



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 9 | Issue 3

5-6-2022

Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach

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Recommended Citation

Dakota D Foster, *Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach*, 9 Tex. A&M L. Rev. 711 (2022).

Available at: <https://doi.org/10.37419/LR.V9.I3.5>

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PROTECTING VIDEO GAME GAMEPLAY CREATORS: A TWO-PRONGED COPYRIGHT APPROACH

by: *Dakota Foster**

ABSTRACT

The video game industry continues to grow into a behemoth, yet the players fueling its rise lack sufficient copyright protection. While the Copyright Act protects video games' copyrightability as audiovisual works, it lacks clear protection for the gameplay created by gameplay content creators. These secondary creators increasingly build careers out of their gameplay yet lack clear copyright protection over the videos they create because the video game developer typically owns the video game's exclusive rights over public performance and derivative works. The status quo relies on a "gentleman's agreement" where video game copyright holders ignore their rights in the copyright and allow gameplay creators to build careers while the copyright holders reap the benefits from the publicity. However, the copyright holders maintain the power to end a gameplay creator's career by simply enforcing their rights.

Several proposals provide workable solutions but fall short of meaningful protection. Most proposals argue stretching the Copyright Act's existing language to meet the video game industry's needs while recognizing the Act lacks sufficient language for the industry's distinctive nature. To overcome the ambiguity in interpreting dated law to a nascent industry, this Note proposes an amendment to the Copyright Act that provides a tailored approach to copyright protection for gameplay creators. This Note first proposes a declaration of non-infringement for a gameplay creator's videos of their own gameplay from nonlinear video games. This Note secondly proposes the use of a sui generis right that recognizes the significant effort by gameplay creators in creating their gameplay videos and rewards the effort with narrow but sufficient copyright protection over their individual audiovisual creative works. Collectively, this approach alleviates the fear of copyright strikes against the gameplay creators while also allowing them to protect their works against potential infringers.

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DOI: <https://doi.org/10.37419/LR.V9.I3.5>

* J.D. Candidate, Texas A&M University School of Law, May 2022. I would like to thank my advisor, Professor Peter K. Yu, for his guidance in helping me develop my thoughts and ideas, as well as the *Texas A&M Law Review* editorial staff for their hard work and excellent editing. I would also like to thank Jenna Dibble for her love and support throughout law school, and my parents and siblings, Darlene, Cary, Katie, Tyler, Kourtney, Corban, and Fayette for their endless encouragement and support.

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I. INTRODUCTION

Super Mario, Donkey Kong, Sonic the Hedgehog, Tetris—for many, these names evoke a fond memory of walking in the door after school, dropping a bookbag on the floor, and racing to grab a controller to begin an evening of video gaming. While similar memories take hold of a new generation of video game players, for some, turning on a gaming console or PC signals the start of a workday. To the tune of \$120 billion generated in 2019, video gaming has evolved from a hobby into a giant in the entertainment industry—surpassing the revenue garnered from both the movie and music industries combined.¹ The dramatic increase in gaming revenue largely derives from its similarity to other sports and entertainment. For example, the National Football League generates billions of dollars each year through its franchised teams, merchandise, packed stadiums, and display of games to viewers across the world; the video game industry now does the same through esports leagues, as well as through video game streamers and content creators (collectively referred to in this Note as “gameplay creators”).²

A notable distinction, however, involves the video gaming industry’s innovation beyond traditional network broadcasting to utilizing modern avenues for reaching viewers—namely, the Internet—particularly with the help of Twitch.tv and YouTube.³ Gameplay creators use these platforms to create streams and videos of their gameplay for all

1. Charlie Fink, *Will Esports Be America’s New Pastime?*, FORBES (Oct. 6, 2020, 11:31 AM), <https://www.forbes.com/sites/charliefink/2020/10/06/will-esports-be-america-new-passtime/#639344c214df> [<https://perma.cc/A4T2-GQNM>].

2. *Id.*; Ben Casselman, *Resistance Is Futile: Esports Is Massive . . . and Growing*, ESPN (May 22, 2015), https://www.espn.com/espn/story/_/id/13059210/esports-massive-industry-growing [<https://perma.cc/VV55-GYTU>]; Adam Stern, *Is Franchising the Future for Esports?*, SPORTS BUS. J.: THE ESPORTS OBSERVER (Nov. 11, 2019), <https://esportsobserver.com/franchising-esports-feature/> [<https://perma.cc/48LV-W8PR>].

3. See John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates its Next National Pastime*, 2020 U. ILL. L. REV. 509, 533 (2020).

audience sizes.⁴ Every day, millions of viewers watch gameplay creators playing their favorite games.⁵ In much the same way as basketball fans watch professional basketball and cooking fans watch professional chefs, video game fans watch professional video game players (or at least those players they find entertaining enough to watch). This wing of the video game industry is just the newest form of the general populace's infatuation with watching people do things better than the average viewer can and stoking those viewers' dreams of accomplishing the same goals.

Of course, as with most aspects of the entertainment industry, there is a lot of money involved. The top earners are gameplay creators on Twitch.tv and YouTube who earn their money from sources including ad revenue, donations, subscriptions, endorsements, and sponsorships.⁶ In 2019, for example, some of the top earners included names like Ninja (\$17 million), PewDiePie (\$15 million), Shroud (\$12.5 million), and TimTheTatman (\$8 million).⁷ However, despite many gameplay creators building careers and livelihoods out of this practice, the industry is thriving on a "shaky foundation and largely at the pleasure of game makers," giving rise to a considerable fear hanging over the heads of gameplay creators.⁸

The fear arises because there is a general consensus that player-created gameplay videos infringe on the game developers' and publishers' copyrights.⁹ Currently, the vast majority of video game copyright holders turn a blind eye and operate under a "gentleman's agreement" with gameplay creators because the infringing actions foster significant publicity for the video games.¹⁰ Despite the status quo, there are instances that give rise to the notion that it may not stand forever.¹¹ When video game copyright holders selectively choose who

4. See *id.*

5. See *id.* at 522, 533, 543 (discussing the large audience that watches esports and Twitch streamers); Mansoor Iqbal, *Twitch Revenue and Usage Statistics (2022)*, BUS. OF APPS, <https://www.businessofapps.com/data/twitch-statistics/> (Jan. 11, 2022) [<https://perma.cc/X5MV-9RVP>].

6. See Matt Perez, *Top-Earning Video Gamers: The Ten Highest-Paid Players Pocketed More Than \$120 Million in 2019*, FORBES (Jan. 29, 2020, 6:00 AM), <https://www.forbes.com/sites/mattperez/2020/01/29/top-earning-video-gamers-the-ten-highest-paid-players-pocketed-more-than-120-million-in-2019/#7959acf04880> [<https://perma.cc/SW5Y-2PZ5>].

7. *Id.*

8. John Holden & Mike Schuster, *Copyright and Joint Authorship as a Disruption of the Video Game Streaming Industry*, 2020 COLUM. BUS. L. REV. 942, 945.

9. See *id.* at 945–46, 955; Holden et al., *supra* note 3, at 540–41.

10. See Holden et al., *supra* note 3, at 540–41.

11. See *infra* Section III.A. Digital Millennium Copyright Act ("DMCA") takedowns are the formal process for removing copyrighted content from the Internet. *How the EU Copyright Directive Affects Esports Live Streams*, ESPORTS INSIDER (Aug. 6, 2019) [hereinafter *EU Copyright Directive*], <https://www.esportsinsider.com/2019/08/eu-copyright-directive-live-streaming/> [<https://perma.cc/2JER-LXXA>] (noting that video game copyright holders are likely to disre-

they want to publicly perform their game—and who they do not want—many gameplay creators will be forced to instantly end their careers and search for a new job, and for many of these gameplay creators, they quit school to pursue these dreams.¹² Regardless of the potentialities, relying on video game copyright holders to continue ignoring copyright infringement while an entire industry builds around infringing activity is not a safe bet. To foster the growth of the nascent industry moving forward, granting copyright protection to gameplay creators should be a priority; they need the peace of mind that video game copyright holders will not prevent them from furthering their careers.

Accordingly, this Note seeks to enhance the copyright protection of gamers that currently lack minimal recourse if they face career-ending copyright takedowns. In doing so, Part II of this Note explores changes in the video game industry and why old law inadequately applies to the current state of the industry. Part III highlights the increasing threats gameplay creators face and how changes in existing law are potentially moving in the wrong direction. By looking at examples of the disparate treatment against gameplay creators, as well as recent and proposed changes in the law, Part III explains why gameplay creators lack adequate legal protections under the current framework. Part IV explores some existing proposals to resolve the overarching issue, analyzes the strengths and weaknesses of each approach, and explains how past adaptations in copyright law may inform on a new framework for protecting gameplay creators. Part V outlines the proposal of this Note—the adoption of (1) a declaration of non-infringement for gameplay creators and (2) a *sui generis* right tailored for the video game gameplay creation realm. This two-pronged approach provides a way by which the video game industry can move forward and (1) allow gameplay creators protection from video game copyright holders as well as (2) grant gameplay creators copyright protection over their own specific gameplay videos against potential infringers.

II. CHANGING FACE OF THE GAME INDUSTRY

The U.S. Copyright Act protects video games as audiovisual works.¹³ In *Stern Electronics, Inc. v. Kaufman*, the Second Circuit found that the “repetitive sequence of a substantial portion of the

gard the free publicity and enforce their copyright as the money becomes more significant).

12. Blue Williams, *Here's How Far These Streamers Got in School*, LOOPER (July 20, 2020, 03:48 PM), <https://www.looper.com/228357/heres-how-far-these-streamers-got-in-school/> [<https://perma.cc/T6TR-T3FU>].

13. See generally Copyright Act, 17 U.S.C. § 101 (defining “audiovisual works” as works that include “a series of related images” intended to be shown by machines “with accompanying sounds . . . regardless of the nature of the material objects . . . in which the works are embodied”).

sights and sounds of the [video] game” make the audiovisual work copyrightable.¹⁴ One year after *Stern* came the Seventh Circuit decision *Midway Manufacturing Co. v. Artic International, Inc.*, where the court described player performances (gameplay) as “one of the limited number of sequences [that] the game allows” and, thus, not creative enough for copyrightability.¹⁵ In the past, these decisions collectively disallowed copyright protection over an individual’s gameplay¹⁶ but did not cause major issues within the industry sans Twitch.tv or YouTube because the industry did not have modern day gameplay creators at the time of these decisions. With *Stern*, the copyrightability of a video game’s audiovisual work stopped direct copying of a video game where a third party might try to sell it as their own.¹⁷ The *Midway* decision made sense because arcade games operated with a limited number of patterns and there were only so many distinct sequences such that players did not use sufficient creativity in their performances.¹⁸ Today, however, gameplay videos are mainstream, differ between each other, and form a key part of the video game industry.¹⁹ Modern video games are a far cry from the classic arcade games in that they can have nearly an infinite number of sequences based on the inputs of gameplay creators, especially the nonlinear video games.²⁰ Every video game player in a respective nonlinear game provides different combinations of inputs such that individual gameplay can rarely, if ever, be perfectly repeated.²¹

As part of their rights in the underlying video game, video game copyright holders continue to hold the exclusive right to prepare de-

14. *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

15. *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1011–12 (7th Cir. 1983).

16. See Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1545-46, 1546 n.67 (2013) (discussing *Stern* and *Midway*).

17. See *Stern*, 669 F.2d at 854–56.

18. See *Midway*, 704 F.2d at 1011–12.

19. See Kyle Coogan, *Let’s Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 381, 390–93 (2018).

20. See Holden & Schuster, *supra* note 8, at 967–68, 970–71 (comparing early video games to modern video games). There is an important distinction with modern video games. For simplicity, this Note refers to video games as either “linear” or “nonlinear.” “Linear” refers to video games that follow a single, preset story line and require little to no decision-making by the player. Soham De, *What’s the Difference Between Linear and Nonlinear Video Games?*, MAKE USE OF (Dec. 13, 2021), <https://www.makeuseof.com/linear-non-linear-video-game-differences/> [https://perma.cc/E2R4-QKMG]. “Nonlinear” collectively refers to games that allow players to provide a higher degree of decision-making, such as open world and exploration games, massively multiplayer online games (“MMOs”), esports games, etc. *Id.*

21. See Holden & Schuster, *supra* note 8, at 970–71 (noting that modern video games can feature “innumerable gameplay variations”); see also Madeleine A. Ball, Note, *Nerf This: Copyrighting Highly Creative Video Game Streams as Sports Broadcasts*, 61 WM. & MARY L. REV. 253, 268 (2019) (noting that no two streams can be truly identical as a result of the infinite number of choices streamers can make in their gameplay).

rivative works from their creations, such as the gameplay videos produced by gameplay creators.²² Further, the copyright holders also hold the exclusive rights to authorize public performances, which may implicate the gameplay videos uploaded to YouTube or the streams on Twitch.tv.²³ Currently, there is no existing case law as to the exact legal status of modern gameplay videos, but commentators on the issue have generally conceded that these gameplay videos constitute copyright infringement while differing to some degree on how the “fair use” doctrine applies to the videos.²⁴

Nevertheless, for a gameplay creator’s gameplay to rise to the level of copyrightability (and therefore be eligible for the protections proposed in this Note), individual gameplay must still meet the minimum statutory requirements for copyright protection—namely, “original works of authorship fixed in any tangible medium of expression.”²⁵ A work meets the fixation requirement when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁶ Regarding originality, the U.S. Supreme Court in 1991 found that “originality requires independent creation plus a modicum of creativity.”²⁷ Therefore, the creativity requirement has a very low threshold. A gameplay creator’s audiovisual output likely meets the minimum requirements for copyrightability.

At least two legal scholars have effectively outlined why a modern gameplay creator’s audiovisual output meets the fixation and originality requirements.²⁸ Specifically, the fixation requirement is likely met at multiple stages of the gameplay creation: first by the video game server that makes temporary memory copies of gameplay; then possibly by some games that make automatic copies of gameplay for replay purposes; and lastly by players that create the copies themselves “through independent video capture or use of a streaming application.”²⁹ While each of these can occur in the gameplay creation process, the latter is the most relevant form of fixation as it relates to this Note.

Regarding originality, gameplay that is “rote and predictable” fails to meet the creativity threshold.³⁰ Returning to *Midway*, the Seventh

22. See 17 U.S.C. § 106(2); see Holden & Schuster, *supra* note 8, at 955–56.

23. Howard S. Chen, Note, *Gameplay Videos and Fair Use in the Age of Tricks, Glitches and Gamer Creativity*, 25 B.U. J. SCI. & TECH. L. 675, 679 (2019) (noting that gameplay videos could be considered public performances under the Copyright Act).

24. See *id.*; *infra* Section IV.A.

25. 17 U.S.C. § 102.

26. *Id.* § 101.

27. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

28. See generally Holden & Schuster, *supra* note 8, 966–81 (discussing the copyrightability of recorded gameplay).

29. *Id.* at 978–80.

30. *Id.* at 967.

Circuit determined that video games consisted of a “limited number of sequences” a player can choose from and stated that playing a video game is something more akin to “changing channels on a television than it is like writing a novel or painting a picture.”³¹ The court further explained that the video game player “is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.”³² Notably, however, the Seventh Circuit formed its opinion by looking at games like Pac-Man³³ where players provided little discernible variation in gameplay and could repeat specific successful patterns.³⁴ Linear video game gameplay may still fall into this category as the player’s decisions or performances remain predictable under the limited range of gameplay sequences; however, nonlinear video game gameplay likely surpasses the low threshold for creativity.³⁵ Nonlinear gameplay allows for gameplay-altering decisions where players often perform hundreds of input commands in a short period of time, decide where and how to explore in an open world, or even discover ways to play the game never considered by developers.³⁶ Holden and Schuster provide a powerful example with the parallel between gameplay creation and “digital keyboards (pianos) [that] operate in a rule-based system where a particular sound is produced in response to keystrokes.”³⁷ In much the same way a pianist creates new music through the combinations of 88 keys on the keyboard, gameplay creators in nonlinear games have limitations in what buttons can be pressed to control specific actions, but the combination of inputs and subsequent gameplay output that allows (and promotes) the player’s decision-making results in something new, different, and creative.³⁸ The significant variation in gameplay permitted by video games such as Rocket League, Apex Legends, and Sea of Thieves from one player to another results in the daily uploads and millions of viewers that watch gameplay every day without feeling as though they are watching the same video as the day before.

Although the personal gameplays of the gameplay creators appear copyrightable as a threshold matter, the gameplay is still likely infringing on the underlying video game copyright as previously noted, leav-

31. Midway Mfg. Co. v. Artic Int’l, Inc., 704 F.2d 1009, 1012 (7th Cir. 1983).

32. *Id.*

33. *Id.* at 1010–11.

34. Holden & Schuster, *supra* note 8, at 967–69.

35. *See id.* at 966–74. Holden and Schuster explain why gameplay creators for “modern [MMOs]” likely meet the creativity threshold for copyrightability; however, the rationale they provide sufficiently extends to the broader context of nonlinear video games as described in this Note. *Id.* at 966–67.

36. *See id.* at 970–71.

37. *Id.* at 969.

38. *See id.*

ing the gameplay creators to the whims of the video game copyright holders. Copyright protection for gameplay creators becomes especially pertinent as the video game industry grows into a behemoth. Large industries with significant income tend to draw the attention of government officials as an area in need of oversight. Over the past 50 years, the video game industry has gradually expanded into households across the world.³⁹ In 2019, the industry accrued approximately \$109.4 billion across mobile, PC, and console platforms.⁴⁰ In relative terms, the video game industry amounts to the dominant feature of the overall entertainment industry—outpacing the American film industry (\$43.4 billion in 2017) and the music industry (\$43 billion in 2017).⁴¹

The success of the industry by itself, however, is not the reason gameplay creators deserve protection. Rather, the integral role of these gameplay creators in providing significant income to the industry illustrates the need for copyright protection, especially as the industry garners more attention. The revenues from esports and video game streaming are expected to reach \$3.5 billion in 2021, which is up from \$1.8 billion in 2016.⁴² While the industry was already gaining this substantial ground and becoming mainstream, the COVID-19 pandemic brought video game streaming and content creation to the forefront with the absence of the usual modern forms of entertainment such as live sports, music concerts, or theatrical performances.⁴³ This all fosters positive industry growth. However, with attention comes consequences, which are explored in Part III.

III. INADEQUATE LEGAL PROTECTION FOR GAMERS

Ryan Morrison, the self-titled “Video Game Attorney,” explained that gameplay creators believe that they “own” their content, but that

39. *Video Game History*, HISTORY, [https://www.history.com/topics/inventions/history-of-video-games#:~:text=the%20video%20game%20industry%20had,or%20arcade%20cabinets\)%2C%20in%201979](https://www.history.com/topics/inventions/history-of-video-games#:~:text=the%20video%20game%20industry%20had,or%20arcade%20cabinets)%2C%20in%201979) (June 10, 2019) [<https://perma.cc/9CTH-BFQ3>].

40. 2019 YEAR IN REVIEW: DIGITAL GAMES AND INTERACTIVE MEDIA, SUPERDATA 1, 10 (2019), <https://direc.ircg.ir/wp-content/uploads/2020/01/SuperData2019YearinReview.pdf> [<https://perma.cc/UPX2-W9TH>].

41. SingularDTV, *30 Stats that Reveal the Economics of the Entertainment Industry*, MEDIUM (Aug. 9, 2018), <https://medium.com/singulardtv/30-stats-that-reveal-the-economics-of-the-entertainment-industry-18e9a5db493b> [<https://perma.cc/SRZ2-E598>].

42. Alex Knapp, *Report: eSports and Game Content Streaming Revenues Will Rise to \$3.5 Billion by 2021*, FORBES (Mar. 14, 2017, 5:13 PM), <https://www.forbes.com/sites/alexknapp/2017/03/14/report-esports-and-game-content-streaming-revenues-will-rise-to-3-5-billion-by-2021/?sh=6fa0c4a91c3c> [<https://perma.cc/GWW7-HYF6>].

43. See James Brumley, *Video Game Streaming Surges in Popularity Due to Coronavirus Lockdown*, MOTLEY FOOL (Mar. 23, 2020, 9:09 AM), <https://www.fool.com/investing/2020/03/23/video-game-streaming-surges-in-popularity-due-to-c.aspx> [<https://perma.cc/58S4-6L3V>].

is not the case.⁴⁴ At best (and barring a fair use finding), they are licensed to stream and lack any significant rights over their own audio-visual creations.⁴⁵ At worst, when gameplay creators purchase a video game, they are merely buying a license to play the game for *non-commercial* purposes, which effectively bars the use of the game for streaming and content creation.⁴⁶ Morrison further explains that “most streamers are 100% infringing.”⁴⁷ This is the nature of the industry in its current form. Although existing legislation never accounted for the possibility of this industry dynamic, courts have found ways to apply the old language to nascent and novel industries. However, this particular industry’s dynamic is distinct enough that it deserves its own tailored understanding and legislative approach.

As video game developers and publishers hold the copyrights to the video games, players within the industry build careers without copyright protection for their content. At least one commentator argues that video game streams and “Let’s Play” videos constitute public performances by the gameplay creators and therefore infringe on the video game’s copyright.⁴⁸ Such infringement provides the video game companies a method to take down content at their discretion⁴⁹ despite the nature of the video game industry where gameplay creators build careers and rely on their content as a primary source of income.⁵⁰ Nintendo, for example, is notorious for a quick trigger finger—send-

44. Steven T. Wright, *Twitch Streamers Flooded with DMCA Copyright Claims on Old Clips*, GAME SPOT (July 1, 2020, 7:53 AM), <https://www.gamespot.com/articles/twitch-streamers-flooded-with-dmca-copyright-claim/1100-6478126/> [<https://perma.cc/8PSH-7GCM>].

45. *See id.*

46. *See id.*; *see also infra* Section IV.B.

47. Wright, *supra* note 44.

48. Brianna K. Loder, Comment, *Public Performance? How Let’s Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law*, 15 WASH. J.L. TECH. & ARTS 74, 77–78 (2020).

49. *See* Spencer Baculi, *Capcom Begins Cracking Down on “Inappropriate or Objectionable” Fan Content*, BOUNDING INTO COMICS (Jan. 9, 2021), <https://boundingintocomics.com/2021/01/09/capcom-begins-cracking-down-on-inappropriate-or-objectionable-fan-content/> [<https://perma.cc/2VBN-2D8Y>] (noting that Capcom updated its policy regarding content so that “‘on a case by case basis[]’ the company ‘reserves the right to take down content that is found to be inappropriate or objectionable[] at [its] discretion’”).

50. *See* Sonu Banerjee, *Female Valorant Pro Tayhuhu Banned on Twitch After 3 Year Old Child Shows on Stream*, TALKSPORT (Dec. 22, 2020), <https://www.talksport.com/news/female-valorant-pro-tayhuhu-banned-on-twitch/> [<https://perma.cc/GTH6-PYZW>] (noting that a professional Valorant player received a ban, cutting off her “only source of income,” because of an accident where her child appeared on stream without an adult present); Jean-Michel Lajoie, *The Pandemic Closed My Small Business. Now I Make a Living Streaming Video Games*, HUFFINGTON POST (Mar. 1, 2021, 6:00 AM), https://www.huffingtonpost.co.uk/entry/not-casuals-youtube_uk_5ff11199c5b6e7974fd3aa5b?guccounter=1 [<https://perma.cc/T4P6-V8JE>] (providing a story on how a small business owner lost their business during the COVID-19 pandemic and turned to video game streaming as their primary source of income).

ing its lawyers after gameplay creators and taking down streams, YouTube channels, and Smash Bros. tournaments for publicly performing Nintendo's copyrighted materials.⁵¹ Although Nintendo has relaxed and found ways to co-exist with gameplay creators,⁵² its past actions are indicative of the possibility that video game copyright holders may disrupt the existing status quo.

A. Cause for Concern

Beyond the issues with Nintendo, the video game industry continues to face multiple contentious issues that emphasize the larger problem—gameplay creators lack proper recourse when their careers are in jeopardy. For example, as the COVID-19 pandemic took hold and platforms such as Twitch.tv experienced unprecedented traffic as the general populace stayed home, Twitch.tv users felt the sting of mass Digital Millennium Copyright Act (“DMCA”) takedowns (the formal process for removing copyrighted content from the Internet).⁵³

Before the COVID-19 pandemic, the status quo of tolerated copyright infringement seemed sufficient to some;⁵⁴ however, there existed lingering concerns that organizations would eventually strike at the industry with DMCA takedowns.⁵⁵ This fear began materializing in

51. See Loder, *supra* note 48, at 87; Otto Kratky, *Capcom Has Announced New Guidelines for Content Creators*, PCINVASION (Jan. 7, 2021), <https://www.pcinvasion.com/capcom-new-guidelines-for-content-creators/> [<https://perma.cc/A7WF-KJEF>]; Thomas Wilde, *How the COVID-19 Relief Bill Could Change the Future of Game Livestreaming in the U.S.*, GEEKWIRE (Dec. 21, 2020, 9:57 PM), <https://www.geekwire.com/2020/covid-19-relief-bill-change-future-game-livestreaming-u-s/> [<https://perma.cc/93FA-AJ6V>]. As an aside, there is a dichotomy worth respecting here—game developers, such as Nintendo, have an interest in protecting their investment. That interest is greater when it comes to story-focused or single-player video games because gameplay videos are more likely to decrease the economic output of the game as potential purchasers may be more reluctant after seeing spoilers of the game. Additionally, such games are less likely to have the greater number of sequences that are central to the gameplay videos this Note addresses. In contrast, competitive games or MMOs are more likely to increase the economic output of the video games.

52. Loder, *supra* note 48, at 87 (noting that Nintendo created the Nintendo Creators Program as a less strict policy for enforcing its copyrights).

53. See Jem Aswad, *Twitch, Amazon Slammed by RIAA and Major Industry Groups for Using Unlicensed Music; Twitch Disputes Claim*, VARIETY (Oct. 26, 2020, 7:16 AM), <https://variety.com/2020/digital/news/twitch-amazon-unlicensed-music-riaa-recording-academy-1234815503/amp/> [<https://perma.cc/J79K-T4BV>] (“Twitch delivered some [5] billion hours of livestreamed content in the second quarter of 2020, a dramatic 83% year-over-year surge, per a report by Streamlabs and Stream Hatchet. As lockdown has paralyzed the concert industry, many artists have turned to Twitch as a platform for livestreamed concerts, DJ sets[,] and other broadcasts involving copyrighted music . . . The music-licensing issues have come to the fore in recent months because of the surge in music being streamed over Twitch, which was previously primarily a gaming platform.”).

54. Chen, *supra* note 23, at 705.

55. DMCA takedowns are the formal process for removing copyrighted content from the Internet. See *EU Copyright Directive*, *supra* note 11; Charlie Hall, *A Second*

the middle of the pandemic. Stuck inside, gameplay creators sought to survive the pandemic making money from home; but a flood of DMCA copyright claims cut the stability short when they tore through Twitch.tv based on the use of copyrighted music during video game streams.⁵⁶

Before the COVID-19 pandemic, Twitch.tv received approximately 50 DMCA takedown notices per year.⁵⁷ During the pandemic, that number dramatically increased as Twitch.tv received thousands of notices.⁵⁸ The massive influx of notices related to copyright infringement for music heard in the background of streams.⁵⁹ The incident highlighted significant issues: Twitch.tv lacked a proper system for gameplay creators to properly check their content to remove any potentially infringing videos and suggested mass deletion of entire libraries; gameplay creators grew fearful that they would receive bans subject to Twitch.tv's "three-strike rule"; and gameplay creators worried that simply playing a game that embedded third-party licensed music could warrant a DMCA notice.⁶⁰ The response by Twitch.tv did little to quell the issue as, in some instances, Twitch.tv deleted user content with no method for objection or appeal with the following message:

We are writing to inform you that your channel was subject to one or more of these DMCA takedown notifications, and that the content identified has been deleted. We recognize that by deleting this content, we are not giving you the option to file a counter-notification or seek a retraction from the rights hold. In consideration of this, we have processed these notifications and are issuing you a one-time warning to give you the chance to learn about copyright law and the tools available to manage the content on your channel.⁶¹

YouTuber was Harassed with DMCA Complaints by the Escape from Tarkov Team, POLYGON (Jan. 30, 2019, 4:03 PM) [hereinafter *Second Escape from Tarkov DMCA Claims*], <https://www.polygon.com/2019/1/30/18203842/escape-from-tarkov-dmca-abuse-el-dee-eroktic-battlestate-absolutsoft> [<https://perma.cc/6Q8Q-9RGN>] (noting that the DMCA process is quick, requiring minimal effort from copyright holders to remove allegedly infringing content, and that the DMCA can be used to take down videos when a gameplay creator uses "video game footage or a hit pop song" in the video or stream).

56. See *infra* Section III.A.; Wright, *supra* note 44.

57. Nathan Grayson, *Twitch Apologizes, but DMCA Fiasco Continues with Punishments for In-Game Sounds, Deleted Clips*, KOTAKU (Nov. 11, 2020, 7:00 PM), <https://kotaku.com/twitch-apologizes-but-dmca-fiasco-continues-with-punis-1845647014> [<https://perma.cc/G2GD-4ZKJ>].

58. *Id.*

59. *Id.*

60. *Id.*; Kate Cox, *Twitch Blasts Streamers with Vague, Unhelpful DMCA Takedown Emails*, ARS TECHNICA (Oct. 21, 2020, 4:32 PM), <https://arstechnica.com/tech-policy/2020/10/twitch-blasts-streamers-with-vague-unhelpful-dmca-takedown-emails/?amp=1> [<https://perma.cc/SYZ4-Z658>].

61. Nicole Carpenter, *Twitch Streamers Were Issued Tons of DMCA Takedown Notices Today*, POLYGON (Oct. 20, 2020, 6:05 PM), <https://www.polygon.com/plat>

Another unfavorable message sent by Twitch.tv encouraged users to review all content for unlicensed and infringing material; while Twitch.tv sent the message in response to the music DMCA notices, the message is vague and could potentially apply to all video game content.⁶²

Other instances have invited cause for concern regarding the status quo between video game copyright holders and gameplay creators. For instance, the prominent video game developer Capcom updated its rules for gameplay creators in an effort to strengthen protection over its copyright.⁶³ While most of the rules do not significantly change behavior, Capcom relayed some notable changes: (1) the content made from a game must match the game's age rating, and (2) content should include commentary or some other benefit such as "instructional or educational value."⁶⁴ Moreover, Capcom made clear the company's power to determine what constitutes inappropriate or objectionable content on a case-by-case basis and "reserves the right to take down content . . . at [its] discretion."⁶⁵ The new guidelines illustrate the disparate power video game copyright holders have over gameplay creators. While the guidelines do not significantly disrupt the industry and could be read as fairly lenient, they are still indicative of how gameplay creators operate under the restrictions of video game copyright holders. Capcom's lenient restrictions do not guarantee another video game copyright holder will maintain the same leniency, which creates further difficulties in trying to keep track of the various restrictions across games.

Additionally, at least one prominent figure within the video game community has spoken out with the opinion that gameplay creators should pay a percentage of their revenue to video game publishers (copyright owners).⁶⁶ Alex Hutchinson, Creative Director for Google's Stadia (Google's video game division), stated exactly what this Note seeks to combat; his statements refer to the issue of gameplay creators building their careers without any assurance they

form/amp/2020/10/20/21525587/twitch-dmca-takedown-notice-content [https://perma.cc/458M-JY6D]; Nathan Grayson, *Twitch DMCA Purge Deletes Thousands of Streamers' Videos*, KOTAKU (Oct. 20, 2020, 6:30 PM), <https://kotaku.com/twitch-deletes-thousands-of-streamers-videos-and-issues-1845429294> [https://perma.cc/L6LX-SPPM].

62. See Carpenter, *supra* note 61.

63. Kratky, *supra* note 51.

64. *Id.*; Dakota 'DarkHorse' Hills, *Capcom Releases New Video and Content Creation Guidelines Including Rules for YouTube, Twitch, Monetization and Mods*, EVENT HUBS (Jan. 6, 2021, 6:30 AM), <https://www.eventhubs.com/news/2021/jan/06/capcom-video-content-rules/> [https://perma.cc/3DP4-5YPB].

65. Baculi, *supra* note 49.

66. Kyle Bradshaw, *Gamers Condemn a Google Stadia Montreal Creative Director for Saying Streamers Should Be Paying Publishers*, 9TO5GOOGLE (Oct. 22, 2020, 1:50 PM), <https://9to5google.com/2020/10/22/gamers-condemn-stadia-creative-director-streamers-should-pay-publishers/amp/> [https://perma.cc/ED4W-KW3L].

can avoid copyright strikes for public performances of video games without licenses.⁶⁷ While the community pushed back against Hutchinson’s statements in favor of the status quo, the fact remains that there are individuals in powerful positions in the video game industry that hold these beliefs.⁶⁸

Finally, and perhaps the most concerning incident, involves Battlestate Games, a Russian-owned gaming company and copyright holder of the popular video game *Escape from Tarkov*.⁶⁹ In December 2018, Battlestate Games issued DMCA takedowns to YouTuber Eroktic.⁷⁰ In this instance, Battlestate Games did not directly cite copyright theft or unfair use of the gameplay but rather masked the DMCA takedown with justifications such as suppressing misinformation, and “negative hype” in Eroktic’s videos.⁷¹ Even more concerning, of the 47 DMCA claims made for individual videos, only two were meant for the misinformation while the remaining 40-plus takedowns were issued on the premise of the “tone of their content.”⁷² Battlestate representatives reportedly acknowledged that although they believed they operated within the bounds of the broadly-written law, they were aware the actions taken to address the perceived negative information could be seen as misuse of the DMCA process.⁷³ Other instances began cropping up of Battlestate Games using the DMCA process to remove content uploaded by other creators, such as YouTuber EL_Deer.⁷⁴ Both Eroktic and EL_Deer claimed loss of significant income from the DMCA claims, noting that even a month’s worth of lost videos had long-lasting effects on their careers, including the loss of 80–90% of YouTube views.⁷⁵ To summarize, Battlestate Games targeted YouTube gameplay creators for “misinformation” and used the DMCA takedown process to remove Eroktic and EL_Deer’s videos, thereby substantially harming their viewership and source of income. Battlestate Games did not even have to go as far as banning the gameplay creators—simply removing the videos from YouTube caused significant harm to budding careers.

The above-outlined incidents plaguing the video game industry attest to the power, and resulting fear, that video game copyright owners hold over the gameplay creators. They signify the weak positions

67. *Id.*

68. *Id.*

69. Charlie Hall, *Escape from Tarkov Team Barrages YouTuber with DMCA Takedowns over ‘Misinformation’*, POLYGON (Dec. 17, 2018, 4:08 PM) [hereinafter *Escape from Tarkov DMCA Claims*], <https://www.polygon.com/2018/12/17/18145139/escape-from-tarkov-dmca-youtube-eroktic> [<https://perma.cc/TTZ6-NKBO>].

70. *Id.*; *Second Escape from Tarkov DMCA Claims*, *supra* note 55.

71. *Escape from Tarkov DMCA Claims*, *supra* note 69.

72. *Id.*

73. *See id.* (explaining that, moving forward, Battlestate will employ traditional lawsuits rather than DMCA takedowns for alleged defamation by YouTubers).

74. *Second Escape from Tarkov DMCA Claims*, *supra* note 55.

75. *Id.*

of gameplay creators relative to copyright holders despite the growth of these creators as the collective face of the industry. So long as this power asymmetry exists, the copyright holders can reasonably conclude that they have the power—through copyright infringement actions—to handpick the gameplay creators that can publicly perform their works. While this is a positive aspect of copyright law in most regards, it is a negative one for a section of the video game industry that has shined by giving the limelight to “diamonds in the rough.” If video game copyright holders had more frequently used their significant power to silence the gameplay creators they disfavor, then the industry may never have gained some of its most prominent names.

B. *Recent and Proposed Changes in Laws*

While the video game industry faces some threats from within, it also faces external threats. Recent laws and proposed legislation further show how the collective video game industry is at a disadvantage without explicit legal protection; gameplay creators may soon face unfavorable laws that destroy their primary source of income.

During the COVID-19 pandemic, the December 2020 omnibus relief package brought with it notable changes to copyright law as riders—the Protecting Lawful Streaming Act and the CASE Act.⁷⁶ Despite the release of the 5,000-page bill’s language occurring only days before its passage, the intellectual property riders passed, invoking uncertain changes in copyright law.⁷⁷ The senator sponsoring each of these pieces of legislation, Thom Tillis, also provided a discussion draft for a new copyright law titled the Digital Copyright Act of 2021, which is meant to overhaul the DMCA.⁷⁸

76. Makena Kelly, *New ‘Felony Streaming’ Measure Is Aimed at Piracy Services, not Twitch Streamers*, VERGE (Dec. 22, 2020, 2:06 PM) [hereinafter *New ‘Felony Streaming’ Measure Aimed at Piracy Services*], <https://www.theverge.com/2020/12/22/22195658/felony-streaming-tillis-youtube-twitch-content-creator-copyright-dmca> [https://perma.cc/S2XN-96YB].

77. See Kratky, *supra* note 51; Seth A. Davidson, *Protecting Lawful Streaming Act Signed into Law*, MINTZ (Jan. 5, 2021), <https://www.mintz.com/insights-center/view-points/2231/2021-01-05-protecting-lawful-streaming-act-signed-law> [https://perma.cc/K5ET-CM62]; Emilio Nicolas, *Important Copyright Legislation Is Slipped into the New Stimulus Bill and Signed into Law*, JD SUPRA: JACKSON WALKER (Jan. 8, 2021), <https://www.jdsupra.com/legalnews/important-copyright-legislation-is-1980417/> [https://perma.cc/2RKT-EN2Q].

78. See Press Release, Thom Tillis, Senator, *Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium Copyright Act* (Dec. 22, 2020), <https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act> [https://perma.cc/SG9X-M9WY]; Kelly, *supra* note 76.

1. Protecting Lawful Streaming Act

Former President Donald Trump signed the Protecting Lawful Streaming Act of 2020 (“PLSA”) into law on December 27, 2020.⁷⁹ The legislation, introduced by Senator Tillis, created panic for many in the video game industry,⁸⁰ as its language only became available days before Congress voted on it.⁸¹ Instant critics gave it the nickname the “Felony Streaming Act,” as the legislation’s primary function changes the punishment for illegal streaming from a misdemeanor to a felony with violators “fac[ing] up to ten years in prison, as well as a fine.”⁸² Actors within the video game industry feared that gameplay creators would fall under the PLSA’s purview and potentially face felony convictions.⁸³ One instance after passage of the PLSA saw one popular video game streamer, xQc, receive a DMCA strike for a one-year-old, ten-second clip derived from his own stream.⁸⁴ After xQc regained his Twitter account, he tweeted about the absurd incident and exclaimed, “NEXT STOP? JAIL!” in apparent reference to the fear brought by the PLSA.⁸⁵

The final language of the Act reads as follows:

(b) PROHIBITED ACT.—It shall be unlawful for a person to willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service that—

(1) is primarily designed or provided for the purpose of publicly performing works protected under title 17 by means of a digital

79. Davidson, *supra* note 77.

80. See Emily Birnbaum, *Lawmakers Are Cramming Controversial Copyright Provisions into a Must-Pass Spending Bill*, PROTOCOL (Dec. 4, 2020), <https://www.protocol.com/amp/copyright-provisions-in-spending-bill-2649260098> [<https://perma.cc/F5HZ-XQ8Z>] (detailing a letter signed by various organizations, including tech groups, urging Congress to block the provisions); Nathan Grayson, *Proposed U.S. Law Could Slap Twitch Streamers with Felonies for Broadcasting Copyrighted Material*, KOTAKU (Dec. 10, 2020, 11:30 AM) [hereinafter *Proposed U.S. Law Could Slap Twitch Streamers with Felonies*], <https://www.kotaku.com.au/2020/12/proposed-u-s-law-could-slap-twitch-streamers-with-felonies-for-broadcasting-copyrighted-material/> [<https://perma.cc/752D-TADL>]; James Fudge, *U.S. Budget Stop-Gap Bill Contains Proposal to Make Streaming Copyrighted Material a Felony*, ESPORTS OBSERVER (Dec. 10, 2020), <https://esportsobserver.com/us-budget-streaming-felony/> [<https://perma.cc/4PH6-3C4J>].

81. See Wilde, *supra* note 51.

82. Nathan Grayson, *Covid Relief Bill Still Includes Felony Streaming Act, but Twitch Streamers Are Probably Safe*, KOTAKU (Dec. 21, 2020, 7:30 PM) [hereinafter *Covid Relief Bill Includes Felony Streaming Act*], <https://kotaku.com/covid-relief-bill-still-includes-felony-streaming-act-1845929782> [<https://perma.cc/Q6XF-X6GX>].

83. See Birnbaum, *supra* note 80; *Proposed U.S. Law Could Slap Twitch Streamers with Felonies*, *supra* note 80; Fudge, *supra* note 80.

84. Alexandra Ramos, *Popular Streamer xQc Banned from Twitter After Using a Clip from His Own Stream*, SCREENRANT (Jan. 1, 2021), <https://screenrant.com/xqc-banned-twitter-posting-own-clip/amp/> [<https://perma.cc/MGK2-D526>].

85. *Id.*

transmission without the authority of the copyright owner or the law;

(2) has no commercially significant purpose or use other than to publicly perform works protected under title 17 by means of a digital transmission without the authority of the copyright owner or the law; or

(3) is intentionally marketed by or at the direction of that person to promote its use in publicly performing works protected under title 17 by means of a digital transmission without the authority of the copyright owner or the law.⁸⁶

A textualist reading of the language does not appear to clearly exclude platforms like Twitch.tv and does little to dissuade the fears of individual gameplay creators. In response to the negative outcry, Senator Tillis provided clarification via Twitter that the bill is narrowly tailored to “target criminal organizations[,] and [Tillis] ensure[d] that no individual streamer has to worry about the fear of prosecution.”⁸⁷ With Senator Tillis’s statement, the general consensus among the video game community was that the video game streamers (and Twitch.tv) were *probably* safe from the bill.⁸⁸ However, despite Senator Tillis’s clarified intentions, his statement is not included in the text of the Act; the legislation invokes more ambiguity than Senator Tillis’s “narrowly tailored” claim.

This concern persists.⁸⁹ The wording “is vague enough to open some troubling doors for [video] game streaming.”⁹⁰ Taking it another step further, a lawyer could argue the legislation’s language includes a Twitch.tv streamer’s channel as a “digital transmission service.” The definition in the Act states “the term ‘digital transmission service’ means a service that has the primary purpose of publicly performing works by digital transmission.”⁹¹ Under this definition, a Twitch.tv streamer’s channel provides a service with the primary function of

86. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 211, 134 Stat. 1182, 2175–76 (2020) (to be codified at 18 U.S.C. § 2319C); Erin Laviola, *Fact Check: Does the Stimulus Bill Make Illegal Streaming a Felony?*, HEAVY, <https://heavy.com/news/stimulus-bill-makes-illegal-streaming-felony/> (Dec. 22, 2020, 4:15 PM) [<https://perma.cc/MV3S-VV4B>].

87. Laviola, *supra* note 86.

88. See Tyler Haughn, *Twitch Streamers Should Be Safe from Felony Streaming Bill*, SCREENRANT (Dec. 24, 2020), <https://screenrant.com/twitch-streamers-safe-felony-streaming-bill/> [<https://perma.cc/9FZQ-ZZ8F>]; *Covid Relief Bill Includes Felony Streaming Act*, *supra* note 82; Kelly, *supra* note 76.

89. See Wilde, *supra* note 51 (“Still, as it’s written, this could be a substantial blow to the programming featured on Amazon’s Twitch service, YouTube, and Facebook Gaming, as well as smaller broadcasting and video services. Much of the content on modern livestreaming platforms still involves live gameplay, much of which at any given time isn’t endorsed by the owners of these games so much as it’s gently tolerated.”).

90. *Id.*

91. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 211, 134 Stat. 1182, 2175–76 (2020) (to be codified at 18 U.S.C. § 2319C).

publicly performing video game gameplay through digital transmission. Such an interpretation rationalizes the initial fears of the video game content creation community in response to the Act.

The PLSA highlights additional problems around copyright legislation. The ability to introduce new and ambiguous legislation that criminalizes activity, stick it in a 5,000-plus page bill, pass it, and enact it in less than a month is a frightening reality for the video game industry. The speed at which the bill passed without public debate and the vagueness and ambiguity in the bill raise considerable concerns. Senator Tillis assures that the intentions behind the bill are noble but does not make those intentions clear in the actual language of the bill. While this legislation may not be the nail in the coffin for gameplay creators, the circumstances under which it passed indicate that industry fears are warranted.

2. CASE Act

The CASE Act is another piece of legislation sponsored by Senator Tillis that passed in the December 2020 omnibus spending bill.⁹² The CASE Act is arguably even more controversial than the PLSA, as it creates a quasi-judicial claims court within the U.S. Copyright Office.⁹³ The claims court will seat three Copyright Claims Officers and authorize them to award copyright holders “up to \$30,000 in damages if they find their creative work being shared online.”⁹⁴ The CASE Act is especially concerning following a report issued by the Copyright Office in 2020 arguing that not enough content on the Internet is removed and notes the lack of punishment for copyright infringers, suggesting loss of Internet access.⁹⁵ Critics of the new law fear the possibility that average Internet users could face a hefty fine for standard, modern behavior such as sharing memes.⁹⁶ User-advocacy groups, like the Electronic Frontier Foundation, used stronger language to express that the tribunal “would be exempt from the regula-

92. *Id.* § 212, 134 Stat. at 2176–201; Aaron Moss, *Felony Streaming and CASE Act Pass: What You Need to Know*, COPYRIGHTLATELY, <https://copyrightlately.com/felony-streaming-bill-and-case-act/> (Dec. 27, 2020) [<https://perma.cc/Y7N8-X2FK>].

93. Kelly, *supra* note 76; Moss, *supra* note 92; see Consolidated Appropriations Act, 2021, § 212, 134 Stat. at 2177–79.

94. Kelly, *supra* note 76; Consolidated Appropriations Act, 2021, § 212, 134 Stat. at 2177–79.

95. U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> [<https://perma.cc/3VYE-AMUQ>]; Katharine Trendacosta, *YouTube’s Copyright Filter Is Crushing Video Critique—and It’s Getting Worse*, GIZMODO (Dec. 22, 2020, 12:55 PM), <https://gizmodo.com/youtube-s-copyright-filter-is-crushing-video-critique-a-1845934339> [<https://perma.cc/8YPH-8Z4k>].

96. Makena Kelly, *Sweeping New Copyright Measures Poised to Pass in Spending Bill*, VERGE (Dec. 21, 2020, 3:54 PM) [hereinafter *Sweeping New Copyright Measures*], <https://www.theverge.com/2020/12/21/22193976/covid-relief-spending-congress-copyright-case-act-felony-streaming> [<https://perma.cc/3BJL-R5PC>].

tions and procedures of the judicial branch” and could award damages capable of “bankrupt[ing] individual artists and creators while letting corporations and sophisticated mass infringers off the hook entirely.”⁹⁷ In contrast, proponents argue the law helps individual, smaller copyright owners resolve disputes without expensive litigation.⁹⁸ Either way, the CASE Act persists the ongoing ambiguity issue within old and new copyright law.

While the CASE Act received more warning and debate than the PLSA, it still highlights that even in the face of reasonable and widespread opposition, unfavorable copyright law can still pass with relative ease. The circumstances under which these two laws passed cause concern for the future of copyright law especially as it pertains to gameplay creation. Without new law specifically protecting the gameplay creation industry, fears will persist that a bill could ride along in an omnibus bill and dramatically change or quell the industry altogether.

3. Digital Copyright Act of 2021

Under section 512 of the Copyright Act, Online Service Providers (“OSP”s) that desire safe harbor from liability for hosting infringing material must maintain a notice-and-takedown process that allows for the expeditious removal of infringing content following notice.⁹⁹ Under this current system, a rightsholder notifies an OSP of infringing material and the OSP removes the material;¹⁰⁰ however, the infringing material often returns.¹⁰¹ Accordingly, Senator Tillis previously opined that the notice-and-takedown system is ineffective at curbing piracy.¹⁰² In the draft copy of the Digital Copyright Act of 2021, Senator Tillis proposed a replacement for the current notice-and-takedown system to a notice-and-staydown system in which OSPs will have stronger requirements to keep infringing material off their sites after the first notice and removal.¹⁰³ While blatant Internet piracy is a real

97. Moss, *supra* note 92.

98. *Id.*

99. See U.S. COPYRIGHT OFF., *supra* note 95, at 25.

100. *Id.*

101. See *Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?*, COMM. ON THE JUDICIARY: SUBCOMM. ON INTELL. PROP. (June 2, 2020, 2:30 PM) [hereinafter *DMCA Notice-and-Takedown Hearing*], <https://www.judiciary.senate.gov/meetings/is-the-dmca-notice-and-takedown-system-working-in-the-21st-century> [<https://perma.cc/58KG-5EXS>] (statement of Senator Thom Tillis, Chairman, Subcommittee on Intellectual Property).

102. See *id.*

103. Thom Tillis, 166TH CONG., DIGITAL COPYRIGHT ACT OF 2021 § 2(A) (Discussion Draft 2020) [hereinafter Draft of Digital Copyright Act of 2021], <https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B> [<https://perma.cc/37VT-Q47E>]; Press Release, Tillis, *supra* note 78.

concern,¹⁰⁴ Senator Tillis’s proposal may inadvertently impact gameplay creators.

The proposed language in the Digital Copyright Act of 2021 states, in pertinent part, that upon receipt of proper notification of infringing materials or activity, an OSP must act expeditiously to remove the infringing material and do the following:

(ii) take[] certain steps to ensure that . . . the allegedly infringing materials stays down when:

(aa) a complete or near complete copy of a copyrighted work already identified in a notification of claimed infringement . . . or

(bb) any portion of a copyrighted work already identified in a notification of claimed infringement . . . if the service provider derives its commercial value predominantly from short-form media.¹⁰⁵

OSPs’ efforts to comply with the proposed language above may impact gameplay content creators. For example, the requirement that OSPs ensure the “allegedly infringing materials stays” off the OSP’s site will likely result in stricter copyright bots as OSPs comply with the amended law.¹⁰⁶ Copyright bots include YouTube’s “Content ID,” which strives to seek out content with copyright-infringing material.¹⁰⁷ A stronger copyright bot may automatically remove gameplay videos to ensure YouTube maintains its safe harbor against liability.

Additionally, the draft language also provides that OSPs should follow reasonable

best practices [which] may include standards such as requiring a user that uploads or publicly performs or displays content on or across the service to affirm that the user holds the copyright to that content, has permission to upload or publicly perform that content, or is otherwise authorized by law.¹⁰⁸

A textualist reading of the language yields additional red flags for gameplay creators. Specifically, gameplay creators may not be able to legally click that “upload” button because they are not the copyright holders of the video game and because the end user license agreement may not allow for commercial use of the game. Senator Tillis has espoused familiar statements that the bill is meant to target larger enterprises and not small platforms or creators.¹⁰⁹ But without such intentions made explicit in the bill’s language, the potential for an adverse impact on gameplay creators remains a real fear. In the event the Digital Copyright Act of 2021 passes with the notice-and-

104. See *DMCA Notice-and-Takedown Hearing*, *supra* note 101.

105. Draft of Digital Copyright Act of 2021, *supra* note 103.

106. Kelly, *supra* note 76.

107. *Id.*; see *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/3EPH-2LE7>].

108. Draft of Digital Copyright Act of 2021, *supra* note 103, at § 2(a)(2)(E).

109. Kelly, *supra* note 76.

staydown language, the more important it is that gameplay creators receive statutory assurances their gameplay and livelihoods are protected.

IV. HOW EXISTING PROPOSALS INFORM POTENTIAL CHANGES

Currently, there is no existing case law or legislation addressing how to specifically treat copyright protection for a gameplay creator's videos. While some scholars argue minimal protection already exists,¹¹⁰ ambiguity remains, and there is no assurance for the industry as a whole, much less for the individual gameplay creators. As such, many scholars have proposed an array of ideas for how to properly address this underlying issue within the industry. While some propose merely maintaining the status quo, others propose (a) either trusting or not trusting the fair use doctrine, (b) utilizing a licensing scheme, (c) relying on the existing law of sports broadcasting rights, or (d) reframing copyright law in terms of prohibited conduct rather than protected rights. While there are positive aspects of each proposal, they all fall short of an appropriate solution. In the face of a distinct problem, the video game industry is deserving of a tailored solution.

A. *Fair Use*

Section 107 of the Copyright Act presents one way in which use of copyrighted material may be exempt from a finding of infringement.¹¹¹ The Copyright Act lists four factors that a court may use to balance and determine whether use of copyrighted work amounts to infringement or constitutes fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use on the potential market for or value of the copyrighted work.¹¹²

The fair use defense presents the primary copyright mechanism by which gameplay creators may seek protection against copyright holders. However, the inconsistent, unpredictable, and costly application of fair use provides little real protection. Instead, fair use is more often misunderstood by gamers within the industry and provides a false sense of copyright protection.

110. See Scott M. Kelly & Kirk A. Sigmon, *The Key to Key Presses: Esports Game Input Streaming and Copyright Protection*, 1 INTERACTIVE ENT. L. REV. 2, 16 (2018).

111. 17 U.S.C. § 107.

112. *Id.*

The inconsistent application and subjectivity of fair use already presents itself in articles discussing fair use in the video game context. Some proposals argue that a standard fair use defense argument provides sufficient protection.¹¹³ Others argue that fair use may cover *some* types of content creation, such as “speedruns” where the creator posts a video offering tips and tricks and demonstrating a high level of skill required to speed through the game at a faster pace than intended by the game developers; but fair use would not cover “Let’s Play” videos where the creator posts a video of regular gameplay without adequate commentary to deem the use transformative of the regular gameplay.¹¹⁴

Accordingly, fair use protection falls short of adequacy with its unpredictable nature and its inherent expense due to the standard requirement that fair use only arises as a defense after commencement of litigation. It leaves gameplay creators subject to lawsuits for copyright infringement and merely allows them to allege that their infringement was justified, requiring the gameplay creators to prove the defense through costly litigation. Within the distinct industry of video game streaming, where the player largely creates the content based on the player’s individual strategy, skill, commentary, and video editing, modern video games should be viewed as a platform that serves a base function allowing gameplay creators to actually produce a creative product. As such, a fair use defense lacks adequate protection for a gameplay creator’s video.¹¹⁵

This Note looks past the debate on whether Let’s Play videos are sufficiently transformative to avoid copyright infringement liability. Rather, this Note argues that *even if* these videos never meet the threshold for fair use, these gameplay creators deserve copyright protection for their creative works. Most gameplay creators are not the monthly millionaires but rather small-time entrepreneur-minded individuals with dreams of becoming millionaires by playing video games. But these circumstances show that arguing fair use before a court is not an option for the vast majority of gameplay creators because they cannot afford the case-by-case, fact-intensive, and notoriously expensive litigation involved with a fair use defense.

113. See generally Dan Hagen, *Fair Use, Fair Play: Video Game Performances and “Let’s Plays” as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245, 273 (2018) (advocating that courts should strongly presume “Let’s Plays” favor a fair use finding).

114. See Chen, *supra* note 23, at 703 (explaining that speedrun videos are more transformative of the original work and appropriate less copyrighted material than “Let’s Plays”).

115. See *id.* at 693 (describing a case in which a court found that “too much” of an original work was used in a book commentary despite the defendant’s claim that the amount taken was necessary to provide commentary).

B. *Licensing*

Licensing has grown as a popular proposal for addressing this issue. Under the status quo, the owners of video game copyrights can choose to include a license in the end user license agreement for gameplay creators to use the video game for commercial use.¹¹⁶ However, this is strictly based on whether a copyright owner chooses to do so and gameplay creators would be subject to the restrictions included in the license.¹¹⁷ With the large number of gameplay creators and the explosion of the industry, the reliance on a voluntary license is insufficient. That leaves the responsibility to all gameplay creators to keep up with every end user license agreement across all games that they create gameplay for and ensure they do not go beyond the scope of the respective license for a particular game—an unrealistic expectation.

Another option arises in the form of compulsory licenses, such as those used in the broadcasting industry.¹¹⁸ A compulsory license would take away the decision from copyright owners while still allowing them to profit from a gameplay creator's use of the game through a set royalty fee.¹¹⁹ Essentially, when a copyright owner permits the reproduction or distribution of their work, it would activate the compulsory licensing provision in the Copyright Act.¹²⁰ Some legal scholars have discussed the consequences of amending the Act to include video gameplay into its compulsory licensing provision, requiring copyright owners to grant a license to end users who request one and pay the royalty fee.¹²¹ With Twitch.tv and YouTube, this would be fairly simple, as video game copyright owners already turn a blind eye to the reproduction and distribution of their work.¹²² However, difficulties arise with enforcing a compulsory licensing scheme. For example, collection of royalties raises a significant hurdle especially when there may be difficulty in tracking the rate at which viewers watch the videos that include the video game or difficulty in negotiating royalty fees.¹²³

Notably, royalties are likely part of the solution to some degree—as this Note outlines in its proposal; however, royalties alone through a compulsory licensing scheme still fall short of the necessary goal. Even if the collection of royalties is possible, as the music industry has demonstrated, there are other significant concerns with compulsory licensing. For example, requiring gameplay creators to pay royalties

116. See Elizabeth Brusa, *Professional Video Gaming: Piracy that Pays*, 49 J. MARSHALL L. REV. 217, 263 (2015).

117. See *id.*

118. *Id.* at 264.

119. See *id.* at 265.

120. See *id.* at 264–65.

121. See *id.*

122. See *supra* Part I; Ball, *supra* note 21, at 259.

123. Brusa, *supra* note 116, at 266.

adds yet another fee they must pay to engage in the industry when they already split advertising profits with Twitch.tv and YouTube. Any solution involving royalties will likely fall on the onus of these major platforms. Finally, licensing still leaves gameplay creators without any affirmative rights over their own creative works, running counter to the goals of copyright. Gameplay creators produce creative works daily and risk loss of their creations without proper protection.

C. Sports Broadcast Rights

One creative proposal suggests copyrighting video game streams as sports broadcasts if they are sufficiently creative.¹²⁴ The proposal recognizes that courts have yet to update how they address video game copyright since the original video game decisions in the 1980s.¹²⁵ Specifically, it argues that one twenty-first-century solution to video game streaming is to treat the streams as sports broadcasts.¹²⁶ Sports broadcasting copyrights are heavily derived from *Baltimore Orioles, Inc. v. Major League Baseball Players Association*.¹²⁷ The idea behind this proposal is to make gameplay creators “the independent authors of their original online videos, affording them full copyright protection.”¹²⁸ The way this would work is that, in the same way broadcasts are copyrightable based on camera work, streams would be copyrightable based on streamers acting as their own cameramen.¹²⁹

This proposal is the biggest step in the right direction because it recognizes some similarities between sports broadcast protection and video game streams.¹³⁰ However, where the proposal of copyrighting creative streams as sports broadcasts falls short is that it fails to account for games that may not be played explicitly like sports.¹³¹ While some streamed video games are competitive like football and baseball (e.g., Madden, Apex Legends, Rocket League), others that are streamed do not fall under such a definition (e.g., Sea of Thieves, Elder Scrolls Online, No Man’s Sky).¹³² Moreover, this solution does

124. Ball, *supra* note 21, at 255.

125. *Id.*

126. *Id.*

127. *Id.* at 261 (discussing *Baltimore Orioles*, which recognized that broadcasts of player performances were sufficiently creative performances fixed in a tangible medium and therefore obtained copyright protection); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986).

128. Ball, *supra* note 21, at 255.

129. *Id.* at 255, 276.

130. *Id.* at 270–77.

131. *See id.* at 264, 276 (noting that whether a video game gameplay is similar to a traditional sport broadcast depends upon the competitiveness of the video game).

132. The games such as Sea of Thieves, Elder Scrolls Online, and No Man’s Sky are not centered around competition but are more akin to adventure-style games where players explore the video game’s respective world and make individual decisions about tasks to complete, personal style of play, stories to pursue, characters to build, etc.

not help the industry as a whole but rather only those who figure out what “highly creative” means, as the proposal’s title suggests. That is yet another ambiguous gray area that can leave many successful gameplay creators left out to dry because they failed to meet some undefined threshold of “high” creativity despite their gameplay meeting the “low” threshold of creativity as required under copyright law.¹³³ As such, it is important to recognize that something more is needed to cover the nascent industry. Finally, the proposal additionally fails to account for the distinction that traditional sports (like baseball, basketball, football, and soccer) are not performances of underlying copyrighted material. The sports broadcasts are not broadcasting something that already maintains copyright protection. Whereas video game gameplay videos stream/broadcast copyrighted material. The distinction is important as it forms the basis of the underlying issue of this Note.

D. *Reversing the Order of Copyright Protection*

Perhaps the most radical proposed solution is the call for a complete reversal of the Copyright Act.¹³⁴ One legal scholar’s approach to addressing the copyright concerns for gameplay creators is to shift from the current status of copyright law where there are “comprehensive and broad copyright protections first and then listing defenses” to a regime where the Copyright Act would list specific prohibited conduct that would constitute infringement.¹³⁵

This proposal appears to be an overcorrection. It would shift the copyright regime across all industries—not merely for the video game gameplay creation industry—where the starting point of any copyright analysis is “that everyone is free to use works created by others.”¹³⁶ Additionally, the proposal provides its own insight to other likely shortcomings of the approach such as requiring statutory revision any time there is a particular use that should be prohibited but is not explicitly outlined in the statute.¹³⁷ The proposal also puts the onus on the creators of original works to prove why use of their work should constitute illegal infringement, which may result in a massive chilling effect on the desire to create in the first place if non-infringement is the starting point across all copyright analyses.¹³⁸

However, the heart of this proposal—ensuring tolerated infringement does not start from a position of illegal infringement but rather

133. See *supra* text accompanying notes 25–38.

134. See generally Shigenori Matsui, *Does It Have to Be a Copyright Infringement?: Live Game Streaming and Copyright*, 24 TEX. INTELL. PROP. L.J. 215 (2016) (arguing for copyright reform).

135. *Id.* at 241–42.

136. *Id.* at 241.

137. *Id.* at 241–42.

138. *Id.* at 241–43.

from a position of non-infringement—is worth attention. While this solution may be unrealistic under the guise of a complete overhaul of the copyright regime, it is possible the proposal informs on an appropriate tailored solution for the video game gameplay creation industry.

V. A DIFFERENT APPROACH

In light of the shortcomings from past proposals, a different approach may be necessary to appropriately account for the present issue facing the video game industry. To appropriately ensure that gameplay creators will have protection against the copyright holders of video games while also obtaining copyright protection in their own works, a feasible solution requires two prongs: (1) a form of protection for the gameplay creator’s gameplay despite the inclusion of pre-existing materials (e.g., the copyrighted game sequences created by game developers); and (2) a form of protection against potential infringers of the gameplay creator’s work. The proposal forwarded by this Note to address these two prongs is (1) a declaration of non-infringement derived from section 1008 of the Copyright Act and (2) a *sui generis* right derived largely from the European Union’s Database Directive.

A. Declaration of Non-Infringement

The Audio Home Recording Act of 1992 (“AHRA”) became law as a response to contention between the music industry and the electronics industry.¹³⁹ While the music industry sought to protect its copyrights, the electronics industry wished to propel the new advances in recording technology out to the public.¹⁴⁰ However, in an effort to avoid significant lawsuits by the music industry, the electronics industry prevented the distribution of new technology, like digital recorders, based on fears that the technology would be used for unfavorable purposes such as music piracy.¹⁴¹ But this meant that the technology was therefore not available to the general public.¹⁴²

The AHRA is an example of the legislature responding to an issue involving large industries with a tailored solution. The legislature wanted to ensure consumers could utilize the new technology without fear of facing copyright actions for personal use of the technology.¹⁴³ This concern gave birth to a particularly interesting aspect of the AHRA in section 1008—the declaration of non-infringement—which states that an action for copyright infringement cannot be brought

139. Erin Brady, *XM Satellite Radio Devices: Is It Fair Use or Copyright Infringement?*, 17 DEPAUL J. ART & ENT. L. 129, 144 (2006).

140. *Id.* at 145.

141. *Id.*

142. *Id.*

143. *Id.*

“based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium . . . or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.”¹⁴⁴ In other words, home taping of music would not constitute copyright infringement—an exception centered around the noncommercial, personal use of digital recording devices.¹⁴⁵ The AHRA, as a compromise for creating the declaration of non-infringement, requires electronics manufacturers and importers to pay a royalty for each digital audio recorder or similar medium sold in the United States; the royalty effectively compensates copyright holders for sales lost as a result of home copying.¹⁴⁶

The first prong of this Note’s proposal is to adopt a declaration of non-infringement not unlike the AHRA but altered in that this new declaration of non-infringement applies to a commercial use. Deriving from the language of the AHRA, a declaration of non-infringement could feasibly read as follows:

When a video game player lawfully acquires or accesses a nonlinear video game, creates gameplay by playing the video game, and streams or uploads the gameplay to the Internet, no action may be brought alleging infringement of copyright based on the use of the video game’s audiovisual sequences.

Given the use of “nonlinear,” the statute would need to define “linear” versus “nonlinear” video games in a definition section. Linear games focus more on the story, give a higher degree of a limitation on what the player can do, and are more commonly single-player games.¹⁴⁷ Linear games are more likely to suffer economic loss from players uploading gameplay because viewers would receive spoilers and may not purchase or play the game as a result. Linear games include games like the Final Fantasy series, Prince of Persia, and the campaign modes in the Halo series. In contrast, nonlinear games rely on a higher degree of player decision-making, may consist of an MMO mechanism, and may have a story but allow for the player to approach the story in a nonlinear fashion. Nonlinear games are more likely to benefit from increased publicity and result in more players.¹⁴⁸ Nonlinear games include games like Rocket League, Sea of Thieves, and Apex Legends.

144. 17 U.S.C. § 1008.

145. Brady, *supra* note 139, at 145.

146. *See id.* at 145–46. The AHRA also prevents creating copies of copies by requiring the incorporation of the serial copy management system (“SCMS”) within digital audio recorders to prevent users from recording copied material. *Id.* However, the SCMS is not a significant aspect of this Note’s proposal.

147. *See supra* notes 20–21, 35–36 and accompanying text.

148. *See Matsui, supra* note 134, at 241.

The proposed language allows for the gameplay creator’s inclusion of copyrighted game sequences in nonlinear games to be non-infringing. Such an approach provides legal protection for gameplay creators against infringement actions brought by the copyright holders of the video games—protecting the gameplay creator from uncertain backlash while they build a career.

Additionally, the video game copyright holders’ interests must be accounted for as well. This proposal is not meant to completely strip their rights. Therefore, the collection of royalties must be part of the solution. The issue is determining what this looks like and how to collect royalties. Should every gameplay creator pay a fee to upload a video? As discussed in Part IV, this could be tricky. Such an approach would likely have a chilling effect on the industry and result in fewer gameplay creators. Alternatively, should Twitch.tv and YouTube eat the cost as major platforms for the content, and should the law require these platforms to pay a defined amount to serve as compensation? Just as with the AHRA, there needs to be a balance that provides something to both sides. The latter approach may be the fairest for all parties involved, but the most appropriate solution should be left to the legislature.

Finally, the AHRA is far from an “apples to apples” approach. This merely serves as an analogy of changing uses of technology requiring tailored solutions to significant issues plaguing major industries. The language does not remove the copyright from the video game’s copyright holders any more than the AHRA removes the copyright of players in the music industry. Section 103 of the Copyright Act expressly states that copyright in a derivative work does not extend to preexisting material.¹⁴⁹ Video game copyright holders will still benefit economically from their copyright through the sale of the games, the sale of content within the games, and other existing revenue streams, as well as protect their copyright against competing video game developers. This proposal merely balances the interests in the nascent industry and provides an advisable level of protection in the face of unpredictable changes in copyright law.

B. *Sui Generis Right*

The traditional position in U.S. copyright law is to not recognize “sweat of the brow” in determining copyrightability, which means an author’s effort put into creating something is not a factor in determining whether that something is copyrightable. However, Congress has twice responded with *sui generis* amendments for certain industries that carve out protections distinguishable from traditional copyright law: the Semiconductor Chip Protection Act (“SCPA”) of 1984 and

149. 17 U.S.C. § 103(a).

the Vessel Hull Design Protection Act (“VHDPA”).¹⁵⁰ Congress passed the SCPA in response to “chip piracy,” where chip pirates copied chip designs while avoiding the high cost of research and development in designing the chips.¹⁵¹ Although the chips had little copyrightability under the then-existing laws, Congress understood the need to protect the massive industry and reward the effort and investment put into designing the chips.¹⁵² Similarly, Congress passed the VHDPA as a form of protection for creative designs in “useful article[s].”¹⁵³ “Useful articles” are items that hold intrinsically utilitarian value, such as a lamp¹⁵⁴ or cheerleading outfit, and typically have little originality or creativity.¹⁵⁵ The VHDPA sought to protect the design of certain useful articles when the design was original and distinctive in appearance; however, the Act is narrowly focused to “a vessel hull or deck, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”¹⁵⁶

While these *sui generis* amendments are not direct applications to video game content creation, they inform on a potential remedy that can ensure protection for gameplay creators by recognizing the effort put into the creative videos and providing copyright protection to the narrow subset within the video game industry. Legal scholars have argued *sui generis* protections are under-utilized, and “expand[ing] *sui generis* design protection legislation to other industries” provides a potential model for copyright protection where little or none presently exists.¹⁵⁷ One previous proposal for expanding *sui generis* rights to another industry involved providing copyright protection to NCAA athletes as a form of compensation for the oft-unrewarded effort and investment of college athletes who have become prone to financial

150. Nathan G. Harrill, Comment, *Going for Broke: Sui Generis Copyright Protection for the NCAA Student-Athlete*, 13 WAKE FOREST J. BUS. & INTELL. PROP. L. 392, 410 (2013).

151. See Leon Radomsky, *Sixteen Years After the Passage of the U.S. Semiconductor Chip Protection Act: Is International Protection Working?*, 15 BERKELEY TECH. L.J. 1049, 1051–52 (2000).

152. See *id.* at 1051–53; Harrill, *supra* note 150, at 411.

153. Harrill, *supra* note 150, at 411–12.

154. See generally *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (holding that lamp bases may be copyrighted when the design has creative value that can be separated from the utilitarian value of the article).

155. See generally *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017) (holding that cheerleading uniforms may be copyrighted when the design has creative value that can be separated from the utilitarian value of the article).

156. 17 U.S.C. § 1301(b)(2); Harrill, *supra* note 150, at 411–12.

157. Harrill, *supra* note 150, at 412 (quoting Regan E. Keebaugh, *Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress?*, 13 J. INTELL. PROP. L. 255, 275 (2005)).

exploitation.¹⁵⁸ Such a form of copyright protection would have given NCAA athletes a position under copyright law to be rewarded for their efforts and benefit where they previously could not (prior to the 2021 name, image, and likeness rule changes for NCAA athletes).

A prime example of the active use of *sui generis* rights to provide copyright protection in recognition of effort and investment is through the European Union’s Database Directive 1996 (“DbD”), which protects effort put into the creation of databases under particular circumstances.¹⁵⁹ The DbD responded to the lack of protection for databases despite their creators’ substantial investments.¹⁶⁰ Specifically, Article 1 of the DbD provides that a database is “a collection of independent works [of authorship], data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.”¹⁶¹ Article 7 outlines the *sui generis* database right as “a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents.”¹⁶² Such language seeks to harmonize the differing copyright laws of European Union members where original databases may have previously lacked copyright protection.¹⁶³

The DbD language provides a potential framework for how video game content creation may adopt a similar *sui generis* approach, which leads into the second prong of this Note’s proposal: the adoption of a *sui generis* right for video game gameplay creators derived from the European Union’s DbD. While U.S. copyright law does not traditionally reward effort or investment put into a project, a *sui generis* right provides more certainty for protecting original video game gameplay.

A *sui generis* right provides a pathway to copyright protection for this key part of the nascent but booming video game industry. Such an affirmative right would ensure protection for the gameplay creators against subsequent replication of their own gameplay. A gameplay creator’s overall work may very well achieve sufficient protection without the use of a *sui generis* right, but such a right creates consistency and reduces uncertainty with regard to copyright protection.

158. *Id.* at 414 (noting that justification for *sui generis* protection requires demonstration of “lack of [federal] protection . . . coupled with the emergence of unique social and technological conditions”; discussing the unique social position of NCAA athletes as having their efforts financially exploited; and recognizing the use of *sui generis* copyright protection to provide compensation to student athletes when, for example, their likeness is used in NCAA Football video game series developed by EA Sports).

159. F. Willem Grosheide et al., *Intellectual Property Protection for Video Games: A View from the European Union*, 9 J. INT’L COM. L. & TECH. 1, 5 (2014).

160. *Id.*

161. Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20, 24.

162. *Id.* at 25.

163. Grosheide et al., *supra* note 159, at 5.

Deriving language from the DbD, language for the gameplay-creator *sui generis* right would need to (1) define “video game gameplay creation,” (2) provide what aspects of the gameplay would be eligible for protection, and (3) provide an illustrative but non-exhaustive list of factors to help identify whether a gameplay creator’s video qualifies for copyright protection under the *sui generis* right.

In line with these elements, first, “video game gameplay creation” is defined as follows: a video game player’s personal decisions and combination of inputs into a video game where the audiovisual sequences result in that player’s own original gameplay. Second, the gameplay creator cannot gain copyright protection on the video game’s elements themselves, such as “objects, background scenes, and nonplayer characters” that are the creative works of the video game developer and not aspects of the personal gameplay created by the gameplay creator.¹⁶⁴ Copyright protection over these videos can only extend narrowly¹⁶⁵ to the original elements that the gameplay creator implements (e.g., their own gameplay resulting from the combination of strategy, decisions, input, and other similar acts of creativity and originality).¹⁶⁶ Third, the *sui generis* right provides protection for the gameplay creator who, on balance, sufficiently satisfies a combination of the following factors: (1) time investment into the gameplay to produce the content of the video; (2) degree of variability in inputs to create the resulting gameplay; (3) the quality and quantity of player decisions that create variety in gameplay; (4) use of varied in-game strategies or collection thereof; (5) time investment into video editing; (6) music selection; and (7) efforts expensed in creating additional effects or aspects of the video not original to video game, namely animations, sounds, face cam, or backgrounds. These factors provide insight into the additional effort taken to create the gameplay beyond solely the input and strategy of the player in creating the gameplay. The *sui generis* right rewards the effort by providing more certainty for gaining copyright protection for the respective creator’s own gameplay. In general, gameplay creators will likely gain narrow copyright protection over their videos, and for a shorter period than traditional copyright protection (such a shorter duration may be 15 years), but such protection still prevents unauthorized use of their videos.

This proposal understands that hard work does not itself make something original and creative but seeks to recognize that video

164. See Dan L. Burk, *Copyright and Paratext in Computer Gaming*, in *EMERGING ETHICAL ISSUES OF LIFE IN VIRTUAL WORLDS* 33, 41 (Charles Wankel & Shaun Mallick eds., 2010).

165. See Harrill, *supra* note 150, at 413–14.

166. One notable and incredibly creative effort involved a Twitch.tv streamer avoiding DMCA takedowns by making her own Skyrim sound effects. Jonathan Ammerman, *Twitch Streamer Goes Viral for Making All Skyrim Sounds Herself, Mocking DMCA Rules*, *GAME RANT* (Nov. 16, 2020), <https://gamerant.com/twitch-streamer-skyrim-sound-effects-dmca-takedown/> [https://perma.cc/3P8L-N4GC].

game content creation is consistently original and meets the base threshold of creativity, deserving protection due to the significance of the individual thought, effort, and investment put into creating the gameplay videos. The proposal also recognizes the significance and size of the video game industry and the need for protection in the near term.

VI. CONCLUSION

The video game industry's rapid growth requires a closer look at protections available to players involved. With respect to the gameplay creators that serve as the faces of the industry, they need copyright protection over their gameplay not just as a form of copyright protection but as assurance over their future careers and livelihoods. While there are several proposals on how to properly provide copyright protection for video game gameplay creators, significant uncertainty and inconsistency lies with each proposal. Whereas a new standard that provides (1) a declaration of non-infringement and (2) a *sui generis* right would decrease the degree of inconsistency in application. Therefore, as the nascent industry continues its rapid growth, copyright protection for gameplay creators grants more consistent assurance to the players that they do not need to fear a video game copyright holder's wrath and can feel confident that they can protect their own content from potential infringers.

