

## NOTES

### **“YOU MUST CONSTRUCT ADDITIONAL PYLONS”: BUILDING A BETTER FRAMEWORK FOR ESPORTS GOVERNANCE**

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*The popularity of “esports,” also known as “electronic sports” or competitive video gaming, has exploded in recent years and captured the attention of cord-cutting millennials—often to the detriment of sports such as basketball, football, baseball, and hockey. In the United States, the commercial dominance of such traditional sports stems from decades of regulatory support. Consequently, while esports regulation is likely to emulate many aspects of traditional sports governance, the esports industry is fraught with challenges that inhibit sophisticated ownership and capital investment. Domestic regulation is complicated by underlying intellectual property ownership and ancillary considerations such as fluctuations in a video game’s popularity.*

*Since analogous reform is nigh impossible, nascent governance organizations have been created to support the professionalization of esports as a new entertainment form. As esports consumption continues to grow, enterprising stakeholders are presented with the unique opportunity to create regulatory bodies that will shape the esports industry. This Note analyzes how the professional sports industry and foreign esports markets have addressed governance challenges that arise from differences between traditional sports and competitive video gaming. It concludes by exploring two potential pathways for domestic esports governance.*

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#### INTRODUCTION

On October 21, 2016, the World Championship Semifinals for “League of Legends,” the most popular competitive video game, took place over two consecutive sold-out nights at Madison Square Garden in New York City.<sup>1</sup> Tension in the stadium was palpable as ten young South Korean players, five for each qualifying semifinal team, hunched over computer battle stations, rapidly clicking away. Instead of watching the competition floor, spectators looked up at the stadium ceiling where large screens projected various angles of the live virtual gameplay. This is the future of professional competition, sport, and video games—a potent combination of entertainment forms that is ripe for potential investors.

Technological advancements have fundamentally penetrated and altered the fabric of modern society by creating new avenues for media consumption, cross-border communication, and social interaction.<sup>2</sup> With the advent of the

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1. See *ROX v. SKT*, LoL ESPORTS, [http://www.lolesports.com/en\\_US/worlds/world\\_championship\\_2016/matches/elimination/R2M1](http://www.lolesports.com/en_US/worlds/world_championship_2016/matches/elimination/R2M1) [<https://perma.cc/7A63-GS57>] (last visited Oct. 16, 2017).

2. See T.L. TAYLOR, RAISING THE STAKES: ESPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 18 (2012) (attributing the increase in esports consumption to “important structural factors” like favorable government policies, a competitive market structure, swift development of information and communication technologies, the transnationalization and globalization of the game industry, and individuals’ mentalities about accepting new technologies).

internet and increasingly speedier connections, online video game players benefit from instantaneous interactions.<sup>3</sup> Widespread connectivity has enabled the rise in popularity of “esports,” a term often used to refer to online competitive gaming.<sup>4</sup>

An esports is “a form of sport[] where the primary aspects of the sport are facilitated by electronic systems; the input of players and teams as well as the output of the [esport] system are mediated by human-computer interfaces.”<sup>5</sup> In the esports ecosystem, professional video game players around the world make a living by competing in tournaments and leagues for prize pools on behalf of team owners and corporate sponsors.<sup>6</sup>

Esports games have captured the world’s attention, and an entire ecosystem has developed around distributing competitive virtual gameplay. If the 213 million global esports consumers formed a nation,<sup>7</sup> it would be the fifth-largest nation in the world.<sup>8</sup> Game developers, tournament teams, independent leagues, broadcasting companies, and other market participants want to capture a portion of the growing worldwide esports market, which is expected to exceed \$1 billion by 2019.<sup>9</sup> In 2016, the United States generated an estimated \$175 million in esports revenue from online advertising, sponsorships, media rights, merchandise, and ticketing.<sup>10</sup> In September 2016, seven North American esports teams announced the formation of the Professional Esports Association (PEA), a “franchise-and-player-focused league more in line with the structures of [traditional] sports leagues,”<sup>11</sup> which emulates the early stages of traditional sports governance. Later that same month, a National Basketball Association (NBA) team became the first North American professional sports organization to acquire an esports team

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3. ROLAND LI, GOOD LUCK HAVE FUN: THE RISE OF ESPORTS 1–3 (2016).

4. See Katherine E. Hollist, Note, *Time to Be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 825 (2015).

5. Juho Hamari & Max Sjöblom, *What Is Esports and Why Do People Watch It?* 27 INTERNET RES. 211, 213–14 (2017).

6. See *id.* (stating that esports are “often coordinated by different leagues, ladders and tournaments, and where players customarily belong to teams or other ‘sporting’ organizations who are sponsored by various business organizations”); Michael McTee, Note, *E-Sports: More Than Just a Fad*, OKLA. J.L. & TECH., Jan. 2014, at 1.

7. See *Esports Market Report*, SUPERDATA, <https://www.superdataresearch.com/market-data/esports-market-brief/> [https://perma.cc/YU2U-ZBJ7] (last visited Oct. 16, 2017).

8. See Ben Casselman, *Resistance Is Futile: Esports Is Massive . . . and Growing*, ESPN (May 22, 2015), [http://www.espn.com/espn/story/\\_/id/13059210/esports-massive-industry-growing](http://www.espn.com/espn/story/_/id/13059210/esports-massive-industry-growing) [https://perma.cc/N86X-ZAA7].

9. See Darren Rovell, *427 Million People Will Be Watching Esports by 2019*, *Reports Newzoo*, ESPN (May 11, 2016), <http://www.espn.com/espnw/sports/article/15508214/427-million-people-watching-esports-2019-reports-newzoo> [https://perma.cc/HZ4X-DS3K].

10. MEC GLOB., SPOTLIGHT ON ESPORTS: AN EXPLORATION OF THE GROWING ESPORTS LANDSCAPE AND ITS IMPLICATION FOR MARKETERS 9 (2016), <http://www.mecglobal.com/assets/publications/2016-08/Spotlight-On-Esports.pdf> [https://perma.cc/NCX3-CSY6].

11. B. David Zarley, *The Sporting Singularity: How Traditional Sports and Esports Are Dovetailing*, VICE (Nov. 9, 2016), [https://sports.vice.com/en\\_us/article/mgz7eb/the-sporting-singularity-how-traditional-sports-and-esports-are-dovetailing](https://sports.vice.com/en_us/article/mgz7eb/the-sporting-singularity-how-traditional-sports-and-esports-are-dovetailing) [https://perma.cc/FXL9-87MD].

and,<sup>12</sup> in doing so, noted: “[t]he market created itself and became a product that a quarter billion people are watching, and when they watch, they’re watching an hour and half a day . . . . [I]t’s an incredibly large, immature market that is somewhat of a Wild West.”<sup>13</sup>

Compared to more developed online gaming markets around the globe, the American esports market is the new Wild West frontier.<sup>14</sup> For the most part, the dovetailing between esports and traditional sports,<sup>15</sup> and the increasing regulatory legitimacy of esports,<sup>16</sup> indicates that many of these issues can be addressed within the confines of traditional sports governance.<sup>17</sup> Private investment in esports continues to grow and “[t]hrough a series of purchases, investments, and coalitions, traditional sport structures and proclivities finally merged irrevocably with esports.”<sup>18</sup>

However, it is becoming increasingly apparent that, as the esports industry evolves, esports will not perfectly align with the governance structures of

12. See Darren Rovell, *76ers Acquire Esports Teams Dignitas and Apex*, ESPN (Sept. 26, 2016), [http://www.espn.com/esports/story/\\_/id/17637299/76ers-acquire-esports-teams-dignitas-apex](http://www.espn.com/esports/story/_/id/17637299/76ers-acquire-esports-teams-dignitas-apex) [https://perma.cc/KDN8-24N8].

13. See *id.*

14. On September 27, 2016, the coowner of the NBA’s Golden State Warriors announced the acquisition of an iconic esports team, Team Liquid, and the creation of a new esports ownership group. Rachel Young Gu, *Team Liquid Sells Controlling Interest to Golden State Warriors Co-Owner*, ESPN (Sept. 27, 2016), [http://www.espn.com/esports/story/\\_/id/17651274/team-liquid-sells-controlling-interest-golden-state-warriors-co-owner](http://www.espn.com/esports/story/_/id/17651274/team-liquid-sells-controlling-interest-golden-state-warriors-co-owner) [https://perma.cc/RH74-LEX8]; see also *Axiomatic Acquires Controlling Interest in Team Liquid, a Leading Professional Esports Franchise*, BUS. WIRE (Sept. 27, 2016, 10:06 AM), <http://www.businesswire.com/news/home/20160927006174/en/Axiomatic-Acquires-Controlling-Interest-Team-Liquid-Leading> [https://perma.cc/MH34-UAS6] (listing other notable owners such as Magic Johnson and Monumental Sports & Entertainment, the owner and operator of the NBA’s Washington Wizards and the National Hockey League’s Washington Capitals); Press Release, Madison Square Garden Co., *The Madison Square Garden Company Acquires Controlling Stake in Counter Logic Gaming* (July 31, 2017), <http://www.themadisonsquaregardencompany.com/news/2017/counter-logic-gaming.html> [https://perma.cc/R5Z8-MWRQ] (“As esports moves toward franchise league models similar to the NBA and NHL, we intend to leverage our knowledge and insight into the business of professional sports to play an active role in the development of this exciting industry,” said Jordan Solomon, Executive Vice President of [Madison Square Garden] Sports.”).

15. For the purposes of this Note, “traditional sports” refers to the “big four” American professional sports: football, baseball, basketball, and hockey.

16. For example, in 2013, the U.S. Citizenship and Immigration Services began to recognize professional esports players as athletes by issuing P-1 visas to international players. See Yannick Lejacq, *Score! Professional Video Gamers Awarded Athletic Visas*, NBC NEWS (July 19, 2013, 7:29 PM), <https://www.nbcnews.com/technology/score-professional-video-gamers-awarded-athletic-visas-6C10679998> [https://perma.cc/LR64-CFWJ].

17. Professional sports organizations also govern issues including players’ rights, collective bargaining and labor union management, salary controls and transparency, contractual stability, and antidoping. Although a comprehensive discussion of players’ rights in esports is beyond the scope of this Note, there is a significant body of literature analyzing these issues. See, e.g., Thiemo Bräutigam, *Riot’s New LCS Player Contracts—A Legal Analysis*, ESPORTS OBSERVER (Nov. 20, 2015), <http://esportsobserver.com/riots-new-lcs-player-contracts-a-legal-analysis/> [https://perma.cc/Z97A-T3LR] (analyzing professional player contracts in a developer-sponsored league).

18. Zarley, *supra* note 11.

traditional sports.<sup>19</sup> In esports, just as in other traditional sports, the “business is [in] creating stars”<sup>20</sup> that will capture the attention of viewers.<sup>21</sup> Yet, if asked to imagine a “sport,” most would likely think of a physical sport like basketball, football, baseball, or hockey. Despite many similarities, there exists a tension between the physical world of professional sports and the virtual world of professional gaming. With the recent global rise of esports, the scope of what constitutes a “sport” has been widely debated.<sup>22</sup> A fundamental quandary for esports governance is that competitive play takes place online, where physical analogues provide no precedent.<sup>23</sup> Esports do not benefit from the same level of legislative protection that has helped shape the traditional sports industry,<sup>24</sup> and, unlike traditional sports, game developers hold intellectual property rights.<sup>25</sup>

Accordingly, this Note will address the need for either a domestic or international regulatory body to support and facilitate the professionalization of the U.S. esports industry. Part I provides a general overview of the market structure and commercialization of both traditional sports and esports. Part II focuses upon key areas where existing traditional sports do not provide adequate guidance to esports, including ownership, territoriality, and media distribution.<sup>26</sup> Next, Part III assesses how regulatory bodies of larger esports markets have addressed esports issues. In conclusion, Part IV advocates for the adoption of a regulatory body that will facilitate the growth of the domestic esports industry.<sup>27</sup>

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19. See generally Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013) (discussing the possibilities and ramifications of ownership rights in esports).

20. Paresh Dave, *Owners of Professional Video Game Teams in a Battle of Their Own*, L.A. TIMES (June 11, 2016, 6:00 AM), <http://www.latimes.com/business/technology/la-fi-tn-esports-owners-20160526-snap-htmlstory.html> [<https://perma.cc/7QF3-CKZW>].

21. See TAYLOR, *supra* note 2, at 17 (“[T]ales are told about young men who have ascended to the level of national hero by playing computer games. The stories circle around the rise of a professional scene whose players have fan bases comparable to that of American mainstream sports stars. They hold contracts and sponsorship deals, wear the latest in sport gear from Nike and Adidas, and play in competitions that regularly draw thousands and are broadcast on major television channels.”).

22. See McTee, *supra* note 6, at 7 (“A common argument made is ‘if it can be done while drinking and smoking, then it is not a sport.’ Such a definition is problematic for defining video games as a true form of ‘professional sport’ (as well as golf, track and field, and many other highly athletic competitions sometimes regarded as sport).”).

23. See TAYLOR, *supra* note 2, at 37 (“Computer games can prove elusive artifacts when we try to discuss the material world in relation to them because so much of our attention drifts to the space on the screen. The media aspect of computer game play may prompt an argument suggesting they cannot be easily aligned with a notion of sport.”).

24. See *infra* Part I.B.

25. See Andreas Rahmatian, *Cyberspace and Intellectual Property Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 72, 76 (Nicholas Tsagourias & Russell Buchan eds., 2015) (“The international nature of cyberspace with separate (private, property-holding) individuals and companies as actors within the cyberspace can potentially blur the legal division between sovereignty and property. . . . So he who has quasi-proprietary power over the cyberspace may very well acquire quasi-sovereignty over people . . .”).

26. See *infra* Part II.

27. See *infra* Part IV.

I. THE UNITED STATES OF PLAY:  
UNDERSTANDING THE BUSINESS OF COMPETITIVE SPORTS

In many regards, the governance and commercialization of the esports industry noticeably emulates the traditional sports industry.<sup>28</sup> This Part provides an overview and background helpful for understanding the emerging esports market. First, it looks at the joint-venture structure of traditional sports organizations and compares this structure to the organizations that have materialized in the esports industry. Then, for both the traditional sports and esports markets in the United States, it analyzes content distribution as a major force behind commercial viability.

A. *Current Structural Models*

The esports industry presents a “nascent structure that one team owner has compared to the state of American baseball when the first vestigial forms of the current team, league, and ownership structures were emerging.”<sup>29</sup> A primer on traditional sports governance, then, can offer insight into how professional sports became a mainstay of the U.S. entertainment industry and also provide a potential model for esports governance. This Part discusses the governance structures of traditional sports and esports in the United States.

1. Traditional Sports

Traditional team sports are generally structured as a league and consist of clubs, teams, or franchises that are distinct, albeit economically interdependent, business entities within the league.<sup>30</sup> In the United States, the highest level of professional competitions in team sports are known as “major professional sports leagues” and include the NBA, Major League Baseball (MLB), National Football League (NFL), and National Hockey League (NHL).<sup>31</sup> Each of these leagues enjoys significant control over governance issues.<sup>32</sup>

Leagues are often structured as joint ventures.<sup>33</sup> A joint venture is a business undertaking by multiple stakeholders engaged in a single defined

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28. See Zarley, *supra* note 11.

29. Burk, *supra* note 19, at 1540.

30. See generally Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 222 (2006) (stating that a league is a “product created by the combination of upstream competition organizing services and downstream clubs participating in the competition”).

31. See Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 575 n.1 (2015).

32. See RICHARD PARRISH & SAMULI MIETTINEN, *THE SPORTING EXCEPTION IN EUROPEAN UNION LAW* 21 (2008) (“These [governance issues] include reserve clauses, draft rules, roster limits, salary caps, collective bargaining arrangements, revenue sharing, joint merchandising and the collective sale and reinvestment of broadcasting rights.”).

33. See generally Ross & Szymanski, *supra* note 30 (discussing the joint-venture structure of professional sports leagues).

project.<sup>34</sup> Each stakeholder shares equal control over the venture and also shares both profits and losses.<sup>35</sup> Joint ventures do not have immunity from antitrust laws but may exhibit anticompetitive, cartel-like behavior.<sup>36</sup> Within a joint-venture league, teams and clubs are franchised to the league, and a league-affiliated team cannot compete outside of the league.<sup>37</sup>

Professional sports leagues draft rules to coordinate the particulars of competition, such as the rules of play, number of teams admitted to the league, revenue distribution and sharing, player contracts and trading rules, sale of broadcast rights, and stadium facility standards.<sup>38</sup> When enforcement of organizational rules is vested in an independent entity, such rules serve to enable and preserve the integrity of competition.<sup>39</sup> Each league typically is headed by a commissioner who is empowered to enforce the league rules that were collectively agreed upon by member franchises.<sup>40</sup>

Leagues are formed as joint ventures due to a “conscious decision to vertically integrate,”<sup>41</sup> and franchises collectively govern the competition—like tournament organization—instead of granting such control to a separate entity.<sup>42</sup> Decisions made by a franchise-run league are subject to voting requirements and are thus likely to be suboptimal; franchises are more likely to advance individual interests over the interests of the league as a whole.<sup>43</sup> In fact, franchises within a league “will necessarily make decisions . . . that limit the extent of economic competition,” which may “simultaneously enhance the overall quality of league play (acceptable under antitrust law) and simply increase profits (unacceptable under antitrust law).”<sup>44</sup>

Moreover, major American professional sports leagues operate in a market with few alternatives, and “[s]ports leagues that do not face competition from close substitutes will artificially suppress the number of franchises in the league.”<sup>45</sup> New franchises enjoy permanent membership after authorization by the league.<sup>46</sup> They are also subject to entry fees, which are then distributed among the league’s existing franchises.<sup>47</sup> Individual franchises must cooperate to maintain competitive balance and often swing toward

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34. *Joint Ventures*, BLACK’S LAW DICTIONARY (10th ed. 2014).

35. *Id.*

36. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) (stating that “joint ventures have no immunity from the antitrust laws”).

37. *See* PARRISH & MIETTINEN, *supra* note 32, at 20–21.

38. *See* Ross & Szymanski, *supra* note 30, at 222–23.

39. *Id.* at 222.

40. *See* PARRISH & MIETTINEN, *supra* note 32, at 21.

41. Ross & Szymanski, *supra* note 30, at 223.

42. *Id.*

43. *See id.* (“In any partnership where profits are shared, the marginal benefit to each partner accruing through the sharing arrangement is smaller than the total benefit, and therefore no partner has the incentive to vote in ways which maximize total payoffs.”).

44. *Id.*

45. *Id.* at 226 (arguing for restructuring and regulation of professional sports to better align with consumer demand).

46. Franchises are not subjected to competitive merit-based promotion and relegation, which could bump a team out of a league. *See* PARRISH & MIETTINEN, *supra* note 32, at 18.

47. *See id.* at 20–21.

monopolistic practices that run up against anticompetition law.<sup>48</sup> Thus, a significant risk of joint-venture operation without vigorous marketplace rivalry is that the franchises, acting in their own self-interest, will prevent the venture from providing innovative goods and services in response to consumer demand.<sup>49</sup>

## 2. Esports

Compared to the traditional sports industry, the esports industry is comprised of more stakeholders: the game developers, the league or tournament organizational bodies, the teams that contract to play within the organizational body, the professional players that contract to play on teams, the sponsors, and, often, a streaming site as the content distributor.<sup>50</sup> Both tournaments *and* leagues form the backbone of the esports industry,<sup>51</sup> and each organizational body licenses the right to play titles created by game developers.<sup>52</sup> Esport competitions run the gamut of styles, but the most popular games center around team-based play.<sup>53</sup> High-profile tournaments typically occur in front of a live audience, while other fans live stream the games on social media and video platforms like Twitch.tv or Justin.tv.<sup>54</sup>

Instead of adopting the joint-venture structure of professional sports,<sup>55</sup> game developers have taken up the mantle of privately sponsoring leagues.

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48. See Ross & Szymanski, *supra* note 30, at 223; see also PARRISH & MIETTINEN, *supra* note 32, at 20–21 (“[O]ff-the-field competition between teams operating within the same league is moderated by a high degree of co-ordination in their activities. . . . Consequently, throughout the US leagues a range of solidarity and restraint mechanisms are in place to ensure balanced on-the-field competition.”).

49. See Ross & Szymanski, *supra* note 30, at 215.

50. See Hunter Amadeus Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional Esports Players*, 22 WASH. & LEE J.C.R. & SOC. JUST. 359, 363–64 (2016) (“Professional League of Legends play involves six main actors: sponsors, Riot Games, the League of Legends Championship Series (LCS), the team organizations, the professional players, and streaming sites.”).

51. Symposium, *Sports, Media & Millennials: Evolving Landscape of Consumer Demand*, 24 JEFFREY S. MOORAD SPORTS L.J. 143, 194 (2017) (“[Esport structuring], organically, has followed two models. There’s the tournament model and then there’s the league model, right? So there’s golf and tennis. There are no guaranteed salaries in golf and tennis; the top ten players make most of the money. It’s all prize money and endorsement deals. That’s very similar to what’s happening in a lot of [esports] games because they grew up organically.”).

52. See TAYLOR, *supra* note 2, at 160. However, esports leagues and tournaments still struggle to generate profits. See Hollist, *supra* note 4, at 828 (“Traditionally, the costs of operating esports leagues have far out-paced profits, making it all but impossible for leagues to launch.”); Pete Volk, *Riot: Esports Still Isn’t Profitable, and We Don’t Care*, RIFT HERALD (Sept. 13, 2016, 8:00 AM), <http://www.riftherald.com/2016/9/13/12865772/lol-esports-profit-money-riot> [<https://perma.cc/5DV7-AXQK>] (“One of the hottest issues around competitive League of Legends is the profitability, or lack thereof, of Riot’s esports wing.”).

53. See Burk, *supra* note 19, at 1538 (“[Esports] tournaments employ a variety of commercial game titles; tournament games span a range of formats and organizational conventions, including both single and team play.”).

54. See *id.* at 1541.

55. See *infra* Part II.



Yet, game developers “still see themselves first and foremost as a game *producer*—not sports provider.”<sup>56</sup>

For example, Blizzard Entertainment and Riot Games, two game developers based in the United States, have forged the path for the esports industry by producing commercial games that have captured a global audience.<sup>57</sup> Some game developers, like Blizzard Entertainment, have expressed a hands-off approach<sup>58</sup> and do not want a primary role in the development of future leagues or in shaping the esports industry.<sup>59</sup> Other game developers, such as Riot Games, however, have extended control over the competition structure and governance of their games.

League of Legends, a game developed by Riot Games for the personal computer, has arguably been the most popular esports title in the world in recent years.<sup>60</sup> The dominance of League of Legends can be attributed, at least in part, to the fact that Riot Games assumes all of the costs of organizing competition.<sup>61</sup> League of Legends has its own developer-sponsored league with seasons, brackets, an annual championship and all-star tournament, and even a fantasy league for fans.<sup>62</sup> Esports developers like Riot Games frequently engage in political and symbolic work on behalf of the industry as

56. See TAYLOR, *supra* note 2, at 166.

57. See MARK J.P. WOLF & TORU IWATANI, VIDEO GAMES AROUND THE WORLD 605–06 (2015).

58. See TAYLOR, *supra* note 2, at 163 (“We’re not in the business of [esports]. You know, we make games, we make video games. We see [esports] as an extension of our community because this is a group of people in our community that not only enjoy playing our games competitively, but also enjoy following these games and the players that play them competitively.”).

59. See *id.* at 165 (“[W]e want [esports] to succeed, but again, it’s not our core business so to become involved in that regard it’s almost like you’re talking about creating its own organization, like a FIFA or something like that, to oversee the sport. . . . [I]t’s just a different environment than traditional sports.”).

60. See NewZoo, *Most Watched Games on Twitch*, NEWZOO, <https://newzoo.com/insights/rankings/top-games-twitch/> [<https://perma.cc/8PKN-NT3Y>] (last visited Oct. 16, 2017). League of Legends is a type of video game known as a Multiplayer Online Battle Arena (MOBA) game, which is a team-based game that operates like a combination of capture the flag and chess. Hollist, *supra* note 4, at 826. Two teams of five select from a growing list of avatars and attempt to control the playing field. See *Champions*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/champions/> [<https://perma.cc/53B5-3QZ5>] (last visited Oct. 16, 2017). Players must defeat computer-controlled minions as well as opponent players in order to advance and eventually destroy the other team’s home base. See Taylor Cocke, *How to Play League of Legends, the Biggest Game in the World*, KOTAKU (Oct. 31, 2013), <http://kotaku.com/how-to-get-into-league-of-legends-the-biggest-game-in-1456272237> [<https://perma.cc/3KY4-BFSL>].

61. David Segal, *Behind League of Legends, E-Sports’s Main Attraction*, N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html> [<https://perma.cc/HK4X-CSCH>] (“Though [esports] were around for about a decade before Riot Games was born, no company has jumped in with the same intensity. Riot controls every aspect of the professional league, right down to the music composed for live events.”).

62. Afrasiab Mian, *Can Activision-Blizzard (ATVI) Profit from Esports Leagues?*, NASDAQ (June 29, 2016), <http://www.nasdaq.com/article/can-activision-blizzard-atvi-profit-from-esports-leagues-cm642968> [<https://perma.cc/3ZYK-CBHK>].

a whole,<sup>63</sup> but some facets of esports writ large—such as proposing professionalization standards and advocating for national legislation—lie outside the purview and efforts of any single developer.

### B. Making “Cents” of Sports Business Revenue

Though the fledgling esports industry is dovetailing with traditional sports,<sup>64</sup> it does not benefit from the same level of federal government protection granted to traditional sports leagues. This Part gives background on how traditional sports and esports leagues derive revenue.

#### 1. Traditional Sports

The traditional sports industry is built around monetizing competition and would not exist without collusion.<sup>65</sup> Franchises within a league collude to manage competition and maximize profits by enacting rules that govern player contracts and trades, territorial rights, and content distribution.<sup>66</sup> The professional sports leagues “provide teams with sufficient individual economic incentive to ensure that they will maximize the profits available in their local market, thus increasing the entire league’s revenues.”<sup>67</sup> In doing so, they effectively operate as natural monopolies.<sup>68</sup> Lawmakers have enacted legislation that authorizes collusive television-rights bargaining practices, and federal courts have issued league-favorable opinions.<sup>69</sup>

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63. See TAYLOR, *supra* note 2, at 174–75 (“[Esports] companies regularly work hard to try and legitimize (and indeed unstigmatize) computer game play, and the hard-core fandom you see in esports.”).

64. See generally Jon Robinson, ‘League of Legends’ Mimics Regular Sports, ESPN (Jan. 30, 2013), [http://espn.go.com/blog/playbook/tech/post/\\_id/3979/league-of-legends-mimics-regular-sports](http://espn.go.com/blog/playbook/tech/post/_id/3979/league-of-legends-mimics-regular-sports) [<https://perma.cc/F2R2-WKLV>] (exploring Riot Games’s promotion of esports as a viable real sport and occupation).

65. See generally Ryan M. Rodenberg & Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. 191 (2013) (discussing how professional sports’ collective-bargaining agreements tend toward collusive practices).

66. See Mohamed El-Hodiri & James Quirk, *An Economic Model of a Professional Sports League*, 79 J. POL. ECON. 1302, 1304 (1971).

67. See Grow, *supra* note 31, at 588 (“[P]rofessional sports leagues have designed an elaborate framework to balance their need to encourage teams to compete vigorously on the playing field, while at the same time ensuring that a sufficient level of competitive balance exists within the sport to create the most marketable and commercially successful product possible.”).

68. See, e.g., Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams’ Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL’Y 35, 48–49 (2008) (“However, in practice, the four premier sports leagues rarely face competition from any new league because sports markets have high barriers to entry.”); Grow, *supra* note 31, at 574 (stating that “direct government regulation of the [professional] industry is warranted” in such cases).

69. See *infra* Part I.B.1.b.

a. *Pooled Broadcast Rights*

Professional sports leagues have relied on television broadcasting as the predominant means of revenue generation and content distribution.<sup>70</sup> The NBA, NHL, and MLB exclusively sell their national television rights on a league-wide basis and, in some instances, permit individual franchises to license broadcast rights regionally.<sup>71</sup>

The sale of broadcast rights, however, often involves transaction costs and significant externalities because franchises “do not operate in completely independent broadcast markets.”<sup>72</sup> Broadcast revenue is contingent on the league’s overall appeal, and competition can be distorted by the number of consumers in local media markets.<sup>73</sup> Thus, to ease the sale of broadcast rights for traditional sports leagues, American lawmakers enacted the Sports Broadcasting Act of 1961,<sup>74</sup> which states:

The antitrust laws, as defined in [section one of the Sherman Act.] . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which *any league* of clubs participating in professional football, baseball, basketball, or hockey contests *sells or otherwise transfers all or any part of the rights* of such league’s member clubs in the sponsored telecasting of the games . . . by such clubs.<sup>75</sup>

This statute provides an antitrust exemption to league teams when they enter anticompetitive “pooled-rights contracts.”<sup>76</sup> As a result, the Sports Broadcasting Act allows traditional sports leagues to pool the broadcasting rights of individual franchises and then sell those rights as a package to over-the-air networks.<sup>77</sup>

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70. See, e.g., Grow, *supra* note 31, at 616; Michelle R. Hull, Note, *Sports Leagues’ New Social Media Policies: Enforcement Under Copyright Law and State Law*, 34 COLUM. J.L. & ARTS 457, 464 (2011) (reporting that the NFL earns over two-thirds of its revenue from television, while the MLB and the NBA each receive over one-half of their income from television deals).

71. See Grow, *supra* note 31, at 616. Even so, despite a trial court finding no evidence of substantial injury to the value of outside broadcast rights, the NBA sought to prevent a franchised team from broadcasting its games on a regional channel in a move to maintain broadcast market power. See Ross & Szymanski, *supra* note 30, at 229 (discussing the NBA’s legal fight against the Chicago Bulls).

72. See Ross & Szymanski, *supra* note 30, at 229.

73. See *id.* at 229–30.

74. 15 U.S.C. § 1291 (2012).

75. *Id.* (emphasis added).

76. See *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1347 (2d Cir. 1988) (“Congress enacted the Sports Broadcasting Act of 1961, which exempted from the antitrust laws pooled-rights agreements entered into by professional sports leagues.”).

77. This practice is known as “sponsored telecasting.” While this exemption only covers over-the-air networks, the Federal Trade Commission and Department of Justice have accepted that traditional sports leagues’ cable broadcast agreements with networks like ESPN also do not warrant antitrust agency action. See Grow, *supra* note 31, at 620–21.

*b. Regional Monopolies*

Furthermore, traditional sports leagues are built on local communities' support for competitive regional teams.<sup>78</sup> Franchises in a professional sports league have exclusive territorial rights that cover major metropolitan areas,<sup>79</sup> thus eliminating the possibility of a local rival.<sup>80</sup> Despite such anticompetitive practices, courts have ruled favorably for professional sports leagues, and “[v]irtually nothing the leagues do can be considered *per se* anticompetitive.”<sup>81</sup>

In 1982, a potential NFL franchisee, the Grizzlies, brought an antitrust suit in the Eastern District of Pennsylvania against the NFL and argued that the collective refusal to accept the Grizzlies' membership into the league unlawfully impeded trade.<sup>82</sup> The court ruled in favor of the NFL and held that “a professional sport league's refusal to accept for membership a qualified applicant for a franchise in an area where no current league team is located” does not violate antitrust laws.<sup>83</sup>

Such federal support of regional lockouts bolsters a professional sports league's profitability.<sup>84</sup> Localities are willing to compete in recruitment and retention of traditional sports players due to the reputational and economic benefits associated with professional sports.<sup>85</sup> Professional sports teams have been able to obtain massive subsidies from their host communities and

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78. Burk, *supra* note 19, at 1578 (“The culture, practice, and business of traditional sports are built around the features of physical location; physical sports teams rely on the geographic loyalty of spectators that identify with a locally branded team; locations for stadiums and receipts from spectator attendance constitute important sources of revenue; construction of such venues is typically dependent on tax and subsidy benefits from local communities.”).

79. See generally Rupert Cornwell, *The U.S. Franchise System . . . Coming to a League Near You?*, INDEPENDENT (Oct. 21, 2011), <http://www.independent.co.uk/sport/football/news-and-comment/the-us-franchise-systemcoming-to-a-league-near-you-2374155.html> [<https://perma.cc/H9JL-A2Z8>].

80. See Edelman, *supra* note 68, at 49 (“[S]ome liken a sports league's tight control on its number of franchises to a form of blackmail or extortion.”).

81. Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 107 (2015) (“Automatic rule of reason scrutiny for sports antitrust cases in the [United States] means leagues are always afforded the opportunity to justify their anticompetitive actions based on the nature of their industry.”); see also El-Hodiri & Quirk, *supra* note 66, at 1304 (stating that, with respect to collective agreements such as “rules governing television and radio contracts” and “rules governing territorial rights,” professional sports leagues have garnered legislative support).

82. *Mid-S. Grizzlies v. Nat'l Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983).

83. *Id.* at 560.

84. See Edelman, *supra* note 68, at 50 (“Absent the monopoly power of America's professional sports leagues, few communities would likely subsidize the professional sports industry.”).

85. See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 913 (1999) (“Local governments are willing to invest substantial sums to attract teams, as they are desperate to obtain the status of a ‘major league city.’”).

local governments,<sup>86</sup> typically in the form of new stadiums constructed at the expense of the public.<sup>87</sup>

## 2. Esports

Video games are the products of a sophisticated development process that combines elements of the creative industry—such as world building, illustration, and interface design—with advanced software technology.<sup>88</sup> Copyright law grants game developers intellectual property rights over the creative aspects embodied within a game.<sup>89</sup> The copyright holder enjoys the exclusive right to make copies, distribute, make derivative works, and publicly display the game.<sup>90</sup> Thus, “[c]opyright is likely to be the lynchpin in any dispute.”<sup>91</sup>

Esports industry participants—game developers as the “creators and owners of copyright works,”<sup>92</sup> players and teams, and content distributors—all seek to direct revenue-generating activities. But, when key drivers of esports revenue—such as “advertising, sponsorship, merchandise, live event revenues, and potentially publisher partnerships”<sup>93</sup>—hinge on copyright ownership, then the game developer as the copyright holder often directs how a game makes money. While teams in traditional sports leagues share control over a league’s actions,<sup>94</sup> esports teams are subject to the control of the game developer.<sup>95</sup>

Accordingly, sale of competition is often governed by the private game developer through licensing agreements for tournaments and leagues.<sup>96</sup> Licenses “can range from [competition organizers] having formal agreements

86. See Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, ATLANTIC (Oct. 2013), <https://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/> [<https://perma.cc/RS7B-Q7KH>] (estimating that “[a]nnualized, NFL stadium subsidies and tax favors add up to perhaps \$1 billion”).

87. See Edelman, *supra* note 68, at 42 (“Since the 1970s, most local communities have paid between seventy percent and eighty percent of new stadium building costs.”).

88. See generally WOLF & IWATANI, *supra* note 57, at 4 (explaining how video games benefit from the verbal and visual literacy of the film and television industries).

89. See John M. Neclerio & Matthew C. Mousley, *Copyright Law Implications in Video Games and Virtual Worlds*, in COMPUTER GAMES AND VIRTUAL WORLDS: A NEW FRONTIER IN INTELLECTUAL PROPERTY LAW 47, 47 (Ross A. Dannenberg et al. eds., 2010) (“Generally, copyright in virtual world content initially vests in virtual world developers and creators.”). Copyright protection for video game production and development is largely settled, but property rights within video games remain a contentious issue. See *id.* at 62 (“Because U.S. courts have not yet squarely addressed this issue, users and developers of virtual worlds will have to wait for future judicial opinions to know with any certainty the extent of copyright protection for their in-world creations and activity.”).

90. *Id.* at 49.

91. Burk, *supra* note 19, at 1569.

92. Susy Frankel & Daniel Gervais, *Evolution and Equilibrium: An Introduction*, in THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE 1, 3 (Susy Frankel & Daniel Gervais eds., 2014).

93. Jas Purewal & Isabel Davies, *The Esports Explosion: Legal Challenges and Opportunities*, LANDSLIDE, Nov./Dec. 2016, at 24, 27.

94. See *supra* Part I.A.1.

95. See *supra* Part I.A.2.

96. See TAYLOR, *supra* note 2, at 159–60.

with game companies to use their games in an ongoing tournament series (and broadcast) all the way to ad hoc one-time agreements between an organizer and game company.”<sup>97</sup> Unlike in traditional sports, game developers play a role in shaping the exposure and popularity of teams within a league or tournament.<sup>98</sup> Through license agreements, game developers maximize profits by selectively authorizing players and content distributors to exercise the developer’s exclusive rights under copyright in exchange for royalties or fees.<sup>99</sup> The general trend is for game developers to subcontract out the work of organizing leagues and tournaments to regional affiliates, thereby granting content-distribution rights for some form of financial kickback.<sup>100</sup>

Furthermore, whereas traditional sports leagues derive a majority of their income from collective television broadcast agreements,<sup>101</sup> broadcast television is not the primary source of revenue for esports.<sup>102</sup> While esports commercialization also depends on content distribution as a primary source of revenue,<sup>103</sup> the esports industry lacks the regulatory support afforded to traditional sports in broadcast television.<sup>104</sup>

Esports matches are televised over broadcast, cable, or pay-per-view channels, but most tournament audiences “attend” over internet platforms.<sup>105</sup> Online platforms facilitate accessibility and extensive infiltration into any market, which,<sup>106</sup> in turn, empowers game developers to create new games for player-versus-player competition.<sup>107</sup> Instead of television, esports consumers watch matches through video-streaming websites,<sup>108</sup> such as

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97. *See id.*

98. *See supra* note 62 and accompanying text.

99. *Cf. Neclerio & Mousley, supra* note 89, at 82–83.

100. *See TAYLOR, supra* note 2, at 160.

101. *See Hull, supra* note 70, at 464.

102. *See Purewal & Davies, supra* note 93, at 27 (“In principle, broadcast revenues could be a significant revenue driver (as in traditional sports), but historically there has been no meaningful ‘traditional broadcast’ (i.e., to TV) of [esports] until this year, all broadcast to date being effectively via digital platforms such as Twitch where it generally has been viewable for free by default.”); Symposium, *supra* note 51, at 185 (“If you look at traditional sports, a lot of these teams are going to be making roughly 70% or so of their revenues off of broadcasting rights. But when you look at esports, actually, that number is closer to zero.”).

103. *See supra* note 70 and accompanying text.

104. *See supra* note 77 and accompanying text.

105. *See Burk, supra* note 19, at 1540–41.

106. For example, the extensive penetration of esports in South Korea is likely related to South Korea’s eleven billion dollar network infrastructure overhaul—resulting in the fastest internet connection on the planet. *See LI, supra* note 3, at 29.

107. *See id.* at 2 (“Many of the best games allow players to clearly differentiate themselves through skill, falling somewhere between the curated, individualized experience of traditional art and the competitive nature of sports.”).

108. *Cf. Symposium, supra* note 51, at 182–83 (“[W]hat’s happening in the whole media industry now is unique in that there are cord-cutters; people are ditching their cable subscriptions. And basically millennials and Gen Zs are cord nevers; they’re not even watching television.”).

Twitch.tv, where peak viewership can surpass primetime traffic of major cable channels.<sup>109</sup>

## II. DOVETAILING OR DIVERGING?: COMPARING ESPORTS TO TRADITIONAL SPORTS

Due to the favorable legal treatment of traditional sports,<sup>110</sup> the debate over whether esports is a “sport” remains contentious.<sup>111</sup> Certain aspects of esports are analogous to traditional sports and the involvement of traditional sports market participants in esports “may expedite the learning curve for their digital brethren.”<sup>112</sup> These similarities encourage a discussion regarding which aspects of professional-sports governance are easily incorporated into esports regulation.

Yet, comparison is only productive to the extent that esports parallels traditional sports. Despite many similarities, esports reside in the digital space, and such a difference renders analogous reform improbable.<sup>113</sup> Part II highlights the differences between esports and traditional sports such as: (1) reliability of gameplay rules, (2) lack of regional ties, (3) preference for online streaming over broadcast television, and (4) anticompetitive behavior.

### A. Variable Rules of Gameplay

Video games are bits of user interaction “mediated by the software and video apparatus of the game,”<sup>114</sup> which complicates ownership of both game

109. See Michael Larkey, Note, *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, 53 (2015) (“Peak viewership on Twitch can surpass primetime viewership of cable channels like MTV, MSNBC, E!, and CNN.”); see also PAUL “REDEYE” CHALONER, TALKING ESPORTS: A GUIDE TO BECOMING A WORLD-CLASS ESPORTS BROADCASTER 12 (2015) (“Twitch may well be one of the top three biggest things to happen to esports in its short life span.”); Symposium, *supra* note 51, at 190 (“One of the reasons that I feel that esports has taken off so quickly and become this kind of giant, global audience is because the traditional sports deals are locked into traditional television for many, many more years.”).

110. See John T. Holden et al., *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 48 (2017) (“The question of whether esports are a sport is legally meaningful. The United States has a variety of statutes that are only applicable to occurrences involving sport.”).

111. See, e.g., LI, *supra* note 3, at 4 (“Veterans of [esports] say it’s ultimately irrelevant if competitive gaming is characterized as a sport. It has all the elements of competition: high-stakes winnings, a barrier to competition that takes skill and training, the excitement of fans, and now, the technological infrastructure to back it all up.”); TAYLOR, *supra* note 2, at 36 (“Well before computer games entered the scene, enthusiasts, regulatory bodies, and athletes debated the merits of counting everything from equestrianism to snowboarding as a sport. . . . It is in this context that computer gaming now finds itself sitting, often uneasily, between digital play and sport.”).

112. Zarley, *supra* note 11.

113. *But see id.* (“There seems to be a conscious effort on the part of the analog sports partners, not to fuck with the chemistry that has already proved so successful but rather to find ways to work within and expand upon an already popular pastime. This is about augmenting, not overhauling.”).

114. Burk, *supra* note 19, at 1553 (“Certainly the video game players can be observed directly, but it is not clear that their physical activity maps onto the role played by physical action in physical play; generally keyboard strokes and mouse movement are not what one

and gameplay. Unlike traditional sports, esports' video games are essentially bits of code and computer software subject to various claims of copyright ownership.<sup>115</sup>

Esports governance is complicated by the fact that game developers create and hard code the rules of play into the game,<sup>116</sup> and a game developer's interests and claims of ownership under copyright may be misaligned with the interests of consumers, players, and team owners.<sup>117</sup> Successful esports games are susceptible to software updates that adjust and shape mechanics that affect gameplay, which means that no dominant strategy stays on top for too long.<sup>118</sup> This collection of strategies and preferences that shape competitive gameplay, the "metagame," is constantly evolving and defined by each individual game developer's software updates.<sup>119</sup>

Esports tournaments and leagues may also impose a separate set of rules or guidelines beyond what is embedded by developers into the actual game.<sup>120</sup> These additional rules are supplementary to the formalized rules of play that are programmed into the game and often embody informal norms of sportsmanship or fair play.<sup>121</sup> Lastly, to add to the morass, "[t]he popularity of [esports] games fluctuates over time, and there is no guarantee the top games of today will remain in place in two, five, or [ten] years."<sup>122</sup>

### B. Lack of Regional Ties

Traditional sports teams typically obtain large subsidies from their host communities and local governments,<sup>123</sup> and leagues incentivize franchised

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considers computer 'gameplay.' Neither is the unobserved alteration of voltages the players prompt across various circuits a matter of much interest. Rather, it is the video output they prompt from the machine that constitutes the activity of interest.").

115. See *supra* notes 88–92 and accompanying text. For a thoughtful discussion on copyright ownership and claims of neighboring rights in esports, see Burk, *supra* note 19.

116. See, e.g., ERNEST ADAMS, FUNDAMENTALS OF GAME DESIGN 13 (2010) ("Unlike conventional games, video games do not require written rules. The game still has rules, but the machine implements and enforces them for the players. . . . It adjudicates victory and defeat if those concepts are programmed into the game."); TAYLOR, *supra* note 2, at 49 ("Computer games . . . encod[e] their logics in the very structure of the game's software, and perhaps in its hardware.").

117. Cf. Frankel & Gervais, *supra* note 92, at 3 ("We often hear that copyright needs to achieve a balance of interests. . . . [I]t is about balancing multiple competing interests from multiple players and recognizing that equilibrium in copyright is complex and dynamic, not static.").

118. See LI, *supra* note 3, at 3.

119. See *id.*

120. See Burk, *supra* note 19, at 1563 ("[T]hese [additional rules] run the gamut from specifications on hardware and equipment, to prohibitions on certain moves in the game, to governance of 'glitches' or anomalies in the game software that players might otherwise exploit during the course of the contest.").

121. See *id.*

122. Purewal & Davies, *supra* note 93, at 26.

123. See Piraino, *supra* note 85, at 913 ("Local governments are willing to invest substantial sums to attract teams, as they are desperate to obtain the status of a 'major league city.'").



teams to maximize profits in local markets.<sup>124</sup> The league structure of traditional sports capitalizes on this regionalism.<sup>125</sup>

In contrast, esports is a complex mix of regional and global participants.<sup>126</sup> The esports industry is international in nature and “stable teams regularly draw their players from a range of countries who generally do not have any physical connection with a national home office but instead mediate their engagement with the team online, at tournament venues, and in occasional co-located boot camps.”<sup>127</sup> Increasingly, large esports tournaments are “distinctively international in orientation.”<sup>128</sup>

Moreover, unlike traditional sports, the U.S. esports industry is fractured across many different organizations and competitive games and lacks a governing body to set standards of professionalism and maintain rules of play.<sup>129</sup> Due to this lack of regional affinity, esports-tournaments, organizations, and leagues have begun to license their brands,<sup>130</sup> thus lending name recognition while deferring to local organizers that are better equipped with regional knowledge.<sup>131</sup> Traditional sports governance fails to accommodate and account for the “dual global-local status” of competitive gaming.<sup>132</sup>

### C. Online over Broadcast

If traditional sports leagues derive income from television-broadcast agreements,<sup>133</sup> then why do esports leagues veer away from the contract model used by professional sports leagues?<sup>134</sup> Due to relative antitrust immunity, traditional sports teams have occupied national sports broadcast rights,<sup>135</sup> and new sports entertainment entrants face high barriers to entry.<sup>136</sup>

124. See *supra* notes 68–80 and accompanying text.

125. See Grow, *supra* note 31, at 588 (“[P]rofessional sports leagues have designed an elaborate framework to balance their need to encourage teams to compete vigorously on the playing field, while at the same time ensuring that a sufficient level of competitive balance exists within the sport to create the most marketable and commercially successful product possible.”).

126. See TAYLOR, *supra* note 2, at 179.

127. *Id.*

128. *Id.*

129. See MEC GLOB., *supra* note 10, at 9; see also Zarley, *supra* note 11 (“Perhaps the most daunting barrier to entry for aspiring esports fans—and undue burden on the players—is the sundry competitions, a dazzling array of ersatz contests and leagues going off, overlapping, and winking out like fireworks displays, owned and operated by independent third-party organizers lacking in the rigid structure imposed upon traditional sports.”).

130. Esports sponsorships have become increasingly intertwined with NBA investors with regional knowledge. See *supra* note 14 and accompanying text; see also Jacob Wolf, *Miami Heat Invest in Esports with Misfits*, ESPN (Jan. 10, 2017), [http://www.espn.com/esports/story/\\_/id/18444193/miami-heat-invest-esports-misfits](http://www.espn.com/esports/story/_/id/18444193/miami-heat-invest-esports-misfits) [https://perma.cc/X2QB-K7KR].

131. See TAYLOR, *supra* note 2, at 179–80.

132. *Id.* at 180.

133. See *supra* note 70 and accompanying text.

134. See TAYLOR, *supra* note 2, at 144–45; see also *supra* note 51 and accompanying text.

135. See *supra* Part I.B.1.

136. See Grow, *supra* note 31, at 602 (“Thus, any new entrant in the professional sports industry will likely find itself facing a catch-22, unable to generate substantial television

By enacting the Sports Broadcasting Act and enabling pooled-rights agreements,<sup>137</sup> the federal government granted professional sports leagues the ability to maintain competitive balance between interdependent teams and helped traditional sports leagues remain viable.<sup>138</sup> Collective broadcasting agreements helped cement the commercial dominance of the traditional sports business, but such agreements raise concerns over price-fixing and restriction of consumer choice.<sup>139</sup>

Instead, the majority of esports consumption occurs online via the internet.<sup>140</sup> Competitions have attracted the attention of several mainstream media outlets, like ESPN and Yahoo!,<sup>141</sup> that have launched dedicated online portals and websites for esports news. An esports industry thought leader has stated: “Traditional media is important to make [esports] more mainstream and to expand the audience. But I think the old [esports] dream [of] ‘we need to get [esports] on TV to succeed’ is dead. [Esports games] have a proven record to be successful on internet stream[s] only.”<sup>142</sup>

Given the popularity of online streaming of esports, esports leagues often do not prioritize television coverage and choose instead to focus on streaming platforms like Twitch.tv.<sup>143</sup> The sale of online-streaming rights can be quite lucrative.<sup>144</sup> For example, on December 16, 2016, an MLB- and Disney-owned video-streaming company, BAMTech, signed a deal with Riot Games to “pay a minimum of \$300 million through 2023.”<sup>145</sup> In exchange,

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revenue until it signs a sufficient pool of talent but lacking the financial means to sign elite players without a significant television contract.”).

137. See 15 U.S.C. § 1291 (2012); *supra* notes 74–77 and accompanying text.

138. See *supra* note 75 and accompanying text.

139. See generally Ross & Szymanski, *supra* note 30.

140. See Symposium, *supra* note 51, at 197 (“You take a look at the NFL, and they’ve grown as far as they can grow, so now they’re looking at London and now they’re looking at Mexico and they want to go international. The NBA, the same way; Major League Baseball, the same way. Well, again, almost like those are TV first, digital second, and esports is digital first, TV second, or maybe even TV third, who knows—this is international first.”); see also *id.* at 192 (“[Esports] breaks a lot of models, especially the broadcast model, and we have this underlying IP ownership issue that’s different than football and basketball and baseball or any stick-and-ball sport.”).

141. See, e.g., Paresh Dave, *ESPN.com to Cover E-Sports with Same ‘Rigor’ as It Does the Big Leagues*, L.A. TIMES (Jan. 14, 2016), <http://www.latimes.com/business/technology/la-fi-tt-espn-esports-20160113-story.html> [<https://perma.cc/8AKE-WCBJ>]; *Yahoo Launches New Experience Dedicated to Esports*, BUS. WIRE (Mar. 2, 2016, 12:00 AM), <http://www.businesswire.com/news/home/20160301007090/en/Yahoo-Launches-New-Experience-Dedicated-Esports> [<https://perma.cc/JC4T-3BE9>].

142. Radoslav “Nydra” Kolev, *DreamHack Partners with MTG for Esports Studio in Stockholm*, GOSU GAMERS (Sept. 25, 2013, 1:30 PM), <http://www.gosugamers.net/starcraft2/news/25446-dreamhack-partners-with-mtg-for-esports-studio-in-stockholm> [<https://perma.cc/2HVV-TAG7>].

143. See Larkey, *supra* note 109, at 53.

144. See Todd Spangler, *MLB-Disney’s BAMTech Inks ‘League of Legends’ \$300 Million Esports Streaming Pact*, VARIETY (Dec. 16, 2016, 10:12 AM), <http://variety.com/2016/digital/news/bamtech-league-of-legends-mlb-disney-esports-1201944167/> [<https://perma.cc/Y7EC-PBE7>].

145. Aaron Souppouris, *MLB and Disney Pick Up ‘League of Legends’ Streaming Rights*, ENGADGET (Dec. 12, 2016), <https://www.engadget.com/2016/12/16/bamtech-riot-games-league-of-legends-streaming-deal-wsj/> [<https://perma.cc/LJ49-8KQB>].

BAMTech will receive the *exclusive right* to “stream and monetize” the competition play of Riot Games’s League of Legends esports title.<sup>146</sup> However, esports tournaments are structured so that the organizers retain the majority of sponsorship and broadcast revenue,<sup>147</sup> with some exceptions.<sup>148</sup> This often results in imbalanced profit sharing between the league, the teams, and the remaining esports market participants.<sup>149</sup>

#### D. Anticompetitive Practices

Traditional sports leagues are formed and maintained as joint ventures.<sup>150</sup> Conversely, the most successful esports leagues are developer sponsored.<sup>151</sup> Both joint-venture leagues and developer-sponsored leagues tend toward monopolistic practices that could trigger antitrust scrutiny.<sup>152</sup>

A game developer that doubles as a league owner has complete control over the players.<sup>153</sup> For example, in 2013, Riot Games amended its contract terms with a noncompete clause that prevented professional League of Legends players from participating in other leagues and from streaming their gameplay in any competing video games.<sup>154</sup> With one amendment, Riot Games unilaterally reduced the rights and earned income of professional League of Legends players.<sup>155</sup> Riot Games subsequently amended these terms after the leaked restrictive contracts produced significant public outcry.<sup>156</sup>

146. *See id.*

147. *See* Zarley, *supra* note 11.

148. *See, e.g.,* Imad Khan, *Riot Releases Details on NA LCS Franchising with \$10M Flat-Fee Buy-In*, ESPN (June 1, 2017), [http://www.espn.com/esports/story/\\_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in](http://www.espn.com/esports/story/_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in) [<https://perma.cc/XK45-M6X2>] (“Revenue sharing is another major part of the evolution of the [League of Legends league]. Last year, Riot started making moves with the media deals and digital goods surrounding teams, and it is looking to build on that by requiring teams to ‘share a portion of their league-driven revenues as well (including things like sponsorships and merch sales).”).

149. *See* Zarley, *supra* note 11.

150. *See supra* note 42 and accompanying text.

151. *See supra* notes 60–63 and accompanying text.

152. *See supra* Parts I, II.D.

153. *But cf.* Zarley, *supra* note 11 (“The well-being of players may very well become baked into esports structures from their earliest days, rather than needing to be shoehorned in generations after the fact—and hopefully mitigating some of the potential downsides of professionalization.”).

154. *See* Peter Bright, *Riot Tells Pro League of Legends Players They Can’t Stream Competing Games*, ARS TECHNICA (Dec. 4, 2013, 7:13 PM), <http://arstechnica.com/gaming/2013/12/riot-tells-pro-league-of-legends-players-they-cant-stream-competing-games/> [<https://perma.cc/ZT3D-ZBJN>]; *see also* Hollist, *supra* note 4, at 829.

155. *See* Hollist, *supra* note 4, at 829–30 (“In addition to their league salaries, prize winnings, and sponsorships, many professional players make money by ‘livestreaming’ . . . their video game matches in real-time over websites such as Twitch.tv. . . . With professional player salaries estimated at around \$25,000 annually, these streaming revenues amount to a large percentage of the players’ incomes.” (footnotes omitted)).

156. *Player Contracts and Unions in the LCS*, DPG LAW (Dec. 2013), <http://www.dpgatlaw.com/Articles/Player-Contracts-and-Unions-in-the-LCS.shtml> [<https://perma.cc/R6RC-4K5Z>] (“[Riot’s director of esports] justified his company’s requirements in part by saying that Riot wants League of Legends to be a legitimate sport with a professional setting. Just as you wouldn’t see an NFL player promoting the Arena Football

Furthermore, as both the league organizer and the game developer, Riot Games can ban a player from participation in a league and even from the game entirely.<sup>157</sup> Esports players and teams may not have the right to appeal these private developer-sponsored league rulings.<sup>158</sup> In comparison, traditional sports leagues—like the NBA—may ban or suspend a player from playing in the league,<sup>159</sup> but the player will not be barred from playing the sport of basketball entirely.

Through copyright ownership, a game developer can also control the expansion of a developer-sponsored league and prioritize developer interests over public uses.<sup>160</sup> For example, in July 2017, Riot Games revealed a new franchising model for its developer-sponsored league in North America, but it did not extend the same franchising model for European teams.<sup>161</sup> In its own best interest, Riot Games unilaterally restricted the rights of European players but also affected the profitability of European teams.<sup>162</sup> Unlike a joint-venture league, which represents interests beyond the developer's own,<sup>163</sup> a developer-sponsored league is focused on the exclusive promotion of the developer's game.<sup>164</sup>

### III. SUCCESSES AND FAILURES IN GOVERNANCE GLOBALLY

In August 2017, the International Olympic Committee stated an interest in including esports in the 2024 Paris Olympic program but did not commit to

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League, he claims, you shouldn't see a League player promoting [competitors' games] either.”).

157. Eddie Makuch, *Pro League of Legends Player Banned for Anti-Semitism*, GAMESPOT (Jan. 24, 2013), <http://www.gamespot.com/articles/pro-league-oflegends-player-banned-for-anti-semitism/1100-6402913/> [<https://perma.cc/L5GY-78RJ>] (describing two lifetime bans issued by Riot against professional players).

158. Richard Lewis, *No Appeals Process for LCS Fines—TSM's Reginald Must Pay*, DAILY DOT (Aug. 20, 2014), <http://www.dailydot.com/esports/tsm-reginald-fine-riot-games/> [<https://perma.cc/E63D-HDFH>] (describing an instance where Riot fined a professional player \$2000 and denied any rights to appeal the fine).

159. Jeff Zillgitt & AJ Neuharth-Keusch, *O.J. Mayo Dismissed and Disqualified from NBA for Violation of Drug Policy*, USA TODAY (July 1, 2016), <http://www.usatoday.com/story/sports/nba/2016/07/01/oj-mayo-dismissed-nba-anti-drug/86603780/> [<https://perma.cc/ET9N-C4J5>] (describing the ban of a professional basketball player from the NBA and subsequent reinstatement eligibility).

160. Frankel & Gervais, *supra* note 92, at 2.

161. See Khan, *supra* note 148.

162. See Xing Li, *4 EU LCS Teams Have Reportedly Applied to Join the NA LCS*, DOT ESPORTS (Aug. 1, 2017, 8:25 PM), <https://dotsports.com/league-of-legends/eu-lcs-apply-na-lcs-franchising-16330> [<https://perma.cc/RSW7-H79M>] (“The decision to franchise one region before others dramatically impacts the balance of power, especially in terms of team and player earnings. Teams accepted into the franchised North American league will be offered revenue sharing for the first time, while EU LCS teams are left to wonder when they'll achieve that level of recognition.”); see also Leo Howell, *LPL to Implement Franchising System*, ESPN (May 1, 2017), [http://www.espn.com/esports/story/\\_/id/19287373/lpl-implement-franchising-system](http://www.espn.com/esports/story/_/id/19287373/lpl-implement-franchising-system) [<https://perma.cc/JF3S-DWKK>] (introducing a franchise model for League of Legends in China).

163. See *supra* notes 42–44 and accompanying text.

164. See Hollist, *supra* note 4, at 829.

doing so.<sup>165</sup> The International Olympic Committee attributed its hesitancy to the lack of an *international* governing body ensuring standardization and legitimacy.<sup>166</sup> Far from achieving even *national* legitimacy, esports-market participants in the United States have thus far been allowed to self-govern.<sup>167</sup>

Other countries, however, have begun to recognize the need for oversight and have taken affirmative steps to address regulatory gaps to varying degrees of success. South Korea, for example, has developed an extensive regulatory environment around esports.<sup>168</sup> As recently as September 2016, the French Senate legalized “video game competitions” and also implemented regulations on exploitative entry fees, thus ensuring the payment of cash prizes and minimum standards for professional player contracts, visa issues,<sup>169</sup> and even the rights of minors under the age of sixteen.<sup>170</sup> In June 2016, the Russia Ministry of Sport recognized esports as a sporting discipline.<sup>171</sup> This Part explores the successes and failures of esports governance in South Korea and the United Kingdom.

#### A. South Korea

The current high-water mark for national regulation of the esports market can be found in South Korea, where government infrastructure has been developed to support the esports industry and where esports games have achieved a degree of household recognition and normalcy.<sup>172</sup> South Korea highlights how cultural influences, larger infrastructure developments, government policy decisions, and economic activities have intersected in a

165. See Marissa Payne, *Paris Mulling Inclusion of Esports in 2024 Olympic Program*, WASH. POST (Aug. 8, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/08/08/paris-mulling-inclusion-of-esports-in-2024-olympic-program/> [<https://perma.cc/UCH3-XKUC>].

166. *Id.* (“We do not see an organization or a structure that will give us confidence, or guarantee, that in this area the Olympic rules and values of sport are respected and in place, and that the implementation of these rules are monitored and secured.”). To become an Olympic event, a sport must demonstrate a certain level of international organization, including having a world governing body like the Fédération Internationale de Football Association (FIFA) for soccer. See *id.*

167. See Symposium, *supra* note 51, at 188 (“In terms of the regulatory environment generally, the video game industry has done an excellent job for thirty-plus years of being self-regulated and working directly with state, local, and federal governments around the world to be able to maintain a level of sophistication.”); Josh Bray, *Esports Is Getting Big, and Here’s the Scandals to Prove It*, SUPER NERDLAND (Aug. 15, 2016), <https://supernerdland.com/article/esports-getting-big-heres-scandals-prove/> [<https://perma.cc/3SWX-Y56N>] (“[I]f the industry isn’t quick to regulate itself, then they are begging for State and Federal authorities in the United States to come and regulate for them.”).

168. See *infra* Part III.A.

169. See Adrien Auxent, *Esports Are Now Officially Legal in France*, ESPORTS OBSERVER (Sept. 30, 2016), <http://esportsobserver.com/esports-are-now-officially-legal-in-france/> [<https://perma.cc/EF44-U45T>] (“Visa issues have become a significant problem for professional players in France, as tourist visas are invalid and illegal for the practice of professional esports.”).

170. *Id.*

171. See Samuel Lingle, *Esports Is Now a Sport in Russia*, DOT ESPORTS (June 9, 2016, 7:30 PM), <https://dotesports.com/general/esports-is-a-sport-russia-3412> [<https://perma.cc/WUK2-CDVQ>].

172. See Hyeryoung Ok, *New Media Practices in Korea*, 5 INT’L J. COMM. 320, 332 (2011).

fortuitous way to support the formation of a flourishing domestic esports industry.<sup>173</sup>

In 2000, the Korea eSports Association (“KeSPA”) was established as a nongovernmental organization after approval and support from South Korea’s Ministry of Culture and Tourism, and it has long been involved in regulating national gaming and esports.<sup>174</sup> The twelve-member board is composed of executives from major corporations and the organization seeks to promote “game culture” and support “game-related international interaction business.”<sup>175</sup> KeSPA, with the support of the South Korean government, can officiate and organize tournaments,<sup>176</sup> manage esports venues and create dedicated esports stadiums,<sup>177</sup> oversee the registration of South Korean players,<sup>178</sup> enforce professionalism and ethical standards,<sup>179</sup> regulate sponsorships,<sup>180</sup> distribute competition broadcast rights,<sup>181</sup> and coordinate licensing agreements.<sup>182</sup>

Due to copyright ownership complications, KeSPA has struggled to enforce actions against game developers even with such a broad grant of authority. For example, in 2007, KeSPA sold the television-broadcasting rights for StarCraft, one of Blizzard Entertainment’s competitive games, to two cable channels without Blizzard Entertainment’s express consent.<sup>183</sup> KeSPA stated that “[i]f a game achieves success as an iconic [esports] competition, and the developer pursues profits by declaring that their copyright is valid in the [traditional sports] industry as well, then that is a large obstacle for [esports’] growth and establishment as a future sports-entertainment industry.”<sup>184</sup> Blizzard Entertainment demanded a higher fee for its television broadcasting rights, which KeSPA refused.<sup>185</sup> Blizzard Entertainment took the case to South Korean courts, stating:

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173. See TAYLOR, *supra* note 2, at 18 (noting that South Korea’s esports industry benefited from a convergence of structural factors).

174. *Id.* at 161.

175. *Mission Statement*, KOREA ESPORTS ASS’N, [http://www.e-sports.or.kr/page\\_kespa2014.php?\\_module=kespa&\\_page=greeting](http://www.e-sports.or.kr/page_kespa2014.php?_module=kespa&_page=greeting) [https://perma.cc/TN28-6RP2] (last visited Oct. 16, 2017).

176. See TAYLOR, *supra* note 2, at 161.

177. *Id.*

178. *Id.* at 162.

179. See Brendan Sinclair, *Twelve Arrested in E-Sports Match-Fixing Scandal—Report*, GAMESINDUSTRY.BIZ (Oct. 19, 2015), <http://www.gamesindustry.biz/articles/2015-10-19-12-arrested-in-esports-match-fixing-scandal-report> [https://perma.cc/F3B4-6RZD] (reporting that KeSPA banned a coach and two players for life for illegal betting and fixing matches).

180. See TAYLOR, *supra* note 2, at 162.

181. See *id.*

182. See *id.* This list of KeSPA’s powers is not exhaustive. See *id.* at 168.

183. See TAYLOR, *supra* note 2, at 162. Blizzard Entertainment has stated: “If a player competes, we expect them to get paid. And if someone signs a license with us, we expect there to be some level of quality and we expect that those things are taken care of.” *Id.* at 164.

184. *Id.* at 167–68.

185. See Kim Tong-Hyung, *Blizzard Vows to Take MBC to Court*, KOREA TIMES (Dec. 2, 2010, 7:19 PM), [http://www.koreatimes.co.kr/www/news/tech/2010/12/133\\_%2077381.html](http://www.koreatimes.co.kr/www/news/tech/2010/12/133_%2077381.html) [https://perma.cc/L233-23XJ].

StarCraft is not a public domain offering, as [Blizzard Entertainment] has invested significant money and resources to create the StarCraft game and the overall StarCraft universe . . . .

Classifying StarCraft and other [esports] as part of the public domain deprives developers such as [Blizzard Entertainment] of their [intellectual property] rights. There will be no incentive to do what [Blizzard Entertainment] had done to balance the games for competition, which is a more difficult task than creating a normal game.<sup>186</sup>

As a result, Blizzard Entertainment found another broadcast partner, GOM TV.<sup>187</sup> KeSPA retaliated by threatening to remove professional teams from the KeSPA league if those teams appeared in GOM TV events.<sup>188</sup> KeSPA released a statement that Blizzard Entertainment has a right to a “rational level of usage fee”<sup>189</sup> and then asserted that KeSPA had the right to a licensing fee for running the league and ownership rights over all sponsorships, broadcasted programs, and program videos.<sup>190</sup> Yet, despite KeSPA’s objections, Blizzard Entertainment ended all negotiations with KeSPA for any future partnerships in 2010.<sup>191</sup> KeSPA maintains that it provides value back to game developers through the authorization and subsequent legitimization of esports titles—“a kind of KeSPA stamp of approval.”<sup>192</sup> KeSPA has extensive dominion over esports in South Korea,<sup>193</sup> but KeSPA lacked sufficient authority over Blizzard Entertainment’s proprietary interests.

### B. United Kingdom

Western countries lag behind Asian countries in esports regulation, but current proposals in the United Kingdom highlight the European Union’s approach to esports governance.<sup>194</sup> For example, in February 2009, the United Kingdom Esports Association (“UKeSA”) was founded as “the [United Kingdom’s] official esports governing body” with the mission of “working with government, industry, and community to develop, support,

186. *Id.*

187. Leigh Alexander, *Blizzard Breaks Off KeSPA Talks, Will Seek New StarCraft Partner*, GAMASUTRA (Apr. 27, 2010), [http://www.gamasutra.com/view/news/119207/Blizzard\\_Breaks\\_Off\\_KeSPA\\_Talks\\_Will\\_Seek\\_New\\_StarCraft\\_Partner.php](http://www.gamasutra.com/view/news/119207/Blizzard_Breaks_Off_KeSPA_Talks_Will_Seek_New_StarCraft_Partner.php) [<https://perma.cc/AC8J-G5MN>]; see also TAYLOR, *supra* note 2, at 166 (“[I]t’s not about [the money]. It’s more [about how] we really just want acknowledgement of [Blizzard Entertainment’s] intellectual property.”).

188. Alexander, *supra* note 187.

189. *Id.*

190. TAYLOR, *supra* note 2, at 167.

191. *Id.* at 162 (“We’ve been negotiating with [KeSPA] about intellectual property rights for the last three years, and we’ve made no progress at all. . . . We’re going to stop negotiating with [KeSPA] and look for a new partner.”).

192. *Id.* at 168. KeSPA has stated that, in relation to developers, it “makes examinations of games when the developers want to make them an ‘official [esports] title.’” *Id.* If approved, then the developers are allowed to host “official leagues” within the country. See *id.*

193. See *supra* notes 174–82 and accompanying text.

194. See Rosie Duckworth, *E-Sports—A Recent Explosion in Popularity but Still Room to Grow*, SQUIRE PATTON BOGGS (Sept. 7, 2016), <http://www.sports.legal/2016/09/esports-a-recent-explosion-in-popularity-but-still-room-to-grow/> [<https://perma.cc/A99A-N3FM>].

encourage, and promote the growth of a professional competitive esports framework from an amateur grassroots level upwards.”<sup>195</sup> UKeSA failed to make promised prize payments and, in December 2009, it issued a final notification stating that it had filed for bankruptcy.<sup>196</sup>

Following UKeSA’s collapse, the United Kingdom recognized the need for independent governance with government support.<sup>197</sup> Accordingly, the British Esports Association (BEA) was founded on June 30, 2016, as an independent governing body under the authority of the United Kingdom government.<sup>198</sup> In conjunction with the Department for Media, Culture, and Sport, the BEA seeks to act as the national governing body for esports in the United Kingdom with a focus on “grassroots” community organization.<sup>199</sup> The BEA plans to “help and represent players at all levels; develop a grassroots competitive video game scene that will nurture future talent; support existing professionals and provide the infrastructure to create future British global champions.”<sup>200</sup> It has already taken measures by meeting with the Department of Culture, Media, and Sport along with several leading game publishers.<sup>201</sup> The BEA’s successes will be measured by its undertakings in 2017 and beyond.

#### IV. CALL OF (GOVERNANCE) DUTY: CONSIDERATIONS AND PROPOSALS

Despite the current dominance of Blizzard Entertainment and Riot Games, the esports industry has evolved and developed well beyond the contribution of any single company. The composition of professional esports is not a result of individual initiatives but comes from a diverse mix of actions,

195. Goodeh, *UKeSA Launches*, ESPORTS HEAVEN (Oct. 31, 2008, 6:05 PM), <http://www.esportsheaven.com/news/view/47606/ukesla-launches> [<https://perma.cc/H88R-EG3U>].

196. See Richard Lewis, *UKeSA Files for Bankruptcy*, ESPORTS HEAVEN (Dec. 23, 2009, 4:28 PM), <http://www.esportsheaven.com/news/view/49681/ukesla-files-for-bankruptcy> [<https://perma.cc/U7GV-4MJB>].

197. See Callum Leslie, *The UK Launches an Official Governing Body for Esports*, DOT ESPORTS (July 1, 2016, 11:52 AM), <https://dotsports.com/general/british-esports-association-3537> [<https://perma.cc/8TJ4-RAX9>]. Upon UKeSA’s failure in 2009, an esports commentator remarked,

I still believe esports needs a governing body and in particular one in the [United Kingdom], but it needs to be government driven or sponsored [and] must include the community at large, not just those wanting to profit from esports. It will be a long time before an organization of this nature can make a profit, but the advantages of a combined, rule defining organization on standards in esports would help tremendously.

Tom Souter, *E-Sports in the UK*, TP REV. (July 23, 2013), <http://www.tpreview.co.uk/blog/2013/07/23/esports-in-the-uk/> [<https://perma.cc/47Z6-FRVT>].

198. *Formation of the British Esports Association*, BRITISH ESPORTS ASS’N (June 30, 2016), <http://www.britisheports.org/press-releases.html> [<https://perma.cc/H4TL-BJWC>].

199. See *id.*

200. *Id.*

201. *About the British Esports Association*, BRITISH ESPORTS ASS’N, <http://www.britisheports.org/about-us.html> [<https://perma.cc/S3DX-RA2C>] (last visited Oct. 16, 2017).



policies, and practices from a range of stakeholders like other game developers, tournament organizers, and broadcasters.<sup>202</sup>

As evidenced by South Korea and the United Kingdom, governments have already begun to regulate the esports industry.<sup>203</sup> Interested stakeholders—from public policy officials down to individual players—seek to situate esports into broader conversations about sportsmanship and competitive play.<sup>204</sup> This last Part proposes and considers two alternatives: (1) the formation of a pan-esports governing body under federal authority and (2) the induction into an existing international esports governance organization.

#### A. *We All Need Some Regulatory Body to Lean on*

As esports leagues and professional teams continue to form in the United States, public regulators should consider forming a national pan-esports governing body with sufficient federal authority to curb anticompetitive behavior and propagate minimum industry standards to foster competition.<sup>205</sup>

##### 1. Independence by Design

Since joint-venture and developer-sponsored leagues have historically exhibited anticompetitive behavior, esports regulators must consider governance that protects consumer demands and stymies anticompetitive practices. Traditional sports joint-venture leagues do not adequately address the interests of all stakeholders but,<sup>206</sup> instead, tend toward collusive practices such as creating geographic artificial scarcity.<sup>207</sup> Without rigorous market competition, joint ventures do not provide optimal assortment of goods and services, to the detriment of consumer welfare.<sup>208</sup> Further, developer-sponsored leagues may seem like an efficient way to govern gameplay of a *single* game, but they also cause problems. Whereas control in a joint-venture model is spread equally across all franchises,<sup>209</sup> teams and players within a developer-sponsored league forfeit any control.<sup>210</sup> With developer-sponsored leagues taking such an active role in shaping esports governance,<sup>211</sup> the industry runs the risk of promoting developer interests over the interests of other stakeholders.<sup>212</sup>

Independent governance may mitigate such problems. This pan-esports governing body should avoid creating its own competitions and tournaments to ensure independence.<sup>213</sup> An independent governing body could determine

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202. *See supra* note 50 and accompanying text.

203. *See supra* Part III.A.

204. *See supra* notes 22–25 and accompanying text.

205. *See supra* Part II.D.

206. *See supra* notes 41–49 and accompanying text.

207. *See supra* Part I.B.1.b.

208. *See supra* note 43 and accompanying text.

209. *See supra* note 35 and accompanying text.

210. *See supra* Part II.D.

211. *See supra* Part I.A.2.

212. *See supra* Parts II.D, III.A.

213. *See supra* notes 183–91 and accompanying text.

minimum standards for consumers, players, teams, and leagues. Such an entity would, ideally, be structured with an advisory board of multiple stakeholders—such as government regulators representing consumer welfare, players’ unions, and professional team owners—to oversee the functions of joint-venture and developer-sponsored leagues and to facilitate negotiations with esports game developers.

At the league level, an independent pan-esports governing body can also put an end to the “dazzling array of ersatz contests and leagues going off, overlapping, and winking out like fireworks displays.”<sup>214</sup> By requiring preapproval of any competition or league offering money prizes through an audit ensuring adequate financing, the governing body can help prevent any insolvencies. All professional joint-venture and developer-sponsored leagues should be required to register as member-stakeholders and pay membership fees based on year-over-year earnings. Contractual membership agreements could then set forth more permanent benchmark rules of play.<sup>215</sup>

At the player level, the governing body, like KeSPA, should mandate registration of all esports professional players and,<sup>216</sup> additionally, mandate the registration of any counterparties that wish to employ or contract with a registered player. Failure to do so should be subject to review, penalty, or fines. If all players and players’ unions are under the purview and protection of a pan-esports governing body, then the governing body will have sufficient market power to appeal on behalf of its constituents, any exploitative rulings or egregious fines imposed by game developers.

Furthermore, an independent pan-esports governing entity could facilitate the negotiation and sale of content-distribution agreements<sup>217</sup> or even act as a clearinghouse for revenue flows.<sup>218</sup> Sales of content-distribution rights often involve significant negative externalities and transaction costs<sup>219</sup> because revenue is often contingent on the overall appeal of a game.<sup>220</sup> A governing body could propagate industry practice standards for balanced profit sharing and prohibit long-term exclusive distribution agreements.<sup>221</sup>

## 2. Federal Support Is Necessary

UKeSA’s failures,<sup>222</sup> in conjunction with the limited successes of KeSPA,<sup>223</sup> support the notion that federal support and regulatory intervention is necessary to ensure the success of a national esports governing body.<sup>224</sup>

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214. Zarley, *supra* note 11.

215. *See supra* Part II.A.

216. *See supra* note 178 and accompanying text.

217. *See supra* Parts I.B.2, II.C.

218. *See supra* notes 148–49 and accompanying text.

219. *See supra* Parts I.B, II.D.

220. *See supra* Part II.B.

221. *See supra* Part II.C.

222. *See supra* notes 195–96 and accompanying text.

223. *See supra* notes 172–83 and accompanying text.

224. *See supra* Part III.B; *see also* Souter, *supra* note 197.

Without enforcement authority, a national pan-esports body lacks legitimacy.<sup>225</sup>

KeSPA's relative successes in regulating and supporting South Korea's domestic esports industry stems from government backing by South Korea's Ministry of Culture and Tourism.<sup>226</sup> Even with this support, KeSPA lacked sufficient regulatory power to deal with Blizzard Entertainment.<sup>227</sup> Part of that difficulty may be attributed to a lack of independence.<sup>228</sup> KeSPA threatened sanctions as a league organizer, and thus a counterparty—not as a governing organization.<sup>229</sup> However, without more significant government involvement lending legitimacy, it is unlikely that an independent esports governing body would gain enough market traction to impact the stakeholder actions, compel membership, or enforce sanctions.<sup>230</sup>

One potential solution is direct legislation. By penning the Sports Broadcasting Act antitrust exemption, the federal government granted a natural monopoly to traditional sports leagues and allowed those leagues to flourish and grow.<sup>231</sup> The esports industry is unlikely to receive the same treatment,<sup>232</sup> but other forms of direct legislation may assist the development of the esports market. For example, in 2016, the French Senate implemented esports regulations that targeted exploitative fees, ensured prize payments, created minimum standards for player contracts, addressed visa issues, and established the rights of minors under the age of sixteen.<sup>233</sup> The primary disadvantage to such direct regulation is that, since the esports industry is essentially based online, changes occur quickly.<sup>234</sup> The legislative process is not anticipatory but often reactionary and likely will not be nimble or flexible enough to adapt to new changes and trends in technology and the esports market.<sup>235</sup> Regardless, the federal government should be prepared to enact legislation that promotes basic gaming rights and ethics—like protection for minors and player employees—and also supports the legitimacy of a domestic esports association.

Another option is to nest an esports association within a federal agency. For example, a domestic esports regulatory authority could be a self-governing entity under the authority of a federal agency like the Federal Communications Commission (FCC).<sup>236</sup> Since an esports organization often

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225. *See supra* note 197 and accompanying text.

226. *See supra* notes 174–74 and accompanying text.

227. *See supra* notes 179–91 and accompanying text.

228. *See supra* Part IV.A.1.

229. *See supra* notes 188–93 and accompanying text.

230. *See supra* Part II.

231. *See supra* note 77 and accompanying text.

232. *See supra* Part II.

233. *See supra* note 169 and accompanying text.

234. *See supra* Part II.A, II.C.

235. *See supra* notes 2–13 and accompanying text.

236. The FCC, the United States agency tasked with oversight of interstate communications, could also step in to directly regulate esports content distributors like Twitch.tv, YouTube, and others. *See What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [<https://perma.cc/CS3E-VJYC>] (last visited Oct. 16, 2017).

engages in political and business dealings,<sup>237</sup> an effective regulatory entity should also be granted enforcement and dispute resolution authority. KeSPA insists that its authorization of an esports game is imperative to a game's success in South Korea.<sup>238</sup> Despite this argument, Blizzard Entertainment, as a private game developer, can choose not to work with KeSPA and contract with other companies without KeSPA's intervention.<sup>239</sup> Without enforcement authority beyond mere reputational harm, an esports organization will have difficulty promulgating rules and standards that all stakeholders are willing to heed. At a minimum, regulators should grant an agency like the FCC the authority and power to enforce actions on behalf of the esports associations.

The manifold soft benefits of an independent private-public governance organization are hard to quantify. A domestic pan-esports body would be authorized to do the following: (1) provide an avenue for the community at large to combat coercive practices imposed by dominant profit-seeking stakeholders, (2) lend stability and reliability to the esports industry, thereby attracting capital investment, (3) amplify the concerns of downstream consumers and individual player interests, and (4) represent the aligned interests of the community at large in legitimizing esports as professional sports entertainment. Governmental support can only contribute further legitimacy to these aims while also buttressing the growth of the esports industry.

#### B. *Join an International Esports Association*

Should the federal government fail to provide adequate authority to a domestic pan-esports organization, the body could petition for membership in an international esports organization. Instead of regulating via multistakeholder standards-setting procedures and domestic market power, a domestic esports organization could largely defer to the regulations and sanctions of an international organization like the International e-Sports Federation ("IeSF"),<sup>240</sup> a South Korea-based global organization, or the World Esports Association ("WESA").<sup>241</sup> By joining an international esports association, the federal government may receive international pressure to grant a domestic governing body much-needed regulatory and enforcement authority.

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237. *See supra* note 63 and accompanying text.

238. *See supra* note 192 and accompanying text.

239. *See supra* note 191 and accompanying text.

240. *Member Nations*, INT'L E-SPORTS FED'N, <http://www.ie-sf.org/about/#member-nations> [<https://perma.cc/S76T-N64F>] (last visited Oct. 16, 2017); *see also* TAYLOR, *supra* note 2, at 174 ("International e-Sports Federation was launched in 2008, positioning itself as a coordinating organization between member nations (including KeSPA and a number of other organizations in Asia and Europe). One of its main goals is the standardization of esports.").

241. WESA is "the result of joint efforts between industry-leading professional esports teams and ESL, the world's largest esports company." WESA, <http://www.wesa.gg/> [<https://perma.cc/EE75-VC7B>] (last visited Oct. 16, 2017) (noting that WESA is open and inclusive and seeks to professionalize esports by "introducing elements of player representation, standardized regulations, and revenue shares for teams").

Joining an international organization has significant advantages, such as increased uniformity, sporting ethics, and standardization across all constituent countries. Uniformity will allow esports stakeholders to access international markets more readily. Conversely, by deferring to international standards, the United States sacrifices the opportunity to be a norm-maker in a rapidly growing global industry. By joining an international esports association, the United States also compromises its ability to protect the interests of its own domestic stakeholders, like game developers and independent league creators.

#### CONCLUSION

In the United States, the “Wild West” esports market is on the precipice of becoming mainstream, with large volumes of revenue soon to follow. As investment into the nascent American esports industry continues to grow, so too does the need to address regulatory deficiencies that plague the industry on every level—from the largest game developer down to the individual consumer. However, the esports industry cannot simply copy the infrastructure and ecosystem that has been built around traditional sports as an entertainment form. Conventional and existing sports-business structures, like joint-venture and developer-sponsored leagues, have the tendency to skew toward favoring the most dominant stakeholder’s interests at the expense of consumer welfare. Moreover, esports games are subject to more complicated intellectual property and antitrust issues.

Since esports cannot adopt the exact structures of its physical analogues, an independent domestic esports governing entity must be formed to accommodate rapid growth and create new legal rights or obligations. Ideally, an esports organization would have the power to set, promote, and enforce regulations on domestic participants across all esports. While oversight is necessary for the esports industry to continue to flourish, such oversight must also avoid overreach. With cautious steering, the United States could help chart the future for the esports enterprise.