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The Use of Digital Millennium Copyright Act to Stifle Speech Through Non-Copyright Related Takedowns

*Miller Freeman**

In 1998, Congress passed the Digital Millennium Copyright Act.¹ This law provided new methods of protecting copyright in online media.² These protections shift the normal judicial process that would stop the publication of infringing materials to private actors: the online platforms.³ As a result, online platforms receive notices of infringement and issue takedowns of allegedly copyrighted works without the judicial process which normally considers the purpose of the original notice of infringement. In at least one case, discussed in detail below, this has resulted in a notice and takedown against an individual for reasons not related to the purpose of copyright, and not related to the copyrighted product either. This paper will discuss whether it is appropriate to use copyright law to stifle speech unrelated to the copyrighted product in order to protect the reputation of the copyright owner. This paper will then provide potential solutions to the apparent need of copyright owners to provide reputational protections for their works as well as the Constitutional rights of those targeted by some copyright owners.

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¹ See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

² 17 U.S.C. §512(c) (1998).

³ See *id.*

I. INTRODUCTION

Imagine you are someone who enjoys playing video games. Similar to at least 30,000 others, you want to share your enjoyment online⁴ via a streaming service such as Twitch or through Let's Play⁵ videos on a platform like YouTube.⁶ If you become popular enough, you may earn a piece of the advertising pie of whichever service you are using, which could include a portion of potential subscription fees or "tips."⁷ If you are really good at what you do and really lucky, you may be one of the rare streamers who makes a living by producing and posting (or streaming) videos on these platforms.⁸

Now imagine that part of your popularity stems from commentary, such as how the game reflects or challenges society and its values, that you add while playing the games you stream.⁹

⁴ Gamers generally share videos of themselves gaming in one of two manners. They record a game session, including voiceovers from themselves either recorded during the game session or added after the session ended. They may then add additional sound effects or visual art from other sources to the video. Secondly, they stream the game session live, usually with a live mic so that viewers may both watch the game session and hear what the gamer is saying to teammates or to his audience. Importantly to this paper, these videos show a full screen video or streaming video of the game itself as the gamer would see it on his monitor. Many times gamers also insert a small video of themselves as they play into the corner of the screen, but most often all that is seen is the game by itself.

⁵ Let's Play videos are used as the exemplar throughout this paper for brevity. This category does and should include the many different platforms upon which gamers record and post their videos or stream them live. Such platforms include YouTube, Twitch, Facebook, Mixer, and more. Mark Longhurst, *Six Alternative Streaming Platforms to Twitch*, MEDIUM (Dec. 21, 2017), <https://medium.com/the-emergence/six-alternative-streaming-platforms-to-twitch-ebf6ae7113e3> [<https://perma.cc/T22Z-WMAU>].

⁶ 30,000 is an approximation based upon the reported concurrent viewership at both Twitch and YouTube as reported in TechCrunch. Sarah Perez, *YouTube Gaming Grew its Streamer Base by 343% in 2017, Twitch by 197%*, TECH CRUNCH (Jan. 25, 2018), <https://techcrunch.com/2018/01/25/youtube-gaming-grew-its-streamer-base-by-343-in-2017-twitch-by-197/> [<https://perma.cc/PS92-DYHL>].

⁷ See *id.* Streamers make their money via a small percentage of advertising revenues (such as YouTube's AdSense program) or by accepting subscription money or tips from viewers of their streams.

⁸ Esports legend "Ninja" makes over \$500,000 per month streaming on Twitch and YouTube. He has over 3.7 million Twitch followers and more than 5 million subscribers to his YouTube channel. Darren Heitner, *Esports Legend Ninja Confirms He Is Earning Over \$500,000 Per Month*, FORBES (Mar. 20, 2018), <https://www.forbes.com/sites/darrenheitner/2018/03/20/esports-legend-ninja-confirms-he-is-earning-over-500000-per-month/#377aa3fa6652> [<https://perma.cc/F6UT-GU4W>].

⁹ This hypothetical is used purely to highlight the core issues at play. This hypothetical is based upon non-partisan political speech but could easily be focused on support for a particular political party or ideology.

Some viewers may find your perspectives to be inconsistent with their world views or political beliefs and they may begin loudly calling for you to be blocked from the platform. For you, this may mean being cut off from your livelihood.

These people may become so loud that the companies whose games you are playing in your videos start feeling the pressure to respond in order to show that they are not like you and don't subscribe to your beliefs. The companies may turn to their most extreme and powerful option to stop your use of their game - the issuance a Digital Millennium Copyright Act (DMCA) takedown notice (also called a DMCA "strike") for all of your videos that include their games. As a result, you are left with a shrinking (or nonexistent, depending on how many companies issue similar DMCA strikes) set of content from which you may support yourself and your family.

A similar situation happened in the Fall of 2017 to Felix Kjellberg, an extremely popular streamer on YouTube. Felix, who goes by the screen name "Pewdiepie," is not the most sympathetic person. The utterances for which this millionaire lost sponsorships from Disney and YouTube are generally viewed as vile.¹⁰ However, the issuance of a DMCA takedown by Campo Santo, the game's publisher, against Pewdiepie for his viewpoints¹¹ raises a novel legal question: Should copyright law be used for the purpose of punishing another for their viewpoints or preventing reputational harm caused by the association of the publishes games used in the gamer's videos? Does the use of copyright law in this manner align with that law's purpose?

This paper will briefly examine the issues of licenses for video games and particularly for creation of Let's Play videos and streams. It will then discuss the purpose and origin of the DMCA followed by the widening use of copyright law by individuals and companies seeking to limit what others say about them and the potential reputational harms of being associated with the purported copyright infringers such as Pewdiepie. This paper will then

¹⁰ Pewdiepie first lost his sponsorships from Disney and YouTube for creating a video where he paid two Indian actors (who spoke little English) to hold up a sign stating "Death to all Jews," but the spur for the DMCA takedown was half a year later when he used a racial epithet during a livestream. Shaun Prescott, *PewDiePie Uses Racial Slur During Stream, Prompting Developer Action*, PC GAMER (Sept. 11, 2017), <https://www.pcgamer.com/pewdiepie-uses-racial-slur-during-stream-prompting-developer-action/> [<https://perma.cc/FZ44-49CK>]; Andy Chalk, *Pewdiepie Responds to 'Attack' Over Anti-Semitic Video, Invites Media to 'Try Again'*, PC GAMER (Feb. 16, 2017), <https://www.pcgamer.com/pewdiepie-responds-to-attack-over-anti-semitic-video-invites-media-to-try-again/> [<https://perma.cc/C5EB-P5G3>].

¹¹ *Id.* (noting that the DMCA takedown was issued largely because co-founder of Campo Santo was "sick of this child [Pewdiepie] getting more and more chances to make money off of what we make.").

examine the legalities surrounding the Let's Play videos use of copyrighted materials; specifically, it will examine the potential First Amendment issues and how courts treat intellectual property cases where the purpose of the lawsuit does not fit the traditional intellectual property regime. Finally, this paper will explore whether Fair Use¹² protects these videos. Following this will be a discussion of what changes, if any, may be needed in copyright law, and whether publishers can address their concerns through new licensing terms.

II. VIDEO GAME LICENSES AND LET'S PLAY VIDEOS

Video games generally operate under software licenses. This means that the gamer does not outright own the game; rather, the gamer has purchased a right to use the game only to the extent that the terms and conditions of the game's licensee permits.¹³ Under these licenses, game companies reserve all rights, including in the specific content of the various images, sounds, characters, and in at least one case, assigns anything that the gamer creates using the game to the game company.¹⁴ Further, many licenses require that the gamer assign irrevocable licenses to the game company of anything that the gamer creates using that game.¹⁵ These End User License Agreements (EULA's) are the first hurdle for any gamer attempting to post videos online of their gameplay.

However, there appears to be general implied licenses for Let's Play videos and streams. These implied licenses are actually acknowledged by at least one game company, Campo Santo – the one of which Pewdiepie ran afoul.¹⁶ Several websites focus on these

¹² The fair use statute provides guidelines for what portions and how much of a copyrighted work may be used by a non-rights holder. *Infra* note 65. Generally, fair use is considered to include parodies of copyrighted works, criticisms, and more. *See* CAMPBELL, *infra* note 77.

¹³ Samples of various End User License Agreements (EULA) can be seen at *Blizzard Legal*, BLIZZARD.COM (2020), <http://us.blizzard.com/en-us/company/legal/eula> [<https://perma.cc/Q35J-EFTE>] (hereinafter samples of EULAs); *End User Access and License Agreement*, STAR WARS THE OLD REPUBLIC, <http://www.swtor.com/legalnotices/euala> [<https://perma.cc/8ABS-5H9D>]; *Bethesda Softworks EULA*, THE SIMPLE EULA PROJECT, <http://simpleeulas.weebly.com/bethesda-eula.html> [<https://perma.cc/L649-MGSQ>].

¹⁴ *See* samples of EULAs, *supra* note 13.

¹⁵ *See* STAR WARS THE OLD REPUBLIC, *supra* note 13. The Electronic Arts license very specifically requires that where the gamer “own[s] certain copyrights over any Content created by [the gamer] by using the [game], [the gamer] assign[s] to EA and/or its licensors all and any intellectual and industrial property rights in all and any such Content.” The EULA goes on to require a non-revocable license in case the rights are not assignable.

¹⁶ *Firewatch - Tell me about Firewatch!*, CAMPO SANTO (2020), <http://www.firewatchgame.com/about/> [<https://perma.cc/342Y-PQQY>]

videos and streams from gamers, permitting monetization of the videos in many cases. The game companies themselves gain great benefits in free publicity with more eyes seeing their products and then buying them. Campo Santo's co-founder said as much when he acknowledged how much money they had made off of the videos for which they issued the DMCA takedown.¹⁷ The rarity of such takedowns further offers some support of an implied license.¹⁸

If a court holds that these implied licenses actually exist, the game companies would likely react by including terms limiting the use of Let's Play videos and streams in their licenses going forward. Some companies have already taken this step, and a model for such licenses can be seen on Blizzard's website, which requires among other things that the gamer maintain a "T" rating under the ESRB.¹⁹ Assuming that they follow Blizzard's example, and that the Campo Santo EULA page performs this same purpose, the question then becomes whether the gamer in creating their videos exceeds the conditions of the license. When a licensor creates a license that "is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement."²⁰ In Pewdiepie's case, Campo Santo set a condition in its EULA that the gamers could not "spread hate or harassment."²¹ By violating these licenses, gamers are subject to copyright law.

Accordingly, gamers such as Pewdiepie may be subjected to certain undefined community standards in these licenses and either exceed the license grant or the game company may revoke that license. At that point, gamers are subject to the copyright laws and especially to the DMCA's notice and takedown provisions. This leads to an examination of whether punishment of viewpoints or purported reputational harms by association are cognizable under copyright law.

(hereinafter *Firewatch*) ("Can I stream this game? Can I make money off of those streams? Yes. We love that people stream and share their experiences in the game, and we extend the privilege [sic] of streaming and monetizing our games on Twitch, YouTube, Steam, and elsewhere to our customers. Streaming and Let's Plays are implicit but revokable [sic] privileges, and if you happen to be among the very, very, very, very few players who use your platform to spread hate or harassment, we would prefer that you not use our games in your content.")

¹⁷ Sean Vanaman, co-founder of Campo Santo, stated "I'm sure we've made money off of the 5.7M views [Pewdiepie's *Firewatch* Let's Play] video has..." Prescott, *supra* note 10.

¹⁸ *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (holding that an implied license may be implied from conduct).

¹⁹ *Infra* note 113. Blizzard dedicates a full webpage to the standards allowed for Let's Play videos and streams. The requirement of a "T" rating by the ESRB is minimally defined.

²⁰ *Jacobsen v. Katzer*, 535 F.3d 1373, 1380 (Fed. Cir. 2008) (citing *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) and *DAVID NIMMER, NIMMER ON COPYRIGHT, § 1015[A]* (Matthew Bender Elite Products 1999)).

²¹ *CAMPO SANTO*, *supra* note 16.

III. COPYRIGHT LAW AND THE DMCA

Courts have repeatedly stated that the purpose of copyright law, like all intellectual property law, is an economic one. Namely, this purpose is to provide a limited monopoly on the author's work so that he or she may profit from it. The economic incentive to create copyrightable works acts in furtherance of the public good to fulfill the Constitutional mandate to "promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²² This Clause forms the basis of the understood purpose of intellectual property law. As the Supreme Court held in *Harper & Row Publs. v. Nation Enters.*, "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."²³ The Court, citing two other Supreme Court cases, particularly noted that the "immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."²⁴ As a result, authors are able to create works without fear that others will use them or put them out as their own, potentially leaving authors with all the effort and expense of creating a work and none of the credit or financial reward.

The DMCA modified the Copyright Act of 1976 to prepare for the digital age by adding a safe harbor and notice, takedown, and put-back procedures.²⁵ The DMCA did no more than add new tools to the copyright law. As the Second Circuit noted in *Authors Guild v. Google, Inc.*, the purpose of copyright did not change following enactment of the DMCA.²⁶ That court noted that "the ultimate, primary intended beneficiary is the public."²⁷

At first blush, the DMCA appears wonderfully balanced to handle the digital age. The DMCA provides for a safe harbor for online service providers who do not create the potentially infringing products but merely host them on their websites.²⁸ It created an

²² U.S. CONST. art. I, § 8, cl. 8.

²³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (citing prior cases).

²⁴ *Id.* (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

²⁵ See 17 U.S.C. § 512.

²⁶ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2nd Cir. 2015) ("The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create... works for public consumption.").

²⁷ *Id.*

²⁸ See 17 U.S.C. § 512.

extrajudicial process whereby a copyright owner may send a takedown notice to the service provider, identifying what that owner believes to be an infringement of their copyright.²⁹ The provider then takes the content down and notifies the person who uploaded the potentially infringing content and informs them what is required to replace that content online. If the putative infringer fails to respond to this notice, the content is not replaced. However, that putative infringer may instead file a put-back notice, at which point the copyright owner may then, and only then, file a lawsuit against that person.³⁰

Unfortunately, most service providers consider the put-back notice process impractical and find that gamers rarely utilize the put-back notice tool. Further, this process emphasizes the removal of potentially infringing material before a put-back notice may be made, thus removing material provided by a putative infringer before any determination of infringement or argument of fair use or noninfringement may be made. This perceived weak protection in the DMCA for targets of rights owners is compounded by the fact that “the typical target of a DMCA complaint has ‘little or no knowledge of copyright law,’” and would not know how to calculate the legal risks involved in issuing a put-back notice.³¹ The power imbalance between the typical person who posts on the internet and the media companies’ armies of attorneys also does not support a robust put-back system.³² Instead, takedown notices issued by some providers tend to heavily emphasize the risk of lawsuits should an alleged infringer respond with a put-back notice. The result is intimidation, whether intended or not, and the minimal use of the put-back safety mechanism in the DMCA.³³ Additionally, many rights owners and service providers are separately automating the takedown process. Rights owners are using algorithms to search for potentially infringing content and using those algorithms to compose and issue the takedown notices. The larger service providers such as YouTube are also automating the same process, automatically removing content based upon an algorithm’s analysis of the takedown notice.³⁴ With a lopsided extrajudicial process in

²⁹ *Id.* The notice must contain very specific pieces of information in order to be valid under the DMCA, but the specifics are not at issue in this paper. This paper assumes that all notices follow the required form except where noted specifically.

³⁰ *Id.*

³¹ JENNIFER M. URBAN, JOE KARAGANIS & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE, AMERICAN ASSEMBLY AND BERKELEY LAW 44-45 (2017).

³² *Id.* at 45.

³³ *Id.* at 46. One rights holder noted having issued over 9,000 takedowns in a two-year period and receiving only 7 put-back notices – but two were administrative errors and the remainder were from locations outside the USA which the rights owner could not reach in a lawsuit.

³⁴ *Id.* at 45.

the takedown and put-back notices, the expansion of the use of the DMCA to cover harms not related to the purpose of copyright law is concerning.

IV. USE OF COPYRIGHT LAW TO PROTECT AGAINST REPUTATIONAL DAMAGE

With a scarcity of legal avenues for those suffering reputational harms, many have turned to copyright law to fill in the gaps.³⁵ Plaintiffs have increasingly used copyright in this manner to capitalize on copyright's powerful litigation tools and target these tools at those purportedly harming the plaintiffs' reputations. Copyright law, and the DMCA in particular, permit outright censorship of the harmful product to a prevailing plaintiff. Using the DMCA, as in the case with Pewdiepie, the harmful work may be permanently removed from the internet. Under copyright law, a permanent injunction against use of and even destruction of the harmful work may be ordered by a court.³⁶ Unlike a successful privacy tort which would result only after a drawn out court battle and require the plaintiff to perform individual takedown notices, a DMCA takedown removes the offending work completely without the need to visit a courtroom.

These attempted expansions of copyright law to cover reputational harm vary in substance from attempting to stop sex tapes (both those made by celebrities and revenge porn³⁷) from getting published, to removal of bad photos of an owner of a professional sports team, to removal of the anti-Muslim video purportedly the spur for the Benghazi attack, and more.³⁸ The courts' treatments of these copyright claims have also varied, from deep discussion of how the claims do not align with the purpose of copyright, to cases where the courts apparently ignored those purposes.³⁹

In Hulk Hogan's lawsuit against Gawker Media for publishing his sex tape, Hogan brought a copyright claim that the

³⁵ See Hon. M. Margaret McKeown, *Keynote Address: Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2016); see also Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549 (2015).

³⁶ 17 U.S.C. § 502-503.

³⁷ "Revenge porn" is used here to refer to a category of material, usually sexually graphic images of former intimate partners distributed online without that partner's consent. See YANET RUVALCABA & ASIA A. EATON, NONCONSENSUAL PORNOGRAPHY AMONG U.S. ADULTS: A SEXUAL SCRIPTS FRAMEWORK ON VICTIMIZATION, PERPETRATION, AND HEALTH CORRELATES FOR WOMEN AND MEN, AMERICAN PSYCHOLOGICAL ASSOCIATION (2019), <https://www.cybercivilrights.org/2019-publication/> [<https://perma.cc/968H-3PTR>].

³⁸ McKeown, *supra* note 35, at 10-11. Fromer, *supra* note 35, at 557-63.

³⁹ *Id.* at 576.

court quickly dismissed.⁴⁰ The court held that Hogan could not use copyright to protect his professional image as this claim was not the sort of irreparable harm contemplated in copyright.⁴¹ Unlike Hogan's sex tape, a court found a valid copyright claim in the Pamela Anderson and Bret Michaels sex tape.⁴² There, the court determined that a preliminary injunction was appropriate by holding that defendant's use of the tape interfered with Anderson's and Michaels' ability to sell the tape in the market.⁴³ By treating the plaintiffs as market participants, the copyright claim then aligned with the purpose of copyright law.

Courts are reluctant to apply copyright to reputational claims where damages are unrelated to the work's value and marketability. For example, the Eleventh Circuit noted that a plaintiff attempted outright censorship in his case against a blogger who used an unflattering photo of the plaintiff as part of a critical blog post. The blogger had focused his critical attention on the co-owner of the Miami Heat; the use of the photo only the latest shot at him. The court held that the blogger's use of the photo constituted fair use, in part because the plaintiff's "attempt to utilize copyright as an instrument of censorship against unwanted criticism" had destroyed the market for the work.⁴⁴ The Ninth Circuit also addressed an asserted reputational harm in *Garcia v. Google, Inc.*, where an actress with a bit part in the video "Innocence of Muslims" asserted a copyright claim to remove the video under the DMCA.⁴⁵ That video was allegedly the catalyst for the Benghazi attacks that killed several Americans.⁴⁶ The Ninth Circuit noted that "authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works."⁴⁷ The court also explained how thin Garcia's copyright claim was, based upon a short scene in a larger work.⁴⁸

While copyright law is increasingly used to protect against non-copyright harms, courts' analyses of plaintiffs' purposes vary. Some courts, like the one in the Pamela Anderson sex tape case, assume that the plaintiff is acting as a market participant and therefore find that the purpose of the suit coincides with a cognizable

⁴⁰ *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

⁴¹ *Id.*

⁴² *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 828-29 (C.D. Cal. 1998).

⁴³ *Id.* at 830-36.

⁴⁴ McKeown, *supra* note 35, at 10-11.

⁴⁵ *See Garcia v. Google, Inc.*, 786 F. 3d 733 (2015).

⁴⁶ *Id.* at 738.

⁴⁷ *Id.* at 745.

⁴⁸ *Id.* at 741 (discussing how plaintiff's work was part of a unitary whole for which she disclaimed joint authorship).

copyright harm.⁴⁹ Other courts account for the purpose behind the suit and factor it into its analysis, as the Eleventh Circuit did with the photo of the co-owner of the Miami Heat, finding no market to be harmed.⁵⁰ Still other courts, as with Hulk Hogan's copyright claim against Gawker⁵¹ or Garcia's claim against Google,⁵² find that the purpose of the plaintiff does not match that of copyright law and as a result determine there can be no damages.⁵³

This scattered approach by the courts only adds to the confusion surrounding the attempted expansion of copyright law to cover other harms. Importantly, as the Ninth Circuit noted in its en banc opinion in *Garcia*, the conflict between copyright law and the First Amendment is only further highlighted by this attempted expanded use of copyright law.⁵⁴

V. THE FIRST AMENDMENT AND NON-MARKET HARMS

As Judge McKeown of the Ninth Circuit noted in both her address at the Chicago-Kent Supreme Court IP Review and her decision in *Garcia*, significant tension exists between the First Amendment and copyright law.⁵⁵ The Supreme Court has declared that "copyright law contains built-in First Amendment accommodations."⁵⁶ The Court "identified the idea/expression dichotomy and the fair use defense as 'built-in' First Amendment protections."⁵⁷ However, these cases were in response to Congressional acts to extend copyright protections in duration and to works already in the public domain.⁵⁸ These cases did not find any extension of the purpose of copyright law.⁵⁹

Judge McKeown and the Ninth Circuit are not the only ones to notice this growing First Amendment conflict. Several online articles and forums discussing the DMCA action against Pewdiepie

⁴⁹ *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 828-29 (C.D. Cal. 1998).

⁵⁰ *See* McKeown, *supra* note 35.

⁵¹ *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

⁵² *Garcia v. Google, Inc.*, 786 F.3d 733, 737 (9th Cir. 2015).

⁵³ *Id.*; *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

⁵⁴ *Garcia v. Google, Inc.*, 786 F.3d 733, 736 (9th Cir. 2015) ("a weak copyright claim cannot justify censorship in the guise of authorship").

⁵⁵ *Id.*; McKeown, *supra* note 35, at 2.

⁵⁶ McKeown, *supra* note 35, at 3 (citing to *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)) (a case fighting the dramatic extension of the copyright term by Congress).

⁵⁷ *Id.* (citing *Golan v. Holder*, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012) (focused on the extension of copyright protections to works previously in the public domain)).

⁵⁸ *See id.*

⁵⁹ *See id.*

raised these same concerns.⁶⁰ Unfortunately, while a proper DMCA takedown notice requires the copyright holder to state under penalty of perjury that they have a good faith belief that the potentially infringing material is unauthorized, the DMCA does not require information about the purpose behind the takedown request.⁶¹

However, the interaction between copyright law and the First Amendment makes the purpose for DMCA takedowns incredibly important. As Judge Lumbard stated in his concurrence in *Rosemont Enters. v. Random House, Inc.*,

the spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed... when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.⁶²

Unlike the examples of sex tapes and revenge porn discussed above, Let's Play videos and streams more directly implicate the First Amendment due to the actual speech content added by gamers such as Pewdiepie. Both Pewdiepie and the exemplar which began this paper address protectible speech, speech that is ultimately the motivation for removing the videos. As the Ninth Circuit in *Garcia* noted, that claim was “grounded in copyright law, not privacy, emotional distress, or tort law, and [sought] to impose speech restrictions under copyright laws meant to foster rather than repress free expression.”⁶³

⁶⁰ See Mona Ibrahim, *Firewatch Creators can Target PewDiePie with DMCA Takedowns, and it's Perfectly Legal*, POLYGON (Sept. 12, 2017), <https://www.polygon.com/2017/9/12/16295412/pewdiepie-campo-santo-firewatch-dmca-legal-abuse> [<https://perma.cc/7XGN-PLSG>] (discussing possible anti-SLAPP claims as well as a robust discussion showing the same First Amendment concerns in the comments section following the article); see also Andy Chalk, *Pewdiepie Warns Against DMCA Abuse After YouTube Accepts Copyright Claim Against Him*, PC GAMER (Sept. 15, 2017), <https://www.pcgamer.com/pewdiepie-warns-against-dmca-abuse-after-youtube-accepts-copyright-claim-against-him> [<https://perma.cc/NT4L-ARBS>] (stating that “the DMCA is not (or at least should not be) mean[t] to be used to force content offline simply because copyright holder don't like it”); Cecilia D'Anastasio, *Let's Play Copyright Threat Raises Questions About the Law and How to Use It*, KOTAKU (Sept. 12, 2017), <https://kotaku.com/lets-play-copyright-threat-raises-questions-about-the-l-1803784376> [<https://perma.cc/WN7G-DE64>].

⁶¹ See 17 U.S.C. § 512.

⁶² *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 311 (2nd Cir. 1966) (Lumbard, J., concurring) (finding no copyright infringement where a biographer used copyrighted articles which copyrights were later purchased by a Howard Hughes shell company in order to prevent publication of the biography).

⁶³ *Garcia v. Google, Inc.*, 786 F.3d 733, 737 (9th Cir. 2015).

Further, these speech restrictions go against the purpose of copyright law, namely to provide information for the public benefit.⁶⁴ Arguably, the use of copyright law to remove Let's Play videos and block streams violates the public policy that underpins copyright law as these actions do nothing to save a protectible copyright interest and instead remove information about these games from the public. But until a court addresses these First Amendment issues head on, the only protection for Let's Play videos and streams falls to the fair use statute.⁶⁵

VI. FAIR USE OF VIDEO GAME CONTENT IN LET'S PLAY VIDEOS

The copyright fair use statute, called both an affirmative defense and non-infringement by various courts, lays out a four factor analysis to determine whether potentially infringing conduct is protectible as fair use.⁶⁶ The Ninth Circuit in *Lenz v. Universal Music Corp.* held that a copyright holder must consider fair use prior to issuing a DMCA takedown notice.⁶⁷ As a result, game companies like Campo Santo must consider whether Let's Play videos constitute fair use prior to issuing a DMCA takedown.

In *Lenz v. Universal*, a YouTube video of a baby dancing to the sound of Prince playing in the background garnered the attention of Universal, then owner of the copyright to the Prince song.⁶⁸ Universal sent a DMCA takedown notice to YouTube, who removed the video. The mother of the baby, who posted the video, along with the Electronic Freedom Foundation, sued Universal for damages under section 512(f) of the DMCA for improper takedown notice on the theory that Universal should have considered fair use prior to issuing the notice. The Ninth Circuit agreed that fair use must be considered before a rights holder issues a takedown notice.

The impact from this case leads to a question of fair use in videogame streaming and Let's Play videos. Many gamers and observers of this section of the videogame industry believe that streaming a game live or posting videos constitutes fair use of the copyrighted material.⁶⁹ However, as discussed above, the put-back

⁶⁴ Rosemont, 366 F.2d at 307 (courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.) (citations omitted).

⁶⁵ 17 U.S.C. § 107.

⁶⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing 17 U.S.C. § 107).

⁶⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2015).

⁶⁸ *Id.* at 1149.

⁶⁹ See Ibrahim, *supra* note 60; See Chalk, *supra* note 60; See D'Anastasio, *supra* note 60.

provision of the DMCA fails to help these streamers for multiple reasons. First, the vast majority of people against whom a takedown notice is made do not understand their rights and fail to avail themselves of the put-back procedure. Second, many service providers strongly suggest that use of the put back notice puts the poster of the material at serious risk of lawsuits from the rights holders. And third, the service providers themselves rarely provide easy access to a put-back system.⁷⁰

Most importantly, Urban's survey of service providers indicated that they felt the put-back provisions of the DMCA fail due to the fact that major rights holders have legions of lawyers to throw at each potential infringer.⁷¹ This disproportionate legal power, in addition to the independent nature and lack of legal sophistication of the streamers, leads to a situation where streamers do not have the tools intended by the DMCA to fight against improper takedowns.

Under *Lenz*, a rights holder only needs a subjective good faith belief that the accused infringer has no fair use defense for their videos.⁷² Unfortunately, streamers fall into a fair use gray area that has never been tested in court. Gamers routinely use a majority of the copyrighted materials in their streams or videos, where they, in either one video or many, play through a majority of a publisher's game. While many commenters support a fair use defense for Let's Play videos and streamers⁷³ the videogame industry has stated a strong argument that fair use does not exist in streams.⁷⁴ Some developers in the industry instead include permissions within their terms of use for streamers, which the developers may seemingly revoke at any time, as they did with Pewdiepie.⁷⁵

Section 107 lays out the fair use factors which, under *Lenz*, a copyright owner must analyze prior to issuing a DMCA takedown. Those 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

⁷⁰ See URBAN, KARAGANIS & SCHOFIELD, *supra* note 31, at 44-45.

⁷¹ *Id.* at 45.

⁷² *Lenz*, 815 F.3d 1145, 1163.

⁷³ See Craig Drachtman, *Do "Let's Play" Videos Constitute Fair Use?*, IPLSRUTGERS (Jan. 26, 2014), <https://iplsrutgers.wordpress.com/2014/01/26/dos-lets-play-videos-constitute-fair-use/> [<https://perma.cc/T677-ZVFU>].

⁷⁴ See D'Anastasio, *supra* note 60.

⁷⁵ See samples of EULAs, *supra* note 13; *Firewatch*, *supra* note 16.

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁶

An analysis of these four factors in Let's Play videos and streams follows.

A. Factor One:

The “transformative” nature of the allegedly infringing work helps determine for whom the first factor weighs in favor.⁷⁷ Courts have explained that this transformation is not that of changing forms, as in translating a book into a new language or creating a film from the book, rather this transformation must “communicate something new and different from the original or expand its utility.”⁷⁸ As the court in *Authors Guild* noted, the statute provides examples of changes of form, such as the book translation, which are not permissible under the first fair use factor. Rather, a transformation under both *Campbell* and *Authors Guild* is one which criticizes or provides information about the copyrighted work.⁷⁹

Further, courts have repeatedly held that the commercial nature question in the first factor covers whether the allegedly infringing product acts as a market substitute for the protected work, and that the alleged infringer's commercial motive is largely irrelevant.⁸⁰ As a result, the fact that many Let's Play gamers make money off of their videos⁸¹ does not factor against a finding of fair use. Instead, the focus of the first factor is properly on what transformation these gamers make to the copyrighted works.

Let's Play videos and streams transform the games they play via the commentary they make during a game session included in the videos. These videos at least include a gamer's voice, recorded or transmitted live, along with the sound and video of the game they are playing. Additionally, many gamers add their own or other art to the videos to highlight something for the audience.⁸² A significant

⁷⁶ 17 U.S.C. § 107.

⁷⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

⁷⁸ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2nd Cir. 2015).

⁷⁹ *Id.* at 215-16.

⁸⁰ *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2nd Cir. 1966) (citations omitted); *see also* *Campbell*, 510 U.S. at 584 (noting that had Congress intended the purely commercial nature of an allegedly infringing work to factor against a finding of fair use, “nearly all of the illustrative uses listed in the preamble” to section 107 would be infringement).

⁸¹ *See supra* note 7 & 8.

⁸² Tyler “Ninja” Blevins’ YouTube channel exhibits the many transformative additions made by gamers in their videos and streams. Ninja includes a new creative introduction for his videos, a picture-in-picture video of himself as he plays the game and running commentary. *See Ninja*, YOUTUBE, <https://www.youtube.com/user/NinjasHyper> [<https://perma.cc/AR6V-LUDL>].

percentage of gamers also include a picture in picture video of themselves in one corner of the screen as they are playing the game (the remainder of the screen is almost always taken up by a view of the game as if the watcher were playing it).⁸³

Like Google's scanning of every page of every book from multiple libraries in the *Authors Guild* case, Let's Play videos and streams add transformative value to the games in several ways while using a significant portion of the copyrighted works. Google added transformative value by creating a snippet view and search function to help searchers better find the books they wanted to purchase. With Let's Play, gamers transform a purely interactive experience into a passive one. Gamers also create these videos to show how to defeat a particularly difficult part of the game, identify strengths and weaknesses of characters or equipment available in the games, and lampoon crazy in-game stunts or bugs.⁸⁴

The issue in Let's Play transformative use comes down to whether "the value of the transformative purpose is overcome by its providing [the work] in a manner that offers a competing substitute."⁸⁵ What gamers create in Let's Play videos does not generally substitute in the market for the video games.⁸⁶ In fact, most gaming companies permit and actively encourage the creation of Let's Play videos as free advertising for their products.⁸⁷ Further, Let's Play videos are at their very core a commentary on the games. Exactly what section 107 calls out for permissible fair use.

However, a court will likely examine the extent of this commentary. Such an analysis may find that the transformation is minimal in the context of the overall allegedly infringing work. Even so, the first fair use factor will favor, at least slightly, the Let's Play gamer.

⁸³ An example of these types of videos can be found on Ninja's YouTube channel. *Id.* Ninja's channel has over 22 million subscribers as of January 13, 2020. *Id.*

⁸⁴ *What is a Let's Play on YouTube?*, MEDIKIX, <http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/#gs.SszNINE> [<https://perma.cc/5J4X-SCXJ>].

⁸⁵ *Authors Guild*, 804 F.3d 202, 218.

⁸⁶ Games that are basically interactive novels, such as THAT DRAGON, CANCER, <http://www.thatdragoncancer.com/> [<https://perma.cc/G2LP-4NV6>], where the story is the primary focus of the game, do experience market substitution effects, as once a viewer has seen the story, many do not feel the need to purchase the game. Games such as these are in a separate category from those discussed in this paper, and generally face market harms which are wholly in line with the purpose of copyright law. For that reason, they are not discussed in this paper as the focus of most DMCA claims there are not related to reputational harms, but copyright harms. Ryan Green, *On Let's Plays*, THAT DRAGON, CANCER (Mar. 24, 2016), <https://www.thatdragoncancer.com/thatdragoncancer/2016/3/24/on-lets-plays> [<https://perma.cc/5LHJ-LQDZ>].

⁸⁷ Prescott, *supra* note 10 (Campo Santo co-founder admits to having made money off of Pewdiepie's videos of Firewatch).

B. *Factor Two:*

The nature of the copyrighted work examines how fanciful versus factual the work is, with the result that the more fanciful the work, the more protections that work gets.⁸⁸ A purely factual work, such as a telephone book, gets minimal copyright protection because copyright is intended to protect creative expression, not facts.⁸⁹ Courts have found this factor to be rarely determinative.⁹⁰ When courts have weighted this factor, they did so only in the context that the “law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”⁹¹ This factor favors the video game publishers as games are fictional works.

C. *Factor Three:*

Factor three examines how much of the copyrighted work the alleged infringer uses. To claim fair use, the alleged infringer must only use as much of the copyrighted work as needed for their purpose while avoiding use of the heart of the work.⁹² This factor will interact with the fourth factor, market substitution, as more of the original work is taken.⁹³

However, courts have found that complete copying of a work could be justified as fair use when that copying was necessary to achieve a transformative purpose and the end result did not act as a market substitute for the original work.⁹⁴ In *Authors Guild*, Google copied the entirety of the original copyrighted books, placing these copies into their servers.⁹⁵ These copies were then made available to be searched by the public with limitations that prevented the searchers from reading more than a few lines of the books at a time.⁹⁶ As a result, Google’s copying of the works in order to make them searchable in a limited fashion did not act as a market substitute despite taking the entirety of the works.⁹⁷

With gamers, as in *Authors Guild*, the amount of the original work used is generally significant, depending on the video or

⁸⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

⁸⁹ *Id.*

⁹⁰ *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 42 (S.D.N.Y. 2017) (citing *Campbell v. Acuff-Rose*).

⁹¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2nd Cir. 2015).

⁹² *Campbell*, 510 U.S. at 587 (noting that “this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too”).

⁹³ *Id.*

⁹⁴ *Authors Guild*, 804 F.3d at 221.

⁹⁵ *Id.* at 207.

⁹⁶ *Id.*

⁹⁷ *Id.* at 221-22.

stream.⁹⁸ Video games may have between just a few hours and hundreds of hours of content, depending on the type of game. Each video or stream posted by the gamer generally takes less than an hour. An aggregation of these may end up being a significant portion of the game (especially where a streamer plays one game for weeks or months in a row). However, the question boils down to whether or not this potentially significant amount of content use is only enough to fulfill the purpose of the allegedly infringing work, and whether it takes the heart of the work. This is not an easy analysis. Streamers generally post their videos and create their streams to entertain others, to show others how to play a particular game in a successful manner, and to critique those games.⁹⁹ These videos may also include the climactic moments of the games, potentially showing the heart of the work.¹⁰⁰

As a result, this factor would depend on a factual analysis of the use of the original work on a case by case basis. In most cases, a court will likely find that a gamer's videos and streams do not create a market substitute for the games or potential derivatives of the games. Therefore, this factor will depend upon how transformative the use of the entirety or just the heart of the original works is under the first factor.

D. Factor Four:

This factor examines “the effect of the [copying] use upon the potential market for or value of the copyrighted work.”¹⁰¹ This factor “must take account not only of harm to the original but also of harm to the market for derivative works.”¹⁰² Courts have identified this factor as the most important of the four fair use factors.¹⁰³

The potential loss of sales from harm to the reputation of the copyright holder would not act as a market substitute. Indeed, even where full copying of copyrighted works which could be read in part in the same medium in which they were originally or derivatively published, such a loss of sales can be insufficient “to make the copy

⁹⁸ See Drachtman. *supra* note 73 (discussion of the various types of games in the context of the third factor of fair use).

⁹⁹ Mona Ibrahim, *Deconstructing Lets Play, Copyright, and the YouTube Content ID System: A Legal Perspective*, GAMASUTRA (Dec. 12, 2013), https://www.gamasutra.com/blogs/MonaIbrahim/20131212/206912/Deconstructing_Lets_Play_Copyright_and_the_YouTube_Content_ID_Claim_System_A_Legal_Perspective.php [<https://perma.cc/X342-VCRA>].

¹⁰⁰ *See id.*

¹⁰¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2nd Cir. 2015).

¹⁰² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985)).

¹⁰³ *Id.*; *see also* *Authors Guild*, 804 F.3d at 223.

an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original.”¹⁰⁴

As a result, courts should examine whether Let’s Play videos and streams act as market substitutes for the original works or their derivatives. As noted above, generally videogame companies like gamers to stream their copyrighted works. It acts as free advertising, and as seen in Pewdiepie’s case with the Campo Santo game *Firewatch*, such streams may boost sales for the original work significantly.¹⁰⁵ Further, the transformation of interactive games into a viewer-only experience does not “amount[] to mere duplication of the entirety of an original” game.¹⁰⁶

Because a passive video cannot substitute for the interactive nature of the games themselves, courts must then look to the market for derivative works. The types of derivatives seen in the video game industry generally involve ports of the game from one platform to another, game sequels or prequels, movies, and books.¹⁰⁷ The first two examples may be analyzed in the same fashion as the duplication of the original game argument above. There appears to be sufficient transformation from an interactive medium to a passive one in the Let’s Play videos to at least make that point arguable in a court. The latter two examples are closer in line with the Let’s Play videos as they too are passive activities (except perhaps in the case of a Choose Your Own Adventure book). However, as books do not include moving images or sounds as part of their medium, a court will likely not compare Let’s Play videos with the market for books.

Therefore, a court would look more closely at the potential market for videos and movies as derivative works of the games. Additionally, the first factor, the transformative use made of the original work, impacts this analysis. Due to this transformation, a court would likely find that Let’s Play videos and streams exist in a different market than those of a video derived from the game. Games tell stories or create scenarios. Let’s Play videos and streams add often humorous commentary on the games or just coinciding with the games, and often additional content to highlight points the gamers want to make about the games. This shifts the Let’s Play uses into a commentary role, something rarely seen in actual derivative works, and more akin to *Mystery Science Theater 3000*

¹⁰⁴ Authors Guild, 804 F.3d at 224.

¹⁰⁵ Prescott, *supra* note 10.

¹⁰⁶ Campbell, 510 U.S. at 591.

¹⁰⁷ The *Tomb Raider* series best exemplifies the variety of derivative works. Originally a video game, this game has been derived into several sequel games, as well as multiple movies and books. See *Tomb Raider*, IMDB, https://www.imdb.com/title/tt1365519/movieconnections/?tab=mc&ref_=tt_trv_cnn [<https://perma.cc/VDQ9-TMZX>].

shows.¹⁰⁸ This close analog of the Let's Play videos has not been tested in a fair use context, but like Let's Play videos, would not be considered a derivative use of the original works.

This fourth fair use factor will depend upon the facts in each case. However, examining cases like this paper's exemplar or Pewdiepie's Let's Play video of Firewatch, a court would be hard pressed to find these videos act as market substitutes for the actual games or any potential derivative works. As a result, this factor likely favors a finding of fair use.

E. Fair Use Analysis under the Four Factors:

Whether a gamer may claim protection under fair use depends largely upon how much of the game they use, and especially upon how transformative their use is. The first factor is usually the most telling. Whether a court determines that the Let's Play video or stream was transformative enough will depend largely upon the facts of each case, with a larger body of commentary within the video aiding in a finding of likely fair use. The second factor, while weighing in favor of the game companies, likely will not affect a fair use determination. The third factor, like the first, will depend upon how transformative the use of the original games was and whether the new work acts as a market substitute. The more content that is used, the more transformative the use needs to be. With the fourth factor favoring, at least somewhat, the Let's Play gamer, a court's analysis will come down to how much of the original games were used and to what extent the gamer's added content transformed the original games.

Based upon this analysis, gamers would have a decent argument of fair use. However, as discussed above, the costs of fighting a DMCA takedown notice by a game publisher are significant. Most Let's Play gamers do not have the wherewithal to take such a fight to court, while most game companies do. As a result, gamers would have to connect with a group like the Electronic Freedom Foundation which took the case for the plaintiff in *Lenz*. Without such rare help, gamers are unlikely to be able to even bring a case arguing fair use before a court, while game companies have the resources to initiate such suits.

¹⁰⁸ Mystery Science Theater 3000 ("MST3K") showed full films, usually B or C list films, while a group of characters sat in the foreground of a darkened theater lampooning the films throughout the showing. Generally, MST3K purchased the rights to these films or used films in the public domain. See *Home: Mystery Science Theater 3000*, MST3K.COM, <https://www.mst3k.com/>.

VI. POTENTIAL SOLUTIONS TO REPUTATIONAL HARMS

The underlying problem with the Pewdiepie situation is one of harms not lining up with those cognizable under copyright law. As the Supreme Court stated in *Campbell v. Acuff-Rose*, the only harms for which copyright law is the appropriate relief are those concerned with market substitution.¹⁰⁹ The increasing use of copyright in order to protect against reputational harms, or even to outright punish, as with Campo Santo's takedown of Pewdiepie's video, does not match this market harm. A new approach is needed to fill this gap.

The first approach may be for state legislatures to step in and create new torts to cover the most egregious reputational harms, such as those found with revenge porn. That particular species of reputational harm fits poorly with copyright except where the first sale doctrine applies.¹¹⁰ Where a single individual takes a nude or otherwise explicit selfie, or creates a video of that same act, sends the selfie or video to a significant other or simply keeps it on a personal drive, that individual may rely upon the first sale doctrine and copyright law to prevent publication. However, they could run afoul of some courts such as the one in the Hulk Hogan case. That court would not recognize their cause of action because the harms do not align with those cognizable under copyright law. Further, these individuals should take care as the use of the DMCA takedown provisions to successfully remove revenge porn videos and images is more likely due to the posters' lack of understanding of the law and resources to fight a takedown than it is to the legality of the actions.

Additionally, revenge porn could also be moved to servers located in countries where courts of the United States could not reach. The result would be servers and owners of such servers who could ignore DMCA takedowns at will.¹¹¹ The stronger and more effective solution would be enhancements to and adoption of revenge porn laws such as those enacted in 46 states so far.¹¹² These laws criminalize the distribution of revenge porn but need to add

¹⁰⁹ *Campbell*, 510 U.S. at 592-93.

¹¹⁰ This paper does not discuss the first sale doctrine which allows a copyright holder to prevent publication or use of a copyrighted work where it has not been sold at all or only sold to an extremely limited group. Video games subject to Let's Play videos and streams all have passed the gate of the first sale doctrine, and so it does not apply.

¹¹¹ See URBAN, KARAGANIS & SCHOFIELD, *supra* note 31 (identifying the only put-back notices one rights holder received out of over 9,000 takedowns were persons in Eastern European nations where they were effectively immune to suit under the DMCA and copyright law).

¹¹² See *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/BG3T-9NSV>].

some method by which such images or videos may be removed outside of the criminal process.

Unlike revenge porn, however, the problem of Let's Play videos and reputational harms lies in a different arena. Here, the reputational harms game companies seek to mitigate are those of association of their products with someone who maintains public views outside of the mainstream or at least outside of that company's views. Pewdiepie has repeatedly used racial slurs and made anti-Semitic comments or videos. But if copyright law can be bent to permit actions against a person with an objectionable attitude who may publicly purchase and review your product, then copyright could be used to also marginalize someone using political speech in a similar manner. The courts severely scrutinize other laws that abridge the right of free speech, and Campo Santo's use of the DMCA to silence Pewdiepie drags the DMCA closer to a new confrontation between the First Amendment and copyright law.

A better approach for Let's Play videos would be stronger and more specific licensing agreements. Currently, as discussed above, game publishers approach licensing Let's Play videos in a haphazard manner. Some publishers, such as Campo Santo and Blizzard, have specific terms licensing the use of their games in Let's Play videos.¹¹³ Unlike Campo Santo, however, Blizzard's "video policy" page lays out several guidelines including a morals clause stating, "[t]o maintain and protect the image of our games, Blizzard also requires that Productions maintain the "T" rating that has been given to its products by the ESRB..."¹¹⁴ By limiting content of Let's Play videos to a "T" rating by the ESRB, Blizzard can better police the use of its content and revoke licenses from Let's Play producers when they cross the line. This approach, with a definite benchmark such as that provided by the ESRB or similar rating, better defines the reputational harms a publisher is willing to risk to the Let's Play gamers.

Ultimately, greater education and stronger enforcement on the put-back provision is necessary overall to protect speech. *Lenz* was a good first step in this direction, but more needs to be done so that the individuals who post videos on sites like YouTube are not

¹¹³ Blizzard devotes an entire webpage to their licensing terms for Let's Play videos. See *Blizzard Video Policy*, BLIZZARD, <https://www.blizzard.com/en-us/legal/dd76b654-f2c4-4aaa-ba49-ca3122de2376/blizzard-video-policy> [<https://perma.cc/8QGD-FJWE>].

¹¹⁴ *Id.* The guidelines for a "T" rating by the ESRB or "similar ratings received from other ratings boards around the world" are not defined, and one must search for those standards on the ratings board's websites. The ESRB defines a "T" rating as "content generally suitable for ages 13 and up. May contain violence, suggestive themes, crude humor, minimal blood, simulated gambling and/or infrequent use of strong language." See *Ratings Guide*, ENT. SOFTWARE RATINGS BOARD, <https://www.esrb.org/ratings-guide/> [<https://perma.cc/EBA2-KW5Z>].

stifled by the legions of lawyers noted in the Urban survey. Uniform licensing agreements that spell out the boundaries of Let's Play videos would provide stronger protection for both game publisher and Let's Play gamer against infringements of speech utilizing copyright laws. Finally, a strict and consistent interpretation by the courts of where copyright falls, and what remedies fit, is needed. Such decisions by the courts would set the boundaries so that legislatures would know where they need to legislate on issues and where game publishers should license and would not stifle free speech as a byproduct of protecting against harms that imperfectly fit within this regime.

VII. CONCLUSION

Because video games are licensed, not sold, to gamers for their use, gamers that use these games in Let's Play videos or streams may end up violating or having those licenses revoked by the rights holder. Gamers are then left in the realm of copyright infringement. Game companies that then file DMCA takedowns or sue Let's Play gamers under copyright law should then do so only when the harms align with the purpose of copyright law; to create an exclusive market for the original work and any derivatives.

The Supreme Court has held that copyright law includes First Amendment protections. These protections include the fair use statute. However, the Court only addressed these issues in response to expansions of the coverage of copyright law, and not specifically with the extrajudicial power of the notice and takedown regime of the DMCA. The use of the DMCA to censor gamers that hold distasteful personal views, while socially commendable, abuses the law and exposes a vulnerability in the DMCA.

The better solutions for reputational harms are those that address the underlying issues; namely the use of the internet to spread harmful materials like revenge porn. State legislatures are already acting to limit this harm, and copyright law needs the legislatures to take further action so that copyright is not used as a solution where non-market harms are sought to be remedied.

Similarly, Let's Play videos should be circumscribed by explicit licensing agreements that delineate the behaviors permitted by the game publishers and any copyright claims then examined wholly under the fair use statute. This fair use analysis is required by the Ninth Circuit's decision in *Lenz* prior to any DMCA takedown action. However, the rights holder only needs to show a subjective good faith belief that there is no fair use. Because the four-factor fair use analysis is largely fact based, depending upon the facts of each use, a court would be hard pressed to find a lack of subjective good faith belief against fair use should a rights holder

issue a DMCA takedown. This leaves the door open for further abuse of the DMCA by rights holders.

The fair use analysis will ultimately come down to how transformative the use of the copyrighted works is, as the market substitute touchstone for most of the factors will tend to favor a finding of fair use. Unlike Google, gamers do not have the significant legal resources and massive utility of their programs to back up a legal case, making it difficult for gamers to defend a DMCA fair use case.

The solution to this problem is two-fold. First, gamers and service providers such as YouTube should become better educated on fair use and specifically the DMCA put-back notice. More complete and helpful notices from the service providers who receive DMCA takedowns would aid in this. With a better understanding of how the put-back system works, and the good faith beliefs required for any notices, gamers would have a better chance of resisting such takedowns. Second, a strict interpretation by the courts requiring a market harm before the use of the DMCA would be permitted will help set clearer boundaries on copyright law and make it easier for gamers to understand what types of uses of copyrighted materials are permitted.