Roll for Lawsuit: Are Actual-Play Series Copyright Infringers?

ABSTRACT

Dungeons and Dragons is a highly popular Tabletop Role-Playing Game designed by Gary Gygax and Dave Arneson in 1973. The game's emphasis on narrative storytelling makes it an interesting subject for copyright analysis. When a group plays Dungeons and Dragons (D&D) for an audience, using copyrighted materials from Dungeons and Dragons's publisher, Wizards of the Coast, there is an open question about whether the players infringe on Wizards of the Coast's exclusive rights under § 106 of the Copyright Act of 1976. This issue is further complicated by Wizards of the Coast's unique approach to licensing.

This Note examines how Dungeons and Dragons performances implicate Wizards of the Coast's exclusive rights under the Copyright Act. After establishing that groups playing D&D publicly are likely liable for infringement of the reproduction, derivative work, and public performance rights of Wizards of the Coast, a statutory solution is proposed based on the Ninth Circuit's holding in Allen v. Academic Games League of America, Inc.

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If someone had said a decade ago that a group of Dungeons and Dragons (D&D) players sold out Madison Square Garden, most people likely would have been skeptical.[1] In the past several years, however, there has been a dramatic rise in the popularity of live performances and filming of D&D play sessions.[2] Combined with the success of other D&D-based media, such as the TV show *Stranger Things* and the D&D movie, it is safe to say that D&D is no longer relegated to its niche fan base.[3] D&D is a collaborative storytelling game where a designated player is the narrator and the rest of the players are the main characters.[4] When playing, the narrator, called the Dungeon Master (DM), describes a scenario and the players explain how their characters respond to that situation.[5] The players then roll dice to determine how well their proposed actions go.[6] It may not sound like a must-see show, but filmed D&D content, commonly referred to as actual play, is making its way from niche to mainstream.[7]

The rise of actual-play series raises copyright questions regarding the creative material of the actual-play creators versus the rights of the publishers of D&D, Wizards of the Coast (WotC).[8] D&D actual-play video series can yield millions of views per episode, generating significant revenue on their respective platforms (Twitch, YouTube, Dropout, etc.).[9] These video series have also led to successful media spin-offs, including a well-received Amazon Prime animated series and several bestselling graphic novel series.[10] Questions about D&D intellectual property (IP) are even more prevalent in the wake of

1. *See* Em Friedman, *Dimension 20's Sold-Out Show at MSG Shines a Light on Decades of TTRPG Performance*, POLYGON (Jan. 23, 2025, 7:00 AM), https://www.polygon.com/actual-play/512133/dnd-actual-play-history-critical-role-dimension-20-acquisitions-inc-hickman-gen-con [https://perma.cc/CQV6-CNP5].

2. *See* Sarah Parvini, *As D&D Booms, 'Critical Role' Makes Its Own Kind of Nerd Celebrity*, WASH. POST (May 9, 2024), https://www.washingtonpost.com/entertainment/2024/05/09/critical-role-dungeons-dragons/ [https://perma.cc/MXK7-52L7].

3. *See* Christine Clarridge, *Why Dungeons & Dragons Is Still Winning at 50*, AXIOS SEATTLE (Jan. 29, 2025), https://www.axios.com/local/seattle/2025/01/29/dnd-wizards-2025-roadmap-dungeons-dragons-50-years [https://perma.cc/46FZ-TKMB].

4. Jackson Haime, *How to Explain DnD to Your Friends That Don't Play*, MEDIUM (July 1, 2020), https://medium.com/@jackson.haime/how-to-explain-dnd-to-your-friends-that-dont-play-465ca95e9122 [https://perma.cc/TE83-G9ZX].

5. DUNGEONS & DRAGONS, PLAYER'S HANDBOOK 6 (5th ed. 2014) [hereinafter PLAYER'S HANDBOOK].

6. *Id.*

7. Parvini, *supra* note 2.

8. *See* Christopher B. Seaman & Thuan Tran, *Intellectual Property and Tabletop Games*, 107 IOWA L. REV. 1615, 1619 (2022) (stating that with the golden age of tabletop innovation come legal questions).

9. *Id.* at 1667–68.

10. *Id.*

WotC's attempt to change its open game license (OGL), its version of a creative commons license.[11]

Commonly, D&D content creators will utilize premade scenario books, called modules, in running their actual-play video series.[12] WotC's modules are copyrighted literary works, meaning WotC has the exclusive rights to reproduce copies of the work, make derivative works based on the original work, publicly distribute copies of the work, publicly perform the work, and publicly display the work under § 106 of the Copyright Act of 1976.[13] If a D&D content creator uses a module without authorization from WotC, the creator may be infringing on WotC's exclusive rights under the Copyright Act and could be held civilly liable.[14] Civil liability for actual-play series could stunt the growth of a new industry because new groups will not risk being hauled into court.[15]

This Note answers whether actual-play series are generally infringing WotC's exclusive rights granted under the Copyright Act. It contends that actual-play series that use modules generally infringe WotC's § 106 rights, despite WotC's unique licensing scheme. Part I provides necessary background into the structure and format of D&D, WotC's history of intellectual property litigation, and how copyright law has developed in games. Part II then analyzes the enforceability of WotC's fan-content license, followed by an analysis of which § 106 rights are implicated by an actual-play series' use of a module. Finally, Part III argues that a statutory exemption to audiovisual derivative works of gameplay should be enacted to support the growth of the actual-play industry.[16]

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11. Noah Downs, *Let's Take a Minute to Talk About D&D's Open Gaming License (OGL)*, MEDIUM (Jan. 5, 2023) https://medium.com/@MyLawyerFriend/lets-take-a-minute-to-talk-about-d-d-s-open-gaming-license-ogl-581312d48e2f [https://perma.cc/K9R4-GB64].

12. *See* Isaac Williams, *How to Start Playing Dungeons and Dragons*, CBR (Oct. 15, 2023), https://www.cbr.com/how-to-begin-playing-dnd/ [https://perma.cc/5CCD-ANE8] ("In a premade *D&D 5e* adventure, DMs can jump in and make their own adventures and campaigns.").

13. *See* Seaman & Tran, *supra* note 8, at 1662–63; 17 U.S.C. § 106.

14. *See* 17 U.S.C. § 501(a), (b).

15. Downs, *supra* note 11.

16. Notably, copyright protection is separate from patent law and trademark law. While both also have implications for D&D and TTRPGs generally, they are not the focus of this Note. Rather, this Note focuses on the specific implications of actual-play series' unauthorized use of WotC's copyrighted expression. WotC does have D&D symbols that are trademarked, but that is a separate line of inquiry than this Note's discussion. D20 SYSTEM, Registration No. 2,630,360; DUNGEONS & DRAGONS, Registration No. 4,368,634. The mark consists of an ampersand consisting of a dragon blowing fire. WotC has recently acted against an organization for trademark infringement in development of a new TTRPG based on a science fiction TTRPG originally developed by TSR. *See* TSR LLC. v. Wizards of the Coast LLC, No. 2:21-cv-01705, 2022 WL 18232993 (W.D. Wash. Sept. 8, 2022). A different company began using the name TSR with the belief that WotC had abandoned that trademark and attempted to publish an TTRPG containing

I. BACKGROUND

To better understand whether actual-play series infringe on WotC's copyrights, it is necessary to understand the content that they are creating. This includes basic knowledge of what D&D is and the history of IP litigation surrounding D&D. It is also necessary to discuss how games are treated under the Copyright Act and WotC's unique approach to licensing. Discussing these topics lays the proper groundwork for the infringement analysis in Part II.

A. Dungeons and Dragons

Often called "the first modern [Tabletop Role-Playing Game],"[17] D&D is a game about fantasy storytelling.[18] Similar to childhood games of make-believe, it is driven by the imagination of the players.[19] "It's about picturing the towering castle beneath the stormy night sky and imagining how a fantasy adventurer might react to the challenges that scene presents."[20] To play, a group of players is led through an adventure by another player, "a lead storyteller and referee," referred to as the DM in D&D.[21] In each "scene," the players are presented with a detailed description of their situation by the DM.[22] The players then respond to the situation by telling the DM proposed actions for their characters.[23] Players then roll a twenty-sided die to determine the outcome of the proposed action.[24] The higher the rolled number on the die, the better the outcome.[25] The skills and abilities of the individual characters can also affect the outcome by adding set numbers, called modifiers, to the die roll.[26] For example, a "fighter" character would probably be better at punching an enemy than persuading them.[27] The

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explicitly harmful content. *Id.* WotC has not filed a patent for D&D rule system, therefore patent infringement is not implicated in this analysis either. Seaman & Tran, *supra* note 8, at 1663.

17. Seaman & Tran, *supra* note 8, at 1662.

18. *Id.* at 1663.

19. PLAYER'S HANDBOOK, *supra* note 5, at 5.

20. *Id.*

21. *Id.*

22. *Id.* at 6 ("The DM tells the players where their adventurers are and what's around them, presenting the basic scope of options that present themselves (how many doors lead out of a room, what's on a table, who's in the tavern, and so on).").

23. *Id.* ("Sometimes one player speaks for the whole party, saying, 'We'll take the east door,' for example. Other times, different adventurers do different things: one adventurer might search a treasure chest while a second examines an esoteric symbol engraved on a wall and a third keeps watch for monsters.").

24. *See id.*

25. *See id.* at 7.

26. *Id.*

27. *See id.* at 14 ("A very strong character with low Intelligence might think and behave very differently from a very smart character with low Strength.").

interactions between the DM and the other players shape the narrative of the game and transform the D&D experience from characters acting out a set script into a dynamic, changing narrative.[28]

To start a game of D&D, the first step is to develop a world for the characters to adventure in.[29] While many actual-play groups develop a fantasy world unique to their group, colloquially called "homebrew,"[30] an integral part of the culture around D&D remains the use of "modules" released by WotC.[31] Modules dictate settings and scenarios that DMs use for planning and running a long-term adventure (a "campaign").[32] These are distinct from the core rulebooks ("sourcebooks") of D&D, which provide the basic rules of the game and materials for DMs to use when crafting their own homebrew setting.[33] Modules provide the DM with setting descriptions, characters, possible plots and subplots, and any necessary additional game mechanics needed to run a premade adventure for their players.[34] For example, in *Curse of Strahd*, a popular D&D module, the locations of important items and allies in the campaign are randomized by the DM pulling cards before the campaign begins and then finding where the card matches up on a table in the *Curse of Strahd* module.[35] Although D&D resembles a board game in mechanics, its narrative focus makes it an excellent device for collaborative storytelling.[36]

The unique potential for collaborative storytelling that D&D offers has created a new type of media: actual play.[37] An actual-play series consists of a group of people playing D&D, or other Tabletop Role-Playing Games (TTRPGs), on camera.[38] In recent years, actual plays such as Critical Role, the Adventure Zone, and Dimension 20 have

28. *See* Brooke Phillipps, *Dungeons & Dragons: What Is Railroading?*, THEGAMER (Jan. 14, 2024), https://www.thegamer.com/dungeons-dragons-railroading-guide/ [https://perma.cc/8PHR-TGG3].

29. *See* DUNGEONS & DRAGONS, THE DUNGEON MASTER'S GUIDE 4 (Scott Fitzgerald Gray et al. eds., 5th ed. 2014) [hereinafter DUNGEON MASTER'S GUIDE].

30. Seaman & Tran, *supra* note 8, at 1667.

31. *See id.* at 1663; Ben Brosofsky, *Every D&D 5e Campaign Book, Ranked*, SCREENRANT (July 26, 2024), https://screenrant.com/dnd-every-5e-campaign-book-ranked-dungeons-dragons/ [https://perma.cc/5V2Y-8GHT] ("Campaign books are a big part of the soul of Dungeons & Dragons 5e, providing a structured way for parties to adventure through its exciting fantasy worlds.").

32. *See* Brosofsky, *supra* note 31; *see also* PLAYER'S HANDBOOK, *supra* note 5, at 5.

33. *See generally* PLAYER'S HANDBOOK, *supra* note 5; DUNGEON MASTER'S GUIDE, *supra* note 29; DUNGEONS & DRAGONS, MONSTER MANUAL (5th ed. 2014).

34. *See generally* DUNGEONS & DRAGONS, CURSE OF STRAHD 5 (Kim Mohan ed., 5th ed. 2016) [hereinafter CURSE OF STRAHD].

35. *See id.* at 11.

36. Seaman & Tran, *supra* note 8, at 1662.

37. *Id.* at 1667; Chris DeVille, *The Rise of D&D Liveplay Is Changing How Fans Approach Roleplaying*, THE VERGE (Nov. 16, 2017, 1:45 PM), https://www.theverge.com/2017/11/16/16666344/dungeons-and-dragons-twitch-roleplay-rpgs-critical-role-streaming-gaming [https://perma.cc/L3X7-Y5PE].

38. Seaman & Tran, *supra* note 8, at 1667.

seen a meteoric rise in popularity.[39] The narrative created on Critical Role has even been adapted into a well-received Amazon Prime animated series,[40] a set of sourcebooks,[41] and a graphic novel.[42] With a dedicated following that generates money through advertising revenue, merchandise sales, and tickets to live performances, the actual-play industry has opened new doors for D&D monetization.[43]

B. History of D&D and IP Litigation

D&D has a long history of intellectual property litigation, dating back to its original parent company, Tactical Studies Rules (TSR).[44] TSR was known for being incredibly litigious and would regularly take action against potential infringers.[45] Indeed, "[g]amers joked that TSR stood for 'they sue regularly.'"[46] At times, however, TSR would adopt a more relaxed approach to infringement from its fan base, with Gary Gygax, the creator of D&D, saying in an interview that TSR was aware that customers would photocopy the rulebook, but wanted to let it slide because it increased its customer base.[47] An approach that is permissive towards fan content but litigious toward any commercial use that possibly infringes on intellectual property rights therefore has long been a part of D&D's history.[48]

When WotC acquired TSR, it continued this permissive approach.[49] In 2000, WotC released its OGL, a variation on the creative commons license which allowed for the creation of D&D-compatible content, royalty free.[50] Compatible content might include a rulebook for

39. *Id.*

40. *The Legend of Vox Machina* (Amazon Prime television broadcast 2022).

41. MATTHEW MERCER, HANNAH ROSE & JAMES J. HAECK, TAL'DOREI CAMPAIGN SETTING REBORN (2022); MATTHEW MERCER, EXPLORER'S GUIDE TO WILDEMOUNT (2020).

42. MATTHEW MERCER & MATTHEW COLVILLE, CRITICAL ROLE VOX MACHINA: ORIGINS VOLUME I (2019); MATTHEW MERCER & JODY HOUSER, CRITICAL ROLE VOX MACHINA: ORIGINS VOLUME II (2020).

43. *See* Parvini, *supra* note 2.

44. Seaman & Tran, *supra* note 8, at 1663–65.

45. *Id.* at 1663–64.

46. David Hartlage, *1994: TSR Declares War on the Internet's D&D Fans*, DM DAVID (Sept. 8, 2020), https://dmdav*id*.com/tag/1994-tsr-declares-war-on-the-internets-dd-fans [https://perma.cc/BL8C-VHX8].

47. Ciro Alessandro Sacco, *The Ultimate Interview with Gary Gygax*, THE KYNGDOMS, http://www.keithrobinson.me/thekyngdoms/interviews/garygygax.php [https://perma.cc/C5MY-6E8M] (last visited Feb. 7, 2022).

48. *See Wizards of the Coast's Fan Content Policy*, WIZARDS OF THE COAST, https://company.wizards.com/en/legal/fancontentpolicy [https://perma.cc/W6RW-S43R] (Nov. 15, 2017) ("You can use Wizards' IP . . . to make Fan Content that you share with the community for free.").

49. Seaman & Tran, *supra* note 8, at 1665.

50. *Id.* (citing WIZARDS OF THE COAST, WIZARDS OF THE COAST SYSTEM REFERENCE DOCUMENT 5.1 2 (2023), http://media.wizards.com/2016/downloads/DND/SRD-OGL_V5.1.pdf [https://perma.cc/5AF4-JCKF]).

adding pirate ships to a campaign, fan-made adventures that can be published and sold, or similar materials that add extra depth to the game of D&D.[51] The OGL also allowed creators of this D&D-based content to sell the materials without license from WotC, so long as the creators complied with the terms of WotC's OGL.[52] WotC's permissive attitude towards commercial uses led to an explosion of unofficial D&D-compatible content, some of which WotC would even officially recognize and make part of its canon.[53] While the OGL did not give an open license to use the settings provided in modules for videos, many creators saw it as granting implicit permission.[54] Overall, the OGL gave tabletop players the security to know they would not be sued for making derivatives of D&D.[55] The success and freedom to grow that the actual-play industry has enjoyed is at least partially due to WotC's lenient attitude towards licensing.[56]

This freedom suddenly appeared at risk in 2018, when the president of WotC stated that she felt D&D was "under monetized," and began discussions to phase out its OGL and adopt a royalty scheme in its place.[57] A leaked draft of this new scheme was met with tremendous backlash, which included some players threatening legal action against WotC, arguing WotC would be revoking an irrevocable license.[58] WotC eventually backed down, but the possibility that WotC might attempt to monetize the licensing of D&D content and crack down on unlicensed use remains.[59] As a result, an in-depth analysis of the copyright liability that actual-play content creators may face has become increasingly important.[60]

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51. *See* Heidi Howard Tandy, *Into the Fandom-Verse: Fanworks and Fair Use*, LANDSLIDE, Sept./Oct. 2019, at 16, 19.

52. WIZARDS OF THE COAST, *supra* note 50, at 2.

53. Seaman & Tran, *supra* note 8, at 1667.

54. *See id.*; Tandy, *supra* note 51.

55. *See* Meera Gajjar, *IP Lawyer Noah Downs Discusses Dungeons & Dragons Licensing Battle*, WESTLAW INTELL. PROP. DAILY BRIEFING (Feb. 6, 2023), https://today.westlaw.com/Document/I25673c39a63a11ed8636e1a02dc72ff6/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 [https://perma.cc/UF42-QY6X].

56. *See* Seaman & Tran, *supra* note 8, at 1663.

57. Downs, *supra* note 11.

58. The legal action was based on the theory that the OGL was an irrevocable license. *See* Gajjar, *supra* note 55.

59. *See generally* TSR LLC. v. Wizards of the Coast LLC, No. 2:21-cv-01705, 2022 WL 18232993 (W.D. Wash. Sept. 8, 2022) (preliminary injunction against an unlicensed trademark usage).

60. *See generally* Gajjar, *supra* note 55; *Systems Reference Document (SRD)*, D&D BEYOND (July 19, 2024), https://www.dndbeyond.com/resources/1781-systems-reference-document-srd [https://perma.cc/2XVB-8CQZ] (stating that "[u]se of D&D content in streaming, fan art, cosplay, and other fan content is not related to the SRD, OGL, or Creative Commons").

C. Copyright Law and Games

Game mechanics are an "uncopyrightable process, system, or method of operation under section 102(b)" of the Copyright Act.[61] Game components, such as "cards, boards, instruction books," can be copyrightable.[62] Game components can be literary works, such as a game's manual, or pictorial, graphic, and sculptural works (PGS), such as a game's board or its pieces.[63]

Under the Copyright Act, an owner of a game's copyright is granted the exclusive right to: (1) reproduce copies of the work, (2) make derivative works based on the original work, (3) publicly distribute copies of the work, (4) publicly perform the work, and (5) publicly display the work.[64] These rights, however, only extend to the copyrightable elements of the game, as mentioned above.[65] The copyrightable elements of a game are further limited by the *scènes à faire* doctrine, which excludes "stock elements" of a genre from protection.[66] For example, the US Court of Appeals for the Seventh Circuit held in *Incredible Technologies, Inc. v. Virtual Technologies, Inc.* that "golf courses, clubs, a selection menu, a golfer, a wind meter," were *scènes à faire* for a golf video game, as they were "by definition" necessary for the presentation of the game.[67]

The reproduction right extends to both literal copying as well as substantial similarity.[68] For example, in *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, the Seventh Circuit held that a maze game featuring a "gobbler" character who is chased by ghosts was substantially similar to Pac-Man.[69] The court looked to the features of the games' characters and whether they appeared substantially similar in design and function.[70] Even though the defendant was able to provide a list of differences between its game and Pac-Man, the court stated

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61. Seaman & Tran, *supra* note 8, at 1663.

62. *See* Hoopla Sports & Ent., Inc. v. Nike, Inc., 947 F. Supp. 347, 354 (N.D. Ill. 1996).

63. *See* Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188 (2d Cir. 1975) (stating that "arrangement of the rules and the manner of their presentation" is copyrightable).

64. 17 U.S.C. § 106.

65. *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 404 (D.N.J. 2012) (reasoning that only the expressive elements of a game are copyrightable).

66. *See* Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

67. 400 F.3d 1007, 1015 (7th Cir. 2005).

68. In copyright law, substantial similarity "exists where 'the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value.'" Stromback v. New Line Cinema, 384 F.3d 283, 297 (6th Cir. 2004) (quoting Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996)).

69. 672 F.2d 607, 618 (7th Cir. 1982).

70. *Id.*

that "[e]xact reproduction or near identity was not necessary to establish infringement."[71] To infringe on the reproduction right of a game, an infringer need only reproduce the protectable elements in their "total concept and feel."[72]

While the reproduction right prohibits those who do not own the copyrighted work from making copies of the original work, the derivative work right grants the copyright owner the exclusive right to make or authorize new works based on the owner's original work.[73] In the context of games, the derivative work right is infringed upon when (1) the (unauthorized) derivative work exists in a concrete or permanent form and (2) the (unauthorized) derivative work substantially incorporates protected material from the original.[74] In *Micro Star v. Formgen Inc.*, the US Court of Appeals for the Ninth Circuit considered whether a commercially sold CD containing user-created levels for a popular video game, Duke Nukem 3D, was considered an infringing derivative work.[75] The court held that the answer was likely yes, given that the defendants recorded the game's audiovisual display to the littlest detail in order to reproduce it and infringed on the protected story of Duke Nukem, the game's titular character, by creating sequels ("telling new (though somewhat repetitive) tales of Duke's fabulous adventures").[76] The court also noted that for the same reason, a book about Duke Nukem would also infringe on the derivative work right.[77]

Moving on from the derivative work right, the public distribution right is the exclusive right of the copyright owner to distribute copies of the work to the public through sale or other transfer of ownership.[78] In *Midway Manufacturing Co. v. Dirkschneider*, the US District Court for the District of Nebraska extended this right to include not just identical copies of a work, but virtually identical copies as well.[79] *Dirkschneider* involved defendants who sold video games that were identical to Pac-Man, Galaxian, and Rally-X in every way except name.[80] By selling those games to consumers, the court held that the defendants had infringed on the copyright owner's public distribution right.[81]

In addition to having the exclusive right to publicly distribute the work, copyright owners also have the exclusive right to publicly

71. *Id.*
72. *Id.* at 620.
73. *See* 17 U.S.C § 106.
74. Micro Star v. Formgen Inc., 154 F.3d 1107, 1110 (9th Cir. 1998).
75. *Id.* at 1009.
76. *Id.* at 1112.
77. *Id.*
78. *See* 17 U.S.C. § 106.
79. 543 F. Supp. 466, 482–83 (D. Neb. 1981).
80. *Id.*
81. *Id.*

perform their work. Public performance is reciting, rendering, playing, dancing, or acting a work to people outside a small group of friends or family in person or transmitted.[82] Any adaptation of a work from one medium to another is an infringement of the public performance right.[83] When it comes to games, however, courts have inconsistently ruled on whether playing them in public constitutes a public performance.[84] In *Allen v. Academy Games League of America, Inc.*, the Ninth Circuit held that by "play," the Copyright Act referred only to playing music or records.[85] The court in *Allen* reasoned that giving the copyright owner of a game the right to control when and where the game might be played would put "undue restraint on the consumer."[86] In addition, the court took the position that "[w]hether privately in one's home or publicly in a park, it is understood that games are meant to be 'played,'" and it would undermine the purpose of the copyrighted work if playing a game was not allowed by the copyright owner.[87]

However, *Allen* involved the playing of board games for a nonprofit tournament.[88] While the court does not directly tie this fact to its analysis of the word "play," the court does make note of the case's tournament context, stating that even if playing a board game constitutes a performance, playing the board game would still constitute fair use.[89] As such, a court ruling on a board game being played for commercial purposes, such as in front of a live audience or at a for-profit tournament, might be more inclined to find public performance infringement.[90]

Although the game at issue in *Allen* was a board game, courts have also held that playing a video game in public constitutes a public performance.[91] The primary case on whether playing video games in public is a public performance is *Red Baron-Franklin Park, Inc. v. Taito Corp.*, in which the US Court of Appeals for the Fourth Circuit reasoned that because playing video games is a sequence of images with sound, it constitutes a public performance.[92] In *Midway Manufacturing. Co. v.*

82. *See* 17 U.S.C. § 101.

83. *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993).

84. *Compare* Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996) ("[P]laying of a game is not a 'performance' within the meaning of the Copyright Act."), *with* Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989) (holding that playing a video game in public constitutes a performance).

85. *Allen*, 89 F.3d at 616.

86. *Id.*

87. *Id.* (internal quotations omitted).

88. *Id.* at 616–17.

89. *Id.* at 617.

90. *See id.*

91. *See, e.g.*, Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989).

92. *Id.*

Artic International, Inc., the Seventh Circuit held that even though players exerted a certain amount of control over a video game during play, because their actions were dictated by the programming of the game at issue, this control was illusory and their playing was a public performance.[93] In the wake of these two cases, Congress amended § 109 of the Copyright Act to exempt coin-operated arcades from liability for infringement of the public performance and display rights.[94] Section 109 only applies, however, to "the owner of a particular copy of such a game lawfully made under this title, [who] is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment," and would not apply to non-arcade games.[95] Accordingly, use of games that fall outside of § 109 may still infringe on the copyright owner's public performance right in accordance with the reasoning in *Red Baron* and *Midway Manufacturing*.[96]

Similar to the public performance right is the public display right, which gives the copyright owner the exclusive right to show a copy of the work publicly.[97] For games, this is dependent on which type of work the game is labeled as.[98] In *Miller v. Facebook, Inc.*, the US District Court for the Northern District of California held that computer games are not publicly displayed when shown publicly because they are considered literary works.[99] Instead, the public display right for computer programs protects against the showing of the source code itself publicly.[100] Furthermore, the audiovisual elements of a computer game are only considered "publicly displayed" if shown as "non-sequential images," such as out-of-context screen shots.[101] Showing of sequential images or video falls under the public performance right.[102]

93. Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1014 (7th Cir. 1983).

94. 17 U.S.C. § 109(e) ("[T]he owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment . . . .").

95. *Id.*

96. *See id.*; *Red Baron-Franklin Park, Inc.*, 883 F.2d at 279; *Artic Int'l, Inc.*, 704 F.2d at 1014.

97. *See* 17 U.S.C. § 101 ("To 'display' a work means to *show* a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." (emphasis added)).

98. *See* Miller v. Facebook, Inc., No. C 10-00264, 2010 WL 2198204, at *4 (N.D. Cal. May 28, 2010) (stating that because software is a literary work, the public display right is not infringed unless the source code itself is on display).

99. *Id.*

100. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1526 (9th Cir. 1992).

101. *See* 17 U.S.C. § 101.

102. *See* United States v. Am. Soc. of Composers, Authors, Publishers, 627 F.3d 64, 74 (2d Cir. 2010).

Despite the multitude of rights granted to copyright owners, it is important to note that these rights are limited by the fair use doctrine, which "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[103] Returning to *Micro Star* (the case involving user-created levels for the video game Duke Nukem 3D), the infringers in that case argued that their use was fair.[104] The Ninth Circuit was not convinced by this argument and held the infringers' conduct to not constitute fair use.[105] The court reasoned that the commercial nature of the infringement, the uniqueness of the material infringed upon, and the usurping of the market for Duke Nukem derivative works all weighed against a finding of fair use.[106] If an actual-play series has an infringement action brought against it, the fair use defense will likely be invoked. The same factors considered in *Microstar* will be applied to the actual-play series' use of WotC's IP.[107]

D. Wizards of the Coast's Current Licensing Approach

If an actual-play series uses WotC's IP with a license the use is not infringement and WotC's Fan Content Policy (Policy) allows for limited use of WotC's intellectual property.[108] Specifically for streaming and video series, content that utilizes WotC's intellectual property must be in accordance with the Policy, as well as WotC's terms of service (Terms) and Code of Conduct (Code).[109] These three documents are listed on WotC's website, but are not listed in the physical copies of modules that WotC releases.[110] According to the Terms, continued use of WotC's websites and games constitutes agreement to the Terms, making the Terms a "browsewrap agreement."[111] Browsewrap agreements are distinct from clickwrap agreements, which require a user's manifest assent to a website's terms of use before use can

103. Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Companies, Inc., 621 F.2d 57, 60 (2d Cir. 1980).

104. Micro Star v. Formgen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998).

105. *Id.* at 1009.

106. *Id.* at 1113.

107. *See id.*

108. *Wizards of the Coast's Fan Content Policy*, *supra* note 48.

109. *General Terms*, WIZARDS OF THE COAST, https://company.wizards.com/en/legal/terms [https://perma.cc/F6D8-9WW7] (May 17, 2022).

110. *Id.*; *Wizards of the Coast's Fan Content Policy*, *supra* note 48; *Code of Conduct & Community Guidelines*, WIZARDS OF THE COAST, https://company.wizards.com/en/legal/code-conduct [https://perma.cc/PK64-KACA] (June 1, 2022); *see, e.g.*, CURSE OF STRAHD, *supra* note 34, at 2.

111. *General Terms*, *supra* note 109, § 23.1; *see* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014).

continue.[112] "Unlike a clickwrap agreement, a browsewrap agreement 'does not require the user to manifest assent to the terms and conditions expressly … [a] party instead gives his assent simply by using the website.'"[113] Finally, in its Terms, WotC reserves the right to modify or terminate the license at any time, "for any reason or for no reason with no liability to [the user]."[114] Given that the Policy lays out WotC's official stance on the use of its IP, an extensive overview of the Policy is necessary to understand the rights of creators.[115]

The Policy allows for limited use of WotC's intellectual property; thus, whether the Policy is enforceable as a binding agreement carries strong implications for whether actual-play series creators are at risk of copyright infringement. If the Policy is enforceable, then actual-play series can use WotC's copyrighted material without threat of liability, so long as they act within the scope of the license.[116] If the Policy is not enforceable, however, then actual play series are likely infringing on WotC's IP, because without the limited use provision, use of WotC's IP by actual-place series is unauthorized.[117] Copyright infringement only comes into play for *unauthorized* uses of copyrighted material.[118] In addition, if the Policy changes, should WotC again demonstrate a desire to capitalize on licensing, such a change could lead to lawsuits against content creators using WotC's intellectual property.[119]

Lawsuits could dissuade new actual-play series from entering the industry and put more established actual-play series out of business. While use of WotC's modules is not required to play D&D, many newer actual-play series may not have the time or experience to create homebrew adventures, and modules offer a lower barrier to entry into the actual-play industry.[120] For instance, the Adventure Zone, a popular actual-play podcast, first began its series using a WotC premade adventure and characters.[121] Should WotC change its Policy

112. *Nguyen*, 763 F.3d at 1176.

113. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014) (quoting Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366–67 (E.D.N.Y. 2009)).

114. *General Terms*, *supra* note 109.

115. *See Wizards of the Coast's Fan Content Policy*, *supra* note 48 ("You probably have a lot of questions about what you can and can't do with Wizards' intellectual property (IP), so we summoned our law mages to put together this Fan Content Policy and FAQ.").

116. *See id.*

117. *See id.*

118. *See* 17 U.S.C. § 106.

119. Downs, *supra* note 11.

120. *See* Williams, *supra* note 12 ("In a premade *D&D 5e* adventure, DMs can jump in and make their own adventures and campaigns.").

121. *See* Jordan White, *'The Adventure Zone' Is a Dungeons & Dragons RPG Podcast That Breaks All the Rules*, THE RINGER (Jan. 31, 2018, 4:20 AM), https://www.theringer.com/2018/01/31/pop-culture/the-adventure-zone-podcast-dungeons-dragons-travis-mcelroy-justin-griffin-clint [https://perma.cc/CDP2-SDBC].

and become litigious, the possibility of liability for use of WotC's intellectual property could dissuade new actual-play series from using that property to start their series.[122] Therefore, analyzing the copyright liability actual-play series could face for infringing WotC's intellectual property is necessary.

II. ANALYSIS

The potential copyright liability that actual-play series face for use of WotC's intellectual property could hinder this budding industry by dissuading new creators and harming established creators. As such, this Note first analyzes the enforceability of WotC's Policy, which governs use of WotC's intellectual property. After concluding that the Policy is likely not enforceable, which therefore suggests that use of WotC's IP by actual-place series is unauthorized, this Note conducts an examination of the potential § 106 rights infringed upon by actual-play series. Finally, this Note discusses the possibility of a fair use defense.

A. Enforceability of Wizard of the Coast's Limited License for Actual-Play Series

Determining the enforceability of the Policy is the first step in analyzing the possibility of infringement by actual-play series on WotC's copyright. While the Policy's limited use provision seems to offer a safe harbor for creators in creating actual-play series, there are significant gaps that may make that security illusory.[123] If the Policy is enforceable, then actual-play series can make use of the limited use license offered by the Policy. However, if the Policy is not enforceable, actual-play series that use WotC's IP would be doing so without a license and, therefore, infringing on WotC's copyrights.

The Policy is likely not an enforceable agreement between actual-play content creators and WotC.[124] For a browsewrap agreement to be enforceable, there must be "actual or constructive knowledge of a website's terms and conditions."[125] Actual notice is determined on a case-by-case basis, but constructive notice looks to "whether the website puts a reasonably prudent user on inquiry notice of the terms of the

122. *See* Dakota Foster, *Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach*, 9 TEX. A&M L. REV. 711, 720 (2022). A similar phenomenon is occurring in the video game streaming industry; during the pandemic, a flood of copyright claims caused streamers to fear that their ability to build careers and earn a primary source of income would be taken away. *See id.*

123. *See Wizards of the Coast's Fan Content Policy*, *supra* note 48.

124. *See* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014).

125. *Id.* at 1176 (quoting Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011)).

contract."[126] WotC has a hyperlink to its Terms at the bottom of each webpage, but in no way directs or prompts the user to read the terms.[127] In *Nguyen v. Barnes & Noble Inc.*, the Ninth Circuit held that "a website [that] makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent . . . is insufficient to give rise to constructive notice."[128] As the Ninth Circuit's description of an "insufficient" browsewrap agreement is nearly identical to WotC's agreement, it is likely that WotC's agreement would be found unenforceable for lack of notice.[129]

Furthermore, it is possible to play D&D and make D&D-based content without going on WotC's website and receiving notice of these terms.[130] As the Policy is not listed as a licensing agreement in any of WotC's physical sourcebooks, there is no notice upon use of the sourcebook that the user has entered into an agreement.[131] Therefore, there is good reason to believe that the Policy is illusory and cannot be enforced in court.

Even if a court holds that the Policy is enforceable, actual-play series may still face copyright liability if they act outside of the limited scope of the license.[132] For example, this may occur if WotC chooses to invoke its right to order a takedown of content "for any reason or for no reason" and an actual-play series refuses to take down the content.[133] Therefore, because actual-play series face a possibility of copyright infringement liability if the Policy is enforceable, as well as if the Policy is not enforceable, it is important to know the scope of the copyright infringement liability that actual-play series may face for using WotC's intellectual property.

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126. *Id.* at 1177.

127. *See* WIZARDS OF THE COAST, https://company.wizards.com/en [https://perma.cc/G6GJ-CVEE] (last visited Feb. 23, 2025).

128. *Nguyen*, 763 F.3d at 1179.

129. *See id.* at 1179 (holding that where "a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice").

130. *See, e.g.*, CURSE OF STRAHD, *supra* note 34, at 2.

131. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002) ("Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."); *e.g.*, CURSE OF STRAHD, *supra* note 34, at 2.

132. *See* Jacobsen v. Katzer, 535 F.3d 1373, 1380 (Fed. Cir. 2008) ("If . . . a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.")

133. *See Wizards of the Coast's Fan Content Policy*, *supra* note 48.

B. Analysis of Possible Rights Infringed Upon by Actual-Play Series

When an actual-play series uses a module as the basis for its campaign, the content creators behind the actual-play series may be infringing on WotC's copyright, for which the creators could be held civilly liable.[134] As an actual-play series has the potential to be liable for copyright infringement if WotC's Policy is unenforceable or if the actual-play series exceeds the scope of the limited use license, this Section contemplates the possible violations of WotC's copyright independent of the Policy.

As an initial matter, copyright protection does not extend to ideas or processes.[135] Case law has generally interpreted game mechanics, which includes D&D's system of rolling dice and adding modifiers (the "d20 system"), as processes and therefore outside of copyright protection.[136] Use of the d20 system absent any other D&D materials, therefore, is not copyright infringement.[137] The expression contained within the sourcebooks and modules of D&D, however, qualify as literary works for which WotC has registered copyrights.[138] Unlicensed use of that expression, therefore, is an infringement.[139] Thus, when DMs use settings, descriptions, and characters from sourcebooks and modules in their adventures, they might be infringing on WotC's copyright.[140] For example, reading verbatim the descriptions contained within a module out loud likely implicates the public performance right, as this would be a "recitation."[141] Therefore, when an actual-play series uses a module as the basis for its campaign, the series may be infringing on WotC's exclusive rights as the module's copyright owner.[142] As such, just by basing a campaign on a module, actual-play series creators could likely face liability.

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134. *See* 17 U.S.C. § 106; CURSE OF STRAHD, Registration No. TX0008273874.

135. *See* 17 U.S.C. § 102(b).

136. *See* Hoopla Sports & Ent., Inc. v. Nike, Inc., 947 F. Supp. 347, 354 (N.D. Ill. 1996) ("Courts have also held that 'games' themselves (as opposed to the cards, boards, instruction books, etc. with which games may be played) are not copyrightable.").

137. *See id.* Although, the term "d20 system" is a trademark of Wizards of the Coast. *See* D20 SYSTEM, Registration No. 2,630,360.

138. *See* Seaman & Tran, *supra* note 8, at 1637.

139. 17 U.S.C. § 106.

140. *See id.*; Seaman & Tran, *supra* note 8, at 1637; CURSE OF STRAHD, Registration No. TX0008273874.

141. *See* 17 U.S.C. § 101 ("To 'perform' a work means to recite, render, play, dance, or act it . . . ."); H.R. REP. No. 94-1476, at 63 (1976) ("To 'perform' a work, under the definition in section 101, includes reading a literary work aloud . . . .").

142. *See* 17 U.S.C. § 106; Seaman & Tran, *supra* note 8, at 1637; CURSE OF STRAHD, Registration No. TX0008273874.

However, elements of a module that fall under the *scènes à faire* doctrine do not create liability.[143] Under the *scènes à faire* doctrine, "stock scenes or scenes that flow necessarily from common unprotectable ideas" do not constitute infringement.[144] For example, the core themes in the D&D module *Curse of Strahd* are gothic horror, tragedy, and vampirism.[145] These themes are firmly rooted in the public domain and constitute ideas and stock elements rather than original expressions.[146] Expression that naturally follows from these themes, such as scenes involving eerie fog, shadowy taverns, or ominous castles, would fall under the *scènes à faire* doctrine.[147] Take a passage from the beginning of the *Curse of Strahd* adventure:

> Outside the tavern, a fog lies over the town this evening. The damp, cobbled pavement glistens as the lights of street lanterns dance across the slick stones. The fog chills the bones and shivers the soul of anyone outside. Yet inside these tavern walls the food is hearty, and the ale is warm and frothy. A fire blazes in the hearth, and the tavern is alive with the tumbling voices of country folk.[148]

This passage likely qualifies as *scènes à faire* because it adheres to the well-worn trope of adventurers meeting in a tavern, a common setup in fantasy TTRPGs.[149] Foggy, ominous streets and cozy taverns are genre conventions rather than protectable expressions unique to *Curse of Strahd*.[150] Because sections of modules likely reflect genre conventions that fall under *scènes à faire* doctrine, such as the *Curse of Strahd* passage discussed above, actual-play series that replicate only those elements are likely not liable for infringement. However, unique combinations or distinctive expressions of these elements, if copied directly, could still raise questions of infringement.[151]

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143. *See* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984) ("Under [the *scènes à faire*] doctrine, a second author does not infringe even if he reproduces verbatim the first author's expression, if that expression constitutes 'stock scenes or scenes that flow[ ] necessarily from common unprotectable ideas' because to hold otherwise would give the first author a monopoly on the commonplace ideas behind the *scenes a faire*." (quoting See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983))).

144. *See Landsberg*, 736 F.2d at 489 (quoting *See*, 711 F.2d at 143).

145. *See* CURSE OF STRAHD, *supra* note 34.

146. *See, e.g.*, Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 914 (7th Cir. 1996) ("The core scenes of *Romeo and Juliet*—the war between rival clans, developing love between children of the clans, death and reconciliation after the rejection of revenge—are in the public domain (and not only because Shakespeare borrowed freely himself)."); Hogan v. DC Comics, 48 F. Supp. 2d 298, 311 (S.D.N.Y. 1999) (stating that the concept of vampirism is in the public domain).

147. *See Landsberg*, 736 F.2d at 489.

148. CURSE OF STRAHD, *supra* note 34, at 18.

149. Sam Jarvis, *Dungeons & Dragons DMs: It's Okay to Start in a Tavern*, THEGAMER (Sept. 26, 2020), https://www.thegamer.com/dungeons-dragons-dm-tip-start-campaign-tavern/ [https://perma.cc/3UWX-C4D8].

150. *See* Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1015 (7th Cir. 2005).

151. *See Reed-Union Corp.*, 77 F.3d at 914 ("Situation comedies, soap operas, romance novels built on love triangles, these and more are cobbled together from staple themes; although the themes are not copyrightable, a unique combination of them is.").

To infringe WotC's reproduction right as it applies to modules, an actual-play series need only reproduce the protectable elements in their "total concept and feel."[152] A court considering whether an actual-play program reproduced WotC's protected expression would look to the features of the protectible elements of the module and whether the actual-play series had utilized elements substantially similar in design and function.[153] For example, an actual-play series that uses *Curse of Strahd*'s characters is likely to be found as infringing upon WotC's reproduction rights because the actual-play series would be copying protected elements of the module, just as the infringer in *Atari* copied the design and function of the characters in Pac-Man.[154] Therefore, when an actual-play series uses WotC's intellectual property, it is in danger of being held liable for infringement of WotC's reproduction right.[155]

An actual-play series may also infringe on WotC's copyright by violating WotC's derivative work right.[156] Derivative works include "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."[157] An actual-play series would violate WotC's derivative work right if the actual-play series qualifies as "derivative" of the module upon which it is based.[158]

For a work to be derivative it must satisfy two elements.[159] First, the work must fit into the statutory definition of a derivative work.[160]

152. *See* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982) (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)).

153. *Id.* at 618.

154. *See id.* at 619–20; Ari Szporn, *Strahd Is More than Dungeons and Dragons Dracula*¸ CBR (Mar. 15, 2020), https://www.cbr.com/strahd-is-more-than-just-dungeons-dragons-dracula/ [https://perma.cc/Z9QG-YWKH]. The popularity of *Curse of Strahd* is in part due to the unique and detailed backstory of its titular villain. *See* Szporn, *supra*.

155. *See Atari, Inc.*, 672 F.2d at 618.

156. *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 414 (9th Cir. 2018) ("A product of independent creation is distinguished from a copy in that it contains something which 'owes its origin' to the independent creator. A copy, on the other hand, is not a separate work, but a mere representation or duplication of a prior creative expression." (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884))).

157. 17 U.S.C. § 101.

158. 17 U.S.C. § 106 ("[T]he owner of copyright under this title has the exclusive rights to . . . prepare derivative works based upon the copyrighted work . . . .").

159. *See ABS Ent., Inc.*, 908 F.3d at 414.

160. *See* 17 U.S.C. § 101 (defining that derivative works include "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").

Second, the original aspects of a derivative work must be more than trivial.[161]

While actual-play series do not fit neatly into one of the derivative work categories enumerated in the statutory definition, they appear sufficiently analogous to a motion picture recreation.[162] In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the US Court of Appeals for the Second Circuit defined "transform" in the context of derivative works to mean remaking a work in "new mode of presentation."[163] By taking a module, acting it out, and adding an audiovisual element to its presentation (filming it), an actual-play series transforms a literary work into an audiovisual work.[164] Because an actual-play program transforms an original work into a new mode of presentation, it fits the statutory definition of a derivative work.[165] In addition, sequels and continuations also constitute derivative works, as held by the Ninth Circuit in *Micro Star*.[166] If a DM were to use the fictional location a module is set in, such as the countryside of Bavaria in *Curse of Strahd*, but design their own encounters in that setting, such usage would still likely constitute a derivative work because any resulting campaigns would be sequels or continuations to the *Curse of Strahd* story, just as the user-created levels in *Micro Star* were continuations of the Duke Nukem story.[167]

To constitute a derivative work, rather than a reproduction, the original aspects of a derivative work must be more than trivial, meaning there must be "distinguishable variation from preexisting works."[168] In most circumstances, obvious creative changes, such as those necessary to transform a literary work into a motion picture or dramatization, make this a simple inquiry.[169] It is only cases where the derivative work is intended as a direct representation of the original, such as

161. *See ABS Ent., Inc.*, 908 F.3d at 414 (quoting U.S. Auto Parts Net., Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1016 (9th Cir. 2012)).

162. *See id.* ("The casting, lighting, cinematography, props, editing, acting, and directing required to craft a movie from a screenplay, for example, easily render the movie distinct from the screenplay."); 17 U.S.C. § 101 (defining that derivative works include "*any* other form in which a work may be recast, transformed, adapted" (emphasis added)).

163. *See* Castle Rock Ent., Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998).

164. *See* Kalem Co. v. Harper Bros., 222 U.S. 55, 61–63 (1911) (explaining that dramatization is the "dramatic reproduction of a story").

165. *See Castle Rock Ent., Inc.*, 150 F.3d at 143.

166. *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) ("A copyright owner holds the right to create sequels, and the stories told in the N/I MAP files are surely sequels, telling new (though somewhat repetitive) tales of Duke's fabulous adventures. A book about Duke Nukem would infringe for the same reason, even if it contained no pictures." (citation omitted)).

167. *See id.*

168. *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 415 (9th Cir. 2018) (quoting Ent. Rsch. Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1223 (9th Cir. 1997)).

169. *ABS Ent., Inc.*, 122 F.3d at 414.

transforming a cartoon character into an action figure, that originality is hard to identify.[170]

The visual elements of an actual-play series contribute greatly to this prong, as well as the acting performed by the players and the DM.[171] In addition, the actual descriptions provided by the *Curse of Strahd* sourcebook are short, meaning the players' responses to those descriptions and the DM's subsequent responses must be longer to fill in the gaps of the story. Therefore, the required length of these responses should make the variations from the original work much more than trivial.[172] For instance, here is a scenario provided by the *Curse of Strahd* sourcebook:

> The woods are quiet this night, and the air grows chill. Your fire sputters as a low mist gathers around the edges of your camp, growing closer as the night wears on. By morning, the fog hangs thick in the air, turning the trees around you into gray ghosts. Then you notice these aren't the same trees that surrounded you the night before.[173]

Player responses to this scenario—dialogue, actions, and character decisions—would be entirely original.[174] Additionally, the module does not script the DM's responses to the players, leaving the DM to create unique descriptions and interactions.[175] The sheer volume of such original content, both from players and the DM, is far from trivial.[176]

As an aside, if an actual-play series were a licensed derivative work, all material separate from the module that is created by the players in the course of the series—such funny tangents, video clips, or characters would be owned by the players.[177]

Moving from the derivative work right to the public distribution right, actual-play series using modules likely do not infringe on WotC's

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170. *See id.* at 414–15.

171. *See id.* at 414 ("The casting, lighting, cinematography, props, editing, acting, and directing required to craft a movie from a screenplay, for example, easily render the movie distinct from the screenplay.").

172. *See generally* CURSE OF STRAHD, *supra* note 34, at 21.

173. *Id.* at 22.

174. *See ABS Ent., Inc.*, 908 F.3d at 414 ("In most circumstances, derivative works contain obvious creative contributions and so are easily recognizable as distinct from the underlying work. The casting, lighting, cinematography, props, editing, acting, and directing required to craft a movie from a screenplay, for example, easily render the movie distinct from the screenplay.").

175. CURSE OF STRAHD, *supra* note 34, at 19.

176. *See ABS Ent., Inc.*, 908 F.3d at 414.

177. 17 U.S.C § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."). It is important to note, if the Policy is found to be binding, a court may find that there was an implied license to create derivative works as long as they fall within the scope of the Policy. *See* Gracen v. Bradford Exch., 698 F.2d 300, 303–04 (7th Cir. 1983).

public distribution right because no copies of the module are being sold or transferred to the public.[178] An actual-play series does not sell identical or virtual identical copies of modules to the public, unlike the defendant in the *Dirkschneider* case selling copies of Pac-Man, Galaxian, and Rally-X.[179] As actual-play series do not sell or transfer ownership of copies of copyrighted works to the public, they likely do not infringe on WotC's public distribution right.[180]

While the public distribution right is likely not implicated, actual-play series creators using WotC's intellectual property may be infringing on WotC's public performance right. A court's analysis of this issue would likely hinge on whether playing a D&D module is more analogous to a video game or a board game.[181] If a D&D module is analogous to a board game, then based on the holding in *Allen*, playing D&D is not a public performance because "[w]hether privately in one's home or publicly in a park, it is understood that games are meant to be 'played,'" and allowing the copyright owner of a copyrighted game to disallow playing it would undermine the game's purpose.[182] Similar to a board game, D&D lacks the audiovisual elements of a video game, which courts have focused on when ruling that playing video game is a public performance.[183] Therefore, D&D could be analogous to a board game and playing it publicly would not constitute a public performance.[184]

On the other hand, if a court finds that TTRPGs are more analogous to video games than board games, the court may be inclined to rule that playing a module on camera is a public performance.[185] After all, when a player plays a D&D module, the player has an amount of control limited by the story's tone, plot, or other delicate story elements.[186] Therefore, the "control" players have over choices is limited in a similar way to video games, which the court in *Midway* found was a deciding factor in favor of infringement.[187] On the other hand, while D&D players are bound by the rules of the setting, as enforced by the

178. *See* Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 482–83 (D. Neb. 1981).

179. *See id.* at 483.

180. *See id.* at 482–83.

181. *Compare* Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996) ("[P]laying of a game is not a 'performance' within the meaning of the Copyright Act."), *with* Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989) (holding that playing a video game in public constitutes a performance).

182. *Allen*, 89 F.3d at 616 (internal quotations omitted).

183. *Red Baron-Franklin Park, Inc.*, 883 F.2d at 279.

184. *See Allen*, 89 F.3d at 616.

185. *See id.*; *Midway Mfg. Co.*, 704 F.2d at 1013.

186. Ashton Duncan, *Running Curse of Strahd for the First Time*, ROLL20 (Apr. 30, 2022) [hereinafter *Running Curse of Strahd*], https://pages.roll20.net/dnd/curse-of-strahd-tips-new-dm [https://perma.cc/C4LW-V5VN].

187. *See Midway Mfg. Co.*, 704 F.2d at 1012.

DM, their expression in exploring those rules through conversation is unscripted, meaning there is more freedom of choice than a typical video game.[188]

Further evidence of public performance infringement might be the DM "recit[ing]" certain environmental descriptions directly from the module, which is one of the examples of a performance enumerated by § 101 of the Copyright Act.[189] While the *scènes à faire* doctrine would render some direct recitations from a module not an infringement of the public performance right, if the recited content is unique enough, a court may find that the expression goes beyond a stock element, which would thus mean that *scènes à faire* would not apply.[190] Therefore, an actual-play series using a WotC module may infringe on WotC's public performance right.

The public display right is likely not being infringed because neither the module nor a copy of it is being "shown" visually.[191] The public display right analysis depends on the type of copyrighted work.[192] Modules are literary works; therefore, the analysis applied in *Miller* to computer software, which is also a literary work, also applies to D&D modules.[193] In *Miller*, the federal district court held that Facebook did not infringe upon a video game developer's public display right because the software's source code (the text of the literary work) was not on display on Facebook.[194] In an actual-play series, the module would likely not be on display because the adventure takes place in the imaginations of the players.[195] On the other hand, some DMs may use the illustrations in a module to set the mood or clarify a point.[196] Therefore, unless a DM publicly displays illustrations from the module,

188. Jerel Levy, *Dungeons & Dragons: How to Run Official D&D Published Adventures*, THEGAMER (Aug. 10, 2022), https://www.thegamer.com/dungeons-dragons-dnd-official-published-adventures-how-to-run/ [https://perma.cc/D9XV-2WE6].

189. 17 U.S.C. § 101 ("To 'perform' a work means to *recite*, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." (emphasis added)).

190. *See* Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 914 (7th Cir. 1996).

191. *See* 17 U.S.C. § 101 ("To 'display' a work means to *show* a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." (emphasis added)).

192. Miller v. Facebook, Inc., No. C 10-00264, 2010 WL 2198204, at *4 (N.D. Cal. May 28, 2010).

193. *See id.*

194. *Id.*

195. PLAYER'S HANDBOOK, *supra* note 5, at 6 ("Often the action of an adventure takes place in the imagination of the players and DM, relying on the DM 's verbal descriptions to set the scene.").

196. *Id.* ("Some DMs like to use music, art, or recorded sound effects to help set the mood . . . .").

the public display right is unlikely infringed upon because the module's text is not being shown to the public.

When an actual-play series uses a copyrighted module as the basis for its campaign, it likely infringes upon WotC's exclusive rights of reproduction, creation of derivative works, and public performance. An actual-play series may infringe on WotC's exclusive right to reproduce the work if the series uses the protectable elements of the module.[197] Additionally, the series likely is liable for infringement of WotC's derivative work right; an actual-play series adds an audiovisual element and the additional original material added by the players' discussions likely infringes on WotC's right to make continuations of its work.[198] Finally, WotC's public performance right may be implicated by an actual-play series' use of a module if a court finds that playing D&D is more similar to a video game than a board game.[199] This distinction is irrelevant, however, if the actual-play series uses direct recitations from the module, as direct recitations are statutorily an infringement upon the public performance right.[200]

C. Fair Use

An actual-play series' best defense against a claim of infringement is likely a fair use argument.[201] Fair use determinations require a four-factor balancing test derived from § 107 of the Copyright Act, the factors being: (1) the purpose and transformative nature of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the use; and (4) potential market harm to the copyrighted work.[202] As this Section will discuss, the fair use defense may protect actual-play series from infringement liability in some cases, but it is generally unlikely to apply.

The first fair use factor looks to the character and purpose of the use of the copyrighted material.[203] The commercial nature of the

197. *See* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 618 (7th Cir. 1982).

198. *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 414 (9th Cir. 2018); Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998).

199. *Compare Allen*, 89 F.3d at 616 ("[P]laying of a game is not a 'performance' within the meaning of the Copyright Act."), *with* Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989) (holding that playing a video game in public constitutes a performance).

200. 17 U.S.C. § 101 ("To 'perform' a work means to *recite*, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." (emphasis added)).

201. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

202. *Id.* at 577.

203. *Id.* at 578.

actual-play program weighs against a finding of fair use.[204] Courts tend to be more cautious about granting fair use in commercial settings because such uses typically aim to profit, which might interfere with the "monopoly privilege that belongs to the owner of the copyright."[205] A commercial venture is less likely to be deemed a fair use, compared to a noncommercial or educational use.[206] The commerciality of a work is not dispositive as to fair use, however.[207] Therefore, it is also necessary to look at whether the actual-play program's content is "transformative" in nature.[208] The *Curse of Strahd* module is often considered a framework for storytelling.[209] An actual-play series uses this framework to tell a unique story and entertain an audience of nonplayers, a purpose distinct from the purpose of the module itself, which is to inform a DM of the setting and how to run the module.[210] Transformative uses, especially those that add new expression or meaning, are more likely to be protected under fair use.[211] However, if an actual play is simply a direct recording of a group playing through a module with little alteration or creativity, it is harder to argue that the actual-play series' use is transformative.[212] Therefore, the first fair use factor weighs more in favor of WotC (and against a finding of fair use) because of the commercial nature of actual-play series, but could tip the other way depending on how transformative the series' program is.

The second factor is the nature of the copyrighted material.[213] *Curse of Strahd* is a highly creative work, which provides WotC with significant copyright protection.[214] Creative works like this module are afforded stronger protections under the Copyright Act, making it more challenging for a commercial actual-play series to claim fair use.[215] The fact that *Curse of Strahd* is a narrative-driven and highly structured work means that it is inherently more difficult to argue that the use is fair, as it relies heavily on the creative choices of the authors, such as

204. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 537 (2023) (stating a work's commercial nature "tends to weigh against a finding of fair use" (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985))).

205. *Harper & Row Publishers, Inc.*, 471 U.S. at 562 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

206. 17 U.S.C § 107.

207. *Campbell*, 510 U.S. at 584 ("In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.").

208. *Goldsmith*, 598 U.S. at 529.

209. Levy, *supra* note 188.

210. *See Goldsmith*, 598 U.S. at 529.

211. *Id.*

212. *Id.*

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

214. *See id.* ("[S]ome works are closer to the core of intended copyright protection than others . . . .").

215. *See* Stewart v. Abend, 495 U.S. 207, 237 (1990) ("[F]air use is more likely to be found in factual works than in fictional works.").

plot, character development, and world-building elements[216] (Although, some elements in *Curse of Strahd*—such as the use of gothic horror tropes—may fall under the *scènes à faire* doctrine.).[217] While the second fair use factor weighs against a fair use argument, mentioned in *Allen*, however, D&D is a game, and games are inherently meant to be played.[218] Therefore, while factor two weighs against fair use, the *purpose* of the work suggests that WotC should not be able to use copyright liability to limit how its game can be played and supports a fair use defense.[219]

The third factor asks whether "'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' are reasonable in relation to the purpose of the copying's purpose."[220] The amount and substantiality of the use will depend on the extent to which the actual-play series directly reproduces the *Curse of Strahd* module.[221] The amount and substantiality inquiry looks not only to the amount of expression from the original work copied, but also to the quality of what was copied.[222] If the series is largely improvisational and utilizes the module only as necessary, it would reduce the impact of this factor.[223] However, if the series closely follows the plot and scenes outlined in the module, utilizing the verbatim expression, it would likely weigh against a finding of fair use.[224]

The qualitative amount and substantiality analysis also looks to whether the copying included the "heart" of the copyrighted work.[225] In general, actual-play series might reproduce significant portions of a module (like the initial setting descriptions, encounters, and key plot points) to maintain continuity in gameplay.[226] If these sections are deemed the "heart" of the module (i.e., the most creative and original parts), use of those sections could tip the scales against fair use, regardless of the quantity of material used.[227] For *Curse of Strahd*, its

216. *See id.*
217. *See* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984).
218. Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996).
219. *Id.*
220. *Campbell*, 510 U.S. at 586 (quoting 17 U.S.C § 107(3)).
221. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565–66 (1985).
222. *Campbell*, 510 U.S. at 587.
223. *Id.* at 589 (holding that when "no more was taken than necessary," it weighed in favor of fair use).
224. *Harper & Row Publishers, Inc.*, 471 U.S. at 565 ("[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.").
225. *Id.*
226. Duncan, *Running Curse of Strahd*, *supra* note 186.
227. *Harper & Row Publishers, Inc.*, 471 U.S. at 565.

namesake villain is likely to be found to be the "heart" of the work.[228] As the villain Strahd is the catalyst behind the adventure, it is impossible to run *Curse of Strahd* without Strahd.[229] Therefore, any actual-play series running *Curse of Strahd* would also certainly be using the "heart" of the module, weighing against fair use. On the other hand, as noted by the US Supreme Court in *Campbell v. Acuff-Rose Music, Inc*, the character of the infringing work may permit the user to use more of the original than usual.[230] If the actual-play series is deemed to be sufficiently transformative and original, the amount of the module originally used may be less relevant.[231]

The final factor of fair use is "the effect of the use upon the potential market for or value of the copyrighted work."[232] This factor is an analysis of whether the infringing work serves as a substitution for buying the original work for the average consumer or usurps the market for potential derivative works.[233] There is an argument to be made that actual-play series pose a market harm to WotC. For example, watching an actual-play series playthrough of *Curse of Strahd* may dissuade a potential WotC customer from purchasing that adventure to play with their group at home, as they have already seen how the adventure plays out, thereby harming the market for modules.[234] As for usurping future derivative works, in the past, WotC has licensed specific groups to play D&D for various special events and live streams.[235] Therefore, there is a demonstrated market for licensing modules. By creating unlicensed derivative works with WotC's modules, actual-play series potentially harm that market by both saturating it and undermining WotC's ability

228. *See* Ashton Duncan, *Curse of Strahd Review*, ROLL20 (Nov. 27, 2024), https://pages.roll20.net/dnd/reviews/curse-of-strahd [https://perma.cc/FWM3-4HPZ] ("The adventure's true strength lies in its villain.").

229. Duncan, *Running Curse of Strahd*, *supra* note 186.

230. Dan Hagen, *Fair Use, Fair Play: Video Game Performances and "Let's Plays" as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245, 270 (2018) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994)).

231. *See id.* ("If playing a [video] game is understood to be transformative, then the amount of gameplay footage captured is ultimately irrelevant because it is a unique work.").

232. 17 U.S.C. § 107(4).

233. *Campbell*, 510 U.S. at 591–92.

234. *See* Hagen, *supra* note 230, at 271–72 ("[T]he video game rights holder must argue that the Let's Play video or performance takes the place of the video game to the average consumer. In other words, that people will refrain from purchasing the game if they can just watch someone else play it. This is why a rights holder might rely on the argument that the spoiling of story elements in gameplay videos might prevent potential purchasers from buying the game, because they can just watch the story unfold online.").

235. *See, e.g.*, Dungeons and Dragons, *LEGO Dungeons and Dragons Game Night*, YOUTUBE (Apr. 6, 2024), https://www.youtube.com/watch?v=6GkSDchj7uE&list=PLfS8QgUdeGYqOitqCs985gkGs2w2lKBSK&index=1 [https://perma.cc/34YR-7JXK]; Dungeons and Dragons, *An Astarion and Karlach Adventure: Love Is a Legendary Action*, YOUTUBE (Aug. 5, 2024), https://www.youtube.com/watch?v=Cn7XLBykzEU&list=PLfS8QgUdeGYr4vhX-bnhBdfr05VD2j9yw&index=74 [https://perma.cc/UD89-HBW3].

to license. On the other hand, every actual-play series is tonally unique and has varying levels of professionalism in production,[236] and independent actual-play series would probably create content that is distinct from the content WotC produces through licensed creators. Therefore, the actual-play series created by unlicensed creators may not be a market substitute for those created by WotC, but rather a distinct market of amateur and independent content.[237]

There is also an argument that actual-play series provide a market good to WotC. The use of WotC's modules provide free advertising for D&D.[238] The current popularity of D&D is often attributed to actual-play series.[239] Therefore, an argument can be made for actual-play series as a market good, even when they feature the unauthorized use of WotC's IP.

On the other hand, given that WotC is in the market for creating derivatives of its own D&D IP, unauthorized use of WotC's IP to create derivative works could be seen as a market harm.[240] In *Campbell*, the US Supreme Court held that "[e]vidence of substantial harm to [the market for derivative works] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals."[241] As explained above, actual-play series are likely derivative works and therefore could be in direct competition with WotC own derivative works. It is likely, then, that a court applying a fair use analysis to an actual-play series would find that WotC should be in control of the derivative work market.[242] Therefore, because of the harm caused by potential crowding of WotC's market for derivative works, it is likely that the market harm factor would weigh against actual-play series. Weighing the four fair use factors, therefore, it seems likely that fair use would generally not apply to actual-play series' use of WotC's IP. However, the fair use inquiry is fact-based and therefore heavily dependent on the specific actual-play series use.

Without fair use as a defense, actual-play series that use WotC's intellectual property without WotC's authorization could be held liable for infringement of WotC's exclusive rights under the Copyright Act. The limited license that WotC provides in its Policy to content creators is likely unenforceable, meaning that actual-play series have no

236. Hagen, *supra* note 230, at 259–60.

237. *Id.* at 272.

238. Christopher Cruz, *Streaming Is Introducing a New Generation to Dungeons and Dragons*, ROLLING STONE (Jan. 22, 2024), https://www.rollingstone.com/culture/rs-gaming/dungeons-and-dragons-tabletop-games-online-1234945297/ [https://perma.cc/G7QW-T354].

239. *See, e.g.*, *id.*; Parvini, *supra* note 2; DeVille, *supra* note 37.

240. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994).

241. *Id.*

242. *See id.*

safeguard in the license if WotC brings a copyright infringement action against them. In addition, even if the Policy is enforceable, an actual-play series could still be held liable for infringement of WotC's copyright if the series use of WotC's IP falls outside the limited scope of the license. Actual-play series that utilize WotC's intellectual property without authorization likely infringe upon WotC's § 106 reproduction right, its public performance right, and its derivative work right.[243] Generally, actual-play series will not be able to rely on the fair use defense, as the four factors likely weigh against a finding of fair use for actual-play series using WotC's modules. If actual-play series are held liable for copyright infringement, it could stunt a growing industry that is just now becoming mainstream.[244] To avoid this, a statutory solution to the infringement problem is necessary.

III. SOLUTION

The purpose of a game is to be played.[245] Although actual-play series' use of modules likely infringes on WotC's exclusive rights under the Copyright Act as the copyright owner of D&D, the actual-play series' infringement comes about by their use of the copyrighted work for its intended purpose.[246] In *Allen*, the Ninth Circuit held that a copyright owner's restriction on where and when a purchaser of the owner's copyrighted game could play placed an undue restraint on the consumer.[247] When arcade games faced the potential of public performance liability, Congress stepped in and amended § 109 of the Copyright Act to exempt coin-operated arcades from liability for infringement of the public performance and display rights.[248] Congress's stated purpose for its intervention was to "address[] an anomaly in current copyright law that prevents certain coin-operated equipment-electronic video games-from being used for their intended purpose."[249] D&D now faces a similar situation. It is undeniable that D&D modules are meant to be played. When a DM buys a module, they should be allowed to use that module for its intended purpose. The threat of copyright liability for use of a lawfully purchased module will ultimately dissuade actual-play series from using modules, making it

243. *See id.*
244. *See, e.g.*, Deville, *supra* note 37.
245. Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996).
246. *See id.*
247. *Id.*
248. 17 U.S.C § 109(e) ("[T]he owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment . . . .").
249. 136 CONG. REC. H133314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier).

more difficult to enter the actual-play industry. By enacting legislation that allows actual-play series to use modules in their content, Congress would be protecting a growing industry, as well as allowing consumers to use a product for its intended purpose.

As demonstrated in *Allen*, tabletop games exist in a different space than most copyrighted works.[250] In the past, the unique copyright situation of tabletop games led to the D&D community's heavy reliance on social norms and self-regulation rather than the legal system.[251] One prominent example is WotC's response to the public backlash it received after it revoked its OGL; the backlash, not legal action, lead WotC to adopt a creative commons license for its new sourcebooks.[252] As the D&D fan base grows and its content enters the mainstream, however, WotC's desire to monetize licensing may exceed its desire to please the D&D community.[253] As discussed above, WotC's current licensing regime leaves actual-play series open to copyright liability for unauthorized use of modules. However, while copyright liability is currently legal possibility, this liability is inappropriate in the context of the commercial playing of games as a form of content. According to the Ninth Circuit in *Allen*, consumers should be allowed to play the games they lawfully purchase.[254] Moreover, when the Fourth Circuit held in *Red Baron* that arcade machine operators were liable for public performance infringement, Congress stepped in to create a statutory exception.[255] Therefore, the most assured way to protect the actual-play series from copyright liability, then, is to create a statutory exception for actual-play series' use of modules.[256] Congress should create a broad exception for the commercial playing of games as a form of content.

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250. *See Allen*, 89 F.3d at 616 ("The term 'play' has not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers.").

251. Seaman & Tran, *supra* note 8, at 1683 ("While tabletop games are not a 'negative space' in the sense that IP does provides meaningful protection to game publishers, the limits of copyright and trademark law, along with the practical absence of patent protection, means that game designers have sufficient freedom to continue to create and innovate.").

252. *See* Gajjar, *supra* note 55; *see also* Chase Carter, *Dungeons & Dragons Will Release Its 2024 Ruleset Under a Creative Commons License*, DICEBREAKER (May 7, 2024), https://www.dicebreaker.com/games/dungeons-and-dragons-5e/news/dungeons-and-dragons-2024-srd-wont-be-another-ogl-fiasco [https://perma.cc/ME36-A473] (explaining that WotC has announced the new SRD will be released under an irrevocable creative commons license).

253. Downs, *supra* note 11. Similarly, Nintendo has demonstrated a willingness to crackdown on video game content creators, pursuing copyright takedowns against even non-monetized video creators. Hagen, *supra* note 230, at 265.

254. *Allen*, 89 F.3d at 616.

255. Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989) (holding that playing an arcade game constituted a public performance); 136 CONG. REC. H133314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier) ("Called the Red Baron controversy, the bill circumscribes the public performance right for the playing of electronic games.").

256. *See* 17 U.S.C § 109(e).

The use of a statutory amendment to protect an industry being harmed by copyright liability is not unprecedented. In *Red Baron*, the Fourth Circuit held that Red Baron, an arcade company, infringed on the copyright of Taito, a game developer, by using Taito's game *Double Dragon,* in Red Baron's arcades without a license.[257] Red Baron had lawfully purchased the games from an importer, but did not obtain a license from Taito.[258] The court disregarded this fact, holding that the because playing the arcade game in public constituted a public performance, Red Baron was required to obtain a license from Taito to operate *Double Dragon*.[259] Following the court's decision, Congress acted swiftly to protect the coin-operated arcade industry from copyright infringement with an industry specific amendment to the Copyright Act.[260] The exception entitles the owner of a lawfully purchased "electronic audiovisual game intended for coin-operated use" to public perform or display the work.[261]

For actual-play series, Congress could similarly make an exception that entitles the owner of a lawfully purchased game, including D&D modules, to play the game and create audiovisual derivative works. Unlike arcade games, which merely *perform* an audiovisual work,[262] actual-play series *create* an audiovisual work. Both, however, are commercial industries that rely upon a copyrighted work. The arcade industry was threatened by the possibility of copyright infringement for use of copyrighted work necessary to the industry's operation, arcade games, and Congress stepped in to ensure the safety of the industry.[263] In the case of D&D, Congress would similarly be stepping in to protect a growing industry and, additionally, would be protecting an industry that generates creative works, which is in line with the purpose of the Copyright Act.[264]

An exception like this would be in line with the reasoning in *Allen*, while still maintaining the other § 106 rights of a copyright owner.[265] The owner of a copy of a game would be able to use that copy

257. *Red Baron*, 883 F.2d at 279.
258. *Id.* at 277.
259. *Id.* at 281.
260. *See* 136 CONG. REC. H133314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier); 17 U.S.C § 109(e).
261. 17 U.S.C § 109(e).
262. *Red Baron*, 883 F.2d at 279.
263. *See* 136 CONG. REC. H133314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier); 17 U.S.C § 109(e).
264. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ([T]he ultimate aim [of the Copyright Act] is . . . to stimulate artistic creativity for the general public good.").
265. *See* Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996).

without undue place and time restraints, which was the primary concern for the court in *Allen*.[266]

The exception would be narrowly limited to only audiovisual derivative works of gameplay, so as to preserve the rest of the exclusive rights of copyright owners of TTRPG works. For example, WotC would still have the exclusive rights license other types derivative works of its intellectual property, such as a movie adaptation of *Curse of Strahd*.[267] Additionally, WotC would still be able to produce actual-play series of its own, but as discussed above, the series produced by WotC, as an "official" series, would cover a distinct market from an independent producer. Also, by limiting the exception to cover lawfully purchased modules, like the arcade exception in *Red Baron*, WotC could still profit from the sale of its D&D modules.[268] Arguably, the loss in licensing revenue could be made up for by the free advertising that actual-play series provide to WotC.[269] Therefore, a broad statutory exception similar to the one made for arcade games in *Red Baron* could shield actual-play series from copyright liability while still allowing copyright owners to capitalize on their § 106 rights.

IV. CONCLUSION

Actual-play series have provided WotC with free advertising for the last decade.[270] With the success of the D&D movie and the use of D&D characters in *Stranger Things*, however, licensing of WotC intellectual property is also incredibly profitable.[271] While its current licensing regime seems to provide freedom to actual-play series, the illusory nature of that security leaves actual-play series facing potential copyright liability for use of WotC's intellectual property.[272] This potential liability could damage a burgeoning industry just as it is entering the mainstream. The best way to ensure that this industry can continue its growth is for Congress to amend the Copyright Act to exempt commercial playing of games from copyright liability. A legislative copyright protection would be consistent with Congress's previous action protecting arcade machines in *Red Baron* and would codify the Fourth Circuit's holding in *Allen* that treating the playing of

266. *See id.*

267. *See* Scott Tong & James Perkins Mastromarino, *Hasbro CEO on the Future of 'Dungeons & Dragons' After 50th Anniversary*, WBUR (Apr. 3, 2024, 9:35 AM), https://www.wbur.org/hereandnow/2024/04/03/dungeons-and-dragons-hasbro [https://perma.cc/33W2-6WFR] ("[WotC] ha[s] some great Hollywood movies and TV shows in development or already produced.").

268. *See* Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989).

269. *See* Cruz, *supra* note 238.

270. *See id.*

271. *See* Downs, *supra* note 11.

272. *See, e.g.*, Deville, *supra* note 37.

a game as a public performance imposes an undue burden on consumers.[273] With the recent release of WotC's new sourcebooks heralding a new era for D&D popularity—and a new impetus for copyright infringement litigation against actual-play series—the sooner that Congress can act, the better.

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273. Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996).

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