

How To Mitigate Copyright Risks Of Video Game Streaming

By **Anthony Dreyer and David Lamb** (December 11, 2019, 4:06 PM EST)

Streaming platforms, such as Twitch, Mixer and YouTube Gaming, are quickly becoming household names, with daily viewership rates that rival those of more traditional media outlets, including cable channels like CNN and ESPN.[1] As video game streaming increases in popularity, more and more individuals are trying to gain notoriety, along with a lucrative living, by creating content to feature on these platforms.

Unfortunately, as often is the case with new media, the law has not kept pace with the rise of this content, leaving copyright owners, streaming services and individual content creators in a legal gray area with respect to intellectual property ownership and infringement.

In this article, we examine the potential harms copyright owners may seek to avoid by asserting copyright infringement claims and what defenses streamers or streaming platforms might try to assert if presented with claims of copyright infringement.[2] We also discuss best practices for each of these actors, given the legal uncertainty presented by these circumstances.

Should Copyright Owners Be Concerned?

It is fairly uncontroversial that most forms of streaming implicate at least some of the rights owned exclusively by the copyright owners of the games being streamed.

A quick review of the offerings available on any streaming platform shows that the typical stream tends to consist of the same basic elements: a broadcast of the video game being streamed (which tends to take up the vast majority of the screen real estate), the streamer appearing in a corner or small box toward the side of the screen, and various other streaming overlays such as chat, donation recognitions or stream goal appearing on the edges or bottom of the screen.

In other words, it is clear from these streams that the main focus is on the video game itself.

Accordingly, such streams likely implicate at least the public performance right and the derivative works right of the copyright owner.[3] Thus, because the risk of infringement itself should always be of some concern to copyright owners, game creators and developers should be mindful, and wary, of the practice of streaming generally.

However, in many instances, copyright owners may accept — or even welcome — certain potentially infringing activity. For example, as streamers are often quick to point out, many streams act as free advertising for a game and help to create a community focused on the game. This, in turn, can encourage additional sales and sustained engagement from a player base, which may be particularly desirable for games featuring regular updates or the ability to purchase additional in-game content.

Nonetheless, a copyright owner may have certain concerns with the free, unfettered use of its



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copyrighted material. For instance, copyright owners may run the risk that a streamer could create a piece of content that is considered a work of joint authorship, thereby stripping the copyright owner of exclusive control over some expression of its work.

One of the main draws of streaming is likely the nongame content and commentary provided by the streamer him or herself. In many instances, these streamers are in fact playing characters, with personalities, mannerisms and characteristics distinct from those of the individuals portraying them. [4]

Thus, there is a colorable argument that, at least in some instances, the streamers are adding sufficiently creative elements to the copyrighted work to create a joint work of authorship, although it could also be argued that the new work is a derivative work — owned by the original authors.

As an analogy, consider a musical artist covering a particular song. While the original songwriter owns the copyright in the underlying work and composition, the artist inarguably owns a separate copyright in the performance and recording (and potentially the arrangement as well).

While the music industry has a compulsory licensing regime that clearly delineates the copyright ownership in such situations, and organizations like the American Society of Composers, Authors and Publishers and Broadcast Music Inc. to monitor and collect royalties, video games do not have any established mechanisms in place to cover such scenarios. Accordingly, without adequate compensation or oversight, publishers and developers risk losing control over, as well as revenue that can be derived from, some expressions of their works.

Second, a copyright owner may want to prevent a third party's commercial exploitation of the owner's work as part of an esports tournament or event. Thus, while a developer may be happy to let individuals stream the game, the developer may be less thrilled by a third party charging admission fees and obtaining advertising revenue for an event focused solely on the developer's copyrighted game.

The copyright owner may also have concerns about the rules of the event and the way the game is presented and may want to prevent potential harm to the integrity of the official esports events for its game.

Third, in addition to the pure copyright concerns, copyright owners may have practical reasons for wanting to prevent a streamer from streaming their game, including protecting plot or game-play elements from spoilers, or avoiding a perceived association with or sponsorship of a particular streamer who may use language or support ideas with which the copyright owner does not agree.[5]

As a final note, it is worth remembering that it is not only the streamers themselves that run the risk of incurring liability from copyright infringement; streaming platforms could potentially be held liable for facilitating, profiting from or providing an outlet for the infringing behavior. Indeed, a copyright owner may be inclined to include a platform in a copyright action, in an effort to obtain damages from a larger and likely better-funded party.

Potential Defenses to Copyright Claims

To date, there has not been a publicly litigated copyright infringement case brought against a streamer, or streaming platform, by a video game developer or publisher. However, it is likely only a matter of time, and if such claims are ever asserted, there are a number of potential defenses that may be available.

The most prominent defense to a copyright claim, and the one most brought up in theoretical discussions about the legality of streaming, would be fair use. However, it is unclear whether a typical stream would qualify as fair use under the factors set forth in Section 107 of the Copyright Act.

For instance, many streams are commercial in nature, copy large portions of the game being streamed (and in many instances perform the heart of the game) and often feature the streamer talking over video of straight game-play. Each of these facts would likely counsel against a finding of fair use. Further, whether streams can be considered transformative is arguable as well, as streamers

are not necessarily transforming the original work so much as they are adding their own creative elements on top of the work.

Conversely, streamers often contend that their main focus is providing commentary on the game (which is specifically called out in the Copyright Act as a favored type of fair use) and suggest that streaming acts a significant transformation of the original work, as the work itself is meant to be a game played directly by a player, while streaming is more akin to a television program or article discussing the game.

Further, the streaming of certain types of games, particularly multiplayer games or games with a large esports scene, likely does not supplant the market for the original work itself (and in some cases may even stimulate the market for the game).

Thus, there appear to be persuasive arguments on both side of the fair use defense, and the viability of these arguments likely will not be clear until they are tested in a specific factual scenario.

In addition to fair use, a streamer could rely on other, lesser-known copyright defenses if faced with a copyright suit. For instance, the doctrine of equitable estoppel provides that where a plaintiff knows of the defendant's infringing use, but nonetheless allows the defendant to continue to the defendant's detriment, the plaintiff may not then later change its mind and seek to enforce those same rights.

Thus, a streamer could argue that because game developers are well aware of streaming, and streamers rely on the developer's lack of action in building their careers on streaming, developers should not be permitted to selectively enforce their copyright in any particular instance.[6]

Finally, the doctrine of copyright misuse allows a defendant to avoid liability if it can show that the copyright owner is enforcing its copyright for an improper purpose. In the context of video game streaming, the most likely argument under copyright misuse would be that a developer was enforcing its copyright in an attempt to prevent legitimate critiques or criticism of its work. Thus a streamer may argue that the copyright owner did not like the commentary and inappropriately sought to censor it under the guise of copyright enforcement.

With respect to streaming services themselves, the most likely defense would be to rely on the safe harbor provisions of the Digital Millennium Copyright Act; the strength of such a defense would, of course, depend on the particular streaming service's compliance with the requirements of that act.

Of particular note, the DMCA safe harbor is only available to service providers that lack actual knowledge of infringement and lack awareness of the facts and circumstances making infringement possible. Thus, to the extent streaming is considered to be plainly infringing, the DMCA safe harbor may not be as strong a defense as streaming platforms would initially assume.

Best Practices

Many of the copyright issues discussed above — in particular the potential equitable defenses to a copyright infringement claim — can largely be sidestepped by the use of appropriate licensing language as part of the end-user license agreements associated with the games at issue. Indeed, several popular esports games already include such language providing individuals with a license to stream the games, while reserving for the copyright owner the unilateral ability to revoke the license for any reason.

Such language can also expressly cover the potential creation of joint works of authorship and clearly set forth which party owns the copyright and, where necessary, grant the developer an irrevocable license to use any intellectual property created by the players/streamers themselves.

Finally, game developers should be aware of the recent U.S. Supreme Court decision in *Fourth Estate Public Benefit Corp. v. Wall-street.com* requiring copyright owners to have obtained registrations prior to bringing an infringement action and to file for registrations as soon as practicable.

For streaming services, the most prudent course of action to avoid liability is to ensure that they are fully compliant with the requirements of the DMCA, with particular focus on the potential risk caused by their knowledge of infringement, or facts and circumstances allowing for such infringement. By

ensuring compliance with the safe harbor provisions, streaming platforms can minimize the risk of incurring liability to the extent a copyright owner seeks enforcement against any individual streamer.

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[1] See "Amazon's streaming service Twitch is pulling in as many viewers as CNN and MSNBC," Ben Gilbert, Business Insider (Feb. 13, 2018).

[2] Streaming implicates a host of potential IP issues, including copyright claims brought by the copyright owners of music played during a stream. However, the focus of this article is on the copyright implications from the perspective of the game developers in particular.

[3] See 17 U.S.C. § 106.

[4] See Calum Patterson, Dr Disrespect Breaks Character to Give Speech on How He Turned His Life Around, Dexerto (Aug. 31, 2019), available at <https://www.dexerto.com/entertainment/dr-disrespect-breaks-character-give-speech-turned-his-life-around-972911>.

[5] For example, the developer of the popular indie game Firewatch issued a copyright takedown notice against Pewdiepie (one of YouTube's most watched content creators) in response to Pewdiepie's use of a racial slur during a live stream. See "The (still) uncertain state of video game streaming online," Willie Clark, Ars Technica (Jan. 28, 2018).

[6] Copyright law also recognizes a doctrine of "implied license" where, similar to equitable estoppel, a streamer could argue that by its inaction a copyright owner has indicated that the streamer had a license to stream the game.