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Nerf This: Copyright Highly Creative Video Game Streams as Sports Broadcasts

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NOTES

NERF THIS: COPYRIGHTING HIGHLY CREATIVE VIDEO GAME STREAMS AS SPORTS BROADCASTS

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INTRODUCTION

Since the 1980s, video games have grown exponentially as an entertainment medium. Once relegated to the niche subcultures of nerds, video games are now decidedly mainstream, drawing over 200 million American consumers yearly.¹ As a result, the industry has stepped up its game. No longer simply a diversion to be enjoyed individually, Americans are increasingly watching others play video games like they might watch television.² This practice, where enthusiastic gamers broadcast their video game session online to crowds of viewers, is called “live streaming.”³

While streaming has become lucrative and popular, American copyright law currently nerfs⁴ this nascent industry.⁵ Streams are considered unauthorized derivative works, mere adaptations of whichever video game the streamer plays.⁶ Therefore, little copyright protection is typically extended to video game streams.⁷ As a result, game developers can wield take-down notices with impunity, erasing a streamer’s online content and, with it, their income.⁸

1. See Colin Campbell, *Here’s How Many People Are Playing Games in America*, POLYGON (Apr. 14, 2015, 5:30 PM), <https://www.polygon.com/2015/4/14/8415611/gaming-stats-2015> [<https://perma.cc/M6H4-U9P5>].

2. Darren Heitner, *Watching Video Games Is Now Bigger than Traditional Spectator Sporting Events*, INC. (Apr. 2, 2018), <https://www.inc.com/darren-heitner/watching-video-games-is-now-bigger-traditional-spectator-sporting-events.html> [<https://perma.cc/6B7S-ZDEY>].

3. *What Is Video Game Live Streaming?*, HYPERX, <https://www.hyperxgaming.com/us/audio/articles/what-is-video-game-live-streaming> [<https://perma.cc/5RAD-4EEU>].

4. “Nerf” is a commonplace verb used by gamers to indicate that a video game character, weapon, or ability has been adjusted to be less powerful. *Nerf*, DICTIONARY.COM, <https://www.dictionary.com/browse/nerf> [<https://perma.cc/X77E-8TTE>]. The first half of the title of this Note, “Nerf This” is a reference to Activision-Blizzard’s video game, *Overwatch*. In that game, when D.Va, a popular playable character, performs her most powerful charge-up attack, she says (with tongue in cheek) “nerf this!” See Jaehoon Jeong & Woo Hyun, “*Nerf This!*” *The Voice of the North American D.Va of Overwatch*, Charlet Chung, INVEN GLOBAL (Jan. 11, 2018), <https://www.invenglobal.com/articles/3933/interview-nerf-this-the-voice-of-the-north-american-dva-of-overwatch-charlet-chung> [<https://perma.cc/3FWZ-WLDS>].

5. See *infra* Part I.A.

6. See, e.g., Shigenori Matsui, *Does It Have to Be a Copyright Infringement?: Live Game Streaming and Copyright*, 24 TEX. INTELL. PROP. L.J. 215, 217 (2016).

7. See *id.*

8. See *infra* Part I.A.

However, a potential remedy lies in finding streamers the independent authors of their original online videos, affording them full copyright protection. No court has directly addressed the novel, twenty-first-century issue of copyrighting video game streams, meaning the possibility hangs in a grey area of insufficient legal precedent. For example, the last time the courts considered authorship in video game performance, the games in question were simple, two-dimensional arcade games.⁹ Today, many modern, competitive video games have little in common with those simplistic games, featuring infinite play combinations or algorithm-generated worlds that are virtually limitless.¹⁰ As such, the legal analysis of authorship and originality in those 1980s cases would be entirely inapplicable to today's video game technology.¹¹

Additionally, while the courts have held video game player performances to be uncopyrightable (based upon those 1980s arcade games), the courts have not looked at video game streams from a modern, twenty-first-century perspective: as broadcasts. Broadcasts are copyrightable audiovisual works that contain player performances, made protectable by originality in the camera work.¹² Initially only discussed in the context of traditional sports broadcasts,¹³ there are compelling arguments that video game streams resemble sports broadcasts more than arcade performances in the eyes of copyright law. Viewed from such a lens, streamers could be considered as making their own sports broadcast, dictating what their viewers see—effectively becoming the cameramen for their own “sports” player performances.

This Note proposes that video game streams are copyrightable audiovisual works and, as full-fledged original works of authorship,

9. See, e.g., *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983) (mentioning that the games in the dispute were *Galaxian* and *Pac-Man*, both two-dimensional arcade classics); see *infra* Part I.B.

10. See Simon Parkin, *No Man's Sky: A Vast Game Crafted by Algorithms*, MITTECH.REV. (July 22, 2014), <https://www.technologyreview.com/s/529136/no-mans-sky-a-vast-game-crafted-by-algorithms/> [<https://perma.cc/AYX6-JMG7>].

11. See Kyle Coogan, *Let's Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 381, 388 (2018).

12. See *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir. 1986).

13. See *id.*

should be afforded protection under the Copyright Act of 1976.¹⁴ Part I of this Note will review the current state of the streaming industry and esports, as well as the case law most applicable to video game copyright disputes. Part II will argue in favor of the copyrightability of streams as audiovisual works, or, more specifically, as original broadcasts containing copyrightable player performances.¹⁵ Finally, Part III will address potential counterarguments such as that *Midway Manufacturing Co. v. Artic International, Inc.* bars stream copyright, or that streams are classified as merely derivative works or public performances of preexisting video games.

I. BACKGROUND

A. *The Esports and Live Streaming Industry*

In 2017, Activision Blizzard launched the Overwatch League—the first concerted effort to push video game sports (called “esports”) into the same realm as American traditional sports.¹⁶ Much like the National Football League, the Overwatch League consists of regionally based teams that compete within a regular season, replete with playoffs, team rivalries, diehard fanbases, and sold out stadiums.¹⁷ However, unlike with football or baseball, these teams compete online by playing head to head inside Blizzard’s six-versus-six,

14. See 17 U.S.C. § 102(a)(6) (2012).

15. Player performances are not copyrightable unless fixed. See *id.* § 102(a). Thus, when a broadcast fixes a performance in a tangible medium (that is, a video recording), the copyright in the broadcast subsumes the copyright that might be had in the player performance. See *Balt. Orioles, Inc.*, 805 F.2d at 675.

16. See generally *What Is the Overwatch League?*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-gb/about> [https://perma.cc/79UQ-R3S4].

17. Samuel Horti, *Overwatch League Will Show Matches Four Days a Week, Each Team Will Play 40 Times a Season*, PC GAMER (Nov. 5, 2017), <https://www.pcgamer.com/the-overwatch-league-will-have-matches-four-days-a-week-and-each-team-will-play-40-games/> [https://perma.cc/U6W3-YLWG]; Brock Koon, *OWL Rivalry ... and It's on Twitter?*, OVERWATCH SCORE (Oct. 24, 2017), <https://www.overwatchscore.com/overwatch-league-teams/los-angeles-valiant/our-first-owl-rivalry-and-its-on-twitter/> [https://perma.cc/59PB-A7QM]; Trent Murray, *Overwatch League Finals Sell Out in Two Weeks*, ESPORTS OBSERVER (June 1, 2018), <https://esportsobserver.com/overwatch-league-finals-sold-out/> [https://perma.cc/YH95-Y556].

first-person shooter video game, *Overwatch*, which is a commercial success in its own right.¹⁸

Blizzard's risky decision to force esports into the American mainstream paid off. In the League's first year of existence, twelve franchise teams bought in at \$20 million apiece—a staggering price tag for the barely tested waters of stateside esports.¹⁹ The *Overwatch* League then went on to attract nearly \$150 million in broadcast rights and sponsorship sales.²⁰ Continuing to expand with more teams and talent, conservative estimates predict that the *Overwatch* League will generate billions of dollars in revenue for Activision Blizzard over the next several years.²¹

The *Overwatch* League owes its success to the relatively new way gamers enjoy video games: live streaming. In the past, games were sold with the expectation that they would be played and enjoyed privately.²² Today, however, many video game enthusiasts not only play games, they also enjoy watching others play.²³ This practice, live streaming, involves a player broadcasting their own gaming experience, often with commentary, for viewers to watch on their computer—like video game television.²⁴ People enjoy watching streams for a variety of reasons. Usually, the streamer is a personally entertaining character or particularly skilled at a

18. Samit Sarkar, *Overwatch Is Already a Billion-Dollar Game*, POLYGON (May 4, 2017, 5:48 PM), <https://www.polygon.com/2017/5/4/15551040/overwatch-revenue-billion-dollars-blizzard> [<https://perma.cc/AH94-XJ45>]; *What Is the Overwatch League?*, *supra* note 16.

19. Jacob Wolf, *Blizzard Entertainment Locks in Two More \$20 Million Overwatch League Spots*, ESPN (Sept. 13, 2017), http://www.espn.com/esports/story/_/id/20673359/blizzard-entertainment-locks-two-more-20-million-overwatch-league-spots [<https://perma.cc/R7CK-6DEM>].

20. Jacob Wolf, *Overwatch League Expansion Slots Expected to Be \$30 Million to \$60 Million*, ESPN (June 6, 2018), http://www.espn.com/esports/story/_/id/23464637/overwatch-league-expansion-slots-expected-30-60-million [<https://perma.cc/7RJ4-N69B>].

21. John Ballard, *Esports Is Already Nearing \$1 Billion in Revenue for Activision Blizzard*, MOTLEY FOOL (June 10, 2018, 10:32 AM), <https://www.fool.com/investing/2018/06/10/esports-is-already-nearing-1-billion-in-revenue-fo.aspx> [<https://perma.cc/F4M3-UBYB>].

22. Cf. Suriel Vazquez, *Five Ways We Used to Watch Games Before Twitch*, PASTE MAG. (Aug. 6, 2015), <https://www.pastemagazine.com/articles/2015/08/five-ways-we-used-to-watch-games-before-twitch.html> [<https://perma.cc/JG5D-QCYU>] (noting that, since video games have existed, gamers have enjoyed watching each other play; however, the avenues available for that hobby before Twitch.tv were limited and not easily accessible, most notably consisting of physically going to an arcade and watching over a friend's shoulder).

23. Ivan Simic, *The Love Between the Streaming and Gaming Industries: Why Do We Watch Others Play Games?*, DOMAIN.ME (Apr. 13, 2017), <https://domain.me/videogame-streaming/> [<https://perma.cc/JZJ7-4TTD>].

24. *Id.*

game.²⁵ Regardless, video games have developed massive value as a passive medium.

The value of live streaming is not abstract. In 2014, Amazon bought the foremost video game streaming platform, Twitch.tv, for \$970 million.²⁶ That is because, in 2018, Twitch boasted nearly 2.2 million unique monthly streamers with over fifteen million daily viewers.²⁷ With such a substantial viewership that translates into subscriptions and advertising revenue, streamers can make a comfortable living playing video games.²⁸ In fact, the top ten most popular streamers on Twitch each earn upwards of one million dollars per year.²⁹ Additionally, some of the most talented players are scouted and signed to professional esports teams, such as those participating in the Overwatch League, due in part to the visibility afforded by their Twitch streams.³⁰

In summary, the video game streaming industry has become so phenomenally lucrative and mainstream that it has made American esports, such as the Overwatch League, entirely viable. Video games now have dual value: as passive TV entertainment and as active, private entertainment. Avid gamers will now not only buy a video game to play on their computer or video game console at home, they will also pay to watch others play those same games online.³¹

25. See *id.*

26. Eugene Kim, *Amazon Buys Twitch for \$970 Million in Cash*, BUS. INSIDER (Aug. 25, 2014, 4:03 PM), <https://www.businessinsider.com/amazon-buys-twitch-2014-8> [<https://perma.cc/VR24-DGL7>].

27. Sarah Perez, *Twitch Now Has 27K+ Partners and 150K+ Affiliates Making Money from Their Videos*, TECHCRUNCH (Feb. 6, 2018), <https://techcrunch.com/2018/02/06/twitch-now-has-27k-partners-and-150k-affiliates-making-money-from-their-videos/> [<https://perma.cc/9V4R-NAVX>].

28. See Jay Egger, *How Exactly Do Twitch Streamers Make a Living? Destiny Breaks It Down*, DOT ESPORTS (Apr. 21, 2015), <https://dotesports.com/general/news/twitch-streaming-money-careers-destiny-1785> [<https://perma.cc/CS4P-T5EQ>].

29. *How Much Do Top Twitch Streamers Make?*, MEDIAXIX (Nov. 2, 2018), <http://mediakix.com/2018/09/how-much-do-twitch-streamers-make/#gs.LNfpdig> [<https://perma.cc/T57H-XN35>].

30. See Nina Mandell, *How to Become a Professional Video Game Player: Practice, Scouting and Natural Talent*, FOR THE WIN (June 6, 2014, 12:49 PM), <https://ftw.usatoday.com/2014/06/x-games-mlg> [<https://perma.cc/853U-J5P3>]. Also note that the line between esports and Twitch streaming continues to blur; for example, streamers can sometimes compete amongst each other in tournaments hosted by and on Twitch.tv. See *A Tournament Series Made for Twitch Streamers*, TWITCH.TV, <https://rivals.twitch.tv> [<https://perma.cc/J74R-CLBW>].

31. See AJ Willingham, *What Is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> [<https://perma.cc/R2RB-G6BZ>] (reporting,

As such, without the millions of dedicated streamers showcasing new video games, honing their skills to a professional level, and generating excited fanbases, it is incredibly doubtful anything like the Overwatch League would ever exist. For this reason, it is particularly troubling that live streams are currently regarded by industry professionals as either a type of tolerated copyright infringement or narrowly allowed under certain provisions in the game's license.³² As such, streamers have very little ownership and legal control of their streaming videos, which game publishers can take down with ease.³³

Examples of video game publishers pulling streamers' content abound, demonstrating the little power professional streamers have in keeping their content, and thus their careers, online. In 2017, professional (and exceptionally controversial) streamer, Felix "PewDiePie" Kjellberg received a Digital Millennium Copyright Act (DMCA) takedown request from game publisher Campo Santo, ordering Youtube to delete any of Kjellberg's past and future streams featuring Campo Santo games.³⁴ A cofounder of Campo Santo accompanied the DMCA takedown with a statement that he was "sick of this child getting more and more chances to make money off of what we make,"³⁵ echoing a sentiment that streamers have no ownership over their videos.

Other game publishers have similarly attempted to limit how users stream their games. Atlus, the developing studio behind role-playing game *Persona 5*, received widespread public criticism after it warned streamers of potential DMCA takedowns if they live streamed the game past a certain in-game date.³⁶ Atlus explained that they did not want the game's story, an integral aspect of

for example, that one *League of Legends* tournament garnered \$5.5 million in sales).

32. See Matsui, *supra* note 6, at 217.

33. *Id.* at 225.

34. Kyle Orland, *FireWatch Dev Uses DMCA Against PewDiePie After Streamed Racial Slur*, ARS TECHNICA (Sept. 11, 2017, 11:03 AM), <https://arstechnica.com/gaming/2017/09/firewatch-dev-uses-dmca-against-pewdiepie-after-streamed-racial-slur/> [<https://perma.cc/3AZ2-JD5D>] (the takedown was issued after Kjellberg directed a racial slur at another player while streaming *PlayerUnknown's Battleground*, a game not actually owned by Campo Santo).

35. *Id.*

36. Jonathan Ore, *Atlus Loosens Persona 5 Streaming Restrictions, Apologizes to Gamers for Copyright Strike Threats*, CBC NEWS (Apr. 27, 2017, 12:01 PM), <https://www.cbc.ca/news/entertainment/persona-5-atlus-restrictions-loosened-1.4088375> [<https://perma.cc/R464-4HUR>].

Persona 5, to be spoiled online for other players.³⁷ After overwhelmingly negative social media response, Atlus backed away from their restriction and apologized for threatening players with copyright strikes.³⁸

While none of these cases have led to actual litigation, the potential looms as the personal stakes increase. Streamers are beginning to pin their careers and income on their ability to publish video game streams, making a DMCA takedown the potential nail in the coffin of someone's livelihood.³⁹ This is particularly true of some streamers who, by gaining publicity through streaming, hope to go professional and play for teams, such as within the Overwatch League. In pursuit of this dream, some streamers have even dropped out of college to stream full-time or have relocated to distant countries.⁴⁰

As a result, there are significant policy reasons why streamers should have some ownership power over their video game streams, particularly in copyright. Not only would streamers' careers have more security, granting copyright ownership to streamers would hardly hurt game publishers, who already benefit tremendously from the advertising and engagement produced by live streams.⁴¹ Game publishers are keenly aware of this fact, hence why live

37. *Id.*

38. *Id.*

39. See Monica Torres, *Twitch: The Video Game Job that Pays So Well that People Have Died for It*, LADDERS (Mar. 21, 2017), <https://www.theladders.com/career-advice/twitch-video-game-job-pays-well-people-died> [<https://perma.cc/H9AD-3WNG>] (describing how even a mere bathroom break while streaming leads to losing a portion of one's viewership; describing that people are risking their lives to stream excessively in order to earn income).

40. Cecilia D'Anastasio, *Popular Overwatch Pro Leaves the League to Return to His Twitch Empire*, KOTAKU (Aug. 7, 2018, 5:29 PM), <https://kotaku.com/popular-overwatch-pro-leaves-the-league-to-return-to-hi-1828174459> [<https://perma.cc/9LFL-AR4M>]; Amelia Savery, *Started from Down Under Now He's Here*, BLIZZARD ENT. (Jan. 25, 2018), <https://overwatchleague.com/en-gb/news/21491558/started-from-down-under-now-he-s-here> [<https://perma.cc/GC8X-R9HU>].

41. Aaron Swerdlow, *The Emerging Legal Battle over Video Game Streaming Rights*, PC GAMING (May 27, 2017), <https://venturebeat.com/2017/05/27/the-emerging-legal-battle-over-video-game-streaming-rights/> [<https://perma.cc/B5YM-YN3L>] ("Streaming of video games can expand a game's user base, drive sales, generate free publicity and foster groups of players who share their gaming experiences with one another. These communities are especially lucrative for advertisers, video game makers, and streamers.").

streams are typically tolerated or sometimes even encouraged with monetization of videos and partnership arrangements.⁴²

Therefore, compelling justifications exist for finding a theory of copyright law that protects streamers. While the law has been settled as to the copyrightability of video game performances,⁴³ the notion of copyrighting streams as a form of sports broadcasting holds promise. This theory, which rests heavily on *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*,⁴⁴ provides a legal vehicle that could remedy the outdated power imbalance between game developers and their player community.

B. Foundational Case Law

The question of whether video game streams are copyrightable is complex—if only because it has not yet been directly addressed by any binding legal authority. Thus, when contemplating the notion, one must extrapolate heavily from the statutory language of the Copyright Act of 1976 and any tangentially related case law.⁴⁵ This Part first goes over how the copyright fundamentals have been applied to video games as audiovisual works. Then, this Part considers cases that, while not directly related to video games or streaming, potentially provide more guidance than cases that explicitly address video game copyright infringement.

1. Video Game Precedent

Video games receive two separate copyright protections: as original literary works for their foundational computer code⁴⁶ and for the audiovisual elements produced by that code.⁴⁷ These works are then protected from infringement as both the game in its entirety and also as particular elements of the game.⁴⁸ There are several cases that not only affirm video games as copyrightable audiovisual

42. *Id.*

43. *See* Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1011 (7th Cir. 1983).

44. *See* 805 F.2d 663 (7th Cir. 1986); *see infra* Part I.B.2.

45. *See* Coogan, *supra* note 11, at 383-84.

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

47. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 442 (4th Cir. 1986).

48. *See* *Stern Elecs.*, 669 F.2d at 855.

works but address the copyrightability of player performance within those games.⁴⁹

In 1982, *Stern Electronics, Inc. v. Kaufman* arose as the first noteworthy case to consider player performance when establishing if video games are copyrightable as audiovisual works.⁵⁰ The Second Circuit held that a video game's audiovisual elements are fixed, and therefore copyrightable, even if the game's sequences vary based upon the player's actions within the game.⁵¹ The court relied on the fact that a substantial portion of the game consisted of repeated sequences that played upon completion of an objective.⁵² In this game, the objective and whole purpose of the game was "keeping [a] spaceship aloft long enough to permit the appearances of all the images and sounds of a complete play of the game."⁵³ Thus, because the simple gameplay was so repetitive that it effectively rendered the same sequences of images and sounds, the game was a fixed audiovisual work.⁵⁴

Midway Manufacturing Co. v. Artic International, Inc. followed *Stern* one year later, wherein the Seventh Circuit also contemplated whether the audiovisual aspect of video games was independently copyrightable from the underlying code.⁵⁵ In that case, the defendant sold modified circuit boards for video game machines that would make certain arcade games more challenging.⁵⁶ One modification sped up the game *Galaxian*, while another modification allowed for *Pac-Man* to be played on unauthorized machines.⁵⁷ In both instances, the circuit board played the two games exactly as originally published (though in the case of *Galaxian* the audiovisuals were slightly accelerated).⁵⁸ The court considered if, because games are usually not played the same way twice, they fail as a "series of

49. See, e.g., *id.* at 853; *Kramer Mfg.*, 783 F.2d at 442.

50. See *Stern Elecs.*, 669 F.2d at 853.

51. *Id.* at 856.

52. *Id.*

53. *Id.*

54. See *id.* Recall that to be fixed, the audiovisual work must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (2012).

55. See 704 F.2d 1009, 1010-11 (7th Cir. 1983).

56. *Id.*

57. *Id.*

58. See *Stern Elecs.*, 669 F.2d at 855.

related images,” the definition of an audiovisual work.⁵⁹ Therefore, to decide if video games were copyrightable in their audiovisuals, the court then asked “whether the creative effort in playing a video game is enough like writing or painting to make each performance of a video game the work of the player and not the game’s inventor.”⁶⁰

In answering that question, the court analogized the mechanics of playing a video game to changing channels on a television, directly stating that video game performances are not inherently copyrightable.⁶¹ The court went on to describe playing a video game as merely selecting “one of the limited number of sequences [that] the game allows,” adding that the “video game in effect writes the sentences and paints the painting for [the player].”⁶² This logical leap allowed the courts to rule that the statutory definition of audiovisual work as a “series of related images” did not require those images be in a fixed order.⁶³ Thus, the court upheld the copyrightability of video games while denying copyright to video game player performances.⁶⁴ However, as this Note does not propose copyrighting video game player performances in isolation, this precedent is effectively side-stepped.⁶⁵

A slightly more recent, seminal case is *Atari Games Corp. v. Oman*, where, in 1992, the court affirmed that video games, regardless of their graphic simplicity, have copyright in their audiovisual elements.⁶⁶ In that case, the U.S. District Court for the District of Columbia considered whether the video game *Breakout* qualified for copyright.⁶⁷ The issue arose due to the elementary nature of *Breakout*, a game that consisted of only “simple geometric shapes and coloring.”⁶⁸ Regardless, the court reaffirmed that the bar for creativity

59. *Midway Mfg. Co.*, 704 F.2d at 1011 (citing 17 U.S.C. § 101 (2012)).

60. *Id.*

61. *Id.* at 1012.

62. *Id.*

63. *Id.* at 1011 (citing 17 U.S.C. § 101).

64. *Id.*

65. See *infra* Part III.A.

66. See 979 F.2d 242, 247 (D.C. Cir. 1992).

67. *Id.* at 243. There was no question that the game was fixed and original, the other two requirements for copyrightability. *Id.* at 243-44.

68. *Id.* at 243.

in copyright is incredibly low.⁶⁹ While the game's individual geometric elements, standing alone, lacked copyrightability, sufficient creativity existed in the overall, collective audiovisual expression.⁷⁰ As a result, video game streams that include even graphically simple creative elements may still qualify for copyright protection.

In summation, video games themselves are copyrightable audiovisual works.⁷¹ Even very simple games, because of the totality of the gaming experience, warrant copyright protection.⁷² However, because video games (at least in the 1980s)⁷³ only allow players to operate within the limited confines of the preestablished game mechanics, player performances of video games are not copyrightable.⁷⁴ Therefore, video game streams, based upon this precedent, are not copyrightable as original player performances.

2. Other Compelling Precedent

One of the most challenging aspects of considering whether video game streams are copyrightable is categorizing video game streams within the context of copyright law. Unsurprisingly, the drafters of the Copyright Act of 1976 did not legislate with YouTube or Twitch.tv in mind. As a result, it is difficult to determine what legal precedent the courts should apply in addressing this issue. While the 1980s arcade cases definitively held that video game player performances, standing alone, are not sufficiently copyrightable, none of those cases grappled with the legal question of whether streaming a video game performance on camera is copyrightable.⁷⁵

Considering that some video games are played much like sports, as evidenced by the Overwatch League, there is some merit to approaching video game streams as telecasted sports performances.⁷⁶ If this were the case, we would consider video game streams within the context of *Baltimore Orioles, Inc. v. Major*

69. See *id.* at 247.

70. See *id.* at 245-46.

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

72. *Atari Games Corp.*, 979 F.2d at 247.

73. See *Parkin*, *supra* note 10.

74. See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983).

75. See *supra* Part I.B.1.

76. See *Horti*, *supra* note 17.

League Baseball Players Ass'n.⁷⁷ In that case, the Seventh Circuit considered whether televised broadcasts, and the sports performances recorded by them, were copyrightable.⁷⁸

The court held that the players' baseball performance had the "sufficient artistic merit" required for copyrightability, emphasizing the law's low bar for originality.⁷⁹ However, these performances are only protectable if they are fixed in a tangible medium.⁸⁰ Thus, the court held that the players' baseball performances were copyrightable when recorded, which happened to be by telecast.⁸¹ The court then went on to discuss that "even if the Players' performances were not sufficiently creative.... [t]he creative contribution of the cameramen and director alone suffices for the telecasts to be copyrightable."⁸² Thus, the copyrightability of the creative camera work in filming a sports game effectively subsumes the copyrightability of the players' performance—if only because the performance alone cannot be fixed without the broadcast.⁸³ This Note relies heavily on *Baltimore Orioles*, arguing that video game streams, as sports broadcasts, similarly subsume a streamer's player performance.

Another avenue for considering video game performances as copyrightable is within the context of *Allen v. Academic Games League of America, Inc.*⁸⁴ In that case, the court considered whether tournament play of a board game constituted an unauthorized public performance.⁸⁵ The court held that, while the Copyright Act does indicate that playing a work can be a performance, the term "play" does not extend to playing games.⁸⁶ The court mostly leaned on a policy argument to come to this conclusion, deciding that it would unduly burden consumers if game publishers could decide

77. 805 F.2d 663, 665 (7th Cir. 1986).

78. *Id.*

79. *Id.* at 669 n.7.

80. *Id.* at 668.

81. *Id.*

82. *Id.* at 669 n.7. Specifically, the court found that "camera angles, types of shots, the use of instant replays and split screens, and shot selection" all lend enough creativity to a telecast to make it independently copyrightable. *Id.* at 668.

83. *Id.* at 677.

84. See 89 F.3d 614, 616 (9th Cir. 1996).

85. *Id.*

86. *Id.*

how consumers could play their purchased game.⁸⁷ A similar policy argument can be extrapolated to video games.

II. STREAMS AS COPYRIGHTABLE BROADCASTS

Video game streams meet the bare requirements of the Copyright Act of 1976 for copyrightability because they are fixed, original expressions that fall within the scope of copyright protection.⁸⁸ Furthermore, video game streams can be likened to sports broadcasts that,⁸⁹ per *Baltimore Orioles*,⁹⁰ indicate courts should grant streams similar broadcast copyright. Thus, there are reasonable legal foundations that courts can employ to deem video game streams copyrightable.

A. *Fitting the Black Letter Copyright Law*

The primary purpose of the Copyright Act of 1976 is to promote the cultivation of arts by rewarding originality and creativity.⁹¹ Specifically, for something to be eligible for protection under the Copyright Act of 1976, it must be considered an “original work[] of authorship fixed in any tangible medium of expression.”⁹² Thus, in order for a video game stream to be copyrightable, it must (1) be able to be fixed in a tangible medium, (2) be an original work of authorship, and (3) be within the subject matter of copyright.⁹³ Video games, as well as broadcasts, qualify as copyrightable expressions and thus their publishers should gain exclusive rights in their work.⁹⁴

First, a work is considered fixed in a tangible medium when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than

87. *See id.*

88. *See infra* Part II.

89. *See Horti, supra* note 17.

90. *See* 805 F.2d 663, 677 (7th Cir. 1986).

91. U.S. CONST. art. I, § 8, cl. 8.

92. 17 U.S.C. § 102(a) (2012).

93. *Id.*

94. *See id.* § 106.

transitory duration.”⁹⁵ For works that are being transmitted, such as a television broadcast for example, the work is considered fixed so long as it is recorded simultaneously at the time of transmission.⁹⁶

Video game streams are typically recorded and archived after they have been played live. On Twitch.tv, these archives are called “videos on demand,” colloquially referred to as VODs.⁹⁷ There is no difference between a live stream and its VOD recording, save for the time delay and the opportunity to engage with the streamer and other viewers within the stream’s live chat room.⁹⁸ While VODs are not hosted indefinitely by Twitch, they can be manually downloaded.⁹⁹ Additionally, as long as Twitch VODs are broken up into two-hour length “highlight” videos, Twitch will host the videos on its website for playback indefinitely.¹⁰⁰ Therefore, Twitch streams are both recorded simultaneously during their live broadcast and can be stored in a stable form for re-watching—either by making a “highlight” video or by downloading the VOD.¹⁰¹ As a result, streams, so long as they are recorded and archived, are fixed.

Second, a work is original if the work evidences creativity and was formed independently.¹⁰² The threshold for adequate creativity has always been held to be quite low, with “at least some minimal degree of creativity” required where “even a slight amount will suffice.”¹⁰³ However, effort or hard work alone does not manifest creativity.¹⁰⁴ In order to constitute an independent creation, the work must not simply be wholesale plagiarized, though it can bear

95. *Id.* § 101.

96. *Id.*

97. Philip Kollar, *Twitch Is Dropping Its ‘Save Forever’ Feature, but Users Can Still Archive Highlight Clips*, POLYGON (Aug. 6, 2014, 1:41 PM), <https://www.polygon.com/2014/8/6/5975413/twitch-video-on-demand-no-save-forever> [<https://perma.cc/W2GJ-WHZ9>].

98. *See id.*

99. *See* Brad Stephenson, *How to Download Twitch VOD Videos*, LIFEWIRE (Feb. 25, 2019), <https://www.lifewire.com/download-twitch-videos-4151697> [<https://perma.cc/ZU4D-B5EC>].

100. Kollar, *supra* note 97.

101. *Id.*; Stephenson, *supra* note 99.

102. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

103. *Id.*

104. *Id.* at 352-53.

striking resemblances to preexisting works so long as the similarities are merely “fortuitous.”¹⁰⁵

Video game streams exhibit creativity in multitudinous ways, easily passing the low threshold famously described in *Feist*. First, there is creativity in the game commentary, which all successful streamers provide into a microphone while gaming.¹⁰⁶ This commentary is entirely original and is often humorous or informative, depending on the streamer’s individual style and viewership.¹⁰⁷ Additionally, streamers will also often inlay a live stream of their real-world self into a corner of the video feed.¹⁰⁸ This allows viewers to simultaneously watch the streamer’s virtual gaming adventures as well as the actual streamer sitting at their keyboard or controller.¹⁰⁹

Additionally, there is significant creativity in the actual gameplay of a streamer’s broadcast. When playing video games, streamers make choices as to where their in-game character will move, how they might solve puzzles, or how they might approach combat.¹¹⁰ Relatedly, streamers dictate what viewers see by moving in-game cameras or manually moving their in-game character.¹¹¹ These gameplay and camera choices evidence at least a modicum of creativity.¹¹²

As a result of the infinite choices streamers can make in their commentary and gameplay, no two streams could truly be identical.

105. *Id.* at 345.

106. Patricia Hernandez, *The Twitch Streamers Who Spend Years Broadcasting to No One*, VERGE (July 16, 2018, 9:50 AM), <https://www.theverge.com/2018/7/16/17569520/twitch-streamers-zero-viewers-motivation-community> [<https://perma.cc/5LPV-DA5Z>].

107. *Id.*

108. See Charlie Deets, *Beginner’s Guide to Streaming on Twitch*, MEDIUM (Feb. 7, 2018), <https://medium.com/@charliedeets/beginners-guide-to-streaming-on-twitch-dc2a7108fbd7> [<https://perma.cc/E8QC-XY7Y>]; Mark Longhurst, *A Guide to the Best Webcam for Twitch Streaming*, MEDIUM (May 5, 2018), <https://medium.com/the-emergence/a-guide-to-the-best-webcam-for-twitch-streamers-ba6c44ce8c44> [<https://perma.cc/7JQH-GBWF>].

109. Deets, *supra* note 108.

110. See Seth Stevenson, *Why Would Anyone Watch Twitch?*, SLATE (Aug. 26, 2014, 9:25 PM), http://www.slate.com/articles/technology/technology/2014/08/why_would_anyone_watch_twitch_the_allure_of_the_video_game_streaming_site.html [<https://perma.cc/4G4P-NYPZ>] (describing different streams and the various antics therein).

111. *See id.*

112. Recall that an extremely simple video game audiovisual, just bare geometric shapes operating in tandem, has been held to be copyrightable. *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992).

While streamers may share similar play styles, personalities, or even play the same video games, their choices within those games render the streams independent creations.¹¹³ Therefore, the average video game stream is both creative and an independent creation, meeting the black letter requirements of copyright.

Finally, in order to be copyrightable, the work must be a work of authorship within the scope of copyright.¹¹⁴ One of the most basic tenets of copyright law is that ideas are not copyrightable, only expressions.¹¹⁵ Seventeen U.S.C. § 102(a) outlines the categories of expressions which are copyrightable, with one such category being “motion pictures and other audiovisual works.”¹¹⁶

An audiovisual work is statutorily defined as “a series of related images which are intrinsically intended to be shown by the use of machines, or devices ... together with accompanying sounds, if any, regardless of the nature ... in which the works are embodied.”¹¹⁷ Congress intended for this definition to be interpreted with some flexibility with the goal of covering future technological advancements in this category.¹¹⁸ As such, the Copyright Act of 1976’s definition of an audiovisual work is typically read quite broadly.¹¹⁹

Video game streams easily qualify as audiovisual works of authorship. At their most basic elements, streams are a sequence of consecutive images with accompanying sounds which are then played over an Internet connection on computers, smart phones, or televisions.¹²⁰ The images consist of the streamer’s gameplay and whatever else is overlaid on the video.¹²¹ This conclusion is bolstered by the fact that video games themselves also qualify as audiovisual

113. See Stevenson, *supra* note 110.

114. 17 U.S.C. § 102(a) (2012).

115. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 356 (1991).

116. § 102(a)(6).

117. *Id.* § 101.

118. WGN Cont’l Broad. Co. v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982).

119. *Id.*

120. See Simic, *supra* note 23.

121. *Id.*

works.¹²² As such, streams satisfy the bare requirements of being a work of authorship.¹²³

Therefore, video game streams are original works of authorship fixed in a tangible medium of expression.¹²⁴ The streams qualify as audiovisual expressions which are works of authorship per 17 U.S.C. § 101.¹²⁵ They also demonstrate originality in the inherent creativity involved in the streamer's unique gameplay decisions, as well as their commentary on that gameplay.¹²⁶ The stream is then fixed in a recording, which can usually be downloaded or replayed online.¹²⁷ As such, video game streams make the prima facie case of being copyrightable.

B. Analyzing Streams Under Baltimore Orioles

With the current dearth of legal precedent regarding this issue, there are compelling reasons to consider the copyrightability of video game streams from the perspective of *Baltimore Orioles v. Major League Baseball Ass'n*.¹²⁸ Increasingly, video games are considered sports and streamed competitively.¹²⁹ Additionally, the line between a traditional broadcast and an online stream is negligible. As a result, video game streams are easily compared to sports broadcasts, which are copyrightable under *Baltimore Orioles*.¹³⁰ Therefore, the Seventh Circuit's opinion in *Baltimore Orioles* is possibly the best precedent available for predicting how courts should approach streaming copyright.

The U.S. Code, while not direct in its definitions, offers some assistance classifying, in legal terms, the criteria for a "sport." For example, the Sports Bribery Act defines a sporting contest as "any

122. *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855-56 (2d Cir. 1982). Also, gameplay, in its collectiveness, has been used by the courts to justify the determination that video games qualify as audiovisual works. *Atari Games Corp. v. Oman*, 979 F.2d 242, 244-45 (D.C. Cir. 1992).

123. *Atari Games Corp.*, 979 F.2d at 244-45.

124. *See id.*

125. 17 U.S.C. § 101 (2012).

126. *See Simic, supra* note 23.

127. *See Kollar, supra* note 97.

128. 805 F.2d 663, 668-69 (7th Cir. 1986).

129. Horti, *supra* note 17; *A Tournament Series Made for Twitch Streamers, supra* note 30.

130. *See Balt. Orioles*, 805 F.2d at 669.

sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence.”¹³¹ Further, the United States Anti-Doping Act defines an amateur athletic competition as a “contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete” with the added caveat that an amateur athlete must meet any “eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes.”¹³²

Meanwhile, multiple other legal scholars have opined as to the definition of “sport.”¹³³ In a robust survey of those definitions, the vast majority of tests appear to support the notion that competitive video gaming is a sport.¹³⁴ For example, by compiling dictionary definitions, some have proposed that sports (1) are a physical activity, (2) have the goal of diversion, recreation, or pleasure, (3) involve skill, and (4) involve competition.¹³⁵

Certain video game streams, depending on the game being played, handily qualify as sports performances based upon these various criteria. Per the U.S. Code, so long as streams are announced in advance to the public, involve competition between real individuals (that is, are not single-player games), and do not involve any violation of the game’s rules, then video game streams can be considered sports.¹³⁶ Per dictionary definitions of the word “sports,” video game streams also qualify, though some might disagree that video games involve “physical activity.”¹³⁷ However, ample evidence

131. 18 U.S.C. § 224 (2012).

132. 21 U.S.C. § 2001(a)(2)-(3) (2012).

133. See John T. Holden et al., *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS OF SPORT 46, 47 (2017).

134. *Id.* at 48-50. But see Ashlee A. Cassman, *Bring It On! Cheerleading vs. Title IX: Could Cheerleading Ever Be Considered an Athletic Opportunity Under Title IX, and if So, What Implications Would That Have on University Compliance?*, 17 SPORTS LAW J. 245, 247 (2010) (quoting law professor Howard Wasserman’s assertion that a sport requires “(1) large motor skills (2) simple machines only (3) objective scoring ... and (4) competition among contestants”).

135. Suzanne Jackiw, *Is Video Gaming a Sport?*, 10 SCITECH LAW. 12, 13 (2014).

136. 18 U.S.C. § 224(c)(2).

137. See Matthew Walther, *Sorry Nerds: Video Games Are Not a Sport*, WEEK (May 4, 2018), <https://theweek.com/articles/771213/sorry-nerds-video-games-are-not-sport> [<https://perma.cc/QW7K-J6KF>].

of the mechanical skill and muscle memory required to play many competitive video games begs to differ.¹³⁸ Professional gamers often practice their “mechanical skills” in custom training games specifically designed to enhance reflexes, muscle memory, and mouse control.¹³⁹

To illustrate, consider an *Overwatch* stream within the context of the “sport” requirements. The game involves two teams of six individuals, each controlled by a real person, cohesively competing in real time to incapacitate each other and thereby win objectives.¹⁴⁰ Typically, *Overwatch* is played recreationally. However, as with any physical sport such as soccer or basketball, it can be played professionally for cash and fame.¹⁴¹ The game requires mental skill to formulate team strategy, as well as the ability to predict and thwart the enemy team’s strategy.¹⁴² One such strategic skill is the ability to build a winning “team composition” out of *Overwatch*’s twenty-seven (and growing) playable “hero” characters, where there are 300,000 possible compositions for a six-person team.¹⁴³ Finally, *Overwatch* is a first-person shooter that necessitates physical skill in terms of mechanical muscle memory, which varies amongst the diverse playable heroes, and often requires the ability to deftly aim weapons or abilities.¹⁴⁴ So long as the stream is announced to the

138. See Kevin Wong, *StarCraft 2 and the Quest for the Highest APM*, ENGADGET (Oct. 24, 2014), <https://www.engadget.com/2014/10/24/starcraft-2-and-the-quest-for-the-highest-aptm/> [<https://perma.cc/9LTW-9YCX>] (“[E]-sports players can perform ... 10 actions every second. In these instances player hands become a blur, their keyboards emit a whirring hum—the result of multiple key presses that are indistinguishable from one another. It’s inconceivable to the average player, who couldn’t perform ten random actions in a second, never mind ten purposeful ones.”). However, it is hard to argue that competitive, online card games, such as *Hearthstone* or *Magic: The Gathering Arena*, would require the same physicality. Though these games have received the “esports treatment,” they require no physical skill and would likely fail to meet the legal definition of a sport. See James Pickard, *5 CCGs that Could Be the Next Big Thing in Esports*, REDBULL (Sept. 20, 2018), <https://www.redbull.com/us-en/ccg-esports-future-games> [<https://perma.cc/Q2KK-RVN4>].

139. Bo Moore, *Aim Training: How to Improve your FPS Aim*, PC GAMER (Apr. 12, 2019), <https://www.pcgamer.com/aim-training/> [<https://perma.cc/L9QP-6NGE>].

140. See *What Is the Overwatch League?*, *supra* note 16.

141. See Horti, *supra* note 17.

142. Ben Lindbergh & Rob Arthur, *The ‘Overwatch’ Dive Dilemma and the Evolution of Esports Strategy*, RINGER (Apr. 12, 2018, 8:09 AM), <https://www.theringer.com/2018/4/12/17226768/overwatch-dive-comp-meta-dilemma-esports-strategy> [<https://perma.cc/X28V-R6K9>].

143. *Id.*

144. See *The Ultimate Overwatch Guide*, ELEVATE OVERWATCH, <https://www.elevateoverwatch.com/> [<https://perma.cc/Y5V8-496F>].

public in advance and involves no cheating, a streamed match of *Overwatch* would thereby satisfy the U.S. Code's "sport" requirements, as well as most dictionary definitions.¹⁴⁵

Thus, playing video games such as *Overwatch* easily qualifies as a sport. Of course, some caveats are necessary: low-skill games or single-player games would fail to match any definition of a "sport."¹⁴⁶ However, multiplayer games that already feature a thriving esports industry and regularly sell out stadiums for competitive tournaments (such as *Overwatch*)¹⁴⁷ would certainly pass muster. Therefore, streaming sports performances of those types of games is, by definition, hardly different than streaming a soccer or basketball match.

To qualify as copyrightable under the *Baltimore Orioles* precedent, streams must also qualify as a type of audiovisual broadcast.¹⁴⁸ Additionally, the court in *Baltimore Orioles* determined that broadcasts of baseball games receive copyright because there is inherent creativity in "the many decisions that must be made during the broadcast ... concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts."¹⁴⁹ Video game streams are practically identical to television broadcasts and include the same camera creativity.¹⁵⁰ Therefore, these streams should be subject to the same copyrightability under *Baltimore Orioles*.

The court in *Baltimore Orioles*, when determining whether telecasts were copyrightable, was most concerned with the issue of fixation.¹⁵¹ Ultimately, the court held that since the telecasts were

145. See Holden et al., *supra* note 133, at 48-50.

146. Single player games, such as *Mass Effect* or *Red Dead Redemption*, lack player versus player competition. In those games, players defeat enemies programmed by the game and are more akin to interactive storytelling than sport. For more examples of similar games, as well as a brief description of their appeal, see GamesRadar Staff, *The 30 Best Video Game Stories Ever*, GAMESRADAR (Dec. 19, 2018), <https://www.gamesradar.com/the-best-videogame-stories-ever/> [<https://perma.cc/5SP3-UTXQ>].

147. See Ballard, *supra* note 21.

148. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986).

149. *Id.*

150. See Holden et al., *supra* note 133, at 52.

151. See *Balt. Orioles, Inc.*, 805 F.2d at 668.

audiovisual works and recorded simultaneously to their live broadcast, the telecasts were copyrightable.¹⁵² Video game streams are broadcast and fixed through recordation in a similar fashion.¹⁵³ While video games are typically streamed over the Internet and not over cable television, the distinction is moot.¹⁵⁴ Legislators have clarified that, so long as the program is “transmitted live to the public while being recorded at the same time” then the copyright owner has statutory rights in the transmission.¹⁵⁵

As a result, the only question that remains under *Baltimore Orioles* is whether video game streams contain sufficient creativity in their camera work.¹⁵⁶ In *Baltimore Orioles*, the court states that creativity arises in broadcasts from the “camera angles, types of shots, the use of instant replays and split screens, and shot selection,” though the list is impliedly nonexhaustive.¹⁵⁷ While there is certainly creativity in the actual gameplay, streamers also make significant creative choices in the broadcast elements described by the *Baltimore Orioles* court.¹⁵⁸

While streaming, gamers are effectively the cameramen to their own sports performances. As cameramen, streamers make a wide variety of decisions while streaming, effectively dictating exactly what their viewership observes.¹⁵⁹ Some of those decisions are more discreet, such as the choice of game, choice of perspective, and choice of where the streamer’s in-game avatar travels.¹⁶⁰ Other choices are more obvious, such as electing to add overlay text, images, or web camera footage on top of their gameplay footage.¹⁶¹ All of these deliberate streaming decisions contribute to the creativity of a stream, reinforcing that these online broadcasts are original works subject to copyright protection.

152. *Id.*

153. *See supra* Part II.A.

154. H.R. REP. NO. 94-1476, at 52 (1976).

155. *Id.*

156. *See Balt. Orioles, Inc.*, 805 F.2d at 668. The issue of creativity has been addressed previously in this Note. However, it bears revisiting for emphasis. *See supra* Part II.A.

157. *Balt. Orioles, Inc.*, 805 F.2d at 668.

158. *See id.*

159. *See Simic, supra* note 23.

160. Coogan, *supra* note 11, at 404.

161. *See id.* at 399; Deets, *supra* note 108.

A number of subtle choices in video game streams amount to directorial choices. For example, by selecting the game and where the in-game avatar moves within that game, a streamer is effectively making a “shot selection,” which the *Baltimore Orioles* court mentioned was a creative decision in broadcasts.¹⁶² Additionally, some games allow for character selection and personalization, which may add to the streamer’s “shot selection” and scenery.¹⁶³ “Camera angles” can further be adjusted, depending upon the video game, as some games allow third-person or first-person viewing.¹⁶⁴ This constellation of decisions, some made in advance of a stream or impromptu during, amount to camera work under *Baltimore Orioles* and is entirely the product of a streamer’s creative direction.

Additionally, many streamers opt to add original overlays to their stream, which function similarly to teletext on a news broadcast.¹⁶⁵ Teletext, or “the use of the vertical blanking interval to carry material intended for the television viewer,” can often carry useful information such as “news bulletins, weather reports, ballgame scores, station announcements,” and so on.¹⁶⁶ This teletext has been held to be a protected audiovisual work, so long as it “is intended to be seen by the same viewers as are watching ... during the same interval of time.”¹⁶⁷

Streamers often, though admittedly not always, add text overlays to their streams. These overlays can include information on players’ win-loss ratio, number of subscribers, donors, viewers, and even

162. *Balt. Orioles, Inc.*, 805 F.2d at 668. To illustrate, a game might have multiple playable regions, or maps. A streamer may elect to only play within one area of the game, effectively “shooting the camera” at a select region. To continue the trend of using *Overwatch* as a catch-all example, see Joseph Knoop, *Robot Temples to Gorilla Space Stations: Every Overwatch Map Ranked*, DAILY DOT (July 26, 2018, 6:16 AM), <https://www.dailydot.com/parsec/overwatch-maps/> [<https://perma.cc/5RRW-L3UU>]. Even the decision of what game to play on stream is a calculated choice. Robert Wiesehan, *Can't Get Viewers on Twitch? You're Playing the Wrong Games*, MAKEUSEOF (June 17, 2014), <https://www.makeuseof.com/tag/cant-get-viewers-on-twitch-youre-playing-the-wrong-games/> [<https://perma.cc/43W3-LLVY>].

163. Recall *Overwatch*’s twenty-seven (and growing) playable heroes. See Lindbergh & Arthur, *supra* note 142. Each hero features a unique appearance, as well as unique combat abilities, meaning each hero plays into the game’s overall strategy differently. *Id.*

164. Mark Serrels, *First or Third Person—What’s Your Perspective?*, KOTAKU (Apr. 18, 2011, 4:30 PM), <https://www.kotaku.com.au/2011/04/first-or-third-person-whats-your-perspective/> [<https://perma.cc/7VA6-43YP>].

165. See Deets, *supra* note 108.

166. *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 623-24 (7th Cir. 1982).

167. *Id.* at 626.

interactive mini-games.¹⁶⁸ The design and placement of this text is all personally decided and implemented by the streamer.¹⁶⁹ Additionally, streamers often inlay a web camera video feed on their stream (typically in a corner of the stream) that is of themselves.¹⁷⁰ This allows viewers to see the streamer and their gameplay footage in tandem, adding a level of human personality to streams.¹⁷¹

Therefore, streamers' text and video overlays are individually copyrightable as teletext.¹⁷² Further, the addition and design of the overlay amounts to the type of artificial editing decisions described by the court in *Baltimore Orioles*, such as "split screen" and "instant replays."¹⁷³ In conjunction with the more subtle directorial choices such as game selection, avatar personalization, player control/ navigation, perspective, and other related gaming decisions (variable by game, of course), video game streamers are creative enough cameramen with their broadcasts to demonstrate well more than a modicum of creativity.¹⁷⁴

As a result, the issue of whether video game streams deserve copyright falls squarely within the precedent of *Baltimore Orioles*. Under that precedent, video game streams are effectively sports broadcasts, where the streamer acts as the cameraman to their own performance.¹⁷⁵ Multiplayer video game matches, depending upon the competitiveness and physicality of the game, are fundamentally identical to traditional sports matches.¹⁷⁶ Further, these gameplay streams require extensively creative camera work.¹⁷⁷ This creativity includes camera angling, shot selection, as well as the design and implementation of text or video overlays. These aspects, in their entirety, demonstrate creative stream personalization and

168. See Hernandez, *supra* note 106.

169. See *id.*

170. Brad Stephenson, *Reasons People Stop Watching You on Twitch*, LIFEWIRE (Nov. 8, 2018), <https://www.lifewire.com/why-people-stop-watching-you-on-twitch-4140284> [<https://perma.cc/B4T4-ZFJQ>].

171. *Id.*

172. *WGN Cont'l Broad. Co.*, 693 F.2d at 628.

173. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986).

174. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

175. See *Balt. Orioles, Inc.*, 805 F.2d at 668.

176. See *supra* note 134 and accompanying text.

177. See Serrels, *supra* note 164.

direction. As such, the copyright of video game streams can be analyzed under *Baltimore Orioles* and, per that precedent, many of those streams warrant statutory protection as original broadcasts.

III. COUNTERARGUMENTS

The majority perception in the legal community is that video game streams are not independently copyrightable.¹⁷⁸ This is because of (1) the precedent set by *Midway*, (2) the notion that video game streams are derivative works, and (3) the assumption that video game streams are merely public performances of the underlying video game. These assumptions are salient, but there are legal arguments to rebuff them. As such, there is ample ammunition for any court seeking to protect burgeoning video game professionals and bring copyright law further into the twenty-first century.

A. Addressing *Midway*

The Seventh Circuit in *Midway Manufacturing Co. v. Artic International Inc.* held that video games are copyrightable audiovisual works.¹⁷⁹ To reach that conclusion, the court pinned its decision on the judgment that video game performances, by comparison, are not copyrightable, holding that the “video game in effect writes the sentences and paints the painting for [the player].”¹⁸⁰ However, *Midway*’s holding lacks relevance to the issue of copyrighting of modern video game streams as broadcasts.¹⁸¹

If *Baltimore Orioles* is used as guiding precedent, the copyright implicated by video game streams is not necessarily in the player’s game performance, but rather in their broadcast.¹⁸² In fact, the court in *Orioles* held that broadcast copyright subsumes performance

178. See Coogan, *supra* note 11, at 418-19.

179. 704 F.2d 1009, 1012 (7th Cir. 1983).

180. *Id.*

181. *Midway* does not address questions of broadcast copyright, only whether or not video games have copyright in their audiovisual elements. See *generally id.*

182. See *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 (7th Cir. 1986).

copyright, with the broadcast alone gaining statutory protection.¹⁸³ Therefore, the question of whether streamers should have rights in their video game performance is moot.¹⁸⁴ By recording the broadcast of their stream, players extinguish rights in their performances and, in exchange, receive unassailable (under *Midway*, at least) copyright in their broadcasts.¹⁸⁵

B. Derivative Works

The prevailing argument against copyrighting video game streams is that streams are derivative works.¹⁸⁶ A derivative work “is a work based upon one or more preexisting works ... consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”¹⁸⁷ The right to prepare, or authorize others to prepare, a derivative work is the exclusive right of the original copyright owner.¹⁸⁸ The Ninth Circuit has narrowed the statutory language to indicate that a derivative work “exist[s] in a ‘concrete or permanent form’” and “substantially incorporate[s] protected material from the preexisting work.”¹⁸⁹ Popular sentiment holds that video game streams substantially incorporate the video games being played on stream.¹⁹⁰ Most streams are therefore considered unauthorized, but widely tolerated, derivative works.¹⁹¹

There is no question that video games are preexisting, protected works.¹⁹² Further, it is difficult to argue that streams do not incorporate these games.¹⁹³ However, there are several defenses to the

183. *Id.* at 675 (“[A]ny rights of publicity in [player’s] performances that are equivalent to the rights contained in the copyright of the telecast are preempted.”).

184. *See id.*

185. *See Midway Mfg. Co.*, 704 F.2d at 1012.

186. *See* Dan Hagen, *Fair Use, Fair Play: Video Game Performances and “Let’s Plays” as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245, 248 (2018).

187. 17 U.S.C. § 101 (2012).

188. *Id.* § 106(2).

189. *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998).

190. *See* J. Remy Green, *All Your Works Are Belong to Us: New Frontiers for the Derivative Work Right in Video Games*, 19 N.C. J.L. & TECH. 393, 397-99 (2017).

191. *See* Matsui, *supra* note 6, at 216-17.

192. *See* Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982); *supra* Part I.B.

193. *See* Elizabeth Brusa, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217, 244-45 (2015). Brusa argues that streams are derivative works because a

premise that video game streams infringe copyright. First, a popular theory concedes that streams are derivative works, but contends that the streams are “fair use” and therefore legal.¹⁹⁴ However, fair use is an affirmative defense to infringement; as a result, the doctrine of fair use does not presumptively protect streams.¹⁹⁵ Rather, the defense must be litigated on a case-by-case basis after a copyright holder issues a DMCA takedown notice.¹⁹⁶ Therefore, the burden of litigating and proving fair use always falls to the supposed infringer.¹⁹⁷

Many video games’ terms of service also hamstring fair use defenses.¹⁹⁸ For example, Activision Blizzard states in its End User License Agreement that users “in whole or in part or under any circumstances” are prohibited from creating derivative works based on the “Platform.”¹⁹⁹ The League of Legends Terms of Service contains similar harsh language, laying claim to any and all “[g]ame recordings and broadcasts.”²⁰⁰ Thus, while the affirmative fair use defense could still be raised and thus negate all copyright infringement allegations, game developers could still penalize streamers under contract law.²⁰¹

As a result, the fair use exception is an imperfect counterargument for the infringing derivative works theory. The majority of streamers are young, likely legally ignorant, and stream to small audiences.²⁰² In all likelihood, the fair use defense is inaccessible to them due to cost and unfamiliarity with the law.²⁰³ In fact, across

“[stream] lacks the requisite transformation; that is, [video gameplay] is simply directly copied and rebroadcast through a different medium absent any creative alterations.” *Id.* at 244. This Note addresses this misconception. *See supra* Part II.

194. *See* 17 U.S.C. § 107 (2012); *see, e.g.*, Hagen, *supra* note 186, at 248.

195. Hagen, *supra* note 186, at 255 n.47.

196. *See id.*

197. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

198. *See* Coogan, *supra* note 11, at 399-400.

199. *Blizzard End User License Agreement*, BLIZZARD (June 1, 2018), <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> [<https://perma.cc/43A4-ZMNB>].

200. *League of Legends Terms of Use (NA)*, LEAGUE LEGENDS (Dec. 6, 2017), <https://na.leagueoflegends.com/en/legal/termsfuse> [<https://perma.cc/XAW7-9QRE>].

201. Coogan, *supra* note 11, at 399-400.

202. *See* Hernandez, *supra* note 106; *Audience*, TWITCH, <https://twittheadvertising.tv/audience/> [<https://perma.cc/VR77-7GJB>].

203. Daphne Keller & Annemarie Bridy, *DMCA Counter-Notice: Does It Work to Correct Erroneous Takedowns?*, CTR. FOR INTERNET AND SOC’Y (Jan. 17, 2017, 5:16 AM), <http://cyber>

the Internet, users rarely assert fair use and file counter-notices to combat DMCA takedowns.²⁰⁴ Additionally, most video games' licenses or terms of use still impose penalties for unauthorized creation of derivative works, regardless of whether they are fair use.²⁰⁵ Therefore, in order to meaningfully protect creative video game streams, an argument must be made that streams are not derivative works altogether.

This argument can, ironically, be made using a seminal fair use case. The court in *Authors Guild v. Google* considered whether Google Books, a search engine for books, was fair use.²⁰⁶ The search engine displayed portions of in-copyright books, giving users a "snippet" of the page of a book if it contained the searched keywords.²⁰⁷ The court held that the book was fair use based upon the four guiding principles outlined in 17 U.S.C. § 107.²⁰⁸ However, during a reflection on the meaning of derivative works, the court stated, "[n]othing in the statutory definition of a derivative work, or of the logic that underlies it, suggests that the author of an original work enjoys an exclusive derivative right to supply information about that work."²⁰⁹ The court went on to note that, while Google Books showed users snippets of books verbatim, "[t]he program does not allow access in any substantial way to a book's expressive content."²¹⁰

Video game streams, similar to Google Books, show only a "snippet" of the video games being played. The entire game, in all its facets, cannot be displayed on a stream.²¹¹ Rather, viewers are

law.stanford.edu/blog/2017/01/dmca-counter-notice-does-it-work-correct-erroneous-takedowns [https://perma.cc/D8WB-3ECX].

204. *See id.*

205. Coogan, *supra* note 11, at 399-400. As mentioned, these terms are usually not enforced except in unusual circumstances. *See, e.g.,* Orland, *supra* note 34.

206. 804 F.3d 202, 206 (2d Cir. 2015).

207. *Id.* at 208-10.

208. *Id.* at 212-13, 229. The fair use four factors are

(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.

17 U.S.C. § 107 (2012).

209. *Authors Guild*, 804 F.3d at 226.

210. *Id.*

211. *Cf. Parkin supra* note 10 ("In this era in which footage of every game is recorded and uploaded to YouTube, we wanted a game where, even if you watched every video, it still

merely watching the game experience of one streamer, which might include only a fraction of the video game's available maps, characters, gameplay styles, and so on.²¹² In many ways, streamers are simply “supply[ing] information”²¹³ about a video game, which viewers can then elect to buy if they want to experience the full game themselves.²¹⁴

Therefore, actively playing a video game is inherent to that video game's enjoyment. Streamers have managed to make video games also passively enjoyable by providing commentary, skill, or personality.²¹⁵ However, these streams could never provide the personal thrill of actually playing the game, which is what game developers are selling.²¹⁶ Rather, the two forms of entertainment, passive and active video game enjoyment, exist in separate symbiosis.²¹⁷ A blogger once described the relationship thusly:

Those asking why Twitch viewers don't just play the game themselves don't seem to understand that watching and playing aren't mutually exclusive. On the contrary, the more you watch pros playing the game at their best, the more enjoyable you're likely to find the game itself when you play. And the more you play, the more likely you are to understand the high-level play you see on display by the pro streamers.²¹⁸

Game developers sell only one-half of the above-mentioned gaming symbiosis, the interactive, hands-on “playing” half. The passive half cannot replace that experience and does not endeavor to do so. Rather, it provides a preview, a “snippet,” of how playing that game

wouldn't be spoiled for you.”)

212. Cf. Lindbergh & Arthur, *supra* note 142.

213. *Authors Guild*, 804 F.3d at 226.

214. Swerdlow, *supra* note 41 (noting that many game developers allow “infringement” via streaming because it serves as free advertising for their product).

215. Kyle Orland, *A Newbie's Guide to Why So Many People Are Watching Twitch*, ARS TECHNICA (Aug. 26, 2014, 6:35 PM), <https://arstechnica.com/gaming/2014/08/a-newbies-guide-to-why-so-many-people-are-watching-twitch/> [<https://perma.cc/HR8E-NU6B>].

216. See Green, *supra* note 190, at Part V.B. There are two ways to enjoy games—passively and actively. Developers are selling the active means. Streamers provide a novel passive enjoyment through their creative additions. Most stream viewers both play video games and watch streams, as they provide different forms of entertainment. Orland, *supra* note 215.

217. See Orland, *supra* note 215.

218. *Id.*

might feel, accompanied by entertaining commentary, educational instruction, or accomplished skill.²¹⁹ Thus, streams do not substantially incorporate the very heart of video game enjoyment: actually playing them.

To illustrate this argument, an example is necessary. Consider those playing in a soccer match and those watching from the sidelines. While both activities clearly involve “soccer,” the two activities otherwise have nothing in common. The individual watching the match is doing nothing physical or substantially similar²²⁰ to the individual who is playing soccer. Meanwhile, the soccer player is similarly engaged in an entirely different act than merely watching soccer. While related by the presence of a soccer game, the two activities otherwise have nothing in common. To borrow language from *Authors Guild*, watching a soccer match “does not allow access in [a] substantial way to [the] ... expressive content” of actually playing soccer.²²¹ Similarly, stream viewers do not gain substantial access to the “expressive content” of actually playing the video game demonstrated on stream. Ultimately, the only “substantial incorporation” is that both individuals are enjoying the same game, though in entirely alien ways.

As the court in *Authors Guild* noted, “[t]he extension of copyright protection beyond the copying of the work in its original form to cover also the copying of a derivative reflects a clear and logical policy choice.”²²² Should courts elect to expand copyright protections to the growing, unprotected streaming industry, the language of *Authors Guild* provides legal support.²²³ Streams are mere “snippets” of video games and cannot provide the same enjoyment in any substantial way as owning and playing a video game. Much like how Google Books does not allow users to read full pages of in-copyright

219. *Id.*

220. The court in *Allen* considered derivative works theory in the case of board game rulebooks. Ultimately, the court decided the merger doctrine applied (a doctrine that is not relevant to the argument of this Note). *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 617-18 (9th Cir. 1996). However, in the course of that analysis, the *Allen* court used a “substantial similarity” test, looking at the similarities between the rulebooks to determine whether they were derivatives. *Id.*

221. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 226 (2d Cir. 2015).

222. *Id.* at 225.

223. *See id.*

books,²²⁴ video game streams do not allow users to personally experience or see any sizable fraction of the video game played on stream.²²⁵ Therefore, streams are not derivative works, but independent creations.

C. Public Performances

Finally, a third counterargument can be made that video game streams are public performances. The right to publicly perform (or authorize others to perform) an audiovisual work, such as a video game, is the exclusive right of the original copyright holder.²²⁶ The Supreme Court has held that performances made over Internet streaming are still governed by 17 U.S.C. § 106.²²⁷ Regardless, this Note argues in some depth that video game streams are entirely original broadcasts;²²⁸ thus, these streams would not constitute a performance of a preexisting, in-copyright work.

Additionally, precedent exists that gaming is not a controllable public performance.²²⁹ In *Allen*, the plaintiff argued that organizing a national board game tournament constituted public performance of the game.²³⁰ The court disagreed, stating that “games are meant to be ‘played.’”²³¹ Though this Note has argued that video games can be played like traditional sports,²³² video games are developed and owned,²³³ whereas no one owns sports such as soccer or basketball. Therefore, *Allen* is a potential precedent for considering whether streaming is a public performance of a video game. While the question is inherently moot (with streams being original broadcasts), *Allen* provides additional ammunition that video game streams are not infringing public performance.

224. *Id.* at 209-10.

225. See Orland, *supra* note 215.

226. 17 U.S.C. § 106(4) (2012).

227. See, e.g., Coogan, *supra* note 11, at 387 n.23 (citing *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014)).

228. See *supra* Part II.

229. *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616-17 (9th Cir. 1996).

230. *Id.* at 616.

231. *Id.*

232. See *supra* Part II.B.

233. See, e.g., *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 854 (2d Cir. 1982).

CONCLUSION

The question of whether video game streams deserve copyright protection is one emblematic of the twenty-first century and its shifting culture and technology. Undoubtedly, as new forms of entertainment are created through innovation, these new industries will necessitate copyright law to evolve accordingly. Streaming is one such industry, with millions of gamers expending tremendous time and effort to create works of profound skill and entertainment.²³⁴ Should the courts decide to protect these efforts with copyright, ample legal precedent exists to support that decision.²³⁵

Streams, so long as they are competitive and creative, comfortably fulfill the bare requirements for copyright as fixed, original works of authorship.²³⁶ Further, by considering streams to be a form of sports broadcast per *Baltimore Orioles*, the courts could easily grant streamers autonomous ownership.²³⁷ This broadcast theory would then allow courts to sidestep aged precedent, such as *Midway*, that no longer serves modern technology and gaming.²³⁸ While the notion that streams are derivative works is not without merit, streams are their own unique creation, imbued with substantial originality, and are enjoyed in an entirely different manner than the video games they depict.²³⁹

As a result, an aggressively pro-streamer approach to copyright has legal merits that could serve an undeniable policy interest. Esports has become a billion-dollar industry, built on the backs of streamers, most of whom earn negligible income from their hours of broadcasting.²⁴⁰ By extending copyright protection to those streams, game developers lose nothing, yet streamers gain the barest of protections.²⁴¹ More importantly, by protecting streamers' rights, we would respect the very foundation of copyright law: to reward

234. See Perez, *supra* note 27.

235. See *supra* Part II.

236. *Supra* Part II.A.

237. See *supra* Part II.B.

238. See *supra* Part III.A.

239. See *supra* Part III.B.

240. See Hernandez, *supra* note 106; Wolf, *supra* note 19; Wolf, *supra* note 20.

241. Green, *supra* note 190, at Part V.B; Swerdlow, *supra* note 41.

originality and creativity.²⁴² Before we set precedent that would nerf an entire new entertainment industry, courts should carefully consider the open opportunity to level the playing field.

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242. U.S. CONST. art. I, § 8, cl. 8.

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