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Bits and Bytes from the Section

By Michael Gallo, 2013-2014 IT Law Section Chairperson-Elect

Daylight Savings Time has arrived, and Spring is right around the corner, though you would not know when looking out the window!

January 2014 IT Law Section Council Meeting - During the January 2014 IT Law Section Council meeting, a motion was approved to form a committee to research and begin efforts for planning the next Information Technology Law Seminar, which would be targeted for September 2014, and would coincide with the Section's Annual meeting. Steve Balagna is chairing the seminar committee this year. If you have ideas for topics or speakers you would like to see, are interested in joining the committee, or are looking for a sponsorship opportunity, please contact Steve at balagnapl@comcast.net!

The next IT Law Section Council meeting is tentatively scheduled for Thursday, April 24, at Kemp Klein Law Firm, 201 West Big Beaver Road, Suite 600 in Troy, Michigan. More information regarding the meeting will be published on the Section's LinkedIn page.

2014 Edward F Langs Writing Award - Anyone with contact to law school faculty is invited to promote the 2014 Edward F Langs Writing Award competition by asking that student essays related to information technology law be submitted per the competition rules, which are posted at <http://www.michbar.org/it/news.cfm>. This year, a total of up to six essays will be selected, and up to \$3,000 in awards is available for distribution to selected authors. The number of awards and total award amount distributed will be based on the number of submissions selected for publication in the *Michigan IT Lawyer*.

Section Members on LinkedIn? - The IT Law Section's Announcement mailing list has about 800 subscribers, and on LinkedIn, the 'IT Law Section of the State Bar of Michigan' group has about 195 members. If you are not a member of the LinkedIn group, please join by visiting http://www.linkedin.com/groups?home=&gid=2993995&trk=anet_ug_hm, and use this resource to connect with your peers by posting to 'Discussions' or 'Jobs', by initiating a 'Poll' or by requesting creation of a 'Subgroup'. Your participation is welcome and desired!

Regards,

Michael Gallo, 2013-2014 Section Chairperson-Elect





Privacy Committee

Information Technology Law Section

2013-2014
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By Robert Rothman and Keith Cheresko
Privacy Committee Co-Chairs

The Privacy Committee held a meeting on February 27, 2014, kindly hosted by Pamela Mack of RGIS in Auburn Hills. The subject of the discussion-format meeting was 2013 privacy developments and projected 2014 issues. The fifteen participating committee members covered a broad range of subjects picked from a large menu of possible topics. These topics included:

- Marketing issues such as behavioral tracking, social media and “mail tracking”
- U.S. regulatory developments from the FTC, FAA and the SEC as well as other developments under the Fair Credit Reporting Act, the Drivers Privacy Protection Act, the Telephone Consumers Protection Act and other federal statutes
- Some of the interesting and developing matters connected with the coming “internet of things”
- US state legislative developments, in particular the new California privacy laws and amendments to various state breach laws
- Major U.S. privacy litigation
- Significant breach cases such as Target, Nieman Marcus, Michaels
- The Snowden revelations and the international reaction, particularly the future of Safe Harbor
- Major foreign developments including the proposed EU Data Protection Regulation to replace the EU Data Protection Directive, developments regarding the European cookie laws, new data protection laws in China, Malaysia, Singapore and South Africa

The next meeting will take place in mid second quarter 2014 at a location to be determined. There will be a deep dive into the legislative process involved in enacting regulations in the EU, as well as a review of the current content of the proposed EU Data Protection Regulation. Also planned is a discussion about recent privacy developments and legislative initiatives.

If interested in joining the Privacy Committee, please send an email message to one of the Co-Chairs at the address listed below and express your interest in participating.

Bob Rothman, Co-Chair
rrothman@privassoc.com
Privacy Law Committee

Keith Cheresko, Co-Chair
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Privacy Law Committee

Recent Developments in Information Technology Law

By David R. Syrowik, Brooks Kushman P.C.

PATENTS – Case Law – U.S. Supreme Court

As reported at 87 BNA's PTCJ 332, on December 6, 2013, the Supreme Court grants a petition for writ of certiorari in a case challenging software method and system patent eligibility under 35 U.S.C. § 101. The patent owner asks whether claims to computer-implemented inventions—including claims to systems and machines, processes, and items of manufacture—are directed to patent-eligible subject matter. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*.

COPYRIGHTS – Case Law – U.S. Supreme Court

As reported at 87 BNA's PTCJ 551, on January 10, 2014, the Supreme Court grants a petition for writ of certiorari challenging the Second Circuit's determination that Aereo Inc.'s transmission of copyrighted television programs to individual Internet subscribers does not constitute a "public performance" under the Copyright Act. *American Broad. Cos. v. Aereo, Inc.*

PATENTS – Case Law – U.S. Court of Appeals

As reported at 87 BNA's PTCJ 680, on January 24, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that claims to a computer expert system for use by medical professionals are not eligible for patenting under 35 U.S.C. § 101. *SmartGene, Inc. v. Advanced Biological Labs., SA*.

As reported at 87 BNA's PTCJ 385, on December 16, 2013, the U.S. Court of Appeals for the Federal Circuit affirmed the ITC's judgments that should lead to an import ban on devices that infringe Microsoft's patent on applications such as Microsoft Outlook. *Motorola Mobility, LLC v. Int'l Trade Comm'n*.

As reported at 87 BNA's PTCJ 546, on December 16, 2013, the U.S. Court of Appeals for the Federal Circuit affirmed Apple's non-infringement of Motorola's patent covering application-push technology. *Motorola Mobility LLC v. Int'l Trade Comm'm*.

As reported at 109 USPQ2d 1265, on January 13, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that a manual for software product, even though it was missing pages, qualified as "printed publication" that was "available

to the public" within meaning of 35 U.S.C. § 102(a)(1), and thus was valid prior art for reexamination of claims directed to computer security device and method. *In re Enhanced Sec. Research, LLC*.

As reported at 87 BNA's PTCJ 169, on November 18, 2013, the U.S. Court of Appeals for the Federal Circuit ruled that Apple cannot enjoin Samsung's smartphones and tablets based on design patent or trade dress protection, but Samsung may be forced to address certain features covered by utility patents. The court remands for the district court to reconsider whether Samsung should be enjoined from selling phones with certain features, including "pinch-to-zoom." *Apple Inc. v. Samsung Elecs. Co.*

As reported at 87 BNA's PTCJ 542, on January 14, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that computing devices do not infringe patent requiring hardware-software combination. *Nazomi Commc'ns, Inc. v. Nokia Corp.*

TRADEMARKS/JURISDICTION – Case Law – U.S. Court of Appeals

As reported at 87 BNA's PTCJ 278, on December 2, 2013, the U.S. Court of Appeals for the Eleventh Circuit held that a district court properly declined to vacate a judgment against the operator of a website selling counterfeit Louis Vuitton products. *Louis Vuitton Malletier v. Mosseri*.

TRADEMARKS – Case Law – U.S. Court of Appeals

As reported at 108 USPQ2d 1500, on March 7, 2013, the U.S. Court of Appeals for the Sixth Circuit, in an unpublished opinion, ruled that affidavit of defendants' former employee warrants reversal of summary judgment for defendants in action in which plaintiff alleges that defendants copied its karaoke discs onto hard drives and MP3 players, and that defendants' customers, when they use these devices, will see plaintiff's "Sound Choice" trademarks on video displays and believe that "Sound Choice" brand is in some way associated with defendants. *Slep-Tone Entm't Corp. v. Karaoke Kandy Store, Inc.*

As reported at 87 BNA's PTCJ 819, on February 5, 2014, the U.S. Court of Appeals for the Ninth Circuit, in an unpub-

lished opinion, ruled that Microsoft and Procter & Gamble did not infringe “Webceleb” trademark. *Webceleb, Inc. v. Procter & Gamble Co.*

TRADEMARKS/CYBERSQUATTING – Case Law – U.S. Court of Appeals

As reported at 87 BNA’s PTCJ 273, on December 4, 2013, the U.S. Court of Appeals for the Ninth Circuit ruled that the federal anticybersquatting statute does not create a cause of action for contributory cybersquatting. Affirming summary judgment in favor of a domain name registrar, the court determines that neither the plain text of the statute, nor the legislative history, support an action for contributory cybersquatting. *Petroliam Nasional Berhad v. Godaddy.com.*

TRADE SECRETS – Case Law – U.S. Court of Appeals

As reported at 87 BNA’s PTCJ 692, on January 24, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment against security software developing outfit. *Dice Corp. v. Bold Techs.*

As reported at 108 USPQ2d 1910, on April 5, 2013, the U.S. Court of Appeals for the Sixth Circuit reversed and remanded a summary judgment ruling that four-year statute of limitations barred plaintiff’s misappropriation claim, on ground that plaintiff should have known of defendants’ misappropriation when defendants’ employee, who had worked for plaintiff’s predecessor, kept copies of shop drawings on his home computer, since defendants’ contention that employee did not acquire drawings by improper means, and had predecessor’s permission to possess and use drawings, undermined defendants’ statute of limitations argument. *Kendall Holdings, Ltd. v. Eden Cryogenics LLC.*

COPYRIGHTS/CRIMINAL – Case Law – U.S. Court of Appeals

As reported at 87 BNA’s PTCJ 418, on December 19, 2013, the U.S. Court of Appeals for the Ninth Circuit ruled that an award of restitution under the Mandatory Victims Restitution Act resulting from a verdict of criminal copyright/infringement in computer software must be based on the copyright holder’s actual losses and not merely the full retail price of a genuine copy of the goods in question. *United States v. Anderson.*

PATENTS – Case Law – U.S. District Courts

As reported at 87 BNA’s PTCJ 620, on January 21, 2014, the U.S. District Court for the Northern District of California,

granted summary judgment to Apple against Samsung with respect to two patents. *Apple Inc. v. Samsung Elecs. Co.*

As reported at 87 BNA’s PTCJ 219, on November 21, 2013, in the U.S. District for the Northern District of California, a second jury puts back \$290 million in a patent infringement award to Apple from the \$450 million that Judge Lucy H. Koh had stricken eight months earlier. The first trial resulted in an award of \$1.05 billion for infringement by 23 different models of Samsung’s Android-based smart phones and tablets, but Judge Koh had found errors in the jury’s calculations. *Apple Inc. v. Samsung Elecs. Co.*

COPYRIGHTS – Case Law – U.S. District Courts

As reported at 87 BNA’s PTCJ 672, on January 22, 2014, the U.S. District Court for the Northern District of California ruled that when compared as a whole, there is no legal basis that would support a jury’s determination that seven “Madden” football games created for the Sega Genesis console are virtually identical to the 1986 “John Madden Football” game that was developed for the Apple II computer. *Antonick v. Elec. Arts. Inc.*

As reported at 87 BNA’s PTCJ 101, on November 14, 2013, the U.S. District Court for the Southern District of New York ruled that the use of the full text of tens of millions of books for its online search function is a transformative use, and thus Google’s mass digitization of those books without authorization from copyright holders constitutes fair use. *Authors Guild Inc v. Google Inc.*

As reported at 109 USPQ2d 1099, on November 17, 2013, the U.S. District Court for the Middle District of Tennessee ruled that “registration approach” to determining whether registration requirement of 17 U.S.C. § 411(a) has been satisfied, under which copyright is not considered registered until Copyright Office passes on application, will be followed in action in which plaintiffs filed “takedown” notifications under Digital Millennium Copyright Act, even though 17 U.S.C. § 512 requires copyright holder who receives counter-notification to file suit within 10-14 days after allegedly infringing material is removed from website. *Schenck v. Orosz.*

As reported at 87 BNA’s PTCJ 58, on October 29, 2013, the U.S. District Court for the District of Idaho ruled that differences between open and closed software code fend off injunction in infringement suit. *Battelle Energy Alliance, LLC v. Southfork Sec., Inc.*

As reported at 108 USPQ2d 1478, on August 28, 2013, the U.S. District Court for the Northern District of Illinois ruled that individual plaintiff who traced outline of drawing

depicting handshake so that image could be reduced in size and scanned into computer is not joint author of image, since joint authorship requires that contribution of each author be independently copyrightable, and plaintiff did not exercise “considerable control” over drawing or make “significant contributions” by merely copying and resizing existing work. *Beasley v. Commonwealth Edison Co.*

As reported at 87 BNA’s PTCJ 491, on December 31, 2013, the U.S. District Court for the Southern District of New York ruled that video-sharing website operator Vimeo LLC is entitled to summary judgment against copyright infringement claims involving user uploads, that employees did not view, granting in part the site’s motion for reconsideration. The court previously held that a jury would need to decide whether Vimeo had red flag knowledge of infringement with respect to videos uploaded by premium members. *Capitol Records, LLC v. Vimeo, LLC.*

As reported at 108 USPQ2d 1593, on September 5, 2013, the U.S. District Court for the District of Columbia ruled that internet-based broadcast television subscription streaming service violates broadcast television plaintiffs’ right to perform their copyrighted works publicly; allegedly “one-to-one relationship” between single mini-antenna and single viewer of video stream in defendants’ system does not warrant finding that their retransmissions of broadcast channels are not public performances. *Fox Television Stations, Inc. v. FilmOn X LLC.*

As reported at 108 USPQ2d 1712, on October 8, 2013, the U.S. District Court for the District of Massachusetts ruled that plaintiff owner of Boston television station failed to show that it is likely to succeed on merits of its claim that defendant internet streaming service, which retransmits plaintiff’s programming for subscribers to watch and record on their computers and other internet devices, infringes plaintiff’s exclusive public performance right. *Hearst Stations Inc. v. Aereo, Inc.*

As reported at 108 USPQ2d 1805, on November 4, 2013, the U.S. District Court for the District of Puerto Rico ruled that infringement plaintiff sufficiently alleged similarities between its copyrighted software product and defendant’s accused software by claiming that defendant had unfettered access to plaintiff’s product through defendant’s working relationship with plaintiff and plaintiff’s customer, and that plaintiff’s agent heard two of defendant’s agents discuss gaining access to functional elements of plaintiff’s product through reverse engineering. *Computer Automation Sys., Inc. v. Intelutions, Inc.*

TRADEMARKS – Case Law – U.S. District Courts

As reported at 87 BNA’s PTCJ 339, on December 4, 2013, the U.S. District Court for the Southern District of California ruled that claims under California state law of trademark infringement and dilution targeting Yahoo’s keyword advertising program were barred by the Communications Decency Act. *Parts.com, LLC v. Yahoo! Inc.*

As reported at 109 USPQ2d 1307, on August 29, 2013, the U.S. District Court for the District of Nevada ruled that domestic sports-handicapping service cannot succeed on its infringement claims against offshore website on theory that defendant encouraged message board users to post, with knowledge that users would mention plaintiff’s marks and thereby drive search engine results that favored defendant’s site, allegation that uses are “in a privity of relationship” with defendant does not change fact that uses of plaintiff’s marks constitute nominative fair use. *Stevo Design, Inc. v. SBR Mktg. Ltd.*

As reported at 87 BNA’s PTCJ 817, on February 5, 2014, the U.S. District Court for the Central District of California ruled that a failed bid to secure a new gTLD did not result in a “registration” of a domain name that would support an action under the Anticybersquatting Consumer Protection Act. *Del Monte Int’l GmbH v. Del Monte Corp.*

As reported at 109 USPQ2d 1512, on November 12, 2013, the U.S. District Court for the Central District of California ruled that Plaintiff has failed to state trademark infringement and related claims by alleging that defendants’ use of plaintiff’s “What’s Your Price” and “Seeking Millionaire” marks as Internet advertising keywords causes paid advertisements for defendants’ “sugar daddy dating” websites to be displayed in response to search for plaintiff’s marks, since defendants’ advertisements are displayed off to side of actual search results, under heading “ads,” and neither those ads, nor domain names of sites they advertise, reference any protected mark. *Infostream Grp. Inc. v. Avid Life Media Inc.*

PATENTS – U.S. Patent and Trademark Office

As reported at 109 USPQ2d 1495, on January 21, 2014, the Patent Trial and Appeal Board ruled that the challenged claims for computerized methods of “substitute fulfillment,” generally involving assignment of substitute teachers or bank tellers to available temporary openings, are directed to abstract, and therefore unpatentable, methods, and addition of “database comprising worker records” in two challenged system claims does not result in meaningful limitation that distinguishes them from patent-ineligible method claims. *CRS Advanced Techs., Inc. v. Frontline Techs., Inc.* ■

The Michigan IT Lawyer is pleased to present “*Multiplayer Streaming as a Career – A New Industry or Copyright Infringement?*” by Patrick B. McDonald, a winner of the 2013 Edward F. Langs Writing Award competition, and a Juris Doctor graduate of the University of Detroit Mercy School of Law.

The statements made and opinions expressed in this essay are strictly those of the author, and not the State Bar of Michigan or the Information Technology Law Section. Comments regarding this article can be forwarded to the *Michigan IT Lawyer*, care of michael@gallo.us.com. Enjoy!

Multiplayer Streaming as a Career – A New Industry or Copyright Infringement?

By Patrick B. McDonald

Online Streaming and the Rapid Growth of E-Sports

Joe “Voyboy” Esfahani spends his afternoons and evenings playing online video games, not unlike millions of people around the world. To say that gaming has become mainstream in recent years is a major understatement – experts estimate that the industry will grow from \$67 billion in 2012 to \$82 billion by 2017.¹ What makes Esfahani different, however, is that while he plays his game of choice, Riot Games’ League of Legends, he is often joined by thirty thousand viewers through his channel on TwitchTV, the video streaming service of choice for most gamers. Esfahani plays League of Legends, often while providing advice and explanations for his in-game decisions, with the hopes of providing entertainment and education to other fans of the game. Unsurprisingly, he doesn’t do this out of the kindness of his heart – the most popular streamers receive payment from TwitchTV for running advertisements on stream.² Payment is provided to the streamer per 1,000 “impressions,” or unique viewers. Extremely popular streamers like Esfahani will receive as much as \$4 per 1,000 impressions per advertisement, easily reaching figures of \$100+ per hour.

While streaming provides regular income and exposure to professional gamers, the real money can be found in professional tournament play. Organizations like Major League Gaming fostered the early stages of the modern “E-Sports” industry, giving fans and players alike an opportunity to see the best of the best compete in their game of choice. E-Sports as an industry has been experiencing huge growth in recent years,³ bringing in six figure salaries for the top players⁴ and providing considerable economic stimulus into the cities that host these rapidly growing events.⁵ Organizations like MLG and corporate sponsors like Intel, ASUS, and AMD make these tournaments and events possible worldwide and pay out huge sums of money to the winners, but the everyday source of

income for these professional players comes from advertisement revenue on their personal streams hosted on TwitchTV, Own3dTV and other streaming services.

In the last year a definite shift has occurred in the hosting of E-Sports events, from third party organizations to the video game developers themselves. League of Legends creators Riot Games has created the “League Championship Series” – LCS for short, which has operated as a sort of “regular season” for the games’ professional players. During the season teams are given a salary from Riot Games, and a team that successfully qualifies for the World Championship will have an opportunity to play for *millions* of dollars in prize money.⁶ Last years’ Season 2 Championship lacked the major structure and support of the LCS Season 3, but still managed to be the single most viewed E-Sports event of all time, drawing in over 8.2 million unique viewers.⁷



Patrick B. McDonald

Recent Challenges to the Streaming Model

Despite its continuing success as an important component of a new industry, the aforementioned streaming model has been threatened by several pieces of proposed legislation. One of the first and the most tailored to challenge the streaming model was Senate Bill 978, the Commercial Felony Streaming Act. S. 978 seeks to amend Section 2319 of Title 18 and Section 506 of Title 17 of the United States Code to reclassify “commercial” streaming of copyrighted material as a felony punishable by up to five years imprisonment.⁸ The Bill amends Section 506 of Title 17 to include digital public performances in the classification of criminal infringement.⁹

The bill also seeks to limit the definition of unauthorized commercial streaming by implementing a quantity requirement, “ten or more public performances by electronic means, during any 180-day period” and an economic requirement: “the total retail value of the performances, or the total economic value of such public performances to the infringer or to the copyright owner, would exceed \$2,500”.¹⁰

The Bill was proposed as an attempt to criminalize the activities of video streaming sites like MegaUpload’s Mega-video. These streaming (and in some cases, restreaming) sites provide online viewers with free access to popular movies and television shows. Many of these organizations have escaped civil liability for copyright infringement due to clever management of their sites (by complying with DMCA takedown notices in a “technical” sense, by removing the exact link named in the DMCA notice, but not any other links, for example) and this Bill would allow criminal prosecution for this very activity.

Despite the limitations placed to limit the application of the Bill to the streaming of copyrighted material for economic gain such as the streaming of network television or movie releases, the Bill, as written, is very likely to encompass the everyday streaming of amateur and professional gamers. It is not uncommon for a popular player to stream his performances for two to four hours daily, several days a week. Even with a conservative estimate, that player will be displaying over one hundred hours of gameplay in the statutory 180-day period, viewed by several thousand unique viewers, totaling a staggering number of allegedly infringing hours of public performance, a figure very likely to yield “economic value” far beyond the required \$2,500.

S.978 was not the only piece of legislation that threatened to the future of E-Sports; both the Protect IP Act of 2011 in the Senate and the Stop Online Piracy Act in the House could have potentially crippled online streaming by cutting off advertising revenue from the sites providing streaming services, as well as to the players themselves.¹¹ While these pieces of legislation failed to pass, largely due to the “largest online protest in history,”¹² their very existence demonstrates that Congress recognizes that the current character of the Internet is severely at-odds with current copyright legislation.

All three pieces of legislation and their application to League of Legends and E-Sports in general, despite their wide-reaching and potentially drastic implications, are predicated upon the assumption that streaming multiplayer game sessions of adversarial competitive video games like League of Legends constitutes illegal copyright infringement. However, careful analysis and application of the fair use doctrine

may demonstrate that the activity in question, the streaming of multiplayer competition in video games, may in fact constitute permitted infringement.

Fair Use Jurisprudence in the United States Supreme Court

Fair use, as a doctrine, has experienced a long and dynamic history in United States jurisprudence as an affirmative defense to a claim of copyright infringement. First recognized in *Folsom v. Marsh*, Judge Story, implying that some infringement of copyrighted works may be excusable, stated “[i]n short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹³ Fair use continued its development after *Folsom* into a common law doctrine until it was codified as § 107 of the Copyright Act of 1976, using a modified version of the factors set forth in *Folsom*. Section 107 reads:

The fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

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.¹⁴

Fair use has been applied by the Supreme Court in several decisions, beginning with *Sony v. Universal City Studios*, holding that “time shifting” a copyrighted broadcast to be watched at a later time or date using Sony’s home video tape recorders constituted fair use.¹⁵ *Sony* also created a presumption as to the first factor that a commercial use of copyrighted material is unfair exploitation, and therefore not to be considered fair use.¹⁶ The following year, the Court decided *Harper & Row Publishers v. Nation Enterprises*, which addressed an unauthorized publication of an excerpt of Jimmy Carter’s yet-unpublished memoirs in *The Nation* magazine.¹⁷ The Court considered the four fair use factors, and in particular, provided a finding that the unpublished nature of the work to be considered in the second factor narrows the scope of a fair use analysis, ultimately leading to a holding against fair use in this case.¹⁸ In addition, the Court retreated

from the *Sony* presumption somewhat, stating that “[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use” before proceeding to quote the *Sony* presumption verbatim.¹⁹

The so-called *Sony* presumption continued to be featured in fair use case law until 1994, when the Court decided *Campbell v. Acuff-Rose Music, Inc.* *Campbell* was the first Supreme Court decision to consider an additional variable in the first fair use factor: transformativeness.²⁰ The facts of *Campbell* were relatively simple – rap group “2 Live Crew” created a parodic version of Roy Orbison’s “Oh, Pretty Woman” that featured not only a divergent musical style but rewritten lyrics that drastically changed the nature of the song.²¹ The transformative nature of the parody weighed heavily in the Court’s decision²² and the Court also took the opportunity to end the *Sony* presumption –

“The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew’s fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that “every commercial use of copyrighted material is presumptively ... unfair.” In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.”²³

The Four Factors

The language of Section 107 combined with the previously examined Supreme Court rulings have created a fair use standard that avoids “bright line” rules and allows fair use defenses to proceed on a very case-by-case basis. In fact, examination of national case law on fair use indicates that there is no judicial consensus on how to assess the facts and apply the factors.²⁴ Despite this confusion, there are still variables and fact patterns that are prevalent enough to allow a more robust understanding of the four factors. The following section examines each factor individually and provides a basic understanding of the machinations at work in applying each one.

The Purpose and Character of the Use

The first factor, the purpose and character of the use, refers primarily to the motivations underlying the use. It is the only factor laid out in § 107 that also concludes an explanatory qualifying phrase – “including whether such use is of a commercial nature or is for non-profit educational purpos-

es.”²⁵ Valuable insight is also granted by the language used before the four factors are introduced, six potential purposes for fair use are listed: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.²⁶ These six purposes, however, were not intended to be an exclusive list nor provide examples of presumptively fair use, according to the *Harper & Row* Court, “[t]his listing was not intended to be exhaustive ... or to single out any particular use as presumptively a “fair” use.”²⁷

As discussed previously, while *Sony* created a presumption against fair use for commercial purposes, the *Campbell* Court relegated it to a much weaker status as merely one of the four factors to be considered.²⁸ In addition to eliminating this presumption, *Campbell* also provided recognition by the Supreme Court of the “transformative” character of some uses, like parody. In recent years, the question of whether the use is “transformative” has emerged as the central and often determinative question in evaluating the first factor.²⁹ The *Campbell* Court reasoned that if a use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; . . . the new work is “transformative.””³⁰ This factor is understandably important in any fair use analysis, as arguably transformative uses, as stated in *Campbell*, “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”³¹ Furthermore, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”³²

The Nature of the Copyrighted Work

The nature of the copyrighted work factor has primarily evolved into two questions: the first, whether the work is expressive, as in works of fiction, versus factual, as in news reporting or scholarly research. The second is whether the work is published or unpublished. Use of copyrighted works of a factual nature is provided more deference than copying of expressive works.³³ As previously reflected by the *Harper & Row* Court, use of an unpublished work operates under a narrowed scope.³⁴ The first question addresses the idea/expression dichotomy widely seen throughout copyright law, in that informative works are largely the product of uncopyrightable ideas, rather than a copyrightable form of creative expression.³⁵ This still must be considered in light of the first factor; in particular that creative works can still be the foundation for a clearly transformative use.³⁶ The second question, while initially made nearly determinative by the *Harper & Row* Court,³⁷ was weakened in force considerably by Congress in 1992. In the 1992 amendment to Section 107, Congress added that “The fact that a work is unpublished

shall not itself bar a finding of fair use if such finding is made upon consideration of all the above facts.”³⁸

The Amount and Substantiality of the Portion Used

Understanding the analysis behind the third factor requires another dual consideration, first, as to whether the portion used is quantitatively substantial as well as qualitatively.³⁹ The portion is measured quantitatively as to the amount of the infringed work that is used in the infringing work, often expressed in percentages.⁴⁰ Qualitatively, the portion copied by the infringing work must not ultimately take the “heart” of the work.⁴¹ Again, neither of these factors are dispositive, and are highly dependent on the facts of a particular case; for example, returning to *Sony*, a fair use defense was allowed despite the fact that “time shifting” copied 100% of the original broadcast, clearly satisfying the third factor, regardless of the weight to be placed on either aspect of the test.

The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

As was made clear in *Harper & Row*, the fourth factor is “undoubtedly the single most important element of fair use.”⁴² The basis for this factor was explored heavily in *Sony*:

“The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain rewards that Congress intended him to have. But a use which has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”⁴³

This factor examines not only actual damage to the market for or value of the copyright work, but also the potential for future harm. Furthermore, the *Campbell* Court demonstrated that the copyright holder need not even intend or be in the position to pursue these potential markets.⁴⁴ Recognizable harm, however, only occurs when the allegedly infringing work “usurps or substitutes for the market of the original work,” not merely where the use “suppresses or even destroys the market for the original work or its potential derivatives,”⁴⁵ the latter of which can occur in instances of scathing criticism or parody.

Fair Use Case Law in the Video Game Industry

Before examining case law bearing on the fair use defense in the context of uses of video games, it is first neces-

sary to examine the ways in which copyright protects the dual aspects of expression necessary to produce a video game: the “literary expression” in the code of the underlying software,⁴⁶ as well as the actual output of the software as an “audiovisual work”.⁴⁷ Recognizing these dual considerations helps to elucidate the unique nature of a video game as a copyrighted work, while the audiovisual output can have the expressive value and qualities of a motion picture, the underlying code that produces it is dynamic and interactive – no two players will have an identical experience with a game, but rather one that may be modified and adapted by the player in a variety of ways; this reality has created unique challenges for judicial interpretations of copyright law as it applies to video games, some of these challenges can be demonstrated by examining two cases within the field: *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* and *Micro Star v. Formgen, Inc.*

Galoob brought the court a challenge to *Galoob*’s “Game Genie” accessory, an electronic device that allowed a player to modify the underlying code of Nintendo’s games, albeit temporarily.⁴⁸ The device worked by substituting values in the game’s code before it is transmitted to the game’s console, resulting in the console loading an altered version of the software, upon powering down the console, however, the alterations were lost, restoring the software to its original state.⁴⁹ Nintendo’s claim of infringement relied on a finding that the newly altered version of the software constituted a derivative work from Nintendo’s copyrighted software. To be considered a derivative work the court reasoned, the work must be fixed in some medium, which it found the Game Genie’s altered software did not do.⁵⁰ The Game Genie unit itself could not produce its own output, and the temporary nature of its output prohibited a finding of infringement based upon its nature as a derivative work.⁵¹

While the court found no finding of infringement, it considered the lower court’s treatment of the fair use analysis in dicta.⁵² The court, in analyzing the first factor, the nature of the use, found that the non-commercial home use of the Game Genie was the correct use in question, and found that its nature tended to support a finding of fair use.⁵³ The court, however, did not discuss the transformative nature of the Game Genie’s use. The second factor could have gone in Nintendo’s favor, as the allegedly derivative works created by the device utilized the copyrighted work in its entirety, but the court recognized the applicability of *Sony* (“when one considers ... that [video tape recording] merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a

finding of fair use”⁵⁴ and analogized the two circumstances – the user has already paid for the entirety of the copyrighted expression, and recognizes that a party who distributes a copyrighted work cannot dictate how that work is to be enjoyed.⁵⁵ The court considered the fourth factor at length, and again found that the facts supported a finding of fair use because Nintendo could not demonstrate harm to the market of the underlying copyrighted work and that no market for slightly modified derivative versions of the software existed.⁵⁶

In a decision six years later, the Ninth Circuit again considered a copyright infringement claim involving video games, derivative works and fair use, and in *Micro Star*, a finding of infringement was sustained.⁵⁷ The court compared the facts with those of *Galoob* at length, as the factual circumstances were largely congruent: *Micro Star* packaged MAP files for Formgen’s video game, Duke Nukem 3D onto a CD-ROM and sold it as an add-on pack, called “Nuke It”, for the game.⁵⁸ The MAP files interfaced with Duke Nukem’s game engine and provided a set of instructions necessary to construct a new level in the game’s world.⁵⁹ The MAP files utilized art files already packaged with Duke Nukem to fill in the maps, and provided no new artistic elements to the game, not unlike the output from the Game Genie.⁶⁰ The court distinguished *Micro Star*’s infringement from that of the Game Genie user by reasoning that because the MAP files themselves were fixed on the CD-ROM media, they were able to overcome the fixation problem that prohibited a finding of infringement in *Galoob*.⁶¹

The court also considered *Micro Star*’s fair use defense, but that too failed to carry the day. The for-profit motive of *Micro Star* was immediately problematic, and despite creating “new” levels, the fact that the *Nuke-It* utilized the same underlying art and story of the copyrighted game, the use was not considered to be adequately transformative.⁶² Furthermore, addressing the second and fourth factors, *Nuke-It* utilized Duke Nukem’s characters and plots in its entirety (“a beefy commando type named Duke who wanders around post-Apocalypse Los Angeles, shooting Pig Cops with a gun, lobbing hand grenades, searching for medkits and steroids, using a jetpack to leap over obstacles, blowing up gas tanks, avoiding radioactive slime”)⁶³ allowing it to fill the role of a Duke Nukem sequel, a derivative work that Formgen clearly held the exclusive right to produce.⁶⁴

Streaming of multiplayer sessions of *League of Legends* creates an interesting application of the fair use doctrine, one that is similar to, but fundamentally very different from those used in *Galoob* and *Micro Star*. Both of these cases consid-

ered fairly straightforward examples of uses that would or would-not classify as fair use, and the courts had little reason to delve into the idiosyncrasies that make video games unique as a medium. As one commenter recognized this challenge “[w]hat is clear is that courts must take account of the changes in the nature of games, their graphic capabilities, and the manner in which they deliver “story,”...”⁶⁵ It is only by truly considering the factors inherent in this uniquely interactive medium that a fair use defense may reach a conclusion that is consistent with the goals of copyright law.

What Is *League of Legends*?

An exhaustive analysis of the nature of *League of Legends* is largely unnecessary for the purposes of this issue, but a basic summary will be useful to readers unfamiliar with the software. *League of Legends* is a team-based competitive video game that is considered part of the MOBA (Multiplayer Online Battle Arena) genre. Players control a single character, or “Champion” that represents them on the battlefield. Each Champion has a static background story and personality (complete with 20-30 prerecorded voice lines to demonstrate that personality), as well as a unique skillset that the players utilize during their battles. Games consist of 3v3 or 5v5 teams on one of five maps, each with a slightly different play-style and objective.

It is important to note that “narrative” in a traditional sense is not present in a *League of Legends* competition. Every battle plays out in fundamentally the same way – as a sort of dynamic “tug-of-war” scenario, where each team tries to push the other team further into their “base,” until one team can destroy the other’s “Nexus” – the game’s ultimate objective. Without player interaction, however, the game will remain in a static state indefinitely.

Applying the Fair Use Factors to Multiplayer *League of Legends* Streaming

Streaming of multiplayer games of *League of Legends* presents a use that is difficult to analogize to the circumstances examined in *Galoob* and *Micro Star*, but their guidance is still valuable to a fair use analysis. It is only by appreciating the uniqueness of video games in general and the nature of an adversarial match of *League of Legends* that a result conducive to the goals of the law of copyright may be reached, and as this analysis will demonstrate, multiplayer streaming of *League of Legends* should constitute a fair use.

Factor One: The Nature of the Use

The streaming of multiplayer games of League of Legends can be done for a variety of purposes – some players stream their play as an educational tool for others, providing free lessons and sharing their knowledge of the game; others seek criticism and analysis of their play-style; while still others, the most popular of streamers, stream their play as a source of income and as a tool with which to gain notoriety and recognition within the community. For the sake of this analysis, it will be conceded that the majority of players streaming League of Legends are doing so with a profit-based motive and that the commercial character of the use may be assumed. While this may have been fatal to a fair use analysis before *Campbell*, the Court clearly demonstrated that this factor must not immediately end the inquiry.⁶⁶ Furthermore, in one commenter's statistical analysis of fair use decisions between 1978 and 2005 found that a finding of a commercial purpose did not significantly contribute to a finding of no fair use.⁶⁷

The second major consideration in the first factor concerns whether or not the use of the copyrighted work is “transformative.” Adopted primarily from the work of Judge Leval,⁶⁸ and applied heavily in *Campbell*, the Court described this requirement as “altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁶⁹ One court reasoned that this factor constitutes the very basis of the entire fair use analysis.⁷⁰

Streaming of multiplayer games of League of Legends, however, create an interesting challenge for the transformativeness analysis. The players are merely broadcasting the output of the copyrighted game, can this be considered “transformative”? There are clearly arguments on both side of the issue, at a superficial level, it is clear that the game is not “altered” in any way as required by the *Campbell* Court, but a more in-depth analysis may overcome this assertion.

League of Legends, like the vast majority of other video game software, is an interactive medium. Players purchase the game so that they can wage virtual war against the game's AI or against other players. “The heart of video games' appeal lies in their interactive nature, the fact that the player gets to play the events of the game and control them, rather than watch passively as with traditional audiovisual works.”⁷¹ Why is it, then, that so many are apt to merely watch others play on a live internet stream, rather than play the game themselves? It is this question that helps to elucidate the transformative nature of this use – the viewers are not watching the stream to see the copyrighted artwork and

audio of the game, they are watching an entirely “new” form of entertainment – the collective display of the gameplay itself, the commentary provided by the streamer, and the very human interaction between players creates a very unique “reality show”-like narrative.

Recall that all multiplayer sessions of League of Legends start identically, without any interaction from the players - the game will remain in that static state, theoretically indefinitely. It is unlikely that unskilled players or basic AI would be able to draw in the numbers of viewers that popular streamers do, and the reasons why are obvious; skilled and creative players can yield exciting and unpredictable events and battles in the game's world, and create all new stories and drama by utilizing the game's engine itself as a toolset. Individual players, and the community at large, have transformed what was once a static “game board” into a new form of expression, a gaming drama complete with rivalries and alliances, victories and failures, a far cry beyond the generic rule-set and maps of the underlying copyrighted work.

Case law analyzing fair use has increasingly relied upon the transformative determination, in fact, “[b]etween 1995 and 2010, a total of 82 reported opinions expressly addressed the definition of transformative use beyond simply quoting the language in *Campbell*.”⁷² A common thread among these opinions is that the use must require a different expressive purpose from that for which the work was created.⁷³ Examples of different expressive purposes include – utilizing copyrighted expression for reference instead of entertainment and aesthetic purposes,⁷⁴ preventing plagiarism instead of educational expression,⁷⁵ and utilizing copyrighted images for historical specimens instead of actual concert promotion.⁷⁶ These transformative uses are considerably varied, and commonality among them is limited. It therefore follows that predicting whether a court will determine a use to be transformative is difficult. Regardless of this limitation, the transformative nature of multiplayer streaming of League of Legends is a definite consideration.

The greatest challenge to a finding of transformativeness for multiplayer streaming of League of Legends lies in the fact that the purpose of both uses (both playing the game and streaming it for others) is done primarily for the purposes of entertainment. The nature of the entertainment, however, is decidedly different. Consumers of League of Legends that play it for themselves are receiving a considerably different experience than those simply watching others play. While it may be a question of degrees, no court is likely to admit that watching a professional football broadcast on live television provides the same type and level of entertainment value

provided by *actually* playing professional football in a stadium in front of thousands of fans. Few would contend that League of Legends, even at the professional level, provides the same level of excitement and drama as a professional sports broadcast, but to deny that the difference between actually playing and spectating exists is considerably shortsighted.

As a final consideration to the transformativeness element, it may be necessary for a defendant claiming fair use to overcome some negative precedent – *Williams Electronics, Inc. v. Arctic International, Inc.*⁷⁷ Here the Third Circuit considered whether “the player’s participation withdraws the game’s audiovisual work from copyright eligibility because there is no set or fixed performance and the player becomes a co-author of what appears on the screen.”⁷⁸ While this may immediately seem to be a rejection of the theory that players can act as quasi co-authors when playing a game, it should be recognized that the precise issue that the Court addressed was whether this co-authorship rendered the audiovisual display of a video game as uncopyrightable. This determination is not necessary for a transformativeness-based fair use finding – even if the co-authorship doesn’t render the underlying work uncopyrightable nor the new expression as copyrightable, it may still be sufficiently transformative as to constitute an expression that does not infringe upon the underlying work.

Factor Two: The Nature of the Copyrighted Work

The second factor is equally challenging when applied to the uniqueness of a multiplayer session of League of Legends, and an analysis requires somewhat unorthodox concepts that are difficult to locate in existing fair use case law. A single player video game campaign is, without question, both a literary and audiovisual work. There are well developed characters with histories and personalities, conflicts and intrigue, and even difficult emotional choices that the player must make that shape the outcome of the storyline. If a player were to stream a live play session of this portion of the gameplay, a fair use defense would be much more difficult to sustain, as works of fiction are clearly within the realm of works that copyright law is meant to protect.⁷⁹ A multiplayer game, however, is not often so clearly within the realm of works of fiction.

A multiplayer game of League of Legends, as previously stated, is not much of a narrative. There is no rhyme or reason to the “story” being told. Two Champions may be allies according to their background stories, but will fight each other without any explanation if they are chosen by opposite sides. There is no justification given for why any given

team is fighting, let alone in a particular area. If an outside viewer were to tune in to a series of matches, they’d likely draw the conclusion that much of the expression in a match is arbitrary.

The “fiction” being told in the game, therefore, is primarily a product of the players themselves. While this distinction was rejected in *Williams Electronics, Inc. v. Arctic International, Inc.*⁸⁰ a reconsideration of the doctrine may be necessary, as the nature of video games has changed drastically since that case was decided in 1982. The maps are not based upon fictional events or stories, but are instead symmetrical game boards designed with primarily functional, rather than aesthetic values in mind. These factors make the multiplayer matches of League of Legends a unique example of expression, one that is not clearly within the “works of art” that copyright law is meant to protect, therefore the second factor may support a finding of fair use as well. The nature of the maps, Champions, and the rules of the game themselves may in fact be more analogous to menus or a method of operation for a computer program rather than artistic expression; this possibility will be discussed further apart from the fair use discussion.

Perhaps the most apt comparison to be drawn from existing case law on this particular idiosyncrasy of the nature of video games comes from copyright cases brought with respect to board and card games. In quoting *Nimmer on Copyright*, the Western District of New York recognized the interplay of idea and expression in games:

“It is said that a game is not copyrightable, but this general proposition is subject to qualification. It is true that no copyright can be obtained in the system or manner of playing a game or in engaging any other sporting or like activity. However, some limited copyright protection is nevertheless available in connection with games. It would seem that a relatively minimal artistic expression, if original, would render copyrightable labels for a game, as well as the pattern or design of game boards and playing cards as pictorial or graphic works. Certain game boards may be copyrightable as “maps”. Moreover, the wording of instructions for the playing of a game is itself copyrightable so as to prevent a literal or closely paraphrased copying. Such copyright would not, however, permit a monopoly in the method of play itself, as distinguished from the form of instructions for such play. It has been held that mechanical and structural similarity between plaintiff’s and defendant’s games will not constitute infringement absent similarity of artwork.”⁸¹

While the general propositions expressed by Nimmer above refer to the poaching of game rules or expressions by competing game manufacturers, the underlying rationale of these assertions are valuable in the current analysis. Many aspects of the operation of a game are intrinsically intertwined with the ideas underlying the game itself, and it is a well-settled truism that ideas are not copyrightable.⁸² Applied to the nature of a multiplayer session of League of Legends, it is very possible that the “method of play itself” is what is being displayed – merely a series of rules and system by which the players interact with each other – a work that is arguably a far cry from the artistic expression contemplated by copyright.

Factor Three: The Amount and Substantiality of the Portion Used

The third factor most clearly supports a finding of fair use for the streaming of League of Legends, as huge portions of its copyrighted expression are not used in any given game. This reality is highly beneficial to a fair use defense, as the aforementioned statistical study found a strong correlation between a positive application of the third factor and a finding of fair use.⁸³ League of Legends contains over 100 selectable Champions, with new ones added every 2-3 weeks. Even the largest multiplayer session contains at most ten of those one hundred champions, or less than 10%. Given the generic nature of the maps themselves, the most robust portion of the expression is clearly found in the Champions. Including only a small portion of this expression in a multiplayer stream is a helpful factor for a finding of fair use. Furthermore, the copyrightability of these characters may be limited by other copyright doctrines.

An examination as to the copyrightability of many of the elements used in a multiplayer session of League of Legends is necessary. Much of the game would be subject to an examination vis-à-vis the idea-expression dichotomy and many of the game’s units could be considered scènes à faire. No author may copyright his ideas or the facts he narrates.⁸⁴ It would possibly take an entire court decision to unravel where the idea ends and the expression begins with the types of fantasy and science-fiction tropes utilized in creating Champions for League of Legends.⁸⁵ Secondly, scènes à faire “[are] incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁸⁶ Much League of Legends expression may fall under this category – heavily armored knights, bow-wielding rangers, insectoid beasts with acids and spines - all of these are practically clichés in

science-fiction and fantasy, and are unlikely to receive much treatment as expression by a modern court.

It is unlikely that any courts have addressed this issue directly, but one decision by the United States Court of Appeals for the Seventh Circuit gives some guidance as to the applicability of the scènes à faire doctrine to video games and their interfaces. In *Incredible Technologies v. Virtual Technologies*, Incredible Technologies (IT), the manufacturers of the popular “Golden Tee” arcade golf franchise brought an infringement action against Virtual Technologies’ similar arcade game, PGA Tour Golf.⁸⁷ In affirming the lower court, the court of appeals held that certain aspects of the display of Golden Tee did not constitute copyrightable expression. In particular, “[i]n presenting a realistic video golf game, one would, by definition, need golf courses, clubs, a selection menu, a golfer, a wind meter, etc. Sand traps and water hazards are a fact of life for golfers, real and virtual.”⁸⁸ These necessary expressive components, the court found, constituted uncopyrightable scènes à faire that are “tied with” the underlying idea.

Factor Four: The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

The final factor to be considered in a fair use analysis arguably approximates the true goal of copyright protection, and was considered by the *Harper & Row* Court to be undoubtedly the single most important element of fair use.⁸⁹ This factor, too, when analyzed through the unique prism of the video game industry, strongly supports a finding of fair use.

Multiplayer streaming of League of Legends does not usurp or substitute for the market of the original work, but rather creates an entirely new market for fans. Riot Games has clearly recognized this fact, and even devotes a section of its website to “Featured Streamers.”⁹⁰ Furthermore, as previously recognized, Riot is hosting a major tournament (that it also streams for free on its own channels) with huge cash prizes.

This is evidence that if there is in fact a market for the streaming of multiplayer League of Legends matches as a quasi-derivative work, Riot is well-aware of it, and continues to allow users of its game to stream their experiences on the internet. The popularity of E-Sports and multiplayer streaming of League of Legends only helps to increase the visibility of the underlying software, bringing in new fans and likely fueling more in-game purchases.⁹¹

A Simple Solution – Licensing

The fact that Riot Games has embraced E-Sports and streaming as a medium for its growth brings to light an important question – why not just authorize it? League of Legends players are making use of Riot’s copyrighted software through a license agreement. The license agreement (which is updated periodically) dictates the terms and conditions of the player’s use of the software. If Riot Games so chooses to, the terms of the license agreement could be updated to include a basic authorization for streaming as a public performance. Example language for such a provision:

The Player is authorized to stream multiplayer sessions of The Game online through an approved streaming service, such as TwitchTV. Streaming The Game is a separate privilege from the use of the software, and any violation of the Terms and Conditions or The Summoner’s Code⁹² may result in termination of this privilege. The Player agrees not to include any content of a pornographic, hateful, or disparaging nature (as defined in Section X.X). Broadcasting of this content while playing The Game will result in immediate termination of streaming rights and a permanent ban from use of The Game.

By including a basic authorization of streaming, Riot Games can eliminate the uncertainty associated with the legality of streaming. This would also be a solution that remains viable with new legislation, as proposed legislation always points to “unauthorized” performances or reproductions. Furthermore, this will establish a precedent by which players may be bound to follow certain rules which could prevent any negative publicity that may occur as a result of the content of a streamer’s channel. Licensing, in short, provides a simple and workable solution to an otherwise difficult dilemma.

Conclusions and Further Thoughts

Multiplayer streaming of League of Legends represents the early stages of a rapidly growing industry, one that has a bright, if somewhat uncertain future. Even without further legislation to bring the underlying copyright conflicts to the fore, there remains a definite possibility that League of Legends streamers may find themselves involved in costly and potentially career-ending litigation based upon claims on infringement. These streamers are not without recourse, however, as this Comment has explored, the fair use defense may prevent any major blows to the future of E-Sports just yet. ■

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- 14 17 U.S.C. § 107.
- 15 *Sony v. Universal City Studios*, 464 U.S. 417, 456 (1984).
- 16 *Sony*, 464 U.S. at 450 “Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”
- 17 *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985).
- 18 *Harper*, 471 U.S. at 564.
- 19 *Harper*, 471 U.S. at 562.
- 20 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-579 (1994) “the use . . . instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.””

- 21 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 15:20.
- 22 *Campbell*, 510 U.S. at 579 “[l]ike less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”
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- 33 ABRAMS, *supra* note 19 at § 15:52.
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- 36 *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) “the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”
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- 53 *Lewis Galoob Toys*, 964 F.2d at 970 “Game Genie users are engaged in a non-profit activity. Their use of the Game Genie to create derivative works therefore is presumptively fair.”
- 54 *Lewis Galoob Toys*, 964 F.2d at 970, (quoting *Sony v. Universal City Studios*, 464 U.S. 417, 450 (1984)).
- 55 *Lewis Galoob Toys*, 964 F.2d at 971
- 56 *Lewis Galoob Toys*, 964 F.2d at 971, Nintendo “has failed to show the reasonable likelihood of such a market.”
- 57 *Micro Star v. Formgen Inc.*, 154 F.3d 1007, 1114 (9th Cir. 1998).
- 58 *Micro Star*, 154 F.3d at 1109.
- 59 *Micro Star*, 154 F.3d at 1110.
- 60 *Micro Star*, 154 F.3d at 1110.
- 61 *Micro Star*, 154 F.3d at 1111 “Because the audiovisual displays assume a concrete or permanent form in the MAP files, *Galoob* stands as no bar to finding that they are derivative works.”
- 62 *Micro Star*, 154 F.3d at FN 6 “[the maps] can hardly be described as transformative; anything but.”
- 63 *Micro Star*, 154 F.3d at 1112.
- 64 *Micro Star*, 154 F.3d at 1113 “Only FormGen has the right to enter that market; whether it chooses to do so is entirely its business.”
- 65 Christopher Reid, *Fair Game: The Application of Fair Use Doctrine to Machinima*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 831, 848 (2009).
- 66 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994), “The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”
- 67 Barton Beebe, *An Empirical Study of U.S. Copyright/fair Use Opinions, 1978-2005*, 156 *U. PA. L. REV.* 549, 602 (2008) “results presented in Table 9 suggest that. . . a finding that the defendant’s use was for a commercial purpose (which was made in 64.4% of the opinions) did not significantly influence the outcome of the fair use test in favor of an overall finding of no fair use.”
- 68 Pierre N. Leval, *Towards a Fair Use Standard*, 103 *HARV. L. REV.* 1105 (1990).
- 69 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).
- 70 *Hofheinz v. Discovery Communications, Inc.*, 00 CIV. 3802 (HB), WL 1111970, at *3 (S.D.N.Y. Sept. 20, 2001).
- 71 Christopher Reid, *Fair Game: The Application of Fair Use Doctrine to Machinima*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 831, 858 (2009)
- 72 Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 *LEWIS & CLARK LAW REV.* 715, 747 (2011).
- 73 Netanel *supra* note 77, at 768.
- 74 *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F.Supp.2d 513, 541 (2008) “Because it serves these reference purposes, rather than the entertainment or aesthetic purposes of the original works, the Lexicon’s use is trans-

- formative and does not supplant the objects of the Harry Potter works.”
- 75 See *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).
- 76 See *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2nd Cir. 2006).
- 77 685 F.2d 870 (1982).
- 78 *Id.* at 674.
- 79 *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998) “The fair use defense will be much less likely to succeed when it is applied to fiction or fantasy creations, as opposed to factual works such as telephone listings”
- 80 685 F.2d 870, (Third Cir. 1982).
- 81 *Milligan v. Worldwide Tupperware, Inc.* 972 F.Supp. 158, 162 (W.D.N.Y. 1997) (citing *Nimmer on Copyright* § 2.18[H][3][a] (1995)).
- 82 See *Mazer v. Stein*, 347 U.S. 201 (1954).
- 83 *Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 615 (2008) “We saw above that the outcome of factor three correlated strongly with the outcome of the overall test as well as with the outcomes of factors one and four. These correlations were especially strong when the third factor was found to favor fair use. This is not surprising. An insubstantial taking of the plaintiff’s work will not likely have an appreciable effect on the market for or value of that work and, perhaps on that ground alone, will likely trigger a finding of fair use.”
- 84 17 U.S.C. 102(b).
- 85 For example, *League of Legends* includes – an Old West-style Bounty Hunter type gunman, a hooded undead Lich, and a club-wielding forest troll.
- 86 *Lewinson v. Henry Holt & Co., LLC*, 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009).
- 87 *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 400 F.3d 1007, 1009 (7th Cir. 2005).
- 88 *Incredible Technologies*, at 1015.
- 89 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).
- 90 *League of Legends, Featured Streamers*, <http://competitive.na.leagueoflegends.com/streamers>
- 91 *League of Legends* is free software, supported by in-game “microtransactions” that allow a player to purchase Champions, alternate Champion skins, and other items using real world currency.
- 92 The Summoner’s Code is a set of behavioral and ethical rules that players must follow. Multiple (or egregious) violations of these rules can result in permanent termination of a player’s account and license to use the software, including a forfeiture of any digital items purchased while playing the game.



2014 Edward F. Langs Writing Award

Essay Competition Rules

1. Awards will be given to up to six student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either endnotes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter’s name, email address, mailing address, telephone number, and school attended.
5. A total of up to \$3,000 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section’s newsletter, the *Michigan IT Lawyer*. (Previous issues of the *Michigan IT Lawyer* can be accessed at <http://www.michbar.org/it/newsletters.cfm>.)
7. Essay must be submitted as a Microsoft Word document, postmarked by **June 30, 2014**, and emailed to dsyrowik@brookskushman.com. ■

Information Technology Law Section, State Bar of Michigan Mission Statement

The purposes of the Section are to review, comment upon, and appraise members of the State Bar of Michigan and others of developments in the law relating to information technology, including:

- (a.) the protection of intellectual and other proprietary rights;
- (b.) sale, leasing, distribution, provision, and use of, hardware, software, services, and technology, including computer and data processing equipment, computer software and services, games and gaming, information processing, programming, and computer networks;
- (c.) electronic commerce
- (d.) electronic implementation of governmental and other non-commercial functions;
- (e.) the Internet and other networks; and
- (f.) associated contract and tort liabilities, and related civil and criminal legal consequences.

The Information Technology Law Section's bylaws can be viewed by accessing <http://www.michbar.org/it/councilinfo.cfm> and clicking the 'Bylaws' link.