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What is Fair Play When It Comes to Fair Use of Online Gaming Videos and Streaming in the United States and Germany

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Abstract

A new form of entertainment has emerged at appeals to many videogame players. Many are demonstrating to the world their gameplays online through videos or live-streaming. These content creators in United States ("U.S.") and European who participate in posting or streaming of online gaming may be worried that they will be subject to the United States or German copyright laws. They may even fear that they will be given a "DMCA Takedown Notice" or that their content will not be available in certain countries due to copyright laws. Since there is uncertainty as to whether a U.S. or German court would rule in favor of video game developers or for the "content creators" when it comes to the use of video games in online videos and streams. This paper examines how copyright laws and fair use defenses affect content creators by comparing the application of U.S. and German copyright and fair use laws, and whether content creators should live in such fear for copyright infringement actions taken against them.

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Introduction

In today's contemporary online videogame culture, a new form of entertainment has emerged. Many gamers are not only playing games for fun, but they are also showing the world their gameplays online through videos or live-streaming ("streams"). This is different than "e-sports,"[1] as this is usually non-competitive content. Usually, these gamers are overlaying their gameplay content with commentary, picture in picture images of themselves playing the game in real time, as well as other professional special effects and other add-ons that are only limited by one's imagination that are in addition to the basic videogame gameplay.

However, many United States ("U.S.") and European gamers who participate in posting or streaming of online gaming may be worried that they will be subject to the United States' or even German copyright laws.[2] The goal for these people is to allow as many viewers as possible to see their content. Many YouTubers and online video game streamers fear that one day, they will be given "DMCA Takedown Notices"[3] for their content[4] or that their content will not be available in certain countries, both due to copyright laws.

There is uncertainty as to whether a U.S. or German court would rule in favor of video game developers or for the "content

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* The laws relating to fair use and video game streaming is a relatively untouched area in the law. Not many cases have been decided in the United States, Germany, or even the world covering this area. Thus, this paper is prospective in the sense that if a claim were to occur and a court needed to decide a case, this paper looks at what would be the likely outcome. Therefore, not many statutes or case law exist that are "on-point" for this issue. However, other laws, cases, and scholarly articles can be applied to find a probable and likely outcome.

[1] In this paper, "e-sports" refers to competitive gaming while the content YouTubers and online streamers create is for educational, entertainment, or other purposes.

[2] The U.S. and Germany take up two of the most popular countries for viewing online gaming and streaming. *Share of Twitch viewership worldwide as of December 2018, by country*, STATISTA, https://www.statista.com/statistics/511558/twitch-access-share-by-device/ (last visited Dec. 1, 2019).

[3] When content is removed from a website at the request of the owner of the content or the owner of the copyright of the content. It is a well-established, accepted, internet standard followed by website owners and internet service providers.

[4] WHAT IS A DMCA TAKEDOWN?, DM(C)A, https://www.dmca.com/faq/What-is-a-DMCA-Takedown (last visited Dec. 1, 2019).

creators"[5] when it comes to the use of video games in online videos and streams. This issue is important for multiple reasons. First, many videogame content creators monetize their content to earn significant sums of money. Other creators wish to educate and entertain anyone who wishes to view their content. If their content is subject to copyright laws, and the copyright holder sues for an injunction against the content creator, then the entire "business" can come to a screeching halt. Online video creation and streaming is a massive business that can be extremely profitable for content creators. Some creators argue that they are protected by fair use, but developers may disagree. So, how does one determine what is "fair play" when it comes to "fair use" of online gaming videos and streaming, especially when applying the different copyright laws in the United States and Germany?

This paper seeks to examine how copyright laws and fair use defenses affect uploaders of online gaming videos and streaming today by comparing the application of U.S. and German copyright and fair use laws. It should also be noted that this paper's focus is on smaller channels and streamers, not high-earning content creators that often are featured by companies who also take a percentage of advertising revenue and manage legal issues.[6] These smaller channels and streamers are the most susceptible to copyright claims by developers as they are less likely to have a licensing agreement and they exist in larger numbers.

First, I will examine what the online gaming videos and streaming culture is currently in the United States and in Germany (but also world-wide). Next, I explain what the applicable copyright laws are in the U.S. and Germany, including the relevant statutes and the defense of fair use, which can affect video game content creators. Following this, I will apply the laws in both the U.S. and Germany to determine if the game developers may have a valid copyright claim, or

[5] In this paper, the term "content creator(s)" includes any person who posts video game gameplay online or streams his or her gameplay online on any platform.
[6] Chris Kohler, *Why Does Nintendo Want This Superfan's YouTube Money?*, Wired (Mar. 27, 2015, 6:30 AM), http://www.wired.com/2015/03/nintendo-youtube-creators/?mbid=social_twitter (last visited Dec. 2, 2019).

if fair use can apply to defense content creators. Finally, I argue that even if fair use does not apply in either jurisdiction, why it does not make sense for copyright holders to even bring a copyright claim even if a copyright infringement does occur.

I. What is Online Gaming Today and Why is it Economically Significant?

Whether you are a serious online gamer or have no clue as to what YouTube or online streaming is, online gaming is a huge business, especially for those who post online content of their gameplay or stream it. People are watching online gaming streaming in huge numbers and "often in prodigious quantities."[7] This means there are not just millions of viewers, but millions of dollars to be made too.

Online gaming is not a new phenomenon. For well over ten years, online gamers have been posting gameplays on websites like YouTube.com., Twitch.com, Vimeo.com, and MajorLeagueGaming.com, just to name a few of these websites. These videos and online streams can attract huge audiences from around the world, as almost anyone with an internet connection can play and watch others play these games.

Many content creators can make money from their channels and streams through advertisements and subscriptions. The number of advertisements one has is private information, but the number of subscriptions at any single time can be found. YouTube channels such as those of the likes of "PewDiePie" have surpassed 100 million subscribers; and "Vegetta777" has over 25 million subscribers.[8] On the popular streaming website Twitch.tv, "Tfue" has over 7 million

[7] Taylor Clark, *How to Get Rich Playing Video Games Online*, THE NEW YORKER, https://www.newyorker.com/magazine/2017/11/20/how-to-get-rich-playing-video-games-online (last visited Dec. 2, 2019).

[8] *The 15 Biggest YouTube Channels Right Now*, THRILLIST ENTERTAINMENT, https://www.thrillist.com/entertainment/nation/top-youtube-channels-most-popular-youtubers (last visited Dec. 2, 2019).

followers; shroud has over 6 million followers; and "TSM | Myth" has over 5 million followers.[9] Furthermore, before he signed an exclusive partnership deal with Microsoft, "Ninja," a world famous online gamer had over 14 million followers.[10]

When posting videos and when hosting live streams, these content creators only have a fraction of their subscribers or followers watch their content. However, which such massive numbers of subscribers and followers, still enormous numbers of views are generated. This is important, because YouTubers and streamers earn money from the amount of views their videos receive or clicks to advertisements associated with their content.

YouTubers can make about $10 per 1,000 views. "PewDiePie" is estimated to have a net worth of over $12 million thanks to the monetization of his gaming videos through the YouTube Partner Program.[11] Even Twitch streamers can make between $1,000 and $10,000 per hour depending on the number of viewers.[12] "Ninja" is estimated to have made over $423,000 per month from Twitch streaming just due to paid subscriptions.[13]

Therefore, online videos and streams are a big and profitable business. People from all across the world have been able to earn money from playing video games and posting their content online. But what is even more significant is that this has lead tens-of-thousands of other, smaller content creators who to do the same thing. They do so in

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[9] *The 10 most popular channels on Twitch*, BUSINESS INSIDER, https://www.businessinsider.com/top-twitch-streamers-by-follower-count-ninja-shroud-tfue-2019-6#honorable-mention-ninja-147-million-followers-1 (last visited Dec. 2, 2019) (similarly to YouTube.com, Twitch streamers can be evaluated based on the number of subscribers and average number of viewership during a live stream).

[10] *Id*. Ninja is one of the most famous YouTube and Twitch "stars" since either platform was created. Ninja has become so popular that a new social media website has recruited him and paid him millions of dollars to exclusively post his content on that platform. This serves to show how significant the content creator and streaming platform can be at its most extreme.

[11] Holly Hunt, *How Much Do YouTubers Make (And How You Can Make It, Too)*, LEARN.G2, (Dec. 4, 2019) https://learn.g2.com/how-much-do-youtubers-make (last visited Dec. 6, 2019) (this list ranges from $14.5 million to $22 million USD).

[12] *Here's A Candid Breakdown Of Exactly How Much Money Twitch Streamers Earn Per Month*, TUBEFILTER, https://www.tubefilter.com/2018/10/10/twitch-streamers-earn-per-month-breakdown-disguisedtoast/ (last visited Dec. 6, 2019).

[13] *Id*. Paid subscriptions does not include the amount that a person can "donate" to one of their favorite streamers which can also increase the amount those people make.

an attempt to "go viral" by merely playing their favorite video games too. They create their content as a hobby, to educate, and to entertain others through video games. They do not have the viewership to attract game developers' attentions in order to sign a licensing agreement to use copyrighted gaming content.

But in the back of many content creator's minds is one question, from a copyright standpoint, are their actions legal? Do they have a defense if not? In what jurisdictions could I have a defense to a copyright claim? What are the prospects of succeeding if such claim were brought and what are my defenses? In order to answer these questions, a closer examination of both the U.S. and German copyright laws, as well as fair use defenses, is needed.

II. What are the Applicable Copyright Laws and Fair Use?

In the U.S., the federal government has the jurisdiction to enact copyright laws affecting intellectual property rights. Title 17 of the United States Code contains the U.S. copyright laws, such as the Copyright Act of 1976 and all of its subsequent amendments.[14] Furthermore, the U.S. Copyright Office has the responsibility of registering all intellectual property claims under the act. Plus, the U.S. Copyright laws cover a wide subject matter under § 102.

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5)

[14] *See* Title 17 of the United States Code.

pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.[15]

However, [i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[16]

When § 102(a) of the U.S. copyright law is applied to video games, it is obvious that the developers are protected under the law and have rights.[17] Video games are works of art covered by the copyright act. They are original, creative works by developers fixed in a tangible medium that clearly can be perceived with the aid of a computer. Large video game developers such as EA, Activision, and Sony want to protect their intellectual property from unauthorized use. This can include the game engines, art within the game, characters, code, original music, the specific game's story, the finished game, etc.[18]

What is not protected by copyright are the ideas for a game, or the method or methods for playing it according to § 102(b).[19] Furthermore, copyright laws will not protect any idea, system, method, device, or trademark material involved in developing, merchandising, or playing a game.[20] However, this is not relevant to content creator who are posting videos online.

In Germany, an authors' right or "Deutsches Urheberrecht" is codified in the Gesetz über Urheberrecht und verwandte Schutzrechte ("UrhG").[21] The author, who is the creator of a piece of work, enjoys

[15] 17 U.S.C. § 102(a).
[16] 17 U.S.C. § 102(b).
[17] 17 U.S.C. § 102(a).
[18] *Game Design Copyright & Patent Guide*, GAME DESIGN, https://www.gamedesigning.org/gaming/copyright/ (last visited Dec. 6, 2019).
[19] 17 U.S.C. § 102(b).
[20] *Id*. (quoting the copyright office).
[21] *See* Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng and Stan Abrams, *The Legal Status of Video Games: Comparative Analysis in National Approaches,* WIPO, July, 29, 2013,

copyright protection. It is up to the author if they want to grant someone such as a publisher the right to reproduce and distribute their work. The author has the exclusive right to exploit the copyrighted work in any form.[22]

German copyright laws provide protection to authors of computer programs. German law protects numerous subject matters which include: (1) works of language, such as writings, speeches and computer programs; (2) musical works; (3) works of pantomime, including choreographic works; (4) works of fine art, including works of architecture and of applied art and plans for such works; (5) photographic works, including works produced by processes similar to cinematography; and (6) illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations. In order for a creation to become a work of authorship the following premises must also be fulfilled: it must be the manifestation of creative activity of a human being of individual nature and it must be established.[23]

While there is no reference to video games in the law, previous decisions and commentary have stated that video games can find protection under the law.[24] Legal doctrines state that numerous different classifications apply to the protection of video games within the UrhG.[25] Thus, German copyright law also protect a video game developers' rights to such works.

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https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf. WIPO (World Intellectual Property Organization) is an international organization that was created to encourage creative activity and also promote the protection of IP throughout the world. There are 192 current member states to WIPO.

[22] *Copyright 2020, Laws and Regulations*, ICLG, https://iclg.com/practice-areas/copyright-laws-and-regulations/germany (last visited Dec. 20, 2019).

[23] Thomasz Grzegorczyk, *Qualification of Computer Games in Copyright Law*, SCI. J. WSFIP 1/2017, 131, 136-37 (Sept, 2017).

[24] *See supra* note 20.

[25] *Id*.

III. Fair Use Applies to Online Video Game Content Creators in the U.S.

In the U.S. and other countries[26], there is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.[27] This is the "fair use" defense. The statutory framework for determining whether something is a fair use is determined by statute.[28] Section § 107 identifies certain types of uses that may qualify as "fair use" such as: criticism, comment, news reporting, teaching, scholarship, and research.[29] As one will see, fair use is a broad standard. It is based on a court's discretionary application of the law, this allows the courts to serve the purpose of U.S. copyright law, to protect works, while also considering the public interest to a certain but undefined degree. When applying the U.S. fair use law, content creators' online videos should fall under this exception to copyright laws.

According to § 107, there are four main factors when evaluating a fair use defense: (1) the purpose and character of the use, including whether the 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.[30] U.S. Courts have affirmed an important precedent that calls for a flexible application of fair use.[31]

[26] Other countries' fair use laws may not apply in the same way, have the same factors, or be similar in language; however, they have the same basic concept as being a defense to a copyright claim.
[27] https://www.copyright.gov/fair-use/more-info.html
[28] 17 U.S.C. § 107.
[29] *Id.*
[30] *Id.*
[31] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S. Ct. 1164 (1994); *see also* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984). Courts in the United States have emphasized that they had been reminded by the United States' Supreme Court "to be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public." Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d at 1166.

First, a court will look at the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.[32] It is significant for courts to examine how the party claiming fair use is using the work.[33] Courts will also balance the purpose and character of the use against the other factors.[34] Additionally, "transformative" uses are even more likely to be considered "fair use."[35] Transformative uses are those that add some additional or new, with a further purpose or different character, and do not substitute for the original use of the work.[36] One court held that the transformative nature of the use is more significant than any incidental superseding use or the minor commercial aspects.[37] Thus, courts look for a transformation of the work.

With respect to this first factor, the purpose and character of online video game content and streams are to entertain an audience in a different way than the game was developed. Many commentators and streamers give tutorials on how to play the game. This can be seen as an educational purpose. Some content creators showcase montages of exceptional gameplay for artistic purposes. Even others merely want to use the game as a backdrop for conversations and to tell stories, which is usually not for commercial purposes. Content creators may also want to demonstrate the game in order to critique it or to provide honest feedback to others about the game.

More significantly, the content creators are transforming the copyrighted work through some type of commentary, critique, teaching or for a reaction. Commentators are adding their own creative and original commentary. Others supplement their own critique to games for flaws or playability. Some demonstrate and teach users how to play the game. Others edit their videos with professional editing software in

[32] 17 U.S.C. § 107.
[33] *More Information on Fair Use*, COPYRIGHT.GOV, https://www.copyright.gov/fair-use/more-info.html (last visited Dec. 7, 2019).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Perfect 10, Inc. v. Google, Inc., 508 F.3d 1146, 1167 (9th Cir. 2007).

order to create theatrical montages and cinematic stories. Others are even putting in their own face to talk to the audience during their videos and streams to give their reactions. Al of these additional, new, and further purposes transform the original work.

Second, courts will also look to the nature of the copyrighted work.[38] Courts will analyze the degree to which the work that was used relates to copyright's purpose of encouraging creative expression.[39] Using a more creative or imaginative work such as a novel, movie, or song is less likely to support a claim of a fair use than using a factual work such as a technical article or news item.[40] "Some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[41] In addition, use of an unpublished work is less likely to be considered fair.[42]

Looking at the nature of the work, creative expression would be encouraged by allowing content creators to use the copyrighted work. A video game is not like a novel, movie, or song, but it is also not factual either. Content creators are attempting to construct creative and new content for people to enjoy by adding to their own gameplay. Courts have not determined that video games are close to the core of intended copyright protection compared to other works. Like in, *Campbell v. Acuff-Rose Music, Inc.*, this factor is not of much help.

Third, courts will also examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole.[43] Courts analyze both the quantity and quality of the copyrighted material used.[44] If the use includes a large portion of the copyrighted work, fair use is less likely to be found; but if the use employs only a

[38] 17 U.S.C. § 107.
[39] *More Information on Fair Use*, COPYRIGHT.GOV, https://www.copyright.gov/fair-use/more-info.html (last visited Dec. 7, 2019).
[40] *Id*.
[41] *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 586 (1994).
[42] *See supra* note 38.
[43] 17 U.S.C. § 107.
[44] *See supra* note 38.

small amount of copyrighted material, fair use is more likely.[45] Some courts held that the use of an entire work may be fair under in some contexts; but also using even a small amount of a copyrighted work might not to be fair because the selection was an important part—or the "heart"—of the work.[46]

Usually, content creators are only using one "gameplay" at a time.[47] That is to say, they only use one match during an entire gameplay, to upload or stream., it is hard to say that a significant quantity of the copyrighted material is being used. Furthermore, the "most important" copyrighted material such as the code is not being used. Thus, the quality of the copyrighted material is not infringed upon either. Even if a court were to find that the "entire work" was being used, it should still find that the use is fair.

There are infinite ways for online games to be played as numerous real people control the in-game characters. The content creators are in control of limitless actions in the game. Content creators, because they are in control of the gameplay while playing online, create a unique and customized gameplay experience that cannot be replicated by another person. Therefore Thus, they are merely using the game as a platform to create a new work. This could be similar to using Adobe Photoshop where users use the Adobe platform and use the tools within Photoshop to create their own art and a completely new work. Content creators are using their own ideas and the game to create their own, new work.

Plus, content creators avoid the "heart" of the work. The heart of a video game relates to the most important parts of the video game's story or spoilers to the video game. Content creators should be careful to avoid this area in any videos or streams. However, online gameplay that is not the story avoids the "heart" of the work. Thus, the amount

[45] *Id*.
[46] *Id*.
[47] Most videos are less than 10 minutes long. However, some videos and streams can last for hours, some even days long.

and substantiality of the portion used does not infringe upon the copyright holder's rights.

Finally, courts will look at the effect of the use upon the potential market for or value of the copyrighted work.[48] The court will review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work.[49] In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.[50]

As it will be discussed below in further detail, the effect of the use upon the potential market for or value of the copyrighted work would most likely be positive for the copyright holders, rather than harmful. Under this factor, it would be common in many cases for a party claiming fair use to decrease the current market for the copyrighted work. However, in this case, it would only increase the market to the benefit of the copyright holder.

The developers would benefit from free promotions of their products. More potential consumers would be exposed to their product. More consumers would also be influenced to purchase the game and play it like the content creators. Finally, consumers would also be influenced to purchase the game in order to become content creators themselves. Thus, content creators are not hurting the future or current market for the original work. To the contrary, they are helping it. Thus, the factors to fair use indicate that content creators would have the defense of fair use available to them under U.S. law.

[48] 17 U.S.C. § 107.
[49] *See supra* note 38.
[50] *Id*.

IV. Application of German Fair Use Laws; Does Fair Use Apply?

In comparison to U.S. law, German law includes no broad statutory concept of "fair use."[51] The German code does not contain a similarly broad and flexible exemption to copyright laws that is related to public policy. Therefore, courts had to develop and apply legal fictions to cope with this issues that are not addressed by the explicit exemptions in the German code. Only certain exceptions to infringement in German laws are available, but they are usually narrowly crafted to specific circumstances and specifically defined activities.

The German Code is vastly different when compared to the U.S.'s copyright and fair use laws. The German Copyright Act provides a list of limitations and exceptions from the exclusive rights granted to the copyright owner.[52] In a broad sense, the exemptions in the German Code attempt to strike a balance between the interests of the copyright owner, and the public interest on the other.[53] The balancing of these rights can be considered one of the most important principles of German copyright law.[54] However, the German Courts state that the exemptions within the Copyright Act are to be exclusive, and they must be strictly
Interpreted.[55]

Some of the circumstances and activities that would bring a work under the German equivalent of fair use include: (1) if limited parts of certain works are incorporated after their publication in a collection, along with a considerable number of authors, for religious,

[51] *Fair Use And Fair Dealing In Foreign Countries*, http://ccarts.ca/wp-content/uploads/2011/07/FairUseandFairDealinginForeignCountries.pdf (comparing the Germany and United States aspects).
[52] *See* §§ 44a-63 UrhG.
[53] *See* Thomas Dreier & Gernot Schulze, UrhG [Copyright Act], Einleitung [Introduction], para. 39, (2008)[Ger].
[54] *Id*.
[55] *See* Federal Court of Justice, Abbildung von Kunstwerken als Thumbnails in Suchmaschine [Display of Works of Art as Thumbnails in Search Engine], Grur, 630 (2010) [Ger].

school or instructional use; (2) to the extent justified by the purpose, where individual works after their publication are included in an independent scientific work, where passages are quoted in an independent work of language, or where passages of published musical works are quoted in an independent work of music; (3) to make copies of small segments of individual contributions published in newspapers or periodicals for personal use in teaching in non-commercial institutions of education and further education; and (4) making available to the public small portions of published works, articles, individual contributions to periodicals, and other short works, exclusively for purposes of illustration for teaching, for students and other participants in instruction in schools, universities, post-secondary institutions, and noncommercial career-training institutions.[56]

Clearly, none of these explicit exceptions apply to content creators who create online videos or streams.[57] Arguably, a content creator may use a video game developer's work for educational purposes under German law. However, this argument would most likely fair because no "students and other participants in instruction in schools, universities, post-secondary institutions, and noncommercial career-training institutions" are directly involved. Thus, there does not seem to be an equivalent defense under German law as there is in U.S. law to a copyright claim in these circumstances.

[56] *See supra* note 50.
[57] A case could be made that law makers have not had the ability, time, or knowledge of the issue to create such an exception, and that online video game content could fall under one of the existing exceptions. However, these exceptions should be strictly and narrowly interpreted, and thus not include video games content.

V. Even if Fair Use Does Not Apply, Why are Online Gaming Videos and Streams Not Being Taken Down For Copyright Infringement Today?

Even if a court in the U.S. or Germany is not convinced that fair use would apply to YouTubers and live-streamers[58], content creators should not live in fear that their content will be taken down. While many content creators cannot afford to bring a suit if a takedown notice is given, there is one major reason why so many video game developers have not brought a claim against the thousands of content creators:[59] money.

Money is what all of the developers are after. They are in the business to create a product that they can sell for a profit. One of the most difficult aspects of making a profit from video games is creating awareness through advertising about the game and creating excitement for consumers to purchase the game. This is where content creators come in.

YouTubers who create videogame videos and online streamers not only share expressive, original and creative content by uploading videos and streaming, but they also are advertising for the developers. Often when a new game is released, streamers will stream themselves playing the game extensively to explain to others if it is worth buying.[60] Usually, these act as advertisements for the game.

The video game developers should be hesitant to file claims against videos and streams that use their copyrighted work because they act as free advertisements.[61] The content created would not exist

[58] *See* Chris Kohler, *Why Does Nintendo Want This Superfan's YouTube Money?*, WIRED (Mar. 27, 2015, 6:30 AM), http://www.wired.com/2015/03/nintendo-youtube-creators/?mbid=social_twitter (last visited Dec. 5, 2019).
[59] YouTube and other websites have taken down some videos for copyright claims, so this cannot be guaranteed.
[60] Felix Gillette & Spencer Soper, *How Twitch Turned Video Game Voyeurism into Big Business*, BLOOMBERG (Nov. 19, 2015), https://www.bloomberg.com/features/2015-the-big-business-of-twitch/ (last visited Dec. 6, 2019).
[61] *See* Conrad Postel, *"Let's Play": YouTube and Twitch's Video Game Footage and a New Approach to Fair Use*, 68 HASTINGS L.J. 1169, 1172. While in some cases, it may make business sense to have a video or stream taken down, but in many cases, I argue that it is more beneficial to the developers than not.

without the game itself, as it is a central part of the creator's videos and streams. Thus, every time a video is uploaded or streamed, the developers subsequently receive a "free advertising" or promotion of their product. Unless someone significantly interferes with the rights of a developer, no lawsuit should be likely to come as it would be against the developer's business interests. If the developers did bring suits against content creators, they would most likely lose thousands of consumers' business. Thus, content creators need not worry about copyright claims with respect to their content.

VI. Last Resorts for Content Creators if Fair Use is Not an Option

Finally, it should be mentioned that the best practice to avoiding any copyright issues regarding video game content is to ask for and receive permission to use the copyrighted work from the developers or copyright holders. Consent is a guaranteed way to avoid any future legal issues. This can be accomplished through a general license or specific game license.

A general license is simply permission by the developer to use copyrighted work without asking for permission. Often times, an application to use copyrighted video game content can be found on the developer's website.[62] Content creators can find this permission by searching the developer's website such as in their "legal" page.[63]

In other circumstances, the developers must be contacted directly through a specific license. In most cases, content creators may need to apply for permission to use a developer's content. Such an application may be found on the developer's website or the content creator may need to reach out to the developer himself and wait for a

[62] Bryce Blum & Michael J. Schwartz, *Streaming and Copyright Law: A Fast-Developing Area of the Law* 2 (2014). Many game developers expressly allow for online videos and streaming in the terms of use under a general license. *Id*.

[63] For an example of a general license, see Blizzard's general license. *Blizzard Video Policy*, BLIZZARD, https://www.blizzard.com/en-us/legal/dd76b654-f2c4-4aaa-ba49-ca3122de2376/blizzard-video-policy (last visited Dec. 20, 2019).

response. Only if the developer grants permission should the content creator post videos or stream the copyrighted content.

Conclusion

Today's contemporary online video game culture should foster creativity, innovation, and new content.[64] Content creators are using their gameplay for such creative and new content for others to enjoy by adding commentary, picture in picture images of themselves playing the game in real time, as well as other special effects that are in addition to the basic video gameplay. While many video game content creators monetize their content to earn significant sums of money, others only do so as a hobby or to entertain and educate others. Thus, they need to be able to use video games without the threat of a copyright claim made against them in the process.

The application of copyright laws and fair use in the U.S. and Germany can lead to different outcomes for game developers and content creators. This is important because these are two of the most popular locations for online video and streaming viewers. Copyright laws in both the U.S. and Germany protect video game developers from unauthorized use of their work. However, fair use is not a uniform defense in all jurisdictions.

In the U.S., after applying the four factors relevant to fair use, it can be determined that content creators should be protected from a copyright claim as long as they are adding to the copyrighted work through commentary, teaching, or other fair use means while using the minimal amount of video game content possible. But in Germany, there is no specific "fair use" law that acts as a defense. There are enumerated exceptions to copyright laws, but none specifically apply to content creators. Thus, some may be without a formal defense.

Even if it were determined by a court that fair use or an exception to copyright laws were not to apply in either jurisdiction, it

[64] Copyright and fair use laws need to balance the copyright holder's interests and public policy interests.

does not make sense for copyright holders to bring a claim for copyright infringement. There is too much to lose economically an financially by preventing content creators from using their work than by allowing them to provide "free advertising" and other promotions of their games. This comes as a byproduct from allowing content creators to use their game as part of their videos and streams. Thus, the only fair and reasonable outcome for most content creators is that they should be able to post their content online without the threat of a copyright claim. Still, content creators can obtain a general or specific license to avoid copyright claims in either jurisdiction to be safe in any anywhere.

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