

MODERN DEVELOPMENTS IN COPYRIGHT LAW AND THE GOVERNANCE OF E-SPORTS

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ABSTRACT

The development of the E-sports or electronic sports or competitive sports industry, both abroad and in India, has facilitated interesting debates and discussions centred on the scope and potential of regulation. India currently does not have an established legal framework to govern the industry. Copyright law seeks to confer on authors the ability to exploit and reap the benefits of their labour by granting exclusive rights in that regard. Certain problems have manifested with respect to the application of certain established principles of copyright law to the E-sports industry. This paper will provide an introduction to the issues encountered in the industry and will also analyse specific issues such as determination of authorship in the industry, the related issue of broadcasting rights and the right to publicity. With regards to the determination of authorship in the gaming industry, while the authorship of the game rests with the creator, allied issues such as avatar ownership and ownership of streamed content continue to spur academic debate with respect to the determination of true authorship. The right of publicity while not a statutory right has gained recognition primarily through the adoption of international principles by the courts in India. The availability of this right with reference to an online persona has gained significant relevance with the emergence of newer forms of video games that allow for increased player autonomy and control. The paper will also discuss the contemporary relevance of these issues and will seek to outline potential solutions for the same.

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I. INTRODUCTION

Electronic sports or E-Sports refers to a broad term which presently has no universally accepted definition,¹ and it is synonymously used with other terms like competitive gaming, etc. The concept broadly refers to an event or programme scheduled between two professional video game athletes, who often compete for large sums of money.² These programmes are usually broadcasted to an audience of millions of dedicated viewers. DreamHack, Mumbai was the first international tournament held in India and was subsequently followed by three international events in 2018. The prize pool in India rose from around USD500K to USD1.5M in 2019 a jump of around 180%.³ The broad definition or the lack thereof generally means that the term can also be construed to denote an informal event scheduled between two friends, with or without the involvement of monetary gains. The Indian E-sports industry was estimated to be valued at over 890 million USD in 2018, with projections suggesting that it will cross 1.1 billion USD by 2020 with an estimated 628 million users.⁴ The E-sports industry has evolved into a huge market and estimates show that the total revenue growth is expected to be around 1.5 billion USD by 2020. The industry also witnessed a sharp increase in its investments, going from around 490 million USD in 2017 to 4.5 billion USD in 2018.⁵

The sharp rise in both investments and revenue has largely occurred due to the ‘pop-culturalisation’ of E-Sports.⁶ The total worldwide viewership of E-sports was estimated to be at 454 million in 2017, which is expected to reach 646 million by 2023.⁷ France recently hosted an E-sports forum in 2018, which consisted of the International Olympics Committee (“**IOC**”) and the Global Association of International Sports Federation, where the IOC mentioned that it is

¹ James Gatto & Mark Patrick, *Overview of Select Legal Issues with eSports*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 427, 446 (2017).

² *Id.*

³ Indian Esports Prize Money Grew by 180% in 2019, *The Esports Observer* | home of essential esports business news and insights (2020), <https://esportsobserver.com/indian-esports-prizepool-2019/> (last visited May 24, 2020).

⁴ Suparna Dutt D’Cunha, *How Digital Gaming In India Is Growing Up Into A Billion-Dollar Market*, FORBES.COM (Mar. 19, 2018), <https://www.forbes.com/sites/suparnadutt/2018/03/09/how-online-gaming-in-india-is-growing-fast-into-a-billion-dollar-market/#35ba167455b6>.

⁵ Mariel Soto Reyes, *Esports Ecosystem Report 2020: The key industry players and trends growing the esports market which is on track to surpass \$1.5B by 2023*, BUSINESS INSIDER (Dec. 18, 2019), <https://www.businessinsider.com/esports-ecosystem-market-report?IR=T>.

⁶ *More Than a Video Game: How PUBG Mobile Became a Cultural Phenomenon in India*, *The Esports Observer* | home of essential esports business news and insights (2019), <https://esportsobserver.com/pubg-mobile-india-esports-primer/> (last visited May 28, 2020).

How eSports is Becoming Part of Pop Culture, Thriveglobal.com (2019), <https://thriveglobal.com/stories/how-esports-is-becoming-part-of-pop-culture/> (last visited May 28, 2020).

Mark Stock, *The Rise of eSports and Online Competitive Gaming* | *The Manual* (2019), <https://www.themmanual.com/culture/rise-of-esports-online-competitive-gaming/> (last visited May 28, 2020).

⁷ *Id.*

currently exploring the option of including E-Sports in the 2024 Olympics.⁸ The development of the gaming industry in India was fuelled by the ease of access to fast and high-speed Internet, and the popularity of games such as Player Unknown's BattleGround (PUBG), Fortnite, Dota 2 and Overwatch.⁹ The industry, which had remained rather dormant in India, saw a sharp rise in popularity in 2018 when India hosted 3 international competitions with an increase in the cash prizes from around 500 thousand USD to over 1.5 million USD in 2019.¹⁰ Similarly, Indian teams have also seen an increase in opportunities to participate in tournaments abroad due to increasing sponsorship programmes being offered from major tech companies like ASUS, etc.¹¹

Copyright laws refer to the protection accorded to works created out of the creativity of the author. The primary objective of the law is to ensure that the creators of a particular work are adequately rewarded against the potential risk of disclosure to the public. The author is allowed to exploit their work and reap the benefits of their labour under copyright laws.¹² Furthermore, the law also recognises situations where the use of such material is allowed and governed by laws such as fair use and precedents.¹³

Intellectual property rights in E-sports currently account for 14% of the total global revenue stream, with \$95.2 million spent on the acquisition of media rights in 2017 – an 81.5% increase from 2016.¹⁴ The need for systematic regulation of the industry echoes concerns regarding potential copyright infringement among other intellectual property rights issues. Academicians and scholars have argued that a strong legislative framework would curtail the prevalence of exploitative and anti-competitive practices within the industry¹⁵. The aim of this article is to analyse the growth and emergence of E-sports in relation to potential regulatory challenges with a special emphasis on issues surrounding copyright law.; Section II will analyse the problems relating to the definition of authorship rights; Section III will look at the scope of broadcasting rights; Section IV will further deal with whether players/athletes have the right of publicity, and the conclusion will deal with potential solutions to the issues enumerated herein.

⁸ *Paris 2024 Olympics: Esports 'in talks' to be included as demonstration sport*, BBC (Apr. 25, 2018), <https://www.bbc.com/sport/olympics/43893891>.

⁹ *The Exemplary Growth Of eSports In India*, INVENTIVA (Feb. 13, 2020), <https://www.inventiva.co.in/trends/inventiva/the-exemplary-growth-of-esports-in-india/>.

¹⁰ Shounak Sengupta, *Indian Esports Prize Money Grew by 180% in 2019*, THE ESPORTS OBSERVER (Jan. 13, 2020), <https://esportsobserver.com/indian-esports-prizepool-2019>.

¹¹ *Id.*

¹² Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29 (2012).

¹³ V.K. AHUJA, *INTELLECTUAL PROPERTY RIGHTS IN INDIA* (2nd ed., 2015).

¹⁴ Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J.L. & SOC. PROBS. 177, 224 (2019).

¹⁵ *Id.*

II. GAMING AND AUTHORSHIP RIGHTS- A COMPLICATED RELATIONSHIP

Article 1 of the Berne Convention of which India, is a signatory¹⁶, states that the countries to which the convention applies would constitute a union for the protection of the rights of authors in their literary and artistic works.¹⁷ Article 2 defines the terms ‘literary and dramatic works’ and provides that the protection shall operate for the benefit of the author and his successors.¹⁸ However, the term author, unlike the other terms, has not been defined in great detail in the Convention. The World Intellectual Property Organisation Guide to the Berne Convention clarifies that the Convention does not explicitly define the term ‘author’ due to the varied definition of the same under certain national jurisdictions.¹⁹ Under the common law system, a rather commercial and pragmatic approach²⁰ towards copyright law is adopted. The rationale is to reward those who spend their time, labour, effort, skill etc. in creating works which can be exploited,²¹ by the author, by way of reproduction, performance, etc.²²

A. Protecting Videogames

Section 2(d) read with Section 17 of the Indian Copyright Act 1957 (“Act”) broadly defines an author to be a person who is the original creator of the work.²³ The Act also protects the expression of an idea, rather than the idea itself. It is important that a work is not copied or appropriated from another author and that the thought is expressed.²⁴ In *Rediff.com India Ltd v E-Eighteen.com Ltd*,²⁵ the court held that the Act was not concerned with an original idea but with the expression of the thought.²⁶ Section 13(1) of the Act states that copyright subsists in any original literary, dramatic, musical and artistic work, but fails to establish a definition of originality. Originality is the basic yardstick used to determine whether an author is entitled to the protection of their work. The Indian test of originality follows a unique blend of the twin test

¹⁶ *Treaties and Contracting Parties*, WIPO.INT, https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=969C

¹⁷ Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.

¹⁸ *Id.*, at Art. 2(1) and (6).

¹⁹ WIPO, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 11 (1978) (ebook).

²⁰ GILLIAN DAVIES ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT (17th ed. 2016).

²¹ WILLIAM FISHER, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Stephen R. Munzer ed., 2001).

²² Gillian Davies et al., *supra* note 20.

²³ T. R SRINIVASA IYENGAR ET AL., COMMENTARY ON THE COPYRIGHT ACT (7th ed. 2010).

²⁴ V.K. Ahuja, *supra* note 13.

²⁵ *Rediff.com India Ltd v E-Eighteen.com Ltd*, 2013 (55) PTC 294 (Del), *University of London Press Ltd v University Tutorial Press Ltd*, (1916) 2 CH. D. 601.

²⁶ V.K. Ahuja, *supra* note 13.

of ‘sweat of the brow’,²⁷ and ‘modicum of creativity’.²⁸

In the case of *Atari Games Corp v. Oman*,²⁹ the United States (“U.S.”) Register of Copyright had decided to deny copyright protection to the creators of the video game, ‘*Breakout*’ on the ground that it lacked minimal creative artistic expression needed to grant protection. The same was upheld by the courts until it was subsequently overturned in the U.S. Court of Appeals.³⁰ The Court concluded that the emphasis must be on the overall flow of the game rather than the individual screens presented and the creative expressions found in the overall feel of the game include its audio-visual effects. The Court also held that, after the decision in *Feist Publications*,³¹ in which the threshold of creativity was set at a lower bar, a minimum standard of creativity is expected out of a person seeking such protection.³² In the case of *Feist Publications*,³³ the court had laid down three primary conditions for a work to be deemed as copyrightable; (i) the collection and assembly of pre-existing material- facts or data, (ii) selection coordination or arrangement of the same and (iii) the creation of an original work by virtue of the selection, coordination or arrangement. Protection is therefore accorded to works that have a *de minimis quantum* of creativity. Subsequent litigation in this domain led to the development of a dual standard of protection to video games. On one hand, the actual code of the game is copyrighted as literary work,³⁴ while the audio-visual displays and the series of sounds and screens being reproduced,³⁵ on the other are protected as audio-visual work.³⁶

In the Indian scenario, there exists a level of uncertainty with regards to whether or not video games fall within the ambit of section 2(f) of the Act which deals with cinematographic works.³⁷ The section defines a cinematographic film to include any work of visual recording, including the sounds involved, and it is construed to mean any work produced through a method or process

²⁷ *Indian Express Newspaper (Bombay) Pvt. Ltd. v. Jagmohan*, AIR 1985 Bom 229 (India).

²⁸ *Eastern Book Company and Ors. v. D.B. Modak and Anr.*, (2008) 1 SCC 1 (India).

²⁹ *Atari Games Corporation v. Ralph Oman*, Register of Copyrights. 888 F.2d 878 (1989)

³⁰ *Atari Games Corporation, Appellant, v. Ralph Oman, Register of Copyrights, Appellee*, 979 F.2d 242 (D.C. Cir. 1992)

³¹ *Feist Publ'n Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

³² *Id.*

³³ *Id.*

³⁴ *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 442 (4th Cir. 1986).

³⁵ Kyle Coogan, *Let's Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 381, 420 (2018).

³⁶ *Midway Mfg. Co. v. Artic Int'l Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983), cert. denied, 464 U.S. 823 (1983).

³⁷ Rishi Wadhwa, *Copyright Aspects in Videogames*, *LEXISNEXIS INDIA* (Sept. 13, 2016), <http://lexisnexusindia.blogspot.com/2016/09/copyright-aspects-in-videogames.html>.

analogous to cinematography.³⁸ It is yet to be seen whether a dual form of copyright similar to the process prevalent in the U.S. will be adopted or whether the scope of the section can be widened to include the same.³⁹ The honourable Delhi High Court in 2013,⁴⁰ had passed an *ex parte* injunction in favour of the plaintiffs, Sony Entertainment, by referring to the anti-circumventing laws provided under section 65A of the Act. It held that the defendants could no longer sell consoles of the plaintiff with certain changes made to the software because they were charging only a nominal fee to make these adjustments,⁴¹ and enabled a future purchaser to play the game at lower costs. This case seemingly reflected the need to address larger concerns regarding potential cases of infringement in the Indian gaming space with an urgent need for judicial clarity on the same. The adoption of this dual system while beneficial for large corporations especially in the budding E-sports industry in India could prove to be detrimental to smaller independent creators or players who would have to rely on gaining permission from these big corporations. This could explain why courts in India are hesitant to apply this form of duality. A part of the company's advertisement cost is covered by enthusiastic players who make videos, etc. widening the reach of the game. While the cost of creating this right is high if companies were to protect it, it would discourage use by smaller players due to the high cost they would be forced to incur ultimately reducing the reach of the game.

B. Who owns the game?

In cases surrounding interactive gaming, there is active participation of the players and they positively partake in the creation of the audio-visual screen.⁴² It could be argued that the player passed the minimum requirement of originality as laid down in the case of *Feist Publications*,⁴³ by proving that their specific actions have resulted in the creation of a newer output than what was originally presented. In the case of *Midway Manufacturing v. Artic International, Inc.*,⁴⁴ the Court looked at whether the actions of a player to cause a particular change would be enough to consider the same to be the work of the player, and not that of the game owner. The Court answered this in the negative and concluded that the player lacks the control to bring about a

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Sony Computer Entertainment v. Harmeet Singh*, 2012 (51) PTC 419 (Del).

⁴¹ Ashutosh Mishra, *Intellectual Property in the Videogame Industry- With Comparative Analysis of PUBG and Fortnite*, IPLEADERS BLOG (Dec. 11, 2019), <https://blog.ipleaders.in/intellectual-property-videogame-industry>.

⁴² Coogan, *supra* note 35

⁴³ *Feist*, 499 U.S. at 345.

⁴⁴ *Artic Int'l Inc.*, 704 F.2d at 1011.

change that exists beyond the defined and limited space of the game.⁴⁵ In subsequent cases, the Court also held that the creativity of the player largely depends on the scope defined by the source material of the code of the game.⁴⁶ Finally, the court concluded that the company was entitled to copyright protection despite the existence of user interaction. While this rationale may find modern relevance, the applicability is immensely dependent on the kind of game that is being adjudicated upon. Games like *MineCraft*,⁴⁷ and *World of Warcraft*,⁴⁸ are marketed on the basis of the limitless nature of these games.⁴⁹ Users are encouraged to engage in, and create worlds that are uniquely defined to their personal tastes and standards. The question before the courts now is multifaceted, as it depends on the nature or the kind of game so developed, and the level of originality exhibited thereunder. The court might either consider the broad themes and plots of the game to constitute the ground for granting protection, or it can consider the entire sequence of screens as a complete entity in itself and grant protection on that basis.⁵⁰ A pertinent issue with regards to allowing for such monopolisation is the potential that the scope of the game would be limited and narrowed down. Additionally, enforcing such standards would also prove to be a massive hurdle, which would require the creation of tools, or algorithms that could effectively single out cases of infringement, which would be a huge cost, that the companies would be forced to incur.

C. Avatar Ownership and Originality

Another interesting facet of originality and authorship is with reference to the ownership of avatars or the in-game character used to represent the player.⁵¹ In the article titled '*Who Owns an Avatar? Copyright, Creativity and Virtual Works*',⁵² the author has talked about four broad aspects of an avatar- as being the distinctive visual appearance, the abilities, the behaviour and the dialogues spoken by the avatar.⁵³ Games are developed with a variety of avatars, including pre-generated and customisable avatars. The determination of authorship, in such a situation will be based on the level of control and autonomy attributed to the individual player. Some academicians believe

⁴⁵ *Id.*

⁴⁶ *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 279 (4th Cir. 1989).

⁴⁷ Tom Stone, *How to Minecraft*, MINECRAFT (Feb. 23, 2017), <https://www.minecraft.net/en-us/article/how-minecraft>.

⁴⁸ *Game Time-World of Warcraft*, BLIZZARD ENT., <https://us.battle.net/shop/en/product/world-of-warcraft>

⁴⁹ *Id.*

⁵⁰ Coogan, *supra* note 35.

⁵¹ Michael McTee, *E-Sports: More than Just a Fad*, 10 OKLA. J.L. & TECH. 1, 27 (2014).

⁵² Tyler T. Ochoa, *Who Owns an Avatar?: Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 961-62 (2012).

⁵³ *Id.*

that, in case of customisable works, the company grants implied permission to the players to create derivative works,⁵⁴ while others argue that the player is the joint owner of the avatar along with the company.⁵⁵ Again, the creation of the avatar is based heavily on the tools made available to the player. In the article mentioned above, the author argues that if the avatar is a pre-existing work or one where the tools allow for minimal customisation, then the work could be construed to be a derivative work. However, if the tools are relatively complex and provide for the creation of a ‘*substantially different*’ avatar from the pre-generated version, then the status of joint authorship must be accorded to the player, as it is an original and creative work.⁵⁶ Whether or not it's actually protected and how this protection plays out in an online space is also very relevant. With the increasing popularity of the games and the possibility of only finite options for customisation, it would be impractical to give protection based on finite options.

D. Licensing Issues

Game publishers have been traditionally considered the authors of the game,⁵⁷ and therefore, also the authors of the specific E-sport created around their game. These publishers could use the guaranteed intellectual property rights on their game to exert control on the production, distribution or broadcasting of their game.⁵⁸ However, the broadcasting of these tournaments is predominantly done online by organisers who may not be the owners of the game. This has resulted in the creation of a situation wherein there is a lack of a clear definition of ownership among the various stakeholders, organisers, players, etc.⁵⁹ Video games are usually licensed and not sold. With regards to online games, the terms of the license are detailed in the terms and conditions provided on the game.⁶⁰ In most cases concerning offline access where a game is downloaded, parties resort to an End User Licensing Agreement. This agreement is entered into between the licensor and the purchaser with clear stipulations as to the rights accorded to the purchaser.⁶¹ The author determines the terms of licensing⁶² and imposes limitations like non-

⁵⁴ Dan L. Burk, *Owner E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1547 (2013).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ANDY RAMOS ET AL., *THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES* 89-91 (2013).

⁵⁸ Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating ESports*, 26 U. MIAMI INT'L & COMP. L. REV. 499, 524 (2019).

⁵⁹ *Id.*

⁶⁰ James Gatto & Mark Patrick, *Overview of Select Legal Issues with eSports*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 427, 446 (2017).

⁶¹ *Id.*

⁶² *Video Games and the Law: Copyright, Trademark and Intellectual Property*, NEW MEDIA RIGHTS (Nov. 19, 2018), https://www.newmediarights.org/guide/legal/Video_Games_law_Copyright_Trademark_Intellectual_Property.

transferability and *bona fide* use by the purchaser. Therefore, any broadcast or stream in violation of such terms of the agreement will be an infringement of the author's rights.

III. BROADCASTING RIGHTS

The issue of broadcasting rights is closely connected to the aforementioned discussion on authorship. While E-sports is similar to traditional sports in the sense that there are strict rules governing the game, it involves strong emotional ties and there is a constant need for high-quality coverage, it still faces a unique set of problems.⁶³ Viewers may develop a much more intimate relationship with the game at hand, either as players themselves or as dedicated viewers of 'walk-through' and 'let's play' videos.⁶⁴ Further, the tournaments heavily focus on the movement of each individual player and require constant monitoring of players. This necessitates the presence of several high-quality cameras. The E-sports industry is witnessing an increase in expenditure, touching around \$700 million in 2016, showing a growth of over 40% from the preceding year.⁶⁵ The entire streaming market for video games, including both live streaming and video-on-demand, is estimated to be over \$4 billion.⁶⁶ Therefore, disputes over broadcasting rights have slowly emerged as a subject matter for increased litigation.

One of the biggest cases occurred in 2010 between Blizzard Entertainment, Inc., the company behind many successful games like *Overwatch* (2016), and the Korea e-Sports Association (KeSPA).⁶⁷ The two entities had a dispute concerning the broadcasting rights over *StarCraft*, another exceptionally popular game. KeSPA argued that they had broadcasted the tournaments for years and were in a way responsible for the success of the game, whereas Blizzard contended that they were the owners of the game and hence had undisputed rights over the same. The matter ended with the suit being settled out of court with Blizzard retaining its rights.⁶⁸ Authorities at KeSPA had argued that *Starcraft* and other similar games existed in the public domain and therefore must be accessible to all. Blizzard thus had no right to deny or restrict

⁶³ Laura L. Chao, *You Must Construct Additional Pylons: Building a Better Framework for Esports Governance*, 86 FORDHAM L. REV. 737 (2017).

⁶⁴ Will Waters, *The challenges of esports broadcasting*, TVBEUROPE (Jan. 3, 2019), <https://www.tvbeurope.com/features/the-challenges-of-esports-broadcasting>.

⁶⁵ NEWZOO, 2017 GLOBAL ESPORTS MARKET REPORT 13 (2017), http://resources.newzoo.com/hubfs/Reports/Newzoo_Free_2017_Global_Esports_Market_Report.pdf [<https://perma.cc/B7Y4-L7RM>].

⁶⁶ See, *Market Brief: Gaming Video Content*, SUPERDATA, <https://www.superdataresearch.com/market-data/gaming-videocontent-2015/> <https://perma.cc/XK37-KWZA>.

⁶⁷ Blizzard vows to take MBC to court, koreatimes (2010), http://www.koreatimes.co.kr/www/news/tech/2010/12/133_77381.html

⁶⁸ Stephen Ellis, *IP law, broadcasting rights and esports*, ESPN (Jan. 25, 2016), https://www.espn.in/esports/story/_/id/14644531/ip-law-broadcasting-rights-esports.

access merely because they were the creators of the game. The COO of Blizzard at the time had strongly retaliated against this sentiment by stating that the company had invested a significant amount of money in developing the game and must, therefore, be allowed to reap the benefits of their hard work. Taking away any opportunity to monetise or deny the intellectual property rights of the creators would disincentivise other creative pursuits.⁶⁹

Another issue cropped up in 2015, when a user on Twitch.tv, which is a live streaming service popularly used for video game streaming, created a channel called ‘SpectateFaker’ and exploited a feature in the game *League of Legends*. The channel allowed any solo queue game to be viewed exclusively through the game’s software, by anyone with a *League of Legends* account.⁷⁰ It automatically streamed any matches in which player Lee ‘Faker’ Sanghyeok was playing. This raised concerns as Faker had already signed a contract with the streaming service Azubu to exclusively stream on their site.⁷¹ Azubu then attempted to issue a Digital Millennium Copyright Act (DMCA) takedown order against Twitch. As per precedent, however, the video game owner’s rights can be extended to include the audio-visual displays created out of their original work (derivative works).⁷² So, in essence, the only entity capable of initiating a claim against ‘SpectateFaker’ was Riot Games, the owner of the game and not Azubu despite their existing contractual obligations with Faker.⁷³ Eventually, Riot Games got involved and issued a takedown order against ‘SpectateFaker’.

In conclusion, broadcasting companies are at constant loggerheads in order to figure out ways to stand above the competition and the area of broadcasting is expected to get even more complicated with the advancements in technology. These deals are also expensive, for instance, the 90 million USD deal between Twitch and Activision Blizzard for exclusive streaming of the *League of Legends* tournament for a period of two years.⁷⁴ The notion of exclusivity can also be challenged on two broad fronts; the social repercussions of conferring such a right and the practical feasibility in terms of enforcement. While it is essential that companies are given the rights that are due to them, allowing a company to charge a fee when the nature of video games

⁶⁹ Report: Blizzard suing over Korean StarCraft broadcast rights, Engadget.com (2010), <https://www.engadget.com/2010-12-04-report-blizzard-suing-over-korean-starcraft-broadcast-rights.html>

⁷⁰ Coogan, *supra* note 35.

⁷¹ *Id.*

⁷² Susan K. Bennett, Copyrights and Intellectual Property - Portions of Video Games May Constitute Protected Property. (Atari, Inc. v. North American Philips Consumer Electronics Corp.), 66 Marq. L. Rev. 817 (1983).

⁷³ James Gatto et.al., *supra* note 60.

⁷⁴ Esports Bar & Newzoo, *Understanding Media Rights in Sports* (2019), https://resources.newzoo.com/hubfs/Reports/Newzoo_Esports_Bar_Understanding_Content_Rights_in_Esports.pdf.

is social and inclusive bothers many. Secondly, as seen in the SpectateFaker case, the enforceability of the terms of a contract is marred by the opportunities posed by the internet especially in terms of the ease in which it can be replicated thereby incurring a high enforcement cost.

IV. RIGHT OF PUBLICITY

The right of publicity or publicity rights essentially recognise the value that subsists in the being of a person and grants the right to control the commercial use of ones' name, image, identity or likeness.⁷⁵ It provides a cause of action when a person or entity uses the protected identity without permission.⁷⁶ This right is recognised in national as well as in international intellectual property jurisprudence. In the case of *White v. Samsung Electronics America, Inc.*,⁷⁷ The plaintiff in this case was a popular TV show hostess who sued the defendant for the use of a robot in an advertisement that closely resembled her. The court recognised the right of the plaintiff to exploit her commercially marketable celebrity identity.

In *Titan Industries v. M/s Ramkumar Jewellers*,⁷⁸ the Delhi High Court granted a permanent injunction in the favour of the plaintiff against the defendant's unauthorised use of an identical advertisement board. It stated that the couple enjoys a special celebrity status and are entitled to control the use of that identity, to ensure that it is not used to their detriment. The right of publicity in India like abroad stems from the right of privacy, which is enshrined under Article 21 of the Indian Constitution.⁷⁹ In the case of *R Raja Gopal v. State of Tamil Nadu*,⁸⁰ the court recognised the right of publicity as part of the right to privacy and concluded that an individual's right is violated when their image or likeness is used without their consent.⁸¹ In India, the tort of passing off is also commonly used when it comes to matters regarding the right of publicity. Liability was initially fixed to uses of a person's name, likeness, or image; however, the scope of the right has expanded in common law jurisdictions to include the concept of 'persona'.⁸² The

⁷⁵ Kumar Anjani, *India and Right of Publicity*, BANANAIP COUNSELS (Apr. 28, 2019), <https://www.bananaip.com/ip-news-center/india-and-right-of-publicity>.

⁷⁶ Jennifer E. Rothman, *E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property*, 161 U. PA. L. REV. 317, 330 (2012).

⁷⁷ *Vanna White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

⁷⁸ *Titan Indus. v. Ramkumar Jewellers*, 2012 (50) PTC 486 (Del).

⁷⁹ M. Sai Krupa, *Personality Rights In Indian Scenario*, MONDAQ (Feb. 27, 2018), <https://www.mondaq.com/india/Intellectual-Property/677226/Personality-Rights-In-Indian-Scenario>.

⁸⁰ *R. Raja Gopal v. State of Tamil Nadu*, 1995 AIR 264.

⁸¹ *Id.*

⁸² Adam Levy, *PWND Or Owned - The Right of Publicity and Identity Ownership in League of Legends*, 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 163, 183 (2016).

term ‘persona’ covers anything that can be linked to the personality of the identity holder.⁸³ The defendant will also be held liable for the causation of a mere mental association with the personality of the identity holder.⁸⁴

With reference to E-sports, the doctrine is applicable in a rather abstract way. With advancements in technology, the definition of ‘persona’ has adopted a variety of meanings and its scope is wide.⁸⁵ In her work, ‘*Raising the Stakes: E-Sports and The Professionalization of Computer Gaming*’,⁸⁶ the author suggests that each player has a distinctive style of playing that adds to the uniqueness of each player. She argues that a player’s right of publicity must be extended to include these playing styles and strategies, in order to prevent appropriation by other players. Given that the industry is built on having players build a large following based on their personality and skill, the protection of such player specific strategies does not seem far-fetched.⁸⁷ Perhaps the biggest issue with the adoption of such a right is that the monopoly right so granted would be too extreme. It would ensure that any future player who is a fan of an established and well-known player would not be able to use such skills even if it was *bona fide*.⁸⁸ The mere possibility that a specific thing might connote likeliness to another thing must not be the sole basis on which the protection is accorded.

Another connected issue is with reference to the ability of individual players to license their right of publicity.⁸⁹ Individual players find it hard to license their rights in the absence of adequate bargaining powers when confronted with large corporate entities. Companies such as *Riot Games*, have created tournaments that are of high standards, through large investments, which makes reproduction by smaller entities almost impossible. Players then feel compelled to enter into contracts with strict terms such as the assignment of their right of publicity to the team and in turn to their sponsors.⁹⁰ The potential solution to the issue would be to educate the players on the availability of certain rights and options and the creation of such regulations which would effectively tackle the same.

The right of publicity grants protection to the commercial value of a celebrity’s identity and

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ T.L. TAYLOR, *RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING* 109-10 (2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*; Newzoo, *supra* note 74.

⁹⁰ *Id.*

prevents unauthorised commercial use of the same.⁹¹ In his dissenting opinion,⁹² J. Kozinski noted that overprotecting a right is as equally harmful as under protecting it. New creators build and expand on the works created before them, overprotecting a right would stifle creativity. In the context of E-sports, if there are a limited number of moves and steps or particular ways in which a game is played, it would become extremely difficult to define infringement in an appropriate manner without negatively impacting the ability of other players to access and enjoy the game.

V. CONCLUSION

The rise of the E-sports industry has catapulted the world into a host of new issues which require intervention by the law.⁹³ The argument in support of a regulatory framework is, essentially centred on the State's responsibility to establish such institutions that ensure non-exploitation and fair use in this industry.⁹⁴ Researchers have identified a myriad of issues that will soon find its way into the Indian market if they already do not exist. These issues range from online gambling,⁹⁵ and doping⁹⁶ to anti-competitive practices by game owners.⁹⁷

This paper has focused exclusively on the issue of copyright infringement within the larger scheme of the E-Sports industry. Copyright law has knowingly created and sustained conflict between those who create a particular work and those who wish to access, use and expand on the copyrighted works.⁹⁸ As discussed above, the scope of the requirement of originality has been widened due to revolutionary changes in technology and possesses its unique set of issues vis-a-vis the issues of avatar ownership, the right to publicity and broadcasting rights. These conflicts went largely untraceable due to the private nature of certain cases of infringement such as those done in the confines of one's home. With the advent of the internet, copyright infringement has now become more traceable, visible and blockable.⁹⁹ In his article '*Owning e-*

⁹¹ White v. Samsung Elecs. Am, *Law School Case Brief*, , LEXISNEXIS.COM, <https://www.lexisnexis.com/community/casebrief/p/casebrief-white-v-samsung-elecs-am>.

⁹² Vanna White v. Samsung Elec. Am., Inc., 989 F.2d 1512 (9th Cir. 1993).

⁹³ McTee, *supra* note 51

⁹⁴ Katherine E. Hollist, *Time to Be Grown-Ups about Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 848 (2015).

⁹⁵ Matthew R. Tsai, *Fantasy (E) Sports: The Future Prospect of Fantasy Sports Betting amongst Organized Multiplayer Video Game Competitions*, 6 UNLV GAMING L.J. 393, 419 (2016).

⁹⁶ John T. Holden et al., *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD. J. INT'L L. 236, 273 (2017).

⁹⁷ Miroff, *supra* note 14.

⁹⁸ Rothman, *supra* note 76.

⁹⁹ *Id.*

Sports: Proprietary Rights in Professional Computer Gaming,¹⁰⁰ the author Dan Burk contends that the advancements in the industry need to be addressed through specific legislation designed to this effect, which can be brought about via amendments to the existing laws. The E-sports industry is ever-evolving and since the law is rather reactionary and rarely adopts a precautionary approach, the present system might fail to account for the series of advancements in an appropriate manner. A potential immediate solution to the issues enumerated in the article could be the expansion of the current legal system to adequately account for these changes.

Any law that attempts to regulate the industry might overstep its boundaries and may encroach upon the domain of an individual's personal life. For instance, the ease of access provided by the internet, on the one hand, makes it easier to trace and figure out cases of infringement. On the flip side, it has the potential of causing severe damage to fair use laws,¹⁰¹ as takedown orders can be communicated and enforced in a quicker manner. An expansion of the existing framework on copyright law in India would ensure that the matters are adjudicated in a nuanced manner giving due regard to the factual matrix of the case at hand.

¹⁰⁰ Burk, *supra* note 54.

¹⁰¹ Rothman, *supra* note 76.