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## Note

### Competing Competitions: Anticompetitive Conduct by Publisher-Controlled Esports Leagues

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#### INTRODUCTION

The esports<sup>1</sup> industry is maturing; with maturation comes attention and regulation. At the same time, the esports industry debates player compensation<sup>2</sup> in light of increased value of esports teams;<sup>3</sup> professional player associations bargain for

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1. The term esports has not been defined by either the federal government or the states. *Cf.* Sports Wagering Act, N.J. STAT. ANN. §§ 5:12A-10 (West 2018) (defining sports events as excluding “electronic sports”). As it will be used in this Note, it is often considered the “organized and competitive playing of video games.” Esports may fall into the definition of sports, which has many implications. See John T. Holden et al., *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46 (2017), for a definitional analysis and discussion of legal consequences of the classification thereof as “sport.” See also *infra* Part I.A (arguing the classification argument masks the complexity of issues in the antitrust context).

2. See Timothy Heggem, “*It’s Complicated*”: *Analyzing the Potential for Esports Players’ Unions*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 447 (2017); see also Hunter A. Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional eSports Players*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 359, 394–407 (2016) (discussing bargaining rights obtained by employee status).

3. See Christina Settini, “*Awful Business*” or the New Gold Rush? *The Most Valuable Companies in Esports Are Surging*, FORBES (Nov. 5, 2019), <https://www.forbes.com/sites/christinasettimi/2019/11/05/awful-business-or-the-new-gold-rush-the-most-valuable-companies-in-esports-are-surging>

standards and rights in their respective leagues;<sup>4</sup> the Federal Trade Commission explores regulation of tech-dependent markets like esports<sup>5</sup> and investigates loot boxes commonly sold by game publishers;<sup>6</sup> Congress calls to reverse a politically-motivated ban of a professional esports player;<sup>7</sup> and antitrust ques-

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[<https://perma.cc/VFU6-KXVF>]; see also Jurre Pannekeet, *Newzoo: Global Esports Economy Will Top \$1 Billion for the First Time in 2019*, NEWZOO (Feb. 12, 2019), <https://newzoo.com/insights/articles/newzoo-global-esports-economy-will-top-1-billion-for-the-first-time-in-2019> [<https://perma.cc/9TPE-848S>]. While many Newzoo statistics are now viewed as not credible, the one-billion-dollar estimate is incorporated by many as credible. See Cecilia D’Anastasio, *Shady Numbers and Bad Business: Inside the Esports Bubble*, KOTAKU (May 23, 2019), <https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843> [<https://perma.cc/C3HK-JA2T>].

4. E.g., Devon Huge, *The NA LCS Player’s Association Makes First Moves*, ESPORTZ NETWORK (Nov. 5, 2019), <https://www.esportznetwork.com/esports-the-nalcs-players-association-makes-first-moves> [<https://perma.cc/QQ6K-M3CK>] (discussing the player’s association for professionals in Riot Games’s league for *League of Legends*). One of the first accomplishments of the NALCS Player’s Association was to negotiate for players to be able to stream on official tournament servers. *Id.* Streaming means “any telecast, webcast, transmission, broadcast or distribution of video game content . . . to viewers not participating in the particular streamed game (whether on a live, delayed, recorded or on-demand basis) via any interface, channel, site, offering, network, application, device or other platform.” OVERWATCH LEAGUE, PLAYER STREAMING POLICY § 2; see also *Streaming*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/streaming> [<https://perma.cc/JCT2-C8MB>] (defining streaming as “the act, the process, or an instance of streaming data . . . or of accessing data that is being streamed”). While this is a far cry from the issues that plagued collective bargaining in traditional sports, it is a first and important step.

5. The FTC recently updated its intellectual property licensing guidelines in 2017. U.S. DEP’T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), <https://www.justice.gov/atr/IPguidelines/download> [<https://perma.cc/UH4T-3KET>]; see also Cecilia Kang, *F.T.C. Hearings Add to Efforts that Threaten Tech Industry*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/technology/ftc-hearings-technology.html> [<https://perma.cc/M393-NUTE>] (discussing antitrust reform in light of technological advancements).

6. On August 7, 2019, the Federal Trade Commission held a public workshop on “consumer protection issues related to video game loot boxes.” See generally FTC, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes* (Aug. 7, 2019), [https://www.ftc.gov/system/files/documents/public\\_events/1511966/slides-loot-box-8-7-19.pdf](https://www.ftc.gov/system/files/documents/public_events/1511966/slides-loot-box-8-7-19.pdf) [<https://perma.cc/JWF6-N4F9>] (slides from panels).

7. Letter from the Congress of the United States to Robert Kotick, Chief Executive Officer, Activision Blizzard 1 (Oct. 18, 2019), <https://www.wyden.senate.gov/download/101819-wyden-letter-to-activision-blizzard-re-hong-kong>

tions loom large in the distance as esports experiment with organizing competitions.<sup>8</sup> Publishers controlling major esports leagues modeled themselves after traditional sports leagues thereby drawing the natural analogy in the antitrust context. However, the existence of an intellectual rights-holder above all—the game publisher—means that esports do not map perfectly onto sports and the precedents cannot be neatly applied.<sup>9</sup> More specifically, largely ambiguous copyright protections afforded to game publishers garner significant attention, complicate the antitrust analysis and generate substantial risk for investment in the nascent market.<sup>10</sup> Highly-structured intellectual property strategy allows the game publisher to exert deep downstream control over the esports market.<sup>11</sup> Without attention and regulation, the publisher decides on the existence of the market, for the publisher as copyright holder over the game has exclusive control over the if, when, and how a game can be

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[<https://perma.cc/2RQZ-JDYU>]; see also *infra* Part II.B.2.a (arguing player bans for arbitrary or pretextual reasons, while permitted under copyright, may be used to reduce competition).

8. See, e.g., Laura L. Chao, “You Must Construct Additional Pylons”: Building a Better Framework for Esports Governance, 86 *FORDHAM L. REV.* 737, 746–49, 755–56 (2017) (raising concerns for anticompetitive conduct in esports based on mirroring of traditional sports); Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 *COLUM. J.L. & SOC. PROBS.* 177 (2019) (analyzing tying claims against publisher-controlled leagues).

9. See *infra* Part I.B.

10. See FOLEY & LARDNER, 2018 ESPORTS SURVEY REPORT 6–9 (2018), <https://www.foley.com/files/uploads/2018-Esports-Survey-Report.pdf> [<https://perma.cc/3MPQ-8NVH>] (identifying, inter alia, intellectual property rights and licensing issues as posing a substantial risk to the esports industry); Matt Morris et al., *Ten Legal Issues To Watch When It Comes to Esports*, *FORBES* (May 19, 2017), <https://www.forbes.com/sites/allabouttherupees/2017/05/19/ten-legal-issues-to-watch-when-it-comes-to-esports/> [<https://perma.cc/F75F-78MG>]. Although the industry is still considered “nascent,” the year 2019 marks the first time the global esports industry will be expected to surpass the billion-dollar revenue mark, with \$409.1 million coming from North America alone. Pannekeet, *supra* note 3.

11. See Jochen Harttung, The Issue of “Deep Control” in Professional Esports—A Critical Analysis of Intellectual Property Structures in Electronic Gaming (2015) (unpublished LL.M. thesis, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/70431/1/Harttung\\_Jochen\\_201511\\_LLM\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/70431/1/Harttung_Jochen_201511_LLM_thesis.pdf) [<https://perma.cc/LQ5U-M9LX>] (critiquing this deep control of downstream markets based on ambiguity of United States copyright jurisprudence).

streamed to others. The market is dependent upon a single actor: a potential monopolist.<sup>12</sup>

Out of all the stakeholders in esports, independent tournament organizers are in the worst pinch.<sup>13</sup> A case study of the 2013 Evolution Championship Series (EVO) best illustrates the risks to such organizers. EVO represents the “largest and longest-running” fighting game tournament.<sup>14</sup> Players pay an entry fee to compete in games such as *Super Smash Bros. Melee*, a Nintendo fighting game, where contestants have the chance to win prize money and, more importantly, recognition in the fighting game community that could lead to sponsorship by a team or company.<sup>15</sup> In return, the tournament organizers have the opportunity to sell tickets, attract advertisers, and monetize the end product: video game streams.<sup>16</sup>

However, video game tournaments are effectively economic parasites, or symbionts, depending on the perspective. Without the publisher’s game, there would be no tournament, no professional player, and no advertising. Therefore, when users—purchasers of the video game<sup>17</sup>—begin interacting with the intellectual property beyond the intended use<sup>18</sup> and create user-

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12. See generally Miroff, *supra* note 8 (determining that publishers represent potential monopolists of the esports market or the individual-game markets).

13. The independent organizer is highlighted as opposed to the game publisher organizer because, as explained in Part II, the copyright most likely falls to the game publisher absent congressional, judicial, or contractual intervention.

14. EVO CHAMPIONSHIP SERIES, <http://evo.shoryuken.com> [<https://perma.cc/S98A-VAF6>].

15. See *Tournament Format*, EVO CHAMPIONSHIP SERIES, <http://evo.shoryuken.com/tournament-format> [<https://perma.cc/3FUV-FMWW>].

16. *An Introduction to the Esports Ecosystem*, ESPORTS OBSERVER, <https://esportsobserver.com/the-esports-eco-system> [<https://perma.cc/C25R-8SVG>].

17. Video games are no longer solely products. John Breyault, *Nat’l Consumers League, Making Money from GaaS: Consumer Protection in an Evolving Video Game Industry*, in *Inside the Game*, *supra* note 6, at 57–73. The greater software-as-a-service phenomenon has gripped the video game industry forcing publishers to commit significant resources to the maintenance of the original product. See Sean F. Kane, *Treasure or Trifle? A Macro Look at Microtransactions*, in *INSIDE THE GAME*, *supra* note 6, at 2, 5–13. But it also allows the publishers to benefit from the longer lifespan through drip pricing (e.g., microtransactions) and organized competitive play. Breyault, *supra* note 17, at 61–63.

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

generated content<sup>19</sup> such as memes<sup>20</sup> or streams,<sup>21</sup> friction sparks battle over ownership.<sup>22</sup>

In 2013, that friction led Nintendo to exercise its copyright protections, call up the EVO organizers, and demand that the tournament pull *Super Smash Bros. Melee* entirely.<sup>23</sup> The organizers managed to negotiate that the game would be played, but not broadcasted.<sup>24</sup> But, when the announcement led to public outcry, Nintendo ultimately relented and permitted the broadcast.<sup>25</sup> As this situation illustrates, without such good-will arrangements or the current industry self-regulation favoring contractual symbiosis,<sup>26</sup> tournament organizers are left exposed to

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[perma.cc/MB6F-93BH](https://perma.cc/MB6F-93BH)] (indicating that game publishers intended such competitive use).

19. See T.L. TAYLOR, WATCH ME PLAY: TWITCH AND THE RISE OF GAME LIVE STREAMING 10 (2018) (describing user-generated content as the “interweaving of original creative material with existing intellectual property”).

20. A meme is defined as “an idea, behavior, style, or usage that spreads from person to person within a culture” or “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.” *Meme*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/meme> [<https://perma.cc/KR6Q-GVVR>]. See generally Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331 (2005) (discussing copyright implications of memes).

21. See *supra* note 4 (defining streaming).

22. Cf. TAYLOR, *supra* note 19, at 21–22, 212–18 (describing the tension between cultural innovation and existing legal frameworks).

23. Jenna Pitcher, *Nintendo Wanted To Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (July 11, 2013), <https://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee> [<https://perma.cc/27ZJ-HYK6>].

24. *Id.*

25. Steven Bogos, *Nintendo Will Officially Sponsor the Next EVO Fighting Tournament*, ESCAPIST (July 6, 2014), <https://www.escapistmagazine.com/news/view/135927-Nintendo-Will-Officially-Sponsor-The-Next-EVO-Fighting-Tournament> [<https://perma.cc/NW23-DUN2>].

26. See, e.g., *Dota 2 Tournament License and Paid Spectator Service Agreement*, VALVE CORP., [cdn.dota2.com/apps/dota2/leagues/league\\_terms.pdf](http://cdn.dota2.com/apps/dota2/leagues/league_terms.pdf) [<https://perma.cc/SXH8-UGXT>] (setting forth a contractual arrangement between independent tournament organizers and the game publisher). While Valve is not unique in providing a Tournament License, the competitive scene around Valve’s products, namely *Dota 2*, does not conform to the traditional league structure. Cf. Vlad Savov, *Dota 2 Is the World’s Richest E-Sport, So Why Aren’t Its Players Happy?*, VERGE (May 13, 2015), <https://www.theverge.com/2015/5/13/8597121/dota-2-professional-gaming-tournaments-the-international> [<https://perma.cc/VU9K-PQMZ>] (noting how Valve is unique for having “laissez-faire principles” that have resulted in the “fragmentation of its self-organizing competitive scene”). Valve has provided some structure with the major/minor

high liability should any game publisher enforce its copyright protections. Coupled with the growing trend of publisher-controlled leagues<sup>27</sup> wherein the entity that holds the rights to the game also partakes in the monetization of the competitive scene, circumstances like this raise alarming concerns over anticompetitive practices and threatened monopolization. With a series of DMCA<sup>28</sup> takedown notices, player bans, or license revocations, the game publisher could defeat any competing leagues thereby gaining a monopoly over their title's viewership.

This Note highlights the problematic rise of publisher-controlled leagues that can manipulate deep control<sup>29</sup> over video game copyright protections to engage in anticompetitive practices seen in traditional sports leagues. Part I begins by discussing the concept of "sportsification"—the application of sports economics to video games so as to produce a competitive scene. This leads to a discussion, first, of the video games and underlying copyright protections afforded to game publishers and the limits on licensing these rights. Next, it details the economic structure of traditional sports markets, antitrust law's rocky history with sports, and a critique of the competitive balance argument. Finally, Part I explains esports (the mix of video games and sports), recognizes the antitrust questions left unexplored, and focuses on the problem of publisher-controlled leagues.

Part II then identifies the problem in copyright law wherein limits to licensing are recognized but ill-defined, thereby allowing publishers to experiment with control over downstream markets. It then delineates (relatively) bright-line antitrust problems found in traditional sports history and pairs them to

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system, but this deviates from the single-tournament structure championed by traditional sports like basketball, football, and baseball.

27. The publisher may not be the actual league operator. Generally, an entity separate from the publisher operates the league; however, the two appear to be integrated in fact. *See* Bayliss, *supra* note 2, at 364 (discussing the questionable separation between Riot Games, the publisher of *League of Legends*, and the North American League of Legends Championship Series, the league operator).

28. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C. (2018)).

29. Harttung, *supra* note 11, at 46, uses the term "deep control" to describe the game publisher's control over other stakeholders in the downstream esports market such as tournament organizers, teams, and players. Because it resonates in the intellectual property and antitrust contexts, it will be used throughout this Note to refer to the same concept.

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traditional licensing arrangements in order to show that the economic practices by publisher-controlled leagues are paradoxically legitimate exercises of copyright and unreasonable restraints on sports competition. Part II focuses on four practices: controlling pool of potential players through bans, territorial allocation through field of use restrictions, restricting supply of esports content through pooled broadcasting rights, and restricting supply of esports content to consumers through pure exclusivity and refusal to deal. In the end, this paradox leaves a fragile status quo reliant on the shaky system of publisher-regulation while the market grows.

Finally, Part III proposes a statutory solution based, in part, on the Music Modernization Act (MMA).<sup>30</sup> After discussing why online music streaming serves as an imperfect model for a solution to publisher-controlled leagues, Part III begins to outline the necessary elements of a so-called Esports Competition Modernization Act. In order to run a tournament, the game publishers would opt-in to a compulsory licensing scheme upon registration of the work with the Copyright Office. Upon opting-in, any tournament organizer could benefit from the irrevocable statutory license for competitive play, so long as they abide by the conditions set forth therein, including payment to the publisher of a royalty based on tournament revenue. A minimally-invasive rate setting board would facilitate collection and distribution of royalties between publishers and independent tournament organizers. In essence, this system ensures that a publisher may only have a league or operate a tournament on the same playing field as independent operators—competing competitions. And, in the end, the competing competitions solution serves as a better alternative to regulatory oversight, changes to copyright law, or reliance on antitrust law, each of which suffer from critical flaws.

### I. ESPORTS: SPORTS & ENTERTAINMENT

Part I will discuss the three foundational pillars of esports antitrust concerns arising from the surge in publisher-controlled leagues: video games as copyright-protected entertainment, league structures as the keystone of sports economics, and esports—the market around the competitive playing of video

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30. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C. (2018)).

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games. The pillars stem from the central debate in esports academic literature: the classification of esports as sports or entertainment.<sup>31</sup> This Note recognizes the importance of the distinction but favors the concept of sportsification—the application of sports economics to video games. To be more exact, publishers are able to use their intellectual property rights over their video games to control a league and reproduce even anticompetitive sports practices.

Video games form the core of the esports industry, and the second portion of Part I outlines the copyright protections over video games. First, ambiguous copyright protections afforded to game publishers lead to deep and downstream control over other stakeholders in esports.<sup>32</sup> While antitrust law places theoretical limits on uses of copyright rights, those limits are relatively unexplored by the courts. Instead, creative licensing strategies allow the publisher to significantly manipulate the market and potential competitors.<sup>33</sup> Some markets, such as music, have found solutions to antitrust concerns with intellectual property licensing through compulsory licensing schemes.<sup>34</sup>

Esports used traditional sports as a model to monetize on the competitive play of those copyright-protected video games. The third portion of Part I tracks the economic structure of sports,<sup>35</sup> the antitrust concerns from the 1950s onwards,<sup>36</sup> and antitrust law's unspoken assumption that competitive balance is achieved by a single championship.<sup>37</sup> The mirrored business models of sports and esports largely grounded in self-regulation lead to the same economic concerns highlighted in the 1950s Congressional hearings on monopolistic tendencies in sports and after: regional monopolies, bottlenecking players from entering competing leagues, pooled broadcast rights, and pure exclusivity.

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31. *See infra* Part I.A.

32. *See infra* Part I.B.1.

33. *See infra* Part I.B.2.

34. *See infra* Part I.B.2.

35. *See infra* Part I.C.1.

36. *See infra* Part I.C.2.

37. *See infra* Part I.C.3.



Finally, the fourth portion of Part I explains the current economic practices in the esports industry, the different stakeholders, and the growing concern for anticompetitive conduct.<sup>38</sup> In particular, this Note focuses on the economic practices giving rise to antitrust concerns in the sports context.<sup>39</sup> In the end, many questions about the application of antitrust to esports are left as unexplored territory.<sup>40</sup> Max Miroff and, to a lesser extent, Laura Chao have addressed antitrust in esports, but this Note is the first to tie together esports intellectual property concerns resulting from publisher-controlled leagues to readily-identifiable anticompetitive sports economics.<sup>41</sup>

#### A. ESPORTS: SPORTS OR ENTERTAINMENT?

Esports is the competitive playing of video games.<sup>42</sup> The evolution of esports is relatively short but spans the history of video games. The first organized competitive playing of video games occurred via arcade machines during the 1970s and 1980s.<sup>43</sup> During that time, competition took place through high scores, though a few games, such as *Pong*,<sup>44</sup> introduced concurrent competitive play.<sup>45</sup> Yet play was localized and competition was inherently limited to those physically present.<sup>46</sup> The second wave of esports, spanning from the 1990s to 2010, crystalized as the cost of bandwidth went down, thereby allowing players to connect online.<sup>47</sup> During this time, games like *StarCraft* (1998),

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38. See *infra* Part I.D.1.

39. There are other antitrust concerns with player unionization. See, e.g., Harris Peskin, *Unionization in Esports*, ESPORTS B. ASS'N J., Oct. 2019, <https://esportsbar.org/journals/2019/9/11/unionization-in-esports> [<https://perma.cc/D48A-RWYS>] (discussing antitrust concerns with mandatory salary caps and collective bargaining).

40. See *infra* Part I.D.2.

41. See *infra* Part I.D.3.

42. Holden et al., *supra* note 1, at 47–48.

43. TAYLOR, *supra* note 19, at 4.

44. *Pong* is a game where players control a paddle guarding a goalpost. Atari *PONG*, CTR. FOR COMPUTING HIST., <http://www.computinghistory.org.uk/det/4007/Atari-PONG/> [<https://perma.cc/HPX2-5EBP>]. A ball bounces around the screen and the player tries to get the ball into the opposing player's goalpost. *Id.*

45. See T.L. TAYLOR, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 184 (2012).

46. See TAYLOR, *supra* note 19, at 4.

47. See *id.*; Dean Takahashi, *Team Liquid's Steve Arhancet Tells Us How*

*Counter Strike* (2000), and *Defense of the Ancients (DOTA)* (2003)<sup>48</sup> invited players to compete against other human players repeatedly and consistency of performance began to matter.<sup>49</sup> However, latency issues with online connectivity forced competitive play to remain relatively localized at Local Area Network (LAN) tournaments.<sup>50</sup> With early adopters of the Internet often attending these LAN events, networking nevertheless allowed for the formation of a true esports industry largely modeled after traditional sports.<sup>51</sup> But it was Twitch<sup>52</sup> that unshackled esports from its locality in 2011 and made esports truly a global phenomenon.<sup>53</sup> Twitch is a live streaming site that serves as a platform for esports: the world can tune in instantly.<sup>54</sup> The growth of live streaming transformed esports from merely competitive play—

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*To Run an Esports Team*, VENTUREBEAT (Apr. 28, 2017), <https://venturebeat.com/2017/04/28/team-liquids-steve-arhancet-tells-us-how-to-run-an-esports-team/> [<https://perma.cc/6XRT-JQYN>].

48. Games such as *Pong* are limited in connectivity. See *Atari PONG*, *supra* note 44. The second wave introduced concurrent and competitive online play where success was not found in beating a computer but in beating another person or even another team. See Takahashi, *supra* note 47.

49. See generally ROLAND LI, GOOD LUCK HAVE FUN: THE RISE OF ESPORTS (2016) (discussing the evolution of competitive playing of videogames).

50. LAN tournaments are those which operate on a single localized network spanning no more than a couple buildings and most often confined to a single room. See *Local Area Network*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/local%20area%20network> [<https://perma.cc/KBW5-XSY8>].

51. Traditional sports shall be used to refer to baseball, football, and basketball collectively. While others, such as soccer, should fall well within the definition, these sports stand apart because of congressional and judicial scrutiny. See *e.g.*, Sports Broadcasting Act, 15 U.S.C. § 1291 (2012) (applying to “organized professional team sports of football, baseball, basketball, [and] hockey,” but not soccer).

52. Twitch.tv is an online streaming platform designed with esports in mind. See TAYLOR, *supra* note 19, at 3–4. Users can broadcast their play online directly to other users who can interact and comment in the chat. *Id.* Most esports tournaments are broadcast through Twitch today, though some companies such as Valve (Steam.tv), Microsoft (Mixer), and even Facebook (Facebook Gaming) are attempting to take a slice of the pie. See, *e.g.*, Catherine Ellis, *Facebook Challenges Twitch with Exclusive Esports Streaming Deal*, TECHRADAR (Jan. 23, 2018), <https://www.techradar.com/news/facebook-challenges-twitch-with-exclusive-esports-streaming-deal> [<https://perma.cc/5AGD-KS4K>].

53. TAYLOR, *supra* note 19, at 4.

54. *Id.* at 3–4.

as T.L. Taylor puts it, a “sports product”—into media entertainment,<sup>55</sup> from a niche and ancillary market to a motive for video game creation.<sup>56</sup>

But therein lies the question: are esports sports or entertainment? The rise of esports triggered a vigorous debate over whether these games should legally be considered sports and cemented the comparison as the starting point of all analysis.<sup>57</sup> On the one hand, esports is entertainment. Esports rely on media rights to monetize,<sup>58</sup> depend on online consumer spectatorship compared to in-person attendance,<sup>59</sup> and stem from video games that were, at one point, only considered entertainment.<sup>60</sup> On the other hand, esports are modeled after sports. Even if society may reject esports as sport,<sup>61</sup> the leagues have the same economic stakeholders one would find in a sports league.<sup>62</sup>

Maybe more importantly, the distinction is relevant legally. Sports are treated differently at the federal and state levels. For example, in gaming law the Professional and Amateur Sports

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55. *Id.* at 4.

56. Consider the string of games since 2016 that have branded themselves, from the very release, as esports titles: *Overwatch* (2016), *Fortnite* (2017), and *PlayerUnknown's Battlegrounds (PUBG)* (2017). See Webster, *supra* note 18 (“It was a unique opportunity in that it was Blizzard’s first new [intellectual property] in 17 years, and so we were building this new IP, this new game franchise. It was an opportunity to build something from the beginning of the game’s lifecycle. . . . [W]e thought, well, ‘How do we build the entire ecosystem around competitive *Overwatch*?’”).

57. See generally Holden et al., *supra* note 1 (discussing the classification of esports as sports).

58. See *infra* Parts I.B., I.D.

59. Robert Elder, *The Esports Audience Is Escalating Quickly*, BUS. INSIDER (Mar. 20, 2017), <https://www.businessinsider.com/the-esports-audience-is-escalating-quickly-2017-3> [<https://perma.cc/7SD6-WPL7>] (comparing 173,000 in-person attendees to 46 million unique viewers online). Of course, sports also rely on broadcasting, which is closer to the esports viewership experience.

60. See *supra* notes 42–56 (discussing the evolution of esports); *infra* Part I.B; see also Gary Larson, *The Far Side: Hopeful Parents*, WASH. POST, Oct. 15, 1990, at B12 (depicting two parents imagining a future where their son can make money from his video game hobby).

61. For most people, there is not the same physical element—gross motor skills such as running, lifting, or throwing. See generally Holden et al., *supra* note 1 (discussing the physical activity involved in esports).

62. See also *infra* Part I.D.1.

Protection Act once regulated sports betting;<sup>63</sup> now states have taken up this mantle.<sup>64</sup> The Wire Act exempts sporting events or contests from its prohibition on wagering.<sup>65</sup> In terms of education, integrating esports into existing collegiate sports has implications for Title IX balance in colleges.<sup>66</sup> Some sports have even received antitrust exemptions in regards to pooled broadcasting rights.<sup>67</sup> Finally, courts and regulators looking at the esports industry will analogize to the sports and entertainment industries in the antitrust context.<sup>68</sup> Therefore, it is necessary to consider the entertainment (intellectual property) and sports antitrust jurisprudence surrounding each.

#### B. ENTERTAINMENT: INTELLECTUAL PROPERTY PROTECTIONS OF VIDEO GAMES

If esports have modeled themselves after traditional sports economics, the defining quality distinguishing the two is the intellectual property rights held by the game publisher.<sup>69</sup> Put another way: no one owns the game of football, but someone owns games like *Overwatch*.<sup>70</sup> The National Football League lacks the capacity, both legally and physically, to stop or otherwise place conditions on every group that would like to play football, ranging from recognized state high school conferences to a collection of neighborhood kids playing a pickup game. But Blizzard is legally well within its rights to prevent players or entire leagues from playing *Overwatch*, and Blizzard can effectively enforce those bans with just the click of a mouse. This Part first looks to United States copyright law that has evolved to protect creative works like video games.<sup>71</sup> Then, it will be shown that the courts

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63. 28 U.S.C. §§ 3701–3704 (2012), *declared unconstitutional* by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

64. *E.g.*, Sports Wagering Act, N.J. STAT. ANN. §§ 5:12A-10 to -19 (West 2018) (defining sports events as excluding “electronic sports”).

65. 18 U.S.C. § 1084 (2012); *see also* 18 U.S.C. § 224 (2012) (criminalizing “bribery in sporting contests”).

66. *See* Holden et al., *supra* note 1, at 56–59.

67. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

68. *See, e.g.*, Miroff, *supra* note 8.

69. *Id.* at 179–80.

70. *Id.* Activision Blizzard is the publisher of *Overwatch*, a team-based first-person shooter. *About*, ACTIVISION BLIZZARD, <https://overwatchleague.com/en-us/about> [<https://perma.cc/9GTJ-9AL4>].

71. *See generally* 17 U.S.C. §§ 101–805 (2018) (codifying copyright laws in the United States).

have failed to examine the exact protections available to video game rights holders, thereby leaving the industry to play at the fringes through self-regulation. Strategic licensing agreements take advantage of this ambiguity progress game publisher control, possibly in excess of actual rights. Finally, this Part highlights the limitations on intellectual property licensing set forth by courts and the black letter law, including antitrust concerns and compulsory licensing schema.

### 1. Copyright Protections of Video Games: Protection, Exclusive Rights, and Licensing

The game publisher creates a video game, sometimes with the monetization of interactive entertainment in mind; to achieve this, the publisher sells or licenses intellectual property rights.<sup>72</sup> The assets produced through the game creation process can be protected through patents (e.g. systems or overlays for spectatorship<sup>73</sup>), trademarks (e.g. game names or iconic phrases), and trade secrets (e.g. game balance process<sup>74</sup>). However, in the end, video games are largely protected via copyright.<sup>75</sup> Copyrightable materials are “original works of authorship fixed in any tangible medium of expression.”<sup>76</sup> They do not include any “idea, procedure, process, system, methods of operation, concept, principle, or discovery.”<sup>77</sup> Although video games

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72. See *supra* note 56. Miroff, *supra* note 8, at 215, generally disagrees with the development-incentivization argument, citing the disproportionate revenue generated from esports relative to game sales. However, even if it is a secondary consideration, copyright law seeks to promote that innovation. U.S. CONST. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

73. E.g., Video Game System with Spectator Mode HUD, U.S. Patent No. 9,878,252 (filed July 26, 2016). This patent is for an overlay that is used to enhance the viewership experience of online spectators for the game of *League of Legends*. *Id.*

74. The process behind making changes to the game is a highly guarded secret of each publisher. See Kyle E. Conklin, *Trade Secrets in the Video Game Industry*, OBER|KALER: IP WATCH (May 22, 2009), <https://www.jdsupra.com/legalnews/trade-secrets-in-the-video-game-industry-44015/> [<https://perma.cc/S8M6-8PY7>]. Finding game balance that keeps players playing and viewers interested is the key to selling the game and its related esports content.

75. See 17 U.S.C. § 102(a)(6) (2012); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983).

76. 17 U.S.C. § 102(a).

77. *Id.* § 102(b).

are not listed among the eight categories of works under 17 U.S.C. § 102, courts have interpreted “literary works” to include the underlying computer code and “motion pictures and other audiovisual works”<sup>78</sup> to protect the audiovisual content of video games.<sup>79</sup>

Copyright attaches at the fixation of the work. A work is fixed when “its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>80</sup> Courts recognize fixation of the audiovisual work when the game is permanently embodied in memory devices from which they can be perceived with the aid of the other components of the game—i.e., the console and television.<sup>81</sup>

Once attached, copyright protects the game’s “story, characters, imagined environments and geographic locations, music, graphics . . . [and] the entire game.”<sup>82</sup> Courts have also interpreted the copyright to extend to every single iteration of the gameplay while recognizing that.<sup>83</sup> Arguably, because the game publisher has intellectual property rights over every possible iteration of gameplay, those rights equally extend to online performance of the games through streaming, despite any interactivity by the player.<sup>84</sup>

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78. See, e.g., *League of Legends*, COPYRIGHT.GOV, <https://www.copyright.gov/> (follow “Search Copyright Records” hyperlink; then search “League of Legends” in Basic Search; select copyright number PA0002065995) [<https://perma.cc/L4SY-JCP8>] (showing copyright for the game *League of Legends* filed, most recently, under “motion picture”).

79. Kyle Coogan, *Let’s Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 381, 385–86 (2018).

80. 17 U.S.C. § 101.

81. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 856 (2d. Cir. 1982).

82. S. GREGORY BOYD ET AL., VIDEO GAME LAW 21 (2019).

83. *Midway Mfg. Co., v. Artic Int’l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983) (“The question is whether the creative effort in playing a video game is enough like writing or painting to make each performance of a video game the work of the player and not the game’s inventor. We think it is not.”). *But see* Ryan Fairchild, *Thirty-Five Years Without Player Rights in Gameplay*, ESPORTS B. ASS’N J., Oct. 2019, <https://esportsbar.org/journals/2019/9/11/player-rights-in-gameplay> [<https://perma.cc/MF99-624B>] (arguing that the interactivity argument is becoming more convincing).

84. See generally Elizabeth Brusa, Comment, *Professional Video Gaming: Piracy that Pays*, 49 J. MARSHALL L. REV. 217 (2015) (analyzing the potentially infringing content of real-time streaming, archived video, tutorials, and walk-

The exclusive rights of a copyright owner are enumerated in 17 U.S.C. § 106. Particular to the esports context are the rights of reproduction,<sup>85</sup> derivative works,<sup>86</sup> and public performance.<sup>87</sup> Reproduction rights protect against exact or substantial copying.<sup>88</sup> Derivative works are those “based upon one or more preexisting works, such as a . . . motion picture version, . . . art reproduction, . . . or any other form in which a work may be recast, transformed, or adapted.”<sup>89</sup> Common derivative works include translations, motion picture adaptations of literary materials, and new software versions of an existing computer program.<sup>90</sup> An author of a derivative work gains copyrights in the enhancement or additions only, provided that the author of the preexisting work duly authorized the author.<sup>91</sup> Finally, the right to perform publicly is to “recite, render, play, dance, or act [a work] . . . or, in the case of a motion picture or other audiovisual work, to show its images in any sequence” at “a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family . . . is gathered.”<sup>92</sup> These exclusive rights are turned into a final product in the esports market—video game live-play or streams. The author may exclude all others from capitalizing on these rights; exclusivity is the copyright owner’s greatest advantage.

One means of enforcing exclusivity is through the Digital Millennium Copyright Act (DMCA)<sup>93</sup> takedown procedure. On

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thoughts of video gameplay). See also *infra* Part II.B, for an examination of the control exercised by publisher-controlled leagues.

85. 17 U.S.C. § 106(1).

86. *Id.* § 106(2).

87. *Id.* § 106(4).

88. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 618 (7th Cir. 1982), *superseded by statute on other grounds*, FED. R. CIV. P. 52(a) (clarifying that courts should apply the “clearly erroneous” test in reviewing findings of fact by the court).

89. 17 U.S.C. § 101.

90. U.S. COPYRIGHT OFFICE, CIRCULAR 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS 1 (2013).

91. *Id.* at 2.

92. 17 U.S.C. § 101; see *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278–79 (4th Cir. 1989) (concluding that playing a pay-for-play arcade machine constitutes a public performance); *Valve Corp. v. Sierra Entm’t*, 431 F. Supp. 2d 1091, 1098 (W.D. Wash 2004) (extending *Red Baron* to playing a game at a cyber-café).

93. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at scattered sections of 17 U.S.C. (2018)).

the one hand, the DMCA provides a safe harbor for online service providers (e.g. Twitch) in the event users upload infringing content.<sup>94</sup> On the other hand, online service providers are obligated to take down content upon receiving a notice of infringement—the online equivalent of a cease-and-desist—from the rights holder.<sup>95</sup> In the video game context, publishers have issued DMCA takedown notices in response to online videos when users fail to obtain a license.<sup>96</sup> This is an important defensive mechanism available to publishers to enforce their copyright exclusivity.

Copyright holders can also engage in various forms of strategy other than enforcing the exclusivity of their rights. The rights holder has the ability to sell the property, license the property, collaborate with competitors and customers to enhance the property, or even give it away.<sup>97</sup> Licensing property includes dividing up the intellectual property by right (only authorizing the making of derivative works, but not the performance thereof) or by field of use restrictions (limiting geography, use, product, etc.).<sup>98</sup> Through careful licensing, publishers can sell individual or grouped parts of the copyright, like separating the rights to make a movie and the rights to make a comic book based on the video game world and characters. In fact, through strategic licensing, the possibilities are nearly limitless.

## 2. Lacking Limitations to Video Game Licensing

What is less clear is what copyright holders cannot do.<sup>99</sup> Video game publishers cannot control their intellectual property

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94. *Id.* § 512(c).

95. *Id.* § 512(c)(1)(C).

96. *E.g.*, Dan Hagen, *Fair Use, Fair Play: Video Game Performances and “Let’s Plays” as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245, 253–54, 257–58 (2018) (describing takedown notices, particularly those issued by Nintendo against the EVO Fighting Games Championships and Let’s Plays on YouTube).

97. William W. Fisher III & Felix Oberholzer-Gee, *Strategic Management of Intellectual Property: An Integrated Approach*, 55 CAL. MGMT. REV. 157, 159–68 (2013).

98. Tyler Maddy, *The Shifting Subject Matter of IP Licensing*, in INTELLECTUAL PROPERTY LICENSING STRATEGIES: LEADING LAWYERS ON ANALYZING TRENDS IN IP LICENSING AND DRAFTING EFFECTIVE AGREEMENTS 10–12 (2016).

99. *But see* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 780 F. Supp. 1283, 1290 (N.D. Cal. 1991) (“Copyright protection does not accord a copyright



in four relevant instances: other copyrights, fair use, copyright misuse, and compulsory licenses. Most of these limitations are ill defined and provide little assistance in determining legitimate boundaries of a publisher's control over its intellectual assets.

First, video game publishers cannot control the copyrights of others. The courts in the 1980s faced the argument that players should receive copyright over their individual performances of the game.<sup>100</sup> This independent interactivity argument best presented in *Midway Manufacturing Co. v. Artic International, Inc.*<sup>101</sup> is seeing a resurgence in light of complex gameplay by the players.<sup>102</sup> Players increasingly contribute to the outcome of the game—including possibly exceeding intended game play, e.g., exploitation of bugs—and that original and fixed performance

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owner complete control over all possible uses of the protected work.”), *aff'd*, 704 F.2d 1009 (9th Cir. 1992)

100. *Atari Games Corp v. Oman*, 888 F.2d 878, 880 (D.C. Cir. 1989) (reversing denial of copyright registration by author of game when Register of Copyrights erroneously said that the audiovisual elements are “created randomly by the player and not by the author of the video game”); *Midway Mfg. Co., v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983), *cert. denied*, 464 U.S. 823 (1983); *see also Williams Electronics, Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982). In essence, the interactivity argument suggests that people, in playing the video game, control the sequence of images on the screen in such a way that their original and fixed performance is the first fixation and should, at the very least, merit copyright protection as a co-author of the performance. *Williams Electronics*, 685 F.2d at 874. The argument was rejected because

[p]laying a video game is more like changing channels on a television than it is like writing a novel or painting a picture . . . [the player] cannot create any sequence he wants out of the images stored on the game's circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose.

*Midway Mfg. Co.*, 704 F.2d at 1012. While this may have been true for the game at issue, *Pac-Man*, this is less true for popular games today like *Fortnite* or *Minecraft*.

101. *Midway Mfg. Co.*, 704 F.2d 1009.

102. Tori Allen, Note, *What's in a Game: Collective Management Organizations and Video Game Copyright*, 8 U. NEV. L.V. GAMING L.J. 209, 215 (2018) (arguing that user-generated content could result in copyrightable works); Fairchild, *supra* note 83 (“While courts to date have effectively held that video game players have no copyrights in their gameplay, those decisions derive from games like *Pac-Man* and *Galaxian*, which bear little resemblance to contemporary games. With the rise of increasing video game complexity, more sophisticated play, and new judicial tests involving copyrights in software output, a legal window may be opening for a player or influencer to challenge old precedent.”).

may result in copyrights, either as independent works, co-authored works or authorized derivative works.<sup>103</sup> However, such arguments have consistently been rejected.

Second, video game publishers cannot control fair use of the intellectual property. Designed to encourage creative activity for the public good, fair use is a defense to infringement of copyright that excuses particular conduct, such as criticism, comment, and teaching, or conduct passing muster after an analysis of the purpose of the use, the nature of the work, the amount used, and the effect of the use on the market.<sup>104</sup> This argument suggests that players contribute significant creative effort in the creation of the esports content so as to transform the game during the stream to such a high degree that it no longer qualifies as infringing.<sup>105</sup> But there do not appear to be any cases claiming to extend fair use to any play.

Next, antitrust—through the doctrine of copyright misuse—provides a third limitation. Despite the seeming paradox of exclusivity and antitrust law’s promotion of competition, the two laws “are complementary efforts to promote an efficient marketplace and long-run, dynamic competition through innovation.”<sup>106</sup>

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103. Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1548–50 (2013) (raising possibility of independent copyrights based on increased interactivity, expressing skepticism towards any intent to create a joint work, and finding the play by players to constitute an authorized derivative work as most plausible); Allen, *supra* note 102, at 218.

104. 17 U.S.C. § 107 (2018); Allen v. Acad. Games League of Am., 89 F.3d 614, 616 (9th Cir. 1996) (implying in dicta that “[e]ven if the playing of a board game could be classified as public performance under copyright law, the ‘performance’ of the games by tournament organizers would constitute fair use”); Valve Corp. v. Sierra Entm’t Inc., 431 F. Supp. 2d 1091 (W.D. Wash 2004) (declining to extend *Academic Games* to games at a cyber-café); Hagen, *supra* note 96.

105. Hagen, *supra* note 96, at 265–71 (arguing that Let’s Plays—a “recording of gameplay footage made for the benefit of an audience”—are fair use of a game publisher’s copyright); Jihan Joo, Note, *Public Video Gaming as Copyright Infringement*, 39 AM. INTEL. PROP. L. ASS’N Q.J. 563, 601 (2011) (arguing competitive and communal video gaming are fair use of a game publisher’s copyright).

106. HERBERT HOVENKAMP ET AL., *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* 1–14 (3d ed. 2018) (quoting Atari Games Corp. v. Nintendo of Am., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

Copyright misuse, borrowed from the doctrine of patent misuse,<sup>107</sup> is a defense to infringement claiming that the copyright holder has exceeded the monopoly provided by the copyright.<sup>108</sup> If the “copyright is being used in a manner violative of the public policy embodied in the grant of a copyright,” then the holder may be estopped from claiming infringement.<sup>109</sup> This does not necessarily mean that the copyright is used in violation of the antitrust laws—the doctrine extends beyond that—but violations of antitrust are likely examples of misuse.<sup>110</sup> Regardless, the ambiguous language of “violative of the public policy” has not been well-clarified by the courts and provides little guidance for copyright holders.<sup>111</sup>

Finally, certain industries, like music, have responded to licensing difficulties through statutes imposing compulsory licensing.<sup>112</sup> Music, like video games, is equally protected by copyright.<sup>113</sup> It is complex and involves a number of different

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107. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 973 (4th Cir. 1990) (finding a defense of copyright misuse predicated upon the defense of patent misuse). Unlike patent misuse, copyright misuse did not find much success in the courts. Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L. & POL’Y 565, 579 (2006) (finding only three successful defenses out of the thirty-two attempts between 1990 and 2006).

108. *Lasercomb*, 911 F.2d at 976. Patent misuse stemmed from concerns that patents would be used to restrain competition for items not covered by the patent. *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 491–93 (1942), *abrogated in part by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (holding that the mere fact that a product is patented does not support a presumption of market power). Four circuits extended the same logic to copyrights by recognizing the limitation to copyright use contrary to the public policy of the original grant in U.S. CONST. art I, § 8, cl. 8: to “promote the Progress of Science and useful Arts.” See also *Video Pipeline v. Buena Vista Home Entm’t*, 342 F.3d 191, 204 (3d Cir. 2003); *Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 772, 793 (5th Cir. 1999); *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518 (9th Cir. 1997); *Lasercomb*, 911 F.2d at 975.

109. Ekstrand, *supra* note 107, at 575 (quoting *Lasercomb Am., Inc.*, 911 F.2d at 970).

110. *Id.*

111. See also Thomas Cotter, *Misuse*, 44 HOUS. L. REV. 901, 925–32 (2007) (analyzing inconsistent standards for copyright misuse).

112. See generally U.S. COPYRIGHT OFFICE, CIRCULAR 73A: COMPULSORY LICENSING FOR MAKING AND DISTRIBUTING PHONORECORDS (2019), <https://www.copyright.gov/circs/circ73.pdf> [<https://perma.cc/UB28-NALM>] (outlining the compulsory license for making and distributing phonorecords in 17 U.S.C. § 115 (2018)).

113. 17 U.S.C. § 102(a)(7).

licenses including composition (whose author is the composer, but whose owner may be the publisher) and sound recording (whose author is the performer) licenses.<sup>114</sup> When streaming services like Spotify and Apple Music want to purchase these licenses en masse, the streaming service first negotiates for the performance rights of the composition with performance rights organizations<sup>115</sup> before negotiating rates with record labels (publishers) for the sound recording license.<sup>116</sup> These groups can always decline to license the rights. In contrast, the streaming service can automatically get a license to the reproduction of the composition of the song via Section 115 of the Copyright Act of 1976, provided that the streaming service follows the conditions thereof, i.e., pays a royalty rate set by statute.<sup>117</sup> These compulsory licenses were also modified and facilitated by the Music Modernization Act. A compulsory license is a significant limitation to the rights holder's control over the use of its intellectual property, but the blunt tool of compulsory licenses are not used in the law often.

### C. SPORTS: LEAGUE STRUCTURES AND ANTICOMPETITIVE ECONOMICS

To learn how to monetize the copyright rights in a competitive context, esports game publishers looked to traditional sports. This Section first identifies the parties necessary to create the sports league whose goal is to deliver the end product of

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114. Sarah Jeong, *A \$1.6 Billion Spotify Lawsuit Is Based on a Law Made for Player Pianos*, VERGE (Mar. 14, 2018), <https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer> [<https://perma.cc/X3ES-UGNX>].

115. Performers naturally have an incentive to come together to sell a better-bundled product—a pooled license to hundreds of songs by different artists. However, pooled licensing agreements have frequently been challenged in the courts due to their anticompetitive nature. *E.g.*, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18–19 (1979); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 890 (S.D.N.Y. 1948) (regarding pooled copyrighted music); *see also infra* Part I.C.2 (discussing pooled licensing arrangements in sports). While the complex antitrust exceptions and regulatory regime for music are beyond the scope of this Note, they nevertheless cloud any attempt to borrow ideas from the music industry.

116. Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated It Is To License Music Rights*, CNBC: TECH DRIVERS (Apr. 27, 2018), <https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html> [<https://perma.cc/8FV5-SWN6>].

117. 17 U.S.C. § 115(c).

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competition amongst the teams. Next, this Section looks at how the collaboration among competitors in these joint ventures naturally triggers antitrust concerns. However, sports ventures have justified anticompetitive conduct based on the practice's benefit to competitive balance. In the end, sports antitrust jurisprudence identifies anticompetitive practices, but often rationalizes them under a critiquable competitive balance argument.

### 1. Structures of Sports and Esports Leagues

To best understand the current economic circumstances of the esports industry, it is important to first discuss the economic structure of traditional sports leagues. In order for the market for competitive sports to exist, there must be some form of cooperation between two entities (teams).<sup>118</sup> When teams come together to play, they are in the unique position of cooperative competitors. In the antitrust context, the entity they create is known as a joint venture.<sup>119</sup> The joint venture is not inherently a separate firm, but an agreement to operate and decide cooperative policy in tandem.

Teams in the league must band together to decide crucial common policy such as the format or method for scheduling matches to determine the champion, the vertical relationships of the league to other leagues (i.e., professional to amateur), the horizontal relationships of the league to other leagues (i.e., professional to professional), the conditions of entry and exit (i.e., membership, the geographic distribution thereof, and whether its member are subject to relegation and promotion), the methods for deciding and enforcing league rules and policies (e.g., arbitrability), as well as many other joint economic decisions.<sup>120</sup> The teams must coordinate to produce competitive balance, a degree of uncertainty of outcome in the game, lest all viewers lose interest because the league becomes predictable.<sup>121</sup> Teams also

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118. Stefan Késenne, *The Optimal Competitive Balance in a Sports League?*, in *THE ECONOMICS OF COMPETITIVE SPORTS* 85 (Rodríguez et al. eds., 2015).

119. See Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 *BERKELEY TECH. L.J.* 1499, 1527–28 (2006).

120. Roger G. Noll, *The Organization of Sports Leagues*, 19 *OXFORD REV. ECON. POL'Y* 530, 531 (2003).

121. *Id.*

pool their rights to offer, jointly, products such as pooled broadcasting rights or player apparel.<sup>122</sup> The league quasi-integrates the individual teams to increase efficiency in organized play, save on transaction costs, and offer better products on the market.

Sports leagues operate in multi-sided markets wherein the teams compete for consumers (fans, viewers, purchasers of merchandise) and for players. Two-sided markets are situations in which a “platform . . . facilitate[s] interactions between different end-users. The owner of this platform will usually try to court both sides of the market at prices that allow a profit.”<sup>123</sup> However, two-sided markets are often faced with a perverse incentive to restrain one side of the market to benefit the other side of the market,<sup>124</sup> which may trigger antitrust scrutiny.

## 2. Traditional Sports Antitrust Concerns

Antitrust law, also known as competition law, is deeply concerned with cooperation among competitors. After providing a brief primer on antitrust law surrounding joint ventures, this Section outlines several anticompetitive practices that adversely affect the market for traditional sports. Because traditional sports economics serves as the base for esports economics,<sup>125</sup> there is a heightened possibility of mirrored attempts by esports league operators to control the esports market in the same manner.

It has been argued that the sports leagues in the United States have formed monopolies (or monopsonies<sup>126</sup>) despite the country’s capacity to support more than one league playing at the highest level.<sup>127</sup> The Big Four—the National Football

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122. See *infra* notes 260–67 and accompanying text.

123. Mehra & Zuercher, *supra* note 119, at 1528.

124. *Id.* at 1528–29.

125. See generally Chao, *supra* note 8 (discussing how esports mirror traditional sports); Holden et al., *supra* note 1 (describing the legal consequences of the classification of esports as a “sport”).

126. A monopsony is a market structure in which a single buyer substantially controls the market of many sellers. The NFL could be considered a monopsonist of professional football players, while also being a monopolist over professional football games. See Xiao Gang Che & Brad Humphreys, *Rival Sports League Formation and Competition*, in *THE ECONOMICS OF COMPETITIVE SPORTS* 11 (Rodríguez et al. eds., 2015).

127. *Id.* at 7; Noll, *supra* note 120, at 550 (“All nations allow the top leagues to be monopolies . . .”).

League, National Basketball Association, National Hockey League, and Major League Baseball—have all faced rival leagues and dealt with them through absorption (e.g., NFL’s merger with the All-America Football Conference in 1949) or economic competition (e.g., paying player salaries that are unsustainable in lesser leagues).<sup>128</sup> In fact, these sports leagues have even received special treatment either through the courts<sup>129</sup> or by convincing Congress on antitrust matters.<sup>130</sup>

Antitrust law deals with promoting fair competition for the benefit of consumers. The primary tool for protecting competition is the Sherman Act. Section 1 of the Sherman Act<sup>131</sup> prohibits unreasonable restraints of trade;<sup>132</sup> Section 2 of the Sherman Act prohibits monopolization or attempts thereof.<sup>133</sup> Both sections target two or more entities acting to the detriment of a third party; this is known as concerted action.<sup>134</sup> Concerted action<sup>135</sup> cases must show (1) the existence of a contract, combination, or conspiracy among two or more separate entities<sup>136</sup> that

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128. NEIL LONGLEY, AN ABSENCE OF COMPETITION: THE SUSTAINED COMPETITIVE ADVANTAGE OF THE MONOPOLY SPORTS LEAGUES 1–2 (2013).

129. *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200, 208 (1922) (finding MLB exempt from antitrust law due to its local nature); *see also Flood v. Kuhn*, 407 U.S. 258, 285 (1972) (maintaining the established aberration); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (upholding MLB antitrust exception).

130. *E.g.*, Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012) (exempting professional team sports from the antitrust laws).

131. 15 U.S.C. § 1.

132. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 31 (1911).

133. 15 U.S.C. § 2.

134. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (denying applicability of Section 1 in concerted action cases where the entities are, in reality, a single entity and therefore only subject to Section 2). While *American Needle, Inc. v. NFL* determined that sports leagues are effectively cartels not falling within the single entity exception, it is unclear whether the case’s holding is controlling in the esports context. 560 U.S. 183, 202 (2010). Put otherwise, will the joint venture between the game publisher and the league be considered a single entity or concerted action?

135. Concerted action cases are different from independent action cases. Section 1 of the Sherman Act only applies to concerted action while Section 2 applies to both, but only if the action “monopolizes” or “threatens actual monopolization.” *Am. Needle*, 560 U.S. at 191.

136. The Court has recently confirmed that a sports league, for purposes of the sale of licensing rights to third parties, does not fall within the single entity exception to antitrust laws. *Id.* at 204. Given the analogous structure of some

(2) unreasonably restrains trade, and (3) affects interstate or foreign commerce.<sup>137</sup> Section 1 is important to the esports analysis because the court may fail to find monopolization by any one publisher in violation of Section 2 but recognize that the practice is unreasonable in violation of Section 1.<sup>138</sup>

In addition to concerted action, Section 2, prohibiting monopoly, applies to independent action—when a single firm abuses its dominant status, known as market power, to the detriment of competitors.<sup>139</sup> To be clear, the law does not punish a successful competitor but only one who quells competition. Monopolization, threatened monopolization, or conspiracy to monopolize can be achieved through different types of prohibited conduct.<sup>140</sup> Despite being a more difficult claim, Section 2 is important in the esports context because it is unclear whether the judicial system would consider licensing deals as pooled licensing or the independent action of the publisher, which would not be subject to Section 1.<sup>141</sup>

In either case, the courts must first define the market before addressing the negative effects of alleged anticompetitive conduct. Definition of a market<sup>142</sup> is necessary because determining

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esports leagues, *American Needle* likely controls, though such a discussion is outside the scope of this Note.

137. See, e.g., *Orr v. Bank of Am.*, 285 F.3d 764, 782 (9th Cir. 2002).

138. This may occur in the event that the court defines the market as esports rather than the individual titles. See Miroff, *supra* note 8, at 204–05.

139. 15 U.S.C. § 2 (2012).

140. For instance, exclusive dealing is when a retailer agrees to purchase from a supplier and promises to purchase from no other supplier. *E.g.*, *Am. Needle*, 560 U.S. at 187. Refusal to supply an essential facility is when a company bottlenecks a market to deny entry by competitors by controlling an “essential facility.” In the sports league context, the American Pro Football League tried to characterize the Washington Redskins’ NFL stadium as an essential facility for the exhibition of professional football games, but the court disagreed and found that the Redskins’ refusal to share the stadium did not violate antitrust law. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 985–86 (D.C. Cir. 1977).

141. While the single entity exception to Section 1 liability is implicated due to the unique role of the game publisher in control of the leagues, determining the applicability of said exception is well beyond the scope of this Note.

142. This has been defined as “the area of effective competition.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)). It is typically “the arena within which significant substitution in consumption or production occurs.” *Id.* (quoting HERBERT HOVENKAMP & PHILLIP E. AREEDA, *FUNDAMENTALS OF ANTITRUST LAW* § 15.02[B] (4th ed. 2017)).



whether the restraints “lessen or destroy competition” is effectively a question of market power—the ability to raise price profitability by restricting output.<sup>143</sup> Markets can be spliced based off of distinctions in kind and distinctions of degree.<sup>144</sup> For instance, courts have repeatedly held that individual sports constitute separate markets and, within those markets, the collegiate may be considered separate from the professional or even pre-professional markets.<sup>145</sup> Consumer demand effectively determines if two markets are actually one based on fungibility and substitution.

The challenged conduct in the defined market may be illegal per se or unreasonable under a rule of reason analysis. Price fixing<sup>146</sup> and geographic market allocation<sup>147</sup> are examples of concerted conduct illegal per se because the act “would always or almost always tend to restrict competition and decrease output.”<sup>148</sup> However, when the practice falls outside of judicially enumerated categories of per se conduct, or where “restraints on competition are essential if the product is to be available at all,” the restraint should be viewed under the rule of reason.<sup>149</sup> Under this analysis, the court conducts a balancing test weighing the practice’s (1) unreasonableness and competitive harm (2) against its pro-competitive justifications (3) in light of less harmful alternatives to achieving the pro-competitive justification. Given the need to cooperate in a sports league, this framework merits significant attention.

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143. *Id.* (quoting *Walker Process Equip.*, 382 U.S. at 177).

144. *Id.*

145. *E.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 112 (1984) (separating college football from professional football); *Int’l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 252 (1959) (finding championship boxing separate from boxing contests generally).

146. Price fixing is when two or more entities agree to set the price for a product jointly instead of competing for consumers. *E.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98 (1927).

147. Geographic market allocation would occur when two or more entities agree not to compete within particular territories.

148. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978)). Other examples include group boycotts—joint refusals not to deal with a particular vendor or purchaser—and tying arrangements—an agreement to sell a product or service conditioned upon a different, tied, product or the promise not to purchase that tied product from competitors. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

149. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101.

To begin, the plaintiff must show that the restraint on trade is unreasonable<sup>150</sup> and would harm competition, taking into account the business, the condition before and after the restraint was imposed, and the restraint's history, nature, and effect.<sup>151</sup> Then, the defendant may counter the unreasonableness by providing a procompetitive justification that outweighs the anti-competitive effects. The procompetitive justification in the sports context is competitive balance:

Competitive balance means in essence that all of the league's teams are of sufficiently comparable strength that . . . fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games, thus supporting the teams' . . . revenues.<sup>152</sup>

Upon showing of a procompetitive justification, the plaintiff can, theoretically, question the legitimacy of the justification by showing less harmful alternatives to achieving the same goals. However, most cases and the hearings before Congress focus on two elements: either the restraint is not unreasonable or competitive balance outweighs the harms.

In the application of both the per se and rule of reason tests, history, from about the 1950s onwards, has defined several anticompetitive practices in sports, including "awarding territorial protection; creating the reserve clause and player draft; setting minimum prices; giving the commissioner power to unilaterally issue edicts; and, later, pursuing national television contracts."<sup>153</sup> Other antitrust issues stemmed from the major leagues' treatment of players and hoarding of talent in the minor

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150. Unreasonableness has been a matter of judicial policy either favoring consumer protection or market protection. Compare ROBERT H. BORK, *THE ANTITRUST PARADOX* 405–07 (1978) (arguing for consumer protection), with Khan, *supra* note 7, at 737–39 (criticizing pure consumer protection tests).

151. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). For a sports example, the Supreme Court found that the National Collegiate Athletics Association violated Section 1 of the Sherman Act when it restricted television of games to encourage live attendance because it reduced supply. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 88.

152. *Smith v. Pro-Football*, 420 F. Supp. 738, 745 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

153. DAVID GEORGE SURDAM, *THE BIG LEAGUES GO TO WASHINGTON: CONGRESS AND SPORTS ANTITRUST, 1951–1989*, at 30 (2015).

leagues.<sup>154</sup> (Esports have, at the very least, adopted the territorial divisions,<sup>155</sup> player rights issues,<sup>156</sup> and pooled international broadcasting practices.<sup>157</sup>) At that time, the leagues used two primary defenses: (1) the body before which the league is appearing is not the appropriate authority to rule on the practice<sup>158</sup> and (2) the restraints on trade are justifiable under competitive balance. Teams and leagues used these arguments to obtain anti-trust exemptions to allow for current practices and to rebuff Congress's attempts to disrupt the industry's trend of self-regulation.<sup>159</sup>

### 3. Critiquing Competitive Balance and the Competing Competitions Alternative

Sports antitrust academics continue to seek alternatives to the current economic practices; the crux of the competing competitions theory is the idea that more than a singular championship can take place so as to introduce rivals into the industry thereby incentivizing an efficient market through competition.<sup>160</sup> American sports leagues—perhaps unnecessarily—all result in a single championship competition. Competitive balance assumes that consumers would not be interested in having multiple first-place teams, particularly if they never played each

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154. *Id.* at 32–33, 48, 56 (discussing the effects of the reserve clause on salary negotiations, the farm systems whereby a single team may control hundreds of minor league players, and the culture of keeping salaries secret); see also *Study of Monopoly Power: Hearings Before the Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary, Part 6, Organized Baseball*, 82d Cong. 2 (1952) (statement of Rep. Emanuel Celler, Chairman, H. Comm. on the Judiciary); Peskin, *supra* note 39 (discussing antitrust issues regarding salary caps).

155. It should be noted that only the *Overwatch* League has steadfastly held onto the city-based team branding methodology. *Dota 2* teams are only affiliated by organizations and split into regions. *League of Legends* teams are affiliated by organization and by region (e.g. North America, Korea, Europe, etc.). See Philip Kollar, *Overwatch League Is Blizzard's Ambitious New Esports Org, Includes City-Based Teams*, POLYGON (Nov. 4, 2016), <https://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-esports-org-includes-city> [<https://perma.cc/NB9N-3NDV>].

156. Heggem, *supra* note 2.

157. *Introduction to the Esports Ecosystem*, ESPORTS OBSERVER, <https://esportsobserver.com/the-esports-eco-system> [<https://perma.cc/C25R-8SVG>].

158. SURDAM, *supra* note 153, at 47.

159. The exact arguments will be considered in turn in Part III so as to determine their applicability in the esports context.

160. Mehra & Zuercher, *supra* note 119, at 1515.

other to determine the ultimate champion. However, the English Premier League represents a successful league whose teams sometimes compete in more than one championship.<sup>161</sup> Teams are not restricted from competing in multiple tournaments.<sup>162</sup> The promotion and relegation system also allows new meritorious teams to enter the market if they successfully work their way up through the divisional system.<sup>163</sup> Fan interest remains high despite the practices deemed necessary for the maintenance of competitive balance.<sup>164</sup>

Competing competitions, despite some drawbacks, incentivize two levels of competition: intraleague and interleague. On the one hand, teams compete intraleague to stay within the highest echelon of professional play. This “open architecture” means that teams must consistently invest in their players to ensure competitive success.<sup>165</sup> However, the open architecture also means that teams are more risky investments for sponsors in the event of relegation or poor performance. On the other hand, the league competes with other leagues for concurrent viewership and for team participation. Together, competing competitions represents an alternative conceptualization of sports leagues that incentivizes competition by decoupling leagues and tournaments from teams. It has not been addressed by Congress or the courts as a viable alternative or weakening of the competitive balance argument, but esports has begun to experiment with this economic structure.

#### D. ESPORTS: STAKEHOLDERS, ECONOMICS, AND THE PUBLISHER-CONTROLLED LEAGUE

Having now discussed the two broad analogous industries of sports and entertainment, as well as the copyright and antitrust laws underlying each, it is necessary to focus on esports itself. First, this Section discusses the various stakeholders in esports

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161. *Id.* at 1522.

162. *Id.*

163. *Id.* at 1523.

164. *See generally* ERNST & YOUNG LLP, PREMIER LEAGUE: ECONOMIC AND SOCIAL IMPACT 4, 17 (2019), [https://www.ey.com/Publication/vwLUAssets/EY-Premier-League-economic-and-social-impact-January-2019/\\$FILE/EY-Premier-League-economic-and-social-impact-January-2019.pdf](https://www.ey.com/Publication/vwLUAssets/EY-Premier-League-economic-and-social-impact-January-2019/$FILE/EY-Premier-League-economic-and-social-impact-January-2019.pdf) [<https://perma.cc/3VZ6-WBG8>] (discussing growth of the Premier League and its role in fostering soccer, even in other leagues).

165. Mehra & Zuercher, *supra* note 119, at 1524.

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and their role within the industry. Next, it breaks down the different distinctions in the industry, namely by game type or genre (differences in kind) and by level of professionalism (differences in degree). Finally, this Section narrows the focus to publisher-controlled leagues as a particularly problematic phenomenon triggering antitrust concerns.

### 1. Esports Stakeholders

In addition to the league, esports have stabilized to include four classes of stakeholders: players, organizations (teams),<sup>166</sup> channelers, and tournament operators (including the publisher).<sup>167</sup> Each category of stakeholders will be discussed in turn.

The first stakeholder is the player. Consider the typical scenario: a person plays a video game such as *League of Legends* to the point that he<sup>168</sup> is no longer satisfied with casual play and commits a significant amount of time to improving his mechanical skills.<sup>169</sup> He may choose to climb through the built-in online leaderboard system of the game (e.g., the ranked queue<sup>170</sup> for

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166. Throughout this Note, the term “organization” is used as opposed to “team” because the corporate entity invests in more than just professional players for a single league in a single esports title. An organization may boast a competitive roster in several esports titles and multiple signed streamers.

167. Chao, *supra* note 8, at 744 (listing game publishers, tournament organizers, teams, players, sponsors, and streaming sites as industry stakeholders); *An Introduction to the Esports Ecosystem*, *supra* note 16 (describing the entities involved in the esports industry); *see also* Miroff, *supra* note 8, at 187–89 (listing publishers, organizers, broadcasters, teams, professional players, viewers, and advertisers as entities).

168. While women compete and play video games professionally, the industry is dominated by men. See generally TAYLOR, *supra* note 19, at 118–28, for a discussion of women in gaming and a criticism of the mythos of the lack of women in gaming. This Note will use the pronoun “he” to refer to gamers.

169. *See generally* Graham Ashton, *What Is the Optimum Training Time for Esports Players?*, ESPORTS OBSERVER (Dec. 28, 2017), <https://esportsobserver.com/optimum-player-training-time> [<https://perma.cc/Q3BY-US8E>] (finding play and practice times of over fifteen hours a day).

170. A ranked queue refers to the matchmaking system that pits the player against those of similar caliber based on criteria within the game. The player has the ability to “climb the ladder” by consistently winning and showing that he is of a better caliber. The system is ranked in so much as there are different tiers and eventually a leaderboard for the best of the best.

*League of Legends*<sup>171</sup> or *Dota 2*), search for competitive teammates online, or enter amateur tournaments. Like other esports athletes, he is competing against all other players for recognition by a professional organization.<sup>172</sup> The reality is that the pool of professional video game players is incredibly shallow relative to the number of players generally.<sup>173</sup> In the interim, or in the event of failure, he may opt to try his hand at personal streaming<sup>174</sup> or play at the collegiate level.<sup>175</sup>

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171. In fact, such ranked play is required for *League of Legends*. N. AM. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, 2018 OFFICIAL RULES NA LCS AND NA LACS § 2.4 (2018) [hereinafter 2018 NA LCS RULES], [https://esports-assets.s3.amazonaws.com/production/files/rules/2018\\_LCS\\_LACS\\_Rules.pdf](https://esports-assets.s3.amazonaws.com/production/files/rules/2018_LCS_LACS_Rules.pdf) [<https://perma.cc/X2LW-4UX9>].

172. See Michael Arin, *Esports & Employment After Dynamex*, ESPORTS B. ASS'N J. (Oct. 10, 2019), <https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex> [<https://perma.cc/C776-DK2M>], for an in-depth look at the life of the player and his relationship to the organization.

173. For example, *League of Legends* boasts a monthly user-base of over 100 million players worldwide. Paul Tassi, *Riot Games Reveals 'League of Legends' Has 100 Million Monthly Players*, FORBES (Sept. 13, 2016), <https://www.forbes.com/sites/insertcoin/2016/09/13/riot-games-reveals-league-of-legends-has-100-million-monthly-players/#3dde46fe5aa8> [<https://perma.cc/45JX-3VKG>]. Even using a conservative estimate of players that engage in competitive ranked play, this number still hovers over 1.6 million in North America alone. DrCyanide, *League's Decline – By the Numbers*, LEAGUE OF LEGENDS: BOARDS (Sept. 9, 2018), <https://boards.na.leagueoflegends.com/en/c/general-discussion/ka7IqcPM-leagues-decline-by-the-numbers> [<https://perma.cc/JD32-HR2U>]. In comparison, the League of Legends Championship Series (LCS) consists of ten teams of five players for a total of fifty possible starting positions in the United States. Even including other leagues, back-up players, academy-tier teams, and staff (analysts, coaches, etc.), the couple hundred possible positions are insignificant when compared to the number of players generally.

174. Compare Joshua Calixto, *Meet Michael 'Imaqtpie' Santana, the World's Best 'League of Legends' Streamer*, ROLLINGSTONE (Mar. 23, 2017), <https://web.archive.org/web/20180617153433/http://www.rollingstone.com/glixel/news/meet-imaqtpie-the-worlds-best-league-streamer-w473364> [<https://perma.cc/K6UN-88SQ>] (former professional turned online personality), with Zachary Scuderi, *Sneaky Shares How He Became a Pro League of Legends Player*, IBUYPOWER: BLOG (Aug. 6, 2013), <http://blog.ibuypower.com/blog/2013/08/06/sneaky-shares-how-he-became-a-pro-league-of-legends-player/> [<https://perma.cc/E3G6-W5HY>] (current professional player for Cloud9).

175. Michael Arin, *Matchmaking Mishaps: NCAA Amateurism and Collegiate Esports*, MINN. L. REV.: DE NOVO BLOG (Oct. 31, 2018), [https://minnesotalawreview.org/2018/10/31/matchmaking-mishaps-ncaa-amateurism-and-collegiate-esports-2/#\\_edn1](https://minnesotalawreview.org/2018/10/31/matchmaking-mishaps-ncaa-amateurism-and-collegiate-esports-2/#_edn1) [<https://perma.cc/9S6R-CVU5>]; John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. Ill. L. Rev. (forthcoming 2020)

Meanwhile, organizations are akin to teams in the traditional sports leagues; they compete in the league, for players, and for fandom. For instance, “LoL esports represents professional League of Legends on a global scale. . . . Each 10-team league competes over nine weeks, with every team facing one another twice per split, for a total of 18 games each.”<sup>176</sup> The product is the competitive league, akin to traditional sports franchises.<sup>177</sup> The league imposes internal rules on the organizations such as minimum player salary,<sup>178</sup> scheduling, dispute resolution via the league commissioner,<sup>179</sup> territory allocation,<sup>180</sup> and player eligibility requirements (e.g., must be eighteen or older to play), including regional residency requirements (e.g., citizenship).<sup>181</sup> While the leagues often publish some rules publicly,<sup>182</sup> others such as the league operating agreement are kept secret.

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(manuscript at 62–69) (discussing issues related to collegiate esports); *see infra* notes 202–07 and accompanying text.

176. *About LoL Esports*, RIOT GAMES, <https://eu.lolesports.com/en/about/about-lol-esports> [<https://perma.cc/QKA4-QKM2>]. Since the rebranding and separation of the North American (LCS) and European leagues (League of Legends European Championship Series (LEC)), the format and number of teams stayed the same, but each league now has a distinct identity. Jack Stewart, *Riot Rebrands NA LCS Following the Creation of the LEC*, ESPORTS OBSERVER (Dec. 14, 2018), <https://esportsobserver.com/riot-rebrands-na-lcs/> [<https://perma.cc/93VS-5VS9>]; *see Riot Games: Creating a New Era for Esports*, DESIGNSTUDIO, <https://design.studio/work/lec> [<https://perma.cc/RGQ7-2VYS>] (describing the LEC rebrand).

177. *See, e.g.*, Imad Khan, *Riot Releases Details on NA LCS Franchising with \$10M Flat-Fee Buy-in*, ESPN (June 1, 2017), [https://www.espn.com/esports/story/\\_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in](https://www.espn.com/esports/story/_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in) [<https://perma.cc/QR95-6P7E>].

178. *See generally* Bayliss, *supra* note 2, at 372 (questioning whether the mandatory minimum salaries, among other league rules, make the league an employer of the players).

179. *E.g.*, Chris Greeley, *Quick Notes: How We Make the Match Schedule*, LEAGUE OF LEGENDS (May 1, 2018), <https://nexus.leagueoflegends.com/en-us/2018/05/quick-notes-how-we-make-the-match-schedule/> [<https://perma.cc/R57K-ERWJ>] (explaining NA LCS Commissioner Greeley’s attempt at providing competitive balance through scheduling).

180. *E.g.*, Susie Kim (@lilsusie), TWITTER (Aug. 3, 2018, 11:28 PM), <https://twitter.com/lilsusie/status/1025599453636395008> [<https://perma.cc/6Q67-KXEA>] (lamenting the inability to do a fan meet-and-greet event in Seoul as general manager of the London Spitfire because “there are [*Overwatch*] region regulations and . . . Dynasty had said that they did not want to give us permission in their region”).

181. *See, e.g.*, 2018 NA LCS RULES, *supra* note 171, §§ 2.1–6.

182. *E.g., id.*

Nevertheless, public information, leaked information, and social media posts by players and organization owners reveal a structure that mimics a traditional sports league.<sup>183</sup> Organizations ultimately serve as a middleman between the player and the league or tournament operators.

Channelers invest in the esports industry or aid in the distribution of the product to a greater audience. Channelers include streaming platforms such as Twitch, YouTube, and even Valve that compete to provide the best interactive viewing experience<sup>184</sup> and sponsors who provide financial support to players, organizations, leagues, streaming platforms, and tournament organizers.<sup>185</sup> While channelers are not direct content producers like the other industry stakeholders, esports would collapse without the added value of distribution and financial investment.

Finally, tournament operators facilitate the relationship between teams and players and teams and channelers. Tournaments may either be independent or publisher-controlled. Organizers such as ESL, DreamHack, and Major League Gaming that compete for the in-person attendance and online viewership license the game from the publisher.<sup>186</sup> In comparison, publisher-controlled leagues—such as Riot Games for *League of Legends Championship Series*, Activision Blizzard for *Overwatch League*, and Valve for *Dota 2 Pro Circuit*—benefit from the close relationship with the publisher; publishers have no incentive to withhold rights to the leagues they control.

Esports have greatly veered away from the traditional monetization process of video game rights. Instead of relying on game sales, many titles are free to play (e.g., *Dota 2* and *League of Legends*) through an end user license agreement and subject to the terms of use; even games with an initial purchase cost generate

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183. See Burk, *supra* note 103, at 1540–41.

184. Erik Kain, *Valve Launched Steam.tv, a New Twitch Competitor, by Mistake*, FORBES (Aug. 18, 2018), <https://www.forbes.com/sites/erikkain/2018/08/18/valve-launched-twitch-competitor-steam-tv-early-by-mistake/#6be5f1243a53> [https://perma.cc/U4US-CPPT].

185. Ben Fischer, *Esports' Next Big Mission: Win Over Sponsors*, SPORTS BUS. J. (May 28, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/28/In-Depth/Esports.aspx> [https://perma.cc/77ZY-GP2T]; *An Introduction to the Esports Ecosystem*, *supra* note 16; Peskin, *supra* note 39. Sponsors sponsor players, teams, or tournaments.

186. *An Introduction to the Esports Ecosystem*, *supra* note 16.



more revenue through microtransactions of cosmetic items.<sup>187</sup> Secondly, users are no longer simply consuming (i.e., playing) the game, but instead they are live streaming competitive play largely supported through online advertising to consumers watching online.<sup>188</sup> Detached from physical games and in-person audiences, tournaments and esports as a whole depend on monetization of intellectual property rights. In the end, who controls these rights—players, organizations, channelers, independent tournament organizers, or the publisher—is of immense importance.

## 2. Esports Potential Market Considerations

Having described the playing field of stakeholders, it is also important to outline different potential markets.<sup>189</sup> The question of “what is the market” is both pivotal to antitrust law and incredibly elusive in the esports context.<sup>190</sup> As mentioned in the sports context, the market is defined based on demand substitution.<sup>191</sup> Consumer demand often falls into particularly identifiable categories based on divisions in kind and divisions in degree.

In the esports industry, distinctions in kind revolve around the type of video games, or, on a particularized scale, individual games.<sup>192</sup> The first type of distinction is based on genre. Major esports titles can be categorized into Multiplayer Online Battle Arenas (MOBAs) (e.g., *League of Legends* and *Dota 2*),<sup>193</sup> First-

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187. Darren Heitner, *A Look Inside Riot Games, from \$320,000 Player Salaries to Using Esports as a Catalyst for Sales*, FORBES (May 2, 2018), <https://www.forbes.com/sites/darrenheitner/2018/05/02/a-look-inside-riot-games-from-320000-player-salaries-to-using-esports-as-a-catalyst-for-sales/#60596ab2c6a7> [https://perma.cc/JM6E-3JVN].

188. Fischer, *supra* note 185.

189. The purpose of this Note is not to present a critical analysis of the market. See Miroff, *supra* note 8, for an answer to that question. However, recognizing the distinctions is important for understanding the encompassing nature of the term “esports.”

190. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018); Fischer, *supra* note 185. The focus of this Note is not an analysis of the proper market for antitrust purposes. Nevertheless, a description of the market subdivisions is necessary to understand exactly why intellectual property law is in tension with antitrust law—at least in the esports context.

191. *See supra* Part I.C.

192. Miroff, *supra* note 8, at 199–204.

193. MOBAs involve two teams controlling characters in a battle to destroy the other team’s base.

Person Shooters (FPSs) (e.g., *Overwatch*, *Counter Strike: Global Offensive*, *Call of Duty*, and *Halo*),<sup>194</sup> Battle Royale (e.g., *Fortnite* and *PUBG*),<sup>195</sup> and fighting games (e.g., *Dragon Ball Z*, *Super Smash Bros.*, and *Street Fighter*).<sup>196</sup> However, games, despite being in the same genre, are generally not fungible.<sup>197</sup> Despite similarities across games, professional players do not compete in multiple titles, and spectatorship trends suggest that people are attracted only to a single game.<sup>198</sup> However, esports as a whole tends to attract viewers from one identifiable demographic regardless of genre or title,<sup>199</sup> therefore having the same value to advertisers (for whom tournaments compete).<sup>200</sup> Distinctions in kind suggest two possible market definitions, consistent with Miroff's analysis: individual esports titles or esports generally.<sup>201</sup>

Distinctions in degree also suggest a vertical hierarchy in the esports industry: collegiate,<sup>202</sup> amateur, and professional.<sup>203</sup>

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194. FPSs can be both team and single-player events where the player plays from the perspective of a character with a gun. The objectives of the game vary from objective control to simply killing other players.

195. The newest form of competitive play, Battle Royales, take the FPS game type and expand the number of competitors, pitting the player or team against hundreds of others in a king-of-the-hill, last-man-standing experience.

196. Fighting games are single or duo events where players control characters and fight the other players in a match of survival.

197. Saying that *League of Legends* and *Dota 2* are fungible because they are both MOBAs would be like saying football and soccer are interchangeable because they both have a ball.

198. Maddy Myers, *Survey: 42 Percent of Esports Viewers Don't Play the Games They Watch*, KOTAKU: COMPETE (May 12, 2017), <https://compete.kotaku.com/survey-42-percent-of-esports-viewers-dont-play-the-gam-1795163095> [<https://perma.cc/KZN3-JE6X>] (finding that 70% of viewers only watch a single esports title).

199. CHASE BUCKLE & JASON MANDER, GLOBALWEBINDEX, ESPORTS TRENDS REPORT 2018, at 3–4 (2018), <https://cdn2.hubspot.net/hubfs/304927/Downloads/Esports-report.pdf?t=1528372092399> [<https://perma.cc/SWB7-UJM2>] (defining the average viewer as a young, affluent man).

200. *Cf. Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250–52 (1959) (discussing the different markets for promotion of nonchampionship and championship boxing based on valuation of broadcasting rights).

201. Miroff, *supra* note 8, at 199–205.

202. *Cf.* 15 U.S.C. §§ 1291, 1293 (2012) (providing limited antitrust exceptions to professional football, baseball, basketball, and hockey telecasts so long as they do not compete with intercollegiate athletics).

203. As mentioned previously, esports mimic sports in even artificial means.

Unlike the collegiate scene in traditional sports, there does not appear to be a unique demand for collegiate esports.<sup>204</sup> Furthermore, the collegiate esports market is not a gateway for professional play like in traditional sports.<sup>205</sup> Instead, the professional league is generally prohibited from interfering with collegiate play.<sup>206</sup> In its place, some leagues foster an amateur market that serves as a talent scouting ground for future professional players.<sup>207</sup> Organizations may be required to maintain both professional and amateur teams.<sup>208</sup> Yet neither the collegiate nor the amateur market has been effectively capitalized by producing a distinguishable audience from the professional scene.<sup>209</sup> In the end, the professional scene remains preeminent, and the collegiate and amateurs scenes, at the very least, should not be considered substitutable products.

Despite its relative youth, the esports industry is rich, complex, and largely modeled after traditional sports. The primary stakeholders combine forces to provide a unified product: a competitive league for a particular esports title. The economics have shifted from game sales to primarily sponsorships and advertising revenue. But esports have begun to diverge from traditional sports by foregoing the college-to-pro pipeline and blending the distinctions in degree of play. Most importantly, the esports leagues already grapple with complex intellectual property issues in the sale of these rights so central to the industry.

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Despite a lack of demand for collegiate esports broadcasts, many publishers assist the college scene due to a large player market.

204. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 111 (1984) (describing the “uniquely attractive” audience of NCAA football games); Noll, *supra* note 120, at 534 (highlighting distinct markets of collegiate and professional sports).

205. Mitch Reames, *The Role of College Programs in Pro Esports*, SPORTTECHIE (May 7, 2018), <https://www.sporttechie.com/role-of-college-esports-ncaa-league-of-legends-overwatch> [<https://perma.cc/HK26-RYKR>].

206. See, e.g., 2018 NA LCS RULES, *supra* note 171, § 5.5 (restricting recruitment of players already committed to collegiate *League of Legends* on scholarship).

207. See *generally id.* § 1 (referencing the North American League of Legends Academy Championship Series).

208. See *id.*; see also *infra* Part II.B.2.a (discussing farm system).

209. *Contra Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 111 (distinguishing collegiate athletics from professional telecasts based on “an audience uniquely attractive to advertisers”).

### 3. The Rise of Publisher-Controlled Leagues

The most successful esports title is *League of Legends*, created by Riot Games; an up-and-coming title is *Overwatch* by Blizzard Entertainment. The competitive scenes for both games, at the highest echelon, have significant involvement from entities related to the game publishers.<sup>210</sup> While some authors prefer the term “developer-sponsored leagues,”<sup>211</sup> this Note uses the term “publisher-controlled leagues” to refer to joint ventures between teams with significant involvement and rule-setting by the rights holders. The difference can be explained by the change in intent of the publisher; today, publishers intend to capitalize on esports as opposed to remaining pure game producers.<sup>212</sup>

Publisher-controlled leagues are successful, in part, due to vertical integration efficiencies. Publisher-controlled leagues wholly consolidate the industry into one efficient league. For instance, Riot Games, through the League of Legends Championship Series (LCS) creates a product: competitive playing of *League of Legends*. Riot Games, through a franchise system, brings ten organizations under its umbrella. Riot Games also employs broadcast talent and a professional studio crew to create online streaming content. Using its insider knowledge, Riot Games’s development team keeps the broadcast talent fully informed of any game changes. Additionally, Riot Games negotiates partnerships with outside sponsors on behalf of the league. Internationally, Riot Games advertises its league through the game client directly to players. What is left to be seen is what Riot Games would do if another tournament challenged its dominant position as the preeminent *League of Legends* league.

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210. It is unclear the exact relation between, for instance, the League of Legends Championship Series and Riot Games, but shared personnel suggest a close relation if nothing else.

211. See, e.g., Chao, *supra* note 8, at 745.

212. Compare *id.* (“[Game developers] still see themselves first and foremost as a game *producer*—not sports provider.” (quoting TAYLOR, *supra* note 45, at 166)), with Webster, *supra* note 18 (describing publisher’s acquisition of gaming group “to create the ESPN of e-sports”).

## II. PUBLISHER-CONTROLLED LEAGUES: SPORTS & ENTERTAINMENT & ANTITRUST ISSUES

This Note argues three interrelated ideas. First, esports is a combination of both sports and entertainment industries. In considering competition in esports, both sports and entertainment jurisprudence should be considered. Second, the crux of this Note is that approaching publisher-controlled leagues from both sports and entertainment perspectives paints the holistic and problematic potential for anticompetitive manipulation of intellectual property by publisher-controlled leagues. The publisher can manipulate its deep copyright control to eliminate or weaken leagues competing with its favored league. Finally, neither the esports industry nor the courts will solve this problem. Like traditional sports, esports will push back with the idea of self-regulation. Like entertainment, courts will struggle to understand the tech-centered industry. Combined, publisher-controlled leagues will reignite tension between copyright and sports antitrust principles, and the industry remains unstable.

### A. ESPORTS: SPORTS & ENTERTAINMENT

While the sports or entertainment classification is important in certain contexts, the antitrust context requires a more holistic approach that recognizes both industries as analogous and helpful in the analysis. As history has shown, video games underwent a sportsification.<sup>213</sup> As the demand for organized competitive playing of video games grew, the esports industry modeled itself after traditional sports. Games went from being personal to an opportunity for spectatorship, professionalism, and organized competition.<sup>214</sup> However, cabining esports to sports jurisprudence fails to recognize the importance of the intellectual property rights that form the base of the industry and the entertainment industry's rocky past with using licensing agreements to achieve market leverage.<sup>215</sup> Yet, framing esports as mere entertainment neglects the intentional economic structuring of the industry and the historically identifiable anticompetitive practices.<sup>216</sup> In short, the classification of esports as a

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213. See *supra* notes 43–56 and accompanying text.

214. See generally TAYLOR, *supra* note 45 (discussing the professionalization of video games); TAYLOR, *supra* note 19 (discussing the rise in spectatorship).

215. See *supra* Part I.B.

216. See *supra* Part I.C.

sport is not determinative in the antitrust context and should be eschewed in favor of a more holistic approach, lest the analysis remain incomplete.

#### B. PUBLISHER-CONTROLLED LEAGUES: BENEVOLENT OVERLORDS

Publisher-controlled leagues, through innovative intellectual property licensing and enforcement, can control the market for their esports titles in violation of antitrust laws unless Congress steps in. Anticompetitive practices damage consumer welfare. This Section discusses how innovative intellectual property management by publishers can serve to effectuate the same practices that drew Congress's attention to traditional sports leagues' antitrust violations. Worse, intellectual property law could insulate the league operator from antitrust scrutiny, particularly with the lack of jurisprudence on copyright and antitrust interplay. After showing why the lack of limitations on copyright licensing allows for such broad control by the publisher, this Section focuses on the rule of reason analysis of anticompetitive practices identified in traditional sports leagues to highlight the court's likely struggle to reign in anticompetitive practices.

##### 1. Downstream Control via Copyright

The rights of video games to public performance and derivative works are inherently implicated in the user-generated content produced in the esports industry. Players play the video game and broadcast their performances through online streaming sites according to the end user license agreement, and subject to any terms of service often automatically assigning back to the game publisher any derivative copyrights.<sup>217</sup> However, whether this performance constitutes infringement upon the game publisher's copyright and the enforceability of the terms of service remains hotly debated.<sup>218</sup>

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217. *E.g.*, RIOT GAMES, LEAGUE OF LEGENDS TERMS OF USE (NA) § 6.1 (2017), <https://na.leagueoflegends.com/en/legal/termsfuse#user-content> [<https://perma.cc/73V9-YTBK>].

218. *Compare* Hagen, *supra* note 96, at 265 (arguing that competitive play and streaming falls within the fair use exception of copyright law), *with* Brusa, *supra* note 84, at 246 (finding that streaming copyrighted content is an infringing public performance).

As described in Part I, all arguments in favor of divvying up the rights over the video game streams face significant challenges. The publishers point to cases like *Midway Manufacturing Co. v. Artic International Inc.*, holding that the publisher's copyright extends to every iteration of the video game,<sup>219</sup> and *Red Baron-Franklin Park, Inc. v. Taito Corp.*, determining that mere play in an arcade—much less than public broadcast online—constitutes infringing public performance<sup>220</sup> to defend its deep control over the copyrighted material.<sup>221</sup> The passage of time and changing technology may warrant a reconsideration of the interactivity, fair use, and copyright misuse arguments. The contribution of players, broadcasters, and the like on top of the mere playing of the video games continues to grow to such an extent that, were the video stripped of these contributions, it would be bereft of any entertainment value. Similarly, the passage of time has led the patent misuse doctrine to become robust while copyright misuse atrophies, despite increased attentiveness by the Federal Trade Commission to competition and consumer welfare in technology- and copyright-dependent industries dealing with copyright.<sup>222</sup>

However, under current caselaw, the exclusivity of copyright law allows the game publisher to restrict its product's esports market, divide it as it pleases, or shut it down entirely at any time, regardless of any investment made by stakeholders. While some limits exist, courts are hesitant to blunt the copyright sword and shield. In a rare video game case, *Atari Games Corp. v. Nintendo of America, Inc.*, the Federal Circuit recognized:

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219. 704 F.2d 1009, 1011 (7th Cir. 1983).

220. 883 F.2d 275, 279 (4th Cir. 1989); *see also* Valve Corp. v. Sierra Entm't Inc., 431 F. Supp. 2d 1091, 1098 (W.D. Wash. 2004) (citing *Red-Baron* favorably in determining that playing videogames in a cyber-café constitutes a public performance).

221. *See generally* Harttung, *supra* note 11 (critiquing this deep control of downstream markets based on ambiguity of copyright jurisprudence).

222. *See supra* notes 5–6.

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[W]hen the patented product is so successful that it creates its own economic market or consumes a large section of an existing market, the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. . . .

There may on occasion exist, therefore, a fine line between actions protecting the legitimate interests of a patent owner and antitrust law violations.<sup>223</sup>

Equally so, certain markets are entirely dependent upon copyrighted materials, such as the music and video game markets.<sup>224</sup> This would be particularly applicable to the esports industry if the court determines the relevant antitrust market to be an individual game. Hence, *Atari's* caution rings true for copyright as well.

While the Federal Trade Commission has stated that ownership of a copyright does not presumptively confer upon its owner any market power,<sup>225</sup> the Supreme Court has also recognized, albeit in dicta, that certain uses of copyright could run afoul of antitrust. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court relegated the blanket licensing of copyrighted music to a rule of reason analysis.<sup>226</sup> Similar to the logic used in joint-ventures,<sup>227</sup> the Court reasoned that “the line of commerce . . . being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws.”<sup>228</sup> The blanket licensing of copyrighted music was not per se illegal because it could have been “reasonably necessary to effectuate the [copy]rights that are granted. . . .”<sup>229</sup> The Court left open the question of what types of arrangements should be deemed “reasonably necessary.” Nor have the courts adequately considered copyright antitrust violations under the per se or rule of reason

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223. *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

224. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18–19 (1979).

225. U.S. DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 2 (2007); see also *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp.*, 460 F. Supp. 2d 1012, 1027–28 (S.D. Iowa) (recognizing the same).

226. *Broad. Music, Inc.*, 441 U.S. at 24.

227. See *supra* note 149 and accompanying text.

228. *Broad. Music, Inc.*, 441 U.S. at 18.

229. *Id.* at 19.



analysis outside of pooled rights.<sup>230</sup> Without guidance, the industries dependent upon copyright are left to decide the line between legitimate exercises of copyright and antitrust violations.

As a result, tournaments and other downstream participants (e.g., players) unwilling to challenge the status quo through antitrust suits against the publisher and its leagues must then license or willingly infringe. Should the publisher bring suit for infringement, the independent tournament operator may assert that the tournament obtained a valid license from the players (the independent-interactivity argument, as opposed to one based on derivative works) and raise the defenses of fair use and copyright misuse (the “equitable arguments”). However, to be successful, the independent copyright argument and the defense of fair use would require overturning of decades-old precedent.<sup>231</sup> Therefore, the defendant would be left to stand on the ill-defined and ill-received defense of copyright misuse.<sup>232</sup> While any one of the arguments or defenses may prove successful, infringers would need to bear the cost of court much like Spotify bore the initial suits for non-payment of royalties.<sup>233</sup> This risk and the current environment of self-regulation allows the publisher to exert substantial control over the esports market for its product. Current case law at the intersection of copyright and antitrust fails to clearly delineate the line between legitimate rights and violations of antitrust law, only bolstering the idea of deep control of downstream markets.

## 2. Copyright Licensing Strategy to Antitrust Concern

Through careful licensing of the publisher’s intellectual property over the underlying video game, the publisher can suppress competition by playing with the ambiguous limits of its rights. However, esports is modeled upon sports economics, and

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230. See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 144 (1948) (pooled copyrighted movies); *Columbia Broad. Sys., Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 620 F.2d 930, 934 (2d Cir. 1980), *on remand from Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), *cert. denied*, 450 U.S. 970 (1981) (upholding blanket licensing under rule of reason analysis after the Court’s ruling that per se analysis was improper); *Alden-Rochelle, Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 80 F. Supp. 888, 894 (S.D.N.Y. 1948) (pooled copyrighted music).

231. See *supra* Part I.B.

232. See *supra* Part I.B.2.

233. See *supra* notes 112–17 and accompanying text.

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traditional sports' long history with antitrust has established definite anticompetitive conduct. This Subsection identifies four anticompetitive practices achievable through copyright licensing and exclusivity: restricting the supply of players, divvying up territory to particular teams, pooled broadcasting rights, and shutting down other competitions. Then, the Subsection will look at the historical justifications of the anticompetitive—but currently allowed—conduct and determine the applicability to esports. Ultimately, the crossroads creates a paradox of simultaneously legitimate exercises of copyright and illegitimate antitrust problems.

*a. Restricting Supply of Players Through Field of Use*

Sports leagues have an incentive to control the pool of possible players. If a competing league cannot obtain the same quality and quantity of talent, the competing league will be uncompetitive and be forced out of the market. Without a competing league, the standing league is in a better position to negotiate rights and player salaries.

In the traditional sports context, player rights concerns drove litigation and provided the most energized offense against the league's control over the market. Player rights can be divided into two issues: vertical integration through the farm system<sup>234</sup> and salary restrictions.<sup>235</sup> Although both practices found their strength in the reserve clause—the clause signing away the player's rights to play in the league even after the conclusion of the employment contract,<sup>236</sup> vertical integration is possible even without such a clause. For example, when professional teams in the MLB (and to a lesser extent the NHL) locked up talent in the minors, they effectively bottlenecked the flow of players into professional teams. Wealthy teams could buy as many players as

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234. SURDAM, *supra* note 153, at 93.

235. See Peskin, *supra* note 39.

236. The reserve clause was a common clause in an athlete's employment contract that stated that the rights to the player were retained by the team upon expiration of the contract. This system has been replaced by free agency. Esports titles have already adopted free agency. See, e.g., Jacob Wolf, *Six Teams, Six Moves during League of Legends Free Agency*, ESPN (Nov. 14, 2019), [https://www.espn.com/esports/story/\\_/id/28080255/six-teams-six-moves-league-legends-free-agency](https://www.espn.com/esports/story/_/id/28080255/six-teams-six-moves-league-legends-free-agency) [<https://perma.cc/95WY-RDZP>] (discussing free agency period for LCS).

possible thereby preventing other teams from acquiring promising players.<sup>237</sup> What was an inter-league problem became a player problem when the control of reserve clauses forced players to abstain from playing and not be paid for their abstinence. In addition, the teams could even prevent a competing league from forming if they controlled enough players.<sup>238</sup> Until the death knell of the reserve clause, the MLB played a game of keep-away with the issue, consistently shifting which institution should address the issue.<sup>239</sup> Nonetheless, even after the death of the reserve clause, major leagues continue to exert control over the minor leagues, justifying such interference on competitive balance premised on avoiding inter-market encroachment.<sup>240</sup> Congress even recognized the validity of this justification by providing an antitrust exception to pooled broadcast rights in the Sports Broadcasting Act conditioned upon non-interference with collegiate athletics.<sup>241</sup>

Analogously, in the esports context, leagues, such as the League of Legends Championship Series, require organizations to field a team of amateur talent—the academy team—in addition to the professional talent.<sup>242</sup> Furthermore, the same publisher directly interacts with the collegiate scene.<sup>243</sup> Rules are put in place so that the leagues do not interact or interfere with each other.<sup>244</sup> The game publisher can successfully control three independent markets—collegiate, amateur, and professional—of players which feed into each other. Splicing up the levels of play brings more players under the game publisher’s control and therefore reduces the opportunities for competing leagues to capture those players and viewers. In addition, Riot operates the only true professional *League of Legends* league, thereby forcing

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237. SURDAM, *supra* note 153, at 93.

238. *Id.* at 94.

239. *Id.* at 47.

240. *Cf.* Ryan Mabry, *Antitrust Law and the Minor League Reserve System*, 6 KALEIDOSCOPE 38, 42–43 (2007) (discussing the Professional Baseball Agreement outlining the intertwined relationship between MLB and the minor leagues).

241. 15 U.S.C. §§ 1291–1293 (2012).

242. *See supra* note 173 and accompanying text (discussing amateur players versus professional teams).

243. *See* Reames, *supra* note 205.

244. *See supra* note 180 and accompanying text.

players to sign to those teams operating in Riot's publisher-controlled league in order to play at the highest echelon. This position as a monopsonist—single buyer for multiple sellers—gives the publisher-controlled league immense bargaining power. Similar to traditional sports, the publisher can attempt to justify the market division and control based on a goodwill attempt to avoid inter-market encroachment.

Additionally, the game publisher controls the supply of players through license revocations, more commonly referred to as bans. Because every player of the game is playing through an End User Licensing Agreement subject to the terms of service,<sup>245</sup> the player can be stopped from playing the game publisher at any time, for any (or no) reason. Although revoking this license is an effective strategy for combatting cheating and other inappropriate online conduct, it could also be used to limit the pool of players available to play in competing tournaments. And unlike in traditional sports, the player could not participate in a competing tournament, or even play for personal enjoyment, and the player's professional career is gone absent a reversal by the publisher.<sup>246</sup>

Take, for example, Blizzard's ban of Chung "Blitzchung" Ng Wai from the *Hearthstone* Asia-Pacific Grandmasters. After winning a match that was being streamed, Blitzchung expressed pro-Hong Kong sentiments.<sup>247</sup> Blizzard, likely motivated by its dependence on the Chinese market that opposed the ongoing revolution in Hong Kong,<sup>248</sup> banned the player from the "highest tier

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245. See *supra* note 187 and accompanying text.

246. However, dedicated esports players have evaded these types of bans in the past, but only with extreme effort. See Eric Van Allen, *Riot Games Unbans Tyler1, A Player it Once Called a 'Genuine Jerk,'* KOTAKU (Jan. 1, 2018), <https://compete.kotaku.com/riot-games-unbans-tyler1-a-player-it-once-called-a-ge-1821785186> [<https://perma.cc/9A82-CCNN>] (claiming that Tyler1 continued to play, subject to an ID ban where, if the account was linked to the player, it would be banned). But see Matt Perez, *Faze Clan Player Permanently Banned from 'Fortnite' for Cheating*, FORBES (Nov. 4, 2019), <https://www.forbes.com/sites/mattperez/2019/11/04/faze-clan-player-permanently-banned-from-fortnite-for-cheating> [<https://perma.cc/9VYJ-PN7U>]. Even "successful" players in this context suffer substantial losses in viewership and therefore revenue. The unprofitability in the event of a ban becomes absolute if the player depends on a team salary rather than advertising revenue.

247. *Hearthstone Grandmasters Asia-Pacific Ruling*, HEARTHSTONE (Oct. 10, 2019), <https://playhearthstone.com/en-us/blog/23179289> [<https://perma.cc/FKG4-75XS>].

248. *Regarding Last Weekend's Hearthstone Grandmasters Tournament*,

of Hearthstone Esports” for a year and divested him of all earnings for “engaging in any act that, in Blizzard’s sole discretion, brings [the player] into public disrepute, offends a portion or group of the public, or otherwise damages Blizzard’s image.”<sup>249</sup> While the ban was ultimately reduced to six months and Blizzard did not opt for the nuclear option of a complete ban from the game, blitzchung could no longer compete at the highest tier of *Hearthstone* esports and suffered serious economic consequences.

One may instinctually push back on the threat of player bans based on the number of players in the video game market. Millions play the games, but very few people possess the aptitude to be a professional esports player; for this reason, they are likened to athletes.<sup>250</sup> Nevertheless, the extreme costs—particularly social costs—of banning a player, waiting for them to play during the ban, and then pursuing legal action to stop their now infringement, do disincentivize this behavior. Even so, the game publisher can always make an example out of a particular player in a competing league to shake investment in its competitors. While a naked ban absent any reason would trigger immediate scrutiny, the EULA and TOS of the game usually prohibits a wide range of conduct that serves as a justification for the revocation—even if one is not needed. The revocation would be justified under the publisher’s legitimate exercise of its copyright.

*b. Territorial Divisions & Geographic Limitations*

Next, both traditional sports leagues and the *Overwatch* League have experimented with territorial divisions. Limiting the number of organizations to one per city and creating local monopolies is enticing to sports leagues.<sup>251</sup> First, consumers associate with a local identity; that identity is tapped into by local

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BLIZZARD ENTMT (Oct. 12, 2019), <https://news.blizzard.com/en-us/blizzard/23185888/regarding-last-weekend-s-hearthstone-grandmasters-tournament> [<https://perma.cc/7XLG-N6T2>] (“The specific views expressed by blitzchung were NOT a factor in the decision we made. I want to be clear: our relationships in China had no influence on our decision.”). People expressed doubt about this statement. *E.g.*, @Slasher, TWITTER (Oct. 11, 2019, 5:31 PM), <https://twitter.com/Slasher/status/1182815995406225408> [<https://perma.cc/B48X-9K8A>].

249. *Hearthstone Grandmasters Asia-Pacific Ruling*, *supra* note 247.

250. *Cf.* 2018 NA LCS RULES, *supra* note 171 (requiring a rank of Diamond 3 or above in ranked solo queue which amounts to less than the top 1% of players even eligible to join a team).

251. *See infra* notes 252–57 and accompanying text.

teams, and hometown pride drives viewership.<sup>252</sup> Placing teams strategically can increase viewership efficiently instead of placing multiple teams in a single locale and only seeing marginal increases in an already tapped market. MLB, NFL, and now the popular *Overwatch* League have seen the results of this method of branding.<sup>253</sup> Second, organizations can begin to develop the infrastructure for physical on-site events. Being packed in an energized stadium with other enthusiasts, feet from the professional players, is a tried-and-true product in the sports context. Similar results are shown in the esports context.<sup>254</sup>

These territorial restrictions provided an easy and noticeable restraint on trade to focus on for Congressional representatives seeking to placate constituent demand for a home team in the 1950s. At the time, major leagues decided where teams could be located; they could not move nor enter the territory of another team. The 1951 Congressional hearings, in particular, pressured the MLB to expand or relocate towards the Pacific coast.<sup>255</sup> The committee reported that the territorial restrictions ensured teams did not face competition from one another.<sup>256</sup> In 1958, the NFL defended similar territorial restrictions and the requirement of unanimous consent for a team to move into another team's territory under a theory of competitive balance: without the protection, teams may encroach upon another in the same city.<sup>257</sup> Without competition, the organization in charge of the event can effectively set supracompetitive ticket prices without fear.

Exclusive licenses to a particular geographic territory are common practice in IP licensing deals,<sup>258</sup> but the local monopoly is often challenged by competing products. Consider the local McDonald's: its franchising agreement may give it the exclusive

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252. Rick Maese, *Overwatch League Looks to Future of Esports, as London Spitfire Makes History*, WASH. POST (July 28, 2018), [https://www.washingtonpost.com/news/sports/wp/2018/07/28/overwatch-league-looks-to-future-of-esports-as-london-spitfire-makes-history/?utm\\_term=.d06ad4ec5b78](https://www.washingtonpost.com/news/sports/wp/2018/07/28/overwatch-league-looks-to-future-of-esports-as-london-spitfire-makes-history/?utm_term=.d06ad4ec5b78) [<https://perma.cc/BL9C-CCHN>].

253. *Id.*; see also *supra* notes 145–47 and accompanying text.

254. Maese, *supra* note 252.

255. SURDAM, *supra* note 153, at 43.

256. *Id.*

257. *Id.* at 91.

258. JOHN PALFREY, *INTELLECTUAL PROPERTY STRATEGY* 94 (John Gorham ed., 2012).

right to sell Big Macs in your neighborhood, but it still has to contend with the Burger King across the street because their Whopper is a competing product. In the esports context, most consumers only follow a single title (the equivalent of eating either Big Macs or Whoppers, but not both) and therefore the local monopoly controls the entire set.<sup>259</sup> Therefore, without competition, the consumers wishing to partake in on-site events must pay a premium. In the end, providing exclusive licensing arrangements tied to particular localities creates miniature monopolies for organizations that harm consumer welfare. Not only is it a recognized division of the publisher's copyright, but it can be justified on a theory of preventing intraleague encroachment.

*c. Pooled Broadcasting Rights & Public Performance*

The most recent antitrust concern of the traditional sports leagues is also central to esports economics: pooled broadcasting rights. Pooling the broadcasting rights for sale and limiting supply of the product through a blackout are both clear types of concerted action that reduces competition among the organizations in the sale of media rights. The NFL adopted an early rule prohibiting transmission of a member's games to other markets during particular times.<sup>260</sup> The court upheld the blackout provision for telecasts while the team is at an away game (finding it a reasonable restraint to protect weaker teams from intraleague competition) but found the restraints on telecasts otherwise illegal under a rule of reason analysis.<sup>261</sup> Lobbyists rushed to Congress for further expansion for broadcast rights—namely an antitrust exception for broadcast rights.<sup>262</sup> Born from the lobbyists' efforts was the Sports Broadcasting Act.<sup>263</sup> The Act exempts contracts for pooled broadcasting rights for leagues participating in football, baseball, basketball, and hockey so long as the broadcasting does not interfere with collegiate and interscholastic athletics.<sup>264</sup>

However, the Sports Broadcasting Act specifically enumerates the exempted sports; esports is naturally not among

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259. See *supra* note 198 and accompanying text.

260. Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 511 (2014).

261. *United States v. NFL*, 116 F. Supp. 319, 326–27 (E.D. Pa. 1953).

262. Boliek, *supra* note 260, at 512.

263. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

264. *Id.*

them.<sup>265</sup> Furthermore, the Sports Broadcasting Act only deals with commercially-sponsored telecasts rather than the sale of the rights to subscription services.<sup>266</sup> Nevertheless, esports leagues have entered into exclusive broadcasting agreements with particular online streaming platforms, possibly in violation of antitrust law's prohibition on concerted action.<sup>267</sup> Esports leagues walk a tight line when exclusively licensing to a particular online media platform.<sup>268</sup>

The league does not have the same antitrust exception or competitive justification of protecting weaker teams. Should a competing streaming service attempt to challenge the grouped package, the publisher-controlled league will likely argue that the "grouped package" is in fact the sale of a license of its public performance rights rather than that of the league. Under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the publisher could say that the licensing is "reasonably necessary to effectuate the [copy]rights that are granted."<sup>269</sup> In the end, the game publisher who controls the league retains the rights to public performance and may authorize anyone or no one to create such copies of the video game content.<sup>270</sup> Instead of being characterized as concerted action among the teams and the league, the "pooling" arrangements may in fact be a sale of public performance rights of the independent publisher. With this legal uncertainty, channelers are left to pay a supracompetitive price or the price of litigation.

*d. Complete Takedown & Exclusivity*

Finally, returning to the EVO example,<sup>271</sup> current practice suggests that the game publisher can shut down any tournament

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265. *Id.*

266. *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 302 (3d Cir. 1999).

267. *E.g.*, Jacob Wolf, *Overwatch League To Be Streamed on Twitch.tv in Two-Year, \$90 Million Deal*, ESPN (Jan. 12, 2018), [http://www.espn.com/esports/story/\\_id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal](http://www.espn.com/esports/story/_id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal) [<https://perma.cc/AN4M-BUW3>] (reporting the deal between Activision-Blizzard and Twitch).

268. *See supra* note 52.

269. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19 (1979).

270. *See supra* notes 87, 92 and accompanying text.

271. *See supra* notes 13–28 and accompanying text.



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that is operating without a license.<sup>272</sup> When the game publisher controls a league, there is an enormous benefit of exercising the monopoly over the intellectual property and taking control of all possible revenue. The publisher can simply refuse to deal and is justified by the legitimate monopoly over its copyright. While this benefit does not likely outweigh the alternatives of licensing fees obtained from tournament revenues and exposure to a larger audience,<sup>273</sup> the risk nevertheless remains that the tournament's broadcast could be entirely shut down with a simple DMCA takedown notice of infringement and the tournament itself via a strongly-worded letter implying an incoming law suit for infringement.<sup>274</sup>

In the end, despite a number of concerning practices possibly restraining trade or maintaining monopolization, publisher-controlled leagues have a number of justifications based in sports antitrust jurisprudence and copyright law that may insulate the leagues from scrutiny. Table 1 summarizes these problematic practices and their justifications. Under these complementary theories of competitive balance and copyright, publisher-controlled leagues will be able to maintain the market of self-regulation favoring deep control over the esports market by the publisher.

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272. See *supra* notes 13–28 and accompanying text.

273. For instance, it may behoove an American publisher to ignore an unlicensed tournament in South America if it brings new players to the game and the publisher would otherwise be unable to tap into that area.

274. This is particularly true where esports depend upon online streaming platforms such as Twitch which shut down first and ask later pursuant to the DMCA safe harbor provisions.

Esports Economics	Antitrust Concern	IP Medium	Justification
Minor Leagues	Restricting Supply of Players to Competing Leagues and Control Across Markets	Field of Use Restriction & License Revocation	Foster Pre-Professional Leagues & Avoid Cross-Market Encroachment
City-Based Teams	Barriers to Entry & Geographic Limits	Exclusive Geographic License	Drive Consumer Interest & Avoid Intra-league Encroachment
Pooled Broadcast Rights	Restricting Supply to Channelers	Public Performance	Sale of Single Right Necessary to Benefit from Copyright
Unique Tournament	Restricting Supply to Consumers	DMCA Takedown & Refusal to Deal	Protection from Infringement

**Table 1:** Summary of Practices

### C. PROBLEMS WITH LEAVING THE STATUS QUO

In the face of these practices, the esports industry nevertheless clamors for self-regulation, and one option is to leave the status quo as is. On its face, it would appear that independent tournament organizers are not suffering too poorly when over a thousand tournaments occur each year.<sup>275</sup> Furthermore, there are very few instances of copyright abuse and publisher refusals to license their game. In fact, self-regulation has been incredibly beneficial to the esports industry whose growth has only accelerated in recent years.<sup>276</sup>

But this view of the industry is misleading and the risk of copyright abuse to engage in anticompetitive practices is too high to consider this to be a reasonable option. First, this view ignores the top-heavy structure of tournament prize pools that place the only economically-viable positions for professional

275. Christopher Ingraham, *The Massive Popularity of Esports, in Charts*, WASH. POST (Aug. 27, 2018), <https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts> [<https://perma.cc/AD3E-Q7ZQ>].

276. Pannekeet, *supra* note 3.

players in the publisher's hands.<sup>277</sup> Second, the game publisher made a significant investment into developing an esports title, perhaps with the very intention of monetizing competitive play.<sup>278</sup> The copyright system rewards that investment by giving the publisher exclusivity rights over the intellectual property. If history has anything to say, self-regulation will eventually break down. Sports leagues eventually entered into dispute over player salaries and congresspeople faced public pressure to bring change.<sup>279</sup> When the courts were asked to make the decisions, they deferred to Congress<sup>280</sup> or found the issues moot once league lobbyists went to Congress.<sup>281</sup> In the end, courts looked to Congress and Congress has either failed to understand the unique economics of sports leagues, failed to act, or succumbed to unilateral lobbying pressure.<sup>282</sup> Intellectual property flowing from technology in esports concerns would only aggravate the problem. As investment in esports continues to increase,<sup>283</sup> game publishers may be seduced by copyright exclusivity and begin enforcing the monopoly over their title with little to no hope for effective intervention by the courts or Congress.

### III. ESPORTS COMPETITION MODERNIZATION ACT: COMPULSORY LICENSING AND COMPETING COMPETITIONS

We would be happy with anything that would keep us out of the courts and spell out the things that we have to have.

—Bert Bell, NFL Commissioner<sup>284</sup>

This final Part presents a solution based on the Music Modernization Act's collective licensing management organization

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277. Will Partin, *The International Is Bad for Dota 2*, KOTAKU (July 31, 2018), <https://kotaku.com/the-international-is-bad-for-dota-2-1827996518> [<https://perma.cc/RE3B-JMP4>].

278. See Webster, *supra* note 18.

279. See *supra* Part I.C.

280. See, e.g., *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (reserving Congress's role in determining the MLB's antitrust exception).

281. See SURDAM, *supra* note 153, at 58.

282. See *id.* at 237–38.

283. Pannekeet, *supra* note 3.

284. SURDAM, *supra* note 153, at 93 (citing *Organized Professional Sports Teams: Hearings Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 85th Cong. 415 (1958) (statement of Bert Bell, National Football League Commissioner)).

and applies it to licensing within the esports industry. The esports industry must come together to Congress to propose a trade-off: compulsory licensing for guaranteed compensation and competition.<sup>285</sup> The Music Modernization Act (MMA) serves as roadmap for finding effective solutions to industries reliant on licensing and self-regulation. Beginning with a discussion of music as an imperfect model for compulsory licensing and rate setting, this Note ultimately aspires to set forth what the esports industry needs in order to stay out of the courts.

#### A. MUSIC AS A MODEL: ONLINE MUSIC STREAMING SERVICES & COMPULSORY LICENSING

In a market equally dependent upon self-regulation, innovation, and copyright, the music industry revisited the pooled licensing and royalty collection problem in 2018. Songwriters were not collecting royalties for the mechanical licenses when sites such as Spotify and Apple Music streamed their work.<sup>286</sup> Those platforms faced legal uncertainty in terms of possible infringement of the songwriter and artist copyrights over the songs.<sup>287</sup> But music fans continued to demand such services without an effective and efficient means for those platforms to obtain the appropriate licensure. Like the Spotify situation, current streamers, professional esports players, and tournaments currently take an infringe-now-defend-later approach.<sup>288</sup>

The bipartisan Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018 signaled a cease-fire to the war over the licensing of music.<sup>289</sup> The bill set forth a compulsory blanket licensing system managed by independent non-profit collective

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285. This Note is not the first to recommend the compulsory licensing system. Yang Qiu suggested that a compulsory license may be used to settle the debate over copyright ownership in streaming under Chinese law. Yang Qiu, *A Cure for Twitch: Compulsory License Promoting Vide Game Live-Streaming*, 21 MARQ. INTELL. PROP. L. REV. 31, 44–50 (2017).

286. *Issues and Policy: Music Modernization Act*, GRAMMY, <https://www.grammy.com/advocacy/issues-policy> [<https://perma.cc/C2C2-4EVX>].

287. *Id.*

288. *See supra* Part II.B.1.

289. Dave Davis, *Music Modernization Act of 2018 Becomes Law*, COPYRIGHT CLEARANCE CTR. (Jan. 29, 2018), <http://www.copyright.com/blog/music-modernization-act-introduced-house-senate> [<https://perma.cc/4DWC-MQHF>] (last updated Oct. 11, 2018).

management organization and a rate-setting board.<sup>290</sup> The goal was to create a more streamlined way to ensure music creators collected royalties due from streaming sites.<sup>291</sup> In effect, through the system, music streaming services can play the music first, then pay a statutorily-set fee per listen or a percentage of the revenue, whichever is greater.<sup>292</sup> In addition, the bill made several reforms to copyright law and provided a safe harbor for digital music services that reserved a sum of money for uncollected royalties.<sup>293</sup> The effects of the Act have not yet been seen, but the industry has exhibited immense support and have faith in the solution.<sup>294</sup> While music publishers could not come together as horizontal competitors to pool together licenses to offer to digital service providers like Spotify, they came to Congress with the genuine desire to solve the problem and created a statutory solution to music licensure. Now, digital service providers have access to millions of songs and content creators are guaranteed royalty payments through a third-party organization.

Unfortunately, the current cooperative atmosphere surrounding the MMA masks a more acrimonious debate over rate-setting that this solution necessarily implicates. In the end, digital streaming service providers want to pay as little as possible for the license, and composers, publishers, Performance Rights Organizations, and performers all want as much money as they can get. Rate-setting litigation is contentious<sup>295</sup> and the proposed Esports Competition Modernization Act will necessarily import this feature. Imperfect as it may be, the MMA, as will be shown, is the most effective and least-invasive means of stopping potential copyright abuses in violation of antitrust laws.

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290. Amy X. Wang, *Trump Signs Landmark Music Bill into Law*, ROLLINGSTONE (Oct. 11, 2018), <https://www.rollingstone.com/music/music-news/trump-signs-music-modernization-act-736185> [<https://perma.cc/JV7Q-2AV8>].

291. *Id.*

292. Jeong, *supra* note 114.

293. *Issues and Policy: Music Modernization Act*, *supra* note 286; Wang, *supra* note 290.

294. Davis, *supra* note 289 (listing support of the Recording Industry Association of America, the National Music Publishers Association, and the National Association of Broadcasters among others).

295. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 91–94, 102–03 (2015), <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/UW95-44VE>].

B. STATUTORY SOLUTION: ESPORTS COMPETITION  
MODERNIZATION ACT

While this Note does not seek to write the entirety of an incredibly complex Congressional bill, it will develop a skeleton of the absolute needs for the esports industry in order for the act to be a success. These include (1) involvement of the industry, (2) an opt-in system, (3) the non-exclusive rights, (4) compensation, and (5) notice tied to (6) withdrawal rights.

The first of these needs is the participation of the entire esports industry. The esports industry, like music and traditional sports before it, has existed through self-regulation. When Congress and regulators tried to impose their will upon traditional sports, sports pushed back and used tactics to delay any significant changes to the industry.<sup>296</sup> It is already a common refrain that esports is unique and regulators would likely fail to consider the specialized nature of the industry.<sup>297</sup> To eliminate industry pushback, the industry itself must be involved in the process. The unique market must identify a unique solution. Organized esports competitions cannot be addressed in tandem with other intellectual property issues without running the risk of doing more harm than good by introducing new concepts or overextending existing ones. The unique solution found by the music industry—a streamlined compulsory licensing system—best serves to solve the problem of publisher-controlled leagues and downstream control without trampling over successful self-regulation.

Next, the industry needs to separate the wheat from the chaff, the esports titles from the average video game. Under this proposed Esports Competition Modernization Act, publishers would choose to opt-in to the compulsory licensing system. Publisher-organized competitive play would only be allowed upon opting-in. This selection could occur upon registration of the

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296. See *supra* Part II.C.

297. See, e.g., David Philip Graham, *Inviting Regulation: The Sportsification of Video Games*, DPG AT LAW, <https://www.dpgatlaw.com/2019/03/27/inviting-regulation-the-sportsification-of-video-games/> [<https://perma.cc/7WVX-MRRE>] (counseling esports clientele to avoid sports terminology to avoid potential for regulation); Aaron Swerdlow, *4 Esports Regulations to Watch for in 2018*, VENTUREBEAT (May 8, 2018), <https://venturebeat.com/2018/05/08/4-esports-regulations-to-watch-for-in-2018> [<https://perma.cc/XNQ8-KAX7>] (discussing possible traditional sports-based regulations for esports).

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game with the Copyright Office. This system recognizes that control over the intellectual property remains with the publisher. Because the publisher can choose when and whether to monetize the competitive scene, publishers remain incentivized to develop esports games without affecting non-esports titles.<sup>298</sup> But, when the publisher chooses to monetize the downstream esports market by forming a league, the publisher must do so on relative equal footing with all other organizations wishing to organize competitive playing of video games. The act cuts off downstream control without making the publisher forfeit their copyright absolutely.

The core of the act would revolve around the rights of tournament operators—regardless of whether that tournament operator is the publisher or independent. The scope of the license and conditions for obtaining one could be outlined using language from existing tournament licenses:

Section 1. Compulsory License to Tournament Operator — A person complying with the provisions of this section may obtain a non-exclusive, non-transferable, limited, royalty-bearing license (“License”) to use and display the software title[s] identified by you in the signup form (the “Game(s)”) for inclusion in the Tournament. The License shall include the following activities: (a) operate and use the Game(s) during the Tournament; (b) publicly display and publicly perform the Game(s) during the Tournament in a live Tournament venue; (c) live online transmission or broadcast of the Tournament via web-based video streaming services; (d) record all Tournament games, and distribute and sublicense such recording for later private linear viewing via web-based video streaming services; and (e) promote the use of the Game(s) in connection with the Tournament.<sup>299</sup>

Each word in this grant is important. It must be non-exclusive so as to promote competitions among tournament operators. The license must be non-transferable to prevent free-riders from not complying with the other conditions set forth in the act. It is limited to tournament play and the broadcast thereof; it does not extend to the game itself. To be exact, it gives all of the rights to operate and monetize a tournament, but nothing more.

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298. Note too that this trade-off necessarily means that the proposed act is inapplicable to the debate over other interactions with the game, such as the creation of Let’s Plays videos discussed in Coogan, *supra* note 79, and Hagen, *supra* note 96.

299. *Dota 2 Tournament License and Paid Spectator Service Agreement*, *supra* note 26 (using similar language).

With the tournament operators happy with the license scope, game publishers must also be happy with the royalty rate. Independent tournament operators could agree to a royalty arrangement to obtain a compulsory license for any number of esports titles through a rate-setting board.<sup>300</sup> One means of calculating the royalty would be a percentage of the revenue from the tournament or a set amount per view and attendee. This “Spotifyfication” of esports would adequately compensate the publisher for its possible lost revenue that would be gained through enforcement of its copyright exclusivity. Outside of the collection of royalties and the adjudication of disputes related thereto, the board should not have any oversight capacity. Again, this balances the need to establish a rate with the industry’s desire to remain in control. Who better to determine the rate for such a license than the industry itself?

There will also need to be a trade-off of notice requirements for tournament reservations and opting-out. First, the tournament operator must notify the game publisher 180 days before the tournament is set to take place. Notice should include the identity of the tournament operator, the dates of the tournament or league (which may last no longer than one year), the anticipated number of competitors, and a general description of the event. This notice would secure the license for a set tournament, which would need to be renewed for each subsequent tournament. Second, the publisher must give 180 days-notice before withdrawing a game from the compulsory licensing scheme. The decision to allow for retraction is likely controversial. After all, one of the greatest worries is that tournament operators will have invested significant resources into a tournament when the game publisher can take it all away. But withdrawal is necessary under the U.S. copyright system that recognizes the inherent right of the author over one’s work. The copyright owner should never permanently lose control over the work until it enters the public domain.<sup>301</sup>

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300. The creation of a rate-setting board prompts the question of whether it would be necessary for the tournament operators to then create a collective management organization in order to effectively bargain for better terms. See generally Allen, *supra* note 102 (arguing that a collective management organization could mitigate the unequal bargaining power between the publisher and the players and tournament organizers).

301. For a defense of the withdrawal mechanism, see Qiu, *supra* note 285, at 49, 53–54 (explaining why it is unlikely that all game publishers would cancel



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In the end, the Esports Competition Modernization Act would allow industry participants to secure the stability it has so desperately sought since its inception in the 1970s by eliminating risk of infringement and enforcement by the publisher. Courts and Congress have yet to adequately lay out the protections inherent in video games and the limitations to those protections, e.g., fair use in the video game and esports context. In a compulsory licensing schema, the licensee would pay for the rights—regardless of what the courts ultimately decide about those rights—and be free from worry of disruption by the publisher. Giving stability to the tournaments would incentivize additional investment. Sponsors would no longer worry about a title being pulled from a tournament or a league and its teams ceasing to exist. In turn, tournament operators would pass on the benefits of increased investment to the consumers. Players, too, would have more certainty and job security in independent leagues: licensees would compete for teams who would compete for players and, in turn, salaries would become competitive.

This effectively implements the interleague competition of competing competitions critique. Publishers can run a league so long it gives up the right to exclude competition. More than a single championship will take place as each league is independent of the others. Consumers would then choose to support any tournament to spectate instead of only having the publisher-controlled league. It does not, however, inherently imply the intra-league open-architecture structure. A league does not need a relegation system under this compulsory license. The teams could be “permanent” within a league, as they are with ones today. But leagues would compete with each other for players. If a league fails to perform, players could switch into a more beneficial league, possibly dragging along consumer interest. This creates a hybrid model of competing competitions that emphasizes competition among tournaments and leagues.

As for the anticompetitive conduct discussed, most of the issues are avoided under the Esports Competition Modernization

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the license and that the right of cancellation is necessary to create balance). With the introduction of a withdrawal mechanic, the act introduces an element of gamesmanship. For instance, if the publisher and a tournament operator launch leagues at the same time and the independent operator is more successful immediately, the publisher is incentivized to withdraw its title, wait until the public has forgotten, and opt back in when the publisher is more prepared. Time limits to opting back in after opting out can deter this behavior.

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Act. Players could not be banned from playing in a competing league so long as they operate within the scope of the compulsory license. Due to the increase in demand for players, leagues will compete with each other by providing the least restrictive league bylaws. Territorial monopolies are impossible to grant because another league represents competition within the territory. Pooled broadcasting rights no longer fall solely within the hands of the publisher, but in the hands of all licensees. Finally, the compulsory license removes the publisher's ability to pull a title at the last minute. While it should be allowed for the publisher to revoke its acceptance of the compulsory licensing guidelines, only future licenses should be affected.

C. COMPETING SOLUTIONS FOR PUBLISHER-CONTROLLED LEAGUES: GOVERNANCE, COPYRIGHT, AND ANTITRUST

Academics have discussed three alternative solutions to addressing the anticompetitive effects of intellectual property licensing by publisher-controlled leagues: leave regulation of the industry to an independent governance body, modify copyright of video games to limit publisher control, and leave parties to test antitrust concerns in the courts. Each solution has critical flaws that render it ineffective in tackling the entire problem of downstream control by publisher-controlled leagues.

Laura Chao proposed a regulatory and governance body to provide oversight of esports.<sup>302</sup> Recognizing the legitimate parallels between sports and esports economics, Chao argued that an independent pan-esports governing body should be used to set minimum standards for consumers, players, teams, and leagues.<sup>303</sup> She also rightfully pointed out that such an independent agency could facilitate the negotiation and sale of content distribution agreements.<sup>304</sup> But, her solution does not engage with the intricacies of copyright licensing. Governance would have a chilling effect but would not prevent the publisher from banning players in competing leagues, granting territorial exclusivity to particular teams, licensing exclusive content to a particular distributor, or refusing to license to competing tournament operators. Furthermore, said governing body could be

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302. Chao, *supra* note 8, at 761.

303. *Id.* at 761–63.

304. *Id.*

subject to regulatory capture. Given that the publishers currently have the largest economic weight to throw, the governance body will end up a rubber stamp for publisher-benefitting practices.<sup>305</sup> Finally, a pan-esports governing body is in direct contrast with the industry's preference for publisher-regulation of its titles and self-regulation as a whole: governance from above is not palatable.

If not governance, many have suggested that the root of the issue is the ambiguity of copyright protections afforded to rights holders over video games, and that statutory or judicial interpretation placing limits on those rights could rectify the problem. The reform would take place through the arguments previously discussed: interactivity creating independent copyright, transformative fair use, and copyright misuse.<sup>306</sup> Harttung<sup>307</sup> and Hagen<sup>308</sup> believe that fair use provides the most likely solution for online broadcasts of video games in particular. The fair use argument has gained the most traction, but it would be the equivalent of hammering in a screw. Modifying an already tortured doctrine permitting quite a bit of user-generated content to fit the unique situation of esports would likely do more harm than good. Furthermore, placing reliance on defensive measures still leaves putative infringers on the hook for the risks of litigation. Finally, finding fair use for online broadcast of video games would disincentivize publishers from creating additional esports titles. This runs contrary to copyright's constitutional goal of promoting innovation.

Finally, Miroff argues that antitrust law already provides an adequate vehicle for limiting anticompetitive conduct by publisher-controlled leagues.<sup>309</sup> In his article, he outlines a tying claim against a publisher-controlled league for its misuse of copyright in the downstream esports markets.<sup>310</sup> While it is true that antitrust law provides an effective means of finding limits to copyright licensing arrangements by publisher-controlled leagues, his failure to engage with sports antitrust history limits

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305. See Miroff, *supra* note 8, at 220 (claiming that Chao's solution would only aggravate anticompetitive practices).

306. See *supra* Part I.B.2.

307. Harttung, *supra* note 11.

308. Hagen, *supra* note 96, at 273.

309. Miroff, *supra* note 8, at 186.

310. *Id.* at 210–12.

its applicability. The culture of self-regulation and industry pushback adopted from traditional sports will effectively delay applicability of antitrust until the economic practices become entrenched. Worst of all, the monitoring costs of his solution fall on the smaller stakeholders within the esports market: the independent tournament operators. Bearing the costs of suit is not in the short-term interest of these organizations, particularly so long as the publishers act benevolently.

What has not been discussed is the possibility of taking a play from the music industry's playbook. Music, like esports, is an industry dependent on copyright licensing and self-regulation. Consumer demand for esports content continues to climb, thereby incentivizing quick capitalization by entrepreneurs.<sup>311</sup> Like the music industry did to find a statutory solution to the mass licensing of digital media, all of the various esports participants must come to Congress and self-regulate one final time. The process of the Music Modernization Act and the solution of compulsory licensing effectively takes ideas native to the sports and intellectual property arenas to create an esports regime that satisfies antitrust concerns through competing competitions.

Critics of this solution would rightfully point out that the Music Modernization Act is a risky basis for problem-solving when the effects of the streamlined system have yet to be seen. There are numerous distinctions between the music and video game industries that may caution against such an import. Importantly, esports do not face the numbers problem that music faces and that necessitated the compulsory licensing solution: it is still economically feasible for a tournament operator to contract with every publisher.<sup>312</sup> The solution is not perfect: just like sports antitrust does not map perfectly onto the esports issues, music does not do so either. In the end, although the compulsory licensing system may not be justified by the sheer number of actors, like in music, it can be justified on the need to address antitrust concerns laid down in this Note. And while the specific

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311. Pannekeet, *supra* note 3.

312. This is distinguishable from the concerns raised by Allen, *supra* note 102, at 227–28, about the impracticality of the publisher contracting with all streamers. The number of independent tournament operators are necessarily fewer than the number of streamers.

effects of the Music Modernization Act have yet to be seen, compulsory licensing in music and rate-setting has a longer history that justifies their use.

Additionally, critics of the proposed Esports Competition Modernization Act can claim that publishers will still come up with invidious ways to maintain control over the league.<sup>313</sup> True, the game publisher has unique access to the game, its client, and its balance system. But, the crux of the proposed act is to put the independent tournament operator and publisher tournament operator on a more level playing field with regards to the mere ability to organize play. The publisher could not introduce new functions or characters in the game without giving access to licensees.<sup>314</sup> The publisher could not force others to play on older versions of the game without subjecting itself to the same limitations. The only advantage left becomes advance knowledge of game balance and changes, which should not impact the heart of competing competitions.

In the end, an Esports Competition Modernization Act could be developed by industry participants in order to address the risk from legal ambiguity and downstream publisher control. Drawing from a solution prevalent in both sports antitrust and copyright domains, the proposed act would create a compulsory licensing system that negates the publisher's ability to monopolize a title while compensating the entity for its loss. At the same time, the proposed act would also reinforce the stability of the industry by allowing independent tournaments to thrive, creat-

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313. The author would like to thank Ross Abbott for discussing means of imposing disadvantage on independent tournament operators.

314. There is, however, an unresolved question as to whether the act should go beyond the gameplay protected by copyright and extend to the means of viewing the gameplay, which could be protected under patent law. *See supra* note 73 and accompanying text. If it does not extend that far, this may lead to a reverse-engineering question similar to the one presented in *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527–28 (9th Cir. 1992) (finding fair use of reverse-engineering of Sega game to make Sega-compatible games) and *Sony Computer Entertainment v. Connectix Corp.*, 203 F.3d 596, 610 (9th Cir.) (finding fair use of reverse-engineering Sony games to make a computer-compatible version to compete against the PlayStation), *cert denied* 531 U.S. 871 (2000), if the independent tournament operator must disassemble the game to determine how it can spectate matches. To the extent that the finished product incorporates copyrightable elements of the game, the compulsory license should shield against claims of infringement.

ing competition for professional players, and giving the basic certainty that the industry is not reliant upon a single benevolent overlord: the publisher.

### CONCLUSION

This Note highlighted the danger of publisher-controlled esports leagues and downstream control by illustrating how copyright licensing can lead to historically-recognized sports antitrust issues. Coupling copyright considerations and antitrust arguments effectively outlines the strong justifications publishers can use to maintain the status quo in their favor. After considering the impact of player restrictions, territorial divisions, pooled broadcasting rights, and publisher exclusivity, this Note recommends adopting a compulsory licensing system based on the Music Modernization Act. The solution would cut off the publisher's downstream control in the industry while compensating it for such loss. This solution is less invasive than an oversight committee, more targeted than statutory amendments to copyright law, and more reliable than leaving it to the courts to discuss the complex antitrust considerations.

Esports will lead to a reconsideration of decades of precedent and practice. Whether it be in antitrust law, copyright law, or other fields, it will be necessary to determine if esports is enlightening or aberrational in the view of the law. This Note used publisher-controlled leagues to shine light on potential anticompetitive conduct through copyright licensing, but the greater implication is a reconsideration of the current antitrust exemptions and excuses for traditional sports. Sports slipped into exceptions as it matured into the national pastime. As esports continue to mature, the questions remain: is it time for regulation and when is it too late?