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A Study on the Copyright Law of Live Game Streaming

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Abstract

The growing development of live game streaming industry has given birth to a new industry and brought huge benefits. However, live game streaming is still facing many unresolved intellectual property rights problems. First of all, this paper believes that the game pictures meet the conditions of originality, reproducibility and photography works belonging to the type of work, which can constitute the work in copyright law. The copyright of the work belongs to the game company or the producer, and the live streaming of the game without permission constitutes infringement. Whether the live streaming of the game under different circumstances constitutes fair use needs to use the three-step test method to analyze according to the situation.

Key words: Live game streaming; Picture of video games; Originality; Three-step test

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1. INTRODUCTION

The esports industry is breaking out worldwide, not least because it's so assessible to watch exciting video game live. The live game streaming meets the psychological demands of players to show their game skills, and also enables others to learn from the experience and enjoy the fun of watching the game, thereby it is all the rage. In

China, the game industry has made a huge contribution to GDP (it is already several times larger than the film industry in China), and the revenue from live game is the second largest source of the game industry income. It has grown by more than 50% for three consecutive years from 2016 to 2018, and exceeded 100% in 2018. The market revenue has over 10 billion yuan.¹ The development of the esports industry is highly dependent on the huge audience attracted by live game streaming. However, it is undeniable that game live streaming has copyright issue, and it is an international consensus that unauthorized live game streaming is illegal and constitutes infringement. Nevertheless, some game players are still streaming their games live and profiting from them from the live streaming platform, and viewers are delighted. The live streaming platforms thrived, attracting more and more funding. Even so, few video game companies are taking action on these live streaming platforms. There is a voice in the international community regarding the copyright issues involved in live streaming of games, which requires that in order to ensure the development of e-sports industry, copyright is not allowed to prevent direct live streaming of games. This is evident in the Korean E-sports Commission proposed in the dispute with Blizzard in the United States that "if game developers claim their rights to maximize their interests after their games have become the core of esports, it will pose a serious threat to the future oriented entertainment industry of esports".² There are also commenters in the United States contended that if the work has become the basis of an emerging competitive project or industry, and the author has not intended to use the work in the same way, the author has

¹ 'China E-sports Report(live)' (*Joynews.cn*, 2019) <<http://www.joynews.cn/jiaodianpic/201912/2732393.html>> accessed 8 January 2020.

² 'Kespa Speaks Out on Intellectual Property Rights' (TLnet, 2010) <<https://tl.net/forum/brood-war/123275-update-kespa-speaks-out-on-intellectual-property-rights>> accessed 8 January 2020.

no right to prohibit use in this way. Take StarCraft, which is enduring in South Korea, as an example. StarCraft should be considered as a quasi-public product. Even if Blizzard should obtain a license fee, it should not be allowed to easily ban the live streaming of the game so as to protect the rights of the continued existence of such a public product and the interests of all parties concerned (Rogers, 2012). Practical treatment of these gaming activities is one example of what Professor Tim Wu has pointed out “tolerated use” (Wu, 2008). This use of a copyrighted work is technically and theoretically illegal but is acquiescence by the copyright holders. Although the industry interests related to game live broadcasting are important, this is not a reason to deny game copyright owners to exercise their rights. If an industry is built on the infringing on the copyright of others, it is also challenging to protect the interests of that industry. As an emerging industry, live streaming of online video game involves copyright issues that are ambiguous in current judicial practice and theoretical research. In the pages that follow, it will be argued that this kind of tolerance for infringement is not sustainable and inappropriate in the copyright world and is not conducive to the long-term sound development of the live game streaming industry. The consequences it brings are unclear and unpredictable (Matsui, 2016). It cannot guarantee that the rights and profits of both the video game companies and the live streaming platforms are protected as much as possible. Whether live game streaming constitutes infringement of copyright, and whether game copyright owners have the right to prohibit unauthorized live game streaming, we should not only consider the industrial interests involved in, but return to the rules of copyright law. Legitimate solutions of the prevalence of such tolerated infringement need to be found. This paper explores the copyright issue of live game streaming without authorization and considers presenting a regime of alternative copyright protection.

2. PICTURES OF VIDEO GAMES AND LIVE GAME STREAMING

2.1 Pictures of Video Games and Copyright

Live game streaming industry by the global rapid development of network game industry and the network game peripheral derivative effect and rapid rise, attracted a lot of industry capital investment, such as the Amazon in 2014 to \$970 million acquisition of Twitch occupied half of online games live abroad, video giant YouTube is not to be outdone, on August 27, 2015, online games live platform of its own. In China, investment companies have also invested in online game platforms, and many online game live streaming platforms have sprung up like mushrooms. Obviously, the era of nationwide

live broadcasting has arrived. The online game live broadcasting industry itself develops rapidly and has formed a complete business ecology, including the game organizer, live streaming platform, game manufacturers and operators, game anchors, players and other multiple subjects in this ecology to co-exist and achieve win-win results and coordinated development.

However, in the development of online game live broadcasting industry, it has encountered a serious legal protection dilemma, that is, whether online game live broadcasting programs constitute works in the sense of copyright law, and thus can be protected by copyright law? The supporting point of view is that “online game events are based on games, and the live game pictures come from the game works themselves. In order to be the continuous pictures directly presented on the computer screen, which are perceptibly and reproducible”, “online game pictures should constitute the works”, and thus be protected by the copyright law; The opposite point of view takes the infringement case of online game live broadcasting in the first case of online game live broadcasting as an example. The court refused to grant the copyright protection of online game live broadcasting on the ground that game competition pictures do not belong to the works stipulated by the copyright law, and instead gave the protection by anti-unfair competition law.

The Chinese Copyright Act grants the author of a work certain exclusive rights as copyright. Starting from exploring the basis of legal protection of copyright law, it is necessary to determine whether video game pictures constitute works in legal sense. According to the requirements of the Copyright Law, the determination of an intellectual activity can constitute a work to meet the substantial and formal requirements, that is, the work must meet originality and reproducibility, and establish the type of work stipulated by the Copyright Law. The composition of the video games is analyzed as follow.

2.1.1 Originality

The originality of the video game picture means that the work is conceived and completed by the author independently, not as a copy, imitation or plagiarism of the existing work. Meanwhile, it conforms to a certain degree of intellectual creation. Computer early development as a result of the limitation of technology, the content of the game screen display is relatively simple, such as Snake, Tetris are composed of simple tiles, which focused on the gameplay, the content is not original. But now the development of computer hardware and software technology, combined with game developer’s capital input, the graphics design more complicated, the character and scene design are more exquisite, designers often unconstrained style design models. This is different from the common graphics in the public. In the case of not copying or imitating the existing graphics, the video game picture completed by the game designer has a

certain degree of creativity to meet the requirements for the originality of the Copyright Law.

2.1.2 Reproducibility

The reproducibility stipulated by copyright law requires that it can be copied and transmitted in a tangible form and can be perceived directly or through machinery or other equipment. At present, the development of game and software technology makes it possible to use the video recording function or screen recording software to film the content of the video game picture during the operation of the game, at the same time, the game screen and video can be found in the files of the game database. Arbitrarily transmitting and editing video is effortlessly through USB flash drive or network and other data transmission tools. Videos can be uploaded to a wide range of platforms as demand. This proves that the video game picture meets the copyright requirements of reproducibility.

2.1.3 Type of Work

Pursuant to Article 3 of Copyright Law of the People's Republic of China, "for the purposes of this law, 'works' mentioned in this Law shall include works of literature, art, natural science, social science, engineering technology and the like made in the following forms: (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic art works; (4) works of fine art and architecture (5) photographic works; (6) cinematographic works and works created in a way similar to cinematography (7) drawings of engineering designs and product designs, maps, sketches and other graphic works as well as model works; (8) computer software; (9) other works as provided in laws and administrative regulations."³ Video game picture can be divided into static game picture and dynamic game picture according to whether there are players involved in the operation. Among them, the static game picture satisfies the provisions of the Copyright Law Implementation Regulations of China on the fine art works, the content is composed by color lines or other means, which has certain aesthetic significance in viewing.⁴ Regarding the provision of the Copyright Law in China of dynamic game pictures, works created by similar film methods should be shot on a certain medium, but dynamic game pictures are not satisfied. However, the Berne Convention does not require that "assimilated works expressed by a process analogous to photography" be produced by the "shooting" method, emphasizing that it is a continuous picture that is the same as that of a photographic works, with or without sound. At this point, the dynamic nature of the game conforms to the expression form of the photographic works, so the dynamic video game screen can be established as an assimilated work of photography.

³ Copyright Law of the People's Republic of China 2010. Art 3

⁴ Regulation on the Implementation of the Copyright Law of the People's Republic of China 2013. Art 4(8)

2.1.4 Ownership of Copyright

After determining the protection scope of video game pictures in the Copyright Law, the ownership of copyright becomes the next focus. The graphics copyright belongs to analyze its formation process, because of the different content of the video game produced by different player operations, it gives people a kind of intuitive feeling that the game screen is described by the player's operation. Players in the game's content for material created works of this type of game picture, the game picture is independent of the game software, players playing in video production, as long as not copied video game software program will not infringe video game developers based on the game software copyright, and this is wrong. The generation of the graphics is game developers through the design of the game models, and the pictures are connected with programs to make them logical and coherent. The possibility of content produced by the graphics are from designers' design in advance, players operating process is only part of the content to have designed a picture reappearance, operation and selection of props is the embodiment of the skill game, cannot reflect the players intense to create. So, the players have no originality of image content. The copyright of the video game picture cannot be owned by the player, but are owned by the investors or developers, as is the case with the photographic works.

2.2 Pictures of Live Game Streaming and Copyright

Live game streaming pictures contains many factors as well as the video game pictures, the video game pictures is the foundation of the host player display content, at the same time, the host player will join their own characteristics elements, including but not limited to, background music, explanation, etc.. The audiences are largely considered as they watched the anchor of the skill and the interaction with audience and entertainment, these factors are important influence of audience choice conditions. Whether the live game streaming belongs to the work of copyright requires different analysis according to the type of game. For simple games, in the process of players operating video games, all aspects of online games, modeling, picture combination, etc. are set by the original model program, leaving players with extremely narrow creative space. It is generally impossible for players to break through the scope designed by game designers and create new game pictures. Therefore, the process of playing games is not the process of creating works. For complex and interactive games, it needs to be discussed according to whether the players are for purely competitive purposes.

2.2.1 Competitive Online Games

This kind of game is also commonly referred to as esports. As a sports item, esports is a kind of confrontation sport that considers intelligence and coordination. It needs to

be played under specific rules and time, which reflects the spirit of fair competition. Like other sports, esports pursues the winning or losing of the game and emphasizes the application of skills and experience. Players mainly pursue efficiency when playing games, and the overall picture produced for the sake of practicality does not have the originality required by the work of copyright. The works need to reflect certain thoughts and contents, that is, the author expresses his creative intention by creating the works, while the player has no creative intention or emotion when playing the game. Therefore, for the live game streaming, it does not belong to the object of copyright law.

2.2.2 Non-competitive Online Games

In these kinds of games, players have a lot of creative space, and it's mainly based on aesthetic pursuits rather than winning games based on skill and experience. In the virtual game world, players can not only involve architecture and sculpture, create music and draw artwork, but also share and trade as in the real world. For this kind of video game picture, the player should be the copyright owner of the picture. Because the player's creation is inseparable from the database of the online game itself, the player's creation at this time is essentially a deductive behavior of the online game, so the player can become the deductive person of the game picture. The content creatively added by these game anchors in their live game streaming pictures is not a collection of the design pictures of the online games themselves, but the fruits of labor with distinct personal styles and creativity, which should be respected and protected. Secondly, the role of players in online game broadcast. Some people believe that players' operation of the game in online game broadcast is a kind of "public broadcast performance", so players can be protected by neighboring rights as performers. This view has a certain rationality. The right of performers, as a kind of adjacent right, is to protect the fruits directly created by the creative labor of performers in their performance activities. The so-called performance refers to the activity that the performer USES certain props (such as musical equipment and costumes) to convey the content of the work through his body language, voice and expression. When the player operates the game, the music, text and other elements in the online game are displayed. Such activity of the player conforms to the definition and requirements of performance, which belongs to "using various means to broadcast a public performance of the work". For simple games or e-sports games, the game screen formed by the players through the combination of different elements does not constitute the work but can be regarded as a reproduction and dissemination of the game. This view is expressed in *Red Baron-Franklin Park v. So did the Taito case*.⁵ The U.S. court of appeals for the

fourth circuit held that in public coin-operated games, the player's actions can constitute a public performance in the sense of copyright law. The sequential presentation of the pictures constitutes a performance of the audiovisual work.

3. EXCLUSIVE RIGHTS TO COPYRIGHT INVOLVED IN LIVE GAME STREAMING

Live game streaming is a type of internet live broadcasting. Internet live broadcasting refers to the activity of continuously releasing real-time information to the public in the form of video, audio, text and other forms based on the Internet. Internet live broadcasting emphasizes "real-time information", which is also the connotation of live broadcasting. Live streaming of video games seems to be similar to broadcasting and network communication, whose purpose is to spread online games to the public. Therefore, it is most likely protected by broadcasting rights and information network transmission rights. However, its essence does not fall into the control scope of these two kinds of exclusive rights.

In accordance with the Berne convention and Copyright Law of the People's Republic of China definition of broadcasting rights⁶, broadcasting rights can be divided into three parts: the first part is the authorized (such as broadcasting organization A) radio work, mainly is the wireless radio and television broadcasting, or through any other wireless transmission methods such as symbols, sounds, or image transmission to the public works. The second part is the subsequent use of such transmissions, in which the author may authorize a broadcasting and television organization other than the original broadcasting organization A. The third is that the right holder may authorize the dissemination of the work broadcast by A through loudspeaker and other devices. Such as stations, trains and other places to install equipment to relay radio or television programs. It can be seen that the copyright owner only gives the license to broadcasting organization A, but does not give the license to B and other organizations to make use of such broadcasting. Broadcasting organization B and other units may retransmit only works broadcast by A. This kind of characteristic and category of broadcasting right, and network game broadcast is obviously very different, the foundation of network game broadcast is Internet, and the foundation of broadcast right is broadcast organization.

The copyright law of China also defines the right of information network transmission⁷. It can be seen from the definition of the right of information network transmission stipulated by law that the right has the following characteristics: (1) Comprehensive. What the

⁵ *Red Baron-Franklin Park v. Taito*, 883F.2d 275(1989).

⁶ Berne convention 1886. Art11(2)

⁷ Copyright Law of the People's Republic of China 2010. Art10(12)

right of information network dissemination regulates is the dissemination of information on the Internet, including a series of acts such as uploading, reprinting, copying and dissemination; (2) Technical. Because of its unique behavior, it will inevitably be accompanied by uploading technology, technical measures, rights management information; (3) Interactivity. This is the most important feature of information network transmission right, which is also different from live streaming of video games. Generally understood as two aspects: the first is the dissemination of works to the public through the Internet, and the second is that the public can independently access works at any time and place, mainly emphasizing the freedom of the way (time and place) for the public to obtain works, which can be selected at any time. Live streaming emphasizes “real-time information” and the public does not have a free choice. The dissemination of live game streaming cannot be protected by broadcasting rights and information network dissemination, but it cannot be left to its own will, otherwise it violates the spirit of copyright law legislation. Therefore, it is necessary to seek other paths for protection.

Article 8 of the WIPO copyright treaty (WCT), which came into force on 6 March 2002⁸, provides for a right of communication to public, including any form of communication. “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” Reviewing the international judicial practice, the current effective copyright law system not only gives authors specific exclusive rights to protect, but also provides for general provisions - other rights that should be enjoyed by the copyright owner. To sum up, the copyright protection of live streaming of video games is now more feasible way is to include game live broadcasting into the “other rights enjoyed by the right holder” this cover for protection.

4. LIVE GAME STREAMING AND “FAIR USE”

It should be noticed that, “fair use” here is not a term in U.S. copyright law, but a concept translated from the Copyright Law in China. Whether live streaming platforms or anchors live video games without authorization is a fair use or not is a big difference in the theoretical field over the world. The “three-step test”

stipulated in Article 13 of the TRIPs agreement is the minimum standard for judging fair use, and the “three-step test” is also adopted in Article 42 of the Copyright Law of China. Therefore, the following will from the “three-step test” to discuss the relationship between live streaming of video games and fair use.

Article 9(2) of the Berne convention states that “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” The three-step test is thus described as: (1) in certain special cases; (2) it does not conflict with a normal exploitation of the work; (3) there is no unreasonable prejudice the legitimate interests of the author. In the subsequent negotiations in Uruguay, TRIPs argument cited this provision of the Berne convention, and almost the whole text referred to the three-step test, which became the minimum standard for the protection of copyright laws in member states. The specific connotation of the three-step test is clearly defined in the case WT/DS160 - Section 110(5) of US Copyright Act.

4.1 In certain Special Cases

The panel believes that the criteria for the first step of test should have a narrow scope. In understanding the specific meaning of each word, combine the context with the general meaning of the word. The so-called “certain” should be deterministic, although it is not necessary to determine a specific situation, but the limitations and exceptions must be known or special situations. The panel believes that the role of “special cases” is to limit the scope of beneficiaries. The criteria for such a limit can be examined in two parts, (1) the quality of the limit should be clear; (2) the limited quantity shall be a narrow range. When this standard is applied to live streaming of video games, it is not difficult to find that for the situation which players broadcast their own operation of the video game pictures, the main purpose is to show their game skills, and find the value in the virtual world from others’ affirmation and even worship of their game results. This mentality of players is just like that many people are willing to share their proud things in life, work or study to their social media. The purpose is to get thumb up and praise from people, rather than to show the beauty and expression of video game pictures. In this state of mind, players can think that the scope of live game streaming is limited to a narrow range, which is not fundamentally different from the use of dramatic music works at home. However, the live streaming of large e-sports games on live streaming platforms cannot be considered as a narrow range. At present, video game platforms and companies are developing rapidly, and live streaming platforms have become a major industry in China’s economy. Therefore, in this market situation, the scope of this exception

⁸ WIPO copyright treaty 1996.Art8

cannot be considered to be narrow, otherwise it will cause great harm to the interests of the video game copyright owner. Therefore, for the live streaming of large-scale competitive games on the video game live platform, it cannot pass the first step test.

4.2 It does not Conflict With a Normal Exploitation of the Work

Expert group thinks the standard of “use” refers to the behavior of obtaining economic value, namely, through the use of the works of the exclusive rights of the copyright owner licensing fees. The “works” shall include all proprietary rights related to the work. The “normal” contains empirical factors and normative factors. The empirical factors include the exercise of rights in accordance with existing experience and current conditions. The normative factors are beyond the existing experience and status quo of the exercise of rights, in addition to the consideration of the existing income approach, consider the restrictions and exceptions in the future to create economic value. On this basis, the expert group has opened up the interpretation of the “market alternative form” path: if those rights that should have been exercised by the author are restricted or exempted, and such restrictions and exemptions will compete with the way in which rights holders exercise their rights, as a result, the commercial interests of the right holders have been harmed, and we believe that such limitations and exceptions to exclusive rights conflict with the normal use of the work.

The interactivity of the online video game is strong, which is different from the film works, photographic works or other broadcasting works. The way a video game copyright owner expects the game to be used is to license the game to others to obtain a license fee.

In the live streaming of video games, the main body of watching live game streaming is generally people who are interested in video games, and people who are interested in video games will not just stay at the viewing level of the process of playing video games by other gamers. They watch live game streaming aim to learn skills and experience from the process of others playing games, which means that watching live streaming of video games is to improve your own skills in playing games. Therefore, for the audience of these online game live programs, they will not consume the game itself because they have watched the online game live programs. In other words, live game shows do not have a substitution effect on the game itself. On the contrary, gamers are more likely to play the game after watching the live game streaming, which is one reason why game developers “tolerate infringement”. Therefore, live streaming of video games itself does not conflict with the normal use of the game and meets the second test criterion. However, because the three-step test method is applicable to “accumulation”, the large-scale online game live competition does not pass the

first step test, it does not meet the standards for fair use, regardless of whether the second part of it is consistent, will not be considered.

4.3 There is no Unreasonable Prejudice the Legitimate Interests of the Author

First of all, the definition of “benefit”, the expert group believes that it should not be defined in terms of actual or potential economic value or loss. From the perspective of legal positivism, “legitimate interests” should be viewed from the goal of exclusive rights protection. Second, with respect to “harm”, the panel found that harm exists in any use and the question is how much harm is unreasonable. For this reason, the expert group believes that the unreasonable loss of income can be used to judge whether the legitimate interests of the copyright holder have been unreasonably harmed.

For competitive video games, as mentioned above, live game streaming itself does not have a competitive relationship with the original video game, so it is difficult to determine the actual loss. For some non-competitive games, players are not pursuing the pleasure and satisfaction of operating the game, but consume the game because of the attractiveness of the screen, scene or story displayed by the game. Therefore, the live streaming of these kinds of games, like live streaming of movies, focuses on freshness and curiosity. However, the audio-visual effect of live game streaming will have a certain impact on the use of online games and damage the enthusiasm of game players. The network transmission of such game pictures may cause unreasonable damage to the market of video games themselves, which cannot pass the third step test.

To sum up, when determining whether live streaming of video games constitutes fair use, different game types need to be analyzed by combining individual cases.

For competitive video games, which can meet the three-step test method, it is considered as reasonable use. As for the live streaming of large-scale competitive games, it does not meet the “narrow range” required by the first step “in certain special cases” theory, and does not constitute fair use. For some non-competitive video games, live game streaming may cause potential players to lose their curiosity and enthusiasm and have an unreasonable impact on the potential market of the video game. Therefore, it cannot pass the test standard of the third step and does not constitute fair use.

5. LIVE GAME STREAMING IN JUDICIAL PRACTICE

Both the live game streaming and the live streaming platform hope that the exemption clause can protect their rights and interests. The live video game industry is growing rapidly, with platforms such as Twitch.tv and

YouTube in the U.S. In China, live game streaming is also booming. In 2015, the people's court of Shanghai Pudong new area made a first-instance judgment on an infringement case of live streaming of online video game, which triggered heated discussions in academia and practice. Dota2 is a well-known electronic competitive online video game, in the case of Asian invitational on January 5 2015 solstice held on February 9, Shanghai Yaoyu culture media co., LTD., the holder of the authorized, in its network live streaming sites to the live webcast events involved, but during the game, Guangzhou Douyu network technology co., LTD on its web site also live Dota2 Asian invitational games match, Yaoyu company in Douyu are unauthorized illegal broadcast live Dota2 Asian invitational, violation of Yaoyu company owns the copyright, And at the same time on the grounds that the company's behavior constitutes unfair competition to the court to seek compensation Douyu company. The court of first instance found that Douyu company constituted unfair competition and assumed the responsibility of losing the lawsuit. However, the most heated discussion was caused by the court's determination that game images were not copyrighted works. This part intends to put forward some different views and opinions on the judgment of first instance.

Yaoyu v. Douyu the first instance judgment that the game competition video does not belong to the copyright law works. Similarly, about whether the game picture constitutes work, recently ruled Beijing Sina Internet information service co., LTD. (hereinafter referred to as the "Sina") v. Beijing days Tianying Kyushu network technology co., LTD. (hereinafter referred to as the "ifneg.com") broadcast sports events without permission of copyright infringement and unfair competition disputes case sentence gives a different conclusion, believes that sport has its composition. Both rulings discussed "pictures of a sporting event" but came to very different conclusions.

E-sports games on the Internet refer to the sustainable individual multiplayer online video games with the Internet as the transmission medium, the game operator's server and user's computer as the processing terminal, and the game client software as the information interaction window, aiming at achieving entertainment, leisure, communication and virtual achievements. E-sports is a kind of sport if treated as a sport, Sina.com v. ifeng.com and Yaoyu v. Douyu give opposite conclusions on the originality of the continuous picture of the game. In the judgment of sina.com v. ifeng.com, it is clear that the pictures of sports competitions meet the requirements of China's copyright law for the originality of works and should be recognized as works. The reason for the originality is that the pictures of the competition meet the requirements of creativity, that is, by means of shooting and production, the pictures are formed, and

the audio-visual form gives people visual induction and effect to form the works. But in Yaoyu v. Douyu case, the court of first instance is that e-sports game pictures does not constitute a work, reason is: "because of the events involved in the game itself, there is no script design beforehand, such as the game screen is composed of a number of players in accordance with the rules of the game, both sides in the race through their dynamic images, which is formed by the operating system of the game is a kind of objective and intuitive form, the randomness of the game process and replication, the outcome is uncertain, so the game picture does not belong to copyright law, the defendant to use the events involved in the game behavior does not constitute a violation of copyright of the picture." In the author's opinion, there are problems in the conclusions of the two judgments.

For ordinary sports events, such as basketball and football games, the picture of the game is a dynamic picture formed by several players participating in the game through their bodies and actions according to the rules of the game, which is a direct reflection of the game. Ordinary sports game screen itself, just as in a state of competition in objective performance, although the participants had tense and spirited competition, game screen is very exciting, but the contestants don't have any subjective intent "creative" work, by the contestants to participate in and form the picture do not conform to the requirements of the original copyright law, thus not protected by copyright law. Of course, the process of the competition can be recorded, but the result is only video products, which cannot reach the height of original works. It should be noted that what is referred to here is a pure picture of the game, excluding the case of adding explanatory words, etc., and the case of adding original explanatory words would be more complicated, which is not discussed in this paper. As for online e-sports games, there is no denying that, like all confrontational games, confrontational games also have the characteristics of competition and competition. Players play games on computers, mobile phones and other devices, and there is no essential difference between them and ordinary football players and basketball players. However, the continuous picture formed by e-sports games is different from that of ordinary sports events in nature. Video game competition is in the game software pre-set in the scene, the game characters role, door school, costume, weapon, etc., are the game developer through the program design to finish beforehand. The role of players in the game is to make the characters in the game survive and perform in the game through their own skills while playing the game, and to enrich the game scenes in various ways. But no matter how skilled a gamer is, he or she cannot operate beyond what the game developer has set out to do. The interrelated scenes, pictures and sound effects presented in the game are created by the game developer.

The player and the contestant are not creating the work. The player and the contestant exist and operate in a huge game scene. Moreover, the game competition cannot exist independently of the whole game. Thus, although the nature of the game is the same as that of a sports match, the picture formed by the game match is also random, depending on the player's skill, not set by the game developer. However, the author believes that the game competition is carried out on the basis of the game, and the player's technology is to show the scenes set by the game program itself. The game competition only makes the characters, props and scenes in the game come alive through the player's operation. Judge Winter of the United States held that sports were not protected by the Copyright Act because they had no author. However, the situation of online games is special. Different from ordinary sports events, all online games are based on games. The skill of the player is important, but more important are the other things that the game developer has set up. As early as in the U.S. Stern case in 1982, the plaintiff Stern company accused the defendant of infringing the copyright of the company's game Scramble. Both games involved in the case were about spacecraft, and the operation experience and game screen were similar, but the defendant's game used different codes from the plaintiff's game to achieve the above game effects. The defendant argues that the game software is recorded on the circuit board of a computer program, the program through the operation of the manipulator, makes the computer program can interact with other parts of game consoles, forming manipulator can be game audio and visual images, sound, the game is not simply playing video images, but changes with the operation of the players in the game image, should not be considered to be art. The court ruled that, even though the program codes of the two game software are different, when the game forms are the same or similar, "the repeatedly occurring combination of images and sound substance in the game can be protected as audio-visual works by copyright protection". The appearance of the two games is substantially similar, and infringement is established⁹.

CONCLUSION

The game pictures meet the characteristics of originality

⁹ Stern Electronics, Inc. v. Kaufman, 669 F. 2d 852,865 (2d Cir. 1982).

and reproducibility required by copyright law and constitute the protection of works under copyright law. Whether the live streaming of video games constitutes the work needs to be analyzed in combination with the specific situation. As for the exclusive rights involved in live game streaming, take China as an example, as a civil law country, judicial practice is particularly dependent on legal provisions, and it is not always possible to expand the interpretation of laws by means of blanket provisions or principled provisions. Along with the development of the Internet industry, it is recommended that the change in the copyright law in consider "live play" into the scope of information network transmission right protection, or extended the connotation of the broadcasting rights, make its cover by the spread of the Internet in the form of limited network information behavior, adapt to the current network transmission that represent the future development direction of transmission form, in the hope of live can guarantee the network game industry development, and the normal order of the Internet industry. In this universal live the age of the Internet, live streaming of video games low input, high return naturally attracted many Internet companies and players to join. At the same time, the development of mobile phone industry have contributed to the convenience and ease of access to live, if for live streaming of online video game related laws and regulations is not reasonable regulation and improvement are easy to obtain the video case, will soon be able to cause infringement problems, so on the premise of attaches great importance to the network game market, determine the obligation of the parties, protect the rights of the parties, to better promote the healthy development of the game of cultural industry. Of course, the easiest way to maximize the protection of both parties' rights is to obtain authorization from the copyright owner.

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