

## ONLINE VIDEO GAME STREAMING, ESPORTS, AND IPR: A SWEEPING SAGA OF CONFLICT

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### ABSTRACT

*The COVID-19 pandemic has led to a surge in the gaming industry and video game streaming has become a popular pastime. However, the existing intellectual property (IP) laws in India are not extensive enough to address the increasing rate of IP infringements and subsequent litigation in this domain. While certain aspects of video games, such as characters, graphics, and codes are protected under the Indian IP laws, there are areas that fall outside the scope of the current legal framework, such as the informal and ambiguous nature of video game streaming, coupled with fragmented regulations imposed by streaming sites and private entities, which complicates the process of addressing IP infringement for both IP owners and users. The use of cryptocurrencies and non-fungible tokens (“NFTs”) in gaming and betting raises additional concerns and threats across many*

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*disciplines of law. Broadcasting gameplay streams, in particular, is an unregulated and abused space that requires attention from legislators. The IP and financial law frameworks need to evolve to keep up with these dynamic phenomena. This paper aims to analyze the loopholes in the Indian intellectual property domain pertaining to legal protection with respect to video game broadcasting. The focus is on safeguarding the rights of IP owners against the misuse of their creative works. The study advocates a more stringent application of concepts such as novelty, fair dealing, and IP infringement to better regulate online game streaming. It also proposes the development of a unique legal framework to address the growing concerns and legislative uncertainties, ensuring that the interests of publishers, developers, and other relevant parties are protected.*

**Keywords:** *Online game streaming, Non-Fungible Tokens, Cryptocurrency, Esports, infringement, copyright, broadcasting.*

## I. INTRODUCTION

With the Covid-19 pandemic sweeping the globe, even the busiest people appeared to have unlimited time and energy, on their hands, to kill. This, combined with reasonably-priced internet access and widely available smart devices and gadgets, the growth of the gaming business was a given – primarily, in the form of online video game streaming, where players indulge in gameplay on an electronic device and allow

the public to view it simultaneously through an online platform. Not only is online video game streaming a source of recreation or earning petty money, but it has turned into one of the fastest-growing sectors, reflecting future global and national economic trends.<sup>1</sup> These activities have also witnessed formalisation and regularisation to an extent by relevant authorities, both national and international, in the form of 'Esports.'<sup>2</sup> Esports is an organised form of online video game streaming which competitively engages players.<sup>3</sup> With exclusive brand collaboration, the organisation of competitive tournaments, and the promise of attractive remuneration, Esports events ensure that the public is captivated and for good.<sup>4</sup> The Indian Esports market is now worth INR 2.5 billion, and in the following four years, the business is projected to develop at a compound annual growth rate (CAGR) of 46%.<sup>5</sup> According to the 2021 E&Y Report, the Esports market is predicted to increase four times, reaching INR 11 billion by 2025.<sup>6</sup>

In the near future, the Esports market in India is set to witness unrestricted expansion and infinite prospects.<sup>7</sup> Naturally, this growth

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<sup>1</sup>Stefan Brambilla Hall, 'How Covid-19 is taking gaming and esports to the next level' (*WEF*, 15 May 2020) <<https://www.weforum.org/agenda/2020/05/covid-19-taking-gaming-and-esports-next-level/>> accessed 20 December 2022.

<sup>2</sup>Qi Peng et al., 'Esports Governance: Exploring Stakeholder Dynamics' (2020) 12(19) 8270 *Sustainability* 1-15.

<sup>3</sup>Marc Leroux-Parra, 'Esports Part 1: What are Esports?' (2020) *Harvard International Review*, <<https://hir.harvard.edu/esports-part-1-what-are-esports/>>.

<sup>4</sup>Animesh Agarwal, 'How Indian Gaming and Esports sector have become a high potential market for revenue generation' *The Times of India* (25 August 2022) <<https://timesofindia.indiatimes.com/blogs/voices/how-indian-gaming-and-esports-sector-have-become-a-high-potential-market-for-revenue-generation/>> accessed 23 December 2022.

<sup>5</sup>Qi Peng et al., 'Esports Governance: Exploring Stakeholder Dynamics' (2020) 12(19) 8270 *Sustainability* 1-15.

<sup>6</sup>Asish Pherwani, 'The dawn of Esports in India' (*EY India Media & Entertainment Leader*, 28 June 2021) <[https://www.ey.com/en\\_in/media-entertainment/the-dawn-of-esports-in-india](https://www.ey.com/en_in/media-entertainment/the-dawn-of-esports-in-india)> accessed 22 December 2022.

<sup>7</sup>Utsav Umang, 'Game on: What are the next big opportunities for Indian esports?' *The Economic Times* (28 May 2022) <<https://economictimes.indiatimes.com/small-biz/security-tech/technology/game-on-what-are-the-next-big-opportunities-for-indian-esports/articleshow/91849069.cms?from=mdr>> accessed 22 December 2022.

rate brings with it the caveats of IP infringements for owners and creators of video games.<sup>8</sup> The utilisation of cryptocurrencies<sup>9</sup> and NFTs<sup>10</sup> in trade and placing bets in these gaming formats poses a set of threats and apprehensions.<sup>11</sup> The intellectual property and financial regimes need an equitable opportunity for development and growth to keep pace with the dynamic escalation of these phenomena. Not only is the domain of video game streaming highly informal and ambiguous, but the fragmentation in regulations formed by private streaming platforms governing this form of economic activity also makes the redressal for IP infringement cumbersome for both IP owners and users.<sup>12</sup>

## II. LEGAL FRAMEWORK FOR VIDEO GAME STREAMING IN INDIA

Since the introduction of the first commercially successful game, Pong, by Atari in 1972,<sup>13</sup> the video game industry has effectively established itself and has been growing dramatically. It has boomed to reach a staggering number of players and viewers, demonstrating its

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<sup>8</sup>David Greenspan et al., 'Video Games and IP: A Global Perspective' (*WIPO Magazine*, February 2014) <[https://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html)> accessed 12 December 2022.

<sup>9</sup>FE Digital Currency, 'Why the future of gaming will be on-chain' *Financial Express* (28 August 2022) <<https://www.financialexpress.com/blockchain/blockchain-gaming-blockchain-game/2646925/>> accessed 15 December 2022.

<sup>10</sup>Ravindra Kumar, 'NFTs: The next big thing in online gaming' *Business Today* (17 December 2021) <<https://www.businesstoday.in/opinion/columns/story/nfts-the-next-big-thing-in-online-gaming-315939-2021-12-17>> accessed 17 December 2022.

<sup>11</sup>Daniel L. King et al., 'Unfair play? Video games as exploitative monetized services: An examination of game patents from a consumer protection perspective' (2019) 101 *Computers in Human Behavior* 131, 131-143.

<sup>12</sup>Joe Bertolone et al., 'Roundtable on Regulating Esports' (2021) 25(10) *GLR* 470, 470-479.

<sup>13</sup>The Editors of Encyclopedia Britannica, 'Pong' (*Encyclopedia Britannica*, 7 May 2020) <<https://www.britannica.com/topic/Pong>> accessed 17 December 2022.

significance to IP regulation and protection.<sup>14</sup> India does not have any specific legislation governing video game streaming, but there exists an amalgamation of legislations governing the different aspects of online gaming. Broadcasting is governed by the Copyright Act of 1957,<sup>15</sup> the characters, logos, etc., and the branding and correlative rights are governed by the Trademark Act of 1999<sup>16</sup> and the Information Technology Act of 2000.<sup>17</sup> While antitrust laws may also come into play in the case of video game streaming, the primary issue is broadcasting, which has been dealt with under the Copyright Act of 1957.<sup>18</sup>

### A. Copyright

Article 2 of the Berne Convention<sup>19</sup> serves as the primary foundation for video games being governed and protected as creative work under the Copyright Act, 1957 (“**the Act**”).<sup>20</sup>

#### a) *Video games as multimedia products*

Video games are not specifically covered by the Act.<sup>21</sup> Regardless, separate parts of a game can be protected under various work headings, such as literary, artistic, musical, cinematographic, etc., as stipulated in Section 14 of the Act.<sup>22</sup> With the absence of legal precedents, the sole consolation for game developers and distributors is that the Ministry of

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<sup>14</sup>Matt Schmidt, ‘The Disruption and Democratization of E-Gaming’ *Forbes* (19 May 2021), <<https://www.forbes.com/sites/forbesbusinesscouncil/2021/05/19/the-disruption-and-democratization-of-e-gaming/?sh=1b94096c5fbb>> accessed 17 December 2022.

<sup>15</sup>The Copyright Act, 1957 (14 of 1957).

<sup>16</sup>The Trade Marks Act, 1999 (47 of 1999).

<sup>17</sup>The Information Technology Act, 2000 (21 of 2000).

<sup>18</sup>The Copyright Act, 1957 (14 of 1957).

<sup>19</sup>Berne Convention for the Protection of Literary and Artistic Work (9 September 1886, revised at Paris 24 July 1971) 1161 UNTS 3.

<sup>20</sup>The Copyright Act, 1957 (14 of 1957) s 14.

<sup>21</sup>*ibid.*

<sup>22</sup>*ibid.*

Electronics and Information Technology<sup>23</sup> recognises the copyright protection of video games under the heading of “multimedia products”. Multimedia is “*a computer-based interactive communications process that includes a combination of writing, sound, image, still images, animation, video, computer software or interactivity content forms*”,<sup>24</sup> i.e., a combination of several elements. Regardless, this protection has recently become more broad-based, with videogames enjoying protection as literary and cinematography works since the various elements of a videogame fall under the scope of protection in either of these two categories.

*b) Video game streaming: Cinematography work or literary work?*

While video game streaming enjoys unquestionable protection under the copyright domain, it is uncertain under which category of copyright such protection is granted.<sup>25</sup> As far as their creative components go, regarding the design and backstory, video game characters are copyrightable, but there is no watertight category in the Act for video games *per se*. Mostly, these are considered either a cinematographic work, i.e., any work of visual recording, sounds, or related to cinematographic work (Section 2(f) of the Act<sup>26</sup>) or a literary work, consisting of plots, characters, etc. (Section 2(o) of the Act<sup>27</sup>), but there is a need to include the games under a certain category because the right of distribution granted in both of these cases is different. Cinematographic work enjoys the right to distribution of a much wider scope than literary work since, in case of the latter, the copyright holder is allowed to sell, resell, or rent the cinematographic work. Therefore

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<sup>23</sup>MEITY <<https://www.meity.gov.in/>> accessed 17 December 2022.

<sup>24</sup>Merriam-Webster <<https://www.merriam-webster.com/dictionary/multimedia>> accessed 16 December 2022.

<sup>25</sup>Shigenori Matsui, ‘Does It Have to Be a Copyright Infringement: Live Game Streaming and Copyright’ (2016) 24 Tex Intell Prop LJ 215.

<sup>26</sup>The Copyright Act, 1957 (14 of 1957) s 2(f).

<sup>27</sup>*ibid* s 2(o).

the *first sale doctrine*,<sup>28</sup> which is usually available in literary work, is not available in cinematographic work.<sup>29</sup> This doctrine stipulates that after a lawful sale or gratuitous transfer, the copyright owner's control over the material object (in that particular copy of the work and not the original work itself) in which the copyrighted work is manifested gets exhausted. Video streaming somewhat embodies the characteristics of both works.<sup>30</sup> For instance, the video game 'League of Legends' includes various characters like *Senna Abaru*, *Aheri*, *Aphellios*, etc. These get protected under the domain of literary work in the form of artistic works, in addition to their commercial rights. The gameplay also consists of a storyline, objectives, conversations between different characters, etc., which can be protected as a literary work (Section 14(a) of the Act<sup>31</sup>). However, when it is broadcasted, or better to say 'streamed', it comes under the purview of cinematographic rights<sup>32</sup> (Section 14(d) of the Act<sup>33</sup>), with due regard to the theory of *scène à faire*, which states that certain innovative works cannot avail the protection of copyright since they are customary to that particular genre.<sup>34</sup>

The music and soundtracks used in video games may be protected as musical compositions and sound recordings (Sections 14(a)<sup>35</sup> and

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<sup>28</sup>The United States Department of Justice Archives <<https://www.justice.gov/archives/jm/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine>> accessed 17 December 2022.

<sup>29</sup>Unnat Akhouri, 'First sale doctrine and the exhaustion of IP Rights' (*PA Legal*, 10 July 2021) <<https://thepalaw.com/trademark/first-sale-doctrine-and-the-exhaustion-of-ip-rights/>> accessed 13 December 2022.

<sup>30</sup>Yash Raj, 'The Lacunae in the Indian Copyright law vis-a-vis video games' (*NLUJ Law Review*, 3 June 2020) <<http://www.nlujlawreview.in/the-lacuna-in-the-indian-copyright-law-vis-a-vis-video-games/>> accessed 27 December 2022.

<sup>31</sup>The Copyright Act, 1957 (14 of 1957) s 14.

<sup>32</sup>Naresh Pujari et al, 'Complexities of IPR in Sports League: the way ahead?' (2018) 2 Sports and Legislature 38.

<sup>33</sup>The Copyright Act, 1957 (14 of 1957) s 14(d).

<sup>34</sup>*NRI Film Production Associates v Twentieth Century Fox Films*5 (2003) KarLJ 98.

<sup>35</sup>Naresh Pujari et al, 'Complexities of IPR in Sports League: the way ahead?' (2018) 2 Sports and Legislature 38.

14(e)<sup>36</sup> of the Act). The graphical components of the gameplay can be protected as creative work (Section 14(c) of the Act<sup>37</sup>). Cut scenes<sup>38</sup>, a popular element of vintage video games like ‘Pac-man’, and even contemporary ones such as ‘Grand Theft Auto’, can be protected as computer programs under Section 14(b) of the Act<sup>39</sup> as these comprise of software codes.<sup>40</sup>

Since sound recordings, dramatic works, and pictorial representations have separate domains under the Act, this poses a dilemma regarding the category in which the overall protection may lie.<sup>41</sup> In *toto*, as per the Act, including video games in the category of computer programs is preferred since the major elements of the concerned work like structure, organization, and sequence of the code would be included under this domain.<sup>42</sup>

Development was seen in this limbo when the Delhi High Court<sup>43</sup>, by referring to anti-circumventing laws under Section 65A of the Act,<sup>44</sup> held that video games could not be resold merely by making minor changes in the software. However, this judgment led to further complications since the adoption of this dual system was only beneficial to big corporations. Small independent creators were

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<sup>36</sup>The Copyright Act, 1957 (14 of 1957) s 14(e).

<sup>37</sup>*ibid* s 14(c).

<sup>38</sup>Collins Dictionary, ‘Definition of ‘cutscene’  
<<https://www.collinsdictionary.com/dictionary/english/cutscene>> accessed 15 December 2022.

<sup>39</sup>The Copyright Act, 1957 (14 of 1957) s 14(b).

<sup>40</sup>Himanshu Sinha, ‘Video Game Streaming and Copyright Law’ (*Mondaq*, 4 October 2021) <<https://www.mondaq.com/india/copyright/1117250/video-game-streaming-and-copyright-law/>> accessed 25 December 2022.

<sup>41</sup>The Copyright Act, 1957 (14 of 1957) s 14.

<sup>42</sup>*ibid*.

<sup>43</sup>*Sony Computer Entertainment Europe Ltd. v Harmeet Singh and Others* (2012) 51 PTC 419.

<sup>44</sup>The Copyright Act, 1957 (14 of 1957) s 65(A).



discouraged from exercising their rights to commercialise their streaming videos owing to the high costs of obtaining licenses.<sup>45</sup>

*B. Broadcasting of games: A copyright infringement?*

Along with copyright, there arises an exclusive right of reproduction, public transmission, and licensing.<sup>46</sup> The right to transmission includes the right to wireless broadcasting, cable transmission and transmission on the internet.<sup>47</sup> Therefore, uploading a copyrighted work on online platforms and making it accessible to a larger public by a person other than the copyright holder without an appropriate license would lead to copyright infringement under Section 51(a)<sup>48</sup> of the Act.

Video game streaming is considered to fall under the purview of Section 2(dd), which defines the term “broadcast”<sup>49</sup> since the streaming of the games on an online platform involves the transmission of sounds and visual images. Broadcasting may be of two types: first, when the player makes a video of the gameplay and uploads it on the internet, and the user has to download it to watch it, and the other is when the player streams it on certain platforms, and users watch it simultaneously.<sup>50</sup> The second category is of primary concern in relation to video game streaming.

In present times, we have many platforms where video games are streamed, including Esports sites like Twitch, Mixer, or Mobcrush and broad-based live streaming sites like YouTube or Facebook. When these players livestream their video games, the audio, video, music, and plot of the game are broadcasted in the public domain, generally

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<sup>45</sup>Amey Jadhav, ‘Do Copyright Laws have the capacity to protect video games?’ (*Khurana and Khurana*, 2 December 2021) <<https://www.khuranaandkhurana.com/2021/12/02/copyright-act-1957-and-video-games/>> accessed 19 December 2022.

<sup>46</sup>The Copyright Act, 1957 (14 of 1957) s 37.

<sup>47</sup>*ibid* s 14.

<sup>48</sup>*ibid* s 51(a).

<sup>49</sup>*ibid* s 2(dd).

<sup>50</sup>The Copyright Act, 1957 (14 of 1957) s 14.

leading to copyright infringement of the game owners since most streamers do not obtain a license.<sup>51</sup> However, this is subject to company policies as, while certain companies like Sony and Microsoft allow for unlicensed streaming of their games to enjoy increased popularity, others monitor their distribution rights strictly. This leads to a dichotomy in the exercise of ownership rights since the neglect towards infringement by many companies for availing free promotional benefits and enhanced sales jeopardizes the rights of those companies which strictly want to protect their distribution rights.<sup>52</sup> There is a need for well-defined standards to remove such laxity so that because of some blind-eye companies, others don't suffer.<sup>53</sup>

### C. Creativity in video game streaming

The right to reproduction of work under Section 14<sup>54</sup> prerequisites inclusion of creativity while reproducing such work. This poses the question of assessing the *modicum of creativity* required for video game streaming. While streaming a game, the streamers are present in small corners of the screens (sometimes even that is missing), and comments include mere reactions to the gameplay. Such reactions may amount to creativity sometimes, but not necessarily always. A standard level of creativity is required.<sup>55</sup> Herein, though we can't quantify what would amount to the standard level of creativity as it depends upon case to case basis, we can say that this standard of creativity has been met when

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<sup>51</sup>Himanshu Sinha, 'Video Game Streaming and Copyright Law' (*Mondaq*, 4 October 2021) <<https://www.mondaq.com/india/copyright/1117250/video-game-streaming-and-copyright-law/>> accessed 25 December 2022.

<sup>52</sup>Amey Jadhav, 'Do Copyright Laws have the capacity to protect video games?' (*Khurana and Khurana*, 2 December 2021) <<https://www.khuranaandkhurana.com/2021/12/02/copyright-act-1957-and-video-games/>> accessed 19 December 2022.

<sup>53</sup>Yash Raj, 'The Lacunae in the Indian Copyright law vis-a-vis video games' (*NLUJ Law Review*, 3 June 2020) <<http://www.nlujlawreview.in/the-lacuna-in-the-indian-copyright-law-vis-a-vis-video-games/>> accessed 27 December 2022.

<sup>54</sup>The Copyright Act, 1957 (14 of 1957) s 14.

<sup>55</sup>The Copyright Act, 1957 (14 of 1957) s 2(f).

the reproductive work transforms the original work in such a way that it contributes a new meaning to that original work.<sup>56</sup> This could be said to be met, for instance, when the player creates a humorous commentary on a current social event while streaming a game, as he is giving a complete different message by his commentary, though he is using the elements of the game.

*D. Fair use principle and how it is abused by game streamers*

Section 52(1)(a) of the Act<sup>57</sup> deals with the principle of fair use. It forms an exception to copyright infringement by allowing the use of a copyrighted work for an inclusive list of reasons, i.e., criticism, comments, reporting, teaching, scholarships, and research.<sup>58</sup> There is a misunderstanding that the fair use principle doesn't allow the creators to use the original work for monetary gain. Whether the original work is used for monetary gain or not is a relevant factor, but not necessarily a critical question in deciding whether a work qualifies for the fair use principle. Many YouTubers stream games for economic incentives, yet such videos may also be solely for entertainment purposes or to raise funds for donation campaigns.<sup>59</sup> There are gaming companies, like Nintendo, which exercise their rights against unlicensed streaming, regardless of whether the streaming was monetised or not. However, when a game is streamed for monetary gain, it is generally upheld that streamers must have a license from the gaming company.<sup>60</sup>

Further, if there is no agreement between the gamer and the company in relation to promotional practice, then precautions must be taken by

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<sup>56</sup>Office of the General Counsel, 'Copyright and fair use: A guide for Harvard community' (*Harvard.edu*, 11 July 2023) <[https://ogc.harvard.edu/sites/hwpi.harvard.edu/files/ogc/files/ogc\\_copyright\\_and\\_fair\\_use\\_guide\\_bea\\_july\\_2023\\_01.pdf?m=1689173704](https://ogc.harvard.edu/sites/hwpi.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_bea_july_2023_01.pdf?m=1689173704)> accessed 5 December 2023.

<sup>57</sup>The Copyright Act, 1957 (14 of 1957) s 52(1)(a).

<sup>58</sup>Dan Hagen, 'Fair Use, Fair Play: Video Game Performances and Let's Plays as Transformative Use' (2018) 13 Wash J L TECH & Arts 245.

<sup>59</sup>The Copyright Act, 1957 (14 of 1957) s 52(1)(a).

<sup>60</sup>*MJ Shivani and Ors. v State of Karnataka and Ors.* (1995) 3 SCR 329.

the streamer to ensure that the gameplay does not form a considerable part of the streaming.<sup>61</sup> Furthermore, the stream has to be constantly commented upon by the streamer and input must be taken from the audience. If the game is played silently without any comments or chat, then it would not amount to fair use.<sup>62</sup>

### III. EMERGING TRENDS IN VIDEO GAME STREAMING: COMPLICATING A COMPLEX SCENARIO FURTHER

#### A. Esports and IPR

Recently, Esports was introduced as a part of the Olympics in Tokyo 2022 to align with the IOC's agenda for the virtuality of non-physical forms of sport.<sup>63</sup> Furthermore, Esports is seeing a major push in Asian gaming, where it made its grand debut in the Asian Games 2022<sup>64</sup> and is featured in the planned official sports list of AIMAG 2025.<sup>65</sup> Commonwealth Games 2022 was also set on featuring Esports but made an unfortunate turnback,<sup>66</sup> however, leaving a persistent hope of Esports being featured in future editions. As Esports evolves with innovative features and gains greater recognition, the inadequacy of

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<sup>61</sup>The Copyright Act, 1957 (14 of 1957) s 2(f).

<sup>62</sup>*ibid* s 52(1)(a).

<sup>63</sup>Rahul Venkat, 'Asian Games 2022: Esports to make debut; FIFA, PUBG, Dota 2 among 8 medal events' (*Olympics*, 9 September 2021) <<https://olympics.com/en/news/fifa-pubg-dota-2-esports-medal-events-asian-games-2022>> accessed 20 December 2022.

<sup>64</sup>Utathya Nag, 'Asian Games 2022: India's 18-member esports team identified' (*Olympics*, 26 April 2022) <<https://olympics.com/en/news/asian-games-2022-indian-esports-team-athletes-qualified-full-list>> accessed 20 December 2022.

<sup>65</sup>'Esports proposed as an official medal sport at AIMAG 2025' *The Times of India* (13 October 2022) <<https://timesofindia.indiatimes.com/sports/more-sports/others/esports-proposed-as-official-medal-sport-at-aimag-2025/articleshow/94829064.cms>> accessed 21 December 2022.

<sup>66</sup>Joe Tidy, 'Commonwealth Games makes mystery Esports U-turn' *BBC News* (12 October 2021) <<https://www.bbc.com/news/technology-63232333>> accessed 21 December 2022.

current IPR protections for online video games becomes increasingly evident.

### *B. Copyright issues*

A person who produces any computer-generated literary, dramatic, musical, or artistic work is referred to as an *author* in Section 2(d)(vi) of the Act 1957<sup>67</sup>. As an outcome, the gaming company or publisher would be granted complete literary rights and be recognized as the author in the context of Esports. This perspective should be used to understand Section 17 of the Act,<sup>68</sup> which addresses situations involving the original owner of the copyright. This suggests that the authorship would solely belong to the publisher in the absence of a contract. However, there are contrary views to the same, and in many commentaries, it has been argued that it is the “player” who should be given the rights of the author since it is the player who plays the game uniquely and creatively.<sup>69</sup>

There is no judicial precedent pertaining the same in India, but this question of authorship has been raised in a US case of *Stern Electronics v. Kaufman Inc.*,<sup>70</sup> where the Court addressed the question of player engagement in a video game infringement lawsuit. It was argued by the defendant that the player is the original owner since the video game is an output of the player’s engagement. However, the Court rejected the contention, and the publisher is deemed the real owner even in future cases.

### *C. Game modding*

Modding is the process of changing or modifying a game by way of its code to adjust it as required, like fixing minor flaws, altering visuals,

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<sup>67</sup>The Copyright Act, 1957 (14 of 1957) s 2(d)(vi).

<sup>68</sup>*ibid* s 17.

<sup>69</sup>Lian Cicily Joseph, ‘Modern Developments in Copyright law and the governance of eSports’ (2020) 3.2 JIPS 48.

<sup>70</sup>*Stern Electronics v Kaufman Inc.* (1981) 523 F Supp 635 (EDNY).

creating new character avatars, or creating a completely new gaming format.<sup>71</sup> A conflict of interest regarding the publisher's rights arises from this intersection of IP and several other fields involved in this procedure since mods allow players to adopt characters from separate brands or games and incorporate them into the original.<sup>72</sup>

The legal status of such user-generated works is ambiguous in Indian law. However, general copyrightability problems have been decided in several judgments, including *R.G. Anand v. M/s Delux Films*,<sup>73</sup> wherein it was held that where the same concept is being developed differently yet the source is common, similarities are unavoidable. The courts should decide in this situation whether the similarities are essential or fundamental parts of the mode of expression used in the copyrighted work with some minor variations.

#### D. Play-to-Earn games

The feature of play-to-earn in the *crypto gaming* format is one of the most recent innovations in the gaming sector. While embracing contemporary technologies, the role of NFTs and cryptocurrency has been pathbreaking.<sup>74</sup> The development of blockchain technology has given crypto gaming creators a chance to incorporate real-world economics into their games by allowing players ownership of in-game digital assets. Users of P2E games have access to a variety of ways to earn or purchase gaming tokens like ApeCoin, Decentralland, SandBox, and others.<sup>75</sup> On both controlled and decentralised

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<sup>71</sup>Cambridge Dictionary, accessed 12 December 2022.

<sup>72</sup>Bente Herbert, 'Game Over: Copyright Issues in the moder video game Landscape' (*UClawreview*, 16 April 2021) <<https://uclawreview.org/2021/04/16/game-over-copyright-issues-in-the-modern-video-game-landscape/>> accessed 20 December 2022.

<sup>73</sup>*R G Anand v M/s Delux Films* AIR 1978 SC 1613.

<sup>74</sup>Siobhan Middleton, 'Play to earn games: what are they and how to get started' *The Us Sun* (13 April 2022) <<https://www.the-sun.com/tech/4606383/play-to-earn-games-money/>> accessed 20 December 2022.

<sup>75</sup>Wayne Duggal et al., 'What is Crypto-gaming?' (*Forbes Advisor India*, 5 September 2022)

cryptocurrency exchanges, it is frequently possible to convert in-game digital tokens into cryptocurrency and NFTs. These digital assets can be instantly converted to fiat money; used in crypto gambling; used for in-game purchases, or sold on internet exchanges.<sup>76</sup>

*E. NFTs and cryptocurrency*

NFTs are unique digital identifier that cannot be copied, substituted, or subdivided, that is recorded in a blockchain, and that is used to certify authenticity and ownership (as of a specific digital asset and specific rights relating to it).<sup>77</sup> Recently, the World Intellectual Property Organization has announced a new NICE classification which expanded Class 9 of international trademark applications and included blockchain technology used for managing crypto assets, NFTs, and crypto-wallets,<sup>78</sup> which has become applicable from 01 January 2023.

As the global popularity for cryptocurrency rises, NFTs have become the fresh face of crypto gaming.<sup>79</sup> Online gaming is adopting cutting-edge technologies into its core products, and since NFTs keep transactions anonymous, restrict double-spending and facilitate ownership of in-game items, players can discover a personalised ecosystem whose goal of digital ownership rights and interoperability provides them with a variety of innovative ways to generate income and prosper.

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<<https://www.forbes.com/advisor/in/investing/cryptocurrency/what-is-crypto-gaming/>> accessed 18 December 2022.

<sup>76</sup>R G Anand v M/s Delux Films AIR 1978 SC 1613.

<sup>77</sup>(Merriam-Webster) <<https://www.merriam-webster.com/dictionary/NFT>> accessed 12 December 2022.

<sup>78</sup>(WIPO *IP Portal*) <[https://www.wipo.int/classifications/nice/nclpub/en/fr/?class\\_number=9&explanatory](https://www.wipo.int/classifications/nice/nclpub/en/fr/?class_number=9&explanatory)> accessed 20 December 2022.

<sup>79</sup>FE Digital Currency, 'Why the future of gaming will be on-chain' *Financial Express* (28 August 2022) <<https://www.financialexpress.com/blockchain/blockchain-gaming-blockchain-game/2646925/>> accessed 15 December 2022.

The market for blockchain-based games has increased by 2000% over 2020.<sup>80</sup> A total investment of \$2.5 billion in the blockchain gaming sector was made well within the first quarter of 2022.<sup>81</sup> In India, due to the comparable idea of trading and data storage in blockchain technology, NFTs are classified as “virtual digital assets” and seen as a part of cryptocurrencies.<sup>82</sup> The main obstacle to NFT trading in the Esports setting is the lack of clarity on the legality and regulation of cryptocurrencies in India.<sup>83</sup>

#### IV. VIDEO GAME STREAMING AND IP: A SWEEPING SAGA OF CONFLICT

##### A. *Ambiguity in the applicability of the Copyright Act on video games*

Since a video game is considered a multimedia product,<sup>84</sup> the fragmentation in its protection has led to ambiguity and conflict in the

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<sup>80</sup>Shashank Bharadwaj, ‘Blockchain Games are leading the DApp industry: DappRadar report’ *Forbes India* <<https://www.forbesindia.com/article/crypto-made-easy/blockchain-games-are-leading-the-dapp-industry-dappradar-report/75561/1>> accessed 20 December 2022.

<sup>81</sup>(WIPO *IP Portal*) <[https://www.wipo.int/classifications/nice/nclpub/en/fr/?class\\_number=9&explanatory](https://www.wipo.int/classifications/nice/nclpub/en/fr/?class_number=9&explanatory)> accessed 20 December 2022.

<sup>82</sup>Shubham Raj, ‘What are ‘virtual digital assets’ that will be taxed at 30% now?’ *The Economic Times* (01 February 2022) <[https://economictimes.indiatimes.com/markets/cryptocurrency/what-are-virtual-digital-assets-that-will-be-taxed-at-30-now/articleshow/89270462.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/markets/cryptocurrency/what-are-virtual-digital-assets-that-will-be-taxed-at-30-now/articleshow/89270462.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)> accessed 20 December 2022.

<sup>83</sup>T Rabi Sankar, ‘Cryptocurrencies – An assessment’ (*RBI Bulletin*, March 2022) <[https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/02SP\\_1703202220A52DAD3D0AD4EC285ADFE2340F1F931.PDF](https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/02SP_1703202220A52DAD3D0AD4EC285ADFE2340F1F931.PDF)>.

<sup>84</sup>Merriam-Webster <<https://www.merriam-webster.com/dictionary/multimedia>> accessed 16 December 2022.



applicability and enforceability of laws and owner rights.<sup>85</sup> In India, the protection of video games is therefore fragmented, and so are the laws that protect against the illegal usage of the games in live streaming and Esports. Video games and internet gaming are a relatively uncharted territory in terms of fair use.<sup>86</sup> Traditional broadcast media's earlier predecessors do not offer a clear roadmap either. The match between the current copyright structure and the new technologies and what is made possible by them in terms of usage and distribution is unsatisfactory. As a result, situations arise where the courts are attempting to fit 'a round peg into a square hole'.<sup>87</sup>

### B. *Lacunae of the present IP protection system*

#### a) *Restricted application of the fair use principle*

In the United States of America,<sup>88</sup> the United Kingdom,<sup>89</sup> and even in India,<sup>90</sup> the *fair use principle* is a widely recognised exception, but it is restricted to cases primarily involving a non-commercial act or a critique or review of a game. This element is subject to case-wise

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<sup>85</sup>Andy Ramos et al., 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (*WIPO Report*, 2013) <[https://www.wipo.int/edocs/pubdocs/en/wipo\\_report\\_cr\\_vg.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_report_cr_vg.pdf)>.

<sup>86</sup>Jonathan Ore, 'Is playing video games on YouTube a copyright infringement? No one wants to find out' *CBC* (07 October 2007) <<https://www.cbc.ca/news/entertainment/youtube-gaming-pewdiepie-fair-use-1.4309312>> accessed 18 December 2022.

<sup>87</sup>Amey Jadhav, 'Do Copyright Laws have the capacity to protect video games?' (*Khurana and Khurana*, 2 December 2021) <<https://www.khuranaandkhurana.com/2021/12/02/copyright-act-1957-and-video-games/>> accessed 19 December 2022.

<sup>88</sup>'Joint Strategic Plan on Intellectual Property Enforcement' (US Intellectual Property Enforcement Coordinator, 2013) <<https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>> accessed 17 December 2022.

<sup>89</sup>Copyright, Designs, and Patents Act, 1989, s 72.

<sup>90</sup>Office of the General Counsel, 'Copyright and fair use: A guide for Harvard community' (Harvard.edu, 11 July 2023) <[https://ogc.harvard.edu/sites/hwpi.harvard.edu/files/ogc/files/ogc\\_copyright\\_and\\_fair\\_use\\_guide\\_bea\\_july\\_2023\\_01.pdf?m=1689173704](https://ogc.harvard.edu/sites/hwpi.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_bea_july_2023_01.pdf?m=1689173704)> accessed 5 December 2023.

scrutiny, and no set principle for determining whether a certain case of live streaming is fair use or not has *per se* been established in India. The element of genuine critique, review and personal input in live streamings is generally seen to be missing.<sup>91</sup> Though non-commercialisation is not essential, most streaming on monetising platforms like Twitch and YouTube is unable to fulfil the criterion that may allow for fair use, regardless of monetary benefits. Similarly, engaging in Esports tournaments without appropriate permissions from the game developers can never fall under fair use, yet home-based streamers lack the capacity to attain licenses and stream gameplay or indulge in Esports competitions without obtaining requisite permissions to earn small gains regularly.

Furthermore, large unbroken clips of gameplay or certain parts consisting of exclusive cutscenes or action sequences cannot be covered even under the fair use principle.<sup>92</sup> It is also a strictly established principle that demo games or beta level games, when given out to reviewers for suggestions, may not be used for gameplay streaming for obvious reasons, i.e., exposing a new product to the market before its launch, threatening it with fake copies and competition from rivals in the market.<sup>93</sup>

*b) Presence of fragmented platform-specific policies*

The regulations and policies that govern infringement in live streaming and commercialisation of gameplay are primarily based on the guidelines and monetisation policies that the video game streaming

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<sup>91</sup>Excel V Dyquiango, 'How live streaming can expose you to charges of copyright infringement' (*Asia IP*, 28 February 2022) <<https://www.asiaiplaw.com/article/how-live-streaming-can-expose-you-to-charges-of-copyright-infringement>> accessed 17 December 2022.

<sup>92</sup>Sebastian C Mejia, 'Fair Play: Copyright Issues and Fair Use in YouTube "Let's Plays" and Video Game Livestreams' (2020) 7(1) *Intellectual Property Brief* 1-44.

<sup>93</sup>Himanshu Sinha, 'Video game streaming and copyright law' (*Khurana and Khurana*, 30 September 2021) <<https://www.khuranaandkhurana.com/2021/09/30/video-game-streaming-and-copyright-law/>> accessed 20 November 2022.

platforms formulate, like YouTube's 'creator and monetisation policy'.<sup>94</sup> Most platforms clarify that for monetisation, step-by-step commentary involving educational, informative, or instructive value and exclusively related to the live action being displayed may only be commercialised.<sup>95</sup> Such guidelines, unfortunately and insufficiently, act as the primary guards against infringement instead of the law of the land in India. Since these platforms are mostly non-national private entities and are governed by principles of profit-making and non-transparent management, they do not ensure the protection of ownership rights with a motive of justice and welfare. The policies are likely to not only be fragmented and constantly varying across platforms, but also manipulative to ensure the greatest profits to the live streaming platform with the least answerability.

c) Unregulated presence of NFTs and cryptocurrency

The role of NFTs and cryptocurrency in the commercialised arena of video game streaming, and especially Esports, is immense, yet they are a piece of unregulated technology that has recently emerged in the Indian diaspora. Some NFT transactions could be covered by the current IP laws, but still fall in a contentious area since an NFT's owner does not own the underlying digital asset but only a *metadata* code.<sup>96</sup> Therefore, with an unregulated mode of monetary exchange being used in an unregulated system, it can pose severe threats not only to private IP ownership rights, but also be a threat to public and national security.

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<sup>94</sup>'Monetisation policies' YouTube, <[https://www.youtube.com/intl/ALL\\_in/howyoutubeworks/policies/monetization-policies/](https://www.youtube.com/intl/ALL_in/howyoutubeworks/policies/monetization-policies/)> accessed 12 December 2022.

<sup>95</sup>*Stern Electronics v Kaufman Inc.* (1981) 523 F Supp 635 (EDNY).

<sup>96</sup>Andres Guadamuz, 'Non-fungible tokens (NFTs) and copyright' (*WIPO Magazine*, April 2021) <[https://www.wipo.int/wipo\\_magazine/en/2021/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2021/04/article_0007.html)> accessed 12 December 2022.

## V. ANALYSIS AND RECOMMENDATIONS

### A. *Enigmatic application of the fair use principle*

When streaming gameplay falls beyond the ambit of the fair use principle, it causes an infringement of the IP owner rights through unsolicited use of their IP for commercial gains. Due to the lack of gaming laws and umbrella legislation to regulate video game streaming and Esports in the country, the IP owners are made to undergo a cumbersome process of analysing multifarious and sometimes conflicting pieces of legislation to have their rights enforced. Furthermore, video games, falling equally under the categories of cinematography works and literary works, are impacted by the distinct pros and cons that each category presents. This suggests the need for a specialised category. Moreover, several of the aspects involved in videogames do not get covered in the ambit of any existing law and find their base in the principles of justice and equity of the Court or the legislative precedents, sources that are unreliable and mercurial to the discretion of the Bench. To safeguard the interests of the publishers, developers, and other relevant parties, a *sui generis* legal framework must be developed in the face of growing concerns and legislative uncertainty.

### B. *The hegemony of private platforms and fragmentation in regulation*

It can be seen that the primary regulation governing these trends are private platforms like YouTube streaming, Twitch, and Discord servers, which themselves lie fairly beyond direct regulation and supervision by governments and get countered posteriorly through takedown notices, thus posing significant personal and national security threats in the initial release and circulation of the content. Company-oriented policies are non-uniform and may be unfair to user rights or national interests. With multiplicity and fragmentation in

intra-platform regulations, which are infested with contradictions and ambiguities, insecurity becomes an overbearing emotion in the minds of streamers and players. For instance, India's deputy IT minister, Rajeev Chandrasekhar, warned social media platforms like Facebook and YouTube against persisting non-compliance with the 2022 IT rules in their platform guidelines most recently.<sup>97</sup> The earlier non-compliant rules remained in application by these companies even months after the new ones had been notified by the government. Such non-transparent regulatory platforms need to be brought under certain check mechanisms, and most importantly, the power of regulation of these growing trends should not be left in their hands. While the government's regulations and notifications are forth-coming to engage with and modulate the same, the compliance to their implementation and adoption needs to be regularly reviewed as well.

*C. Need for an umbrella regulation for game streaming and Esports*

The legislature must inculcate the aforementioned amendments into existing pieces of legislation to include the aspects of these emerging trends in its ambit. Furthermore, it is imperative for the Parliament to release a regulation clearly defining the extent and scope of applicability of the existing laws on different aspects of the Esports industry and video game streaming to statutorily solidify the position of law on these aspects instead of leaving it at the mercy of judicial discretion. A long-term approach would involve enacting a video game-specific piece of legislation since specialised legislation will be an inevitable requirement in the near future, and early action to ensure regulation will assure a balanced and coherent state of affairs in the Esports domain well in time. An umbrella regulation will ensure that creators can continue creating and generating revenue that contributes

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<sup>97</sup>'India warns Facebook, YouTube to enforce rules to deter deepfakes' *The Indian Express* (24 November 2023) <<https://indianexpress.com/article/technology/tech-news-technology/india-warns-facebook-youtube-to-enforce-rules-to-deter-deepfakes-9041670/>> accessed 30 November 2023.

to the national economy and strengthens the world's financial systems under regularized IP schemes. Similar recognition and regulation of the popular commercial trends of NFTs and cryptocurrency would go a long way in preparing India's legislative and judicial structure for the trends of the future.

*D. Re-establishment of a multifunctional and expert IPR-dedicated tribunal*

The growing number of lawsuits challenging IP infringement is an expected turn of events given the current trend, and India has all of its IP infringement suits being legislated upon by the civil courts alongside all other matters presently, owing to the disbanding of the 18-year-old Intellectual Property Appellate Board (IPAB) in 2021.<sup>98</sup> The said Board underwent dismantling for various reasons including dysfunction, concurrent lawsuits, excessive delay in the recruitment of officers, negligible technical knowledge, and infrastructure limitations.<sup>99</sup> The dismantling had a significant impact on the country's IP regime<sup>100</sup> since the pending cases before the five appellate boards were moved to the appropriate High Courts, adding to their already substantial backlog.<sup>101</sup>

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<sup>98</sup>The Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 (2 of 2021).

<sup>99</sup>S&A Law Offices, 'Dissolution Of IPAB' (*Mondaq*, 1 December 2022) <<https://www.mondaq.com/india/trademark/1066942/dissolution-of-ipab>> accessed 12 December 2022.

<sup>100</sup>Ananyaa Banerjee and Hema Shekhawat, 'Adios, IPAB: Government of India officially abolishes the IPAB' (*SS Rana & Co*, 21 November 2022) <<https://ssrana.in/articles/ipab-abolished-officially-india/>> accessed 13 December 2022.

<sup>101</sup>Saiesha Dhawan 'The Aftermath of Change: The Abolishment of the IPAB and the Establishment of the IPD' (*Excelon IP*, 1 December 2022) <<https://excelonip.com/the-aftermath-of-change-the-abolishment-of-the-ipab-and-the-establishment-of-the-ipd/>> accessed 18 December 2022.

Regardless of the alleged dysfunctionality, the Rajya Sabha's Parliamentary Standing Committee on Commerce<sup>102</sup> proposed a reorganisation and restoration of the IPAB to avert an increase in pending cases. It suggested that the IPAB be reinforced with increased structural autonomy, administrative and infrastructure changes, and the prompt recruitment of efficient officials. With India currently lacking a unified IP legal framework to govern game streaming and Esports, IPAB must make a comeback with improved resources and supervision for establishing a well-structured dispute resolution mechanism in place for IP disputes, especially those relating to video game streaming, alongside others.

A consistent Intellectual Property redressal system is urgently needed in light of the abolishment of a tribunal that frequently issued noteworthy judgments, which is headed by a technical expert bench with industry-equipped capabilities. Judges in civil courts will not be equipped with relevant information about such emerging trends, and hence the panel of experts well versed in the upcoming trends of IP issues in matters of Esports, NFTs, and video game streaming will ensure quicker, well-versed, and more accurate decisions.

## VI. CONCLUSION

Video game streaming and its conflict with IP has been a hot topic for IP enthusiasts for the past few years. The rise of online gaming platforms has democratized the ability for individuals to stream, play, and connect with a broader audience concurrently, all while potentially reaping financial benefits. However, given that streaming platforms in India operate without proper regulations, facing either a complete absence or significant ambiguities in the governing rules, there is a

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<sup>102</sup>One Hundred And Sixty First Report of the Department Related Parliamentary Standing Committee on Commerce, 'Review of the Intellectual Property Rights Regime in India' <[https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/13/141/161\\_2021\\_7\\_15.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf)>.

pressing need to establish regulations for video game streaming, especially considering the potential for IP infringements.

Video games are ambiguously categorised under the Copyright Act due to their falling under the ambit of both cinematographic and literary work. Establishing proper terms of application of the fair use principle and the principle of the modicum of creativity is another issue on which both the legislature and judiciary are silent. To add to the ambiguity, the introduction of new trends like play-to-earn games, which include the use of NFTs, has made it more difficult to regulate game streaming because of the lack of their regulation.

The introduction of Esports in international sports recently has led to the realisation that there is a requirement for separate legislation governing this arena of game streaming. Therefore, it is high time to introduce a separate and effective set of rules to regulate the ambiguous arena of game streaming, thereby ensuring that the Indian legal regime is at par with that of nations across the world. This demands effective work on the part of the legislature. The judiciary should also play an active role in regulating the same by taking inspiration from countries like the USA, Japan, where video game streaming is specifically regulated. Once regulated, this arena of video game streaming and online sports can lead to significant contributions to the Indian economy and its growth.