

A SEAMLESS WALKTHROUGH OR GAME OVER: DETERMINING THE FEASIBILITY OF LIVESTREAMING GAMES

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Abstract

Video games, as complex multimedia works, involve diverse copyrightable elements such as software, storylines, music, and character designs. When these elements are streamed live, a pressing conundrum emerges: does the livestreaming of gameplay constitute unfair use, crossing into copyright infringement? The Indian Copyright framework, with its nascent jurisprudence on digital content, struggles to address these nuances, making the discussion urgent and relevant. Consider a streamer who attracts millions by playing a trending game, only to face takedown notices or legal disputes for showcasing copyrighted material. The rapid growth of gaming livestreaming has fostered a unique ecosystem, blurring the boundaries between creativity, user-generated content, and copyright law. This paper explores the legal implications of livestreaming video games, analyzing the intersection of content creation, developer rights, and copyright laws. Through a comparative analysis, the paper examines U.S. and EU copyright doctrines; and further evaluates how safe harbor provisions and licensing frameworks can balance competing interests. It further emphasizes the importance of fair use in fostering creativity while recommending policy adjustments, including the need for a tailored gaming law in India. The introduction of licensing agreements, robust EULAs, and mechanisms for streamers to protect their content would create a more collaborative ecosystem. Drawing from international practices, India could implement fair use standards and adapt provisions like the DMCA to local needs, ensuring that streaming platforms are held accountable while offering streamers fair protection. Ultimately, a dynamic legal system is proposed—one that harmonizes innovation, economic interests, and user expression, fostering a sustainable and equitable digital future for gaming and livestreaming.

Keywords: Livestreaming, Copyright, Gaming, Fair Use, Streamers.

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1. Introduction: The Phenomenal Rise of the Gaming Industry

Technological advancements have led the way to foster innovation to the extent that an individual can have anything at their fingertips – commodities, entertainment, and connection. The history of the video game industry can be traced back to Pong by Atari in 1972, which has now been transitioned to a multibillion-dollar industry from arcade gaming to the tune of role-playing, strategy, card, and sandbox games.¹

With the onset of the COVID-19 pandemic, the gaming industry saw a major boost primarily due to the streams on Twitch and YouTube.² The void created by modern-day entertainment forms such as music concerts and sports matches, was filled with content creators and gameplays.³ The streams are viewed by thousands of people boosting the sales of the games. Streamers provide various elements to the livestream– satire, meme references, reactions, guides, and walkthroughs that provide insights to the audience on how to defeat the formidable archnemesis.

It is much more than a mere execution of the inherent command of the game in a mechanical manner. Each player has their own creative style and voice, and the culmination of which adds value to the perception of a particular character by curating a playing style as per their strengths and weaknesses. The road is paved for those who want to play the game and pick up handy tricks from the broadcast.⁴ Streamers have to burn the midnight oil to gain popularity and, most of all, gain a loyal fanbase that religiously watches the gameplay almost on a daily basis.⁵ Fortnite is a prime example of a game that has seen unparalleled popularity, with social media platforms being flooded by users

¹ Encyclopedia, “Pong”, *Encyclopedia Britannica*, available at: <https://www.britannica.com/topic/Pong>, (last visited on November 30, 2024).

² Charlie Hall, “Game streaming viewership nearly doubled during the pandemic”, *Polygon*, available at: <https://www.polygon.com/2021/1/28/22254217/twitch-youtube-gaming-viewership-2020-pandemic-streamlabs> (last visited on November 30, 2024); Jacob Kastrenakes, “People are watching a lot more Twitch during the pandemic”, *The Verge*, available at: <https://www.theverge.com/2020/7/23/21335559/twitch-pandemic-viewership-increase-facebook-gaming-live-streaming> (last visited on November 30, 2024).

³ Bijan Stephen, “The show must go on: here’s how Twitch streamers are handling quarantine”, *The Verge*, available at: <https://www.theverge.com/2020/4/2/21199757/twitch-quarantine-data-coronavirus-streamers> (last visited on November 30, 2024).

⁴ Shani Shisha, “Fairness, Copyright, and Video Games: Hate the Game, Not the Player”, 31 *Fordham Intell. Prop. Media & Ent. L.J.* 694 (2021).

⁵ Joe Marino, “Trying to Make It as a Twitch Streamer Almost Killed Me”, *KOTAKU*, available at: <https://www.kotaku.com.au/2017/02/trying-to-make-it-as-a-twitchstreamer-almost-killed-m> (last visited on November 25, 2024).

mimicking the dance moves featured in the game. The game is even regarded as the most popular social media platform by teenagers.⁶

Livestreaming is gradually gaining more viewership and opening new rooms for entertainment whilst traditional forms are going stagnant.⁷ Streamers boost sales and increase the demand not just for the very games they play but for the consoles and the add-along downloadable content (DLC) as well.⁸ India has emerged as the country with the second-highest number of gamers across the globe. It is predicted that by the end of the current fiscal year, over one lakh jobs will be generated in the gaming industry.⁹

Softwares are granted copyright protection globally, and therefore, video games emanating from such softwares also have the right to such protection. There is more than meets the eye in the production of a video game – the creation of characters, storyline, original soundtrack, and the choices that the player has to meet to reach the conclusion or fulfill a particular mission of the game. There are countless permutations and combinations to reach a particular level, and these algorithm-run virtual worlds have no limits.¹⁰

The conundrum arises herein - “*can the live streaming of video games constitute unfair use and thereby, an infringement of the copyright?*” Considering the dominance of the streaming platforms in the market, it is the digital audio-visual content creators who have to face the brunt and do not have any clearly demarcated safeguards in their interests.

⁶ Jared Newman, “Unlike social media, Fornite actually makes you feel better”, *FastCompany*, available at: <https://www.fastcompany.com/90359338/unlike-social-media-fornite-actually-makes-you-feel-better> (last visited on November 15, 2024); David Bloom, “Is Fortnite the new social media for teens?”, *Forbes*, available at: <https://www.forbes.com/sites/dbloom/2019/06/04/is-fortnite-the-new-social-media-home-for-teens/?sh=cce1db959f96> (last visited on October 28, 2024).

⁷ Darren Heitner, “Watching Video Games Is Now Bigger than Traditional Spectator Sporting Events”, *INC*, available at: <https://www.inc.com/darren-heitner/watching-videogames-is-now-bigger-traditional-spectator-sporting-events.html> (last visited on October 28, 2024).

⁸ Dean Takahashi, “Twitch's Research shows that livestreaming leads to better game sales”, *VentureBeat*, available at: <https://venturebeat.com/games/twitchs-research-shows-that-livestreaming-leads-to-better-game-sales/> (last visited on November 12, 2024).

⁹ Sanchay Saksena, “Niko Partners: Indian Games Market Includes Almost 40 Crore Players, Mobile Gaming Dominates With 98.8% Share and More”, *IGN India*, available at: <https://in.ign.com/india/176737/news/niko-partners-indian-games-market-includes-almost-40-crore-players-mobile-gaming-dominates-with-988> (last visited on November 12, 2024).

¹⁰ Simon Parkin, “No Man’s Sky: A Vast Game Crafted by Algorithms”, *MITTECH. REV.*, available at: <https://www.technologyreview.com/s/529136/no-mans-sky-a-vast-game-crafted-by-algorithms/> (last visited on November 25, 2024).

In the Indian context, video games have been conferred copyright protection as they fall under the garb of multimedia products.¹¹ Video games are a culmination of several elements, each of which can be copyrighted - visual designs,¹² storyline,¹³ characters,¹⁴ music,¹⁵ cutscenes,¹⁶ computer programs¹⁷ and so on and so forth.

The Berne Convention for the Protection of Literary and Artistic Works¹⁸ extends copyright protection to video games as creative works. In India, Section 14 of the Copyright Act, 1957, provides comprehensive protection for video games, covering elements such as music, characters, storylines, and segments of the underlying code. Additionally, software and video games may receive distinct types of protection under copyright law. The gaming ecosystem in India is still at a nascent stage, with platforms such as Loco taking it to new heights.¹⁹ However, there is a notable scarcity of infringement cases involving video games in India, leaving the legal position on this issue largely unexplored and ambiguous.

2. Live Streaming: A Direct Copyright Infringement or Fair Use?

Seeing the potential of streaming, Amazon bought Twitch for a staggering \$970 million²⁰ and it is reported that esports and streaming video game content could evolve into a multi-billion-dollar industry. The revenue is definitely going to soar each year keeping in mind the technological advancements.²¹ Streamers have high potential in the country similar to influencers, content creators, and stand-up comedians. The Digital

¹¹ *Ibid.*

¹² The Copyright Act, 1957 (Act 14 of 1957), s. 14(c).

¹³ *Id.*, s. 14(a).

¹⁴ *Id.*, s. 14(c).

¹⁵ *Id.*, ss. 14(a), 14(e).

¹⁶ *Id.*, s. 14(d).

¹⁷ *Id.*, s. 14(b).

¹⁸ The Berne Convention for the Protection of Literary and Artistic Works, 1886, art. 2 and 4.

¹⁹ Dean Takahashi, "Loco hits stride in game livestreaming as Indian market comes back", *VentureBeat*, available at: <https://venturebeat.com/games/loco-hits-stride-in-game-livestreaming-as-indian-market-comes-back/> (last visited on October 24, 2024).

²⁰ Eugene Kim, "Amazon Buys Twitch for \$970 Million in Cash", *BUSINESS INSIDER*, available at: <https://www.businessinsider.com/amazon-buys-twitch-2014-8> (last visited on November 29, 2024).

²¹ Saidat Giwa-Osagie, Sam Barker, "Esports & Games Streaming: Market Forecasts, Trends and Emerging Opportunities", *Juniper Research*, available at: <https://www.juniperresearch.com/researchstore/content-digital-media/esports-games-streaming-research-report> (last visited on October 16, 2024).

India drive has made it even more accessible to the public at large with better infrastructure and an internet connection in more homes.

Walkthroughs often serve as a powerful incentive for viewers to purchase games, enticing them to experience the gameplay firsthand. Streamers add an engaging and entertaining dimension to gaming, showcasing alternate paths, hidden features, or multiple endings, thereby enhancing the game's appeal. For many, livestreaming has evolved into a significant source of livelihood, driven by financial opportunities such as viewer donations, ad revenue, and platforms like Twitchbits. With the gaming and streaming industries generating billions in annual revenue, streaming has solidified its position as a dynamic and lucrative profession.²²

Copyright strikes occur when content is displayed without obtaining proper permission from the copyright holder. The infringer may face both civil and criminal action, with the latter posing a serious threat to their future opportunities. The question now arises: do streamers infringe on copyrighted material when they broadcast content without authorization, and how does this differ from traditional forms of entertainment?

3. Distinguishing gameplay from traditional forms of entertainment

As opposed to movies and musical albums, these games do not *prima facie* attract copyright strikes, and a fine line of distinction can be drawn between the former and the latter. This is primarily because the work is transformative in nature, with several personal entertaining elements of the streamer and a unique performance by each player. Most importantly, games cannot run themselves from start to end on their own; thereby, such streaming moves away from the radar of copyright infringement. Therefore, it can be understood that streaming does not deter prospective players from entering the gaming arena and consuming the content themselves.²³

²² Shivani Shinde, Saurabh Lele, "Game Streaming is Becoming a Serious Choice for Youth", *Business Standard*, available at: https://www.business-standard.com/article/technology/how-game-streaming-is-becoming-a-serious-professional-choice-for-youth-122061200888_1.html (last visited on November 30, 2024).

²³ Yufeng Huang, "Video-Game Companies are Spending Big on Sponsored Streams. Are They Getting Their Money's Worth?", *KelloggInsight*, available at: <https://insight.kellogg.northwestern.edu/article/video-game-companies-are-spending-big-on-sponsored-streams> (last visited on October 25, 2024).

It is commonly observed that gameplay does not directly attract copyright infringement and is considered tolerated infringement.²⁴ This can be affirmed by Nintendo's current content guidelines that make way for a streamer-friendly environment.²⁵ Bringing a lawsuit against the gamers would amount to a PR nightmare with the potential threat of fanbases possibly boycotting the games.

On the contrary, it is quite possible that a streamer's problematic comments during a livestream could be considered linked to the game developer.²⁶ There is a lacuna of proper legislation for such content creators, thereby giving rise to a need to impose certain guidelines and restrictions pertaining to the conduct of a streamer during a stream.

In fact, there have been several lawsuits for the broadcast of content without due authorization. A prominent example is a very recent suit initiated against streaming giant Bilibili in China by the Chinese Basketball Association (CBA) to the tune of 406 million yuan for broadcasting games online in the absence of any authorization from the latter.²⁷

Similarly, the Persona 5 streaming was vehemently criticized and hailed as digging a grave for itself by imposing certain restrictions on livestreaming the game as a preventive measure for spoiling it for other users. Non-compliance with the guidelines could lead to suspension of the account. It was contended that the viewers voluntarily decide to receive spoilers of the game when they view the broadcast and this decision not only takes away their autonomy but the "free marketing" provided by the streamers.²⁸ In response to the backlash, the company issued an apology for threatening the players and

²⁴ Shigenori Matsui, "Does It Have to Be a Copyright Infringement: Live Game Streaming and Copyright", 24 *Tex Intell. Prop. LJ* 215 (2016).

²⁵ Julia Alexander, "Nintendo's new content guidelines make it easier for YouTube creators to get paid", *The Verge*, available at: <https://www.theverge.com/2018/11/28/18117172/nintendo-youtube-monetization-partner-program-super-smash-bros-ultimate-lets-play-livestream> (last visited on November 29, 2024).

²⁶ Kevin Lui, "PewDiePie Is Being Accused of Using a Racial Slur While Live-Streaming a Game", *TIME*, available at: <https://time.com/4935548/pewdiepie-racial-slur-live-streaming-youtube/> (last visited on November 25, 2024).

²⁷ Ann Cao, "China's top basketball league slaps streaming video giant Bilibili with copyright lawsuit, US\$60.12 million in compensation", *South China Morning Post*, available at: <https://www.scmp.com/tech/big-tech/article/3186630/chinas-top-basketball-league-slaps-streaming-video-giant-bilibili> (last visited on November 05, 2024).

²⁸ Erik Kain, "Persona 5' Streaming Ban Is Ludicrous and Absurd", *Forbes*, available at: <https://www.forbes.com/sites/erikkain/2017/04/05/persona-5-streaming-ban-is-ludicrous-and-absurd/?sh=720ab80b1bb1> (last visited on November 15, 2024).

highlighted the glaring need for developers to balance their intellectual property rights while retaining their consumer base and reputation among the public.²⁹

Bethesda Softworks, primarily known as the studio behind the infamous Elder Scrolls series, has taken a middle ground by forming a partnership. Monetization of videos is encouraged through streaming platforms like YouTube. However, the studio has the autonomy to take down content that would constitute a violation of the non-disclosure agreements. Content will be evaluated on a case-to-case basis, and any videos deemed to be “wildly inappropriate” will be taken down.³⁰ Furthermore, it strictly prohibits users from performing or even displaying any part of the game.³¹

Similarly, Riot Games, globally renowned as both the developer and publisher of League of Legends, grants users a “*personal, non-exclusive, non-sublicensable, non-transferable, revocable, limited license to use, display and create derivative works.*”³² This license authorizes the use of Riot IP for varied purposes to the extent that the users comply with the stipulated terms of use. Prima facie, the terms seem inviting for streamers to continue their earnings and work; however, the further clauses stipulate that the developer has the “sole and absolute discretion” to prohibit the transfer of their IP rights to users.³³ There is no straitjacket formula for ascertaining in what cases the developer might take down the content therefore, this power could be used in an arbitrary manner.³⁴

Therefore, these policies act as the basis for demarcating the permissible acts of the streamers.³⁵ It is commonly observed that many developers culminate a relationship with the streamers by providing them free copies of the games, thus affirming the free

²⁹ “An Update on Persona 5 and Streaming,” *Atlus*, available at: <http://atlus.com/update-persona-5-streaming/> (last visited on November 05, 2024).

³⁰ “End User Licensing Agreement for Doom Eternal,” *BETHESDA*, available at: <https://bethesda.net/en/eulas/doom-eternal> (last visited on October 25, 2024).

³¹ *Id.*

³² “Legal Jibber Jabber,” *RIOTGAMES*, available at: <https://www.riotgames.com/en/legal> (last visited on December 05, 2024).

³³ *Id.*

³⁴ Karthik Subramaniam, “Hierarchy in the E-Sport Copyright Regime: Is Vesting of Copyright in an E-Sports Player a Possibility?,” *Metacept*, available at: <https://metacept.com/hierarchy-in-the-e-sport-copyright-regime-is-vesting-of-copyright-in-an-e-sports-player-a-possibility/> (last visited on December 05, 2024).

³⁵ Aaron Swerdlow, “The Emerging Legal Battle over Video Game Streaming Rights,” *VentureBeat*, available at: <https://venturebeat.com/pc-gaming/the-emerging-legal-battle-over-video-game-streaming-rights/> (last visited on November 30, 2024).

marketing provided by them.³⁶ This acts as an incentive for the streamer to continue promoting the game whereas the developer gives away any scope of potential litigation against them.

4. Demarcating the Rights and Obligations of Game Developers and Streamers

Hours of hard work go into developing a game, especially distinguishing it from the plethora of games available on the market. At the very outset, a game promises players an immersive experience far from reality, encouraging users to learn techniques and formulate strategies to arrive at a conclusion.

There needs to be a demarcation of the rights and obligations of the parties pertaining to ownership of the content on streaming and digital media services. It must be considered whether a streamer can have rights on the grounds that it was a fair use of the content. On the contrary, the copyright holder must not lose their exclusive right due to reviews and walkthroughs being available in the public domain.

It is contended that exclusive rights should be given to the game developers along with the intellectual property rights they are granted, considering the unique elements they bring to the table. In most cases, the copyright holders' implied conduct showcases their acquiescence to gameplay and, thereby, would constitute tolerated infringement. Theoretically, it would be a direct case of copyright infringement however, it can be inferred that it is admissible due to the tolerance of the copyright holder coupled with the number of gameplays on streaming platforms.³⁷

4.1. Asserting fair use standards

In the Indian context, gaming laws currently are neither documented nor is there a stringent enforcement mechanism protecting or curtailing the rights of the gamers and, subsequently, an administrative authority governing the same. Therefore, it is unclear whether gameplay can be accorded protection as an original copyright or if it would fall within the ambit of a 'performance' under the existing regime. As per Section 2(q)³⁸ the

³⁶ Gerald Kerr-Wilson, "Video Game Streamers: Free promotion, copyright infringement, or both?," Fasken IP, available at: <https://ip.fasken.com/video-game-streamers-free-promotion-copyright-infringement-or-both/> (last visited on November 24, 2024).

³⁷ Tim Wu, "Tolerated Use" 31 Colum JL & Arts 617 (2008).

³⁸ *Supra* note 12, s. 2(q).

scope of performance is defined. Upon further scrutiny, it can be determined that gameplay is a part of live visual entertainment to the audience and therefore, would be considered as a performance. Furthermore, the rights of performers³⁹ are also defined unlike in the American scenario.

Many game developers establish a relationship with streamers by providing free copies of games, recognizing the promotional value streamers bring. This practice incentivizes streamers to continue promoting the game while allowing developers to mitigate any potential litigation, as the streamers' promotional activities act as a form of free marketing.⁴⁰ Platforms such as Microsoft⁴¹ and Sony⁴² have encouraged streamers to stream their gameplay in this manner.

The aspects of creativity, originality, and fixated expressions are fulfilled since the player needs to have a creative approach to make an original character, develop it, and then achieve a specific outcome through simultaneous clicks on a controller various mouse clicks, and keyboard combinations on a laptop. On the contrary, it has been previously held that gameplay does not satisfy the minimum requirement of creativity since it is the player's skill and not his creativity that attracts viewers. In addition, the player is limited to playing according to the rules of the game.⁴³

Streamers have been encouraged and discouraged at the same time by certain companies to share their games. Sony and Microsoft are two prominent companies that welcome streamers; however, Nintendo, League of Legends, and China's NetEase expect strict adherence to their copyright policy of authorized streaming.⁴⁴ However, streamers must ensure to conduct their due diligence as to whether there is a requirement to take a

³⁹ *Supra* note 12, s. 38, 39.

⁴⁰ Gerald Kerr-Wilson, "Video Game Streamers: Free promotion, copyright infringement, or both?," *Fasken IP*, available at: <https://ip.fasken.com/video-game-streamers-free-promotion-copyright-infringement-or-both/> (last visited on October 12, 2024).

⁴¹ "Streaming from your Xbox Series X or S on Twitch", *Twitch*, available at: <https://www.twitch.tv/creatorcamp/en/paths/going-live/setting-up-your-stream-xbox-series-xs/> (last visited on November 15, 2024).

⁴² "How to Set up Youtube on PS5 Consoles," *Playstation*, available at: <https://www.playstation.com/en-us/support/hardware/ps5-youtube/> (last visited on November 15, 2024).

⁴³ *Football Association Premier League and Others v. QC Leisure and Others* (C-403/08); *Karen Murphy v. Media Protection Services Ltd.* (C-429/08) EU:C:2011:613.

⁴⁴ Greg Lastowka, "All Your Nintendo Let's Plays Are Belong To Nintendo?" *Gamedeveloper*, available at: <https://www.gamedeveloper.com/business/all-your-nintendo-let-s-plays-are-belong-to-nintendo-> (last visited on November 12, 2024).

license and ensure that their gaming battles do not provide an impetus to battles before courts of law.

5. Unregulated Influence of Streaming Platforms on Game Content

Copyright infringement notices can be a double-edged sword, not only having less content on the platforms but also shooing away most of the users due to imposing such restrictions on entertainment. Platforms may act upon fake infringement reports, and even channels with massive followings have to face the brunt of their content being removed on such unproven grounds.⁴⁵ After three strikes, all the content, along with the user's channel, is completely removed from the platform. Malafide copyright claims could have a direct impact on the livelihoods of the streamers.

Despite stiff competition from Twitch, YouTube enjoys a monopoly in streaming user-generated videos online, and thus, the copyright claimant is shielded from being held accountable. What automatically ensues are negative reviews and polarized opinions. It is a cumbersome and almost unthinkable process for streamers to file lawsuits against BigTech corporations. Thus, the only alternative is to write about their grievances on social media platforms.⁴⁶

YouTube scans every livestream and matches them with copyrighted content. On identification, a warning is issued, and on the continued violation, the stream will either be interrupted or terminated. There might be a copyright or community guidelines strike.⁴⁷ The Content ID system permits the registration of content by copyright holders, and the platform then monitors its use.⁴⁸ Furthermore, it has the power to remove the video and restrict advertising revenue earned for that content by the streamer. This gained significance after Nintendo claimed content ID match for all Let's Play video games that

⁴⁵ Matt Binder, "False YouTube Copyright Claim Takes Down Lofi Girl's Years-Long Livestream," *Mashable India*, available at: <https://in.mashable.com/digital-culture/34746/false-youtube-copyright-claim-takes-down-lofi-girls-years-long-livestream> (last visited on November 25, 2024).

⁴⁶ Matt Binder, "YouTube Reversed My Bogus Copyright Strike After I Threatened To Write This" *Mashable India*, available at: <https://in.mashable.com/tech/10892/youtube-reversed-my-bogus-copyright-strike-after-i-threatened-to-write-this> (last visited on October 13, 2024).

⁴⁷ "Copyright issues with live streams," *GOOGLE*, available at: <https://support.google.com/youtube/answer/3367684?hl=en> (last visited on November 23, 2024).

⁴⁸ "Youtube," *CONTENT ID*, available at: <http://www.youtube.com/t/contentid> (last visited on October 15, 2024).

featured the games developed by them.⁴⁹ This highlighted the game developers' need to protect their intellectual property so as to sustain their business in the long run.

The onset of the COVID-19 pandemic showed a massive increase in the number of Digital Millennium Copyright Act (hereinafter referred to as DMCA) takedown notices due to absence of broadcasting licenses.⁵⁰ This brought to the forefront the absence of any proper mechanism for gameplay creators to monitor their content so as to prevent themselves from being banned on the platform. Twitch responded by deleting content and the streamers were left in vain with no opportunity to object or appeal against the decision.⁵¹

Capcom, another prominent game developer, added two criteria that streamers must meet to avoid copyright infringement. First, the content must be as per the age rating of the game, and second, the content must have a commentary or have “*instructional or educational value*”.⁵²

Now, despite being seen as the face of the gaming industry, the gameplay creators have a significantly weak position as compared to the copyright holders. A prominent example of this was when Battestate Games removed the videos of streamers on the ground of misinformation which significantly harmed the size of their audience and subsequently, their income.⁵³

⁴⁹ Ian Miles Cheong, “Nintendo Flexing Copyright Clout on YouTube Let's Play Channels,” *GAMEFRONT*, available at: <http://www.gamefront.com/nintendo-flexing-copyright-clout-on-youtube-lets-play-channel> (last visited on October 05, 2024).

⁵⁰ Tobias Seck, “Valve Addresses Counter-Strike: Global Offensive Media Rights, Exclusivity, and Conflicts of Interest,” *The eSports Observer*, available at: <https://archive.esportsobserver.com/valve-statement-csgo-rights/> (last visited on November 30, 2024).

⁵¹ Nathan Grayson, “Twitch Apologizes, but DMCA Fiasco Continues with Punishments for In-Game Sounds, Deleted Clips,” *KOTAKU*, available at: <https://kotaku.com/twitch-apologizes-but-dmca-fiasco-continues-with-punis-1845647014> (last visited on November 13, 2024); Nicole Carpenter, “Twitch Streamers Were Issued Tons of DMCA Takedown Notices Today,” *POLYGON*, available at: <https://www.polygon.com/2020/10/20/21525587/twitch-dmca-takedown-notice-content> (last visited on November 20, 2024).

⁵² Dakota 'DarkHorse' Hills, “Capcom Releases New Video and Content Creation Guidelines Including Rules for You Tube, Twitch, Monetization and Mods,” *EventHubs*, available at: <https://www.eventhubs.com/news/2021/jan/06/capcom-video-content-rules/accessed> (last visited on November 02, 2024).

⁵³ Charlie Hall, “Escape from Tarkov Team Barrages YouTuber with DMCA Takedowns over 'Misinformation,’” *POLYGON*, available at: <https://www.polygon.com/2018/12/17/18145139/escape-from-tarkov-dmca-youtube-eroktic> (last visited on October 25, 2024).

Similarly, a twitch user, by the name of ‘*SpectateFaker*’, imitated Faker, a professional gamer by misusing a feature in League of Legends permitting anyone with an account to view the “sole queue game”. Irrespective of the participation of the players, the extent of the copyright held by the developer would take within its purview all audiovisual displays and, thus, is the only party that has the power to issue a DMCA takedown request to Twitch. Streamers and even the platform, in this case, were unable to protect their interests as the copyrights were exclusively vested with the game publisher.⁵⁴ It has been previously held that video games do not meet the creative threshold for classifying a performance as the player's and not that of the gamers.⁵⁵

6. Copyright Holders v. Streamers: Judicial Trends in the US and EU

Video game developers assert dominance over streaming services, being the copyright holders and having deep pockets can afford to file for litigation. It is argued that the game player will be left with no recourse when developers file lawsuits against streaming services. Such a scenario would be detrimental to new entrants in the industry and suppress creativity in the market.⁵⁶

6.1. US Legal Regime

In the US, copyright protection is vested in original works that can be fixed in any tangible medium therefore, game developers have the right to have rights over usage of their videos and games. Further, video game developers and publishers have the right to impose limitations, control, and authorize the reproduction, distribution, creation, display, and performance of works.⁵⁷

However, DMCA is the most widely used framework for social media platforms.⁵⁸ It updated the copyright provisions to incorporate protection for online

⁵⁴ Yang Qui, “A Cure for Twitch: Compulsory License Promoting Video Game Live-Streaming” 21 Marq Intell Prop L Rev 31 (2017).

⁵⁵ *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983).

⁵⁶ Nicholas Robinson, “From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming” 20 *NC JL & Tech* 286 (2018).

⁵⁷ 17 U.S. Code, s. 106.

⁵⁸ Joanna Mrsich, “Streamer or Infringer? Copyright Law in the Video Game World,” *Washington Journal of Law, Technology and Arts*, available at: <https://wjta.com/2021/01/29/streamer-or-infringer-copyright-law-in-the-video-game-world/> (last visited on October 15, 2024).

service providers, and increased the extent of access to the works of copyright owners, making it illegal to provide false, misleading copyright management information.

Online service providers are exempted from liability as they fall under the umbrella of the “*safe harbor*” provision and implement a system that takes down content after providing notices to the users.⁵⁹ Therefore, Twitch will be absolved from any liability emanating from streamers engaging in broadcasting if they remove such content from the platform under this provision. Streaming platforms can be held liable if they enable users to continue posting such content or engage in infringing copyrighted works.⁶⁰

A mass DMCA takedown was issued by Nintendo, removing 379 videos made by fans from Gaming Jolt since the games infringed on the former’s protected works, such as music, characters, and prominent features of their video games.⁶¹ Furthermore, they sued a streamer on the ground of her infringement of the Pokémon franchise.⁶² Such steps have warranted fear from streamers since their broadcasts are in a way a direct reproduction of copyrighted work and can be subject to DMCA takedowns.

A significant case dealt with whether an A-to-Z guide on the Harry Potter Universe would be a transformative use of an encroachment on the copyright protection granted to the franchise. It was held that the content was not just a translation to another medium to another, but a reimagination of the existing material in the franchise.⁶³ Therefore, the foundation of the ideas, the objective, and the constituted an original piece of work. Similarly, livestreams also do not recast the work but change the expression to that of the streamer.

Furthermore, in a previous decision, the Court held that gameplay (described as player performances) does not meet the creativity threshold required to warrant

⁵⁹ Digital Millennium Copyright Act, 1998.

⁶⁰ *Supra* note 57.

⁶¹ Ryan Craddock, “Nintendo Issues Mass DMCA Takedown, 379 Fan-Made Games Forcibly Removed,” *Nintendolife*, available at: https://www.nintendolife.com/news/2021/01/nintendo_issues_mass_dmca_takedown_379_fan-made_games_forcibly_removed (last visited on November 25, 2024).

⁶² Ryan Craddock, “Popular Twitch and TikTok Star Pokeprinxss Has Been Sued By Nintendo,” *Nintendolife*, available at: https://www.nintendolife.com/news/2020/10/popular_twitch_and_tiktok_star_pokeprinxss_has_been_sued_by_nintendo (last visited on November 30, 2024).

⁶³ *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

copyrightability on the ground that it is merely one of the limited sequences allowed by the game.⁶⁴

It is argued that livestreams are not just a means to create revenue but to sustain the very enthusiasm that ties individuals together. Games provide an escapist medium for individuals tired of their mundane lives. Further, streaming also protects consumer interests by broadcasting the actual contents stored within the game. A direct comparison can be made to books reviews wherein an individual describes the best and worst parts of the books.⁶⁵ It gets shielded from any sort of copyright infringement provided that the content is not defamatory or cites a substantial portion of the book. Therefore, to hold whether there is an instance of copyright infringement by livestreaming video games would require scrutinizing various subjective factors. A one-size-fits-all approach cannot be used.

The Protecting Lawful Streaming Act, 2020 (PLSA)⁶⁶ makes it illegal for streamers to upload their streams under two conditions - not being the copyright holder and an express prohibition given in the terms of the end-user license agreement. Furthermore, the condition in which the legislation was enacted makes it clear that the legislature has started scrutinizing the matter and the outcome is not going to benefit the streamers.⁶⁷

It is difficult to determine whether livestreams that do not interact with the audience per se and merely display images from a videogame violate the four statutory rights, namely: (i) reproduction, (ii) display, (iii) public performance, and (iv) distribution. Reproduction can be answered in the negative, provided that there is no archive of the livestream.⁶⁸ Affixing a copyrighted work in a medium for a transitory

⁶⁴ *Supra* note 55.

⁶⁵ *Supra* note 12, s. 52 (1)(a)(i).

⁶⁶ Seth A. Davidson, "Protecting Lawful Streaming Act Signed into Law," *MINTZ*, available at: <https://www.mintz.com/insights-center/viewpoints/2231/2021-01-05-protecting-lawful-streaming-act-signed-law> (last visited on November 25, 2024).

⁶⁷ Dakota Foster, "Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach" 9 *Tex A&M L Rev* 711 (2022).

⁶⁸ Sebastian C. Mejia, "Fair Play: Copyright Issues and Fair Use in YouTube Let's Plays and Videogame Livestreams," 7 *Am U Intell Prop Brief* 1 (2015).

period would not fulfill the durational requirements.⁶⁹ Nevertheless, such dilemmas have not stopped streamers from regularly streaming and uploading it on the internet.⁷⁰

6.2. EU Legal Regime

Article 13 of the EU Copyright Directive has long-reaching implications and could severely impact streamer's right to speech and earn a livelihood.⁷¹ Twitch will be held liable for all instances of copyright violation. It would have to implement a strict monitoring system and filters on all forms of content uploaded by individuals residing in the European Union. On the contrary, it would pave the way for IP owners to receive monetary compensation for copyright infringement.

The Directive further mandates Internet Service Providers (ISPs) to at least endeavor to receive permission from owners before such content is shared, contrary to the safe harbor principles in the US. This will likely lead to material being disallowed without any forum for questioning the same again; it would significantly impact streamers. The game developer will have complete control over allowing sharing gameplay videos and could potentially prohibit esports competitions. A WIPO study recommended that legislators must look towards drafting a framework according *sui generis* protection to video games ensuring that both creators and consumers are adequately safeguarded in an increasingly digital and interconnected world.⁷²

Presently, Twitch has broadened the functions of AudibleMagic to include the identification of clips from streams playing copyrighted music. The streamers will not be penalized for the same. However, their clips will be deleted, and their account will be banned on non-cognizance of the copyright strikes.⁷³ Additionally, Twitch has launched

⁶⁹ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008).

⁷⁰ Shigenori Matsui, "Does It Have to Be a Copyright Infringement: Live Game Streaming and Copyright" *24 Tex Intell Prop LJ* 215 (2016).

⁷¹ EU Copyright Directive, Article 13.

⁷² "The Legal Status of Video Games," *WIPO*, available at: https://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf (last visited on November 10, 2024).

⁷³ Jacob Kastrenakes, "Twitch will begin scanning and deleting clips that contain copyrighted music," *The Verge*, available at: <https://www.theverge.com/2020/6/11/21288220/twitch-scan-clips-copyrighted-music-dmca-takedowns-audible-magic> (last visited on October 15, 2024).

a “DJ Program” that allows streaming DJs to share the cost of music rights when monetizing their streams.⁷⁴

7. Reevaluating Safe Harbor and Licensing Feasibility

The Safe Harbor provision came as a compromise between the streaming platforms and content creators. Streaming platforms must fulfill the following three conditions⁷⁵:

- i. The platform must fall within the scope of “service provider.”⁷⁶ Twitch transmits webcasts between streamers and viewers as the steamer chooses without altering the content in any way, thereby meeting this requirement.
- ii. Reasonably implemented a “repeat infringer policy” that would envision termination of the account in case of the repeated infringement. Twitch has clearly laid down certain requirements before a takedown notice is issued, what is expected from a counter-notification, and provided relevant information pertaining to the platform’s copyright agent.⁷⁷
- iii. Standard technical measures must be adopted by the streaming platforming so as to make it easier for copyright owners to identify their protected works. AudibleMagic is one such software that complies with the identification condition. Thus, it meets all the required conditions.⁷⁸

It is quite cumbersome to enforce a mandatory licensing scheme in cases of reproduction and distribution of work. Negotiating is a crucial aspect, and it is difficult to affix a certain rate as per the viewers, engagements, and the monetary profits earned by the stream that would be transferred to the copyright holder.⁷⁹ Furthermore, this could

⁷⁴ James Trew, “Twitch’s New DJ Program Has Flaws, But It’s the Best There Is,” *Wired*, available at: <https://www.wired.com/story/twitchs-new-dj-program-may-be-doomed-but-its-the-best-there-is/> (last visited on October 12, 2024).

⁷⁵ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

⁷⁶ U.S. Code, Chapter 17, § 512(k)(1)(B); The Information Technology Act, 2000 (Act 21 of 2000), s. 79.

⁷⁷ Community Guidelines, *TWITCH*, available at: <https://www.twitch.tv/p/en/legal/community-guidelines/> (last visited on November 29, 2024).

⁷⁸ Michael Larkey, “Cooperative Play: Anticipating the Problem of Copyright Infringement in the New Business of Live Video Game Webcasts” 13 *Rutgers J. L. & Pub. Pol’y* 52 (2015).

⁷⁹ Elizabeth Brusa, “Professional Video Gaming: Piracy that Pays,” 49 *J. MAnSHALL L. REV.* 217, 263 (2015).

have a chilling effect on the industry since paying a fee to upload a video would result in fewer gameplay creators and raise concerns for free speech in the virtual arena.

The streamer implements a variety of elements into their games and endeavors to suggest the most ideal strategy that involves certain inputs and quick decisions showcasing creativity and originality.⁸⁰ Added to that, there need to be constant interactions with the audience to the point wherein the views of the audience are considered.⁸¹ Terms of service agreements consist of several conditions that bind the user to limited ways of using the software.⁸²

These could potentially restrict the extent of the gameplay to fair use; however, the copyright holders will still have the upper arm and various contractual remedies in their favor.⁸³ Non-commercial use is a major impediment to the players' earning capacity.⁸⁴

The provisions stipulated in the End-User License Agreement (hereinafter referred to as EULA) gain significance:

- i. governing the use of the game for the purposes of uploading on streaming platforms;⁸⁵
- ii. prohibits any incomes emanating from the same;⁸⁶ and

⁸⁰ Jonathan Ammerman, "Twitch Streamer Goes Viral for Making All Skyrim Sounds Herself, Mocking DMCA Rules," *Gamerant*, available at: <https://gamerant.com/twitch-streamerskyrim-sound-effects-dmca-takedown/amp/> (last visited on November 11, 2024).

⁸¹ Eli Stonberg, "How interactive live streaming is removing the barrier between audience and show," *MEDIUM*, available at: <https://medium.com/hovercast/how-interactive-live-streaming-is-removing-the-barrier-between-audience-and-show-a29ec89ccfd8> (last visited on November 10, 2024).

⁸² *MDY Indus., LLC. v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010).

⁸³ 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 (2018).

⁸⁴ "Policy on posting copyrighted Rockstar Games material," *Rockstar Games*, available at: <https://support.rockstargames.com/articles/200153756/Policy-on-posting-copyrighted-Rockstar-Games-material> (last visited on November 13, 2024).

⁸⁵ "Electronic Arts, Software End User License Agreement Dragon Age II, *Inquisition I (F)*, available at: <https://media.contentapi.ea.com/content/dam/eacom/en-us/eula/eula-da2-with-cider-1-4.pdf> (last visited on October 14, 2024).

⁸⁶ "End User License Agreement," *Blizzard*, available at: <https://www.blizzard.com/en-es/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> (last visited on November 30, 2024).

- iii. the power to take down content in its entirety if found in violation of the policies.

It is to be emphasized that the moment an artistic or literary work is created, copyright is vested within the owner.⁸⁷ Therefore, the absence of any clause on copyright infringement would not injure the developer in any way and it is implied that users do not have the right to broadcast the content in a public manner.⁸⁸

Licensing should be such that it deters the streamers from broadcasting the entire walkthrough game, especially when the game has only one ending and one way of achieving it. It is argued that this would dissuade the audience from playing and severely affect the game developers.

A written expression license with the applicability of contractual law principles seems to be the best option to address the issue.⁸⁹ The implied license doctrine from the US approach provides respite by suppressing copyright infringement and simultaneously addressing the competing interests of streamers, developers, and platforms.⁹⁰

8. The Way Ahead: Expanding the Contours of India's Copyright Regime

Presently, video games have not been comprehensively explored in Indian jurisprudence, and the legal framework governing them remains largely underdeveloped. The Indian gaming industry is still in its nascent stage, with its rapid expansion outpacing the evolution of regulatory mechanisms. Unlike other forms of creative content, video games do not have a dedicated legislative framework addressing their unique intersection of software, audiovisual elements, and user interactivity. This regulatory gap extends to the realm of livestreaming, where legal uncertainties persist regarding ownership rights, fair use, and the liabilities of content creators and streaming platforms.

⁸⁷ Essense Obhan, Mehak Dhingra, "India: Is Your Original Work Automatically Protected By Copyright?", *MONDAQ*, available at: <https://www.mondaq.com/india/trademark/1055784/is-your-original-work-automatically-protected-by-copyright> (last visited on November 16, 2024).

⁸⁸ Isabel Assunta C. Caguioa, "Recent Copyright Issues in Video Games, Esports, and Streaming" 63 *Ateneo LJ* 882 (2019).

⁸⁹ Christina Grey, "Let's Play and Livestreaming: Does Game Developer Endorsement Preclude a Claim of Copyright Infringement under the DMCA?" 23 *Tex Rev Ent & Sports L* 89 (2022).

⁹⁰ Yang Qui, "A Cure for Twitch: Compulsory License Promoting Video Game Live-Streaming" 21 *Marq Intell. Prop. L. Rev.* 31 (2017).

Under the Information Technology (IT) Act, 2000, intermediaries like streaming platforms⁹¹ benefit from protections,⁹² but since video game publishers and streaming platforms are not explicitly covered, livestreaming operates in a grey area. This leaves them in a position where they neither fully benefit from intermediary protections nor face direct liability. A more specific Safe Harbor provision for gaming content would help clarify responsibilities and foster a balanced regulatory approach.

8.1. Fair Use v/s Infringement: The Dilemma in India's Gaming Ecosystem

Under the Copyright Act, 1957, video games are protected as a combination of literary (software code), artistic, and cinematographic works. However, there is no explicit recognition of gameplay as an independent subject of copyright. Copyright owners are granted exclusive rights over reproduction, adaptation, and communication to the public, but the extent to which these rights apply to live-streamed gameplay remains legally uncertain.⁹³

Another complexity arises from the interpretation of Section 2(dd), which defines "*broadcasting*."⁹⁴ Video game streaming could potentially fall within this definition, as it involves the transmission of sounds and visual images. However, the distinction between recorded gameplay videos and live streaming presents a challenge.⁹⁵ Some game developers, like Sony and Microsoft, allow unlicensed streaming to promote their games, while others strictly enforce their copyright rights. This creates a dichotomy where some companies benefit from free promotion, while others face the risk of unauthorized distribution.⁹⁶

The concept of "*fair dealing*"⁹⁷ offers limited exceptions for criticism, review, and reporting. The judicial approach in India has often borrowed elements of "*fair use*" while interpreting "*fair dealing*." For instance, in *The Chancellor Masters and Scholars*

⁹¹ The Information Technology Act, 2000 (Act 21 of 2000), s. 2(w).

⁹² *Id.*, s. 79.

⁹³ *Supra* note 12, s. 14.

⁹⁴ *Id.*, s. 2(dd).

⁹⁵ *Supra* note 93.

⁹⁶ Yash Raj, "The Lacunae in the Indian Copyright law vis-a-vis video games," *NLUJ Law Review*, available at: <https://nlujlawreview.in/intellectual-property-law/the-lacuna-in-the-indian-copyright-law-vis-a-vis-video-games/> (last visited on November 30, 2024).

⁹⁷ *Supra* note 93.

of the University of Oxford v. Narendra Publishing House,⁹⁸ the Delhi High Court recognized the “transformative use” doctrine, a concept developed under U.S. fair use jurisprudence, as relevant to the Indian fair dealing analysis. However, the ruling primarily pertained to criticism and review, which limits its applicability as a precedent in the gaming context.⁹⁹ Given that video game streaming often involves commentary, audience engagement, and continuous review of the game by the streamer, it could arguably fall under this exception. However, the scope of fair dealing in this context remains uncertain.

The factors to assess fair dealing in video game streaming involve evaluating the degree of transformation added to the original game content are:

- i. The time investment into gameplay is crucial, as streamers who dedicate significant time and skill to mastering the game often produce more original content, making it less likely to be seen as mere reproduction.
- ii. The degree of variability in inputs reflects how much the player's choices influence the game's outcome, with higher variability supporting a more transformative use.
- iii. The quality and quantity of player decisions also plays a role, as games where player decisions create diverse outcomes show greater creativity and originality in the stream.
- iv. The use of varied in-game strategies or collections contributes to the content's originality, as it showcases unique approaches to gameplay.
- v. The time invested into video editing is another key factor, as extensive editing or adding creative elements like overlays and commentary adds a transformative layer, making the stream more than just a gameplay recording.

⁹⁸ RFA (OS) No.21 of 2009 and FAO (OS) No.458 of 2008.

⁹⁹ Sankalp Jain, “Video Games, User-Generated Content and Copyright,” *SpicyIp*, available at: <https://spicyip.com/2020/06/video-games-user-generated-content-and-copyright.html> (last visited on September 30, 2024).

- vi. The selection of music by the streamer can also enhance the transformation, especially when custom tracks are used to complement the gameplay.
- vii. The efforts expended in creating additional effects or aspects—such as animations, sound effects, face cams, or custom backgrounds—demonstrate creativity and originality, further distancing the content from simple reproduction. These combined factors help determine whether the stream qualifies as fair dealing under copyright law.¹⁰⁰

In this context, the role of game developers' policies becomes critical. If developers explicitly allow streaming for promotional purposes, fair dealing could be more easily justified. However, when such practices are not part of the agreement, streamers should avoid directly commercializing their content and ensure that they do not violate the integrity of the game by streaming it in a manner that detracts from the original work.

8.2. Policy Recommendations: Filling the Legislative Lacuna

To address the existing gaps and provide clarity, several policy reforms and legislative changes are necessary. First, amendments to the Copyright Act, 1957, should explicitly recognize video games as a distinct category ensuring clearer protection in line with international norms.¹⁰¹ Moreover, a statutory licensing system, similar to those in the music and film industries, could be implemented to facilitate fair compensation for developers while allowing streamers to use game content.

The adoption of specific fair dealing guidelines tailored to video game streaming is crucial. These guidelines should establish thresholds for transformative use, outlining the degree of modification required for gameplay footage to qualify as fair dealing. They should also account for the factors above, providing clarity on the extent of acceptable use for different types of gameplay and post-production modifications.

¹⁰⁰ Kaushal, Kalpana, "Online Video Game Streaming, Esports, and IPR: A Sweeping Saga of Conflict," 13 *NLIU L. Rev.* 160, 165 (2023); Dakota Foster, "Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach" 9 *Tex A&M L Rev* 711 (2022).

¹⁰¹ *Supra* note 12, s. 13(1).

Moreover, a statutory licensing system similar to those in the music and film industries could be implemented to facilitate fair compensation for developers while allowing streamers to use game content. This statutory license would ensure that game developers receive fair compensation without overly restricting gamers' freedom of expression. It would significantly reduce the transaction costs associated with license negotiation for both game developers and streamers, streamlining the process and making it more accessible for smaller players in the industry.¹⁰² While streaming platform operators may enter into agreements with major game developers, individual game streamers often struggle to negotiate with big game developers on their own. Thus, a statutory licensing mechanism would level the playing field for all involved parties.¹⁰³

Additionally, since the streaming images are fixed on and transmitted through the operator's platform (such as Twitch or YouTube), the operator plays a significant role in the live game streaming industry. In this regard, streaming platform operators' status is akin to that of film producers, as they control the development of the live-streaming ecosystem, while game anchors/streamers and players act more like actors or performers. The content creation process is not limited to gameplay alone but also includes significant input from the platform operator. This calls for a reevaluation of the role and rights of platform operators, alongside the streamers themselves.

A critical issue lies in balancing competing interests—free speech, the right to livelihood, and intellectual property rights. Current copyright laws heavily favor developers and publishers, leaving streamers vulnerable to arbitrary takedowns and legal challenges. One practical solution to these challenges is through licensing agreements. Developers could grant broadcasting rights to streamers for specific durations under clearly defined conditions, including usage limits, review policies, and revenue-sharing models. End-User License Agreements (EULAs) should be carefully crafted to include clear penal provisions and injunctions, ensuring that both developers and streamers reach a mutually agreeable understanding. These agreements would foster a collaborative ecosystem that benefits both parties and minimizes the need for costly litigation.

¹⁰² Zhaoxia Deng, Yahong Li, "Players' Rights to Game Mods: Towards a More Balanced Copyright Regime" 43 *Computer Law & Security Review* 5-6 (2021).

¹⁰³ *Id.*

Drawing on international best practices, India could integrate elements of the DMCA framework, particularly Safe Harbor provisions, while tailoring them to fit the local context. Streaming platforms must be held accountable for distributing unauthorized content and ensuring fair treatment for legitimate creators. Additionally, the Copyright Act, 1957, should be revised through a utilitarian approach that recognizes the changing nature of content creation in the digital age. The inclusion of artificial intelligence for scanning copyrighted material could streamline enforcement, though human oversight must be incorporated to prevent arbitrary takedowns and preserve due process.¹⁰⁴ Furthermore, exceptions to copyright infringement should be reevaluated to protect transformative works, which often lie at the heart of creative expression in the gaming and livestreaming sectors.

Streamers themselves must also take proactive steps to safeguard their intellectual property. This could include registering their content, using watermarks, and issuing takedown notices for unauthorized use. While livestreaming has revolutionized media consumption, unchecked infringement can discourage creators, result in financial losses, and burden legitimate creators with expensive litigation.

The policy should recognize how live-streaming and content creation can serve to complement, rather than replace, the original works created by game developers.¹⁰⁵ By adopting this approach, a mutually beneficial relationship can be fostered between content creators and copyright holders, allowing both parties to flourish while safeguarding each other's intellectual property rights. A comprehensive approach to protecting the rights of all stakeholders could unlock the full potential of the gaming industry.

9. Conclusion: Towards a Harmonized Framework for Indian Gaming Ecosystem

Gaming has evolved into a mainstream cultural and economic phenomenon, largely driven by technological advancements and evolving consumer engagement through livestreaming. However, the legal framework surrounding gaming in India remains underdeveloped, particularly when addressing the complexities of this rapidly

¹⁰⁴ *One Hundred and Sixty First Report: Review of the Intellectual Property Rights Regime in India*, Department Related Parliamentary Standing Committee on Commerce, Rajya Sabha, Parliament of India, July 2021, available at https://files.lbr.cloud/public/2021-07/161_2021_7_15.pdf?VersionId=S01fCQEC5DzDqKNyMsGxal6YXmJbUwM (last visited on 30 November 2024).

¹⁰⁵ Tim Wu, *Tolerated Use*, 31 Colum. J. L. & Arts 617 (2008).

growing sector. Foundational issues such as data protection remain unresolved, and the absence of a dedicated gaming law exacerbates the challenges faced by all stakeholders. The need to examine the scope and application of copyrighted works in virtual spaces is now an urgent concern as the industry evolves toward new digital engagement models.¹⁰⁶

In the long term, the success of the gaming sector will hinge on fostering a symbiotic relationship between streamers, developers, and platforms. The core values of creativity and self-expression that define copyright law should be preserved, avoiding overregulation or overly restrictive government policies. By forming partnerships with both established and emerging developers and streamers, the gaming industry can ensure mutual growth. Additionally, incorporating a human element in decision-making—rather than relying solely on automated content flagging—would better balance the interests of all stakeholders. While streaming platforms often prioritize copyright holders with more resources, the rights of individual creators must be also protected in this evolving digital landscape.

¹⁰⁶ Jared Lindzon, “The gaming industry is aiming for subscribers. Will gamers play along?”, *BBC*, available at: <https://www.bbc.com/worklife/article/20240130-the-gaming-industry-is-aiming-for-subscribers-will-gamers-play-along> (last visited on November 30, 2024).