

# INDIAN JOURNAL OF LEGAL REVIEW



VOLUME 3 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



**Indian Journal of Legal Review [ISSN - 2583-2344]**

**(Free and Open Access Journal)**

**Journal's Home Page – <https://ijlr.iledu.in/>**

**Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>**

**Volume 3 and Issue 1 of 2022 (Access Full Issue on – <https://ijlr.iledu.in/volume-3-and-issue-1-of-2023/>)**

### **Publisher**

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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## INTELLECTUAL PROPERTY RIGHT IN THE WORLD E-SPORTS

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**Best Citation** - MD TAUSEEF ALAM, INTELLECTUAL PROPERTY RIGHT IN THE WORLD E-SPORTS, Indian Journal of Legal Review (IJLR), 3 (1) of 2023, Pg. 424-430, ISSN - 2583-2344.

### **Abstract**

*To generate the many components of any software, computer programs and virtual world development tools are employed. In e-sports and the metaverse, some of these include buildings, markets, and even avatars. Since these works are regarded as graphical user interfaces, they could not be covered by the same copyright protection as software. In India, two significant landmark decisions that introduced two key tests helped to create the originality test. The author or creator is required to exhibit at least rudimentary inventiveness (de minimis quantum) alongside the efforts put into such work in order to preserve intellectual property. All games contain a combination of trade secrets, patented technology, copyrights, and trademarks. A comprehensive game includes patents, trademarks, and copyright. As a literary work, the whole game's code is protected by copyright. It is the lifeblood of your business, according to the developer. Numerous problems that, if they do not already exist, will soon join the Indian market have been recognized by researchers. These include anti-competitive activity by game developers as well as doping and online gambling. Cases would be adjudicated in a sophisticated manner if the present framework for intellectual property rights legislation in India is expanded.*

**KEYWORDS:** IPR, E-SPORTS, OWNERSHIP RIGHT, GAME.

### **I. Introduction**

Virtual world development tools and computer programs are used to create the different

elements of any software. Structures, marketplaces, and even avatars are some of them in e-sports and metaverse. The protection offered to these works, however, may differ from the copyright protection given to software since they are thought of as graphical user interfaces. During the 1990s We all have grown in playing video games and with the boom in the internet revolution there was seen massive growth in our favorite pass time so, online gaming or e-sports cannot be said as a totally new phenomenon, and today we are standing where people are making their careers out of it.

The world market of e-sports is growing rapidly and with the same, there are several e-sports competitions taking place all around the world. When there is any competition taking place several promotional activities get involved. With an estimated 628 million users, the Indian e-sports market was predicted to be worth over 890 million USD in 2018. According to predictions, that figure would rise to over 1.1 billion USD by 2020.<sup>1180</sup> Further another report by KPMG India and Google from May 2017, the Indian online gaming market is expected to reach \$1 billion in revenue by 2021.<sup>1181</sup>

Video and computer games are used in the competitive sport known as "Electronic-Sports," or "E-sports." Video games may be divided into two main categories: Casual and Competitive. Casual games are ones that contain a narrative for the player to follow and have no restrictions on how often or how they may be played. Competitive games have a leaderboard, a large player base, and some type of skill level based game play. These call on the player to both learn and master the game. The TRIPS Agreement provides that, "Computer programs, whether in source or object code, shall be protected as literary works under the Berne

<sup>1180</sup> Suparna Dutt D'Cunha, 'How Digital Gaming In India Is Growing Up Into A Billion-Dollar Market' (Forbes.com Mar. 19, 2018), <<https://www.forbes.com/sites/suparnadutt/2018/03/09/how-online-gaming-in-india-is-growingfast-into-a-billion-dollar-market/#35ba167455b6>>

<sup>1181</sup> 'Online Gaming in India: Reaching a New Pinnacle,,A Study by KPMG in India and Google' (Kpmg.com May 2017), <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf>

Convention.<sup>1182</sup> Further, the world Intellectual Property Organization Copyright Treaty also incorporates the copyright protection to the computer programs as the literary work.<sup>1183</sup>

## II. Background

India is a signatory of the Berne Convention<sup>1184</sup> whose Article 1 states that 'the countries to which the convention applies would constitute a union for the protection of the rights of authors in their literary and artistic works.'<sup>1185</sup> The Indian Copyright Act of 1957 generally protects the expression of the idea, not the idea itself. The Court in Rediff.com India Ltd. v E-Eighteen.com Ltd<sup>1186</sup> addressed this and held that this act was concerned about the expression of the idea or thought not the idea itself. The copyright act further goes on into section 13(1) where it covers the original literary, artistic work, musical, etc. but does not anywhere exhaustively defines originality. we are more concerned about originality when there is a question about the intellectual rights of the work, as it acts as the backbone to determine if a writer has a right to have their work protected.

In India, the test of originality was developed by two major landmark rulings which brought in two principal tests. On the very firsthand, the Hon'ble Supreme Court in Indian Express Newspaper (Bombay) Pvt. Ltd. v Jagmohan<sup>1187</sup> developed the 'sweat of the brow' and through its ruling of Eastern Book Company and Ors. v. D.B. Modak and Anr<sup>1188</sup> we have a "modicum of creativity" and today these tests are blended and the authorship is determined by the courts. In the case of Atari Games Corp. v Oman<sup>1189</sup>, the authority refused to grant copyright protection to the owners of the game named, 'Breakout' as

it lacked the creative expression by the creator which was necessary to grant the protection. For the protection of the intellectual property, it is expected by the courts that the author or the creator have a minimum basic creativity (*de minimis quantum*) with the efforts put into the development of such work.<sup>1190</sup> In the development of the laws governing the intellectual property protection of the video games the courts came up with the dual protection. The court in M. Kramer Mfg. Co. v. Andrews<sup>1191</sup> gave the protection of the actual computer code of the game or the software as a literary work and separately protected the graphics and the audio-visual works. In India, the same dual protection system is not fully recognized per se. We at this stage are still struggling that whether video games fall under the ambit of section 2(f) of the copyright act.

## III. Analysis of the IPR in a game

All games contain some mix of copyrights, trademarks, patented technologies, and trade secrets, independent of their kind, content, origin, intended platform, or supporting media. A complete game encompasses copyright, trademark, and the patents. The player only sees the surface layer of your game when he launches it. But behind the wizards, jet fighters, spaceships, and fantastical settings, something that most gamers find useless but are crucial to you are hidden: the code. A game is essentially nothing more than a fantastic concept document and many of individual works of art without coding. The code is the game's unseen beating heart for the player; for the developer, it is the lifeblood of your company. The code is generally taken as the literary work of the developer and can even be copyrighted. The code for the whole game, including the graphical user interface, music, voice, and other elements, qualifies for copyright protection as a literary work since it expresses these characteristics in textual, albeit coded, form. Further, the logo and name of the game, distinctive sounds, and graphics, slogans, and

<sup>1182</sup> The Agreement on Trade-related Aspects of Intellectual Property Rights 1994, art. 10.

<sup>1183</sup> The World Intellectual Property Organization Copyright Treaty, art. 2.

<sup>1184</sup> 'Treaties and Contracting Parties', WIPO.INT, [https://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=969C](https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=969C)

<sup>1185</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 1, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.

<sup>1186</sup> Rediff.com India Ltd v. E-Eighteen.com Ltd 2013 (55) PTC 294 (Del), see also University of London Press Ltd v. University Tutorial Press Ltd (1916) 2 CH. D. 601.

<sup>1187</sup> Indian Express Newspaper (Bombay) Pvt. Ltd. V. Jagmohan AIR 1985 Bom 229.

<sup>1188</sup> Eastern Book Company and Ors. v. D.B. Modak and Anr (2008) 1 SCC 1.

<sup>1189</sup> Atari Games Corp. v. Oman 888 F.2d 878 (1989), see also Atari Games Corporation, Appellant, v. Ralph Oman, Register of Copyrights Appellee, 979 F.2d 242 (D.C. Cir. 1992)

<sup>1190</sup> Feist Publ'n Inc. v. Rural Tel. Serv. Co. 499 U.S. 340, 345 (1991).

<sup>1191</sup> M. Kramer Mfg. Co. v. Andrews 783 F.2d 421, 442 (4th Cir. 1986).

different valuable marks are the types of the trademarks found and involved in the game. With these applied algorithms, compiling techniques, translation methods, user interface features can be the area that attracts the patents in the game.

#### IV. Actual Owner of the Game

The players actively participate in interactive game situations and actively contribute to the development of the audio-visual screen. By demonstrating that their particular activities have produced a fresher output than what was first supplied, it might be claimed that the player has met the minimal standard of originality. The same question was answered by the court in *Midway Manufacturing v Artic International Inc.*<sup>1192</sup> and held that, as the player lacks to bring into the game the significant change and cannot go beyond the codes which are coded while the development of the game. As the creativity of the player is very narrow and it wholly depends on the scope of the source materials of the code of the software or the game.<sup>1193</sup> The courts in its plethora of the rulings protected the intellectual property rights of the company even if the game or the software involves the interaction of the user. But when we take the games or the software where the player's modifications are open and are of a limitless nature. In many games, users are urged to participate in and design worlds that are exclusively defined by their own preferences and criteria. The current legal issue is complex since it relies on the type of game that was created and the degree of originality that was demonstrated therein.

#### A. Ownership of the Characters and other collections in the game

Most of the games have the characters or the avatars which are used to represent the user. Further, the players cross onto different levels. Here the question arises whether the player can sell the game account? If we analyze the ruling of *Kirtsaeng v John Wiley & Sons, Inc.*<sup>1194</sup> court

held, *'the first sale doctrine applies to copies of a copyrighted work (like textbooks) which were lawfully made abroad, sold there, and then imported into the United States for resale as a "new" book. This second sale was held to be beyond the scope of copyright protection.'* It is inferred that when the item once purchased, with the application of first sale doctrine if there exist the second sale of the product after the purchase by the player, it may not necessarily infringe the intellectual property rights of the company. In India, this principle is not legally recognized and is still the grey area of law which needs to be answered. If try to answer this question from a different perspective with the principle of 'sweat & brow' we can refer the ruling of *Eastern Book Company & Others v D.B. Modak and Anr.* where the Hon'ble Supreme Court held that, *" that copyright protection finds its justification in fair play. When a person produces something with his skill and labour it normally belongs to him, and other person would not be permitted to make a profit out of the skill and labour."* The game players invest a lot of efforts, skills and time into clearing the level and earning the rewards in the game, so again it would not be wrong to say that the rights of the player should be protected too and they should be allowed to resale the account or the game after the first authorized purchase and make profit out their hard work and skills. Still, it should be kept in mind the user lacks endless control and creativity in a game, it is only confined to the source codes, which is already been developed by the company.<sup>1195</sup>

#### V. Rights of Broadcasting

While e-sports have many characteristics with traditional sports—strict regulations regulate the game, it includes deep emotional connections, and there is a continual demand for high-quality coverage—they also have their own set of issues. This intimates the viewers to purchase the game and play the same.<sup>1196</sup> The E-sports industry is rapidly growing, and this is rising the disputes over the broadcasting rights.

<sup>1192</sup> *Midway Manufacturing v. Artic International Inc* 704 F.2d at 1011.

<sup>1193</sup> *Red Baron-Franklin Park, Inc. v. Taito Corp.* 883 F.2d 275, 279 (4th Cir. 1989).

<sup>1194</sup> *Kirtsaeng v. John Wiley & Sons, Inc.* 133 S.Ct. 1357 (2013).

<sup>1195</sup> *Midway Manufacturing v. Artic International, Inc.* 704 F.2d at 1011.

<sup>1196</sup> Will Waters, 'The challenges of esports broadcasting', *TVBEUROPE* (Jan. 3, 2019).

On one hand, the organizer urges that as they are the organizer of the e-sport tournament and somewhere they are responsible for the success of the game while on the other hand, the gaming company urges that as they are owners the broadcasting rights should be in their hands. Through broadcasting of the gameplay, an individual can earn millions of dollars. With the same, the payer of the game monetizes the broadcasting of the game through various online streaming platforms such as Youtube. This concern was raised by the courts in *Super Cassettes Industries Ltd v Youtube & Google SCIL*<sup>1197</sup> where that court held that these business models of Youtube and Google allow and encourage the use of copyrighted materials for the purposes of making profit without the prior permission by the owner.

While an individual streams gameplay the public or viewer will see the relevant game audio and music backdrop when streamers livestreaming their play online, which might be viewed as an infringement of the information network transmission right. The company of the game or the software owns the intellectual property rights which may get infringed while the game is live streamed over the internet. Argument of the advocates supporting the interest of the gaming company is that it is necessary that there must be authorization from the gaming company before streaming, while on the other hand the argument of the player community is that when they stream it is their skillset of playing the game in a specific manner which is different from player to player get the audience involved. Furthermore, most of the games are been purchased by the player to play the game another question arises that whether the player who purchased the game has some ownership rights over the game and can stream it online and whether the companies by merely in the enforcement of the End-User Licensing Agreement stop the streaming without authorization.

Most of games get an End-User Licensing Agreement signed by the player which in most cases prohibits the transfer and/or sale of the game or the game account and the same prohibits the commercial use of the software. While it is said that when the protected product is sold the intellectual property rights of the author get exhausted. But Hon'ble Delhi High Court in the ruling of *John Wiley & Sons Inc. v Prabhat Chander Kumar Jain*<sup>1198</sup> held that "as the express provision for International Exhaustion is absent in our Indian law, it would be appropriate to confine the applicability of the same to regional exhaustion."

Answering the question of the skills of the player in the game the court in *Midway Manufacturing v. Artic International, Inc.* looked at the actions of the player to cause a particular change would be enough to consider the same to be the work of the player and not that of the game owner. The court answered this negatively and held that 'the player lacks the control to bring about a change that exists beyond the defined and limited space of the game.' In later judgments, the Court likewise maintained that the player's inventiveness is greatly influenced by the parameters set by the game's source code. Finally, the court found that even though there was user participation, the company was nonetheless entitled to copyright protection.

Livestreaming of video games has become increasingly common, which has raised several legal problems related to copyright. Although it is believed that fair use protections provide protection, such a video may be deemed a copyright violation. Platforms should adapt to the changes that are unavoidable, which may include paying more for streaming services, developing closer ties with developers, and keeping an eye on license agreements between other platforms and developers.

#### **VI. Right to Publicity**

Connecting to the right of broadcasting another right to publicity gets involved.

<sup>1197</sup> *Super Cassettes Industries Limited v. Youtube & Google SCIL* (2016) SCC OnLine Del 6382.

<sup>1198</sup> *John Wiley & Sons Inc. v. Prabhat Chander Kumar Jain* (2010) SCC Online Del 2000.

The right of publicity, sometimes known as a publicity right, basically acknowledges the value that exists in a person's very existence and allows the right to restrict how their name, image, identity, or likeness is used for commercial purposes. The person can get their identity protected and have the remedy for the same if anything has a close resemblance of them.<sup>1199</sup> The right to privacy, which is protected by Article 21 of the Indian Constitution, is the root of the right to publicity both domestically and internationally. The Hon'ble Supreme Court in *R Raja Gopal v. State of Tamil Nadu*<sup>1200</sup> acknowledged the right of publicity as a component of the right to privacy and came to the conclusion that it is against the law to use someone's picture or likeness without their permission.

The same rule applies to the world of E-sports by the way characters and illustrative graphical representation in the games. With growing time the definition of 'persona' has grown its scope wide. Without sufficient negotiating strength, individual actors find it difficult to license their rights when dealing with powerful corporate enterprises. Subsequently, players feel obligated to sign contracts with tight clauses, such as those that convey their publicity rights to the team, which then transfers those rights to its sponsors. Each player of the game separate style and strategies to the play the game. The right to publicity must be extended to them. Many users of the game get influenced by the existing player. It is also important to consider the fact that overprotecting the right can be equally harmful as under protecting the right. Overprotecting a right will hinder innovation since new artists develop and expand on the works produced before them. It would be very challenging to define infringement in the context of E-sports if there are only a certain number of moves, actions, or certain methods in which a game is played, without adversely affecting other players' access to and enjoyment of the game. Hence, there has to be

the rule of proportionality upheld in deciding the same matter and creating a balance.

### Way Forward

The major challenge is that there is no existing legislation or even mere a regulation to govern e-sports in India. In 2018, Shashi Tharoor at the parliament introduced Sports(Online Gaming and Prevention of Fraud) Bill as a private member's bill in front of the Lok Sabha to recognize and streamline this large base of unorganized e-sport sector. The integrity of e-sports was the primary goal of bill. For this reason, the law was essentially split into two halves. A unique approach to deal with sports fraud is prescribed in one section of the law. The other section recognises that entrenched interests have more financial motivations to manipulate athletic events due to the growing commercialization of sports, thus it makes provisions for the regulation of online sports betting.

If this bill would have been turned into an Act of the parliament then with the streamline and organisation of the e-sports industry could be a road changing for the development all laws related to e-sports. Presently, in India we are in need of a framework which can govern and regulate this evolving area of law.

### VII. Conclusion

The global e-sports industry's expansion has created a number of new issues that need for legislative intervention. The primary argument in favour of a regulated framework is that it is the State's responsibility to set up the institutions required to ensure fair usage and avoidance of exploitation in this industry.<sup>1201</sup> Researchers have identified a number of issues that, if they do not already exist, will soon enter the Indian market. These issues range from doping and internet gambling to game creators' anti-competitive behavior.<sup>1202</sup>

Specific legislation must be created to handle the improvements in the sector is the need of

<sup>1201</sup> Katherine E. Hollist, 'Time to Be Grown-Ups about Video Gaming: The Rising eSports Industry and the Need for Regulation', (2015) 57 ARIZ. L. REV. 823, 848.

<sup>1202</sup> Matthew R. Tsai, 'Fantasy (E) Sports: The Future Prospect of Fantasy Sports Betting amongst Organized Multiplayer Video Game Competitions', (2016) 6 UNLV GAMING L.J. 393, 419.

<sup>1199</sup> *Vanna White v. Samsung Elec. Am., Inc.* 989 F.2d 1512 (9th Cir. 1993).  
<sup>1200</sup> *R. Raja Gopal v. State of Tamil Nadu*, 1995 AIR 264.

the hour, and that legislation may be created by amending current laws. The e-sports business is constantly changing, and because the law tends to be reactionary and seldom takes a preventative approach, the current system may not be able to adequately take into account the numerous improvements. Considering the concerns of avatar ownership, the right to publicity, and broadcasting rights, the necessity of originality has expanded in scope as a result of revolutionary technological advancements. Due to the private nature of some instances of infringement, such as those done within one's own house, many confrontations remained mostly undetected. Copyright infringement is increasingly easier to track down, spot, and stop thanks to the internet.<sup>1203</sup> An enlargement of the current framework for intellectual property rights law in India will guarantee that the cases are decided in a nuanced manner with proper consideration for the relevant factual circumstances.

The new software and technological advancement will provide fresh and difficult legal difficulties, much like every significant technology development. As technology develops, the challenges of law and regulation will grow and alter along with the practical uses of the metaverse. The extremely interconnected, seamless, and location-unanchored nature of the software adds to the complexity of the gaming world. Each of the legal issues should be addressed which will be required by the practitioners to navigate jurisdictional, territorial, and legal conflict issues.

#### REFERENCES

- Suparna Dutt D'Cunha, 'How Digital Gaming In India Is Growing Up Into A Billion-Dollar Market' (Forbes.com Mar. 19, 2018),
- 'Online Gaming in India: Reaching a New Pinnacle,,A Study by KPMG in India and Google' (Kpmg.com May 2017).
- The Agreement on Trade-related Aspects of Intellectual Property Rights 1994, art. 10.
- The World Intellectual Property Organization Copyright Treaty, art. 2.
- 'Treaties and Contracting Parties', WIPO.INT,
- [https://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=969C](https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=969C)
- Berne Convention for the Protection of Literary and Artistic Works, art. 1, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.
- Rediff.com India Ltd v. E-Eighteen.com Ltd 2013 (55) PTC 294 (Del).
- University of London Press Ltd v. University Tutorial Press Ltd (1916) 2 CH. D. 601.
- Indian Express Newspaper (Bombay) Pvt. Ltd. V. Jagmohan AIR 1985 Bom 229.
- Eastern Book Company and Ors. v. D.B. Modak and Anr (2008) 1 SCC 1.
- Atari Games Corp. v. Oman 888 F.2d 878 (1989).
- Atari Games Corporation, Appellant, v. Ralph Oman, Register of Copyrights Appellee, 979 F.2d 242 (D.C. Cir. 1992)
- Feist Publ'n Inc. v. Rural Tel. Serv. Co. 499 U.S. 340, 345 (1991).
- M. Kramer Mfg. Co. v. Andrews 783 F.2d 421, 442 (4th Cir. 1986).
- Midway Manufacturing v. Artic International Inc 704 F.2d at 1011.
- Red Baron-Franklin Park, Inc. v. Taito Corp. 883 F.2d 275, 279 (4th Cir. 1989).
- Kirtsaeng v. John Wiley & Sons, Inc. 133 S.Ct. 1357 (2013).
- Midway Manufacturing v. Artic International, Inc. 704 F.2d at 1011.
- Will Waters, 'The challenges of esports broadcasting', TVBEUROPE (Jan. 3, 2019).
- Super Cassettes Industries Limited v. Youtube & Google SCIL ( 2016) SCC OnLine Del 6382.
- John Wiley & Sons Inc. v. Prabhat Chander Kumar Jain (2010) SCC Online Del 2000.
- Vanna White v. Samsung Elec. Am., Inc. 989 F.2d 1512 (9th Cir. 1993).
- R. Raja Gopal v. State of Tamil Nadu, 1995 AIR 264.
- Katherine E. Hollist, 'Time to Be Grown-Ups about Video Gaming: The Rising eSports

<sup>1203</sup> Jennifer E. Rothman, 'E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property', (2012) 161 U. PA. L. REV. 317, 330.





- Industry and the Need for Regulation', (2015) 57 ARIZ. L. REV. 823, 848.
26. Matthew R. Tsai, 'Fantasy (E) Sports: The Future Prospect of Fantasy Sports Betting amongst Organized Multiplayer Video Game Competitions', (2016) 6 UNLV GAMING L.J. 393, 419.
27. Jennifer E. Rothman, 'E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property', (2012) 161 U. PA. L. REV. 317, 330.