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**WHERE'S THE FAIR USE?  
THE TAKEDOWN OF LET'S PLAY AND REACTION VIDEOS  
ON YOUTUBE AND THE NEED FOR COMPREHENSIVE  
DMCA REFORM**

*Jessica Vogele\**

**I. INTRODUCTION**

With the rise in popularity of Let's Play ("LP") videos and reaction videos over the past decade, takedown demands and claims for copyright infringement have become widespread on YouTube. LP videos often feature a play-through or demonstration of the mechanics of a video game accompanied by a gamer's commentary,<sup>1</sup> while reaction videos record an individual's response to some stimulus, such as a television episode or film clip.<sup>2</sup> Both types of videos typically use copyrighted content from other individuals and companies without licenses, which turns them into targets for large companies, such as Nintendo, that vigorously police their copyrights.<sup>3</sup> In accordance with the Digital Millennium Copyright Act ("DMCA"), which was enacted in 1998 to protect copyrighted material on the internet,<sup>4</sup>

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<sup>1</sup> Evan Asano, *What is a Let's Play on YouTube?*, MEDIKIX (Feb. 3, 2016), <http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/#gs.VWPIjhQ>.

<sup>2</sup> Sam Anderson, *Watching People Watching People Watching*, N.Y. TIMES (Nov. 25, 2011), [http://www.nytimes.com/2011/11/27/magazine/reaction-videos.html?\\_r=0](http://www.nytimes.com/2011/11/27/magazine/reaction-videos.html?_r=0).

<sup>3</sup> Keza MacDonald, *Nintendo Enforces Copyright on YouTube Let's Plays*, IGN (May 16, 2013), <http://www.ign.com/articles/2013/05/16/nintendo-enforces-copyright-on-youtube-lets-plays>.

<sup>4</sup> The DMCA's most notable provision provides for a takedown notice system, allowing

and YouTube's Content ID, which is an "automated copyright flagging system,"<sup>5</sup> thousands of these types of videos have been demonetized or removed from YouTube over the years for alleged copyright infringement,<sup>6</sup> despite the claim of many content creators and fans that such use should be deemed fair use. The use of copyrighted material may be deemed fair use if its purpose is "criticism, comment, news reporting, teaching. . . scholarship or research," and it meets certain factors.<sup>7</sup> Copyright holders argue that many LPs and reaction videos do not constitute fair use because they feature long clips of copyrighted material without much substantive addition.<sup>8</sup> Yet, because fair use is determined on a case-by-case basis<sup>9</sup> and there is not much case law regarding these types of videos, YouTubers are often left in the dark as to what they can or cannot upload.

Sections II and III will discuss the history and current state of LP videos and reaction videos respectively. Section IV will lay out the relevant sections of the U.S. Copyright Act of 1976, including the fair use defense, as they relate to video games and reaction videos. It will also provide an overview of the DMCA and YouTube's Content ID. Section V will conduct a comparative fair use analysis of an LP of the video game *That Dragon Cancer* and a reaction video of a YouTube video called *Bold Guy vs Parkour Girl*. Specifically, this section will determine that the LP is likely infringing while the reaction video is likely fair use. Section VI will present several recommendations as to how to protect copyright owners and content creators alike in the digital age. Overall, this Note will argue that typical LP videos and reaction videos are often infringing because they take

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copyright owners to send requests to internet service providers to remove infringing material on their websites. *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, COPYRIGHT.GOV (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf>.

<sup>5</sup> YouTube's Content ID is an automatic system that monitors the use of copyrighted works on YouTube to ensure there is no infringement. Stephen McArthur, *How to Beat a YouTube ContentID Copyright Claim – What Every Gamer and MCN Should Know*, GAMESUTRA (June 24, 2014), [http://www.gamasutra.com/blogs/StephenMcArthur/20140624/219589/How\\_to\\_Beat\\_a\\_YouTube\\_ContentID\\_Copyright\\_Claim\\_What\\_every\\_Gamer\\_and\\_MCN\\_Should\\_Know.php](http://www.gamasutra.com/blogs/StephenMcArthur/20140624/219589/How_to_Beat_a_YouTube_ContentID_Copyright_Claim_What_every_Gamer_and_MCN_Should_Know.php).

<sup>6</sup> Jonathan Bailey, *Breaking Down YouTube's New DMCA Policy*, PLAGIARISM TODAY (Nov. 20, 2015), <https://www.plagiarismtoday.com/2015/11/20/breaking-down-youtubes-dmca-move/>.

<sup>7</sup> 17 U.S.C. § 107 (2012).

<sup>8</sup> See Jonathan Bailey, *YouTube's Reaction Video Controversy*, PLAGIARISM TODAY (Feb. 9, 2016), <https://www.plagiarismtoday.com/2016/02/09/youtubes-reaction-video-controversy/>.

<sup>9</sup> *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1103 (C.D. Cal. 2015).

too much of the original copyrighted work and are not transformative enough to constitute something “new” above and beyond the original copyrighted work.<sup>10</sup> With three hundred hours of video uploaded every minute and almost five billion video views every day,<sup>11</sup> YouTube is littered with these infringing videos. As such, it is becoming increasingly necessary for Congress to pass legislation that better protects copyright owners while also providing better examples of the fair use defense for content creators.

## II. LET'S PLAY VIDEOS

LPs usually fall into one of the following two formats: (1) The gamer is featured on one side or in the corner of the screen while the video game plays in the remaining screen space; or (2) The video game occupies the entire screen and is accompanied by audio commentary.<sup>12</sup> Within the past few years, LPs have exploded in popularity as YouTube channels began featuring LPs of video games of all types and from all consoles.<sup>13</sup> Although many viewers will watch an LP to learn how to play a game or to obtain assistance with finding all the items and unlocking every level in a game, many LP YouTube channels became popular based on the gamer's entertaining commentary, jokes, and reactions, often transforming the original copyrighted video game into a new work entirely.<sup>14</sup> In this regard, a gamer's commentary can turn an otherwise lackluster game into a video that is fun to watch<sup>15</sup> and may actually draw people, who were not originally interested, to play it for themselves. For example, the most popular LP YouTube channel, PewDiePie, has over fifty million sub-

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<sup>10</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>11</sup> Danny Donchev, 36 *Mind Blowing YouTube Facts, Figures and Statistics – 2017*, FORTUNELORDS, <http://fortunelords.com/youtube-statistics/> (last updated Jan. 20, 2017).

<sup>12</sup> *PewDiePie*, YOUTUBE, <https://www.youtube.com/user/PewDiePie/videos> (last visited Mar. 4, 2017) (featuring videos where the gamer is in the corner of the screen). *NintendoCapriSun*, YOUTUBE, <https://www.youtube.com/user/NintendoCapriSun/videos> (last visited Mar. 4, 2017) (featuring videos where the game occupies the entire screen).

<sup>13</sup> Fred McConnell, *Let's Play – the YouTube Phenomenon that's Bigger than One Direction*, THE GUARDIAN (Jan. 2, 2014), <https://www.theguardian.com/technology/2014/jan/02/lets-play-youtube-pewdiepie-one-direction>.

<sup>14</sup> Ryan Tanaka, *Let's Play! Narrative Discovery vs. Expert Guides*, RIBBON FARM (Jan. 21, 2015) <http://www.ribbonfarm.com/2015/01/21/lets-play-narrative-discovery-vs-expert-guides/>.

<sup>15</sup> *Id.*

scribers<sup>16</sup> due, in part, to the heavily edited nature of the videos, the gamer's goofy, self-deprecating humor and his seemingly genuine, off-the-cuff reactions.<sup>17</sup> LPs have become an entirely new genre.

The concept of LPs likely began on a website called Something Awful, which consists of a variety of content, such as blogs, articles, and forums.<sup>18</sup> In 2005, one member made a post called "Let's Play *Oregon Trail*," asking others to help him play the game.<sup>19</sup> Those who posted on the thread debated what items to buy and what decisions to make in order to move the characters to Oregon.<sup>20</sup> Unlike the LP formats that are commonly used on YouTube today, there was no video or voice-over but instead just a variety of posts of members playing a game as one unit, which is why the term "let's play" was used in the thread's title.<sup>21</sup> Patrick Klepek, a senior reporter on Kotaku, succinctly explained, "Even though the term Let's Play has become a way of describing talking over a game, often from start to finish, it *began* as a way of rallying people to literally play a video game together."<sup>22</sup> Even today, this kind of LP, where people play the game as one unit by making decisions together, is still alive to a degree, as notably reflected in the highly popular Twitch channel called *TwitchPlaysPokémon*.<sup>23</sup> This channel first went live in 2014 when it streamed a video involving millions of people playing the game *Pokémon Red* together by having a bot read the users' commands in a text chat and then input those commands into the game over the course of sixteen days.<sup>24</sup> Chris Berrow, a journalist who followed the progress of the game, stated, "It's less about actually completing the game.<sup>25</sup> It's more about trying to work with other people

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<sup>16</sup> *Real Time YouTube Subscriber Count - PewDiePie*, SOCIALBLADE, <https://socialblade.com/youtube/user/pewdiepie/realtime> (last visited Mar. 4, 2017).

<sup>17</sup> Patricia Hernandez, *What People Get Wrong About PewDiePie, YouTube's Biggest Star*, KOTAKU (Dec. 19, 2014), <http://kotaku.com/what-people-get-wrong-about-pewdiepie-youtubes-biggest-1673109786>.

<sup>18</sup> Patrick Klepek, *Who Invented Let's Play Videos?*, KOTAKU (May 6, 2015), <http://kotaku.com/who-invented-lets-play-videos-1702390484>.

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *TwitchPlaysPokémon*, TWITCH, <https://www.twitch.tv/twitchplayspokemon> (last visited Mar. 4, 2017).

<sup>24</sup> *Twitch Plays Pokémon*, BULBAPEDIA, [http://bulbapedia.bulbagarden.net/wiki/Twitch\\_Plays\\_Pok%C3%A9mon](http://bulbapedia.bulbagarden.net/wiki/Twitch_Plays_Pok%C3%A9mon) (last visited Mar. 4, 2017).

<sup>25</sup> Jaimee Haddad, *In 'Twitch Plays Pokemon,' a Million People Played One Character in*

to overcome the game's obstacles, and other humans' obstacles."<sup>26</sup> The stream became so popular due to the chaos of having millions of users inputting commands at the same time that it became a cultural phenomenon, flooding the internet with thousands of memes, fan art, fan fiction, and music videos.<sup>27</sup>

A Something Awful member named Michael Sawyer (also known as "Slowbeef") is believed to be the first person to post an LP in the video format that is known today.<sup>28</sup> Similar to the *Oregon Trail* thread, his first LPs consisted of a mix of game screenshots and textual commentary on a thread, which other members could then view and make comments and suggestions.<sup>29</sup> In 2007, he introduced video with audio commentary for a game called *The Immortal* and received enough positive feedback from other Something Awful members that he decided to post more LP videos.<sup>30</sup> This format soon went viral and others began making their own LP videos not only on Something Awful but on YouTube as well.<sup>31</sup> Most LPs today do not involve people playing the video game together online but instead show gamers playing the video game while often also injecting humorous comments.<sup>32</sup>

LPs are now so popular that many gamers have decided to become YouTube partners in order to monetize their videos,<sup>33</sup> generating revenue from, among other things, the advertisements that YouTube places on or near the gamers' videos.<sup>34</sup> If LP gamers have licenses from copyright holders to use game content, they can monetize their LPs for that game within the scope of their licenses without an issue.<sup>35</sup> Even without licenses or authorization from copyright

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<sup>a</sup> *16-Day Videogame*, PRI (Mar. 3, 2014), <http://www.pri.org/stories/2014-03-03/twitch-plays-pokemon-million-people-played-one-character-16-day-videogame>.

<sup>26</sup> *Id.*

<sup>27</sup> *TPP Victory! The Thundershock Heard Around the World*, TWITCH (Mar. 1, 2014), <https://blog.twitch.tv/tpp-victory-the-thundershock-heard-around-the-world-3128a5b1cdf5#txifbjg8b>.

<sup>28</sup> Klepek, *supra* note 18.

<sup>29</sup> Klepek, *supra* note 18.

<sup>30</sup> Klepek, *supra* note 18.

<sup>31</sup> Klepek, *supra* note 18.

<sup>32</sup> Klepek, *supra* note 18.

<sup>33</sup> *YouTube Partner Program Overview*, YOUTUBE, <https://support.google.com/youtube/answer/72851?hl=en> (last visited Mar. 4, 2017).

<sup>34</sup> *How to Earn Money From your Videos*, YOUTUBE, [https://support.google.com/youtube/answer/72857?hl=en&ref\\_topic=6029709](https://support.google.com/youtube/answer/72857?hl=en&ref_topic=6029709) (last visited Mar. 4, 2017).

<sup>35</sup> *Video Game and Software Content*, YOUTUBE,

holders, LP gamers can often monetize their LPs if they have an “associated step-by-step commentary [that] is strictly tied to the live action being shown and provides instructional or educational value.”<sup>36</sup> Many LPs fall within the second category due to LP gamers’ ignorance and disinterest regarding licensing agreements.

Most gamers do not have licenses to use a variety of elements from the original game, such as the cutscenes, music, and artwork—all of which are copyrightable in their own right.<sup>37</sup> Over the years, thousands of copyright claims have been made on LPs due to the use of unlicensed copyrighted music.<sup>38</sup> Though game developers may allow and even encourage LPs of their games for the free advertising, the music of the video games is often still owned by record labels or music distributors, forcing LP gamers to either remove the background music entirely or obtain a separate license for the use of the music when posting their videos.<sup>39</sup> In 2013, in response to a backlash in the LP community over changes to YouTube’s takedown policy, YouTube explained:

While you might not recognize the owner, this doesn’t necessarily mean their claims are invalid . . . Many games allow you to turn off background music, while leaving sound effects enabled. And if you’re looking for music you can freely use (and monetize!), check out our Audio Library.<sup>40</sup>

LPs may also be taken down for their use of copyrighted cutscenes.<sup>41</sup> Many video game developers do not want the entire plot of their games to be released to the public, especially when the story is a significant factor in decisions to purchase and play the game.<sup>42</sup> Thus, it is critical that LP gamers understand the scope of their licenses (if

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<https://support.google.com/youtube/answer/138161?hl=en> (last visited Mar. 4, 2017).

<sup>36</sup> *Id.*

<sup>37</sup> Stephen Totilo, *Here’s YouTube’s Reply to Angry YouTubers About This Content ID Mess*, KOTAKU (Dec. 17, 2013), <http://kotaku.com/heres-what-youtube-has-to-say-to-angry-youtubers-1485168478>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> McArthur, *supra* note 5.

<sup>42</sup> See Toderico, *Let’s Play Copyrighted Games*, THEZB (Feb. 11, 2015), <http://thezb.net/2015/02/11/lets-play-copyrighted-games/> (“It is feared that people will view these cut scenes and then not want to play the game themselves to unlock these scenes as a sort of achievement or reward for playing.”).

they have licenses) because it is quite possible that video game developers who have embraced LPs may still not want cutscenes shown at all.

For example, Rockstar Games, a video game publisher known for its *Grand Theft Auto* games, has clarified that gamers should not upload outright spoilers of its games, such as unedited cutscenes or endings, to avoid ruining the experience for others.<sup>43</sup> Story-oriented games are the ones most likely to suffer when entire cutscenes are posted on YouTube because they satisfy the viewers' curiosity about the game, thereby making it less likely that they will purchase the game for themselves.<sup>44</sup>

### III. REACTION VIDEOS

A reaction video is a recording of an individual reacting to some "outside stimulus," such as a television episode, film trailer, movie clip, and even other YouTube videos.<sup>45</sup> Though many reaction videos simply show the person's reaction without showing the work itself,<sup>46</sup> a common format today consists of a split screen, where one side features the work and the other side features the person's reaction to that work in real time.<sup>47</sup> As with LPs, these videos have become a YouTube phenomenon, as millions of individuals choose to watch reaction videos instead of the original works for their commentary and humor.<sup>48</sup> Anthony Brady, famously known by his YouTube persona "Jinx," is a twenty-four year old reaction video star with over 1.6 million subscribers.<sup>49</sup> With yearly earnings estimated to be any-

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<sup>43</sup> *Policy on Posting Copyrighted Rockstar Games Material*, ROCKSTARGAMES (May 12, 2012), <https://support.rockstargames.com/hc/en-us/articles/200153756-Policy-on-posting-copyrighted-Rockstar-Games-material>.

<sup>44</sup> Green, *On Let's Plays*, THAT DRAGON, CANCER BLOG (Mar. 24, 2016), <http://www.thatdragoncancer.com/thatdragoncancer/>.

<sup>45</sup> *Reaction Videos*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/reaction-videos> (last visited Mar. 4, 2017).

<sup>46</sup> See bashthemonkey, *Son's Reaction to 'Empire Strikes Back' Reveal!!!!*, YOUTUBE (Oct. 2, 2011), [https://www.youtube.com/watch?v=ZbV5hn\\_ET0U](https://www.youtube.com/watch?v=ZbV5hn_ET0U) (showing the person's reaction without showing the work itself).

<sup>47</sup> See FBE, *YouTubers React to Don't Hug Me I'm Scared*, YOUTUBE (May 9, 2013), <https://www.youtube.com/watch?v=tEo8GIJIXxw> (showing the work on one side of the screen and the person's reaction to the work in real time on the other side of the screen).

<sup>48</sup> See Anderson, *supra* note 2 ("I haven't actually seen the original video; I prefer to watch reaction videos, whenever possible, on their own terms, without any reference to the thing being reacted to.")

<sup>49</sup> *Jinx*, FAMOUSBIRTHDAYS, <http://www.famousbirthdays.com/people/jinx-webstar.html>



where between \$11,100 and \$177,900,<sup>50</sup> depending on the amount of monetized videos he uploads per year, he makes his living from simply taping his apparently genuine and often humorous reactions to “compilations, Vines, viral videos, and anything else that catches his attention” that are displayed in the corner of his screen.<sup>51</sup> Despite his popularity, some subscribers dislike this format of reaction videos, claiming that these types of YouTubers profit from stealing works in their entirety with little to no transformation.<sup>52</sup> One Reddit subscriber claimed Jinx takes away views from the original works because his over one million subscribers no longer have a reason to watch them, as they already viewed the entire work playing in the corner of his screen on his channel.<sup>53</sup>

One of the first popular reaction videos was uploaded in 2006, featuring a brother and sister excitedly opening a Nintendo 64 on Christmas Day in 1998.<sup>54</sup> The children’s screaming reaction quickly went viral, as people viewed it as the epitome of “over-the-top excitement while unwrapping Christmas presents.”<sup>55</sup> Today, it has over twenty-one million views<sup>56</sup> and is still the top result on Google when one enters “Nintendo Sixty-Four” in the YouTube search bar. Sam Anderson, a critic for The New York Times Magazine, speculated in a 2011 article that the appeal of reaction videos is that “they allow us to experience, at a time of increasing cultural difference, the comforting universality of human nature.”<sup>57</sup> This video reminded people

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(last visited Mar. 4, 2017).

<sup>50</sup> Jinx, SOCIALBLADE, <http://socialblade.com/youtube/user/starsosilly> (last visited Mar. 4, 2017).

<sup>51</sup> Sam Gutelle, *YouTube Millionaires: Reaction Star Jinx is “A Born Entertainer,”* TUBEFILTER (Oct. 22, 2015), <http://www.tubefilter.com/2015/10/22/youtube-millionaires-jinx-reaction/>.

<sup>52</sup> *Can we All Agree Jinx is Possibly the Crapiest YouTuber of All Time? Why Hasn’t his Channel Been Removed?*, REDDIT (Dec. 20, 2015), [https://www.reddit.com/t/youtube/comments/3xksg3/can\\_we\\_all\\_agree\\_jinx\\_is\\_possibly\\_the\\_crapiest/?st=iutv3i03&sh=12f6fc31](https://www.reddit.com/t/youtube/comments/3xksg3/can_we_all_agree_jinx_is_possibly_the_crapiest/?st=iutv3i03&sh=12f6fc31).

<sup>53</sup> Moorua, Comment to *Can we All Agree Jinx is Possibly the Crapiest YouTuber of All Time? Why Hasn’t his Channel Been Removed?*, REDDIT (Dec. 20, 2015), [https://www.reddit.com/t/youtube/comments/3xksg3/can\\_we\\_all\\_agree\\_jinx\\_is\\_possibly\\_the\\_crapiest/?st=iutv3i03&sh=12f6fc31](https://www.reddit.com/t/youtube/comments/3xksg3/can_we_all_agree_jinx_is_possibly_the_crapiest/?st=iutv3i03&sh=12f6fc31).

<sup>54</sup> raw64life, *Nintendo Sixty-FOOOOOOOOUR*, YOUTUBE (Mar. 26, 2006), <https://www.youtube.com/watch?v=pFlcqWQVVuU>.

<sup>55</sup> Scott Stump, *‘Nintendo Kids’ Recreate Viral Christmas Excitement*, TODAY (Dec. 27, 2013), <http://www.today.com/news/nintendo-kids-recreate-viral-christmas-excitement-2D11810437>.

<sup>56</sup> raw64life, *supra* note 54.

<sup>57</sup> Anderson, *supra* note 2.

across the world what it felt like to open presents on Christmas Day as a child.<sup>58</sup>

Reaction videos became increasingly popular after the Nintendo 64 video was uploaded, as YouTube subscribers began uploading videos of their reactions to games and popular videos. Particularly, one video called “2 Girls 1 Cup” prompted tens of thousands to upload their reactions in the late 2000s due to its shock value as a clip of extreme fetishistic pornography.<sup>59</sup> It was so grotesque that many did not want to watch the original video at all but instead would rather watch it indirectly through reaction videos — “like Perseus looking at Medusa in the reflection of his shield.”<sup>60</sup> Reaction videos quickly became their own genre as more and more subscribers, such as Jinx,<sup>61</sup> CJ SO COOL,<sup>62</sup> and BlastphamousHD,<sup>63</sup> created channels based solely on their reactions to games, YouTube videos, films, and film trailers. Today, if the term “reaction video” is inputted in the YouTube search bar, it would yield over 35 million results.<sup>64</sup>

Although reaction videos commonly feature real time reactions to the original video in a split-screen or corner-screen format with little commentary or editing, not all reaction videos are in this type of format. Some YouTubers, such as Pat Contri (also known as “Pat the NES Punk”), focus on commentary and critiques and show the original work in short clips or not at all.<sup>65</sup> For example, Pat, as part of his “Completely Unnecessary Podcast” series, spoke about his reactions to the season seven premiere of the AMC series *The Walking Dead* without showing any clips of the episode at all.<sup>66</sup> Instead, Pat showed a picture of one character and focused on how the epi-

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<sup>58</sup> Stump, *supra* note 55.

<sup>59</sup> Anderson, *supra* note 2.

<sup>60</sup> Anderson, *supra* note 2.

<sup>61</sup> Jinx, YOUTUBE, <https://www.youtube.com/user/STARSOSILLY> (last visited Mar. 4, 2017).

<sup>62</sup> CJ SO COOL, YOUTUBE, <https://www.youtube.com/channel/UCVyM1Zknz3u2hGLAN2NVtZg/videos> (last visited Mar. 4, 2017).

<sup>63</sup> BlastphamousHD TV, YOUTUBE, <https://www.youtube.com/channel/UCtrIvE-HULm9jbgzN26AG-Q> (last visited Mar. 4, 2017).

<sup>64</sup> There are even reaction videos to reaction videos. Reaction Video Query, YOUTUBE, [https://www.youtube.com/results?search\\_query=reaction+video](https://www.youtube.com/results?search_query=reaction+video) (search “reaction video”) (last visited Mar. 4, 2017).

<sup>65</sup> Pat the NES Punk, YOUTUBE, <https://www.youtube.com/user/PatTheNESpunk/featured> (last visited Mar. 4, 2017).

<sup>66</sup> Pat the NES Punk, *Walking Dead Season 7 Premiere Thoughts - #CUPodcast*, YOUTUBE (Oct. 27, 2016), <https://www.youtube.com/watch?v=LH9v8ssVA8k>.

sode made him feel and whether he will watch the rest of the season if it continues to be gory “zombie porn.”<sup>67</sup> Excluding the picture of the character, because characters may be copyrightable in their own right,<sup>68</sup> such a video of Pat’s commentary would not infringe on The Walking Dead episode at all.

Due to the proliferation of reaction videos, Fine Brothers Entertainment (“FBE”), a content studio that runs a popular reaction channel on YouTube, announced its plans in early 2016 to create a franchise-like system called React World, licensing out its “React” brand and video format on a profit-sharing basis.<sup>69</sup> As part of its plans, it had applied to register trademarks of terms such as “Kids React,” “Elders React,” and “React,” which it has since rescinded after the YouTube community widely criticized it for attempting to monopolize the reaction genre.<sup>70</sup> Because FBE is known to aggressively police use of its video clips, even in other reaction videos, many YouTube subscribers feared that existing and future reaction videos would be shut down as infringing on their trademarked terms such as “React.”<sup>71</sup> As such, FBE not only rescinded their applications to register their trademarks but also publicly apologized, discontinued its plans for React World, and released its prior claims on videos that it believed were infringing.<sup>72</sup> This harsh backlash proved that the reaction video genre is incredibly strong today, and the number of videos will only increase in the near future.

For subscribers who post their reactions along with the entire clip of the original work on the side or corner of the screen, copyright infringement is an inherent concern. While a subscriber’s step-by-step instructional or educational commentary and appropriate clipping of the original work would likely transform the original work,<sup>73</sup> many reaction videos do not have such commentary or editing. Rather, many reaction videos display the entire original work and the subscribers’ role in these videos is not to give a review or to teach

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<sup>67</sup> *Id.*

<sup>68</sup> 7 A.L.R. Fed. 2d 269 (2005).

<sup>69</sup> Dolan Pls, *ReactWorld Reupload – Announcement and Apology (TheFineBros)*, YOUTUBE (Feb. 1, 2016), <https://www.youtube.com/watch?v=H9X8xZzyZyY>.

<sup>70</sup> Benny Fine & Rafi Fine, *A Message from the Fine Brothers*, MEDIUM (Feb. 1, 2016), <https://medium.com/@FineBrothersEnt/a-message-from-the-fine-brothers-a18ef9b31777#.e6trid891>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See infra* Section V.

viewers how to do something but to display facial expressions, guttural noises, and interspersed comments about their feelings. In this regard, these types of reaction videos do not offer anything new or transform the original works in any way and thus should be infringing.

One recent dispute involved two popular YouTube users, GradeAUnderA and Tyrone Mangus.<sup>74</sup> Tyrone Mangus uploaded a reaction video to GradeAUnderA's 16-minute rant video in a split screen format.<sup>75</sup> GradeAUnderA, believing Mangus's reaction video to be infringing on his rant video, filed a third party content claim to prevent Mangus from monetizing the reaction video for himself.<sup>76</sup> GradeAUnderA claimed that Mangus's posting his video in its entirety in the corner of Mangus's screen did not constitute fair use because Mangus did not clip it or add substantial commentary in any way.<sup>77</sup> In fact, he only said seven words throughout the 16-minute video and did not speak about the video afterwards but instead just explained why he is a good reactor.<sup>78</sup>

One of GradeAUnderA's issues with reaction videos is that most YouTubers who make such videos do not seek permission from the original authors who have the responsibility to police infringing works.<sup>79</sup> When GradeAUnderA found out about the infringing video, it already had over 300,000 views, which equate to hundreds of dollars in monetization for Mangus.<sup>80</sup> While GradeAUnderA could have sued Mangus for copyright infringement, he chose instead to simply stop the monetization even though Mangus was still able to keep the money that the video generated before GradeAUnderA's third party claim was approved in accordance with YouTube's policy.<sup>81</sup> GradeAUnderA lamented that this system is inherently unfair, as it allows reactors to easily profit from other people's original works without permission.<sup>82</sup> He claimed, "I, as a video maker, have to shift

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<sup>74</sup> Bailey, *supra* note 8.

<sup>75</sup> Bailey, *supra* note 8.

<sup>76</sup> GradeAUnderA, *Everything Thats Wrong with YouTube (Part1/2) - Copyright, Reactions and Fanboyism*, YOUTUBE (Feb. 8, 2016), <https://www.youtube.com/watch?v=vjXNvLDkDTA>.

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

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

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

<sup>80</sup> *Id.*

<sup>81</sup> GradeAUnderA, *supra* note 76.

<sup>82</sup> GradeAUnderA, *supra* note 76.

some of my attention and my focus away from video making so I can be on the . . . look-out for video thieves.<sup>83</sup> People stealing my videos become my responsibility.”<sup>84</sup> However, despite these concerns, the fan base for reaction videos keeps growing.

#### IV. COPYRIGHTABILITY AND FAIR USE

##### A. The Law

Copyright protection automatically arises for (1) original works of authorship (2) that are fixed (3) in any tangible medium of expression.”<sup>85</sup> Originality has a low threshold, as it requires only that works are (1) “independently created by the author” and (2) have “at least some minimal degree of creativity.”<sup>86</sup> With regard to this “minimal degree of creativity,” the U.S. Supreme Court in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*<sup>87</sup> stated:

The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.<sup>88</sup>

Fixation in any tangible medium of expression requires that the work “be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”<sup>89</sup> and be “projected for more than a brief period of time or captured more than momentarily in a computer memory.”<sup>90</sup> For example, a musical composition that exists solely in the composer’s head is not eligible for copyright protection because it cannot be perceived by individuals other than the

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<sup>83</sup> GradeAUnderA, *supra* note 76.

<sup>84</sup> GradeAUnderA, *supra* note 76.

<sup>85</sup> 17 U.S.C. § 102 (2012).

<sup>86</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

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

<sup>88</sup> *Id.*

<sup>89</sup> 17 U.S.C. § 102 (2012).

<sup>90</sup> 2 William F. Patry, Patry on Copyright § 3:22.

composer himself.<sup>91</sup> Rather, the musical composition embodied in sheet music or on a compact disc qualifies for copyright protection, so long as it is original, because such a work can be tangibly perceived and reproduced for more than a transitory duration.<sup>92</sup>

Registration of a work in the U.S. Copyright Office is not a requirement for copyright protection but rather to initiate a copyright infringement action.<sup>93</sup> Additionally, registration allows for the availability of awards of statutory damages and attorney's fees in infringement actions<sup>94</sup> and provides prima facie evidence of copyright validity if made within five years after first publication of the work.<sup>95</sup> For these reasons, and also because many copyright owners want to have their copyrights on the public record, the Copyright Office recommends registration of all eligible works.<sup>96</sup>

In order to establish copyright infringement, the plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) [defendant's] copying of constituent elements of the work that are original."<sup>97</sup> In response, the defendant may assert fair use of the copyrighted work as an affirmative defense.<sup>98</sup> Fair use is a limitation on a copyright owner's exclusive rights<sup>99</sup> to (1) reproduce the copyrighted work, (2) prepare derivative works, (3) distribute copies or phonorecords of the copyrighted work to the public, (4) publicly perform the copyrighted work, and (5) publicly display the copyrighted work.<sup>100</sup> A defendant who can prove that his or her use of a copyrighted work is fair is not liable for copyright infringement,<sup>101</sup> as fair use is a doctrine that creates "a limited exception to the individual's private property rights in his expression-rights conferred to encourage creativity-to promote certain productive uses of copyrighted material."<sup>102</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 17 U.S.C. § 411 (2012).

<sup>94</sup> 17 U.S.C. § 412 (2012).

<sup>95</sup> 17 U.S.C. § 410 (2012).

<sup>96</sup> *Copyright in General*, COPYRIGHT.GOV, <http://www.copyright.gov/help/faq/faq-general.html#register> (last visited Mar. 4, 2017).

<sup>97</sup> *Feist Publ'ns, Inc. v. Rural Tel. Ser. Co.*, 499 U.S. 340, 361 (1991).

<sup>98</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>99</sup> 17 U.S.C. § 107 (2012).

<sup>100</sup> 17 U.S.C. § 106 (2012).

<sup>101</sup> 17 U.S.C. § 107 (2012); *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 445 (S.D.N.Y. 2001).

<sup>102</sup> *Hofheinz*, 146 F. Supp. 2d at 446 (quoting *Maxtone-Graham v. Burtchaeil*, 803 F.2d

No bright line rule determines what constitutes fair use.<sup>103</sup> Rather, courts conduct a case-by-case analysis<sup>104</sup> to determine whether use of a copyrighted work qualifies as fair use based on the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>105</sup>

For the first factor, the purpose and character of the use, the question is “whether and to what extent the new work is ‘transformative.’”<sup>106</sup> Transformation requires that the defendant adds something new to the original work, altering it with “new expression, meaning, or message” so as to change the purpose or character of the original work.<sup>107</sup> A finding of transformative use lowers the significance of the other factors.<sup>108</sup> However, the absence of transformation does not necessarily preclude a finding of fair use.<sup>109</sup> The Seventh Circuit in *Kientiz v. Sconnie Nation LLC*<sup>110</sup> reasoned that courts should not look exclusively to whether something is transformative when conducting a fair use analysis because such an approach would “not only replace[] the list [of factors] in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”<sup>111</sup> In that case, the Seventh Circuit did not ask whether the allegedly infringing work was transformative at all and instead looked only at the four factors on their face.<sup>112</sup>

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1253, 1255 (2d Cir. 1986)).

<sup>103</sup> *Campbell*, 510 U.S. at 577.

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

<sup>105</sup> Use of a copyrighted work for the purpose of criticism, comment, news reporting, teaching, scholarship, or research is illustrative of fair use. 17 U.S.C. § 107 (2012).

<sup>106</sup> *Campbell*, 510 U.S. at 579.

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

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

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

<sup>110</sup> *Kientiz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015).

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

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

Therefore, while many courts, especially in the Second Circuit,<sup>113</sup> almost exclusively consider whether a work is transformative, it is not an absolute requirement in order to find fair use.<sup>114</sup>

For the second factor, the nature of the copyrighted work, the question is whether there is a need to allow greater public use of a certain type of work than of other works.<sup>115</sup> For example, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy,”<sup>116</sup> which means that a court may find for fair use in more cases involving non-fictional works than fictional works based on the need of the public to access facts.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, requires an inquiry regarding both the quantity and quality of the materials used from the copyrighted work.<sup>117</sup> In *Harper & Row Publishers v. Nation Enterprises*,<sup>118</sup> the U.S. Supreme Court held that The Nation Magazine’s taking of a portion of President Ford’s memoirs did not constitute fair use because that portion was considered to be “the heart of the book.”<sup>119</sup> In other words, The Nation had taken the most interesting, moving, and powerful passages from the memoirs, which were *qualitatively* substantial materials from the copyrighted work.<sup>120</sup> It thus did not matter that the Nation’s “direct takings” from the memoirs constituted only about 300–400 words or 13% of its article.<sup>121</sup>

The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, requires courts to consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” for the original.<sup>122</sup> For example, in *Campbell v. Acuff-Rose Music*,<sup>123</sup> the U.S. Supreme Court held that parodies generally do not harm the marketability of the original copyrighted

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<sup>113</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); see *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>114</sup> *Kienitz*, 766 F.3d at 758.

<sup>115</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>116</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

<sup>117</sup> *Id.* at 564–66.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 565.

<sup>121</sup> *Harper*, 471 U.S. at 548, 565–66.

<sup>122</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting *Nimmer* § 13.05[A] [4], p. 13–102.61).

<sup>123</sup> *Id.* at 591.



work because parodies and the originals usually serve different market functions.<sup>124</sup> In other words, there is often no danger that a parody will substitute an original work.<sup>125</sup>

### B. Video Game Copyrightability

Video games are protectable as audiovisual works as a whole because they can satisfy the requirements of originality and fixation in a tangible medium of expression. In *Atari Games Corp. v. Oman*,<sup>126</sup> the U.S. Court of Appeals for the District of Columbia Circuit held that the Register of Copyright's refusal to register a video game based on unoriginality was unreasonable when measured against the low level of creativity required for originality.<sup>127</sup> Here, the video game involved a simple concept of using a rectangle-shaped paddle to hit a square ball against the wall.<sup>128</sup> The Register refused to register the video game because it found that the elements as combined and arranged were not original and creative and therefore were not copyrightable.<sup>129</sup> The court rejected the Register's rationale, focusing rather on "the entire effect of the game"<sup>130</sup> and the motion of the ball through the series of images.<sup>131</sup> Specifically, the path of the ball as it bounced from one side of the screen to the other side did not "follow . . . the laws of physics"<sup>132</sup> and the abstract representation of the "ball" as a square and the "paddles" as shrinking rectangles was not a "time-honored or conventional combination,"<sup>133</sup> thus satisfying the low degree of creativity required for copyright protection.<sup>134</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 592. ("Th[e] distinction between potentially remediable displacement and unre-remediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

<sup>126</sup> *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 243.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 245.

<sup>131</sup> *Atari Games Corp.*, 979 F.2d at 246.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 247.

<sup>134</sup> *Id.*

The Second Circuit in *Stern Electronics v. Kaufman*<sup>135</sup> addressed the fixation issue of videogames.<sup>136</sup> Here, the video game involved moving a spaceship horizontally across the screen through various obstacles.<sup>137</sup> The court held that the statutory requirement of fixation in a tangible medium of expression was satisfied because the video game was embodied in a memory device that allowed it to be played over and over again.<sup>138</sup> A player's participation in the game did not make a difference because the sights and sounds of the game overall remained constant during each play and, as such, this "repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work."<sup>139</sup> The copyrightability of video games is widely accepted today.<sup>140</sup>

Not only are video games protectable as a whole but certain elements are protectable in their own right.<sup>141</sup> Characters, for example, are copyrightable apart from the video game in which they appear if they are "especially distinctive,"<sup>142</sup> such as Nintendo's Mario. In fact, in 2013, Nintendo submitted a Digital Millennium Copyright Act takedown notice to the owner of a website that hosted an unauthorized remake of the *Super Mario Bros.* game due, in part, to the website's use of Nintendo's copyrighted characters and video game images in violation of Nintendo's exclusive rights.<sup>143</sup> However, stock characters, such as army men in camouflage, samurai, or robots, do not receive the same copyright protection as distinctive characters because they are not products of original expression but instead types of characters so commonplace that copyrighting them would create an undesirable monopoly.<sup>144</sup> Such stock characters, along with inci-

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<sup>135</sup> *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 853.

<sup>138</sup> *Id.* at 855–56.

<sup>139</sup> *Id.* at 856.

<sup>140</sup> *See* 7 A.L.R. Fed. 2d 269 (2005).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> FULL SCREEN MARIO, <http://www.fullscreenmario.com/> (last visited Mar. 4, 2017); Thomas Whitehead, *Full Screen Mario Web Game Closed Down Following Nintendo's Copyright Complaint*, NINTENDOLIFE (Nov. 11, 2013), [http://www.nintendolife.com/news/2013/11/full\\_screen\\_mario\\_web\\_game\\_closed\\_down\\_following\\_nintendos\\_copyright\\_complaint](http://www.nintendolife.com/news/2013/11/full_screen_mario_web_game_closed_down_following_nintendos_copyright_complaint).

<sup>144</sup> Bryan Wasetis & James Ball, *Copyright in Characters: What Can I Use?*, ASPECT LAW GROUP (May 9, 2014), <https://www.aspectlg.com/posts/copyright-in-characters-what-can-i-use>.

dents or settings “which are as a practical matter indispensable, or at least standard, in the treatment of a given topic” are called “scènes à faire.”<sup>145</sup> In *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*,<sup>146</sup> the U.S. Court of Appeals for the Seventh Circuit held that golf-related imagery in a golf video game constituted scènes à faire, which provided copyright protection only from virtually identical copying, because certain elements of the game, such as the golf courses, players, and clubs, were necessary in order to make a realistic golf video game.<sup>147</sup>

Therefore, because video games as a whole are protectable as audiovisual works<sup>148</sup> and individual elements of the video games themselves are protectable in their own right,<sup>149</sup> LP gamers may infringe on not just one but multiple copyrights every time they upload a new video on YouTube. Although their use of the video game may constitute fair use through their commentary and criticism, such a determination must be made by a court after a consideration of the four statutory fair use factors.<sup>150</sup> Many YouTubers mistakenly believe that if they post a disclaimer or if they give credit to the copyright owners, their use is fair and not infringing.<sup>151</sup> As YouTube warns under its Fair Use Guidelines, “[t]here is actually *no silver bullet* that will guarantee you are protected by fair use when you use copyrighted material you don’t own.”<sup>152</sup> If a video game company does not have a clear policy as to whether it allows LPs of its materials, LP gamers should probably obtain authorization from that company before uploading LPs to protect themselves from the possibility of takedown notices and copyright infringement suits.<sup>153</sup>

### C. Digital Millennium Copyright Act (DMCA)

In 1996, the World Intellectual Property Organization (WIPO) Copyright Treaty was concluded, requiring its signatories to provide

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<sup>145</sup> *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011-12 (7th Cir. 2005).

<sup>146</sup> *Id.* at 1015.

<sup>147</sup> *Id.*

<sup>148</sup> *See Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

<sup>149</sup> *See* 7 A.L.R. Fed. 2d 269 (2005).

<sup>150</sup> 17 U.S.C. § 107 (2012).

<sup>151</sup> *What is Fair Use?*, YOUTUBE, <https://www.youtube.com/yt/copyright/fair-use.html#yt-copyright-myths> (last visited Mar. 4, 2017).

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

legal protection and remedies that were appropriate for copyright issues in the digital age.<sup>154</sup> The United States, as one of the signatories, passed the Digital Millennium Copyright Act (DMCA) in 1998, which amended the Copyright Act of 1976 in order to implement the WIPO Copyright Treaty.<sup>155</sup> Specifically, the DMCA protects service providers from liability for monetary and injunctive relief for hosting infringing material on their systems, so long as the service providers (1) do not have actual knowledge of the infringing activity and are not aware “of facts or circumstances from which infringing activity is apparent,” (2) do not receive a financial benefit “directly attributable” to the infringing activity when they have the right and ability to control the infringing activity, and (3) stop the infringing activity upon receiving notice of claimed copyright infringement.<sup>156</sup> Additionally, service providers must also take action to stop infringing activity once they have actual knowledge of the infringing activity or awareness “of facts or circumstances from which infringing activity is apparent.”<sup>157</sup>

In order for a DMCA notice of claimed copyright infringement to be effective, the complaining party (the copyright owner or his/her agent) must provide the notice in a signed writing to the service provider’s designated agent.<sup>158</sup> The identity of this designated agent may be found in the U.S. Copyright Office’s DMCA Designated Agent Directory.<sup>159</sup> The notice must identify the allegedly infringed copyrighted work and the infringing activity and material and must also provide the complaining party’s contact information and a statement of good faith belief that the activity and material are in-

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<sup>154</sup> *Executive Summary Digital Millennium Copyright Act Section 104 Report*, COPYRIGHT.GOV,

[http://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](http://www.copyright.gov/reports/studies/dmca/dmca_executive.html) (last visited Mar. 4, 2017); *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WIPO.INT, [http://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](http://www.wipo.int/treaties/en/ip/wct/summary_wct.html) (last visited Mar. 4, 2017).

<sup>155</sup> *Executive Summary Digital Millennium Copyright Act Section 104 Report*, *supra* note 154.

<sup>156</sup> 17 U.S.C. § 512(c)(1) (2012).

<sup>157</sup> *Id.*

<sup>158</sup> 17 U.S.C. § 512(c)(3) (2012).

<sup>159</sup> In December 2016, the U.S. Copyright Office introduced a new online directory. It required that “any service provider that has designated an agent with the Office prior to December 1, 2016” must submit a new designation using the online system by December 31, 2017. As such, until December 31, 2017, the Office will maintain two directories—one called the “New Directory” and the other called the “Old Directory.” *DMCA Designated Agent Directory*, COPYRIGHT.GOV, <https://www.copyright.gov/dmca-directory/> (last visited Mar. 4, 2017).

fringing.<sup>160</sup> Finally, the notice must conclude with a statement that the notification is accurate under penalty of perjury and that the complaining party is an authorized agent of the owner of the exclusive right that is being infringed.<sup>161</sup> After the service provider processes the notice, it must act to remove or disable the allegedly infringing material and notify the subscriber, who then can respond by providing a counter notification in a signed writing to the designated agent of the service provider.<sup>162</sup> Among other statutory requirements, the counter notification must include the subscriber's statement of good faith belief that its "material was removed or disabled as a result of mistake or misidentification."<sup>163</sup> If the complaining party does not challenge the counter notification by immediately filing an action in court, then the service provider will automatically put the material back up on the website not less than ten business days but not more than fourteen business days after receipt of the counter notification.<sup>164</sup>

When YouTube receives a DMCA takedown notice, it not only takes down the allegedly infringing video, but it also gives a "copyright strike" to the YouTube account that hosted the video.<sup>165</sup> A strike warns the subscriber to not commit further acts of copyright infringement and also restricts the subscriber from live-streaming for ninety days if the removed video was a live stream.<sup>166</sup> If an account receives three strikes, it is terminated, its videos are deleted, and the subscriber of that account is restricted from creating new accounts in the future.<sup>167</sup> A subscriber can resolve strikes in one of three ways: (1) The strike expires within three months so long as the subscriber watches a four-minute video about copyright law and then answers four multiple choice and true/false questions regarding the content of the video; (2) The subscriber can request the copyright owner to retract the copyright claim; or (3) The subscriber can submit a DMCA counter notification.<sup>168</sup> The DMCA does not require copyright

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<sup>160</sup> 17 U.S.C. § 512(c)(3) (2012).

<sup>161</sup> *Id.*

<sup>162</sup> 17 U.S.C. § 512(g) (2012).

<sup>163</sup> 17 U.S.C. § 512(g)(3) (2012).

<sup>164</sup> 17 U.S.C. § 512(g)(2) (2012).

<sup>165</sup> *Copyright Strike Basics*, YOUTUBE, [https://support.google.com/youtube/answer/2814000?hl=en&ref\\_topic=2778545](https://support.google.com/youtube/answer/2814000?hl=en&ref_topic=2778545) (last visited Mar. 4, 2017).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id. Copyright School*, YOUTUBE, [https://www.youtube.com/copyright\\_school](https://www.youtube.com/copyright_school) (last vis-

strikes, as they are instead part of YouTube's aggressive internal policy to prevent rampant copyright infringement.<sup>169</sup> Because YouTube remains the one of the only viable platforms for monetized videos today,<sup>170</sup> this policy, combined with the DMCA procedures, is a double-threat for all LP gamers.

The complaining party is not required to register his or her copyright in order to file a valid takedown notice.<sup>171</sup> However, a complaining party who wants to file a lawsuit for copyright infringement must first have a registered copyright.<sup>172</sup> Specifically, Section 411(a) of the U.S. Copyright Act of 1976 requires that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim."<sup>173</sup> Without copyright registration, the complaining party does not have legal recourse if the subscriber decides to submit a counter notification, as the service provider is required to automatically put the material back up within a short period of time after receipt of the counter notification.<sup>174</sup>

YouTube subscribers have criticized the DMCA takedown notice process as a heavily abused system because it is extremely easy for copyright owners to take down *allegedly* infringing material from a website using DMCA notifications, even if that material is not actually infringing at all.<sup>175</sup> Though copyright owners are encouraged by the U.S. Copyright Office to review material to determine whether it qualifies for fair use,<sup>176</sup> it is apparent from the large number of takedown notifications that are sent out every day<sup>177</sup> that such a review does not always take place. For example, since January 17,

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ited Mar. 4, 2017).

<sup>169</sup> *Copyright Strike Basics*, *supra* note 165.

<sup>170</sup> See Russell Brandom, *YouTube's Complaint System is Pissing off its Biggest Users*, THE VERGE (Feb. 1, 2016), <http://www.theverge.com/2016/2/1/10887120/youtube-complaint-takedown-copyright-community>.

<sup>171</sup> See 17 U.S.C. § 512 (2012); see *infra* text accompanying notes 93-96.

<sup>172</sup> 17 U.S.C. § 411 (2012).

<sup>173</sup> *Id.*

<sup>174</sup> 17 U.S.C. § 512(g)(2) (2012).

<sup>175</sup> Matt Greenfield, *Where's the Fair Use?*, THE HUFFINGTON POST (Feb. 18, 2017), [http://www.huffingtonpost.co.uk/mat-greenfield/wheres-the-fair-use\\_b\\_9261486.html](http://www.huffingtonpost.co.uk/mat-greenfield/wheres-the-fair-use_b_9261486.html).

<sup>176</sup> See, e.g., *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/> (last visited Mar. 4, 2017).

<sup>177</sup> See *Requests to Remove Content Due to Copyright*, GOOGLE TRANSPARENCY REPORT, <https://www.google.com/transparencyreport/removals/copyright/?hl=en> (last visited Mar. 4, 2017).

2014, Disney Enterprises, Inc. has requested the removal of 14.1 million potentially infringing URLs from Google.<sup>178</sup> Of those 14.1 million URLs, 843,125 URLs were allowed to remain on Google, as they were deemed non-infringing.<sup>179</sup> While these 843,125 URLs constitute only 6% of the total 14.1 million URLs,<sup>180</sup> it is still not an insignificant number and shows that copyright owners may not be able to distinguish between what is fair use and what is infringing. Subscribers have recourse against false takedown notifications through the use of counter notifications,<sup>181</sup> but they are often intimidated by the process and very few submit counter notifications, as they fear the potential litigation with large corporations.<sup>182</sup> Responding to this concern of intimidation, Google Copyright Legal Director Fred von Lohmann announced in November 2015:

We are offering legal support to a handful of videos that we believe represent clear fair uses which have been subject to DMCA takedowns. With approval of the video creators, we'll keep the videos live on YouTube in the U.S., feature them in the YouTube Copyright Center as strong examples of fair use, and cover the cost of any copyright lawsuits brought against them.<sup>183</sup>

While this policy certainly protects some subscribers from false takedown notifications, Mr. von Lohmann admits that it is impossible for Google to assist every subscriber with valid fair use claims.<sup>184</sup>

In February 2016, Channel Awesome, a popular YouTube channel, uploaded a video called “Where’s the Fair Use?,” in which Doug Walker, one of its content producers, lamented that film studios were using DMCA procedures, YouTube’s strike policy and Content ID “as a scare tactic” to take down negative reviews of their films

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<sup>178</sup> *Copyright Owner: Disney Enterprises, Inc.*, GOOGLE TRANSPARENCY REPORT, <https://www.google.com/transparencyreport/removals/copyright/searchdata/owners/?id=56054> (last visited Mar. 4, 2017).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See 17 U.S.C. § 512(g) (2012).

<sup>182</sup> See Fred von Lohmann, *A Step Toward Protecting Fair Use on YouTube*, GOOGLE PUBLIC POLICY BLOG (Nov. 19, 2015), <https://publicpolicy.googleblog.com/2015/11/a-step-toward-protecting-fair-use-on.html>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

and “stunt channels that could grow into popular media outlets.”<sup>185</sup> He ended his video by displaying the hashtag “#WTFU” (“Where’s the Fair Use”) on the bottom of the screen in order to encourage members of the public to upload similar videos and post on other social media outlets to protest takedown abuse.<sup>186</sup> The hashtag “#WTFU” became immensely popular across the internet.<sup>187</sup>

During this period, the U.S. Copyright Office was undertaking a public study regarding the impacts and effectiveness of the DMCA takedown process, asking copyright owners, service providers, content creators, and the general public to file comments with the Office on these issues.<sup>188</sup> In March 2016, Channel Awesome, along with Fight for the Future, a digital rights non-profit organization, launched an online campaign to file comments expressing dissatisfaction with the current system.<sup>189</sup> Not only did Channel Awesome upload a video called “Save Fair Use NOW” as a call for action,<sup>190</sup> Channel Awesome and Fight for the Future also created a website called [takedownabuse.org](http://takedownabuse.org), which provided an online form for individuals to submit their comments to the Copyright Office and also contained an archive of “DMCA horror stories” based on content creators’ personal stories involving the DMCA takedown process.<sup>191</sup> One such story involved a dispute between Alex, the creator of the popular YouTube channel called I Hate Everything, and Derek Savage, the creator of a low-budget children’s movie called *Cool Cats Saves the Kids*.<sup>192</sup> Alex posted a highly critical, humorous 20-minute

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<sup>185</sup> Channel Awesome, *Where’s the Fair Use? – Nostalgia Critic*, YOUTUBE (Feb. 16, 2016), <https://www.youtube.com/watch?v=zVqFAMOtwaI&t=308s&list=PL0AQIMR-tponsleL90Pv2EZVWVpo2SI7Q&index=3>.

<sup>186</sup> *Id.*

<sup>187</sup> #WTFU (*Where’s the Fair Use?*), KNOW YOUR MEME, <http://knowyourmeme.com/memes/events/wtfu-where-s-the-fair-use> (last visited Mar. 4, 2017).

<sup>188</sup> The Copyright Office recently asked to receive additional public comments by February 21, 2017. *Section 512 Study*, COPYRIGHT.GOV, <http://www.copyright.gov/policy/section512/> (last visited Mar. 4, 2017).

<sup>189</sup> Grant Gross, *Critics of DMCA Takedowns Flood Copyright Office with Thousands of Comments*, PC WORLD (April 1, 2016), <http://www.pcmag.com/article/3050843/internet/critics-of-dmca-takedowns-flood-copyright-office-with-thousands-of-comments.html>.

<sup>190</sup> Channel Awesome, *Save Fair Use Now*, YOUTUBE (Mar. 31, 2016), <https://www.youtube.com/watch?v=NoIL5qUI1p8>.

<sup>191</sup> *Act Now to Stop DMCA Takedown Abuse*, TAKEDOWNABUSE, <https://www.takedownabuse.org/> (last visited Mar. 4, 2017).

<sup>192</sup> *Id.*



review on his channel in November 2015,<sup>193</sup> which was then taken down after Mr. Savage filed a DMCA notification stating that the movie clips used in the review infringed upon his copyright.<sup>194</sup> After the takedown, Mr. Savage, who appeared to be offended by the bad review, continued to harass Alex, threatening to file a lawsuit and additional DMCA notifications if Alex re-uploaded the review.<sup>195</sup> The review was eventually put back up after Alex posted a video regarding his private email exchanges with Mr. Savage, in which he explained to his viewers that Mr. Savage impersonated lawyers in two of the emails as a scare tactic.<sup>196</sup> Near the end of the video, Alex asked, “Don’t you think it’s just a tad unfair that all of the power is put in the hands of the clueless people who can freely take down videos of things they personally don’t like?”<sup>197</sup> This dispute received a lot of attention from YouTube subscribers due to the popularity of the I Hate Everything channel.<sup>198</sup>

By the U.S. Copyright Office’s deadline of April 1, 2016 for the DMCA public study, over 92,000 written submissions were received.<sup>199</sup> The Office then held public roundtables in May 2016 in both New York and San Francisco for additional feedback.<sup>200</sup> Though this protest allowed designated agents from Fight for the Future and Channel Awesome to attend these hearings, the designated agents claimed that they did not make much headway, as “the hearings were dominated by representatives and lobbyists from the copyright industry.”<sup>201</sup> DMCA reforms have yet to be made.

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<sup>193</sup> I Hate Everything, *Cool Cat Saves the Kids – The Search for the Worst – IHE*, YOUTUBE (Nov. 6, 2015), <https://www.youtube.com/watch?v=HoTZZYm2HZI>.

<sup>194</sup> *Act Now to Stop DMCA Takedown Abuse*, *supra* note 191.

<sup>195</sup> *Act Now to Stop DMCA Takedown Abuse*, *supra* note 191.

<sup>196</sup> I Hate Everything, *I Hate Everything vs Derek Savage – IT’S OVER*, YOUTUBE (Nov. 28, 2015), <https://www.youtube.com/watch?v=jzXSQ5f08sA>.

<sup>197</sup> *Id.*

<sup>198</sup> I Hate Everything has over 1.2 million subscribers. *I Hate Everything*, YOUTUBE, [https://www.youtube.com/channel/UCRbOPaGDB\\_xOQkVM8Rnn62Q](https://www.youtube.com/channel/UCRbOPaGDB_xOQkVM8Rnn62Q) (last visited Mar. 4, 2017).

<sup>199</sup> *Section 512 Study*, *supra* note 188.

<sup>200</sup> *Section 512 Study*, *supra* note 188.

<sup>201</sup> Jeff Lyon, *A Look Inside the Closed-Door DMCA Meetings*, FIGHTFORTHEFUTURE (May 17, 2016), <https://www.fightforthefuture.org/news/2016-05-17-a-look-inside-the-closed-door-dmca-meetings/>.

#### D. YouTube Content ID

Content ID is an automated system that allows copyright owners to locate unauthorized use of their content on YouTube.<sup>202</sup> In order for copyright owners to participate in Content ID, they “must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community.”<sup>203</sup> Because YouTube provides other tools to locate potential copyright infringement on the website, such as the copyright notification web form<sup>204</sup> and the Content Verification Program (CVP),<sup>205</sup> YouTube’s evaluation of a copyright owner’s application for Content ID is based on the owner’s “actual need” for it.<sup>206</sup> Copyright holders of popular works are regularly approved for Content ID, but it remains unclear from YouTube’s policy how “actual need” is determined or what constitutes “frequent” uploads.<sup>207</sup> Regardless, once approved, copyright owners must provide reference files of their work for YouTube’s database, which is automatically scanned every time a new video is uploaded for an audio or video match of any of the reference files.<sup>208</sup> Depending on the copyright owner’s chosen approach, YouTube will respond to a match by sending a Content ID claim and either (1) muting the audio, (2) blocking the video, (3) monetizing the video for the copyright owner, or (4) tracking the video’s viewership statistics.<sup>209</sup> In fact, YouTube’s policy states: “In most cases, getting a Content ID claim isn’t a bad thing for your YouTube channel.<sup>210</sup> It just means, ‘Hey, we found some material in your video that’s owned by someone else.’<sup>211</sup> It’s up to copyright owners to decide whether or not

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<sup>202</sup> *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Mar. 4, 2017).

<sup>203</sup> *Id.*

<sup>204</sup> *Copyright Infringement Notification*, YOUTUBE, [https://www.youtube.com/copyright\\_complaint\\_form](https://www.youtube.com/copyright_complaint_form) (last visited Mar. 4, 2017).

<sup>205</sup> *Content Verification Program*, YOUTUBE, <https://support.google.com/youtube/answer/6005923?hl=en> (last visited Mar. 4, 2017).

<sup>206</sup> *Qualifying for Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/1311402> (last visited Mar. 4, 2017).

<sup>207</sup> See *How Content ID Works*, *supra* note 202.

<sup>208</sup> *How Content ID Works*, *supra* note 202.

<sup>209</sup> *How Content ID Works*, *supra* note 202.

<sup>210</sup> *What is a Content ID Claim?*, YOUTUBE, <https://support.google.com/youtube/answer/6013276> (last visited Mar. 4, 2017).

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

others can reuse their original material.”<sup>212</sup> A subscriber who receives a Content ID claim does not get an automatic copyright strike, as he or she would if a DMCA takedown notice was received.<sup>213</sup> A subscriber who wants to challenge a Content ID claim may do so by filing a dispute form with YouTube, which then prompts the copyright owner to respond within thirty days.<sup>214</sup> If the copyright owner does not answer, the claim expires and the video remains untouched.<sup>215</sup> However, if the copyright owner does answer, the owner may choose to release the claim, uphold the claim, or submit a DMCA takedown notice.<sup>216</sup>

## V. FAIR USE ANALYSES

### A. Factual Background of Markiplier’s LP for *That Dragon, Cancer*

Ryan Green, a game designer and programmer, and his small team launched a short, story-oriented computer game called *That Dragon, Cancer* in January 2016 based on his experiences with his young child dying from cancer.<sup>217</sup> Though he was pleased by its warm reception by “[t]he mainstream culture, the gamer culture and others,”<sup>218</sup> he was also frustrated by the number of LPs regarding his game on YouTube with little to no commentary:

[F]or a short, relatively linear experience like ours, for millions of viewers, Let’s Play recordings of our content satisfy their interest and they never go on to interact with the game in the personal way that we intended for it to be experienced. If you compare the millions of views of the entirety of our game on YouTube to our sales as estimated on SteamSpy, you can hopefully see

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Dispute a Content ID Claim*, YOUTUBE, [https://support.google.com/youtube/answer/2797454?hl=en&ref\\_topic=2778545](https://support.google.com/youtube/answer/2797454?hl=en&ref_topic=2778545) (last visited Mar. 4, 2017).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Jason Tanz, *Playing for Time*, WIRED (Jan. 2016), <https://www.wired.com/2016/01/that-dragon-cancer/>.

<sup>218</sup> Green, *supra* note 44.

the disparity.<sup>219</sup>

After Green created Content IDs on YouTube for the original music used in the game, there was a backlash in the LP community when LP videos of the game began receiving copyright claims.<sup>220</sup> He quickly removed the Content IDs because he did not want a wave of negative reviews on YouTube and instead asked LP gamers to provide links to his website, to encourage viewers to donate to his team, and to upload LPs with more than minimal commentary.<sup>221</sup> He also did not want to upset the LP community which, in part, helped to popularize his game.<sup>222</sup> Yet, regardless of his personal decision, Green can still theoretically submit DMCA takedown notices or sue for copyright infringement at any time, especially if LP videos satisfy viewers' curiosity about the game and the viewers believe that they can skip paying for and playing through the game themselves.<sup>223</sup> As of March 24, 2016, Green's studio had "not yet seen a single dollar from sales."<sup>224</sup>

If Green decided to sue an LP gamer for copyright infringement, the LP gamer would likely assert the fair use defense. As an example, Mark Fischbach (better known as Markiplier) is one of the most popular LP gamers on YouTube, having more than 15 million subscribers and more than 6 billion video views to date.<sup>225</sup> Seven months after the release of *That Dragon, Cancer*, Markiplier posted an LP showing his entire 2-hour, unedited play-through of the game.<sup>226</sup> As the purpose of the game is not to overcome obstacles or beat levels but instead to show the gamer what it feels like to live with a dying child,<sup>227</sup> Markiplier's LP of the game heavily involves

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<sup>219</sup> *Id.*

<sup>220</sup> Allegra Frank, *That Dragon, Cancer Dev Calls out Let's Plays for why Game Hasn't Turned a Profit*, POLYGON (Mar. 25, 2016), <http://www.polygon.com/2016/3/25/11305862/that-dragon-cancer-lets-play>.

<sup>221</sup> Green, *supra* note 44.

<sup>222</sup> Green, *supra* note 44.

<sup>223</sup> Green, *supra* note 44.

<sup>224</sup> Green, *supra* note 44.

<sup>225</sup> Todd Spangler, *YouTube Star Markiplier Signs with WME*, VARIETY (Nov. 16, 2016), <http://variety.com/2016/digital/news/markiplier-wme-1201919766/>.

<sup>226</sup> Markiplier, *That Dragon, Cancer*, YOUTUBE (July 16, 2016), [https://www.youtube.com/watch?v=5sWTD6vmH\\_U](https://www.youtube.com/watch?v=5sWTD6vmH_U).

<sup>227</sup> Rich Stanton, *That Dragon, Cancer review – You've Never Played Anything Like it*, THE GUARDIAN (Jan. 18, 2016), <https://www.theguardian.com/technology/2016/jan/18/that-dragon-cancer-review-youve-never-played-anything-like-it>.

cut scenes and dialogue.<sup>228</sup>

Markiplier often says throughout the LP that he does not want to talk over the dialogue or take away from the animation.<sup>229</sup> However, he does analyze and make comments through some of the quieter scenes.<sup>230</sup> For example, as he explores the introductory scene in the game, he analyzes ominous black trees and branches to represent sickness or cancer itself.<sup>231</sup> At about 15 minutes into the video, he also states:

This is a fascinating experience . . . I didn't know it would be an artistic endeavor . . . you can appreciate something in terms of crafting a story, in terms of artistic representation of what these complex emotions that can't exactly be conveyed in words are. You know what I mean? Because the human language is nice and all but at the same time, language is a translation of our base emotions. . . and our base thoughts.<sup>232</sup>

Additionally, even when he is silent, his facial expressions are visible in the corner of the screen at all times.<sup>233</sup> Some of the subscribers said in the comments section under the video that watching Markiplier's reactions and hearing his comments throughout the LP make the experience even sadder.<sup>234</sup>

### **B. Factual Background for Hila and Ethan Klein's Reaction Video *The Big, the BOLD, the Beautiful***

Hila and Ethan Klein (hereinafter "the Kleins"), owners of two YouTube channels *h3h3Productions* and *Ethan and Hila*, gained popularity by posting their humorous reactions to other YouTube videos.<sup>235</sup> On February 15, 2016, they posted a reaction video to "Bold Guy vs Parkour Girl," a video created and uploaded by Matt

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<sup>228</sup> Markiplier, *supra* note 226.

<sup>229</sup> Markiplier, *supra* note 226.

<sup>230</sup> Markiplier, *supra* note 226.

<sup>231</sup> Markiplier, *supra* note 226.

<sup>232</sup> Markiplier, *supra* note 226.

<sup>233</sup> Markiplier, *supra* note 226.

<sup>234</sup> Markiplier, *supra* note 226.

<sup>235</sup> Geoff Weiss, *H3h3Productions Sued for Copyright Infringement by MattHossZone, Spotlighting Fraught Issue of Fair Use*, TUBEFILTER (May 25, 2016), <http://www.tubefilter.com/2016/05/25/h3h3productions-sued-copyright-infringement-matthosszone-fair-use/>.

Hosseinzadeh (hereinafter “Hoss”).<sup>236</sup> Hoss’s video, which is only 5 minutes in length, features a skit of a man named “the Bold Guy” trying to pick up a woman who is stretching in public.<sup>237</sup> After a few exchanges, the woman expresses an interest in sexual intercourse with the Bold Guy but only if he catches her in a “parkour” chase.<sup>238</sup> The Kleins’ reaction video called “The Big, the BOLD, the Beautiful” features their humorous comments and criticisms regarding the title, characters, setting, dialogue, costume design, and music<sup>239</sup> while also showing “only 3:42 minutes combined over 24 separate clips” of Hoss’s video.<sup>240</sup> The longest clip of Hoss’s video is 25 seconds.<sup>241</sup>

Hoss’s attorney submitted a letter to the Kleins, demanding that they (1) “immediately cease and desist their infringement of Mr. Hoss’s Work and removing the Infringing Video from YouTube and any other publishing platforms,” (2) “sign a mutual release and confidentiality agreement wherein they shall agree never to infringe on any of [his] client’s current or future works,” and (3) “pay [his] client’s current legal fees in this matter which, as of today amount to \$3,750.”<sup>242</sup> The Kleins rejected the offer, as they believed that their use of Hoss’s video was fair,<sup>243</sup> and they wanted to instead prove their case in court in order to set an example for all YouTube subscribers of what kinds of reaction videos constitute fair use.<sup>244</sup> Their attorney, Michael Lee, publicly announced, “This case not only affects [the Kleins’] ability to produce videos, but affects the ability of many other content creators who make ‘react’ videos.”<sup>245</sup>

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<sup>236</sup> Complaint and Jury Demand, *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>237</sup> MattHossZone, *Bold Guy vs Parkour Girl*, YOUTUBE (Aug. 11, 2013), <https://www.youtube.com/watch?v=Dj4XAYhF0ok>.

<sup>238</sup> *Id.*

<sup>239</sup> Seashroom, *The Big, the BOLD, the Beautiful (Re-Upload)*, YOUTUBE (Apr. 27, 2016), <https://www.youtube.com/watch?v=-i0IQfBpwMA&feature=youtu.be>.

<sup>240</sup> Defendants’ Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>241</sup> *Id.*

<sup>242</sup> h3h3Productions, *We’re Being Sued*, YOUTUBE (May 24, 2016), <https://www.youtube.com/watch?v=fEGVOysbC8w>.

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

<sup>244</sup> *Id.*

<sup>245</sup> Christina Carrega-Woodby, *YouTube Stars Matt Hoss, h3h3 in Copyright Battle Over ‘The Bold Guy’ Uploads, Reaction Videos*, N.Y. DAILY NEWS (June 1, 2016), <http://www.nydailynews.com/entertainment/youtube-stars-matt-hoss-h3h3-copyright-battle-bold-guy-article-1.2656345>.

After the first offer was rejected, Hoss's attorney then offered that Hoss would forego a copyright infringement suit if the Kleins posted a promotional video of his channel, apologized for using too much of his content, promoted him on their social media for at least two months, and referred to or hyperlinked to several of his videos.<sup>246</sup> The Kleins also rejected this offer due to their belief that they had already promoted Hoss's channel in their reaction video.<sup>247</sup> During these negotiations, Hoss filed a DMCA takedown notice, which removed the video from YouTube and caused YouTube to issue a copyright strike against the Kleins' channel.<sup>248</sup> Hoss filed his complaint for copyright infringement on April 26, 2016 in the U.S. District Court for the Southern District of New York.<sup>249</sup> The judge is expected to make her decision on cross-motions for summary judgment soon.<sup>250</sup>

**C. Analyses of Markiplier's LP *That Dragon, Cancer* and Hila and Ethan's reaction video *The Big, the BOLD, the Beautiful***

For the purpose of this fair use analysis, assume that Green had sued Markiplier for copyright infringement. Since Hoss has already sued the Kleins for copyright infringement, there is no need for an imaginary scenario.

In order for the court to dismiss a case on fair use grounds, it must weigh the following four factors: (1) the purpose and character of the defendant's use; (2) the nature of the plaintiff's work; (3) the amount and substantiality of the portion used in relation to the plaintiff's work as a whole; and (4) the effect of the defendant's use upon the potential market for or value of the plaintiff's work.<sup>251</sup> For the

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<sup>246</sup> h3h3Productions, *supra* note 242.

<sup>247</sup> Ethan Klein, at the end of the reaction video, tells his viewers to watch Hoss's videos, admitting that "the guy puts a lot of effort into his videos, he clearly plans them, he is very professional and...cares about what he does." h3h3Productions, *supra* note 242.

<sup>248</sup> h3h3Productions, *supra* note 242; Defendants' Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), Matt Hosseinzadeh v. Ethan Klein and Hila Klein, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>249</sup> Complaint and Jury Demand, Matt Hosseinzadeh v. Ethan Klein and Hila Klein, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>250</sup> Hosseinzadeh v. Klein (1:16-cv-03081), COURT LISTENER, <https://www.courtlistener.com/docket/4356997/hosseinzadeh-v-klein/> (last visited Mar. 4, 2017).

<sup>251</sup> 17 U.S.C. § 107 (2012).

purposes of this analysis, whether Markiplier and the Kleins' respective works are transformative will play an integral role in determining whether their works are fair use or infringing. The Seventh Circuit's approach in *Kienitz*, which did not place much emphasis on transformation,<sup>252</sup> will not be used.

In *Equals Three, LLC v. Jukin Media, Inc.*,<sup>253</sup> the U.S. District Court for the Central District of California held that a content creator's use of viral video clips was highly transformative.<sup>254</sup> There, Equals Three produced short episodes involving a host who commented on events and people presented in video clips shown on the screen.<sup>255</sup> Equals Three posted an episode on YouTube called "The Resurrection," which featured, among other clips, a clip of Jukin's copyrighted video called "Black Bear Milk Jug Rescue."<sup>256</sup> Though Equals Three's episode arguably used the "heart" of Jukin's copyrighted video, which involved a crane removing a milk jug from a bear's head, the court nonetheless held that Equals Three's use was transformative because the host did not merely explain what happened in the video but instead highlighted its ridiculous or humorous aspects through jokes, narration, and editing.<sup>257</sup> Therefore, the court held that the essential character of Jukin's video was entirely changed through the host's jokes and comments as its focus.<sup>258</sup>

In contrast, Markiplier's LP features the entirety, *not* clips, of *That Dragon, Cancer* while Markiplier makes comments, facial expressions, and analyses in the corner of the screen.<sup>259</sup> While it is possible that many subscribers watch the LP specifically for Markiplier's response and personality, it is also possible that many subscribers watch the LP because they are curious about the game and want to experience a play-through without having to actually buy the game themselves. The play-through, together with the cutscenes and dialogue, is the focus of the video, as Markiplier's comments, criticisms, and analyses are not constant or substantial.<sup>260</sup> For a significant part

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<sup>252</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015).

<sup>253</sup> *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1106 (C.D. Cal. 2015).

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

<sup>255</sup> *Id.* at 1099.

<sup>256</sup> *Id.* at 1104.

<sup>257</sup> *Id.* at 1104–05.

<sup>258</sup> *Equals Three, LLC*, 139 F. Supp. 3d at 1105.

<sup>259</sup> Markiplier, *supra* note 226.

<sup>260</sup> Markiplier, *supra* note 226.



of the video, he either just watches the screen or makes minimal comments such as “wow,” “woah,” “what,” or “uhh.”<sup>261</sup> Additionally, his analyses are often short and obvious.<sup>262</sup> For example, at about 12 minutes into the video, he clicks on the child, Joel, to rock him on a ride in a playground.<sup>263</sup> Joel, who is facing the camera in this scene, does not have a face or hair.<sup>264</sup> Markiplier comments: “I wonder if the design of Joel is intentional because [it’s] a little disconcerting almost to have this faceless person, whereas the dad has glasses, beard, and facial features and all that stuff.”<sup>265</sup> So I wonder if that’s intentional to make it a little off-setting.”<sup>266</sup> After he says this, he admits that he wants to yield to the story of the game and does not want to distract the viewers with too many comments or opinions.<sup>267</sup>

The counterargument is that Markiplier’s comments, analyses, and facial expressions during some of the quieter or tedious parts of the game make those parts interesting or enjoyable. Even when Markiplier is silent during the most emotional and dramatic scenes of the game, his presence in the corner of the screen arguably changes the experience of the video game because the viewers are no longer interacting with the game on their own as it was intended to be played. Still, it is likely that the LP is not transformative overall, as it is completely unedited and its focus is not on Markiplier’s comments, criticisms, and analyses but on the game’s cutscenes and dialogue instead.<sup>268</sup>

The Kleins’ reaction video shares more similarities with Equals Three’s episode than with Markiplier’s LP. Unlike other reaction content creators, they do not stream the entirety of Hoss’s work in the corner of the screen or in a split-screen but instead use clips “averaging 9.25 seconds”<sup>269</sup> so that their criticisms, jokes, facial expressions, sarcastic remarks, and sexual innuendos are the focus of

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<sup>261</sup> Markiplier, *supra* note 226.

<sup>262</sup> Markiplier, *supra* note 226.

<sup>263</sup> Markiplier, *supra* note 226.

<sup>264</sup> Markiplier, *supra* note 226.

<sup>265</sup> Markiplier, *supra* note 226.

<sup>266</sup> Markiplier, *supra* note 226.

<sup>267</sup> Markiplier, *supra* note 226.

<sup>268</sup> Markiplier, *supra* note 226.

<sup>269</sup> Defendants’ Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

their video.<sup>270</sup> It is arguable that viewers watch the Kleins' video not for the underlying work but for their entertaining responses, analyses, and personalities instead. For example, at about four minutes into the video, the Kleins discuss the almost 10 million views on Hoss's video, its "like/dislike" ratio, and its relatively low number of subscribers to the video in comparison to the millions of views.<sup>271</sup> They analyze these elements, separate and apart from Hoss's actual video.<sup>272</sup> When Hila points out the low number of subscribers, Ethan explains that this video was created during an era on YouTube when cringe-worthy videos were popular.<sup>273</sup> Therefore, although their use of Hoss's video is commercial because they received ad revenue for their video,<sup>274</sup> it is likely that the court will hold that the video's transformativeness outweighs the commercial nature of the use based on the Kleins' commentary.

The second factor, the nature of the copyrighted work, looks at the extent to which it is creative or informational and published or unpublished.<sup>275</sup> In *Los Angeles News Service v. KCAL-TV Channel 9*,<sup>276</sup> the U.S. Court of Appeals for the Ninth Circuit held that a video's informational and factual nature weighed in favor of fair use.<sup>277</sup> There, a KCAL-TV used 30 seconds from Los Angeles News Service's 4-minute 40-second copyrighted video of the Reginald Denny beating.<sup>278</sup> Despite the copyrighted video's creative features, the court still considered it to be a published news event and held that this was the type of work that weighs in favor of fair use because it should be widely disseminated to the public.<sup>279</sup> On the other hand, in *Equals Three, LLC*, the court held that Jukin's works, though largely point-and-shoot videos, were creative (and thus weighing against a finding of fair use) because they did not "convey mainly factual in-

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<sup>270</sup> Seashroom, *supra* note 239.

<sup>271</sup> Seashroom, *supra* note 239.

<sup>272</sup> Seashroom, *supra* note 239.

<sup>273</sup> Seashroom, *supra* note 239.

<sup>274</sup> The Kleins received ad revenue before the video was taken down. *See* Complaint and Jury Demand, *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>275</sup> 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>276</sup> *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997).

<sup>277</sup> After considering all the factors, the court ultimately remanded the case for further proceedings on the question of fair use. *Id.* at 1122-23.

<sup>278</sup> *Id.* at 1120.

<sup>279</sup> *Id.* at 1122.

formation.”<sup>280</sup>

Clearly, here, *That Dragon, Cancer* is a highly creative work – “[a]n immersive narrative videogame that retells Joel Green’s 4-year fight against cancer through about two hours of poetic, imaginative gameplay that explores faith, hope and love.”<sup>281</sup> It almost entirely revolves around the dialogue and beautiful, striking cutscenes, with minimal interaction from the player himself.<sup>282</sup> For example, there is a scene in the game that shows the parents sitting in a waiting room, thinking about the uncontrollable nature of their situation and the dichotomy of hope and despair.<sup>283</sup> As the parents sit, water fills up the room and the sounds of a thunderstorm and dialogue echo throughout.<sup>284</sup> In this scene, which is only one example of the many touching cutscenes throughout the game, there is not much for the player to do but watch and listen.<sup>285</sup> This work is undoubtedly creative, which weighs against a finding of fair use.

Likewise, Hoss’s *The Bold Guy vs Parkour Girl* is not a news event but is instead a creative work. In his complaint, Hoss describes himself as an independent filmmaker who “passionately invest[s] his time, energy, and occasionally blood into his film projects.”<sup>286</sup> This work involves a fictional scenario in which a man and woman’s flirtatious exchanges lead to a three-minute choreographed parkour action sequence.<sup>287</sup> He not only wrote, directed, produced, and edited the dialogue and action, but he also acted in the video, performed his own stunts, and composed the original music for it.<sup>288</sup> Therefore, Hoss’s work is highly creative, which initially weighs against a finding of fair use. However, since the Kleins’ use is likely transformative, the creative nature of Hoss’s work does not carry as much weight.<sup>289</sup>

The third factor, the amount and substantiality of the portion

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<sup>280</sup> *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1106 (C.D. Cal. 2015).

<sup>281</sup> *That Dragon, Cancer*, THAT DRAGON, CANCER, <http://www.thatdragoncancer.com/#home> (last visited Mar. 4, 2017).

<sup>282</sup> Markiplier, *supra* note 226.

<sup>283</sup> Markiplier, *supra* note 226.

<sup>284</sup> Markiplier, *supra* note 226.

<sup>285</sup> Markiplier, *supra* note 226.

<sup>286</sup> Complaint and Jury Demand, *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>287</sup> *MattHossZone*, *supra* note 237.

<sup>288</sup> Complaint and Jury Demand, *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>289</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

used in relation to the copyrighted work as a whole, looks to both “the quantitative amount and qualitative value of the original work.”<sup>290</sup> In *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*,<sup>291</sup> the U.S. District Court for the Southern District of New York held that the amount and substantiality of the portion used from a copyrighted work was minimal.<sup>292</sup> There, the defendants used clips aggregating between 41 seconds and 2 minutes in length from the copyrighted film “When We Were Kings” in their Muhammad Ali documentary.<sup>293</sup> These clips consisted only of “.7 to 2.1 percent” of the copyrighted film, which was quantitatively small.<sup>294</sup> Additionally, from a qualitative standpoint, the clips were not the focus of the documentary and “the allegedly infringing uses [were] not particularly noticeable even if one is looking for them.”<sup>295</sup> As such, the court held that both the quantitative and qualitative aspects of the documentary weighed heavily in favor of finding fair use.<sup>296</sup>

In contrast, the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios*<sup>297</sup> held that use may still be fair even when the entirety of the copyrighted work is reproduced.<sup>298</sup> There, Universal alleged that Sony was contributorily infringing on Universal’s copyrighted works via its home videotape recorders (VTRs).<sup>299</sup> The Court held that Sony was not liable because the VTRs had substantial non-infringing uses, such as time-shifting, to allow consumers to watch television shows at a later time.<sup>300</sup> Even though the VTRs recorded the entirety of copyrighted works, the Court reasoned that time-shifting was fair use because there was ultimately no evidence that time-shifting would harm the potential market for the copyrighted works.<sup>301</sup> Therefore, the Court placed more emphasis on market harm than on the amount and substantiality of the portion used in re-

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<sup>290</sup> 17 U.S.C. § 107 (2012); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013).

<sup>291</sup> *Monster Commc’ns, Inc. v. Turner Broad. System, Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 491.

<sup>294</sup> *Id.* at 495.

<sup>295</sup> *Id.*

<sup>296</sup> *Monster Commc’ns, Inc.*, 935 F. Supp. at 495.

<sup>297</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 420.

<sup>300</sup> *Id.* at 456.

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

lation to the copyrighted work as a whole.<sup>302</sup>

In his LP of *That Dragon, Cancer*, Markiplier plays through the entirety of the 2-hour game.<sup>303</sup> He does not clip the game at all but instead makes the video game the focus of his video while his reactions are placed in the top left corner of the screen.<sup>304</sup> Since the purpose of this game is not to beat a level but to learn and understand the family's struggles with a child's illness,<sup>305</sup> the plot, dialogue, and music are the critical elements of the game. Though Green had intended for players to personally interact with the characters of the game, rather than just watch as passive bystanders, it is undeniable that, for many people, watching the story itself satisfies their interest in the game.<sup>306</sup> Therefore, Markiplier takes a substantial quantitative amount of the game because the *entirety* of the game is shown in his video.<sup>307</sup> Additionally, he takes a substantial qualitative amount of the game because he cuts to the "heart" of the game by revealing each and every cutscene,<sup>308</sup> thus showing subscribers the actual elements of why people would be interested in the game at all. Unlike the VTRs in *Sony*, Markiplier's taking of the "heart" of the video game likely causes immense harm to the potential market for *That Dragon, Cancer*.<sup>309</sup>

In the *The Big, the BOLD, the Beautiful*, the Kleins clip Hoss's work instead of streaming the entire work in the corner of the screen or in a split screen.<sup>310</sup> However, these clips, in the aggregate, show virtually all of Hoss's work.<sup>311</sup> Hoss's work is only 5 minutes and 24 seconds long<sup>312</sup> while the Kleins' work contains 3 minutes and 42 seconds of Hoss's work combined over 24 separate clips.<sup>313</sup> As such, the quantitative amount is substantial, since a viewer can simply see Hoss's work almost in its entirety in the Kleins' video rather

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<sup>302</sup> *Sony*, 464 U.S. at 456.

<sup>303</sup> Markiplier, *supra* note 226.

<sup>304</sup> Markiplier, *supra* note 226.

<sup>305</sup> Stanton, *supra* note 227.

<sup>306</sup> Green, *supra* note 44.

<sup>307</sup> Markiplier, *supra* note 226.

<sup>308</sup> Markiplier, *supra* note 226.

<sup>309</sup> Green, *supra* note 44 (“[O]ur studio has not yet seen a single dollar from sales.”).

<sup>310</sup> Seashroom, *supra* note 239.

<sup>311</sup> Seashroom, *supra* note 239.

<sup>312</sup> MattHossZone, *supra* note 237.

<sup>313</sup> Defendants' Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

than separately searching for Hoss's work instead. It is likely that the Kleins' subscribers, who enjoy watching their videos for the jokes, commentary, and criticism, have no incentive to search for Hoss's video because they already have seen it, separated by clips, in the Kleins' video. Additionally, these clips certainly take the qualitative "heart" of Hoss's work, as they show virtually *everything*, including the entire parkour action sequence,<sup>314</sup> which was extremely popular at the time the video was created<sup>315</sup> and was likely one of the main reasons why people would want to watch Hoss's video at all. Overall, the Kleins take *more* than was reasonably necessary to allow their "jokes, comments, and criticisms to make sense to the viewer and resonate."<sup>316</sup> Rather than showing 3 minutes and 42 seconds of Hoss's work,<sup>317</sup> they could have instead shown short examples of conversations or stunts and then commented and criticized based on those examples. Even if those examples included one or two of the funniest or most awkward moments of Hoss's work, which could arguably have been the "heart" of Hoss's work, it is likely that these examples would not be more than was reasonably necessary for the Kleins' jokes to make sense. However, instead, Hoss's work itself pervades Kleins' video, as the Kleins' took too much and cut to the "heart" of Hoss's work. Thus, this factor weighs against a finding of fair use.

Finally, the fourth factor, the effect of the plaintiff's use upon the potential market for or value of the copyrighted work,<sup>318</sup> states that "[w]here the secondary use is not a substitute for the original and does not deprive the copyright holder of a derivative use. . . [there is a weighing] in favor of fair use."<sup>319</sup> In *SOFA Entertainment v. Dodger Productions*,<sup>320</sup> the U.S. Court of Appeals for the Ninth Circuit held that one 7-second clip of *The Ed Sullivan Show* used in the Broadway musical *Jersey Boys* was not a substitute for *The Ed Sullivan Show*

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<sup>314</sup> Seashroom, *supra* note 239.

<sup>315</sup> AP, *Parkour Fitness Craze Born Out of YouTube Fad*, CBSNEWS (Feb. 28, 2014), <http://www.cbsnews.com/news/parkour-fitness-craze-born-out-of-youtube-fad/>.

<sup>316</sup> See *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1107 (C.D. Cal. 2015).

<sup>317</sup> Defendants' Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>318</sup> 17 U.S.C. § 107 (2012).

<sup>319</sup> *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013).

<sup>320</sup> *Id.*

itself.<sup>321</sup> This factor weighed in favor of fair use because “Dodger’s use of the clip advance[d] its own original creation without any reasonable threat to SOFA’s business model.”<sup>322</sup> In other words, since the use of the clip was held to be transformative, market substitution was unlikely.<sup>323</sup>

As stated above, Markiplier’s LP of *That Dragon, Cancer* is likely not transformative, as it shows the game in its entirety with no editing and minimal comments and analyses.<sup>324</sup> When comparing the millions of views of LPs on YouTube to the only 14,000 copies of the game sold as of March 2016, it is likely that many viewers are satisfying their interest in the game for free by simply watching the LPs on YouTube.<sup>325</sup> To many, if they watch the LP in its entirety to experience all the cutscenes and dialogue sequences, it is unnecessary to then purchase the game and interact with it themselves. *That Dragon, Cancer* is not a game of skill or a multi-player party game that people would purchase regardless of first viewing it on an LP. Rather, it is a game that completely revolves around a story so it is very likely that market substitution occurred here.

On the other hand, the Kleins’ use of their clips is probably transformative, and as such, any negative effect on Hoss’s business model is unlikely. Though it is arguable that some of the Kleins’ subscribers may have decided not to watch Hoss’s video because they had already seen it in the Kleins’ video, many subscribers probably do not care about that underlying work at all and instead watch the videos because they enjoy the Kleins’ style, personality, jokes, comments, and criticisms. Many of these subscribers would never have been interested in Hoss’s channel on their own because it caters to an entirely different audience for its vlogs and short films.<sup>326</sup> Besides, even if they were interested in Hoss’s videos, the Kleins’ video ultimately is not a substitute because their video is over 13 minutes in length consisting of comments, criticisms, jokes, and sexual innuendos and only 3 minutes and 42 seconds are Hoss’s work shown in

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Markiplier, *supra* note 226.

<sup>325</sup> Chris Higgins, *That Dragon, Cancer Suffers Poor Sales, Suspects Let’s Plays*, PCGAMESN (Mar. 27, 2016), <https://www.pcgamesn.com/that-dragon-cancer/that-dragon-cancer-suffers-poor-sales-suspects-lets-plays>.

<sup>326</sup> MattHossZone, *About*, YOUTUBE, <https://www.youtube.com/user/MattHossZone/about> (last visited Mar. 4, 2017).

separate clips.<sup>327</sup> Although Hoss may not enjoy or appreciate the Kleins' negative treatment of his work, this negative treatment is not necessarily damaging to a fair use finding.<sup>328</sup> The Kleins pointed out, "If a viewer had any real interest. . .they would go directly to that video which is merely a mouse click away on YouTube instead of sitting through [our] constant interruptions and commentary."<sup>329</sup> As such, this factor weighs in favor of fair use.

Ultimately, if Ryan Green had decided to sue Markiplier for copyright infringement, it is likely that he would have won, as Markiplier does not have a fair use defense. Indeed, all four factors weigh against a finding of fair use because Markiplier's video shows the entirety of *That Dragon, Cancer* with minimal editing or commentary. On the other hand, for the Kleins' video, which focuses on their criticisms and jokes, it is likely that the court will hold that their use of Hoss's clips is fair and does not infringe on his copyright.

Either way, as shown above, these determinations required an in-depth analysis of each of the four factors under the Copyright Act. These four factors create fear and uncertainty for YouTubers because their videos using portions of copyrighted works could be demonetized or taken down at any time in the future if copyright owners analyze the factors differently and ultimately disagree with the YouTubers—even if the YouTubers truly believed that their use was fair and non-infringing in the first place. Therefore, changes to the DCMA and YouTube's policies are necessary to protect YouTubers who rely on their monetized videos for their livelihood.

## VI. RECOMMENDATIONS

As LPs and reaction videos become increasingly popular, there will be more DMCA takedowns, Content ID notifications, and copyright infringement suits. Many content creators do not understand fair use, and they believe that minimal commentary and editing are enough to protect themselves from allegations of copyright in-

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<sup>327</sup> Defendants' Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzaideh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).

<sup>328</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-93 (1994).

<sup>329</sup> Defendants' Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Matt Hosseinzaideh v. Ethan Klein and Hila Klein*, No. 16-cv-3081 (S.D.N.Y. 2016).



fringement.<sup>330</sup> Others believe that giving credit to the copyright owner or posting a disclaimer that they do not own the underlying work will protect them as well.<sup>331</sup> To counteract this misunderstanding, YouTube has an informative fair use webpage that contains three video examples of fair use, a detailed explanation of the fair use factors and links to more resources, such as the Center for Media and Social Impact's Code of Best Practices in Fair Use for Online Video, the Digital Media Law Project's explanation of the fair use factors, and the U.S. Copyright Office's fair use index.<sup>332</sup> Yet, despite these resources, thousands of infringing videos are still uploaded every day as the LP and reaction video communities continue to grow.

The DMCA's notice and takedown system has destroyed the fair use doctrine as applied to digital media because it does not recognize when a use of a work is indeed *fair use*.<sup>333</sup> While copyright owners are encouraged by the U.S. Copyright Office to review material to determine whether it qualifies for fair use before sending DMCA takedown notices,<sup>334</sup> it is quite apparent from the astronomical number of takedown notifications on Google every year that they do not conduct such a review.<sup>335</sup> Some commentators have proposed a "reverse notice and takedown regime" as a solution to revive the fair use doctrine in the digital age.<sup>336</sup> Under such a regime, YouTubers and other content creators would send a notice to copyright owners that they intend to use their copyrighted material for non-infringing purposes, and copyright owners would have fourteen days either to object to the use or to allow it "by silence, without prejudice."<sup>337</sup> If the copyright owners deny the use, then the YouTubers could seek a declaratory judgment "to vindicate [their] claim to an entitlement to circumvent a TPM ["technological protection measure"] for the purpose of engaging in the specified non-infringing

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<sup>330</sup> *What is Fair Use?*, *supra* note 151.

<sup>331</sup> *What is Fair Use?*, *supra* note 151.

<sup>332</sup> *What is Fair Use?*, *supra* note 151.

<sup>333</sup> Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 106 (2010).

<sup>334</sup> *U.S. Copyright Office Fair Use Index*, *supra* note 176.

<sup>335</sup> *See Requests to remove content due to copyright*, *supra* note 177.

<sup>336</sup> Jerome H. Reichman et. al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007).

<sup>337</sup> *Id.* at 1032.

use.”<sup>338</sup> While this method would impose the burden on YouTubers to send out a notice every time they want to upload a video (which, for some YouTubers, would occur *every day*), this method would do a good job to ensure that YouTubers’ videos would not be demonetized or taken down at a later date. In other words, it would restore some certainty to YouTube.

Similarly, in 2007, Michael Carroll, who is currently a Professor of Law at American University Washington College of Law,<sup>339</sup> proposed the creation of a Fair Use Board (the “Board”) in the U.S. Copyright Office to adjudicate fair use petitions and issue rulings.<sup>340</sup> Under this system, YouTubers would petition the Board and serve notice of that petition on the copyright owner, who then, in turn, could participate in the hearing before the Board.<sup>341</sup> After the Board made its decision, either party could appeal administratively and then to the federal court system if necessary.<sup>342</sup> While the Board’s rulings would be nonbinding, such rulings would likely “influence the development of binding fair use decisions by the federal courts,” as is the case in the areas of law involving the Internal Revenue Service and the Securities and Exchange Commission.<sup>343</sup> Again, as under the “reverse and takedown” proposal, this method would place the burden on the YouTubers to petition every time they want to upload a new video using copyrighted material. Additionally, it would be very costly—especially when YouTubers and the copyright owners dispute the use of the copyrighted work before the Board and then appeal it administratively and to the federal courts.<sup>344</sup> It would also be time consuming, “[g]iven that fair use is the most common defense to infringement suits” and “review requests may overwhelm the administrative body.”<sup>345</sup> However, despite these drawbacks, it would still be a better method than the uncertainty that plagues YouTube today.

If these two methods are unfeasible or place too much of a burden on the YouTuber, then it may be better to revise YouTube’s policies. Doug Walker, in his “Where’s the Fair Use?” video, argued

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<sup>338</sup> *Id.* at 1032-33.

<sup>339</sup> *Faculty – Michael W. Carroll*, AMERICAN UNIVERSITY WASH. COLLEGE OF LAW, <https://www.wcl.american.edu/faculty/mcarroll/> (last visited Mar. 4, 2017).

<sup>340</sup> Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007).

<sup>341</sup> *Id.* at 1123.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 1140.

<sup>344</sup> Parchomovsky & Weiser, *supra* note 333, at 111.

<sup>345</sup> *Id.*

that after a copyright owner submits a DMCA takedown notice to YouTube, “a [copyright] strike should not automatically and immediately be placed on [the YouTuber’s] account.”<sup>346</sup> Instead, he stated that there should be a grace period in which the YouTuber could notify YouTube that he or she is fighting the DMCA takedown notice.<sup>347</sup> Additionally, because copyright owners at the present time can submit as many DMCA claims as they want, even if such claims are false or unfounded, Walker argued that YouTube should institute penalties against copyright owners for false claims.<sup>348</sup> Penalties would deter copyright owners from submitting such false claims and would force them to actually review the videos to determine whether they constitute fair use.<sup>349</sup> Unlike the proposed amendments to the DMCA, these revisions would be relatively easy and cost-effective to implement and YouTubers would see direct benefits almost immediately.

However, perhaps the best way for copyright owners to approach allegedly infringing videos is to have an open policy, thus allowing the videos to remain online and taking a percentage of the ad revenue through YouTube’s monetization policies. That way, the copyright owners receive free publicity and a share in the video’s profits while the content creators continue to make their videos without the fear that the music will be removed or the video will be taken down entirely. However, on the one hand, such a policy may not work for small, independent copyright owners, such as Ryan Green, because the ad revenue would not be enough to counteract the fact that they are not making profits or are losing profits on their original works.<sup>350</sup> On the other hand, for corporate copyright owners, such as Nintendo, the policy makes sense, as they will receive free publicity and uniform treatment.

There is likely no silver bullet solution to the problem of uncertainty. Rather, some combination of the above proposals will need to be instituted to protect videos that constitute fair use. Doug Walker has claimed, “I have been doing this professionally for over eight years, and I have never had a day where I felt safe posting one of my

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<sup>346</sup> Channel Awesome, *supra* note 185.

<sup>347</sup> Channel Awesome, *supra* note 185.

<sup>348</sup> Channel Awesome, *supra* note 185.

<sup>349</sup> Channel Awesome, *supra* note 185.

<sup>350</sup> See Green, *supra* note 44.

videos.”<sup>351</sup> It is necessary to finally allay that fear, and Congress should take action soon to do so.

## VII. CONCLUSION

The DMCA and YouTube’s copyright policies are ill-equipped to handle this ever-expanding online media because they fail to curb YouTubers’ uncertainty over whether their videos will be demonetized or taken down at some time in the future. If there was a reverse notice system<sup>352</sup> or a review board in place,<sup>353</sup> Ryan Green, as a small, independent copyright owner, would not have lost potentially hundreds of thousands of dollars in profit to the rampant infringing Let’s Play videos on YouTube.<sup>354</sup> Hila and Ethan Klein would not have spent over \$50,000 in attorney’s fees for December 2016 alone fighting a copyright owner over a video that likely is non-infringing.<sup>355</sup> Although the ultimate answer may lie in the content creators and copyright owners working together in harmony outside of the confines of a courtroom, there also should be institutional protections for fair use in place to protect against abuse. Otherwise, YouTubers will forever be left with the question: “Where’s the fair use?”

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<sup>351</sup> Channel Awesome, *supra* note 185.

<sup>352</sup> See Reichman, *supra* note 336.

<sup>353</sup> See Carroll, *supra* note 340.

<sup>354</sup> Green, *supra* note 44.

<sup>355</sup> h3h3Productions, *We’re Still Being Sued*, YOUTUBE (Feb. 27, 2017), <https://www.youtube.com/watch?v=m40bWgWH8Ro>.