

## A Cure for Twitch: Compulsory License Promoting Video Game Live-Streaming

Yang Qiu

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# A CURE FOR TWITCH: COMPULSORY LICENSE PROMOTING VIDEO GAME LIVE-STREAMING

YANG QIU\*

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## ABSTRACT

*New technology always bring challenges to Chinese legislation. In recent years, based on technological development of network transmission, video game streaming platforms like “Twitch.tv” have made “big” money. The problem, however, is that the streaming content on those platforms involve copyrightable video games, which infringe game publishers’ copyright, if the streaming platform lacks authorization. And only a few of the streaming platforms and streamers have licenses from game publishers. Nowadays, most game publishers allow streaming to exist because they view the streaming as free advertisement for their games. By making these allowances, the game publishers stay in their fans’ good graces. But what if they change their mind? Once game publishers shut down the video game streaming, streaming platforms could be left without content and professional streamers could be left without a livelihood. This is not the ideal situation for a growing business.*

*This article provides an amendment to Chinese copyright law, which would create a compulsory license that allows video game players to stream games by paying remuneration to copyright owners. This article argues that fair use and safe harbor will not help the video game streaming industry, whereas a compulsory license could be a potential legislative solution based on Chinese foundation. This proposal absorbs the right of cancellation and elements of the U.S. implied license doctrine, consisting of four key elements: (1) when the*

*compulsory license applies; (2) the opting out of the compulsory license; (3) the right of cancellation; and (4) remuneration, which prevents abuse from streamers and helps copyright owners as they attempt to enforce their rights.*

#### INTRODUCTION

Have you ever heard of “Arteezy”? He is a famous video game player who broadcasts his game playing live on the Twitch.tv website. Arteezy gains more than three-hundred thousand subscribers that pay \$4.99 per person each month to stream his game playing.<sup>1</sup> At this rate, he could potentially earn at least \$1.5 million per month from his fans. That is a substantial amount of money! All his success is based on the development of an emerging industry: the video game streaming industry.

The video game streaming industry is based on the technical development of online streaming platforms. Recently, one of the most famous video game streaming platform “Twitch.tv” was purchased by the company Amazon for \$1.1 billion.<sup>2</sup> What type of venture commands this type of price? Basically, “Twitch.tv” provides video gamers with a website location to share and stream their video game experiences with others. Through the platform, streamers host their own channel and achieve interaction with audiences while playing the game. Specifically, “Twitch viewers typically see the screen of a [web]caster, featuring the game being played, along with a video feed of the player’s face and a chat window so they can communicate with the player and others watching the action.”<sup>3</sup> And the audiences are not a group of people sitting in a gymnasium or theater—in fact, they are millions of Twitch users sitting in front of their computer screens. “Twitch boasts 1.5 million broadcasters . . . [a]nd its 100 million viewers per month spend an average of 106 minutes watching streamed content on the network per person per day.”<sup>4</sup> The existence of such activities is not new, and there are lots of websites around the world that share this “big cake,” like “Douyu.tv” in China and “afreeca.tv” in Korea, whom primarily focus on “video gaming, including playthroughs of video games by

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1. See Arteezy’s streaming webpage, TWITCH, [https://www.twitch.tv/arteezy/profile\\_\(last visited Mar. 15, 2016\)](https://www.twitch.tv/arteezy/profile_(last%20visited%20Mar.%2015,%202016)).

2. Nick Wingfield, *What’s Twitch? Gamers Know, and Amazon Spent \$1 Billion on It*, N.Y. TIMES (Aug. 26, 2014), [http://www.nytimes.com/2014/08/26/technology/amazon-nears-a-deal-for-twitch.html?\\_r=0](http://www.nytimes.com/2014/08/26/technology/amazon-nears-a-deal-for-twitch.html?_r=0) [https://perma.cc/4B7Q-BSVA].

3. See CBS This Morning, *Twitch Turns Gaming into Spectator Sport*, CBS NEWS BROADCAST (Oct. 10, 2014), <http://www.cbsnews.com/videos/pay-for-play-twitch-turns-gaming-into-spectator-sport/> [https://perma.cc/9QVB-24Z9].

4. Chris Morris, *YouTube Gaming Launches to Take on Twitch*, CNBC (Aug. 26, 2015, 11:42 AM), <http://www.cnbc.com/2015/08/26/youtube-gaming-launches-to-take-on-twitch.html> [https://perma.cc/A689-59LL].

users, broadcasts of e-sports competitions,”<sup>5</sup> and other gaming-related events. Content on the site can either be viewed live, or viewed on an on-demand basis.<sup>6</sup> However, lurking in the live game streaming industry are some copyright risks, which need to be mitigated to ensure the new industry flourishes in the future. Video game streaming consists of the platform who profits from the hits and ads, and streamers who share the profit with the platform.<sup>7</sup> Absent from this wealth distribution party are the copyright owners who own the copyright of the electronic games played by streamers. As large amounts of wealth are channeled to the new industry, disputes are unavoidable. What if the game developers argue that live streaming infringes their copyright? Another question is whether the live streaming content is copyrightable work. And what if someone rebroadcasts and transcribes the streaming content without permission? Those questions along with the development of a new technology that demands a prompt solution have not been answered effectively by the legal system in China, which always puts e-sports<sup>8</sup> on an equal footing with traditional sports.<sup>9</sup> Chinese copyright law lags when confronted with a new industry, like online streaming,<sup>10</sup> whereas the U.S. copyright law fails to provide perfect answers to these questions. To help this burgeoning industry grow, while ensuring protection of copyright and financial fairness, a new solution must be identified.

This Note proposes a compulsory license that absorbs the right of cancellation and elements of the implied license doctrine from the U.S. approach as a potential legislative solution in China. This proposal attempts to eliminate the high copyright infringement risk of the video game streaming industry, but it seeks to balance the interests of streamers, platforms and copyright owners. To prevent abuse from streamers<sup>11</sup> and prejudice on legitimate interests of copyright owners, a “right of cancellation” is the suggested solution.

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5. *Twitch.tv*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Twitch.tv> [https://perma.cc/8AMH-6QXY] (last visited Apr. 8, 2016).

6. *Id.*

7. Breena Kerr, *Get Rich or Die Streaming: Making Money on Twitch.tv*, THE HUSTLE (Oct. 30, 2015, 4:20PM), <https://thehustle.co/get-rich-or-die-streaming-making-money-on-twitch-tv> [https://perma.cc/VC4E-TBWX].

8. E-sports is form of competition that is facilitated by electronic systems, particularly video games. Juho Hamari & Max Sjöblom, *What is eSports and why do people watch it?*, 27 INTERNET RESEARCH 211–232 (2017).

9. Here, the problem is that video games are subject to copyright protection, but traditional sports are not.

10. 王立诚 [Wang Li-chen], 网络环境下著作权问题的研究 [*A Research on the Copyright Issues occurring in Cyber Environment*], 津图学刊 [TIANJIN LIBRARY J.] (2003) (author’s translation).

11. Exemption refers to the proposed compulsory license.

Part I of this Note provides an overview of the unauthorized streaming problem. Part I also discusses whether elements in US copyright law, such as fair use and the DMCA safe harbor will be successful in China. Part II proposes an amendment to Chinese copyright law, which would create a compulsory license that allows video game players to participate in game streaming and pay remuneration to copyright owners. This proposal absorbs the right of cancellation and elements of the implied license doctrine as a potential legislative solution in China, which prevent abuse from streamers and helps copyright owners as they attempt to enforce their rights. A more compatible compulsory license will resolve the issue and make sure copyright owners receive their fair share of this new business while it continues to develop. Part III discusses the potential criticism to this proposal.

#### I. UNAUTHORIZED STREAMING AND DEFENSE AGAINST COPYRIGHT INFRINGEMENT IN CHINA AND U.S.

As the market value of video game streaming increases, some potential copyright disputes are aggravated. Recently, a dispute occurred between famous streaming platform Twitch.tv, Azubu and the famous video game manufacturer Riot.<sup>12</sup> This dispute provides an insight into how this new industry works, how the parties are involved, and how the potential disputes occur. In the video game streaming industry, further copyright disputes are inevitable. However, the Chinese copyright law lags in this new industry, compared to U.S. copyright law on some issues. Under current Chinese law, those issues will be difficult to solve. Part I further analyzes the problem of unauthorized streaming of video game playing under copyright law of U.S and China.

##### *A. Practice of Video Game Live Streaming*

As explained later in this Note, video game streaming has grown in popularity and created more controversy under copyright law. The biggest problem currently is that most of the video game streaming is unauthorized. The streaming industry is at risk of high copyright infringement. And disputes like “Spectatefaker” might happen more frequently. That is not an ideal situation for a growing industry.

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12. Samuel Lingle, *Spectatefaker dares Riot games to shut him down*, THE DAILY DOT (Feb. 23, 2015, 1:58 AM), <http://www.dailydot.com/esports/spectatefaker-riot-games-dmca-dare/> [<https://perma.cc/TAR9-ZTKU>].

## 1. Overview of Unauthorized Streaming

When video game streaming occurs, it inevitably involves copyrightable parts of the game. For instance, when “Arteezy” plays the game DOTA 2,<sup>13</sup> “Arteezy” also makes comments, and communicates with audiences during the stream on Twitch.tv. Typically, his stream includes several discrete elements: the picture of DOTA 2, the sound and background music of DOTA 2, his oral commentary, and video showing his face. The streamed content contains the visual work and sounds of the game, which could infringe Valve Corporation’s copyright if “Arteezy” lacks authorization.

Under current U.S. copyright law, infringement occurs when someone publicly performs copyrighted work without a license.<sup>14</sup> The Copyright Act dictates that “public performances include not only displaying copyrighted content in public to a substantial number of individuals, but also disseminating electronic copies of the content.”<sup>15</sup> Under the protections in U.S. copyright law, video game copyright holders have legal authority to prohibit public tournaments, like online streaming content that features their games.

The question is how many streamers and platforms have licenses from a copyright holder for use of their video game. The answer is few.<sup>16</sup> That is, only “several [manufacturers] have enacted user agreements that explicitly allow for the live streaming of their titles. But such agreements often do not extend to commercial use . . . .”<sup>17</sup>

## 2. “SpectateFaker” Dispute Brings Copyright Concerns about the New Business.

As the video game streaming industry has developed, copyright disputes involving unauthorized streaming has occurred frequently in China and the United States. In February 2015, streaming platform Azubu sent a DMCA takedown notice to Twitch. This dispute began when a Twitch channel “SpectateFaker” streamed the game playing content of professional player Lee

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13. DOTA 2 was developed by the Valve Corporation, an entertainment software and technology company founded in 1996. *See About the Company*, VALVE, <http://www.valvesoftware.com/index.html> (last visited Sept. 8, 2017).

14. *See* 17 U.S.C. § 106 (2012).

15. Jonathan Stahl, *Video Games: Copyright Law and the Future of an Industry*, PENN UNDERGRADUATE L. J., (July 31, 2015), <http://www.pulj.org/the-roundtable/video-games-copyright-law-and-the-future-of-an-industry> [<https://perma.cc/2GBA-X9W2>].

16. *Id.*

17. Christopher Zara, *Will Google Ruin Twitch? YouTube-Style Copyright Enforcement Worries Gamers Amid Rumors*, INT’L BUS TIMES (June 5, 2014, 9:20 AM), <http://www.ibtimes.com/will-google-ruin-twitch-youtube-style-copyright-enforcement-worries-gamers-amid-rumors-1594767> [<https://perma.cc/S256-HDJT>].

“Faker” Sang-hyeok on Twitch.tv through LoL<sup>18</sup> spectator mode. According to a contract Azubu signed with “Faker” in September 2014, “Faker” can only stream his game playing exclusively on the Azubu platform.<sup>19</sup> However, the “SpectateFaker” streamer StarLordLucian countered that “according to the LoL terms of use, players sign away rights of ownership to the gameplay content they create within the game. Legally, Azubu does not own the streaming content that Faker was producing. Thus, their DMCA action was not based on a valid legal claim of ownership.”<sup>20</sup>

Because Azubu did not have legal standing, “Faker” and KeSPA (Korea eSports Association) reached out to Riot to express that “Faker” did not want his game playing to be streamed without his consent because it had a negative impact on the value and stability of his streaming offering.<sup>21</sup> And Faker and KeSPA hoped Riot would take action to shut it down.<sup>22</sup>

Under the U.S. copyright law, Azubu has the exclusive right to act as Faker’s broadcast platform.<sup>23</sup> However, that arrangement simply cannot grant copyrights to the gameplay itself. That game content is not “Faker’s” to license—it is Riot’s.<sup>24</sup> Thus, we find that streamers, even platforms, are unable to safeguard their rights and interests, as the copyrights belong exclusively to the game publisher. Moreover, if Riot has the right to stop “SpectateFaker” from streaming its game content, other similar streaming, which does not have a license from the game publisher, seems illegal too.

“SpectateFaker” is only the beginning of copyright disputes. To ensure this new industry continues growing, some legal issues demand prompt solutions.

Currently, the development of video game streaming is not an ideal situation. Most game publishers allow users to stream their games as long as they are available to the public without a fee because the publishers view streaming as free advertisement for their games, and a “booster” for business. By making these allowances, the game publishers stay in the “good graces” of

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18. “LOL” is the abbreviation of “League of Legend”, a multiplayer online battle arena game (MOBA) developed by Riot Games, Inc. See *We Make Games for Gamers*, RIOT GAMES, <https://www.riotgames.com/our-games> [<https://perma.cc/Z5EY-LMU8>] (last visited Sept. 8, 2017).

19. See Bryce Blum, *An esports lawyer breaks down everything you need to know in the SpectateFaker case*, THE DAILY DOT (Feb. 21, 2015, 4:08 PM), <http://www.dailydot.com/esports/dmca-faker-azubu-twitch-riot/> [<https://perma.cc/TAR9-ZTKU>].

20. Tryndamere, *SpectateFaker - what we learned and what we’ll do*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/news/riot-games/announcements/spectatefaker-what-we-learned-and-what-well-do> [<https://perma.cc/6258-LPXS>] (last visited Feb. 28, 2015).

21. *Id.*

22. *Id.*

23. Lingle, *supra* note 12.

24. *Id.*



their fans.<sup>25</sup> The fact is, however, that the game publisher's copyright is exploited by streaming; there is no written agreement, no transfer of any copyrights,<sup>26</sup> and moreover, the service provider is also liable for that infringement. But this also means that game publishers can take away the streaming of their games at any time. "In that situation, [platforms like] Twitch could be left without content and the professional streamer could be left without a livelihood. This is not the ideal situation for a growing business."<sup>27</sup>

There are reasons to transform video game streaming—this infringing activity—into a legal business. While streamers are broadcasting their game playing on websites like Twitch.tv, they invest both time and money into building a brand and a community of fans, and buying equipment to make quality streaming.<sup>28</sup> Meanwhile, platforms are investing large amounts of money to gain users and sign contracts with famous streamers. If the game streaming content is infringement, and game publishers could arbitrarily take down the streaming content, or potentially ask for damages, the strike to this new industry will be fatal. To balance the interests of the streamers, the streaming platform and copyright holders and ensure this new business develops, the situation needs to be changed. Legislative action might be necessary to achieve a "win-win" situation for those involved.

### *B. The Legality of Unauthorized Streaming of Video Game Playing Is Uncertain*

Both streamers and platforms demand exceptions or licenses to ensure their reasonable interests. Video game streaming industry is developing rapidly in the U.S. with platforms like Twitch.tv and YouTube, among other platforms. In China, the video game streaming industry is also booming. In February 2015, the court of Shanghai Pudong adjudicated the first unfair competition case about video game streaming in which the defendant Douyu.tv (a famous streaming platform in China), compensated the plaintiff, Yaoyu company, one million yuan for economic losses for rebroadcasting the DOTA 2 Asia Championship without consent.<sup>29</sup> However, faced with this new industry,

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25. A report shows that people prefer to purchase game based on watching someone else play it. Nowadays, streaming plays an important role in video game industry. See *eSports and Streaming Gaming report*, THE NPD GRP., <https://www.npd.com/lps/pdf/Games-eSportsandStreamingGameplay.pdf> [https://perma.cc/B9ZE-7967] (last visited Sept. 8, 2017).

26. 17 U.S.C. § 204(a) (2012). ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.")

27. Michael Larkey, *Cooperative play: Anticipating the Problem of Copyright Infringement in the New Business of Live Video Game Webcasts*, 11 RUTGERS J.L. & PUB. POL'Y 52, 59 (2015).

28. *Id.*

29. See 邢爽 [Shuang Xing], 中国首例电竞直播纠纷案判决斗鱼被判停播 [China's First

Chinese copyright law and U.S. copyright law have different provisions regarding exceptions.

### 1. Is the Gamer's Online Streaming Infringement?

Under current U.S. and Chinese law, streamers are taking the risk of directly infringing the copyright of video games, because most publishers do not explicitly provide licenses to stream the content of the game. In order to identify whether their unauthorized game streaming is infringement, all possible exceptions shall be taken into consideration, not only the exclusive interests.

#### *a. U.S. Law*

A problem for video game streaming in the U.S. is that unauthorized streaming of such content may constitute copyright infringement. "There is no doubt that unauthorised [sic] online streaming for commercial purposes amounts to IP infringement."<sup>30</sup> In U.S. copyright law, unauthorized streaming will infringe the copyright owner's public performance right.<sup>31</sup>

Another problem is that the fair use doctrine is applied on a case-by-case basis and may not necessarily exempt the practice of unauthorized streaming. In the provisions of sections 106 and 106(a) of Title 17 of the U.S. Code, fair use of a copyrighted work, "including such use by reproduction in copies, records, or by any other means specified in that section, including: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."<sup>32</sup> To determine whether the use of a work is a fair use, four factors should be considered: (1) the purpose and the character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and the substantiality of the portion taken in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the copyrighted work.<sup>33</sup>

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*Live Gaming Dispute Judgment Betta Adjudged Off the Air*, 凤凰网 [IFENG NEWS] (Sept. 24, 2015, 2:40 PM), [http://games.ifeng.com/yejiehangqing/detail\\_2015\\_09/24/41082517\\_0.shtml](http://games.ifeng.com/yejiehangqing/detail_2015_09/24/41082517_0.shtml) [<https://perma.cc/X7NB-G6AF>].

30. Arty Rajendra, *Insight: Getting the most out of games streaming Rouse Legal*, THE MARKET FOR COMPUTER AND VIDEO GAMES (June 23, 2015, 9:30 AM), <http://www.mcvuk.com/news/read/insight-getting-the-most-out-of-games-streaming/0151581> [<https://perma.cc/ZCD2-K8R8>].

31. See 17 U.S.C. § 106.

32. *Id.* § 107.

33. *Id.*

Applying the four factors, which are guidelines for courts, it is not likely that fair use can be a defense for video game streaming. Although the four factors are flexible and fair use is potentially available to any copyrighted works, when it comes to live game streaming, several factors are important: (1) the purpose of the game's use is making money; (2) the video game content does not belong in the public domain, and the visual work and sounds are protected; (3) a substantial portion is taken in relation to the copyrighted work, and that part is essential; and (4) streaming seems to have a positive effect on advertisement, but may harm the potential market, since people who watch the stream may choose to not play the game. Thus, in the U.S., the application of fair use in this situation is doubtful.

Aside from fair use, it is also unclear whether an implied license arises. The implied license doctrine is not contained in the U.S. Copyright Act, but it is established by case law.

The implied license doctrine was subsequently imported into copyright law, primarily with respect to two aspects . . . .The first such area was the 'exhaustion of right' doctrine, also known as the "first sale" doctrine. The second area was the development of a supplemental framework for determining the rights of copyright owners and transferees beyond their explicit contractual relations.<sup>34</sup>

The first sale doctrine is quite different with game streaming, because game publishers never sell their game to subscribers; rather, they only sell a "right to play the game."

In general, as for second area, the implied license is available in certain circumstances where (1) the licensee requests the creation of the work, (2) the licensor makes that particular work and delivers it to the licensee, and (3) the licensor intends that the licensee copies and distributes his work,<sup>35</sup> which is not likely to be applied to game streaming.

But under network environment, the scope of an implied license has been extended, and it may protect the game streaming industry. In *Field v. Google*, the court held that the plaintiff granted an implied license to display his work because he failed to take technical measures to prevent his site from being cached by Google. And such kind of technical measure is a general practice.<sup>36</sup> It seems possible that a court may find there is an implied license for game

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34. Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 281 (2008).

35. See *Asset Marketing Sys, Inc. v. Gagnon*, 542 F.3d 748 (9th Cir. 2008); see also *Numbers Licensing LLC v. bVisual USA Inc.*, 643 F. Supp. 2d 1245 (E.D. Wash. 2009).

36. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

streaming. There is no certain answer, however, as game streaming remains largely untested. “Nobody really knows, because no court has weighed in.”<sup>37</sup>

*b. Chinese Law*

The same problems exist in Chinese copyright law. For example, a Chinese limitation on exclusive rights cannot be applied to the practice of video game streaming. Section Four of the Copyright Law in the People’s Republic of China [中华人民共和国著作权法] contains a provision about limitations on rights. There are twelve kinds of cases where a copyrighted work can be used without permission, and without payment of remuneration to the copyright owner, including private study or self-entertainment; quotation; news; education; performing official duties; free performance of published work; and the translating of language into minority nationality.<sup>38</sup>

Video game streaming is not included in any cases of Chinese fair use. Article 22 lists all the conditions that can be “fair use,” distinguished from U.S. copyright law. This provision is confined to certain cases, yet, video game streaming is not included in those twelve cases. Therefore, the Chinese limitation on exclusive rights cannot be applied as a defense to legal liability here.

There is no implied license doctrine in Chinese copyright law, but there are some provisions that grant a compulsory license in the absence of an actual agreement, such as articles 33 and 40 of Copyright Law in the People’s Republic of China. Articles 33<sup>39</sup> and 40<sup>40</sup> state that individuals can get licenses for news and sound recordings, even if there is no actual agreement, but must pay remuneration to the copyright owner as prescribed in the regulations.

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37. Stahl, *supra* note 15.

38. 中华人民共和国著作权法 [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 10, 2010), art. 22 (2010) (China), available at [http://www.gov.cn/flfg/2010-02/26/content\\_1544458.htm](http://www.gov.cn/flfg/2010-02/26/content_1544458.htm) [<https://perma.cc/S9GN-PHAA>] (author’s translation) [hereinafter *Copyright Law of People’s Republic of China*].

39. *See id.* at art. 33.

After a work is published in a newspaper or a periodical, other newspaper or periodical publisher may, except where the copyright owner has declared that reprinting or excerpting is not permitted, reprint the work or print an abstract of it or print it as reference material, but such other publishers shall pay remuneration to the copyright owner as prescribed in regulations.

40. *See id.* at art. 40.

[A] producer of sound recordings who exploits a music work another person has duly made into a sound recording to produce sound recordings, may not obtain permission from, but shall pay remuneration to the copyright owner as prescribed by regulations, such work shall not be exploited where the copyright owner has declared that such exploitation is not permitted.

Article 9 of the Regulation on the Protection of the Right to Network Dissemination of Information [信息网络传播权保护条例] states that individuals can take advantage of works under specific conditions. But, in order to respect the rights of the copyright owner, this provision also gives copyright owners a right of termination without any reason.<sup>41</sup>

Since a compulsory license is the general practice in dealing with license disputes—in the absence of an actual agreement, a compulsory license for video game streaming may be the best legislative solution in Chinese copyright law.

## 2. Is the Streaming Platform Protected by ISP Safe Harbor?

On the Internet, potential infringing works are always transmitted and stored through a third party's network. Streaming platforms like Twitch.tv are third-party online service providers that does not store the streaming data, but transmit the streaming data and provide links to streaming channels. In order to protect online service providers from endless liability for individuals' copyright infringing activities transmitted or stored by their network, safe harbor was created. Since unauthorized video game streaming is an infringement to copyright under the current situation, we may consider safe harbor as an online service provider's defense.

### a. *DMCA Safe Harbor*

The problem is that it is unclear whether video game streaming websites fall within the DMCA safe harbor. Section 512 of the Digital Millennium Copyright Act (DMCA)<sup>42</sup> protects online service providers from liability for infringing data stored or transmitted by subscribers “if they quickly remove or disable access to material identified in a copyright holder's complaint.”<sup>43</sup>

In order to qualify for safe harbor protection, a service provider who hosts content must: have no knowledge of, or financial benefit from, infringing activity on its network[;] once provided with knowledge, act expeditiously to remove or disable access to the complained-of material[;] have a copyright policy and provide proper notification of that policy to its subscribers[; and] list an agent to deal with copyright

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41. 信息网络传播权保护条例 [Regulation on the Protection of the Right to Network Dissemination of Information] (promulgated by the St. Council Gaz., May 10, 2006, effective July 1, 2006), art. 9 (2006) (China) (author's translation).

42. 17 U.S.C. § 512 (2012).

43. *Topics: DMCA Safe Harbor*, LUMEN, <https://www.lumendatabase.org/topics/14> [<https://perma.cc/6SBS-F4FA>] (last visited May 23, 2015).

complaints.<sup>44</sup>

No matter how fast the streaming platform removes or disables access to material identified in a game publishers' complaint, DMCA safe harbor cannot be applied to a streaming platform, because the platform has "knowledge of, and financial[ly] benefits from, infringing activity on its network."<sup>45</sup>

*b. Chinese Safe Harbor*

The Regulation on the Protection of the Right to Network Dissemination of Information promulgated by State Council of the PRC used DMCA safe harbor for reference.<sup>46</sup> The principle of Chinese safe harbors is regulated in article 22, which states:

A network service provider which provides an information storage space to a service recipient, thus enabling the service recipient to make available to the public through information network a work, performance, or sound or video recording, and which meets the following conditions, bears no liability for compensation:

- (1) it clearly indicates that such information storage space is provided for the service recipient, and it makes known to the public its name, the person to be contacted and network address of the network service provider;
- (2) it does not make any modification to the work, performance, or sound or video recording made available by the service recipient;
- (3) it does not know or has no reasonable grounds to know that the work, performance, or sound or video recording made available by the service recipient is an infringement;
- (4) it does not gain any direct financial benefit from the service recipient making available the work, performance, or sound or video recording; and
- (5) upon receiving a written notification of the right owner, it removes, in accordance with the provisions of these Regulations, the work . . . .<sup>47</sup>

Game streaming platforms cannot be protected by the Chinese safe harbor,

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44. *Id*; see generally 17 U.S.C. § 512(a).

45. *Topics: DMCA Safe Harbor*, *supra* note 43.

46. 王迁 [Qian Wang], 信息网络传播权保护条例》中“避风港”规则的效力 [The effectiveness of the “safe haven” rules in the Regulations on Protection of the Right of Communication through Information Network], 法学 [LAW SCIENCE] (2010) (author's translation).

47. Regulation on the Protection of the Right to Network Dissemination of Information, art. 22.

either. The Chinese safe harbor has similar requirements to the U.S. safe harbor. When the ISP knows or should know about the infringement, they are liable. Apparently, streaming platforms are quite aware of the streaming content.

### 3. Can Streamers Get Copyright of Their Oral Commentary and Performance?

Another problem is that it is not certain whether streamers can obtain copyright protection of their oral commentary and performance. As mentioned earlier, the streaming content not only involves the visual work and sound of the game, but it also contains oral commentary and performance by streamers. If a work is not fixed simultaneously at the time of its creation, then it cannot receive copyright protection under Chinese copyright law<sup>48</sup> or U.S. copyright law.<sup>49</sup> However, most of game streaming content is recorded by the platform automatically. So, who is the copyright owner of this fixed work? It is not that clear, since most streaming is unauthorized, and the streaming platform, not the streamers, records the content.

## II. A NEW COMPULSORY LICENSE IN CHINESE COPYRIGHT LAW TO HELP VIDEO GAME STREAMING OUT

Because there is no exception that can be used to protect the streamer and platform and eliminate their worries of being shut down, finding a legal resolution for the infringement problem is necessary. Licensing seems to be the only option. However, the traditional (“one to one”) way of licensing does not satisfy the efficiency requirement under the network environment. Part II proposes that China adopts a new compulsory license, which absorbs the elements of the implied license doctrine and the “right of cancellation” to develop video game streaming industry.

### A. *Proposal of Adopting a Compulsory License in Chinese Copyright Law*

This section sets forth a proposal based on the elements of Chinese pre-existing compulsory license and the elements of the U.S. implied license doctrine. Currently, China has a foundation of the copyright compulsory license,<sup>50</sup> but has no doctrine of implied license. To determine how compulsory

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48. See 中华人民共和国著作权法实施条例 [Regulations for the Implementation of the Copyright Law] (promulgated by the St. Council Gaz. Jan. 30, 2013, effective Mar. 1, 2013), art. 2 (China) (author’s translation).

49. See 17 U.S.C. § 102 (2012). 17 U.S.C. § 102 states “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.” *Id.*

50. See Copyright Law of the People’s Republic of China, *supra* note 38 at arts. 33, 40; see also 信息网络传播权保护条例 [Regulation on the Protection of the Right to Network Dissemination

license applies, elements of the U.S. implied license doctrine and a compulsory license under Japanese copyright law should be used as reference.

### 1. Draft of Video Game Streaming License Provision

Referring to the example of pre-existing Chinese copyright compulsory license provisions,<sup>51</sup> and consulting the Chinese statutory language, a sample draft of a compulsory license for video game streaming based on Regulation on the Protection of the Right to Network Dissemination of Information<sup>52</sup> is as follows:

#### (1) Compulsory License to Stream Game Playing.

For the video game work that Copyright Owner has published and uploaded to the Internet independently and directly, subscribers who received a license to use the game content from Copyright Owner have the right to transmit the game content to other persons or performance to the public through online stream. And the copyright of any fixed streaming content shall belong to the streamer. But such streamer shall pay remuneration to the copyright owner as prescribed in regulations. The names of works as well as the names of the authors (titles) shall be specified by the streamer on the streaming webpage.

#### (2) Rights of Copyright Game Owner.

(a) **Opt out right.** In cases where the Copyright Owner has declared that transmission of the work is not permitted, and has set technical measures to limit the access to the work or avoid the transmission of the work, the compulsory license shall not be applied.

(b) **Right of cancellation.** With respect to the above right of transmission and performance, Copyright Owner has the right of cancellation. Copyright Owner may file a notice with the relevant network service provider, requesting the provider to delete the works, performance and audio-visual products or to cut off the link

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of Information] (promulgated by the St. Council Gaz., May 10, 2006, effective July 1, 2006), art. 9 (2006) (China) (author's translation).

51. Copyright Law of the People's Republic of China, *supra* note 50.

52. *Regulation on Protection of the Right of Communication through information Network*, WIPO (Mar. 31, 2018). [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182147](http://www.wipo.int/wipolex/en/text.jsp?file_id=182147).



to the works, performance and audio-visual products concerned. After receiving a notice from the Copyright Owner, the network service provider shall transfer the notice to the users that enjoy the above right of communication and performance, and shall delete the relevant works, performance and audio-visual products suspected of infringement or cut off the link to the relevant works, performance and audio-visual products within 30 days.

### (3) Remuneration.

The above Subscribers shall pay remuneration for the video game publicly performed on the streaming website. The remuneration can be collected from the streaming platform directly or through the Copyright Society of China. The remuneration standard shall be 10% of the streaming income.

## 2. Key Elements of the Proposal

This proposal, which absorbs elements from the *Field v. Google* case and article 47 of the Japanese Copyright Law, discusses the following key elements: (a) when the compulsory license applies, (b) the opting out of the license, (c) remuneration for copyright owners, and (d) copyright owners' right of cancellation.

### a. *When the Compulsory License Applies*

The first part of this Proposal discusses when a compulsory license applies. A compulsory license shall be limited to specific cyberspace and specific kind of works.<sup>53</sup> Besides, article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPs)<sup>54</sup> also requires that the exception or limitation must be confined to certain special cases.<sup>55</sup> So, the scope of a proposed license is limited to cases when a "video game work has [been] published and uploaded to the Internet by Copyright owner independently and directly." The compulsory license applies only when subscribers gets a license to use the game content from the copyright owner.

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53. Li Jie, *Implied license under network environment*, INTELLECTUAL PROPERTY No. 5, 67 (2015), available at [http://www.pkulaw.cn/fulltext\\_form.aspx?Db=qikan&Gid=1510154770&keyword=&EncodingName=&Search\\_Mode=accurate&Search\\_IsTitle=0](http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1510154770&keyword=&EncodingName=&Search_Mode=accurate&Search_IsTitle=0) (author's translation). There is no implied license doctrine in Chinese copyright law. See *id.* at 9 ¶ 3. In Li Jie's article, use of words "implied license" is inaccurate, it refers to compulsory license.

54. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs].

55. *Id.* at art. 13.

By limiting the scope to video game works published and uploaded to the Internet by a copyright owner independently and directly, games that are published only by CD or other hard carriers are excluded because those kinds of games are more private and improper for the compulsory license.

Subscribers receive a license to use game content when players sign the subscriber agreement. Through this license, subscribers and players build a relationship with the game publishers. This license applies in the absence of an actual agreement for video game streaming between the game publisher and game players. Yet, when a game player downloads a game, the player must sign a Subscriber Agreement with the game publisher, which gives them a non-exclusive license and right to use the content and services.<sup>56</sup> While a player is using the game content, whether that is playing the game or making comments to the game, they add to the originality of the game and further develop it. The recording of the gameplay is automatically stored in the game engine. These activities can be considered derivative works of the game. Thus, as game publishers license subscribers to use the game content, they are licensing them to create a derivative work based on the game content. Players are also obligated under the agreement, such as accepting the updates of a game unconditionally.<sup>57</sup> And this relationship of rights and obligations provides a legal basis to apply a compulsory license.

#### *b. Opting Out of the Compulsory License*

The second part of this Proposal is opting out of the compulsory license. In declaring that streaming is not permissible or taking a technical measure to limit access to the game, a game publisher can opt out of the compulsory license.

This part refers to elements of the U.S. implied license doctrine—ase specifically seen in *Field v. Google*. The U.S. Copyright Act does not contain explicit provision about the implied license, but courts have established the principles of an implied license on a case-by-case analysis. In *Field v. Google*, using an implied license, Google, Inc. successfully defended a lawsuit against copyright infringement.

Field argued that Google violated his exclusive rights to reproduce and distribute copies of his works, when Google “cached” his website. “Assuming that by allowing users to access Field’s copyrighted works through its ‘Cached’ links[,] Google is engaged in direct copyright infringement, the Court finds that Google has established four defenses to Field’s copyright infringement

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56. See, e.g., *Steam® Subscriber Agreement*, art. 2(a), STEAM, [http://store.steampowered.com/subscriber\\_agreement/](http://store.steampowered.com/subscriber_agreement/) [<https://perma.cc/ZYA3-74TD>] (last visited June 3, 2016).

57. *Id.*

claim.”<sup>58</sup> One of the strongest defenses is implied license.

In this case, the court held that the author granted the operator an implied license to display “cached” links to web pages containing his copyrighted works. In general, a court does not require a copyright holder to take action to prevent infringement. In this case, however, “the court held that Field’s failure to include a “no-archive” metatag on his site established an implied license to cache its content and estopped Field’s infringement claims, given the norms of internet publication and search engine index.”<sup>59</sup> And this kind of metatag measure is a general practice to prevent being cached, which Field knew but still chose not to add metatag to his work. This could reasonably be interpreted as a grant of a license for that use. Accordingly, the Court granted Google’s motion that it was entitled to the defense of implied license.<sup>60</sup>

The elements taken from the case demonstrates how taking technical measures can grant a non-exclusive license. And that technical measure should be general practice. Compared with previous cases,<sup>61</sup> the range of application of implied license was extended in the *Field* case. The court identified that the search engine caching website applies to the implied license, unless a website copyright owner adds metatags to his work. Adopting this element to an online video game streaming license does not extend the scope of a license, but rather provides the game publishers a way of opting out of the license. Game publishers can avoid application of the license to their games by explicitly making a declaration or taking a technical measure. This makes the proposal easier for game publishers to accept and it balances the interests of game publisher and streamers in some ways.

Aside from the U.S. case law, Japan also has a similar provision.. Facing the challenge that burgeoning networks brought to copyright license, especially following *Field v. Google*, Japan considered the application of implied license to internet domains. In 2009, Japanese copyright law added a specialized provision about license for a search engine, which states: (1) a search engine can legally cache the work online unless website takes technical measures to avoid being cached; and (2) after the search engine service provider is aware that website content infringes others’ copyright, the service provider should stop providing the link of the website.<sup>62</sup>

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58. See *Field*, 412 F. Supp. 2d at 1115.

59. *Field v. Google Inc.*, 21 BERKELEY TECH. L.J. 361 (2006).

60. See *Field*, 412 F. Supp. 2d 1106.

61. *A&M Records v. Napster, Inc.*, 239F. 3d 1004 (9th Cir. 2001).

62. Chosakukenho [Copyright Act], Law No. 73 of 2009, art. 47, para. 1, translated in (Japanese Law Translation), <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&printID=&ft=1&re=02&dn=1&x=0&y=0&co=01&ky=copyright&page=14&vm=02> [https://perma.cc/EQS2-5GRD] (Japan) [hereinafter Copyright Act of Japan].

Because Japan and China are statutory law countries, the Chinese should follow the example of a compulsory license for a search engine by adding a compulsory license for video game streaming. At the same time, a copyright owner has the right to ask an ISP to delete the content of his works.

### *c. Right of Cancellation*

The third part of this Proposal is the right of cancellation. After a streamer begins streaming based on a compulsory license, the copyright owner of a game has the right to terminate a license—unconditionally.

This right of cancellation is referred to in article 9 in the Regulation on the Protection of the Right to Network Dissemination of Information. Article 9 states that “[a]fter a network service provider provides any work if the relevant copyright holder disagrees to the upload, the network service provider shall immediately delete the copyright holder’s works and pay the relevant remunerations corresponding to the display period of the copyright holder’s works in light of the relevant announced rates.”<sup>63</sup> This provision provides a compulsory license to ISPs to use copyrightable works in absence of an actual agreement, but gives copyright holders the right to terminate the compulsory license unconditionally.

To a certain extent, compulsory license ignores the willingness of the copyright holders and makes them “surrender” their rights.<sup>64</sup> This has put copyright holders at a disadvantage, therefore, the right of cancellation is necessary to balance the interests of copyright holders and licensees. Besides, the ways of streamers, like the “SpectateFaker,” can endlessly irritate game publishers. When faced with improper streaming, game publishers need a right to terminate that license to protect both themselves and other streamers’ interests. Giving a copyright owner the right of cancellation makes the compulsory license convenient to streamers and platforms, and it also balances the interests of both sides, effectively protecting the interests of a copyright owner.

The right of cancellation makes the proposed license system work better. It not only makes the platforms more positive to fulfill their obligations and pay remuneration, but it also restrains the behavior of streamers. This makes the proposal easier to accept by game publishers in policy.

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63. See 信息网络传播权保护条例 [Regulation on the Protection of the Right to Network Dissemination of Information] (promulgated by the St. Council Gaz., May 10, 2006, effective July 1, 2006), art. 9 (2006) (China) (author’s translation).

64. See Regulation on the Protection of the Right to Network Dissemination of Information *supra* note 50.

*d. Remuneration*

The fourth part of this proposal is the remuneration, including who should pay the remuneration, the standard of remuneration, and how to collect and distribute the remuneration.

Generally, it is the users who pay the remuneration according to pre-existing Chinese provisions.<sup>65</sup> And the users of the copyrightable work in streaming activities are those streamers. However, given the very large number of streamers, it may be extremely inconvenient for game publishers to collect remuneration from streamers. This Note proposes, since streaming platforms benefit the most, streaming platforms should be responsible for paying the remuneration.

The standard of remuneration can be based on existing provisions in China. Chinese Copyright Law explicitly addresses remuneration of compulsory license. Articles 33 and 40<sup>66</sup> of the Copyright Law of the People's Republic of China states that the licensee shall pay remuneration to the copyright owner as prescribed in regulations. Nevertheless, there is no remuneration of video game work prescribed in any regulation, but the regulation about the remuneration of literary work<sup>67</sup> states that the remuneration standard of original work shall be three percent to ten percent of sales. In reference to this standard, the remuneration of my proposal shall be ten percent of streaming income, which includes subscription fees in any form and any other advertising income on the certain game streaming website location.<sup>68</sup>

The remuneration can be collected by the Copyright Society of China and transmitted to copyright owners timely. Platforms can also pay remuneration to copyright owners directly.<sup>69</sup>

*B. Application of Proposal*

Take “Arteezy” for instance, who is a DOTA 2 player. Now, DOTA 2 is a free video game published by Valve on STEAM, an online game store

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65. See 中华人民共和国著作权法 [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 10, 2010), arts. 32, 49 (2010) (China).

66. See Copyright Law of the People's Republic of China, *supra* note 38 at art. 40.

67. Measures of August 21, 2014 for the Remuneration Payment for the Use of Literary Works (promulgated by the National Copyright Administration., Sept. 23, 2014, effective Nov. 1, 2014) art. 4, (2014) (China) (author's translation).

68. Some streaming platforms collect subscription fees in different ways, such as Douyu.tv collecting fee by encourage audience to parches virtual gift on their website for the streamer.

69. Measures of August 21, 2014 for the Remuneration Payment for the Use of Literary Works, art. 13.

developed by Valve.<sup>70</sup> Anyone is able to download and play the game, and there is no declaration about streaming or a technical measure to limit access. “Arteezy” must sign a subscriber agreement with Valve and obtain a license to use the game content of DOTA 2. When he installs DOTA 2, he needs to press the button labeled “accept,” which means he accepts and signs the subscriber agreement with Valve. At this point, the proposed compulsory license applies.<sup>71</sup> Arteezy gets a license to stream DOTA 2. Twitch.tv, the platform with whom he signed a contract, profits from him and thus, has an incentive to not shut down the streamer. Additionally, the game publisher Valve has the right to terminate that license. So, Twitch must pay remuneration, which will be ten percent of the income in Arteezy’s channel, at least one hundred-fifty thousand dollars per month to Valve. Obviously, Valve will be happy to accept the money and likely never terminate the license, unless the streaming becomes harmful to the market of DOTA 2 in the future.

### C. *The Advantages of Adopting a Compulsory License*

The proposal not only absorbs the fine elements of the U.S. and the Japanese approach, but it can also fit into the Chinese statutory framework. Nowadays, a traditional license is not effective to satisfy subtle network technology, and the compulsory license can be applied only to a very limited scope in China. The application of compulsory license to the video game streaming industry, this means a large number of works can no longer be taken advantage.<sup>72</sup> The proposal is an efficient principle, and accounts for equity simultaneously, which is cost efficient to implement.

#### 1. Harmonized with Chinese Legal System

The first advantage of my proposal is harmonization with the Chinese legal system. Because Chinese copyright law does not have an implied license doctrine,<sup>73</sup> adopting a new compulsory license to the Regulation on the Protection of the Right to Network Dissemination of Information is far more reasonable. This proposal takes some elements of the implied license doctrine on the network aspect, and extends it to a specific subject—video game

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70. An online game store developed by Valve.

71. See *supra* Part II.A.1.1.

72. See Copyright Law of the People’s Republic of China, *supra* note 38 at art. 3.

73. The implied license doctrine under U.S. Law is a judge-made doctrine. As a country with statute laws, China does not have implied license doctrine. Article 9 of Regulation on the Protection of the Right to Network Dissemination of Information, which is widely regarded as an implied license in China, is actually a compulsory license. See Sun Dong, *The limitation of implied license doctrine in solving the dilemma of network communication authorization*, CHINA COPYRIGHT (2017), <http://www.cqvip.com/read/read.aspx?id=671745880> [<https://perma.cc/E2J3-9C3E>] (author’s translation).

streaming. A necessary limitation has been implemented to prevent legal abuses. Referring to existing compulsory license provisions, the words have been adjusted to Chinese statutory law. The provision was drafted in a Chinese statutory style, and it combines both the foreign and domestic approach. Therefore, the proposal fits into the Chinese legal system without any conflict.

## 2. Satisfy the Efficiency Requirement of Network Environment

The second advantage of my proposal is efficiency. The current Chinese copyright law provides a compulsory license with a narrow scope, limited to education; news; and alleviation of poverty,<sup>74</sup> which cannot satisfy a large demand of the copyright license under the Internet environment. Under Internet environment, implied license behavior exists, such as implied licenses for search engines and implied licenses for sharing platforms.<sup>75</sup> Because China does not have an actual implied license doctrine, creating the compulsory license provisions to govern them is unnecessary.

The proposal extends the scope of an application of compulsory license under the Internet environment, which effectively increases the speed of a license and reduces the cost, compared to a traditional “one-to-one” license. What is more, it not only protects the video game streaming industry and transforms the video game streaming into a legal business, as opposed to infringement, but it also promotes the development of other internet businesses.

## 3. Balancing the Interests Between Copyright Owners, Streamer(s), and Streaming Platforms

The third advantage of my proposal is fairness. Although a compulsory license does not require a copyright owner’s permission in advance, it still follows a principle of autonomy of will and respects the interests of a copyright owner. This proposal draws an element from the Chinese approach, ensuring a copyright owner’s right to compensation. Moreover, the proposal is based on the voluntariness. Because a copyright owner’s rights must be respected, the proposal gives a copyright owner the right to terminate a license unconditionally. While creating convenience for the streamer and platform, it effectively protects the right of a copyright owner. While streaming the game, streamers invest time and money into building a brand, building a community of fans, and buying equipment to ensure quality streaming. And platforms are

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74. See Hua Ying, *The review and Reconstruction of Copyright Compulsory License System*, CHINA COPYRIGHT (2014), available at [75. See Copyright Law of the People’s Republic of China, \*supra\* note 38 at art. 3.](http://kns.cnki.net/KCMS/detail/detail.aspx?dbcode=CJFQ&dbname=CJFDLAST2015&filename=ZGBQ201406011&v=MDQzMzFMcVks5RVpZUjhlWDFMdxhZUZdEaDFUM3FUcldNMUZyQ1VSTDJmYnVabkZ5dmdVTHJQUHlySmY3RzRIOVg=[https://perma.cc/S5YL-STUS] (author’s translation).</a></p></div><div data-bbox=)

investing large amounts of money to gain users and sign contracts with famous streamers. Considering the facts above, this proposal gives a streamer and the platform a period of thirty days to remove the streaming content to avoid loss. Hopefully, they will consult with the copyright owner to obtain a written license, thereby reducing the possibility of loss and somewhat protecting the interests of streamers and platforms. Generally, this proposal results in a balance of interests among copyright owners and streamers.

### III. RESPONDING TO CRITICISMS ON A COMPULSORY LICENSE WITH “RIGHT OF CANCELLATION”

This part addresses potential criticisms of my proposal. One criticism is based on the “right of cancellation”—that is, what if all game publishers cancel the license? Another criticism is that my proposal may conflict with the TRIPs three-step test.

#### *A. Why it is Unlikely that All Game Publishers Would Cancel the License?*

The first objection to my proposal is this possible scenario: every game publisher terminates the compulsory license, killing the online video game streaming industry. Since the “right of cancellation” exists, game publishers can terminate the license if they choose. As a consequence, streamers are left without a livelihood and the platforms are left without content. The final result is death to the video game streaming industry.

The objection should be rejected because it is very unlikely that all game publishers will terminate this compulsory license. Under my proposal, game publishers can easily make money from the streaming industry; they do not need to take further action to get a new profit—remuneration. Streamers who get the compulsory license have an obligation to pay remuneration as well. Once streamers make money, game publishers are rewarded with remuneration. Streamers and platforms could even be more positive to fulfill their obligations due to this right of cancellation, considering once they do not pay the remuneration, game publishers will be able to terminate the license.

The current situation is that game publishers are not making money from a large amount of unauthorized streaming. As streamers and platforms are profitable today by publicly performing the game, they do not compensate the game publishers. For instance, streamers on Twitch.tv. are solely responsible for the streaming content, according to the terms of service,<sup>76</sup> which means that

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76. Twitch.tv. Terms of Service, *Broadcasters: Broadcaster Content Representations and Warranties*, TWITCH INTERACTIVE, INC., <https://www.twitch.tv/p/terms-of-service> (last modified Jan. 15, 2015).

You are solely responsible for your Broadcaster Content and the consequences of posting or



Twitch will not help them pay remuneration, or assist in obtaining a license from the copyright owner. The truth, however, is that no streamer has a contractual relationship with game publishers—that is, the only thing that a streamer does before streaming, is accept the platform’s terms of service. Recently, some game publishers have started to look for the remuneration. For example, “earlier this year, Nintendo began claiming revenue from user-created YouTube videos that featured the company’s games.”<sup>77</sup>

My proposal will ensure that game publishers receive remuneration from streaming, unlike today, where game publishers make no money off unauthorized streaming. How can all those businesses choose to terminate the compulsory license?

### *B. How the Proposal Satisfies the Three-Step Test of the TRIPs Article Thirteen*

The second objection is that my proposal may be inconsistent with the three-step test of TRIPs.<sup>78</sup> TRIPs “set forth general conditions to delimit when an exception may be permitted. Article 13 of [the] TRIPs agreement allows countries to establish limitations or exceptions to exclusive rights, but only if: (1) confined to certain special case; (2) they do not conflict with normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interests of the right holder.”<sup>79</sup>

My proposal consists of a three-step test as well. “The chairman of Main committee I, Ulmer, conceded that under the three-step test, ‘the countries of the Union were entitled to introduce a compulsory license in some cases. This was accomplished in German legislation’ and the three-step test was understood to permit certain kinds of the compulsory license.”<sup>80</sup>

My proposal satisfies the first step. The first step requires exceptions or

publishing it. By uploading and publishing your Broadcaster Content, you represent, and warrant that: . . .

(2) [Y]our Broadcaster Content does not and will not (a) infringe, violate, or misappropriate any third-party right, including any copyright . . .

77. Chris Pereira, *Fez Creator Phil Fish: YouTubers Should Pay Game Devs “Huge Portion” of Revenue*, GAMESPOT.COM (June 18, 2014), <http://www.gamespot.com/articles/fez-creator-phil-fish-youtubers-should-pay-game-devs-huge-portion-of-revenue/1100-6420573/>.

78. TRIPs, *supra* note 54, at art. 13: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

79. DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY PROBLEMS, CASES, AND MATERIALS 184 (Thomson Reuters, 2d ed. 2012).

80. Martin Senftleben, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 80 (Kluwer Law International 2004).

limitations to (1) be clearly defined, and (2) “[to] be narrow in quantitative as well as a qualitative sense.”<sup>81</sup> Apparently, my proposal is clearly defined in respect to the type of video game works that may be used and when the limitation applies. The scope is limited to special cases within the meaning of the first step test. The compulsory license applies only to certain type of games, like a free PC game or MOBA (Multiplayer Online Battle Arena). And it is only applied in the streaming field, which is a fairly narrow scope. Moreover, Section 115 of the U.S. Copyright Act, consisting of a three-step test, provides that a compulsory license should make and distribute phonorecords once that record of work has been distributed to the public in the United States under authority of the copyright owner.<sup>82</sup> Compared with 17 U.S.C. § 115, my proposal provides a more narrow scope to apply the compulsory license.

My proposal does not conflict with normal exploitation of the work. To conflict with normal exploitation means that “if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the way that right holders normally extract economic value from that right to the work and thereby deprive them of significant or tangible commercial gains.”<sup>83</sup> Normal exploitation of a video game is attracting many players and earning profit from selling the “right to play the game,” as well as peripheral products. My proposal allows more streamers to broadcast games which is more like advertising and popularizing games that will help to attract even more players. A streamer can hardly enter into an economic competition with game publishers who normally extract value from a copyright to the game. Even if there is an individual streamer enters into economic competition with game publisher, the right of cancellation in my proposal will ensure that the economic value of a game is protected, because game publishers can terminate the license if they find any undesirable streaming. So, it will not conflict with normal exploitation of the video game work.

My proposal does not unreasonably prejudice the legitimate interests of the right holder. As Daniel C.K Chow and Edward Lee defined in their book, “[P]rejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”<sup>84</sup> My proposal not only ensures the publisher’s right to remuneration, but it also helps in advertising

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81. CHOW & LEE, *supra* note 79, at 189.

82. U.S. COPYRIGHT OFFICE, NOTICE OF INTENTION TO OBTAIN A COMPULSORY LICENSE - SECTION 115, [http://www.copyright.gov/licensing/sec\\_115.html](http://www.copyright.gov/licensing/sec_115.html) [<https://perma.cc/G2Z2-WW69>] (last visited May 25, 2016).

83. CHOW & LEE, *supra* note 79, at 193.

84. *Id.* at 194.

their game. There is no unreasonable loss of income. Moreover, my proposal provides copyright holders the “right of cancellation,” which respects their interests and prevents a situation of potential income loss. Thus, it does not injure copyright holders’ legitimate interests at all.

#### CONCLUSION

As a booming industry, video game streaming is exposed to the risk of copyright infringement, because most of the streaming content is currently unauthorized. And the legality is not clear for unauthorized streaming. This Note proposes that China adopt a compulsory license which allows video game players to stream games by paying remuneration to copyright owners. In absorbing the right of cancellation and elements of the implied license doctrine from U.S. approach, this proposal tries to eliminate the high risk of copyright infringement of the video game streaming industry, but it balances the interests of streamers, platforms and game publishers. This compulsory license might be new, as well as video game streaming itself, but it seems to be a plausible solution to the problem. It is an acceptable answer for both the streaming industry and game publishers.