

Copyright in Let's Plays and Video Game Playthroughs: Has A Balance Been Achieved?

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Introduction

In recent years, the number of videos in which someone plays through a video game, often providing their commentary, has grown considerably. These videos can come in the form of a pre-recorded playthrough that may be edited, called a Let's Play (LP), or a real-time playthrough in a livestream. The monetization of these LPs and livestreams, through advertising, sponsorships, and channel memberships, have resulted in this type of video becoming a lucrative industry. However, videos of game playthroughs also raise legal concerns due to the use of the copyrighted material of video game creators and developers.

Copyright Law Applied To LPs and Playthroughs

Until now, the copyright issues that LPs and livestreams present have not been brought before Canadian courts. But what could happen if such a case were to emerge? While the *Copyright Act* does not specifically state that video games fall under "works", the courts have recognized video games to be copyrightable¹. Video games would be "literary works"², as code and software, or "compilations"³, as a combination of developers' code, artists' designs, musicians' pieces, and voice actors' performances. Videos and livestreams of people playing games would thus appear to constitute copyright infringement either as reproduction or performance in public.

Although LPs and livestreams are *prima facie* copyright infringements, they could be protected by the fair dealing doctrine in Canada. These videos might fall under "criticism or review"⁴ since they enable users to share their experience of the game and to praise or critique the game, either throughout or after the playthrough. Moreover, LPs and livestreams could be for "research"⁵ purposes as valuable sources of information to potential buyers who are deciding which game to buy. "Parody or satire"⁶ could also be another purpose, depending on the context and content of the videos. Finally, it could be viable to claim that LP or livestream footage serves the purpose of "news reporting"⁷ since the video may be showcasing and discussing new games or features introduced.

¹ *Seggie v. Roofdog Games Inc.*, 2015 QCCS 6462, 2015 CarswellQue 14027.

² *Copyright Act*, RSC 1985, c C-42, s 5(1).

³ *Ibid*, s 2.

⁴ *Ibid*, s 29.1.

⁵ *Ibid*, s 29.

⁶ *Ibid*, s 29.

⁷ *Ibid*, s 29.2.

In determining if the dealing must be “fair”, the content, style, and format of the particular video will be crucial with regards to the *CCH v. LSUC* factors⁸. For example, an LP accompanied by the player’s commentary could be seen as “fairer” than one without commentary. Also, there could be a substantial difference between videos where the user plays through an entire game and a one-off LP where only a portion of the game is shown. Regarding the amount of the dealing, arguments could arise whereby, because video games are highly interactive, the scene of gameplay that is recorded and watched by viewers represents “just a small proportion of the game and all of the possible permutations of moves”⁹, and not an “unfair” amount.

Currently, platforms that host LPs or livestreams, such as YouTube and Twitch, have mechanisms whereby a copyright holder can submit takedown requests against a video, pursuant to the U.S. *Digital Millennium Copyright Act (DMCA)*¹⁰ and, to a lesser extent, the Canadian Notice and Notice Regime¹¹. If successful, the video in question will be removed and the user will be given a copyright strike. Once a user accumulates 3 copyright strikes, their entire video catalogue will be removed, their account will be terminated, and they will be prevented from creating new accounts¹². Copyright holders must merely provide sufficient identifying information to locate the video and have a “good faith belief” that the use of the material in the video has not been authorized. Rather, the brunt of the burden is on the user who, in filing a counter-notification, must state the rationale for reinstating the video. Permissible reasons include having permission to use the content; being protected by fair use, fair dealing, or an exception; or the takedown being a mistake.

Possible Ways Forward

As the situation stands, the mechanisms that video platforms use to deal with copyright claims push the balance¹³ too far toward copyright holders. On one hand, the dissemination of LPs and livestreams is in the public interest because they form lively communities and are a valuable source of entertainment, news, or research. On the other hand, video game creators must be rewarded for their works. At the same time, however, these videos can be beneficial to copyright holders as forms of publicity and marketing. Unfortunately, the takedown procedures of video platforms are prone to abuse through questionable uses, such as retaliating to negative

⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339.

⁹ Kyle Coogan, “Let’s Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games” (2018) 28:2 *Fordham Intell Prop Media & Ent LJ* 381 at 398.

¹⁰ *Digital Millennium Copyright Act*, Pub L No 105-34, 112 Stat 2860 (1998), <<https://www.govinfo.gov/content/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf>>

¹¹ *Copyright Act*, *supra* note 2, s 41.25-41.26.

¹² YouTube, “Copyright strike basics”, online:

<https://support.google.com/youtube/answer/2814000?hl=en&ref_topic=9282678#zippy=>

[<https://perma.cc/QZT2-NVNT>]; Twitch.tv, “Digital Millennium Copyright Act Notification Guidelines”, online:

<<https://www.twitch.tv/p/en/legal/dmca-guidelines/>> [<https://perma.cc/FEB4-BFFK>].

¹³ *Galerie d’art du Petit Champlain Inc. v. Th  berge*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para 30.

comments or trolling, by developers and other internet users¹⁴. Raising the requisite standard for a successful takedown request on platforms is necessary in order to even the playing field for owners and users. This would involve requiring copyright holders to provide substantial reasons to support their takedown request and conducting a more thorough inquiry into whether actual infringement has occurred.

Moreover, an expansion in the use of licencing agreements that contain express permission to record LPs or livestreams of games would be beneficial. Not only would this help clarify this grey area of law, licensing agreements would “facilitate better cooperation and dialogue between developers and users, while also improving public perception of the game developers among the gaming community”¹⁵. Indeed, various companies have taken this route by detailing whether the use of their copyrighted material in videos is permitted and attaching certain conditions to such use¹⁶. Consequently, the current legal landscape of playthrough videos suggests that there is an atmosphere of “tolerated infringement”, where LPs and livestreams are technically copyright infringements but they are generally tolerated¹⁷. It remains to be seen, however, whether this level of toleration will remain.

Furthermore, rather than relying too much on *DMCA* takedown procedures, the case-by-case use of the fair dealing doctrine presents a more appropriate approach to this legal issue. Playthrough videos, protected by fair dealing, facilitates the spread of information and free expression while also providing significant publicity to game developers. Better information for both buyers and sellers results in a more efficient market and maximizes value to the consumer, which is essential to games where online networks form a crucial component¹⁸. If gameplay videos are not protected and are too easily targeted by takedown requests, the dynamic communities around these videos would be stifled. Additionally, video game creators, if too aggressive in enforcing their copyright, could be shooting themselves in the foot since they would be losing out to free publicity and the interactions necessary for feedback and quality control.

¹⁴ Anna-Lisa Tie, “Copyright law issues in the context of video game Let’s Plays and livestreams” (2020) 3:2 *Interact Entertain Law Rev* 121 at 127.

¹⁵ *Ibid*, at 130.

¹⁶ Who Let’s Play, “Company Let’s Play Policies”, online: <<https://wholetsplay.com/index.html>> [<https://perma.cc/57RF-BXZA>].

¹⁷ Shigenori Matsui, “Does it have to be a Copyright Infringement?: Live Game Streaming and Copyright” (2016) 24:2 *Tex Intell Prop LJ* 215.

¹⁸ James Puddington, “Fair Play: Economic Justifications for Applying Fair Use to the Online Streaming of Video Games” (2015) 21:2 *BU J Sci & Tech L* 413 at 435-37.