

# A QUESTION OF (E)SPORTS: AN ANSWER FROM COPYRIGHT

CREATe Working Paper 2021/1

AMY THOMAS



CREATe

# A question of (e)Sports: an answer from copyright\*

Amy Thomas\*\*

## Abstract

eSports is a nascent industry of considerable commercial value that is fundamentally underlain with creative works—video games. Despite this, no legal scrutiny has been given to the copyright status of eSports in the UK context. By using copyright as an analytical tool, this article assesses the conceptual boundaries of eSports to better understand the legal status of this new industry to help inform future regulatory efforts.

In analysing the subject-matter positions of the three key eSports actors—the game rightsholder, the tournament organizers and the professional players—this article concludes that the copyrightable status of a video game results in the control of all further downstream usage of that game. This is in stark contrast to the copyright treatment of its most frequently cited bedfellow—traditional sports.

This article proposes that the interpretation of existing broader principles of copyright may achieve a better balance of interests between eSports actors. In doing so, comparative reference is made to South Korea as the genesis of the eSports industry.

## 1. Introduction

As a hybrid between video games and traditional sports, the idea of eSports ('electronic sports' or competitive video gaming) invokes an immediate challenge to our pre-conceptions of what these activities entail and the boundaries between them. Conflating the two often prompts visceral reactions,<sup>1</sup> and indeed, it has been said that 'if you can play it whilst smoking or drinking

---

\* This is a pre-print version of an article published in *The Journal of Intellectual Property Law & Practice*, Volume 15, Issue 12 (December 2020), published by Oxford University Press. <https://doi.org/10.1093/jiplp/jpaa157>.

\*\* Amy Thomas is a PhD candidate and Research and Teaching Associate at CREATE, University of Glasgow. Amy is a recipient of funding from the CMS/CREATE Collaborative Scholarship. Please note that the contents of this Working Paper are not endorsed by CMS.

<sup>1</sup> Public perception of eSports can be hostile. Football fans in Switzerland have recently protested increasing investments in eSports by throwing console controllers and tennis balls on the pitch (see S McCaskill 'Why Swiss Soccer Protests Shows the Difficulty in Mixing eSports and Sports' <<https://www.forbes.com/sites/stevemccaskill/2018/09/25/why-swiss-soccer-protests-show-the-difficulty-in-mixing-esports-and-sports/#66106de6434a>> accessed 27 July 2020). Former ESPN presenter Colin Cowherd claimed he would leave his job if required to cover eSports, labelling eSports

it isn't a sport'.<sup>2</sup> Yet, and as the very existence of eSports evidences, this distinction is becoming less relevant in the digital era. Instead, this article posits that the more important distinction between the two is that eSports, quite unlike any other sporting or entertainment competitions, is an industry built around a commercially produced copyrighted video game.

Legal attention on eSports has mainly focussed on issues such as gambling, match-fixing, doping and employment regulations.<sup>3</sup> Comparatively, copyright aspects (and indeed intellectual property aspects more generally) have received relatively little scrutiny despite eSports being fundamentally underlain and facilitated by a creative work – a video game. The most comprehensive work to date comes from Burk, who provides an overview of the copyright status of eSports in the US.<sup>4</sup> Rothman's response in turn highlights how eSports can be used as a prism to understand technological change.<sup>5</sup> In parallel to this, more recently the junction between eSports, intellectual property and competition law has drawn attention from scholars such as Arin<sup>6</sup> and Mirotff,<sup>7</sup> and broadly analogous economic analysis by Karhulati.<sup>8</sup> Yet, despite being the sixth largest market globally for games,<sup>9</sup> there has been no legal scrutiny on the copyright aspects of eSports in the UK. Instead, the closest proxy for interest in the copyright aspects of eSports comes from a 2017 debate in the EU Parliament, where copyright was identified as a crucial matter of conceptual definition: in the opinion of the participants, if by merit of being a rightsholder one can determine who, when and under what conditions a competition can be organised around their work, then this makes eSports incomparable to any other sporting industry.<sup>10</sup>

---

players 'nerds' (see B Shea 'ESPN's Colin Cowherd Says He Would Quit If Forced To Cover Video Games' <<https://www.gameinformer.com/b/news/archive/2015/04/27/espn-colin-cowherd-says-he-would-quit-if-forced-to-cover-video-games.aspx>> accessed 27 July 2020).

<sup>2</sup> See ProCon 'Is Golf a Sport?' (8 January 2019) <<https://golf.procon.org/>> accessed 27 July 2020, noting that many professional golfers would smoke or drink whilst playing (including John Daly, Ben Hogan, Arnold Palmer).

<sup>3</sup> See generally JT Holden, A Kaburakis and R Rodenberg 'The Future is Now: eSports Policy Considerations and Potential Litigation' (2017) 27 *Journal of Legal Aspects of Sport*, 46-78.

<sup>4</sup> D Burk 'Owning eSports: Proprietary Rights in Professional Computer Gaming' (2013) 161 *U. Pa. L. Rev.* 1535-1578.

<sup>5</sup> JE Rothman 'E-Sports As a Prism for the Role of Evolving Technology in Intellectual Property' (2013) 318 *U. Pa. L. Rev.* 317-329.

<sup>6</sup> M Arin 'Competing Competitions: Anticompetitive Conduct by Publisher-Controlled eSports Leagues' (2020) 104(3) *Minnesota Law Review*, 1585-1646.

<sup>7</sup> M Mirotff 'Tiebreaker: An Antitrust Analysis of Esports' (2019) 52(2) *Columbia Journal of Law and Social Problems*, 177-223.

<sup>8</sup> VM Karhulahti 'Reconsidering eSport: Economics and Executive Ownership' (2017) 74(1) *Physical Culture and Sport, Studies and Research*, 43-53.

<sup>9</sup> UKIE 'The games industry in numbers' (date unknown) <<https://ukie.org.uk/research>> accessed 27 July 2020.

<sup>10</sup> Detailed in RE de los Monteros 'Crónica del primer evento de los esports en el seno del Parlamento Europeo: Un primer paso esperanzador' *eSports Bureau* (6 September 2017)

That eSports' key differentiation from traditional sports is by virtue of having an identifiable rightsholder, this invites the opportunity to use copyright as an analytical tool to evaluate its conceptual boundaries. This requires an analysis of the subsistence and subject-matter of copyright in eSports to better understand how copyright may engage with this new industry. In doing so, this essentially invites an old question in a new context: how do we interpret copyright in such a way as to minimise the impediments to the public's ability to engage with creative content in socially and culturally valuable ways, whilst still providing incentives and/or rewards for creation?

This article approaches this question from a UK context, with due consideration to EU law where appropriate. Firstly, the background and context for eSports is outlined as a field of study. Thereafter, the subject-matter and authorship aspects of eSports are examined through the prism of the main eSports stakeholders: the game's rightsholder, the organisers and the professional players. This section also gives consideration as to the sporting status of eSports as a relevant factor for subject-matter concerns. Finally, the article analyses how we may engage with more general copyright principles in order to accommodate new industries and technologies, with comparative reference to the South Korean approach.

## **2. eSports: background and context**

eSports are not necessarily a new phenomenon. The public spectacle of video games has waxed and waned since its inception: from the public element of arcade gaming in the eighties, through private home gaming in the nineties and noughties, and now as enabled through global interconnectivity the capacity for worldwide public contest. Certainly, the interconnectivity of Web 2.0 and improved high-speed broadband connections have given new capabilities for industry players that have resulted in the most recent resurgence of eSports.

The definition of eSports is contested, but broadly it is agreed to be the competitive playing of video games. These games do not need to replicate traditional sports in themselves, like tennis or football, but instead are more commonly first-person shooters (e.g. *Call of Duty*) or massively multiplayer online games (e.g. *World of Warcraft*). Professional players, who specialise in

---

<<https://www.esportsbureau.com/cronica-del-primer-evento-de-los-esports-en-el-seno-del-parlamento-europeo-un-primer-paso-esperanzador/>> accessed 27 July 2020.

particular video games, train with the same level of intensity as a traditional sports athlete,<sup>11</sup> and more recently have even resulted in eSports related injuries, such as repetitive strain injury.<sup>12</sup>

At an organisational level, players are often organised in teams with accompanying coaches, competing in leagues and tournaments for monetary prizes.<sup>13</sup> Traditionally, these tournaments have been organised by third-parties with no direct affiliation to the game, but more recently there has been vertical integration to create 'in-house' competitions (such as Riot Games' *League of Legends* competitions). These events can be held either entirely online, or face-to-face in stadiums or arenas (some purpose-built). Broadcasts of these matches are accompanied by ancillary commentary (or 'shoutcasting') and partisan fans may even place bets on eSports teams and purchase branded merchandise. Outside of tournaments and leagues, eSports players also regularly broadcast individual streams of 'training videos' on platforms such as Twitch or YouTube, providing commentary on their thought processes or reflections. This remains a valuable source of additional income to players, as basic salaries remain relatively low with the exception of a few superstars.<sup>14</sup>

In terms of popularity, the industry continues to grow from its genesis as a niche, predominantly South Korean practice to a thriving global phenomenon with almost 40% year-on-year growth.<sup>15</sup> Not only does this bring with it economic benefits, but eSports may also facilitate important societal benefits: its international character means there is little geographical dependence for participation as players regularly compete with each other online; video games may arguably be more accessible for some people with disabilities than traditional sports, and; there is no suggestion that eSports does not bring with it the same development of social and teamwork skills as traditional sports. Indeed, as early as 2014 it seemed that eSports had surpassed some traditional sports in popularity, with reports claiming that the 2014 championship final of *League*

---

<sup>11</sup> Detailed in T Kari and VM Karhulahti 'Do e-Athletes Move?: A Study on Training and Physical Exercise in eSports' (2016) 8(4) *International Journal of Gaming and Computer-Mediated Simulations*, 53-66.

<sup>12</sup> D Lee 'The real scars of Korean gaming' *BBC* (5 June 2015) <<https://www.bbc.co.uk/news/technology-32996009>> accessed 27 July 2020.

<sup>13</sup> The prize pool in eSports league The International 2019 amounted to over \$34 million USD (over 21 million euros) (see eSports Earnings 'Largest Overall Prize Pools in eSports' (date unknown) <<https://www.esportsearnings.com/tournaments>> accessed 27 July 2020).

<sup>14</sup> To the extent that we can be confident in crowdsourced databases (such as eSports Earnings <<https://www.esportsearnings.com/>> (date unknown) accessed 27 July 2020), the average salary for eSports players in a team are approx. 3,000 - 5,000 USD per month. By contrast, at the time of writing, the highest earning eSports player is Johan Sundstein, earning almost 7 million USD in their capacity as an eSports player (see eSports Earnings 'Top 100 Highest Overall Earnings' (date unknown) <<https://www.esportsearnings.com/players>> accessed 10 August 2020).

<sup>15</sup> Newzoo 'Global 2013 Global eSports Market Report - Light' (2018) <<https://newzoo.com/insights/trend-reports/global-esports-market-report-2018-light/>> accessed 27 July 2020.

*of Legends* had more viewers than the National Basketball Association (NBA) finals.<sup>16</sup> The COVID-19 pandemic has also, unarguably, accelerated the growth and cultural importance of eSports.<sup>17</sup> Following the postponement of many traditional sports, eSports have provided a fitting substitution both for traditional sports athletes to give them platforms to perform in their own virtual sport<sup>18</sup> and for new and existing fans to follow ongoing eSports activities which have continued, relatively undisturbed, through the pandemic.

To give a global appreciation of the industry, many Asian countries have demonstrated an enthusiastic approach to embracing eSports. Particularly in South Korea, which is widely recognised as being both the genesis and mecca of eSports, a governmental eSports regulatory body, the Korean eSports Association (KeSPA) (established in 2000), is a member of the South Korean Olympic Committee. The approach of EU Member States has been more piecemeal and conservative. Germany<sup>19</sup> and Italy<sup>20</sup> have recognised eSports as 'official' sports, and France has created explicit legislative recognition of eSports by providing labour regulations for players, conditions for the involvement of minors, and legalising 'physical presence' eSports competitions.<sup>21</sup> Other Member States, such as the UK, maintain that eSports are essentially games.<sup>22</sup>

Importantly, no specific international regulatory body exists for eSports in the same way that e.g. FIFA regulates international football. In terms of national efforts, KeSPA, as a quasi-official body, is probably the best established and well-financed. The UK equivalent, the British eSports Association, was established in 2016 by the UK government to improve awareness of the industry at grassroots level, but has no governing function.

---

<sup>16</sup> See P Dorsey "League of Legends' ratings top NBA Finals, World Series clinchers' ESPN (2 December 2014) <[https://www.espn.co.uk/espn/story/\\_/page/instantawesome-leagueoflegends-141201/league-legends-championships-watched-more-people-nba-finals-world-series-clinchers](https://www.espn.co.uk/espn/story/_/page/instantawesome-leagueoflegends-141201/league-legends-championships-watched-more-people-nba-finals-world-series-clinchers)> accessed 27 July 2018.

<sup>17</sup> The Economist 'Legends in lockdown: The pandemic has accelerated the growth of e-sports' The Economist <<https://www.economist.com/international/2020/06/27/the-pandemic-has-accelerated-the-growth-of-e-sports>> accessed 27 July 2020.

<sup>18</sup> For example, *rFactor2* was specifically designed for Formula 1 athletes and fans whilst the sport was otherwise suspended.

<sup>19</sup> J Speight 'Germany to recognise eSports as an official sport' (8 January 2018) *DW* <<https://www.dw.com/en/germany-to-recognize-esports-as-an-official-sport/a-42509285>> accessed 27 July 2020.

<sup>20</sup> S Paik 'eSports recognized as a regular sport in Russia and Italy' (16 June 2016) *TalkeSport* <<https://www.talkeSport.com/news/world/esports-recognized-russia-italy-sport/>> accessed 27 July 2020.

<sup>21</sup> The Digital Republic Bill 2016–2017 of 7 October 2016.

<sup>22</sup> According to British eSports Association 'British eSports Association' (date unknown) <<https://britishesports.org/>> accessed 27 July 2020. The Bazalgette Review also calls for the 'national recognition of eSports' (P Bazalgette 'Independent Review of the Creative Industries, a report for the Department for Digital, Culture, Media, and Sport' (2017) at, p71).

The result is a (relatively) new industry, with complex structures which, whilst rapidly increasing in terms of growth and popularity, remains for the most part unregulated. Instead, the UK position maintains that eSports are, reductively, 'just a game', despite the elaborate competitive structures built around it. This invites a new and important question – who regulates this game, and under what justifications? As a creative work, copyright has a high stake in answering this question. And whilst there is a growing consensus that video games should be protected under copyright, there are many questions about how to incorporate this into the UK framework.

### **3. Subsistence of copyright in eSports**

eSports are, at their core, about contest facilitated via a video game. Yet, eSports cannot be reduced to a video game in a vacuum. Instead, one of the distinguishing features of eSports are the competitive structures which have been built around the game: in particular, note the professional players who contribute their skill and creativity, and the third-party organisers of tournaments and leagues responsible for creating a public spectacle. Neither of these aspects are subject to copyright as such, yet they necessarily return to the problem (and regulation of) a copyrighted game.

When considering subject-matter and authorship in the context of eSports, this is a complex and multi-layered issue that is best described through the prism of the three key eSports actors: the game's publisher/developer (the rightsholder), the (tournament) organiser and the professional player. As a final, but crucial, consideration, we must also question to what degree eSports may be categorised as a traditional sport, its most frequently cited bedfellow, in order for us to better understand the conceptual boundaries of this new phenomenon.

#### **3.1 The game rightsholder**

As aforementioned, video games are the focal point and foundational aspect of any eSport. As such, the subject-matter claimed by the game rightsholder must be interrogated. Games, like sports, are essentially systems of rules, which are traditionally excluded from the ambit of copyright protection. In principle, there is no reason why this doctrine should not apply to all game forms, including board games and parlour games. Indeed, despite their increased complexity and artistry, video games remain interactive games constrained by systems and rules as any other. However, over time, video games have come to be accepted as protectable subject-matter both in themselves, and through their constituent components. Broadly, there are two approaches<sup>23</sup> to video game copyright: the first is to treat games as solely computer

---

<sup>23</sup> A Ramos et al. 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (2013) <<https://www.wipo.int/publications/en/details.jsp?id=4130&plang=EN>> accessed: 27 July 2020.

programmes; the second looks to the multiple, constituent and separately protectable works, such as the graphic displays, music and dialogue which comprise a game. However, the most recent precedent from the ECJ in *Nintendo v PC Box* indicates a marrying of these two approaches:

[V]ideo games constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value, which cannot be reduced to that encryption.<sup>24</sup>

A video game's 'unique creative value' therefore cannot be reduced to simply a computer programme, but *also* includes 'audiovisual' components. The court confirmed that these components can be 'protected, *together* with the entire work, by copyright in the context of the system established by [the Information Society Directive].<sup>25</sup> Translating this into UK parlance, under the Copyright Designs and Patents Act 1988 (CDPA), the underlying code of video games is protectable as a literary work (i.e. computer programme) in the first instance. This code normally incorporates the rules and systems of the game which allow the player to progress, determine permitted actions and penalties (i.e. 'gameplay'<sup>26</sup>). Audiovisual components may be roughly translated as some graphic works (e.g. icons), film (e.g. cutscenes), sound recordings (e.g. soundtrack) and increasingly other literary works (e.g. dialogue, in-game lore). Provided these meet the necessary thresholds of originality, each aspect may be protected separately. Importantly, the addition of these elements does not erase the uncopyrightability of the underlying gameplay rules (and indeed there is literature to this effect on game cloning),<sup>27</sup> but the effect becomes that anything which *displays* these rules, whether visually or audibly, tends to default to copyright protection.

However, one element of video game subject-matter remains unclear: the 'running' of a game, where the player explores and interacts with the game environment in an unscripted, unique manner. In these situations, the running of the game represents only a small proportion of all possible permutations, and in eSports is usually the focal aspect of any play (i.e. the unique and unpredictable movements of the players in action). There are two possibilities for categorising 'running' of a game under the CDPA: as a film, or a graphic work.

---

<sup>24</sup> Judgement of *Nintendo v PC Box*, C-355/12, EU:C:2014:25.

<sup>25</sup> *Ibid.* para 23.

<sup>26</sup> YH Lee, 'Play again? Revisiting the case for copyright protection of gameplay in video games' (2012) 34 EIPR 865, 865-874.

<sup>27</sup> C Katzenbach, S Herweg and L van Roessel 'Copies, Clones and Genre Building: Discourses on Imitation and Innovation in Digital Games' (2016) 10 International Journal of Communication, 838-859 and L van Roessel and C Katzenbach 'Navigating the grey area: game production between inspiration and imitation' (2018) 26(2) Convergence: The International Journal of Research into New Media Technologies, 402-420.



To be categorised as a film, the running of a game would have to satisfy the definition given in s5B CDPA as being a '*recording* on any medium from which a moving image may by any means be produced'.<sup>28</sup> The recording requirement is crucial and presents an immediate challenge to this categorisation. Strictly speaking, the running of a game does constitute a recording, even if in theory it could be retrieved from a computer's memory. Instead, in order to qualify as a film, the rightsholder would presumably need to *record* each possibility of an individual's run elsewhere; in effect, the rightsholder would have to have made a near-identical video of each possible playthrough in order for the 'running' of the game, in any possible manner, to be sufficiently recorded and enforceable against any instance of future gameplay. This seems highly unlikely, and more clearly applies to game cutscenes (films in the true sense with no variability or interactivity) or e.g. interactive movies, which have very limited permutations.<sup>29</sup> Instead, it becomes more likely that the capture of game footage only becomes a recording when a third-party captures a sequence using e.g. video capture technology, and only becomes infringed when this recording is copied, rather than by independently creating the same display through the same permutations.

The possibility for the 'running' of a game to be construed as a graphic work is more complicated. In *Nova v Mazooma*,<sup>30</sup> the court held that each individual frame of a video game may be protected as a graphic work.<sup>31</sup> However, in the context of the 'running' of a game, showing the moving image of a player exploring their environment, this clearly does not have the qualities of a graphic work, being defined in this case as 'static, non-moving'.<sup>32</sup> Indeed, the court confirmed that a compilation of static, frame-by-frame sequences of 'a series of still images which provides the illusion of movement'<sup>33</sup> is not deserving of an additional, new copyright over the particular arrangement of that series, as was sought in the case. This more aptly falls within the remit of the film category, which as discussed above, may also be problematic in the context of games. Such a conclusion may be satisfactory per the facts of the case, which was intended to exclude specific 'look and feel' animation sequences.<sup>34</sup> However, a strict reading of this judgement would suggest that there exists no copyright in a sequence of individual frames, only the static graphic work, and as such, the 'running' of a game would fall within this uncopyrightable category.

---

<sup>28</sup> CDPA s5(b).

<sup>29</sup> Although, see dissent in T Aplin *Copyright Law in the Digital Society: The Challenges of Multimedia* (Hart Publishing 2005) who concludes that there is no reason that the running of video games cannot be classified as a 'film' as CDPA s5(b) suggests that frames do not need to be linear or predictable to be categorised as such, but merely related.

<sup>30</sup> *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA 29 Civ 219.

<sup>31</sup> *Ibid.* para 12.

<sup>32</sup> *Ibid.* para 16.

<sup>33</sup> *Ibid.* para 17.

<sup>34</sup> In this case referring to the "in-time" movement of cue and meter (*ibid.* para 13).

Otherwise, the more conservative suggestion is that for every new frame which is generated on screen there is endlessly new copyright in graphic works, which would appear to apply even after the programmer's (or more likely the company director's) death; to give some context to this massive calculation, there can be as many as 60 frames-per-second in a PC game.

Much of this discussion returns to the difficulty of accommodating interactive, moving media within copyright. This may be reflective of the limitations of a closed-list system in the UK, and absence of a more general audiovisual category, which often results in unintuitive categorisations of new multimedia.<sup>35</sup> Certainly, this approach seems to go against the EU suggestion of a stand-alone video games category, which would specifically caution *against* dissecting games into components that fit within other categories. Nonetheless, the result under the CDPA is that video games occupy a hybrid status in copyright as a complex, multimedia work. The upshot of this system is perhaps counterintuitive: in principle, the game itself is not copyrightable, but all of its constituent elements are. In essence, these unprotectable rules and systems become bundled into protectable components, transforming it into several protectable works. As such, a video game rightsholder is entitled to exercise their exclusive rights under copyright, and anyone seeking to undertake any of the activities reserved by these rights will in theory need their permission to do so. In the eSports context, there are likely to be activities which make game content, including game footage, music etc., publicly available, whether through an in-person tournament or online streams. Displays of this audiovisual content to the public are likely to be reserved to the rightsholder by the communication to the public right.<sup>36</sup>

### 3.2 The organiser

A typical eSports tournament broadcast includes: game footage (comprising each of the elements detailed in s3.1), film footage of players 'in action' or fans in the crowd, commentary, background music and trademarks. In most cases, the focal point of the tournament will be the game footage itself (similarly to e.g. broadcasts of a football match), which may belong to a third-party publisher/developer. But many of the other aspects – the film footage of players or commentary – are likely to be original, separately protectable works of the organiser. Nonetheless, due to the inclusion of the game footage, most eSports tournaments will be

---

<sup>35</sup> See further discussion of multimedia products and the problems of a closed-list system in Aplin (n29) and IA Stamatoudi *Copyright and Multimedia Products: A Comparative Analysis* (Cambridge University Press, 2009).

<sup>36</sup> CDPA s20.

premised on obtaining permission from the game publisher/developer, regardless of the accompanying combination of original works.<sup>37</sup>

Even where these permissions are secured, tournament organisers may struggle to regulate or sanction the unauthorised usage of their tournament content where that content is primarily made up of game footage. For example, in 2018, third-party organizer Electronic Sports League (ESL), agreed an exclusive broadcasting agreement with Facebook for their upcoming tournament, which included Valve's *Dota 2*.<sup>38</sup> However, many *Dota 2* personalities who were not affiliated with ESL chose to stream the events on their own personal Twitch channels due to technical issues with using Facebook as a platform and the larger audiences available through Twitch. As a result, ESL issued notice-and-takedown requests to these personalities compelling the defector streamers to remove what they perceived to be ESL exclusive content. These requests ultimately caused upset in the gaming community and calls for Valve to rectify what was perceived as an issue in conflict with both ESL's legal standing to issue takedown notices, as well as a violation of Valve's (the rightsholder's) own *DotaTV* guidelines. Per these guidelines, anyone is free to broadcast any Dota game for their own audience using the in-game spectator tools. This is caveated on the conditions that the stream cannot be commercial, cannot use any official broadcast content belonging to the tournament organizer (such as commentary or camerawork), and that it does not compete with the original stream.

On the first point, Valve confirmed that they were the only party entitled to issue takedown notices in respect of *Dota 2* content, but noted that this does not extend to the use of the tournament organisers' content (e.g. the original components of commentary, video footage etc.). On the second point, Valve re-iterated that it is a matter of their own discretion, not the tournament organiser's, as to whether their community rules had been violated. In particular, a statement by Valve highlighted that the flexible interpretation of these rules was to enable up and coming casting figures to stream tournaments on their own channels, whilst prohibiting commercial competition from other parties looking to compete with the primary stream.

In terms of copyrightable subject-matter, cases like the above illustrate that eSports actors differentiate between game content that, whilst licensed to the tournament organiser still remains ultimately controlled by game rightsholder, and the original broadcasting content of the

---

<sup>37</sup> Blizzard, for example, requires the completion of a separate eSports licence in order for third-parties to organise tournaments. See: Blizzard 'Organise your own community eSports competition' (date unknown) <<https://communitytournaments.blizzardesports.com/en-gb/>> accessed 27 July 2020.

<sup>38</sup> S Stewart 'Valve Releases Statement on DotaTV Broadcasts Following ESL One Controversy' *IGN* (2018) <<https://www.ign.com/articles/2018/01/26/valve-releases-statement-on-dotatv-broadcasts-following-esl-one-controversy>> accessed 27 July 2020.

organiser. However, this case is also illustrative of the risk assumed by platforms and other potential stakeholders, such as sponsors, who acquire rights that may be usurped at the discretion of the rightsholder. Essentially, despite efforts to integrate original content into a tournament stream, the crucial question remains: who owns the underlying content (i.e. the game)? In this regard, the organiser simply becomes another ‘user’, despite being structurally and organizationally distinct.

### 3.3 The professional player

Conceptually, the professional player presents a challenge to many of our pre-ordained notions of usership. Most conceptions of the user, or user-generated content (UGC), are premised, explicitly or implicitly, on the idea of an amateur.<sup>39</sup> In eSports, there is the difficult task of reconciling this idea of amateur with the professionalism and dedication shown by many players, some of whom depend on eSports for their livelihood. This livelihood will be derived, at least in part, from the player’s ability to claim and control their eSports performances in order to exploit this for e.g. sponsorships or ad revenue. Surprisingly, in the eSports context there is less emphasis on control of in-game image rights such as e.g. a player avatar, as many eSports games use pre-set characters rather than a tailor-made avatar distinct to a specific player. Ownership of these types of UGC are thus less attractive than ownership of the player’s performance, which showcases their skill and creativity.<sup>40</sup> Such elements are more difficult to capture under copyright law but have led some scholars to question whether there is scope for performance rights for professional players.<sup>41</sup> Essentially, the question becomes whether the player, in showing their creativity and skills in a unique playthrough of the game, is in fact performing either a literary or dramatic work.

However, much like traditional sports, the interactive nature of games has not usually been persuasive enough to deny them copyright protection or grant any authorial interest to the

---

<sup>39</sup> See for example OECD ‘Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking’ (2007) <<https://www.oecd.org/sti/ieconomy/participativewebanduser-createdcontentweb20wikisandsocialnetworking.htm>> accessed 27 July 2020, which defines user-generated content as ‘freely provided amateur-created content’.

<sup>40</sup> For example, many eSports players may have competencies, or be renowned for playing, a particular character from a pre-created set of characters in games such as *Overwatch* – these characters are not custom-designed by the player, so there is rarely a question of intellectual property ownership. However, there may be some interesting questions about ownership of customisable player ‘skins’ (see M Iljadica, ‘User generated content and its authors’ in T Aplin (ed) *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 163–185. However, we might speculate that a discussion of e.g. trademark protection for ‘gamertags’ is imminent, given the close tie a player has with this which tends to encapsulate their eSports identity.

<sup>41</sup> Discussed in Burk (n4) and SM Kelly and KA Sigmon ‘The key to key presses: eSports game input streaming and copyright protection’ (2018) 1(1) *Interactive entertainment Law Review*, 2–16.

player. In the UK context, the *Nova* case confirmed the same. Firstly, on the question of whether it is possible to 'perform' a game, the court held that due to a lack of 'unity' a game could not be a dramatic work. The game in question, a virtual emulation of pool, was considered as 'not a work of action which is intended to be or is capable of being performed before an audience. On the contrary, it is a game.'<sup>42</sup> An initial interpretation of this leaves open the possibility that some games could be capable of being performed, if there is an element of 'action'. However, the court's further elaboration seems to suggest that *any* game cannot be performed:

Although the game has a set of rules, the particular sequence of images displayed on the screen will depend in very large part on the manner in which it is played. That sequence of images will not be the same from one game to another, even if the game is played by the same individual. There is simply no sufficient unity within the game for it to be capable of performance.<sup>43</sup>

This seems to emphatically deny the possibility of any performance rights for the player in any circumstance where a game has significant variability. Yet, case law developments since *Nova* now suggest that 'unity' should be interpreted less in the sense of absolute uniformity, and more in the sense that there is a degree of consistency and recognisable form throughout.<sup>44</sup> In a video game or eSports context, we might anticipate that consistency and recognisable form may be inferred by the fact that any permutations of possible actions take place within a defined game environment/space, regardless of how varied. However, and in any case, the court in *Nova* went on to doubly confirm that even if a game were capable of being performed, a literary work (the underlying component of the game as a computer programme) could not simultaneously be a dramatic work.<sup>45</sup>

Secondly, the court held that, per CDPA s9(3), the sequence of computer-generated frames of a video game which are displayed on a screen are authored by the person who made the arrangements necessary to create the frame images (i.e. the game publisher or developer). They explicitly rejected the role of the player in authoring anything displayed on the screen as they

---

<sup>42</sup> *Nova Productions v Mazooma Games* [2007] EWCA Civ. 219, para 116.

<sup>43</sup> *Ibid.*

<sup>44</sup> The *Nova* court's interpretation of 'sufficient unity' was based on *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056, which suggested that dramatic formats must contain a degree of repeatability from performance to performance. Subsequent developments in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch) instead defined unity as requiring more of a baseline framework from which something may be repeated in a recognisable, rather than uniform, fashion. See also *Ukulele Orchestra of Great Britain v Clausen* [2015] EWHC 1772.

<sup>45</sup> Noting that this is potentially in conflict with the decision in *The Judgement of Levola Hengelo BV v Smilde Foods BV* C-310/17, EU:C:2018:899, which defined the notion of 'work' as an autonomous concept to be given uniform interpretation throughout the EU.

'... contributed no skill or labour of an artistic kind',<sup>46</sup> instead favouring the creator who coded/created the audiovisual outputs (i.e. frames) to be displayed:

...the player is not, however, an author of any of the artistic works created in the successive frame images. His input is not artistic in nature and he has contributed no skill or labour of an artistic kind. Nor has he undertaken any of the arrangements necessary for the creation of the frame images. All he has done is to play the game.<sup>47</sup>

Under this reasoning, a video game player has very little agency to make any authorial contributions. The player only has agency when they are prompted to do so, and the outcome will always be pre-scripted by the game's creator. Elements of video game interaction are treated as invariable, with fixed components and sequences, and a static range of inputs and outputs (despite, somehow, lacking sufficient 'unity' as detailed above). Elements of display in a game are also viewed as invariable, such as the camera angle and lighting. By contrast, in traditional sports, the arrangements necessary to set up the camera angle and lighting has generally been enough to give copyright protection to the person filming the event (the 'Director's choice'<sup>48</sup>), but not in the case of video games – here, this always remains with the rightsholder. The conclusion appears to be that the users' inputs do not determine what happens in the video game, but rather the creator of the video game itself. Any user outputs are thus, automatically, an extension of the game creator's work.

A more optimistic reading points to the *Nova* facts as opening the door for a case-by-case analysis of player contributions to a game. There is a suggestion that if a player contributes 'skill and labour of an *artistic* kind' that they would be entitled to some authorial interest in their playthrough. In the eSports context, we might certainly anticipate that skill and labour on the player's behalf are present: players will be the most skilful of their respective game (with research suggesting they can make up to 10 in-game moves per second)<sup>49</sup> and laborious to the extent that the physical exertion of pressing a button can be considered as such (as is the case with photography). However, the question of whether such a contribution can satisfy the, seemingly new, independent variable of 'artistic'<sup>50</sup> tends to return to the problem of how much artistry and creativity can be attached to an activity that takes place in the context of a larger

---

<sup>46</sup> *Nova Productions v Mazooma Games* [2007] EWCA Civ. 219, para 106.

<sup>47</sup> *Ibid.*

<sup>48</sup> T Margoni 'The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection' (2016) 47(4) IIC, 386–417.

<sup>49</sup> American Osteopathic Association 'Elite-level video gaming requires new protocols in sports medicine: eSport athletes at risk for physical, psychological and metabolic disorders' *Science News* (4 November 2019) <<https://www.sciencedaily.com/releases/2019/11/191104121617.htm>> accessed 27 July 2020.

<sup>50</sup> This quality is not typically associated with the UK standard of originality – artistry as an independent criterion is typically only considered for works of artistic craftsmanship (CDPA s4(1)(c)).

system that is constrained by rules and limitations; such has been part of a longstanding debate in the traditional sports context, which is discussed below.

### 3.4 The 'sport' element

There is little doubt that eSports have modelled themselves on traditional sports leagues by monetising competitive play, inviting both a natural analogy and the same economic stakeholders. To what degree eSports may be considered analogous to a traditional sport is one of the more popular areas of debate within eSports research, with much debate on this relationship between sports philosophers.<sup>51</sup> Elsewhere, sports lawyers have seemingly debunked the question of eSports' sports status due to physicality requirements stipulated by the ECJ.<sup>52</sup> This question has been relatively underexplored from the copyright perspective, despite this categorisation having the potential to cause some conceptual boundary issues: if eSports are more like a traditional sport then they err towards being unprotectable; if they are a video game, they err towards being protectable instead.

Per Boyden, games and sports share the same qualities of uncopyrightable systems in the sense that they both comprise 'rules, space, players and goals'.<sup>53</sup> Such unfixed works of rules and systems tend to fall outwith the remit of copyright protection as any capacity for original artistic expression and creativity is necessarily limited by, and is an output of, the structure of rules and play. This limitation suggests that copyright should exclude systems where entertainment is supplied by users (players) who follow procedures, methods, rules or systems, rather than the author supplying the entertainment as such. This, in principle, is true of and applies to both sports and games. Yet, the two industries have arrived at different conclusions when it comes to questions of a product's overall copyrightability status.

In the *Premier League vs QC Leisure case*,<sup>54</sup> the ECJ confirmed that traditional sports, in themselves, cannot be copyrightable subject-matter:

... sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom

---

<sup>51</sup> To name but a few, see e.g. D Hemphill 'Cybersport' in CR Torres, *The Bloomsbury Companion to the Philosophy of Sport* (New London: Bloomsbury Publishing, 2005), SE Jenny, RD Manning, MC Keiper and TW Olrich 'Virtual(ly) Athletes: where esports fit within the definition of sport' (2016) 69(1) *Quest*, 1-18 and J Parry 'eSports are Not Sports' (2019) 13(1), *Sport, Ethics and Philosophy*, 3-18.

<sup>52</sup> C Abanazir 'E-sport and the EU: the view from the English Bridge Union' (2019) 18(3) *The International Sports Law Journal*, 102-113.

<sup>53</sup> B Boyden 'Games and Other Uncopyrightable Systems' (2011) 18(2) *George Mason Law Review*, 439-480

<sup>54</sup> The Judgement of *Football Association Premier League and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) EU:C:2011:613.

for the purposes of copyright. Accordingly, those events cannot be protected under copyright.<sup>55</sup>

This is due to the fact that any sports play or player tricks lack free and creative choices as they are constrained by a system of rules and methods. The fact that players can interact creatively with this system through tricks or complex sports plays has not been persuasive enough to give traditional sports copyrightable status; in short, player input into traditional sports represents skill, but not creativity.

This decision has been criticized as being debatable.<sup>56</sup> Clearly, such an interpretation is more readily applicable (as the court acknowledged) to competitive and adversarial sports, such as football, which necessarily rely on unscripted and unpredictable randomness as an essential component of their contest. However, we should anticipate that there may be some feasibility for pre-determined performances to be protected as dramatic works. For example, gymnastic performances executed per a script, provided it is recorded in a fixed medium, would almost certainly be considered as dramatic work akin to choreography.

Regardless of the underlying copyright status of traditional sports, several other mechanisms are in place which converge to effectively replace the need for any such protection.<sup>57</sup> For example, within this package is a valuable broadcasting right<sup>58</sup> which, quite separately from typical requirements of originality (seemingly, for the most part, absent in sports as such), protect sports broadcasts in respect of the actual signal as a valuable act of communication in itself.<sup>59</sup> Other components of the broadcast, such as company logos or theme songs, may similarly be protectable separately provided they meet relevant originality thresholds. The *Premier League* case also left open the question for national efforts to substitute the protection of sport given its 'specific nature... its structures based on voluntary activity and its social and educational function.'<sup>60</sup> The result is best described as an activity which is underlain with an *uncopyrightable* product, which is thereafter bolstered by additional separate protectable elements.

For eSports, the reverse is true. Any eSports competition revolves around a copyrighted video game, which is bolstered by *uncopyrightable* elements such as competition, rules and

---

<sup>55</sup> *Ibid.* para 98.

<sup>56</sup> See O Andriyчук 'The Legal Nature of Premium Sports Events: 'IP or Not IP - That is the Question' (2008) 7(3-4) International Sports Law Journal, 52-71 and Margoni (n48).

<sup>57</sup> For a full discussion, see Margoni (n48).

<sup>58</sup> CDPA s6.

<sup>59</sup> Detailed further in Margoni (n48).

<sup>60</sup> Article 165 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU)[2016] OJ C202/1.



structures. The potentially limited remit for scripted performances also lacks weight in the eSports context, as most eSports revolve around more adversarial and unscripted performances. Further, we should presume that any creative tricks or choices made within the game, regardless of how skillful, would also be interpreted as being within the pre-programmed remit determined by the game's publisher/developer and thus cannot satisfy the *Nova* court's artistic requirement for an authorial grant to the player. In short, eSports rightsholders have achieved what many traditional sports organizers have long sought – total exclusivity.<sup>61</sup>

As such, we might conclude that (at least from the copyright perspective), eSports are not functionally equivalent to sports. Nonetheless, traditional sports remain a useful comparator in demonstrating the complexities in this area: despite sharing similarities in the sense that they are both derived from uncopyrightable systems, the conclusions on protection are different. Throughout all considerations of copyright subsistence, there is a clear tension between the ownership and regulation of a copyrighted product, and the natural analogy and similarities of the sporting event that relies on interactivity and a constantly changing and unpredictable landscape.

#### **4. Staying ahead of the game: alternative models of copyright regulation**

The most fundamental component of eSports relates to their necessary digital medium (e.g. the 'e' in 'eSports'). Any contest between players is translated through, and facilitated by, a video game. Whilst this digital medium has been described as no more significant to eSports than e.g. the medium of water is to swimming,<sup>62</sup> by virtue of the fact this is created by subject-matter, this results in a product subject to private, commercial control. This fact changes the landscape considerably; if a sport is copyrightable, all further downstream usage of that sport may be regulated by the owner. This is an extreme evolution from the doctrinal position of games as fundamentally unprotectable systems of rules; and indeed, the control that copyright invites in this new context is difficult to reconcile with the spontaneous and unpredictable nature of (something that models itself on) sport.

The current UK approach to protecting video games seems to rely on a sliding scale of interpretation: at what point does an unprotectable system become a protectable expression? If we consider the analogue equivalent of a video game, the board game, in what circumstances

---

<sup>61</sup> The negotiation mandate for the Copyright in the Digital Single Market Directive approved by the European Parliament in September 2018 included provisions for a new Article 12a, being a new exclusive right for sport event organisers to record events and make them available through publication or broadcast.

<sup>62</sup> MR Llorens 'eSport Gaming The Rise of a New Sports Practice' (2017) 11(1) Sport Ethics and Philosophy, 1-13 see sec. 'Specific Features'.

would we permit the gamemaker to determine how, where, when and under what conditions their board game could be played? Would the fact that some board games which feature original artistic works (e.g. on a game card) or literary expressions (in e.g. *Dungeons and Dragons*) be enough to require rights from the rightsholder to hold a public tournament? At what level of complexity do these features need to reach in order to erase the uncopyrightable component? In short, when is it appropriate to limit how a game should be played? It is not immediately clear why video game rightsholders are deserving of more copyright protection than board game designers because of the complexity involved, or indeed by merit of the fact this takes place via a digital medium.

As courts emphasise the exclusivity of the rightsholder, this important policy issue appears to have been missed in the UK context. At the root of this question is how copyright negates the inchoate nature of games, which both invite and depend on user interactivity. Inputs by the player, despite more closely resembling the random and unpredictable elements of sports performances, become extensions of the rightsholder's interest in the game. This simultaneously denies any third-party interests from tournament organisers, who are also very limited in the exceptions they may claim in making such content available. In doing so, the UK perspective limits eSports conceptually to the remit of 'just a game'.

Having outlined copyright subsistence issues in eSports, we can now offer a reflection on how to perceive games in the light of this new, professionalised competitive context. Do eSports not also have a 'specific nature... its structures based on voluntary activity and its social and educational function'<sup>63</sup> akin to traditional sports, worthy of further consideration? Despite some health concerns and worries concerning violent content,<sup>64</sup> there is nothing to suggest that eSports do not carry many of the same benefits as traditional sports. During the COVID pandemic, eSports have proven that gaming in this context is mainly a means of socializing and connecting with others. eSports are more accessible than many traditional sports, with no geographical discrimination, 'anyone being allowed to play' models,<sup>65</sup> and potentially more opportunities for access for people with disabilities. At an industry level, there is the capacity to create jobs through marketing support and management, whilst culturally introducing the public

---

<sup>63</sup> See TFEU n60.

<sup>64</sup> Many games on which eSports are based depict violence, involving weapons, fighting, blood, and gore (e.g. *Call of Duty*). Whilst both shooting and fencing are recognised Olympic sports, the depiction of blood or gore represented a "red line" for eSports (in contrast to the 'civilised expressions of violence' in traditional sports) (see BBC 'eSports 'too violent' to be included in Olympics' (4 September 2018) <<https://www.bbc.co.uk/news/newsbeat-45407667>> accessed 27 July 2020).

<sup>65</sup> See for example the *Fortnite* World Cup 2019 where 40 million players applied to participate in the tournament.

to the idea of game spectatorship. As such, a pro-user copyright approach has strong policy merits in the eSports context.

Many scholars have concluded similarly, highlighting that the current means of patchwork protection are inadequate with some suggesting the creation of a regulatory body,<sup>66</sup> or custom-made copyright exceptions.<sup>67</sup> However, this article suggests that we may instead look to the existing, broader principles of copyright law to come to a more satisfying conclusion on how copyright can help eSports flourish. To this end, this section focusses on one narrow possibility of altering the status of the 'running' of a game, which is most crucial for the new eSports actors – the organisers and professional players. Indeed, and as sketched above, under existing UK precedent, it is difficult to find a fitting (or satisfying) categorisation for the running of a game, showing the player in a game environment interacting with it in a unique, unpredictable way. This section offers suggestions on how this may be adapted.

#### 4.1 Looking to the past: the South Korean perspective

As a starting point to this discussion, it should be understood that the UK treatment of eSports is culturally specific. Indeed, many of the copyright-related debates in eSports have occurred between (smaller) Asian companies and (larger) US games publishers (such as Blizzard or Riot Games). In scoping this problem-for-the-future, this article also now looks to the past – to the genesis of eSports as a predominantly South Korean commodity. South Korea, which is largely accepted to be the home of eSports and remains the largest market today. Here, eSports is a household term, and has been described as the 'national sport'.<sup>68</sup> Much of this support is cultural, with video gaming not only being an acceptable and encouraged pastime, but also a social event – widespread PC Bangs (cafes) function as popular meeting spaces for multiplayer LAN gaming; this is in stark contrast to the more Western perception of games as a primarily private, and occasionally taboo, hobby.

Indeed, one of the earliest copyright-related conflicts in eSports exemplifies this cultural tension.<sup>69</sup> The quasi-official governmental Korean eSports regulatory body, KeSPA, organised and produced *StarCraft* tournaments, a game developed and published by US company Blizzard

---

<sup>66</sup> See LL Chao "You Must Construct Additional Pylons": Building a Better Framework for eSports Governance' (2017) 86(2) Fordham Law Review, 737-765 and Rogers 'Crafting an Industry: An Analysis of Korean Starcraft and Intellectual Properties' (24 August 2012) <<https://jolt.law.harvard.edu/digest/crafting-an-industry-an-analysis-of-korean-starcraft-and-intellectual-properties-law>> accessed 27 July 2020.

<sup>67</sup> Rogers *ibid.*

<sup>68</sup> S Evans 'Video gaming: South Korea's new national sport?' (9 December 2015) BBC, accessed 27 July 2020.

<sup>69</sup> See full analysis by J Joo "Public Video Gaming as Copyright Infringement' (2011) 39 AIPLA Q.J., 563 – 601.

Entertainment. At this time, it was generally agreed that KeSPA had been responsible for the development and popularisation of the eSports industry, and had generated a substantial amount of goodwill for the *StarCraft* brand.<sup>70</sup> In 2007 KeSPA sold broadcasting rights to these competitions to other South Korean companies, a move which was in turn challenged by Blizzard. KeSPA, in their defence (and subsequent challenge against an exclusive broadcasting deal for *Starcraft II* between Blizzard and another company), initially submitted that eSports, as sports, were fundamentally uncopyrightable and thus Blizzard had no legal standing to assert broadcasting rights over uncopyrightable subject-matter. Failing this, they submitted that the transformative aspects they had introduced to the underlying video game (e.g. commentary, tournament organisation, merchandise, filming etc.) meant that any underlying copyrightable matter had been sufficiently transformed to make this an original product of KeSPA. When both of these points failed, KeSPA went on to argue that eSports should be regarded as a hybrid between a (private) game product and (uncopyrightable) sport. In suggesting this, KeSPA highlighted that such a separation was necessary for the sake of the growth of the eSports industry without running the risk of monopoly:

If a game achieves success as an iconic eSports competition, and the developer pursues profits by declaring that their copyright is valid in the sports industry as well, then that is a large obstacle for eSports growth and establishment as a future sports-entertainment industry.<sup>71</sup>

Nonetheless, KeSPA could not dispute that Blizzard owned the exclusive rights to broadcast the game content, irrespective of any claim of transformative or adapted use.<sup>72</sup> The dispute was subsequently settled outside of court, and KeSPA have since discontinued *StarCraft* based competitions.<sup>73</sup> However, the concerns of stunted growth as raised by KeSPA at the time are now beginning to look well-founded as rightsholders increasingly crowd-out third-party tournaments in favour of in-house arrangements.

---

<sup>70</sup> See Rogers n66.

<sup>71</sup> English transcription of KeSPA statement provided by Waxangel '[Update] KeSPA Speaks Out on Intellectual Property Rights' (3 May 2010) *Team Liquid* <<https://tl.net/forum/brood-war/123275-update-kespa-speaks-out-on-intellectual-property-rights>> accessed 27 July 2020.

<sup>72</sup> See statement by Blizzard in K Tong-hyung 'Blizzard vows to take MBC to court' <[http://www.koreatimes.co.kr/www/news/tech/2010/12/133\\_77381.html](http://www.koreatimes.co.kr/www/news/tech/2010/12/133_77381.html)> (12 February 2010) Korea Times, accessed 27 July 2020:

'StarCraft is not a public domain offering, as Blizzard has invested significant money and resources to create the StarCraft game and the overall StarCraft universe (...) Classifying StarCraft and other e-sports as part of the public domain deprives developers such as Blizzard of their IP rights. There will be no incentive to do what Blizzard had done to balance the games for competition, which is a more difficult task than creating a normal game.'

<sup>73</sup> Noting that a competition/antitrust angle was not discussed but may nonetheless be appropriate (e.g. refusal to deal or essential facility doctrine, or 'copyright misuse' as proposed by Miroff (n7)).

Legal approaches to eSports are notably distinct here too. At their earliest inception, the South Korean Computer Programs Protection Act 1986<sup>74</sup> recognised video games as a computer program in an analogous manner to the more UK 'software code as literature' treatment. However, where Western countries tend to protect video game outputs as audiovisual works, South Korea explicitly recognises the 'running' of a video game as a *cinematographic* work, being a narrower category within the overarching branch of audiovisual.<sup>75</sup> This is an important distinction, as the South Korean Copyright Act of 2009 permits the performance and broadcasting of cinematographic works to the public, provided no fee is charged in respect of this performance. The rationale appears to be that the display of this work is simply a performance of the rightholder's purchasable merchandise, for which no fee has been obtained to the loss of potential rightholder revenue.<sup>76</sup> Experiential play (e.g. the act of playing a game and creating outputs) and observed play (e.g. watching those outputs) are therefore distinct.<sup>77</sup> Or to express this in another way, the act of playing a game for plays-sake and for sports-sake (which invites spectatorship) are distinct. This distinction, combined with other factors (such as an analogous 'fair use' and public quotation provision)<sup>78</sup> creates a legislative environment which is much more tolerant of eSports, and sets a more distinct boundary for rightholders. As similar distinctions are not recognised in the UK or US (of which the eSports creators so often inhabit), exclusivity has instead become the defining element of how eSports are regulated.

At one point, it would have been possible to adopt the Korean perspective meaningfully into the UK framework. Essentially, this could have led to a clarification that the 'running' of a game (e.g. a recording of a playthrough) was a film in its own right, made by the person creating the recording who has contributed their skill and labour in an artistic manner to create that unique sequence. This would have fit neatly into the pre-*Karen Murphys*.72(1)(c) CDPA world, allowing broadcasts of eSports in free-to-enter public spaces. However, such an approach seems no longer feasible (if we interpret the *Nova* case conservatively) or even useful (if it leaves no opportunity to widen dissemination of broadcasts in free-to-enter public spaces post-*Karen*

---

<sup>74</sup> Computer Programs Protection Act (Act No. 3920 of December 31, 1986, as amended up to Act No. 5605 of December 30, 1998).

<sup>75</sup> Copyright Act of 1957 (Act No. 432 of January 28, 1957, as amended up to Act No. 5015 of December 6, 1995), Art 2.

<sup>76</sup> *Ibid.* Art 29(2).

<sup>77</sup> Noting that this may open the ambit for a defence of communicating protected content to a 'new public' (see The Judgement of *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764).

<sup>78</sup> Copyright Act of 1957 (Act No. 432 of January 28, 1957, as amended up to Act No. 5015 of December 6, 1995), Art 28 ('Quotations from Works Made Public') and more general fair use preamble in article 1 ('... to promote fair exploitation of works in order to contribute to the improvement and development of culture').

*Murphy*). The Korean perspective is nonetheless illuminative as to an alternative view of eSports and their copyright regime.

#### 4.2 Looking to the future: a new UK context

By contrast to the Korean perspective, UK courts have rejected any distinction between experiential and observed gaming. In the *Nova* case, arguments that the literature aspect of games (e.g. the code) could be performed as a dramatic work for public spectacle were rejected, and thus seemingly rejecting the notion that gameplay can be performative. Here, the court held that any sequence of audiovisual outputs is entirely dependent on the experiential and dynamic nature of games inputs and therefore no outcome is predetermined and is entirely dependent on the unique inputs of the player; this capacity for variance in outputs results in gameplay being considered a nonunified, and non-dramatic work. Of course, the dramatising of more traditional literature scripts can also be dynamic and interpretative, varying in terms of outputs from play-to-play. However, at least in UK courts, there appears to be a differentiation between original interpretations depending on whether the medium is a human (e.g. in a play) or a computer program (e.g. a video game). In the latter, choice is perceived as constrained by a program which has no capacity to be interpretative or substitute instructions, thus not resulting in an original output irrespective of dynamic human inputs.

In short, we have a tendency to not associate creative performances with play or games, which are necessarily about the pursuit of a goal, resulting in the repeated rejection of game play as expressive (the same is also confirmed in the US)<sup>79</sup>. Conversely, the South Korean perspective of game outputs as cinematographic by comparison presupposes performance without explicitly categorising them as such, apparently acknowledging that experienced and observed gameplay is quite distinct. This categorisation instead suggests that some form of original expression is evident in a human playing a video game. As aforementioned, this has led KeSPA other South Korean broadcasters to maintain that eSports are a *hybrid* of a commercially owned product and sports entertainment; thus, whilst some authorial claims may be legitimate, others may not.

Whilst we are unlikely to recategorize video games as a different subject-matter (as aforementioned, the dramatization and performance of video games have been consistently rejected by courts the world over), the Korean argument is not dissimilar to the ECJ's categorisation of video games as having a 'unique creative value'. We may conclude that video games can be conceptualised as having three elements: the software, which bundles rules and

---

<sup>79</sup> *DaVinci Editrice S.R.L. v Ziko Games, LLC*, 183 F. Supp. 3d 820, 828-30 (S.D. Tex. 2016) – instead, video games create an 'environment *forexpression*' (at 13).

systems into a protectable literary work; the audiovisual content, which displays pre-set and pre-determined visual and aural outcomes and; the play, running or competition of a game, which is a system whose value is dependent on user inputs.

The latter element, the recognition of play and running as a component of a video game, may provide a suitable limitation or natural endpoint to rightsholder control in the eSports industry. The running of a game, being a functional output from a system of rules, showcasing the skill of the player, is uncopyrightable. Effectively, this is an extension of the gameplay rule, which has worked to exclude these matters from the ambit of copyright – except when they're displayed on a screen. In illustrating this point further, the parallel between traditional sports and eSports is helpful. In traditional sports, sports performances cannot be protected by copyright because they are not considered to be an artistic or creative expressions, being constrained by the rules of the game and necessary to the functional outcome of winning the match. If a sport performance cannot be authored, it follows that a game performance also cannot be authored – in short, it should fall outwith the boundaries of copyright. It is not an extension of the rightsholders copyright, nor something that would automatically attract protection when created – this is a longstanding assumption that must be challenged.

In doing so, this provides a way of interpreting an existing, built-in limitation of copyright without introducing a narrowly-defined exception. At the same time, it is capable of preserving rightsholder interests which more clearly fall within the ambit of copyright. Indeed, by excluding the running of a game from the ambit of copyright (an extension of the existing gameplay rule), rightsholders themselves are still entitled to sell their product, retain interests in the many other copyrightable components contained within a game and indeed, to create their own eSports tournaments and streams featuring player runs. But in respect of the latter, under this new interpretation they would not be the only party entitled to do so.

## **5. Conclusion**

eSports is an industry characterised by its youth, both in the sense of being a young industry and overwhelmingly made up of a young generation of players. This brings with it is the suggestion of unconstrained potential and impetus for change, but also new and disruptive forces that have so far received little legal scrutiny. This article has analysed the question of copyright in eSports from the perspective of UK law, mainly focussing on subsistence and subject-matter issues. This in itself is a complex, multi-layered topic, with many core legal issues as of yet unresolved. However, by examining the subsistence and subject-matter that underlies this new industry, this allows us to make informed decisions about what is actually being claimed – where do eSports

fit within the copyright spectrum? This critical assessment challenges the assumption that copyright will attach to all aspects of a game without actually engaging with the restrictions of the UK system, which has been relied to legitimise the control of eSports. Instead, as has apparently been the suggestion at the inception of eSports in South Korea, some authorial claims are legitimate, some are not.

By evaluating the conceptual 'bones' of eSports using copyright as an analytical tool, this can better inform any future regulations which may be imposed on the industry; any such regulations should have a holistic appreciation for all of the objectives of fostering creativity, with account taken of all the relevant stakeholders involved. This article has highlighted the potential inputs and creativity offered by actors other than the rightsholder themselves, namely the tournament organiser and professional player. To this end, this article suggests a reading of broader copyright principles that may create an environment for expressiveness through play, and that can be permissive of new forms of creativity, whilst at the same time reserving many of the legitimate interests of the rightsholder.





CREATE

**UK Copyright and Creative Economy Centre**

School of Law / University of Glasgow

10 The Square

Glasgow G12 8QQ

[www.create.ac.uk](http://www.create.ac.uk)

2021/1 DOI: [10.5281/zenodo.4524517](https://doi.org/10.5281/zenodo.4524517)

CC BY-SA 4.0

In collaboration with:

