
A SHORT TREATISE ON ESPORTS AND THE LAW: HOW AMERICA REGULATES ITS NEXT NATIONAL PASTIME

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With its tremendous popularity among Millennials and Generation Z, esports represents one of the fastest growing segments of the U.S. sports and entertainment market. It is the source of massive amounts of venture capital inflow, unprecedented marketing and media dollars, and altogether new forms of social networks and fan engagement. Nevertheless, the industry of esports is still in its infancy and faces legal challenges that have not yet been fully studied by either legal academics or practitioners. This Article provides an in-depth analysis of the primary legal issues that face the esports industry as it pursues its path toward becoming America's next major national pastime.

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I. INTRODUCTION

In May 2018, more than 127 million fans from around the world tuned in to watch the China-based Royal Never Give Up defeat Korea’s Kingzone DragonX 3–1 to win the 2018 Midseason Invitational in *League of Legends*—a videogame created by Riot Games.¹ This unprecedented fan support for contestants who play a videogame for a living represents an important tipping point in terms of how, as a society, we regard both organized competition and how, more specifically, we define the term of “sport.” Whereas until recently fan support for organized sports represented exclusively competitions in physical activities, the emergence of electronic sports today is changing all that and forcing society to revisit who is conceived as a “competitive athlete,” and why.

Electronic sports (or, as they are more colloquially called, “Esports”) include a wide range of competitive video game tournaments that are rapidly growing in popularity throughout both the United States and the world.² By 2021, esports globally are expected to have about 250 million enthusiasts and produce upwards of \$1.6 billion in revenue.³ If esports were considered to be a sport, it would represent the fastest growing segment of the commercial sports industry.⁴

1. Nicholas Barth, *The 2018 MSI Grand Finale Was the Most Watched Esports Event in History*, TWIN GALAXIES (May 22, 2018, 1:56 PM), https://www.twingalaxies.com/feed_details.php/1564/the-2018-msi-final-was-the-most-watched-esports-event-in-history/6.

2. While there are a variety of different spellings of ‘esports’, the Associated Press made the determination in 2017 to utilize this spelling. The decision was made following a previous change to the word ‘email’ that removed a hyphen as the word became commonly used. The use of ‘esports’ was precipitated by a review of Google Trends results, which showed that a vast majority of individuals searched for esports, as opposed to e-sports, by a margin of 30 to 1. See Kieran Darcy, *Why the Associated Press Stylebook went with esports, not eSports*, ESPN (July 6, 2017), http://www.espn.com/esports/story/_/id/19860473/why-associated-press-style-book-went-esports-not-esports.

3. Dean Takahashi, *Newzoo: Esports could hit 380 million fans and \$906 million in revenues in 2018*, VENTURE BEAT (Feb. 21, 2018), <https://venturebeat.com/2018/02/21/newzoo-esports-could-hit-380-million-fans-and-906-million-in-revenues-in-2018/>; see also Matt Perez, *Report: Esports To Grow Substantially At Near Billion-Dollar Revenues In 2018*, FORBES (Feb. 21, 2018), <https://www.forbes.com/sites/mattperez/2018/02/21/report-esports-to-grow-substantially-and-near-a-billion-dollar-revenues-in-2018/#1552579e2b01>. The world’s top hedge fund yielded a 26% return in 2017, net of expenses. Cf. Lawrence C. Strauss & Erix Uhlfelder, *The Top 100 Hedge Funds*, BARRON’S (June 17, 2017), <https://www.barrons.com/articles/the-top-100-hedge-funds-1497666771>.

4. See Will Leitch, *Nobody’s Going to Sports in Person Anymore. And No One Seems to Care*, N.Y. MAG (July 11, 2018), <http://nymag.com/intelligencer/2018/07/nobodys-going-to-sports-in-person-and-no-one-seems-to-care.html>; cf. Mark Cooper, *Football forever: As football’s youth participation rates continue decline, coaches try to improve the sport to preserve its future*, TULSA WORLD (Aug. 18, 2018), <https://www.tulsaworld.com/>

Indeed, esports are quickly becoming to Generation Z what basketball was to Millennials and pro football was to Generation X—the new, chic “sport” that perhaps best defines their generation.

While the operation of esports events in many ways parallels traditional sports, esports is distinct from the traditional, major professional sports because esports fans are able to play the same games at home in a nearly exact manner as the professionals. The accessibility of esports games to anyone interested in playing is a model that professional sports has never had and likely never could provide. The events enjoy a broad overlap of consumers who both play and watch games, which may provide an additional layer of engagement by allowing the consumer to be familiar with the experience of professional gamers.⁵ And, in esports, the video game developer owns the underlying game itself, whereas, in traditional sports, the underlying activity arguably lies within the public domain.

This Article (or, if one prefers, short treatise) seeks to be the first of its kind to explore the myriad of legal issues that surround the rapidly emerging esports industry, and it provides an in-depth analysis of those issues with which the esports industry must contend as it continues to grow in terms of both its size and scope. Part II of this Article provides an overview of the history of esports and the evolution of competitive gaming. Part III discusses the size of the esports market today, and the potential for growth in the coming years. Part IV examines the legal issues that face the various esports leagues and game-makers. Part V analyzes the legal issues facing teams, sponsors, and investors in esports, and how the structure of teams poses different legal risks than traditional sports models. Part VI explores the issues facing streamers, who act as broadcasters in esports, often achieving such levels of popularity that their earnings can surpass the players themselves. Part VII identifies and probes a number of the ancillary legal questions facing the esports industry, including issues of gambling, doping, the regulation of collegiate esports, and international issues. This Article concludes that esports is a formidable segment of the sports industry and may represent the future of sports entertainment as television ratings for traditional sports stagnate or drop.

sportsextra/football-forever-as-football-s-youth-participation-rates-continue-decline/article_816d1cf4-aa7e-521b-b93e-e4a05c1f340b.html.

5. Jurre Pannekeet, *Esports, a Franchise Perspective: 70% Watch Only One Game and 42% Do Not Play*, NEWZOO (May 11, 2017), <https://newzoo.com/insights/articles/esports-franchises-70-watch-only-one-game-and-42-dont-play/>.

II. HISTORY OF ESPORTS

A. *Before the Video Game*

Before there were video games available within reach of nearly every American via their cellphone, and even before video game arcades, there was pinball.⁶ Pinball took a step toward the masses when Raymond Maloney launched the *Ballyhoo* game, produced by the Bally Manufacturing Company.⁷ The Bally Manufacturing Company, which would come to be known as Bally, was a gaming conglomerate that at one time was widely known for a variety of things, from manufacturing slot machines, to running health spas.⁸ Pinball, however, would not enjoy an easy ride, as on March 6, 1948, a New York City patrolman landed a lucky shot on the “Marvel Pop Up” in the back of a Harlem cigar store that earned him a free play.⁹ What followed was the arrest of the cigar shop owner for “unlawful possession of a gambling machine.”¹⁰ The pinball gambling connection was the advent of legal challenges to gaming machines, one that began decades before the first video game made its debut. It would not be until 1974, that the California Supreme Court would issue a ruling that pinball was a skill-based game, outside the scope of the California gambling statute.¹¹

As the *Ballyhoo* and its pinball competitors were sweeping the nation, other companies were making their first forays into the video game realm, including the Connecticut Leather Company (later renamed Coleco), which launched one of the prominent cartridge based video game consoles, Colecovision.¹² In 1951, Fusajiro Yamauchi’s playing card company changed its name to Nintendo.¹³ Three years later, Korean War veteran, David Rosen created “Service Games,” which sold coin-operated games to U.S. military installations overseas.¹⁴

6. For a short overview of the evolution of pinball, see Mary Bellis, *The History of Pinball*, THOUGHT CO. (July 3, 2017), <https://www.thoughtco.com/history-of-pinball-1992320>, for a short overview of the evolution of pinball.

7. ASHLEY SAUNDERS LIPSON & ROBERT D. BRAIN, *VIDEOGAME LAW: CASES, STATUTES, FORMS, PROBLEMS & MATERIALS* 6 (2d ed. 2015).

8. *Id.* at 6–7.

9. Christopher Klein, *That Time America Outlawed Pinball*, HISTORY (Aug. 22, 2018), <https://www.history.com/news/that-time-america-outlawed-pinball>.

10. *Id.*

11. *Cossack v. Los Angeles*, 523 P.2d 260, 264 (Cal. 1974) (“Whether a game is a game of skill or a game of chance depends upon which factor predominates, and this is a fact question for the trial court. In the present case, the trial court found, supported by substantial evidence, that the games in question are games predominantly of skill. In addition, the Attorney General has indicated that although pinball machines which are predominantly games of chance are prohibited by section 330b of the Penal Code, pinball machines equipped with flippers, permitting manipulation of the ball by the player, are predominantly games of skill.” (internal citations omitted)).

12. See LIPSON & BRAIN, *supra* note 7, at 7.

13. *Id.* Yamauchi died in 1940, prior to Nintendo’s rise as a major industry player in video gaming sector. See D.S. Cohen, *Fusajiro Yamauchi, Founder of Nintendo*, LIFEWIRE (June 24, 2019), <https://www.lifewire.com/fusajiro-yamauchi-founder-of-nintendo-729584>.

14. LIPSON & BRAIN, *supra* note 7, at 7.

Rosen's company name would eventually be known as SEGA,¹⁵ and would be Nintendo's main competitor during the late 1980s and early 1990s.¹⁶

The 1960s saw tremendous advances in computing and while many scientists were working to put a man on the moon, a group of MIT students were working to create the first ever video game built using Cathode Ray Tube monitors and a PDP-1 computer.¹⁷ *Spacewar*, the first video game in the modern sense, allowed two players to fire computerized missiles at one another with the objective being to strike the other competitor's spaceship.¹⁸ *Spacewar* would inspire the first ever coin operated game, which was an early predecessor to the game *Asteroids*. The inventor of the first coin operated game, Nolan Bushnell, would go on to start a variety of other companies, among them Atari.¹⁹ The technological advances in the 1960s paved the way for the era of arcade gaming.

B. *The Rise of the Arcade*

Bushnell's coin operated game, *Computer Space*, was a failure, at least commercially, but the game launched an industry.²⁰ Bushnell and his Atari partners would release *Pong* during 1974.²¹ The money *Pong* made was funneled back into the company to create more games. It also helped launch a fake competitor, Kee Games, in order to give the appearance of market competition.²² Before 1975, there was real competition with more than a dozen companies manufacturing arcade video games, including Bally's.²³ In 1976, *Death Race* was released, which would launch the beginning of public outcry over violence in video games.²⁴ The *New York Times* described the operation of the game as: "For a quarter, a player gets a minute to chase and run down all the symbolic pedestrians he can. Hitting one of the figures rewards the player with an electronic shriek and points scored on a grave-marker."²⁵ Gerald Driessen of the National Safety Council stated: "nearly 9,000 pedestrians were killed last year and that's

15. *Id.*

16. Levi Buchanan, *Genesis vs. SNES: By the Numbers*, IGN (July 13, 2016), <https://www.ign.com/articles/2009/03/20/genesis-vs-snes-by-the-numbers>.

17. LIPSON & BRAIN, *supra* note 7, at 8.

18. *Id.*

19. Benj Edwards, *The Untold Story of Atari Founder Nolan Bushnell's Visionary 1980s Tech Incubator*, FAST COMPANY (Feb. 17, 2017), <https://www.fastcompany.com/3068135/the-untold-story-of-atari-founder-nolan-bushnells-visionary-1980s-tech-incubator>.

20. Laura June, *For Amusement Only: the life and death of the American arcade*, VERGE (Jan. 16, 2013, 10:00 AM), <https://www.theverge.com/2013/1/16/3740422/the-life-and-death-of-the-american-arcade-for-amusement-only>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Ralph Blumenthal, *'Death Race' Games Favor, But Not With the Safety Council*, N.Y. TIMES (Dec. 28, 1976), <https://www.nytimes.com/1976/12/28/archives/death-race-game-gains-favor-but-not-with-the-safety-council.html>.

no joke.”²⁶ Driessen’s critiques of violence in video games would be the first of many, but the concerns did not slow the expansion of the Arcade industry.²⁷

By 1982, there were more than 13,000 arcades across the United States, and that does not include the presence of arcade cabinets in grocery stores, pharmacies, and even in some schools.²⁸ *Pac-Man* launched in 1980 and shortly thereafter the arrival of hardcore gamers followed.²⁹ The idea of professional video gaming began to emerge in this time with the show *Starcade*, which saw two players play new video games during a primetime broadcast slot on television.³⁰ In 1983, the U.S. National Video Game Team was chosen and included the country’s six best video gamers.³¹

C. *The Arcade at Home*

The Atari 2600, which was launched in 1980, created a dual system *Space Invaders* game allowing users to play in the arcade as they had been, or at home on their Atari 2600.³² Though shortly thereafter, turmoil was beginning to emerge at Atari, and in 1980, several developers left to start a game company called *Activision*.³³ By 1983, there was a move away from playing video games in arcades and toward playing on home consoles.³⁴ In 1985, the Japanese company Nintendo launched its home gaming console called the Nintendo Entertainment System, or NES, which revolutionized at-home game play.³⁵ The NES was armed with a special feature, one whose absence would cause the Atari 2600 to lose revenue.³⁶ Authorized NES games were equipped with a chip that would allow the NES system to play the game, effectively restricting unauthorized third-parties from manufacturing Nintendo games.³⁷ In 1989, the Sega Genesis was launched and was one of the only competitors to Nintendo remaining in the video gaming space.³⁸ Atari began to hemorrhage money after the failure of the Atari XE Game System and Coleco filed for bankruptcy in 1988.³⁹ The video game industry would not stay a two-party market for long, as by the 1990s the personal computer (“PC”) became ubiquitous with middle-class America.⁴⁰

26. *Id.*

27. *See* June, *supra* note 20.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. LIPSON & BRAIN, *supra* note 7, at 12.

33. *Id.* at 13.

34. June, *supra* note 20.

35. *Id.*

36. LIPSON & BRAIN, *supra* note 7, at 15.

37. *Id.*

38. *Id.* at 16.

39. *Id.*

40. Tony Smith, *Number Cruncher Charts Rise of the personal computer and its Fall at the Hands of Smartphones, Tablets*, REGISTER: PERSONAL TECH (Jan. 19, 2012), https://www.theregister.co.uk/2012/01/19/asymco_blogger_charts_rise_and_fall_of_the_personal_computer/.

In 1984, Electronic Arts (“EA”) founder Trip Hawkins sought to create a realistic football game, which could be played on the computer. Needing a face of the future franchise, Hawkins went after Oakland Raiders coach John Madden.⁴¹ In 1988, EA released John Madden football, the first American football game complete with realistic playbooks and 11 on 11 competition.⁴² By 1994, EA had reached a licensing agreement with the NFL and NFLPA to use team names, logos, and even include rosters from past Super Bowl teams.⁴³ Over the years, despite competition from various competitor-game-makers, the Madden series remained the premier American football game for both casual and competitive sports video gamers.⁴⁴ As EA was securing a licensing deal with the NFL and NFLPA, they were also rolling out what would become the bestselling sports video-game franchise of all-time, FIFA.⁴⁵ EA is largely responsible for the rise of the sports genre of esports; which is based on real world sports and serves as a stark contrast to the preceding role-playing or combat games.

During the 1990s, video games saw an influx of games which were promoted as having educational aspects, such as *SimCity*, where users were responsible for building and managing a city.⁴⁶ Huge strides were being made in the educational video gaming space, including approval by the California State Bar Association of a legal video game, *Objection!*, as an approved element of its continuing education requirements and as well, there were great strides in making violent games more gratuitous.⁴⁷ In 1992, both *Mortal Combat* and *Wolfenstein 3D* launched. In these games, users would hunt and kill Nazi zombies.⁴⁸ A year later *Doom* was released, and Congress took an interest in the violence being displayed in video games.⁴⁹

This era was one which saw tremendous gains in the complexity of graphics, beginning with the thirty-two-bit Sega Saturn in 1994, which Nintendo trumped within a year with the Nintendo 64, a sixty-four-bit system that was so popular near-riots erupted at stores when it was launched.⁵⁰ By the end of the 1990s console prices were dropping and following a ruling by the European Economic Commission that Nintendo could no longer exclude third parties from producing Nintendo 64 cartridges, their market share of the gaming industry would shrink.⁵¹ The turn of the millennium brought continued scrutiny of the content of games with both state and federal lawmakers taking a keen interest in the sex

41. Jason M. Gallagher, *How Madden Became King of the Gaming Gridiron*, DEN OF GEEK! (Sept. 8, 2019), <https://www.denofgeek.com/us/games/madden-nfl/168481/madden-nfl-football-history>.

42. *Id.*

43. *Id.*

44. *Id.*

45. James Clark, *A History of Gaming: EA Sports FIFA Then and Now*, DESIGNSPARK (Nov. 4, 2016), <https://www.rs-online.com/designspark/ea-sports-fifa-then-and-now>.

46. LIPSON & BRAIN, *supra* note 7, at 16.

47. *Id.* at 17.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 18; see Commission Decision No. 2003/675/EC of 30 October 2002 (relating to a proceeding pursuant to art. 81 of the EC Treaty and art. 53 of the EEA Agreement).

and violence of video games, particularly as the visual features of games continued to improve and become more lifelike.⁵²

Courts began defending video games from censorship attempts in 2001, when the Seventh Circuit ruled that violent video games enjoy the same First Amendment protections as other objectionable content and the government must continue to satisfy the requirements that their interest be “compelling.”⁵³ Litigation over the content of video games would reach a climax in 2011, when the Supreme Court would rule in *Brown v. Entertainment Merchants Association* that California’s restrictions on the sale of violent video games to minors violated the First Amendment on the basis that the content-specific restriction did not satisfy strict scrutiny.⁵⁴ Without the *Brown* ruling, the future landscape of esports would be uncertain at best, and more likely doomed in the American marketplace, but by establishing that sweeping bans on video game sales to minors violates the First Amendment, *Brown* has enabled the growth of professional video gaming.⁵⁵

D. *The Rise of Organized Gaming Competitions*

The beginning of esports, or at least competitive video gaming tournaments, can be traced to 1972, when students at Stanford University hosted a tournament for the game *Spacewar*.⁵⁶ The tournament’s winner was rewarded with a one-year subscription to *Rolling Stone* magazine and the ability to call themselves the “Intergalactic *Spacewar* Champion of 1972.”⁵⁷ By 1980, game-maker Atari was hosting a *Space Invaders* tournament that had more than 10,000 participants.⁵⁸ In the early 1980s, the *Guinness Book of World Records* began to keep track of high scores in various video games, and by 1983, the U.S. National Video Game Team was formed and consisted of Billy Mitchell, Steve Harris, Jay Kim, Ben Gold, Tim McVey, and captain, Walter Day.⁵⁹ The 1980s laid the foundation for what we know as esports today, but the 1990s were a decade where consistent growth was established.

The modern era of esports was ushered in with 1997’s Red Annihilation *Quake* tournament, which drew more than 2,000 participants.⁶⁰ The event was

52. LIPSON & BRAIN, *supra* note 7, at 18–20.

53. *See* Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001).

54. 564 U.S. 786, 804–05 (2011).

55. For an overview of *Brown*’s impact on First Amendment jurisprudence more broadly, see generally Erwin Chemerinsky, *Not A Free Speech Court*, 53 ARIZ. L. REV. 723 (2011).

56. Chris Baker, *Stewart Brand Recalls First ‘Spacewar’ Video Game Tournament*, ROLLING STONE (May 25, 2016, 9:02 AM), <https://www.rollingstone.com/culture/culture-news/stewart-brand-recalls-first-spacewar-video-game-tournament-187669/>.

57. *Id.*

58. Dot Esports Staff, *The Evolution of eSports*, DOT ESPORTS (July 22, 2015), <https://dotesports.com/league-of-legends/news/the-evolution-of-esports-7693>.

59. *Id.*

60. *Id.*

also the breakthrough for the so-called first professional gamer, Dennis Fong.⁶¹ Fong was not only the first professional gamer, but he was an innovator credited with numerous techniques used by high-level gamers, before his career was derailed by carpal tunnel injuries contributing to his retirement.⁶² Red Annihilation was the inspiration for the Cyberathlete Professional League, which quickly began offering tournaments with prize money rivaling low-level professional sports tournaments.⁶³ The 1990s also saw the launch of the real-time strategy game market, with games like *StarCraft: Brood War*, which introduced a fundamentally different style of video gaming.⁶⁴ The 1990s saw game-makers, like Nintendo, begin hosting tournaments for popular game titles.⁶⁵ In 1994, Nintendo took their video game competition *Powerfest* on the road, where the best video game players in the country would play special versions of three games: *Super Mario Bros: The Lost Levels*; *Super Mario Kart*; and, *Ken Griffey, Jr. Presents Major League Baseball*, a home run derby game, with the individual who earned the best score being able to move on to the Nintendo World Championships in San Diego, California.⁶⁶ The game-maker championships drew sufficient interest, and in 2000 the World Cyber Games launched, along with the Electronic Sports World Cup.⁶⁷

The World Cyber Games were the premier international esports event of the early 2000s, drawing competitors from more than seventy-eight countries.⁶⁸ Relatedly, the Electronic Sports World Cup grew to the point that it drew upwards of 500,000 spectators for its offline events and had a prize pool of more than \$2 million.⁶⁹ In 2002, Major League Gaming launched, which at the time would be the most successful esports league.⁷⁰ Major League Gaming initially offered competitions mainly centering on first-person shooter video games, but the developer would later branch out to include titles such as *Tekken* and *StarCraft 2*. Major League Gaming would also be the first organization to get a contract with a U.S. cable channel, teaming up with *USA Network* in 2006, to broadcast video games on television to U.S. consumers.⁷¹ Major League Gaming

61. Chris Baker, *Meet Dennis 'Thresh' Fong, the Original Pro Gamer*, ROLLING STONE (Aug. 30, 2016, 9:35 PM), <https://www.rollingstone.com/culture/culture-news/meet-dennis-thresh-fong-the-original-pro-gamer-103208/>.

62. *Id.*

63. Dot Esports Staff, *supra* note 58 (noting that the Cyberathlete Professional League was offering prize money of up to \$15,000 in 1998).

64. *Id.* (“While first-person shooters focus more on reflexes and instantaneous reactions, RTS [Real-time Strategy] games focus more on careful thought and long-term planning, being compared to being a modern version of Chess.”).

65. *Id.*

66. Rob Lammler, *10 Very Rare (and Very Expensive) Video Games*, MENTAL FLOSS (Mar. 16, 2016), <http://mentalfloss.com/article/66183/10-very-rare-and-very-expensive-video-games>.

67. Dot Esports Staff, *supra* note 58.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

would continue to evolve and survive until their acquisition in 2015, by game-maker Activision Blizzard, which would usher in the modern era of esports.⁷²

E. *The Billionaires Enter the Marketplace*

The world of esports has come a long way in a relatively short period of time. In some ways, esports resemble traditional sporting events with two teams facing off against each other, and with broadcasts that have their own commentators like traditional broadcasters such as Dick Vitale, or Verne Lundquist.⁷³ Esports are already eclipsing the traditional sports market and big gaming events are selling out sporting venues such as the Staples Center in Los Angeles⁷⁴ and the Barclays' Center in New York,⁷⁵ at speeds which are typically reserved for pop stars who appeal to adolescents. One of the key distinctions between esports and traditional sports is that esports have become an industry force without the lucrative broadcasting contracts the four major American sports leagues enjoy.⁷⁶ Indeed, esports has relied on allowing the content of tournaments to be streamed largely for free on websites like Twitch and YouTube Gaming. For instance, the 2017 *League of Legends* championship saw 106.2 million viewers at peak time, compared with the 2018 Kentucky Derby, which had 15 million viewers at its peak.⁷⁷ Esports, in many ways, may be the perfect sport for the so-called cord-cutting generation, as they have an audience that already consumes them online and there will be no need to transition consumers over from broadcast television to online consumption.⁷⁸

The demographics of esports consumers appeal to investors who covet younger audiences and are concerned that traditional sports fans are aging out of their target markets in regard to spending.⁷⁹ Potential access to a desirable consumer base drives esports investment, but investors want to see returns and at

72. John Gaudiosi, *Activision Blizzard Acquires MLG for \$46 Million*, FORTUNE (Jan. 4, 2016), <http://fortune.com/2016/01/04/activision-blizzard-acquires-mlg/>.

73. Christopher Ingraham, *The Massive Popularity of Esports, in Charts*, WASH. POST (Aug. 27, 2018, 1:59 PM), https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/?noredirect=on&utm_term=.b21f4426caf4.

74. Paul Tassi, *League of Legends Finals Sells Out LA's Staples Center in an Hour*, FORBES (Aug. 24, 2013, 9:28 PM), <https://www.forbes.com/sites/insertcoin/2013/08/24/league-of-legends-finals-sells-out-las-staples-center-in-an-hour/#7d55141432b8>.

75. Joe O'Brien, *Overwatch League Season One Grand Finals Sells Out Barclays Center*, DEXERTO (June 1, 2018, 1:17 PM), <https://www.dexerto.com/overwatch/overwatch-league-season-one-grand-finals-sells-out-barclays-center-93410>.

76. See Todd Spangler, *Big Media, Silicon Valley Battle for Multibillion-Dollar Sports TV Rights*, VARIETY (2018), <https://webcache.googleusercontent.com/search?q=cache:jnic6TCPhPcJ:https://variety.com/2018/digital/features/olympics-rights-streaming-nbc-winter-games-1202680323/+&cd=4&hl=en&ct=clnk&gl=us>.

77. Ingraham, *supra* note 73.

78. Cord-cutting is the term associated with foregoing traditional cable television packages, often replacing cable with subscription streaming services like Netflix, Amazon Prime, or Hulu. See Noel Murray, *How to Cut the Cord on Cable*, N.Y. TIMES, <https://www.nytimes.com/guides/watching/tv-streaming-cut-the-cord> (last visited Feb. 12, 2020).

79. See Zorine Te, *The Average Age of the Esports Fan Is 31, According to Latest Nielsen Report*, YAHOO FIN. (May 10, 2017), <https://finance.yahoo.com/news/average-age-esports-fan-31-according-latest-nielsen-report-002654718.html>.

least one major player has struggled to profit off of professional esports.⁸⁰ Paul Tassi of *Forbes* noted:

Riot [Games] has said that they do in fact lose money on massive events like this [the *League of Legends* World Championship], and on the league they sponsor, the [League Championship Series] LCS. They pay for prize money, event set-up and even player salaries, but the money brought in from sponsors, viewers and ticket sales doesn't yet offset the cost.⁸¹

Despite these challenges, investors are bullish on esports, likely signaling a potential for sustainable growth. Investors range from individuals, to well-known venture capital firms such as The Kraft Group, which also own the New England Patriots, and Vulcan Capital, which was run by Paul Allen, co-founder of Microsoft.⁸² Despite the early lack of realized profits, esports are continuing to grow and those within are doing what they can to convert fans from traditional sports.

League of Legends is one of the most popular esports titles and the League Championship Series (“LCS”) has attracted large viewership numbers for several years.⁸³ *League of Legends* popularity continues to drive much of the discussion around esports, but a new league that was built to closer resemble traditional sports leagues (with city-based teams, and conferences based on geographic locations) has emerged in the form of *Overwatch* League.⁸⁴ *Overwatch* League is breaking new ground by operating in ways traditional sports fans are used to, including the implementation of regulatory controls like the provision of minimum salaries for players and a requirement that players adhere to conduct standards established by the league.⁸⁵ Esports is distinct from traditional sports because the game-makers control the intellectual property behind the games, and effectively control access to the game in a way that the NFL or MLB simply cannot.⁸⁶ Despite the ability for game-makers to turn off the tap that allows esports to operate, money continues to pour into the industry. In Part III of this Article we provide an overview of the esports industry today.

80. Tassi, *supra* note 74.

81. *Id.*

82. Stephen Hays, *Who Is Investing in Esports Startups?*, HACKERNOON (Aug. 7, 2017), <https://hacker-noon.com/who-is-investing-in-esports-startups-by-stephen-hays-of-deep-space-ventures-1efa7a55a60a>.

83. See Daniel Rosen, *The EU LCS Has a Problem: EU Viewership Is Stagnating While NA Booms*, SCORE ESPORTS (Apr. 21, 2017), <https://www.thescor.esports.com/lol/news/13877-the-cu-lcs-has-a-problem-eu-viewership-is-stagnating-while-na-booms>.

84. Maddy Myers, *A Viewer's Guide to Overwatch League*, KOTAKU (Jan. 9, 2018, 12:16 PM), <https://compete.kotaku.com/a-viewers-guide-to-overwatch-league-1821908160>.

85. Andrew Webster, *Why Competitive Gaming Is Starting to Look a Lot Like Professional Sports*, VERGE (July 27, 2018, 10:00 AM), <https://www.theverge.com/2018/7/27/17616532/overwatch-league-of-legends-nba-nfl-esports>.

86. While traditional sports leagues can exercise intellectual property protections over things like team names and logos, many other aspects of traditional sports are outside the scope of intellectual property protections. See Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 87–96 (2015).

III. THE ESPORTS INDUSTRY TODAY

A. *Market Overview*

The esports market is not one homogenous component, akin to a single sport like football or baseball. Instead, it may be best to think of esports like the Olympics, a name for an industry composed of a variety of different, but related, components.⁸⁷ The esports industry has evolved significantly from its early years of professionalization that primarily focused on first-person shooter (“FPS”) games like *Quake*,⁸⁸ to a diverse industry composed of not only FPS games, but real-time strategy (“RTS”), sports games, fighting games, multiplayer online battle arena (“MOBA”), as well as other games that do not quite fit in any individual category.⁸⁹ Despite the fierce competition, which in other industries might drive away investors, esports has seen a steady influx of investment capital over the last several years, and the industry is poised for growth.⁹⁰

1. *Industry Growth*

The exact size of the esports industry is something of a floating target, but it is predicted that in 2018 esports will see revenue of \$905 million, which surpasses the \$655 million that the industry saw in 2017.⁹¹ Additionally, esports market research company Newzoo projected that the esports industry could pass \$1.65 billion by the year 2021, which would mean revenues increasing at a rate greater than 25% per year over four years.⁹² It was estimated that esports fans were spending approximately \$3.64 per capita on esports, with a potential that spending could grow to \$5.20 by 2020.⁹³ The spending of esports fans is assumed to trail spending of sports fans for more traditional sports and this is one of the

87. John T. Holden, Anastasios Kaburakis & Joanna Wall Tweedie, *Virtue(al) Games—Real Drugs*, 13 *SPORT, ETHICS, & PHIL.* 19, 22 (2019).

88. Dot Esports Staff, *supra* note 58.

89. For instance, the game Fortnite closely resembles FPS titles, but is in fact a third-person shooting game. See Ben Gilbert, *Over 45 Million People Are Playing a Bizarre Shooter That Pits 100 Players Against Each Other in a Fight to the Death—Here’s What’s Going On*, *BUS. INSIDER* (May 1, 2018, 9:53 AM), <https://www.businessinsider.com/what-is-fortnite-battle-royale-2018-3>. There is also a professional platform for the classic puzzle-game *Tetris*, which does not clearly fit into any other esports category. See Charles Curtis, *10 Video Games You Could Be Playing Professionally If You Had Only Skipped More Homework*, *USA TODAY* (July 3, 2017, 10:12 AM), <https://ftw.usatoday.com/2017/07/esports-classic-video-games-list-championships-tetris-super-mario-tecmo-super-bowl-counterstrike-street-fighter-list-videos>.

90. VB Staff, *The Esports Surge—and the Massive Opportunities Behind It (VB Live)*, *VENTURE BEAT* (May 24, 2018, 4:10 AM), <https://venturebeat.com/2018/05/24/the-esports-surge-and-the-massive-opportunities-behind-it-vb-live/>.

91. Matt Perez, *Report: Esports To Grow Substantially At Near Billion-Dollar Revenues In 2018*, *FORBES* (Feb. 21, 2018, 11:00 AM), <https://www.forbes.com/sites/mattperez/2018/02/21/report-esports-to-grow-substantially-and-near-a-billion-dollar-revenues-in-2018/#1552579e2b01>.

92. *Id.* The world’s top hedge fund had a 26% return in 2017, net of expenses. Cf. Lawrence C. Strauss & Erix Uhlfelder, *The Top 100 Hedge Funds*, *BARRON’S* (June 17, 2017), <https://www.barrons.com/articles/the-top-100-hedge-funds-1497666771> (showing the world’s top hedge fund had a twenty-six percent return in 2017, net of expenses).

93. Christina Gough, *Estimated Average Per Capita Spending on Esports Related Content Worldwide in 2017 and 2020*, *STATISTA* (Apr. 4, 2017), <https://www.statista.com/statistics/691794/consumer-esports-spend/>.

reasons that esports investors find the growth potential of the industry so attractive.⁹⁴

Esports is also an attractive market for investors for a number of other reasons as well, including the fact that an industry survey revealed that 43% of esports “enthusiasts have an annual household income of \$75,000 per year or higher.”⁹⁵ Sixty-five percent of esports fans are between the ages of eighteen and thirty-four, with women making up nearly 40% of esports fans.⁹⁶ Esports fans are also more engaged with their professional sports fan counterparts because many play the games themselves.⁹⁷ The majority of esports fans also see esports professionals on the same level as other professional athletes.⁹⁸ The popularity of esports is an anomaly in professional sports, where the average age of viewers continues to rise.⁹⁹

Esports are not only pulling in younger viewers than traditional sports, but they also are attracting more loyal viewers. Viewers between eighteen and twenty-five are spending an average of three hours and twenty-five minutes per week watching esports, which is an hour more than that same demographic spends watching traditional sports.¹⁰⁰ By 2021, Newzoo estimates that there will be 307 million casual esports viewers and 250 million esports enthusiasts—people who watch professional esports content more than once a month.¹⁰¹ Newzoo also estimates that by the end of 2018, more than 1.5 billion people will have an awareness of esports globally.¹⁰² The tremendous growth potential for esports has driven a steady stream of diverse investors to the industry looking to capitalize on the potential for sustained gains.

2. *Esports Investors*

Hedge fund manager Tim Seymour described the growth of the esports industry by stating: “The excitement is there. And it’s all demographics. It’s not just guys. It’s not just girls. It’s not just young folks. It’s old folks.”¹⁰³ While esports teams represent one potential means of investing in the industry, it is also

94. E. J. Schultz, *Are You Game?*, ADAGE (N.D.), <https://adage.com/article/news/e-sports/308447/> (last visited Jan. 22, 2020).

95. Joss Wood, *New Research: Esports Fans May Not Be Exactly Who You Think They Are*, LINES (June 20, 2016), <https://www.thelines.com/esports-fan-demographic-research/>.

96. *Id.*

97. *Id.*

98. *Id.*

99. Jason Notte, *The Sports With the Oldest—and Youngest—TV Audiences*, MARKETWATCH (June 30, 2017, 1:34 PM), <https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30>.

100. Darren Heitner, *Watching Video Games Is Now Bigger Than Traditional Spectator Sporting Events*, INC. (Apr. 2, 2018), <https://www.inc.com/darren-heitner/watching-video-games-is-now-bigger-traditional-spectator-sporting-events.html>.

101. NEWZOO, FREE 2018 GLOBAL ESPORTS MARKET REPORT 11 (2018), https://asociacionempresarialesports.es/wp-content/uploads/newzoo_2018_global_esports_market_report_excerpt.pdf.

102. *Id.* at 20.

103. Kellie Eil, *Esports are booming and some investors are growing more bullish*, CNBC (July 30, 2018, 10:51 PM), <https://www.cnbc.com/2018/07/31/as-esports-booms-some-investors-are-growing-more-bullish.html>.

possible for investors to invest in game companies themselves or in technologies that support video gaming, such as virtual reality.¹⁰⁴ Esports presently has at least five potential draws for investors: a huge market; tremendous growth; user consumption; consumer spending below competitors; and a global audience.¹⁰⁵

The potential for gains, not present in most other economic sectors, has sparked an interest in investing from celebrities such as Alex Rodriguez, Mariah Carey, and Mark Cuban, as well as big brands such as ESPN, Gillette, and BMW.¹⁰⁶ While some investors have chosen to hire esports insiders to run their investments in teams, others may follow the lead of former Los Angeles Lakers player Rick Fox who prefers a hands-on approach with the team that he owns and bears his name (Echo Fox).¹⁰⁷ Fox has admitted to combining some of his training methods as a traditional professional athlete and applying them to his esports teams in order to differentiate them from the competition.¹⁰⁸ While influxes of money continue to pour into the esports industry, one of the questions outstanding is how much will investors be able to extract. Expect questions concerning the feasibility of esports to intensify as more cities and public educational institutions commit public resources to grow esports in their communities by creating esports programs at public schools and through efforts to attract esports events and teams.

Similar to their traditional sport counterparts, esports is capitalizing on public interest through the construction of stadiums/arenas that are popping up in cities around the globe.¹⁰⁹ In March 2018, the Esports Arena Las Vegas opened inside the Luxor hotel and became the first dedicated esports arena in the U.S.¹¹⁰ Similarly, Arlington, Texas is in the process of building a \$10 million esports arena.¹¹¹ While the stadium may appear modest, with a 1,000 seat capacity, it is one more example of the rise of esports in America.¹¹² In addition to municipalities, cities, and states looking to capitalize on esports, universities and colleges

104. *Id.*

105. Stephen Hays, *Why Invest in Esports? Common Questions About Esports: Answered*, HACKERNOON (June 27, 2017), <https://hackernoon.com/why-invest-in-esports-deab33a4835b>.

106. Jason Yu, *Investing in Esports: Why Brands and Celebrities Want a Piece of the Esports Scene*, XLIVE (July 18, 2018), <https://online.xlivecon.com/esports/investing-esports-why-brands-and-celebrities-want-piece-esports-scene>.

107. *Id.*

108. *Id.*

109. See Michael Long, *Esports Week: From the Vault-The Rise of the Purpose-Built Esports Arena*, SPORTS PRO MEDIA (Feb. 13, 2018), <http://www.sportspromedia.com/analysis/esports-week-rise-purpose-built-esports-arena>.

110. Richard N. Velotta, *'First of Its Kind' Esports Arena Opens on the Las Vegas Strip*, LAS VEGAS REVIEW-JOURNAL (Mar. 23, 2018, 10:59 PM), <https://www.reviewjournal.com/business/casinos-gaming/first-of-its-kind-esports-arena-opens-on-the-las-vegas-strip/>.

111. Mark Wilson, *Texas is Building a Huge Stadium for a Billion-Dollar Sport: Video Games*, FAST COMPANY (Mar. 19, 2018), <https://www.fastcompany.com/90164370/texas-is-building-a-huge-stadium-for-a-billion-dollar-sport-video-games>.

112. *Id.*

have also begun to explore expansion into esports, with a variety of schools offering scholarships to esports athletes.¹¹³ The growth potential of esports has created a frenzy of sorts and this frenzy has been coupled with sports like football experiencing a decrease in participation and concerns over safety extending across a variety of traditional sports, leaving potential space for esports to fill in the sports industry.¹¹⁴ With so much interest in them, the individual “sports” within the umbrella of esports need to be understood and this is best done by categorizing them based on game type.

B. *Types of Games*

There are a variety of different types of games that make up the field of esports, the different types of games each require a different skill set. Not all video games are esports, while there are no specific criteria for whether a game can be an esports, or not. Video games with a strong competitive element¹¹⁵ and a large following have enjoyed the most success as esports.¹¹⁶ Generally, games which are easy to understand have succeeded in the realm of esports, and perhaps no game type is as easy to comprehend as fighting games.¹¹⁷

1. *Fighting Games*

Fighting games are amongst the easiest for an outsider to understand because they are closely related to arcade games and there are a number of popular titles, like *Street Fighter* and *Tekken*, that were first popularized as arcade games.¹¹⁸ Fighting games involve “controlling characters in close combat action, attempting to defeat each other by reducing their opponent’s health to zero.”¹¹⁹ Professional fighting games are distinct from a number of other game categories as professional tournaments often include an open bracket, which enables amateurs the opportunity to play their way to a championship.¹²⁰ The pinnacle of the esports fighting game season is the Evolution Championship Series, or Evo.¹²¹ Evo consists of a number of fighting titles selected by the tournament organizers;

113. See Thomas A. Baker III & John T. Holden, *College Esports: A Model for NCAA Reform*, 70 S. CAR. L. REV. 55, 60 (2018).

114. Jacob Bogage, *High School Football Participation Continues to Drop as Concerns Over Cost, Injuries Persist*, WASH. POST (Aug. 28, 2018, 4:34 PM), https://www.washingtonpost.com/news/early-lead/wp/2018/08/28/high-school-football-participation-continues-to-drop-as-concerns-over-cost-injuries-persist/?utm_term=.02cf2c44f6c5.

115. Brett Molina, *Why Watch Other People Play Video Games? What You Need to Know About Esports*, USA TODAY (Jan. 12, 2018, 10:22 AM), <https://www.usatoday.com/story/tech/news/2018/01/12/more-people-watch-esports-than-x-dont-get-here-basics/1017054001/>.

116. Kat Bailey, *Seven Essential Ingredients for a Successful eSport*, US GAMER (Feb. 13, 2016), <https://www.usgamer.net/articles/seven-essential-ingredients-for-a-successful-esport>.

117. *Id.*

118. ESPORTS BETTING ELITE, *What Types of Games Does Esports Include?*, <http://www.esports-bettingelite.com/learn-esports/what-types-of-games-does-esports-include/> (last visited Jan. 24, 2020).

119. *Id.*

120. Trent Murray, *An Introduction to Watching Fighting Games as Esports*, ESPORTS OBSERVER (Feb. 26, 2018), <https://esportsobserver.com/introduction-fighting-games-esports/>.

121. *Id.*

past games include *Street Fighter V*, *Super Smash Bros. Melee*, and *Tekken 7*.¹²² Fighting games can also have similarities to their pugilistic predecessor like boxing or mixed martial arts, as the genre has become known for not only trash talking, but pre-fight handshakes and stare downs.¹²³ While fighting games have a large following, which is growing, their following is behind MOBAs and FPS games.¹²⁴

2. *First-Person and Third-Person Shooter Games (Including Battle Royale)*

FPS games are a type of esports game that places the human player in the game from the view point of the game's protagonist.¹²⁵ FPS games typically show the avatar's arms, and sounds like grunting often accompany the avatar performing what would be exertive activities in real life, such as running.¹²⁶ The first FPS game is widely cited as a game called *Maze War*, which was installed on computers at NASA's Ames Research Center.¹²⁷ FPS games transformed into a game of choice for the gaming public with the launch of *Wolfenstein 3D*, and today, games like *Counter-Strike: Global Offensive* (CS:GO), the *Call of Duty* series and *Overwatch* are dominant titles in esports.¹²⁸ FPS games "involve players taking part in a firefight across a map. This could be for the purpose of gaining as many kills as possible, or to achieve some form of objective such as planting or defusing a bomb."¹²⁹ Relatedly, FPS games can be played individually, or more commonly, in the case of esports, they are played as a team.¹³⁰ Amongst the largest FPS events are the *Call of Duty World Championships* and the Electronic Sports League ("ESL") majors, which involve *CS:GO*.¹³¹ Related to FPS games, are third-person shooter games, *Fortnite* and *Player Unknown's Battle-Grounds* ("PUBG"), that can be played across a variety of platforms.¹³² *Fortnite*, *PUBG*, and *Apex Legends* are Battle Royale-style games, which pit dozens of players against each other, with the game going until there is only one player

122. Michael McWhertor, *Evo 2018: How to Watch the Year's Biggest Fighting Game Tournament*, POLYGON (Aug. 3, 2018, 9:59 AM), <https://www.polygon.com/2018/8/3/17631988/evo-2018-schedule-live-stream-sunday-finals>.

123. Murray, *supra* note 120.

124. Trent Murray, *Fighting Games: The Next Esports Investment Frontier*, ESPORTS OBSERVER (Mar. 9, 2018), <https://esportsobserver.com/fighting-games-next-investment-frontier/>.

125. *First Person Shooter (FPS)*, TECHNOPEdia, <https://www.techopedia.com/definition/241/first-person-shooter-fps> (last visited Jan. 24, 2020).

126. *Id.*

127. K. Thor Jenson, *The Complete History of First Person Shooter*, GEEK (Oct. 11, 2017, 9:00 AM), <https://www.geek.com/games/the-complete-history-of-first-person-shooters-1713135/>.

128. *Id.*

129. ESPORTS BETTING ELITE, *supra* note 118.

130. *Id.*

131. Corne Dubelaar, *The Top 10 Most Hyped Esports Events of the Year*, MEDIUM: TRIPLE UNIVERSE (Sept. 26, 2017), <https://medium.com/tripleuniverse/the-top-10-most-hyped-esports-events-of-the-year-195dc483b4bd>.

132. Sarah LeBoeuf, *What is 'Fortnite': A Look at the Video Game That Has Become a Phenomenon*, NBC NEWS (June 30, 2018, 10:27 AM), <https://www.nbcnews.com/tech/tech-news/what-fortnite-look-video-game-has-become-phenomenon-n887706>.

remaining.¹³³ These games are relatively new to esports, but game-maker Epic Games has committed \$100 million toward prizes for *Fortnite* events during 2018–2019.¹³⁴ While FPS games are amongst the most popular genres currently, previously RTS games were amongst the most popular games with titles like *Starcraft II*.¹³⁵

3. *Real-Time Strategy (“RTS”) Games*

RTS games were once the most popular genre of esports in the world and *Starcraft II* was the most popular game in the RTS area.¹³⁶ One of the factors driving the decline of RTS games involves their relatively expensive price point for consumers who can play many MOBA titles for free.¹³⁷ RTS games are traditionally associated with PC gaming and typically involve a player building a force and constructing infrastructure and defenses to support the force and defend against opponent attacks.¹³⁸ The real-time aspect involves all players competing simultaneously to develop their forces, as opposed to players taking turns, as they would in a traditional game like *Risk*.¹³⁹ *StarCraft II* is being repromoted by game-maker Activision Blizzard in an attempt to reassert itself amongst the most popular titles and simultaneously revive the RTS genre of esports.¹⁴⁰ If RTS games were esports’ past, many traditional sports teams are hopeful that sports games represent the future of esports.¹⁴¹

4. *Sports Games*

Sports games are based on traditional sports, popular titles include *NBA 2K*, *Madden*, and *FIFA*.¹⁴² A challenge for esports sport titles is that they are constantly being compared to their traditional counterpart and this has led to poor viewership numbers for some games based on professional sports, particularly with the NBA-backed *NBA 2K* league.¹⁴³ *FIFA* has long been established as the premier sport-based game, having been included in premier tournaments going

133. Max Miceli, *Fortnite Esports: Where It Came From and Where It’s Going*, ESPORTS OBSERVER (Aug. 31, 2018), <https://esportsobserver.com/fortnite-esports-explainer/>.

134. *Id.*

135. Matt Porter, *It Was Once the Biggest Esport in the World, so What’s Happened to ‘StarCraft’?*, VICE (Oct. 5, 2015), https://www.vice.com/en_us/article/nn945x/it-was-once-the-biggest-esport-in-the-world-so-whats-happened-to-starcraft-446.

136. *Id.*

137. *Id.*

138. ESPORTS BETTING ELITE, *supra* note 118.

139. *Id.*

140. Will Partin, *‘StarCraft II’: How Blizzard Brought the King of Esports Back from the Dead*, VARIETY (July 13, 2018), <https://variety.com/2018/gaming/features/starcraft-ii-esports-history-1202873246/>.

141. Daren Heitner, *17 NBA Teams Buy In for Startup NBA 2K Esports League*, FORBES (May 4, 2017), <https://www.forbes.com/sites/darrenheitner/2017/05/04/17-nba-teams-buy-in-for-startup-nba-2k-esports-league/#6c8e282f2e07>.

142. Mitch Reames, *FIFA is a Better Esport Than Other Sports Simulation Games*, SPORT TECHIE (June 18, 2018), <https://www.sporttechie.com/examining-fifa-as-an-esport/>.

143. *Id.*

back to before 2010.¹⁴⁴ *FIFA*'s 2018 championship saw more than six million players enter the "Ultimate Team Championship" for part of a \$400,000 prize pool, with the thirty-two best players being brought together to compete for the crown as *FIFA*'s best gamer.¹⁴⁵ Many traditional sports league investors, particularly those in the NBA who have bought into the league's esports partnership, obviously hope that traditional basketball fans will also take an interest in the sport simulation version of games.¹⁴⁶ While sports titles are most closely aligned with their traditional sport counterparts, MOBA games are the current stars of esports.¹⁴⁷

5. *Multiplayer Online Battle Arena Games*

MOBA games evolved from a modification to *Warcraft III*.¹⁴⁸ MOBA's involve a five-on-five game, where players play different roles to vanquish their opponents' building.¹⁴⁹ MOBA players use pre-spawned units, with the sole objective of destroying the opponents structure prior to their destruction of yours, regardless of the time it takes to do so.¹⁵⁰ MOBA's, in some ways, resemble RTS games, but involve less building and are typically played more rapidly.¹⁵¹ In addition to the five players on each team, the players are accompanied by spawning characters which follow set paths as the user-controlled players approach their opponents.¹⁵² *League of Legends*, *Defense of the Ancients 2* ("Dota 2"), and *Heroes of the Storm*, are the most popular MOBA games and most popular esports titles.¹⁵³ *League of Legends* is so popular that it has more than 100 million registered users and averaged 27 million daily players in 2017.¹⁵⁴ *Dota 2*, which ranks second, has more than 100 million registered users, but averages about 450,000 daily users.¹⁵⁵ Despite the numerous categories of esports genres, there are still some titles which have the characteristics to be called an esports, but simply do not fit into an existing category.

144. Adam Savage, *Can FIFA Become the World's Biggest eSport?*, RED BULL (Oct. 11, 2018), <https://www.redbull.com/gb-en/can-fifa-become-the-biggest-esport-ever>.

145. *Id.*

146. Dean Takahashi, *NBA 2K League Chief: Global Scale Will Be Key to Making Money in Esports*, VENTURE BEAT (Oct. 1, 2018), <https://venturebeat.com/2018/10/01/nba-2k-league-chief-interview/>.

147. *Which MOBA Is Right for You?*, PCGAMESN, <https://www.pcgamesn.com/which-best-moba> (last visited Jan. 24, 2020).

148. *Id.*

149. *Id.*

150. *What Is a MOBA? The History of the Multiplayer Online Battle Arena*, LOL SMURFS (June 19, 2018), <https://www.lol-smurfs.com/blog/what-is-a-moba/>.

151. ESPORTS BETTING ELITE, *supra* note 118.

152. *Id.*

153. Lara Zeigler, *Top 10 Most Played MOBA Games (2019 Edition)*, GAMERS DECIDE (Feb. 14, 2019), <https://www.gamersdecide.com/articles/top-10-most-played-mobas>.

154. *Id.*

155. *Id.*

6. *Other*

There are a group of other types of games that do not fit into the preceding categories, including puzzle games such as *Tetris*.¹⁵⁶ The esports title that is most commonly associated with the other category is a card-based electronic game called *Hearthstone*.¹⁵⁷ *Hearthstone* relies on players using cards to arm and summon minions and then attack, hoping to reduce an opponent's health to zero.¹⁵⁸ Despite being a more cerebral esports, *Hearthstone* has well attended live events and hundreds of thousands of viewers online.¹⁵⁹ While the games are the stars of the esports universe, the stakeholders behind the avatars are what enables esports to be separated from playing video games at home. In the next Section we examine the various esports stakeholders.

C. *The Stakeholders*

Within each of the various games there are stakeholders. The stakeholders can be divided into four distinct groups: (1) players; (2) teams, sponsors and investors; (3) leagues and game-makers; and (4) streamers.

1. *Players*

The first esports stakeholder group is the players. The exact number of professional esports players is unknown. Similar to sports such as tennis, which has various professional player levels such as the Challenger Tour, many esports titles have lower level tournaments for professionals that are not quite ready for the top echelons of competition.¹⁶⁰ Esports players on the whole are younger than many of the professionals playing the four major American sports, with the average professional *League of Legends* player being 21.2 years old.¹⁶¹ The youngest professional esports player was Jun 'TY' Tae Yang who signed a professional contract to play *StarCraft II* at the age of twelve, making his professional debut at thirteen.¹⁶² While esports players have a tendency to be younger than other professional team sport athletes, there are exceptions like Daigo Ume-hara, who has become a legend in the fighting game genre, continuing to play at the highest levels into his mid-thirties.¹⁶³

156. See Div, *7-Time Tetris World Champion Defeated by a 16-Year-Old at 2018 CTWC*, VP ESPORTS (Oct. 22, 2018), <https://www.vpesports.com/more-esports/7-time-tetris-world-champion-defeated-by-a-16-year-old-at-2018-ctwc/>.

157. ESPORTS BETTING ELITE, *supra* note 118.

158. *Id.*

159. Sean Morrison, *Hearthstone: Welcome to the Tavern*, ESPN (July 11, 2018), http://www.espn.com/esports/story/_/id/24066136/hearthstone-championship-tour-2018-welcome-tavern.

160. See *League of Legends Challenger Series Overview*, LEMONLY, <https://lemonly.com/work/league-of-legends-challenger-series-overview> (last visited Jan. 24, 2020).

161. ESPN Stats & Info, *Average Age of Esports vs. Major Sports*, ESPN (Sept. 19, 2017), http://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl.

162. *Id.*

163. *Id.*

Player salaries in esports are varied and while some top-players can earn more than a million dollars a year,¹⁶⁴ the league minimum salaries in many top-tier leagues remain substantially lower than their traditional sports league counterparts.¹⁶⁵ The esports salaries of low-level professionals is but one aspect players must contend with, as working conditions that require upwards of twelve to fifteen-hour practice sessions are standard in some team's dorms.¹⁶⁶ It is, however, not limited to professional gamers who seek isolation to practice for more than half the day. Video gaming became such a concern that South Korea implemented a *Cinderella Law*, which imposed a curfew on video gaming for those under sixteen years old, barring them from playing between midnight and 6:00 AM.¹⁶⁷

Nevertheless, there is one segment of the population missing from the professional ranks of esports, females. While esports events can attract crowds that are evenly split between males and females, there are very few females in the professional slots.¹⁶⁸ While there is an increase in female spectatorship of esports, few females have secured spots on professional teams.¹⁶⁹ This is attributed to a number of factors, including the very prominent matter of sexism and harassment in the gaming community, but can also be partially explained by the volumes of affluent males between twenty-one and thirty-four that the esports gaming communities are generally targeting with their marketing.¹⁷⁰ While there have been efforts to elevate women in professional gaming through women's-only tournaments, many of these efforts are at an early stage and lacking the prize money associated with the men's tournaments.¹⁷¹ Despite the obstacles faced by women gamers seeking to reach the top levels of esports, there have been a handful of women who have found themselves playing on teams that have been historically dominated by men, including Riley 'Kitty' Frost who played on the French *Overwatch* team.¹⁷²

164. See Mai-Hanh Nguyen, *See How Much the Top eSports Teams, Athletes, and Their Organizations Make*, BUS. INSIDER (Jan. 11, 2018, 9:21 AM), <https://www.businessinsider.com/top-esports-teams-players-salaries-2018-1>.

165. See *id.*

166. Simon Hattenstone, *The Rise of eSports: Are Addiction and Corruption the Price of its Success?*, GUARDIAN (June 16, 2017, 7:24 AM), <https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports>.

167. *Id.*

168. *Id.*

169. Emily Gera, *Where Are the Women in eSports?*, POLYGON (May 27, 2014, 12:00 PM), <https://www.polygon.com/2014/5/27/5723446/women-in-esports-professional-gaming-riot-games-blizzard-starcraft-lol>.

170. *Id.*

171. *Id.*

172. Nicole Carpenter, *Half of All Heroes Chosen Five Percent or Less at the Overwatch World Cup*, MEDIUM (Nov. 8, 2016), <https://medium.com/@nicolecarpenter/half-of-all-heroes-chosen-five-percent-or-less-at-the-overwatch-world-cup-8ce214bc00a0>.

2. *Teams, Sponsors and Investors*

The second category of stakeholders are the teams, sponsors and investors. These groups often contain some overlap. Unlike traditional American sports leagues, many teams are closer in design to the European Club system of sports, where clubs may field teams across various esports titles.¹⁷³ Amongst the most popular and successful esports teams are: FaZe Clan, Team Liquid, Cloud9, 100 Thieves, and OpTic Gaming.¹⁷⁴ While teams do not participate in every esports title, many large organizations field teams for top-level game titles like *Dota 2*, *CS:GO*, and *League of Legends*.¹⁷⁵ Depending on the league, team structures can vary, for instance the ESL Pro League has very little oversight of teams and players are able to contract directly with their teams who then enter into various tournaments without exclusivity.¹⁷⁶ Other leagues, such as *Overwatch* League, see teams engage directly with the league and teams are required to abide by league requirements dictating minimum salaries for players.¹⁷⁷ Team size also varies across esports titles, with fighting games teams sometimes being composed of as few as one or two players.¹⁷⁸

Esports sponsors have various levels of engagement. Sponsorship agreements take various forms, including sponsorship of events like the Intel sponsorship of the ESL Intel Extreme Masters and the Coca-Cola sponsorship of the League of Legends World Championship.¹⁷⁹ Other brands, like Comcast Xfinity, have chosen to partner with individual teams such as the Evil Geniuses in order to activate their sponsorships.¹⁸⁰ The third sponsorship type is a sponsorship of an entire league. This approach has been taken by soft drink company Mountain Dew, who founded the Mountain Dew League and sponsor the X Games–Dew Tour.¹⁸¹ Many sponsors also seek to sponsor both teams and events in order to maximize their return on investment.¹⁸² Sponsors may also partner with individual players, provided team and league rules allow such partnerships.¹⁸³ Companies such as Gillette have articulated that their esports sponsorships have had

173. See, e.g., TEAM LIQUID, <https://www.teamliquidpro.com/players#starcraft2> (last visited Jan. 24, 2020).

174. *The World's Greatest Esports Teams*, RANKER GAMES, <https://www.ranker.com/list/best-esports-teams/ranker-games> (last visited Jan. 24, 2020).

175. *Id.*

176. John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 407 (2019).

177. *Id.* at 428.

178. See, e.g., TEAM LIQUID, <https://www.teamliquidpro.com/players#sf> (last visited Jan. 24, 2020).

179. Andrew Meola, *The Biggest Companies Sponsoring eSports Teams and Tournaments*, BUS. INSIDER (Jan. 12, 2018, 8:23 AM), <https://www.businessinsider.com/top-esports-sponsors-gaming-sponsorships-2018-1>.

180. *Id.*

181. *Id.*

182. *Id.*

183. Holden & Baker, *supra* note 176, at 405.

early returns in regard to purchase intent and brand recognition; however, it remains to be seen how brands will fare over the long term as esports continues to evolve.¹⁸⁴

Esports investors who invest in teams have been grouped into three primary categories: sports teams, celebrities, and moguls.¹⁸⁵ While there are certainly a number of high profile investors within these categories, institutional investors are also beginning to take notice of the gaming industry with some hedge funds seeing esports as one of the major investment opportunities coming out of Asia.¹⁸⁶ Investing and buying teams is not the only way that investors are impacting esports. There are numerous opportunities to invest in companies like Amazon, owner of the streaming site Twitch and Tencent Holdings, which owns Riot Games, the makers of *League of Legends*.¹⁸⁷ Finally, investors are able to invest in esports by launching startups, such as starting their own esports team and attempting to find their way to profitability.¹⁸⁸ Many esports investment opportunities can be impacted by the leagues and game-makers examined in the next Section.

3. *Leagues and Game-Makers*

Esports leagues and game-makers are occasionally one and the same. Leagues such as the LCS are wholly-owned subsidiaries of game-makers like Riot Games.¹⁸⁹ Other leagues, such as the ESL, are largely independent from game-makers.¹⁹⁰ The relationship between game-makers and leagues is important in esports because of the leagues' reliance on game-makers to continue supporting game play in order for leagues to remain viable. The ESL is the largest and most popular non-game-maker owned league.¹⁹¹ Previously, Major League Gaming was one of the largest gaming leagues, but it was acquired by Activision Blizzard.¹⁹² While ESL is the largest third-party league, game-makers Blizzard

184. Matthew Chapman, *Why Esports Is Attracting Global Brands (and What it Has to Do to Get More)*, TIMES (Nov. 28, 2017), <https://www.thetimes.co.uk/raconteur/business/why-esports-is-attracting-global-brands-and-what-it-has-to-do-to-get-more/>.

185. Riad Chikhani, *The 3 Types of Esports Investor: Sport Teams, Celebrities, and Moguls*, VENTURE BEAT (May 15, 2018, 4:40 PM), <https://venturebeat.com/2018/05/15/the-3-types-of-esports-investor-sports-teams-celebrities-and-moguls/>.

186. Yuji Nakamura & Takako Taniguchi, *Hedge Fund Boss Bets on Japan's Pro Gaming Scene*, BLOOMBERG (Feb. 23, 2018), <https://www.bloomberg.com/news/articles/2018-02-23/oasis-hedge-fund-boss-bets-on-japan-s-professional-gaming-scene>.

187. Danny Vena, *3 Ways to Invest in Esports*, MOTLEY FOOL (Oct. 8, 2017, 7:20 PM), <https://www.fool.com/investing/2017/10/08/3-ways-to-invest-in-esports.aspx>.

188. Stephen Hays, *How to Invest in Esports*, HACKERNOON (May 12, 2018), <https://hackernoon.com/how-to-invest-in-esports-f28ff0f1bd8e>.

189. Holden & Baker III, *supra* note 176, at 404.

190. Game-maker Valve is distanced from the ESL. Valve, however, does sponsor and fund a series of 'majors' during the season. See Trent Murray, *Valve Outlines Counter-Strike Major Selection Process*, ESPORTS OBSERVER (May 11, 2018), <https://esportsobserver.com/valve-csgo-major-selection/>.

191. *Esports Leagues and Tournaments*, ESPORT BET, <https://esportbet.com/leagues/> (last visited Jan. 24, 2020).

192. *What is Major League Gaming*, ESPORT BET, <https://esportbet.com/major-league-gaming/> (last visited Jan. 24, 2020).

and Riot each respectively run *Overwatch* League and *League of Legends* LCS.¹⁹³ Other leagues such as the NBA's 2K league are not owned by game-maker Take-Two Interactive, but are an extension of an existing licensing agreement that enabled the use of NBA players' names and likenesses to be used in the NBA video game series.¹⁹⁴

There are a variety of game-makers, but three companies dominate the most played esports titles. Riot Games, the makers of *League of Legends* and operators of the LCS is one of the three.¹⁹⁵ Since 2011, Riot has been a subsidiary of Chinese company Tencent.¹⁹⁶ Though rumors of tensions have persisted for some time between Tencent and Riot, Riot is still the maker of the most dominant esports title, *League of Legends*.¹⁹⁷ Activision Blizzard, maker of *Overwatch* and operator of *Overwatch* league, is one of the other major game-makers.¹⁹⁸ Blizzard is the game-maker and tournament operator for *StarCraft* and *Hearthstone* championships.¹⁹⁹ The third major esports company is Washington-based Valve Corporation, the makers of *Dota 2* and *CS:GO*.²⁰⁰ Other major game producers include Take-two Interactive, the makers of NBA 2K,²⁰¹ and Electronic Arts who make *FIFA*.²⁰² There are additional game-makers who compete in the esports scene and many more seeking to displace those at the top, including Epic Games, the makers of *Fortnite*.²⁰³ While the game-makers and leagues form the basis of esports, one factor that makes them resemble traditional sports is the esports equivalent of broadcasters, streamers.

193. *Esports Leagues and Tournaments*, ESPORT BET, <https://esportbet.com/leagues/> (last visited Jan. 24, 2020).

194. See Press Release, *NBA Extends Agreements with Take-Two Interactive and Electronic Arts*, NAT'L BASKETBALL ASS'N (May 23, 2011), <https://pr.nba.com/nba-take-two-interactive-electronic-arts/>.

195. *Esports Leagues and Tournaments*, ESPORT BET, <https://esportbet.com/leagues> (last visited Jan. 24, 2020).

196. Dean Takahashi, *China's Tencent Acquires Majority Stake in Online Game Firm Riot Games for Nearly \$400M*, VENTURE BEAT (Feb. 4, 2011, 5:19 PM), <https://venturebeat.com/2011/02/04/chinas-tencent-acquires-majority-stake-in-online-game-firm-riot-games-for-more-than-350m/>.

197. Aaron Mickunas, *Riot's Relationship with Tencent Has Reportedly Been Strained Over Declining Profits and Mobile Games*, DOT ESPORTS (Aug. 13, 2018, 10:40 AM), <https://dotesports.com/league-of-legends/news/riot-strained-relationship-tencent-declining-players-mobile-games-information-32079>.

198. *Esports Game Developers & Publishers*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/esports-betting/game-developers-publishers/> (last visited Jan. 24, 2020).

199. See *Esports Competitions*, BLIZZARD ENT., <https://esports.blizzard.com/en-us/> (last visited Jan. 24, 2020).

200. *About Us*, VALVE CORP., <https://www.valvesoftware.com/en/about> (last visited Jan. 22, 2020); *Esports Game Developers & Publishers*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/esports-betting/game-developers-publishers/> (last visited Jan. 24, 2020).

201. Arjun Panchadar, *Take-Two Fourth-Quarter Revenue Misses as "NBA 2K" Underperforms*, REUTERS (May 16, 2018, 3:13 PM), <https://www.reuters.com/article/us-take-two-results/take-two-fourth-quarter-revenue-misses-as-nba-2k-underperforms-idUSKCN1IH2UA>.

202. EA SPORTS, *FIFA 20*, <https://www.ea.com/games/fifa/fifa-20> (last visited Jan. 24, 2020).

203. Tom Huddleston Jr., *'Fortnite' Launched Battle Royale a Year Ago Today—Here's How the Company Behind the Billion-Dollar Game Was Founded by a College Kid*, CNBC (Aug. 9, 2018, 11:41 AM), <https://www.cnbc.com/2018/06/12/epic-games-company-behind-fortnite-was-founded-by-a-college-kid.html>.

4. *Streamers*

Streamers are the packaging that delivers esports to viewers. Much like broadcasters of traditional sports, streamers can offer insight into the games, the players, and the atmosphere of esports.²⁰⁴ While there have been some deals between game-makers and streaming sites, such as Blizzard giving streaming site Twitch the rights to broadcast twenty esports events, many streamers make their name broadcasting the commentary for their own play.²⁰⁵ There are a variety of sites that streamers can use, including the aforementioned Twitch, but YouTube and Azubu, which is popular with Korean-streamers, are other major streaming sites.²⁰⁶ Twitch consistently ranks amongst the top fifty global websites most heavily trafficked and is a top twenty site in the United States, ranking ahead of websites like *cnn.com*.²⁰⁷ Similar to traditional sports, many streamers began as esports players before transitioning over to the broadcast side, but unlike traditional sports, some streamers can make more money streaming than the players they are broadcasting.²⁰⁸ Streamers are now powerful influencers within esports communities, but this segment of stakeholders within esports are vulnerable in that their streams involve the play of sports that are effectively owned by game-makers.²⁰⁹

IV. LEGAL ISSUES FOR THE LEAGUES AND GAME-MAKERS

There are various legal issues facing esports leagues and game-makers looking to sustain success in the industry. This Part scrutinizes the legal issues that specifically affect leagues and game-makers. First, we examine the importance of establishing clear rules pertaining to determining contest competitors and winners. Second, we discuss the necessary rules pertaining to paying prizes to successful competitors. Third, we explore the various intellectual property considerations facing the leagues and game-maker side of the industry. The fourth topic of our analysis involves potential antitrust issues facing leagues and game-makers. Finally, we provide an overview of labor law considerations for leagues and game-makers.

204. Damian Alonzo, *How Streaming Is Taking Esports to the Big Leagues*, VENTURE BEAT (Aug. 19, 2017, 3:30 PM), <https://venturebeat.com/2017/08/19/how-streaming-is-taking-esports-to-the-big-leagues/>.

205. *Id.*

206. *What Is Streaming?*, BRITISH ESPORTS ASS'N, <http://www.britisheports.org/108/news/what-is-streaming.html> (last visited Jan. 24, 2020).

207. *See Twitch.tv Competitive Analysis, Marketing Mix and Traffic*, ALEXA, <https://www.alexa.com/siteinfo/twitch.tv> (last visited Jan. 24, 2020).

208. Sam Nordmark, *Live Streamer or Competitive Gamer—Which Career Makes the Most Sense?*, DOT ESPORTS (July 22, 2018, 10:49 AM), <https://dotesports.com/general/news/esports-vs-streaming-money-career-31144>.

209. Richard P. Flaggert, *Copyright in Esports: A Top-Heavy Power Structure, But Is It Legally Sound?*, DLA PIPER (Sept. 27, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

A. Rules Pertaining to Determining Contest Competitors and Winners

The first set of issues pertaining to esports leagues and their game-makers relates to determining who is eligible to participate and who is ultimately declared the winner of given contests. The general rule is that as a private association, esports leagues have the full discretion to determine who is eligible to compete and who is declared the winner—subject, of course, to the mandate that the esports league does so in accordance with otherwise existing laws, and without violating the “basic rudiments of due process.”²¹⁰ The term “basic rudiments of due process” does not relate to due process under the Fifth and Fourteenth Amendments, as the term is conventionally defined under constitutional law, but rather as the more basic requirement of reasonably attempting to follow one’s own rules, or acting in good faith.²¹¹ It is exceedingly rare that a private association’s rules are successfully challenged by a contest participant on these grounds.²¹² In one notable exception, a French-born boxer, who was not represented by a management company favored by the World Boxing Association, successfully brought suit against the World Boxing Association for repeatedly passing him up for reasonably earned opportunities to compete for his weight class’s title, where each time the boxer was passed up by another competitor who was represented by the boxing association’s preferred management company.²¹³ The court also pointed out that the plaintiff-boxer had paid sanctioning fees to the World Boxing Association, thus granting him certain contractual or quasi-contractual rights to a fair process.²¹⁴

Based on this decision, among others, it would be reasonably prudent for esports leagues to maintain simple and clear rules to determine contestant eligibility and contest winners.²¹⁵ The league should choose which participants would participate in given events, as well as receive prizes, based on a good faith interpretation of their own bylaws—without regard to matters including, but not limited to, the participant’s race or gender, his or her agent or manager, or his or her popularity within the sport. By conforming to these rather simple guidelines, the esports league and game operator otherwise enjoys relatively broad latitude in terms of determining contestant eligibility and contest winners.

210. *Crouch v. Nat’l Ass’n for Stock Car Auto Racing Inc.*, 845 F.2d 397, 402 (2d Cir. 1988).

211. *See id.* at 403 (subbing the term “bad faith” in for its previous reference to failure to follow to basic rudiments of due process); *see also M’Baye v. World Boxing Ass’n*, 429 F. Supp. 2d 660, 667 (S.D.N.Y. 2006) (same).

212. *See M’Baye*, 429 F. Supp. 2d at 667 (explaining that “[c]ourts generally are reluctant to interfere with the internal decisions of organizations . . . deferring to the principle that courts are ill-equipped to resolve conflicts involving the interpretation of the organization’s own rules”).

213. *See id.* at 670.

214. *See id.* at 663–64, 668.

215. *See id.* at 670.

B. Rules Pertaining to Paying Prizes

In addition to rules for determining contest winners, esports leagues that pay prizes also need to be aware of gaming laws related to prize eligibility for competition winners. Somewhat oversimplified, state gambling laws prevent the operation of contests (unless specially licensed) that include three attributes: consideration; reward; and chance.²¹⁶ “Consideration” is typically described as a “quid pro quo or something in exchange for something else.”²¹⁷ In the context of state gambling laws, the notion of “consideration” typically references an entry fee.²¹⁸ “Reward,” meanwhile is the tangible benefit that one obtains for winning a contest.²¹⁹ Chance is defined as “something that happens unpredictably without discernible intention or observable cause.”²²⁰ Nevertheless, the minimum ratio of chance-to-skill for an activity to constitute “chance” varies by state, with some states deeming a contest to be one of “chance” if it includes even a modicum of chance, whereas others only deeming a contest to be one of chance if the chance elements of a contest predominate over elements of skill.²²¹

Esports leagues, much like professional leagues governing boxing, golf, and tennis, typically pay participants prize money based on their finish in a particular contest.²²² Because this prize money legally constitutes a “reward,” the underlying contest would need to forgo either requiring “consideration” (generally money) to enter or ensure that the underlying activity does not constitute chance.²²³ In traditional sports, the notion that the underlying activity is one of skill rather than chance has been treated as axiomatic under the law.²²⁴ By contrast, in esports, the matter seems somewhat less settled. Jurisdictions are mixed on whether typical board games, such as dominos, constitute games of skill or games of chance.²²⁵ In one relatively famous court decision, a dissenting judge

216. See Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 556 (1990).

217. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 27 (2012).

218. See Rychlak, *supra* note 216, at 556 (explaining that “[c]onsideration is the stake, wager, or bet that gamblers risk losing if they are unsuccessful[,]” and that “[w]ith a traditional slot machine[,] for example, consideration is the coin that the gambler inserts into the machine before pulling the arm that sets the reels in motion.”).

219. See Edelman, *supra* note 217, at 28.

220. *Id.*

221. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 134 (2016).

222. See Jonathan Shieber, *Fortnite World Cup Has Handed Out \$30 Million in Prizes, and Cemented Its Spot in the Culture*, TECH CRUNCH (July 28, 2019, 8:59 PM), <https://techcrunch.com/2019/07/28/fortnite-world-cup-has-handed-out-30-million-in-prizes-and-cemented-its-spot-in-the-culture/> (describing the prize pools offered for contests in games such as Fortnite).

223. See Edelman, *supra* note 217, at 26–27 (noting that consideration, chance and reward all must exist for conduct to constitute illegal gambling); Rychlak, *supra* note 216, at 556 (same).

224. See Rychlak, *supra* note 216, at 558 (describing the “right to receive cash” as being one example of a reward).

225. Compare *Francis v. County of Stanislaus*, 57 Cal. Rptr. 881 (Cal. Ct. App. 1967) (addressing a California municipal ordinance that treated dominoes as an illegal game of chance), with IOWA CODE § 99B.61 (2015) (describing as a carve-out from Iowa gambling law bona-fide contests, which include, among other things, “cribbage, bridge, euchre, chess, checkers, dominoes, and pinochle”).

even concluded that while the game of duplicate bridge might constitute one of skill, the game of simple bridge would be one of chance.²²⁶

Video games, much like board games, seem to run the full gamut in terms of their legal analysis.²²⁷ On one end of the spectrum, sports video games in which player performance is determined based upon hand-eye coordination in the completion of certain tasks such as, for example, the *NBA 2K* video game, is almost certainly a game of skill that could be reasonably likened to a contest between individuals in shooting physical baskets.²²⁸ On the other end of the spectrum, a video game version of the card game stud poker, much like its real-life counterpart, is almost certainly a game of chance. The movement of the game from a card table onto the Internet changes nothing.²²⁹

The shooter-oriented video games that have become so common in the emerging world of esports seem likely to meet the definition for a “game of skill” with states that apply a predominant purpose test for skill.²³⁰ Indeed, the underlying activities involved in these games undeniably entail a combination of both hand-eye coordination and strategic thinking, as well as in some circumstances, cooperation among teammates. Yet, in states that adopt the “any chance” test for determining whether an activity is one of skill or chance, some of these games arguably may fall on the wrong side of the law.²³¹ For example, in Arizona, which is an any-chance state in which if even the smallest elements of chance are present, esports operators may wish to scrutinize the underlying contests carefully to make sure the ongoing video games do not include the sort of elements of chance that could provide a reasonable argument for an aggressive prosecutor’s legal challenge.²³²

C. Intellectual Property Ownership

Intellectual property issues represent a third area of legal concern for game designers. Every game used for esports was developed, distributed, and maintained by a profit-maximizing game producer and this fact frames almost every aspect of esports governance and regulation.²³³ While some game titles do not

226. See *In re Allen*, 377 P.2d 280, 282–83 (Cal. 1962) (McComb, J., dissenting).

227. See generally Rychlak, *supra* note 216, at 566–67 (explaining that whether videogames constitute games of chance is dependent upon the underlying nature of the specific videogame).

228. See *id.* at 566 (explaining that “[v]ideo gambling devices are typically based on traditional games of chance such as poker, blackjack, craps, and horse racing”).

229. Cf. *id.* at 566–67 (implying that the fact a contest exists over the Internet does not directly affect its chance-to-skill ratio).

230. See Edelman, *supra* note 221, at 130 (explaining that in predominant purpose tests states, a contest will comply with state law if the contest entails more skill than chance).

231. See *id.* at 134.

232. See *id.*

233. Veli-Matti Karhulahti, *Reconsidering Esport: Economics and Executive Ownership*, 74 PHYSICAL CULTURE & SPORT STUD. & RES. 43, 46 (2017); see also Andreas Rahmatian, *Cyberspace and Intellectual Property Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 72, 76 (Nicholas Tsagourias & Russell Buchan eds., 2015) (stating that individuals and companies as actors within the cyberspace can blur the divisions between sovereignty and property, providing a quasi-proprietary power to exert quasi-sovereignty over people).

require purchase or registration fees, they all exist for the purpose of making financial profit.²³⁴ When a product becomes unprofitable, the game will stop being produced and will likely stop serving as a sport for tournaments and competitive league play.²³⁵ For these reasons, the relationship between those who operate esports and the manufacturers of the game titles that make up the sports within esports is very different from the dynamics of traditional sports.²³⁶ Game producers have the authority to literally rewrite the constitutive rules for the games they make and even determine whether the game will exist as a sport.²³⁷ It is true that even within traditional sports, sponsors and media companies have grown so powerful that they now have the ability to dictate characteristics of events and even change some fundamental aspects of the sport.²³⁸ Yet, the influence media partners and sports leagues exert over the way organized competition is packaged and sold is not the same as control over the actual sport. For example, anyone can play traditional football (and even adopt NFL rules) without permission from the NFL or having to agree to terms of use as a condition precedent prior to playing football. Conversely, video game producers require anyone who plays their games to consent to the terms of an End User Licensing Agreement (“EULA”) before gameplay.²³⁹

Game producers are able to exert exclusive proprietary rights²⁴⁰ based on copyright law which grants to creators the ability to control reproductions,²⁴¹ distributions,²⁴² public performances,²⁴³ and creations of derivative works²⁴⁴ that involve or stem from their own copyrighted work.²⁴⁵ The Copyright Act of 1976 provides copyright protection to the creators of original creative works that are affixed to tangible mediums of expression and these rights exist for the life of the owner plus seventy years.²⁴⁶ Video game technology is eligible for copyright protection even though it may include some utilitarian²⁴⁷ components that are more function-focused than creative, so long as they are components of a creative

234. Karhulahti, *supra* note 233, at 46.

235. *Id.*

236. *Id.*

237. *Id.*

238. KATRIEN LEFEVER, *NEW MEDIA AND SPORT: INTERNATIONAL LEGAL ASPECTS* 8 (2012).

239. See, e.g., Elizabeth Brusa, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217, 255 (2015).

240. 17 U.S.C. § 101 (2018).

241. 17 U.S.C. § 106 (2018).

242. 17 U.S.C. § 106(3) (2018).

243. 17 U.S.C. § 106(5) (2018) (listing the copyright owner’s exclusive rights to public display of their copyrighted work).

244. 17 U.S.C. § 106(2) (2018). There are limitations to this right in that derivative works must be capable of independent copyright protection and the new creation must be substantially similar to the original work in order for it to qualify as derivative.

245. For more on the rights afforded to game producers under copyright law, see Elizabeth Brusa, *supra* note 239, at 224–30.

246. 17 U.S.C. §§ 101–302 (2018).

247. Utilitarian works are not eligible for copyright protection. See 17 U.S.C. § 103 (2018); see also *Baker v. Selden*, 101 U.S. 99, 107 (1879) (establishing a functionality test for whether the work operates more for function than creativity).

and original work.²⁴⁸ In terms of international rights, video game producers receive protections provided by the World Intellectual Property Organization (“WIPO”)²⁴⁹ and the WIPO Copyright Treaty²⁵⁰ in countries that are signatories to the Digital Millennium Copyright Act (“DMCA”).²⁵¹ The copyright ownership of the actual “sports” that are used for esports competitions becomes less clear in cases involving games that are modifications of other games that were created with the permission of the original game creator.²⁵² Leagues and tournaments that use games modified by those other than the original creator should probably obtain a license from both the creators of the original work and the modified game prior to incorporation of the ‘mod’ into competitive play.

1. *Copyright Law and Esports Leagues and Tournaments*

Copyright law provides game producers with actual control over the use of games in tournaments and how tournament play should function.²⁵³ Game producers even have the right to restrict who can participate as professionals by banning players from playing the games that are used in esports tournaments and by esports leagues.²⁵⁴ Tournaments and leagues form the backbone of esports and

248. See, e.g., *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786 (2011); *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (finding that statuettes of dancing legs that operated also as lamp bases were deserving of copyright protection despite their functionality. Adding strength to the use of copyright protection for the expressive components of a video game is the fact that the Supreme Court and lower courts have been consistent in holding that video games are expressive creations that deserve First Amendment protection); *ESS Entm’t 2000 v. Rock Star Videos*, 547 F.3d 1095 (9th Cir. 2008); *Candy Lab Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1141 (E.D. Wis. 2017).

249. *Video Games*, WIPO, https://www.wipo.int/copyright/en/activities/video_games.html (last visited Jan. 24, 2020).

250. *Summary of the WIPO Copyright Treaty*, WIPO, https://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Jan. 24, 2020).

251. Amends U.S. copyright law so that it complies with the WIPO Copyright Treaty so that domestic copyright law fits internationally-agreed upon policies for copyright enforcement of digital works. For more on the DMCA, see generally Kenneth Hwang, *Blizzard Versus Bnetd: A Looming Ice Age for Free Software Development?*, 92 CORNELL L. REV. 1043 (2007).

252. For an example, see the pending litigations initiated by producers Blizzard and Valve against Lilith and uCool over the ownership of game modifications of DotA. DotA modifications have been used for major esports competitions and the original game producer (Valve) and another producer (Blizzard) putatively own the copyrights to some of the modifications, but serious questions persist as to whether those modifications are jointly owned with users who made the modifications or whether the rights to the original modification were abandoned by its creator, who was 14 years old at the time. The original moderator (Eul) announced in a forum post that he had unlocked his modification so that others within the gaming community could make their own; just so long as they give him a “nod” in the credits. The DotA controversy represents more than just a copyright battle between multiple game producers, it also highlights the complications stemming from the use of community-generated games for competitive play in leagues and tournaments. The controversy also reflects how game producers are hesitant to exert their market power against their own game communities by imposing tighter copyright restrictions. For a detailed history of this litigation and the battle over the ownership of DotA mods, see David Nathaniel Tan, *Owning the World’s Biggest ESport: Intellectual Property and DotA*, 31 HARV. J.L. & TECH. 965, 976 (2018).

253. TINA L. TAYLOR, *RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING* 171 (2012).

254. Kathryn E. Hollist, *Time to be Grown-Ups about Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 836 (2015) (noting also that unlike what is found within traditional

both, like any other game user, must license the right to play game titles from game developers.²⁵⁵ While some producers (e.g., Blizzard) work with third-parties who develop leagues and organize competitions, most others (e.g., Riot) have taken the role of sponsoring leagues.²⁵⁶ The emergence of developer-sponsored leagues stimulated the growth of esports because the producers were best-positioned to absorb the start-up costs associated with starting a new sports league.²⁵⁷ For example, the game producers had the capital and incentive needed to invest in the operation of tournaments; broadcasting championship rounds; and providing players, commentators, and all other personnel important to the operation of tournaments with salaried compensation.²⁵⁸ The costs of operating esports have buried nonproducer start-up leagues in the past because they depended on revenues generated by esports to survive.²⁵⁹ Conversely, game producers have operated leagues at a loss for sustained periods of time as a loss-leader for game or in-game purchases by consumers who are esports enthusiasts.²⁶⁰ Game producers “still see themselves first and foremost as a game producer—not sports provider.”²⁶¹ Not all game producers, however, have viewed esports as a positive means for promoting their products. For example, in 2013 Nintendo exerted its copyright authority to pull its title *Super Smash Bros. Melee* from live and streamed competition in the Evo tournament.²⁶² It took pressure from consumers to force Nintendo to back down from the use of its authority to stop its product from serving as the focal sport in the Evo tournament.²⁶³ This case demonstrates both the power that game producers yield in regards to controlling the use of their titles as sports in league or tournament play and the power that consumers have in checking producer authority.

sports leagues, banned esports players have no right to grievance arbitration in most cases). The licensing arrangement between the game producers and esports players also permits the former to collect data from gameplay by the latter and use it as seen fit.

255. Laura L. Chao, *You Must Construct Additional Pylons: Building a Better Framework for Esports Governance*, 86 *FORDHAM L. REV.* 737, 744 (2017).

256. *Id.*

257. Hollist, *supra* note 254, at 828–29.

258. David Segal, *Behind League of Legends, E-Sports's Main Attraction*, *N.Y. TIMES* (Oct. 10, 2014), <https://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html>.

259. Hollist, *supra* note 254, at 828.

260. Riot Games reported losses linked to esports in 2012 and 2013, but generated \$624 million in revenue based on in-game purchases in 2013 and almost \$1 billion in revenue in 2014. For more information on this, see Quinten Plummer, *'League of Legends' a Billion-Dollar Winner for Riot Games*, *TECH TIMES* (Oct. 13, 2014, 7:14 PM), <https://www.techtimes.com/articles/17803/20141013/league-of-legends-a-billion-dollar-winner-for-riot-games.htm>.

261. TAYLOR, *supra* note 253, at 18.

262. Tori Allen, *What's in a Game: Collective Management Organizations and Video Game Copyright*, 8 *UNLV GAMING L.J.* 209, 211 (2017) (citing Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, *POLYGON* (July 11, 2013, 1:59 AM), <https://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee>).

263. Will Partin, *With the Switch, Nintendo is finally taking esports seriously*, *META*, <https://kill-screen.com/themeta/switch-nintendo-finally-taking-esports-seriously/> (last visited Jan. 24, 2020).

2. Streaming

Another example of consumer-imposed limits on game producer copyright authority can be found on Twitch, YouTube, and any other online medium used by esports players and gamers to stream their live game play.²⁶⁴ Gamers and tournament operators regularly stream live play of copyright-protected video games on platforms like Twitch or YouTube.²⁶⁵ Game producers have flexed their copyright muscles to restrict third parties from selling rights to streams of tournament play,²⁶⁶ but have seemingly turned a blind eye to unauthorized and very commercial streaming by gamers.²⁶⁷ This blind eye is turned despite the fact that most EULAs for game titles include terms that prohibit the commercial use of the video game.²⁶⁸ Still, producers tend to tolerate the existence of professional streamers who can command big money for their live play from the sale of ads and by donations from viewers.²⁶⁹ Some producers for games (*e.g.*, *Minecraft*) do more than just tolerate game streaming, they actually include integrations into their games that facilitate end user streaming on Twitch.²⁷⁰ Some suggest that fear of consumer backlash serves as the primary reason for why game producers haven't asserted their rights under domestic copyright law and the

264. The term "gamers" in this context is used to describe anyone who does not actively compete in esports tournaments. Many of the most popular streamers of gameplay are not professional esports. For a description of the differences between streamers and esports players, see generally Kelly Kline, *OPINION: Streamers Aren't Esports, They're in a League of Their Own*, ESPORTS OBSERVER (Apr. 24, 2018), <https://esportsobserver.com/streamers-arent-esports/>.

265. *See id.*

266. For example, in 2010 a dispute arose between Korean Esports Association and Blizzard concerning networks in Korea airing StarCraft II competitions without paying 100 million won (\$86,000) to the rights holder Gretch-GomTV. More importantly, KeSPA sold the rights to broadcast their competitions for 1.7 billion won even though they didn't own those rights. *See* Alec Meer, *Blizzard: Korean E-sport TV "Deprives Devs of IP Rights"*, GAMESINDUSTRY.BIZ (Dec. 6, 2010), <https://www.gamesindustry.biz/articles/2010-12-06-blizzard-korean-e-sports-tv-deprives-devs-of-ip-rights>.

267. For example, Tyler 'Ninja' Blevins has about 121,000 subscribers on Twitch and earns approximately \$423,000 per month just from subscriptions to his streams. *See* James Loke Hale, *Here's a Candid Breakdown of Exactly How Much Money Twitch Streamers Earn Per Month*, TUBEFILTER (Oct. 10, 2018), <https://www.tubefilter.com/2018/10/10/twitch-streamers-earn-per-month-breakdown-disguisedtoast/>.

268. *See, e.g., League of Legends Terms of Use (NA)*, LEAGUE OF LEGENDS, <https://na.leagueoflegends.com/en/legal/termsofuse> (last updated Jan. 15, 2020); *Blizzard End User License Agreement*, BLIZZARD, <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> (last updated June 1, 2018).

269. William A. Hamilton et al., *Streaming on Twitch: Fostering Participatory Communities of Play Within Live Mixed Media*, in PROCEEDINGS OF THE 32ND ANNUAL ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1316 (ACM, 2014) (recognizing that Twitch partners with streamers in the distribution of advertising revenues generated from live streaming whereby streamers earn between \$2.00-\$5.00 per impression and keep half of service fees "donated" to them by viewers).

270. Michael Larkey, *Cooperative Play: Anticipating the Problem of Copyright Infringement in the New Business of Live Video Game Webcasts*, 13 RUTGERS J.L. & PUB. POL'Y 52, 57-58 (2015); *see also* Michael Fulton, *So You Want to Stream Minecraft*, LIFEWIRE (Aug. 5, 2018), <https://www.lifewire.com/so-you-want-to-stream-minecraft-4067680> (discussing integrations in Minecraft that make it easy for users to stream Minecraft content on Twitch). *But see Minecraft End User License Agreement*, MOJANG, https://account.mojang.com/documents/minecraft_eula (last updated Sept. 20, 2017) (restricting commercial use of the game by end users despite their license which seemingly permits them to stream content).

DMCA to shut down unauthorized commercial streaming of their intellectual property.²⁷¹

If that is the case, then streamers operate under the protection of consumers who wield more power over live streaming than those who actually own copyrights to the streamed games. More than likely, however, game producers relax their copyright enforcement because the streamers operate as unofficial brand ambassadors who advertise the producer's commercial products for free by streaming six to twelve hours of gameplay most days of the week.²⁷² Imagine if Laker fans were able to spend hours almost every day watching LeBron James practice and could even interact with him while he practiced and you will get a sense of the impact that streaming provides for the streamers, their sponsors, and game producers who want to push product more than they want to enforce their ownership under copyright. Despite the positives that flow from tolerance of streaming, there is also risk of controversy resulting from streamers who engage in scandalous behavior or who make racist, sexist, or some other offensive statement while streaming.²⁷³ Lastly, there is an underlying threat that producers could ultimately lose their rights to control the commercial use of their copyrighted work.²⁷⁴ The last concern is why some within the industry anticipate more efforts in the future from producers to reign in streaming by developing exclusive licensing agreements for either the streamers or their mediums for streaming (e.g., Twitch).²⁷⁵ Moving forward, expect game producers to continue to work towards finding an approach that affords them both better control over streamers and access to the monies generated from those who stream play of their intellectual property on specific platforms.²⁷⁶ Attempts from producers to restrain the market for streaming will likely be met with resistance from fans of streaming, and from the streamers who are also content creators with rights under copyright law that must also be appreciated.

271. See Larkey, *supra* note 270, at 102–03 (discussing backlash to Nintendo's decision to take "Let's Play" videos off of YouTube).

272. Taylor Clark, *How To Get Rich Playing Video Games Online*, NEW YORKER (Nov. 13, 2017), <https://www.newyorker.com/magazine/2017/11/20/how-to-get-rich-playing-video-games-online>.

273. See, e.g., Jordan Crook, *Gaming Star Ninja Sparks Outrage By Refusing To Stream with Women*, TECHCRUNCH (Aug. 14, 2018, 11:35 AM), <https://techcrunch.com/2018/08/14/gaming-star-ninja-sparks-outrage-by-refusing-to-stream-with-women/> (describing controversy centered around Ninja, the star streamer of Fortnite for his refusal to play with women); see Chella Ramanan, *PewDiePie Must Not Be Excused. Using the N-Word Is Never OK*, GUARDIAN (Sept. 11, 2017, 11:07 AM), <https://www.theguardian.com/technology/2017/sep/11/pewdiepie-racism-youtube-games-industry> (describing PewDiePie's use of racist slurs and history of anti-Semitic remarks).

274. See generally Brusa, *supra* note 239.

275. Brianna Howard, Jessica Walker & Jason Kunze, *To Avoid Copyright Disaster, the Future of Game Streaming Is Licensing*, VENTURE BEAT (Aug. 23, 2017, 3:30 PM), <https://venturebeat.com/2017/08/23/to-avoid-copyright-disaster-the-future-of-game-streaming-is-licensing/>.

276. *Id.*

3. *Fair Use*

Streaming channel owners add content for viewers in the form of commentary and the use of various other audio-visual elements that are added for engagement and entertainment.²⁷⁷ As such, streamers are content creators, and this begs the question, could their streams evade copyright's reach on the basis that they qualify as fair use? The fair use doctrine is an affirmative defense to copyright claims that allows for reproduction of copyrighted work for the purpose of criticism, comment, news reporting, teaching, scholarship, or research.²⁷⁸ Fair use is permitted under copyright law as a means for ensuring that the public has access to and use of information.²⁷⁹ There are four statutory factors that courts utilize in discerning whether an appropriation of copyrighted work deserves protection as fair use. The four factors include: (1) the purpose and character of the use, (2) the nature of the original work, (3) the amount of copyrighted content used in the reproduction, and (4) the effect of the appropriation on the market value for the copyrighted work.²⁸⁰ For the purpose of examining streaming content, a quasi-fifth factor of fair use called transformative use may be the most applicable.²⁸¹ The transformative use doctrine protects a reproduction in which the copyrighted work provides the basis of raw material that has been transformed through the creation of new meanings and expressions into a new creation.²⁸² There are, however, some hurdles for streamers that may prevent them from qualifying their streams as transformative and fair use.

The first is found in the fact that streamers make use of substantial amounts of copyrighted game content for their live feeds. They are literally playing the games online for all who subscribe to see. Second, the additional expressions added to the streams in the form of player commentary and perhaps the use of background music are likely too minimal to transform the copyrighted game into a new expression. After all, the games played are not substantially modified by the streamer and courts have been consistent in finding that the transition of copyrighted work from one medium to another is not transformative enough to satisfy the fair use doctrine.²⁸³ Furthermore, transformative works are probably too impermanent to qualify as new, creative derivations of the original.²⁸⁴ Instead, the live stream is more like a public performance²⁸⁵ and most streamers do not

277. Brusa, *supra* note 239, at 244.

278. 17 U.S.C. § 107 (2018).

279. For a decision stating his point, see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 425 (1984) and for a discussion on this point, see Brusa, *supra* note 239, at 231–35.

280. 17 U.S.C. § 107 (2018).

281. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

282. *Castle Rock Entm't v. Carol Publ'g Grp.*, 150 F.3d 132, 142 (2d Cir. 1998).

283. See *Mirage Editions, Inc. v. Albuquerque A.R.T Co.* 856 F.2d 1341, 1343 (9th Cir. 1988).

284. Brusa, *supra* note 239, at 245 (referencing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008)).

285. See 17 U.S.C. § 501 (2018) and 17 U.S.C. § 101 (2018) for definitions of public performance; see also *Am. Broad. v. Aereo, Inc.*, 573 U.S. 431, 449 (2014) (holding that streaming copyrighted work is a form of public performance).

have a license from the game producer that allows for commercial and public performance of gameplay.²⁸⁶

4. *Player Publicity Rights*

Despite what many of us may have been told by our parents, it is possible to become famous from playing video games. Esports has moved into the mainstream and the most accomplished esports competitors in the world have hundreds of thousands, or even millions, of followers on Facebook, Twitter, and Twitch.²⁸⁷ With so much influence literally at their fingertips, esports stars should be able to monetize their celebrity status through endorsement deals with product brands. In fact, esports players can provide brands with substantially more exposure than traditional sports stars because esports players often stream online play on platforms like Twitch for twelve or more hours a day.²⁸⁸ Yet despite their potential for influence, very few esports players are able to secure endorsement deals in excess of five figures.²⁸⁹ Compared to traditional professional sports stars, esports players have far less freedom to endorse products or brands based on their relationship with teams on which they play and the leagues in which they play.²⁹⁰

Teams constrain player publicity rights via contractual provisions that prohibit players from endorsing products that compete with the team's official sponsors.²⁹¹ Furthermore, these standard contracts require team approval even when there is no apparent conflict.²⁹² The current situation with teams, however, is better than what it was just a few years ago when players were forced into contracts that prevented them from having *any* individual endorsement deals.²⁹³ Leagues control player publicity rights by requiring them to enter into contracts that include clauses that grant the producer a license to use a player's name and likeness that lasts in perpetuity.²⁹⁴ While these clauses are not much different from those also found in player contracts for traditional sports leagues like the NBA and NFL, there are no unions to represent esports players in this process.²⁹⁵ Without collective bargaining, esports players lack the leverage to force esports

286. Brusa, *supra* note 239, at 246.

287. For a list of the most famous professional esports players on social media, see Christian Kresse, *The Most Famous Professional Esports Players*, ESPORTS MARKETING BLOG: FIGURES AND FACTS, <http://esports-marketing-blog.com/most-famous-professional-esports-players-in-league-of-legends-counter-strike-global-offensive/> (last visited Jan. 24, 2020).

288. Ben Fisher, *Esports Players Have Less Endorsement Freedom*, SPORTS BUS. J. (May 28, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/28/In-Depth/Endorsement.aspx>.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Adam Levy, *PWNED or Owned? The Right of Publicity and Identity Ownership in League of Legends*, 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 163, 175–76 (2016) (including an example Riot Game's "Use of My Name and Likeness" provision in player contracts for its leagues).

295. *Id.* at 166.

leagues to provide compensation for the use of player names, images, and likenesses.²⁹⁶

Both the team and league contracts with esports players that control player publicity rights are arguably adhesive and the dynamic between the parties closely resembles that found in the relationships between NCAA, its member institutions, and student-athletes, who must license away rights as a condition to their scholarships for athletic performance.²⁹⁷ Similar to the situation with student-athletes, esports players are also very young, on average (ranging from seventeen to twenty-five years of age), and lack the sophistication needed to negotiate contractual arrangements with very sophisticated entities that wield incredible leverage over them.²⁹⁸ The adhesive nature of the contractual arrangements between the leagues/teams and esports players raises concerns as to whether the contracts are unconscionable.²⁹⁹ In the absence of licensed rights to their use, esports players would generally have a right to publicity that permits them to control any commercial value that is inherent to their names, images, and likenesses.³⁰⁰

The right of publicity grew out of the right to privacy and was first recognized as a common law doctrine in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a sport-related case that addressed the question of whether professional baseball players could grant the exclusive right to use their images on baseball cards.³⁰¹ The court in *Haelan* recognized that in addition to a person's right to privacy, "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."³⁰² Following the lead of the court in *Haelan*, other states began to recognize a common law right of publicity,³⁰³ and twenty-two states have enacted a statutory right of publicity.³⁰⁴

296. Holden & Baker III, *supra* note 189, at 435–36.

297. For a discussion on the adhesive nature of scholarship agreements that include clauses that provide the NCAA and its member institutions with license for the perpetual use student-athlete likeness, see generally Thomas A. Baker III, John Grady & Jesse M. Rappole, *Consent Theory as a Possible Cure for Unconscionable Terms in Student-Athlete Contracts*, 22 MARQUETTE SPORTS L. REV. 619 (2012).

298. Levy, *supra* note 294, at 166.

299. The doctrine of unconscionability grew out of the use of covert tools and into an equitable doctrine in common law and a legally enforceable mechanism for attacking procedural and substantively unfair bargains by state enactment of U.C.C. § 2-302. Baker, Grady & Rappole, *supra* note 297, at 621; see Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1073 (2006) (discussing procedural and substantive unconscionability); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1983) (describing the characteristics of a contract of adhesion).

300. Levy, *supra* note 294, at 168–69.

301. 202 F.2d 866, 868 (2d Cir. 1953).

302. *Id.*

303. At least thirty-eight states have judicially-recognized the right of publicity. *A Brief History of the Right of Publicity*, RIGHT PUBLICITY, <https://rightofpublicity.com/brief-history-of-ropo> (last visited Jan. 24, 2020).

304. For the list of states that have codified the right of publicity, see *Statutes and Interactive Map*, RIGHT PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Jan. 24, 2020).

Over time, the right of publicity evolved to extend protection beyond the provision of property rights for the appropriation of another's name and/or photograph to include any "indicia of identity."³⁰⁵ The key to understanding what is intended by "indicia of identity" is in appreciating that the term applies whenever the plaintiff can be identified in the alleged appropriation.³⁰⁶ In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit found that "peculiar" markings on a race car had "distinctive and recognizable nature" that identified the plaintiff, even though his name and physical likeness were not used in the defendant's advertisement.³⁰⁷ In *White v. Samsung Electronics America, Inc.*, the court found that a robot wearing a wig and evening gown that turned letters on a gameboard in a commercial implicated the right of publicity by identifying Vanna White.³⁰⁸ Both the *White* and *Motschenbacher* cases are particularly relevant for esports players because they are represented in competitions by the in-game characters that they use in competition and there is issue as to whether in-game characters could be modified to identify the actual people who use them.³⁰⁹

Also relevant to this discussion is the fact that the characters used by esports players are the intellectual property of the game producer that designed them; or they are both the property of the game developer and a third-party creator that partnered with the game producer.³¹⁰ At this time, it remains unclear as to whether an in-game character can be uniquely customized to identify the user in the same way that a distinctive racing stripe identified Motschenbacher and a robot in a wig and dress identified White. Even if a game character could be modified to identify its player in an esports competition, the player's state-provided right of publicity would be preempted by the developer's federal copyright interest.³¹¹ For the sports genre of esports, the characters themselves are often

305. The term "indicia of identity" is expressly used in section 46 of the Restatement (Third) of Unfair Competition's description of what is covered by the right of publicity. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995). For examples of how courts have interpreted "indicia of identity," see *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974), in which the Ninth Circuit found that "peculiar" markings on a race car had a distinctive and recognizable nature that identified the plaintiff, even though his name and physical likeness were not used in the defendant's advertisement and *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), a case in which a robot wearing a wig and evening gown that turned letters on a gameboard in a commercial was found to identify Vanna White.

306. 971 F.2d at 1398.

307. 498 F.2d at 827.

308. 971 F.2d at 1399.

309. Modifications to characters often involve the use of "skins." Skins are cosmetic components for character design that can be purchased within the game for the purpose of customizing characters.

310. For example, *Capcom vs. Marvel* is a game that uses both game developer-generated characters (e.g. Guile and Dhalsim from the *Street Fighter* franchise) and characters from the Marvel Comics universe (e.g. Thor and Hulk). For a full list of characters in *Marvel vs. Capcom*, see *List of Marvel vs. Capcom Characters*, RANKER: BUTTON MASH, <https://www.ranker.com/list/list-of-marvel-vs-capcom-characters/video-game-info>. (last visited Jan. 24, 2020).

311. For more on the application of the preemption doctrine to cases in which right of publicity and copyright interests are at odds, see generally Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165 (2010); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002); David E. Shipley, *Three Strikes and They're out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L.J. 369, 374 (1988).

virtual representations of actual people who have their own right of publicity.³¹² In regards to video games and the right of publicity, courts have recognized publicity rights in video game representations that identify individuals.³¹³

There exists, however, a limitation within the right of publicity, in that some form of economic harm to the plaintiff and economic benefit for the defendant must occur for the plaintiff to recover an appropriation.³¹⁴ Along those same lines, section 46 of the Restatement (Third) of Unfair Competition³¹⁵ describes the right of publicity as protecting against the appropriation of the commercial value of a person's identity. The commercial value component found in the Restatement's version of the right of publicity also reflects the need for there to be some economic advantage or harm that results from the appropriation.³¹⁶ At first blush, the economic benefit and injury requirements from common law versions of the right of publicity and the commercial value component from section 46 of the Restatement seemingly limit the right of publicity to celebrities. After all, an ordinary person likely does not have commercial value in their identity that will produce either an advantage or injury if appropriated.

The issue of whether celebrity status is a requirement to recover under the right of publicity is an important one for esports players because while there are some leading influencers from esports, the majority of players are not well-known outside of their relevant communities. The nature of esports competitions may also restrict players from achieving fame because they are (to a great extent) hidden behind their monitors and avatars (virtual representations).³¹⁷ The right of publicity, however, exists for *individuals*³¹⁸ and not just *celebrities*, and that should be the case even though it may be more difficult for non-celebrities to establish commercial value in their identities or an economic harm or benefit from the use thereof.³¹⁹ Adding to that recognition is the fact that commercial value has been found in appropriations involving plaintiffs who were hardly household names. A leading example of this can be found in *Zacchini v. Scripps-*

312. Sports games are those for which the subject of the game involves traditional sports. For example, soccer is the subject of the FIFA sport video game franchise. Players of FIFA can use characters that are the virtual representations of actual soccer stars (e.g. Luka Modric).

313. See, e.g., *Keller v. Nat'l Collegiate Athletic Ass'n (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1288 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 169 (3d Cir. 2013); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411–12 (Cal. Ct. App. 2011). For more on the use of actual athletes in sport video games and how their use influences consumer interest in those games, see Thomas A. Baker et al., *Conceptualizing and Measuring the Use of Student-Athlete Likeness in EA's NCAA Football*, 28 J. SPORT MGMT. 281 (2014).

314. For example, California common law requires plaintiffs to have incurred an injury and for the defendant to have gained an advantage from the appropriated use. For more on the requirements for the right of publicity in California, see Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS OF SPORT 35, 39–40 (2010).

315. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

316. *Id.*

317. Holden & Baker III, *supra* note 176, at 436.

318. Although, Indiana's statutory right of publicity covers "personalities" rather than "individuals" and it is unclear as to whether the term "personality" demands some degree of fame in order for the plaintiff to recover. See IND. CODE ANN. § 32-36-1-1 (West 2012).

319. For cogent argument on the point that the right of publicity is for all persons, see generally Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203 (1954).

Howard Broadcasting Co.,³²⁰ the only Supreme Court decision that recognized and addressed the right of publicity. In *Zacchini*, the Court recognized the publicity rights belonging to a human cannonball performer for a traveling carnival whose exhibition was covered in its entirety on a news broadcast.³²¹ The plaintiff and performer in *Zacchini* was not a household name by any means, but he still had commercial value in the price that people paid to witness his performance.³²² The Court in *Zacchini* stated that “no social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay.”³²³ Accordingly, even lesser-known or relatively unknown esports players can establish the existence of commercial value in their identities in cases of appropriation so long as they can establish that they were identified and the use is one for which they should expect to be compensated.³²⁴ Still, an esports player’s ability to recover will likely turn on judicial recognition of some economic value that resulted from the specific appropriation of their identity by the defendant.

Also, of importance is the fact that if an esports player is successful in establishing an appropriation of their identity that triggers the right of publicity, the appropriation could be protected expression under the First Amendment. An inherent tension exists between the right of publicity and the First Amendment.³²⁵ The Court in *Zacchini* recognized this, but left the responsibility of figuring out how to balance these competing interests to the several states.³²⁶ While there is no uniform test for balancing the right of publicity against the First Amendment, there is one test that has been used more than any others³²⁷ and that is the transformative use test which was borrowed for right of publicity cases from copyright law.³²⁸ The critical inquiry for transformative use analysis involves a determination as to whether the plaintiff’s identity was significantly transformed through the appropriation to the point that the end result is “primarily the defendant’s own expression rather than the celebrity’s likeness.”³²⁹ If the

320. 433 U.S. 562, 578 (1977).

321. *Id.* at 575–76.

322. *Id.*

323. *Id.* at 576.

324. *See, e.g., id.* at 575–76.

325. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

326. 433 U.S. at 578–79.

327. There are two other tests for balancing the right of publicity and the First Amendment: (a) the predominant purpose test, and (b) the related use test. The predominant purpose test is used in Missouri and was crafted by the Missouri Supreme Court in *Doe v. TCI Cablevision* as a method for discerning whether the primary purpose is the creation of new expression or to commercially exploit the plaintiff’s identity. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (2003). The related use test is the product of the Restatement (Third) of Unfair Competition. For more on these tests, see Gloria Franke, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role* 79 S. CAL. L. REV. 945, 974–76 (2006).

328. For more information on the transformative use test, see Thomas A. Baker III et al., *Simplifying the Transformative Use Doctrine: Analyzing Transformative Expression in EA’s NCAA Football Sport Video Games*, 7 ELON L. REV. 467, 468 (2015) (study that empirically examined and measured the transformative elements in a sport video game).

329. *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

use is sufficiently transformative, then the First Amendment takes priority over the right of publicity.³³⁰

Where the First Amendment does not preempt a state-provided tort for the right of publicity, the same is not true when competing interests involve the same copyrighted content.³³¹ Accordingly, the preemption doctrine presents a serious barrier to player right of publicity actions challenging the use of player name, image, and likeness in streams, broadcasts, or reproductions of gameplay by esports leagues. In the case of esports matches, the streamed or broadcasted matches are complicated also by the fact that the game itself is the copyright property of the game producer, which is often also the sponsor of the league or tournament. For example, in *Baltimore Orioles v. Major League Baseball Players*, the Seventh Circuit used the preemption doctrine to prevent professional athletes from using the right of publicity to stake claim to what they believed was their fair share of monies generated from game broadcasts and their reproductions.³³² The overarching message from courts seems to suggest that negotiation rather than litigation is the proper approach for players who wish to assert their publicity rights to copyrighted work.³³³

D. Antitrust Law Consideration

Meanwhile, the application of antitrust law to the emerging esports industry presents an issue that has received little, if any, discussion elsewhere in legal discourse.³³⁴ Antitrust law is aimed at enhancing economic efficiency for the purposes of preserving consumer welfare.³³⁵ Among its many goals is preventing large competitors from working together to restrain trade, and preventing established companies from expanding their monopolies through unnatural means.³³⁶

330. *Id.*

331. *Id.* at 807.

332. 805 F.2d 663, 674 (7th Cir. 1986).

333. In *Baltimore Orioles*, the court stated that the players remained “free to attain their objective by bargaining” for their interests in the copyrighted telecasts. *Id.* at 679.

334. The one meaningful piece of scholarship to date that seeks to address the antitrust issues in esports is a note by third year Columbia Law School student, Max Miroff. See Max Miroff, Note, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J.L. & SOC. PROBS. 177, 219 (2019). The authors’ skepticism arises both from *bona fide* questions about whether a single sports videogame is likely to constitute a relevant market under antitrust law, as well as the issue of whether, in the aftermath of the Supreme Court’s holding in *Verizon Comm’n Inc. v. Law Office of Curtis Trinko, L.L.P.*, 540 U.S. 398, 414–15 (2004), a court decision ordering the compulsory licensing of any form of intellectual property, including a copyright on a videogame is likely to withstand scrutiny. See Michael A. Carrier, *Refusals to License Intellectual Property After Trinko*, 55 DEPAUL L. REV. 1191, 1209 (2006) (concluding that the Supreme Court’s decision in *Verizon Communications* points in the direction of upholding absolute or near-absolute immunity for companies’ maintenance of monopoly power where they refuse to license the intellectual property); see also *Data Gen. Corp. v. Grumman Sys. Corp.*, 36 F.3d 1147, 1188 (1st Cir. 1994) (holding that in the context of an allegation under antitrust law that the refusal to license a copyright to a competitor was anticompetitive, the court will apply a rebuttable presumption that “[the] refusal to license is not exclusionary”), *abrogated by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

335. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 1–2 (5th ed. 2005).

336. See *id.*

Specifically, Section 1 of the Sherman Act states that “[e]very contract, combination[,] . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal.”³³⁷ Meanwhile, Section 2 of the Sherman Act disallows monopolization, as well as the “attempt to monopolize, or combine or conspire with any other person or persons, to monopolize.”³³⁸

Within traditional commercial sports leagues such as the MLB, NBA, NCAA, and the NFL, antitrust issues frequently arise under Section 1 of the Sherman Act based on the unique league structure that involves both some competition and cooperation among individual team owners.³³⁹ As a unique form of joint venture, sports leagues sometimes engage in legally dubious forms of collective action from both the product side (such as the NCAA’s joint selling of televised game broadcasts and the NFL’s collectivization of licensing rights)³⁴⁰ and the labor side (e.g., league drafts, reserve rules).³⁴¹

In all of the premier U.S. commercial sports leagues, save for the NCAA, courts will resolve most labor-side antitrust suits without addressing the substantive merits by instead applying what has come to be known as the nonstatutory labor exemption.³⁴² This is “a court-created exemption from antitrust law that [in the presence of a players union] insulates from scrutiny certain concerted conduct in labor markets.”³⁴³ The nonstatutory labor exemption “arose from numerous Supreme Court decisions that sought to reconcile the legal conflict between the need for concerted activities among members in a multi-employer bargaining unit . . . and the prohibition against concerted conduct under Section 1 of the Sherman Act.”³⁴⁴ Thus, greatly oversimplified, it articulates the view that in many cases where federal labor law applies, federal antitrust law does not.³⁴⁵

337. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2018).

338. Sherman Antitrust Act § 2.

339. *Am. Needle Inc. v. Nat’l Football League*, 560 U.S. 183, 202 (2010) (explaining that the unique characteristics of a professional sports league “may provide a justification for many kinds of agreements” to the extent that the teams individually, in order to be successful, “must cooperate in the production and scheduling of games”).

340. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (holding that the NCAA illegally restrained competition by collectivizing individual member college broadcast rights and limiting the number of games that each individual member school may play on television).

341. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187 (D.D.C. 1978) (finding NFL league draft implemented outside the context of a collective bargaining relationship violated antitrust law); *see, e.g., Mackey v. Nat’l Football League*, 543 F.2d 606, 621–22 (8th Cir. 1976) (finding the NFL’s “Rozelle Rule,” which limited the free movement of players not under contract under a reserve system violated antitrust law so long as the rule was not reached through the proper workings of the collective bargaining process).

342. Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned From Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 *CARDOZO L. REV.* 1627, 1655–56 (2017).

343. *Id.*

344. *Id.*

345. Forgoing this oversimplification, there is actually a circuit split about the breadth of the non-statutory labor exemption to antitrust law. *See* Darren W. Dummit, *Upon Further Review: Why the NFL May Not Be Free After Claret, and Why Professional Sports May Be Free from Antitrust Law*, 8 *VAND. J. ENT. & TECH. L.* 149, 151–52 (2005) (describing the evolution of this circuit split). While most circuits agree that the non-statutory labor exemption only insulates from antitrust scrutiny, the limited range of restraints that relate to mandatory subjects of bargaining that primarily affect the parties to a collective bargaining relationship and are reached through arms’ length bargaining, the U.S. Court of Appeals for the Second Circuit has adopted a somewhat

At present, the participants in esports contests are not members of any union, meaning that esports leagues would not enjoy any nonstatutory labor exemption defense to antitrust scrutiny.³⁴⁶ Nevertheless, it is also not clear that any of the esports leagues are engaging in the sort of concerted conduct that currently subjects the traditional U.S. professional sports leagues to regular antitrust scrutiny.

Moreover, at present there are many different esports leagues, rather than just a single league, with monopoly power. Although in some cases there may be only a single league for a given esports game, such monopoly seems to arise from the maintenance of intellectual property rights over the game by the game producer, rather than from any attempt to maintain monopoly power that lies outside the scope of rights obtained through federal intellectual property protections.³⁴⁷ Although one of the nation's leading scholars to study the application of antitrust law to the refusal of companies to license their intellectual property has conceded in a law review article that "[t]he conflict between antitrust and IP cannot easily be resolved,"³⁴⁸ prevailing interpretation of Supreme Court precedent, including its decision in the case *Verizon Communications Inc. v. Curtis V. Trinko LLP*,³⁴⁹ seems to point in the direction of upholding absolute or near-absolute immunity for companies' maintenance of monopoly power where they refuse to license the intellectual property.³⁵⁰

E. Labor Law Considerations

As esports' growth has led to many new sources of revenues flowing to game publishers and tournament operators, competitive esports players have begun to consider attempting to form a legally recognizable union.³⁵¹ Indeed, the idea of esports players unionizing should not be entirely surprising, as the elite athletes in the MLB, NFL, NBA, and the NFL are all currently members of players unions.³⁵² In addition, the informal players associations that currently exist within esports (for example the organization that Riot Games helped to found for

iconoclastic alternative view that the exemption insulated any restraint where applying antitrust law would subvert fundamental principles of federal labor policy. See Edelman, *supra* note 342, at 1656 nn.162–63 and accompanying text (2017).

346. Noah Smith, 'It's not as awesome as people imagine': Esports players say 'dream job' is more than fun and games, WASH. POST: SPORTS (Dec. 13, 2018, 8:53 AM), https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/?utm_term=.e1e8fb52cd46.

347. Cf. Miroff, *supra* note 334, at 179–80 (explaining that based on the ownership of intellectual property rights of videogames, "a single game producer owns monopoly rights to the game being played . . .").

348. Carrier, *supra* note 334, at 1209.

349. 540 U.S. 398.

350. Carrier, *supra* note 334, at 1209.

351. See Jonathan Kogel, *State of the Esports Players Union: Drawbacks and Legal Challenges*, ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union> (discussing some of the early talk about esports players attempting to unionize).

352. See Marc Normandin, *50 Years Ago, Marvin Miller and the MLBPA Changed Sports Forever*, SB NATION (June 11, 2018, 11:00 AM), <https://www.sbnation.com/mlb/2018/6/11/17437624/mlb-mlbpa-cba-marvin-miller-robert-cannon> (also recognizing that players in other sports leagues, such as the Women's National Basketball Association, similarly have unions).

its *League of Legends* Players) are sullied by employer-side influence in the same manner that the precursors to the players associations in the premier, professional U.S. team sports had been before the players formally unionized.³⁵³

The National Labor Relations Act of 1935 is the federal statute that grants esports players the right to attempt to form a union without the fear of retaliation.³⁵⁴ The act, in pertinent part, states that private employees have the legal right to self-organize and “engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection.”³⁵⁵ If a recognizable union is formed, the employer group then garners the “affirmative duty to bargain over the mandatory terms and conditions of bargaining—hours wages and working conditions.”³⁵⁶ Employers also must bargain with the unionized employees over disciplinary procedures.³⁵⁷

The unionizing of athletes in the four premier U.S. professional sports leagues helped lead to the advent of modern free agency and the substantial increase in sport-related revenues to the players.³⁵⁸ For example, prior to the formation of the Major League Baseball Players Association in 1968, as a legally recognized union, the MLB minimum players salary sat for two decades at \$6,000.³⁵⁹ But after the first round of collective bargaining negotiations between the MLB and its newly formed players union, the league minimum salary increased immediately to \$10,000.³⁶⁰ By 1980, the league minimum had increased to \$30,000.³⁶¹ Meanwhile, today, in 2019, the MLB minimum player salary for players on each team’s forty-man roster (those with union membership benefits) sits at \$555,000.³⁶²

353. See Kogel, *supra* note 351 (discussing Riot Games’ efforts to create something it referred to as the “League of Legends Players Association” as a purported bargaining unit of players against which Riot Games could attempt to collectively negotiate); see also Normandin, *supra* note 352 (discussing the period from 1954 until 1968 when the Major League Baseball Players Association operated not as an NLRA-recognized union, but rather an entity for negotiating the players pension plans, under the leadership of Robert Cannon, a Wisconsin judge, who was paid by the Major League Baseball owners and who encouraged the players not to make any demands).

354. See National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1935) (recognizing under the National Labor Relations Act that it would constitute an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights” guaranteed under the National Labor Relations Act, including the right to attempt to form a union).

355. National Labor Relations Act, 29 U.S.C. § 157 (2018). See generally Michael H. LeRoy, *Courts and the Future of “Athletic Labor” in College Sports*, 57 ARIZ. L. REV. 475, 504 (2015) (explaining that the National Labor Relations Act only applies to private sector employment).

356. Edelman, *supra* note 342, at 1629.

357. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

358. See generally Jon Shelton, *How Free Agency Changed the Course of Baseball’s Labor History*, IN THESE TIMES (Dec. 23, 2015, 6:00 AM), http://inthesetimes.com/working/entry/18651/todays_baseball_salaries_are_the_result_of_a_labor_struggle (discussing how the Major League Baseball Players Association brought free agency and improved salaries to their sport through bringing legal challenge to the league’s reserve system).

359. Normandin, *supra* note 352.

360. See *Major League Baseball Minimum and Average Salary Chart*, https://www3.nd.edu/~lawlib/baseball_salary_arbitration/minavgsalaries/Minimum-AverageSalaries.pdf (last visited Jan. 24, 2020).

361. *Id.*

362. MAJOR LEAGUE BASEBALL, 2017–2021 BASIC AGREEMENT, 11–12, https://docs.wixstatic.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf.

If the revenues generated by commercial esports continue to grow at their current rate, it is reasonable to think that the unionization for esports players could yield the same positive effect as it has for MLB players and star athletes in other professional sports. Nevertheless, some of the main challenges that esports players will face, if pursuing the formation of a union, would entail successfully organizing a group that has the sufficient “community of interest” to represent an “appropriate bargaining unit.”³⁶³ This task creates both legal and logistical hurdles.

Questions pertaining to the proper potential bargaining unit for esports participants present issues in terms of both the unit’s proper depth and breath. In terms of depth, the professional sports players unions in the traditional sports consist of all of the players who compete in the highest level of their sport, and they bargain against all of the teams that employ players in the highest level of that given sports as part of what is known as a league-wide multiemployer bargaining unit.³⁶⁴ For example, the NFL players union includes all players who compete on NFL team rosters, irrespective of whether the player is the starting quarterback for the NFL champions or the backup long snapper for the worst team in the league.³⁶⁵ The NFL Players Association, however, does not include professional football players who compete in other, lower-level professional sports leagues, nor does it include players who attend NFL training camp but do not ultimately make a team.³⁶⁶ Similarly, the MLB Players Association, at any point in time, includes approximately 1,200 players—forty players designated by each of the thirty teams as eligible to compete at that point in time on their Major League roster (as well as eligible players who are temporarily on the team’s injured list).³⁶⁷

In esports, potential labor leaders need to similarly consider how deep each union should be. Clearly, a prospective esports players union should not include every individual who enjoys playing a given game recreationally or hopes one day to compete in playing video games at the highest level.³⁶⁸ Such a potential

363. See NAT’L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 7–8, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> (last visited Jan. 24, 2020) (explaining that “[a] unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining,” and that typically “[t]hose who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit.”).

364. See MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, SPORTS LAW CASES AND MATERIALS 653 (2007) (explaining that in most U.S. professional sports leagues “[t]he collective bargaining has been conducted on a league-wide basis (*i.e.*, the entire sport, as in Major League Baseball, the National Football League, etc.).”).

365. See *id.*; see also NFL PLAYERS ASS’N, NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 15 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

366. See NFL PLAYERS ASS’N, *supra* note 365, at xiv.

367. See MAJOR LEAGUE BASEBALL PLAYERS: FAQ, <https://www.mlbplayers.com/faq> (last visited Jan. 24, 2020).

368. See generally Paul Tassi, *Riot’s ‘League of Legends’ Reveals Astonishing 27 Million Daily Players, 67 Million Monthly*, FORBES (Jan. 27, 2014, 4:24 PM), <https://www.forbes.com/sites/insertcoin/2014/01/27/riots-league-of-legends-reveals-astonishing-27-million-daily-players-67-million-monthly/#1b22fed6d39> (explaining that more than 67 million different people play League of Legends each month).

bargaining unit would lack “community of interest,” which is both a requirement to garner recognition under federal law as an appropriate bargaining unit, as well as a matter of common sense need to ensure the unionization process is smooth and meets its membership’s needs.³⁶⁹ At the same time, the scope of a given unit should not be proposed so small that it excludes some individuals that reasonably may have “commonality of interest” with the proposed membership.³⁷⁰

In terms of breadth, the primary issue relates to how many different types of esports players should be a member of the same union, as well as whether the union should constitute a single-employer bargaining unit (where the players bargain against one publisher or one organizer) or a multiemployer bargaining unit (one that simultaneously consists of multiple publishers and/or organizers).³⁷¹ On one end of the spectrum, it would seem to make little sense to include all elite esports players as part of one gigantic bargaining unit because the skill-set, popularity and revenues of different type of esports vary substantially—thus indicating a likely absence of a “community of interest.”³⁷² On the other end of the spectrum, however, if one were to propose adopting a single-employer bargaining unit in esports in which each individual team of players negotiated separately against the publisher or contest organizer (rather than all the teams of elite players), this would likely seem too narrow and thus likely leave others, with a reasonable “community of interest,” on the outside of certain potential bargaining units.³⁷³ As the efforts for esports players to unionize progress, both the esports players and the publishers/organizers will need to think deeply about what is most important to them in the context of potential collective bargaining, and potential labor organizers should seek to ensure proposing bargaining units that are not too broad, too narrow, too deep, nor too shallow to meet a reasonable test for determining “commonality of interest.”³⁷⁴

V. LEGAL ISSUES FOR TEAMS, SPONSORS, AND INVESTORS

The legal issues for teams, sponsors, and investors vary by esports league, team, and level of investment. Amongst the primary issues facing this group are the labor conditions faced by the players, as well as issues related to the sponsorship and behavior of players, with the potential trickle-down effect negatively impacting investor’s reputations. This Part begins by analyzing the labor issues facing teams, as well as sponsors, and investors. Second, we discuss employment law issues relevant to teams, sponsors, and investors. Third, we examine some of the common ownership structures of esports teams. Fourth, we analyze the potential for investors to extract value from teams. Fifth, we scrutinize potential

369. NAT’L LABOR RELATIONS BD., *supra* note 363, at 7–8.

370. *See id.*

371. *See generally* Brown v. Pro Football Inc., 518 U.S. 231, 240 (1996) (explaining that “multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements, and is used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports”).

372. *See* NAT’L LABOR RELATIONS BD., *supra* note 363, at 7–8.

373. *See id.*

374. *See id.*

legal ramifications for teams, sponsors, and investors for violent acts by or against competitors. Finally, we study the legal issues surrounding sponsorship of esports teams and events.

A. Labor Issues

Issues relevant to labor conditions surrounding esports competitors have focused on a few critical aspects: living conditions, pay, and working conditions. While most professional athletes in team sports live in their own homes,³⁷⁵ many esports teams share housing, living together, in order to maximize team building and practice time.³⁷⁶ While players receive housing, the agreements are not without their restrictions and the players who receive the housing accommodations are expected to abide by team rules, which often include rigorous practice schedules and the prioritization of professional advancement over socialization or fraternization.³⁷⁷ The living arrangements are also provided with the understanding that they are conditional based on satisfactory player performance.³⁷⁸ Unsatisfactory performance in competition may, quite literally, result in a player's room being given to someone else.³⁷⁹ Business Insider referred to gaming houses, where professional video-gamers live, as "reminiscent of the MTV show, 'The Real World.'"³⁸⁰ While the idea of teams providing houses for teams of young adults, often away from home for the first time, may seem shocking to some, the arrangement is common in the esports world.³⁸¹

Liability associated with providing housing to teams of young people is likely to have significant overlap with traditional landlord and tenant regulations, which vary between jurisdictions³⁸² and there are likely some additional legal considerations that arise because of this unique relationship. Team ownership groups provide the housing, and often times use the homes as a workplace as

375. See, e.g., Keith Flamer, *20 Outrageous Mansions Owned By Modern Sports Legends*, FORBES: LIFESTYLE (Mar. 23, 2016, 5:58 AM), <https://www.forbes.com/sites/keithflamer/2016/03/23/20-ridiculous-mansions-owned-by-modern-sports-legends/#4b0e296236bd>.

376. Vic Hood, *Life Inside a Pro-Esports Team House With Fnatic: Streaming, Training and Burritos*, TECH RADAR (Sept. 21, 2018), <https://www.techradar.com/news/life-inside-a-pro-esports-team-house-with-fnatic-streaming-training-and-burritos>.

377. *Id.*

378. Maddy Myers, *How Pro Gamers Live Now: Curfews, Personal Chefs, And All Of It On Camera*, KOTAKU: ESPORTS (Jun. 21, 2018, 12:30 PM), <https://compete.kotaku.com/how-pro-gamers-live-now-curfews-personal-chefs-and-a-1827017564>.

379. Hood, *supra* note 376.

380. Harrison Jacobs, *Here's what life is like in the cramped 'gaming house' where 5 guys live together and earn amazing money by playing video games*, BUS. INSIDER (May 5, 2015, 9:40 AM), <https://www.businessinsider.com/inside-team-liquids-league-of-legends-gaming-house-2015-4>. The Real World was an MTV reality television show that helped launch the reality television genre. The show ran for 32 seasons from 1992 to 2017 on MTV, and featured a number young adults from different backgrounds placed in a house together for a period of months. See Nellie Andreeva, *'Real World' Reboot In Works By MTV & Bunim-Murray, Eyed For SVOD Platforms*, DEADLINE (June 7, 2018, 4:42 PM), <https://deadline.com/2018/06/real-world-reboot-mtv-bunim-murray-svod-platforms-1202404898/>.

381. Jacobs, *supra* note 380.

382. See generally Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982).

well as a traditional domicile.³⁸³ This shared role of the structure may implicate various responsibilities for the team owner above and beyond the provision of a habitable environment, including assuming liability under workplace safety regulations.³⁸⁴ Constantly being surrounded by the same individuals can also cause tensions to boil over and team management must be prepared to manage feuds in order to minimize the risk of workplace violence litigation.³⁸⁵

Concerns over player housing are also part of a bigger conversation involving problems that many have regarding player compensation. While there are certainly esports millionaires,³⁸⁶ there are many more professional and semiprofessional players seeking to get by on very little.³⁸⁷ In addition to fourteen-hour work days and little job security, the young age of players has made it difficult for the competitors to achieve some uniform standards regarding pay and working conditions across leagues.³⁸⁸ Leagues, like Overwatch League³⁸⁹ and the LCS,³⁹⁰ have implemented minimum salaries for competitors, which pale in comparison to the amount of money coming into esports from outside investors.³⁹¹ There remain questions about where esports competitors fall under U.S. labor law, while some players have been treated as professional athletes for visa purposes, teams may face lawsuits if the players do not receive minimum levels of compensation for the amount worked if they do not fall under exemptions to the Fair Labor Standards Act (“FLSA”) or other relevant state and federal legislation.³⁹²

383. See Jacobs, *supra* note 380.

384. See generally SAFETY AT WORK (John Ridley & John Channing eds., 7th ed. 2008).

385. See, e.g., Joel H. Neuman & Robert A. Baron, *Workplace Violence and Workplace Aggression: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, 24 J. MGMT. 391 (1998).

386. Joshua Staskus, *The 25 Richest eSports Players (And How Much They Are Worth)*, GAMER (June 5, 2018), <https://www.thegamer.com/25-richest-esports-players-much-worth/>.

387. See Smith, *supra* note 346.

388. Noah Smith, *‘It’s Not as Awesome as People Imagine’: Esports Players Say ‘Dream Job’ is More than Fun and Games*, WASH. POST (Dec. 13, 2018, 8:53 AM), https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/?utm_term=.e1e8fb52cd46.

389. Overwatch League has a minimum salary of \$50,000 per season. See Jessica Conditt, *Overwatch League Pro Players Will Earn At Least \$50,000 a Year*, ENGADGET (July 26, 2017), <https://www.engadget.com/2017/07/26/overwatch-league-salary-esports-players-health-insurance-blizzard/>.

390. North American LCS rules impose a minimum salary of \$12,500, though the average North American LCS strategy in 2017 was \$105,000. See theScore Staff, *ESPN Survey: Average NA LCS Player Salary Approximately \$105k, EU Salary \$81k*, SCORE ESPORTS (Jan. 13, 2017), <https://www.thescoreesports.com/lol/news/12728-espn-survey-average-na-lcs-player-salary-approximately-105k-eu-salary-81k>.

391. Holden & Baker III, *supra* note 176, at 405.

392. It is likely that the competitors are employees of their teams in the case of the major leagues and teams, as opposed to independent contractors. See *id.* at 395. It remains to be seen whether esports competitors would qualify as exempt for overtime pay under the FLSA’s exemption for those engaged in a creative or artistic endeavor. See 29 CFR § 541.302 (a) (2018) (“To qualify for the creative professional exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.”).

B. *Employment Law*

There are various employment law concerns for teams. The most pressing concern is whether players are employees. While there may be some variability with the analysis of players on lower-level professional or semi-professional esports teams, there is likely a near-consensus that in the United States, most professional esports teams would be viewed as employers of their team members.³⁹³ The advantages of players being independent contractors are numerous for team owners, including the fact that they cost less and have fewer worker protections than employees; however, courts employ a variety of tests to determine the status of workers.³⁹⁴ The tests typically focus on the degree of control that an employer exercises over employees, the nature of an ongoing relationship between the parties, and the reliance of the worker on the employer for compensation.³⁹⁵ As employees, esports players are entitled to greater protections than independent contractors, including minimum wage pay and statutory protections in the event of termination.³⁹⁶

While teams likely have an employment relationship with the players, one of the emerging issues is the potential for unionization.³⁹⁷ The desirability for esports players to unionize has two sides. The players would likely see significant benefit from being able to engage in meaningful collective bargaining with ownership, although teams and leagues are likely to resist efforts to unionize in order to keep costs down. At present, teams have been able to avoid many of the added costs associated with unionization, instead capitulating to non-traditional organizations like the World eSports Association (“WESA”), which represents player interests, but is not a traditional union, or likewise Riot Games, the makers of *League of Legends*, who launched preemptive efforts to prevent players from forming a union.³⁹⁸ Riot Games has taken a two-step approach to prevent union formation, the first step was to unilaterally raise minimum player salaries and the

393. See generally Holden & Baker III, *supra* note 176; see also Stephen D. Fisher, *Player Contracts: Defining Expectations to Avoid Conflict League of Legends Article Series*, FOSTER PEPPER PLLC (Aug. 2014), https://www.foster.com/documents/foster-pepper-white-paper/playercontracts_definingexpectationstoavoidconflict_pdf; Ferguson Mitchell, *Esports Primer: Understanding Independent Contractors vs. Employees*, ESPORTS OBSERVER (Jan. 21, 2016), <https://esportsoobserver.com/esports-primer-understanding-independent-contractors-vs-employees>; Roger Quiles, *Are Esports Players Actually Independent Contractors?*, QUILES L. (Apr. 17, 2015), <http://www.esports.law/blog/are-esports-players-actually-independent-contractors>.

394. Quiles, *supra* note 393.

395. *Id.*

396. See Fisher, *supra* note 393.

397. Al Neal, *The eSports Union Revolution Is Coming*, GRANDSTAND CENT. (Aug. 4, 2018), <https://grandstandcentral.com/2018/sports/esports/esports-union-is-coming/>.

398. Michael Long, *Playing the Game: An Insider's Take on eSports Representation*, SPORTS PRO MEDIA (July 21, 2017), <http://www.sportspromedia.com/analysis/playing-the-game-an-insiders-take-on-esports-representation>.

second step was to implement a management funded players' association.³⁹⁹ Historically, one of the alternatives for players concerned with working conditions would be to form their own teams.⁴⁰⁰

C. Ownership structure of teams

The ownership structure of esports has evolved. Historically, esports teams would be established by players themselves, often recruiting friends to play alongside them and then jointly raising funds to enter tournaments.⁴⁰¹ Players were traditionally compensated by the prize pools that teams would earn, but as esports began to grow in popularity, there were increasing opportunities for players to earn money via sponsorships and other branding opportunities.⁴⁰² The relatively recent influx of money to esports has brought with it more professional ownership groups.⁴⁰³ While ownership groups can be traced back for more than twenty years, it is within the last decade that there has been exponential growth in esports investment.⁴⁰⁴ Two prominent esports teams, Evil Geniuses and Alliance, became player owned teams in 2016, breaking from the industry trend of associating with investor-ownership groups. The advantage is that the players are now shareholders, taking a piece of team profits. It is uncertain how sustainable player-owned teams are in the esports universe, as new money continues to flow to the industry and there are more and more incentives bringing top players to the teams with the most resources.⁴⁰⁵

The ownership structure of leagues is varied, with some presenting greater restrictions on teams than others.⁴⁰⁶ The ESL Pro League, likely the premier CS:GO league, allows teams great autonomy to compete in other leagues if they so desire, whereas leagues like the LCS and Overwatch League restrict the mobility of teams to compete in additional leagues.⁴⁰⁷ Both the LCS and Overwatch League are owned by game-makers Riot Games and Activision Blizzard, respectively, which may explain their desire to more tightly restrict teams from seeking out additional money making opportunities.⁴⁰⁸ There appears to be a relationship

399. See Kieran Darcy, *Riot's Players' Association Lays Groundwork for Unionization*, ESPN (June 15, 2017), http://www.espn.com/esports/story/_/id/19617991/riot-players-association-lays-groundwork-unionization.

400. See Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union/>.

401. Steve Van Sloun, *Esports Franchise Economics*, LOUP VENTURES (Mar. 9, 2018), <https://loupventures.com/esports-franchise-economics/>.

402. *Id.*

403. *Id.*

404. *Id.*

405. Joss Wood, *Esports Teams Evil Geniuses and Alliance Go Independent as Player-Owned Brands*, LINES (Dec. 14, 2016), <https://www.thelines.com/evil-geniuses-alliance-go-independent/>.

406. See generally Holden & Baker III, *supra* note 176.

407. *Id.* at 405–07.

408. *Id.* at 404, 429.

between the involvement of the game-maker in operation of the league and the restrictions on teams and players.⁴⁰⁹

D. *Exploitability of Team Value*

The question of how valuable esports teams are is one which remains uncertain, despite organizations selling for 10s of millions of dollars.⁴¹⁰ Prices are rising for esports organizations and as of late 2018, some teams were being valued and selling for more than thirteen times the revenue they were generating, which can be contrasted with tech companies that frequently sell for ten times revenue, or professional sports teams that are often valued at five times revenue.⁴¹¹ Esports team revenue can be broken down into sponsor revenue, advertising revenue, merchandise sales revenue, prize pools and related revenue sources.⁴¹² Esports are distinct from professional sports in a few ways that raise questions about current valuations. Firstly, there is no traditional ticket sales revenue for esports competitions, and secondly, few leagues have managed to monetize the sale of media rights so that teams are able to take a share of the league contracts with broadcasters.⁴¹³ While there is great excitement regarding esports, and esports team ownership, the current league model has many unanswered questions about the ability for team owners to exploit value from ownerships.

E. *Legal Responsibility for Violent Actions*

Sadly, teams must consider the potential responsibility for violent actions by players. Following the 2018 shooting at an esports competition in Jacksonville, Florida, by David Katz, a Madden professional gamer, the need for esports teams to evaluate the safety of team members, both in competition and fellow team members, was heightened.⁴¹⁴ The targeting of other esports competitors by Katz illustrated a dark problem associated with esports and the real-life violence that has occasionally followed video games.⁴¹⁵ While video game-makers have

409. 2018 OFFICIAL RULES NA LCS AND NA LACS (Jan. 11, 2018), https://esports-assets.s3.amazonaws.com/production/files/rules/2018_LCS_LACS_Rules.pdf; cf. *Global Rules*, ESL, <https://play.eslgaming.com/rules> (last updated Nov. 14, 2019).

410. See Josh Chapman, *Esports Teams: Valued as Tech Companies*, MEDIUM (Nov. 27, 2018), <https://medium.com/konvoy/esports-teams-valued-as-tech-companies-79d134a3e00d>.

411. *Id.*

412. *Id.*

413. Editor, *How Do Esports Teams Make Money?*, VERSED (Mar. 28, 2017), <https://www.theversed.com/3554/how-do-esports-teams-make-money/#.Hs99JKhvZL>.

414. Daniel Arkin, *Jacksonville Shooting Puts Spotlight on Booming World of eSports*, NBC NEWS (Aug. 28, 2018, 3:44 AM), <https://www.nbcnews.com/news/us-news/jacksonville-shooting-puts-spotlight-booming-world-esports-n904161>.

415. Alan Blinder et al., *E-Sports World Is Rocked as Gunman 'Clearly Targeted Other Gamers'*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/us/jacksonville-shooting-gaming-esports.html>. There have been other incidents, referred to as Swatting, where online video game competitors make 911 calls that result in a swat team being sent to their opponent's home. These hoaxes have tragically resulted in deaths. See, e.g., Matt Stevens & Andrew R. Chow, *Man Pleads Guilty to 'Swatting' Hoax That Resulted in a Fatal Shooting*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/barriss-swatting-wichita.html>.

First Amendment protections to sell violent video games,⁴¹⁶ teams will need to play a proactive role in advocating for sufficient screening of attendees at live events, much like other sporting venues that have increased security post-9/11. Esports events are now potential soft targets that will need to increase security to ensure the safety of both attendees and competitors. Teams also need to be cognizant of liability associated with negligent hiring of esports competitors. Reports of mental health incidents associated with esports are growing⁴¹⁷ and because of this, teams need to be aware of their obligations. Teams need to be proactive in addressing concerning behavior from competitors, which is especially true in cases where players are living in team housing, isolated from outside society for hours at a time.⁴¹⁸ Team management will likely play the most vital role in obtaining help for competitors displaying problematic behavior.

F. Team sponsor considerations

The structure of esports teams is such that some larger organizations field teams across multiple titles, whereas smaller teams might field a team in a single-game title, though this is becoming increasingly rare at the top levels of competition.⁴¹⁹ From a sponsor's perspective, there is a risk to investing in certain esports teams or leagues. Esports are distinct because game-makers own the intellectual property underlying the games, unlike traditional sports, and the game-maker can choose to stop supporting the game, effectively killing third-party leagues.⁴²⁰ One recent example of this phenomenon occurred when game-maker Activision Blizzard chose to launch Overwatch League, a league modelled on traditional sports leagues, and command a \$20 million franchise fee for teams wanting to enter the league.⁴²¹ From the sponsor's point of view, there is a clear benefit to choosing the more prominent teams to enter into partnership with as they are more likely to be able to weather a storm of game-maker related turmoil, though even the most prominent teams choose to discontinue fielding teams for certain game titles.⁴²² The fact that esports titles come and go in terms of popularity would seemingly be a concern for sponsors, as one would conceivably want to associate only with the top or up and coming titles, but at this stage it is likely

416. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (holding that video games were a form of protected speech similar to other forms of media.).

417. Tyler Erzberger, *Mental Health Issues Remain Pervasive Problem in Esports Scene*, ESPN (Aug. 24, 2018), http://www.espn.com/esports/story/_/id/24427802/mental-health-issues-esports-remain-silent-very-real-threat-players.

418. *Id.*

419. See Andrew Webster, *Why Competitive Gaming Is Starting To Look A Lot Like Professional Sports*, VERGE (July 27, 2018, 10:00 AM), <https://www.theverge.com/2018/7/27/17616532/overwatch-league-of-legends-nba-nfl-esports>.

420. Holden & Baker III, *supra* note 176, at 412.

421. B. David Zarley, *How Esports Teams Decide to Expand Into New Games*, VICE SPORTS (July 19, 2017, 8:15 AM), https://sports.vice.com/en_us/article/qvpxv/how-esports-teams-decide-to-expand-into-new-games.

422. *Id.*

too early to empirically test this in the North American market, given the relatively recent emergence of esports as a near billion-dollar industry.⁴²³

1. Sponsorship Issues

As leagues have strived to become more mainstream, some sponsors have become less welcome. Gambling companies are prominent sponsors across European soccer,⁴²⁴ despite this, some esports game-makers, like Valve, are pushing back against gambling sites sponsoring teams.⁴²⁵ The move by Valve follows a number of high-profile incidents involving players engaging in match-fixing using virtual currency tied to virtual weapon skins.⁴²⁶ The challenge with banning betting websites as sponsors is that these sites not only provide a source of revenue, but are also a key means of growing interest in both individual teams and leagues.⁴²⁷ While leagues and teams must evaluate the benefits of gambling related sponsorships, the internet's ubiquity of pornography related websites has also created controversy in the realm of esports.⁴²⁸ Several leagues have implemented regulations restricting the promoting of pornographic websites or advertising sexually suggestive products, which has made it difficult for pornography websites to sponsor teams.⁴²⁹ The fear of losing other sponsors is likely one of the driving forces behind the reluctance to partner with companies in the adult entertainment industry.⁴³⁰

Despite the ban by some leagues on sponsorships from adult content companies, the treatment of women in esports remains an issue that sponsors must consider before choosing to enter the industry.⁴³¹ The treatment of women in esports has been a prominent concern since at least 2014's Gamergate, when a group of male gamers organized a harassment campaign against women in the

423. Matt Perez, *Report: Esports To Grow Substantially and Near Billion-Dollar Revenues In 2018*, FORBES (Feb. 21, 2018, 11:00 AM), <https://www.forbes.com/sites/mattperez/2018/02/21/report-esports-to-grow-substantially-and-near-a-billion-dollar-revenues-in-2018/#49a7f2d32b01>.

424. *Numbers of Clubs Sponsored by Gambling Firms Still on the Rise*, IRISH TIMES (July 31, 2018, 8:31 AM), <https://www.irishtimes.com/sport/soccer/english-soccer/numbers-of-clubs-sponsored-by-gambling-firms-still-on-the-rise-1.3581844>.

425. Rebekah Valentine, *Valve Tells Dota 2 teams not to take on gambling sponsors*, GAMES INDUSTRY BIZ (Aug. 14, 2018), <https://www.gamesindustry.biz/articles/2018-08-14-valve-tells-dota-2-teams-to-not-take-gambling-sponsors>.

426. See John T. Holden & Sam C. Ehrlich, *Esports, Skins Betting, and Wire Fraud Vulnerability*, 21 GAMING L. REV. 566 (2017); John T. Holden, *Trifling and Gambling with Virtual Money*, 25 UCLA ENTMT L. REV. 41, 44 (2018).

427. Cody Luongo, *ESI Gambling Report: Bookmakers Are Going All-In on Esports Partnerships*, ESPORTS INSIDER (July 13, 2018), <https://esportsinsider.com/2018/07/esi-gambling-report-bookmakers-are-going-all-in-on-esports-partnerships/>.

428. Jeff Grubb, *Esports League Bans YouPorn's Pro Gamer Squad*, VENTURE BEAT (Apr. 23, 2016, 9:00 AM), <https://venturebeat.com/2016/04/23/esports-league-bans-youporn-pro-gamer-squad/>.

429. Mat Smith, *Esports League Bans Porn Site-Sponsored Team*, ENGADGET (Apr. 26, 2016), <https://www.engadget.com/2016/04/26/esports-league-bans-porn-site-team/>.

430. Grubb, *supra* note 428.

431. See Jake Seiner, *Women Navigate Toxicity, Other Barriers in Esports*, BLOOMBERG: BUSINESS, <https://www.bloomberg.com/news/articles/2019-01-03/women-navigate-toxicity-other-barriers-in-esports> (last updated Jan. 3, 2019, 8:46 AM).

industry.⁴³² Women have been quoted as saying they “feel marginalized” within the top levels of esports and are often bombarded with hyper masculinity.⁴³³ Relatively few women have managed to reach the upper echelons of esports, with even fewer managing to sustain their time at the top.⁴³⁴ Esports toxicity has potential to hurt sponsorship opportunities from brands leery of entering an environment where racism, homophobia, and sexism are commonplace online, though there is hope that as esports matures as an industry some of the negative behaviors may be eradicated.⁴³⁵

VI. BROADCASTING

Unlike sports leagues that have traditionally relied on broadcast contracts to convey their sports to consumers, esports primary method of delivery is via streaming on platforms like YouTube and Twitch.⁴³⁶ Twitch is now one of the most visited websites in the world, and has allowed any esports fan to become a broadcaster, creating an opportunity to become a personality within esports, in some cases as popular as the competitors themselves.⁴³⁷ The pressure on streamers to build a following can be intense, with some resorting to stimulant consumption in order to stay-awake and stream for marathon sessions.⁴³⁸ The pressures to rise to the top of a competitive streaming market are accompanied by legal issues regarding the Digital Millennium Copyright Act (“DMCA”), which provides protections for internet services providers from copyright liability if they undertake to remove materials that infringe on copyright, and terminate access for repeated offenders.⁴³⁹ This Part examines the impact of the Digital Millennium Copyright Act on Streamers, and then examines competition facing the industry segment from traditional broadcasting models.

A. *Digital Millennium Copyright Act*

Streamers are in a precarious legal position. Streamers broadcast game action with their own voices describing the action. The difficulty for streamers is that they do not own the underlying content that they are placing on Twitch or

432. *Id.*

433. *Id.*

434. *Id.*

435. Matt Perez, *How Toxicity Hurts The Future Of Esports And Twitch*, FORBES (Apr. 3, 2018, 11:35 AM), <https://www.forbes.com/sites/mattperez/2018/04/03/how-toxicity-hurts-the-future-of-esports-and-twitch/#3f68dc6c1778>.

436. John T. Holden, Ryan M. Rodenberg & Anastasios Kaburakis, *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD. J. INT'L L. 236, 255 (2017).

437. John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 47 (2017).

438. John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Esports: Children, Stimulants and Video-Gaming-Induced Inactivity*, 54 J. PAEDIATRICS & CHILD HEALTH 830, 830 (2018); *see also* Holden et al., *supra* note 87, at 26.

439. Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L.J. 247, 250 n.14 (2008).

YouTube.⁴⁴⁰ While game-makers have historically allowed streamers to stream footage without exercising their takedown powers under the DMCA, game-maker Valve has begun to crackdown on the commercial broadcasting of *Dota 2* games stating:

[I]n addition to the official, fully-produced streams from the tournament organizer itself, we believe that anyone should be able to broadcast a match from DotaTV for their audience. However, we don't think they should do so in a commercial manner or in a way that directly competes with the tournament organizer's stream. This means no advertising/branding overlays, and no sponsorships. It also means not using any of the official broadcast's content such as caster audio, camerawork, overlays, interstitial content, and so on.⁴⁴¹

Numerous Twitch streamers have seen their Twitch accounts either temporarily or permanently banned as a result of DMCA takedown notices from copyright holders.⁴⁴² While many DMCA takedown notices have been initiated by music rights holders, who have had their music included by streamers without consent, the DMCA could allow game-makers to potentially initiate DMCA takedowns if the streamer's use does not meet one of the exceptions to the Copyright Act.⁴⁴³

The Copyright Act allows for fair use of copyrighted material provided it is for a limited and transformative purpose.⁴⁴⁴ Fair use analysis is normally limited to critique, commentary, or parody.⁴⁴⁵ The extensive reliance on content belonging to game-makers may not qualify for exceptions to the Copyright Act, as there may be an insufficient transformative use despite the introduction of commentary. This proposition could leave streamers, some of whom make their living streaming, vulnerable to losing access to streaming platforms, facing civil liability, or even criminal prosecution, with fines of up to \$1 million and ten

440. Howard et al., *supra* note 275.

441. @s7orm3r, *ESL Illegally Filed DMCA Notices Against Twitch Streamers, Because Their Facebook Streams Were Getting Far Less Viewers Than the Alleged Streamers*, ALIENWARE ARENA, <https://na.alienwarearena.com/ucf/show/1837150/boards/gaming-news/News/esl-illegally-filed-dmca-notices-against-twitch-streamers-because-their-facebook-streams-were-getting-far-less-viewers-than-the-alleged-streamers> (last visited Jan. 24, 2020).

442. Austen Goslin, *Popular Twitch streamers temporarily banned thanks to DMCA takedowns*, POLYGON (June 22, 2018, 3:12 PM), <https://www.polygon.com/2018/6/22/17494198/twitch-bans-dmca-copyright-keemstar-friday-fortnite-league-overwatch>.

443. Noah Downs, *Let's take a minute to talk about the DMCA*, MEDIUM: PRETZEL (Oct. 30, 2017), <https://medium.com/pretzelrocks/lets-take-a-minute-to-talk-about-the-dmca-cd14596a329d>.

444. See Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 519–20 (2006).

445. Rich Stim, *What is Fair Use?*, STAN. U. LIBR.: COPYRIGHT & FAIR USE, <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/> (last visited Jan. 24, 2020).

years imprisonment for repeat violators.⁴⁴⁶ The precarious nature of the streaming business may give some streamers pause, especially as esports continues to grow and commercialize, looking more to traditional sport models.⁴⁴⁷

B. Competition from Traditional Broadcasting Deals

Traditional sports leagues rely heavily on media rights deals for television broadcasts as a predominant source for generating revenues.⁴⁴⁸ In the United States, professional sports leagues can make use of the Sports Broadcasting Act of 1961⁴⁴⁹ and leverage rights to broadcasts on a league-wide basis without fear of offending the Sherman Antitrust Act of 1890.⁴⁵⁰ By packaging pooled media rights, teams act as interdependent partners in the creation of a league-wide product and this allows leagues to maximize the value of broadcast fees.⁴⁵¹ In 2017, PWC reported that media rights for professional sports in the U.S. are outpacing other revenue streams for the industry and will balloon in combined value to \$22.7 billion in 2021, from \$19.1 million in 2017.⁴⁵² Almost all of that revenue is sourced from media deals with major television networks.⁴⁵³

Similarly, the value for content rights to esports competitions is expected to expand at an incredible rate, from \$100 million in 2018, to \$400 million in 2021.⁴⁵⁴ There are, however, two key points for distinguishing the management of media rights for esports from those for traditional sports leagues in the U.S. The first point concerns the fact that, for the most part, viewers can watch esports competitions on streaming services like Twitch without a subscription.⁴⁵⁵ Tournaments do not charge Twitch for media rights to the tournaments and viewers are not forced to pay for what they watch.⁴⁵⁶ Twitch is considered the “ESPN” of esports⁴⁵⁷ and is now the fourth highest website in peak Internet traffic in the U.S.⁴⁵⁸ The second point, however, involves the fact that this shared value for

446. See 17 U.S.C. §§ 1201–1204 (2018).

447. Andrew Webster, *Why Competitive Gaming Is Starting To Look A Lot Like Professional Sports*, VERGE (July 27, 2018, 10:00 AM), <https://www.theverge.com/2018/7/27/17616532/overwatch-league-of-legends-nba-nfl-esports>.

448. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 616 (2015).

449. See 15 U.S.C. § 1291 (2018).

450. See 15 U.S.C. §§ 1–38 (2018).

451. CHRIS GRATTON & HARRY A. SOLBERG, *THE ECONOMICS OF SPORTS BROADCASTING* 145–46 (2007).

452. Anthony Crupi, *Sports Media Rights To Soar To \$23B In 2021, PWC Report Says*, ADAGE, (Dec. 11, 2017), <https://adage.com/article/media/pwc-report-sports-m/311578/>.

453. *Id.*

454. ESPORTS BAR & NEWZOO, *UNDERSTANDING MEDIA RIGHTS IN ESPORTS* 4 (2018), <http://strivesponsorship.com/wp-content/uploads/2018/10/Newzoo-Understanding-Content-Rights-in-Esports.pdf>.

455. Ben Popper, *Field of Streams: How Twitch Made Video Games a Spectator Sport*, VERGE (Sept. 30, 2013, 9:00 AM), <https://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming>; The Overwatch League recently experimented with an All-Access Pass on Twitch that cost \$30 and provided fans with additional Overwatch League content such as behind the scenes footage, multi-view streams, and access to question and answer sessions with competitors. ESPORTS BAR & NEWZOO, *supra* note 454, at 17.

456. Popper, *supra* note 455.

457. *Id.*

458. Benjamin Burroughs & Paul Rama, *The eSports Trojan Horse: Twitch and Streaming Futures*, 8 J. VIRTUAL WORLDS RES. 1, 2 (2015).

media rights to esports streams extends well beyond five or six professional sports leagues to include thousands of individual tournaments and leagues.⁴⁵⁹

The most-watched esports competition is the League of Legends World Championship, which attracted 43 million total viewers in 2016, with a peak concurrent viewership of more than 14 million for the final match.⁴⁶⁰ To put this in perspective, the 2017 NBA Finals attracted only 20.4 million total viewers in comparison, despite the fact that it was the most-watched finals since 1998.⁴⁶¹ With so many eyes on top esports competitions, the economic appeal for esports should be greater than what it is currently, and even bigger than the nearly \$400 million in media rights value estimated for 2021.⁴⁶² The biggest problem for esports is that it is an emerging industry that still seems unstructured when compared to any of the traditional sport leagues in the U.S.⁴⁶³ Too much variance exists among esports leagues and tournaments in terms of their business models and potential for profitability.⁴⁶⁴ For esports, as an industry, to maximize its potential for generating revenue from media rights and tournaments, leagues must erect stable structures in terms of their organization and find reliable ways to engage with audiences so as to secure lasting profitability.⁴⁶⁵ For this to happen, game producers must treat esports as more than just a marketing tool that drives player engagement and retention.⁴⁶⁶ Game producers that also sponsor tournaments and leagues for their titles need to focus on esports' potential for revenue generation and develop the industry into a product that is independent of the game title.⁴⁶⁷

An example of an esports league that has moved in a progressive direction is Overwatch League. Overwatch League was modeled with media rights management in mind and this is why its structure more closely resembles traditional American sports leagues than any other esports league.⁴⁶⁸ Specifically, Overwatch League is split into geographic divisions (Atlantic and Pacific) and has a regular season of competition that spans twenty weeks of home and away competition, followed by a playoff format, which concludes with a championship match.⁴⁶⁹ More germane to media rights management is the fact that Overwatch

459. ESPORTS BAR & NEWZOO, *supra* note 454, at 4.

460. Leo Howell, *League of Legends hosts 14.7 million concurrent viewers during Worlds*, ESPN (Dec. 6, 2016), http://www.espn.com/esports/story/_/id/18221739/2016-league-legends-world-championship-numbers.

461. Daniel Holloway, *TV Ratings: NBA Finals Is Most Watched Since 1998*, VARIETY (June 13, 2017, 9:21 AM), <http://variety.com/2017/tv/news/tv-ratings-nba-finals-1202464230/>.

462. ESPORTS BAR & NEWZOO, *supra* note 454, at 4.

463. Andrew J. Curley et al., *What Motivates Esports Fans? A Data-Driven Approach to Business and Development Strategy 1* (Apr. 6, 2017) (unpublished thesis, Southern Methodist University) (on file with author).

464. Pieter van den Heuvel, *Esports Revenues Deep Dive: The Esports Economy Is Expanding Rapidly but ROI Is Still Limited*, NEWZOO (Feb. 28, 2017), <https://newzoo.com/insights/articles/esports-revenues-deep-dive-the-esports-economy-is-expanding-rapidly-but-roi-is-still-limited-for-most-individual-companies/>.

465. Curley et al., *supra* note 463, at 8–9.

466. *See id.* at 1.

467. TAYLOR, *supra* note 253, at 18.

468. ESPORTS BAR & NEWZOO, *supra* note 454, at 11.

469. The Overwatch League listed its first seven cities (Boston, Los Angeles, Miami, Orlando, New York, San Francisco, Seoul, and Shanghai), but expressed plans to grow into having teams in 28 major media markets. *See Overwatch League Seams, Structures, Schedule and, Everything Else We Know*, PCGAMESN, <http://>

League intends to move its teams into home cities in an attempt to lock down markets for each of the teams, similar to the regional interest in teams that exists in traditional sports.⁴⁷⁰ Overwatch League has plans to distribute 50% of revenues (after accounting for expenses) to the teams so that team owners and players directly benefit from the leveraging of media content.⁴⁷¹ The amount distributed to teams and players will be substantial, because Overwatch League packaged and sold its digital media rights to Twitch for a reported \$45 million per year and its linear TV rights to Disney for broadcast on ESPN, the Disney Channel, and the ABC family of networks for an undisclosed amount.⁴⁷² Overwatch League's media deal represents the first multi-year agreement that covers multiple networks, in addition to online content distribution.⁴⁷³ Analysts and potential investors are watching Overwatch League carefully to see if their model for competition and their management of primary and secondary media rights proves successful to the point that other leagues follow its lead. What is clear is that the industry of esports will continue its evolution and maximizing revenues from media rights will play a substantial role in that evolution.⁴⁷⁴ Whether broadcast networks play a significant role in that evolution, however, remains to be seen.

Studies have found that a growing number of people are turning away from network television⁴⁷⁵ in favor of on-demand video content.⁴⁷⁶ The trend is more pronounced for Millennials and Gen Xers (twenty-two to forty-five years of age), as evidenced by a study⁴⁷⁷ which found that almost half of those in that age range watched no content on traditional TV platforms.⁴⁷⁸ In an attempt to buck that trend, some networks are using esports to pull younger audiences back to TV. In the United Kingdom, a twenty-four-hour television channel dedicated to esports content, called GINX, hit the airways in 2016.⁴⁷⁹ In Japan, Nippon TV established both an esports team and an esports television show ("eGG") as a means

www.pcgamesn.com/overwatch/overwatch-league-teams-cities-dates (last visited Jan. 24, 2020). Overwatch League's structure is also different than the other two examined leagues. *Id.*

470. *Id.*

471. *Id.*

472. ESPORTS BAR & NEWZOO, *supra* note 454, at 11. For more on this transaction; see Stefanie Fogel, *ESPN, Disney, ABC Airing Overwatch League*, VARIETY (July 11, 2018, 10:16 AM), <https://variety.com/2018/gaming/news/espn-disney-abc-overwatch-league-1202870413/>.

473. Dustin Bailey, *Overwatch League will be broadcast on ESPN and ABC*, PCGAMESN (July 11, 2018), <https://www.pcgamesn.com/overwatch/overwatch-league-tv> (last visited Jan. 24, 2020).

474. "The battle for media rights in esports has global ramifications, and billions are in the balance," said Jason Lake, owner of multiple esports teams for multiple game titles. Ben Fischer, *Unlocking media riches in esports*, SPORTS BUS. J. (Feb. 27, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/02/27/In-Depth/Main.aspx>.

475. Including traditional broadcast television, cable television, and satellite television formats.

476. See generally Victor Luckerson, *Fewer People Than Ever Are Watching TV*, TIME (Dec 3, 2014), <http://time.com/3615387/tv-viewership-declining-nielsen/>.

477. Study was conducted by Omnicom Media Group agency Hearts & Sciences.

478. Jeanine Poggi, *Nearly Half of Millennials and Gen Xers Don't Watch Any Traditional TV: Study*, ADAGE (Sept. 22, 2017), <https://adage.com/article/media/half-young-consumers-watching-content-traditional-tv-study/310564/>. For reports on this trend in the United Kingdom, see John Plunkett, *Third of TV Watching Among Younger Viewers Is Via On-Demand Services*, GUARDIAN (July 11, 2016, 7:20 AM), <https://www.theguardian.com/media/2016/jul/11/third-of-tv-watching-among-younger-viewers-done-on-demand-services?>.

479. *UK Gets 24-hour Esports Gaming Channel on TV*, BBC (June 16, 2016), <https://www.bbc.com/news/technology-36548479>.

to attract younger audiences with limited or no previous experience watching the once dominant media platform.⁴⁸⁰ In the United States, traditional sports networks have developed verticals dedicated to esports content, but delivery of that content is either nonexclusive to television, or involves a mix of online and television distribution.⁴⁸¹ Two traditional sports television brands, ESPN and Turner Sports, have been at the forefront in broadcasting esports.⁴⁸²

1. ESPN

ESPN branded itself as the “worldwide leader in sports,” and as such has moved aggressively into the business of distributing esports content across its networks and its digital platform (ESPN+).⁴⁸³ ESPN and its partner networks within the Walt Disney/ABC family will air the playoff and championship for the Overwatch League.⁴⁸⁴ In 2018, Riot entered into a streaming agreement with ESPN+ for the nonexclusive rights to stream *League of Legends* matches.⁴⁸⁵ ESPN+ picked up the rights to stream *League of Legends* matches when the \$350 million deal between Riot and BAMTech for the exclusive rights to stream *League of Legends* matches fell apart.⁴⁸⁶ The original deal with BAMTech would have represented the first exclusive media rights agreement for esports content and, at the time, was considered to be a “game changer” for esports.⁴⁸⁷ Disney, which owns ESPN+, also owns BAMTech, which supplies the underlying tech for ESPN+ and other digital properties, including MLB, PGA Tour, and WWE Network.⁴⁸⁸ Prior to these deals, ESPN tested the water with esports by agreeing to stream the 2014 League of Legends World Championship, and the 2014 and 2015 International Dota 2 Championships.⁴⁸⁹ Additionally, the 2016 and 2017 Street Fighter V Championships aired on television on ESPN2.⁴⁹⁰ Yet, ESPN has had less success in creating new esports content for viewers and this should give producers at other networks and media outlets some reason for concern.

480. Sheila Morris, *Nippon TV Establishes AX Entertainment to Create Its First E-Sports Team AXIZ and Launch Its First E-Sports Show “eGG”*, BROADCASTING CABLE (July 30, 2018), <https://www.broadcasting-cable.com/post-type-the-wire/nipponvesports> (stating also that Japan has an aging population and younger audiences were not consuming as much television content as the generations before them).

481. NIELSEN, ESPORTS PLAYBOOK FOR BRANDS (Apr. 24, 2019), <https://www.nielsen.com/us/en/insights/report/2019/esports-playbook-for-brands/#>.

482. See discussion *infra* Sections VI.B.1, 2.

483. Daniel Roberts, *ESPN Says Esports Is Not a Fad*, YAHOO FIN. (Aug. 22, 2018), <https://finance.yahoo.com/news/espn-says-esports-not-fad-124537864.html>.

484. Dylan Byers, *Disney Bets on eSports*, CNN (July 11, 2018, 7:45 PM), <https://money.cnn.com/2018/07/11/technology/disney-espn-esports-overwatch/index.html>.

485. Eben Novy-Williams, *Record \$350 Million Esports Deal Dissolved Before It Began*, BLOOMBERG (May 25, 2018, 2:45 PM), <https://www.bloomberg.com/news/articles/2018-05-25/record-350-million-esports-deal-dissolved-before-it-began>.

486. *Id.*

487. *Id.*

488. *Id.*

489. See Roberts, *supra* note 483.

490. *Id.*

ESPN, TESP, and Blizzard created a collegiate esports competition for the latter's title- *Heroes of the Storm*.⁴⁹¹ *Heroes of the Storm* was cancelled in 2018, and drew both external and internal criticism based on claims that the concept missed the mark by failing to deliver quality esports content.⁴⁹² Despite that setback, ESPN and the rest of the Disney-ABC family of networks are moving forward with established leagues and competitions. ESPN now has a dedicated vertical for esports and the extent of its involvement in the burgeoning field is expected to increase substantially over the next two-three years.⁴⁹³

2. TBS ELEAGUE

Like ESPN and its family of networks, Turner Sports is one of the biggest names in broadcast television for sports content.⁴⁹⁴ It is only natural that Turner Sports would also want to assert itself as a source for esports content. Rather than purchasing the rights to broadcast matches for an extant league, Turner Sports created its own ELEAGUE ("EL").⁴⁹⁵ The EL launched in 2015 with a league built around the title: *CS:GO* and has since added *Street Fighter V* and side events such as *Super Smash Bros*.⁴⁹⁶ Ultimate Invitational, the Overwatch Open, and Rocket League Cup.⁴⁹⁷ Matches for EL are broadcast on the TBS, the flagship network, on Friday nights and simultaneously streamed online via Twitch and YouTube.⁴⁹⁸ All matches are played at an esports arena built by Turner Sports in Atlanta, Georgia.⁴⁹⁹ Craig Barry, the chief content officer for Turner Sports, believes that esports is currently a "monster niche" and that is why TBS has been positioned as a "portal for the casual fan" who may "be too intimidated to get on Twitch."⁵⁰¹

491. *A Guide to Heroes of the Storm, the ESports Event That's About to Take Over Your Timeline*, FOX SPORTS (July 25, 2018 1:25 PM), <https://www.foxsports.com/buzzer/story/heroes-of-the-storm-esports-heroes-of-the-dorm-explainer-heroic-four-tournament-guide-040916> (discussing *Heroes of the Storm* event).

492. Todd Spangler, *Turner, WME/IMG Form E-Sports League, With TBS to Air Live Events*, VARIETY (Sept. 23, 2015, 5:20 PM), <https://variety.com/2015/tv/news/turner-wme-img-esports-league-tbs-1201600921/>.

493. Matt Peckham, *Why ESPN Is So Serious About Esports*, TIME (Mar. 1, 2016), <http://time.com/4241977/espn-esports/>.

494. Properties for Turner Sports include: The NBA on TNT, NBA Digital, NCAA March Madness, MLB on TBS, NCAA Digital, PGA Championship and Ryder Cup, UEFA Champions League and Europa League. See TURNER SPORTS, <http://media.turnersports.com/> (last visited on Jan. 24, 2020).

495. See Spangler, *supra* note 492.

496. McWhertor, *supra* note 122; Sahil Patel, *Turner's Esports League Aims for Growth with More Tournaments, Advertisers*, DIGIDAY (July 19, 2018), <https://digiday.com/media/turners-esports-league-aims-for-growth-with-new-games-advertisers/>.

497. See Patel, *supra* note 496.

498. *Id.*

499. For more on the ELEAGUE arena in Atlanta, Georgia, see *State-of-the-Art Turner Studios Facility in Atlanta*, ELEAGUE (May 23, 2016), <https://www.eleague.com/news/state-of-the-art-tournament-facility>.

500. Nick Schwartz, *Turner Buys into ESports with Creation of New 'Counter-Strike' League*, USA TODAY (Sept. 23, 2015, 8:20 PM), <https://ftw.usatoday.com/2015/09/turner-new-counter-strike-league-esports>.

501. Jake Seiner, *'League of Legends' Eyes U.S. Boost with TBS' 'Esports 101'*, CHI. TRIBUNE (Oct. 19, 2018, 2:10 PM), <https://www.chicagotribune.com/sports/ct-spt-esports-league-of-legends-tbs-20181019-story.html>.

VII. ANCILLARY ISSUES IN ESPORTS

In addition to the various issues affecting teams, players, leagues, sponsors, investors, and streamers there are a number of ancillary issues that have an impact on esports. This Part examines these topics and first up is an exploration of legal issues for esports betting and fantasy sports providers. The second subject addressed in this Part involves issues relating to doping and drug use in esports. Following that is an investigation of the legal issues facing collegiate esports and that is followed by an examination of international issues affecting the industry.

A. Legal Issues for Esports Betting and Fantasy Sports Providers

Similar to most other organized sports, a market has emerged for observers to bet on the results of esports.⁵⁰² At the time of writing this Article, the United States is undergoing a massive change in the way it treats sports gambling in general.⁵⁰³ Prior to 2019, the overwhelming share of legal sports betting activity in the U.S. occurred in Nevada casinos that enjoyed a carve-out from the Professional and Amateur Sports Protection Act.⁵⁰⁴ The U.S. Supreme Court's May 2018 decision in *Murphy v. National Collegiate Athletic Association*, which struck down PASPA, has led to more widespread legalized and regulated sports gambling at the state level.⁵⁰⁵ Much like the betting on sports today, the betting on esports is presumably legal in most states that have passed new sports betting laws. This means that, in a number of states, licensed casinos may offer legal betting on esports contests. In addition, in at least two states, individuals may now bet on esports online through licensed online gaming providers who partner with casinos in their state of operation.⁵⁰⁶ Yet, even with the overall liberalization of sports gambling laws, companies cannot offer betting on esports legally, without a license from the state where the betting is being offered.⁵⁰⁷

Some entrepreneurs have also begun to offer fantasy esports contests, either as standalone businesses or in conjunction with websites that simultaneously offer traditional fantasy sports.⁵⁰⁸ To be clear, fantasy sports, in the vernacular,

502. See *Esports Betting—Overview of the Esports Gambling Vertical*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/esports-betting> (last updated Feb. 7, 2020, 10:22 AM).

503. See generally Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313 (2018).

504. *Id.*

505. *Id.*

506. Esports betting was approved by law in Nevada in June 2017. See Dustin Gouker, *Esports Betting Was Already Legal in Nevada, So Why Did the State Enact a New Law?*, LINES (June 2, 2017), <https://www.thelines.com/esports-pari-mutuel-betting-nevada/>. West Virginia also allowed for esports wagering via their sports betting enactment legislation. See *West Virginia Sports Betting*, PLAY USA, <https://www.playusa.com/west-virginia/sports-betting/> (last visited Jan. 24, 2020). New Jersey has also approved esports wagering; however, at the time of writing no licensed New Jersey sportsbook has offered odds or accepted wagers on an esports event, this is likely because New Jersey law requires all players in the event to be over the age of 18. See Lydia Mitrevski, *New Jersey Regulators Clarify Esports Betting Ban*, ESPORTS INSIDER (June 15, 2018), <https://esportsinsider.com/2018/06/new-jersey-regulators-clarify-esports-betting-ban/>.

507. *Id.*

508. See, e.g., *Play Fantasy Esports at DraftKings*, DRAFTKINGS, <https://www.draftkings.com/lp/esports> (last visited Jan. 24, 2020) (advertising for DraftKings "1-Day Fantasy Esports" featuring league of legends).

include “a wide range of contests in which participants construct virtual teams, using statistics generated by real-life athletes in individual and team-based sporting events.”⁵⁰⁹ Although there are various ways in which one may attempt to differentiate fantasy sports from sports gambling,⁵¹⁰ Congress, in particular, has defined fantasy sports in the Unlawful Internet Gambling Enforcement Act of 2006 to include contests in which “no fantasy or simulation sports team is based on the current membership of an actual team” and three specific criteria are met:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real world sporting or other events. (III) No winning outcome is based—(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.⁵¹¹

When analyzing the legal status of fantasy esports under state law, one needs to look separately at those states that have statutory requirements to address fantasy sports contests and those that do not. In those states that have implemented special laws to license and regulate fantasy sports contests, fantasy esports might also be subject to this licensing requirement. Thus, to operate fantasy esports in those states, both obtaining a license and complying with the associated regulatory rules is a requirement.⁵¹²

By contrast, within states that do not have separate laws to regulate fantasy sports, the legal status of fantasy sports (as well as within states in which fantasy esports would fall outside of the definition of fantasy sports) the legal status of fantasy esports would be determined under general state gaming laws.⁵¹³ Applying general state gambling law standards, a plaintiff in most states can make a prima facie claim of illegal gambling by showing consideration, chance and reward.⁵¹⁴ Presuming the underlying fantasy sports contest includes both an entry fee and a prize, the applicable legal question thus comes down to whether the underlying fantasy esports contest is one of chance.⁵¹⁵

509. Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 656 (2017).

510. One of the most typical ways is that fantasy sports is played among participants, rather than “against the house.”

511. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(i)–(ix) (2018).

512. 31 U.S.C. § 5362(10)(B)(ii).

513. Edelman, *supra* note 509, at 662 (noting that “[u]nless separately regulated, fantasy sports contests of all formats and durations must comply with the general gambling laws of all states in which they operate, as well as with all applicable federal laws”).

514. *Id.*

515. *Id.* at 662–63 (applying the general state law test for illegal gambling).

When determining whether a fantasy esports contest constitutes an activity of chance, it is relatively safe to presume that if the underlying esports contest itself is an illegal contest of chance (such as, for example, an esports tournament involving stud poker), then the one-off fantasy esports contest is also an illegal game of chance. Yet, even if the underlying esports contest were deemed to be a contest of skill (for example, the aforementioned *NBA 2K* video game)⁵¹⁶ it is not necessarily the case, in every state, that the derived fantasy esports contest would be seen in that light.⁵¹⁷ Fantasy sports (and thus presumably fantasy esports) contests that apply a predominant purpose test to determine whether an underlying activity is one of skill,⁵¹⁸ have been blessed by attorneys general in certain states, such as Rhode Island and West Virginia, that apply a predominant purpose test to determine whether an underlying activity is one of skill,⁵¹⁹ in other states, such as Texas, attorneys general have concluded that a fantasy sports contest would violate state gambling laws, even where participants in the underlying contest betting on their own results would have been entirely permissible.⁵²⁰

B. Doping

Sports and doping have gone hand in hand for millennia, with Ancient Greeks using stimulants as a part of training and Roman gladiators using stimulants to fight off fatigue.⁵²¹ The prevalence of doping in traditional sports is something of an open question, while World Anti-Doping Agency (WADA) accredited laboratories report an incidence of about one percent positive tests, others, including the US Office of National Drug Control Policy, estimated that between 10% and 90% of athletes were doping.⁵²² While the concept of doping in esports would have traditionally been mocked as unnecessary, not all types of doping involve anabolics capable of increasing an athlete's size. Indeed, the esports world was shocked when professional *CS:GO* player Kory "Semphis" Friesen announced, during an interview, that he and other members of his team,

516. See *supra* note 216 and accompanying text.

517. Rychlak, *supra* note 216, at 557–58.

518. See Letter from Peter F. Kilmartin, Att'y Gen., R.I. Dep't of Att'y Gen. to Hon. Gina Raimondo, Gov., Off. of the Gov. of R.I., Hon. M. Teresa Paiva Weed, Pres. of the R.I. S. & Hon. Nicholas Mattiello, Speaker of the R.I. H.R. 2–3 (Feb. 4, 2016), <https://www.legalsportsreport.com/wp-content/uploads/2016/02/Rhode-Island-DFS-Opinion.pdf>; see also Letter from Patrick Morrissey, Att'y Gen., Off. of the Att'y Gen. of W. Va., Elbert Lin, Solic. Gen. of W. Va. & Julie Marie Blake, Asst. Att'y Gen. of W. Va. to Hon. William P. Cole, III, Pres. of the S. of W. Va. 3 (July 7, 2016), [https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/Cole%20Fantasy%20Sports%20Opinion%20\(optimized\)%20\(M0130230xCECC6\).pdf](https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/Cole%20Fantasy%20Sports%20Opinion%20(optimized)%20(M0130230xCECC6).pdf).

519. *Id.*

520. See Letter from Ken Paxton, Att'y Gen. of Tex. to Hon. Myra Crownover, Chair, Comm. on Pub. Health, Tex. H.R. 4–6 (Jan. 19, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0057.pdf> (concluding that in Texas, daily fantasy sports contests are contests of chance, and they do not fall under the actual-contest exclusion for contests entailing "speed, strength or endurance" by the participants).

521. Richard I.G. Holt, Ioulietta Erotokritou-Mulligan & Peter H. Sönksen, *The History of Doping and Growth Hormone Abuse in Sport*, 19 GROWTH HORMONE & IGF RES. 320, 320 (2009).

522. *Id.* at 322.

Cloud9, “[w]e were all on Adderall.”⁵²³ While likely hyperbolic, Friesen’s comments sparked concerns within the industry, and prompted the implementation of drug testing in at least one major league.⁵²⁴

The use of nootropics, or brain-boosting drugs, is a problem that various leagues are grappling with.⁵²⁵ Leagues like MLB have been in the public eye resulting from the awarding of therapeutic use exemptions to more than 100 players a year, essentially enabling one-sixth of players to compete under the influence of nootropics.⁵²⁶ The widespread legitimate use of stimulant drugs like Adderall and Ritalin raise challenges for leagues seeking to restrict their use in a competitive setting.⁵²⁷ It will be necessary for esports leagues and traditional sports leagues to balance the legitimate medical needs of competitors with the need to preserve competitive integrity.⁵²⁸ Concerns regarding the use of brain-boosting drugs trickle down from the professional ranks to the amateur ranks through the streaming industry, as numerous streamers attempt to achieve notoriety via marathon streaming sessions, frequently operating on little sleep in order to maximize the time they are able to broadcast.⁵²⁹ The revelations regarding the use of drugs that could boost performance by enhancing focus, and potentially boosting reaction times, has led some leagues to begin implementing drug testing.⁵³⁰

The ESL Pro League, for example, implemented a list of banned substances and announced the launch of skin-based drug testing in 2015.⁵³¹ Questions about the efficacy of the doping tests being used, in at least some esports events, have been raised, with the return of a single positive test out of approximately 400 players tested.⁵³² Despite the lack of positive tests, there continue to be periodic rumors regarding the purported wide-spread use of drugs like Adderall.⁵³³ The industry’s current approach is constrained in part because of the existence of various leagues and overseeing bodies, each with separate views on drug testing. In

523. Emanuel Maiberg, *Counter-Strike eSports Pro: ‘We Were All on Adderall’*, VICE: MOTHERBOARD (July 15, 2015, 8:20 AM), https://motherboard.vice.com/en_us/article/gvy7b3/counter-strike-esports-pro-were-all-on-adderall.

524. See Roy Graham, *Does Esports Have a Drug Problem?*, KILL SCREEN (Mar. 10, 2016), <https://kill-screen.com/articles/does-esports-have-a-drug-problem/>.

525. See Ryan M. Rodenberg & John T. Holden, *Cognition Enhancing Drugs (‘nootropics’): Time to Include Coaches and Team Executives in Doping Tests?*, 51 BRIT. J. SPORTS MED. 1316, 1316 (2017).

526. *Id.*

527. John T. Holden, Anastasios Kaburakis & Joanna Wall Tweedie, *Virtue(al) Games—Real Drugs*, 13 SPORT, ETHICS & PHIL. 19, 22–23 (2019).

528. *Id.* at 26.

529. John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Esports: Children, Stimulants and Video-Gaming-Induced Inactivity*, 54 J. PAEDIATRICS & CHILD HEALTH 830, 830 (2018).

530. See, e.g., Chris Welch, *Electronic Sports League reveals list of drugs banned from e-sports*, THE VERGE (Aug. 12, 2015, 3:12 PM), <https://www.theverge.com/2015/8/12/9143819/e-sports-banned-drugs>.

531. See *id.*; see also Nathan Grayson, *New eSports Drug Tests Are Full of Loopholes*, KOTAKU (July 23, 2015, 7:30 PM), <https://kotaku.com/new-esports-drug-tests-are-full-of-loopholes-1719817001>.

532. Calum Patterson, *Behind The Scenes Doping Control At CS:GO Event Reveals Surprising Truth About Doping in Esports*, DEXERTO (Aug. 9, 2018), <https://www.dexerto.com/esports/behind-the-scenes-doping-control-at-csgo-event-reveals-surprising-truth-about-doping-in-esports-137521>.

533. Kevin Loria, *Some competitive video gamers are abusing drugs to get an edge*, BUS. INSIDER (Jan. 15, 2016, 3:44 PM), <https://www.businessinsider.com/esports-doping-scandal-investigated-by-espns-otl-2016-1>.

order for esports to successfully curtail doping, it is likely that leagues will need to come together and agree on a system of in and out of competition random testing, similar to systems used in other sports.⁵³⁴ While capturing the prevalence of doping in esports remains something of an enigma, match-fixing has been more readily observed.⁵³⁵

C. Collegiate Esports

The origin story for intercollegiate esports resembles the birth of college football⁵³⁶ in the U.S., in that both grew out of competitions between student clubs⁵³⁷ and both initially emerged outside of the NCAA's regulatory shadow.⁵³⁸ The comparisons between the two sports, however, do not stop there. While college football is currently a multi-billion-dollar industry,⁵³⁹ there are those who project that collegiate esports has the potential to also grow into a major profit generator for colleges and universities.⁵⁴⁰ For that to happen, those who manage collegiate esports will need to better leverage media rights for streaming competitions and consumer interest in those competitions will need to increase dramatically.

Until then, colleges and universities will continue to invest in collegiate esports due to its low start-up cost (\$50,000 on average) and potential for very high return.⁵⁴¹ Already, collegiate esports programs are generally perceived as effective tools for attracting students.⁵⁴² Currently, there are more than 100 varsity esports programs⁵⁴³ and that number seemingly increases every week as

534. Aaron Swerdlow, *4 Esports Regulations to Watch for in 2018*, VENTUREBEAT (May 8, 2018, 11:11 PM), <https://venturebeat.com/2018/05/08/4-esports-regulations-to-watch-for-in-2018/>.

535. *Id.*

536. See Marc Edelman, *The NCAA's "Death Penalty" Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK L. REV. 385, 388–89 (2014) (providing an account of the origins of college football and intercollegiate sport governance in the U.S.).

537. See Kieran Darcy, *College Esports is the next big thing in varsity athletics*, ESPN (Oct. 23, 2017), http://www.espn.com/college-sports/story/_/id/21113602/thenext-big-thing-collegiate-athletics-esports; see also Chris Radford, *Intersport to Help NCAA Research Esports*, NCAA (Nov. 30, 2017, 4:15 PM), <http://www.ncaa.org/about/resources/media-center/news/intersport-help-ncaa-research-esports> (for a general discussion on the rise of college esports from club teams to varsity programs).

538. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015) (discussing the creation of the NCAA as a means for addressing safety risks in college football); see also Kieran Darcy, *Colleges increasingly catching the esports wave*, ESPN (May 25, 2017), http://www.espn.com/esports/story/_/id/19441338/colleges-increasingly-catching-esports-wave (discussing how the NCAA has not yet involved itself in the regulation of collegiate esports).

539. Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), <https://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html>.

540. See Neal Robison, *Esports Is The New College Football*, FORBES (Jan. 30, 2018, 5:18 PM), <https://www.forbes.com/sites/moorinsights/2018/01/30/esports-is-the-new-college-football/#208c70f41855>.

541. Layne Shirley, *Witnessing the Dynamic Rise of Varsity Esports*, MEDIA PLANET, <https://www.educationandcareernews.com/higher-education/witnessing-the-dynamic-rise-of-varsity-esports> (stating that operating costs are also very low).

542. *Id.*

543. Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Mar. 15, 2018), http://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america;

more and more major universities create varsity programs.⁵⁴⁴ The first varsity program was established in 2014, at Robert Morris University, and following that, a trend of adding varsity programs spread among other colleges that were also part of the National Association of Intercollegiate Athletics (“NAIA”).⁵⁴⁵ That trend eventually extended to include schools that are member institutions of the National Collegiate Athletic Association (“NCAA”) and now they make up more than 50% of the extant varsity esports programs.⁵⁴⁶ Only recently, however, have the leading athletic institutions started to add varsity programs.⁵⁴⁷

Much more so than its professional counterpart, collegiate esports is in an infancy stage of development, with more than half of the current varsity programs having been formed within the past two years.⁵⁴⁸ Much work needs to be done before collegiate esports emerges from its nascence and blossoms into a significant subsidiary of the multi-billion-dollar business of intercollegiate athletics. Specifically, a regulatory framework for collegiate esports must be erected and the shape it takes must capitalize on what makes esports popular.

1. *Regulating Collegiate Esports*

Currently no dominant regulatory agency organizes and sanctions collegiate sports competitions in the way the NCAA does for its member institutions. The closest thing to a governing body for collegiate esports is the National Association of Collegiate Esports (“NACE”). The NACE is a voluntary and member-managed association that was designed to develop “the structure and tools needed to advance collegiate esports in the varsity space.”⁵⁴⁹ Similar to the NCAA and the NAIA, the NACE developed bylaws to regulate its member institutions and their respective student-athletes.⁵⁵⁰ Prior to the NACE, the only regulatory control over collegiate esports existed within the leagues and tournaments that operate collegiate esports competitions. Most college esports tourna-

Michael Smith & Ben Fischer, *Final Four-nite? NCAA explores move to sponsor esports*, SPORT BUS. J. (Nov. 19, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/11/19/Esports/Esports.aspx>.

544. Varsity programs are those that recruit players, provide them with scholarships (even if partial), hire coaches, and officially sponsor teams to compete in college esports tournaments.

545. See J. Collins, *Esports Scholarships Are Growing. Do They Leave Some Students Behind?*, EDSURGE (Feb. 27, 2019), <https://www.edsurge.com/news/2019-02-27-esports-scholarships-are-growing-do-they-leave-some-students-behind>.

546. See *supra* note 543.

547. Noah Smith, *Ohio State is Latest Power Conference School to Embrace Esports While NCAA Sits Idle*, WASH. POST (Oct. 11, 2018, 12:52 PM), <https://www.washingtonpost.com/sports/2018/10/11/ohio-state-is-latest-power-conference-school-embrace-esports-while-ncaa-sits-idle/>.

548. Jeremy Bauer-Wolf, *Video Games: Entertainment or Sports?*, INSIDE HIGHER ED (Feb. 12, 2019), <https://www.insidehighered.com/news/2019/02/12/new-frontier-college-athletics-video-games>.

549. For more on NACE, see *About*, NACESPORTS.COM, <https://nacesports.org/about/> (last visited Jan. 22, 2020).

550. NAC ESPORTS, NAC ESPORTS OFFICIAL POLICY HANDBOOK 8–17 (2016), <http://nacesports.org/wp-content/uploads/2017/02/NAC-eSports-Constitution-Bylaws-9-29-2016-1-1.pdf>. [hereinafter NAC ESPORTS HANDBOOK].

ments are the property of for-profit producers that have no connection, coordination, or even cooperation, with the NACE and its member institutions.⁵⁵¹ In fact, most collegiate esports tournaments are not limited to varsity teams and this means that club squads regularly compete against better-resourced teams that are composed of players on scholarship.⁵⁵² The NACE has managed to organize most of the varsity programs into a regulatory unit, but all of its efforts could be undone if the NCAA decides to act on its expressed interest of imposing its own regulatory controls over collegiate esports.⁵⁵³

In October 2018, the NCAA's Board of Governors held meetings to discuss the possibility of sponsoring esports and what an NCAA esports championship would look like, but in April 2019 the NCAA tabled its involvement in esports.⁵⁵⁴ The NCAA's possible intrusion into collegiate esports presents a number of complications. First, a concern exists as to whether there would be enough varsity NCAA programs to make it worth the NCAA's management efforts. If the NCAA moves into the space, it will likely do so with the confidence that more of its members, particularly Division I members, will follow the trend and add their own varsity esports programs. NCAA member institutions that are currently governed by the NACE will likely leave the organization for whatever coverage the NCAA provides, but what will happen to the varsity programs within the NACE that are not NCAA members?

Both NAIA and NCAA members may join the NACE,⁵⁵⁵ but the same is not true for the NCAA unless some special allowance is granted. This situation is very different from those in which an NCAA member in one conference participates as a member in a second conference for a specific sport that is not sanctioned by the member's senior conference.⁵⁵⁶ After all, conferences within the

551. Baker III & Holden, *supra* note 113, at 64–65. For examples of collegiate esports tournaments, see COLLEGIATE STARLEAGUE, <https://www.cstarleague.com/> (last visited Jan. 22, 2020); COLLEGE LEAGUE OF LEGENDS, <https://ulol.na.leagueoflegends.com/> (last visited Sept. 22, 2020); TESPA, <https://tespa.org/> (last visited Jan. 24, 2020).

552. Collegiate Starleague includes information on its websites for competitors looking to join club teams at their universities.

553. On August 25, 2017, the NCAA requested proposals for assistance in determining whether it should move into the regulatory agency space currently occupied by the NACE. The NCAA ultimately retained Intersport, a consulting firm contracted to help the NCAA take its next step toward regulating collegiate esports. See Radford, *supra* note 537 (discussing the NCAA's contract with a marketing and consulting firm, Intersport, to take the next step towards involvement in esports).

554. Smith & Fischer, *supra* note 543. The NCAA voted to be a discussion regarding the organization possibly regulating certain types game competitions in April 2019. This does not foreclose on the possibility to the collegiate regulatory body returning the subject at a later time. With the NCAA, taking a step away from esports Riot Games has launched an organization for collegiate teams centered around League of Legends. See Associated Press, *While NCAA Stalls, Game Publisher Forms College Esports Body*, FOX BUS. (May 22, 2019), <https://www.foxbusiness.com/markets/while-ncaa-stalls-game-publisher-forms-college-esports-body>.

555. See *Why Choose NACE?*, NACESPORTS.COM, <https://nacesports.org/get-involved/for-schools/> (last visited Jan. 24, 2020).

556. For example, the University of Florida is a member of the Southeastern Conference (SEC) for most sports, but its lacrosse team competes in the American Athletic Conference because the SEC does not sanction lacrosse. See 2019 *Florida Lacrosse Media Supplement*, FLORIDA GATORS LACROSSE, https://floridagators.com/documents/2019/1/10/2019_Lacrosse_Media_Guide.pdf?id=25970 (last visited Jan. 24, 2020).

NCAA still operate under NCAA authority. Accordingly, the NCAA's involvement in esports would threaten not only the NACE, but also all NACE members that are not also NCAA member institutions.

Unlike traditional sports, the NCAA may need to tolerate its members competing against non-NCAA members and even club teams in third-party tournaments. That sort of interleague competition is a concern for the NCAA.⁵⁵⁷ If the NCAA moves into esports, then it may attempt to work directly with the producer-managed tournaments to secure competitions only for NCAA members.⁵⁵⁸ It seems probable that if non-NCAA members are left on the outside looking in to whatever the NCAA develops, then those schools would have both the incentive and the need to litigate an antitrust threat.⁵⁵⁹ Similar incentive and need would exist for collegiate tournaments that may also find themselves left out of any potential NCAA arrangement.⁵⁶⁰

Another issue expressed by Mark Emmert, NCAA President, involves violence in video games that are popular titles for esports. Emmert spoke to the 2019 NCAA Convention and stated that the NCAA doesn't "particularly embrace games where the objective is to blow your opponent's head off."⁵⁶¹ This issue is interesting for multiple reasons. First, the statement highlights the reality that some of the more popular titles are for mature audiences. Second, the comment reflects the NCAA's need for control in regulating the "sports" it sanctions and that may be problematic because consumer interest in games⁵⁶² has determined which titles emerged as popular esports. While all the aforementioned concerns are serious, perhaps the most pressing problem posed by the NCAA's potential regulation of collegiate esports involves incorporation of the amateurism model for intercollegiate athletics.⁵⁶³

557. This concern was expressed at the October meeting of the 2018 Board of Governors. See Smith & Fischer, *supra* note 543 and accompanying text.

558. At its October 2018 Board of Governors meeting, the NCAA also discussed the possible creation of a collegiate esports championship. See Michael Smith & Ben Fischer, *Final Four-nite? NCAA Explores Move to Sponsor Esports*, SPORTS BUS. J. (Nov. 19, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/11/19/Esports/Esports.aspx>.

559. The threat of antitrust liability if this were to occur would resemble the threats the Bowl Championship Series (BCS) faced in the 1990s from schools that were excluded from that championship format. For more on this, see generally Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. L. REV. 517 (2011).

560. See *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 273 F. Supp. 2d 933 (2003), for an example of promoters of a collegiate sport tournament that successfully challenged NCAA restraints that limited the promoter's ability to operate its tournament.

561. Alex Kirshner, *The Extremely Odd Thing About the NCAA's Argument Against Esports*, SB NATION (Jan. 25, 2019, 10:12 AM), <https://www.sbnation.com/college-football/2019/1/25/18197240/mark-emmert-esports-ncaa>.

562. As opposed to athletic department administrators and university presidents. For information on game titles that are rising in consumer interest and may evolve into the next big esports, see generally Michael Johnson, *What Are the Latest Games That Will Dominate Esports?*, THAT SHELF (May 28, 2018, 1:52 PM), <https://thatshelf.com/what-are-the-latest-games-that-will-dominate-esports/>.

563. See *Reaching Out: NCAA Issues RFP for Help Evaluating Possible Role in Esports*, SPORTS BUS. DAILY (Aug. 31, 2017), <https://www.sportsbusinessdaily.com/Daily/Issues/2017/08/31/Colleges/Esports.aspx> (stating that in its request for proposals for help in evaluating a possible role in regulating collegiate esports, the NCAA stated that any involvement must be consistent with the NCAA's organizational values).

2. *Amateurism and Collegiate Esports*

The NCAA asserts that amateurism is part of its core “values,”⁵⁶⁴ while critics of the model claim that it is the “shame of college sports.”⁵⁶⁵ Of importance for esports is the fact that the NCAA’s amateurism model states that only amateurs are eligible to participate in NCAA-sanctioned sports.⁵⁶⁶ This means that, with very few exceptions,⁵⁶⁷ students are not eligible if they have ever received compensation for playing the sport for which they seek NCAA eligibility.⁵⁶⁸ Second, the NCAA prohibits student-athletes from profiting off of the commercial use of their names, images, and likenesses (NILS).⁵⁶⁹ These two NCAA prohibitions pose a problem, because many, if not most, esports competitors who are talented enough to warrant a college scholarship for playing esports have had competition and streaming experiences that provided them with compensation in some form or another for gaming or competing in esports.

If the NCAA were to absorb collegiate esports, it would need to relax its adherence to amateurism to allow for the inclusion of those who have previously profited from competitive gaming, whether from the receipt of prize money from tournaments or from their streaming gameplay on applications like Twitch.⁵⁷⁰ Furthermore, those who profit from streaming gameplay may refuse to shut down their channel as a condition for receiving an esports scholarship.⁵⁷¹ For those reasons, the NACE intentionally left the NCAA’s amateurism model out of its

564. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Jan. 24, 2020).

565. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

566. *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Jan. 24, 2020).

567. NCAA Bylaw 12.02.7 permits payment to student-athletes of small amounts (\$300 or less) from authorized agencies that cover expenses for competition. NCAA, DIVISION I MANUAL 61, <https://web3.ncaa.org/lstdbi/reports/getReport/90008>. Bylaw 12.2.3.2 permits student-athletes for the sports of tennis, golf, two-person beach volleyball, or two-person synchronized diving to receive prize money that is not in excess of the expenses incurred for competition; and Bylaw 12.2.3.2.5 permits student-athletes to be compensated for expenses incurred as part of training for and competing in the Olympics. *Id.* at 69–70.

568. NCAA, DIVISION I MANUAL 60, <https://web3.ncaa.org/lstdbi/reports/getReport/90008>; *see also id.* at 63, which enumerates the type of conduct that would render ineligible a student-athlete based on a loss of amateur status as including: (a) student-athlete compensation in any form for that sport; acceptance of a promise for future payment for performance in that sport following completion of NCAA eligibility; signing a contract to play professional sports; compensation or financial assistance provided by a sports organization based on athletic skill; competitive play for a professional team; entering a professional league draft; or entering an agreement with a sports agent.

569. NCAA, DIVISION I MANUAL 77, <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

570. For more on streaming, see William A. Hamilton, Oliver Garretson & Andruid Kerne, *Streaming on Twitch: Fostering Participatory Communities of Play Within Live Mixed Media*, in PROCEEDINGS OF THE 32ND ANNUAL ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1315, 1316 (2014).

571. Gamers who stream on Twitch can make between \$2.00 and \$5.00 per 1000 impressions. *Id.* See also Dan Gartland, *UCF Kicker Declared Ineligible After YouTube Channel Gets Him in Trouble With NCAA*, SPORTS ILLUSTRATED (July 31, 2017), <https://www.si.com/college-football/2017/07/31/ucf-kicker-donald-de-la-haye-ineligible-ncaa-youtube-videos>, for a description of Donald De La Haye, a former varsity football player at the University of Central Florida, who refused to shut down his YouTube channel that had more than 117,000 followers, following a mandate given to him by UCF in accordance with NCAA policy. De La Haye chose to terminate his collegiate sport career rather than cease the operation of his YouTube channel.

league rules and regulations.⁵⁷² Similarly, the NCAA's version of amateurism is not incorporated into any of the regulations for the major tournaments and leagues within collegiate esports.⁵⁷³

The absence of amateurism within collegiate esports also creates a legal problem for the NCAA. Presently, there are multiple antitrust actions pending against the NCAA that challenge the legality of its amateurism model for intercollegiate athletics.⁵⁷⁴ The NCAA's legal defense in antitrust cases that threaten the legality of amateurism is based on a presumption that preserving amateurism is necessary for maintaining consumer interest in intercollegiate athletics.⁵⁷⁵ This presumption of validity for the NCAA's amateurism rules is not grounded in any market-based evidence. In fact, market-based evidence exists for the position that amateurism does not influence consumer demand for intercollegiate athletics.⁵⁷⁶ At some point, courts of law will no longer tolerate the "chimerical"⁵⁷⁷ argument that amateurism is a vital component of the multi-billion-dollar industry of intercollegiate athletics. In regard to esports, the presumption that protects the NCAA's amateurism model does not apply because amateurism has never been an essential component of collegiate esports.⁵⁷⁸

3. *Title IX and Esports*

Another serious issue that could restrict the growth of collegiate esports involves gender equity. In the U.S., Title IX of the Education Amendments Act of 1972 prohibits sex-based discrimination in all educational institutions that receive federal financial assistance.⁵⁷⁹ Despite this mandate, "vast and significant" inequalities continue to exist in regards to the provision of intercollegiate athletic opportunities for women.⁵⁸⁰ In theory, varsity esports programs could be added without Title IX concerns because there is no need to segregate esports opportunities based on the gender of participants. Yet, toxic masculinity permeates the

572. *NCAA to Evaluate Esports Landscape in October*, ESPN (Aug. 15, 2017), http://www.espn.com/college-sports/story/_/id/20341540/ncaa-discuss-esports-landscape-october.

573. Baker III & Holden, *supra* note 113, at 67.

574. *Alston v. NCAA, and Jenkins v. NCAA* are antitrust actions that challenge the NCAA's cap on athlete compensation in the Northern District of California. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

575. Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 342–44 (2016) (describing how the presumption originated from Justice John Paul Stevens' dicta in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)). Decisions from the Third, Fifth, Sixth, Seventh, and Ninth Circuits have all applied Justice Stevens' dicta in ways that established amateurism as either a barrier to rule of reason review, or as a justification for the commercial restraints imposed by amateurism. See Baker & Holden, *supra* note 113, at 346 (citation omitted).

576. See Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661 (2018).

577. Judge Joel Martin Flaum used the term "chimerical" to describe the NCAA's amateurism argument in his partial dissent in *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1099–1100 (7th Cir. 1992).

578. Baker III & Holden, *supra* note 113, at 81.

579. 20 U.S.C. § 1681 (1986).

580. Alixandra B. Yanus & Karen O'Connor, *To Comply or Not to Comply: Evaluating Compliance with Title IX of the Educational Amendments of 1972*, 37 J. WOMEN, POL. & POL'Y 341, 352 (2016).

electronic gaming industry,⁵⁸¹ and limits opportunities for women who might otherwise participate in collegiate esports. Online gaming communities are very hostile⁵⁸² places for women; and the environments are so toxic that they push girls, adolescents, and adult women away from competitive video gaming.⁵⁸³ In fact, Emmert expressed worries over misogyny in esports and recognized the need for more inclusion and diversity.⁵⁸⁴ Much work needs to be done in terms of policing online gaming and game forums before esports can be described as inclusive and gender-neutral.⁵⁸⁵ It is possible that collegiate esports could play a role in creating safer spaces for women within competitive video gaming. Those efforts will be for not if the greater gaming community, including the game producers, do not embrace inclusion and reject sexual harassment.

4. *Closing Thoughts on Collegiate Esports*

The rapid development of collegiate esports is expected to continue over the next decade as the organizational and regulatory frameworks for this emerging intercollegiate sport are erected.⁵⁸⁶ The NCAA's potential involvement might hasten the growth in some regards because of the organization's experience in conducting intercollegiate sport competitions. The NCAA is also very sophisticated in capitalizing on potential for commercial success. As mentioned, the NCAA has some concerns that might constrain its involvement in collegiate esports.⁵⁸⁷ But the amateurism model for intercollegiate athletics and the NCAA's history of exploiting college athletes should provide stakeholders within collegiate esports with some serious cause for concern.⁵⁸⁸ Even if the NCAA does not move into the business of collegiate esports, its influence could

581. For examples of toxicity in esports, see *4 Instances When Sexual Harassment Rocked Esports*, FOX SPORTS ASIA (Nov. 6, 2018), <https://www.foxsportsasia.com/esports/968558/4-instances-when-sexual-harassment-rocked-esports/>.

582. For information on sexual harassment in online gaming, see generally Jesse Fox & Wai Yen Tang, *Women's Experiences with General and Sexual Harassment in Online Video Games: Rumination, Organizational Responsiveness, Withdrawal, and Coping Strategies*, 19 *NEW MEDIA & SOC'Y* 1290 (2017); see also Jesse Fox & Wei Yen Tang, *Sexism in Online Video Games: The Role of Conformity to Masculine Norms and Social Dominance Orientation*, 33 *COMPUTERS IN HUM. BEHAV.* 314 (2014).

583. Emma Boyle, *Study: Sexual Harassment Drives Women Away from Online Games More Than Other Kinds of Abuse*, GADGETTE (Mar. 23, 2016), <https://www.gadgette.com/2016/03/23/sexual-harassment-drives-women-away-from-online-games-more-than-other-kinds-of-abuse/>.

584. Alex Kirshner, *The Extremely Odd Thing About the NCAA's Argument Against Esports*, SB NATION (Jan. 25, 2019, 10:12 AM), <https://www.sbnation.com/college-football/2019/1/25/18197240/mark-emmert-esports-ncaa>. Emmert also recognized that 95% of current esports competitors are male. *Id.*

585. For more on Title IX concerns involving esports and what is being done about them, see Yifan Wu, *Title IX Compliance a Priority for Varsity Esports Programs*, ESPN (Oct. 23, 2017), http://www.espn.com/college-sports/story/_/id/21121563/title-ix-compliance-priority-varsity-esports-programs.

586. Kieran Darcy, *College Esports Is the Next Big Thing in Varsity Athletics*, ESPN (Oct. 23, 2017), http://www.espn.com/college-sports/story/_/id/21113602/the-next-big-thing-collegiate-athletics-esports.

587. Michael Smith & Ben Fischer, *Final Four-nite? NCAA Explores Move to Sponsor Esports*, SPORTS BUS. DAILY (Nov. 19, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/11/19/Esports/Esports.aspx>.

588. For more on this, see Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

still take root through NCAA member involvement in the NACE.⁵⁸⁹ Like the NCAA, the membership of the NACE determine policy, and increased involvement by NCAA members will increase the potential for the implementation of rules that resemble those in place in the NCAA.⁵⁹⁰ Specifically, NCAA member involvement in the NACE increases the chances that the NACE could incorporate the rules that form the framework for the NCAA's amateurism model for intercollegiate athletics.⁵⁹¹ Needless to say, the operation and regulation of collegiate esports is far from settled. While the industry awaits a decision from the NCAA as to whether and/or how it will involve its members in intercollegiate esports, colleges and universities keep adding programs in an effort to gain competitive advantages on those schools that come later to the game. This is an exciting era for collegiate esports and for any person who enjoys watching games they play evolve into a new sport and a major industry. In addition to the unique area of the collegiate environment, there are numerous international issues that may impact esports growth.

D. International Issues

The international issues surrounding esports are numerous, as each country has its own set of laws that will govern the relationships between esports various stakeholders. There are, however, several international issues that are worth discussing because of their potential significance. The international nature of esports raises some challenges that may not present themselves with traditional sports. The first is various intellectual property regimes. American law may allow companies to limit competitor's rights via licensing agreements, and European law, in particular, may require more affirmative action from competitors to waive rights, than is currently required under American law.⁵⁹² There are also potential international concerns that may arise from certain countries banning game titles.⁵⁹³ In December 2018, a review by the Online Ethics Review Committee in China reportedly flagged several popular esports games as needing to take corrective action or risk being banned in the country.⁵⁹⁴ The lack of First Amendment protection abroad and the often graphic nature of video games that are the object of esports, may raise investor concerns that events may not be feasible, or even worse, that players could be subject to arrest in some jurisdictions.

589. Baker III & Holden, *supra* note 113, at 59.

590. *Id.*

591. *Id.*

592. For an overview of various shrink-wrap licensing regimes, see Jiao Xue, *A Comparative Study of Shrink-Wrap Licenses*, 2 J. POL. & L. 86 (2009); see also David Naylor & Cyril Ritter, *French Judgment Condemning AOL Illustrates EU Consumer Protection Issues Facing US Businesses Operating in Europe*, 1 N.Y.U. J.L. & Bus. 881 (2004).

593. Nathan Fusco, *Is League of Legends Banned in China?*, DBLTAP (Dec. 17, 2018), <https://www.dbltap.com/posts/6249837-is-league-of-legends-banned-in-china>.

594. *League of Legends, Overwatch, PUBG, Fortnite Among List of Games Reportedly Banned In China*, FOX SPORTS ASIA (Dec. 12, 2018), <https://www.foxsportsasia.com/esports/996831/996831/>.

In the United States, there may be concerns about the eligibility of top competitors for some titles for an entry visa. The primary question comes down to whether esports players can be classified as athletes and receive a P-1 visa, which is “designated for internationally recognized athletes and teams coming to the U.S. to participate in athletic competitions.”⁵⁹⁵ Dating as far back as 2013, the United States authorities issued a P-1 visa to an esports competitor, but since that time, granting of P-1 visas to esports competitors has been unpredictable.⁵⁹⁶ There are also two layers to P-1 approval that make it challenging for esports competitors. The first is that not all esports have been recognized as meriting the designation of sport, but secondly, the requirement that competitors be internationally recognized is restrictive to competitors trying to break into the top ranks of esports.⁵⁹⁷ Failing to secure the proper visa resulted in a commentator and professional being excluded from a tournament in 2017, and highlighted the challenges of navigating an antiquated visa system with modern conceptualizations of sport.⁵⁹⁸ As esports grow in popularity, visa issues are likely to be resolved, however, as the industry continues to gain a foothold there will be trying times as the competitors are put into various different categories by immigration officials.

VIII. CONCLUSION

The esports segment of the U.S. sports and entertainment market is likely to continue its sustained and rapid growth in the years to come—fostering a new form of “sports” competition that helps to bridge national divides and bond together those of different genders and cultures. In doing so, the esports industry has provided a new outlet for individuals who often consider themselves more cerebral, introverted and less athletically inclined than the fan base of traditional physical sports. In time, esports competitions and fandom may also open new doors to segments of the population who have been excluded from traditional sports such as the physically disabled.

Nevertheless, just like any new and rapidly growing industry, esports presents a wide range of uncharted legal challenges for all of its constituents, ranging from the producers, organizers, streamers, and sponsors to the contest participants themselves. As indicated in this Article, it is also an industry that is ripe, if not carefully managed, for legal exploitation. The esports participants who at

595. Courtney New, *Immigration in Esports: Do Gamers Count as Athletes*, FORBES (May 18, 2017, 3:49 PM), <https://www.forbes.com/sites/allabouttherupees/2017/05/18/immigration-in-esports-do-gamers-count-as-athletes/#54724a0b468e>.

596. *Id.*

597. *Id.*

598. Will Partin, *Visa Problems Cost the International a Caster and a Player*, WAYPOINT (Aug. 2, 2017, 3:00 PM), https://waypoint.vice.com/en_us/article/a3gwpz/visa-problems-cost-the-international-a-caster-and-a-player. Henrik Ahnberg, a former professional and esports broadcaster was barred from entering the United States as he had secured a B1/B2 visa which is for business and tourism, but not gainful employment such as broadcasting. A competitor for Team Empire had his passport held at the American Embassy in Moscow and was not released in time for the competition. *Id.*

present are in the forefront of this industry's growth could reasonably face attempts to implement restraints on their efforts to profit from their skill set, names and likenesses from a wide range of business that are becoming increasingly involved in this market, including even the NCAA.

As esports continues to mature as an industry segment, the norms that govern issues such as labor obligations and intellectual property rights will continue to fortify themselves. In addition, perhaps global standards will emerge as the investors, participants and fans of esports continue to interact with one another across a wide range of different countries and legal regimes. This is an exciting time for esports—a rapidly growing segment of the sports and entertainment industry that is still, in many ways, in its incipience. Understanding and explaining the ongoing legal issues represents a substantial step toward formalizing this segment of the sports and entertainment industry and helping to propel the growth of esports forward in a logical and meaningful direction.

