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Fair Game: The Application of Fair Use Doctrine to Machinima.

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Fair Game: The Application of Fair Use Doctrine to Machinima

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INTRODUCTION: VIRTUAL HOLLYWOOD

On April 1, 2003, a group of friends, bored with their day jobs and having met limited success with various website projects, released the pilot episode of what would become a hit comedy series. The show, *Red vs. Blue: The Blood Gulch Chronicles*, followed the antics of two teams of wisecracking space soldiers, as bored with their respective missions as the series’ creators were with their jobs.¹ *Red vs. Blue* proved so popular that the second season premiered at Lincoln Center for the Performing Arts in 2004 and a total of five seasons were eventually produced, drawing millions of fans worldwide.² An ocean away, in late 2005, a young

¹ See *Red vs. Blue—The History of Rooster Teeth*, <http://rvb.roosterteeth.com/info> (last visited Jan. 29, 2009); Interview by Machinima.com Staff with Geoff Fink & Gus Sorola, Founders, *Red vs. Blue*, <http://www.machinima.com/article/view&id=390> (Dec. 22, 2003); Wikipedia—*Red vs. Blue*, http://en.wikipedia.org/wiki/Red_vs._Blue (last visited Feb. 9, 2009).

² See Posting of Cory Doctorow to BoingBoing, *Red Versus Blue Season Two to Premiere at Lincoln Center*, <http://www.boingboing.net/2003/12/18/red-versus-blue-seas.html> (Dec. 18, 2003 1:32 PM); Chris Kohler, *Machinima Series Red vs. Blue Ends Tour of Duty*, WIRED.COM, June 26, 2007, <http://www.wired.com/entertainment/theweb/news/2007/06/redversusblue> (discussing the length and popularity of the series).

French designer, Alex Chan, was troubled by what he saw as vastly distorted reporting concerning the root causes of riots which had recently engulfed Parisian suburbs and spread to other parts of his country before finally subsiding.³ He responded by creating a short, but potent documentary called *The French Democracy*.⁴ The film won worldwide plaudits⁵ for its concise yet emotionally provocative window into the racial tensions that Chan saw as the genesis of the riots.

In addition to the critical acclaim they received, these two projects share one other important feature. None of their actors are real. Nor are their sets, props, filming locations, or for that matter, their camera equipment. Both *Red vs. Blue* and *The French Democracy* are examples of machinima,⁶ a form of animation which uses video games as a sort of virtual studio to create original videos, ranging from clips lasting minutes, to series lasting seasons.⁷ A typical machinima film is created in the following way: the team starts up a multiplayer video game, assigning one or more players, or the computer server, to act as “cameras” while other players control the virtual “actors” and manipulate them through the game’s controls to act out the scene.⁸ The audiovisual outputs of the “camera” players’ screens are recorded and the footage is edited and embellished with voiceovers and other effects.⁹ Machinimators, as the creators of machinima are known, employ many traditional film techniques in the framing of shots

³ See Mike Musgrove, *Game Turns Players into Indie Moviemakers*, WASH. POST, Dec. 1, 2005, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002117.html>.

⁴ See *id.*

⁵ See, e.g., Collision Detection—Machinima Commentary on the Riots in France, http://www.collisiondetection.net/mt/archives/2005/11/_heres_an_extre.html (Nov. 23, 2005 7:43 PM).

⁶ Pronounced “muh-sheen-eh-mah.” See Academy of Machinima Arts & Sciences—The Machinima FAQ, <http://www.machinima.org/machinima-faq.html> (last visited Jan. 29, 2009).

⁷ See *id.*

⁸ *Id.*; see also Wikipedia—Machinima, <http://en.wikipedia.org/wiki/Machinima> (last visited Feb. 9, 2009).

⁹ See WikiHow—How to Make A Machinima, <http://www.wikihow.com/Make-a-Machinima> (last visited Apr. 9, 2009).

and composition of scenes.¹⁰ Thanks, in part, to a growing awareness of machinima among game publishers, many games now include “filming” features that record players’ actions and allow them to review them from different angles, taking the tedium out of what was once a time consuming process of jerry rigging the games’ capabilities.¹¹

One genre of games in particular, known as Massively Multiplayer Online Role-Playing Games (“MMORPGs”) and often referred to loosely as “virtual worlds,”¹² provides especially rich tools for aspiring machinimators. In contrast to other genres of video games, which often place players in the shoes of a hero whose story they act, but are unable to change outside narrow bounds, MMORPGs allow players to set their own agenda and steer their character wherever they like in a richly detailed, three-dimensional environment with thousands (sometimes millions) of other players connected via the Internet.¹³ Furthermore many of these games allow players a wide latitude in crafting the look and personality of their character, his possessions, and his place in the virtual world, making it easy for machinimators to bend the game to their own creative ends.¹⁴

Red vs. Blue, *The French Democracy*, and other projects like them have demonstrated machinima’s potential as a legitimate and powerful vehicle for creative expression, generating public interest in an art form that was once the sole province of video game

¹⁰ See Academy of Machinima Arts & Sciences—What is Machinima?, <http://www.machinima.org/machinima-faq.html> (last visited Apr. 9, 2009); *Machinima 101*, IGN.COM, Mar. 15, 2006, <http://ps2.ign.com/articles/695/695920p1.html>.

¹¹ See Monty Phan, *Machinima Licenses Spell Out New Rules for Creators*, WIRED.COM, Sept. 28, 2007, <http://www.wired.com/culture/art/news/2007/09/machinimalicenses>.

¹² See, e.g., World of Warcraft, <http://www.worldofwarcraft.com/index.xml> (last visited Jan. 29, 2009); Eve Online, <http://www.eveonline.com> (last visited Jan. 29, 2009); Second Life, <http://secondlife.com/> (last visited Jan. 29, 2009). The legal implications of virtual worlds are still hazy, despite the volume of writing on the subject in recent years. See, e.g., David Jacoby, *Secondlife, Second Strife?*, 20 INTELL. PROP. & TECH. L.J. *7, 7 (2008). This Note seeks to deal with the questions virtual worlds raise only insofar as they might impact machinima made using these games.

¹³ See Michael Anissimov, What is a MMORPG?, WISEGEEK, <http://www.wisegeek.com/what-is-a-mmorpg.htm> (last visited Jan. 29, 2009).

¹⁴ *Id.*; see, e.g., World of Warcraft—Getting Started, <http://www.worldofwarcraft.com/info/basics/gettingstarted.html> (last visited Feb. 9, 2009).

enthusiasts. However, as both machinima's practitioners and audience have matured, so has the industry whose video games provide the tools of the trade. Considering the value of today's major video game franchises—Microsoft's *Halo 3*,¹⁵ for instance, grossed more in its first twenty-four hours than Hollywood's biggest blockbuster to date did in its first three days¹⁶—it is easy to understand why game publishers may have a keen interest in machinimators' use of their games. Until recently, most publishers have taken a permissive attitude towards machinima by declining to rigidly define the scope of their proprietary interests in machinima videos.¹⁷ In many cases, companies have even openly encouraged machinima uses of their games,¹⁸ likely because they realize the opportunity for free advertising created by works made with their games. However, it is not hard to imagine that some machinimators might create works that are troublesome to game publishers.¹⁹ In June 2007, possibly in anticipation of such problems, both Microsoft and Blizzard Entertainment, who publish two of the most popular games used by machinimators,²⁰ released official policies clarifying what they considered to be acceptable

¹⁵ Halo 3, <http://www.halo3.com>.

¹⁶ See Ryan Geddes, *Halo 3 Racks Up Record Sales*, IGN.COM, Sept. 26, 2007, <http://xbox360.ign.com/articles/823/823255p1.html>.

¹⁷ See, e.g., Christina J. Hayes, *Changing the Rules of the Game: How Video Game Publishers are Embracing User-Generated Derivative Works*, 21 HARV. J.L. & TECH. 567, 569 (2008); Kohler, *supra* note 2.

¹⁸ For instance, the special "Legendary Edition" of *Halo 3* included *Red vs. Blue* content. See *Halo 3 Details Explosion*, Gameworld Network, Oct. 29, 2006, http://consoles.gwn.com/news/story.php/id/10624/Halo_3_Details_Explosion.html.

Additionally, some companies sponsor official machinima contests based on their games. See Blizzard Entertainment—BlizzCon, Contest Winners, <http://www.blizzard.com/us/blizzcon07/contests.html> (last visited Jan. 15, 2009).

¹⁹ In an extreme, perhaps ridiculous example, the United States House Intelligence Committee cited "Sonic Jihad," a machinima with militant, presumably anti-American, content as an example of "propaganda and recruiting material for terrorists." See Thinking Machinima, http://www.machinima.org/paul_blog/2006/06/machinima-in-crosshairs.html (June 22, 2006 2:53 PM). The actual video is more likely the product of a bored teenager than a terrorist recruiter, but it illustrates how certain machinima might be a source of concern for publishers. See *id.*

²⁰ Microsoft's *Halo* series and Blizzard Entertainment's *World of Warcraft*, are popular both as games and as tools for machinimators. See, e.g., Quality Halo Machinima, <http://halomovies.org> (collection of machinima films made using the Halo series); Warcraft Cinema, <http://www.warcraftcinema.com> (collection of machinima films made using the World of Warcraft and its expansions).

and unacceptable machinima uses of their games.²¹ It is not surprising that game publishers have an interest in encouraging machinima when it helps the image and demand for their games. It is equally likely that those same publishers will wish to reserve the right to act as gatekeepers, with final editorial control over any uses they find objectionable²² and might seek legal recourse as a way of enforcing such control.

Microsoft and Blizzard's moves are a harbinger of the mounting tension inside the video game industry between the huge profitability of their products and the creative powers of their customers, unleashed by the interactive and contributory nature of those products. Many modern video games are successful as an entertainment medium precisely because they offer a chance for users to engage in robust expression and interaction with the game and other players. Companies expect, encourage,²³ and market the opportunity for player input and creativity.²⁴ But game publishers may also perceive a danger in allowing free exploitation by others of their increasingly lucrative intellectual property, both due to lost licensing revenues and the possibility of uses which tarnish the image of game franchises.²⁵ While the ex ante contract approach evident in Microsoft and Blizzard's revised machinima policies implicates several thorny issues itself,²⁶ game publishers may also

²¹ See Phan, *supra* note 11; see also Xbox.com—Game Content Usage Rules, <http://www.xbox.com/en-US/community/developer/rules.htm> (last visited Jan. 15, 2009) (covering *Halo* and other Microsoft games); World of Warcraft—Letter to Machinimators, <http://www.worldofwarcraft.com/community/machinima/letter.html> (last visited Jan. 15, 2009) (covering Blizzard Entertainment's *World of Warcraft*).

²² For example, Microsoft's Game Content Usage Rules warn machinimators that they "can't use Game Content to create pornographic or obscene [machinima], or anything that contains vulgar, racist, hateful, or otherwise objectionable content." Game Content Usage Rules, *supra* note 21. The rules provide no further guidance as to the scope of this seemingly sweeping restriction other than to say dismissively that "you know it when you see it." *Id.*

²³ See generally Phan, *supra* note 11.

²⁴ See, e.g., *Machinima 101*, *supra* note 10 (noting that some game companies promote the film creations of users by posting the best examples of Machinima on their websites).

²⁵ See, e.g., Game Content Usage Rules, *supra* note 21.

²⁶ Contractual issues such as whether the inclusion and advertising of machinima-focused features in games constitutes an implicit or explicit license, or a waiver, and whether and to what extent games' End User License Agreements ("EULAs") or Terms Of Service ("TOS") are enforceable are outside the scope of this Note. It is worth

eventually avail themselves of copyright law, alleging infringement of the copyrighted audiovisual works embodied in their games.²⁷ Such cases would raise a number of complex and novel legal questions. Video games' interactive nature raises questions about the continuing accuracy of their classification as audiovisual works under copyright law.²⁸ Works made using video games, such as machinima, may also constitute joint works or works for hire.²⁹ However, given copyright law's overriding purpose of encouraging the production and dissemination of creative works,³⁰ one issue sure to arise in any such litigation is the application of the doctrine of fair use.³¹ This Note will address this topic, describing how current fair use jurisprudence ought to be applied in the novel context of machinima through the use of representative hypotheticals.

Part I will survey the current fair use doctrine and case law, and discuss several important cases relating to copyright in video games and fictional characters. Part II will discuss the fair use doctrine as it should apply to machinima, highlighting the aspects of the doctrine which take on special significance in this context. Part III will describe a hypothetical MMORPG and two imagined

observing, however, that some provisions in at least one MMORPG's EULA have been held unenforceable. *See* *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007) (finding arbitration clause in Second Life's EULA unenforceable).

²⁷ *See, e.g.*, Hayes, *supra* note 17, at 568 (noting that using videogame images are copyrighted assets, and that machinima could be in violation of the Copyright Act).

²⁸ *See* Int'l Standard Audiovisual Number—FAQs, http://www.isan.org/portal/page?_pageid=166,41960&_dad=portal&_schema=PORTAL#FAQ4 (last visited Jan. 29, 2009) (listing video games as an audiovisual work).

²⁹ 17 U.S.C. § 101 (2006) (defining a "work made for hire" as one which is commissioned or ordered as a contribution to a collective work and a "joint work" as one made by two or more authors which is merged into a whole). These and other related issues are outside the scope of this Note.

³⁰ *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8.

³¹ Fair use is the concept under which a copyrighted work may be used in the production of another work so as to advance science and the arts. *See generally* 17 U.S.C. § 107 (2006). There is some debate as to whether fair use should be classified as an affirmative defense to infringement, or a limitation on the original grant of the right to copyright. *Compare* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (designating fair use as an affirmative defense), *with* J. Brian Beckham, *Can the RIAA Survive "Substantial Non-Infringing Uses?"*, 10 VA. J.L. & TECH. 4, 18 n.80 (2005) (concluding that fair use is a right). This Note proffers no opinion on that matter, but merely addresses the substance of fair use analysis as it might be applied to machinima.

machinima uses of that game. It will then analyze the fair use claims of each as a way of demonstrating how the fact-intensive fair use doctrine might be applied in real cases involving machinima, bringing to light special concerns that might arise in this context.

I. CURRENT FAIR USE JURISPRUDENCE AND COPYRIGHT LAW AS APPLIED TO VIDEO GAMES

A. *The Goals of Fair Use*

Judge made exceptions to copyright for fair use (originally “fair abridgement”) are almost as old as England’s first copyright law, the Statute of Anne.³² However, the first American articulation of the doctrine came in *Folsom v. Marsh*³³ where Justice Story, suggesting some copying of protected works could be excused, famously said that “[i]n short, . . . 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.”³⁴ Fair use continued to develop as a common law doctrine and was eventually codified in the Copyright Act of 1976 (“The Copyright Act”).³⁵ The Supreme Court has held that “[f]air use serves as an affirmative defense to a claim of copyright infringement.”³⁶ In assessing such a defense, § 107 of the Copyright Act directs courts to consider four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted

³² See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (citing *Gyles v. Wilcox*, 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130)).

³³ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

³⁴ *Id.* at 348.

³⁵ 17 U.S.C. § 107.

³⁶ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁷

In *Campbell v. Acuff-Rose Music, Inc.*,³⁸ the Supreme Court's most recent case to discuss the fair use analysis in depth, the Court cautioned that "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."³⁹ The Court further noted that in drafting the statute, Congress declined to create presumptive categories of fair use, even for the examples⁴⁰ listed in the text, "intend[ing] that courts continue the common-law tradition of fair use adjudication."⁴¹ Thus, taken individually, none of the four factors is dispositive to the fair use analysis. Rather, "[a]ll are to be explored and the results weighed together, in light of the purposes of copyright."⁴² Judge Pierre Leval,⁴³ whose article *Toward a Fair Use Standard*,⁴⁴ was cited liberally by the *Campbell* Court,⁴⁵ suggested that the four factors simply supply a framework for answering the overriding question of whether a given use would serve the "objectives of the copyright."⁴⁶ Fair use doctrine

³⁷ 17 U.S.C. § 107. Hereinafter all references to the "first," "second," "third" or "fourth" "factor(s)," refer respectively to these four factors codified in the section of the Copyright Act defining fair use.

³⁸ *Campbell*, 510 U.S. 569 (1994).

³⁹ *Id.* at 577.

⁴⁰ Section 107 lists "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as examples. However, the statute makes it clear that Congress intended these examples to be "illustrative and not limitative," 17 U.S.C. § 101 (defining the terms "including" and "such as"), and that they "thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair use." *Campbell*, 510 U.S. at 577–78.

⁴¹ *Campbell*, 510 U.S. at 577.

⁴² *Id.* at 578.

⁴³ At the time of publication of his famous article, Judge Leval was a United States District Court Judge for the Southern District of New York. Leval, *supra* note 32. He was subsequently appointed to the Court of Appeals for the Second Circuit in 1993. Court of Appeal, 2nd Circuit—Circuit Court Judges' Biographical Information, <http://www.ca2.uscourts.gov/Judgesbio.htm> (last visited Jan. 29, 2009).

⁴⁴ Leval, *supra* note 32.

⁴⁵ See, e.g., *Campbell*, 510 U.S. at 577, 586, 587.

⁴⁶ Leval, *supra* note 32, at 1110–11 ("The factors do not represent a score card that promises victory to the winner of the majority. Rather they direct the courts to examine the issue from every pertinent corner and to ask in each case whether and how

therefore requires courts to view a given use through the lens of these purposes and “to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁴⁷

B. *The Four Factors*

In keeping with *Campbell*'s prohibition on reducing fair use to a bright-line test, § 107 provides no guidance on how much weight each factor should receive. Indeed, the case-by-case approach called for has led courts to adjust the relative weight accorded to each factor based on the specifics of the case before them.⁴⁸ While the weight accorded each factor is impossible to determine outside a specific factual context, the case law postdating the enactment of the 1976 Act helps to define the rough contours of each factor.

1. The First Factor: The Purpose and Character of the Use

The first factor of the fair use test instructs courts to look at “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁴⁹ Judge Leval called this factor “the soul of fair use,” arguing that it establishes the would-be fair user’s justification, against which the other three factors weigh the interests of the

powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”). While the objectives of copyright are often summarized by reference to the Copyright Clause’s preambular language, “[t]o promote the Progress of Science and useful Arts,” many have noted the role of fair use as a safety valve for relieving some of the tension between the limited monopolies created by copyright and the free speech values enshrined in the First Amendment. U.S. CONST. art. I, § 8, cl. 8; *see, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (describing fair use as one of copyright law’s two “built-in First Amendment accommodations,” along with the idea-expression dichotomy); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998).

⁴⁷ *Campbell*, 510 U.S. at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

⁴⁸ *See, e.g., id.* at 585–86 (noting that the importance of commerciality in the first factor varies with context and that the second factor’s creative/factual distinction is never “likely to help much in separating the fair use sheep from the infringing goats in a parody case”); *Castle Rock Entm’t*, 150 F.3d at 144 (“[R]eproduction of entire work ‘does not have its ordinary effect of militating against a finding of fair use’ as to home videotaping of television programs.” (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984))).

⁴⁹ 17 U.S.C. § 107 (2006).

copyright holder.⁵⁰ The statutory language also asks courts to consider the commercial or non-profit nature of the use.⁵¹ However, while the commerciality of the use weighs against fair use in some contexts,⁵² the Supreme Court has retreated from imbuing such commercial nature with a presumption of unfairness.⁵³ Furthermore, the significance of this prong of the first factor wanes when the use is highly transformative.⁵⁴ Leval argues, and later cases agree, that the primary inquiry of the first factor of the fair use test is the extent to which the secondary use is “transformative.”⁵⁵ The question hinges on “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁵⁶ This formulation acknowledges that all creative activity builds, to some extent, on prior work. At the same time it draws a line (though not a bright one) at the point where the original work is no longer being used as “raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,”⁵⁷ but rather is simply being copied and repackaged in an attempt “to get attention or to avoid the drudgery in working up something fresh”⁵⁸

⁵⁰ Leval, *supra* note 32, at 1116 (“The strength of [the would-be fair user’s] justification must be weighed against the remaining factors, which focus on the incentives and entitlements of the copyright owner.”).

⁵¹ See 17 U.S.C. § 107(1).

⁵² When the material taken is used to compete directly with sales of the original work, commerciality is clearly implicated; in this respect, the first and fourth factors are linked. See *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1026 (9th Cir. 2000).

⁵³ See, e.g., *Campbell*, 510 U.S. at 584 (“If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph . . .”).

⁵⁴ *Id.* at 579 (“[T]he 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.”).

⁵⁵ See Leval, *supra* note 32, at 1111; *Campbell*, 510 U.S. at 579.

⁵⁶ *Campbell*, 510 U.S. at 579 (internal citations omitted).

⁵⁷ Leval, *supra* note 32, at 1111.

⁵⁸ *Campbell*, 510 U.S. at 580.

The concept of “transformative” use is difficult to pin down due to the fact-intensive nature of the fair use analysis.⁵⁹ Perhaps, in part, because the first factor of the fair use test often provides the main measure of the nature and magnitude of the secondary user’s justification for copying, there is a danger that courts may simply apply the term in a legally conclusory way, finding transformative character whenever they are already inclined to a finding of fair use.⁶⁰ When considered along with the fourth factor of the fair use test, however, the idea of transformative purpose gains workable criteria.⁶¹

2. The Second Factor: The Nature of the Copyrighted Work

The second factor of the fair use test concerns itself with the extent to which the original work is of the sort that copyright was designed to encourage and protect.⁶² The analysis comprises two dichotomies: that between published and unpublished works, and that between factual and creative works.⁶³ The general rule has been that the scope of fair use is narrower for unpublished than for published works, and narrower for creative works⁶⁴ than for factual works.⁶⁵ A line of cases, beginning with *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁶⁶ construed the published/unpublished prong aggressively against the copying of unpublished works,⁶⁷ culminating in Congress adding to § 107 the following clarifying language: “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 factors.”⁶⁸ The first factor of the fair

⁵⁹ See *infra* Part II.A.1 (exploring the contours of transformative uses).

⁶⁰ 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 [A][1][b] (2008).

⁶¹ See *infra* Part II.A.1.

⁶² See 17 U.S.C. § 107(2) (2006).

⁶³ See *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (citing 2 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 15:52 (2006)).

⁶⁴ The term “creative” as used here serves simply to distinguish copyrighted works of fiction or pure creative invention (e.g., a song, or a novel) from those in which the copyrighted expression concerns some factual matter (e.g., a scientific article).

⁶⁵ *Koons*, 467 F.3d at 256 (citing ABRAMS, *supra* note 63, § 15:52).

⁶⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

⁶⁷ *Id.* at 549.

⁶⁸ 17 U.S.C. § 107; see NIMMER, *supra* note 60, § 13.05 [A][2][b].

use test often overrides the creative/factual prong of the second factor, however, such that a transformative use of a creative work will usually be found to be a fair use.⁶⁹

3. The Third Factor: The Amount and Substantiality of the Portion Used

The third factor of the fair use test, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”⁷⁰ is intimately related to the purpose of the copying, as addressed under the first factor.⁷¹ The court examines the amount taken and determines whether it is excessive in light of the purpose of the use. Accordingly, the acceptable amount varies greatly with the facts of a given case.⁷² Moreover, both the quantitative and qualitative amount of the copying are relevant.⁷³ This factor is also sometimes linked to the fourth factor of the fair use test, insofar as a larger or more qualitatively significant taking often (but not always) signals that the use is substituting for, rather than transforming, the original.⁷⁴ Finally, this factor cannot be gamed “by conceptualizing the single [copyrighted work] as separate ‘modules,’” in order to increase the proportion of individual taking with respect to the whole.⁷⁵

⁶⁹ See *Koons*, 467 F.3d at 257 (“[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006))).

⁷⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

⁷¹ See *id.* at 586–87 (“[T]he enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use.”).

⁷² For example, taping an entire TV show (taking 100% of the copyrighted work) for personal time-shifting was deemed fair use. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷³ See *Campbell*, 510 U.S. at 587 (discussing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), where a mere 300 words taken from President Ford’s memoirs were nonetheless deemed “the heart of the book” and tilted the third factor against fair use).

⁷⁴ *Id.* at 587–88.

⁷⁵ See *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 480–81 (2d Cir. 2004).

4. The Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

In addition to the first factor of the fair use test, various courts and commentators have singled out the fourth factor, explicitly and implicitly, as the most important factor of the fair use test,⁷⁶ although the Supreme Court made it clear in *Campbell* that no single factor is dispositive and that “[a]ll [factors] are to be explored”⁷⁷ This factor asks courts to examine “not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”⁷⁸ Additionally, the fourth factor “take[s] account . . . of harm to the market for derivative works, defined as those markets that creators of original works would in general develop or license others to develop.”⁷⁹ Thus, subsidiary markets which spring from the licensing of authorized derivative works, based on the original work, may be harmed if the use at issue simply creates an unauthorized derivative work. However, the first factor is tightly integrated into this analysis because subsidiary markets for *transformative* uses do not fall under the aegis of the fourth factor. Essentially, the court determines if the copyright holder is entitled to control the type of use at issue. If he is, then the alleged infringer has injured this right by taking for free something for which he should have paid.⁸⁰ Furthermore, economic harm cognizable under this factor results only when “the secondary use usurps or substitutes for the market of the original work [or its derivatives]” and not simply when “the secondary use suppresses or even destroys the market for the original work or its potential

⁷⁶ See NIMMER, *supra* note 60, § 13.05 [A][4] (“If one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important, and indeed, central fair use factor.”) (internal citations omitted).

⁷⁷ *Campbell*, 510 U.S. at 578.

⁷⁸ *Id.* at 590 (quoting NIMMER, *supra* note 60, § 13.05 [A][4]).

⁷⁹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 590, 592) (internal quotation marks omitted).

⁸⁰ The relationship between the transformative nature of the use and recognition of cognizable market harm is at the heart of fair use analysis and is discussed in depth *infra* in Part II.A.

derivatives”⁸¹ (as with negative criticism or review which quotes the work).⁸²

C. Video Game Cases Bearing on the Fair Use Analysis

Today, video games claim copyright protection in two major ways. The code comprising the underlying computer program is a “literary work,”⁸³ and the visual and aural output produced by the game is an “audiovisual work.”⁸⁴ The implications of this audiovisual classification were further explored in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,⁸⁵ where the Ninth Circuit examined the “Game Genie,” a device which allowed players of Nintendo’s copyrighted games to alter certain elements of the game (such as increasing the speed or strength of their character) before playing.⁸⁶ Nintendo argued that the audiovisual display produced when Game Genie owners used the device to play a modified version of a game constituted an infringing derivative work based on the game’s copyrighted audiovisual displays.⁸⁷ The court disagreed, reasoning that because the modified displays were never fixed, they could not be derivative works.⁸⁸ In dicta⁸⁹ the court then discussed the fair use arguments that had been raised below.⁹⁰ The court’s analysis of the first factor of the fair use test

⁸¹ *Castle Rock Entm’t*, 105 F.3d at 145.

⁸² *See Campbell*, 510 U.S. at 591–92 (“[A] lethal parody, like a scathing theater review, kills demand for the original, [but] it does not produce a harm cognizable under the Copyright Act.”).

⁸³ 17 U.S.C. § 102(a)(1); *see Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855 n.3 (2d Cir. 1982) (citing *NIMMER*, *supra* note 60, § 2.04 [C]).

⁸⁴ 17 U.S.C. § 102(a)(6); *see Stern*, 669 F.2d at 855.

⁸⁵ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

⁸⁶ *Id.* at 967.

⁸⁷ *Id.*

⁸⁸ *Id.* at 969. In *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1111 n.4 (9th Cir. 1998), the court did note, however, that someone who managed to capture and *record* a game’s output would have created an infringing derivative work. At the time, lack of computer sophistication led the court to imagine someone “filming the screen.” *Id.* Video capture software and hardware used by machinimators today allow for easy, full quality capture of a computer or TV screen’s output. *See generally* Machinima.com—View Forum, Gameplay Recording & Capturing, <http://www.machinima.com/forums/viewforum.php?f=31&sid=c55362a23e50665fa51b1b16422b4b04> (last visited Feb. 8, 2009).

⁸⁹ *Micro Star*, 154 F.3d at 1113 (“[T]he fair use analysis in [*Galoob*] was not necessary and therefore is clearly dicta.”).

⁹⁰ *Id.* at 1112.

did not mention the transformative nature of the work; rather it drew a presumption of fairness from the non-profit nature of individuals' home use of the Game Genie.⁹¹ Under the second factor of the fair use test, the court analogized to *Sony Corp. of America v. Universal City Studios, Inc.*,⁹² stating that once customers had paid to own and play copies of Nintendo's games, "the fact that the derivative works created by the Game Genie are comprised almost entirely of Nintendo's copyrighted displays does not militate against a finding of fair use."⁹³ The court placed the most weight on the fourth factor of the fair use test, acknowledging Nintendo's argument that it need not have exercised its rights to slightly modified versions of its games in order to be entitled to protection of those rights.⁹⁴ However, the court found that Nintendo had failed to show that a market for such rights even existed, let alone had been harmed by the non-profit, personal use of Game Genie owners.⁹⁵

Six years later, in *Micro Star v. Formgen*,⁹⁶ the Ninth Circuit took up video games again, addressing the issue of "add-on levels."⁹⁷ The defendant had collected and sold on CD-ROM 200 user-created "MAP" files,⁹⁸ which could be used with Formgen's game, *Duke Nukem 3D*, to play new levels beyond those included with the original game.⁹⁹ The MAP files contained none of the graphical or audio elements of the game itself (these remained stored in the "source art library," as part of the original game), but were essentially instructions which told the game how to organize and display the existing assets in new ways, creating different

⁹¹ *Galoob*, 964 F.2d at 970.

⁹² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁹³ *Galoob*, 964 F.2d at 971.

⁹⁴ *Id.* ("If the defendant's work adversely affects the value of any of the rights in the copyrighted work . . . the use is not fair even if the rights thus affected have not as yet been exercised by the [copyright holder]." (quoting *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 (9th Cir. 1988))).

⁹⁵ *Id.*

⁹⁶ *Micro Star v. Formgen*, 154 F.3d 1107 (9th Cir. 1998).

⁹⁷ *Id.* at 1109.

⁹⁸ *Id.* at 1110 n.2; see, e.g., File-Extension.org—File Extension MAP, Duke Nukem 3D Map File, <http://www.file-extensions.org/map-file-extension-duke-nukem-3d-map-file> (last visited Feb. 10, 2009).

⁹⁹ *Micro Star*, 154 F.3d at 1109.

adventures in the same theme of the original game.¹⁰⁰ Furthermore, the MAP files could only be used with, and could not function apart from, a copy of the original game.¹⁰¹ The game was a rudimentary first-person shooter¹⁰² in which the player assumed the role of “a beefy commando type named Duke,” and which told a simple, but distinctive story set in “post-Apocalyptic Los Angeles,” replete with “aliens, radioactive slime and freezer weapons.”¹⁰³ In holding that the MAP files constituted an infringing derivative work, the court rejected Micro Star’s contention that the analysis should focus on the game’s audiovisual displays, noting instead that the work being infringed was the game’s story.¹⁰⁴ Because the MAP files simply pulled from the limited source art of the original game, reorganizing it in familiar patterns, the additional levels made playable by them ended up “telling new (though somewhat repetitive) tales of Duke’s fabulous adventures.”¹⁰⁵ Having found that “the MAP files encompass new Duke stories, which are themselves derivative works,” the court then declined to find fair use, holding that the MAP files “can hardly be described as transformative,” and that they “expressly use[d] the . . . story’s unique setting, characters, and plot.”¹⁰⁶ Thus, the court recognized that the game’s story, comprising its “setting, characters and plot,” could be a source of subsidiary markets for derivative works (such as sequels) the fruits of which Formgen was entitled to.¹⁰⁷ This entitlement, in turn, made the damage to that market resulting from Micro Star’s unauthorized

¹⁰⁰ *Id.* at 1110.

¹⁰¹ *Id.*

¹⁰² A three-dimensional game in which the player explores a world from the point of view of the main character, often for the purposes of firing varied weaponry at hoards of enemies. See ANDREW ROLLINGS & ERNEST ADAMS, ANDREW ROLLINGS & ERNEST ADAMS ON GAME DESIGN 289–96 (2003); see also Wikipedia—First-person Shooter, http://en.wikipedia.org/wiki/First-person_shooter (last visited Feb. 9, 2009).

¹⁰³ *Micro Star*, 154 F.3d at 1112–13.

¹⁰⁴ *Id.* at 1113.

¹⁰⁵ *Id.* at 1112.

¹⁰⁶ *Id.* at 1113 n.6 (quoting *Stewart v. Abend*, 495 U.S. 207, 238 (1990)) (internal quotation marks omitted).

¹⁰⁷ *Id.* at 1113.

sale of sequels into market harm cognizable under the fourth factor of the fair use test.¹⁰⁸

Machinima presents an interesting next step in this progression of cases. Because machinimators record the audiovisual displays of the game they use, *Galoob* does not provide a close factual fit. However, it has been argued that since “[w]hat is essentially being evaluated is the experience of the user,” the technical details of how a game’s audiovisual displays are generated, modified, and stored should be as invisible to the fair use analysis as they are to the end user.¹⁰⁹ Additionally, while current online MMORPGs do not tether the player to the role of a specific hero, many of them do involve potentially copyrightable story elements—“unique setting, characters, and plot”¹¹⁰—which may find their way into a given video. What 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,” when dealing with the legal issues presented by machinima.

D. A Brief Note on Copyright in Characters

While copyright in the audiovisual works embodied by the output of video games is an obvious source of potential infringement claims against machinimators, courts have also found copyright in characters.¹¹¹ While video games have put players in the shoes (or spaceship) of a main character almost since their inception, the sophistication of the stories told and the characters that inhabit them has increased greatly along with the audiovisual capabilities of the systems running game software.¹¹² This increasing sophistication allows game makers to present players

¹⁰⁸ See *id.*

¹⁰⁹ See John Baldrice, *Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects*, 8 MINN. J.L. SCI. & TECH. 681, 707 (2007).

¹¹⁰ *Micro Star*, 154 F.3d at 1113.

¹¹¹ See NIMMER, *supra* note 60, § 2.12 (“Although there has been some conflict in the cases, it is clearly the prevailing view that characters *per se* are entitled to copyright protection.”).

¹¹² See ROLLINGS & ADAMS, *supra* note 102, at 533–66 (reviewing the history of video games and predicting the future of gaming).

with an array of very visually and aurally distinct characters, which in turn increased the likelihood that the characters themselves may be subject to copyright protection.

Judge Learned Hand remarked famously in *Nichols v. Universal Pictures Corp.*¹¹³ “that the less developed the characters, the less they can be copyrighted.”¹¹⁴ In *Walt Disney Productions v. Air Pirates*,¹¹⁵ the Second Circuit found cartoon characters such as Mickey Mouse and Donald Duck copyrightable, noting that while “it is difficult to delineate distinctively a literary character . . . [w]hen the author can add a visual image . . . the difficulty is reduced.”¹¹⁶ The court went on to reason that “a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”¹¹⁷ This idea was reinforced recently by Judge Posner in *Gaiman v. McFarlane*,¹¹⁸ where a writer of an issue of the comic “Spawn” sued the artist of the same issue, alleging joint authorship in several characters.¹¹⁹ Discussing “Count Cogliostro,” one of the characters at issue, the court noted first that the script and dialogue written by plaintiff would not alone have made the Count distinct enough to grant him copyright protection, but that the writing combined with the artist’s visual rendering of the character was enough to create a character sufficiently delineated to be protectable.¹²⁰ The court also distinguished “stock” characters (not protectable) with a distinct character like the Count (protectable).¹²¹

¹¹³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

¹¹⁴ *Id.* at 121. By way of example, Judge Hand reasoned that “[i]f Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.” *Id.*

¹¹⁵ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

¹¹⁶ *Id.* at 755.

¹¹⁷ *Id.*

¹¹⁸ *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

¹¹⁹ *See id.* at 648–49.

¹²⁰ *See id.* at 660.

¹²¹ *See id.* While “a knowledgeable old wino” is an uncopyrightable stock character, “Cogliostro’s age, obviously phony title (‘Count’), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright.” *Id.*

While many of the modern games used by Machinimators, such as *Halo* or *World of Warcraft*, involve storied worlds populated by some number of distinctly named (and often times voiced) characters, the players themselves are often required to create their own characters.¹²² They may be offered “stock” visual models which have been designed by the games’ creators, but the name, actions, and many other subtleties of the character’s story are the product of the player’s interaction with the game.¹²³ In other words, the player contributes much of the “writing” of the characters, even as he uses the pre-made three-dimensional art of the game. In the case of Machinima the degree of player involvement is even greater. Machinimators may completely change the context of characters they use, imbuing what were stock characters in the game with unique voices, names, and personalities.¹²⁴ However, it is also possible that Machinimators might seek to elaborate on some of the distinct characters provided by the games’ creators to create “extra chapters.”¹²⁵ Although the court did not explicitly state it in those terms, it is likely that the court in *Micro Star* saw this as the source of the infringement.¹²⁶

Copyright in characters raises many interesting issues both in terms of infringement,¹²⁷ and in terms of potential joint authorship

¹²² See, e.g., The Machinima FAQ, *supra* note 6; Gamespot.com—World of Warcraft Review, <http://www.gamespot.com/pc/rpg/worldofwarcraft/review.html> (last visited Feb. 5, 2009).

¹²³ See generally Academy of Machinima Arts & Sciences, <http://machinima.org> (last visited Feb. 6, 2008); World of Warcraft, <http://www.worldofwarcraft.com/info/wrath/index.xml> (last visited Feb. 5, 2009).

¹²⁴ See, e.g., World of Warcraft—Character Information, <http://www.worldofwarcraft.com/info/basics/characters.html> (last visited Feb. 5, 2009); Halo 3—Master Chief, <http://www.halo3.com> (follow “About Halo” hyperlink; then “Characters” hyperlink) (last visited Feb. 5, 2009).

¹²⁵ See *infra* Part III.A.3.

¹²⁶ See *Micro Star v. Formgen*, 154 F.3d 1107, 1112, 1114 (9th Cir. 1998).

¹²⁷ See 17 U.S.C. § 501 (2006) (defining copyright infringement); see also Britton Payne, Note, *Super-Grokster: Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 972–86 (2006) (listing many infringement cases dealing with copyrighted characters in superhero comics).

with players.¹²⁸ For purposes of this Note, however, it is sufficient to assume that there is *some* alleged infringement, be it of the audiovisual work, or one or more protectable characters embodied in the game.

II. APPLYING FAIR USE TO MACHINIMA

An infringement case targeting machinima will present courts with the somewhat muddy post-*Campbell* fair use jurisprudence in the appellate courts and a dearth of cases providing guidance in applying the fair use doctrine to the interactive media of current and future video games. This section will discuss the fair use analysis as it should apply to machinima in general. While fair use analysis is fact-intensive,¹²⁹ certain propositions concerning the application of the doctrine to machinima can be determined in the abstract and should be instructive to courts as they apply it to specific factual situations.

A. *The First and Fourth Factors Applied to Machinima*

1. A Closer Look

In the context of machinima, the first factor is of special significance because of machinima's potential to be highly transformative. Justice Leval's characterization of the first factor as "the soul of fair use"¹³⁰ was apt because this factor, more than any other, asks the secondary user to show how, and to what extent, his taking furthers the policies underlying fair use, namely the use of existing works "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings . . . for the enrichment of society."¹³¹ Some of these uses, like criticism and study, transform the original work by using it as a catalyst for generating new information in a

¹²⁸ See 17 U.S.C. § 101 (defining joint work as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable and interdependent parts of a unitary whole").

¹²⁹ See Leval, *supra* note 32, at 1107.

¹³⁰ *Id.* at 1116.

¹³¹ *Id.* at 1111.

preexisting form (the literary or artistic review, for example, or the scholarly paper). The purpose of these works, although probably anticipated by the author of the original, is distinct from the original author's own purpose. The parts of the original work incorporated or quoted by the secondary user appear in a new functional role, having been transformed to serve the new purpose of that use.

While the expression and information created by a critic or scholar is new, the *type* of use (review or scholarly commentary) is not. Critical commentary and review of previous works is an established and accepted part of almost any literate and artistic society. Thus, Congress listed these as some of the most common traditional transformative uses by way of example when they enacted § 107 of the Copyright Act.¹³² However, Congress also deliberately and unequivocally rejected the creation of presumptive fair use categories,¹³³ choosing instead to maintain the open-ended, evolutionary common law approach to fair use that the courts had followed since *Folsom v. Marsh*. This choice demonstrates that the “breathing space within the confines of copyright”¹³⁴ created by fair use serves to protect not only the enumerated examples, but an equally, if not more important set of transformative uses: those which use the original work not only to catalyze new content in a traditional form, but to create a new type of transformation altogether.¹³⁵ Machinima is the perfect example of this second category of transformative use because it makes use of the interactive nature of video games and repurposes it as an engine for creative expression.

¹³² See 17 U.S.C. § 107.

¹³³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence.”).

¹³⁴ *Campbell*, 510 U.S. at 579.

¹³⁵ *Id.* at 577–78 (“[The enumerated statutory examples] thus provide only general guidance about the sorts of copying that courts and Congress most commonly *had* found to be fair uses.” (emphasis added)). The purpose of an open ended standard is precisely to allow for the future recognition of categories of fair use which were unanticipated at the time the statute was drafted.

While arguably even more vital to the “enrichment of society”¹³⁶ than traditionally accepted transformative uses, these new types of transformations illuminate the tense symbiosis between the first and fourth factors. On the one hand, the fourth factor helps to give definition to the term “transformative use” by asking whether the portions of the original work taken for a given secondary use are truly integrated with the alleged transformative purpose, or whether they simply “usurp[] or substitute[] for the market of the original work.”¹³⁷ On the other hand, the Court in *Campbell* held that “the market for the original” includes subsidiary markets for derivative works based on the original.¹³⁸ The Court narrowed the scope of this inclusion to markets “that creators of original works would in general develop or license others to develop,”¹³⁹ indicating that some subsidiary uses must occupy markets outside the cognizance of the fourth factor. This limiting principle is extremely important because without it the analysis can become circular. Section 106 of the Copyright Act grants the copyright holder the exclusive right “to prepare derivative works based upon the copyrighted work.”¹⁴⁰ The law thus entitles the copyright holder to reap the benefits of the subsidiary markets for any and all such derivative works, either by entering the market himself, or by licensing others to do so. However, the copyright holder need not have entered or plan to enter (or license) a given subsidiary market for derivatives in order for economic harm to his entitlement to be cognizable under the fourth factor. For example, simply because an author has not, or does not plan to license his book for film adaptation (a derivative use), an unauthorized adaptation is not therefore fair

¹³⁶ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

¹³⁷ *Id.* at 145. Compare *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (“We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.”), *with id.* at 253 (finding significant transformative purpose where a painting composed for an art exhibit admittedly copied many elements of a copyrighted photo shot for use in a fashion magazine).

¹³⁸ See *Campbell*, 510 U.S. at 591–92.

¹³⁹ *Id.* at 592.

¹⁴⁰ 17 U.S.C. § 106 (2006).

use.¹⁴¹ But this derivative entitlement cannot extend to *every* possible use of the original work, or else a circularity arises which would enable the fourth factor to swallow the entire fair use doctrine. As Nimmer points out, “it is a given in every fair use case that plaintiff suffers a loss of a potential market if that *potential* is defined as the theoretical market for licensing the very use at bar.”¹⁴²

Fair use doctrine therefore creates a “breathing space” for certain subsidiary uses¹⁴³ of a work by declining to recognize the copyright holder’s entitlement to control (or exploit) the markets for these uses. In determining which uses fall into this breathing space, the first and the fourth factors blend together, creating a sliding scale; the use moves out of the market for derivatives (where the fourth factor recognizes harm) and into the breathing space (where the fourth factor does not recognize market harm) as the degree of its transformative purpose under the first factor increases.¹⁴⁴ The relationship between these two factors has its own danger of circularity: transformative works are less likely be market substitutes for the original or its derivatives because the law does not recognize (for fair use purposes) the *existence* of markets for works deemed transformative. Thus, the *Campbell* Court’s

¹⁴¹ See *Castle Rock Entm’t*, 150 F.3d at 145–46 (“Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works . . . the copyright law must respect that creative and economic choice.”); see also *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (holding that author’s intent not to publish certain letters during his lifetime did not reduce the need to examine the potential market harm resulting from a biographer’s publication of portions of those letters).

¹⁴² NIMMER, *supra* note 60, § 13.05[A][4]; see also *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 n.17 (2d Cir. 1994) (“[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.”).

¹⁴³ *Campbell*, 510 U.S. at 591. The term “subsidiary use” is broader in scope than “derivative work.” See NIMMER, *supra* note 60, § 26.02. A subsidiary use is any use that employs part or all of the original work in any manner. See *id.* The law recognizes that the original author has a proprietary entitlement to a subset of these uses, which it dubs “derivative works.” See 17 U.S.C. § 106. Fair use doctrine aims to define the subsidiary uses which the law places outside the category of derivative works. See NIMMER, *supra* note 60, § 26.02[C][2].

¹⁴⁴ See *Castle Rock Entm’t*, 150 F.3d at 145 (“The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.” (citing *Campbell*, 510 U.S. at 591)).

limitation of markets cognizable under the fourth factor to markets “that creators of original works would in general develop or license others to develop”¹⁴⁵ demonstrated the Court’s awareness of this dangerous circularity, and represented a first step in attempting to avoid it by providing meaningful criteria for discriminating between transformative and non-transformative uses.

Later that year, the Second Circuit recast the language from *Campbell*, holding that “[o]nly an impact on potential licensing revenues for *traditional, reasonable, or likely to be developed* markets should be legally cognizable” under the fourth factor of the fair use test.¹⁴⁶ In a recent case, *Bill Graham Archives v. Dorling Kindersley Ltd.*,¹⁴⁷ the same court attempted to further clarify the contours of the markets recognized.¹⁴⁸ The court ruled that reduced-size reproductions of copyrighted Grateful Dead concert posters used in a comprehensive, illustrated history of the band was a fair use.¹⁴⁹ In finding the use to be transformative, the court rejected the copyright holder’s arguments “that it established a market for licensing its images, and in this case expressed a willingness to license images to [the secondary user],” and that “fees [had been] paid to other copyright owners for the reproduction of their images in [the book].”¹⁵⁰ The court held that “[n]either of these arguments shows impairment to a traditional, as opposed to a transformative market.”¹⁵¹ Thus, the copyright holder cannot transmute markets for transformative uses¹⁵² into protected, “traditional” markets simply by saying that he *could* charge for the

¹⁴⁵ *Campbell*, 510 U.S. at 592.

¹⁴⁶ *Texaco*, 60 F.3d at 930 (emphasis added).

¹⁴⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁴⁸ *Id.* at 614.

¹⁴⁹ *Id.* at 607.

¹⁵⁰ *Id.* at 614.

¹⁵¹ *Id.*

¹⁵² Courts have varied in their use of the term “market.” However, there is a consistency in meaning, if not in choice of words. The *Campbell* opinion speaks of “the rule that there is no protectable derivative market for criticism,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994), whereas the *Bill Graham Archives* opinion refers to “transformative market[s].” 448 F.3d at 615. In both cases the use at issue is part of *some* economic market, but the market is dubbed “transformative” as a way of indicating that the law does not recognize or protect the copyright holder’s interest in that market.

use at issue.¹⁵³ Copyright law must recognize the copyright holder's *entitlement* to charge for (or otherwise control) a given use. In other words "the copyright holder cannot prevent others from entering [the] fair use market[] merely 'by developing or licensing a market for . . . transformative uses of its own creative work.'"¹⁵⁴

It may be useful here to distinguish three broad classes of situations in which courts have traditionally found fair use by way of a lack of fourth factor market harm. First are situations where the copyright holder has, for various reasons, been uninterested in exploiting the use at issue.¹⁵⁵ Parody and critical commentary are ready exemplars of this category.¹⁵⁶ Second are situations where the copyright holder is unable to exploit the use, regardless of whether he desires to do so.¹⁵⁷ In these situations, it is merely the impracticability (or outright impossibility) of the copyright holder's exploitation of the use which makes that use non-harmful and fair.¹⁵⁸ Thus, as the court in *Texaco* noted, if changing technological or business circumstances (like the development of a

¹⁵³ Cf. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 n.17 (2d Cir. 1994) ("[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.").

¹⁵⁴ *Bill Graham Archives*, 448 F.3d at 615 (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)). *But see Texaco*, 60 F.3d at 934 (Jacobs, J., dissenting) ("I do not agree at all that a reasonable and customary use becomes unfair when the copyright holder develops a way to exact an additional price for the same product.").

¹⁵⁵ See, e.g., *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) ("In the cases where we have found the fourth factor to favor a [secondary user], the [secondary user]'s work filled a market niche that the [copyright holder] simply had no interest in occupying.").

¹⁵⁶ See, e.g., *Campbell*, 510 U.S. at 592 ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

¹⁵⁷ See, e.g., *Texaco*, 60 F.3d at 930 (noting that other courts have held that no market harm exists when the market is one "that the copyright holder has not typically sought to, or reasonably been able to, obtain or capture" (emphasis added)); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (noting that there is a lack of market harm when the secondary user "profits from an activity that the owner could not possibly take advantage of").

¹⁵⁸ See *Texaco*, 60 F.3d at 930; *Duncan*, 744 F.2d at 1496.

viable market for institutional photocopying licenses) make it possible or practical for the copyright holder to start exploiting such a use, that use's fairness will diminish as the fourth factor begins to recognize harm.¹⁵⁹ Finally, there are those uses where the law simply refuses to grant the copyright holder an entitlement, even when he both wants to exploit the market and is capable of doing so.¹⁶⁰ This third category covers highly transformative works, where denying the copyright holder's otherwise clear right helps to further the objectives of copyright.

The difficulty lies in drawing a line within the twilight overlap of the derivative market entitlements we wish to secure to copyright holders¹⁶¹ and the transformative fair uses we wish to protect and foster in the "breathing space" created by § 107.¹⁶² To a certain extent, this may simply reduce to a policy judgment about how far the penumbra of exploitative entitlement of a given work need extend in order "[t]o promote the Progress of Science and useful Arts,"¹⁶³ while not "'stifl[ing] the very creativity which that law is designed to foster.'"¹⁶⁴ The open-ended formulation of fair use doctrine acknowledges that this line will never be bright, but that it can still be drawn with consistency in similar factual scenarios.

¹⁵⁹ *Texaco*, 60 F.3d at 930–31 ("[I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier.").

¹⁶⁰ *See, e.g.*, *Blanch v. Koons*, 467 F.3d 244, 258 n.9 (2d Cir. 2006) ("[No] derivative market [existed] for [the copyright holder] to tap into that is in any way related to [the secondary user]'s use of her work, even if [the copyright holder] dearly wanted to."). Here there was no doubt that copyright holder *could* have sought (and the secondary user could have produced) a licensing payment, but, entangling the first factor analysis, as outlined in *supra* Part I.B.1, the court simply refused to give the copyright owner the *legal* right to do so, on account of the transformative nature of the secondary use. *Koons*, 467 F.3d at 258.

¹⁶¹ *See* 17 U.S.C. § 106(2) (2006).

¹⁶² *See supra* text accompanying notes 134–36, 143–44.

¹⁶³ U.S. CONST. art. I, § 8, cl. 8.

¹⁶⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

2. Machinima as Transformative Works

Machinima videos, which are ultimately linear works in the mold of TV shows or movies, are unlikely to act as market substitutes for the interactive experience of playing an online video game. 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. It is unlikely, for example, that *Halo*¹⁶⁵ would be as popular as it is if users were paying \$60 to simply sit and watch hours of three-dimensional animation over which they had as little control as they do over an animated film from Pixar. As noted above, for purposes of fair use analysis, the interactive nature of the audiovisual work comprising a game's copyright is relevant because video games are a medium which presuppose and encourage some amount of creative, transformative input from the player.¹⁶⁶ The tiny reproductions of concert posters in a historical commentary in *Bill Graham Archives*.¹⁶⁷ and the incorporation of a glossy fashion photo into a gallery painting in *Blanch v. Koons*,¹⁶⁸ used the copyrighted material at issue, not for its original artistic (and economic) purpose, but as part of a new and different purpose.¹⁶⁹ Similarly, a machinima video yokes the graphical and audio output of a video game to a purpose entirely different from that of the original game. Of course, it could be argued that precisely because game publishers are aware of and encourage

¹⁶⁵ Halo 3, <http://www.halo3.com>.

¹⁶⁶ See *supra* notes 134–36 and accompanying text.

¹⁶⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

¹⁶⁸ *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006).

¹⁶⁹ See *id.* at 253 (“[The artist’s] stated objective [was] thus not to repackage Blanch’s ‘Silk Sandals,’ but to employ it in the creation of new information, new aesthetics, new insights and understandings.” (internal citations and quotations omitted)); *Bill Graham Archives*, 448 F.3d at 609 (“[The defendant’s] purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of [the plaintiff’s] images fulfilled the dual purposes of artistic expression and promotion. The posters were apparently widely distributed to generate public interest in the Grateful Dead and to convey information to a large number people about the band’s forthcoming concerts. In contrast, [the defendant] used each of [the plaintiff’s] images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*’s timeline.”).

machinima uses of their games,¹⁷⁰ such uses constitute *less* of a transformative leap that did the uses in *Bill Graham Archives* and *Koons*. However, this logic would impugn the fairness of many transformative uses where copying is anticipated and possibly encouraged. For example, publishers send advance copies of books to critics with the expectation that some material will be quoted in reviews. Simply because copyright holders may be aware of certain transformative uses, does not reduce their transformative nature.

That machinima do not directly compete with video game sales does not end the inquiry, however, since harm to potential derivative markets from allowing the use may be cognizable under the fourth factor of the fair use test as well.¹⁷¹ But considering that machinima is an attractive medium precisely because it does not require investment in expensive and hard to use rendering software (of the sort Pixar might use to create an animated blockbuster¹⁷²), it is extremely unlikely that a serious potential market for licensing video games as movie creation tools is being harmed.¹⁷³ A game publisher might argue that it could have charged a higher price for copies of the game had it wished to license the right to use the game for machinima in addition to its regular interactive entertainment purpose. However, this argument seems disingenuously circular,¹⁷⁴ because the same publishers are already including features in their games that encourage and aid users in the creation of machinima.¹⁷⁵ This does not exclude the possibility that machinima uses of games might in the future rise to such a prominent and established level that publishers start selling special versions of their games which prioritize the needs of

¹⁷⁰ See *supra* notes 17–18, 23–24 and accompanying text.

¹⁷¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (“[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

¹⁷² See, e.g., *RATATOUILLE* (Pixar 2007); Pixar—How We Do It, <http://www.pixar.com/howwedoit/index.html> (last visited May 27, 2009) (briefly describing the creative and mechanical genesis of a Pixar movie).

¹⁷³ See Leval, *supra* note 32, at 1124 n.85 (“If a royalty obligation attached to every secondary use, many would simply forgo use of the primary material in favor of substitutes.”).

¹⁷⁴ See *supra* Part II.A.1.

¹⁷⁵ See *Machinima 101*, *supra* note 10.

machinimators over those who play for entertainment, but that is not yet the case. In the case of MMORPGs, which advertise as a feature the high degree of user input into the experience and content of the virtual world,¹⁷⁶ a claim that uses based on just such features are unauthorized and therefore evince market harm seems even weaker.

In *Micro Star*, the court characterized the work being infringed as the story of *Duke Nukem*, holding that “the stories told in the [infringing] MAP files are surely sequels, telling new (though somewhat repetitive) tales of Duke’s fabulous adventures.”¹⁷⁷ This is significant because it is uncontested that video game sequels are something that companies “would in general develop or license others to develop,”¹⁷⁸ reaping huge rewards by milking popular franchises with multiple sequels.¹⁷⁹ From the point of view of players of *Duke Nukem 3D*, the MAP files distributed by Micro Star substituted for sequel versions (or more accurately, “expansion packs”, in the lingo of the game industry), of the *Duke* story which Formgen had the exclusive right to create or license.¹⁸⁰ The net result for a user playing Micro Star’s extra MAP files was an interactive game experience of exactly the same type (and, in that case, using all the same limited source art and animations) as the original game.¹⁸¹

Today’s MMORPGs are different from the game at issue in *Micro Star* in one very important way. A user playing an

¹⁷⁶ See *supra* notes 12–14.

¹⁷⁷ *Micro Star v. Formgen*, 154 F.3d 1107, 1112 (9th Cir. 1998).

¹⁷⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

¹⁷⁹ See Geddes, *supra* note 16 (sales figures from the second sequel in the *Halo* series).

¹⁸⁰ *Micro Star*, 154 F.3d at 1112. Ironically, the planned sequel to *Duke Nukem 3D* has been in the works for over a decade, becoming somewhat of an inside joke in the gaming industry as its release date has been pushed back again and again. See generally Duke Nukem Forever, <http://www.3drealms.com/duke4> (last visited Feb. 9, 2009) (“There is no release date set . . . yes, we know the game has taken a long time. There’s no possible joke you could make about the game’s development time that we haven’t already heard.”).

¹⁸¹ *Micro Star*, 154 F.3d at 1112. Cf. *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145–46 (2d Cir. 1998) (finding that the repackaging of copyrighted expression from the *Seinfeld* TV series into a trivia book about the show designed to “satisfy the between-episode cravings” was not fair use).

unmodified version¹⁸² of *Duke Nukem 3D* always stepped into the shoes of Duke himself, and no matter how well or poorly he played, his experience was the (admittedly repetitive) story of Duke's "fabulous" adventures.¹⁸³ Most MMORPGs, on the other hand, bill as an attractive feature the fact that the player himself creates the protagonist of his game experience, giving his character a name, determining what he looks like, what he wears, and most importantly, creating his own personal story through interactions with other human players.¹⁸⁴ The game's creator has often filled the world with a rich back story and setting, but such details are not the focus of the gameplay. Thus, while it is possible for a machinimator to create machinima which allegedly infringes not only the audiovisual aspect of the game, but the protectable story elements of the virtual world as well, it is equally possible for him to simply use the world in the same way a shoestring budget filmmaker might use an empty lot or city street, merely as somewhere to shoot. In the latter case, the fair use analysis would focus exclusively on the allegedly infringed audiovisual work, while in the former the story, and possibly copyrighted characters,¹⁸⁵ are also allegedly infringed, complicating the analysis of the "purpose" of the secondary work under the first fair use factor.¹⁸⁶

In short, a machinima video which uses the game to tell new stories (or variations on preexisting ones) set in the fictional game world will look more like a traditional derivative adaptation¹⁸⁷

¹⁸² For a discussion of the separate, but related issue of the legal status of game "mods" (e.g., actual code modifications to a game which can change many features of the play experience), see Baldrice, *supra* note 109 (suggesting a "spectrum of user contribution" as an analytic framework for dealing with game mods and suggesting that machinima belong on the high fair use protection end of that spectrum).

¹⁸³ *Micro Star*, 154 F.3d at 1112.

¹⁸⁴ See, e.g., GuildWars—Game Play Features, <http://www.guildwars.com/products/guildwars/default.php> (last visited Feb. 11, 2009).

¹⁸⁵ See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004) (holding comic book characters who were sufficiently distinctive to be copyrightable).

¹⁸⁶ See 17 U.S.C. § 107(1) (2006).

¹⁸⁷ See 17 U.S.C. § 101 (defining a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.

(even if it is switching format from interactive game, to non-interactive movie), for which a real licensing market undeniably exists.¹⁸⁸ Finally, it is worth noting that the “harm” looked at by the fourth factor of the fair use test¹⁸⁹ refers to harm to the copyright holder’s *entitlement*, which sometimes, but not always tracks with actual lost revenues.¹⁹⁰ As the court in *Castle Rock*¹⁹¹ noted, even if a use *helps* demand for the original or one of its protected derivatives, the fourth factor still recognizes harm to the entitlement.¹⁹² Thus, machinimators cannot argue that the positive effects of their work on demand for the game on which it is based tilts the fourth factor in their favor. If the machinima falls within a protected rather than transformative market, it causes cognizable market harm to the publisher’s entitlement.

For machinima which do not simply use the game to tell more of the game’s story—and examples of this range from comedy, to political talk shows, to historical fiction¹⁹³—there is a strong case to be made that these works are highly transformative in exactly the way that § 107 was designed to protect and encourage.¹⁹⁴ The market appeal (if any) of such machinima does not lie in the audiovisual assets appropriated from the underlying game.¹⁹⁵ As with traditional media, like TV and movies, much of the appeal comes from the quality of the writing, directing, editing, and

A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . .”).

¹⁸⁸ See, e.g., *LARA CROFT: TOMB RAIDER* (Paramount Pictures 2001); *RESIDENT EVIL* (Screen Gems 2002).

¹⁸⁹ 17 U.S.C. § 107(4).

¹⁹⁰ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985).

¹⁹¹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

¹⁹² See *id.* at 145 n.10 (“[B]ecause a ‘film producer’s appropriation of a composer’s previously unknown song that turns the song into a commercial success’ is a market substitute, that use is not made fair because it increases the market for the original work.” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21 (1994))).

¹⁹³ See, e.g., *Red v. Blue*, <http://www.redvsblue.com>; *Call of Duty*, <http://www.machinima.com/channel/view&id=64> (WWII game); *This Spartan Life*, <http://www.thisspartanlife.com> (political themed talkshow).

¹⁹⁴ See *Campbell*, 510 U.S. at 579.

¹⁹⁵ In the case of machinima which directly parody the experience of the game with which they are made, this might be different.

acting.¹⁹⁶ It is no coincidence that a number of the machinima made today might be considered parodic commentary on the games used to create them (and on gaming culture in general).¹⁹⁷ However, it would be a mistake for courts to constrain their fair use analysis of machinima to this well-litigated area. Rather than relying on familiar types of transformative use, such as parody,¹⁹⁸ courts should acknowledge the new and varied types of transformation represented by machinima.

Finally, the commercial nature of machinima can be hard to judge. Some successful machinima shows, like Rooster Teeth Productions' *Red vs. Blue*, are the centerpiece of nascent media companies, which make money through sales of DVDs as well as website memberships.¹⁹⁹ However, most projects are posted to third party hosting sites like YouTube²⁰⁰ or Machinima.com.²⁰¹ These sites gain advertising revenue from targeted ads displayed when people view the videos,²⁰² but the makers of the machinima themselves usually do not get a cut, making such postings hard to classify as a commercial use under the first factor.²⁰³

¹⁹⁶ Producers of machinima employ both voice and "body" actors, the latter being people who manipulate the virtual characters within the game so that they act out a given scene. Machinima.com, an online community devoted to creators and consumers of machinima, contains a "help wanted" section, in which there are frequent ads for all of the jobs mentioned. See Machinima.com—View Forum, Help Wanted & Offered, <http://www.machinima.com/forums/viewforum.php?f=19> (last visited Mar. 24, 2009).

¹⁹⁷ Indeed, *Red vs. Blue* falls into this category to some extent.

¹⁹⁸ See *Campbell*, 510 U.S. at 592.

¹⁹⁹ See Allen Varney, *Red vs. Blue Makes Green*, ESCAPIST, Oct. 24, 2006, http://www.escapistmagazine.com/articles/view/issues/issue_68/396-Red-vs-Blue-Makes-Green; Rooster Teeth Online Store, <http://www.roosterteethstore.com> (last visited Feb. 9, 2009).

²⁰⁰ YouTube, <http://www.youtube.com>.

²⁰¹ Machinima.com, <http://www.machinima.com>.

²⁰² See GOOGLE, INC., QUARTERLY REPORT (FORM 10-Q), at 22 (Nov. 7, 2008), http://investor.google.com/pdf/20080930_google_10Q.pdf ("YouTube, a consumer media company for people to watch and share videos worldwide through the web . . . recognize[s] as revenue the fees charged advertisers each time an ad or a promoted video is displayed on the YouTube site."); Machinima.com—Advertise Page, <http://machinima.com/film/advertise> (last visited Feb. 10, 2009) (describing Machinima.com's advertising practices).

²⁰³ See *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) ("[C]ourts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of commercial exploitation, i.e., when the copier directly and *exclusively* acquires

B. *The Second Factor Applied to Machinima*

The video games employed by machinimators are published works,²⁰⁴ so the published/unpublished dichotomy²⁰⁵ is unlikely to have much impact. Most video games are entirely creative, rather than factual²⁰⁶ in their content and are thus “closer to the core of intended copyright protection than [factual works].”²⁰⁷ This factor is very unlikely to carry significant weight when the machinima at issue are deemed transformative because, as noted in *Castle Rock*, “this factor may be of less (or even of no) importance when assessed in the context of certain transformative uses.”²⁰⁸ In such cases, the second factor is therefore almost certain to be eclipsed by the combination of the first and fourth factors. However, where the machinima is deemed to have little or no transformative purpose, this factor may weigh heavily against machinimators.

C. *The Third Factor Applied to Machinima*

Like the second factor of the fair use test, the third factor’s significance will vary according to the degree and type of

conspicuous financial rewards from its use of the copyrighted material.” (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)) (emphasis added)).

²⁰⁴ See 17 U.S.C. § 101 (2006) (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”).

²⁰⁵ See *id.*

²⁰⁶ This assertion, however, is not as necessarily true as it might seem. Many games are based on real historical events. See, e.g., *Medal of Honor*, <http://www.ea.com/moh/airborne> (last visited Feb. 9, 2009). *Medal of Honor* was used in the creation of the machinima historical fiction mini-series *Pathfinders*. See *Machinima.com—Pathfinders*, <http://www.machinima.com/series/view&id=73> (last visited Mar. 25, 2009). Other games are set in increasingly accurate simulations of real locations. See *Project Gotham Racing 4*, <http://www.bizarrecreations.com/games/pgr4/cityguide.php> (last visited Feb. 9, 2009). This real world verisimilitude could be very attractive to machinimators whose creations are rooted in “real” locations or events.

²⁰⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

²⁰⁸ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

transformative purpose shown under the first factor.²⁰⁹ To satisfy this factor, the secondary user must show that he has used no more of the copyrighted work than was necessary to achieve that purpose.²¹⁰ Keeping in mind any transformative purpose a given machinima might have, (e.g. if it merely uses the game's virtual environment as a way to "shoot" film) the analysis should examine both the quantitative and qualitative magnitude of the material taken.²¹¹ Determining the quantitative amount, while usually a simple matter in traditional media like books, film, or graphical works,²¹² is less straightforward in the machinima context because of video games' interactive nature. For instance, since the work infringed will always include the audiovisual aspect of the game, courts must determine what constitutes "the copyrighted work as a whole."²¹³ In the primitive games of the early 1980s, which gave rise to much of the precedent establishing video games' ability to be copyrighted as audiovisual works,²¹⁴ the graphics and sound changed little as the player progressed through levels. Later, many games had defined endings and a limited number of "levels" to be completed before the player "beat" the game (and had presumably experienced most of the possible content).²¹⁵ Modern MMORPGs, however, are designed to be open-ended, in that while a player's character may gain wealth, status, and abilities in the virtual world, the acquisition of these achievements does not end the appeal of the game,²¹⁶ which can continue as long as the player wishes to

²⁰⁹ *Campbell*, 510 U.S. at 586–87 (“[T]he extent of permissible copying varies with the purpose and character of the use.”).

²¹⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (“[No court] has ever ruled that the copying of an entire work *favours* fair use” but “copying the entirety of a work is sometimes necessary to make a fair use of [it].”).

²¹¹ *See Campbell*, 510 U.S. at 587–88.

²¹² *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

²¹³ 17 U.S.C. § 107(3) (2006).

²¹⁴ *See, e.g., Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 854 (2d Cir. 1982).

²¹⁵ In *Duke Nukem 3D*, for instance, each of the limited number of original MAP files corresponded to a “level” and once players have completed all of them, they were treated to whatever denouement or reward the game's programmers had prepared. *See generally Micro Star v. Formgen, Inc.*, 154 F.3d 1107 (9th Cir. 1998).

²¹⁶ Indeed, for some, the “grind” of racking up these achievements is so tedious that they are willing to pay money to third party players who will sell them the account of a

keep interacting with other players in the world. Given the large amount of time people spend playing MMORPGs, the specific sequence of frames and sounds recorded for a given machinima video seems quite small, perhaps closer to a “screen shot” (a single, static frame of the game’s visual output) of the sort addressed in *Sony Computer Entertainment America, Inc. v. Bleem, LLC*.²¹⁷ The use at issue in *Bleem* was comparative advertising, but the court provided a useful analytic framework, finding that the third factor weighed in favor of fair use because the screen shots represented a small amount of the game both “[t]emporally” and “inasmuch as these games involve plots that can be controlled interactively by the player and may elapse over several hours.”²¹⁸ While machinima videos use much more than a single frame, most are short enough to fit within YouTube’s 10 minute limit,²¹⁹ quite a small amount of time relative to the weekly hours clocked by the average MMORPG player.²²⁰

As for the qualitative taking, in machinima which either do not, or only incidentally include, story elements from the underlying game, the “importance” of the footage taken is very hard to judge. It would not be useful to claim that individual experience of a given user is central to that user’s experience of that game because the work is to be looked at “as a whole.”²²¹ In many ways, the very draw of MMORPGs consists in the fact that players are not forced to act out a story that has been written for them, but rather create that story themselves (albeit with a few constraining rules). Thus, only in the case where background story elements are

“leveled up” character. See, e.g., Powerlevelingweb.com—FAQ Page, <http://www.powerlevelingweb.com/faq.asp> (last visited Jan. 14, 2009).

²¹⁷ *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. 2000).

²¹⁸ *Id.* at 1024, 1028.

²¹⁹ See Posting of the YouTube Editors to the YouTube Blog, *Your 15 Minutes of Fame... ummm... Make that 10 Minutes or Less*, http://www.youtube.com/blog?entry=oorjVv_HDVs (Mar. 26, 2006).

²²⁰ See Posting of Jason Dobson to Gamasutra, *Nielson Finds PS2, World of Warcraft Most Played in June*, http://www.gamasutra.com/php-bin/news_index.php?story=14848 (Jul. 26, 2007, 6:29 PST) (players of World of Warcraft logged “an average of 1043 minutes per week in June” of 2007).

²²¹ 17 U.S.C. § 107(3) (2006).

taken²²² does the third factor have a likelihood of weighing significantly against fair use.

III. BLACKACRE ONLINE: TWO MACHINIMA USES OF A HYPOTHETICAL MMORPG

Fair use analysis is fact-intensive,²²³ and so for purposes of demonstrating how such analysis might apply to machinima in a less abstract sense, this Note will posit a hypothetical MMORPG and two hypothetical machinima made using it. Section A will describe the game and the two machinima. Section B will apply the fair use analysis to them. Neither example is styled or discussed as a parody.²²⁴

A. *The Facts*

1. The Game: Blackacre Online

Our hypothetical game is called Blackacre Online and is a MMORPG published by Voyager software. The software is free, but users pay a monthly fee, for which they are permitted to create up to five different “characters.” Players are given wide latitude in customizing almost every aspect of their characters’ physical appearance. The result is that no two players’ virtual characters look identical, and each is the product of that players’ creative

²²² For example, many games, MMORPGs included, have pre-animated “cut scenes” which are triggered at dramatic moments in the plot, and which often make the player temporarily into a passive observer of events. Daniel Punday, *Involvement, Interruption, and Inevitability: Melancholy as an Aesthetic Principle in Game Narratives*, 33 *SUBSTANCE* 80, 83 (2004) (“Called ‘cut scenes,’ these cinematic elements can run for a few seconds to several minutes without user input.”).

²²³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–78 (1994).

²²⁴ Although many machinima might fall under the parody category, they likely represent “easier” cases for fair use. *Campbell*, and several cases which follow it, discuss and develop the jurisprudence of parodical uses of copyrighted material. See generally *Campbell*, 510 U.S. 569; *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998). This Note, however, does not seek to elaborate on parody in general. Suffice it to say that more copying will often be allowed under such a use than under a similar but non-parodical use. See *Campbell*, 510 U.S. at 586. Thus, it is analytically more useful to define the outer limits of acceptable copying in machinima cases than to focus on a safer potential subcategory of the art form. See, e.g., *id.* at 569.

input (i.e., hair and facial features changed, body shapes and sizes modified). Voyager has created a back story and fictional history for the virtual world of Blackacre, and the game allows players to explore many of the virtual locations that are part of the setting, ranging from cities to waterfalls, to fantastical dungeons filled with treasure. The world contains a default population of “non player characters” (“NPCs”), many of whom are simply stock characters, randomly generated and controlled by the program, who add ambiance to the world. Some of the NPCs, however, are more fully fleshed out (Lord Blackstone for instance), having specific roles in the world of Blackacre, more distinct appearance and more robust interaction with the players. There are some pre-written, built-in “quests,” which serve as a way for new players to advance their character’s virtual wealth and skills. These include dialogue and pre-scripted animations which can be triggered by the players who complete them. However, these quests are mostly optional, and beyond them, it is entirely the interactions of players logged in at any given time who determine what events, if any, are transpiring on a given day in Blackacre. Furthermore, while some of the world is filled with distinctive locations developed by Voyager, players are at liberty (and encouraged by the game’s marketing materials) to create, build, trade, fight, and carry on life as they see fit within the virtual world. Thus, many players create their own mansions or gardens, altering the virtual landscape. Finally, Voyager is aware that the creation of machinima movies is popular among its players (and potential customers who play competing games) and has included a “camera replay” feature, which enables players to re-watch game footage of their characters’ exploits from different angles in the three-dimensional environment.

2. Use #1: “A Good Night for Murder”

Our first hypothetical machinimator is Edmund C. Fex, an aspiring filmmaker and writer. Fex has an idea for a comic noir murder mystery, “A Good Night for Murder” (“Murder”), to be made in six ten minute installments. He considers a live action version, but decides for both budgetary and artistic reasons, that making use of Blackacre Online would be a better fit for his vision.

He purchases several Blackacre accounts and recruits a crew of friends and interested voice actors to help him create the project. The story calls for an urban setting, so Fex does most of his “shooting” in Islo, one of the virtual cities of Blackacre. However, his script makes no mention of Blackacre, or the virtual city’s name within the game’s story, and to the extent that NPCs from the game show up in various scenes, they are limited to incidental background characters. The main characters of the story are all customized in appearance and dress to the maximum extent allowed by the game’s features. Fex takes pains to set up shots in a way reminiscent of classic film noir techniques, and although each of the six installments lasts a little less than ten minutes, most of them take several weeks of work to prepare. In addition to voice acting, he employs additional video editing, such as fade outs and filters, using digital video software, even changing the final product to black and white to add an extra noir ambiance. Fex posts the installments one by one on his website (which includes banner ads for which he receives compensation commensurate with the number of visitors to his site). Fex considers himself somewhat *avant garde*, and has strong opinions concerning artistic censorship. Consequently his series deliberately includes several scenes and dialogue which, although intended to be thought provoking, is viewed as racist and very offensive by some. Despite this, the show also receives many positive reviews, and develops a small following, at which point Fex decides to package all six installments on a DVD (with director commentary) which he then sells through his website.

3. Use #2: “The Fabulous Adventures of Sir Post”

Our second hypothetical machinimator, Pierce N.V. Post, is a longtime veteran of Blackacre Online, who has been playing regularly for over a year. Post enjoys the back-story of the Blackacre world, and has read every piece of information published by Voyager, as well as exploring all of the built-in subplots the game has to offer. He enjoys “role playing” his character, “Sir Post,” conversing with other players in-character, and trying to creatively fit his characters’ story into the larger background of the world. Post decides to create a machinima

documenting and narrating the adventures of Sir Post in the world of Blackacre. Post uses the game's camera function to record his character as he adventures through many of the game's scattered bits of story. He edits the footage and adds voices for Sir Post and even for some of the NPCs who appear in various scenes. In some cases, he takes entire, or edited versions of some of the game's "cut scenes," and weaves them into his story, along with a narrator voiceover. The plot is based on much of the fictional lore of Blackacre and involves some of the game's main NPCs, such as Lord Blackstone (for whom Post adds extra dialogue). The final product is easily identifiable as being set in the world of Blackacre Online. Post submits his videos (like Fex, he makes a series of six ten minute videos) to Machinima.com with the accompanying description: "Exciting adventures in the world of Blackacre!" Although he receives no compensation for posting them, Machinima.com's site is supported by sponsored advertising, and its owners benefit from any traffic generated by Post's videos.

B. Fair Use Analysis of Blackacre Machinima

1. Fex's Machinima

The analysis of Fex's machinima begins with the first fair use factor²²⁵ and an assessment of the degree to which Fex's use of Blackacre Online was transformative.²²⁶ Fex's purpose seems to have been to create an animated noir comedy murder mystery in the medium he thought best suited to his artistic vision and budget. His choice of Blackacre seems to have little to do with the game's specific content, and more to do with his assessment of its ability to provide him with a tool to "film" his story. His avoidance of including distinctive features and names from Blackacre's fictional world, shows that his work is not meant to function as any sort of sequel or adaptation of that world or the characters therein. Furthermore, Fex used the various locations, items, accoutrements, and three-dimensional character models as simple building blocks for his own story, repurposing them to suit his own artistic vision,

²²⁵ 17 U.S.C. § 107(1).

²²⁶ See discussion *supra* Part I.B.1.

a vision quite clearly different from that of the games' creators. Some recognizable version of the project could still have been made had he followed his initial impulse to film in live action, or perhaps used traditional animation instead of Blackacre. Thus, Blackacre was not being appropriated for its original expressive value as an MMORPG. Rather, Fex's use is transformative because, as in *Koons*, "the copyrighted work [was] used as 'raw material' in the furtherance of distinct creative or communicative objectives," and Fex's "stated objective [was] thus not to repackage [Blackacre Online] but to employ it in the creation of new information, new aesthetics, new insights and understandings."²²⁷ Additionally, it is important to note that the offensive nature of "Murder," while it might bear on Voyager's decision to pursue legal action, does not enter the fair use analysis. As Justice Holmes famously and wisely noted in *Bleistein v. Donaldson Lithographing Co.*,²²⁸ "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [creative works], outside of the narrowest and most obvious limits."²²⁹

Fex's financial gain from the advertising on his website, and especially from the sale of DVDs, suggests that his use was somewhat commercial in nature, which can weigh against fair use.²³⁰ However, given the highly transformative nature of his use, this prong of the first factor of the fair use test should be "discounted."²³¹ The real financial inquiry, which springs from the fourth factor, concerns whether Fex's creation and sale of "Murder" causes cognizable harm to the market for Blackacre Online (or any of the recognized markets for derivative adaptations), or whether instead Fex has simply entered a

²²⁷ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)) (internal quotations and citation omitted).

²²⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

²²⁹ *Id.* at 251.

²³⁰ *See Koons*, 467 F.3d at 253 (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

²³¹ *Id.* at 254 (citing *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004) ("Finding the work substantially transformative, the district court properly discounted the secondary commercial nature of the use."))

“transformative market” the sort of which § 107 aims to protect.²³² Clearly a comic noir murder mystery in six parts does not compete with sales of the actual Blackacre Online game, nor any of the subsidiary derivative markets, such as video game sequels (“Murder” is a non-interactive show), film or book rights (Fex’s machinima partakes little, if at all, of Blackacre’s setting and story), or merchandise. Voyager would need to argue that a market in license fees charged to machinimators exists, is cognizable under the fourth factor of the fair use test, and is being harmed by Fex’s free use of the game, or the potential aggregate effect of a large number of other machinimators doing the same.²³³ But this seems more like “a market niche that the [copyright holder] simply had no interest in occupying”²³⁴ or “a potential market or value that the copyright holder has not typically sought to, or *reasonably been able* to, obtain or capture”²³⁵ than a situation where “a ready market or means to pay for the use”²³⁶ exists. Voyager provides game features designed in part to ease the production of machinima with its game. That it did so, but made no attempt to extract license fees from those who make use of the features, suggests that despite their strategic protestations to the contrary, they have not reasonably been able to take advantage of the claimed market or have no intention of doing so. Machinima uses such as Fex’s therefore exist in a transformative market, outside the protection of the fourth factor, which consequently tilts in his favor.²³⁷

Given the extremely transformative nature of Fex’s use, the second factor of fair use is “of limited usefulness” in this analysis.²³⁸ For purposes of the quantitative aspect of the third factor both Fex and Post used the same amount of game footage

²³² See discussion *supra* Part I.B.1.

²³³ See cases cited *supra* note 78.

²³⁴ *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

²³⁵ *Texaco*, 60 F.3d at 930 (emphasis added).

²³⁶ *Id.* at 931.

²³⁷ See *supra* Part II.A.1 (discussing the interaction of the first and fourth fair use factors).

²³⁸ *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (“[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”).

(six ten minute clips), but given the near infinite amount of replay possible in Blackacre, this represents very little of the total game experience. If this factor has any significant impact on the balance, it must hinge on the qualitative importance of the material taken. Fex actively avoided incorporating any of the distinctive and easily recognizable story or setting elements (and in fact did his best to supplant them with his own) in his work. Rather, almost all the footage in “Murder” is the product not of exciting scenes programmed by Voyager, but Fex’s deliberate and thoughtful manipulations of the game’s interface to bring about the precise scenes and effects he desired. While the three-dimensional models and textures were created by Voyager, the expressive content of the series is much more the product of Fex’s input than of Voyager’s design. Thus, the third factor is unlikely to weigh against fair use either.

Overall, Fex’s justification in using Blackacre to create “Murder” is highly transformative and therefore compelling from a first factor standpoint.²³⁹ Because none of the other factors of fair use individually, or taken together give much weight to Voyager’s entitlement, Fex’s machinima is likely to constitute a fair use.

2. Post’s Machinima

Post’s claim to a transformative purpose differs from Fex’s in that “Sir Post” tells a story about the fictional world of Blackacre and uses many distinctive story and character elements from the game’s background setting to do so. Post even bills “Sir Post” as a series of “adventures in the world of Blackacre,” indicating that his purpose is to add new characters and stories to that existing fictional world. This type of use looks very much like the sort of derivative adaptation which Voyager might license to a third party (in the form of film rights for instance). It is important to note that in this case the copyrights for both the audiovisual work *and* the game’s story and characters²⁴⁰ are allegedly being infringed. Post’s decidedly non-transformative purpose with respect to the story informs the analysis of his takings from the audiovisual

²³⁹ See *id.* at 608.

²⁴⁰ See *supra* Part II.A.2.

work, making it hard for him to claim transformative use of the video footage in the same way that Fex did. A court might simply see Post as free-riding on the best parts of the Blackacre setting.

Additionally, the commercial nature of the use which was “discounted” in Fex’s case due to the transformative purpose of his work, reenters the analysis in this situation. However, the commerciality prong of the first factor of the fair use test is only implicated “when the copier directly and *exclusively* acquires conspicuous financial rewards from its use of the copyrighted material.”²⁴¹ Post cannot be said to reap a direct financial reward from simply uploading his videos to a third party’s site for public consumption. That Machinima.com might gain ad revenue from traffic generated by Post’s video raises an issue between the site and Voyager, but has no bearing on the commerciality analysis of Post’s use.²⁴² Furthermore, “courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest”²⁴³ and Post has made his video available free of charge to the general public through Machinima.com. Thus, while the non-transformative nature of Post’s machinima project turns the first factor against fair use, the non-commercial nature of his project does not exacerbate this tendency.

The alleged infringement of the game’s story alters the treatment of other factors of the fair use test as well. For instance, the second factor, whose weight is lessened when the use is transformative,²⁴⁴ regains its full significance here and weighs strongly against fair use due to the obviously creative nature of the copied material. Under the third factor, despite Post’s using the same quantitative amount of game footage as Fex, the qualitative significance of what he took may be greater because the footage represents elements of the game’s setting, story and characters.²⁴⁵ In this sense, the copied footage is somewhat closer to the “heart”

²⁴¹ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (emphasis added).

²⁴² *See id.* (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

²⁴³ *Id.* at 253 (quoting *Texaco*, 60 F.3d at 922).

²⁴⁴ *Id.* at 257 (citing *Bill Graham Archives*, 448 F.3d at 612).

²⁴⁵ *Id.* at 257 (quoting 17 U.S.C. § 107(3) (1992)).

of the work than Fex's use.²⁴⁶ This factor would thus tilt slightly against fair use.

The fourth factor of fair use analysis is also affected by Post's non-transformative use of Blackacre's setting and story, because the market at issue may be characterized as the market for derivative adaptation licenses, a market which a game publisher "would in general develop or license others to develop."²⁴⁷ Post's free entry into this established market for derivatives harms Voyager's entitlement.²⁴⁸ While the harm from Post's use alone is unlikely to represent much in the way of lost licensing revenue, the aggregate effect of thousands like Post may potentially be substantial, tipping the fourth factor against Post.²⁴⁹ Viewed "in light of the purposes of copyright"²⁵⁰ the factors seem to weigh against finding Post's machinima to be a fair use.

CONCLUSION

The overriding goal of Copyright law is "stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."²⁵¹ To this end, the law employs two principles in productive tension with each other: (1) the vesting of "exclusive Right[s]" in the authors of the works whose creation is encouraged;²⁵² and (2) prudential limitations on those rights which ensure that these rights do not extend so far as to be self-defeating. Fair use is one such internal limit, without which the incentive system created by copyright would collapse on itself, stifling the very creativity it was designed to protect. Congress recognized that many of the greatest creative innovations build on prior work, and so created in § 107 a flexible and evolving "breathing space" in which such new uses and new knowledge

²⁴⁶ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992).

²⁴⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

²⁴⁸ *Cf. Anderson v. Stallone*, 11 U.S.P.Q.2d 1161, 1167 (C.D. Cal. Apr. 25, 1989) (unsolicited script for the film *Rocky IV* held to be an unauthorized derivative work).

²⁴⁹ *See supra* note 78 and accompanying text.

²⁵⁰ *Campbell*, 510 U.S. at 578.

²⁵¹ Leval, *supra* note 32, at 1110.

²⁵² U.S. CONST. art. I, § 8, cl. 8.

could be fostered.²⁵³ This space protects the valuable contribution of referential and critical thought, such as review, scholarship, and analysis,²⁵⁴ but perhaps even more importantly, it provides a womb for entirely new paradigms which take the old as “raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”²⁵⁵

Machinima, which transforms the interactive fantasy of video games into the virtual analogue of the movie studio, represents a shining example of the creative repurposing envisioned and nurtured by the fair use doctrine. The swift advance of computing power, cheap storage, and the vast connectivity of the Internet have given millions of future artists ready access to the tools of creative repurposing. Courts should not flinch or retreat to familiar forms of creativity when confronted with Machinima. They should recognize that the pressures of new technology add a new urgency to the protective mandate of fair use, and should boldly apply the analysis on its own terms. Like the camera and camcorder before it, the video game is helping to democratize a new art form by demolishing the barriers to entry and tapping a vast sea of potential artists. Courts should not close the door.

²⁵³ See *supra* note 135 and accompanying text.

²⁵⁴ See 17 U.S.C. § 107 (2006).

²⁵⁵ Leval, *supra* note 32, at 1111.