

WILL SONY'S FOURTH PLAYSTATION LEAD TO A SECOND *SONY V. UNIVERSAL*?

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ABSTRACT

Sony has included a “share” button on the next version of their popular PlayStation video game system. This feature is meant to allow players to record and share videos of their gameplay. This service shares similarities with the controversial “record” button that Sony included with its Betamax players over thirty years ago. The Betamax player was the subject of the landmark case Sony v. Universal, a foundational case for the modern application of copyright law to new technology. This Issue Brief examines how this “share” feature would fare under the framework laid out by Sony v. Universal and other evolutions in copyright law.

INTRODUCTION

On February 20, 2013, Sony announced their newest videogame system, predictably named the PlayStation 4.¹ Chief among its new features is the *share* button displayed prominently on its controller.² Microsoft's newest offering also has a similar feature.³ Pressing the *share* button will allow a player to post images or videos of their gameplay to the internet, sharing them with their friends and complete strangers.⁴ The PlayStation 4 even buffers the last few minutes of gameplay so that a player can share their gameplay video after the fact.⁵ Sony's intention is to provide an easy way for players to share images and videos online.

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¹ Video of the press announcement is available on numerous websites. *E.g.*, *Sony PlayStation 4 Press Conference*, GAMESPOT (Feb. 21, 2013), <http://www.gamespot.com/killzone-shadow-fall/videos/sony-playstation-4-press-conference-6404254/>.

² Edgar Alvarez, *Sony's New DualShock 4 Controller Official: All-New Design, Touchpad, Share Button and More*, ENGADGET (Feb. 20, 2013, 6:17 PM), <http://www.engadget.com/2013/02/20/playstation-4-dualshock-controller/>.

³ See Billy Steele, *Xbox One with 300,000 Servers, Game DVR and More*, ENGADGET (May 21, 2013, 1:26 PM), <http://www.engadget.com/2013/05/21/microsoft-updates-xbox-live-/> (describing the Game DVR feature of Microsoft's system).

⁴ *Id.*

⁵ *Id.*

Almost 30 years ago, the United States Supreme Court handed down the landmark copyright decision *Sony v. Universal*.⁶ This decision dealt with the Betamax video recorder, and resolved a circuit split about whether devices allowing the recording of images on a person's television screen led to secondary liability for copyright infringement.⁷ The principles handed down in *Sony* shaped the structure of secondary liability in copyright law and provided a foundation for modern copyright law.⁸

The core similarities between Sony's Betamax and Sony's PlayStation 4 set the groundwork for revisiting the issues raised in *Sony*. The *record* function of the Betamax and the *share* function of the PlayStation 4 both allow a home user to record a copy of copyrighted material being displayed on their television and replay it in a variety of ways. However, the PlayStation 4 will exist in a legal ecology that includes thirty years of legal development around copyright, particularly as the law has come to grips with advancing consumer technology and the internet. Specific case law and legislative adjustment to copyright law potentially changes the structure of liability here and the proposed PlayStation 4 *share* function provides a means of considering this. There is also an important factual distinction in that the PlayStation 4 share feature records and shares videos while the Betamax simply recorded.

The first Part of this Issue Brief will describe the PlayStation 4's implementation of the *share* feature. Part Two will summarize the application of copyright principles to video recordings of interactive video games, including a discussion of fair-use defenses for videos of video games. Part Three will consider the status of the PlayStation 4's *share* function under the *Sony* framework. Part Four will consider the impact of developments in secondary copyright liability. Then there will be a conclusion.

I. VIDEO GAMES AND USER GENERATED CONTENT

Modern video game systems are hyper-specialized computers, which use data provided from fixed media (generally Blu-ray discs) to generate images that can be displayed on a screen. A player can use an input device to alter the display. This interaction between player inputs and fixed media takes place in conjunction with the system's RAM and CPU. Copies of portions of the data generated can also be recorded separately on a hard drive or other media. This process allows players to keep records of their

⁶ See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 417 (1984).

⁷ *Id.* at 419.

⁸ Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *FORDHAM L. REV.* 1831, 1850 (2006).

playing and create save states which will allow them to resume playing at a later time without leaving the system running.⁹

One feature growing in popularity in the video game sector is user-generated content, which raises new questions about copyright infringement.¹⁰ Several published video games already have user-generated content built into their design. Many games include the ability to customize player avatars for online play, which can include a mix of piecemeal design from programmer-supplied options or even photographs provided by a user.¹¹ “Modding”, or player modification of the rules of the games themselves, has long been prevalent with PC games, and is beginning to appear in console games as well.¹² Additionally, several popular games include extensive level creation tools.¹³

Another type of video-game-related user-generated content is works that make use of footage taken from video games. The simplest examples of these videos are simple recordings of gameplay, often with a recorded voice-over. Machinima goes further by using footage of video games combined with editing or sound recording to create new narratives.¹⁴ There are several well-regarded and popular examples of this as well as numerous

⁹ See generally, Jeff Tyson, *How Video Game Systems Work*, HOWSTUFFWORKS, <http://electronics.howstuffworks.com/video-game.htm> (last visited Nov. 29, 2014) (providing a quick discussion on what a video console is and how it works in case the reader is entirely unfamiliar with the concept).

¹⁰ See, e.g., Greg Lastowka, *User Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008) (discussing the intellectual-property implications of the Web 2.0 trend towards user-generated content, with several sections dealing specifically with video games).

¹¹ *Id.* at 911.

¹² Castle Wolfenstein may be the first PC game to have had a publicly available mod, namely Castle Smurfenstein, which replaces the original game’s Nazi theme with loveable Smurfs and Smurf paraphernalia. See *History of Modding*, FROM PAC MAN TO POOL: RESEARCH ON USER GENERATED CONTENT, <http://mediaindustries1.wordpress.com/modmoddermodding/history-of-modding/> (last visited Nov. 29, 2014). Recent versions of the popular Xbox game Halo allowed for simple player modifications to multiplayer games. See Alexa Ray Corriea, *How ‘Halo 4’s’ Forge Mode Lets Players ‘Create Beautiful Maps Almost by Accident’*, POLYGON (Oct. 9, 2012, 2:28 PM), <http://www.polygon.com/2012/10/9/3479758/how-halo-4s-forge-mode-lets-players-create-beautiful-maps-almost-by>.

¹³ See, e.g., *About*, LITTLE BIG PLANET (last visited Nov. 29, 2014), <http://littlebigplanet.com/about>.

¹⁴ Matthew Brett Freedman, Note, *Machinima and Copyright Law*, 13 J. INTELL. PROP. L. 235, 236 (2005).

more amateur approaches, largely made available for free streaming on the internet.¹⁵

It is safe to assume that all of these applications of user-generated content will continue on the PlayStation 4. Based on Sony's publicity thus far, the area that their *share* feature targets is the recording and sharing of gameplay recordings. Sony's *share* feature is directly concerned with creating these kinds of videos, but other in-game user-generated content may have relevance to the infringement and fair-use analysis of these videos.¹⁶

For the purposes of this Issue Brief, it is sufficient to understand that the *share* feature will record a segment of gameplay and post it to a location associated with the player's username. It will be possible for other users to stream these videos within controls set by the uploading player. A process like this will necessarily look similar to current social video streaming websites, such as YouTube or Facebook.¹⁷

II. VIDEO GAMES UNDER COPYRIGHT

A. Are Video Games Copyrightable?

What, if anything, about video games is copyrightable? For the most part, courts have given copyright protection to most aspects of the video game experience.¹⁸ But the interactivity of video games, particularly modern open-ended video games, may challenge this conclusion. In essence, a core function of video games is to create the impression that a player's inputs directly influence the images on the screen. Is there a point at which interactivity would reach the level that elements of the image on the screen are a copyrighted audiovisual work for the player and not for the programmer?

¹⁵ See, e.g., *Red vs. Blue*, ROOSTER TEETH, <http://roosterteeth.com/archive/?sid=rvb&v=more> (last visited Nov. 30, 2014); *Ledo and IX*, KID CAN DRIVE, <http://kidcandrive.com/the-adventures-of-ledo-and-ix/> (last visited Nov. 30, 2014).

¹⁶ The fair use issues of some of these are discussed in Part II.B, *infra*.

¹⁷ Sony has in fact already suggested that Facebook would be one platform where these shared videos would be available. *PS4: Share Videos Instantly to Facebook, Killzone: Shadow Fall Used as an Example*, PSU (Feb. 20th, 2013 at 7:21 PM), <http://www.psu.com/a018407/>.

¹⁸ See, e.g., *Atari v. N. Am. Phillips Elec. Corp.*, 672 F.2d 607, 617 (7th Cir. 1985) (finding that several of the elements of the Pac Man video game are protected expression, such as the appearance of the protagonist as a "gobbler" being chased by "ghost monsters"); *MDY Indus. v. Blizzard Entm't*, 629 F.3d 928, 938 (9th Cir. 2010) (holding that the total audiovisual experience of World of Warcraft is protected expression and unauthorized modification can be an infringing derivative work).

An example makes this issue clearer. Consider a word processing program. A word processing program includes some copyrightable code elements, but it strains credulity to think that Microsoft would attempt to claim copyright over every work written in one of their word processors. At the other end of this spectrum, consider a DVD player. The user can interact with the audiovisual work in several limited ways by fast forwarding, rewinding, or pausing. But it is clear that no court would consider the resulting work anything distinct from the original work.

As video games increase in interactivity and customizability it strains the clarity of the distinction. Courts have ruled that a wide range of games, from Pac-Man¹⁹ to World of Warcraft²⁰ create copyrightable audiovisual works in their functioning. These games are all similar in that their developer created their work with a fixed range of audiovisual experiences in mind. Player input directs the audiovisual experience through a predictable range of outcomes. In some sense, these types of video games are simply very complicated video playback systems.²¹

But there are video games which challenge this understanding of the copyrightability of the audiovisual experience of gaming, at least for the original programmer. There are entire genres of games which that directly allow a player to create and alter their audiovisual experience. Numerous games fit in this category. Some recent examples include: Minecraft, a game which allows players to mine and build in a randomly generated pixel-based environment;²² Second Life, an online space where players can make money designing and selling in-game items;²³ LittleBigPlanet, which allows players to use a substantial set of assets to create their own levels;²⁴ Spore, which gives players free range to create characters, items, and

¹⁹ See *Atari*, 672 F.2d at 617.

²⁰ See *Blizzard*, 629 F. 3d at 938.

²¹ See ESPEN J. AARSETH, CYBERTEXT: PERSPECTIVES ON ERGODIC LITERATURE 149 (1997) (describing the culmination of interactive literature in online Multi User Domains and the parallel with video games and interactive audiovisual experiences).

²² MINECRAFT, <https://minecraft.net/> (last visited Nov. 30, 2014) (“Minecraft is a game about breaking and placing blocks. At first, people built structures to protect against nocturnal monsters, but as the game grew players worked together to create wonderful, imaginative things.”).

²³ *What is Second Life?*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (last visited Nov. 30, 2014) (“Second Life is a 3D world where everyone you see is a real person and every place you visit is built by people just like you.”).

²⁴ *About*, LITTLE BIG PLANET (last visited Nov. 30, 2014), <http://littlebigplanet.com/about> (“During your travels with Sackboy, you will learn how to create in LittleBigPlanet and with each new adventure; you will learn even more new and exciting ways to craft the world around you to create your very own games!”).

buildings;²⁵ or the RPG Maker series, which provides a set of assets for users to create and distribute their own games.²⁶

Cases about modding have provided some general suggestions about how to think about copyrightability in this arena. The idea of modding is that the game developer gives the user limited access to their development tools to alter or create levels for a complete game. The law here suggests that map files for mods are derivative works because they provide directions for already completed assets.²⁷ But there has to be some limit on this principle. It would be possible to describe any number of computer applications using the same principle where the resulting work clearly is not a derivative work.²⁸ As video games become more amenable to creating user-generated content, this understanding may be further called into question.

The current state of the law, however, is fairly clear that the planned audiovisual experience of playing a video game is copyrightable.²⁹ It is a reasonable inference then that recorded videos of the experience are either copies of the work or derivative works.³⁰ Copyright law has never identified an exception for copying or using only part of a work.³¹ However, the ambiguities around video games discussed previously suggest that their copyrights have a certain “thinness” to them.³² This thinness can be highly relevant in fair-use considerations.

²⁵ *How Will you Create the Universe?*, SPORE, <http://www.spore.com/what/spore> (“[S]pend as much time as you like making creatures, vehicles, buildings and spaceships with Spore’s unique Creator tools.”) (last visited Nov. 30, 2014).

²⁶ RPG MAKER, <http://www.rpgmakerweb.com/> (“The RPG Maker series allows you to customize every aspect of your game with an easy to use interface”) (last visited Nov. 30, 2014).

²⁷ See *Micro Star v. Formgen*, 154 F.3d 1107, 1113 (9th Cir. 1998) (discussing how commercial sale of created levels for Duke Nukem 3D violates the right of the original publisher to sell levels using their engine and assets).

²⁸ Consider again, a suit claiming Microsoft owned the copyright to this Issue Brief because it was written in Word 2010. How likely is that suit to succeed?

²⁹ *MDY Indus. v. Blizzard Entm’t*, 629 F.3d 928, 942 (9th Cir. 2010) (accepting the district court’s view that the non-literal total experience of playing World of Warcraft is protected by copyright).

³⁰ The difference does not particularly matter since infringement is the violation of any of the exclusive rights under copyright. 17 U.S.C. § 501(a) (2012).

³¹ The copyright in an audiovisual work extends to the audio and visual effect by themselves as well as the combined effect.

³² This is a concept that originates in the useful-works area but has been suggested by some scholars to apply beyond. *E.g.*, Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 230 (2012).

B. Fair Use

In the fair-use analysis, courts analyze a particular use using four factors to determine if it is protected.³³ The factors are (1) purpose and character of the use, (2) nature of the underlying work, (3) amount and substantiality of the use, and (4) effect on the underlying work's value.³⁴ Fair-use determinations are work- and use-specific and courts must balance each factor for each use under consideration.³⁵

This Issue Brief will consider four different potential uses of gameplay videos generated by a *share* feature like the one proposed by Sony. These are meant to outline the space in which fair use will operate. These four uses are:

1. Time shifting to watch gameplay videos later
2. Space shifting to watch gameplay videos at different locations
3. Sharing to allow others to watch gameplay videos
4. Recording and editing videos for other purposes

The second element of fair use will apply similarly for each of these uses. For narrative video games, the video game is close to the creative experience at the core of copyright protection. This is a factor that might change significantly for games that are directed specifically at creating works, since a tool for creativity is less protected than a narrative work.³⁶ Given the current state of the law here, this factor will likely favor the developer. The other three factors will vary by use, so each must be considered in turn.

Time shifting is the process of creating a copy for viewing later. This use came up often as a fair-use example in video-recording cases, although the holding is still open to debate.³⁷ The purpose and character of time shifting is viewed as “personal use” so it generally favors the user. In video-recording cases, the amount and substantiality of the recording was

³³ 17 U.S.C. 107 (2012).

³⁴ *Id.*

³⁵ *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

³⁶ This distinction goes all the way back to a 19th century Supreme Court decision holding that double entry bookkeeping was not copyrightable, but an explanation of how to do double entry bookkeeping was. *See Baker v. Selden*, 101 U.S. 99, 106 (1879).

³⁷ *See, e.g., Maria Termini, Time Shifting in the Internet Age: Peer-to-Peer Sharing of Television Content*, 38 COLUM. J.L. & SOC. PROBS. 415, 423 (2005).

effectively 100 percent, although this did not prevent a fair-use finding. Videos of gameplay are slightly less than the total game since they take out the interactive part, but the audiovisual experience is central enough that this factor may slightly favor the developer. The market impact of time shifting will be as minimal as it was in the video recording cases. Since the player already has access to the work, being able to view the work again at a later time would probably not prevent him from buying a second copy.³⁸ Overall, time shifting is probably a fair use, and it almost certainly is as along as time shifting video broadcasts remains firmly in the fair-use category.

Space shifting has been more controversial in the video fair-use debate.³⁹ The analysis of the nature and amount of the use for space shifting are largely similar to time shifting. The variation comes from market impact: A space-shifted use might reduce the number of purchases. For example, if a purchaser wants to view a photograph in two places, they need to either move it or purchase two copies. It is not permissible to make a copy for this purpose. This same argument could apply to audiovisual works. As a result, this use ends up a close question.

Sharing as a use plays out very differently. The nature of the use is to allow people who have not purchased a work to view it without purchasing it.⁴⁰ Overall, simply sharing the audiovisual experience of a copyrighted work is not the type of use favored by fair use. As to amount, this will vary depending on the sharer. Conceivably, this could range from very brief snippets of gameplay to a recording of an entire play through of a sixty-hour game. Market impact is difficult to predict here. To the extent people purchase a video game for its interactive component, sharing videos will have very little impact.⁴¹ To the extent that people purchase them solely for the audiovisual experience, it is a fair assumption this use will significantly impact the market. It seems likely that courts would resolve this distinction in favor of the developers, since the protected audiovisual work produced by running video game software is copyrightable in and of itself. Overall, sharing of gameplay videos is unlikely to be protected by fair use.

³⁸ This is the concern that the Supreme Court focused on in time shifting. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 (1984).

³⁹ See *A&M Records v. Napster*, 114 F. Supp. 2d 896, 915 (2000) (avoiding finding whether space shifting was or was not a fair use by identifying that it was not a substantial use of Napster).

⁴⁰ *Id.* at 914 n.14 (describing the presumption against sharing as fair use based on its market impact).

⁴¹ See IAN BOGOST, *HOW TO DO THINGS WITH VIDEO GAMES* 14 (2011) (discussing how the interactive element of video games complicates the discussion of video games as art).

Creating new works using these videos aligns closely with the transformative uses that are often protected by fair use. These kinds of transformative uses will favor the user.⁴² The amount used is also likely to favor the player to the extent that they only use what is necessary for their new work.⁴³ As to market impact, even if this creative work is a critique that greatly reduces the market value of the work, this is not the kind of market injury with which copyright is concerned.⁴⁴ There may be an important distinction here between the types of use being supported. Commentary, critique, and parody would fall clearly into protection here.⁴⁵ Uses that utilize recordings as material for new, unrelated works might raise some legal issues to the extent that they are analogous to music sampling.⁴⁶ While this issue has not been decided by the Supreme Court, the Sixth Circuit holding finding sampling to be infringement tends to be followed.⁴⁷

Below is a table that considers each of these four uses and the likely outcome of a fair use analysis. Of note, there is one use, sharing, which is unlikely to be fair use and one which is likely to be fair use, creating parody or critique. Time shifting and space shifting are closer to the middle with time shifting favoring the player and space shifting the developer. As a result there are some fair uses for recording video game play and some unfair uses. This is a core similarity with the *Sony Betamax* case.⁴⁸

⁴² *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) (“[Transformative uses] thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . .”).

⁴³ *Id.* at 588 (“When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”).

⁴⁴ *Id.* at 591–92 (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

⁴⁵ They are in fact, explicitly listed in the fair-use provision. 17. U.S.C. §107 (2012).

⁴⁶ See *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005) (“Get a license or do not sample.”).

⁴⁷ Tracy Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 371 (2008) (discussing the confusing interpretation of laws relating to sampling in the context of justifying the *Bridgeport* decision).

⁴⁸ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984) (discussing the problem of some infringing and non-infringing uses).

	Nature of Use	Character of Work	Amount	Market Impact
Timeshift	Strong for player	Strong for developer	Slightly for developer	Strong for player
Spaceshift	Strong for player	Strong for developer	Slightly for developer	Slightly for player
Share	Strong for developer	Strong for developer	Varies	Slightly for developer
Create	Strong for player	Strong for developer	Strong for player	Strong for player

III. SONY'S BETAMAX

Sony v. Universal was the Betamax case that made clear that home video recorders were legal devices. Universal's argument in this case was that the device could primarily be used to infringe copyright and so it should not be available for unlicensed sales.⁴⁹ Universal lost. The core ruling in this case was that a device was not unlawful for purposes of violating copyright if it was 1) a staple article of commerce and 2) had substantial noninfringing uses.⁵⁰ While this standard has been altered by later copyright cases and laws, it still provides a core basis for cases about devices capable of infringing copyright.⁵¹

A. Staple Article of Commerce

The staple-article-of-commerce doctrine was imported from patent law into copyright law by the Supreme Court's decision in *Sony*.⁵² The idea of a staple article of commerce is left vague in copyright jurisprudence, but the *Sony* case makes it clear that "the sale of copying equipment [is] like the sale of other articles of commerce."⁵³ The Supreme Court reinforced the district court's reasoning that the staple-article-of-commerce doctrine was necessary to avoid nonsensical results that would make devices like typewriters and photocopiers liable for copyright infringement by their mere existence.⁵⁴ In the software context, word processors or computer aided drafting systems would certainly be the equivalent of these staple articles of commerce.

⁴⁹ *Id.* at 419.

⁵⁰ *Id.* at 440.

⁵¹ Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *FORDHAM L. REV.* 1831, 1850 (2006).

⁵² *Sony*, 464 U.S. at 440.

⁵³ *Id.* at 442.

⁵⁴ *Id.* at 426.

The question of whether a video game system is a staple article of commerce is likely more complex than the Supreme Court described. Video game systems are by their nature a closed system. Video recorders can play audiovisual works that are recorded from any source; type writers can type any content; computers can run any compatible program; but the tradition in video game systems has been to limit operability to specifically selected or approved software. In the patent context, a device which can only work with one other device or class of devices would not be interpreted as a staple article of commerce.⁵⁵

Since the Sony PlayStation is designed to only play PlayStation games, there is a clear similarity to patented works which are not staple articles of commerce. On the other hand, modern video game systems include additional features that open connections to other media through the internet, which is the kind of interoperability that might weigh in favor of something being a staple article of commerce.⁵⁶ This issue becomes even more problematic as video games become software that allows for new forms of creation, which puts pressure on both the staple-article-of-commerce issue and the fair-use issue.

B. Substantial Noninfringing Uses

There is enough ambiguity in the definition of a staple article of commerce that either side could be effectively argued. However, for the most part Sony-type cases have left the hurdle for staple article of commerce fairly low and moved on to the substantial-noninfringing-use issue.⁵⁷ If this trend holds true, a court is unlikely to find against Sony simply on whether the PlayStation is a staple article of commerce.

Instead, a court would have to wade into the complicated fair-use issues that this Issue Brief previously discussed.⁵⁸ The *Sony* court identified two potential fair uses for the Betamax: authorized recording of broadcast television and time shifting. As discussed previously, time shifting is also a potential use of the PS4 share function. It is also a fair bet that at least Sony

⁵⁵ *Id.* at 428.

⁵⁶ *See, e.g., Getting Started on Playstation 3*, HULU, <http://www.hulu.com/support/article/203276> (last visited on Nov. 30, 2014); *Netflix on PlayStation*, PLAYSTATION, <http://us.playstation.com/netflix-on-playstation3/> (last visited on Nov. 30, 2014).

⁵⁷ Shane Nix, Note, *Lifting the Supreme Court's Thumb Off the Scale: Promoting Technological and Entrepreneurial Innovation, while Protecting the Interests of Copyright Holders after MGM v. Grokster*, 16 DEPAUL-LCA J. ART & ENT. L. 49, 51 (2005).

⁵⁸ *See supra* Part II.B.

will authorize the usage of the sharing function with their software, so there will be some authorized recordings.⁵⁹

In *Sony* the court accepted a fairly small percentage of likely fair uses as substantial. The court estimated that about 10 percent of broadcasters explicitly authorized about 58 percent of their works to be recorded.⁶⁰ Beyond this, the court saw that unauthorized time shifting would be a substantial fair use of the Betamax, without precisely deciding the amount.

With reference to the PS4, it seems likely that both of these uses would be present in at least equivalent proportions. That would suggest that even if the staple-article-of-commerce issue was a close question, the analysis would land slightly in favor of Sony on the substantial-noninfringing-use question. As a result, the mere manufacture and sale of the PS4 would not be inducing copyright infringement.

C. Sony Dissent

Sony itself, however, was a close case for Sony. Given the prevalence of video recorders in today's society it is often forgotten that *Sony* was a 5-4 decision.⁶¹ Since the PS4 is closer to the line under the *Sony* analysis than the Betamax was, it may be a real possibility that it could be an exception that alters the analysis. Going on that assumption, it is valuable to consider the dissent's position in *Sony* and whether Sony's current product would fair under it.

In his forceful dissent, Justice Blackmun raises serious concerns about importing the staple-article-of-commerce approach from patents into copyright.⁶² The importance of this issue may even be heightened for a device like the PS4. The policy justification for the staple-article-of-commerce doctrine in the patent field related to the uniquely progressive nature of technological invention.⁶³ If someone invented a new, half as expensive, twice as fast microprocessor, it is easy to see that it would quickly dominate the market. If producers of other computer components could not produce compatible components, then patent law would be inhibiting the exact progress that it was intended to promote.

Copyright, on the other hand, protects a much wider variety of works. If a popular book dominates the field on a certain subject, it will

⁵⁹ Sony also develops a substantial number of games for its own system.

⁶⁰ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 443 (1984).

⁶¹ *Id.* at 417.

⁶² *Id.* at 462–4. (Blackmun, J., dissenting) (looking to specific language in the statute as well as legislative history to conclude that Congress explicitly did not intend this principle to carry over from patent to copyright law).

⁶³ *Id.* at 478.

inhibit creativity in that area but it is fairly easy for authors to write on different subjects. There is scholarly debate about how iterative copyright-type creative works are in this respect, but it seems clear that they are at least a little less so than patents.⁶⁴

Preventing the recording of videos from a particular video game system via a built in mechanism is potentially even further along this spectrum. Video games are at the periphery of artistic works, struggling to gain popular acceptance as objects of art rather than objects of commerce.⁶⁵ Also telling is the fact that with current technologies, video recordings of video games are profligate on video streaming sites, so limiting new technologies in this arena would do little to eliminate the form of expression.⁶⁶ Under the current policy approaches to copyright it seems unlikely that video recordings of video games were the type of works that copyright should be interpreted to bar.⁶⁷

As to the substantial-noninfringing-use issue, Justice Blackmun begins from his position of having rejected private home uses as a protected consumer right under copyright.⁶⁸ He goes on to observe that the timeshifted recordings of broadcast television are actually the exact same use as the original, nothing new or productive has occurred.⁶⁹ Here, the PS4 might fare better since the video recording of a video game is something at least a little different in that it strips out the interactivity. However, it is hard to imagine that in itself would be enough to be viewed as productive. But it is difficult to imagine a court would view these uses as the kind Congress considered to be in the public benefit. While this dissent is not binding law, it is useful to keep in mind when proceeding into the secondary liability analysis.

⁶⁴ See, e.g., Erez Reuveni, *Authorship in the Age of the Conducer*, 54 J. COPYRIGHT SOC'Y U.S.A. 285, 288 (2005).

⁶⁵ BOGOST, *supra* note 41, at 9.

⁶⁶ Searching the phrase "gameplay videos" on YouTube results in about 44.5 million results. See https://www.youtube.com/results?search_query=gameplay+videos (last visited Nov. 30, 2014).

⁶⁷ This position may not be right and it may not be true in the long run, but it does seem to hold true today. The current trend to consider the new market worth of the created work would probably not account for gameplay videos.

⁶⁸ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 479 (1984) (Blackmun, J., dissenting).

⁶⁹ *Id.* at 480.

IV. POST *SONY* DEVELOPMENTS

A. *Contributory Infringement*

In his *Sony* dissent, Justice Blackmun also considers the issue of contributory infringement. Since *Sony*, contributory infringement in copyright has developed significantly. Contributory liability in copyright attaches when a third party to the copying materially supports the copying and has knowledge of it, either constructive or actual.⁷⁰

The PS4's potential to materially support copyright infringement is clear. Some activities that could be performed with an unbounded *share* feature would be almost certainly infringing.⁷¹ Without the *share* feature, recording and sharing videos of gameplay would be difficult. Providing this feature certainly supports at least some potential violations of copyright.

Actual knowledge occurs when a company has knowledge that its feature is being used for infringement. If Sony keeps close tabs on its sharing features, or manages the website, it is easy to see how they could have actual knowledge. Constructive knowledge occurs when a company knows to a near certainty that its feature is being used for infringement. Here, Sony's choice to name the feature "share" instead of "record" is the most damning. Since "sharing" is the use least likely to be found fair, this almost amounts to an admission that Sony knows this use will be prevalent.

B. *Vicarious Infringement*

Vicarious liability is another form of secondary liability in copyright infringement. Here, knowledge is not essential. A third party instead must have the right or duty to control the infringement and benefit from not doing so.⁷² Generally, it is not sufficient for a party to have the ability to remove a user created work from their service.⁷³ Something more is required.

Here, it would seem that the closed nature of the PlayStation system could amount to that something more.⁷⁴ Sony actively limits the ability of

⁷⁰ See *MGM v. Grokster*, 545 U.S. 913, 914 (2005).

⁷¹ Sharing a particularly text-heavy portion of gameplay or a scripted cutscene, for example, would have little protection since these are most similar to traditionally copyrighted works.

⁷² See *Perfect 10 v. Visa*, 494 F.3d 788, 802 (9th Cir. 2007).

⁷³ *Viacom Int'l v. YouTube*, 676 F.3d 19, 38 (2d Cir. 2012).

⁷⁴ Being a closed system is one of the things that distinguishes a video game system from a general PC. The manufacturer keeps a great degree of control over what can and cannot function on their device.

people to engage in uses of their hardware of which they do not approve.⁷⁵ In this context it is difficult to see how Sony doesn't have the ability to remove the content and something more. Issues like how much the *share* feature drives sales, whether Sony benefits from hosting the videos through advertising, and whether there are other financial benefits that flow to Sony would have to be determined by more developed facts. Nevertheless, it is conceivable that Sony would be vicariously liable for recordings on the

CONCLUSION

The share feature on Sony's PlayStation 4 will likely raise many of the same copyright issues as were at the center of the *Sony v. Universal* case nearly 30 years ago. In the current climate, these issues are largely solvable based on the judicial and legislative evolution of copyright as well as expansive license agreements. However, the continuing approach to respond to these issues with such minor fixes leaves many underlying questions unresolved. The PlayStation 4 will almost certainly not be the last piece of new technology which challenges basic assumptions about copyright and technology, but its *share* feature provides a useful platform from which to reconsider the principles that govern our modern understanding of these rights.

⁷⁵ See, e.g., Complaint, *Ventura v. Sony*, filed Apr. 27, 2010 (N.D. Cal. 2010) (CV 10-1811) (a class action filed on behalf of owners of the PS3 whom Sony was preventing from installing Linux) (available at http://www.wired.com/images_blogs/threatlevel/2010/04/sonysuit.pdf).