

FAN FAIR USE: THE RIGHT TO PARTICIPATE IN CULTURE

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ABSTRACT

Have copyright laws turned children into criminals?¹ Is it better to say that they might be criminals but we are not sure?² Children prominently participate in fan fiction, a creative practice centered around borrowing elements from another, typically famous, creative work.³ The practice of fan fiction falls under a gray area of copyright law, somewhere between copyright infringement and fair use.

Although some support fan fiction's legality,⁴ many rights-holders consider these artistic works to be copyright infringement. Nintendo shut down a Pokémon Cosplay party⁵ over copyright complaints.⁶ Hand knitted hats inspired

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¹ See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, xviii (2008) (Lessig's analyzes remix music, and comments that "[i]n a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?").

² Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1877 (2009).

³ Brittany Johnson, Note, *Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law*, 100 MINN. L. REV. 1645, 1651 ("In examining user profiles of one of the largest fan fiction sites, FanFiction.net, a study published in 2011 found that 80% of users who included their age on their profiles were between thirteen and seventeen years old."); For a discussion about the evolving definition of "fan fiction" see Fan fiction, https://en.wikipedia.org/w/index.php?title=Fan_fiction&oldid=778245552 (last visited May 6, 2017).

⁴ *Id.* at 1667; Heather Alexandra, *Sega Takes Shot at Nintendo, Encourages Fans to Keep Making Sonic Stuff*, KOTAKU (Sept. 12, 2016, 11:30 AM), <http://kotaku.com/sega-takes-shot-at-nintendo-encourages-fans-to-keep-ma-1786527246>.

⁵ Cosplay is the contraction of "costume play." Participants wear costumes to represent specific fictional characters, often characters from video games and anime.

⁶ Steve Schlackman, *Pokémon Sues Their Biggest Fan for Copyright Infringement*, ORANGENIUS (Oct. 5, 2015), <http://artlawjournal.com/pokemon-sues-biggest-fan-copyright-infringement/>; Jack Shepherd, *The Pokemon Company Are Suing a Fan For fan for Putting on An 'Unofficial' Cosplay Party*, INDEPENDENT (Oct. 5, 2015, 2:59 PM), <http://www.independent.co.uk/arts-entertainment/tv/news/the-pokemon-company-are-suing-a-fan-for-putting-on-an-unofficial-cosplay-party-a6680381.html>.

by Firefly Serenity were removed from Etsy after copyright complaints.⁷ Decades of programming and coding work were deleted when DMCA takedown notices were filed against fan games⁸ Project AM2R (“Another Metroid 2 Remake”)⁹ and Pokémon Uranium.¹⁰ These DMCA takedown notices shutdown World of Warcraft legacy servers, preventing the revival of the original game.¹¹

Rights-holders can abuse their enforcement authority to arbitrarily discriminate amongst users. For example, J.K. Rowling, the author of the Harry Potter series, chooses to prosecute only certain fan artists and not others.¹² YouTubers¹³ hit with a DMCA takedown notice suffer from the ‘shoot first, ask questions later’ attitude of copyright infringement, as YouTubers’ videos are automatically removed and counter-notices are simply denied after a cursory examination.¹⁴ These DMCA takedown notices have become ubiquitous and problematic to the Internet’s potential to cultivate a creative culture. Google processed one billion of these takedown notices in 2016 alone.¹⁵ A study done by UC Berkley suggests that as many as 30% of DMCA takedown notices are of questionable validity.¹⁶

Fair use serves as a defense to a DMCA takedown notice, but DMCA counter-claims are infrequently pursued,¹⁷ because even a successful copyright infringement defense is expensive,¹⁸ while the unsuccessful reach as far as \$88

⁷ Leah Yamshon, *‘I Almost Got almost got Sued for Knitting a Firefly Hat’: The Legal Risks of Pop-Culture Fan Art*, PCWORLD (July 19, 2013, 3:30 AM), <http://www.pcworld.com/article/2044685/i-almost-got-sued-for-knitting-a-firefly-hat-the-legal-risks-of-pop-culture-fan-art.html>.

⁸ Fan games are a subset of fan fiction, where fans create their own video game based on a professionally produced video game.

⁹ Dalton Cooper, *Nintendo Shuts Down Metroid 2 Fan Remake*, GAMERANT, <https://gamerant.com/nintendo-metroid-2-fan-remake/>.

¹⁰ Tony Maglio, *‘Pokemon Uranium’ Fan Game Shut Down by Nintendo After 1.5 Million Downloads*, CULTURE (Aug. 17, 2016, 7:26 AM), <http://www.thewrap.com/pokemon-uranium-nintendo-go/>.

¹¹ Allegra Frank, *World of Warcraft Fans Bid fans bid Farewell to Largest Legacy Server Before Shutdown*, POLYGON (Apr. 11, 2016, 5:30 PM), <http://www.polygon.com/2016/4/11/11409436/world-of-warcraft-nostalrius-shutdown-legacy-servers-final-hours>.

¹² *Harry Potter in the Restricted Section*, LUMEN, <https://lumendatabase.org/notices/1182> (last visited Mar. 2, 2016).

¹³ YouTubers are people who share videos on video-sharing website YouTube, where some become YouTube personalities and YouTube celebrities.

¹⁴ Patrick McKay, *YouTube Refuses to Honor DMCA Counter-Notices*, FAIR USE (Apr. 4, 2013, 1:24 PM), <http://fairusetube.org/articles/27-youtube-refuses-counter-notices>.

¹⁵ *Request to Remove Content Due to Copyright*, GOOGLE, <https://www.google.com/transparencyreport/removals/copyright/#glance> (last visited Apr. 9, 2017).

¹⁶ Jennifer M. Urban, et al., *Notice and Takedown in Everyday Practice* 1 (UC, Berkeley Public Law, Research Paper No. 2755628, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

¹⁷ *Id.*

¹⁸ Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 545 (2004).

million.¹⁹ Considering the costs of litigation and the notorious uncertainty of a fair use defense, it is no wonder fan artists roll over and play dead when hit with a DMCA takedown notice, engaging in self-censorship.

This article begins by defining “fan fiction” and then offers an explanation of why it is important. Section two highlights three fan fiction video games that were shut down by questionable DMCA takedown notices. Section three analyzes the origins of the DCMA, its current use, and issues therein. The final section discusses the doctrine of fair use and its application in prominent case law. This article concludes by setting forth a novel solution to the problematic interplay of fan fiction and the DMCA in the form of a modified version of the fair use doctrine. The modification occurs in the first element of fair use analysis, ‘the nature and character of the use,’ and infuses within this element a consideration of the right to participate in one’s own culture.

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¹⁹ Ben Kuchera, *The \$88 million server: private WoW server op loses big*, <http://arstechnica.com/gaming/2010/08/the-88-million-server-private-wow-server-op-loses-big/>.

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SECTION I: WHAT IS “FAN FICTION”?

A. Definitions

So what is fan fiction? Fan fiction is about borrowing, and it occurs in about every form of the creative arts.²⁰ Fine artists like Jeff Koons and Andy Warhol appropriate images to form the foundations of their works.²¹ Musicians sample and remix music.²² Writers draft “spinoff” stories within the Harry Potter universe. Fans even act as directors of fan flicks, often within the Star Trek universe.²³ All of these fan artists take something that piques their interest and generate a creative work based upon it. Their creative input is often little more than a “shift in perspective,” such as examining a minor character’s story in detail. Another option is to “transplant” characters from one universe into another. A professional example is the “Batman v Superman” movie. Fans also like to “revamp” the classics by breathing new life into classical music through a remix or by improving the graphics of a classic video game. Another form of fan creation is the “spin-off,” where a work within popular culture is taken in a drastically new direction. One example includes “Fifty Shades of Grey,” which actually had its roots on a fan fiction website; it is based on the characters within the Twilight book series.²⁴ By generating these creative works, fan artists participate in the popular culture around us.

The entertainment industry thrives on fan participation. Consider the massive following Star Wars has generated. The participation of these fans drove the first three Star Wars movies to be produced not once, but twice. Rather than merely hoping fans will participate, companies are now actively soliciting participation. Blizzard Entertainment is leading this charge by creating the most popular online games of all time, such as World of Warcraft and Overwatch.²⁵ Participation is the foundation of these games for the simple reason that they cannot be played alone. Online gameplay is about competing with and against other players. Blizzard does not merely sell a game; it sells a community of

²⁰ Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (2009).

²¹ Linda Kattwinkel, *Legalities 30: Jeff Koons and Copyright Infringement*, OWEN, WICKERSHAM & ERICKSON, P.C. (2017), <http://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/>.

²² See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

²³ Hetcher, *supra* note 3, at 1881.

²⁴ Johnson, *supra* note 4,” at 1647.

²⁵ John Ballard, *Activision Blizzard, Inc. 's Overwatch Is Killing It*, MOTLEY FOOL (Mar. 1, 2017), <https://www.fool.com/investing/2017/03/01/activision-blizzard-incs-overwatch-is-killing-it.aspx>.

dedicated participating fans. Although players were only invited to participate within this gaming forum, there have been spillovers. In the spirit of participation fans have taken to YouTube and Twitch to share videos of their gameplay, thereby generating whole new communities based within a video-and-comment forum. It doesn't stop there; sure, games can be played and games can be recorded, but they can also be coded. Fans are now participating by coding fan games, coding fan downloadable content (to enhance aspects of a game), and coding fan online servers when the originals have been removed or are difficult to access.²⁶ Unfortunately, where game producers welcomed the video sharing community with open arms, they retaliated against the coding community with legal threats and DMCA takedown notices.²⁷

B. Participatory Culture Outside of Fan Fiction

Is fan fiction a new concept? Fan fiction owes its rising popularity to the internet, but the fan artist's practice of borrowing creative content spans humanity's existence. From sharing stories of Zeus around a campfire in ancient Greece, to writing a Supreme Court opinion in twenty-first century America, creative content is borrowed and modified to suit the purpose of the speaker. The campfire story is modified to match the crowd, and legal precedence is analogized to fit the current issue. Modifying the underlying material is not always ideal. Sometimes lawyers need to use exact quotations, recycle entire boilerplate documents, and they are constantly reminded to not re-invent the wheel. Creative artists feel the same way. Fine artists like Jeff Koons borrow images from today's culture to "ensure a certain authenticity or veracity that enhances [his] commentary—it is the difference between quoting and paraphrasing."²⁸ Unfortunately, where a lawyer is encouraged to copy the phrases of the past, an artist is sued for it.

C. Avoiding Arbitrary Laws and Arbitrary Enforcement

The fan fiction community is under constant threat of arbitrary legal action. Copyright enforcement is placed in the hands of the rights-holders who are free to choose who to sue.²⁹ For instance, J.K. Rowling targeted a specific fan work and filed a DMCA takedown notice because the fan fiction was sexually explicit as opposed to "innocent" fan fiction.³⁰ The fan fiction community

²⁶ *Blizzard v. BNETD*, ELECTRONIC FRONTIER FOUND.EFF, <https://www.eff.org/cases/blizzard-v-bnetd> (last visited Apr. 9, 2017).

²⁷ See Kevin Poulsen, *Hackers Sued for Tinkering with Xbox Games*, SECURITY FOCUS (Feb. 9, 2005), <http://www.securityfocus.com/news/10466>.

²⁸ Kattwinkel, *supra* note 19.

²⁹ See Brett Danaher, et al., *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications* 68-75, 60 COMMS. OF THE ACM (Feb. 2017), <https://cacm.acm.org/magazines/2017/2/212432-copyright-enforcement-in-the-digital-age/fulltext>.

³⁰ *Harry Potter in the Restricted Section*, *supra* note 11.

operates in a gray area of law, somewhere between fair use and copyright infringement, and the vast majority cannot afford to find out from a judge which side of the line they fall on. The practical effect is that J.K. Rowling, in that case, acted as the final arbitrator of what is and is not acceptable behavior. This result violates the fundamental principles that our nation was founded upon, that we are to be a “nation of laws, not of men.”³¹ The fan fiction community exists under a shadow of uncertainty subjected to the various and numerous whims of what artists and rights-holders think the law ought to be. Unless the legal structure is changed, these communities are not subject to a unitary legal system, but rather a system of individuals, a nation of men.

D. Harms Produced by Current Law

But why should you care? The current legal framework causes three independent harms. It harms the individual creator, society generally, and limits the effectiveness of our court systems.

The individual creator can spend years creating a work, only to lose all their time and effort when slapped with a DMCA takedown notice that they cannot afford to defend. Their expression is deleted. These works could have landed the author a job,³² but the reputation and professional notoriety they could have extracted is eliminated upon the work’s deletion.

Second, these personal harms pollute society at large. It diminishes both competition among creative people and the options available to consuming persons. This legal framework disincentives further contribution and reopens gaps in the market place that these works were created to fill.

Finally, the current legal framework harms our structure of government. It places the executive power of enforcement in the private hands of the rights-holders and the uncertainty and lack of legal precedence concerning fan fiction prohibitively raises the costs of litigation for the majority of creative fans. These people do not realistically have access to the courts—where perhaps their rights could be clearly delineated and their behavior could be adjusted accordingly. Rather, they are subject to arbitrary enforcement by authors who are free to proclaim what is and is not a copyright infringement.

³¹ MASS. CONST. 1 art. XXX, pt. I.

³² See Justin Pot, *Nintendo Threatens Diehard Fans; Sega Hires Them*, THE NEXT WEB (Sep. 13, 2016), https://thenextweb.com/gaming/2016/09/14/nintendo-threatens-diehard-fans-sega-hires/#.tnw_slvJoYMn.

SECTION 2: FAN VIDEO GAMES AND THE DMCA

A. Project AM2R

Fan games permeate the Internet. Sites like gamejolt.com host independently developed computer games and have whole sections dedicated to fan games.³³ While sites like [MFGG.com](http://mfgg.com) are entirely dedicated to fan games.³⁴ Journalism sites such as gamepur.com rank the top fan games, those games “that were better than the official ones.”³⁵ Among that list is “Project AM2R,” which is short for “Another Metroid 2 Remake.”

The Metroid series began in 1986 and has sold 17 million game copies as of 2012.³⁶ Project AM2R is based on “Metroid 2: The Return of Samus,” which was released in 1991. In the game, players take control of space-faring bounty hunter Samus Aran. She is on a mission to eradicate fast evolving, parasitic metroids. The game combined the platform style of “Super Mario Bros.” with the exploratory, non-linear style of “The Legend of Zelda” series.



Figure 1: The original Metroid 2 is shown on the left, while Project AM2R on the right shows the same section of the game

Project AM2R was released in 2016 and is a remake of the classic game, which incorporates improved graphics (as illustrated above), improved gameplay mechanics, a new map system, new areas, minibosses, new music, and an updated artificial intelligence system for enemies.³⁷ These improvements are the fruits of ten years of production by independent developer Milton Guasti.³⁸ The game

³³ GAMEJOLT, <https://gamejolt.com/channels/fangame> (last visited Apr. 14, 2017).

³⁴ MARIO FAN GAMES GALAXY, <http://mfgg.net/> (last visited Apr. 14, 2017).

³⁵ Dennis Patrick, *Top 10 Fan Made Games/Remakes That Were Better Than Official Ones* (Feb. 11, 2015), <http://www.gamepur.com/feature/17976-top-10-fan-made-gamesremakes-were-better-official-ones.html>.

³⁶ GUINNESS WORLD RECORDS LTD., GUINNESS WORLD RECORDS 2013: GAMER’S EDITION 154 (Craig Glenay ed., 2012).

³⁷ David L. Craddock, *Better than Black and White: One Man’s Decade-Long Quest to Remake Metroid II*, *Vice* (Sep. 18, 2016, 9:21 AM), https://www.vice.com/en_us/article/am2r-better-than-black-and-white-one-mans-decade-long-quest-to-remake-metroid-ii.

³⁸ *Id.*

developed significant hype and received favorable reviews upon release.³⁹ However, Nintendo was quick to file DMCA takedown notices to websites hosting a download link for the game.⁴⁰ Guasti halted all development of the game after personally receiving a DMCA takedown request from Nintendo.⁴¹ After this DMCA takedown notice, the question lingers as to whether Guasti's use of the Samus character, imagery, and storyline was fair use. Guasti never filed a DMCA 512(f) counter-notification or instigated a lawsuit against Nintendo, so we are left to analogize.

Another creative artist, Jeff Koons, has been on the receiving end of several law suits alleging copyright infringement for similar behavior.⁴² He has responded by taking these disputes to court. Jeff Koons' "appropriation art" is based around incorporating and recreating another person's image.⁴³ An examination of Koons' lawsuits provides insight into what could have happened to Guasti, were he to fight the DMCA takedown notices in court.



Figure 2: On the left is the post card Koons used to create the sculpture shown on the right.

Jeff Koons' appropriation art has caused him to be sued several times.⁴⁴ In *Rogers v. Koons*, Koons appealed a finding of copyright infringement at the summary judgment stage. Koons was sued over his "String of Puppies" sculpture shown above.⁴⁵ Where Guasti based his creation on a video game, Koons based his sculpture on a post card.⁴⁶ Both borrowed heavily on the visual aspects of the

³⁹ *Id.*

⁴⁰ Allegra Frank, *Metroid 2 Fan Remake Finally Released, Quickly Hit with Copyright Claims*, POLYGON (Aug. 8, 2016, 4:00 PM), <http://www.polygon.com/2016/8/8/12404100/metroid-2-fan-remake-am2r-copyright-claim>.

⁴¹ Thomas Whitehead, *Nintendo of America Issues Takedown Request on AM2R, Ending the Project*, NINTENDO LIFE (Sept. 2, 2016), http://www.nintendolife.com/news/2016/09/nintendo_of_america_issues_takedown_request_on_am2r_ending_the_project.

⁴² Brian Boucher, *Experts Weigh in on Jeff Koons Copyright Infringement Lawsuit* (Dec. 16, 2015), <https://news.artnet.com/people/experts-jeff-koons-copyright-infringement-suit-393690>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Rogers v. Koons*, 960 F.2d 301 (1992).

⁴⁶ *Id.* at 305.

underlying work. Koons argued that his “String of Puppies” sculpture was a “parody of society at large[,] which showed that mass production of commodities and images had led to a deterioration of the quality of society.”⁴⁷ The second circuit was not persuaded and affirmed the district court’s decision, holding Koons liable for copyright infringement.⁴⁸

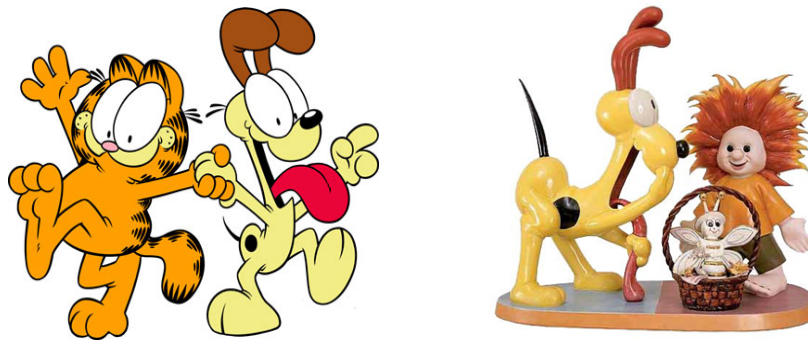


Figure 3: Odie from the Garfield Comic is shown on the left, while Koons’ sculpture of Odie is on the right.

Guasti did more than take an image and dress it up. Guasti added new elements. Guasti’s creation of Project AM2R might actually more closely resemble Koons’ second lawsuit. In *United Feature Syndicate, Inc. v. Koons*, Koons was sued for his use of cartoon character Odie in one his sculptures (shown above). Koons mounted a fair use defense, arguing that his use of Odie was done in order to “symbolize the cynical and empty nature of society.”⁴⁹ He also argued that the genre of his art was defined by appropriation, which must take identifiable images in order to “ensure a certain authenticity or veracity that enhances [his] commentary—it is the difference between quoting and paraphrasing.”⁵⁰ Koons was held liable for copyright infringement.⁵¹

In some respects, Guasti has a stronger argument to make for fair use than did Koons. Guasti’s strongest argument is that his game was non-commercial. Both of Koons’ sculptures were found presumptively unfair under the first factor of fair use analysis because their sole purpose was to be “s[old] as high-priced art.”⁵²

Under the first factor’s transformative inquiry, Koons and Guasti are on fairly even footing. Like Koons’ Odie sculpture, Guasti added additional elements to his creation. Where Koons added a “wildboy” and a bumblebee, Guasti added improved AI and new areas to explore. Where Koons translated a

⁴⁷ Linda Kattwinkel, *Legalities 30: Jeff Koons and Copyright Infringement*, <http://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/> (last visited Apr. 13, 2017).

⁴⁸ Rogers, 960 F.2d 301301.

⁴⁹ *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 383 (S.D.N.Y. 1993).

⁵⁰ *Id.*; Kattwinkel, *supra* note 19. *Id.*

⁵¹ Koons, 817 F. Supp. at 379.

⁵² *Id.*

cartoon into a work of fine art, Guasti translated a game written in Nintendo code into PC code. However, Guasti did more than a literal, verbatim translation; he added chapters and made objectively verifiable improvements on every sentence of every other chapter of the code. Each addition of new content strengthens the fair use defense under the transformative inquiry. On the other hand, the fourth factor—what is sometimes called the “central fair use factor”—errs in Koons’ favor.⁵³

The fourth factor examines potential negative effects on the market value of the original work in light of the defendant’s creation. The court found against Koons because his work was commercial. However, moving past the commercial nature of his work, sculptures do not compete in the postcard market or the cartoon market, while Guasti’s game does compete in the game market. As such, Guasti case is weakened by the fact that his game has the potential to serve as a market substitute. Given that some factors weigh for Guasti and others against him, it was probably in his best interest to not enter the courtroom under the current fair use doctrine.

B. Pokémon Uranium

Like Project AM2R, Pokémon Uranium was developed over nearly a decade.⁵⁴ Unlike Project AM2R, which was a mere remake, “Pokémon Uranium is its own game within the Pokémon narrative,” boasting 150 new and unique Pokémon to catch.⁵⁵ This game creates an alternative universe within the Pokémon narrative and thus falls under the alternate universe fan fiction genre.

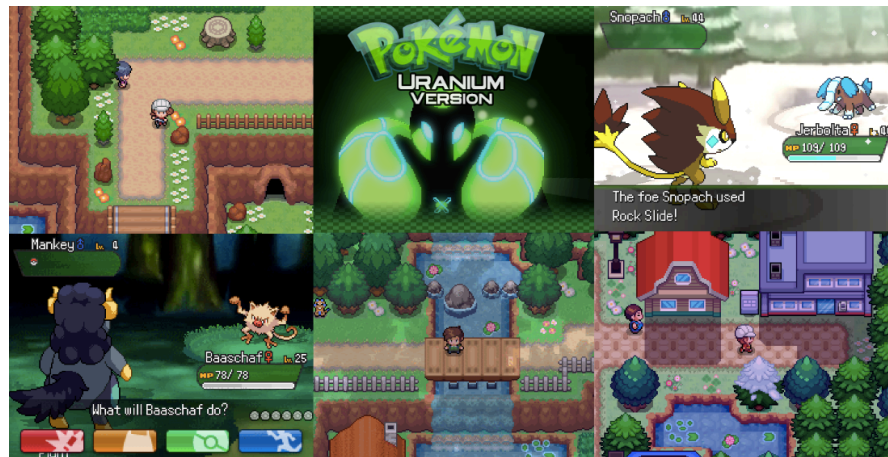


Figure 4: This is Pokémon Uranium, a game that could pass as an official game.

⁵³ *Id.*

⁵⁴ Kapodaco, *Thoughts on Pokémon Uranium (v. 1.0) (Through 8 Hours)*, WORDPRESS (Aug. 13, 2016), <https://kapodaco.blog/tag/pokemon-uranium/>.

⁵⁵ *Id.*

The story of Pokémon Uranium starts with tragedy. The player's mother was killed in a nuclear meltdown ten years prior. After the accident, the player's father becomes cold and distant, spending so much time at work that the player is forced to live with his or her elderly aunt. As the aunt becomes weak with old age, the player is forced to strike out on his or her own in what is known as the Tantor Region.

The introduction is not only darker than the typical Pokémon game but also richer in depth, and this theme continues throughout the game. For instance, the player finds the first gym abandoned and must locate the gym leader who has locked herself in her home to avoid invasive fans who stake out her gym because she is a retired Pokémon league champion.⁵⁶ This kind of in-depth story is lacking from the original Pokémon games.

Unlike the typical Pokémon game that caters to younger players by being relatively easy to play, the challenging nature of Pokémon Uranium makes it more suited for mature audiences. In addition, this game is unique among Pokémon games for offering a "Nuzlocke mode," which allows a player to experience the game with an even higher difficulty level. In Nuzlocke mode Pokémon who lose in battle are lost forever, unlike the original games where they merely "faint" and can be revived at Pokémon Centers. This invites fans who appreciate a greater challenge, but still want to engage the Pokémon universe.

Pokémon Uranium had a greater level of original creative input than Project AM2R. However, Nintendo still filed a DMCA takedown notice against the internet service provider ("ISP") hosting the game's download.⁵⁷ Prior to the notice, the game was wildly popular, and was downloaded 1.5 million times.⁵⁸ Despite its success, the owners did not file a DMCA 512(f) counter-notification or defend their use of Pokémon as fair use in any manner.⁵⁹ This is unfortunate, because a successful defense of this work as fair use could have opened the flood-gates for fans to mimic this approach in their own fan games and be confident of avoiding legal liability. Again, analysis of an analogous case is necessary due to the lack of fan game legal precedence. For the Pokémon Uranium fan game, a relatively similar creative fan work that did reach a judge's desk is the literary work, "The Wind Done Gone" ("TWDG").

TWDG is a parody of the hit-classic "Gone with the Wind."⁶⁰ The story of TWDG is based in the same universe as "Gone with the Wind."⁶¹ The major

⁵⁶ Luara Dale, *What Nintendo Should Learn from Pokemon Uranium*, LET'S PLAY VIDEO GAMES (Aug. 20, 2016), <http://letsplayvideogames.com/2016/08/what-nintendo-should-learn-from-pokemon-uranium/>.

⁵⁷ Maglio, *supra* note 9.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

⁶¹ *Id.* at 1259.

difference is that the story is told from a different perspective.⁶² Such perspective shifting is a popular technique of fan fiction, where the story of a minor character is elaborated in greater detail than the original author cared to do.⁶³ This is in contrast to Pokémon Uranium, which is an alternate universe type of fan fiction. Pokémon Uranium's world, characters, and Pokémon are completely unique, it is an alternate existence of what Pokémon could have been.

Where Pokémon Uranium and TWDG overlap is in their criticism and deep modification of the underlying work. Both works are highly transformative of the underlying works. When a work is more transformative, the courts are more likely to find that the use is fair use and, consequently, that there is no copyright infringement.⁶⁴ The federal circuit presiding over TWDG case found the work to be transformative enough to remove an injunction put in place by the district court.⁶⁵ So, the question is whether Pokémon Uranium is as transformative as TWDG.

The transformative inquiry asks whether material taken from the original work has been transformed by adding new expression or meaning.⁶⁶ It additionally asks whether the new work adds new information, new aesthetics, new insights, and new understandings.⁶⁷

Beginning the analysis, both works intended to evoke the underlying works that inspired their creation. The first hint of this comes from the titles of the works, which both play off the originals. After a user encounters the title, he or she moves onto either playing the game or reading the story. Depending on whether it is a game or a book, the user's engagement is different. This difference presents an analytical challenge for the transformative inquiry. The transformative nature of a book can only be determined after reading it completely, while the transformative nature of a game can be presumed by a surface level examination of the first couple of images presented to the player.

The gameplay in Pokémon Uranium is instantly recognizable as a Pokémon game. The visual aspects of the characters, houses, and trails all look like a professional Pokémon game. Aside from the title, two books cannot be compared in the same manner; comparison takes more than a mere glance. Sure, from a visual perspective, two English books both have English text structured in chapters and paragraphs within a book, but that observation says little to nothing

⁶² Id. at 1270.

⁶³ See Johnson, *supra*, at, 1650.

⁶⁴ Rich Stim, *Measuring Fair Use: The Four Factors*, Stanford University Libraries, <http://fairuse.stanford.edu/overview/fair-use/four-factors/>.

⁶⁵ SunTrust Bank, 268 F.3d at 1270.

⁶⁶ Rich Stim, *Measuring Fair Use: The Four Factors*, Stanford University Libraries, <http://fairuse.stanford.edu/overview/fair-use/four-factors/>.

⁶⁷ Id.

about the content of the story. Such visual aspects, which serve well to compare games, are not a valuable means of comparison in books.

A book must be read and engaged, sometimes extensively, to determine whether it is similar in nature to another book. The setting, the characters, the conversations, and the events all must be taken in through the process of reading. It is a process of digestion and absorption. After this lengthy process, a picture of the book's story can be grasped in the mind of the reader.

To generate a picture of a game, much less is required of user. Within a game, the imagery is compiled by a computer analyzing the text of the script coding for the game. The script that represents the game is digested and interpreted by a computer. The computer then translates the script into a series of images for rapid absorption by the user. The text of a book should really be compared to such script. While the visual aspects the text of the script codes for should be compared to the story as absorbed in total by a reader. Otherwise, fan fiction would be treated unjustifiably more favorably for books than for games.

Courts should be careful not to assume that a game is less transformative because similarities can be identified more quickly and with more ease because a computer facilitates the process. In fact, courts ought to be more tolerant of such visual similarity, because if it varied too much, the work would fail to evoke the underlying work. This is what fair use is all about. Identifying those works that are neither completely original nor complete copies, but instead lie somewhere in between, in that they borrow just enough to evoke the underlying work.

Moving past surface level visual similarities, Pokémon Uranium begins to shine as being highly transformative. Both TWDG and Pokémon Uranium have completely different characters. Since TWDG is a novel, in order to change the characters, all the author had to do was change their names. As a game, Pokémon Uranium required both new names and new images for the many characters and the 150 Pokémon. This, comparatively, requires a significantly greater degree of creative input on Pokémon Uranium's part. These new characters and Pokémon bring a significant degree of new information and new aesthetics lacking from the underlying work.

The literary component of Pokémon Uranium also serves as strong fuel for argument that Pokémon Uranium is highly transformative and even critical of the underlying work. When an artistic work is critical of the underlying work as a parody, the courts favor a finding of fair use. TWDG is a parody. TWDG eschews the fairytale-like southern story and tells the more realistic and dreary story of a slave traveling to become the mistress of a white businessman, and later leaving him for an aspiring black politician.⁶⁸ The typical struggles faced in life

⁶⁸ *The Wind Done Gone Summary & Study Guide*, BOOKRAGS, <http://www.bookrags.com/study-guide-the-wind-done-gone/#gsc.tab=0> (last visited Apr. 14, 2017).

are confronted, parodying the original's idyllic fairytale life story.⁶⁹ Pokémon Uranium is also a parody in this sense. It takes a stereotypical hero adventure game and turns it into something visceral and real. It is not the story of the perfect family with the perfect child going off to become a great Pokémon master. It is a story of hardship and adversity. Since Pokémon Uranium is a game, as opposed to a mere novel, the narrative aspects of Pokémon Uranium run in tandem with gameplay. This gameplay posits the same message. Where the original series is easy to play, forgiving, and tailored to children, this game is difficult, challenging, and unforgiving, as captured Pokémon can die permanently if the player is not careful.

The final question to ask is whether a judge would find Pokémon Uranium's use of the Pokémon copyright to be fair use as a transformative work. TWDG was found to be transformative to such a degree that "a viable fair use defense [was] available."⁷⁰ Where TWDG borrowed the setting and characters of the original work, Pokémon Uranium borrowed the imagery of the typical Pokémon game. Both works modified the literary component heavily to change the story from something idyllic to something visceral and dreary. Both added new characters, and Pokémon Uranium went further by creating new aesthetics for each character. As such, Pokémon Uranium is at least as transformative as TWDG and perhaps even more so. Considering that TWDG case was quickly settled after the federal circuit made clear the transformative nature of TWDG⁷¹ and that TWDG is currently available for purchase,⁷² it is reasonable to conclude that Pokémon Uranium is in fact fair use and has been wrongfully removed from the public domain.

C. World of Warcraft Legacy Server "Nostalrius"

This last example is of significant interest to this article. The game "World of Warcraft" caused a relatively new type of fan work: the revival. In this type of fan participation, the fan brings back to life something the rights-holder abandoned, neglected, or destroyed. The closest analogy is that of book burning. If a rights-holder burned every copy of a particular book, a revival would be some fan re-writing the book. In the case of World of Warcraft, the original game—the game as it existed at launch—has been abandoned. In its place, Blizzard Entertainment offers World of Warcraft: Legion ("Legion"). Legion is an expansion; it expands the available content in the game and it makes obsolete any

⁶⁹ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

⁷⁰ *Id.*

⁷¹ 'Wind Done Gone' Suit Is Settled, WASH. POST (May 10, 2002), https://www.washingtonpost.com/archive/lifestyle/2002/05/10/wind-done-gone-suit-is-settled/2c3cdd51-dc94-4b15-8f1c-c5926302997d/?utm_term=.07bbd5eb7123.

⁷² <https://www.amazon.com/Wind-Done-Gone-Novel/dp/0618219064>

previous versions. Legion is the seventh expansion or World of Warcraft, and it has resulted in a complete overhaul of the game.

So, what is the big deal? To illustrate the issue that compelled fans to revive the original World of Warcraft, it is helpful to consider a recent class action filed against Electronic Arts (“EA”).⁷³ EA offered an online game called Simcity. In Simcity the player is appointed mayor of an empty tract of land. By building roads, providing water and electricity, and zoning areas as residential or commercial, NPCs (non-player characters) called “Sims” start to move onto the tract of land. These Sims then build houses and commercial businesses. After many hours of play, a city begins to form. To make the game easier, EA offered in-game purchases. Players could purchase in-game currency or special buildings. The problem is that after the players invested not only their time but also real money into this virtual world, EA shut down the servers. This prompted a class action suit against EA.⁷⁴



Figure 5: The guild “Ret” preparing to fight the last boss in the Molten Core raid, Ragnaros, from the Original version of World of Warcraft.

The scenario faced by Simcity fans is very similar to what led fans to revive the original version of World of Warcraft. The primary objective in World of Warcraft is building a powerful character. By killing monsters and defeating other players, players level up and grow stronger. By grouping together in order to defeat all the monsters and bosses within a dungeon, players can obtain improved weapons and armor to use in the game. That is pretty typical of a Massive Multiplayer Online Role Playing Game (“MMORPG”); however, where

⁷³ Timothy Geigner, *EA Sued for Shutting Down Online Games Too Quickly*, TECH DIRT (Aug. 2, 2013), <https://www.techdirt.com/articles/20130802/12464524046/ea-faces-class-action-suit-over-sports-titles-online-gaming.shtml>.

⁷⁴ *Id.*

World of Warcraft stood out and drew dedicated fans was its raiding system. What is illustrated above is a World of Warcraft raid. This raid on Molten Core required 40 max level⁷⁵ players to work together in order to defeat the raid bosses. Each raid boss dropped two of the best items (armor and weapons) in the game, and it took many months of raiding to collect all of them for any given character. The typically player strived to collect all the best items for their character. To achieve this, players collaborated by forming guilds of people who would raid together on a weekly basis. Raiding was only successful when a coordinated group of players participated together. As such, the primary activity of the game—raiding—was only made possible by the extensive participation of other players and the community they created within the game.

It is unsurprising then, given such a large investment of time and effort, that players were upset when the game was overhauled in an expansion, which made the characters they invested in worthless and obsolete. Where EA deleted the Sim Cities players created, Blizzard eliminated the value the players worked to develop in their characters. The expansions became more and more radical over the years, turning the game into something completely different. These drastic changes caused dedicated fans to revive the original version.

These dedicated fans created a new online server called Nostalrius, a name playing on the developers' motivation for creating the server, nostalgia. The computer programming script for the game had to be built from the ground up because the current version of World of Warcraft had altered it so drastically.⁷⁶ After years of development, they released the Nostalrius server, a revival of original World of Warcraft as it existed in 2004. Nostalrius was wildly popular, boasting 150,000 unique users.⁷⁷ The game was free to play and the terms of use were simple: access was contingent on having purchased the game discs from Blizzard.^{78, 79} The original game did not come with a disclaimer stating that it was temporary. That if Blizzard stopped hosting a server, no one could ever play the game again. Unfortunately, that is what happened. Blizzard stopped hosting the original game and replaced it with Legion. The fans did what they had to do to fill the gap Blizzard left. They wrote the code and hosted an online server where fans

⁷⁵ See <https://us.battle.net/forums/en/wow/topic/18000263534> (last visited 1:00 PM 4/19/2017) for a discussion elaborating on the time required to reach max level. Reaching the maximum level in original World of Warcraft took experienced players 10 days of play time, and new players up to 20 days.

⁷⁶ *Nostalrius Begins*, NOSTALRIUS, <https://en.nostalrius.org/> (last visited Apr. 15, 2017).

⁷⁷ Allegra Frank, *World of Warcraft Fans Bid fans bid Farewell to Largest Legacy Server Before Shutdown*, POLYGON (Apr. 11, 2016, 5:30 PM), <http://www.polygon.com/2016/4/11/11409436/world-of-warcraft-nostalrius-shutdown-legacy-servers-final-hours>.

⁷⁸ *Nostalrius Begins*, *supra* note 63.

⁷⁹ In 2004 Blizzard sold discs required to install World of Warcraft onto a PC for \$60 and then charged an additional \$15 per month to access the online servers—the only way the game could be played.

of old could get together and relive the adventure of original World of Warcraft. These fans revived something otherwise lost to time, like a burned book being re-written from memory by those fortunate to have read it before the flames turned it to ash.

The revival type of fan participation is an emerging activity. The revival is a direct response to the nature of online gaming because gameplay requires a server to be hosted by somebody. The closest analogous case is *DC Comics v. Towle*, where a fan created fully functional Batmobiles from the old TV show and sold them.⁸⁰



Figure 6: Towle's Batmobile replica.

In a sense, the Batmobile replica is a revival. The defendant there was bringing back the Batmobile of the old show, which is significantly different from the Batmobile of today's movies and cartoons. The court detailed in great length how DC Comics has a copyright interest in not only the characters of its stories but also the identifiable vehicles in the show.⁸¹ In the end, the court found that the defendant infringed DC Comics copyright by manufacturing and selling the Batmobile replica.⁸² That holding does not bode well for Nostalrius.

A second similar case is *Salinger v. Colting*.⁸³ As mentioned earlier, the elimination of original World of Warcraft was like burning a book. The *Salinger* case is about as close as a United States court decision has gotten to book burning. Colting wrote a sequel to the hit classic, "The Catcher in the Rye," called "Coming Through the Rye." In a sense, this also was a revival. Like reviving an old television series, Colting brought the universe back to life. He continued the story elaborating on what happened to Holden Caulfield after the events in "The Catcher in the Rye." It is hard to see why this case would turn out differently than the Batmobile case, which is probably why the case was settled

⁸⁰ 802 F.3d 1012 (9th Cir. 2015),

⁸¹ *Id.* at 1071.

⁸² *Id.* at 1078.

⁸³ 607 F.3d 68, 70 (2d Cir. 2010); *Coming Through the Rye*, authored by Fredrick Colting under pseudonym John David.

after a preliminary injunction was issued against Colting's new book.⁸⁴ As such, this case also paints a poor picture for the legality of Nostalrius under today's precedence.

So how does Nostalrius stack up against these cases? Nostalrius probably lies somewhere in the middle. A major point is that, unlike the Batmobile case, Nostalrius is not a commercial product. Prior court decisions have held that the primary factor of fair use analysis is the effect on the market.⁸⁵ It is not very persuasive to argue that a free product can truly have a market impact on a billion-dollar giant like Blizzard. So, Nostalrius has the stronger fair use argument under the market effect analysis. On the other hand, the Batmobile case had more creative input. Towle took an image from a television show and created a fully functional automobile. Such an endeavor takes extensive creative input to design not only the stylistic outer-shell but everything underneath it to hold it together and to make it operational. With Nostalrius, there was little creative input. Nostalrius did not transform the original work in any significant manner. In fact, its mission was to replicate the original World of Warcraft servers as accurately as possible. As such, the Batmobile has the stronger argument under the first factor of fair use analysis, the nature and character of the use, which also includes the transformative inquiry.

Moving on to the *Salinger* case, Nostalrius has the edge in being a freely available non-commercial product, while Colting's book was placed on the market with a sales tag. But Colting's novel has a stronger argument under the first factor of fair use because the work is extremely transformative, much like TWDG. Colting's work may have been based on the universe and character of Holding Caulfield, but the story was completely his own. He created the setting, the dialogue, the events, the conflict, and the conclusion. He chose the prose, the pace, the degree of suspense, and the comfort imparted at the end. His creative input was absolute, he merely borrowed a known character from a fictional universe and continued the story. Again, Nostalrius has the edge in being non-commercial, but its position is weakened by its lack of any transformative character, where both the Batmobile and book shine. Given these plusses and minuses, an argument of fair use by Nostalrius can fairly be construed as similar in strength to these other two cases. Given the fact that today's law has prevented

⁸⁴ Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHERS WEEKLY (Jan. 11, 2011), <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html>.

⁸⁵ This is the Fourth Factor in the fair use analysis. The third factor is the amount and substantiality of the portion taken. The second factor is the nature of the copyright work. And the first factor is the purpose and character of the use. The first and fourth factor get all the attention because they involve the more rigorous analysis, while the second and third factors are relatively straightforward inquiries.

consumers from buying either Towle's Batmobile or Colting's book, it is reasonable to conclude that Nostalrius would suffer a similar fate.

This is unfortunate because Nostalrius was less about appropriating copyrighted material, and more about reviving a community lost to time. This is a significant consideration absent from today's fair use analysis. The original World of Warcraft community was dedicated and lively. Within the game, players would develop friendships and form guilds. The players created an economy, trading in-game items for in-game currency through mailboxes, hand-to-hand trades, or on an auction house. Some players on the servers would even develop fame, for either their skill or the prowess of the characters they created and developed. Many of these aspects of the game have been lost with the numerous expansions, which have taken steps to eliminate the camaraderie present in the original version. For instance, the game used to be immensely challenging. Raids were notoriously difficult and took forty dedicated and organized people.⁸⁶ They had to struggle together to succeed. Simply put, these fans don't want a commercial enterprise, they just want to socialize and challenge themselves with a game they know and love.

At the end of the day, World of Warcraft is just a game, like soccer, football, or baseball. With those sports, people are allowed to freely play the games at their homes. They even film each other playing to brag, to analyze themselves, or to highlight specific techniques, which they then are free to post online. No one thinks the NFL can stop people from playing football, or that when the NFL changes the rules for what distance a field goal must be kicked that people in their backyards then must comply with the new rule or face a lawsuit. So, my challenge is this: why should it be different for a video game? Just like physical sports, people play video games in front of friends and family; they film themselves playing and put it on YouTube. If Blizzard decides to change the rules and gameplay of World of Warcraft, why should fans have to either jump ship or abandon ship? Copyright was not intended to enforce monopoly control over how we decide to spend our free time.

D. Video Game Culture

Harvard Law Professor Rebecca Tushnet asked 20 years ago whether a child violates copyright laws by playing with Barbie dolls and enacting a drama "in her front yard, where passers-by can easily see."⁸⁷ She then asked whether the answer should change if the girl wrote down her stories, emailed her stories, or posted the stories on the Internet with accompanying pictures.⁸⁸ What she didn't

⁸⁶ Forty person raids are no longer a component of today's World of Warcraft: Legion. Blizzard has made raiding easier by requiring only twenty to twenty-five players.

⁸⁷ Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

⁸⁸ *Id.*

ask is what would happen if she posted the “elaborate scenarios in which [the Barbie dolls] play starring roles” on YouTube?

The question of how to treat such fan content when it appears on YouTube is a novel question that Professor Tushnet did not confront 20 years ago. Today, YouTubers like CookieSwirlC post such videos, and they attract as many as 21 million views.⁸⁹ There now exists a community of Barbie YouTubers, each hosting their own channel of Barbie videos with as many as 500,000 subscribers. The ease of producing high quality videos in the home and on the PC has also sparked the generation of a substantial community of video gamers who post their gameplay on YouTube called “Lets Play” videos.

These “Lets Play” videos are 100% fan generated content. Like the attorney in the seminal DEFENDER case argued, the player is in a sense an author.⁹⁰ When fans watch professional eSports, it is not to admire the programmer’s copyrighted work, it is to watch the professional in action, to see what they author in a live setting. Fans watch to take note of the strategies they employ, what decisions they make, and how the pros overcome adversity from their opponents. That is what fills the stadiums for eSports events. Streaming video games gives a unique insight into the interworkings of someone’s mind. It is more than just standing side by side with a friend watching an event unfold. You enter their frame of reference, you see exactly what they see, a perfect replica. You follow their every step as they engage a challenge. You can critique or admire their every reaction to an adverse situation. You can see their problem-solving capabilities in action every second



Figure 7: A stadium filled to watch professional gamers play an Esport.

⁸⁹ *CookieSwirlC*, YOUTUBE, <https://www.youtube.com/user/CookieSwirlC> (last visited Apr. 15, 2017).

⁹⁰ *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982) (Here, the defendant argued that, although the game was visually nearly identical, the game should not be eligible for audiovisual copyright protection because there is no set or fixed performance. Rather the audiovisual performance is fluid and dynamic, depending on what the player decides to do, and the player is thus a co-author of what appears on the screen).

Analyzing strategy is one reason you *could* watch someone play a video game, but why would you *want* to watch someone else play a video game? This question perplexed media outlets when Amazon acquired Twitch.com for \$1 Billion dollars in 2014.⁹¹ The allure of watching someone else play a video game has been analogized to watching the performance of a professional actor.⁹² One such performer is named PewPieDie, a streamer who shares stories, tells jokes, and generally overreacts to the game he is playing to the appeasement of his fans.⁹³ People really like to watch this stuff, so much so that his YouTube royalties exceed \$12 million a year.⁹⁴ An image of his streaming feed can be seen below.



Figure 8: "Lets Play" YouTuber PewPieDie streams himself playing and commenting on a videogame.

In fact, watching people play video games is not a very new phenomenon. Recently, we have just seen the content move online. Siblings watch each other play and take turns; friends and relatives do the same. Some people actually prefer to watch, rather than play.⁹⁵ Why? Sometimes the games are just too

⁹¹ See, e.g., Karl Evers-Hillstrom, *Why Do People Watch Other People Play Video Games?* NEW YORK STATE OF MIND (Jan. 13, 2017), <http://kevershillstrom.areavoices.com/2016/11/23/why-do-people-watch-other-people-play-video-games/>; Carolyn Gregoire, *Why Are Millions of People Spending So Much Time Watching Others Play Video Games?*, HUFFINGTON POST (Sept. 12, 2014, 12:31 PM), http://www.huffingtonpost.com/2014/09/12/twitch-video-games_n_5755568.html; Robinson Meyer, *It's Totally Normal to Watch Other People Play Video Games*, ATLANTIC (Sept. 3, 2014), <https://www.theatlantic.com/technology/archive/2014/09/its-totally-normal-to-watch-other-people-play-video-games/379476/>; Jake Munchy, *Why I Watch People Play Video Games on the Internet*, WIRED (Aug. 21, 2016, 7:00 AM), <https://www.wired.com/2016/08/why-i-watch-lets-plays/>.

⁹² Evers-Hillstrom, *supra* note 74.

⁹³ Chris Mandle, Independent, *Forbes names PewDiePie as highest-earning YouTuber with annual income reaching \$12m.*

⁹⁴ *Id.*

⁹⁵ Meyer, *supra* note 74.

challenging, and this way they can avoid the suffering and frustration the game presents. Games can be challenging, and like physical sports or the arts, those without the skills to play can still appreciate the nuances of the game even though they lack the skills of the professionals. However, these websites offer more than mere passive observation. Websites like Twitch.com incorporate a chat box on the live stream where viewers can type questions and comments, while the streamers playing the game actively participate in the conversation simultaneously. This open dialogue begins to bridge the gap from watching a mere stranger play a video game, to being more like sitting next to your sibling while they play a game.

These fans like to participate not only in the game but with each other. They share interests and they share challenges. As the gaming industry drives towards more online play, more cooperative play, and rewards the development of communities within games, they encourage the type of participation that occurs outside of the boundaries they first established. People like to post streams of gameplay to show-off their skills and to create new styles of play, like trying to beat a game without dying once,⁹⁶ or even beating a game without getting hit once.⁹⁷ Others respond, posting their own videos where they try the same challenge. These video game streamers like to compete to see who is better at overcoming the challenge the game presents. Others post for less competitive reasons. For instance, some post videos that guide players on how to beat a game, where they highlight techniques and strategies to help their fellow gamers improve. As the audience of viewers continues to grow, so does the variety and diversity of video game streams offered.

Video games have developed a community of players and fans who like to participate with each other through streaming, and it is a large community. Twitch.com alone “pulls 1.35 percent of U.S. broadband traffic, which rivals Amazon Video’s own 1.9 percent.”⁹⁸ This is a growing community, conducting activity of questionable legality. Are the videogame creators copyright’s violated by this entire community? Are these streams derivative works in the sense that they are a live performance of a copyrighted work? Such a popular activity should not be of questionable legality, and enforcement of such a disregarded legal framework should not be left in the hands of arbitrary rights-holders.

⁹⁶ Within a typical video game a player takes control of a character that has a pool of health. Each time an enemy’s strikes them attack their health pool diminishes. When their health pool is fully depleted the character the player is controlling “dies” and the game is reset. YouTube has developed a community where gamers post videos of themselves beating an entire game without this ever happening, without them dying once.

⁹⁷ A more extreme (and more challenging) version of the last example. This YouTube community tries to beat entire games while avoiding ever obstacle and ever enemy, so that by the time they reach the finish line, not a single enemy has done damage to their health pool.

⁹⁸ Robinson Meyer, *The Atlantic*, *Id.*

SECTION 3: ORIGINS OF THE DMCA, CURRENT USES, AND THE PROBLEMS THEREIN

A. DCMA Introduction and Rationale

Much of fan fiction faces opposition in the form of DMCA takedown notices. So, what is the DMCA and why do we have it? The DMCA introduced Title 17 U.S.C §512 to the U.S. Code. The Online Copyright Infringement Liability Limitation Act introduced DMCA takedown notices, and that Act is Title II of the Digital Millennium Copyright Act (“DMCA”). The rationale behind takedown notices is illustrated by the Act’s title—“Copyright Infringement Liability Limitation”—which should sound strange after this article complained about the DMCA takedown notices being used to enforce copyright infringement liability. The reason it sounds strange is that the Online Copyright Infringement Liability Limitation Act was not intended to limit liability for the public at large, but rather limit liability for Internet Service Providers (“ISP”) and Online Service Providers (“OSP”).

An example of an ISP is Comcast. People who use Comcast might conduct illegal activity, like downloading “Game of Thrones,” which could open up Comcast to contributor liability since they enabled the illegal activity. However, by following the DMCA protocols that require, among other things, an agent to accept and act on DMCA takedown notices, Comcast is afforded a safe harbor that protects it from copyright violation claims.

An example of an OSP is the online forum “Reddit.” Individual users might violate copyright law by uploading a picture or video they don’t have the right to share. Reddit can avoid liability for these actions it enables by following the safe harbor protocols the DMCA requires, such as requiring the swift removal of content after receiving a DMCA takedown complaint from a rights-holder.

B. DMCA Problematic Examples

DMCA takedown notices pose a constant threat of liability for those who post content onto the Internet. The Electronic Frontier Foundation (EFF) characterizes DMCA takedown notices as jeopardizing fair use, chilling to free expression, and as an impediment to competition and innovation.⁹⁹ Examples of the execution and effect of DMCA takedown notices are highlighted in what follows.

A large swath of creative content is regularly removed from the Internet by DMCA takedown notices. The website Ninjahacker allowed players of certain games to modify the in-game appearance of their characters. These add-on enhancements could only be used by fans who already owned the game, nonetheless the website was ultimately taken down after a DMCA takedown

⁹⁹ *Unintended Consequences: Fifteen Years Under the DMCA*, ELECTRONIC FRONTIER FOUND. (March 2013), <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>.

notice was filed by a rights-holder to one of the affected games.¹⁰⁰ Blizzard prevailed on a DMCA takedown notice based on circumvention allegations against creators who published “bentd”—a free, open source, noncommercial software—which allowed access to online play for those owning Blizzard games that had experienced difficulty in connecting to Blizzard’s servers.¹⁰¹ Aside from the countless games and game applications that are shutdown, YouTube videos are routinely taken down after rights-holders file DMCA takedown notices.¹⁰² Some YouTube stand up to this legal threat, while most simply accept defeat.¹⁰³ The individual typically has little to lose from the loss of a single video, but the accumulation of these small takings and deletions has a significant impact on the overall available content on the Internet.

Aside from digital content, fan artists like to create tangible fan art and fan goods. We saw earlier the Batmobile case, where a fan got sued for building and selling a fully functional Batmobile. Another example is a knitted beanie that was sold on Etsy to commemorate TV show *Firefly*.¹⁰⁴ Like many other products on Etsy, this triggered legal threats from the rights-holder.¹⁰⁵ Copyright infringement lawsuit threats have even extended to social gatherings. Pokémon fans organized a “5th Annual Unofficial Pokémon PAX Kickoff Party,” a party advertised with the Pokémon Pikachu’s image, with Pokémon themed drinks, and a cosplay contest.¹⁰⁶ A threat from Nintendo’s lawyers was all it took to shut down the party for these fans. These prominent examples of fan art, fan creation, and fan participation suppression illustrate only a small fraction of today’s DMCA takedown practice.

C. DMCA Statistics, Abuses, and Policy Concerns

Just how pervasive are DMCA takedown notices? OSP Google processed one billion DMCA takedown notices in 2016 alone. Google’s Transparency Project is designed “to help everyone understand the impact that copyright has on

¹⁰⁰ Poulsen, *supra* note 25.

¹⁰¹ Davidson & Assoc. v. Jung, 422 F.3d 630, 639-42 (8th Cir. 2005); *see also* Howard Wen, *Battle.net Goes to War*, SALON (Apr. 18, 2002), <http://www.salon.com/2002/04/18/bnetd/>; *Blizzard v. BNETD*, *supra* note 24.

¹⁰² Russell Brandom, THE VERGE, *YouTube’s Complaint System is Pissing off its Biggest Users*, (Feb 1, 2016) <http://www.theverge.com/2016/2/1/10887120/youtube-complaint-takedown-copyright-community>.

¹⁰³ *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (holding that copyright holders must consider fair use in good faith before issuing a takedown notice for content posted on the Internet).

¹⁰⁴ Steve Schlackman, *Etsy: A Home for Copyright Infringement*, ART LAW JOURNAL (May 26, 2013), <http://artlawjournal.com/etsy-and-copyright/>.

¹⁰⁵ *Id.*

¹⁰⁶ Schlackman, *supra* note 6.

available content.”¹⁰⁷ This project illuminates the immense volume of DMCA takedown notices Google has processed since 2012. Google’s data illustrates how the number of DMCA takedown requests have not only consistently increased year after year, but continue to increase at a greater rate every year.¹⁰⁸ Google’s stated mission is to “push back on these requests when they fail to include the necessary information or we suspect they are fraudulent.”¹⁰⁹ Google concludes their transparency page with several examples of the fraudulent claims they have received. Examples include a musical label requesting Google to delist webpages with the word “coffee” in the title, a politician requesting a news site to be delisted because it reported his arrest record, and companies requesting delisting of websites hosting complaints about the company.¹¹⁰

Other particularly egregious examples of DMCA abuse include a garage-door-opener manufacturer, Chamberlain, suing Skylink under the auspices of DMCA anti-circumvention laws for their production of a universal remote.¹¹¹ Yahoo also filed a DMCA suit against whistle-blower Cryptome, who leaked a Yahoo surveillance document detailing how user data is retained and sold to law enforcement.¹¹² DMCA takedown notices have been stretched and expanded beyond their intended purpose.

Google is not the only company cognizant of DMCA abuse. Lumen is a collaborative archive founded by several law school clinics and the Electronic Frontier Foundation to protect lawful online activity from legal threats. In a single six-month period, the Lumen archive has received 108 million DMCA takedown notices.¹¹³

Law professors at UC Berkeley conducted a data mining expedition on the Lumen archive to establish empirical research on how these DMCA takedown notices operate in practice. Their mining suggests that as many as “30% of takedown requests were of questionable validity.”¹¹⁴ Their study highlighted the fact that the typical recipient of a DMCA takedown notice has “little or no

¹⁰⁷ Google Transparency Report, *Request to Remove Content Due to Copyright*, GOOGLE (Mar. 9, 2011), <https://www.google.com/transparencyreport/removals/copyright/#glance>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004) (“(pointing out that DMCA established a cause of action for liability — not a new property right — and that mere circumvention did not amount to infringement: “Chamberlain’s construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies.”).

¹¹² See Kurt Nimmo, *Yahoo Threatens Cryptome over Leaked Surveillance Document*, INFOWARS (Dec. 5, 2009), <http://www.infowars.com/yahoo-threatens-cryptome-over-leaked-surveillance-document/>.

¹¹³ JENNIFER M. URBAN ET. AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE, 1 (2017).

¹¹⁴ *Id.* at 2.

knowledge of copyright law” and is consequently unable to make an informed assessment of risks of liability for filing a 512(f) counter-claim.¹¹⁵ People who have their content taken down have the option to file a counter-notification under 17 U.S.C. §512(f), where they can assert that the DMCA takedown request is invalid. However, counter-notification exposes the filer to litigation. One OSP characterized counter notices as essentially “irrelevant” because the language of the typical DMCA takedown notice is “really threatening” and the people receiving them are simply “too afraid” to risk legal liability.¹¹⁶ Another OSP cited receiving only seven counter notices after executing 9,000 DMCA takedown requests to remove content.¹¹⁷ Of these seven counter-claims, two were administrative errors, and the other “[f]ive were from Russian or Ukrainian torrent sites that knew that there was no chance that we would sue them in their jurisdiction.”¹¹⁸

Several OSPs expressed concern about doing anything that might encourage users to assert their rights—even when a notice is clearly invalid—because of the power imbalance between senders and users. In one OSP’s view, the prospect of sending users up against media company attorneys backed by statutory copyright penalties “eviscerated the whole idea of counter notice.” One rightsholder respondent agreed that “there is a real imbalance of power in the event of a lawsuit. You don’t want to go up against [a major entertainment company’s] lawyers.” Another OSP respondent portrayed the counter notice procedure as a threat to user privacy because it requires the user to disclose both name and address to the sender.¹¹⁹

These DMCA takedown notices are being utilized excessively to silence participation in fan games, to stifle participation in generic technology, and to silence whistleblowing. Those who file them depend on the receivers having little knowledge of copyright law and even fewer resources to defend their rights.

D. Litigation landscape in inspired creation

The average fan is typically not someone who can afford a ticket to the courthouse. In order to examine the impacts of copyright litigation, analysis will now shift to cases involving music and works of contemporary art that have been inspired by other copyrighted works. Some of these artists do have the financial resources necessary to mount a fair use defense against allegations of copyright infringement.

¹¹⁵ *Id.* at 44-45.

¹¹⁶ *Id.* at 45.

¹¹⁷ *Id.* at 4656.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 45.

The owner of Barbie, Mattel, sued Aqua for producing the sensational “Barbie girl” song.¹²⁰ Aqua mounted a parody fair use defense.¹²¹ However, even a successful defense like this is immensely expensive.¹²² Aqua had to finance counsel to make arguments before both the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit.¹²³ The only court left after that is the Supreme Court of the United States. Luckily, Aqua avoided a third round of litigation when Judge Alex Kozinski of the Ninth Circuit wrote a scathing opinion against Mattel.¹²⁴ This opened the door to one type of cultural participation in the music arena.

An artist discussed earlier, Jeff Koons, has been sued at least five times for copyright infringement.¹²⁵ His first suit was for his “String of Puppies Sculpture.”¹²⁶ His second was for his Odie sculpture.¹²⁷ In Koon’s third lawsuit he was sued by Allure magazine for his use of an image from their magazine.¹²⁸ The image (shown below) captured a women’s crossed legs from the middle of the shins down, and the feet were adorned with high heels.¹²⁹ With this appropriation art piece, Koons opted for a collage.¹³⁰ He again made a fair use defense, but rather than claiming that his work was a parody—as he had done in prior suits—he claimed that his use was transformative, which was a newly available analytic approach to fair use.¹³¹ Using essentially the same arguments as his last lawsuit, but under a different analytical test, the court sided with Koons.¹³²

The effect of these lawsuits is concerning because (1) Koons has begun to change his art to avoid liability and (2) his success as an artist has caused him to become a target for lawsuits. In direct response to these lawsuits, Koons has changed his art by incorporating outside work as part of a collage rather than making it the central focus.¹³³ He cannot express his critique of modern culture in the subtle manner he preferred, because “[t]he courts are not good at

¹²⁰ Mattel, Inc. v. MCA Records, 296 F.3d 894, 899 (9th Cir. 2002).

¹²¹ *Id.* at 901-02.

¹²² Tushnet, *supra* note 16, at 545.

¹²³ Mattel, 296 F.3d at 4894.

¹²⁴ *Id.* at 908 (after summarizing the extensive lists of claims and counter-claims brought by both parties to this lawsuit, Judge Kozinski concluded his opinion by swiftly dismissing them and offering a bit of advice: “T: “[he parties are advised to chill.”).

¹²⁵ Boucher, *supra* note 39.

¹²⁶ Kattwinkel, *supra* note 19.

¹²⁷ United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 372 (S.D.N.Y. 1993).

¹²⁸ Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006) (affirming the district court decision to grant summary judgment to Koons on the ground that his appropriation of Blanch’s photograph was fair use).

¹²⁹ *Id.* at 260-61.

¹³⁰ *Id.*

¹³¹ *Id.* at 252.

¹³² *Id.* at 259.

¹³³ *Id.* at 260-61.

understanding subtle artistic messages.”¹³⁴ Koons has altered is artistic expression to avoid legal liability. Unfortunately, he continues to be harassed with persistent litigation. Koons’ success has made him a target for unpredictable copyright lawsuits. His work is “the most original, controversial, and expensive American artist of the past three and a half decades.”¹³⁵ He elicits controversy because he appropriates cultural images, while the potential for a big settlement entices frequent lawsuits. For instance, in December of 2014, Koons received two lawsuits within a couple weeks of each other:¹³⁶ one for his work “Fair d’Hiver” for resembling a French advertisement, and another for his sculpture “Naked” for resembling a photographer’s photo.¹³⁷ Koons was sued yet again in 2015 for alleged copyright infringement in his painting that resembled a photographer’s gin ad of a couple on a beach with an easel.¹³⁸ The frequency of these suits and “[t]he disparate results of [Koons’] cases, not to mention the high costs of litigating against a back-drop of uncertainty, help explain why a climate of “self-censorship” has taken hold in the art world.”¹³⁹



Figure 9: Allure magazine is shown on the left, while Koon's collage is shown on the right.

Part of the issue here is the breadth of copyright protection. This is especially true in regards to copyright's derivative works right. Derivative rights protect the copyright holder's ability to monopolize derivative markets with their work. Examples include translating, dramatizing, or fictionalizing a work.¹⁴⁰ For Koons this right has resulted in liability for appropriation art he derived from

¹³⁴ Kattwinkel, *supra* note 19.

¹³⁵ See Peter Schjeldahl, *Selling Points: A Jeff Koons Retrospective*, NEW YORKER (July 7, 2014), <http://www.newyorker.com/magazine/2014/07/07/selling-points> (calling Koons “the most original, controversial, and expensive American artist of the past three and a half decades”).

¹³⁶ Henri Neuendorf, *Jeff Koons Sued Yet Again Over Copyright Infringement*, ARTNET NEWS (Dec. 15, 2015), <https://news.artnet.com/art-world/jeff-koons-sued-copyright-infringement-392667>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Amy Adler, *Fair Use and the Future of Art*, N.Y.U. L. REV. 559, 566 (2016).

¹⁴⁰ United States Copyright Act 17 U.S.C. § 101.

other people's images. Other examples include the \$90,000 full size Batmobile.¹⁴¹ DC Comics was not selling a Batmobile, nor did they imply that they intended to. Rather, they asserted that their right in the character Batman included his iconic Batmobile.¹⁴² The Batmobiles that Towle sold was found to be a derivative work based on a Batman TV show, and thus exclusively under the control of the DC Comic's copyright holder.¹⁴³ The problem with this exclusivity is that DC Comics is not using their property to fill the empty market niches. This is classic market failure resulting from an overly expansive derivative works right.

A need of the market is being left unsatisfied under color of law. Derivative work rights are necessary in order to counter act unapproved translations or revisions. However, derivative work rights do not make sense when the fan-generated work is in a market entirely untouched by the rights-holder. Injunctions against creators like Towle result in a diminution of the amount of art available to the public. The progress of the arts is being reserved for those who do not wish to progress it.

E. Extraordinary Harm

The many copyright infringement cases covered in this article often result in extraordinarily punitive remedies. In *Cariou v. Prince*,¹⁴⁴ the District Court judge ordered Prince to turn over his art for *destruction*.¹⁴⁵ There, Prince incorporated photographs of Rastafarians into his pop art without permission from the original photographer. Some of his modifications to the photographs were as simple as adding a cartoon guitar, while others were turned in to intricate collages (both are shown below). The fan who authored a fan fiction sequel to "The Catcher in the Rye," as discussed earlier, faced a similarly harsh punishment.¹⁴⁶ "Coming Through the Rye" was and is banned under color of law in America because of its content.

¹⁴¹ DC Comics v. Towle, 802 F.3d 1012, 1017 (9th Cir. 2015).

¹⁴² *Id.* at 1021.

¹⁴³ *Id.* at 1026.

¹⁴⁴ 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

¹⁴⁵ *Id.* at 348.

¹⁴⁶ *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir. 2010).



Figure 9: Both images are Prince's artwork. The left image was modified by adding a guitar and face decoration, while the right image incorporated both rastafarian's and girls into a collage.

The punishments for copyright infringement are destruction and censorship. They make an injunction look harmless, and yet the Supreme Court has advised that “[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”¹⁴⁷ If an injunction is extraordinary, then what is book burning and destruction of art? Destruction like this, in the form of deletion or erasure, is what happens when YouTube videos, fan games, and legacy servers are removed from the Internet. These punishments are more than extraordinary, and the victims are not the only affected communities, but the public at large who experiences a diminishment in the amount of available content in the public domain.

F. Leading Examples of Companies Recognizing the Value of Public Participation

Some companies and developers recognize the value in fan participation. Where Nintendo files DMCA takedown notices against Metroid and Pokémon fan games,¹⁴⁸ Sega responds to fan games with: “[k]eep making great stuff, Sonic fans.”¹⁴⁹ Sega goes beyond recognizing the value and attention these games bring to the Sonic trademark, they even hire the people who program Sega fan games to come work for them as legitimate Sega programmers.¹⁵⁰ This is how fans should be treated; like the number one customers they are. Rather than treating fans like adversaries that need to be shut down and silenced, the concerns of the people that paid for the games, and thus contributed to the success of the company, should be taken into consideration.

¹⁴⁷ Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

¹⁴⁸ Maglio, *supra* note 9.

¹⁴⁹ Alexandra, *supra* note 5.

¹⁵⁰ *Id.*

One example of compromise comes from the creator of Minecraft, Majong. Minecraft's license agreement contained an anti-monetization clause and Majong faced backlash after announcing a plan to start enforcing it.¹⁵¹ For years, fans hosted online servers sold in-game items and utilized that revenue to make a better server experience for the players by employing developers to assist in maintaining their servers.¹⁵² Minecraft is largely played through privately hosted servers. Rather than shutting down these revenue generators, and the benefits that come with them, Majong compromised with the fans, by permitting monetization of certain categories of items, thereby allowing these servers to survive.¹⁵³ With the survival of the servers comes the survival of the fan-generated content on each of those servers. This compromise preserved the fruits of countless hours of labor players had undertaken to create the immense virtual worlds characteristic of Minecraft.

Another example of rights-holder accommodation of fan participation is the gaming industry's general response to YouTube's "Let's Play" videos and Twitch live streaming. Rights-holders recognize that these participatory fans draw interest to the games they play and they encourage other people to keep playing the games.

From major publishers down to independent developers most corners of the industry have acknowledged YouTubers as powerful influencers able to swing public opinion and even drive sales. This kind of acceptance from the gaming industry, unsurprisingly, drives even more viewers to the gamer audience camp.¹⁵⁴

In much of the same way, games like Project AM2R and Pokémon Uranium draw interest to the product the rights-holders own. They can revitalize the products, and they can show rights-holders the potential of their games.

SECTION 4: THE FAIR USE DOCTRINE AND A PARTICIPATORY CULTURE

A. Property Rights and the Fair Use Chameleon

Property comes with a bundle of rights. The rights vary with the type of property involved. These rights include the right to use, sell, mortgage, lease, give away, enter, and to refuse to exercise any of those rights. What this article concerns is the right of exclusion—the right to refuse entry—and the right to use. This article proposes adding in another right to the already existing bundle of

¹⁵¹ Colin Campbell, *Why Some Fans Are Battling with Notch over Minecraft Changes*, POLYGON (June 18, 2014, 8:24 AM), <http://www.polygon.com/2014/6/18/5819274/mojang-multiplayer-servers>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Evan DeSimone, *How Gaming Got Big on YouTube*, NEW ROCKSTARS (June 15, 2015, 2:15 PM), <http://newmediarockstars.com/2015/06/how-gaming-got-big-on-youtube/>.

rights when it comes to property; the participation right. A right the public has against the owners of a copyright, much like fair use is a right of the public to use a copyrighted work for specific purposes.

Fair use is a statutory defense to copyright infringement. It is composed of four elements, which are weighed by the courts to assess whether a particular use of a copyrighted work is fair and thus considered a non-infringing use.¹⁵⁵

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.¹⁵⁶

Some issues related to the fair use doctrine include how the above factors are supposed to be analyzed, how these factors relate to one another, and how to weigh each factor.

The courts first took the stance that the fourth factor was “the single most important element of fair use.”¹⁵⁷ Copyrights are economic rights, and there can be no such thing as fair use if it undermines the economic potential of what the artist created. The courts then shifted to “an aggregate weighing of all four fair use factors.”¹⁵⁸ Judge Leval however, disrupted this approach through his law review article that introduced and defended “transformative use” as fair use.¹⁵⁹ This approach again placed emphasis on the first factor of the test, the purpose and character of the use.¹⁶⁰ This emphasis on the first factor has faded as recent decisions have seen the courts adopt a new approach to fair use in the form of a “reasonable observer” test.¹⁶¹

These numerous changes highlight the unpredictability of the fair use defense because the analysis keeps evolving. This uncertainty leaves creative fans, and all artists, vulnerable to liability and lawsuits.¹⁶² It is no wonder that

¹⁵⁵ *Harper & Row, Publrs. v. Nation Enter.*, 471 U.S. 539, 560-61 (1985).

¹⁵⁶ United States Copyright Act 17 U.S.C. § 107.

¹⁵⁷ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (citing *Harper & Row*, 471 U.S. at 566.).

¹⁵⁸ *Id.*

¹⁵⁹ Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1112-16 (1990) (discussing the existence of literary quotation insufficiently transformative to warrant fair use protection).

¹⁶⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁶¹ *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

¹⁶² *See Adler*, *supra* note 120, at 559, 567.

legal scholars have characterized fair use as “resistant to generalization,”¹⁶³ “unpredictable,”¹⁶⁴ and “subjective.”¹⁶⁵ The purpose of this article is to propose a change that offers to infuse some certainty into the fair use defense for at least one subset of our culture, fan artists.

B. The Participatory Inquiry Under the First Factor of Fair Use Analysis

The suggested modification applies to the first factor of the fair use analysis: the purpose and character of the use. This factor has been modified in the past to accommodate the transformative inquiry, and following in those footsteps, I suggest an additional inquiry there.

One type of fair use ought to be those works whose purpose and character of use is participatory in nature. Those creative artists who participate in culture by modifying, continuing, redirecting, or reviving famous stories and games do not undermine the value of a rights-holder’s copyright; such as Project AM2R’s use and modification of the Samus game, Pokémon Uranium’s use and redirection of the standard Pokémon game, Nostalrius’s use and revival of original World of Warcraft, and Colting’s use and continuation of the Holding Caulfield’s story. This type of cultural appropriation is fair. Such use is fair because has little to no economic impact on the rights-holders, enriches society with additional entertainment options, and fosters participation and creativity within our community. The issue is, what kinds of creative works actually fall under the umbrella of participatory works?

Participatory works should not be commercial works. Any work that is commercial in nature should have a significant degree of profit allocation commensurate in scope with the amount of copying. Participatory works should not be exact copies, except in the case of revivals, because participation is about infusing one’s own creative input into the work. The revival is not a creative effort, but it is a labor intense effort that promotes participation in a work otherwise lost to time. Such a work is primarily participatory in nature, it promotes participation in a cultural work, and is thus favored behavior under this analysis. Participatory works should not be deceptive, and should not misappropriate ideas and present them as their own individual creations. With this in mind, participatory works should be labeled as such.

Participatory works should give notice, not only to the public that they borrowed from another work, but also to the rights-holder themselves. The notice function serves two purposes for rights-holder: (1) it allows them to license the

¹⁶³ Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990).

¹⁶⁴ Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1266 (1997) (referring to the fair use “doctrine, which many find unpredictable, if not incomprehensible”).

¹⁶⁵ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1005 (1990) (arguing that the vagueness of the fair use doctrine must surely have a chilling effect on some protected speech).

use if the use is commercial, and (2) it allows them to request a temporary injunction should the rights-holder themselves be on the verge of releasing a substantially identical product, allowing the rights-holder the privilege of entering the market first.

Finally, works based on remarkably famous works should be given preferential treatment as fair use. Like genericide in trademark law,¹⁶⁶ these works become so mainstream that their ideas permeate our culture. Our cultural identity becomes linked with these innovations. Much like the renaissance period evokes a perception of new scientific thought and art, the art of our day defines who we are. We should be free to participate in the culture that we identify with.

C. Application of the Participatory Inquiry

So how would participatory fair use look in action? With this new type of fair use, Project AM2R would clearly be fair use. The Samus story is famous, the game involved creative effort, was available for free, and was not one of deceptive misappropriation in that it did not try to pass itself off as a legitimate Nintendo game. The same analysis applies equally well to Pokémon Uranium's use of the Pokémon copyright. However, Pokémon Uranium presents an analytical challenge to the participatory inquiry not presented by Project AM2R; with Pokémon Uranium, an argument can be made that the game was so successful that it could serve as a market substitute for current Pokémon games.

Why pay \$50 for an original Pokémon game when you can get Pokémon Uranium for free? With Project AM2R, the game was a remake of a nearly twenty-year old game, market competition was not a legitimate concern in that scenario. However, with Pokémon Uranium, market competition is a very real possibility, and as such, Pokémon Uranium has a weaker claim to participatory fair use. Perhaps some type of compulsory licensing could ameliorate this market competition issue by requiring that the game to be sold for a minimum price and then allocating most of the profits to Nintendo. When fair use encounters a potential market substitute, defensive analysis becomes very challenging. This implicates the fourth factor of fair use analysis. The effect the use has on the market. Fair use analysis is a balancing act. The fourth factor's market effect must be balanced against the first factor's transformative and participatory inquiries.

¹⁶⁶ Genericide is what happens when a trademark becomes generic. Trademarks are supposed to signal the source of a good, to reassure the public that the good exhibits a certain degree of quality. However, some popular products dominate the market to such a degree that the trade name no longer identifies a particular company behind the product but rather identifies the particular good itself. For instance, "zipper" and "Kleenex" do not evoke a particular brand, like a trademark ought to. Instead, these names evoke a particular product. When a company's trademark loses the ability to signal source, the company loses monopoly control over the name that the law once enforced.

The participatory inquiry does not necessarily save every artistic work discussed in this article. Works like the replica Batmobile may seem intuitively fair. DC Comics is not being economically challenged. They do not sell a Batmobile. In fact, such a Batmobile might be an economic boom to DC Comics in that it draws attention and interest to the copyrighted works that they do sell. On the other hand, the Batmobiles have sold for a significant sum of money. These profits essentially freeride on the Batman character and go against the non-commercial imperative of the participatory inquiry. Towle was not merely participating in the cultural phenomenon of Batman, he was engaging in the market place. In such a scenario, the participation inquiry should only offer a defense if profit allocation is successfully negotiated between the alleged copyright infringer and the rights-holder.

With YouTube and twitch streamers, the same seems to be true. Those works are commercial in nature, and profit allocation seems justified. On the other hand, they have a high level of creative input. They decide how to play the game. They decide whether and how to give witty commentary. They decide whether to try to beat a game in the shortest amount of time possible or whether to beat the game the most meticulous manner. This creative input provides fuel for the argument that these streamers are not even in the same market as games. They are not selling games, but are selling themselves, their imagination, their activity. They are marketing their personalities and their preferences to an audience who wants to see it. This is a favored form of participation.

Nostalrius presents an additional and somewhat unique analytical challenge to the participatory inquiry. It has no problem satisfying most of the participatory factors. The game is non-commercial and it is an old game that does not realistically compete with the market for new games. On the other hand, the game lacks creative effort. This fan work looks like a blatant copy. This typically weighs heavily against a finding of fair use under the third factor. An exact copy serves as a perfect substitute, thereby undermining the monopoly granted under a copyright. However, the participatory inquiry adds a wrinkle of complexity to this otherwise straightforward analysis. This additional consideration comes from the fact that games like Nostalrius are revivals. Revivals are not perfect copies that undermine a copyright's market exclusivity by replacing the original work. Revivals do not replace anything, rather they fill a void left in the market place. An intellectual innovation was introduced to society and then it disappeared. These sequences of events left a nostalgic gap. Nostalrius makes up for its lack of creativity by its propensity to open up participation in a community otherwise lost to time. This is a favored form of participation.

D. Justifications for the Participatory Inquiry

The participatory inquiry is justified as enhancing the value of the public domain. The participation of fan gamers and streamers enhances the amount of

available content around some people's hobby and passion, gaming. Where hikers have national parks set aside by the government for their enjoyment, gamers are working hard to create their own fan community paradise. The participation inquiry also recognizes the flaw in demanding originality. Nothing is completely original. Some works are more original than others, but all creative works build off of one another. We learn brush strokes from famous artists, turn of phrases from witty friends, and concepts like 'orcs' and 'elves' have been permanently entrenched in our imaginations after Tolkien. It is normal, natural, and should be encouraged to not shun the culture around us, but to embrace it, to make it a part of us, and to make it our own.

Lastly, the participatory inquiry is pragmatic. It provides a margin of certainty to the fair use defense. It will provide a sense of security for these fan communities that grow in numbers every day. It will encourage participation in not only artistic works of culture, but also in the legal system as fans will be more willing to defend their rights when they receive a DMCA takedown notice when they learn that the law recognizes the value they contribute to society by being a participatory citizen.

SECTION 5: CONCLUSION

Fan games fall under the larger umbrella of fan fiction. It is a growing subset of fans who create their own versions of popular video games. These creative fans also fall within the growing emergence of the gaming community. A culture that is participatory in its own right. Creative fans participate by writing software code to share their creations with people who are already fans of the underlying series. While, other fans participate by streaming themselves playing games, by watching people playing games, and by talking with those streamers and other viewers while they all watch the same video stream together. Like Super Bowl Sunday, these gaming practices are becoming social events, centered around a sport. A sport that even has its own professionals that can fill entire stadiums as fans watch them compete for million dollar prizes.

These same communities are under constant threat of legal action, due to the questionable legality of their pass time. The law could not predict the emergence of this culture, but it can respond to it. A favorite pastime of the children of America should not be illegal, we should not label them as criminals, and it is not better to say that they might be criminals. The law needs to reflect societal norms, and this is one of them: fans participate. The uncertainty in the fair use defense hangs over these communities like an ominous hurricane, ready to sweep them away. By recognizing the value of a participatory culture we can recognize the value in these gaming communities. The law can protect this value by recognizing and assessing the value of public participation when evaluating fair use.