

Recent Copyright Issues in Video Games, Esports, and Streaming

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I. INTRODUCTION

It has been over half a century since the first video game, *Tennis for Two*, was released,¹ and half a century since the first person heralded video games as “the future.”² Still, it is hard to imagine that anyone could have predicted

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Cite as 63 ATENEO L.J. 882 (2019).

1. Kristen J. Nyitray, *William Alfred Higinbotham: Scientist, Activist, and Computer Game Pioneer*, 33 IEEE ANNALS HIST. COMPUTING 96, 96 (2011).
2. See Jack Lule, *Understanding Media and Culture: An Introduction to Mass Communication*, ch. 10 (2012).

that people today would be making a living from playing video games, or that they would be doing so while millions of viewers from around the world watched.

This very scenario happened last August 2018 in Vancouver's Rogers Arena, where video game company Valve Corporation (Valve) held a US\$25 million tournament (The International 2018) for the popular online game *Dota 2* (*Dota*).³ Millions of *Dota* fans from around the world watched on Twitch, an online streaming service, as the 18 best teams from China, Europe, North America, South America, Southeast Asia, and the Commonwealth of Independent States (CIS) competed for the US\$11,190,158.00 grand prize and for the honor of being known as the best *Dota* team in the world.⁴

One thing, however, remains constant. With any new industry or technology, there will always be new legal issues to tackle.

In this Essay, the Author takes a look at some of the more recent issues involving video games, esports, and streaming, particularly those related to copyright law. As the copyright law of the Philippines is highly similar to the copyright law of the United States (U.S.), both being signatories to the Berne Convention,⁵ the discussion will use both Philippine and U.S. laws, unless there are notable differences between the two.

The rest of the Essay proceeds as follows: Part II focuses on the definition of video games, esports, and streaming. Part III discusses four of the most recent copyright issues involving these topics. Finally, Part IV provides a brief overview of forthcoming legal issues involving esports.

II. VIDEO GAMES, ESPORTS, AND STREAMING

A. Video Games

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3. Hitanshu "Anomalina" Budhwani, OG are your champions of The International 2018, *available at* <https://www.gosugamers.net/dota2/news/47745-og-are-your-champions-of-the-international-2018> (last accessed Feb. 1, 2019).
 4. Valve Corporation, *Dota 2*, *available at* <https://www.dota2.com/international/overview> (last accessed Feb. 1, 2019).
 5. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sep. 9, 1886, 828 U.N.T.S 221 & World Intellectual Property Organization, WIPO-Administered Treaties, *available at* http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last accessed Feb. 1, 2019).

“Video game” has been defined as “an electronic game played on a video screen.”⁶ Alternatively, it is considered to be “a game which [everyone] play[s] thanks to an audiovisual apparatus and which can be based on a story.”⁷ While video games were certainly not contemplated by the earliest manifestations of copyright law, the question of video game copyright is not exactly a new one in the legal world.

In the landmark case of *Stern Electronics Inc. v. Kaufman*,⁸ video games are defined as “computers programmed to create on a television screen cartoons in which some of the action is controlled by the player.”⁹ It should be noted that up until this point, computer programs were considered copyrightable as the written code was considered a literary work.¹⁰ The case of *Stern Electronics, Inc.*, involving the game *Scramble*, was unique because Konami, the company that granted Stern Electronics Inc. the exclusive license over the game, “eschewed registration of its program as a literary work and chose instead to register the sights and sounds of ‘Scramble’ as an audiovisual work.”¹¹

The argument of the defendant, Omni Video Games, Inc. (Omni), was that video games could not be considered audiovisual works as they were neither fixated¹² nor original.¹³ Omni’s theory was that each time the game

6. MERRIAM-WEBSTER DICTIONARY 806 (2004 ed.).

7. Nicolas Esposito, A Short and Simple Definition of What a Videogame Is at 1, *available at* <http://www.utc.fr/~nesposit/publications/esposito2005definition.pdf> (last accessed Feb. 1, 2019) (emphases omitted).

8. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982) (U.S.).

9. *Id.* at 853.

10. U.S. Copyright Act of 1976, 17 U.S.C. § 101, para. 9 (1976). In 1980, the U.S. Congress amended the Copyright Act of 1976 to specifically include “computer program” as literary works. *Id.* See also Jan L. Nussbaum, *Apple Computer, Inc. v. Franklin Computer Corporation Puts the Byte Back into Copyright Protection for Computer Programs*, 14 GOLDEN GATE U. L. REV. 281, 289-90 (1984). In the I.P. Code, computer programs are listed as copyrightable. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293, § 172.1 (n) (1998) (as amended).

11. *Stern Electronics, Inc.*, 669 F.2d at 855 (citing 17 U.S.C. App. § 102 (1) (6)).

12. *Id.* at 853. See 17 U.S.C. App. § 102 (a). Under the Copyright Act of the United States (U.S.), it is necessary that the work be “fixed in any tangible medium of expression.” 17 U.S.C. App. § 102 (a).

was played (each “playthrough”) generated a new audiovisual expression, and thus, could neither be fixed (because each playthrough was unique) nor original (because the originality and the copyright would extend only to each particular playthrough and not to the game as a whole, or because the playthroughs are predetermined by the already-protected code).¹⁴ However, the Federal Court debunked both arguments, explaining that even though certain elements appear or disappear depending on the particular playthrough, certain elements remained constant, and the “repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work.”¹⁵ Moreover, the Federal Court ruled that “[t]he visual and aural features of the audiovisual display are plainly original variations sufficient to render the display copyrightable even though the underlying written program has an independent existence and is itself eligible for copyright.”¹⁶

B. Esports

The definition of “esports” is not, however, quite as established as the definition of video games. One way of looking at it is to consider esports as a kind of sport. After all, in the Philippines, the Gaming and Amusement Board, by issuing athletic licenses to esports players,¹⁷ has already recognized that esports is a sport.

But what makes a sport a sport? Is it the prize money? The number of viewers? The presence of the Golden State Warriors? Some would argue that esports is not a sport because there is no physical aspect. In the United Kingdom (U.K.) case of *R (English Bridge Union) v. Sport England*,¹⁸ the High Court of England and Wales ruled that the card game Bridge was not a sport because it did not have a physical aspect.¹⁹ In this case, the High Court ruled

13. *Stern Electronics, Inc.*, 669 F.2d at 853.

14. *Id.* at 855–56.

15. *Id.* at 856.

16. *Id.*

17. Pia Regalado, The Philippines’ new athletes: eSports gamers, *available at* <http://news.abs-cbn.com/focus/10/10/17/the-philippines-new-athletes-esports-gamers> (last accessed Feb. 1, 2019).

18. *R (English Bridge Union) v. Sport England*, CO/524/2015, Oct. 15, 2015, *available at* https://www.judiciary.uk/wp-content/uploads/2015/10/ebu_approved.pdf (last accessed Feb. 1, 2019) (Admini. Ct. Q.B. Div., 2015) (U.K.).

19. *Id.* ¶¶ 25 & 44.

that the applicable law was the European Sports Charter, which provides that “[s]port’ means all forms of *physical activity* which, through casual or organized participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.”²⁰

The most obvious counterpoint to this, of course, is chess. While chess has no physical aspect, it has regularly been included in the International Olympics, the organization widely considered to be the foremost authority in sports. In fact, there has already been a move to include esports in the Olympics,²¹ although this has not been met with universal approval.²²

Dr. Raymond Stefani,²³ noting the trend of the Olympics to include more and more sports every year, classifies Olympic sports into “physical sports” and “mind sports.”²⁴ Stefani then suggests that “esports” form a new category, to be defined as “a competition with a set of rules for determining the winner, requiring physical prowess and skill to move a virtual person and/or a virtual object as required by the rules.”²⁵

The Global Association of International Sports Federations (GAISF), meanwhile, defines a sport as having the following characteristics:

- (1) The sport proposed should include an element of competition[;]

20. *Id.* ¶ 3 (citing Council of Europe, Revised European Sports Charter, Recommendation No. R (92) 13 Rev, art. 2, ¶ 1 (a) (Sep. 24, 1992)) (emphasis supplied).

21. International Olympic Committee, Olympic Movement, Esports and Gaming Communities Meet at the Esports Forum, *available at* <https://www.olympic.org/news/olympic-movement-esports-and-gaming-communities-meet-at-the-esports-forum> (last accessed Feb. 1, 2019).

22. See Rachel Kaser, Olympics Committee President rejects esports as ‘promoting violence’, *available at* <https://thenextweb.com/gaming/2018/09/04/olympics-esports-violence> (last accessed Feb. 1, 2019).

23. Dr. Stefani is an emeritus professor of Engineering at the California State University. LinkedIn, Raymond Stefani, *available at* <https://www.linkedin.com/in/raymond-stefani-a843a049> (last accessed Feb. 1, 2019).

24. Ray Stefani, E-sports, mind sports and the Olympics: What is a sport, anyway?, *available at* <https://www.statslife.org.uk/sports/3222-e-sports-mind-sports-and-the-olympics-what-is-a-sport-anyway> (last accessed Feb. 1, 2019).

25. *Id.* (emphasis omitted).

- (2) The sport should not rely on any element of ‘luck’ specifically integrated into the sport[;]
- (3) The sport should not be judged to pose an undue risk to the health and safety of its athletes or participants[;]
- (4) The sport proposed should in no way be harmful to any living creature[; and]
- (5) The sport should not rely on equipment that is provided by a single supplier.²⁶

Under these definitions, esports can most definitely be considered a class of sport, such as physical sport or mind sport. However, if this supposition was true, can we also say that *Dota* and *League of Legends (LoL)* are kinds of esports, in the same way that basketball and football are kinds of physical sports?

It is probably more accurate to say that the “kind” of traditional sport, such as basketball or football, is equivalent to the *genre* in esports or video games.²⁷

Dota and *LoL* are part of the Multiplayer Online Battle Arenas (MOBA) genre, sometimes also called Action Role Playing Games (ARPGs). *Overwatch* and *Counter-Strike: Global Offensive (CS:GO)* are types of First-Person Shooters (FPS). *Starcraft* is a Real-Time Strategy (RTS), *Hearthstone* is an online card game (sometimes called an online trading card game, an online collectible card game, or a strategy card video game). It is these genres that are comparable to basketball, football, and volleyball.

Dota and *LoL* are really most similar to leagues — groups of sports teams that regularly play one another — like the National Basketball Association (NBA) or the National Football League (NFL). Each team playing within *Dota* and *LoL* has a different owner, but like the NBA and NFL, all of these teams play together under the rules and regulations of one governing body: for *Dota*, Valve; for *LoL*, Riot. Just as there can be different leagues in basketball (e.g., National Collegiate Athletic Association and NBA) both foreign and local (e.g., Philippine Basketball Association and University

26. Global Association of International Sports Federations, Definition of Sport, available at <http://www.gaisf.sport/en/members/definition-of-sport> (last accessed Feb. 1, 2019). SportAccord is the former name of the Global Association of International Sports Federations.

27. Certain video game genres do not have an esports aspect, such as RPGs.

Athletic Association of the Philippines), there can be different games under one single genre (e.g., *Dota* and *LoL*).

C. Streaming

“Streaming” is defined in the dictionary as “a technology for transferring data so that it can be received and processed in a steady stream.”²⁸ It may refer to watching movies or a series online through a medium like Netflix, or to watching videos on YouTube. However, streaming — sometimes called *livestreaming* to distinguish it from Netflix and YouTube — means something more particular in the world of video games and esports. A more comprehensive description of streaming for the purposes of this Essay may be found in Blizzard’s Overwatch League (OWL) Streaming Policy²⁹ —

‘Streaming’ means any telecast, webcast, transmission, broadcast[,] or distribution of *video game content* ... to viewers not participating in the particular streamed game (whether on a live, delayed, recorded[,] or on-demand basis) via any interface, channel, site, offering, network, application, device[,] or other platform (including Twitch, YouTube, Facebook, Twitter, Azubu, Beam, Douyu.tv, Afreeca.tv, Huya, Streamable, Gyfcats[,] and Reddit), whether now known or hereafter developed ... ‘Streaming’ does not, however, include one-to-one communications.³⁰

In layman’s terms, streaming is most commonly understood as watching someone else play video games over the Internet. It is the 21st century version of watching over your brother’s shoulder as he lands a combo in *Tekken* or takes down Sephiroth in *Final Fantasy VII*. No discussion about either video games or the esports industry can be complete without a discussion on streaming — video games are streamed by millions of people

28. Dictionary.com, Streaming, available at <https://www.dictionary.com/browse/streaming> (last accessed Feb. 1, 2019).

29. Overwatch League LLC (Streaming Policy Provided to Overwatch League Players), available at <https://rlewisreports.com/wp-content/uploads/2018/03/OWLRulebook.pdf> (last accessed Feb. 1, 2019).

30. *Id.* at 1 (emphases supplied and omitted). It must be noted that the definition of streaming under these guidelines includes both pre-recorded (e.g., YouTube) and live (e.g., Twitch). This Essay will be using the word “streaming” to refer to both or either. Additionally, the definition only includes video game content as non-video game content is not covered by this discussion.

every day,³¹ bringing to it not only a wealth of viewers and revenues but also a host of legal problems.

Streaming is also one of the reasons why esports has seen tremendous growth over the past few years. If cable television is the reason sports went from a niche viewership to a global,³² and even political,³³ presence, streaming is doing the same for esports. And if Entertainment and Sports Programming Network (ESPN) was responsible for bringing sports to the forefront of cable television, Twitch.tv (Twitch) is doing the same for esports.

Twitch is a streaming platform that focuses on video games: watching people play games, watching people talk about games, or watching professional players compete in esports tournaments. Started in 2011, Twitch and streaming grew into a cultural phenomenon around the world. In 2013, Twitch had 45 million unique viewers per month,³⁴ and in 2014, Amazon acquired the company for US\$970 million.³⁵ Just last year, Twitch had 15 million unique viewers per day.³⁶

In many ways, Twitch is similar to ESPN. In the mid-1980s, sports broadcasting was fragmented, and television networks were not making money from the broadcasts.³⁷ ESPN changed the game by introducing sports

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31. Joshua Fruhlinger, You won't find the new pop stars in movies. You'll find them on Twitch., *available at* <https://www.digitaltrends.com/gaming/the-popularity-of-twitch-youtube-gaming-other-streaming-sites-on-the-rise> (last accessed Feb. 1, 2019).
 32. See RAYMOND W. GAMACHE, HISTORY OF SPORTS HIGHLIGHTS: REPLAYED PLAYS FROM EDISON TO ESPN 129-30 (2014).
 33. Patrick Hruby, *ESPN: can The Worldwide Leader in Sports manage its own decline?*, GUARDIAN, Dec. 7, 2017, *available at* <https://www.theguardian.com/sport/2017/dec/07/espn-revenue-viewership-politics-layoffs> (last accessed Feb. 1, 2019).
 34. Abigail Elise, Twitch Hits Over 45 Million Monthly Viewers, *available at* <https://www.ibtimes.com/twitch-hits-over-45-million-monthly-viewers-1543751> (last accessed Feb. 1, 2019).
 35. Eugene Kim, Amazon Buys Twitch, For \$970 Million In Cash, *available at* <https://www.businessinsider.com/amazon-buys-twitch-2014-8> (last accessed Feb. 1, 2019).
 36. Twitch, 2017 Year in Review, *available at* <https://www.twitch.tv/year/2017/factsheet.jpg> (last accessed Feb. 1, 2019).
 37. GAMACHE, *supra* note 40, at 17.

highlights and instant replays; pulling in popular anchors and sports commentators; and broadcasting all kinds of sports — from obscure regional sports to the NFL and collegiate sports — 24 hours a day.³⁸

The way fans perceived sports was soon changed forever, due to the emergence of these sports networks. Viewers were now exposed to watching games from various camera angles, instant replay, and all-around better lighting. These networks provided the sports fan with a ‘packaged reality,’ as a way to watch games.³⁹

In a similar manner, before Twitch came along, streaming was difficult both for the producer and the consumer. The equipment required to stream esports tournaments was expensive, and those watching were subject to poor quality streams and lag.⁴⁰ With Twitch, streaming has become less expensive as it has enabled anyone with minimal equipment to stream from the comfort of his or her own home.⁴¹ Moreover, Twitch features spectator chat, which allows viewers to interact with their favorite streamers and with each other — making viewing video games and esports a two-way experience in a way that cable television could never capture.⁴² This is also what truly differentiates livestreaming from pre-recorded videos, which offer no two-way interaction.

Nowadays, Twitch and streaming has expanded even beyond video games and esports. People stream cooking, art, talk shows, and anything under the sun. Its unique aspect of two-way interaction has even allowed feats such as “Twitch Plays Pokémon,” where over a million people in Twitch chat played a single game of Pokémon by giving commands through chat.⁴³ Where ESPN offers the packaged reality of sports highlights, commentary, and replays, Twitch offers an online community for people to watch video games and esports together, as though they were watching it at home with their friends and family.

38. *Id.* at 157.

39. *Id.* at 142.

40. Ben Popper, Field of streams: how Twitch made video games a spectator sport, *available at* <https://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming> (last accessed Feb. 1, 2019).

41. *Id.*

42. Twitch, Don’t just watch, join in, *available at* <https://www.twitch.tv/p/about> (last accessed Feb. 1, 2019).

43. Twitch, Twitch Plays Pokemon, *available at* <https://www.twitch.tv/twitchplayspokemon/videos> (last accessed Feb. 1, 2019).

III. COPYRIGHT ISSUES

One of the core tenets of copyright law is that an idea is not copyrightable, but its expression is — the idea-expression dichotomy.⁴⁴ The seminal case of *Baker v. Selden*,⁴⁵ on idea-expression dichotomy, involves a method of bookkeeping or accounting as described in a book by Charles Selden.⁴⁶ The U.S. Supreme Court ruled then that while the very statements in the book may be protected under copyright, the method of bookkeeping it described could not.⁴⁷ In other words, the book was the expression, but the method was the idea.⁴⁸

In Philippine law, this doctrine is codified in Section 175 of the Intellectual Property Code of the Philippines (I.P. Code), which states that “no protection shall extend ... to any *idea* ... even if they are expressed, explained, illustrated[,] or embodied in a work[.]”⁴⁹ The doctrine was first applied in the case of *Joaquin, Jr. v. Drilon*,⁵⁰ a case involving a dating game show.⁵¹ In that case, the Supreme Court quoted Section 175 and ruled that while there may be a copyright over the audio-visual tapes of the dating gameshow (the expression), there could be no copyright over the idea of a dating gameshow.⁵²

The applicability of the idea-expression dichotomy to video games was settled as far back as the 1980s, in landmark cases such as *Atari, Inc. v. North American Philips Consumer Corp.*,⁵³ and *Capcom U.S.A., Inc. v. Data East*

44. See Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 551 (1990) (citing *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989) (U.S.) & *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204, 208 (2d Cir. 1981) (U.S.)).

45. *Baker v. Selden*, 101 U.S. 99 (1879).

46. *Id.* at 104.

47. *Id.*

48. *Id.*

49. INTELL. PROP. CODE, § 175 (emphasis supplied).

50. *Joaquin, Jr. v. Drilon*, 302 SCRA 225 (1999).

51. *Id.* at 229.

52. *Id.* at 239.

53. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982) (U.S.).

Corp.⁵⁴ In *Atari, Inc.*, the games in question were *PAC-MAN*, by Atari, and a game called *K.C. Munchkin*.⁵⁵ Here, the U.S. Federal Court held that

[Atari's] audiovisual work is primarily an unprotectible game, but ... to at least a limited extent the particular form in which it is expressed (shapes, sizes, colors, sequences, arrangements, and sounds) provides something 'new or additional over the idea.' In applying the abstractions test, [the Federal Court found] that [the] plaintiffs' game can be described accurately in fairly abstract terms, much in the same way as one would articulate the rules to such a game. *PAC-MAN* is a maze-chase game in which the player scores points by guiding a central figure through various passageways of a maze and at the same time avoiding collision with certain opponents or pursuit figures which move independently about the maze. Under certain conditions, the central figure may temporarily become empowered to chase and overtake the opponents, thereby scoring bonus points. The audio component and the concrete details of the visual presentation constitute the copyrightable expression of that game 'idea.'⁵⁶

While *K.C. Munchkin* was eventually held to have been too substantially similar to *PAC-MAN* to hold its own copyright, the Federal Court here makes the important distinction between the abstract idea of a game and its expression.⁵⁷ The Federal Court even went on to say that other maze-chase games (a game genre) would not infringe copyright laws, so long as they did not use *PAC-MAN*'s protectable elements.⁵⁸

In *Capcom U.S.A., Inc.*, and its companion case of *Data East Usa, Inc. v. Epyx, Inc.*,⁵⁹ the U.S. courts applied the copyright doctrine of *scènes à faire* to video games.⁶⁰ The courts recognized that within certain genres — in these cases, the fighting game genre in particular — certain aspects are necessarily

54. *Capcom U.S.A., Inc. v. Data East Corp.* 1994 WL 1751482 (N.D. Cal. 1994) (U.S.).

55. *Atari, Inc.*, 672 F.2d at 610.

56. *Id.* at 617 (citing *Goodson-Todman Enterprises, Ltd. V. Kellogg Co.*, 513 F.2d 913 (9th Cir. 1975) (U.S.)).

57. *Atari, Inc.*, 672 F.2d at 616.

58. *Id.* at 617.

59. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir. 1988) (U.S.).

60. *Id.* at 208 (citing *Aliotti v. R. Dakin Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (U.S.) & *Atari, Inc.*, 672 F.2d at 616) & *Capcom U.S.A. Inc.*, 1994 WL 1751482 at 12 (citing *Data East Usa, Inc.*, 862 F.2d at 208)). *Scènes à faire* are "expressions that are 'as a practical matter, indispensable or at least standard in the treatment of a given [idea].'" *Id.*

repeated across different games.⁶¹ In the same way that the court ruled in *Atari, Inc.*, it was stated that a maze is a necessary part of maze-chase games, while special moves and combinations are intrinsic to fighting games.⁶²

Similarly, the genre of a video game, whether RPG, MOBA, FPS, etc., may not be copyrighted, but its expression as the games of *Dota*, *LoL*, *OWL*, etc., may be. Thus, the games of *Dota*, *LoL*, as well as other MOBAs such as *Arena of Valor* or *Mobile Legends: Bang Bang (MLBB)* share aspects such as the objective of destroying a base, or the multiple heroes or champions with different sets of skills, a mini-map, and others.⁶³ However, the art used for the map, the names, and the stories behind the heroes or skills can be considered as copyrightable assets.⁶⁴

A. Ownership

1. Applying the Idea-Expression Dichotomy

Riot Games (Riot) recently filed a lawsuit against Shanghai Moonton Technology Co., Ltd., the developer of popular mobile MOBA *Mobile Legends: Bang Bang* for infringing Riot's *League of Legends*.⁶⁵ While Riot does not contest that the idea of a MOBA is not protected by copyright, it alleged that *MLBB* clearly copied several aspects of their game, such as the map, the logo, and even the characters.⁶⁶ The following images are taken from the lawsuit filed by Riot:

61. *Data East USA, Inc.*, 862 F.2d at 209 & *Capcom U.S.A. Inc.*, 1994 WL 1751482 at 13-15.

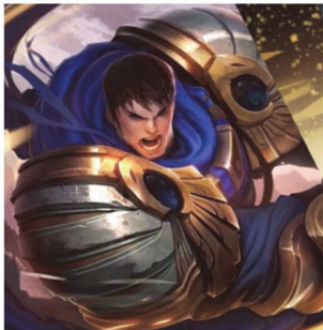
62. *Atari, Inc.*, 672 F.2d at 617. See also Henry Gilbert, Lawsuits that altered the course of gaming history, available at <https://www.gamesradar.com/lawsuits-changed-gaming> (last accessed Feb. 1, 2019).

63. See Julius Tabios, *Arena Of Valor VS Mobile Legends: A Comparison Between the 2 Hottest MOBAs Right Now*, available at <https://www.mineski.net/news/arena-of-valor-vs-mobile-legends-a-comparison-between-the-2-hottest-mobas-right-now> (last accessed Feb. 1, 2019).

64. See *Capcom U.S.A. Inc.*, 1994 WL 1751482 at 11-15 (where the U.S. Supreme Court made a comparison of the skillset, costumes, etc. of characters in the game and determined whether these are copyrightable).

65. *Riot Games, Inc. v. Shanghai Moonton Technology Co., Ltd. et al*, Case No. 2:17-CV-4986 (C.D. Cal., filed July 6, 2017) (U.S.) (pending).

66. *Id.*



Garen from LoL



Image from Mobile Legends



“Mini-Map” of LoL’s “Summoner’s Rift”



“Mini-Map” of *Mobile Legends: Bang bang*



Screenshot from LoL

Screenshot from *Mobile Legends: Bang bang*

Although this case has not yet been decided,⁶⁷ it is clear that Riot has good reason to be concerned. *MLBB* has not just taken the idea of a MOBA and made it mobile; it may have also taken the art and assets of Riot, given how similar the two games look.

In comparison, just this 2018, PUBG Corporation, developer of *PlayerUnknown's Battlegrounds* (*PUBG*), sued Epic Games, Inc., developer of *Fortnite*, in a court in Korea for allegedly copying several aspects of their game.⁶⁸ *PUBG* is a type of Battle Royale game, and was the first Battle Royale game to truly be popular, gaining ground even during its beta stages

67. Note, however, that as of 18 July 2018, Riot Games' parent company, China-based Tencent Holdings Limited, has been awarded an estimated US\$2.9 million in its lawsuit against Moonton Technology CEO Xu Zhenhua. See Aaron Mickunas, Riot Games parent Tencent wins \$2.9 million in lawsuit against Moonton CEO, *available at* <https://dotesports.com/league-of-legends/news/source-riot-games-parent-tencent-wins-lawsuit-mobile-legends-31079> (last accessed Feb. 1, 2019).

68. Tom Warren, PUBG owners file lawsuit against Fortnite to 'protect copyright', *available at* <https://www.theverge.com/2018/5/29/17404516/pubg-epic-games-fortnite-lawsuit> (last accessed Feb. 1, 2019).

in 2016.⁶⁹ Although *PUBG* was an instant hit and quickly attracted esports enthusiasts — players, producers, casters, sponsors, and viewers — looking to jump on the “next big esport,” it was not on top of the food chain for long. *Fortnite*, a free-to-play game also in the Battle Royale genre, was released just a few months after *PUBG*’s official launch and rapidly grew to match — if not, surpass — *PUBG*’s success.⁷⁰ *Fortnite* broke Twitch records last March 2018 when popular streamer Tyler “Ninja” Blevins streamed himself playing with the rapper and musician Drake,⁷¹ while *PUBG*’s popularity has continued to slide.⁷²



There are no details yet as to what exactly *PUBG* sued *Fortnite* over,⁷³ but if the history of games suing one another is to be followed, it does not

69. See Charlie Hall, *PUBG has dominated 2017, here’s how it happened*, available at <https://www.polygon.com/2017/12/4/16725104/pubg-2017-in-review-game-of-the-year> (last accessed Feb. 1, 2019).

70. Phil Hornshaw, *The history of Battle Royale: From mod to worldwide phenomenon*, available at <https://www.digitaltrends.com/gaming/history-of-battle-royale-games> (last accessed Feb. 1, 2019).

71. Nick Slatt, *Ninja played more Fortnite with Drake, who gave him \$5,000 for winning a game*, available at <https://www.theverge.com/2018/4/10/17222702/fortnite-ninja-drake-twitch-stream-again> (last accessed Feb. 1, 2019).

72. Ali Jones, *PUBG’s player count has halved since January*, available at <https://www.pcgamesn.com/playerunknowns-battlegrounds/battlegrounds-sales-numbers> (last accessed Feb. 1, 2019).

73. However, it was reported on 27 June 2018 that *PUBG Corporation* has dropped its lawsuit against *Epic Games, Inc.* See Sam Kim, *Copyright Lawsuit*

seem like *PUBG* has a strong case against *Fortnite*. That is because *PUBG* has no copyright over the idea of a Battle Royale game. It only has copyright over the assets of their game: the design of the characters, the design of the map, the design of the interface, and the like. In this sense, *PUBG* and *Fortnite* look nothing alike.⁷⁴



PUBG favors a grittier, more realistic hue, while *Fortnite* embraces vivid hues to match its cartoonish gameplay.⁷⁵ In *PUBG*, players use relatively realistic weapons; alternatively, in *Fortnite*, players can disguise themselves as bushes to thwart enemies.⁷⁶

Dropped Against Fortnite Creators, Ending Legal Battle, *available at* <https://www.bloomberg.com/news/articles/2018-06-27/pubg-drops-lawsuit-against-creators-of-gaming-phenom-fortnite> (last accessed Feb. 1, 2019).

74. Ryan Victoria, *PUBG VS FORTNITE, What Are the Differences?*, *available at* <https://showmore.com/pubg-vs-fortnite.html> (last accessed Feb. 1, 2019). Image below is taken from here.

75. See Victoria, *supra* note 85.

76. *Id.*

2. Multiple Versions

a. History of the MOBA

It is easy to point to a game's "owner" or "author" when it refers to only one person, such as in *Tetris* or in *Pong*. It might seem similarly easy to say Valve owns *Dota* or Riot owns *LoL*, but as anyone familiar with *Dota*'s and *LoL*'s origins probably knows, this was not always the case. *Dota* and *LoL*, and in truth, the MOBA genre as a whole, began in the game of another developer — Blizzard's *Warcraft III*.

In the early 2000s, Blizzard released the "World Editor," or a set of tools inside *Warcraft* that allowed players to use Blizzard assets and design their own games.⁷⁷ These custom games could be played by anyone with access to Battle.Net, Blizzard's online gaming network.⁷⁸ Kyle "Eul" Sommer, a high school student at the time, created "*Defense of the Ancients*,"⁷⁹ a custom tower defense game using *Warcraft* assets that eventually became known as *DotA* or *DotA All-Stars*.⁸⁰ Unlike any other game at the time, the development of *DotA* was not limited to one person or even to one company.⁸¹ Instead, the developers, who worked on the game without pay and only in their free time, would pass on the project to other dedicated programmers within the scene.⁸² The most prominent of these designers were Eul himself, Stephen "Guinsoo" Feak,⁸³ and Abdul "Icefrog" Ismail.⁸⁴ Throughout the years, the developers would upload new versions, or "maps," of the game. Eul's original "*Defense of the Ancients*" became "*DotA All-Stars*" under Guinsoo,

77. Battle.Net, World Editor, available at <http://classic.battle.net/war3/faq/worldeditor.shtml> (last accessed Feb. 1, 2019).

78. See Battle.Net, *supra* note 88.

79. Blizzard Entertainment, Inc. et al. v. Lilith Games (Shanghai) Co. Ltd. et al., Case No. 3:15-cv-04084-CRB, at 5, available at https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_15-cv-04084/pdf/USCOURTS-cand-3_15-cv-04084-6.pdf (last accessed Feb. 1, 2019) (N.D. Cal. 2017) (U.S.).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 6.

84. *Id.* at 8.

with maps ranging from version 3 to version 5.^{84c}⁸⁵ Icefrog, in turn, began with *Dota All-Stars* version 6.00, and is still the developer for the current version, *Dota 2* version 7.20.⁸⁶ In each of these versions there would be changes to the rules or to the number of heroes or items.⁸⁷

As *DotA*'s popularity grew, some of these developers took the opportunity to monetize their work and looked to companies outside of Blizzard. As early as 2006, a company called S2 Games hired developer Icefrog to design *Heroes of Newerth*,⁸⁸ a game many considered to be *DotA*'s spiritual successor, or "DotA 1.5." Icefrog, along with Eul, eventually went to work for Valve for the development of *Dota 2*.⁸⁹ Both Icefrog and Eul assigned their rights in *DotA* to Valve.⁹⁰ Meanwhile, Guinsoo assigned his own rights in *DotA 1* to Riot Games, the creators of *LoL*.⁹¹ These games, which were all forms of tower defense games, eventually became known as the MOBA genre.

It was at this point that the question of "who owns the game?" became far more complicated.⁹² Is it Blizzard, who created the custom tools that began everything? Is it the developers Eul, Guinsoo, or Icefrog, who all individually made important contributions to the game? Is it Valve or Riot, who bought the rights from different developers?

Although Blizzard initially filed suits against both Valve and Riot, these questions were not immediately resolved in the courts of law, as Blizzard, Valve, and Riot decided to settle out of court.⁹³ Valve dropped the title "*Defense of the Ancients*" and kept only "*Dota*," (dropping the capital A) and

85. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 7. See also Cybersport, *Dota through the ages: Competitive MOBA and IceFrog's absolute authority*, available at <https://cybersport.com/post/dota-through-the-ages-competitive-moba-and-icefrog-s-absolute-authority> (last accessed Feb. 1, 2019).

86. Cybersport, *supra* note 96.

87. *Id.*

88. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 9.

89. *Id.*

90. *Id.*

91. *Id.* at 10.

92. *Id.* at 11-12.

93. Brian Sipple, *Blizzard & Valve Reach Trademark Agreement on 'DOTA' Name*, available at <https://gamerant.com/dota-2-blizzard-valve-trademark-agreement> (last accessed Feb. 1, 2019).

remade all of the assets within the game that had any connection to Blizzard's other properties.⁹⁴ All three parties continue to develop their individual games within the MOBA genre, with Blizzard releasing its own MOBA, *Heroes of the Storm*, several years after *Dota 2* and *LoL* were released.⁹⁵

Then in 2014, uCool, Inc. (uCool) and Lilith Games released smart phone games that drew heavily from both the original *DotA* and *Dota 2*.⁹⁶ Thus, Blizzard and Valve filed a joint complaint against the two companies for copyright infringement.⁹⁷ uCool moved for partial summary judgment against Valve, arguing that Valve does not own copyright in the original *DotA* or its subsequent versions, and thus has no viable copyright claims against uCool.⁹⁸

As of this writing, litigation is still ongoing in the District Court of the Northern District of California. U.S. District Judge Charles R. Breyer summarizes the copyright issues in this case succinctly in his May 2017 Order — “With literally hundreds of versions of *DotA* and *DotA Allstars* floating around in the ether, the [c]ourt confronts quite the copyright conundrum.”⁹⁹

b. Collective, Joint, or Derivative?

One of Valve's arguments is that the collection of different versions of *DotA 1* should be considered joint works to which they were validly assigned.¹⁰⁰

94. *Id.*

95. Brian Crecente, *Heroes of the Storm*, Blizzard's MOBA, launches June 2, available at <https://www.polygon.com/2015/4/20/8456223/heroes-of-the-storm-blizzards-moba-launches-june-2> (last accessed Feb. 1, 2019).

96. Brandy Shaul, uCool's *Heroes Charge* Officially Launches on iOS, Android, available at <https://www.adweek.com/digital/ucools-heroes-charge-officially-launches-ios-android> (last accessed Feb. 1, 2019) & Artem Uarabei, *Dota* Inspired Card Game *Soul Clash* Renamed As *Soul Hunters* to North America, available at <https://click-storm.com/en/articles/2600> (last accessed Feb. 1, 2019).

97. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 10.

98. *Id.* at 11.

99. *Id.* at 12.

100. *Id.* at 13.

Judge Breyer, in a footnote, debunks this by pointing out that there was no intention between any of the parties to have joint authorship.¹⁰¹

In *Childress v. Taylor*,¹⁰² the U.S. Federal Court ruled that it is not enough for two parties to have collaborated together for joint authorship, regardless of the contribution of either party.¹⁰³ In this case, the defendant Clarice Taylor contributed a significant amount of research to the play *Childress* directed.¹⁰⁴ Yet, the court ruled that because *Childress* clearly never intended that Taylor be considered co-author, the relationship was more akin to an editor or researcher, and could not be considered joint authorship.¹⁰⁵

The Author agrees that the different versions should not be considered joint works. While it is true that each developer contributed to the game with the knowledge and intent that it should be passed on from developer to developer, a closer look at the versions throughout the years reveals that each version lists its primary author. In *DotA 1*, all of the versions from 6.00 and above read “by Icefrog” or “Presented by Icefrog.”¹⁰⁶ Similarly, all the versions from 3.00 to 5.84c list the name of Guinsoo.¹⁰⁷ These disclaimers militate against the idea that the developers intended to be joint authors.

One of uCool’s arguments, on the other hand, was that *each* version should be considered collective because they “took the most popular *DotA* heroes and arranged them into a new game.”¹⁰⁸ In response to this, Judge Breyer compares each version to a movie, stating that “[e]ach individual version is also a unitary work. Movies, for example, almost always make up a ‘unitary whole’ with ‘inseparable and interdependent parts,’ because the direction, acting performances, cinematography, costume design, and all the

101. *Id.*

102. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (U.S.).

103. *Id.* at 505–06.

104. *Id.* at 502.

105. *Id.* at 507–08.

106. Epic War, Maps (A Database of Downloadable Maps for Warcraft III), available at <https://www.epicwar.com/maps> (last accessed Feb. 1, 2019).

107. *Id.*

108. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 13. Notably, the earlier versions of *DotA* took characters from *Warcraft*, *Starcraft*, and even *anime*.

rest merge into one integrated work.”¹⁰⁹ He then notes that the movie *Star Wars: The Force Awakens* is not considered a collective work even if it “arrange[s] the most popular Star Wars heroes, settings, and one-liners into a new movie[.]”¹¹⁰ and that collective works contemplate “periodical issue[s], anthologies, or encyclopedia[s].”¹¹¹

The Author would further opine that the “collective work” argument also cannot be applied to the multiple versions as a whole. When a game of *DotA* or *Dota 2* is played, they are not played on the collection of multiple versions of the map. Rather, they are played on the latest version of the map. It is not a collection but an improvement or adaptation of the previous versions.

Judge Breyer concludes that each version has its own individual copyright, citing primarily Section 101 of the U.S. Copyright Act, which states that “where the work has been prepared in different versions, each version constitutes a separate work.”¹¹² The Author agrees that each version is subject to an individual copyright, in that it is neither joint nor collective, and thus individual.¹¹³

109. *Id.*

110. *Id.*

111. *Id.* at 14 (citing 17 U.S.C. § 101).

112. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 13 (citing 17 U.S.C. § 101) & 17 U.S.C. § 101.

113. The Author does not fully agree with Judge Breyer’s use of this provision. The full provision in the Copyright Act defines when a work is created, in this wise

—
A work is ‘created’ when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101.

The definition does not state whether it refers to situations with only one author, with two or more, or to either situation. However, the Author believes that the provision really only refers to one author. If it referred to two or more, then it would mean that between a writer and an editor, the editor would have a copyright over the edited work since the same is a different “version.” This would contravene the logic in the *Childress* case. The fact that the definition

As each individual version is an improvement on the previous version, with additional features, heroes, and rule changes, each version may be considered a derivative work. Derivative works are “[d]ramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works[.]”¹¹⁴ Case law further provides that a derivative work is valid and has its own copyright if it is sufficiently original and creative by itself.¹¹⁵

The Author is of the opinion that the changes between the versions of Eul, Guinsoo, and Icefrog were all sufficiently substantial. Each developer made changes to the layout of the map, added new heroes, new items, new abilities, and even made changes to the code.

Many of the aforesaid changes may not have seemed substantial. For example, a casual onlooker would not be able to tell the difference between the map in Guinsoo’s version and the map in Icefrog’s version. But to a person who plays the game, and to professional players, the differences were incredibly game-changing. Moreover, as the bar for originality and creativity in copyright is intentionally low,¹¹⁶ these changes should be considered original and creative enough to warrant a new copyright.

Finally, Judge Breyer also cites and discusses the case of *Aalmuhammed v. Lee*¹¹⁷ in order to determine who the author of each individual version is. While Eul, Guinsoo, and Icefrog were the most well-known and most influential developers,¹¹⁸ multiple persons had a hand in contributing to the creation of *DotA*. Aside from some of the smaller developers who worked directly with Eul, Guinsoo, and Icefrog, the latter three also took many ideas from the public forums¹¹⁹ — many of the heroes and items in *Dota 2* and *League of Legends* today were initially conceived by anonymous strangers on the Internet.¹²⁰

uses the word “version” does not mean it should automatically be applied to the different versions of *DotA* when they are created by different developers.

114. INTELL. PROP. CODE, § 173.

115. *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 358 (1991).

116. *Id.* at 345.

117. *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 1999) (U.S.).

118. *Blizzard Entertainment, Inc. et al.*, Case No. 3:15-cv-04084-CRB, at 15.

119. *Id.* at 7–8.

120. *Id.*

Thus, Judge Breyer simply applied the *Aalmuhammed* case, which states that even should a person have a significant contribution to the copyrightable work, the author of the work is still the initial “mastermind.”¹²¹ In this case, absent any other claims, the identified masterminds were Eul, Guinsoo, and Icefrog.

B. *Let's Play*

1. Is it Infringement?

Given that all of these individual developers own the assets of their games, how is it, then, that streamers are able to broadcast themselves playing said games, and — in some cases — even make money from it? Under copyright law, the game developers own the rights to authorize or prevent the following acts:

- 177.1. Reproduction of the work or substantial portion of the work;
- 177.2. Dramatization, translation, adaptation, abridgment, arrangement[,] or other transformation of the work;
- 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
- 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials[,] or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;
- 177.5. Public display of the original or a copy of the work;
- 177.6. Public performance of the work; and
- 177.7. Other communication to the public of the work.¹²²

Yet, popular streamers like Ninja continue to make money¹²³ off of what can be a “public display,” “public performance,” or “other

121. *Id.* (citing *Aalmuhammed*, 202 F.3d at 1232 (citing *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53, 61 (1884))).

122. INTELL. PROP. CODE, §§ 177.1-177.7.

123. Tae Kim, Tyler ‘Ninja’ Blevins explains how he makes more than \$500,000 a month playing video game ‘Fortnite’, *available at* <https://www.cnbc.com/2018/03/19/tyler-ninja-blevins-explains-how-he->

communication to the public” of the work. For some games, the answer is simple — the terms of the game allow it. Riot’s legal policy, for example, explains very simply that users generally have permission to use Riot intellectual property (IP) for any noncommercial purpose, and may additionally use Riot IP for advertisement revenue and donations so long as it complies with Riot’s policies.¹²⁴ This allows popular streamers to earn and, sometimes, make a living out of streaming *LoL*.¹²⁵

Other games are not quite as generous. The majority of games provide in their end-user license agreements (EULA), a clause that grants the developer the rights over any content a user may make using their game (i.e., YouTube videos or streams),¹²⁶ or prohibits a user from using their

makes-more-than-50000-a-month-playing-video-game-fortnite.html (last accessed Feb. 1, 2019).

124. Riot Games, Legal Jibber Jabber, *available at* <https://www.riotgames.com/en/legal> (last accessed Feb. 1, 2019).

125. Mel Hawthorne, 6 of Twitch’s richest streamers and how much they make, *available at* <https://www.gamebyte.com/6-of-twitchs-richest-streamers> (last accessed Feb. 1, 2019).

126. An example of an end-user licensing agreement limitation may be found in BioWare and Electronic Arts’ (EA) *Dragon Age: Inquisition*, which provides for the following —

In exchange for use of the Software, and to the extent that your contributions through use of the Software give rise to any copyright interest, *you hereby grant EA an exclusive, perpetual, irrevocable, fully transferable and sub-licensable worldwide right and license to use your contributions in any way* and for any purpose in connection with the Software and related goods and services including the rights to reproduce, copy, adapt, modify, perform, display, publish, broadcast, transmit, or otherwise communicate to the public by any means whether now known or unknown and distribute your contributions without any further notice or compensation to you of any kind for the whole. If the duration of the granted right cannot be perpetual in accordance with the laws of your country of residence, the term of the grant shall be the maximum duration of protection granted to intellectual property rights by the laws of your country of residence or any international conventions. You further agree that you will not assert any moral rights with respect to your contributions as licensed to EA herein. The license grant to EA survives any termination of this License.

games for profit,¹²⁷ or allow them to take down user content if they find that a user violates certain restrictions.¹²⁸ Moreover, even if the EULA does not provide any provision on copyright infringement¹²⁹ or if the copyright is not registered, the developers still have copyright over the video game since copyright arises from the moment of creation.¹³⁰ Thus, by default, users are

Electronic Arts, Software End User License Agreement – Dragon Age: Inquisition ¶ 1 (F), *available at* <https://media.contentapi.ea.com/content/dam/eacom/en-us/eula/eula-row-dai-pc-9-4-14-current.pdf> (last accessed Feb. 1, 2019) (emphasis supplied).

127. Blizzard’s End User License Agreement for South East Asia (excluding Thailand) prohibits particular commercial use in this wise —

Exploit[ing], in its entirety or individual components, the Platform for any purpose not expressly authorized by Blizzard, including, without limitation (i) playing the Game(s) at commercial establishments (subject to Section 1.B.iv.3.); (ii) gathering in-game currency, items, or resources for sale outside of the Platform or the Game(s); (iii) performing in-game services including, without limitation, account boosting or power-leveling, in exchange for payment; (iv) communicating or facilitating (by text, live audio communications, or otherwise) any commercial advertisement, solicitation or offer through or within the Platform; or (v) organizing, promoting, facilitating, or participating in any event involving wagering on the outcome, or any other aspect of, Blizzard’s Games, whether or not such conduct constitutes gambling under the laws of any applicable jurisdiction, without authorization.

Blizzard, End User License Agreement 1 (C) (iii), *available at* <https://www.blizzard.com/en-sg/legal/08b946df-660a-40e4-a072-1fbde65173b1/blizzard-end-user-license-agreement> (last accessed Feb. 1, 2019).

128. Pursuant to the Tech Trial Agreement of Titanfall 2 of Respawn Entertainment and EA, “EA may, without prior notice to [a user] and in its sole judgment, remove [user-generated content] that may infringe the intellectual property or other rights of a third party.” Electronic Arts, Tech Trial Agreement: Titanfall 2 at 18, *available at* <https://media.contentapi.ea.com/content/dam/eacom/en-us/eula/tf2-tech-trial-beta-agreement.pdf> (last accessed Feb. 1, 2019).

129. Dungeon Siege’s EULA makes no mention of any stipulation against copyright infringement. The same document, however, asserts that “the Game Software is protected by the copyright laws of [U.S.], international copyright treaties and conventions, [U.S.] and common law trademark laws, and other laws.”

Steam, Dungeon Siege End User License Agreement, *available at* https://store.steampowered.com/eula/eula_39160 (last accessed Feb. 1, 2019).

130. INTELL. PROP. CODE, § 172.1.

precluded from exercising the right to publicly display the video game through streaming.

That said, copyright strikes — known as Digital Millennium Copyright Act (DMCA) takedowns¹³¹ in the U.S. — are rare in the streaming world.¹³² Most developers understand that streaming, “Let’s Plays”¹³³ on YouTube, and other word-of-mouth reviews are some of the most effective ways of advertising their games.¹³⁴ This, however, does not necessarily make it legal.

The best illustration of this problem is the case of Felix “PewDiePie” Kjellberg. One of the most highly-paid YouTube personalities in the world, PewDiePie became famous for his “Let’s Play” videos, where he would make a video of himself playing the game accompanied by jokes and commentary.¹³⁵ As PewDiePie’s fanbase grew in the millions,¹³⁶ so did the scandals surrounding him.

131. Digital Millennium Copyright Act Services Ltd., What is a DMCA Takedown?, *available at* <https://www.dmca.com/faq/What-is-a-DMCA-Takedown> (last accessed Feb. 1, 2019).

132. Willie Clark, The (still) uncertain state of video game streaming online, *available at* <https://arstechnica.com/gaming/2018/01/to-stream-or-not-to-stream-how-online-streaming-game-videos-exist-in-an-ip-world> (last accessed Feb. 1, 2019) & Rob Fahey, Gaming YouTube must get its house in order, *available at* <https://www.gamesindustry.biz/articles/2017-09-15-gaming-youtube-must-get-its-house-in-order> (last accessed Feb. 1, 2019).

133. “‘Let’s Play’ videos [...] show people playing popular video games and adding their own funny commentary.” Harrison Jacobs, Here’s why PewDiePie and other ‘Let’s Play’ YouTube stars are so popular, *available at* <https://www.businessinsider.com/why-lets-play-videos-are-so-popular-2015-5> (last accessed Feb. 1, 2019).

134. Clark, *supra* note 150. *Contra* Fahey, *supra* note 150.

135. Reese Ristau, PewDiePie: No. 1 in #Famechangers Digital Star Ranking, *available at* <https://variety.com/2015/digital/news/pewdiepie-youtube-digital-star-ranking-1201544779> (last accessed Feb. 1, 2019).

136. Danny Fratella, PewDiePie becomes first YouTuber ever to hit 50 million subscribers, *available at* <https://socialblade.com/blog/pewdiepie-becomes-first-youtuber-50-million-subscriber> (last accessed Feb. 1, 2019).

Last 2017, PewDiePie used a racial slur while playing the game *PUBG*.¹³⁷ This prompted Campo Santo, the company behind the game *Firewatch* (a game which had been featured on PewDiePie's channel and in fact had 5.7 million views), to file a DMCA takedown against PewDiePie to remove all of his *Firewatch* videos and any future Campo Santo videos.¹³⁸ The issue never went to court, as PewDiePie did take down the videos, but the case is still a curious one. Campo Santo filed a DMCA takedown against PewDiePie for actions the latter committed while playing a completely unrelated game.¹³⁹

a. Derivative Work

Firewatch's website, at the time of the DMCA takedown, stated in its FAQ — “Can I stream this game? Can I make money off those streams? Yes. We love that people stream and share their experiences in the game. You are free to monetize your videos as well.”¹⁴⁰

The streams and videos of content creators — whether on Twitch, YouTube, or elsewhere — may be considered derivative works under Section 173 of the IP Code.¹⁴¹ Streamers and content creators add their commentary and skill to the copyrighted video game and, because the bar

137. Aja Romano, YouTube star PewDiePie used the n-word in a live stream, after months of denying he's racist, *available at* <https://www.vox.com/culture/2017/9/11/16288826/pewdiepie-n-word-playerunknown-battlegrounds> (last accessed Feb. 1, 2019).

138. Matthew Handrahan, PewDiePie racial slur sparks backlash from Campo Santo, Simogo, *available at* <https://www.gamesindustry.biz/articles/2017-09-11-pewdiepie-racial-slur-sparks-backlash-from-campo-santo> (last accessed Feb. 1, 2019).

139. *See* Sean Vanaman, @vanaman, Tweet, Sep. 11, 2017, 4:51 A.M., TWITTER (this is the first among a thread of tweets explaining the reasons why Campo Santo wanted PewDiePie to stop streaming its games), *available at* <https://twitter.com/vanaman/status/906983575337107456> (last accessed Feb. 1, 2019). Sean Vanaman is a co-founder of Campo Santo.

140. *Firewatch*, About *Firewatch*, *available at* <http://www.firewatchgame.com/about> (last accessed Feb. 1, 2019). Campo Santos, after the incident, added the following statement — “Streaming and Let's Plays are implicit but [revocable] privileges, and if you happen to be among the very, very, very, very few players who use your platform to spread hate or harassment, we would prefer that you not use our games in your content.” *Id.*

141. INTELL. PROP. CODE, § 173.

for “originality and creativity” in copyright is very low,¹⁴² this should be considered as original and creative enough to be a derivative work separate from the original copyrighted video game. However, these works will not be valid unless the creator obtains consent from the copyright owner of the original work.¹⁴³ The right to create a derivative work is one of the economic rights granted to the copyright owner.¹⁴⁴

One possible argument for PewDiePie is that the disclaimer on *Firewatch*'s website gave him explicit permission to create derivative work.¹⁴⁵ Notably, there were no “rules of conduct” in the *Firewatch* website (and even for EULAs which have rules of conduct built-in, the majority would refer only to actions in the game and not to a third, unrelated game like *PUBG*) that Campo Santo could have used to withdraw PewDiePie's permission to stream their game. Under Philippine law, intellectual property rights are governed by contract law and civil law in addition to the I.P. Code.¹⁴⁶ Thus, it would be easy to argue that the Campo Santo should not be able to withdraw PewDiePie's right to a derivative work absent any violation of terms, especially given that Campo Santo had already benefitted from the 5.7 million views PewDiePie had earned for them.¹⁴⁷ However, under U.S. law, intellectual property licenses are, in default of any negative terminology, considered revocable.¹⁴⁸

142. See *Feist Pubs., Inc.*, 499 U.S. at 345.

143. See *Pickett v. Prince*, 207 F.3d 402 (7th Cir. 2000) (U.S.).

144. INTELL. PROP. CODE, § 177.2.

145. *Firewatch*, *supra* note 158.

146. See generally INTELL. PROP. CODE & An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, arts. 712 & 1159 (1950).

147. *Handrahan*, *supra* note 156.

148. Sidley, The Terms “Revocable” and “Irrevocable” in License Agreements: Tips and Pitfalls, *available at* <https://www.sidley.com/en/insights/newsupdates/2013/02/the-terms-revocable-and-irrevocable-in-license-agreements-tips-and-pitfalls> (last accessed Feb. 1, 2019).

b. Fair Use

Another possible argument is that the work is transformative, or falls under the concept of fair use.¹⁴⁹ The four factors to be considered in determining fair use are:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for or value of the copyrighted work.¹⁵⁰

However, the Author believes that this argument is likely to fail when it comes to Let's Plays and other similar walkthroughs. Anent the first factor, Let's Plays are hardly educational — they are created for profit on YouTube.¹⁵¹ Moreover, the content added to the copyrighted work can be very “thin.” While PewDiePie's videos clearly show the sheer amount of creativity and work he puts into his commentaries and jokes, some Let's Plays involve nothing more than a person playing the game and a few half-hearted comments. For the second factor, the video games are purely creative and non-factual, squarely within the realm of copyright.

The third factor is probably the most damning of all four. A Let's Play usually goes through the entire content of the game. If the video game were a movie, and 80% to 90% of the movie were shown in a video where the content creator simply makes his or her comments, then the video would clearly not be fair use.¹⁵²

149. American Jurisprudence defines fair use as “a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression.” *Habana v. Robles*, 310 SCRA 511, 545 (1999) (C.J. Davide, Jr., dissenting opinion) (citing 18 AM. JUR. 2D *fair use* § 109 (1964)).

150. INTELL. PROP. CODE, § 185.1.

151. Christopher Zoia, This Guy Makes Millions Playing Video Games on YouTube, *available at* <https://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402> (last accessed Feb. 1, 2019).

152. Tyler Wilde, Lawyers explain why Campo Santo's takedown of PewDiePie's video is legal, *available at* <https://www.pcgamer.com/lawyers-explain-why->

Finally, the fourth factor is most likely the reason why so many Let's Plays have remained undisturbed on YouTube. For many developers, having popular personalities make videos of their game actually boost sales and issuing copyright strikes can even backfire on developers — after Campo Santo issued the DMCA strike against PewDiePie, the game *Firewatch* received millions of negative reviews from angry fans.¹⁵³ But this is not true for all games. For example, Atlus, the creators of *Persona 5*, have stated that they will take down any streams of *Persona 5* since the game is heavily reliant on plot; hence, seeing game content online may dissuade viewers from buying the game.¹⁵⁴ Thus, it would be very difficult for content creators to claim that their work is fair use.

C. Article 13 #SaveYourInternet

Recently, the European Parliament has voted in favor of a new Copyright Directive¹⁵⁵ that may make “information society service providers,” such as Twitch and YouTube, and even Twitter and Facebook, liable for copyright infringement.¹⁵⁶ The first paragraph of the controversial Article 13, entitled “Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”¹⁵⁷ of the original Directive states —

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, *take measures to ensure the functioning of agreements* concluded with rightholders for the use of their works or other subject-matter or *to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with*

campo-santos-takedown-of-pewdiepies-video-is-legal (last accessed Feb. 1, 2019).

153. Andy Chalk, *Firewatch is getting review-bombed on Steam*, available at <https://www.pcgamer.com/firewatch-is-getting-review-bombed-on-steam> (last accessed Feb. 1, 2019).

154. Jason Schreier, *Atlus Threatens To Go After People Who Stream Too Far Into Persona 5*, available at <https://kotaku.com/atlus-threatens-to-go-after-people-who-stream-too-far-i-1794004068> (last accessed Feb. 1, 2019).

155. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD) (Sep. 14, 2016).

156. *Id.* art. 13.

157. *Id.*

the service providers. Those measures, such as the use of *effective content recognition technologies*, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.¹⁵⁸

YouTube, in particular, was strongly against this Directive.¹⁵⁹ Currently, under the DMCA, if a copyright owner finds that his or her work is being streamed on YouTube, he or she may send a notice to YouTube to either have the video taken down or to hand over the revenue to the copyright owner.¹⁶⁰ YouTube is obliged to comply with this takedown unless the video owner also sends proof otherwise, but YouTube will not be held liable for copyright infringement so long as it follows this procedure. This has been the case for the entire history of the Internet — service providers, such as Google, Facebook, and so forth, have never been found liable for copyright infringement committed using their services.¹⁶¹

Under this new Directive, because of the wording of the law, YouTube would be forced to block videos by creators in the European Union (E.U.) and block viewers in the E.U. from seeing any videos, unless the video owners were able to positively prove that each and every element of the video belonged to them or that they had permission from the copyright owner.¹⁶² Thus, the simple cover of a song would be blocked in the E.U. because of this law. Some have even taken to calling the Article the “meme

158. *Id.* art. 13, ¶ 1 (emphases supplied).

159. Julia Alexander, YouTube CEO says EU regulation will be bad for creators, *available at* <https://www.theverge.com/2018/10/22/18008406/article-13-copyright-directive-youtube-susan-wojcicki-robert-kyncl> (last accessed Feb. 1, 2019) & Julia Alexander, YouTube CEO calls EU’s proposed copyright regulation financially impossible, *available at* <https://www.theverge.com/2018/11/12/18087250/youtube-ceo-copyright-directive-article-13-european-union> (last accessed Feb. 1, 2019).

160. Digital Millennium Copyright Act Services Ltd., *supra* note 149.

161. *See, e.g.,* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (U.S.).

162. YouTube Creators, Video, *Article 13 - Burning Questions #SaveYourInternet*, Nov. 16, 2018, YOUTUBE, *available at* <https://www.youtube.com/watch?v=TRYSxIYHSow> (last accessed Feb. 1, 2019).

ban”¹⁶³ because something as innocent as a funny picture may be blocked if the original creator of the picture is not proven. The law may even have a chilling effect on free speech.

YouTube launched the “#SaveYourInternet” campaign in order to bring awareness to the possible unintended consequences of Article 13.¹⁶⁴ As of now, the law has yet to be finalized, although several changes have already been proposed.¹⁶⁵

D. DotaTV

Someone who has not been keeping up with the growth of esports would, on the mention of an esports tournament, probably think of nothing but a bunch of gangly teenagers holed up in a net café. That might have been true in the early 2000s, but in 2018, esports tournaments are comparable to major sporting affairs. The 2017 LoL Worlds had an estimated 50 million unique viewers, with the tickets to the 90,000-capacity Olympic Stadium in Beijing, China completely sold out.¹⁶⁶ But more than the numbers, it is the production of esports that is probably most impressive to the casual viewer.

163. Matt Reynolds, What is Article 13? The EU’s divisive new copyright plan explained, *available at* <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> (last accessed Feb. 1, 2019).

164. YouTube, *supra* note 180.

165. Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)0593 – C8-0383/2016 – 2016/0280(COD) (Sep. 12, 2018).

166. Tanner Dedmon, The Stadiums for League of Legends’ Worlds 2017 are Beyond Impressive, *available at* <https://comicbook.com/gaming/2017/09/08/the-stadiums-for-league-of-legends-worlds-2017-are-beyond-impres> (last accessed Feb. 1, 2019) & Celia Chen, *League of Legends World finals tickets gone in seconds, showing how e-sports continues to boom in China*, S. CHINA MORN. STAR, Oct. 26, 2017, *available at* <https://www.scmp.com/tech/china-tech/article/2117163/league-legends-world-finals-tickets-gone-seconds-showing-how-e> (last accessed Feb. 1, 2019).

Like traditional sports, esports have color commentators, analysts, panels, devoted camera work, interviewers, and hosts.¹⁶⁷

This added layer of production has greatly improved the esports scene. Viewers tune into esports on Twitch not only to watch professional players duke it out, but also to listen to the panel discuss the intricacies of the game, watch interviewers conduct post-game interviews, or watch esports personalities' content in-between games. For most games, this is, literally, the only way to watch esports. *LoL* tournaments, for example, can only be watched on Twitch.

For *Dota 2*, the system is a little bit different. When Valve held the first *Dota 2* tournament in 2011, one of its most unique features was DotaTV. With DotaTV, anyone who has a copy of *Dota 2* — which happens to be completely free — can hop into the game and watch an official tournament between teams straight from their computers. Through DotaTV, the viewer has the option of becoming his or her own cameraman — they can choose to watch only one player; they can watch parts of the map that the official tournament casters do not see; they can mute the broadcasters they dislike; or they can look up their own statistics at their own pace and leisure. It would be as if, in an NBA game, the viewer had the control over the cameraman and the statsmen.

This also means that, because of DotaTV, *anyone* — and not just the official, developer-hired commentators and analysts — can become a commentator and analyst and stream the tournaments online. In the *Dota 2* scene, it is very common to have several different available streams for a single tournament, with viewers tuning into whichever personality they like the most, whether it is a straightforward tournament broadcast by the official broadcaster or a more relaxed stream from a former professional player. For tournament organizers, this has not exactly proved to be a good thing.

In October 2017, some tournament organizers expressed concerns over popular *Dota 2* streamers, such as Henrik “AdmiralBulldog” Ahnberg, streaming tournament games at the same time as the official tournament streams. Since tournament organizers gauge interest and make revenue through the number of viewers, the fact that another

167. See AJA, The Rise of Sophisticated eSports Production, *available at* <http://www.studiodaily.com/sponsored/rise-sophisticated-esports-production> (last accessed Feb. 1, 2019).

streamer was “taking up viewers” that they would have otherwise benefited from, the organizers lose money. In response, Valve announced on their official blog that

in addition to the official, fully-produced streams from the tournament organizer itself, we believe that anyone should be able to broadcast a match from DotaTV for their audience. However, we [do not] think they should do so in a commercial manner or in a way that directly competes with the tournament organizer’s stream. This means no advertising/branding overlays, and no sponsorships. It also means not using any of the official broadcast’s content such as caster audio, camerawork, overlays, interstitial content, and so on. Finally, this is not permission for studios to broadcast each other’s events. In general, everyone should play nice together, and we think the boundaries should be pretty clear.¹⁶⁸

Then, last January 2018, tournament organizer ESL took the issue a little further by contracting an *exclusive* deal with Facebook to stream all future ESL tournaments (not just for *Dota 2*, but even for other esports such as *CS:GO*) on Facebook’s new esports streaming platform.¹⁶⁹ This was a very bold move by both ESL and Facebook, given Twitch’s consistent monopoly over the streaming industry. On the first day of the first tournament to be featured on Facebook, ESL One Genting, viewers were incredibly unhappy with Facebook’s service — many experienced lag while watching, many found the features lacking (such as the instant “clip” feature of Twitch, that allows any viewer to instantly record a good play from the game and show it to his or her friends in .GIF form),¹⁷⁰ and many

168. Valve Corporation, Broadcasting Dota 2, *available at* <http://blog.dota2.com/2017/10/broadcasting-dota-2> (last accessed Feb. 1, 2019).

169. Mike Stubbs, ESL Launches Exclusive Facebook Streaming Partnership But ‘Dota 2’ Fans Are Not Happy, <https://www.forbes.com/sites/mikestubbs/2018/01/23/esl-launches-exclusive-facebook-streaming-partnership-but-dota-2-fans-are-not-happy> (last accessed Feb. 1, 2019).

170. Aloysius Low, ESL One’s Dota 2 Minor hits high notes despite Facebook fail, *available at* <https://www.cnet.com/news/esl-ones-dota-2-minor-hits-high-notes-despite-social-media-upset> (last accessed Feb. 1, 2019).

others simply did not want to watch on Facebook because it attracted a different crowd.¹⁷¹

In response, viewers boycotted the Facebook stream entirely, and instead went to watch it on Twitch.¹⁷² Because there was no official Twitch stream, many popular *Dota 2* streamers and personalities, such as Brian “BananaSlamJamma” Canavan, streamed the games from their personal accounts.¹⁷³ This directly competed with ESL’s official Facebook stream. Thus, ESL filed a DMCA strike against the offending streamers.¹⁷⁴ This prompted a discussion of whether or not ESL had the right to file a DMCA notice. Did the copyright belong to ESL who, after all, hired and paid for the entire production of the tournament, or to Valve who owned the game on top of which all of this production value had been added to? Valve stepped in and announced on their official blog —

[We have] been seeing a bunch of discussion regarding DotaTV and want to expand on what [we have] said before.

The first issue [we have] been seeing discussed is regarding DMCA notices. This one is very simple [—] [n]o one besides Valve is allowed to send DMCA notices for games streamed off of DotaTV that [are not] using the broadcasters’ unique content (camera movements, voice, etc).

The second issue is regarding who is permitted to cast off of DotaTV. We designed the DotaTV guidelines to be flexible in order to allow for up and coming casters, or community figures like BSJ or Bulldog that occasionally watch tournament games on their channel, to be able to stream off of DotaTV. It is not to allow commercial organizations like BTS to compete

171. See Austen Goslin, ESL signs exclusive streaming deal with Facebook for CS:GO, Dota 2 esports, *available at* <https://www.polygon.com/2018/1/18/16903872/esl-streaming-partnership-facebook-esl-one-pro-league-counter-strike-global-offensive-dota-2> (last accessed Feb. 1, 2019).

172. Bree Royce, Dota 2 fans boycott ESL’s Facebook streaming platform over Twitch banwave, *available at* <https://massivelyop.com/2018/01/25/dota-2-fans-boycott-esls-facebook-streaming-platform-over-twitch-banwave> (last accessed Feb. 1, 2019).

173. Julia Alexander, Dota 2 players plan boycott of ESL pro games on Facebook after Twitch bans (update), *available at* <https://www.polygon.com/2018/1/25/16932086/dota-2-esl-facebook-twitch-ban> (last accessed Feb. 1, 2019).

174. *Id.*

with the primary stream. It [wi]ll be our judgment alone on who violates this guideline and not any other third party's.¹⁷⁵

Valve made their stance clear. As owner of the game, only they were allowed to file copyright strikes or DMCA notices against persons streaming their game from DotaTV.¹⁷⁶ ESL, and any other tournament organizer, may only file DMCA notices against those who are explicitly using their tournament's casting, observing, or other content. Thus, the following rules can be established:

- (1) Valve owns the copyright to the game and generally allows anyone to access the game through DotaTV and to stream it, but "everyone should play nice together,"¹⁷⁷ and they reserve the judgment to decide whether someone is not playing nice;¹⁷⁸ and
- (2) ESL, and all other tournament organizers, have the copyright over their tournament streams and the added production value of their hired commentators, panelists, hosts, etc.

This result is consistent with copyright law over traditional sports broadcasts in the sense that, in both esports and traditional sports, the broadcast is copyright, and that it is owned by the tournament organizer (or league, for traditional sports). However, the underlying reason is slightly different.¹⁷⁹

In the case of *NBA v. Motorola, Inc.*,¹⁸⁰ the U.S. court held that sporting events are not copyrightable —

In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute 'original works of authorship' under 17 U.S.C. Section 102 (a). Section 102

175. Valve Corporation, DotaTV Streaming, available at <http://blog.dota2.com/2018/01/dotatv-streamng> (last accessed Feb. 1, 2019).

176. *Id.*

177. *Id.*

178. *Id.*

179. See Stephanie N. Horner, *DMCA: Professional Sports Leagues' Answer to Protecting Their Broadcasting Rights Against Illegal Streaming*, 24 MARQ. SPORTS L. REV. 435 (2014).

180. *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (U.S.).

(a) lists eight categories of ‘works of authorship’ covered by the act, including such categories as ‘literary works,’ ‘musical works,’ and ‘dramatic works.’ The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.

Sports events are not ‘authored’ in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script.¹⁸¹

However, the U.S. court conceded that broadcasts are copyrightable since they are “original and creative” and may be “fixated” —

As noted, recorded broadcasts of NBA games [—] as opposed to the games themselves [—] are now entitled to copyright protection. The Copyright Act was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would meet the Act’s requirement that the original work of authorship be ‘fixed in any tangible medium of expression.’ ... Accordingly, Section 101 of the Act, containing definitions, was amended to read [—]

A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Congress specifically had sporting events in mind [—]

[T]he bill seeks to resolve, through the definition of ‘fixation’ in [S]ection 101, the status of live broadcasts [—] sports, news coverage, live performances of music, etc. [—] that are reaching the public in unfixed form but that are simultaneously being recorded.

The House Report also makes clear that it is the broadcast, not the underlying game, that is the subject of copyright protection. In explaining how game broadcasts meet the Act’s requirement that the subject matter be an ‘original work[] of authorship,’ ... the House Report stated [—]

When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the

181. *Id.* at 846.

public and in what order, there is little doubt that what the cameramen and the director are doing constitutes ‘authorship.’¹⁸²

In esports, the major difference would be that the game itself is — in this Author’s opinion¹⁸³ — copyrightable. While “sporting event” is not under the list of copyrightable subject matter in either Sec. 172.1 of the I.P. Code or Section 102 (a) of the U.S. Copyright Act, as previously discussed in Part II-A of this Essay, video games are copyrightable audiovisual works.¹⁸⁴ Thus, the broadcasts of these games cannot be original works but are, at most, derivative works: adaptations, original and creative, separable from the original, and with permission from the original copyright holder. Notably, this makes it open to withdrawal by Valve at any time, considering that in the U.S., intellectual property licenses are deemed revocable absent language otherwise.¹⁸⁵

Similarly, the same reasoning applies to esports highlights. As in traditional sports, the highlights from a tournament belong to the tournament organizer/league.¹⁸⁶ Recently, YouTube content creator NoobFromUA, known in the *Dota 2* community for making the best highlights and making them incredibly quickly, had his YouTube channel taken down for copyright violation.¹⁸⁷ He had been making highlights for

182. *Id.* at 847.

183. The argument that sporting events do not have an “underlying script,” as well as the other arguments cited by the U.S. court in *NBA v. Motorola, Inc.* (that the determination of joint copyright owners would be too difficult; that the authorship in a sports event must be open to copying if competition is to continue; and that lack of case law suggests that sports are not copyrightable) do apply to esports. However, the Author does not think these outweigh the argument that video games are copyrightable.

184. INTELL. PROP. CODE, § 171.1.

185. Sidley, *supra* note 166. See also Valve Corporation, Limited Game Tournament Licenses, available at https://store.steampowered.com/tourney/limited_license (last accessed Feb. 1, 2019). The Steam Tournament License does not state that the license is irrevocable.

186. See Luke Winkie, A look into the semi-legal world of NBA highlight videos, available at <https://www.si.com/extra-mustard/2016/02/09/nba-highlight-videos-clips-youtube-legality> (last accessed Feb. 1, 2019).

187. Patrick Bonifacio, YouTube strikes NoobFromUA’s channel with a copyright claim from PGL, available at <https://dotesports.com/dota-2/news/noobfromua-dota2-content-creator-channel-taken-down-22477> (last accessed Feb. 1, 2019).

one of the *Dota 2* Majors run by the Professional Gamers League (PGL) and using PGL's casts and commentary.¹⁸⁸ Although the rearranging of work is generally considered a form of derivative copyright, NoobFromUA was doing so without permission. Thus, PGL was completely within its rights to file a DMCA against him. Moreover, PGL's actions were perfectly in line with Valve's statement regarding the use of other people's intellectual property.¹⁸⁹ If NoobFromUA wanted to be able to post highlights, he should have either used camera work from the game's built-in DotaTV and taken highlights without the logos of PGL, or asked permission from PGL.¹⁹⁰

Finally, it should be noted that the "free competition" that Valve employs for *Dota 2* is not the norm in esports. *LoL* and *OWL*, two of the biggest esports in the current market, employ a drastically different method over their esports scenes, much more akin to traditional sports leagues such as the NBA. In both games, Riot and Blizzard respectively control every aspect of the tournament circuit, from the teams that are allowed to play,¹⁹¹ to the hiring of commentators,¹⁹² to the very behavior of their players.¹⁹³ "Stream stealing" would never be an issue for these developers. However, they may face a different issue altogether — competition law.

188. *Id.*

189. See Valve Corporation, *supra* note 192.

190. *Id.*

191. See, e.g., Chaim Gartenberg, Blizzard announces first Overwatch League teams and owners, including Robert Kraft and Jeff Wilpon, *available at* <https://www.theverge.com/2017/7/12/15958222/blizzard-overwatch-league-teams-owners-robert-kraft-jeff-wilpon-esports> (last accessed Feb. 1, 2019) & Emily Rand, Riot Games announces European League of Legends teams and rebranding, *available at* http://www.espn.com/esports/story/_/id/25326289/riot-games-announces-european-league-legends-teams-rebranding (last accessed Feb. 1, 2019).

192. See, e.g., Austin Gosling, Riot's English language broadcast team will not be in Korea for most of Worlds, *available at* <https://www.rifthermal.com/lol-worlds/2018/8/27/17786770/riot-english-language-casters-not-in-korea-worlds> (last accessed Feb. 1, 2019).

193. See, e.g., Andy Chalk, Overwatch League suspends xQc again, this time for 'racially disparaging' emotes (Updated), *available at* <https://www.pcgamer.com/overwatch-league-suspends-xqc-again-this-time-for-racially-disparaging-emotes> (last accessed Feb. 1, 2019).

In the 1984 case of *NCAA v. Board of Regents*,¹⁹⁴ the National Collegiate Athletic Association (NCAA) attempted to restrict televising of college football by limiting the number of games that any one college was allowed to televise, restricting the earnings from the same, and by entering into exclusive broadcasting contracts with American Broadcasting Cos. and the Columbia Broadcasting System.¹⁹⁵ When the College Football Association attempted to broker a deal with National Broadcasting Co. that would offer colleges more airtime (and more money), the NCAA boycotted the said schools.¹⁹⁶ The U.S. Supreme Court, citing the lower court's decision, ruled that the acts of the NCAA were anti-competitive in nature and violated the Sherman Act.¹⁹⁷

The acts deemed anti-competitive by the U.S. Supreme Court are the precise things over which esports developers have control. For example, Blizzard made an exclusive deal with Twitch for OWL tournaments.¹⁹⁸ As there are no official tournaments outside of OWL, no other streaming platform (Facebook, YouTube, etc.) may stream competitive *Overwatch*.

This ruling, of course, would not exactly apply to esports. Riot and Blizzard are not merely governing bodies, as the NCAA is — they *own* the game. They own the esports. However, lately, there have been attempts to move esports from an industry involving purely private teams and organization to an industry involving national teams,¹⁹⁹ state

194. *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

195. *Id.* at 92.

196. *Id.* at 95.

197. *Id.* at 120. See also An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015). Notably, the pertinent provisions of the Sherman Act has been incorporated in the Philippine Competition law.

198. Jacob Wolf, *Overwatch League to be streamed on Twitch.tv in two-year, \$90 million deal*, available at http://www.espn.com/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal (last accessed Feb. 1, 2019).

199. See, e.g., Jay Castello, *'Playing on national pride': eSports is coming home at the Overwatch World Cup*, *GUARDIAN*, Oct. 12, 2018, available at

teams,²⁰⁰ and even a collegiate circuit.²⁰¹ In Blizzard's OWL, for example, each of the franchised teams represents a different city — from the London Spitfire to Dallas Fuel to the Seoul Dynasty.²⁰² Regardless of the private ownership of esports, it may one day grow big enough to warrant government intervention.

IV. CONCLUSION

The legal issues discussed in this Essay are merely a fraction of the possible legal issues surrounding video games, esports, and streaming.

Video game technology has improved to the point where virtual reality gaming may be commonplace within the next few years.²⁰³ Already, early adopters are picking up virtual reality headsets, with the likes of Google and Facebook behind them.²⁰⁴ The issues may range from something as familiar

<https://www.theguardian.com/games/2018/oct/12/playing-on-national-pride-on-the-road-at-the-overwatch-esports-world-cup> (last accessed Feb. 1, 2019).

200. See, e.g., Rand, *supra* note 216.

201. See, e.g., League of Legends, WHAT IS COLLEGE LOL, *available at* <https://ulol.na.leagueoflegends.com/what-is-college-lol> (last accessed Feb. 1, 2019).

202. See, e.g., Blizzard, Overwatch League Teams, *available at* <https://overwatchleague.com/en-gb/teams> (last accessed Feb. 1, 2019) & *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). In the infamous case of *Federal Baseball Club*, declaring that the MLB was exempt from anti-competition laws (and which subsequently became the basis for justifying the monopoly which the NFL, NBA, and NHL currently enjoy over their respective sports), the U.S. Supreme Court ruled that the sports were not “interstate trade or commerce” and therefore outside the coverage of the Sherman Act. *Federal Baseball Club*, 259 U.S. at 208-09. That said, the decision was met with criticism.

See Ken Reed, Why Does the U.S. Continue to Permit Unregulated Sports Leagues?, *available at* https://www.huffingtonpost.com/entry/why-does-the-us-continue-to-permit-unregulated-sports_us_5965465fe4b0911162fc2f9c (last accessed Feb. 1, 2019).

203. Nathan Pettijohn, The Future Of VR Is Here, Let's Start Using It Properly, *available at* <https://www.forbes.com/sites/nathanpettijohn/2018/11/26/the-future-of-vr-is-here-lets-start-using-it-properly/#7335d184609c> (last accessed Feb. 1, 2019).

204. Association for Computing Machinery, Google unveils new virtual reality experience at SIGGRAPH 2018, *available at* <https://phys.org/news/2018-07->

as copyright ownership to the more risqué topics of highly sexualized video games.²⁰⁵

In the streaming community, streamers are no longer limited to games — right now, there is a trend on YouTube of “reaction videos,” where the content creator post entire films or TV shows side-by-side with a shot of their face, so the audience can see their reactions.²⁰⁶ The film or episode is often cut in certain places to avoid being taken down by robots on YouTube, but a good 70% to 80% of the film or episode remains. These reaction videos would be very similar to Let’s Plays and walkthroughs in terms of copyright infringement.

Esports is slowly starting to become regulated around the world,²⁰⁷ and the industry has begun to face the problems that traditional sports are facing now, such as unionization and minimum wage, taxation of prize winnings, visa and immigration, and even gambling.²⁰⁸

For now, many of the laws initially intended for other industries still apply. The scope of copyright, once intended only for literature, is broad enough that many of these issues may still be resolved, if imperfectly. Yet, the law has always struggled to keep up with the pace of technology. All of

google-unveils-virtual-reality-siggraph.html (last accessed Feb. 1, 2019) & Waverly Colville, Facebook VR leader talks about the future of virtual reality, *available at* <https://www.cnn.com/2018/09/26/facebook-vr-leader-talks-about-the-future-of-virtual-reality.html> (last accessed Feb. 1, 2019).

205. Jessica Buchleitner, When virtual reality feels real, so does the sexual harassment, *available at* <https://www.revealnews.org/article/when-virtual-reality-feels-real-so-does-the-sexual-harassment> (last accessed Feb. 1, 2019); Peter Rubin, Coming Attractions: The Rise of VR Porn, *available at* <https://www.wired.com/story/coming-attractions-the-rise-of-vr-porn> (last accessed Feb. 1, 2019).

206. Valentina Palladino, The science behind the insane popularity of “react” videos on YouTube, *available at* <https://arstechnica.com/gaming/2016/04/the-science-behind-the-insane-popularity-of-react-videos-on-youtube> (last accessed Feb. 1, 2019).

207. Regalado, *supra* note 19. *See also* Paul Tassi, The U.S. Now Recognizes eSports Players As Professional Athletes, *available at* <https://www.forbes.com/sites/insertcoin/2013/07/14/the-u-s-now-recognizes-esports-players-as-professional-athletes> (last accessed Feb. 1, 2019).

208. Colin Stevens, Loot Boxes to be Investigated by the FTC, *available at* <https://sea.ign.com/pc/143779/news/loot-boxes-to-be-investigated-by-the-ftc> (last accessed Feb. 1, 2019).

the legal issues presented in this Essay occurred only within the last few years, but, doubtless, there will be many more in the future — some, which only the most imaginative of legislators may be able to predict.