

OWNERSHIP OF INTELLECTUAL PROPERTY IN E-SPORTS: PUBLISHER OR PLAYER

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Abstract

Constantly sitting in front of a computer and playing e-sports games? E-sports is a popular and growing form of entertainment. The COVID-19 pandemic has made e-sports more profitable with Dream 11, PUBG, League of Legends, E-premiere league, E-formula one, etc. becoming an alternative to the traditional sports industry. The e-sports competitions are mainly run through computer game software that is itself the subject of various intellectual property rights. But the most important and controversial question arises, who has the ownership of those intellectual properties? Does the publisher have it or does the player? Mainly there are three essential stakeholders in e-sports which are very similar to traditional sports, namely, the Publishers, the Organizers of tournaments, and lastly the players. Generally, it is the publishers of the game who claim sole ownership of the game's intellectual property. However, there have been incidents where the players have asserted due ownership associated with the game played. The first section of this paper provides a brief introduction to e-sports, how intellectual property is related to e-sports, and its recent advancements. The second section gives a brief background description of how e-sports is different from traditional sports like soccer, cricket, baseball, etc. The third section broadly portrays the interrelation between Intellectual property and e-sports. The fourth section describes the various proprietary rights in e-sports. Lastly, the fifth section elucidates whether the owner of the intellectual property rights should be given to publishers or the player.

Keywords: Ownership, Intellectual Property, Publishers, Traditional, Proprietary.

1. Introduction

Electronic Sports, also popularly known as e-sports is the latest and rapidly growing form of entertainment in which players at the pinnacle of their abilities compete

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for recognition and prizes. E-sports are originally video games that are played in an extremely organized competitive environment. However, e-sports are competitive as in human-vs-human, which is different from conventional video gaming, and typically has a wide engaging spectator component. In a short span of time, e-sports has gained its position as a highly competitive, most-viewed entertainment industry. This industry is not something new. It can be traced back to the era of video games that is the 1980s.¹

In 2021, the global revenue generated by e-sports has reached 1 billion USD and it is further predicted to produce 1.6 billion USD by 2024.² Additionally, the e-sports industry has experienced a rise in recent years as more and more fans tune in to watch some of the top players in the world compete in their favorite games. Over 318 million e-sports fans are anticipated to exist worldwide by 2025, a considerable rise from 215.2 million in 2020. In addition to that, by 2025, it is anticipated that 322.7 million individuals would occasionally watch e-sports.³ The growth of e-sports has become such a phenomenon that the International Olympic Committee (IOC) has declared that e-sports or video games could qualify as a sport.⁴

Furthermore, it appears that there is also an integration of sorts between mainstream sports and e-sports. Apart from the enormous success of the “traditional” e-sports games based on the First-Player Shooter (FPS) as well as Multiplayer Online Battle Arena (MOBA) formats, for instance, Dawn of the Ancients 2 (DotA 2) Counter-Strike League of Legends (LoL), etc, the mainstream sporting events such as FIFA has its own unique e-World Cup, where the 32 best FIFA18 Xbox and PlayStation players compete to be crowned the FIFA e-World Cup Champion.⁵ This has furthered the development of

¹ Keith Stuart, “The 15 greatest video games of the 80s – ranked!”, *The Guardian*, available at: <https://www.theguardian.com/games/2021/may/27/the-15-greatest-video-games-of-the-80s-ranked> (last visited on January 12, 2023).

² Tony Maglovski, “15 Exciting E-sports Statistics” *Reviewlution*, available at: <https://reviewlution.ca/resources/esportsstatistics/#:~:text=But%20if%20we%20look%20at%20esports%20statics%20from,grow%20to%20a%20mind-blowing%20US%241.6%20billion%20in%202024> (last visited on January 12, 2023).

³ Christina Gough, “e-sports audience size worldwide from 2020 to 2025, by type of viewers” *Statista*, 27 July 2022, available at: <https://www.statista.com/statistics/490480/global-e-sports-audience-size-viewer-type/> (last visited on January 17, 2023).

⁴ “Esports: International Olympic Committee considering esports for future Games”, available at: <https://www.bbc.com/sport/olympics/41790148> (last visited on January 13, 2023).

⁵ Arnav Bishnoi and Achint Johri, “Different Strands of IP on Sports and eGaming Industry: Exploring the Horizons”, 9 *CNLU Law Journal* 98 (2020).

the e-sports concept and its widespread acceptance among the following generation of sports fans.

However, along with e-sports' rapid expansion came a number of legal issues that, if not resolved, may seriously impede the industry's ability to expand. E-sports are fundamentally creative works created by different game publishers, making them subject to intellectual property laws' protection. The intellectual property used in e-sports generates significant sponsorship and broadcasting revenue for players, publishers, as well as tournament organizers.⁶ There are multiple hindrances that overrule both publishers and players as the lack of a proper IP strategy in e-sports has a possibility to infringe both of their IP rights. Nevertheless, the lack of a proper legal regulatory system regarding the control and ownership of the intellectual properties involved in the e-sports industry may cause huge complications in its growth.⁷ Thus, it has become very necessary to determine the ownership of the IP rights in respect of e-sports of both the publisher of the game as well as the players.

2. E-Sports versus Traditional Sports

With an estimated 4 billion fans worldwide, soccer is the most popular sport and cricket comes in second with an estimated 2.5 billion fans worldwide.⁸ However, People always look forward to something new and entertaining. An example that can be taken here is the development of e-sports. Traditional sports have had a huge fan base for centuries. However, sports enthusiasts are now shifting towards the expanded versions of sports, or the alternative world of sports popularly known as an e-sport. Some of the top-rated games that dominate the e-sports industry are Fortnite, Overwatch, DOTA 2, League of legends (LOL), and PUBG.⁹ Despite having just under five hours of action, in 2019, the Fortnite World Cup Solo Finals reached a total hours watched mark of 1.8 million

⁶ Roman Brtko, "Intellectual Property in the World of Esports", *IPWatchdog*, available at: <https://ipwatchdog.com/2018/04/02/intellectual-property-esports/id=95245/> (last visited on January 17, 2023).

⁷ Karthik Venkataraman, "E-sports and Underlying Intellectual Property" *IPleaders*, available at: https://blog.ipleaders.in/e-sports-underlying-intellectual-property/#_ftnref3 (last visited on January 19, 2023).

⁸ "Top-10 Most Popular Sports in the World 2023", available at: <https://sportytell.com/sports/most-popular-sports-world/> (last visited on January 18, 2023).

⁹ Tony Brown, "WHAT TO EXPECT FROM THE ESPORTS INDUSTRY IN 2022" *Gamespace.com*, 31 January 2022 available at: <https://www.gamespace.com/all-articles/news/what-to-expect-from-the-esports-industry-in-2022/> (last visited on January 19, 2023).

viewers.¹⁰ This statistic is frequently used to gauge how popular esports are. According to Newzoo's 2020 Global Esports Market Report, there were an estimated 495.0 million esports fans worldwide in 2020, an increase of 11.7% over the previous year.¹¹ In addition to that, there will be 646 million esports enthusiasts worldwide by 2023, with occasional viewers i.e., individuals who watch professional esports content over once a month, and esports enthusiasts i.e., individuals who watch professional esports content beyond once a month, each increasing in number from 245 million to 351 million and 198 million to 295 million between 2019 and 2023, respectively.¹²

E-sports tournaments and competitions are basically multiplayer video game competitions between professional players.¹³ Both industries have certain similarities and certain differences. Traditional mainstream sports such as football, basketball, cricket, and so on, have been developed over years, and thus, it has well-framed and established rules and regulations whereas e-sport is still evolving based on the market trends and entertainment factor. The games under e-sport tend to follow the rules of traditional sports which goes futile. It was recently observed in FIFA 19, in which the developers brought certain changes by adding new features which went against the basic rule of the game.¹⁴ This allows the player to be lenient while following the rules and fails to follow the core basic rules of the sport.

The core difference that is being discussed in this paper is the Intellectual Property rights protection provided to traditional sports and e-sports. Earlier, there was no IP protection for either of the sports. In the cases of *Football Association Premier League v. QC Leisure*¹⁵ and *Karen Murphy v. Media Protection Services Limited*¹⁶, the European Court of Justice concluded that “Sports events such as football matches cannot be considered intellectual creations or works and so cannot be protected by the Copyright

¹⁰ “The Fortnite World Cup: A Record-setting Tournament, available at: <https://www.fortnite.com/news/the-fortnite-world-cup-a-record-setting-tournament> (last visited on January 20, 2023).

¹¹ “Esports Viewership vs. Sports in 2020”, available at: <https://www.roundhillinvestments.com/research/esports/esports-viewership-vs-sports> (last visited on January 20, 2023).

¹² *Ibid.*

¹³ Anthony Tyre, “A Current Comparison of E-Sports & Traditional Sports, Plug me in Coach”, (2018) (Masters in Arts in Communication Research & Theory Thesis, California State University).

¹⁴ *Supra* note 7 at 2.

¹⁵ *Football Association Premier League Ltd. v. Luxton* (2014) EWHC 253 (Ch).

¹⁶ *Karen Murphy v. Media Protection Services Limited* [2007] EWHC 3091 (Admin).

laws.” The passage of time due to the increase in the popular sports industry along with its rapid growth in the commercial aspect has provided IP protection to the marketing tools of the industry.

In practically every aspect of the sports industry, IP rights are reserved. They begin with patents, which promote technological advancements that lead to improved athletic goods. The distinctive identity of events, teams, and their clothing is influenced by trademarks and designs. The money needed for broadcasters to spend on the pricey venture of transmitting sports events to fans all over the world is generated through copyright-related rights. For instance, the International Olympic Committee (IOC), whose use of the Olympic symbol is strictly regulated by the Nairobi Treaty on the Protection of the Olympic Symbol, also has an impact on other aspects of the marketing strategies of many companies¹⁷.

Another aspect of Traditional sports is the tournament leagues like FIFA, NFL, NBA, Indian Premier League (IPL), etc, are not particularly owned by anyone. Different teams of players are assembled to compete in those leagues, which are owned by individuals or partners.¹⁸ Teams are sold to other people or businesses, and in such a case, the chain of title becomes problematic in order to determine the ownership of any trademarks, copyrights, and other intellectual property rights that may be involved.

However, e-sports are practically owned by the right holders. Copyright protection in the case of e-sports is usually only provided to authorships and any related non-interactive works. Thus, the IP law for e-sports is a bit complex as it needs to be considered. The government must create strict legislations to protect intellectual property rights in e-sports immediately. In order to safeguard themselves from infringements, or abuse of their IP rights, e-sports IP owners should be aware of the significance of their rights.

¹⁷ “India: Role of IPR in Sports”, available at: <https://www.mondaq.com/india/sport/808132/role-of-ipr-insports#:~:text=IP%20Rights%20are%20vested%20in%20almost%20every%20component,distinct%20identity%20of%20events%2C%20teams%20and%20their%20gear> (last visited on January 19, 2023).

¹⁸ *Ibid.*

3. The Interplay of Intellectual Property and E-Sports

No owner or developer would like to give credit for its invention to anyone. Thus, by taking the nature of e-sports into consideration, the publishers and developers will protect the work from any infringement from anyone including the professional players of the said game. The publisher will be the owner of all usage rights and would carry unlimited and unrestricted control over such IP rights. They are also eligible to frame their own rules and regulations and can apply the same to the players by giving them access to any league, event, or competition. In terms of legal perspective video games play an important role in e-sports. It is to better understand e-sports as the videogame can be used as a layer of software that will include audio-visual components, which is ultimately the subject matter of IP protection. Publishers being the owner of the IP right gains all the profit out of it and also by selling licenses to the end users.

Thus, this huge industry of e-sports has a crucial need for IP protection. Various mechanisms of Intellectual Property Rights can be taken into consideration to safeguard the creation of various artists.

3.1. Copyrights

Every e-sport consists of several features that are in the form of software coding that is translated into the user interface of a game. These features or components such as literary, artistic, and musical forms, can be provided with copyright protection except for any kind of theme or concept as per the general rule of copyright. Following are the components of video games.

3.1.1. Protection of Various Characters

Today we see various famous and favourite characters in games. All thanks to the developers of such characters. Thus, such characters can be protected from any infringements through copyright. One such old and famous character is Mario. To safeguard this, Nintendo copyrighted this character and has complete rights over it and the game until 2080.¹⁹ Such rights not only protect the appearance of the character but

¹⁹ Reetika Wadhwa and Meril Mathew Joy, "India: Copyright in the Gaming Industry" *Mondaq*, 30 January 2020 available at: <https://www.mondaq.com/india/copyright/879888/copyright-in-the-gaming-industry> visited (last on January 20, 2023).

also any accessory, clothing, or any other element of that character. Such elements can only be sold after licensing if the developer wants to do so.

3.1.2. Protection of Performance or Gameplay

Performance or gameplay is the way of interaction between the player and the game as per the rules of the same. It includes the settings of terms and conditions such as various levels, obstacles during the game, the plot of the game, etc. Thus, it is important to protect such creativity of the creator and to encourage to build such more plots.

3.1.3. Protection of the Audio-Visuals

In such e-sports, there are different types of music and animations at every different level. Such audio-visuals sometimes become so famous and liked by various viewers. Under copyright law, not only these audio-visuals but also dialogues are used at some intervals for the player-game interface. However, visual designs or artwork of the game can only be protected to some extent by specific genre elements and not the whole of actual elements as per the doctrine of *Scène à faire*, which means certain ideas and concepts which are essential for execution cannot be protected by copyright.²⁰ For example, in the case of war games where they use similar kinds of weapons and other artillery cannot be given protection.

3.1.4. Protection of the Game Codes:

Various software engines and software codes are used in the games to give a basic framework and accessibility on gaming platforms. This software is either owned or licensed by the developers. In cases where two gaming companies are using the same software engines, the overlapping coding of such engines will not be covered under copyright protection and the different features that are framed using the same engine are saved under copyright separately.

3.1.5. Protection Player Licences

The term player licenses, also known as the user contract, specifies all the terms and conditions of usage of the rights given to them along with the limitations. The publisher also provides them with certain gaming services to get access to multiple games.

²⁰ *Ibid.*

Steam by Valve and Origin by Electronic Arts is considered to be the most popular gaming services.²¹

3.2. Trademarks

E-sports, despite being one of the rapidly growing and popular industries in today's world have very few registered trademarks. Trademark helps to safeguard the wordmark, logos, designs, etc. In the field of e-sports there are various gamertags and unique gamer logos that can be protected by trademark. The players and publishers in e-sport have their own brand identities that can be saved from using the same mark in the same field. The trademark gives opportunity to the right holder to conduct licensing agreements with the third party to publicly use it for commercial purposes without any liability. It also helps the teams, athletes, and organizations to sell any goods that consist of their logo through third-party manufacturers and distributors. They need to just prove that they have registered a trademark and carry the exclusive right to use the same. The benefit of the registered trademark to the e-sport individuals is that they can withhold assigning these rights and can also negotiate for the value of their trademark as a licensing deal in addition to the larger agreement. Only one element that is necessary to get this benefit is the individual needs to register their trademark before signing the team as the team contract may include clauses with regard to assigning ownership to the team itself. Thus, it can be said that a valid and registered trademark can protect the goodwill and reputation associated with various brands in the game.

3.3. Patents

In the field of e-sport patent protection can be provided to different inventions which includes news and useful processes such as play methods, graphics techniques, user interface communications, computer software or gaming engine, etc. The ambit of the patent also covers the composition of matter, new ornamental designs such as icons, artwork, characters, etc. The patent protection also provides with the benefit of licensing bargaining. It also provides a monopoly over the patent right claimed.

4. Proprietary Rights and Live Streaming in E-Sports

Gameplay in e-sports is frequently mediated by proprietary software, which poses a number of challenging questions for the regulation and licensing of professional

²¹ *Ibid.*

competitions and tournaments. E-sports tournaments are mediated by computer game software, which is the subject of different intellectual property rights. This is in contrast to mainstream physical sports, where player activity is watched and recorded directly for broadcast and similar televising. This aspect of e-sports complicates the legal debate further by bringing up the rights of other rights-holding organizations that are not often involved in discussions over competitive performances in physical sports. The exclusive rights to duplicate the work, create derivative versions of the work, circulate, and publicize copies of the original work, as well as perform and display the work is specifically given to the proprietor of the IP of the e-sport.²²

E-sports relies more on online consumer spectatorship than live attendance for monetary capital. Frequent streaming of the live gameplay of copyright-protected video games is done by the players and tournament organizers on online platforms like YouTube, Twitch, and so on.²³ The publishers ostensibly look the other way rather than vigorously enforce their proprietary rights. The Terms of Use Agreements (TOUA) for a few well-known games such as Minecraft World of Warcraft, Counterstrike, etc. permit players to live streams.

In respect of live game streaming, YouTube Gaming is a very well-known name. The accessibility, user-friendliness, and ease-of-content-discoverability traits of YouTube Gaming are very popular.²⁴ Three major e-sports leagues, the Call of Duty League, the Overwatch League, and competitive Hearthstone, have streamed matches exclusively on YouTube later in 2020.²⁵ Until then, Twitch was the main platform for all three leagues' that were being streamed, all of which are owned by the game publisher Activision Blizzard. These leagues are not minor in any way. According to Nielsen, in 2019, the Overwatch League attracted an average of 313,000 viewers worldwide every

²² "Video game streaming and copyright law", available at: <https://www.khuranaandkhurana.com/2021/09/30/video-game-streaming-and-copyright-law/> (last visited on January 22, 2023).

²³ *Ibid.*

²⁴ Josh Yang, "E-sports Streaming Platforms: Where Can You Watch in 2022?" *TECHPRESIDENT*, 6 July 2022 available at: <https://techpresident.com/e-sports-streaming-platforms/> (last visited on January 23, 2023).

²⁵ Julia Alexander, "YouTube is using massive e-sports leagues to take on Twitch in big live-streaming bet" *The Verge*, available at: <https://www.theverge.com/2020/1/27/21082612/youtube-blizzard-activision-e-sports-leagues-twitch-live-streaming> (last visited on January 23, 2023).

minute, which is an 18% increase from the regular season in 2018.²⁶ An analytics company discovered that more than 55,000 of those viewers were only located in the United States. According to the e-sports Observer reports, the Call of Duty World League (CWL) has 2.7 million hours of total Twitch viewing, even though the League is very new in the industry. The Observer also said that the CWL global championship averaged about 66,000 viewers concurrently and which spiked to 182,000 in 2020.²⁷ The figures are stunning, and they offer YouTube a rich opportunity in the ongoing live stream platform wars where competing platforms compete for exclusive rights to the greatest streamers and licenses in the industry. The tactic that traditional mainstream sports broadcasters have employed for years in disputes over the rights to major sports is exactly what YouTube is doing. The only difference is that YouTube is hoping e-sports keeps expanding at the rate it is and, as a result, attracts more viewers via the platform's significantly larger Video on Demand (VOD) audience.²⁸

Twitch, one of the most well-known live stream providers, runs a partnership scheme through which its partners i.e., the players who live stream, receive a portion of the ad revenue that is generated by their streams in Twitch. Depending on the number of subscribers, a usual Twitch streamer might earn between 300 USD to 5,000 USD per month. Some of this platform's highest earners bring in more than 100,000 USD per month.²⁹ Although Twitch is a free service, the streamers receive 50% of what viewers pay as a monthly plan. The majority of Twitch streamers make extremely meager incomes, but some of the more well-known ones are able to play full-time and support themselves. While famous streamers could possibly draw more than 900,000 followers and 6,000 subscribers and earn more than 200,000 USD from the subscribers alone, the average professional streamer earns between 2,000 USD- 5,000 USD per month. For instance, Pewdiepie is a well-known professional streamer who earns about 12 million

²⁶ Annlee Ellingson, "Activision Blizzard uses Nielsen numbers to draw advertisers to Overwatch League" *L.A. BUSINESS FIRST* (Sept. 5, 2019), available at: <https://www.bizjournals.com/losangeles/news/2019/09/05/activision-blizzard-uses-nielsen-numbers-to-draw.html> last visited on (January 23, 2023).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ "Gaining Revenue: Do Twitch Streamers Get Paid For Views?", available at: <https://www.galaxymarketing.global/twitch/do-twitch-streamers-get-paid-for-views/> (last visited on January 23, 2023).

USD annually.³⁰ The fact that viewers can watch Twitch broadcasts of e-sports competitions, including the most well-known professional e-sports tournaments, without a subscription is another intriguing feature of the connection between e-sports and Twitch. Twitch is not charged by the tournaments for the media rights of the events, nor are viewers charged by Twitch to watch them.

As e-sports become more well-known, it becomes more likely that other media companies will ultimately appear and begin charging viewers for access to e-sports content. E-sports competitions and tournaments are also extremely likely to someday charge media partners for the broadcast rights, much like their traditional mainstream sports counterparts such as the Federation Internationale de Football Association (FIFA), National Football League (NFL), and Major League Baseball (MLB). The League of Legends (LoL) publisher Riot Games has agreed to a seven-year, 350 million USD media rights deal with BAMTech, a streaming platform that is a division of MLB Advanced Media.³¹ All of this indicates that the e-sports sector has not yet fully realized the commercial potential of live-streaming competitions and tournaments.

5. Ownership of E-Sports IP Rights

E-sports is a highly developed work of authorship that employs a wide range of artistic mediums, including drawings, graphics, video, characters, etc., and invents numerous degrees of player engagement to carry out the game. Intellectual property rights in the e-sports industry are a very crucial element because it deals with the most controversial legal issue i.e., the ownership of the property. The publishers would be protected from problems like piracy, infringement, and unlawful use of original work without remuneration with a strong IP policy in place. Because it is generally the publishers who insist that they alone hold the rights to their creations. However, there have been frequent disputes in which the players have asserted their rightful ownership of the played game. Therefore, there are several opinions that contend that players learn specific techniques when playing games and that it is this original strategy and their individual playing style that reveal the rest of the game. Herein arises the most debatable

³⁰ Chris Mandle, "Forbes names PewDiePie as highest-earning YouTuber with annual income reaching \$12m" *Independent* (October 15, 2015), *available at*: <https://www.independent.co.uk/news/people/forbes-names-pewdiepie-as-highestearning-youtuber-with-annual-income-reaching-12m-a6695536.html> last visited on January 23, 2023).

³¹ *Supra* note 25 at 7.

question: should the ownership of the property solely lie with the publisher? Or are the players also entitled to it? Who has the authority to broadcast and stream these sports, and on what grounds?

In this scenario, Intellectual Property Rights come into play, and the most vital of them is copyright. E-sports' copyright issues will probably be comparable to those in professional sports. While professional sports like baseball, hockey, cricket, and soccer are not protected by copyright, in e-sports the map, video recordings, sound effects, source code, and characters (avatars) are copyrighted.

The publisher of PlayerUnknown's Battlegrounds (PUBG) Bluehole's Korea-based subsidiary PUBG Corporation, filed a copyright violations lawsuit against the Korean unit of Fortnite developer Epic Games, Inc. in the Seoul Central District Court for allegedly copying several aspects of their game in January 2018.³² Both companies have published wildly popular "Battle Royale" shooter games, while PUBG was released several months ahead of Fortnite. The lawsuit was filed at the time of Fortnite's release in Korea. According to PUBG, Fortnite is a "carbon copy" of PUBG. Both games will share certain similarities because they belong to the same genre. However, in this case, Epic Games explicitly acknowledged PUBG as the source of inspiration for Fortnite, even going so far as to refer to PUBG in promotional videos and stating that "We love battle royale games like PUBG and thought Fortnite would make a great foundation for our own version." This is very similar to incorporating copyrighted content into your work. It is against the law to use the reputation of one game to advertise another game. PUBG Corp. has filed a lawsuit for copyright infringement before. The company had previously filed a lawsuit against mobile developer NetEase, alleging that two of its games, "Knives Out" and "Rules of Survival," plagiarised the mechanics of PUBG. However, this lawsuit is quite uncommon due to the fact that tech giant Tencent owns a portion of both PUBG Corp. and Epic Games. Additionally, PUBG is also based on Epic Games' Unreal Engine technology. There are still no specifics on what PUBG sued Fortnite for. The lawsuit has

³² Ferguson Mitchell, "PUBG Sues Epic Games Korea, Claims Copyright Violation", The Esport Observer (May. 29, 2018), *available at*: <https://archive.e-sportsobserver.com/pubg-sues-epic-games-korea/> (last visited January 25, 2023).

reportedly been resolved, with PUBG Corp. issuing a letter of withdrawal to Epic's lawyers, according to the local court system, in Seoul, South Korea³³.

Video games form the core of the e-sports industry. Typically, video games are not sold but rather licensed. The End User License Agreement (EULA) is the name of the license for a downloaded game, whereas the Terms of Service (ToS) is the name of the license for online games.³⁴ The owner can acquire copyrights to the underlying code as a literary work as well as to the artwork and sound-effect made for the game as an audio-visual work. Generally, the publisher would be the only owner of all proprietary rights due to the very nature of e-sports. Any commercial depictions of how the game is played will fall under this category. In contrast, traditional mainstream sports such as football and baseball, etc, are not owned by anyone. Given that professional e-sports events are publicly performed and frequently televised and streamed online, they raise a variety of intellectual property issues, specifically about the ownership and management of rights in player performances.

Considering the scenario, whether the publisher should be the sole owner of the proprietorship or to some extent players should also be given rights over their user-generated content is further discussed in this section.

5.1. Ownership of Publishers

Video games used in e-sports are fundamentally copyrighted. Generally, copyrightable items are considered the original creative opuses of an individual set in a tangible medium of expression. However, the finding, innovative conceptual ideas, procedures, systems, methods of action, and principles, are not included. In e-sports, “literary works” are deciphered to protect the underlying computer code, combined with “motion and other audio-visual works” which are deciphered to protect the audio-visual components of video games.³⁵ The game publisher is the creator of the e-sports video games and predictably owns and controls the intellectual property rights for the video

³³ Calum Patterson, “PUBG Has Dropped the Lawsuit Against Epic Games and Fortnite” *Dexerto*, 24 May 2022 available at: <https://www.dexerto.com/pubg/pubg-has-dropped-the-lawsuit-against-epic-games-and-fortnite-107940/> (last visited January 26, 2023).

³⁴ “Canadian Startup and Video Game Law Blog”, available at: <https://voyerlaw.com/blog/end-user-license-agreement-vs-terms-of-service-when-does-each-apply> (last visited on January 24, 2023).

³⁵ Nancy Saroha and Akshat Mehta, “The Interplay of Intellectual Property and eSports: Issues & the way ahead”, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4261371 (last visited January 25, 2023).

games, which forbids others from exploiting the associated subject matter. The publisher of the video game sometimes sells or licenses intellectual property rights, in order to achieve a monetizing synergistic entertainment. The main technique for carrying out such is the sale of licenses to end users, the terms of which are established by the End User License Agreement (EULA) and Terms of Service (ToS).³⁶ Under these agreements, the publisher's license is nearly often restricted to personal or non-commercial purposes. The publishers through careful licensing even sell distinct or congregated parts of the copyright, segregating the rights in order to make a movie or a comic book based on the video game as well as its characters.

Therefore, theoretically, an e-sports competition or tournament authorization from the publisher of the video game contrasts with any traditional mainstream sports competitions or events. However, game publishers have established privately sponsored leagues. Because individual publishers consider themselves game producers first instead of sports providers, advocating for the development of uniform standards of play and professionalism across the industry is not possible by any single publisher. It is impossible for any particular publisher to advocate for the establishment of consistent standards of play and professionalism throughout the event because usually, publishers view themselves first as creators of the game rather than providers.

The rights of professional players in e-sports are additionally affected due to their lack of negotiating power to overcome the power imbalance between the players, publishers, and licensed organizers. In spite of any player interactivity in e-sports, the game publisher retains intellectual property rights over all variations of the gameplay. These players must be adequately protected in order for permanent growth to take place in the e-sports industry, otherwise, they won't be driven enough to give their best during the competitions and tournaments. Publisher-owned leagues and competitions occasionally act uncompetitively to their players.³⁷ For instance, Riot Games, the publisher, and proprietor of the League of Legends (LOL), formerly enacted a "non-compete" provision that barred its players from taking part in other leagues or live-streaming their gameplay of rival video games. Riot Games also has the exclusive

³⁶ *Supra* note 34 at 9.

³⁷ Michael Arin, "Competing Competitions: Anticompetitive Conduct by Publisher-Controlled Esports Leagues", 104 *Minnesota Law Review* 1585 (2020).

authority to permanently ban a player from LoL without the option of the right to plea, because of its twin role as publisher and league owner. In contrast to this, traditional physical sports leagues have no authority to stop a player from participating in the sport. They can only expel a player from the sporting event. Further, the question of the intellectual property status of the players' characters in the game and their performances are often rendered irrelevant because of the Terms of Service (ToS) agreement between the publisher and the players. E-sport games are frequently equipped with some sort of adhesion contract, which is intended to transfer any copyright or similar rights accruing to the user to the game publisher. These agreements may sometimes be displayed as click-wrap when the player loads the game onto their computer, or they may display as Terms of Service (ToS) alerts on the game publisher's website. This type of contract appears to privately void all ownership disputes wherever they may arise. Accordingly, the power imbalance between the publishers of the game and professional players is immense in e-sports.

In addition to that, another cause for the explosive rise of e-sports over the past few years is streaming. E-sports competition streaming rights fetch high prices as several platforms, like Twitch. tv, YouTube, Facebook, etc., compete for exclusive contracts. The exclusive IP rights of the publisher also apply to live streaming and online broadcasting of the games. The code, audio, music, and video of the game are broadcast to the public when the player live streams their game, which is considered a copyright violation. If an online service provider such as Amazon's Twitch or Google's YouTube users uploads infringing content, then the service providers are obligated to take down such infringing content upon receiving a notice of infringement from the rights holder, usually the publisher of the game. However, the policies or agreements between the player and the publisher of the game will ultimately determine this. Companies like Sony and Microsoft, for instance, encourage players to stream their games. In contrast to this, China NetEase, League of Legends, as well as Nintendo, follow a strict copyright policy regarding the streaming of their game.³⁸ The streaming of the game by the players is required to be

³⁸ "Tencent and NetEase fall as China reportedly tightens restrictions on video games industry", *available at*: <https://www.businessinsider.in/stock-market/news/tencent-and-netease-fall-as-china-reportedly-tightens-restrictions-on-video-games-industry/articleshow/86069427.cms> (last visited on January 25, 2023).

authorized by the publisher and any unauthorized live streaming can subject the broadcaster or streamer to copyright infringement charges.

5.2. Ownership of Players

Image rights play an important role in the life of every player whether he is competing in traditional mainstream sports or e-sports. This right includes the right to use their face, name, or likeness as per the agreement between them and the sponsors. In traditional sports the players do carry such rights. However, the players in e-sports compete through their avatars, and Gamertags also known as nicknames over which they have control.³⁹ The commercial view of these avatars and Gamertag being a part of the game is managed by the publishers.⁴⁰ Now, this has caused a huge disappointment in the minds of the players. In order to raise the reputation and vogue of the players, there have always been discrepancies as to who has the authority to control the image rights and also the pecuniary earnings from the commercial use of the player's character.

Usually, the majority of the IP rights lies with the publishers. However, this has always been difficult to segregate what rights relating to the game should be considered for the publishers and what should be saved for players. The developers have control of the footage as to which player should be streaming on the platform which ultimately affects the player's image right and his commercial interest in the character and Gamertag. The main reason behind the image rights exploitation of the players is the lack of a legal system in the field of e-sports which helps the developers to carry such action through licensing and merchandising players' likenesses.

During the Championship series, the players literally work hard for winning the series as it is only a source of income for them, and the gains that are given by the sponsors are taken away from them by the publishers.⁴¹ This is especially observed in the case of Riot Games through the contract entered between them and the contestants of its League of Legends (LoL) Championship series. As per their contract, Riot has limitless rights to use players' avatars in the game, this takes away or debars the players from their monetary

³⁹ *Supra* note 5 at 2.

⁴⁰ Zhaoxia Deng, "Illegal to Play? Re-Examining the Copyright Ownership of Player Created Content", 8 *GNLU Law Review* 22 (2021).

⁴¹ *Supra* note 5 at 2.

earnings for their performance during the series.⁴² This not only takes away the confidence in the players but also demotivates them from qualifying for major tournaments. The income of players in e-sports is not sufficient as they do not have a regular source of income as compared to the players of traditional sports who have control over their image rights and have structured income through licensing and sponsorships.⁴³ Thus, the players here have to completely rely on the bounded IP they get, which is the team's name and logo, as the source of their earnings through sponsorships and endorsements. Another reason for fewer sponsorships to e-sports players compared to traditional sports is that they are largely unknown. The bit of sponsorship that they get is usually from computer hardware companies who can mainly pay a considerable amount to these e-sport teams.⁴⁴

Apart from the above circumstances, it is usually observed that the players in e-sports are young and therefore there are chances of having a lack of knowledge of image rights which causes the exploitation of their IP rights. Professional teams usually take control of the use of IP rights through player contracts between the team and the members. Along with this loss of control over image rights, they also lose sponsorships and contracts with the brands at the individual level. Sometimes taking advantage of the lack of awareness and communication gap between them, the teams and the sponsors usually capitalize by adding exploitative clauses in the player's contracts due to which there is a high chance that the players can be the victim of breaching the sponsorship agreement. To avoid such a breach, it is the duty of the teams to keep transparency between the team sponsors and their members which would ensure clarity to the players while dealing with the individual sponsors.⁴⁵

The right to publicity is also one of the major rights of the players. It similarly protects the performance and the image rights of the players in the e-sport. If the licensing system could be nourished this would also protect the publicity rights of the professionals. If the licensing rights can be hampered by the developers and the sponsors, this will help

⁴² Adam Levy, "PWND or Owned? The Right of Publicity and Identity Ownership in League of Legends" *6 Pace Intellectual Property, Sports & Entertainment Law Forum* 175 (2016).

⁴³ *Ibid.*

⁴⁴ Daniel Alfreds, "IP and Rights Package: Legal Issues to Consider in Esports Sponsorships", *The Esports Observer* (Mar. 7016), available at: <https://esportobserver.com/legal-issues-to-consider-in-endorsements-and-sponsorships-part-1/> (last visited on January 26, 2023).

⁴⁵ *Ibid.*

the players in commercializing the popularity and reputation as per their discretion and also can earn optimum benefit out of it.

Thus, the question still remains unanswered as to what players in e-sports exactly own. The answer to this question is quite complex. The players in the game get second-hand ownership of the avatars as the making of such a character depends upon the existence of the game which lowers the possibility of the player claiming copyright protection. However, the player has access and control to the input that is the game and the program code which prevents the publisher from exploiting it in the first instance and the control of the avatar lies with the players during the in-game performance. In many ways, the avatars can be controlled by the individual players by different equations which creates confusion for the publishers as such combinations are not predicted.⁴⁶ Thus, it can be said that the majority of avatar proprietorship relies upon the performance of the players in the field of e-sports.

6. Conclusion

E-sports exhibits an effective analysis of the different types of changes in the technology and the challenges it presents to the IP system. A different setting can bring to light unresolved issues in IP law that require serious attention. Intellectual property is a significant source of revenue for the esports business. In order to address ownership of the game, the legislation must have clear standards addressing the intellectual property ownership criteria in esports. Due to the current arrangement, it is quite unclear if these rights are primarily owned by the publishers or, to some part, also potentially owned by the players. These shifting ownership arrangements serve as another reminder of the need for the publishers to become IP aware. A basic grasp of Intellectual property enables the publishers to deal with the variety of licensing issues that arise across the value chain, whether in relation to securing players, as well as external IP licenses relating to, for example, licenses for music, sports, or movie that have grown to be important areas of interest.

In terms of Indian law, the protection provided by the current act is insufficient for the players as well as the publishers. The laws that govern the esports industry are

⁴⁶ Dan L. Burk, "Owning E-Sports: Proprietary Rights in Professional Computer Gaming" 161 *University of Pennsylvania Law Review* 1535 (2013).

very vague, even though it is growing rapidly. India needs legislation in a fashion that manages vagueness and provides copyright protection to those who deserve it. Since many video games are being played in India but are made in other nations, the lack of legal protection causes issues for both international and Indian game publishers. Lawmakers must consider, settle on, and put into effect regulations regarding the legal categorization of video games produced in India and abroad in order to safeguard the publisher's intellectual property.

Esports' rising popularity makes it inevitable that intellectual property problems will also develop. If these IP claims are upheld in the Court of Arbitration for Sports (CAS) it will set a precedent for how intellectual property rights in this complicated industry should be handled. To create a functioning model to handle this complex issue of intellectual property ownership, it is crucial to take into account both the precise intellectual property laws set forth by a particular regulatory agency and the precedent from CAS claims resolution.