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European Copyright Directive and the Growing Copyright Problem of E-SPORTS

Connor Jackson*

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In an age where definitions of privacy and social norms are evolving, so has the definition of “athlete,” thanks largely to the rise of the E-sports industry.¹ While the general population might refer to participants in this gaming industry as “nerds,” the fans of this growing, worldwide, multibillion-dollar industry might refer to the fast thumb-twitching basement dwellers as the future of modern athletic specimen. This is a new world of sports. Its field exists entirely in the digital world where athletic ability is no longer defined by “traditional” strength or talent. And, while both traditional sports and E-sports have dedicated fans that tune in for matches, games, and other major or notable events, the majority of E-sport viewership takes place on internet platforms.²

Unlike traditional sports, E-sports have grown because E-sports have grown exclusively through online streaming using service providers.³ The growth of this new industry is occurring in the digital age, at a time where legal frameworks must adapt to the new internet market place.⁴ Internet law has developed with the intent to protect both the rights of copyright-holders and important societal values such as public policy and fair business practices.⁵

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¹ Stephen D. Fischer, Foster Pepper, PLLC, *Streaming and Copyright Law: A Fast-Developing Area of the Law League of Legends Article Series* (2014).

² See Dan L. Burk, *Owning E-Sports: Propriety Rights in Professional Computer Gaming*, 161 U. Pa. L. Rev. 1535 (2013).

³ *Id.* at 1541-43.

⁴ *Id.*

⁵ *Id.*

However, as internet businesses have formed and industry giants have become established, the balance of protections have tipped in the favor of large service providers.⁶ The internet has grown and developed into a community for free expression and sharing of information.⁷ As the internet has developed, businesses and industry in the digital world have been able to evolve in a community that has only ever been lightly regulated.⁸ Platforms that were once viewed as providing a space to allow artists to share their work and spread information, such as Google, Facebook, and YouTube, have been able to thrive as platforms that take advantage of artists' works by not having an obligation to provide proper protections for broadcasting copyrightable works.⁹ Governments and legislative bodies have begun to create restrictions in order to protect the rights of the digital community's creatives.¹⁰

Large online sharing platforms have proved they are capable of removing artist's works from the platform if the artists complain about copyright protections.¹¹ However, as the digital world becomes more pervasive, these platforms have gotten away with too much control over artists' rights and content, limiting creatives' bargaining power to protect themselves.¹²

The European Union has proposed a Copyright Directive ("the Directive") that aims to protect the principle of fair pay for European creatives.¹³ The European Union believes that legislation is necessary in order to ensure that copyright law is observed in the digital world. The

⁶ See The Star Online, *Brussels Gripped by Lobbying War Over Copyright Law* (Aug. 28, 2018), <https://www.thestar.com.my/tech/tech-news/2018/08/28/brussels-gripped-by-lobbying-war-over-copyright-law/>.

⁷ European Commission Press release IP/16/3010, *The State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate* (Sep. 14, 2016).

⁸ *Id.*

⁹ *Brussels Gripped by Lobbying War Over Copyright Law*, *supra* note 6.

¹⁰ Asha Velay, *Using the First Fair Use Factor to Screen DMCA Takedowns*, 17 Va. Sports & Ent. L.J. 54, 58-60 (2017).

¹¹ See Alexandra Giannopoulou, *Alexander Von Humbolt Institut Für Internet Und Gesellschaft, Proposed Directive on Copyright in the Digital Single Market: A Missed Opportunity?* (Sep. 11, 2018),

<https://www.hiig.de/en/proposed-directive-on-copyright-in-the-digital-single-market-a-missed-opportunity/>.

¹² *Id.*

¹³ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final [hereinafter "EU Copyright Directive"].

Directive is an effort to protect the negotiating rights of European creatives, which need to be strengthened in order to create a more equal playing field for European creatives on large “American” platforms.¹⁴

While the proposal originally spawned from copyright infringement claims coming from “traditional” artists and journalists, its effects have permeated the digital world with the onset of new online industries, including E-sports. To ensure the continued and sustained success of E-sports, the copyright issues of ownership and control on large media platforms need to be addressed.¹⁵

As E-sports continue to grow, the athletes continue to gain fame and recognition for their play on the internet.¹⁶ However, the new “athlete” raises issues of copyright law that have never been addressed or even contemplated.¹⁷ The problems that have cropped up concerning content and how to use it or share it could not have been imagined when legislation and common law were established.¹⁸ The copyright issues arising from this unique sport are complex because they don’t meet the standards already established in traditional sports such as the Olympics, NFL, or NBA.¹⁹ In the foreseeable future, the issue of copyright in E-sports will have to be addressed by all legislative bodies and the European Union’s new copyright directive could provide a solution that supports common law and ultimately benefits these modern-day athletes.²⁰

This article will discuss (1) the European Union’s Copyright Directive proposal and the lobbying that has been done surrounding the proposal, (2) the comparison of the United States’

¹⁴ *Proposed Directive on Copyright in the Digital Single Market: A Missed Opportunity?*, *supra* note 11.

¹⁵ *See* Burke, *supra* note 2.

¹⁶ *Id.*

¹⁷ *Id.* at 1537.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1550-53.

internet copyright laws with the Directive, (3) how the Directive would more effectively help the growth of the E-sports industry than U.S. copyright law.

I. European Union Directive

“Digital technologies, widespread broadband connections and reliance on the internet in daily life have transformed the way creative content is produced, distributed and used.”²¹ The European copyright law was first established under Article 36 which allows for restriction on trade between member states, if justified by the protection of industrial and commercial properties.²² The law was later developed through directives, made under the internal market provision of the treaties, in order to harmonize the laws of European Union member states.²³

The internet has become a key distribution channel, and new economic players, including online platforms that were unfathomable 20 years ago, have become well-established online services that allow the mainstream market to have access creative content.²⁴ The internet and digital age have created an environment where digital content can easily be copied and used, which has given rise to issues of online copyright and property rights.²⁵ The European Union believes that European copyright laws have to adapt so that all market players and citizens can “seize the opportunities of the new market.”²⁶

The modernization of the European Union’s copyright rules was originally outlined in 2014 by President Juncker’s Political Guidelines for the incoming Commission and was further

²¹ The State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate, *supra* note 7.

²² Alexandra Giannopoulou, *supra* note 11.

²³ *Id.*

²⁴ *Id.*

²⁵ EU Copyright Directive, *supra* note 13

²⁶ *Id.*

outlined in the digital single market strategy.²⁷ The Juncker Commission aimed to update the European Union's issue of fragmentation and friction resulting from the legal complexities of business interactions between the member states.²⁸

The goal of creating a digital single market is a market where goods, services, capital and data are guaranteed, and "where citizens and businesses can seamlessly and fairly access online goods and services, whatever their nationality, and wherever they live."²⁹ For the purpose of copyright, the Commission has identified that the modernization aims to protect right-holders copyright rights online, and to improve the position of right-holders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.³⁰

Currently, online platforms and aggregation services capitalize on the lack of clarity on the definition of copyright in the online world.³¹ The European Union has been debating whether the current set of recognized copyright laws and liability exemptions are sufficient for the growing digital world.³² The European Union policy goals for copyright aim to protect citizens access to copyright protected information, facilitate new uses in fields of research and education, and clarify the role of online services in the distribution of online works.³³

Rights-holders face difficulties seeking to license their online rights and to be remunerated for the online distribution of their works.³⁴ This puts the development of European creativity and

²⁷ The State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate, *supra* note 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See EU Copyright Directive, *supra* note 13.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

production of creative content at risk.³⁵ Press publishers and other creatives negotiating power in licensing also affects the citizens' access to information.³⁶

The European Union has been introduced to several online copyright infringement claims that illustrate the problems of enforcing content copyrights on online platforms. The Court of Justice established that national court could allow content filters to be enforced in order to force platforms to identify and prevent unlicensed content from being accessed, however, the only guidance the Court offers is that the filter system cannot be too complex or costly to outweigh the "cost of doing business".³⁷ The Court has not established a rule that establishes requirements for online service providers to follow in order to protect content rights holders.³⁸

The rechtbank van eerste aanleg te Brussel, or the Court of First Instance, Brussels, referred the issue of whether national courts are precluded from issuing an injunction against a host service provider to install a system for filtering the information stored on its servers by service users, exclusively at the service providers expense, in order to identify audio visual works that held rights and subsequently block the exchange of those files to prevent those works from being made available to the public in breach of copyright.³⁹ The court explained that courts must balance the protection of intellectual property rights enjoyed by copyright-holders and the freedom to conduct business.⁴⁰ The court held national courts are precluded from issuing an injunction requiring such a filtering system because the injunction would result in a "serious" infringement of the hosting service provider's freedom to conduct its business since the system

³⁵ Giannopoulou, *supra* note 11.

³⁶ *Id.*

³⁷ Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012 E.C.R. 85.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Componisten en Uitgevers CVBA (SABAM)* [2012] E.C.R. 85, ¶ 42.

would require costly measures that outweigh and over-complicate the measures necessary to ensure protection of intellectual property rights.⁴¹

In a similar case, the Oberster Gerichtshof, or the Supreme Court of Austria, referred a case to the Court of Justice that found that a less specific content filtration system could be implemented by the court as an injunction.⁴² An internet service provider allowed its customers access to a website placing protected subject-matter online without the agreement of the right-holders.⁴³ The Court held that European law did not preclude a court from issuing an injunction prohibiting such access as long as the injunction did not specify the measures that access provider must take.⁴⁴ The access provider would be protected from breach of that injunction if it could show that it had taken all reasonable measures that prevented, made difficult, or seriously discouraged users unauthorized access to the protected subject-matter, so long as the measures do not unnecessarily deprive internet users of lawful access to the content by creating complex measures overcomplicating the protection of intellectual property rights.⁴⁵

The strength of online service providers in the market have made it increasingly difficult for Member States to individually enforce stricter copyright practices.⁴⁶ The Directive attempts to provide a baseline standard to enforce a common level of copyright protection in Member States, and provide “teeth” to enforce copyright rights.⁴⁷

This legislation comes about because of unrest from European businesses and the large tech companies, specifically American tech companies. Axel Voss, a member of European Parliament (“MEP”), has echoed the belief that huge American platforms make money while European

⁴¹ *Id.* ¶ 51.

⁴² Case C-314/12. *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 E.C.R. 192.

⁴³ *Id.* at 66.

⁴⁴ *Id.*

⁴⁵ Giannopoulou, *supra* note 11.

⁴⁶ *Id.*

⁴⁷ *Id.*

creatives often do not get a share of the profit off of their works and eventually die out.⁴⁸ The Directive is intended to address the issues recognized by the European Union, which has taken note of the actions of individual member states attempting to protect their journalists and news outlets, but have, thus far, lacked the legislative “teeth” to provide an actual threat to stop large internet platforms from unfair practices.⁴⁹

Belgium, Germany, and Spain created legislation to help protect newspapers and journalists whose copyrightable works were being misused, and attempted to force platforms using anything beside a headline to license the material.⁵⁰ However, individually, the member states lacked bargaining power to enforce such legislation.⁵¹

Germany passed the Leistungsschutzrecht für Presseverleger bill, which provided German publishers the explicit right to collect a licensing fee on any content the aggregator published beyond the headline.⁵² Google complied with the legislation, but instead of licensing the material, Google chose not to provide a lead or thumbnail photo from an article unless the publication waived their right to collect licensing fees.⁵³

Eventually VG Media, a consortium of 200 German publishers, including Axel Springer, Germany’s largest news publisher, attempted to stop Google and stated that Google could not publish snippets of text and images from their publication without a license.⁵⁴ Google complied, but the companies lost significant business, which was shown through Axel Springers’ decrease of 40% of traffic by clicks through Google, and loss of 60% of traffic through Google News.⁵⁵

⁴⁸ See *Brussels Gripped by Lobbying War Over Copyright Law*, *supra* note 6.

⁴⁹ *Id.*

⁵⁰ Mark Scott, *Google News to Shut Down in Spain*, Bits (Dec. 11, 2014), <https://bits.blogs.nytimes.com/2014/12/11/google-to-drop-its-news-site-in-spain/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Spain attempted similar legislation as Germany, but Google responded by pulling Google News out of Spain all together. Google had controlled 85% of the market share prior to leaving, so the Spanish market was significantly hurt.⁵⁶ The control Google had over the online market created an unfair bargaining position from the service platform which caused member states' publishers to comply with Google's practice or lose a significant amount of business.⁵⁷

Seeing the individual member states' inabilities to create law that adapts to the issues with digital copyright and online platforms while creating a check on online content platforms, the European Commission responded by proposing this Directive.⁵⁸ In July 2015, the European Parliament published the resolution on the assessment of the implementation of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, originally drafted by the Member of European Parliament ("MEP"), Julia Reda.⁵⁹

The European Commission introduced the initial proposal in September 2016.⁶⁰ Following deliberations and the voting processes from the various committees of the European Parliament, the proposal was presented in the plenary session of the European Parliament.⁶¹ MEPs voted on July 5, 2018 not to proceed to the negotiation stage, but instead to reopen the Directive for debate in September 2018.⁶²

On September 12, 2018, the updated position of the Parliament was approved with 438 in favor and 226 against, which would allow that trilogue negotiation to begin among the European

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *EU Copyright Directive*, *supra* note 13.

⁵⁹ Alexandra Giannopoulou, *supra* note 11.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Commission, the Council of the European Union and the European Parliament with an expected conclusion on January 2019.⁶³

The Directive on copyright in the digital Single Market 2016/0280 is a controversial proposal intended to ensure “a well-functioning marketplace for the exploitation of works and other subject matter...taking into account in particular digital and cross-border uses of protected content.”⁶⁴ The proposal had legal basis under Article 114 TFEU, which confers upon the European Union the power to adopt measures that aim for the establishment and functioning of the internal market.⁶⁵

As a directive, the proposal only forces member states to implement the minimum standard required by the Directive, however, each state can choose to increase their regulation if they choose.⁶⁶ The Directive has gained particular push back because of Articles 11 and 13, which place the increased liability on online platforms.⁶⁷ In regard to the E-sports industry, Article 13 specifically strengthens this growing industry and will help to strengthen the growth of the sport in the European Union.⁶⁸

Currently, publishers of press publications must be assigned copyright by authors and then must prove their rights of ownership for each individual work. Article 11 of the EU Copyright Directive grants direct copyright over “online use of their press publications by information service providers.”⁶⁹ Article 11 establishes protection for press publications concerning digital

⁶³ Emma Woollacott, *European Parliament Approves ‘Worst Possible’ Copyright Rules*, Forbes (Sep 12, 2018), <https://www.forbes.com/sites/emmawoollacott/2018/09/12/european-parliament-approves-worst-possible-copyright-rules/#5bfcc50f351b>.

⁶⁴ *EU Copyright Directive*, *supra* note 13, at 5.

⁶⁵ *Id.* at 4.

⁶⁶ Giannopoulou, *supra* note 11.

⁶⁷ Monika Ermert, *European Court of Justice Tightens Screws on “Streaming,”* Intellectual Property Watch (Mar. 28, 2017), <http://www.ip-watch.org/2017/04/28/european-court-justice-tightens-screws-streaming/>.

⁶⁸ *Id.*

⁶⁹ *EU Copyright Directive*, *supra* note 13, at 18.

uses is a non-waivable remuneration right. Also known as the “Snippet Tax,” the article calls for news aggregators like Google to pay media companies a link tax when sharing their content.⁷⁰

The purpose of Article 11 is to hold news aggregators accountable for paying publishers for using snippets of their articles on their platforms.⁷¹ This article is powerful for online broadcasting platforms because broadcasting platforms are responsible for getting licenses for content from content providers.⁷²

The other article in controversy is Article 13. The so-called “meme ban” states that online content sharing service providers and right-holders must cooperate in good faith in order to ensure that unauthorized protected works or other subject matter are not available on their services.⁷³ The proposal would replace the current exemption that provided companies a safe harbor protection that allowed online content sharing service providers to act as “mere conduits” for content.⁷⁴ This means that the Directive would withdraw the safe harbor from any service that “optimizes content including promoting, tagging, curating, or sequencing a sites contents.”⁷⁵

Article 13 establishes that websites hosting large amounts of user-generated content are liable for infringing content.⁷⁶ However, the article does not offer a requirement for license to content that shares information through “mere hyperlinks which are accompanied by individual words.”⁷⁷ The proposal also offers terms to enforce liability of the content platforms.⁷⁸ The

⁷⁰ Giannopoulou, *supra* note 11.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Matt Reynolds, *What is Article 13? The EU's divisive new copyright plan explained*, WIRED, (Nov. 13, 2018), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>.

⁷⁴ Glyn Moody, *Illegal Memes? Weak Safe Harbor? Unpacking the Proposed EU Copyright Overhaul*, arsTechnica, <https://arstechnica.com/tech-policy/2018/06/illegal-memes-weak-safe-harbor-unpacking-the-proposed-eu-copyright-overhaul/>.

⁷⁵ *Id.*

⁷⁶ EU Copyright Directive, *supra* note 13, at 26.

⁷⁷ *Id.* at 19.

⁷⁸ *Id.* at 18.

service platform would have a new, conditional exemption to liability based on the implementation of “effective and proportionate measures” to “prevent the availability of specific unlicensed works identified by rights-holders, acting ‘expeditiously’ to remove them, and demonstrating the ‘best efforts’ have been made to prevent future availability.”⁷⁹ The proposal will allow any licenses granted to the content host to extend to their users as long as those users are not acting on a commercial basis.⁸⁰

The Directive is projected to have financial ramifications due to service providers having to pay licensing fees or lose content, and pay to enforce the content filters has created a “lobbying war” surrounding the Directive.⁸¹ The threat of this legislation showed that the European Union had the “teeth” to threaten these large platforms, and these service providers have taken notice.

Supporters of the Directive consist of artists and traditional media, the content providers in desperate search of revenue at a time when most things can be seen on the internet for free.⁸² While critics including Silicon Valley and the Computer and Communications Industry Association, who lobbies for the digital industry, argue that the change will lead to blanket censorship of platforms that have become hubs for creativity.⁸³ Some MEPs have stated that the campaigning efforts of unprecedented violence orchestrated by GAFA (Google, Apple, Facebook, Amazon) was only comparable to that of the arms industry.⁸⁴ MEP Virginie Rozier

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at 15.

⁸¹ *Brussels Gripped by Lobbying War Over Copyright Law*, *supra* note 6.

⁸² Joanna Plucinska, *European Parliament Backs Copyright Reform, Dealing Blow to Tech Giants: In the End, the European Parliament Backs Media Groups, Publishing Houses and Record Labels Against the Tech Industry and its Allies*, Politico (Sep. 12, 2018), <https://www.politico.eu/article/european-parliament-axel-voss-backs-copyright-reform-against-tech-giants-google-facebook/>.

⁸³ *Brussels Gripped by Lobbying War Over Copyright Law*, *supra* note 6.

⁸⁴ *Id.*

stated that digital companies had used huge resources to create pseudo citizen campaigns and that she received more than 40,000 emails against the law three weeks before the July vote.⁸⁵

While supporters claim a need to protect copyrights, the opposition argues that such regulation would limit the freedom of expression.⁸⁶ In order to comply with such lofty filtering requirements, many believe the work load would require technologies to filter through all of the content and such technology would not be able to recognize nuance required in identifying fair use.⁸⁷ The lack of nuance would cause possible non-infringing content to be found as infringing, and could cause a significant limitation of accessible content.⁸⁸ The main contention of oppositionists is the practical challenge of enforcing the Directive by service providers because of the cost and the effect that such cost would have on start-up and smaller online service providers.⁸⁹

The legislation has caused a rise in tension because the ramifications of such a Directive would create at the minimum a standard of copyright protection for copyright-holders that would cause large platforms to adapt to comply with stricter laws for creatives that would cause loss in profits.⁹⁰

II. US Copyright Law and the Internet

The United States has established regulations and common law to adapt right-holder's protections to the digital age. The United States copyright protections are rooted in the Constitution under Art. 1 Section 8, Clause 8, which states that "at limited times creatives have an exclusive right to their respective writings and discoveries in order to promote the progress of

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

science and useful arts.”⁹¹ The United States Copyright Act of 1976 controls the rights of copyright.⁹²

As the internet has grown, similar to how the European Union has approached digital copyright, Congress attempted to balance the societal benefits of the internet against possible effects on copyright-holders whose material was infringed online.⁹³ While the European Union has shown a greater effort to protect the rights of creatives, many argue that Congress consulted the technology and content industries in order to protect their interests in drafting statute and regulation for online copyright rights and failed to protect the rights of content right-holders.⁹⁴

In order help grow the internet, Congress established the Digital Millennium Act (DMCA) which provided limited liability to sites hosting user generated content in order to help grow the internet.⁹⁵ The main problem with liability stems from the notice-takedown regime that affords online intermediaries liability protection for the content posted by users provided that they remove “known” infringing content when it comes to their attention.⁹⁶ This limits the liability on these providers and puts the responsibility on the copyright owners.⁹⁷

There are similarities in the language used between the European Copyright Directive and the DMCA. The DMCA requires takedown of “known” misused content, which is explained using very content server friendly language to define “known.”⁹⁸ The Directive states that “appropriate and proportionate” efforts must be used to prevent unauthorized use.⁹⁹ While both use this vague language, the Directive forces platforms to license content and utilize more

⁹¹ U.S. Const. art. 8, § 8, cl. 8.

⁹² Copyright Act of 1976, 17 U.S.C. § 107 (2012)

⁹³ Asha Velay, *supra* note 10, at 59-60.

⁹⁴ *Id.*

⁹⁵ *Id.* at 59.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *EU Copyright Directive*, *supra* note 13.

intense filtering requirements.¹⁰⁰

Currently, the European Union has seen the issues that arise when adapting copyright laws and disrupting large online platforms business market by attempting to limit the control of these platforms.¹⁰¹ The United States, however, approached online copyright law with the goal of helping build the digital market on the internet, and helped create the large content providers that exist today.¹⁰² The combination of internet service provider friendly legislation, common law, and businesses recognizing the threat of losing out on their content being used on the internet, created precedent that created large online platforms with unfair bargaining power for online copyrights.¹⁰³

In Viacom v. YouTube, Viacom eventually settled out of court because Viacom believed that the YouTube platform provided a growth opportunity and ultimately decided that the two companies could work together in order to take advantage of opportunities.¹⁰⁴ Viacom felt it was “more constructive to work together rather than litigate because content providers need Google and Google needs content providers.”¹⁰⁵

This case asked who was going to bear the cost of adopting and developing technology to effecting screen content.¹⁰⁶ The DMCA safe harbor for platforms was stated that in order to receive the safe harbor the platform could not have “actual knowledge,” and there was confusion about what sufficed as actual knowledge.¹⁰⁷ The underlying issue was that if actual knowledge

¹⁰⁰ *Id.*

¹⁰¹ Mark Scott, *supra* note 50.

¹⁰² Asha Velay, *supra* note 10.

¹⁰³ Joanna Plucinska, *supra* note 82.

¹⁰⁴ Jonathan Stempel, Google, Viacom Settle Landmark YouTube Lawsuit, Reuters (Mar. 18, 2014), <https://www.reuters.com/article/us-google-viacom-lawsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318>.

¹⁰⁵ *Id.*

¹⁰⁶ Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012).

¹⁰⁷ *Id.*

was a lesser bar, then YouTube would have to invest in technology to better filter their content.¹⁰⁸ The court remanded the issues for an examination of the facts, the District court found no liability for YouTube on the facts, and Viacom appealed.¹⁰⁹ Viacom believed that Google would develop filtering technology that detected copyright works on YouTube.¹¹⁰ The internet had grown to a point where the large platforms were necessary for content providers to get their content to the public, so companies like Viacom tried make sure their content was used by the platform in order to stay in business.¹¹¹

Similar to the European Union, the United States has had issues with large platforms using publishers content without proper licensing,¹¹² as well as linking and the copyright issues that arise from website linking practices.¹¹³ The Second Circuit addressed the fair use of publishers' content and found that infringement claims were not warranted where the project provided a public service without violating copyright law.¹¹⁴

Google scanned 20 million books in various university libraries both subject and not subject to copyright.¹¹⁵ Google stated that books that were not subject to copyright would be fully available, however, if the book was subject to copyright only "snippets" of the books would be available and if users wanted to read the whole book, the user would have to pay for the

¹⁰⁸ Jonathan Stempel, *supra* note 104.

¹⁰⁹ YouTube, Inc., 676 F.3d at 42.

¹¹⁰ Jonathan Stempel, *supra* note 104.

¹¹¹ *Id.*

¹¹² Goldman v. Breitbart News Network, LLC, 302 F.Supp.3d 585, 595-596 (2018) (explaining that a right to publicly display a photograph on Twitter was maintained because the Copyright Act protected the owners right to publicly display through the transmission of "any devices or process," including ones that are known or later developed.)

¹¹³ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

¹¹⁴ *Google, Inc.*, 804 F.3d at 213-14.

¹¹⁵ *Id.* at 209.

content.¹¹⁶ The Courts found a broad definition of fair use, and explained that the public benefit of use outweighed the damages to the copyright-holders.¹¹⁷

The United States has addressed online copyright rights and has established a precedent that protects and furthers the growth of online service providers,¹¹⁸ however, as the European Union moves forward with the Directive proposal, the Commission has been adamant that the European creative's interests and rights are at the forefront as opposed to the interests of service providers.¹¹⁹

III. E-sports and Copyright Law

Competitive video-gaming has become one of the fastest growing segments of the entertainment industry.¹²⁰ E-sports has become the derived term for the practice of competitive video gaming because of the variety of types of games and game titles.¹²¹ Deloitte has projected that direct E-sports revenue will surpass the \$1 billion mark by 2019,¹²² and Goldman Sachs projects that revenue will exceed \$3 billion by 2022.¹²³ As E-sports grow and the E-sports industry solidifies itself as a major sports market both in the United States and internationally, various legal issues have arisen, ranging from developing governance and regulation framework to concerns about gambling, doping and intellectual property.¹²⁴

¹¹⁶ *Id.* at 210.

¹¹⁷ *Id.* at 229-230.

¹¹⁸ Asha Velay, *supra* note 93.

¹¹⁹ *Brussels Gripped by Lobbying War Over Copyright Law*, *supra* note 6.

¹²⁰ Stephen D. Fischer, *supra* note 1.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Mike Hume, *ESPN secures Overwatch League Broadcast Rights, Continuing Esports' Mainstream Surge*, The Washington Post (Jul. 11, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/07/11/espn-secures-overwatch-league-broadcast-rights-continuing-esports-mainstream-surge/?noredirect=on&utm_term=.1fc866b717e0.

¹²⁴ Richard P. Flaggert and Calvin Mohammadi, *DLA Piper, Copyright in Esports: A Top-heavy Power Structure, but is it Legally Sound?* (Sep. 28, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

While traditional sports grew in the era of television, E-sports has developed through online streaming platforms, which have eliminated the need for national television contracts.¹²⁵ In fact, thirteen-percent of broadcast subscribers exclusively used online video service providers for television, and users under the age of 35 have a growing base of users moving strictly to streaming.¹²⁶

In order for E-sports business framework to begin to form, developers and E-sports generally must determine how to handle the issue of online streaming of the games.¹²⁷ There is a question of how those copyrights can be protected in the digital world and who owns the copyright of these athletic performances.¹²⁸ In traditional professional sports, leagues own and license their own intellectual property including copyright.¹²⁹ However, in E-sports, the copyright in any given game is owned by the developer or publisher of that game.¹³⁰

The complexity of E-sports grows as it becomes more of a spectacle and audiences are drawn to watch specific professionals.¹³¹ In traditional sports, courts have established that the sport is not copyrightable. In the *NBA v. Motorola, Inc.*, the Court argued that athletic events are not “authored in any sense of the word,” and that they are the result of random, unforeseen, and surprising occurrences that arise out of the contest between players whose action are directed toward winning the contest, and “not toward artistry or aesthetics” which are protected under copyright.¹³²

¹²⁵ Stephen D. Fischer, *supra* note 1.

¹²⁶ *Id.*

¹²⁷ See Burke, *supra* note 2, at 1550-55.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *The National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997).

In *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, the court found that the broadcasts were copyrightable works controlled solely by the team owners.¹³³ The court explained that the broadcasts were copyrightable because of the creative choices made by the camerawork.¹³⁴ This vests from the logic that a picture can be copyrighted because while the photograph is of a specific fact, which are not protectable under copyright, the angles and artistic choices make the photograph a work of artistry and not a mechanical record of a factual status.¹³⁵

However, this audiovisual copyright logic is difficult to transfer to E-sports because, unlike traditional sports, E-sports are always mediated by software.¹³⁶ A spectator of traditional sports can directly observe a football completion, but “can only observe an online game as action as a computer output.”¹³⁷ Thus, because the camera angles that are shown through online sources are preprogrammed, the owner or developer of the game will gain the rights to those broadcasts.

While the broadcast rights of competition are owned by the game developer or owner, the view of player rights has come about. As competitive E-sports become more popular, the argument has developed that players offer some creative content that would establish a level of copyright protections for broadcasts of their play, however, these arguments are outside the scope of this paper.¹³⁸

However, players are able to benefit from streaming through sponsorship. As a practical matter, the main goal of E-sports is to promote games and make people want to buy them.¹³⁹ Online streaming provides an opportunity for E-sports to monetize competition.¹⁴⁰ Teams earn

¹³³ *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 669 (7th Cir. 1986).

¹³⁴ *Id.*

¹³⁵ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60-61 (1884).

¹³⁶ Burke, *supra* note 2, at 1550-55

¹³⁷ *Id.* at 1553-1554.

¹³⁸ See Burke, *supra* note 2.

¹³⁹ Matt Bogdan, *A Copyright Monopoly: Live Streaming Esports, Taking Esports Seriously* (Apr. 15, 2015), <http://www.keepcalmtalklaw.co.uk/a-copyright-monopoly-live-streaming-esports/>.

¹⁴⁰ *Id.*

their income from ticket sales, merchandising, and broadcast deals.¹⁴¹ Players are typically compensated with their basic salaries and endorsement deals.¹⁴² However, the teams are afforded further opportunity for marketing from players live streaming gaming sessions on online platforms.¹⁴³ Some E-sport athletes have garnered “celebrity status.”¹⁴⁴ These athletes have hundreds of thousands of online followers who visit streaming sites to watch their favorite athletes.¹⁴⁵ Game developers can profit from this notoriety through online platforms who pay for users to broadcast advertisements on their streams.¹⁴⁶ They also share the profit from subscriptions to a particular streamer’s channel.¹⁴⁷ The developers of the game gain advertising and the players gain more popularity.¹⁴⁸

While broadcasting the competition creates copyright complications, players live streams bring about issues as well. Live streaming has a lot to offer: players demonstrating the game, valuable oral commentary from a professional athlete, background music, and the athlete’s name and image streamed through a webcam.¹⁴⁹ The commentary, name, and image either cannot be protected by copyright or are automatically assigned to the player, thus the main issue is the copyright issues related to the music used on the streaming and the game itself.¹⁵⁰

As discussed above, the developer of the game owns the rights for intellectual property for the game, however, teams allow and games even offer in their terms of service (“ToS”) that

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Bryce Blum, *An Esports Lawyer Breaks Down Everything You Need to Know in the SpectateFaker Case*, Dot Esports (Feb. 21, 2018), <https://dotesports.com/league-of-legends/news/dmca-faker-azubu-twitch-riot-1361>.

¹⁵⁰ *Id.*

users can stream games without infringing copyright as long as the users either provides their live streaming for free, or the user only receives revenue generated through advertisements.¹⁵¹

Recently, an E-sports legal issue occurred on a global broadcasting platform. A user on an online platform that broadcasts E-sports, Twitch.tv, used a publically available spectator-mode to broadcast a stream of a popular professional player.¹⁵² The stream attracted a substantial amount of attention, including the attention of another streaming platform, Abuzu, who had secured an agreement with the professional player to act as that players exclusive streaming platform.¹⁵³ The streaming platform filed a complaint under the DMCA to take down the stream.¹⁵⁴

The developer of the game has the exclusive right to publicly perform the work and reproduce copies of the work,¹⁵⁵ however the game had the blanket ToS policy that the game could be used if the user was showing their streaming video for free or was generating revenue through advertisements.¹⁵⁶ Here, Abuzu believed that the professional gamer had licensed to Abuzu the exclusive right to act as the gamer's broadcaster. However, the content of the gamer is not the gamer's to license, it is the right of the developer.¹⁵⁷ So, Abuzu actually filed a false claim, however, in accordance with the DMCA take-down provision, Twitch.tv removed the user's content.¹⁵⁸ Later, the game developer filed a legally valid complaint against the user's channel for the use and Twitch.tv shut down the user's channel.¹⁵⁹

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

The live streaming allows players access to gain popularity and provides the game greater opportunity for advertisement, however, making sure that online users do not take advantage of these streaming networks proves difficulty when it comes to copyright.¹⁶⁰ While the DMCA allowed the game developer to shut down the channel, there are countless online streams, and being able to monitor all of these channels on massive platforms like Twitch.tv and YouTube is costly and complex.¹⁶¹

IV. The EU Directive and E-Sports

E-sports are heavily invested in the use of online service providers because they provide the platform for their game to be broadcasted, viewed, and advertised.¹⁶² The online opportunity to broadcast events and live streams is unlimited because there are platforms that offer regional services as well as the large international platforms such as YouTube, Amazon, and Twitch.tv.¹⁶³ The European Copyright Directive proposal established Article 13 with the goal of protecting European creatives and establishing dialogue between creative and service providers to implement a more efficient content filtration protections for rights holders.¹⁶⁴

The Directive has occurred at a great time for E-sports because many online service providers are hoping to gain exclusive rights to broadcast works.¹⁶⁵ In fact, last year Amazon purchased the online streaming platform Twitch.tv, that is currently monopolizing the E-sports market, for \$970 million.¹⁶⁶ YouTube created a dedicated gamer platform to compete with these

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Ferguson Mitchell, *Opinion: There is No War for Broadcast Rights in Esports*, The Esports Observer (Dec. 5, 2018), <https://esportsobserver.com/opinion-there-is-no-war-for-broadcast-rights-in-esports/#>.

¹⁶³ *Id.*

¹⁶⁴ EU Copyright Directive, *supra* note 13.

¹⁶⁵ Stephen Ellis, *Esports is Growing UP: IP Law and Broadcasting Rights*, ESPN (Jan. 25, 2016), http://www.espn.com/esports/story/_/id/14644531/ip-law-broadcasting-rights-esports.

¹⁶⁶ Thiemo Brautigam, *YouTube Gaming's Hype Quashed by Audio Copyright Woes*, The Esports Observer (Aug. 26, 2015), <https://esportsobserver.com/youtube-gaming-the-twitch-competitor-launches-with-challenges/>.

growing E-sports platforms.¹⁶⁷ Twitch, while having a larger gaming user base, was reported to have difficulty gaining copyright to music being used in live streaming of games.¹⁶⁸ YouTube looks to enter the market knowing that it has an edge because of its licenses to copyrighted music that could be applied to streams on their gaming platform.¹⁶⁹

While these are large-scale examples of the fight for broadcasting rights for E-sports, they also show that media platforms are accounting for copyright issues that arise in E-sports.¹⁷⁰ Platforms are beginning to adapt their rules for licensing music and streaming in order to project their platforms as the most fit for exclusive rights for game developers and E-sports content right-holders.¹⁷¹

The Directive forces platforms to begin to adapt and change their policies to protect the online copyright of e-sports content, and E-sports rights holders will have to balance their choice of broadcasting platforms knowing that users/fans want the best way to watch their teams and using a platform that will best protect their rights.¹⁷² The member states will have the ability to control the strictness by which they implement the content filter and licensing requirements for rights holders.¹⁷³ While there are international platforms, E-sports rights holders will be able to control how the game is advertised and used in the member states based on whether the sport feels their rights will be sufficiently protected in the specific member states.¹⁷⁴

¹⁶⁷ *Id.*

¹⁶⁸ Scott Alan Burroughs, *A Twitch in Time: Legal Issues Catch Up with Popular Game-Broadcasting Platform*, Above The Law (Sep. 5, 2018), <https://abovethelaw.com/2018/09/a-twitch-in-time-legal-issues-catch-up-with-popular-game-broadcasting-platform/>.

¹⁶⁹ Thimo Brautigam, *supra* note 167.

¹⁷⁰ Ferguson Mitchell, *supra* note 163.

¹⁷¹ *Id.*

¹⁷² Scott Alan Burroughs, *supra* note 169.

¹⁷³ Matt Bogdan, *supra* note 140.

¹⁷⁴ *Id.*

Many believe that E-sports are currently operating as “loss leader for the gaming industry,” because the developers are using the current growth in popularity of streaming and competition viewership as free advertising for their games.¹⁷⁵ Developers have allowed infringement in streaming to allow for advertising growth, however, E-sports developers could move to paid streaming.¹⁷⁶ This would mean commercials and sponsors in streaming, which would lead to greater leverage when negotiating for broadcast rights.¹⁷⁷ Since the Directive aims to place content developers at better bargaining position with platforms, E-sports developers would enter into licensing negotiations in better negotiating position than they would have prior to the Directive.¹⁷⁸

V. Conclusion

Copyrights in the digital world will continue to evolve, and E-sports will be part of the experiment as the sport continues to challenge current copyright laws. The Directive will allow the E-sports industry to control how the sport grows, and will create practical change in how online licensing will be enforced.¹⁷⁹ While many copyright issues that occur in E-sports will be able to be addressed through contracts, the largest foreseeable difficulty will be how service providers invest and create technologies to enforce licensing agreements of copyrightable content.¹⁸⁰

The European Union’s approach to copyright law will allow sustainable growth for E-sports athletes and developers. The European Union Directive is derived from a series of member state legislations that proved to be inadequate to combat the problem of creating

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Joanna Plucinska, *supra* note 82; See Generally Tori Allen, *What’s in a Game: Collective Management Organizations and Video Game Copyright*, 8 UNLC Gaming L.J. 209 (2018).

enforceable protections against large media platforms that have had sustained growth on an internet with little regulation. The Directive's approach emphasizes the rights of content-creators, which will empower E-sports athletes and developers to continue to build a revolutionary sport.