ESTABLISHING COPYRIGHT IN E-SPORT STREAMS UNDER UK LAW

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INTRODUCTION

E-Sports is the competitive playing of video-games in league-based formats similar to conventional sports such as basketball, football etcetera. Like conventional sports, E-Sports is also broadcast with commentary of the game-play; these broadcasts are called streams. The medium of broadcast is usually over the internet, specifically platforms such as YouTube and Twitch. While smaller than conventional sports, E-Sports is catching up very fast. It is already a billion-dollar industry[1] and in 2014, a popular E-Sports game had more viewers than the NBA finals for that year.[2]

This paper aims to trace whether or not copyright can apply to E-Sport streams and if there are any copyrightable works, who owns the copyright therein. Considering works as the foundations of copyright, Part I considers the various works that can be identified within streams. Part II covers criteria for protection and authorship.

* This paper only considers copyright ownership in streams. I researched more comprehensively into E-Sports during my Masters looking at infringement, defences, and industry practices. These will be presented in a subsequent publication.

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[1] 'The Value of E-Sports in the UK' p.7 (Ukie Report, October 18, 2020), available at https://ukie.org.uk/download/4myj6wt9mv38c6vt38xfx3aq4e/0 (Hereinafter, 'Ukie Report').

[2] Patrick Dorsey, 'League of Legends' Ratings top NBA Finals, World Series clinchers' (ESPN, December 02, 2014), available at https://www.espn.co.uk/espn/story/_/page/instantawesome-leagueoflegends-141201/league-legends-championships-watched-more-people-nba-finals-world-series-clinchers.

PART I – WORKS IN E-SPORTS STREAMS

A typical E-Sport stream can be thought of as a video containing the video-game match as is played between the players along with a commentary by commentator(s) who is referred to in the industry as streamers/casters. This output video contains a plethora of works. For ease of analysis, we may group these works into three separate baskets.

The first basket contains all the works that can be associated with the underlying video-game. This includes aspects like the artwork in the video-game, original musical pieces in the video-game etcetera. The second basket is the specific match that is being commented upon. Essentially, analysing this basked involves answering the question, 'Can a specific match between 2 or more players be regarded as a work within UK's closed definition of work?' The final basket contains works that originate from the streamer, chiefly his spontaneous commentary of the game.

Each of these baskets of works are analysed separately below.

1. THE UNDERLYING VIDEO-GAME

A typical video game contains many copyrightable components such as artistic works, musical works, the software as literary work etcetera. What is less certain is whether the video game itself can also be seen as a single composite work.[3] There is a difference between a video-game *containing* copyrightable works and the video-game itself *being* a copyrightable work. Unless this distinction is resolved, it will be messy to consider authorship in the next part.[4] Therefore, the remainder of this section will explore whether it is possible to consider video-games as composite works in UK copyright law.

UK has 8 possible categories of works.[5] Out of these, musical works, sound recordings, broadcasts, and typographical arrangements can be ruled out straight away as being capable of holding a composite work such as a video-game. Further, literary works can also be excluded

[3] Andy Ramos *et al*, 'The Legal Status of Videogames: Comparative Analysis in National Approaches' pp. 8-9 (World Intellectual Property Organisation, 2013), available at https://www.wipo.int/edocs/pubdocs/en/wipo_report_cr_vg.pdf.

[4] Tito Rendas, 'Lex Specialis(sima): Videogames and Technological Protection Measures in EU Copyright Law', 37(1) European Intellectual Property Review 39, 40 (2015).

[5] Copyright, Designs and Patents Act 1988 (Hereinafter, 'CDPA', §1(1).

as a video-game is not a work that is 'written, spoken, or sung'[6].[7] The remaining 3 categories deserve closer scrutiny.

The UK law on video-games is influenced largely by two cases – *Nova v Mazooma* which is a 2007 Court of Appeal decision on whether video-games can be considered as works;[8] and Nintendo v PC Box, a 2014 CJEU decision which mentioned that 'the entire work' in video-games is protected under the Information Society Directive.[9] Considering the relevance of these two cases, the subsequent analysis is split into two – 1) the law as laid down by *Nova*, and 2) how the law changes post *Nintendo*.

a) Law as Laid Down by *Nova*

Nova were the developers of a video-game that allowed players to play the popular cue game, Pool on a computer device. Mazooma made a subsequent video-game for the same purpose. Nova alleges that this is an infringement of their copyright in the earlier video-game.[10]

In this part, we analyse UK law post *Nova*, on the inclusion of video-games as composite works in the categories of artistic work, dramatic work, and film work.

i) Artistic Work

Nova argued that the underlying animation in their video-game should be protected as an artistic work, specifically a graphical work under S.4(1)(a).[11] Animation when broken down to its technical core is a series of images that produces the illusion of motion. Each of these images would anyway receive protection as individual artistic works.[12] Nova wanted protection for the animation and not just the underlying images because protecting the end-product animation is

[6] *Id*., §3(1).

[7] Claimant in *Nova* tried to argue that video-games could be included as a preparatory material for a computer program and thereby a literary work. This was rightfully struck down by the court - *Nova Productions v Mazooma Games*, [2007] EWCA Civ 219 (Hereinafter, 'Nova CA'), ¶¶ 27-52.

[8] Nova CA (n7).

[9] *Nintendo v PC Box,* Case C-355/12 dt. January 23, 2014 (Hereinafter, 'Nintendo').

[10] Nova CA (n7), ¶1.

[11] *Id.,* ¶13.

[12] *Id.,* ¶12.

a stronger form of protection than protecting each individual frame. To illustrate this, consider the following hypothetical scenario.

In a video-game, G1 the competing players have martial-arts matches against each other. The competing players take one of the Avatars in the figure given below and fight by performing a variety of martial arts moves and special moves such as 'breathe-fire' on each other. The player to deal a set amount of damage first wins.

Now, consider a rival Game, G2 that has identically copied the fight moves that can be made, the animation of the fights, the amount of damage dealt, and the method in which the game interacts with the player. However, G2 has changed the designs of the Avatars and changed the static background image against which the players fight.

In the hypothetical scenario, no single frame of G2 would ever be taking a whole or a substantial part from G1. Therefore, the individual frames in G2 do not infringe the individual frames in G1. However, if the animation is protected, the court can compare the animation as a whole and see whether there is substantial copying.

Thus, Nova by seeking to protect animation is to hoping to get protection for the 'look-and-feel' of the video-game. Such protection is available for video-games in the United States.[13] The Court of Appeal rejected Nova's argument. The court felt that protecting animation rather than the underlying frames would be equivalent to protecting the idea rather than the expression. Therefore, it was held that the artistic work exists only in each still image.[14]

ii) Dramatic Work

The claimants themselves recognised the weakness of claiming video-games as dramatic works and never advanced it beyond the trial stage.[15] It is clear from the *Green* case that dramatic works must possess unity.[16] Unity requires an element of repeatability to the actions in the

[13] *Atari v North American Philips Consumer Electronics*, 672 F.2d 607, 620 (1982) ('Hereinafter, Atari v NAPCE').

[14] Nova CA (n7), ¶16.

[15] *Id.*, ¶3.

[16] *Green v Broadcasting Corporation of New Zealand*, [1989] RPC 700, 702.

work.[17] As the trial court pointed out in *Nova,* each instance of playing a video game would differ based on the choices made by the player.[18]

This is all the truer for games which form part of E-Sports since they offer almost limitless number of choices to the players on how to navigate the game-world.[19] Thus, each time a game is played, it would play out differently; they lack unity and cannot be seen as a dramatic work.[20]

iii) Films

Nova reserved the right to argue video-games as films in both the courts.[21] Therefore, neither court gave a decision on this. There is no judicial pronouncement in the UK yet that considers whether video-games can be regarded as films. However, courts in the United States,[22] Australia,[23] and South Africa[24] have held video-games to fall under works under their respective statutory provisions which seem to be defined similarly to UK films. A common argument made by the infringers in almost all the above decisions was that video games allow for player input which hinders unity and goes against the general notion of what a film is.[25] The courts negated this argument by relying on the broad phrasing of their respective statutes, specifically the absence of any form of prohibition against player interactivity within the statutory language.[26]

The US definition of audio-visual work refers to '*works that consist of a series of related images which are intrinsically intended to be shown by the use of machines* […].'[27] The

[17] *Banner Universal Motion Pictures v Endemol Shine Group*, [2017] EWHC 2600 (Ch), ¶44.

[18] *Nova Productions v Mazooma Games*, [2006] EWHC 24 (Ch) (Hereinafter, 'Nova HC'), ¶116.

[19] Kyle Coogan, 'Let's Play: A Walkthrough of Quarter-Century Old Copyright Precedent as Applied to Modern Video-Games', 28(2) Fordham Intellectual Property, Media & Entertainment Law Journal 318, 402 (2018).

[20] COPINGER AND SKONE JAMES ON COPYRIGHT ¶3-112 (Nicholas Caddick, Gwilym Harbottle & Uma Suthersanen (ed), Sweet & Maxwell 18th edn 2020).

[21] Nova CA (n7), ¶3; Nova HC (n21), ¶120.

[22] *Stern Electronics v Kaufman*, 669 F.2d 852, 856-857 (1982).

[23] *Galaxy Electronics v Sega Enterprises*, (1997) 75 FCR 8, 20 (Hereinafter, 'Galaxy Electronics').

[24] *Golden China TV Game Centre v Nintendo*, Case No. 55/94 before the Supreme Court of South Africa dt. September 25, 1996 (Hereinafter, 'Golden China').

[25] *Id.*, pp. 17-18; Galaxy Electronics (n23), 16.

[26] Golden China (n24), p. 19; Galaxy Electronics (n23), 18.

[27] 17 USC §101 (United States of America).

Australian definition of cinematograph film refers to '*the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing (a) of being shown as a moving picture* […].'[28] The South African definition of cinematograph film refers to '*sequence of images capable, when used in conjunction with any mechanical,· electronic or other device, of being seen as a moving picture* […].'[29]

The UK's definition of films uses the words, '*a recording on any medium from which a moving image may by any means be produced* […].'[30] The repeated use of the word, 'any' makes this provision as expansive, if not more, than the definitions discussed above. The approach of the respective domestic courts in dealing with those definitions gives credence to the claim that video-games should be seen as a film work in the UK as well. Other academic works on this topic also agree with this position.[31]

b) Impact of EU Law

The ECJ considered video-games in the *Nintendo* case in the context of Article 6 of the Information Society Directive. The specific question in the case was whether measures incorporated through independent hardware would qualify as effective technological measures under Article 6 of the Directive.[32] The answer to this question does not turn on whether videogames *contain* or whether they *are* protected works; it is sufficient that either applies.[33] Therefore, the court does not lay stress to the distinction between the two in this judgement but mentions as a preliminary observation that "*In so far as the parts of a videogame, in this case,*

[28] Copyright Act, 1968 (Australia, Act 63 of 1968), §10(1).

[29] Copyright Act, 1978 (South Africa, Act 98 of 1978 dt. June 30, 1978), §1(1)(viii).

[30] CDPA (n5), §5B(1).

[31] Yin Harn Lee, 'Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames' 34(1) European Intellectual Property Review 865, 871-872 (2012); Tanya Aplin, 'Not in our Galaxy: why film won't rescue multimedia' 21(12) European Intellectual Property Review 633, 637 (1999).

[32] Nintendo (n9), ¶18.

[33] Information Society Directive, Directive 2001/29/EC dt. May 22, 2001, Article 6 provides protection against circumvention of technological measures designed to restrict infringement. Even if the video-game as a whole is not protected, there can still be infringement of the underlying works like the computer code and the art-work; Article 6 would therefore still be applicable.

the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29."[34]

Considering that the court does not deal with the copyrightability of video games ever again in this judgement or any of its other judgements till date, the position of EU law on the protection afforded to copyright law depends on the interpretation of the above sentence. Regardless of how one turns it, the CJEU did use the phrase, 'together with the entire work'. This suggests that in addition to protecting the individual components in a video-game, the video-game itself would be protected as a work under EU law[35] as long as it is the intellectual creation of the author. 'Intellectual creation' implies that the author is able to stamp the work with his personal touch;[36]*i.e.*, the author must exercise creative choices when making the work.[37] This is satisfied for video-games as making a video-game includes a fair amount of creativity.[38]

Works under the Information Society Directive receive content protection and not just signal protection.[39] However, UK law following *Nova* protects video-games as a whole, only as first fixation films.[40] This protects only the signal and not the content.[41] Therefore, making a new video game from scratch that resembles an existing one in every respect without using any of the old game's programming code would not infringe the film copyright. However, following *Nintendo*, this may be an infringement under EU law. Therefore, protection solely as films fall short of the EU standard.[42] Considering that this case was decided in 2014, UK has to comply with it regardless of Brexit – it has the same precedential value as a Supreme Court decision.[43]

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[34] Nintendo (n9), ¶23.

[35] Gemma Minero, 'Videogames, Consoles and Technological Measures: the Nintendo v PC Box and 9Net Case', 36(5) European Intellectual Property Review 335, 338 (2014).

[36] *Football Dataco v Yahoo! UK*, Case C-604/10 dt. March 01, 2012, ¶38.

[37] *Infopaq International v Danske Dagblades Forening*, Case C-5/08 dt. July 16, 2009 (Hereinafter, 'Infopaq I', ¶45.

[38] *But see* internal reference – Part II(1)(a) mentions certain job profiles in a video-game companies that do not produce intellectual creations.

[39] The Information Society Directive sees works and first fixation of films as two different concepts in Articles 2(a) and 2(d) respectively. Content protection is provided to works and signal protection for first fixations – *see generally* Richard Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection', 1(3) Queen Mary Journal of Intellectual Property 272 (2011).

[40] Internal reference – Part I(1)(a).

[41] Arnold (n39),276, 277.

[42] *See* Richard Arnold, 'Joy: A Reply', 1 Intellectual Property Quarterly 10, 18-19 (2001).

[43] European Union (Withdrawal) Act 2018, §6(5).

What sort of protection would comply with the EU standard? It is important to note that the underlying EU legislation is in the form of a directive and not a regulation. The obligation on UK is only to bring about the result envisaged by the Directive.[44] Thus, UK law need not recognise video-game as a single work in form as long as substantive protection is given to all aspects of video-games.

Various constitutive parts of a video-game such as computer code, art-work etcetera undoubtedly receive content related protected in UK law. However, the court declined to protect the overall look-and-feel of the video-game in *Nova*.[45] The look-and-feel is a very important aspect of a video-game[46] and protecting the video-game 'as a whole' requires protecting the look and feel as well. Protection of look-and-feel under EU law receives further bolster from the *BSA* case as well. Here, the CJEU recognised graphic user interfaces as protectible works to the extent that they are the intellectual creations of the author.[47] The graphic user interface is in essence the look-and-feel of a program output.[48]

I argue that the look-and-feel of a video-game should be protected as an artistic work, specifically a graphical work. The look-and-feel comes primarily from the animations in the game.[49] Therefore, protecting animations should make UK law compatible with the *Nintendo* ruling.

Graphical work is defined inclusively[50] and as such there is scope for going beyond the elements given in the statute. Further, *Nova* accepts static images from video games as graphic works.[51] Jacob L.J gave the idea-expression dichotomy, static nature as a common feature of

[44] *Marleasing v La Commercial International de Alimentación*, Case C-106/89 dt. November 13, 1990 (Hereinafter, 'Marleasing'), ¶8.

[45] Internal reference – Part I(1)(a)(i).

[46] Benjamin C. R. Lockyer, 'Trying on Trade Dress: Using Trade Dress to Protect the Look and Feel of Video-Games', 17(2) John Marshall Review of Intellectual Property Law 109, 113 (2017).

[47] *Bezpečnostní softwarová asociace v Ministerstvo kultury*, Case C-393/09 dt. December 22, 2010, ¶46.

[48] Gregory J. Wrenn, 'Federal Intellectual Property Protection for Computer Software Audiovisual Look and Feel: The Lanham, Copyright and Patent Acts' 4(2) High Technology Law Journal 279, 283 (1989).

[49] Atari v NAPCE (n16), 618; *Atari Games v Ralph Oman*, 979 F.2d 242, 245-247 (1992).

[50] CDPA (n5), §4(2).

[51] Nova CA (n7), ¶12.

all examples given in the inclusive definition for graphic works,[52] and overlap with films[53] as reasons for rejecting animation as graphic works. None of these are convincing reasons.

Norowzian v Arks explicitly recognised that films and dramatic works can overlap.[54] *Nova* does not give a reason as to why overlap should be disallowed between artistic works and films when they are allowed between dramatic works and films. On the aspect of staticity as a common feature of all examples for graphic works, ejusdem generis is admittedly a valid method of construction.[55] However, considering the subsequent development in *Nintendo,* ejusdem generis would have to give way to the Marleasing Principle.[56]

With respect to the idea-expression dichotomy, the difference between an idea and an expression is one of degree and no bright line rules can be drawn in this regard.[57] The US has been providing content related protection to the look-and-feel of videogames since the 1970s, under the category of 'audio-visual' works.[58] When the US courts check infringement between video-games, they identify parts that are original artistic expressions and those that are mere ideas necessary for the game in question or the limitations posed by the technology. Protection is afforded only to the former.[59] Thus, it is possible to separate ideas from expressions on a case-by-case basis for look-and-feel.

To sum up, a future UK court that deals with copyrightability of video-games will have to decide in light of the *Nintendo* case. For reasons stated above, I believe that this would imply protecting the look-and-feel of the game as a graphic works as long as they are the intellectual creations of the author.

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[52] *Id.*, ¶16.

[53] *Id.*, ¶17.

[54] *Norowzian v Arks*, [2000] FSR 363, 367 (Hereinafter, 'Norowzian').

[55] *See* Jo Ann Boylan-Kemp, ENGLISH LEGAL SYSTEM: THE FUNDAMENTALS ¶2-058 (Sweet & Maxwell 4th edn 2018).

[56] *See* Marleasing (n44), ¶8.

[57] *IBCOS Computers v Barclays Mercantile Highland Finance*, [1994] FSR 275, 291.

[58] Peter Lee & Madhavi Sunder, 'The Law of Look and Feel', 90 Southern California Law Review 529, 540 (2017).

[59] *Atari v Amusement World*, 547 F.Supp 222, 229-230 (1981); *Midway Mfg v Dirschneider*, 543 F.Supp 466, 480 (1981).

c) Summation

1) Video-games contain a myriad of works that include literary works, musical works, artistic works, and films.
2) A video-game as a whole can be regarded as a film work.
3) The look-and-feel of the video game as expressed in its animations constitutes artistic work.

2. SPECIFIC INSTANCE OF GAME PLAY

Each instance of game-play[60] would contain the various copyrightable works that the videogames themselves contain. However, there is no reason to analyse them here since those have already been analysed in the previous part. In this part, the analysis is constrained to works that result from the act of playing the game.

The impact of EU law is minimal here. In the *FAPL* case, the CJEU confirmed that EU law does not consider sports matches as works.[61] The court went on to hold that domestic systems may provide such protection if they so desire.[62] This decision was given in the context of conventional sports, namely Football. However, in the absence of any other EU decision that brings E-Sport matches specifically within copyrightable works, it is sensible to restrain the analysis in this section purely to UK domestic law.

From the UK's 8 categorised works, musical works and typographical arrangement can be summarily rejected as a contender for incorporating a work arising from game-play. Further, broadcasting of gameplay will be dealt in the next section as gameplay is broadcast in the form of streams.[63] A separate analysis of sound recordings may also be excluded since video-games have an audio-video output and not an audio only output.[64] Playing a video-game cannot be a literary work since the primary player input is the physical action performed on computer input-

[60] By instance of game-play, I mean a specific match of video-game as is played between two players/teams.

[61] *Football Association Premier League v QC Leisure & Karen Murphy v Media Protection Services*, Cases C-403/08 & 429/08 dt. October 04, 2011 (Hereinafter, 'FAPL EU'), ¶¶ 96-98.

[62] *Id.*, ¶100; Toby R. Hill, 'He Goes Left, He Goes Right, He Claims He has Performers' Rights: the Case for Granting Sportspersons protection for unique in-game performances', 42(2) European Intellectual Property Review 84, 92-93 (2020).

[63] Internal reference – Part I(3)(b).

[64] CDPA (n5), §5B(2).

devices; it and cannot be brought within the ambit of "*written, spoken, or sung*".[65] Finally, playing a game does not *create* the art-work, it merely uses the art-work that was created by the developers of the game.[66] Therefore, game play does not result in an artistic work. The remaining 2 categories are analysed below.

a) Films

There is a very strong case for recognising game play as films when they are suitably fixated. It is already well established that conventional physical sports when recorded gives rise to valid film works.[67]

Most of the modern video-games, especially ones used in E-Sports produce a multi-media computer readable recorded file for each instance of game play. These files contain a record of not just what one particular player did in a game but all the events that happened in the game Universe at a single instance of game play.[68] They can be opened on any computer device subsequently to view a play-back of the match.

The above-mentioned files fall within "*recording on any medium from which a moving image may by any means be produced.*"[69] The output file has some amount of interactivity since the whole game Universe is captured and the viewer can choose which part of the Universe to focus on at any given point in time. However, the element of interactivity is in any case not relevant to the definition of films.[70]

Therefore, as an extension of the same logic that was used to categorise video-games as films,[71] each instances of game play when recorded falls within film works.

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[65] *Id*., §3(1).

[66] *Midway MFG v Artic International*, 704 F.2d 1009, 1011-12 (7th Circuit 1983) (Hereinafter, 'Midway v Artic').

[67] *Football Association Premier League v QC Leisure*, [2008] EWHC 1411 (Ch) (Hereinafter, 'FAPL HC', ¶¶180, 181.

[68] Recorded files of various games are available online. *See for example* 'Recorded Games' (AoM Heaven, undated) (Hereinafter, 'AomHeaven), available at https://aom.heavengames.com/downloads/lister.php?category=rec.

[69] CDPA (n5), §5B(1).

[70] Golden China (n24), p. 19; Galaxy Electronics (n23), 18.

[71] Internal reference – Part I(1)(iii).

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b) Dramatic work

In *Norowzian v Arks*, the Court of Appeal defined dramatic work as 'a work of action capable of being performed'.[72] Further, the court specifically recognised an overlap between films and dramatic works and held that all films that could be 'performed before an audience' constitute dramatic works.[73] Does this mean that specific instances of game-play should be treated as dramatic works since they were found to be films?

Stamatoudi critiques the final position of law established by Norowzian with respect to the overlap between films and dramatic works. She argues that dramatic works are meant to cover only those kinds of works where an existing work is meant to be performed repeatedly before an audience. In a film, the work is performed once which is subsequently shown multiple times. Stamatoudi compares this to an art exhibition wherein the painting is drawn only once and is exhibited on multiple occasions.[74] These observations apply to videogame recorded files as well. The underlying instance of gameplay was meant to be performed only once. This has been recorded as a film and can be viewed multiple times. Thus, under Stamatoudi's conception of dramatics works, video-game matches should be excluded.

A more direct study on dramatic work and sports was undertaken by Elam. She argued that adversarial sports should not be considered dramatic works in the UK owing to the lack of choreography and predictability in such games. While players and coaches may have a plan on certain things they want to do in a game, the game itself is incredibly dynamic and the actions of the players are largely responsive to what the opposing team does. Therefore, Elam argues that "*UK copyright law would arguably be stretched beyond its limits if adversarial sports plays were to be classified as original authorial works*."[75] While Elam wrote in the context of conventional sports, her observations regarding lack of choreography and the dynamic nature of player interaction applies to E-Sports as well.

[72] Norowzian (n54), 367.

[73] *Id.*, 367.

[74] Irini A. Stamatoudi, 'Joy for the Claimant: Can a Film also be Protected as a Dramatic Work', 2000(1) Intellectual Property Quarterly 117, 122-123 (2000).

[75] Viola Elam, 'Sporting Events as Dramatic Works in the UK Copyright System', 13 Entertainment and Sports Law Journal ¶38 (2015).

In addition to the arguments made by Stamatoudi and Elam, the requirement of a 'work of action' as specified in *Norowzian*[76] is yet another reason to dissuade treating game-play as dramatic work despite it being films. 'Work of action' requires there to be some action being performed by the performer.[77] This would be present in most forms of conventional movie films as they inherently include acting performances. However, the only actions performed by the players in E-Sports are keying in inputs with a computer device. It is incredibly doubtful whether this is sufficient to qualify as a work of action.

While all of the above arguments are persuasive, the strongest rationale for excluding E-sport game play from dramatic works is found in the reasoning in the US case, *NBA v Motorola Inc*. Here, the court considered whether basketball matches could be protected under copyright law. Faced with zero precedents on the issue,[78] the court based its decision largely on policy. An integral element of gameplay is defeated if players are allowed to monopolise strategies. "*A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try*."[79]

This applies in the context of E-Sports as well. All major E-sport games have 'metas'. A meta is the prevailing strategy of the time that the top players acknowledge as the most efficient way to play the game. Implementing metas properly is a key aspect of skill in E-Sports.[80] Allowing a monopoly to the first player to find a meta creates the same problem as allowing conventional sports players to monopolise certain ways of playing games.

Therefore, game-play should not be allowed any content related protection.

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[76] Norowzian (n54), 367.

[77] Caddick *et al* (ed) (n20), ¶3-109.

[78] *NBA v Motorola*, 105 F.3d 841, 847 (1997).

[79] *Id.*, 846.

[80] Simon Helgeson, 'eSports: The Concept of Meta and Its Influence on how Esports is Played' (Sky Sports dt. March 13, 2018), available at https://www.skysports.com/more-sports/other-sports/news/34214/11288113/esports-the-concept-of-meta-and-its-influence-on-how-esports-is-played; Adam Newell, 'What is "the meta" an how does it affect gaming' (Dot Esports dt. June 16, 2019), available at https://dotesports.com/general/news/what-is-the-meta-meaning-24834.

c) Summation

The recording of game-play is a film work. Game-play cannot be accommodated within any other category of works.

3. THE REMAINING WORKS IN STREAMS

The paper has now considered the works associated with the underlying video-game and specific instances of game-play. This section looks at the categories of works that are present in the remaining part of a video-game stream i.e., the streamer's words and any musical or artistic embellishments that maybe added for enhancing the stream's production value. Here, these are checked against the 7 categories of work in the CDPA.[81]

a) Content Protected Works

Prima facie, 'literary works' seems the most likely fit for a stream since an overwhelming majority of the stream is the streamer's 'spoken'[82] opinions about a match. Within spoken words, it is possible to draw a distinction between considered speech such as lectures and sermons, and situational speech such as interviews and private conversations.[83] Video-game streams largely fall into the latter category even more so than commentaries of conventional sports matches. This is because that the audience are able to post questions about the match during the stream, as text messages addressed to the streamer. Answering these questions and thereby engaging with the audience is an integral part of streaming.[84] A streamer reacts to both the match being played out and the audience's reactions to the match, making the exercise highly situational.

[81] As in the previous parts, arrangement of typographical works can be ignored here as well.

[82] CDPA (n5), §3(1).

[83] Berne Convention obliges countries to protect only the former category of speeches – Berne Convention for the Protection of Literary and Artistic Works, dt. September 09, 1886, Article 2(1).

[84] Isabel Assunta C. Caguioa, 'Recent Copyright Issues in Video Games, Esports, and Streaming', 63(3) Ateneo Law Journal 882, 890 (2019).

There is a difference of opinion among various jurisdictions as to whether protection should be given for situational speech.[85] Unfortunately, there is no UK case-law that looks at spoken literary work in the context of the 1988 statute.[86] However, a large number of secondary sources point to the non-restrictive terms of the statutory language to argue that situational speech should also be regarded as literary work in the UK.[87] I agree with this view. The countries that deny protection rely largely on situational speech being too informal / unplanned to be regarded as work.[88] However, this goes against a fundamental rule in this field that literary merit should not be a criterion for defining literary works.[89] Further, taking into account additional factors such as the amount of planning that went into a work would also be contrary to the EU position that *all* intellectual creations of the author deserve protection.[90]

The second factor that requires consideration in the definition of literary work is the statutory exclusion of dramatic and musical works.[91] The stream being in the nature of commentary of E-sports game-play, is not a musical work. Therefore, the exclusion analysis can be constrained to dramatic works.

Three of the four arguments presented against treating game-play as dramatic works[92] applies in the context of streams as well. Streams lack choreography; they are performed once and enjoyed multiple times; and the only work of action is moving the screen with a computer mouse to follow the game play. The lack of a work of action is especially relevant here and can allow one to confidently predict that a future case law on this issue would not regard streams as dramatic works. Therefore, streams can be regarded as literary works.

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[85] New York Court of Appeal said that courts should be wary of excluding conversation speech as literary works – *Estate of Hemingway v Random House*, 23 NY.2d 341, 348; Ontario Court of Appeal held that a speaker cannot have any copyright over casual conversations – *Gould Estate v Stoddart Publishing*, 1998 CarswellOnt 1901 (Hereinafter, 'Gould'), ¶¶ 22, 23.

[86] Hector L. MacQueen, My Tongue is Mine Ain': Copyright, the Spoken Word and Privacy, 68(3) Modern Law Review 349, 359 (2005).

[87] *Id.*, 373-377; Caddick *et al* (ed) (n20), ¶3-62; Jeremey Phillips, 'Copyright in Spoken Words – Some Potential Problems', 11(7) E.I.P.R. 231, 231-232 (1989); Michael Tappin *et al*, LADDIE, PRESCOTT AND VITORIA: THE MODERN LAW OF COPYRIGHT ¶3.22 (LexisNexis Butterworths 5th edn 2018); Lionel Bently *et al*, INTELLECTUAL PROPERTY LAW p.62 (Oxford University Press 5th edn 2018).

[88] Gould (n85), ¶22.

[89] *University London Press v University Tutorial Press*, [1916] 2 Ch 601, 608.

[90] Infopaq I (n37), ¶37.

[91] CDPA (n5), §3(1).

[92] Internal reference: Part I(2)(b).

In addition to the words spoken by the streamer, a stream generally contains photographs, drawings, musical extracts etcetera that are used to enhance its production value. For example, many streams play a short musical extract whenever a member of the audience contributes financially to the stream during a game. Similarly, the streamer might use photographs of players while introducing them. These embellishments generally fall under either artistic work or musical work depending on their nature.

b) Signal Protected works

This paper has already explained the law surrounding films.[93] It was seen that as long as there is fixation which can produce moving images, there would be a film. A stream definitely falls within this conception. Further, it is very similar to commentaries of conventional sports which is recognised as a film work.[94]

Inclusion of streams as 'broadcasts' depends on whether it is live or if the viewer is accessing a recording of the stream. In a live stream, the audience views the stream simultaneously as the streamer is commenting on the match.[95] Once the live stream gets over, the streaming platform converts the stream into a video file which is stored on the platform's servers.[96] Viewers who could not catch the stream live can then access the recorded video file at a time of their convenience.

To be included as broadcasts, a transmission should satisfy either the first limb or the second limb in §6(1), CDPA. If the broadcast is in the nature of an internet transmission, there is the added requirement that it should meet one of the three conditions given in §6(1A). While internet transmission is not a defined term, the ordinary meaning of the term is transmission effected over the internet.[97] E-sport streams are effected over the internet; hence, we must check whether they satisfy both §§ 6(1) and 6(1A).

[93] Internal reference – Part I(1)(a)(iii).

[94] FAPL HC (n67), ¶¶180, 181.

[95] Caguioa (n84), 890.

[96] 'Video on Demand' (Twitch, undated), available at https://help.twitch.tv/s/article/video-on-demand?language=en_US.

[97] *See* Tappin *et al* (n87), ¶8.14.

It is clear that live-streams satisfy the first limb of §6(1). They are meant for reception by members of the public and the reception is simultaneous.[98] Similarly, live-streams also satisfy the second condition in §6(1A). The broadcast being a 'live-stream' implies that it is being broadcast as the streamer is saying the words and is not an on-demand service.[99] Having satisfied both 6(1) and 6(1A), live-streams are valid broadcasts under the CDPA.

Recorded files of a stream being available on streaming platforms for later consumption of the viewer does not fit the description of a stream. Such a case would be an internet transmission that does not satisfy any of the three conditions in §6(1A). There is no simultaneous transmission happening outside the internet;[100] there is no concurrent live event;[101] and the transmission is not made at times determined by the streamer.[102] Therefore, recorded files being available on a streaming platform for later viewing does not constitute broadcasts. It is only the live stream that can be considered a broadcast.

Finally, there are multiple broadcast works associated with a single live stream. The communication from the streamer's computer to the server of the Twitch platform is a broadcast; it qualifies §6(1)(b) since it is made for presentation to members of the public, and it qualifies §6(1A)(b) since it is a concurrent transmission of the live commentary. Further, the communication from the Twitch server to the audience's computers also qualify as broadcasts since it qualifies §§6(1)(a) and 6(1A)(b).

c) Summation

The chief part of a stream i.e., the commentary uttered by the streamer constitutes literary work. Streams might also have musical and artistic works in them for enhancing the production value. The recording of a stream is a film; and a live stream constitutes multiple broadcasts.

[98] *See* CDPA (n5), §6(1)(a). The requirement of lawful reception in §6(1) is targeted at transmissions that violates specific statutory provisions like the Wireless Telegraphy Act of 2006.[98] These complications do not arise in the context of E-Sports streams.

[99] Concurrent transmission of live events is basically an exclusion of on demand services - Caddick *et al* (ed) (n20), ¶3-277.

[100] *See* CDPA (n5), §6(1A)(a).

[101] *See Id*., §6(1A)(b).

[102] *See Id*., §6(1A)(c).

PART II – COPYRIGHT OVER THE IDENTIFIED WORKS

This Part aims to track ownership in copyright for the various works identified in the previous part. Fixation, originality, qualifying factors to the UK,[103] and absence of public policy exclusions[104] are the four major conditions for copyright protection in the UK.[105] For the sake of simplicity, it will be assumed that the various works associated with E-Sports comply with qualifying factors and a lack of public policy exclusions.[106] Further, as seen in the previous part, all of the works in streams are either fixated as computer code/film, or broadcast over the internet in the case of a live stream. Fixation is not a requirement for broadcasts.[107] Originality becomes an issue for some of the works; these shall be dealt with while looking at the authorship of these works.

With the above considerations in mind, *first*, the paper analyses authorship over the various works in an E-Sports stream individually. *Second*, the link between authorship and ownership is explored.

1. AUTHORSHIP

a) The Underlying Video-Game

Video-games contain multiple underlying works that include artistic works, musical works, and literary works in the computer code.[108] Each individual work here is often produced by

[103] *Id*., §§ 153-156.

[104] *Attorney-General v Observer*, [1990] 1 AC 109, 262; *Glyn v Weston Feature Film Company*, [1916] 1 Ch 261, 269, 270.

[105] Bently *et al* (n87), p.91.

[106] Extreme and graphic violence in video-games might trigger public policy exceptions. *See*, Rowland Atkinson & Thomas Rodgers, 'Pleasure Zones and Murder Boxes: Online Pornography and Violent Videogames as Cultural Zones of Exception', 56(6) British Journal of Criminology 1291 (2016) where the authors describe extremely violent video-games as murder boxes. This paper does not deal with the question of public policy exclusions because it is an issue that governs certain kinds of video-games rather than the E-Sports industry.

[107] Caddick *et al* (ed) (n20), ¶3-163.

[108] Internal reference – Part I(1)(c).

various teams consisting of multiple people.[109] Each of these team members have a factual claim to authorship which should be tested against the applicable law.

Under EU influence, the UK test for authorship is contribution towards the intellectual creation of the work.[110] While this standard has not been defined in precise terms, the exercise of creative choices is a key aspect in deciding intellectual contribution.[111] Many team members in a video-game industry would fall under this standard. However, it is possible to imagine certain job profiles which do not. For example, if the sole job of a person in the programming team is debugging the code, he might be comparable to a proof-reader for a book and denied authorship.[112] Authorship would also be denied to those whose only contribution was 'slavishly copying' existing works[113] into the video-game. Thus, if the audio-team for a video-game exclusively used existing musical scores, then the members would not receive authorship since they have not contributed anything original that can be regarded as their intellectual creation.

The remaining team members who have extended authorial contribution would receive authorship as joint authors. The standard of joint authorship in UK is collaboration between multiple authors with a common design and indistinct contribution.[114] In the case of the underlying works in a video-game, this criterion is easily met. The creators are working together with the intention of creating the art-work, background music, or code to be used in the video-game. Further, within each work, it is difficult to have standalone contributions. Thus, if we were to consider the literary work of the computer code, it would be extremely difficult to point to any individual part of the code which would exist separately from each other and still retain meaning.[115]

One of the unconventional copyrights identified with respect to a video-game in this paper was the look-and-feel of the game as translated through its animations being protected as an artistic

[109] *See* 'People at Valve' (Valve Corporation, undated), available at https://www.valvesoftware.com/en/people.

[110] Bently *et al* (n87), pp. 126-27.

[111] *SAS Institute v World Programming*, [2013] EWCA Civ 1482, ¶31; *Funke Medien v Bundesrepublik Deutschland*, Case C-469/17 dt. July 29, 2019, ¶19.

[112] *Fylde Microsystems v Key Radio Systems*, [1998] FSR 449, 456-457.

[113] *Hyperion Records v Lionel Sawkins*, [2004] EWHC 1530 (Civ), ¶31.

[114] *Julia Kogan v Nicholas Martin*, [2019] EWCA Civ 1645 (Hereinafter, 'Kogan'), ¶31.

[115] The criterion of 'sounding odd and losing meaning' was applied to recognise joint authorship in the context of a musical work – *Robert James Beckingham v Robert Hodgens*, 2002 WL 1310819 (Hereinafter, 'Hodgens'), ¶46.

work.[116] Similar to the other underlying works in a video-game, the joint authors for this work would be those who created the animations. Animations are often inseparable concepts consisting both art and computer code.[117] Thus, based on the standard for joint authorship set in *Kogan*, both the coders and the artists may be regarded as joint authors for the artistic work in the animations.

The final work identified in the context of video-games was the film work in the game.[118] The principal director and the producer are the joint authors of a film.[119] Producer is defined statutorily as 'the person by whom the arrangements necessary for the making of the sound recording or film are undertaken'[120] This includes companies and for most contemporary films, the producer will be a company.[121] The notion of a principal director is not statutorily defined, but case law describes it as the person who has creative control over making the film.[122]

Video-games used in E-sports are incredibly complex products that require a lot of investment. As such, the production of these is arranged by companies and not individuals. Thus, the producer of the film work would be easily identifiable as the company that was behind the video-game. With respect to principal director, the general law is that the attribution in the film is to be respected unless there is evidence to the contrary.[123] In case a game does not formally credit any individual person with titles such as 'Director', or 'Principal Director', it would be a question of fact that has to be proved in courts as to who exercised overall creative choices with respect to the creation of the game.[124]

[116] Internal reference – Part I(1)(b).

[117] 'What is it Like to be a Video-Game Animator' (Deakin University, undated), available at https://this.deakin.edu.au/career/art-in-motion-what-its-really-like-to-animate-video-games.

[118] Internal reference – Part I(1)(a)(iii).

[119] CDPA (n5), §§ 9(2)(ab), 10(1A)

[120] *Id.*, §178.

[121] Bently *et al* (n87), p.130.

[122] *Slater v Wimmer*, [2012] EWPCC 7 (Hereinafter, 'Slater'), ¶72.

[123] CDPA (n5), §105(5).

[124] *See for example* the analysis of the court in Slater (n122), ¶73.

b) Game-play in each specific instance of playing the game.

This paper identified only a film-work associated with the game-play.[125] The standard of originality for copyright in films is that it should not be a copy of any prior film.[126] I argue that the game-play film does not satisfy this standard as it is a copy of the video-game film.

The game-play film is a recording of all the actions that happened in the game universe during a particular instance of game-play. The video-game film is a recording of all possible actions that can be taken in the game universe generally. It is impossible for the player to produce a single frame in the game-play film that is outside what was created by the video-game developers.[127] This applies to both the audio and video component of the game-play film. Therefore, they constitute wholly the copies of the previous film work in the video-game and cannot be provided copyright.

Consequently, game-play film is not copyrightable as per the UK law.

c) The E-Sport Stream

A stream has elements of literary work, artistic work, musical work, film, and broadcast.[128] Here, authorship over each of these categories is analysed.

In a stream with a single streamer, it is clear that the streamer is the author of the literary work. However, most E-Sports tournaments have multiple commentators commenting together on a game to produce a single stream. This is similar to having multiple commentators for conventional sports matches such as Football/Cricket. In these scenarios, there would be joint authorship of the literary work as the *Kogan*[129] criterion for joint authorships is met here. Individual authors (streamers) are collaborating with a common design (producing a commentary for an E-Sports match) and without distinct contributions. The contribution is not

[125] Internal reference – Part I(2)(c).

[126] CDPA (n5), §5B(4).

[127] American courts have used this logic while deciding originality of underlying video-games – *see* Midway v Artic (n68), 1011-12.

[128] Internal reference – Part I(3)(c).

[129] Kogan (n114), ¶31.

distinct since separating the commentary of any individual streamer would give an inaccurate and incomplete picture of the match and it would not make any sense anymore.[130]

The musical and artistic works used for embellishment are often not created by the streamers. These are works for which either the copyright duration has run out, or the streamer takes authorization from the owner of copyright. In some cases, the streamer might include such works without authorization from the copyright owners; this risks possible infringement claims and penalties from streaming platforms.[131] In very few cases, the streamer creates these works himself. For example, the stream might feature a photograph that the streamer clicked himself. In these rare cases, the streamer is the author of the works.

This brings us to the entrepreneurial works. *First*, the paper considers films. It was observed earlier that the game-play film contains all actions in the game Universe for the duration of specific match. The stream film contains the scenes from the game-play film that the streamer wants to concentrate on, with a verbal commentary overlaying the game audio. Further, often the streamer's live face is super imposed onto the video component so that the audience can see the facial reactions of the streamer as he comments on the game.[132] Thus, 3 parts can be identified in a stream film:

1) parts of the game-play film,
2) the streamers' verbal commentary, and
3) the streamer's face.

The rule against copying says that films will be denied copyright 'to the extent that it is a copy taken from a previous film.'[133] Thus, if any part(s) of the three can be seen not to be a copy, it will receive protection to the exclusion of the copied parts. The first element in the list is a copy of the game-play film. Therefore, following the same principles used for analysing game-films,[134] this element cannot enjoy copyright protection. However, the latter two elements are

[130] Hodgens (n115), ¶46.

[131] Pablo Olondriz, 'Background Music for Twitch' (LegisMusic March 28, 2021), available at https://legismusic.com/background-music-for-twitch/#toc3.

[132] Recently, some have started the practice of multi-cam streams whereby there are multiple cameras on the streamer which keeps switching to capture the best angles – 'This Twitch Streamer has the Coolest Camera Setup You have Ever Seen Using Cube' (Teradek, undated), available at https://teradek.com/blogs/articles/this-twitch-streamer-has-the-best-camera-setup-ever-using-cube.

[133] CDPA (n5), §5B(4).

[134] Internal reference – Part II(1)(b).

not the copies of anything; they are first fixations. Therefore, they receive copyright protection and the authorship should be examined closely.

Producers and principal directors are the authors for film works.[135] To recapitulate, producers make the arrangements, especially of a financial nature, necessary for the film;[136] and principal directors exercise the creative choices in the film.[137] In the context of an E-Sports tournament, the producer would be the tournament host since he arranges the money for the price pool, payment of casters etcetera.[138]

There is often no specific attribution of the principal director in E-Sport streams. The identity of the principal director will vary between the type of stream. In streams with a single caster, the caster will easily be identifiable as the principal director since he alone has the choice of what to include within the stream film. He exercises sole discretion on what area of game-play to concentrate on (the video component of the film), and what to say as commentary (the audio component of the film). In the case of co-casts, there is often a dedicated observer who chooses what areas of the game-film to concentrate on for the stream-film.[139] This then directs what the commentators can include as the verbal commentary. Here, I would argue that the observer is similar to a director in a conventional film, and thus would be regarded as the principal director. This is further bolstered by the *Slater v Wimmer* case wherein the court had held in the context of a small-scale mountaineering film that the cameraman was the principal director since he exercised creative control over what shots were to be taken for the film.[140] Similar to the cameraman in *Wimmer* and the director in a conventional film, the observer decides the shots to be included in the stream film.

Finally, we consider the broadcast works. Multiple broadcasts are created as the live stream is transmitted from the streamer's computer to the audience's computers through multiple intermittent servers. The latter transmissions are relays of the initial transmission originating

[135] CDPA (n5), §9(2)(ab).

[136] *Re FG (Films)*, [1953] 1 WLR 483, 485.

[137] Slater (n122), ¶72.

[138] For the list of top E-Sport hosts in UK, *see* 'Behind the Scenes: Who hosts Esports Events?' (British E-Sports Association, undated), available at https://britishesports.org/news/behind-the-scenes-who-hosts-esports-events/.

[139] 'E-Sports Job Spotlight: Observer' (British E-Sports Association, undated), available at https://britishesports.org/careers/observer/.

[140] Slater (n122), ¶73.

from the streamer's computer.[141] As such, the author of all the broadcasts here will be the persons making the initial transmission.[142] 'Person making the transmission' is defined in §6(3), CDPA as

a) the person transmitting the programme, if he has responsibility to any extent for its contents, and

b) any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission

'Programme' in this definition refers to the contents of the broadcasts.[143] Unfortunately, §6(3) has not yet been meaningfully analysed by the courts; consequently, there is no clarity on the thresholds that apply to other terms such as 'responsibility' and 'person providing the programme' Thus, the application of the law to streams attempted in the subsequent paragraph is an attempt to follow the ordinary meaning of the words used in the statute without the guidance of any case law.

Almost all streaming platforms disclaim responsibility for the content that they run on their platforms;[144] further, they do not have any role in creating the content for the broadcasts. As such, it can be reasonably presumed that they would not qualify as authors. Analysing the second limb is slightly more complicated. Is 'the person providing the programme' the players, the streamer, or the tournament hosts? Following the statutory language, the 'person providing the programme' should be read in conjunction with 'the person making arrangements with the transmitter'. The transmitter is the streaming platform; it has user accounts from which streams originate.[145] The person operating these user accounts will the person in direct relationship with the platform. Therefore, the person controlling the user account registered with the streaming platform should be identified as the person providing the program.

For many E-Sport tournaments, the stream is broadcast on the streaming platform account of the tournament host. In this case, the person making the broadcast would be the tournament

[141] Internal reference – Part I(3)(b).

[142] CDPA (n5), §9(1)(b).

[143] *Id*., §6(3).

[144] 'Terms of Service' (Twitch, January 01, 2021), §§ 8(b), 9, available at https://www.twitch.tv/p/en/legal/terms-of-service/ (Hereinafter, 'Twitch ToS'); 'Terms of Service' (YouTube, March 17, 2021), available at https://www.youtube.com/static?template=terms (Hereinafter, 'YouTube ToS').

[145] Twitch ToS (n144), §4; YouTube ToS (n144).

host. In cases where professional players stream their own matches or when third party streamers comment on causal games, the streamers broadcast on their personal platform user accounts. Here, the streamer is the person making arrangements with the platform and qualifies as the author.

Thus, the authors of the broadcasts will be the tournament host or the streamer depending on whose streaming platform account the stream is broadcast from.

2. COPYRIGHT OWNERSHIP

The default rule is that the author is the first owner.[146] However, if a work is produced by an employee in the course of employment, then the employer is the first owner unless there is a contract to the contrary.[147]

Most of the underlying works in a video-game are created by employees of the company producing the video-game, in the course of their employment. Thus, the producer company will be the first owner of copyright in these works. However, it is *not* the case that video-game companies are automatic owners of all underlying works in the game. Some works in video-games might be pre-existing works that were licensed from the respective copyright owners. Alternatively, producer companies do not have automatic ownership over works that were made under a contract *for* services rather than a contract *of* services.[148] Thus, there must be a factual case-to-case analysis made to identify the first owners for the various works in the video-games.

With respect to streams, tournament hosts receive first ownership of the copyright as a result of their authorship as producers. It is reasonably safe to assume that tournament hosts would not be acting in the course of any employment when hosting a tournament. However, the same assumption may not always be true for streamers as they are arranged by the tournament host. We must check whether the relationship between hosts and streamers qualifies as employment.

[146] CDPA (n5), §11(1).

[147] *Id.*, §11(2).

[148] *See Id*., §178.

Employment for the purpose of deciding first ownership depends on whether the author is engaged with a *contract for services* or a *contract of services/apprenticeships.*[149] Further, only those works created in the course of employment would belong to the employer.[150] The satisfaction of these criteria are dependent on a variety of factors that include the party arranging the tools for the work, the terms of the contract between the parties, amount of control exercised, and nature of remuneration as commission versus fixed salary.[151] While there is literature on these factors in the case of the relationship between players and league owners,[152] there is unfortunately a lack of empirical research on the nature of the relationship between streamers and tournament hosts even for the top E-Sport games. Therefore, we will have to conclude our analysis by saying that first ownership would be based on the above-mentioned factors which courts will have to adjudge based on a case-to-case basis.

Finally, it is possible for the owners to transfer their copyright by the way of assignment.[153] Thus, regardless of the contract being for services or of services, tournament organisers can have contractual clauses with streamers that assign copyright to them. This can be done even on a prospective basis before the copyrighted work is produced.[154]

CONCLUSION

This paper analysed the copyright in E-Sport streams by dividing the works in it into three distinct baskets.

The first basket was the works associated with the underlying video-game. Video-games were found to be film works, and its look-and-feel as translated though its animations an artistic work. Video-games also contain various other works such as a literary work in the computer code, artistic works in the frames used for animation, and musical works for any relevant musical score used in games. These works are protected by copyright subject to the criteria for

[149] *Id*., §178.

[150] *Noah v Shuba*, [1991] FSR 14, 24, 26.

[151] *Nora Beloff v Pressdram*, [1973] FSR 33, 42, 46.

[152] Michael McTee, 'E-Sports: More than Just a Fad', 10 Oklahoma Journal of Law and Technology 1, 26 (2014); Justin Ronquillo, 'The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property', 23(2) Intellectual Property and Technology Law Journal 81, 90-92 (2019).

[153] CDPA (n5), §90.

[154] *Id.*, §91.

protection and generally owned by the company that created the game. Exceptions on ownership include when separate works are licensed by video-game companies or when they are produced under contract *for* services.

The second basket contains only the film work in the recorded game-play. It was seen that there is no copyright in these works because they are exclusively copies of the film work in the video-game. Therefore, authorship does not apply with respect to this basket.

The third basket contains all other works in the stream. Chiefly, this includes the film work that is the video output file containing the commentary and game-play; broadcast work when this film work is broadcast over the internet; and literary work in the spoken commentary by the streamer. All these works enjoy copyright provided the criteria for protection are met. The copyright in the film work is owned by the tournament host, and jointly by the tournament host and casters in cases where the casters are engaged via a contract *for* services. The copyright in the broadcast work is owned by the person from whose streaming platform account the broadcast is made. The copyright in the literary work is owned by the streamer(s) unless he was acting as an employee of the tournament host while streaming.

To close, I appeal for further research in this area. There is a lot of matter that has not been covered in this paper; important examples include performance rights for E-Sports players, infringement of copyright, and liability of intermediaries. Further, considering the absence of hard-law in this area, researchers are bound to disagree on their interpretations. Continued engagement in scholarship consisting of arguments and counter-arguments will be invaluable to a future court that has to decide these matters. This will happen sooner rather than later considering the continued expansion of the E-Sport industry.