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## IPR in Gaming Industry Concerning Indian Laws

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### Abstract

The gaming industry is indeed a rewarding and most promising Industry of this era and upcoming decade. Covid-19 played a vital role in booming the industry worldwide and India also got benefitted in terms of the Gaming Industry. When we talk about gaming then one of the most important aspects in this is the protection of the Intellectual Property of the Game Developers or Inventors. IP rights are indeed a crucial part of any of the innovations and inventions in any field. Through this paper, the authors aim to analyze the importance of Intellectual property rights in the gaming industry specifically with the Indian Laws and applicable legislations. Analysis and recommendations have been made by the authors to overcome the loopholes existing in the present laws. Since India doesn't have any specific legislation regarding Gaming the authors try to analyze the position of gaming under the existing law and try to suggest the remedies for the loopholes for the same.

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## Introduction

One of the fastest-growing Industries worldwide is the Gaming Industry which is growing at a rapid pace and so we can see its effect in the Indian Gaming sector as well. As we are seeing advancement in technology and the Internet which is a major reason behind the booming of the gaming sector worldwide. Intellectual Property Rights play a major role for the game developers as well as the distributors of those games. There are innumerable cases where we see Intellectual Property Infringement relating to the gaming industry such as replicating popular games, copyright infringement in the games, etc. Video games have evolved worldwide for more than 4 decades. A survey done on gaming Industry states that the majority population which plays a video game in today's world are the adult population of age group 18 - 26 years, gone are the days when 5 - 10 years kids were the only target audience of the game developers. The Indian Gaming industry is still growing at a rapid pace which will be matching the market of the US in just a few years from now. In the year 2020, the valuation of the Indian Gaming Industry was \$930 million and in the year 2024, it is expected to be \$3750 million. From the data, we can analyze that India is seen as the biggest Fantasy Sports market in the world.

## Emergence of E-Sports

With the emergence of technology and Internet connectivity worldwide we saw an increase in the number of gamers which ultimately lead to the boom in the gaming industry worldwide. Due to the covid-19 pandemic, the gaming industry outperformed the sports & movie industry combined. The reason behind this is lockdown due to the pandemic. As everyone is home now be it children, youngsters, adults, working people or old age people. Now people are most of the time free because schools, colleges, offices are shut down which ultimately contributed to their boredom so the year 2020 saw a spike in the gaming industry as people are buying gaming consoles, purchasing games online, downloading the games in their smartphones to kill their spare time at home.

In the year 2020, the valuation of the gaming industry was approximately \$162.32 Billion<sup>3</sup> and if the current growth rate exists then it is expected to have a valuation of \$300 billion in the

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<sup>3</sup> What Does Global Gaming Industry Growth Look Like in 2021?, TransPerfect Gaming team, Feb. 2<sup>nd</sup> , 2021, <https://www.transperfect.com/blog/global-gaming-industry-growth-in-2021> , accessed on 29<sup>th</sup> June, 2021.

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coming 5 years from now. There has been a change in valuation in the gaming industry region-wise. Asia Pacific region is prominent among them. With the rise in the population of southeast Asia the numbers of gamers also saw a spike. Although gaming is relatively new to Southeast Asia it is becoming popular as compared to traditional sports, the majority of the gamers are youth. Presently the number of gamers in Southeast Asia is expected to increase to 250 million. According to Forbes, Middle East is emerging as a new leader in the gaming industry and its valuation is expected to reach \$6 billion in the year 2021. The reason behind the middle east as an emerging leader in mobile infiltration in the world and the youth population in these regions. Another aspect behind this is the availability of these games in the Arabic language which is one of the most spoken languages in the middle east, this has helped the development and localizing of the games.

We are well aware of the fact that how internet penetration and easy availability of smartphones had made gaming so popular these days. In the year 2020, 3% of the overall revenue was generated from gaming alone in Europe, the reason behind that was 51% of the residents were playing the games. In the last 6 years, the revenue of Europe has grown by 55% because of the gaming sector which involves development, creation & playing.

The gaming industry continues to boom across the Nordic regions, France, Spain, Italy, United Kingdom & Germany, the reason behind this boom is in these countries developers are consistently creating, updating & innovating the games. Moreover, they are getting support from the people and government as well.

On average, people in Europe play online games 8.6 hours per week, this is the result of the invasion of gaming In the European market. Some of the industry veterans who are ruling the market in Europe are Tencent, Ubisoft, Blizzard, Activision & Zynga.

As most of the regions got benefited because of lockdown and pandemic via gaming sector, America was not left untouched for the same, it saw the most successful year of growth in terms of gaming industry specifically North America is evolving at a rapid pace due to technological changes such as virtual reality and augmented reality which gives an enhanced experience of gaming to the user and the other reason for the growth in gaming in North America is cloud gaming which saw the increase in several users almost 100% last year especially during the lockdown people switched to gaming and presently the situation is that every 3 out of 4 people is playing video games these days. Another fastest growing market for gaming is in South America where the majority of its users are playing Online gaming which accounts for the increase in the global online gaming sector.

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As we saw that how different regions of the world got benefited from the pandemic in the gaming industry, India didn't remain untouched from this as well. In the first 9 months of the year, 2020 India remained in the number 1 spot in mobile game downloads worldwide with 7.3 billion installs and collecting 17% market share of the installs volume worldwide and this data was given by Sensor Tower. Another reason apart from the lockdown-pandemic is India has the majority of its population which is youth, approx. more than 50%. The age group of this population is less than 25 years and 60% of the nation's gamers are under the age of 25 years which makes it the potential market for the gaming industry.

Another important aspect to look after that why India emerged as a key player in the gaming industry is the cheap availability of smartphones and increasing internet penetrations. As we are aware of the fact that after Jio entered the market how much it made mobile data accessible to the public at a cheaper rate which was initially not possible with other telecom operators. So, these are some of the important factors that why India is a potential gaming market and it is successful as well in providing opportunities to people and gaming companies as well.

### **Involvement of IP in E-Sports**

Intellectual Property or IP is an important aspect of any business entity or any of the industry or sector and so, is the gaming industry. To protect the literary works, inventions of the game developers Intellectual Property Rights are a necessity for creators. So, we will be dealing with Copyright, Patent, Trademark, Industrial Design, Trade secret, etc in this part.

In India, we don't have any specific legislation for Gaming as well as video games are also not classified under any particular category of the Intellectual Property Law but under Section 2 of the Copyright Act 1957, we have the definition of "cinematography works" which is as -

*"any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films."*

As we can see from the above definition that "process analogous to cinematography" is written so it pretty much clears from the definition that video games can be incorporated in its ambit. Moreover, the copyright act allows computer programs to be protected as literary work, therefore the source code of the video games can be protected under the copyright act, 1957.

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We are aware of the fact that there is no codified legislation for the protection of games but we have derivative protections from our existing legislations to E-Sports such as Trademark Law protects the name of the E-Sport, distinct identity of the characters, the logo of the e-sport; under the Patent law we have protection for the gaming devices such as gaming consoles, joysticks or any other technical instrument which helps in processing the game; Under the Copyright Law we have protection to the background music, source code of the game, and other artistic content of the e-sport; When the publishers or the makers of the game do not want to reveal their source code then trade secret comes into play.

According to Forbes Indian Gaming<sup>4</sup> Industry crossed a worth over \$890 million and is among the top 5 countries for mobile gaming in the world. The size of the industry is enough to aware everyone regarding the legal protection required in this field. Although there is a variety of IPR involved in Gaming the most prominent among them is Copyright and how gaming needs to be protected under copyright law.

Whenever we play video games, we come across a variety of stuff such as the storyline of the game, graphics of the game, software coding that is responsible for the user interface. Although this stuff is copyrightable themes aren't. According to the general rule of copyright, no concept or theme can be copyrighted but only its expression in form of literary, musical, or artistic work can.

Let's understand this concept with an illustration: A character of a Cricketer from a game based on the World Cup can be copyrighted but it wouldn't be able to restrict other characters of a cricketer in a game or game based on World Cup cricket.

## Protection of Copyright Content

### 1. Protection of Characters

The best way to justify this field of protection will be by taking the example of the popular gaming character Mario. Mario is all-time famous and one of the most loved characters in the gaming fraternity. Once in a lifetime, almost every gamer has played this game or at least have heard about it for sure. The storyline of Mario revolves around saving a princess across

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<sup>4</sup> How India became number one in global gaming industry?, The Print, Rajan Navani, Feb. 27, 2021, 4:30 PM IST, <https://theprint.in/features/how-india-became-number-one-in-the-global-gaming-industry/612990/> , accessed on 1<sup>st</sup> July, 2021.

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all the levels and Mario is a plumber and that is visible from the graphics and theme of the gameplay. Nintendo has the copyright of Mario till the year 2080, which means that Nintendo<sup>5</sup> can restrict any gameplay with Mario as a character but it can also control and regulate the merchandising of the character Mario such as selling dolls, toys, accessories, clothes, etc. because Nintendo has exclusive merchandising rights of Mario. If any business entity or Individual thinks of merchandising Mario then they are required to take licensing from Nintendo to merchandise their product with the use of Mario.

## 2. Protection of Gameplay

As we saw above that for illustrating the point, we took the example of Mario, let's look towards another aspect of the game with the same example. Gameplay is a way in which the player reacts towards the progress based on the rules of the game and how the player is interacting with the game and all of this includes the storyline of the game, the plot, the level of difficulty, obstacles in the game. From this, we come towards the implication that the plot and objective<sup>6</sup> of the game cannot be copied by another game, and protection to this not only gives credibility to the game but also the liberty to the creators and developers of the game to build up more such games on the storyline of the previous game.

## 3. Protection of Music & Sound

Everyone is aware of the fact that how much popular is the music and background sound effects of Mario are. There is an ample amount of music cover of Mario available on YouTube with more than a million views. If anyone had ever played Mario, he must have observed that every level has distinct background music including the main theme music of Mario. These music and background sounds attached to the gameplay are copyrightable. The background sound of collecting<sup>7</sup> the coins, jumping, killing the enemies of them is copyrighted by Nintendo, any usage of the music or any sound effects without licensing from Nintendo will be liable for giving royalties to Nintendo. Dialogues which are used frequently in the gameplay are also copyrightable.

## 4. Protection of Visual Design & Artwork

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<sup>5</sup> Copyright in the Gaming Industry, Mondaq, Reetika Wadhwa & Meril Mathew Joy (S.S Rana & Co. Advocates), <https://www.mondaq.com/india/copyright/879888/copyright-in-the-gaming-industry> , accessed on 1<sup>st</sup> July 2021.

<sup>6</sup> Ibid.

<sup>7</sup> Supra note 1.

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The creators and developers of the games can have the copyright to their games to an extent that no one could duplicate their work. Moreover, if the game is of a specific genre and it requires specific elements in the gameplay and that can't be copyrighted fully but they can have copyright over the exact representation not over the whole actual element. Here the doctrine of **scenes a faire** comes into play which states that a few elements that are essential for gameplay can't be copyrighted by the creators. Let us say for example there is a cricket game which is based on World Cup then the makers of that game can't have copyright over the Bat, Ball, or stumps that are a must in any cricket-based game, the doctrine of scenes a faire state this only.

## 5. Player License

Whenever we install it as the game on our PC or our smartphone, we see that game asks for certain permissions from use like user agreement, licensing, and all. The main aim of these agreements and licensing is to aware the user of his liabilities while he is using the game and it is an important part of the game. It also tells about the limitations to the user regarding his game. Also, there exists some gaming service by the Game publishers, which act as an online portal for accessing the multiple games, these gaming service provided by these publishers also have some user agreements which has IP related clauses and other limitations clauses in that.

## 6. Protection of Game Codes

In the light of copyright protection, we need to, first of all, ensure the role of software in gaming after that we will be looking into the coding of the games. Gaming comprises of 2 major things Game Engines and Readable software codes. Gaming engines which are the basic framework are used to create the game by the developers and secondly, readable software code makes the games accessible on the different platforms for gaming. The Gaming engine<sup>8</sup> is owned by the developers and if not owned it is licensed to the developers of the game to protect their IP. Therefore if 2 gaming companies are there and they use the same gaming engine, then some essential feature of the game might overlap in the games which are running on the same engine, so here based on the coding of the software engines would be reduced to an extent and will be outside the ambit of the copyright protection.

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<sup>8</sup> Supra note 1.

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## Present legislations for regulating E-Sports in India

“Gambling”, “gaming”, or “games of mere skill” are not defined. The Supreme Court has interpreted “games of mere skill” as games where success predominantly (i.e. more than 50%) depends on the skill of the player, as opposed to chance. Today in India the gaming industry is mainly governed by two regulatory models. First, the 14 states and union territories in India have adopted the Public Gambling Act 1867 (PGA 1867) second, the rest of the states have developed their own states' laws to govern the same. (Collectively known as “State Gambling Acts”). The first attempt to curb gambling was made in 1867 with the Public Gambling Act, the Act provides punishment for public gambling and common gaming house. Many states government have also brought different laws to keep in check the same. Few are

- The Orissa Prevention of Gambling Act 1955
- The Assam Game and Betting Act 1970
- The Telangana Gaming Act 1974
- The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015
- The Andhra Pradesh Gaming (Amendment) Ordinance 2020

## Applicability of Intellectual Property laws in the Gaming Industry

According to Copyright Act 1957, the author is defined with respect to artistic, dramatic, musical, literary, photographic, and cinematographic work.

- **Section 2(o)** of the Copyright Act, 1957 defines literary work includes computer programs, computer databases, etc. so that can be intercepted that the developer can come under the ambit of this act.

But to develop a game there are so many people behind the scene such as producers, creative directors, game animators, etc which doesn't directly come under this section. So, they cannot avail the monetary benefits caused by the game. The challenge will lie to make a framework that includes all these people whose contribution results in the success of the game.

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- *Section 2(ffc) of the Copyright Act 1957* defines computer programs and copyrights associated with them. It is a set of instructions in the form of codes that causes a computer to perform a particular task or achieve a particular result<sup>9</sup>.

By definition, we can conclude that video games don't come under the ambit of this section as the gaming console requires the player to instruct but it is software that performs such functions. So, there is a dire need to revisit this section and modify it so that modern gaming can come under the ambit of it.

- *Section 2(ja) of Patent Act 1970* provides that an inventive step that leads to technological advancement having economic significance shall attribute towards an invention<sup>10</sup>.

By this definition we can derive those modern games can be included in this section as they are the example of technological advancement, comparing to games in 1970 to modern games the technological advancement can be witness, the recent gameplay, sound in the background, the character movements and all of these have a significant economic attribute. Whether a player likes or dislikes a game depends upon the method in which the games can be played so if the developer came with a whole new method of playing games, then that should be allowed to be protected under Patent Act 1970.

- *Section 2(d) of The Design Act, 2000* provides that a design includes features of shape, configuration, patterns, the composition of lines applied to any article in two- or three-dimensional forms by any industrial process<sup>11</sup>.

It doesn't cover they design created by the technology so there is the need that the lawmakers revisit this Act and make some necessary amendments to ensure that the gaming community gets benefit out of it.

### Judgments related to I.P (Online Gaming)

#### *Sony Computer Entertainment Europe Ltd. v. Harmeet Singh and Ors.*<sup>12</sup>

The subsidiary organization of Sony Computer Entertainment spread the word about PlayStation 3, PlayStation Vita, and so forth and had created different computer games to be played on something similar stage. Retailer, Mr. Harmeet Singh, and his partners sold such

<sup>9</sup> The Copyright Act, 1957, § 2 (ffc), no. 14, Acts of Parliament, 1957 (India).

<sup>10</sup> The Patent Act, 1970, § 2(ja), no. 39, Acts of Parliament, 1970 (India).

<sup>11</sup> The Design Act 2000, § 2(d), No. 16, Acts of Parliament, 2000 (India).

<sup>12</sup> Delhi High Court, CS(OS) NO. 1725/2012, [http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=97181&yr=2013](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=97181&yr=2013), accessed on 10<sup>th</sup> July, 2021.

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control centres and video games out of a shop situated in New Delhi. They were supposedly engaged with altering and transferring pilfered programming projects in the gaming consoles to run the pilfered form of the games made by Sony. The product was called Jailbreak which would break the encoded code on the first machines in order to make it viable with the pilfered form of the games introduced by Mr. Singh. Further, he would deliberately open the framework and adjust the first types of gear to prepare it for use with the pilfered programming. This was finished by charging an ostensible cost from the buyer empowering him to play costly games at a very minimal expense. Mr. Singh just got one unique plate of that specific game made by Sony and made different duplicates for its circulation. This demonstration of superseding the encoded code disregarded the copyright of the offended party in the product of its working framework. Sony moved toward the court looking for the directive, controlling encroachment of copyright, encroachment of brand name, passing off, version of records, harms, conveyance up, and so on. It was fought Sony that their unique machines were being altered without their assent and that Mr. Singh encroached its copyright by presenting pilfered games without having any permit. The fundamental debate was copyright encroachment and the capacity to make the proliferation of Sony's games. An ex-parte directive was allowed forestalling Mr. Singh from replicating, selling offering available to be purchased, appropriating, hard-plate stacking, altering the preparing unit of the control center, fake/unlicensed forms of programming program/rounds of Sony which added up to copyright encroachment. The case doesn't focus on the drawn-out impact of the copyright encroachment on Sony. Even though, it tends to be accepted that it was probably going to make quality worries concerning the items made by Sony, even though the guarantee of such control center according to the terms and conditions slips by when the item is altered. Further, since the first plates of the games made by Sony were replicated and transferred in such a control centre, it would have just denied Sony of its income from each circle it sold.

In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*<sup>13</sup> the U.S Court held that the games driven by software's are copyright protected, as is the source code forming part of the game on the owner's servers as well as on the "clients" or links on the player's machines. The Court classified such software, as "literal elements" of rights stating that each graphics and visual of a game carries protection right against infringement.

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<sup>13</sup> 629 F.3d 928 (9th Cir. 2010).

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The above case dealt with the game MMORPG-titled “World of Warcraft”. The Court classified such “discrete visual and audible components of the game, such as a visual image of a monster or its audible roar” as “individual non-literal elements,” which the Court estimated to be over 400,000 in number in this game.

Finally, the Court held that the “real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players,” is as “individual non-literal elements”. The Court explains the extent to which each of the above elements of the game is protected under IP rights. This case gives a glimpse of the kind of intellectual property or proprietary rights that form part of a single game.

### Conclusion

While the gaming industry in India has seen massive growth in recent years the current status doesn't protect the game developer(s). With the development of modern games, the ambit of laws required has also increased character, gameplay, storyline is a whole new untapped category and it requires detailed attention. The increase in gaming has also increased the number of ways in which gamers dupe the developers. They have found a way to access the games at a lower price or for free, downloading games and uploading them to drives and then distributing them, it is high time that the gaming industry needs a proper set of legislation to prevent such infringement. The absence of legislative protection in Indian poses a serious threat to the gaming industry in the Indian market as well as in the international market. The government needs to examine, discuss, agree, and implement laws to protect the developers and the gaming industry. To emphasize the importance of IP protection for the gaming industry is, therefore, merely stating the obvious. From the name of the game to every aspect of a game and finally, derivative rights including the right to merchandising characters from the game lie with the owners or creators. So, the need for a flexible and accommodating framework that can not only cover the past and the present rights of the developers as well as the players such as piracy, concern related to growing fraud during gaming transactions, concern related to infringement, data and privacy rights of the players are many of the few concerns that need to be addressed and also there must be space for the lawmakers to address the pacing growth of the technological advancement in the gaming sector in future.