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USeSPA? Exploring the Idea of a U.S. Esports Regulatory Authority

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JUSTIN HUNG

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I. INTRODUCTION

In October 2013, Bryant Gumbel and a host of commentators held a discussion on competitive video gaming called “esports.”¹ The event that

¹ HBO Sports, *Real Sports with Bryant Gumbel*, HBO SPORTS (Oct. 2013), <https://www.hbo.com/#sports/video&assetID=GOROSTGP41467?videoMode=embeddedVideo/>; see also Samit Sarkar, *HBO's Real Sports Debates the Merits*

prompted their discourse happened earlier in the year: One of the largest venues in the United States, the Staples Center, sold-out *in under an hour* to accommodate the World Championships of League of Legends, where titans “SK Telecom T1” and “Royal Never Give Up” (esports teams) fought over a million dollar prize pool.² Only one of the seven commentators that day acknowledged the legitimacy of people being paid large sums to compete in a video game on the world stage.³ The rest of the correspondents did not share that sentiment:⁴ “My issue is,” correspondent Mary Carillo noted, “it’s still not a sport, it’s a game.”⁴

Regardless, it is undeniable that esports have become more than just a game.⁵ Now valued at around \$1 billion, esports transformed from a news media joke into an international sensation in the last decade.⁶

of *ESports*, POLYGON (Dec. 18, 2013, 5:09 PM), <https://www.polygon.com/2013/12/18/5225226/hbo-real-sports-debate-is-esports-a-sport>.

² Paul Tassi, *League of Legends Finals Sells Out LA’s Staples Center in an Hour*, FORBES (Aug. 24, 2013, 9:28 PM), <https://www.forbes.com/sites/insertcoin/2013/08/24/league-of-legends-finals-sells-out-las-staples-center-in-an-hour/?sh=7af8b66e32b8>; see also TheScore Staff, *How Esports Changed The Game: From Media Laughing Stock To Media Craze*, THESCOREESPORTS, <https://www.thescoreesports.com/news/14384-how-esports-changed-the-game:-from-media-laughing-stock-to-media-craze> (noting that Jimmy Kimmel and several hosts of CNN and HBO were quick to publicly laugh at the idea of video games becoming a profession).

³ See HBO Sports, *supra* note 1.

⁴ *Id.*

⁴ *Id.*

⁵ See also Sarkar, *supra* note 1. The correspondent who acknowledged esports’ legitimacy, Soledad O’Brien, is quoted as saying: “‘Whether or not esports is a sport isn’t important’ because the global success of . . . the competitive environment in esports make that discussion moot.” *Id.*

⁶ See, e.g., *Newzoo Global Esports & Live Streaming Market Report*, NEWZOO 29 (2021), https://newzoo.com/insights/trend-reports/newzoos-global-esports-live-streaming-market-report-2021-free-version/?utm_campaign=GEMR%202021&utm_source=older%20content%20to%202021%20free%20report&utm_content=free%20report; see also *Esports Market Size, Share & Trends Analysis Report by Revenue Source (Sponsorship, Advertising, Merchandise & Tickets, Media Rights), by Region, and Segment Forecasts, 2020–2027*, GRAND VIEW RSCH. (June 2020), <https://www.grandviewresearch.com/industry-analysis/esports-market>.

Valuation methods differ, but these reports, among others, both suppose that esports’ market size is around \$1 billion.

However, in spite of its increasing pertinence to modern society, there has been no hard and fast regulation or involvement from the U.S. Government.⁷ Where other countries with esports communities have government-endorsed and coordinated associations to help administer the rules of fair play, in the United States, only the publishers of the games or third-party league operators regulate esports related activities.⁸ Several parties have expressed the opinion that the development of esports and the video game industry, as well as the issues that have arisen from their development, warrants the formation of a central regulatory authority for esports.⁹ Yet, exactly what kind of governance structure is needed or appropriate, the issues such an authority can tackle, and what role it would play in the regulatory or legal ecosystem, remains unexplored.¹⁰ Further, exactly how such a monolithic regulatory body for all esports in the United States would benefit or resolve the present issues facing the esports market, assuming it could, is unclear.

This article will conclude, ultimately, it is a matter of policy with two convincing sides best left for the public to decide.¹¹ First, having a monolithic regulator for all esports in the United States is unnecessary to

⁷ Katherine E. Hollist, *Time to be Grown-Ups about Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 843 (2015) [hereinafter *Time to be Grown-Ups*].

⁸ *Id.*

⁹ *Id.*; see Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating ESports*, 26 U. MIAMI INT'L & COMP. L. REV. 499, 506 (2019) [hereinafter *The Challenges of Implementing a Governing Body*] (“Having multiple regulatory organizations creates confusion and lacks cohesion.”); Jas Purewal and Isabel Davies, *The Esports Explosion*, LANDSLIDE (Nov./Dec. 2016), reprinted in Jas Purewal and Isabel Davies, *The Esports Explosion*, AM. BAR ASS'N, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/ (noting that, “[e]sports needs to build its own governance structures if it is truly to realize its potential on a sustainable, long-term basis.”); Laura L. Chao, “*You Must Construct Additional Pylons*”: *Building a Better Framework for Esports Governance*, 86 FORDHAM L. REV. 737, 761 (2017) [hereinafter *You Must Construct Additional Pylons*]; Taylor Kitzmiller, *The Meteoric Rise of Esports: What Legal Issues Threaten the Growth of This New Industry*, UNIV. OF BALT. L. REV. (2020) (noting, as a section heading, that “[r]egulating [the esports] industry has been a struggle because it lacks a single, central governing body.”).

¹⁰ Purewal & Davies, *supra* note 9.

¹¹ See discussion *infra* Conclusion.

address many of the legal issues esports faces and may actually cause more legal issues.¹² Second, some centralized effort or a centralized association to heighten and universalize standards would be beneficial because it would allow market participants to address the systemic threats to the esports market.¹³ As to a centralization, this article will argue the most effective means to accomplish such a task is through a binding and monolithic regulatory body.

In arriving at this conclusion, Section I of the article will briefly go over the current nature of the esports regulatory ecosystem and how game publishers exert control over the competitive scenes derived from their games. Section II will give an overview of the legal issues that esports presently faces and what governs how those issues are dealt with. Section III will provide case studies on analogous, monolithic esports regulatory bodies in other jurisdictions. Section IV will examine the similarities between the current esports regulatory bodies and those of conventional sports. Section V will underline several reasons why a monolithic regulator may not be the ideal solution that many scholars have proposed. Last, Section VI will take the insights gained from the analysis in Parts I through IV to provide general suggestions as to what authority an effective monolithic regulatory body should possess. In the interest of brevity, this article will not examine the individual legal issues that esports face with great precision and will be limited in scope to esports as a professional competitive scene.

II. BACKGROUND: ESPORTS IN A NUTSHELL

Esports, short for electronic sports, refers to “highly organized, competitive level gaming” where players or “teams of players compete against each other at a professional level in popular video games.”¹⁴ The video games encompass a variety of genres, and the publishers of the games often design a competitive ecosystem within them with competitive play in mind.¹⁵ The humble beginnings of esports in the United States trace

¹² See discussion *infra* Section II and Section VI.

¹³ See discussion *infra* Sections V & VI.

¹⁴ Sagar Khillar, *Difference Between ESports and Sports*, DIFFERENCEBETWEEN.NET (May 21, 2020), <http://www.differencebetween.net/miscellaneous/sports-miscellaneous/difference-between-esports-and-sports/>.

¹⁵ *Id.*

back to a small, in-house tournament, at Stanford University in 1972.¹⁶ This was followed by strings of local competitions held in arcade cabinets throughout the 1980s.¹⁷ However, it is generally accepted the scene truly saw first light in 1997 when the producers of the game Quake organized a tournament to win a Ferrari at one of the earliest Electronic Entertainment Expos (E3).¹⁸ Since then, esports has become a multi-million dollar affair as an incidental product of the billion dollar video game industry.¹⁹ Perhaps more surprising, COVID-19 has helped, not harmed, both esports and the gaming industry.²⁰ Further, esports players sign million-dollar

¹⁶ Bountie Gaming, *The History and Evolution of Esports*, MEDIUM (Jan. 3, 2018), <https://medium.com/@BountieGaming/the-history-and-evolution-of-esports-8ab6c1cf3257>; Lawrence Phillips, *The History of Esports*, HOTSPAWN (Apr. 1, 2020), <https://www.hotspawn.com/guides/the-history-of-esports/>; American Esports Publisher, *The History of Esports*, AM. ESPORTS, <https://americanesports.net/blog/the-history-of-esports/#:~:text=The%20First%20Signs%20of%20Esports,was%20first%20developed%20in%201962.>

¹⁷ TheScore Staff, *supra* note 2 (noting Billy Mitchel's holding the Guinness World Record for the highest score in six arcade cabinet games, including *PacMan* and *Mario vs. Donkey Kong*. It also mentions a variety of television programs where child contestants would compete in playing these games on air. *Id.* Note, under the definition of a competition based on esports, a general competitive scene where people compete for the highest score would qualify. *See* Khillar *supra* note 14 (defining esports).

¹⁸ TheScore Staff, *supra* note 2.

¹⁹ *See* Phillips, *supra* note 16.

²⁰ SuperData Research, *SuperData 2020 Year in Review*, SUPERDATA 6, 21 <https://www.superdataresearch.com/reports/p/2020-year-in-review>. SuperData notes, specifically, games and interactive media “earned \$139.9 billion USD in 2020, up from \$124.5 billion USD in 2019; and this fact is actually helped, not hindered, by the COVID-19 pandemic. Analytics presented in the report suggest that the COVID-19 pandemic’s directly causing people to stay home encouraged them to indulge in interactive media and the purchase of technological products incidental to such media’s enjoyment.” *Id.* *See also* Newzoo *Global Esports & Live Streaming Market Report*, *supra* note 6 (noting that, as of 2019, global esports revenues were estimated at \$950.6 million. No data has been released on precisely how much was made throughout the COVID-19 pandemic yet. *Id.* *But see* Newzoo, *Key Numbers*, NEWZOO (Oct. 2020), <https://newzoo.com/key-numbers> (noting that as of October 2020 and despite the COVID-19 pandemic, there is only an estimated 0.8% reduction in year-on-year thus far, with still some events and releases to come that might eliminate that reduction entirely).

contracts;²¹ commercial companies from a variety of business sectors sponsor esports teams;²² and even the casual player can earn up to a six-figure salary living off of “streaming” (where the player collects sponsorships or brand deals based on playing the game as a media personality via social media platforms).²³ There are no analogous

²¹ See, e.g., Tyler Erzberger, *Faker’s Groundbreaking New Contract—From T1 Superstar to Part-Owner*, ESPN (Feb. 18, 2020), https://www.espn.com/esports/story/_/id/28724101/faker-groundbreaking-new-contract-t1-superstar-part-owner (noting that the most famous player of League of Legends, Lee “Faker” Sang-hyeok, would even receive part ownership of the organization that he plays for); Noah Smith, *SwordArt Signs with TSM for \$6 million Over Two Years*, WASH. POST (Nov. 26, 2020), <https://www.washingtonpost.com/video-games/esports/2020/11/26/swordart-tsm-contract/>; Jef van den Bosch, *ALEX Signs with Cloud9, \$1.65 million Deal Made Public*, ESPORTS.COM (Nov. 9, 2020), <https://www.esports.com/en/alex-signs-with-cloud9-1-65-million-deal-made-public-125184>; Jacob Wolf, *Sources: Huni Agrees to Two-Year, \$2.3 million Extension with Dignitas*, ESPN (Nov. 11, 2019), https://www.espn.com/esports/story/_/id/28059409/sources-huni-agrees-two-year-23-million-extension-dignitas.

²² See generally Billy Studholme, *Key esports sponsorships and partnerships, October 2020*, ESPORTS INSIDER (Nov. 9, 2020), <https://esportsinsider.com/2020/11/sponsorships-partnerships-oct/>.

²³ See Elizabeth Chung, *Gotta Catch ‘Em All! The Rise of Esports and the Evolution of its Regulations*, 22 SMU SCI. & TECH. L. REV. 231, 234–35 (2019) (noting the monetary success of streamers, i.e., PewDiePie and Ninja, who have net worths upwards of several millions of dollars, and that “people are being paid thousands of dollars to play games, while others . . . watch them play for hours on end.”). See also *How Much Do Twitch Streamers Make*, BRAVE (last updated July 6, 2020), <https://brave.com/learn/how-much-money-do-twitch-streamers-earn/> (noting that more prominent figures can earn up to \$20,000 a month based on streaming alone, not including what income they may receive through sponsorships, competitive gaming contracts and prizes, and brand deals); *Twitch Affiliate Partner Program*, BUS. OF APPS, <https://www.businessofapps.com/affiliate/twitch/#:~:text=How%20Much%20Money%20Do%20Twitch,about%20%24250%20every%20100%20subscribers> (last visited Feb. 13, 2021) (noting the average earnings of a “successful” Twitch.tv streamer are between \$3,000 and \$5,000 USD a month.); Bob Woods, *Amazon’s Twitch leads a booming esports six-figure-salary job market in coronavirus era*, CNBC (May 19, 2020, 8:58 AM), <https://www.cnbc.com/2020/05/19/amazons-twitch-leads-a-booming-esports-six-figure-salary-job-market.html> (noting jobs that are incidental or ancillary to the streaming and esports experiences, such as software engineering, managerial work, sales and even stage directors can have six-figure salaries).

streaming opportunities available to an ordinary enthusiast of other competitive sports.²⁴

The following data may prove illustrative of the esports market's size and its potential for growth: the global audience count for esports in 2019 sits at 194 million, compared to 98.2 million for the Super Bowl.²⁵ In addition, the cumulative viewership of the *League of Legends* (LoL) finals at 58 million viewers beat that of the Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) championships.²⁶ In terms of revenue, the esports industry is reported to have only dropped to \$947.1 million in 2020 from \$957.5 million in 2019, and is still expected to grow to \$1.08 billion in 2021.²⁷ Moreover, esports is poised to be a medal event at the 2022 Asian Games, which may lead to its eventual inclusion into the Olympics.²⁸

III. PRESENT REGULATORY STRUCTURES

Presently, there is no unified or monolithic body that regulates U.S. esports.²⁹ Rather, most mainstream esports are officially regulated through a combined effort between the publisher of the esports underlying game and an esports league, sometimes owned or unofficially controlled by the publishers, with arrangements of varying nature.³⁰ The professional competitive environment for a game, or a set of games, possesses one of two general legal structures:³¹ the decentralized model and centralized

²⁴ See Woods *supra* note 23 (discussing the unique job opportunities created by esports streaming).

²⁵ Katie Jones, *How the eSports Industry Fares Against Traditional Sports*, VISUAL CAPITALIST (Sep. 3, 2019), <https://www.visualcapitalist.com/how-the-esports-industry-fares-against-traditional-sports/>.

²⁶ *Id.*

²⁷ Newzoo's *Global Esports Market Report 2021 | Free version*, *supra* note 6.

²⁸ Karen Chiu, *Esports debuts as official medal event at Hangzhou 2022 Asian Games*, SOUTH CHINA MORNING POST (Dec. 17, 2020, 1:58 PM), <https://www.scmp.com/tech/article/3114298/esports-debuts-official-medal-event-hangzhou-2022-asian-games>.

²⁹ See Hollist, *supra* note 7, at 843; Martinelli, *supra* note 9, at 501.

³⁰ See DAN NABEL & BILL CHANG, VIDEO GAME LAW IN A NUTSHELL, 417–25 (2018).

³¹ See Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J. LAW & SOC. PROB. 177, 184 (2019); see also NABEL & CHANG, *supra*

model. First, the decentralized model provides “a number of independent tournament organizers license[d] IP from publishers in order to produce and distribute esports content.”³² Second, the centralized model allows for “publishers [to] take on the tournament organizing role themselves.”³³

Within these two broader structures, four models exist: Third Party Esports Leagues, Publisher Run Championships, Publisher Run Leagues, and Publisher Run Franchises.³⁴ In the Third Party Esports League model, a game’s publisher/developer delegates the management and regulation of the game’s competitive scene to a third-party tournament operator by a licensing agreement.³⁵ In the Publisher Run Championship model, publishers may license independent third parties to run their own leagues in their own jurisdictions, while only retaining control of the operations and regulations of the final competition, the championship.³⁶ In the Publisher Run League model, a video game publisher directly controls the management and operation of a competitive league and usually delegates the control and management of the participating teams to third parties.³⁷ Lastly, in the Publisher Run Franchise model a video game publisher takes direct control over the management and operation of a competitive league and controls the management of individual teams by delegating it to licensed franchisees.³⁸

While the esports market’s competitive scene can be classified into the categories above based on their legal mechanics, the factual circumstances of each competitive scene can make definitive classification more difficult. For example, Riot Games, Inc. (Riot Games) technically follows the Third Party Esports League model, where it licenses the operation of the *League of Legends* (LoL) competitive scene to the League Championship Series (LCS), which serves as the main authority and

note 30, 418–21 (noting several kinds of arrangements that differ in terms of publisher control over the competitive scene’s regulations that fall within these two general categories).

³² Miroff, *supra* note 31, at 184.

³³ *Id.*

³⁴ *See id.* at 189 (noting, “A publisher can act as an organizer, as Riot has with its *League of Legends* Championship Series. . . . Increasingly, publishers are beginning to also act as both organizers *and* broadcasters.”); NABEL & CHANG, *supra* note 30, at 418–21, 441–42.

³⁵ *See* NABEL & CHANG, *supra* note 30, at 418.

³⁶ *Id.* at 420.

³⁷ *See also id.* at 421.

³⁸ *See also id.* at 441–42.

esports league for LoL competitions.³⁹ However, because the LCS is a subsidiary of Riot Games and Riot Games maintains close ties and tight control over the LCS, the LoL esports scene is essentially a Publisher Run League.⁴⁰ Conversely, Blizzard Entertainment, Inc. (Blizzard Entertainment) maintains a Publisher Run Franchise model for the *Overwatch* competitive scene through the Overwatch League (OWL), allowing entities to franchise *Overwatch*'s competitive scene while maintaining complete control over the competitive authority and the participants of *Overwatch* competitive esports.⁴¹

On the other hand, some publishers maintain more distant control over the esports scenes of their games while retaining ultimate authority over their games' entire esports scene.⁴² For example, Valve Corporation (Valve) subscribes to the Third Party Esports League model for *Counter-Strike: Global Offensive* (CS:GO) and *Defense of the Ancients 2* (Dota 2) by licensing them to third party league operators, while only organizing a final championship tournament for Dota 2.⁴³ Moreover, Valve ultimately decides which tournaments, and thus by extension which players, teams, and arrangements, are "official" and count towards entry into its Publisher Run Tournament.⁴⁴ Valve even decides the eligibility of players and competitive organizations, thus maintaining a pseudo control over its games' esports scenes.⁴⁵ It is not necessary, however, that any tournament or league operator be entitled to the competitive game scene exclusively. A prime example is the Evolution Championship Series (Evo), a tournament for fighting games belonging to other publishers, which is run as a third-party tournament by a non-publisher entity that does not hold

³⁹ See Jackson Wong, *More than Just a Game: The Labor and Employment Issues Within Esports*, 11 UNLV GAMING L.J. 123, 127 (2020).

⁴⁰ See *id.* at 128 ("The LCS has an extremely close relationship with Riot Games, and is in privity with, or an alter ego of, Riot Games."). See also NABEL & CHANG, *supra* note 30.

⁴¹ See Wong, *supra* note 39, at 128.

⁴² See NABEL & CHANG, *supra* note 30, at 418–20.

⁴³ *Id.*

⁴⁴ See Miroff, *supra* note 31, at 180.

⁴⁵ See, e.g., Yen-Shyang Tseng, *The Principles of Esports Engagement: A Universal Code of Conduct?*, 27 J. INTELL. PROP. L. 209, 241, 243 (2020); Sok Min Yun, *A Comparative Overview of Esports Against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating, and Gambling*, 37 CARDOZO ARTS & ENT. L.J. 513, 533 (2019).

the exclusive operator for the games in its lineup but is still considered the de facto main event for those games.⁴⁶

Nevertheless, the arrangements above are possible because of the downward control that the developers may exercise through the intellectual property rights over their products.⁴⁷ While no one owns the exclusive intellectual property rights to conventional sports, such as football or baseball, game publishers can, and do, own the intellectual property rights to the games underlying esports.⁴⁸ Because of this, game publishers can exercise significant control over who gets to use their content and how.⁴⁹ As such, everything relating to the game, from broadcasting to tournament operation, advertising, and sponsorships, and player contracts, is subject to the publishers' discretion.⁵⁰ These publishers can then exert considerable control over "downstream markets,"—markets that follow or are based on their original game—and make themselves the ultimate authority for the sport based on their game.⁵¹ Publishers can effectively control the rights, status, and conduct of parties in the downstream market, such as: who can broadcast or organize their tournaments, which tournaments are official, who gets to compete, which organizations or institutions may be affiliated with it, and who may advertise in all media produced by the sport, etc.⁵²

Under this downward control, the chain of authority begins with the publisher and then goes to the tournament operators, whether third

⁴⁶ See EVOLUTION CHAMPIONSHIP SERIES, <http://evo.shoryuken.com/> (last visited Feb. 28, 2021); 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. 509, 524 (2020) (noting that Evo is considered "[t]he pinnacle of the esports fighting game season").

⁴⁷ See Hollist, *supra* note 7, at 836; see also Miroff, *supra* note 31, at 182.

⁴⁸ Miroff, *supra* note 31, at 179–80; NABEL & CHANG, *supra* note 30, at 417–18.

⁴⁹ See Miroff, *supra* note 31, at 180–81.

⁵⁰ See *id.* at 182.

⁵¹ See Jochen Harttung, *The Issue of "Deep Control" in Professional E-Sports—A Critical Analysis of Intellectual Property Structures in Electronic Gaming* (Nov. 2015) (LLM thesis, University of Toronto) (on file with the University of Toronto Library).

⁵² Miroff, *supra* note 31, at 179–80; Holden et al., *supra* note 46, at 538–40.

parties or subsidiaries of the publishers.⁵³ For the most part, publishers of games that maintain an online multiplayer community begin their regulatory control over players through an end user license agreement and rules and regulations for player conduct.⁵⁴ These base regulations from the publisher can coincide with, supplement, or inform the additional rules and regulations and codes of conduct set forth by a designated authority for the competitive scene to regulate the conduct and interactions between players and teams.⁵⁵ Together, the publisher's end user license agreement and the competitive operator's rules and regulations and codes of conduct effectively prescribe the full set of regulations for professional esports.⁵⁶ Each of the regulatory bodies of esports developed its own rules specific to its games and made regulations particularly suited to its competitive environment.⁵⁷ There is, however, a common set of principles that these competitive environments appear to be based on.⁵⁸

IV. OVERVIEW OF LEGAL ISSUES

To better understand how U.S.-based esports might benefit from some monolithic regulatory body, it is helpful to identify and give a general overview of the major issues that plague the industry by category and status.

⁵³ See Miroff, *supra* note 31, at 179–80; Holden et al., *supra* note 46, at 538–40.

⁵⁴ Wong, *supra* note 3939, at 127–28; Holden et al., *supra* note 46, at 537.

⁵⁵ Wong, *supra* note 3939, at 128.

⁵⁶ See League of Legends Championship Series, *2020 Official Rules (v. 20.1) LCS and LACS*, LEAGUE OF LEGENDS § 14.5.5 (Jan. 17, 2020), https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1_6bkbwz26cgp7fngat6a.pdf (noting how the LCS or Riot Games may sanction players found in violation of the LCS Official Rules or Riot Game's Summoner's Code or End User License Agreement); Overwatch League, *Summary of Official Rules and Code of Conduct 2020 Season*, OVERWATCH LEAGUE § 3.6, https://bnetcmsus-a.akamaihd.net/cms/page_media/wg/WG2YO9KJ0I5I1587056527743.pdf (last visited Mar. 4, 2022) (noting that participating in Overwatch League events requires compliance “with the Official Rules, [and] Player Streaming Policy,” as well as maintaining good standing on any “Battle.net account associated with the player in compliance with, . . . the Blizzard End User License Agreement.”).

⁵⁷ See Tseng, *supra* note 44, at 247.

⁵⁸ *Id.*

A. *Employment: Labor Laws and Contract Disputes*

With so many participants in the esports market, issues surrounding individual “employment terms, contract provisions, and labor laws” are to be expected.⁵⁹ Contract disputes are, perhaps, on the more prolific side of disputes that professionals in conventional sports tend to face, and this is not lost to esports.⁶⁰

Despite the esports market’s recent creation, its players have encountered employment issues that are “identical to those faced by traditional sports players” regarding players’ rights and power disparities between them and their employers.⁶¹ These can include, but are not limited to, fair treatment in a balanced work schedule, “post-career development[,] medical insurance[,] quality and term of housing[,] . . . and the rights to their [own] intellectual property, such as image and likeness.”⁶²

Though, as with conventional sports, these are not limited to disputes between individual players and their institutions. Sometimes they concern agreements between the publishers, the owners of the exclusive rights to esports’ underlying games, and other participants in the esports market.⁶³

A primary concern surrounding these arrangements, however, is that the publishers and league operators maintain the authority to essentially dictate the terms and conditions of teams, other businesses, and

⁵⁹ Wong, *supra* note 39, at 124.

⁶⁰ *See id.*; *see also* John T. Holden, Anastasios Kaburakis, Ryan Rodenberg, *The Future is Now: Esports Policy Considerations and Potential Litigation*, 27 JLEGASP 46, 59–66, 67–68 (2020); Jesse Rubinstein, *How Contract Provisions and Common Law Principles Will Impact the Sports Business*, JDSupra (Published Sept. 4, 2020) <https://www.jdsupra.com/legalnews/how-contract-provisions-and-common-law-33248/>; Bill Whitehill, *Enforceability of Professional Sports Contracts - What's the Harm in It*, 35 SW L.J. 803, 803–6 (1981) <https://scholar.smu.edu/smulr/vol35/iss3/4>; Chase Cripe, *TFue v. Faze Clan and Newly Created Players Associations: What Has Happened And How Will it Impact the Future of Esports*, 31 MARQ. SPORTS L. REV. 151, 157 (2020).

⁶¹ Cripe, *supra* note 60, at 151.

⁶² *Id.*; *see also* Holden et al., *supra* note 46, at 543–48 (detailing, specifically, players’ name, image, and likeness rights).

⁶³ Holden et al., *supra* note 46, at 550–57; *see also* Holden et al., *supra* note 60, at 6768.

players through their control over the underlying game.⁶⁴ This has frustrated the question of whether professional esports players are employees or independent contractors, which usually turns on how much control an employer has over a worker and the worker's economic prospects, by making the analysis more factually intensive given the variations of publisher control over esports through their contractual frameworks.⁶⁵ Incidentally, the question of classifying the esports professional player is central to many of the employment issues discussed below.⁶⁶ This renders it difficult to ascertain the legal rights and obligations of players, teams, league operators, tournament operators, and publishers; also leaving the best means for ascertaining such things subject to debate.

Further complicating the matter, esports players are generally quite young and legally unsophisticated (some being minors), which may result in unfavorable terms and the use of legal backdoors to employment.⁶⁷ One example of this unsophistication, is the case of TFue

⁶⁴ *Id.*; Timothy Heggem, “*It’s Complicated*”: *Analyzing the Potential for Esports Players’ Unions*, 6 ARIZ. ST. SPORTS & ENT. L. J. 447, 455–57 (2017) [hereinafter *It’s Complicated*] (noting that sometimes even the game publishers and the league or tournament operators compensate the players); Wong, *supra* note 39, at 129–30, 135, 143.

⁶⁵ *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (noting that the employer-employee relationship is determined by considering how much control the employer has over the alleged employee’s work by considering factual circumstances in light of several factors); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947) (noting that the employer-employee relationship determination should also take into consideration a worker’s dependency on the business that hires him in an economic context); *Reich v. Circle C Invs.*, 998 F.2d 324, 327 (5th Cir. 1993) (noting that the employer-employee relationship determination should also consider the employer’s degree of control over a worker’s opportunity for profit). *But see* Wong, *supra* note 39, at 125–26, 131–37, 139 (noting, for example, that Riot Games and Blizzard Activision set forth mandatory salaries and benefits to the players of professional LoL and Overwatch, and operate a system of punitive action with “sole and absolute discretion” of the tournament operator and publisher, which likely qualifies them as alter ego employers).

⁶⁶ *See generally* Wong, *supra* note 39; Kelsey F. Ridenhour, *Traditional Sports and Esports: The Path to Collective Bargaining*, 105 IOWA L. REV. 1857, 1885 (2020).

⁶⁷ *See* Hollist, *supra* note 7, at 831 (“Many professional players are inexperienced and uneducated in the complexities of contract negotiation—an unsurprising fact when one considers their ages. In League of Legends, players

and the FaZe Clan,⁶⁸ where Tfue “labeled himself [as] an artist, not an athlete” so he could take advantage of the Talent Agency Act.⁶⁹ However, it appears that the trend in the law favors “compensat[ing] [the more conventional esports players] as freelance contractors through cash prizes,” while “the more accomplished players” are paid salaries.⁷⁰ It would be preferable for the players to be considered employees, as that would entitle them to a greater range of rights and more secure careers.⁷¹

In response to the growing concern over these arrangements between players and teams, teams and the official leagues and publishers, and the players and the official bodies, there has been a call for the formation of a player’s union for esports.⁷² Supporters of unions argue this might help overcome the concerns mentioned previously, while simultaneously helping game publishers address certain antitrust concerns

can begin playing professionally at 17. For some other e[s]ports, professional play can begin as early as age 14.”); Wong, *supra* note 39, at 129–30 (“The age of majority for a person to achieve full legal capacity to enter into a professional gamer contract depends on the jurisdiction. In the United States and Europe, for the most part, the age of majority is eighteen.”); Holden et al., *supra* note 46, at 544.

⁶⁸ Christina Settini, *Fortnite Star Tfue Settles Dispute With FaZe Clan, Ending Esports’ First Major Employment Lawsuit*, FORBES (August 26, 2020, 01:59, PM EDT), <https://www.forbes.com/sites/christinasettimi/2020/08/26/fortnite-star-tfue-settles-dispute-with-faze-clan-ending-esports-first-major-employment-lawsuit/?sh=743eae2d22d8>.

⁶⁹ *Id.*

⁷⁰ See Wong, *supra* note 39, at 124.

⁷¹ *Id.* at 140–42; see also National Labor Relations Act, 29 U.S.C. § 158(d) (allowing employees to exercise collective bargaining related to “wages, hours, and other terms and conditions of employment”); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (confirming that the subjects of collective bargaining, outlined in section 158(d) of the National Labor Relations Act must be discussed); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209–10 (1964) (noting that employers have an obligation meet and confer with employees to discuss matters of wages, hours, and other terms and conditions of employment with employees in good faith).

⁷² See, e.g., Pat Evans, *How Players Associations Could Help Improve Esports’ Infrastructure*, FRONT OFFICE SPORTS (Mar. 8, 2019), <https://frontofficesports.com/players-associations-esports-infrastructure/>; William Welser, *Why eSports players need to unionise in 2019*, WIRED (Jan. 6, 2019, 6:00 AM), <https://www.wired.co.uk/article/esports-unions>; NABEL & CHANG, *supra* note 3030.

by providing a means for collective bargaining on the players' behalf.⁷³ Currently, however, there are only player associations for specific games, and no unions exist for esports players generally.⁷⁴ The League of Legends Player Association (LoL PA), formed in 2017, is one attempt to provide professional LoL players with representation.⁷⁵ But, there has been some controversy about whether the LoL PA's financing by Riot Games violates the National Labor Relations Act (NLRA), which turns on the issue of whether professional LoL players are considered employees of Riot Games.⁷⁶

Other significant players' associations include the Overwatch Players Association (OWPA) for the players of *Overwatch*, which "has adopted some aspects of the National Football Players Association," and the Counter-Strike Professional Players Association (CSPPA).⁷⁷ These associations were founded by current and former players.⁷⁸ The concerning issue here is, that until recently, "the collective bargaining provisions of the [NLRA were] not satisfied in any form," and considerations on labor laws were left unaddressed in the contracts between players and competitive institutions, meaning the contracts risked

⁷³ Wong, *supra* note 39, at 126; NABEL & CHANG, *supra* note 30, at 436 (noting that, "a union allows certain restrictions on trade to exist without running afoul of antitrust law... because the courts have recognized a nonstatutory antitrust exemption for contracts that result from collective bargaining."); *see, e.g.,* Wood v. Nat'l Basketball Ass'n., 809 F.2d 954, 961–62 (2d Cir. 1987) (finding a non-statutory exemption for provisions made as the result of a collective bargaining process).

⁷⁴ Wong, *supra* note 39, at 125, 129.

⁷⁵ Liz Mullen, *Riot Games' 'League of Legends' players form first esports labor union*, THE BUS. J. (June 21, 2017, 8:42 PM EDT), <https://www.bizjournals.com/losangeles/news/2017/06/21/riot-games-league-of-legends-players-form-union.html>.

⁷⁶ Minnie Che, *Is Riot Games in Violation of the NLRA for Funding its Own Union?*, ONLABOR (May 1, 2019), <https://onlabor.org/is-riot-games-in-violation-of-the-nlra-for-funding-its-own-union/> (noting that if Riot Games is considered an employer of LoL PA's professional players, then its funding the LoL PA would violate section 8(a)(2) of the NLRA); Holden et al., *supra* note 46, at 556–57 (noting that Riot Games may have "launched preemptive efforts to prevent players from forming a union"); *see also* National Labor Relations Act § 158(a)(2).

⁷⁷ *See* Wong, *supra* note 39, at 125; *About CSPPA*, COUNTER-STRIKE PRO. PLAYERS' ASS'N, <https://www.csppa.gg/about> (last visited Aug. 8, 2022).

⁷⁸ *Id.*

constituting unfair labor practices.⁷⁹ Additionally, there is a “significant lack of transparency in the world of esports [which] makes it difficult for players to determine what constitutes fair compensation.”⁸⁰ Despite the lack of apparent transparency, “[m]any of the typical bargaining subjects, such as wages and benefits, have been taken care of by the current e[s]ports framework,” such that “professional players would have no reason to even consider . . . collective bargaining.”⁸¹

While contracts govern the arrangements between players, institutions, and publishers, “the relationship between an employee and an employer is governed by [federal] law, not by the employer’s judgment.”⁸² Nonetheless, some league and tournament operators maintain their own supplementary standards prescribing certain minimum required benefits and terms for players.⁸³ With regards to players’ unions, the NLRA governs, and it is difficult for contracting parties in the esports industry to circumvent it.⁸⁴ Further, although many parties desire an esports players’ union, the NLRA requires that the workers take the initiative to unionize and that such workers must be employees under the common law definition.⁸⁵ Thus, an overarching players union for all players in esports

⁷⁹ *Id.* at 141; *see also* Richard Lewis, *How fair is an LCS contract? We asked a lawyer*, DOT ESPORTS (Sept. 22, 2014, 6:51 AM), https://dotsports.com/league-of-legends/news/lcs-contract-analysis-league-of-legends-riot-games-682_ (noting the many provisions in a sample contract that seem exploitative or without regard for labor conventions); National Labor Relations Act § 158.

⁸⁰ Ridenhour, *supra* note 66, at 1879 (citing Mai-Hanh Nguyen, *See how much the top eSports teams, athletes, and their organizations make*, BUS. INSIDER (Jan. 11, 2018, 6:21 AM), <https://www.businessinsider.com/top-esports-teams-players-salaries-2018-1>).

⁸¹ Wong, *supra* note 39, at 143.

⁸² *Id.* at 130; *see also* Holden et al., *supra* note 46, at 551, 555–56 (noting the Fair Labor Standards Act and National Labor Relations Act as applicable federal law to esports market participants); Fair Labor Standards Act of 1938, 29 U.S.C. § 203; Social Security Act of 1935, 42 U.S.C. § 301; National Labor Relations Act of 1935, 29 U.S.C. §§ 151–59.

⁸³ *See* Wong, *supra* note 39, at 137 (noting Overwatch League’s required minimum annual salary and mandated terms for “employer-sponsored health insurance, housing, retirement savings plans, training support, and other benefits”).

⁸⁴ *See* Ridenhour, *supra* note 66, at 1862–63; National Labor Relations Act, 29 U.S.C. §§ 151, 157 (1935).

⁸⁵ Ridenhour, *supra* note 65, at 1862–63; National Labor Relations Act §§ 152(3), 158(a)(2); *see also* NLRB v. Town & Country Elec., Inc., 516 U.S. 85,

cannot be compelled into existence by the publishers or the league/tournament operators.⁸⁶ As to the disputes that have arisen and led to litigation, there is little case law, with the Tfu controversy—which ended in settlement—being the “esports industry’s first major employment lawsuit.”⁸⁷

B. *Immigration*

Esports operate internationally as players often travel to global sites to participate in competitions and sometimes transfer between different teams headquartered in different locations.⁸⁸ Thus, immigration laws and the issuing of visas are also a concern to the esports market.⁸⁹ Historically, the U.S. government has denied visas to players, such as, William “Leffen” Hjelte, attempting to enter the country.⁹⁰ At the time, the United States Citizenship and Immigration Services (“USCIS”) did not consider esports as *legitimate* sports for the purposes of the P-1A visa.⁹¹ The uncertainty of these relatively unresolved legal issues caused fear for some.⁹²

In general, esports immigration issues center around the visa status of professional players under U.S. law and which visa each player may qualify for.⁹³ The following are a few possible categories. One

89 (1995) (“[NLRA] rights belong only to those workers who qualify as ‘employees’ as that term is defined in the Act.”).

⁸⁶ See National Labor Relations Act, 29 U.S.C. §§ 158(a)(1)–(2).

⁸⁷ See, e.g., Settimi, *supra* note 67.

⁸⁸ See Noah Parson, *Immigration and Esports: The Issue of Legitimacy and its Impact on the United States Visa Process*, 43 FORDHAM INT’L L.J. 1187, 1200 (2020).

⁸⁹ See National Labor Relations Act, 29 U.S.C. §§ 158(a)(1)–(2).

⁹⁰ See, e.g., Steven Jurek, *White House Responds to ‘Free Leffen’ Petition, Won’t Make any Changes to Esports Visa Policies*, DOT ESPORTS (Jun 28, 2016, 2:23 PM), <https://dotsports.com/general/news/white-house-free-leffen-petition-response-3523> (noting how a consular officer originally denied professional “Super Smash Bros.: Melee” player William “Leffen” Hjelte a visa to compete in “the biggest fighting games tournament on the planet” because the United States Citizenship and Immigration Services requirements for a P-1A visa are not written with esports players in mind); Parson, *supra* note 87, at 1188–90.

⁹¹ Parson, *supra* note 87, at 1189.

⁹² See *id.* at 1190 (“Leffen’s situation embodies the inconsistency and unpredictability of the US visa system as it pertains to admitting Esports players into the United States for competition.”).

⁹³ See Jurek, *supra* note 90.

possibility for esports players is to apply for the visa waiver program (“VWP”), which allows “citizens of participating countries” to “stay in the United States for up to ninety days for business or tourism without obtaining a visa.”⁹⁴ However, VWPs are unfavorable because they are unrenewable, “the seasons for US-based [e]sports are often longer than ninety days,” and “it may be illegal for salaried [e]sports players to play in US tournaments under the VWP.”⁹⁵

Other options include B-1, B-2, or H-1B visas which allow esports players to enter the United States for business, pleasure, or a “specialty occupation,” and require the “attainment of a bachelor’s degree or higher . . . in the specific specialty.”⁹⁶ However, the wording of the statutes authorizing the former B-1 and B-2 visas does not comport with the circumstances of esports players, as the players usually do not meet the requirements for the H-1B visa.⁹⁷ The high evidentiary standards of the O-1A and EB-1 visas, issued to individuals who show “extraordinary ability,” result in players not typically seeking such visas, as well.⁹⁸

The P-1A visa option for professional athletes shows the most promise.⁹⁹ In 2013, Riot Games successfully took this route when it convinced the USCIS to classify an esports player as a professional athlete because the League of Legends competitive scene had “met government benchmarks for a major sports league,” qualifying him for the P-1A visa.¹⁰⁰ Despite no official agency comment after this approval, it opened

⁹⁴ Parson, *supra* note 88, at 1201 (citations omitted).

⁹⁵ *Id.* at 1201–02.

⁹⁶ *Id.* at 1202–03 (citations omitted); *see also* Bridget A.J. Whan Tong, Comment, *A New Player Has Entered the Game: Immigration Reform for Esports Players*, 24 JEFFREY S. MOORAD SPORTS L.J. 351, 370, 374–75 (2017).

⁹⁷ Parson, *supra* note 87, at 1203–04 (citations omitted) (explaining that esports players “do not attend . . . conventions or conferences as specified in the” B-1 visa statute, “do not qualify for a B-2 visa” because they are “employed and salaried,” and avoid the H-1B visa because they do not meet its requirements); Tong, *supra* note 96, at 370–73, 375.

⁹⁸ Parson, *supra* note 88, at 1205–06; Tong, *supra* note 96, at 378–80.

⁹⁹ *See* Parson, *supra* note 87, at 1207–08; Tong, *supra* note 96, at 381–83.

¹⁰⁰ Chung, *supra* note 23, at 235; Paresh Dave, *Online game League of Legends star gets U.S. visa as pro athlete*, L.A. TIMES (Aug. 7, 2013, 12:00 AM), <https://www.latimes.com/business/la-xpm-2013-aug-07-la-fi-online-gamers-20130808-story.html> (noting a USCIS representative’s statement that P-1A cases are reviewed on a case-by-case basis, and that the competitive league “met

the door for esports players to receive visas under the professional athlete route.¹⁰¹ However, complications remain in trying to satisfy the definitions and evidentiary requirements for the P-1A as the P-1A's issuance to esports players remains sporadic and unpredictable.¹⁰² Namely, there appears to be some difficulty defining esports as a sport, and esports players as athletes due to esports' lack of legitimacy in the public eye and from lack of friendly firm regulatory structures.¹⁰³

As such, with the law prescribing the various visa options under which immigration in esports can be resolved, it appears that immigration issues are more a matter of agency policy than of black letter law. Thus, esports as an industry must work towards classifying their athletes as legitimate for P-1A's purposes by lobbying for such a designation, legitimizing the esports scene, or registering esports "as an official sport" in the United States.¹⁰⁴ The more immediate concerns with immigration deal with the individual esports leagues' policies and regulations.¹⁰⁵

government benchmarks for a major sports league because it had clear rules and at least six teams with combined revenues of more than \$10 million . . .").

¹⁰¹ See Chung, *supra* note 22, at 235–36 (noting that the USCIS has begun to approve P1 petitions for eligible professional video gamers who are internationally recognized).

¹⁰² Parson, *supra* note 87, at 1208–10.

¹⁰³ *Id.* at 1209–11; Tong, *supra* note 96, at 382–83. See also Hollist, *supra* note 7, at 843 (suggesting that the lack of established esports associations in the United States weighs against the legitimacy of esports).

¹⁰⁴ Gillian Linscott, *Esports, Sports Recognition, and Visas*, ESPORTS EDITION (Dec. 4, 2016), <https://esportsedition.com/dota-2/esports-sports-recognition-visas/> Linscott notes, "[t]he next step for expanding on [the growth the esports industry] is making esports an officially recognized sport in all countries." *Id.* See also Parson, *supra* note 88, at 1210–11 (noting the absence of a legal definition of "athlete" or "sport," or a determination of what esports classifies as—in addition to the absence of guidance for USCIS officers on the matter—suggests that the establishment of definitions and guidelines that qualify esports would be beneficial); Dave, *supra* note 100 (noting there appears to be a benchmark for market capitalization and size of a competitive scene, which suggests that a sufficiently large and capitalized esports could qualify under this regime).

¹⁰⁵ See Sayantan Chowdhury, *Everything to know about the LCS Import drama*, SPORTSKEEDA (Feb. 22, 2021), <https://www.sportskeeda.com/esports/everything-know-lcs-import-drama#:~:text=According%20to%20the%20LCS%20import,receive%20proper%20attention%20and%20development.&text=This%20was%20not%20an%20end,in%20the%20history%20of%20LCS.>

Namely, the most recent controversy in the esports industry concerns the “Import Rule,” which concerns players hired from other regions to play in the United States, and whether esports should have stricter or looser regulations on incorporating them into U.S.-based teams.¹⁰⁶ Again, this appears to be a matter of policy, albeit one that isn’t touched by law, and must be addressed by the individual esports leagues and publishers through their own regulations and policies.

C. Antitrust via Intellectual Property Rights

Generally, antitrust in sports law concerns regulating the conduct of larger associations or a group of entities engaging in anti-competitive conduct within the competitive scene of the sport or sports.¹⁰⁷ Scholars agree that this applies equally to esports and conventional sports, in that they could monopolize their professional players within a given region, implicating the Sherman Act.¹⁰⁸ However, because game publishers have ultimate control over every aspect deriving from their games through their intellectual property rights, this broad control exposes esports to additional antitrust issues.¹⁰⁹ This makes for a second means of implicating antitrust concerns: the strong bargaining power discrepancy between the game publisher and all downstream esports market participants.¹¹⁰

¹⁰⁶ *Id.*; Danny Appleford, *Potential LCS import rule change sparks controversy on social media*, DAILY ESPORTS (Feb. 20, 2021), <https://www.dailyesports.gg/potential-lcs-import-rule-changes-spark-controversy/> (noting LCS team owners held a discussion with Riot Games “to adjust the LCS import rule to allow more international players on LCS rosters...,” with most owners “in favor of the import rule being changed, [and] some executives . . . with a more aggressive take.”); Jef van den Bosch, *LCS teams want to remove import restrictions – is it a good idea?*, ESPORTS.COM (Mar. 2, 2021) <https://www.esports.com/en/the-lcs-removing-import-restrictions-is-it-a-good-idea-174976>. Bosch notes, trouble with team and regional identity resulting in games with looser “import rules,” which “takes away a lot of the reasons for American fans to cheer on and support their team.” *Id.*

¹⁰⁷ Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 576–77, 580 (2015); Holden, *supra* note 46 at 548–49.

¹⁰⁸ See Grow, *supra* note 107, at 581; Miroff, *supra* note 31, at 180–83; NABEL & CHANG, *supra* note 30, at 422, 426.

¹⁰⁹ See discussion *supra*, Section I; see also Miroff, *supra* note 31, at 179–83; Chao, *supra* note 9, at 755–56; Hollist, *supra* note 7, at 836.

¹¹⁰ Hollist, *supra* note 7, at 836–37; NABEL & CHANG, *supra* note 30, at 422–24. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (noting an entity that simultaneously (1) possesses a monopoly power in the relevant market

This is further complicated by the fact that while there are multiple categories of participants in the esports market, an individual participant can also fall into multiple categories.¹¹¹ For example, because of the incredible downward control that publishers have over an esports IP with the right license, a publisher could potentially also be an operator of a tournament or league as well as the broadcaster of that esports scene.¹¹² In the case of the *Overwatch* League, Blizzard acts as the publisher of the underlying game, *Overwatch*, the organizer of the game's entire competitive scene, and holds control over all competitive teams under a franchise model.¹¹³ In the case of *League of Legends*, Riot Inc. acts as the publisher, organizer and broadcaster of the North American League Championship Series.¹¹⁴ Even parties that are not publishers can play different roles. For example, professional players of one game can easily be viewers of another or the same game, and customers can switch viewership between each individual game.¹¹⁵

There is an even bigger question of how to define the esports market; and this question is key in determining whether a party is exercising a monopoly or violating antitrust laws: Is the esports market defined as every possible video game with a potential competitive scene?¹¹⁶ Or, perhaps, are there "micro-markets" that consist of the competitive scene of just one game?¹¹⁷ Or, is there a specific group or

and (2) willfully acquires or maintains "that power as distinguished from growth or development . . . [because] of a superior product, business acumen, or historic accident," is in violation of Section 2 of the Sherman Act). *Id.*

¹¹¹ Miroff, *supra* note 31.

¹¹² *Id.* at 188–89 (note that Miroff refers to competitive operators as organizers).

¹¹³ Wong, *supra* note 39, at 127–28.

¹¹⁴ *Id.*

¹¹⁵ Miroff, *supra* note 31, at 189.

¹¹⁶ See, e.g., Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 731-733 (2013) (explaining the analytic necessity of market definition); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 401 (1956) (noting that "the market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.").

¹¹⁷ See Miroff, *supra* note 31, at 199 (noting how a single game can constitute an antitrust-relevant market under established tests for market definition); see also *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 112 (1984) (noting that the NCAA's "complete control" over the broadcasts of college football games "provides a solid basis for the . . . conclusion that the

genre of games that constitute the esports market? While the individual publishers may exercise total downwards control over only their IP, it is possible for a single independent tournament organizer to hold an exclusive license from publishers to “produce and distribute esports content.”¹¹⁸ The sheer number of games in the esports market does not make this issue any easier either.¹¹⁹ Ultimately, the analyses required to answer such questions are beyond the scope of this article. For now, it suffices to note that there is a convincing argument to consider esports a multi-sided market, which tends to frustrate the conventional tests used by the Department of Justice to fully account for antitrust consideration.¹²⁰

Presently, no case law has addressed antitrust matters in esports.¹²¹ Nonetheless, several parties acknowledge that antitrust law still applies, and they tend to draw analogies from antitrust case law as it applies to conventional sports.¹²² This has led some scholars to conclude that the esports market, be it in the context of a single esports game or all esports, is a vertically-integrated monopoly.¹²³ Subsequently, this means that game

NCAA possesses market power with respect to those broadcasts.”); *Int’l Boxing Club of N.Y. Inc. v. United States*, 358 U.S. 242, 252 (1959) (finding that championship boxing matches rather than boxing matches in general, comprise a proper market for anti-trust purposes).

¹¹⁸ Miroff, *supra* note 31, at 184. *See also* Hartung, *supra* note 51, at 45 (“Games which belong to the same genre are probably substitutable to some extent from the view of the players as well as the consumers of e-sports matches.”).

¹¹⁹ Christina Gough, *Leading Esports Games Worldwide 2021, By Tournament Prize Pool*, Statista (Feb. 3, 2022), <https://www.statista.com/statistics/501853/leading-esports-games-worldwide-total-prize-pool/> (noting that esports tournaments involve wide variety of games including “League of Legends, Dota 2, Counter-Strike, Valorant, Overwatch, Street Fighter, Super Smash Bros., and StarCraft.”).

¹²⁰ *See* Miroff, *supra* note 31, at 197–99 (noting that, because esports has several categories of participants that are uniform throughout multiple products, the esports industry is what is considered a “multi-sided” market that makes it difficult for conventional tests used by the Department of Justice to fully account for antitrust considerations).

¹²¹ Holden et al., *supra* note 46, at 548.

¹²² *See, e.g., Id.*, at 550; Miroff, *supra* note 31, at 199–205; Nabel & Chang, *supra* note 30, at 426–35.

¹²³ *See* Miroff, *supra* note 31, at 191–205 (noting that the relevant market definition tests, namely the “small but significant and non-transitory increase in price, or SSNIP” test, makes it possible for a single esports to constitute an anti-trust relevant market as easily as all esports would as vertically integrated monopolies).

publishers, who hold ultimate control at the top of the vertical market, are most likely to trigger anti-trust scrutiny through the exercise of their downstream control.¹²⁴

On the other hand, regardless of market definition, the Supreme Court and the Department of Justice have stated that control over a market based upon one's intellectual property rights does not necessarily equate to having an antitrust-relevant monopoly over the market.¹²⁵ Another, albeit weaker argument, is that esports are a relatively immature and newly developing competitive environment, when compared to conventional sports, that may justify some anti-competitive activity to a certain extent.¹²⁶ Even if a constituent league is found in violation of antitrust laws, it is not unprecedented for the courts to afford non-statutory exemptions to the rule, as they have for conventional sports.¹²⁷ Ultimately, antitrust is a matter of policy coded into law, and thus an issue left to the legislature and the courts to decide. It appears that game publishers will have little say other than as a special interest group, or as parties to a lawsuit. Regardless, esports' interactions with antitrust laws, by analogy to conventional sports, is bound to cause trouble, and participants of the esports market would be wise to expect antitrust issues to eventually surface.¹²⁸ If any claims were brought pursuant to the Sherman Act, they "could be brought by antitrust enforcement agencies, such as the

¹²⁴ See Miroff, *supra* note 31, at 205.

¹²⁵ See *Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 45 (2006); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017).

¹²⁶ See *Fraser v. Major League Soccer L.L.C.*, 97 F. Supp. 2d 130, 140 (D. Mass. 2000) (holding, in part, that the relatively new and underdeveloped environment of this particular competitive scene of soccer was not sufficiently developed to warrant the application of antitrust laws); *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200, 209 (1922) (ruling that competitive baseball did not constitute interstate commerce for the purposes of antitrust regulation, even if teams often travel between states); Chao, *supra* note 9, at 742 (noting that the esports market is akin to the early stages of Major League Baseball); Nabel & Chang, *supra* note 30, at 430–34 (noting certain similarities in structure between esports and the institution in *Fraser*, that "the fact that all esports leagues are still in a development phase helps to defend some restraints of trade," and that *Fraser* "provides guidance that may be more applicable to esports").

¹²⁷ Holden et al., *supra* note 46, at 549.

¹²⁸ Steven R. Rivkin, *Sports Leagues and the Federal Antitrust laws, Government and The Sports Business*, 387, 387 (Roger G. Noll ed., 1974) (noting that the application of antitrust laws to professional sports is bound to be troublesome).

Department of Justice or the Federal Trade Commission, or by private plaintiffs . . . directly damaged by anticompetitive conduct.”¹²⁹

D. *Gambling*

Despite being outlawed for some time and resulting in numerous scandals, gambling on American sports acquired notoriety in the early 1900’s.¹³⁰ In light of recent changes to gambling legislation across the U.S., there can be no dispute that sports gambling has become a greater topic of discussion.¹³¹ Gambling, as it pertains to the video game industry, is not without its fair share of such issues, and the discussion seems centered on the “microtransaction” business model.¹³² A highly controversial service where players acquire virtual items of varying rarities, and thus of varying value, sometimes through what is akin to a digital roulette, which can then be sold on a secondary market for real currency.¹³³ This means acquiring in-game content has led to several controversies, all pointing to consumer dissatisfaction and public relations fiascoes, and ultimately culminating in several government hearings in the U.S. and abroad.¹³⁴

¹²⁹ See, e.g., Miroff, *supra* note 31, at 206.

¹³⁰ See, e.g., Evan Andrews, *What was the 1919 “Black Sox” baseball Scandal?*, HISTORY CHANNEL (Aug. 12, 2021), <https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago> (chronicling the “Black Sox Scandal,” where eight players for the Chicago White Sox were paid significant amounts of money to throw the 1919 World Series); *Pete Rose Gets Booted from Baseball*, HISTORY CHANNEL (Nov. 16, 2009), <https://www.history.com/this-day-in-history/pete-rose-gets-booted-from-baseball> (noting that the MLB commission permanently banned Pete Rose from participating in any capacity for placing wagers on certain matches while he was a player and a team manager in 1989).

¹³¹ Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (Apr. 7, 2021), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization (noting that any state can now legalize sports betting and both state lawmakers and Congress are considering legislating sports betting).

¹³² See, e.g., Tyler Hamilton, *Taking a Gamble: Analyzing How the Regulation of Lootboxes in Video Games May Change a Billion Dollar industry*, 2020 UNIV. ILL. L. REV. 727, 732.

¹³³ *Id.*, at 729 (noting that trading and betting of “skins,” in-game items that aesthetically change a player’s game play has been heavily criticized).

¹³⁴ *Id.*, at 734–35, 749–50 (noting that the ESRB introduced an “in-game purchases” label for all games that offer microtransactions and detailing the FTC’s investigation and public workshop, leading to public disclosure of loot box odds

Returning to esports, it appears that gambling based on the outcome of professional games and the performance of players has emerged as well.¹³⁵ In fact, as the COVID-19 pandemic virtually stagnated betting on conventional sports, betting on esports became more prolific.¹³⁶

in several games by the end of 2020); *A bill to regulate certain pay-to-win microtransactions and sales of lootboxes in interactive digital entertainment products, and for other purposes.*, S. 1629, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1629/text> (as introduced by Senator Josh Hawley, seeking a study on the effects of microtransactions and loot boxes proposing regulations for “microtransactions,” namely prohibitions on loot box sales for games marketed towards minors; however, the bill never went past its introduction to Congress); Aisha Hassan, *Are video-game “loot boxes” gambling? The FTC will decide*, QUARTZ (Nov. 29, 2018), <https://qz.com/1478361/are-video-game-loot-boxes-gambling-the-ftc-will-decide/> (noting that, following Senator Aisha Hassan’s concerns raised during a congressional-oversight committee hearing with the U.S. Federal Trade Commission (FTC), the FTC has agreed to investigate and decide whether the “loot box” microtransaction system constitutes gambling); Wesley Yin-Poole, *Now Belgium declares loot boxes gambling and therefore illegal*, EUROGAMER, <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal> (Apr. 27, 2018), (noting that both Belgium and the Netherlands have deemed loot boxes gambling and therefore illegal); Alex Walker, *Senate Inquiry Calls For ‘Comprehensive Review’ Of Loot Boxes*, KOTAKU (Nov. 28, 2018, 8:45 AM), <https://www.kotaku.com.au/2018/11/senate-inquiry-calls-for-comprehensive-review-of-loot-boxes/> (noting that the Australian Government’s Senate has conducted an inquiry into microtransactions and has tabled a report to Parliament, leading to a long line of arguments from different parties); Kyle Orland, *EA: Loot boxes actually “surprise mechanics” that are “ethical and fun,”* ARS TECHNICA (June 20, 2019, 9:24 AM), <https://arstechnica.com/gaming/2019/06/ea-loot-boxes-actually-surprise-mechanics-that-are-ethical-and-fun/> (noting that the British Parliament has conducted a panel in which it interacted with several game publisher representatives on the matter but did not have a good impression, which can be viewed here: *Digital, Culture, Media and Sport Committee*, PARLIAMENTLIVE.TV (June 19, 2019), <https://parliamentlive.tv/Event/Index/0bf5f000-036e-4cee-be8e-c43c4a0879d4>).

¹³⁵ Kevin Sweeney, M.H. Tuttle & M. Douglas Berg, *Esports Gambling: Market Structure and Biases*, 16(1) GAMES & CULTURE 1, 65–91 (2021). Sweeney notes, “[d]ue to the growth in the esports entertainment industry as well as advances in technology platforms...there has been a tremendous growth in the gambling market centered on esports.” *Id.*

¹³⁶ Graham Ashton, *COVID-19 is Wiping Out Sports Betting—but Odds Look Good for Esports*, ESPORTS OBSERVER (Apr. 7, 2020),

Nonetheless, as of 2018, there are estimates that the annual esports gambling market is “worth between U.S. \$2.3 billion . . . and U.S. \$50 billion,” which is a far cry from the market capitalization of the esports market, between U.S. \$800 million and \$869 million during the same period.¹³⁷ This could be the result of analysts purposefully inflating the numbers to encourage investments through such reports, but otherwise, this suggests that the esports betting economy is troublesomely large.¹³⁸ This has understandably led some to call for its regulation because the potential for such a lucrative market to compromise the integrity of the sport, in much the same manner as it does conventional sports, seems obvious.¹³⁹ Indeed, in December 2020, Riot Korea revealed they had not only discovered—but also confirmed—“a number of players overseas have been involved with illegal Chinese esports gambling websites to directly influence the [performance] of” Korean professional players.¹⁴⁰

As esports is an international phenomenon, much can be said on the matter of gambling laws relative to esports across national jurisdictions. However, as this paper concerns esports in the United States, the following discussion will be limited to gambling laws within the nation. DLA Piper’s report on esports regulation lists several statutes of primary concern for esports, such as the Illegal Gambling Business Under the Organized Crime Control Act, the Travel Act, the Racketeer Influenced and Corrupt Organizations Act, and the Unlawful Sports Gambling Act.¹⁴¹ However, the report does not make clear as to whether they are implicated by

<https://esportsoobserver.com/covid-19-sports-esports-betting/>; Hanjoong Kim, *The Rise of Esports Betting*, NAT’L LAW REV. (Aug. 4, 2020), <https://www.natlawreview.com/article/rise-esports-betting>.

¹³⁷ Joseph Macey, Brett Abarbanel, & Juho Hamari, *What predicts esports betting? A study on consumption of video games, esports, gambling and demographic factors*, 23 NEW MEDIA & SOC’Y, 1481, 1481–82 (Mar. 3, 2020), <https://journals.sagepub.com/doi/pdf/10.1177/1461444820908510>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Daniel “Quest” Kwon, *Riot Korea announces measures to combat intentional griefing in relation to illegal Chinese gambling websites*, INVENGLOBAL (Dec. 13, 2020), https://www.invenglobal.com/articles/12886/riot-korea-announces-measures-to-combat-intentional-griefing-in-relation-to-illegal-chinese-gambling-websites_.

¹⁴¹ Giulio Coraggio et al., *Esports Laws of the World*, 251 DLA PIPER (July 26, 2021), <https://www.dlapiper.com/en/us/insights/publications/2019/11/esports-laws-of-the-world/>.

esports.¹⁴² With the Supreme Court's ruling in *Murphy v. National Collegiate Athletic Association*, which held a federal ban on sports betting was unconstitutional, it is clear that the Professional and Amateur Sports Protection Act no longer applies.¹⁴³ Although it has never been made entirely clear as to whether betting on esports activities are subject to the Wire Act and the Unlawful Internet Gambling Enforcement Act, both have been pegged as laws that esports betting could potentially run afoul of.¹⁴⁴ There is also the question of "whether e[s]ports itself," with respect to the mere participation in an esports or winning a competition's payout, "constitutes gambling" which has not been officially resolved; the answer to which is, presumably, no.¹⁴⁵ More troublesome is that while esports market participants and competitive events can implicate such gambling laws, current sports betting regulation does not strictly or explicitly include esports.¹⁴⁶ Further, even if betting on esports is legal, there appears to be no means for market participants to appeal or contest the matter.¹⁴⁷ Thus, it is clear that some kind of legislation is needed to bring esports betting into the purview of sports betting laws or legal attention.

¹⁴² *Id.*

¹⁴³ Holden et al., *supra* note 4646, at 568 (noting that the *Murphy* ruling more or less allows legal betting on esports contests in a number of states from parties licensed in those states); Hanjoong Kim, *supra* note 136; *see also* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (holding that the Professional and Amateur Sports Protection Act of 1992 ("PAPSA"), a federal law that prohibited state sports betting, was unconstitutional, thus allowing state-sponsored sports betting notwithstanding the Act).

¹⁴⁴ Macey, Abarbanel, Hamari, *supra* note 137, at 1; James Gatto & Mark Patrick, *Select Legal Issues with Esports*, 6 ARIZ. ST. U. SPORTS & ENT. L. J. 427, 429–34 (2017), <http://asuselj.org/wp-content/uploads/2017/08/Gatto-Esports.pdf>; *see also* Matthew Dobil, *Leveling (Up) the Playing Field: A Policy-Based Case for Legalizing and Regulating Esports Gambling*, 37 LOY. L.A. ENT. L. REV. 139, 150–54, 164–67 (2017). Note, however, that this article was published prior to the *Murphy* decision.

¹⁴⁵ Gatto & Patrick, *supra* note 144, at 434–42 (providing legal analysis suggesting that esports, through analogous cases dealing with other forms of betting and wagering, is not illegal under federal or state laws pertaining to gambling and lotteries); Holden et al., *supra* note 46, at 535 (noting that, particularly as to state gambling laws, there is more ambiguity on prizes from esports because there might be more "chance" involved in determining the outcome of a professional esports match).

¹⁴⁶ Martinelli, *supra* note 9, at 501–02.

¹⁴⁷ Bryce Blum, *How the U.S. gambling decision will affect esports*, ESPN (Nov. 19, 2018), http://www.espn.com/esports/story/_/id/23507383/how-us-supreme-court-gambling-decision-affect-esports.

Notwithstanding this legal ambiguity, it appears that gambling on esports and fantasy esports is a legal activity, and it has continued to grow.¹⁴⁸ Publishers can still exercise their intellectual property rights and conduct the appropriate legal proceedings to prevent gambling based on their products,¹⁴⁹ and both the publishers and the league/tournament operators can write in their own regulations on the matter. But as esports continues to grow, only time will tell if Congress enacts legislation to counteract esports betting. Ultimately, game publishers may also restrict gambling activity, notwithstanding the positive law, through their formidable downward control of their intellectual property in the tournament operators' official rules and in the publisher's code of conduct or terms of use.

E. *Discrimination & Harassment*

Discrimination and harassment—be it by race, gender, class, or age—have been subjects of controversy across American society, and the video game industry is not free of such concerns. However, sexual discrimination appears to be of particular concern. For years, the video game industry, from the player community to the game developers, has suffered from a pervasive trend of sexual discrimination that recently came to a boiling point.¹⁵⁰

¹⁴⁸ Holden et al., *supra* note 46, at 568–70; Hanjoong Kim, *supra* note 137; Seth Schiesel, *With Real-Life Games Halted, Betting World Puts Action on E-Sports*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/sports/coronavirus-esports-sports-betting.html> (noting that esports betting has picked up following the COVID-19 pandemic).

¹⁴⁹ Sok, *supra* note 45, at 534–37 (noting that this was precisely the case where Valve had sent cease and desist letters to gambling sites, pursuant to breaches in terms and conditions of Steam subscriber agreements, which are ultimately controlled and owned by Valve).

¹⁵⁰ Holden et al., *supra* note 46, at 577–78. Holden notes, “[t]oxic masculinity permeates the electronic gaming industry Online gaming communities are very hostile places for women; and the environments are so toxic that they push girls, adolescents and adult women away from competitive video gaming.” *Id.* Kruthika N. S., *Esports and its Reinforcement of Gender Divides*, 30 MARQ. SPORTS L. REV. 347, 357 (2020), <https://scholarship.law.marquette.edu/sportslaw/vol30/iss2/4>. Kruthika notes, “[w]omen have so often been subject to misogynistic and sexist harassment in the world of gaming, that over time, it has almost been accepted as canon.” *Id.*

Sexual discrimination does not seem to be localized to any particular corporate rank or gaming company.¹⁵¹ In fact, the most recent scandal involves one of the premier esports game producer's CEO.¹⁵² It is, however, important to distinguish between the video game industry with that of esports; this paper's scope is limited to the legal issues surrounding esports and not the video game industry as a whole.

Nevertheless, there has been a long and unfortunate history of gender discrimination and sexual misconduct in esports, particularly

See also Keza MacDonald, *Is the video games industry finally reckoning with sexism?*, GUARDIAN (July 22, 2020, 3:00 PM), <https://www.theguardian.com/games/2020/jul/22/is-the-video-games-industry-finally-reckoning-with-sexism> [hereinafter, *Video Game Industry Reckoning with Sexism*] (discussing sexual harassment in the video game industry); Chella Ramanan, *The video game industry has a diversity problem-but it can be fixed*, GUARDIAN (Mar. 15, 2017, 7:30 PM), <https://www.theguardian.com/technology/2017/mar/15/video-game-industry-diversity-problem-women-non-white-people> (discussing diversity issues in the video game industry); Taylor Lorenz & Kellen Browning, *Dozens of Women in Gaming Speak Out About Sexism and Harassment*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/style/women-gaming-streaming-harassment-sexism-twitch.html> (discussing how sexism and harassment impacts how women interact with the video game industry).

¹⁵¹ Cecilia D'Anastasio, *Inside The Culture Of Sexism At Riot Games*, KOTAKU (Aug. 7, 2018), <https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483>; Matthew Gault, *A Wave of Sexual Harassment Accusations Is Sweeping the Games Industry*, VICE (June 24, 2020), <https://www.vice.com/en/article/akz3b8/sexual-harassment-alligations-gaming-ubisoft-bungie-cards-against-humanity> (noting sexual harassment accusations at Twitch, Paradox Interactive, Cards Against Humanity, Techland, Gato Studio and Bungie); Macdonald, *supra* note 150 (noting, "a particularly alarming volume of complaints about harassment, sexual predation and misogynist bullying at . . . Ubisoft"); STJV, *Discriminations in the video games industry: systematic problems require collective solutions*, (July 13, 2020), <https://www.stjv.fr/en/2020/07/discriminations-in-the-video-games-industry-systemic-problems-require-collective-solutions/>.

¹⁵² Taylor Lyles, *Riot Games CEO under investigation following allegations of gender discrimination*, VERGE (Feb. 9, 2021, 5:10 PM), <https://www.theverge.com/2021/2/9/22275059/riot-games-ceo-investigation-gender-discrimination-sexual-harassment-allegations> (noting the latest development from the most recent controversy, but also, that this is not the first time the company has faced such suits).

within the fighting game community, which continues today.¹⁵³ Some of the earliest instances of publicly known harassment applied to professional female players, which led to the retirement of some, and the ostracization of others.¹⁵⁴ This treatment is not limited to professional players and

¹⁵³ Patrick Klepek, *When Passions Flare, Lines are Crossed*, GIANT BOMB (Feb. 28, 2012), <https://www.giantbomb.com/articles/when-passions-flare-lines-are-crossed-updated/1100-4006/> (noting a conversation with a member of the fighting game community who explains that racist and sexist remarks are considered part of the fighting game environment); The Conversation, *Here's what it'll take to clean up esports' toxic and sexist culture*, TNW (Aug. 24, 2020, 11:02 AM), <https://thenextweb.com/syndication/2020/08/24/heres-what-itll-take-to-clean-up-esports-toxic-and-sexist-culture/> [hereinafter *Esports' Toxic and Sexist Culture*] (noting that the history of harassment extends back to simpler days of mere online play); Cecilia D'Anastasio, *The Super Smash Bros. Community Reckons With Sexual Misconduct Allegations*, WIRED (July 10, 2020, 4:12 PM), <https://www.wired.com/story/super-smash-bros-sexual-misconduct/> (noting a slew of sexual misconduct allegations in the professional *Super Smash Bros.* community); see also u/JFMB763, *Summary of sexual and non-sexual allegations Megathread*, REDDIT (Originally Posted Jul. 1, 2020), https://www.reddit.com/r/smashbros/comments/hjfv0y/summary_of_sexual_and_nonsexual_allegations/ (for an unofficial, non-scholastic compilation of all individuals who have allegedly engaged in sexual harassment or misconduct); see also Jerome Heath, *Sinatraa accused of sexual assault by ex-girlfriend*, DOT ESPORTS (Mar. 10, 2021, 4:50 AM), <https://dotesports.com/news/sinatraa-accused-of-sexual-assault-ex-girlfriend/>; Rebekah Valentine & Matt T.M. Kim, *Valorant Player Sinatraa Suspended Following Sexual Abuse Accusations [Update]*, IGN (Mar. 10, 2021, 5:59 PM), <https://www.ign.com/articles/valorant-player-sinatraa-suspended-following-sexual-abuse-accusations> (last updated Aug. 16, 2021, 5:07 PM) (noting that Riot launched an investigation into the matter, and Sinatraa's suspension was ruled pursuant to Riot's "existing competitive rules and investigative process," and that the Overwatch League offered refunds for the character skin that commemorated Sinatraa's MVP win); Mikhail Klimentov, *'Valorant' pro Jay 'Sinatraa' Won suspended from competitive play after sexual abuse allegations*, WASHINGTON POST (Mar. 10, 2021, 4:55 PM), <https://www.washingtonpost.com/video-games/esports/2021/03/10/jay-sinatraa-won-suspended-sentinels-allegations/> (discussing the suspension).

¹⁵⁴ See Mustafa Gatollari, *The Gaming Community Was Shocked to Learn That Remilia Passed Away*, DISTRACTIFY (Dec. 29, 2019, 7:32 PM), <https://www.distractify.com/p/how-did-remilia-die> (noting that Maria "Remilia" Creveling, largely considered the first female *League of Legends* professional player, had passed away and suffered a constant string of harassment and ridicule since her debut as a professional player); Dom Sacco, *Warnings issued to LCL teams RoX and Vega Squadron for discrimination and unsportsmanlike behaviour towards all-female side Vaevictis*, ESPORTS NEWS UK (Feb. 21, 2019),

participants either, as the management of certain tournament organizers for esports have been equally suspect of such claims.¹⁵⁵ Also of immediate alarm to esports is the sheer gender imbalance in the professional scene: indeed, the NCAA stepped away from including esports into its purview, ostensibly because it was concerned about the possibility of gender discrimination implicating Title IX of the Education Amendments Act of 1972, with the esports being heavily skewed towards a predominantly male environment.¹⁵⁶ This does not mean that there is no female talent: there are several highly skilled or even professional female players, all of them formidable in their own right.¹⁵⁷ Rather, it appears the dearth of female esports professionals is due to the fact that the esports ecosystem

<https://esports-news.co.uk/2019/02/21/rox-vega-squadron-warnings-lcl/> (noting that two professional teams were issued warnings for competitive decisions that were deemed “manifestation[s] of disrespect for the players of Vaevictis,” an all-female professional team, and that Vaevictis’ management has also been criticized for hiring players of a lower skill ranking than most competitive players).

¹⁵⁵ James O’Connor, *EVO 2020 Online Has Been Cancelled*, GAMESPOT (July 6, 2020, 8:49 AM), <https://www.gamespot.com/articles/evo-2020-online-has-been-cancelled/1100-6479302/> (noting that several games and commentators pulled out of the online tournament in 2020 in light of several allegations of sexual misconduct on the part of EVO’s CEO). There also appears to be a particularly prevalent trend of sexual misconduct on the part of professional gamers in the Smash Brothers professional scene. *Id.*

¹⁵⁶ See Holden, *supra* note 46, at 577–78; DAVID B. HOPPE, ESPORTS IN COURT, CRIMES IN VR, AND THE 51% ATTACK: KEY TRENDS AND DEVELOPMENTS IN ESPORTS, VR AND AR, BLACKCHAIN AND CRYPTOCURRENCIES 46–47 (2020) [hereinafter *Esports in Court*]; Tim Reynolds, *NCAA’s Emmert expresses concern over wagering, esports*, AM. PRESS (Jan. 25, 2019), <https://apnews.com/article/7d62e621e8dd4c3bb1edfc54363c40c6> (noting that “[o]ne of the challenges of esports could be having it adhere to Title IX compliance rules . . . there are other studies that suggest the gap between male and female players—while still tilted heavily toward men— is much smaller than [95%].”); see also Education Amendments Act, 20 U.S.C. §1681(a) (1972). The statute reads, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” *Id.*

¹⁵⁷ See Rosario Blue, *Trailblazers: the women who are taking the esports world by storm*, TECHRADAR (Sept. 4, 2020), <https://www.techradar.com/news/women-of-esports-the-pro-list> (providing a list of female professional esports players); Nicholas Pace, *Overwatch: Aspen Hits Rank 1 in Competitive Play*, GAME RANT (Mar. 1, 2021), <https://gamerant.com/overwatch-aspen-rank-1-competitive/> (discussing Becca “Aspen” Rukavina’s ascension to the top of the “Overwatch” rankings).

has not nurtured any of them, and the few female players who do pursue competitive aspirations, are treated poorly by the community.¹⁵⁸

Claims of discrimination and harassment can implicate several provisions of federal law that provide the afflicted with remedies or injunctive relief, and even criminal liability for varying degrees of violation.¹⁵⁹ But there does not appear to be many, if any, suits brought forth pursuant to such law in the context of esports. Considering the litigation that has been brought under discrimination and harassment suits in the video game industry already, even if suits are brought forward in the future, individual parties will bring these disputes to court, and it is unlikely that the esports operators will step in for the aggrieved.¹⁶⁰ Nonetheless, the social community called for reform, and game publishers, particularly for those games with a competitive scene, were quick to respond.¹⁶¹ Many, if not all, have implemented other in-game systems to allow for communication without revealing one's gender and have enforced basic cultural norms through policies and rules of conduct for esports participants with reporting systems for improper behavior.¹⁶² Further, publishers and other participants in the esports ecosystem have indeed provided their own systems and policies to curtail such behavior through their codes of conduct and their practices.¹⁶³

¹⁵⁸ See Rebekah Valentine, *Esports' urgent need for visible gender diversity*, GAMESINDUSTRY.BIZ (Dec. 20, 2018), <https://www.gamesindustry.biz/articles/2018-12-20-esports-urgent-need-for-visible-gender-diversity>; Kruthika, *supra* note 150, at 350–60; Tseng, *supra* note 45, at 226–28.

¹⁵⁹ See *i.e.*, *Canutillo Independent School Dist v. Leija* 101 F.3d 393, 396 (5th Cir. 1996) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979) & *Franklin v. Gwinnet County Pub Sch.*, 503 U.S. 60 (1992)) ("There is an implied right of action under Title IX in favor of victims of discrimination on the basis of sex . . . and monetary damages may be awarded for its intentional violation."); *Halczenko v. Ascension Health, Inc.*, 37 F.4th 1321, 1324 (7th Cir. 2022) ("Title VII provides a range of remedies to successful plaintiffs, including reinstatement, back pay, front pay, compensatory damages and 'any other equitable relief as the court deems appropriate.'")

¹⁶⁰ Sam Dean, *Riot Games will pay \$10 million to settle gender discrimination suit*, L.A. TIMES (Dec. 2, 2019, 1:29 PM), <https://www.latimes.com/business/technology/story/2019-12-02/riot-games-gender-discrimination-settlement>.

¹⁶¹ Tseng, *supra* note 45, at 222–24

¹⁶² *Id.*

¹⁶³ *Id.*

F. *Market Participant Misconduct*

Finally, there is the matter of regulating player and institutional misconduct within the esports market. To be specific, this paper refers to the murky area that the law does not necessarily reach: The way participants of the esports market behave, whether through corrupt or unfair or unethical practices; disrespectful or bad “behavior;” poor or unfair treatment of other parties; or foul slurs. This does not come as much surprise since online interactions between players is notoriously hostile at times. Outside of the competitive environment, the online gaming community is rife with unacceptable behavior known generally as “player toxicity,” which can include threats, insults and slurs on a variety of grounds, cheating, and even theft.¹⁶⁴ Some individuals are known to involve themselves in corrupt practices that compromise the integrity of a game’s competitive system, and thus, some players seek competitive recognition through unlicensed cheating software or ranking manipulation practices.¹⁶⁵

Professional esports is not without such blunders.¹⁶⁶ There have been cases of professional players engaging, and even maintaining, toxic and socially unacceptable behavior towards others during their practice games, within their teams, or in their interactions with the general public through the game’s competitive system and beyond.¹⁶⁷ For example,

¹⁶⁴ *Id.* at 240–47.

¹⁶⁵ See Michael Gwilliam, *Overwatch player exposes game-breaking win-trading exploit*, DEXERTO, <https://www.dexerto.com/overwatch/overwatch-player-exposes-game-breaking-win-trading-exploit-1340386/> (last updated Mar. 12, 2020) (noting that an *Overwatch* player had detailed an exploit in which players can attempt to match against each other, and have one of them intentionally grief their team into losing the game for the other to improve their competitive ranking, a practice known as “win-trading”); Bill Cooney, *Blizzard Bans Over 1600 South Korean Overwatch Players for Account Sharing in Season 17*, DEXERTO, <https://www.dexerto.com/overwatch/blizzard-bans-over-1600-south-korean-overwatch-players-account-sharing-season-17-933822> (last updated Aug. 20, 2019).

¹⁶⁶ See generally Tseng, *supra* note 45; Sok, *supra* note 45, at 528–33.

¹⁶⁷ See Samuel Lingle, *Two ‘League of Legends’ pros banned after using racist slurs*, DOT ESPORTS (June 2, 2014, 11:40 AM), <https://dotesports.com/league-of-legends/news/mithy-nukeduck-banned-league-of-legends-362>; LoLesports Staff, *Competitive Ruling: Konstantinos ‘ForgIven’ Tzortziou*, LEAGUE OF LEGENDS ESPORTS (2015), <https://nexus.leagueoflegends.com/en-us/2015/07/competitive-ruling-konstantinos-forgIven-tzortziou/> (noting that the professional player,

substance abuse, particularly with study drugs/nootropics, or drugs that boost brain function, appears to be rampant.¹⁶⁸ Further, unethical competitive practices, such as match fixing, occurs from time to time;¹⁶⁹

Konstantinos ‘Forg1ven’ Tzortziou would be suspended from competitive play for four games following “a pattern of negative in-game behaviour and toxicity[.]”); Ibrik Daya, *The nail in the coffin for Forg1ven’s legendary career*, QRANK (Feb. 18, 2020), <https://qrang.gg/lol/forg1ven-and-his-ruined-career/> (noting that Forg1ven is known for his generally toxic and negative behavior, which played a large part in the fall of his professional career); Richard Lawler, *‘Overwatch’ Pro Suspended for ‘Racially Disparaging’ Emote*, ENGADGET (Mar. 10, 2018, 11:39 PM), <https://www.engadget.com/2018-03-09-overwatch-pro-suspended-again-for-racially-disparaging-emote.html> (noting that professional player xQc had been suspended from competitive *Overwatch* play for using a racially discriminatory emote and that the Overwatch League’s policies and regulations prescribe punishments for in-game actions, actions while streaming, and comments on social media); *see also* Tseng, *supra* note 57, at 224–34.

¹⁶⁸ *See i.e.*, Holden et al., *supra* note 46, at 571–72; Rebecca Rosenthal, *A Tough Pill to Swallow: Making the Case for Why eSports Leagues Must Adopt Strict Banned Substance Policies to Prevent Disability Discrimination*, 20 VA. SPORTS & ENT. L. J. 14 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589710 (noting that “Adderall and ritalin . . . are popular in e[s]ports because they boost cognitive function, reduce fatigue and lead to faster reaction times,” where “e[s]ports places a premium on a player’s ability to achieve a high level of mental focus for extended periods of time.”); Nick Summers, *Top ‘Counter-Strike’ player admits eSports has a doping problem*, ENGADGET (July 17, 2015, 9:43 AM), <https://www.engadget.com/2015/07/17/esports-adderall-doping/>; John T. Holden, Ryan M. Rodenberg, & Anastasios Kaburakis, *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD. J. INT’L L. 236, 269 (2017).

¹⁶⁹ *See* Chris Godfrey, *‘It’s incredibly widespread’: why esports has a match-fixing problem*, GUARDIAN (July 31, 2018, 3:00 PM), <https://www.theguardian.com/games/2018/jul/31/its-incredibly-widespread-why-esports-has-a-match-fixing-problem> (noting, for example, the case in which a competitive StarCraft II player “was arrested and eventually prosecuted for throwing two matches” and “banned for life from South Korean e[s]ports”); Kenrick Davis, *Chinese Esports Teams Banned Over Dota 2 Match Fixing*, SIXTH TONE (Jan. 5, 2021), <https://www.sixthtone.com/news/1006669/chinese-esports-teams-banned-over-dota-2-match-fixing> (noting that a Chinese team had been “banned from future competitions organized by the game’s U.S. owner, Valve Corporation, and Chinese partner, Perfect World Entertainment”); *see also* Stoyan Todorov, *ESIC Issues Bans to 35 Australians Involved in Esports Match-Fixing*, GAMBLING NEWS (Jan. 22, 2021), <https://www.gamblingnews.com/news/esic-issues-bans-to-35-australians-involved-in-esports-match-fixing/>.

professional and high-ranked players are known to engage in or solicit “ELO Boosting,” in which one player plays on another player’s account to raise its competitive ranking for money, or “win trading,” where players purposefully lose and win matches to promote another’s competitive ranking;¹⁷⁰ additionally, there are documented cases involving the outright use of cheats and hacks to give an unfair advantage in official competitive play.¹⁷¹ Misconduct, or what would normally count as misconduct in other contexts, can also occur on the part of administrative staff, corporate employees, and even executives of the several participants in the esports market; sometimes, this can involve negligently revealing sensitive and confidential topics related to institutional management and maintaining relationships that might normally be considered a conflict of interest.¹⁷² In fact, some of the latest include the fining of a professional institution’s

¹⁷⁰ See *The Riot Ban Hammer Comes Down on XiaoWeiXiao and FORGIVEN*, INQUIRER.NET (July 23, 2015, 6:40 PM), <https://esports.inquirer.net/8544/the-riot-ban-hammer-comes-down-on-xiaoweixiao-and-forg1ven> (noting that professional player Yu “XiaoWeiXiao” Xian was suspended from professional play for participating in ELO Boosting); see generally Eoin Conroy et al., *Boosting: Rank and skill deception in esports*, 36 ENT. COMPUTING (2021), <https://doi.org/10.1016/j.entcom.2020.100393>.

¹⁷¹ See Owen S. Good, *CS:GO pro caught cheating gets five-year ban*, POLYGON (Oct. 25, 2018, 1:00 PM), <https://www.polygon.com/2018/10/25/18023236/forsaken-cs-go-cheating-optic-india-ban> (recalling the incident where a prodigious CS:GO player, Nikhil “forsaken” Kumawat, was caught using a cheating software during a professional event and “was handed a five-year-ban by the Esports Integrity Coalition.”).

¹⁷² Preston Byers, *TSM President Admits to Saying “No One Wants to Pick up Dardoch” on Doublelift’s Stream*, DOT ESPORTS (May 11, 2020, 5:56 PM), <https://dotsports.com/league-of-legends/news/tsm-president-admits-to-saying-no-one-wants-to-pick-up-dardoch-on-doublelifts-stream> (recounting the incident where professional organization Team Solo Mid’s (TSM) president, Leena Xu, conducted a sensitive phone call on a Team Liquid player’s stream, with whom she had a romantic relationship, thus leaking the conversation on player management to the public); see also Josh Tyler, *TSM: A Lawyer Breaks Down All the Doublelift, Leena, Dardoch Drama*, FANSIDED (May 11, 2020), <https://blogoflegends.com/2020/05/11/tsm-latest-doublelift-leena-drama/> (wherein a lawyer gives a legal opinion, with some analysis, on the above controversy with respect to how it implicates and interacts with the law on Conflicts of Interest and Breach of Fiduciary Duty on the part of Leena Xu, and Yilang “Doublelift” Peng, as well as an ethical standpoint on the matter).

CEO for, apparently, insensitive remarks towards a professional player on social media in a comment on the topic of “import restrictions.”¹⁷³

Sometimes, such misconduct results in punitive measures, such as suspension from involvement in the competitive scene and fines; and sometimes, the infractions go unpunished for one reason or another.¹⁷⁴ Much like with discrimination, game publishers, esports operators, and professional institutions within and beyond the esports market have their own policies for these matters, with some seeing action in recent memory; sometimes, these incidents result in legal action, if the jurisdiction in which it takes place has applicable criminal or civil law.¹⁷⁵ Regarding toxic or unbecoming behavior, it seems that the terms of use and the regulations set forth by the game publishers and the tournament operators, respectively, can—and have—governed.¹⁷⁶ That said, it is possible for these incidents to give rise to civil legal process in, say, fiduciary law for example.¹⁷⁷ As to misconduct of a higher level, such as match fixing, past instances show that publishers and tournament operators wrote their own regulations and policies to combat such behavior; and such misconduct may be sanctioned/enforced through legal proceedings in jurisdictions that possess the relevant laws.¹⁷⁸ As for substance abuse, although some

¹⁷³ Eva Martinello, *TSM Co-Owner Reginald Reportedly Fined \$5,000 by Riot for “Conduct Unbecoming,”* DOT ESPORTS (Mar. 2, 2021, 10:47 AM), <https://dotesports.com/league-of-legends/news/tsm-co-owner-reginald-reportedly-fined-5000-by-riot-for-conduct-unbecoming> (noting, “TSM co-owner Andy ‘Reginald’ Dinh was fined \$5,000 by Riot Games for a tweet” in which he reacted to Team Cloud9 player Vulcan’s “comment on the topic of potentially lifting import restrictions in NA...”).

¹⁷⁴ See *The Riot Ban Hammer Comes Down on XiaoWeiXiao and FORGIVEN*, *supra* note 170 (noting that both XiaoWeiXiao and FORGIVEN were both suspended from competitive participation for their conduct); see also *Martinello*, *supra* note 173 (noting that Reginald was fined for his comments); Davis, *supra* note 169; but cf. Rosenthal, *supra* note 168 (noting despite there being rampant abuse of study drugs, there does not appear to be any sanctions so far).

¹⁷⁵ See, e.g., Todorov, *supra* note 169 (exhibiting that the Esports Integrity Commission (ESIC) works to eliminate match-fixing and cheating and that Australia could prosecute cheaters).

¹⁷⁶ Tseng, *supra* note 4557, at 224–34 (noting a long list of infractions and disciplinary actions).

¹⁷⁷ Tyler, *supra* note 172.

¹⁷⁸ See Godfrey, *supra* note 169 (discussing law enforcement prosecution of an esports player for violations); Davis, *supra* note 169 (discussing

competitive regulations exist, it's notable that these regulatory measures are neither widespread nor particularly effective, as substance abuse reportedly remains prolific despite preexisting regulations.¹⁷⁹ Further, with the more prolific study drugs falling under the "prescriptive" designation, taking them without prescription is illegal anyways, so the law does provide some additional regulation in a sense.¹⁸⁰ Nonetheless, the issues mentioned above prompted many parties to urge competitive esports operators and publishers to establish and enforce regulations, as well as argue for a monolithic esports regulator to handle such matters.¹⁸¹

V. ESPORTS REGULATORY BODIES IN OTHER JURISDICTIONS

To date, there have been several regulatory authorities throughout the world, some of which are government-sponsored, and they have been largely successful in regulating the esports ecosystems in their respective jurisdictions.¹⁸² An examination of several of these regulatory bodies may shed light on the effect that a monolithic regulator or association for esports may have on the esports ecosystem of a given jurisdiction.

A. *KeSPA, the Korean Esports Association.*

KeSPA, the Korean Esports Association, is the government-backed regulator for Esports in South Korea and is considered the first "regulator," for lack of a better term, of esports in the world.¹⁸³ Note, however, that while it is supported and approved by South Korea's Ministry of Culture and Tourism, KeSPA is a nongovernment organization with a twelve-member board "composed of executives from major

punishment levied by a game's owner); see Todorov, *supra* note 169 (discussing a non-profit's role in suspending players).

¹⁷⁹ Holden, et al., *supra* note 46, at 570–71; Rosenthal, *supra* note 168, at 4–5.

¹⁸⁰ Chung, *supra* note 23, at 239–41 (noting, however, that a work around would simply be to have a player receive a prescription for, say, Adderall, and this would be difficult to comport with regulations because nothing would stop the player from taking more than prescribed per dose).

¹⁸¹ See Tyler, *supra* note 172 (suggesting that Riot should "take a look at their rules..."); see also Xing Li, *Conflicts of Interest Are Inherent To the Nature of Sports—and Esports*, DOT ESPORTS (June 11, 2020, 5:30 PM), <https://dotesports.com/league-of-legends/news/conflicts-interest-inherent-nature-sports-esports>.

¹⁸² See Wong, *supra* note 39; Chao, *supra* note 9, at 758–760.

¹⁸³ See Chao, *supra* note 9, at 757–58.

corporations” with a recently established fairness committee to investigate and enforce its policies comprised of scholars and lawyers.¹⁸⁴ With the South Korean government’s support, it is the monolithic regulatory body for all esports in South Korea, whose authority includes officiating competitions, managing venues, supervising arrangements between esports market participants, and enforcing ethical and competitive regulations.¹⁸⁵ KeSPA’s history and South Korean esports’ recent controversies revealed the utility of government involvement in the operations of a monolithic regulatory body for esports in that jurisdiction.¹⁸⁶ Case in point, the controversy henceforth referred to as the “Griffin Scandal,” illustrates this reality well enough: In September 2019, the Korean professional team Griffin let their head coach, Kim “cvMax” Dae-Ho, go.¹⁸⁷ However, shortly afterwards, cvMax made several statements alleging that his release from Griffin stemmed from a long-standing conflict between him and the CEO and manager of Griffin, Cho Gyu-Nam, and seemingly confirmed other reports of Cho’s toxic disposition towards Griffin’s players.¹⁸⁸ Initially, this matter prompted a joint investigation by Riot Games Korea and KeSPA on Griffin’s poor governance and Cho’s conduct, which led to the suspension of both Cho and cvMax from *League of Legends* activity.¹⁸⁹ Shortly afterwards, rumors

¹⁸⁴ *Id.* at 758 (citing T.L. Taylor, *Raising The Stakes: Esports and the Professionalization of Computer Gaming*, 161 (2012)); see also, Korean Esports Association, *Organization Guide*, E-SPORTS.OR.KR, <http://e-sports.or.kr/fair/organization.php> (last visited Mar. 1, 2021) (detailing the organizational chart and roles of KeSPA’s fairness committee).

¹⁸⁵ Chao, *supra* note 9, at 758. Chao notes, “KeSPA, with the support of the South Korean government, can officiate and organize tournaments, manage esports venues and create dedicated esports stadiums, oversee the registration of South Korean Players, enforce professionalism and ethical standards, regulate sponsorships, distribute competition broadcast rights, and coordinate licensing agreements[,]” et cetera. *Id.*

¹⁸⁶ See, e.g., Ashley Kang & Jacob Wolf, *A Timeline of Riot Korea and KeSPA’s Investigation of Griffin*, ESPN (Dec. 23, 2019), https://www.espn.com/esports/story/_/id/28334899/a-line-riot-korea-kespa-investigation-griffin.

¹⁸⁷ *Id.*; Vince Koyle, *Former Griffin ADC Responds to cvMax Controversy, Defends Him*, DAILY ESPORTS (Oct. 15, 2019), <https://www.dailyesports.gg/former-griffin-adc-responds-to-cvmax-controversy-defends-him/>.

¹⁸⁸ Koyle, *supra* note 187.

¹⁸⁹ GAMES TODAY, *[Translated] Riot Korea Reports Interim Findings on the “Griffin Incident”*; Ministry of Culture, Sports and Tourism Denies National Assembly’s Request (Oct. 29, 2019, 10:35 AM),

of Cho pressuring a minor into signing unfavorable contract terms, which the minor could not have understood, came to light.¹⁹⁰ Subsequently, a South Korean Ministry investigated this as a legal affair, and the South Korean National Assembly, their equivalent of our Congress, considered and revised regulations regarding the controversial practice of allowing minors to become professional gamers as matter of policy.¹⁹¹ Since then, the Griffin Controversy has escalated beyond private arbitration or competitive regulation and into criminal investigation: in December 2019, one of Griffin's ex-players, Choi "Sword" Sung-won, formally filed a report with the police alleging that cvMax verbally and physically abused some of Griffin's players.¹⁹² Not much news has come of Cho, but cvMax was found liable, fined approximately U.S. \$900, and suspended from professional play until May 2021.¹⁹³

<https://gamestoday.info/pc/league-of-legends/translated-riot-korea-reports-interim-findings-on-the-griffin-incident-ministry-of-culture-sports-and-tourism-denies-national-assemblys-request/>; see also Kang & Wolfe, *supra* note 186.

¹⁹⁰ See also Jacob Wolf & Ashley Kang, *Riot Korea Fines Griffin, Bans Team's Former Director and Coach From LCK*, ESPN (Nov. 20, 2019), https://www.espn.com/esports/story/_/id/28123613/riot-korea-fines-griffin-bans-team-former-director-coach-lck.

¹⁹¹ Kang & Wolf, *supra* note 186.

¹⁹² Andrew Amos, *Griffin's Sword Files Police Report Against cvMax over Alleged Assault*, DEXERTO, <https://www.dexerto.com/league-of-legends/griffin-sword-police-report-cvmax-assault-1300842/> (last updated Dec. 16, 2019).

¹⁹³ See Doohyun "Biit" Lee, Takyun "Laff" Pack, & David "Viion" Jang, *[Exclusive] Final Trial for cvMax Held, cvMax Testifies in Court (Full Transcript)*, INVENGLOBAL (Jan. 29, 2021), <https://www.invenglobal.com/articles/13166/exclusive-final-trial-for-cvmax-held-cvmax-testifies-in-court-full-transcript#:~:text=Jan%2029%2C%202021&text=After%20five%20trials%2C%20DRX%20head,from%20the%20Fair%20Esports%20Commission.&text=On%20Jan.,was%20interrogated%20as%20the%20accused> (providing the full transcript for the final hearings on the matter before judgment); Cristian Lupasco, *South Korean Court Reportedly Fines cvMax \$900 in Final Verdict of Griffin case*, DOT ESPORTS (Feb. 18, 2021), <https://dotsports.com/league-of-legends/news/south-korean-court-reportedly-fines-cvmax-900-in-final-verdict-of-griffin-case> (noting that the final verdict on the cvMax case sees cvMax fined "one million South Korean won" or "roughly [1]901 [USD]," on top of a suspension from the LCK, the Korean League of Legends Championship Series, until May 2021).

The fact that a single dispute between key members of a professional team could unravel into a legal fiasco seems to strengthen the idea that a monolithic esports regulator must collaborate closely with the government of the jurisdiction to maintain regulatory effectiveness. The authority, procedures, and measures taken to investigate and respond to abuses such as the Griffin Scandal, however, may not have been possible if not for KeSPA's government support, even though KeSPA is not perfect and is vulnerable to questionable practices. Illustrative of this fact is the open rumor that many of Korea's own competitive gamers are asked to sign KeSPA's standard contract template that some users have christened a "slavery contract."¹⁹⁴ These contracts, copies of which were released onto the internet, contain many terms that are unfavorable to the competitive player including: the revocation of a players' career autonomy, the "lack of direct payment of tournament winnings to players," and the lack of "any real protection[] for players[.]" which leaves them at the mercy of their teams.¹⁹⁵ Of particular note is that the sample contract provides that players "aren't entitled to any earnings . . . from tournaments or brand partnerships," which are instead "paid to the organization, which then distributes the money at its discretion."¹⁹⁶ In light of these revelations and the Griffin Controversy, the South Korean Government, through its direct involvement with KeSPA, responded by proposing to draft its own standard contract template, which would differ from the KeSPA template.¹⁹⁷ This leads to a troublesome revelation: if not for the

¹⁹⁴ Marta Juras, *Many Korean LoL pros reportedly signed to "slavery contracts"*, WIN.GG (Dec. 1, 2019, 7:31 PM), <https://win.gg/news/3143/many-korean-lol-pros-reportedly-signed-to-slavery-contracts> (noting the contract was leaked onto South Korean "media outlet Naver" here: <https://sports.news.naver.com/news.nhn?oid=005&aid=0001264175>) (translated into English by a Reddit user, here: https://www.reddit.com/r/leagueoflegends/comments/e41hqk/this_is_crazy_the_kespa_standard_contract_is/).

¹⁹⁵ *Id.*

¹⁹⁶ Juras, *supra* note 194; Lim Jeong-yeo, *FTC to probe 'slave' contracts of Korean esports players*, KOREA HERALD, [http://www.koreaherald.com/view.php?ud=20191209000837_\(last updated Dec. 10, 2019\)](http://www.koreaherald.com/view.php?ud=20191209000837_(last%20updated%20Dec.10,2019)).

¹⁹⁷ Lim, *supra* note 196 (noting that the Fair Trade Commission has "pledged to comb through the relevant regulations and examine all contracts[.]" such that, "any unfair clauses found during the investigation will be revised . . ."); David "Viion" Jang, *KR government announces official statement on re-investigation of the Griffin controversy*, INVENGLOBAL (Jan. 16, 2020), <https://www.invenglobal.com/articles/10196/kr-government-announces-official->

government's direct intervention, KeSPA's standard contract template would have likely proliferated throughout the scene, damaging the reputation of esports and hindering its development.

B. *JESF, the Japanese Electronic Sports Federation.*

Until 2018, Japan, despite being one of the foremost producers of video games, had a weak professional esports scene.¹⁹⁸ It was not so much that Japan did not have any associations to handle an esports scene. On the contrary, Japan hosted three separate video game associations and had a considerable arcade-centric community.¹⁹⁹

Moreover, Japan was home to many fine competitors, but these professional players—and the competitive scene—were limited strictly to fighting games. It also did not help that the larger competitions, which helped such players to flourish in such games, were not hosted in their own jurisdiction. For example, the Evolution Championship Series (Evo), an annual tournament dedicated specifically to fighting games, provided a forum for top professionals to compete at the highest levels for over a decade.²⁰⁰ But Evo normally hosted its event in Las Vegas, which might have deterred many of Japan's budding players from competing, and only came to Japan in 2018, in which it operated at a net loss due to the lack of sponsorships.²⁰¹ The greatest irony was that Evo's foremost games over the years were from franchises owned by Japanese developers, such as

statement-on-re-investigation-of-the-griffin-controversy (noting the response from the Korean government ad verbatim).

¹⁹⁸ Edge, *Esports in Japan*, MEDIUM (Sept. 17, 2019), <https://medium.com/@edgetechgg/esports-in-japan-2bb1abf3b2b0> (noting that, in 2017, the “Japanese esports industry was worth \$3 million.”); Sarah Enders, *Esports Law in Japan: An Introduction*, TEAM LIQUID (July 14, 2018), <https://www.teamliquid.com/news/2018/07/14/esports-law-in-japan-an-introduction>.

¹⁹⁹ Mazin Hussain, *How Arcades Have Evolved To Survive*, MEDIUM (Aug. 19, 2020), <https://medium.com/super-jump/how-arcades-have-evolved-to-survive-4f4164ce8259>.

²⁰⁰ Imad Khan, *The World's Biggest Fighting Game Tournament Began with \$10,000 and a UCLA Ballroom*, WASH. POST (Aug. 3, 2018, 12:30 PM), <https://www.washingtonpost.com/news/sports/wp/2018/08/03/the-worlds-biggest-fighting-game-tournament-began-with-10000-and-a-ucla-ballroom/>.

²⁰¹ Lydia Mitrevski, *EVO Japan Reports \$1.13m Loss Due to Lack of Sponsorship*, ESPORTS INSIDER (May 13, 2018), <https://esportsinsider.com/2018/05/evo-japan-reports-loss/>.

Bandai Namco's *Tekken*, Capcom's *Street Fighter*, SNK's *King of Fighters*, and Arc System Works's *BlazBlue*, among others.²⁰² Yet some Japanese publishers actively exercised their intellectual property rights to exclude their games from esports competitions, as Nintendo did with some of its *Super Smash Bros.* titles.²⁰³

The chief cause of the lack of a professional esports market in Japan appeared to originate from Japanese legislation.²⁰⁴ Of most

²⁰² See Andrew Goldfarb, *Evo 2013 Lineup Revealed*, IGN (Jan. 9, 2013, 5:59 PM), <https://www.ign.com/articles/2013/01/10/evo-2013-lineup-revealed> (listing *Ultimate Marvel vs. Capcom 3*, *Super Street Fighter IV Arcade Edition*, *Tekken Tag Tournament 2*, *Mortal Kombat 9*, *Street Fighter X Tekken*, *King of Fighters XIII*, and *Persona 4 Arena*); Mike Mahardy, *Evo 2014 Lineup Revealed, New Seeding Process Announced*, IGN, <https://www.ign.com/articles/2014/02/07/evo-2014-lineup-revealed-new-seeding-process-announced> (Jan. 31, 2017, 4:28 PM) (listing *Ultra Street Fighter IV*, *Ultimate Marvel vs. Capcom 3*, *Killer Instinct*, *Injustice: Gods Among Us*, *King of Fighters XIII*, *BlazBlue: Chrono Phantasma*, and *Tekken Tag Tournament 2*); Zorine Te, *EVO 2015 Game Lineup Announced*, GAMESPOT (Jan. 20, 2015, 8:27 PM), <https://www.gamespot.com/articles/evo-2015-game-lineup-announced/1100-6424767/> (including *Ultra Street Fighter IV*, *Ultimate Marvel vs. Capcom 3*, *Super Smash Bros. for Wii U*, *Guilty Gear Xrd -SIGN-*, *Killer Instinct*, *Mortal Kombat X*, *Persona 4 Arena Ultimax*, *Super Smash Bros. Melee*, and *Tekken 7*); Rob Crossley, *Nine Games Revealed for EVO 2016 Tournament*, GAMESPOT (Jan. 27, 2016, 3:20 AM), <https://www.gamespot.com/articles/nine-games-revealed-for-evo-2016-tournament/1100-6434204/> (noting selected titles included *Street Fighter V*, *Guilty Gear Xrd Revelator*, *Ultimate Marvel vs. Capcom 3*, *Pokkén Tournament*, *Super Smash Bros. for Wii U*, *Super Smash Bros. Melee*, *Killer Instinct*, *Mortal Kombat X*, and *Tekken 7: Fated Retribution*); Tamoor Hussain, *Evo 2017 Fighting Game Tournament Lineup Revealed*, GAMESPOT (Jan. 25, 2017, 2:21 AM), <https://www.gamespot.com/articles/evo-2017-fighting-game-tournament-lineup-revealed/1100-6447233/> (confirming games included *Street Fighter V*, *Tekken 7*, *Super Smash Bros. Melee*, *Super Smash Bros. for Wii U*, *BlazBlue: Central Fiction*, *The King of Fighters XIV*, *Guilty Gear Xrd REV 2*, and *Injustice 2*); Shabana Arif, *EVO 2018 Lineup Announced*, IGN (Feb. 7, 2018, 4:51 AM), <https://www.ign.com/articles/2018/02/07/evo-2018-lineup-announced> (listing *Tekken 7*, *Super Smash Bros. 4*, *Street Fighter V: Arcade Edition*, *BlazBlue Cross Tag Battle*, *Guilty Gear Xrd Rev 2*, *Injustice 2*, *Super Smash Bros. Melee*, *Dragon Ball FighterZ*).

²⁰³ Holden, *supra* note 46, at 539; HOPPE, *supra* note 156, at 58.

²⁰⁴ Sayuri Kodama, *Legal Barrier Hobbles Esports in Game-Crazy Japan*, NIKKEI ASIA (July 25, 2017, 1:00 PM),

immediate concern was the Act Against Unjustifiable Premiums and Misleading Representations of 1962 (Act Against Unjustifiable Premiums).²⁰⁵ The National Diet originally designed the provision to prevent, or at least restrict, organized crime from generating income through illegal gambling.²⁰⁶ But the Consumer Affairs Agency also interpreted it as preventing tournaments from offering cash prizes over 100,000 yen.²⁰⁷ This restriction on payouts effectively stagnated the development of the Japanese esports scene because a competitive environment with little to no payoff was not an attractive prospect.²⁰⁸ There was also the Japanese Penal Code, which banned all sports betting; this was interpreted as saying that paying the registration fees to an esports competition that would go into the prize money of the competition constituted betting, and thus, was illegal.²⁰⁹ Equally troublesome was that the arcade-centric gaming community of Japan was subject to the Businesses Affecting Public Morals Regulation Law of 1948, which required game centers—or what Americans would refer to as arcade businesses—to obtain permission from the Prefectural Public Safety

<https://asia.nikkei.com/Business/Trends/Legal-barrier-hobbles-esports-in-game-crazy-Japan?page=1>

²⁰⁵ See Futō keihinrui oyobi futō hyōji bōshihō [Act Against Unjustifiable Premiums and Misleading Representations], Law No. 134 of 1962, *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2007&re=02&vm=04> (Japan); Esports in Court;

²⁰⁶ Jay Massaad, *Watch out Esports: Japan is Coming*, ESPORTS INSIDER (Dec. 13, 2017), <https://www.esportsinsider.com/2017/12/watch-out-esports-japan-is-coming/>

²⁰⁷ HOPPE, *supra* note 156, at 38; Kodama, *supra* note 204; *see also* Act Against Unjustifiable Premiums and Misleading Representations.

²⁰⁸ HOPPE, *supra* note 156, at 38; Massaad, *supra* note 206.

²⁰⁹ See KEIHŌ [PEN. C.] art. 185, *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&re=02&vm=04> (Japan). The law states: “A person who gambles shall be punished by a fine of not more than 500,000 yen or a petty fine” *Id.* Further, the law goes on to state: “A person who, for the purpose of profit, runs a place for gambling or organizes a group of habitual gamblers shall be punished by imprisonment with work for not less than 3 months but not more than 5 years.” *Id.* art. 186, para. 2. Additionally, *see* Edge, *supra* note 198 (discussing the application of the penal code to esports).

Commission and abide by several restrictions.²¹⁰ These included a “limitation of business hours, entrance limitations for minors[,] and a ban on giving prize money to players if they [held] competitions,” which effectively prohibited arcade-centric esports.²¹¹ Incidentally, it also did not help that some of the more prolific developers, namely Bandai Namco and Nintendo, were virtually unwilling to allow their products to be associated with a competitive scene out of their own sense of policy.²¹²

This changed in February 2018 when three independent esports associations that previously managed smaller-scale tournaments in Japan came together to form the Japan esports Union (JeSU).²¹³ With the Japanese government’s support, the JeSU then created a new government-approved licensing system for professional esports players to circumvent the legislation mentioned above, namely the Act Against Unjustifiable Premiums, and received the cooperation of over forty-two Japanese game developers.²¹⁴ In the span of eighteen months, Japan developed an esports market that was more readily accepted by its society and 1,244% larger in terms of market capitalization.²¹⁵ Esports’s growing market capitalization

²¹⁰ Fūzoku Eigyō Torishimari Hō [Businesses Affecting Public Morals Regulation Law], Law No. 122 of 1948, art. 22–23, <https://elaws.e-gov.go.jp/document?lawid=323AC0000000122> (Japan).

²¹¹ *Id.* art. 22 (proscribing individuals under eighteen years of age from being allowed into arcade centers after 10:00 PM and before 6:00 AM, being served alcoholic beverages or tobacco); *id.* art. 23 (prescribing that there can be no prize money given to customers in the event of a competition); *see also* Edge, *supra* note 198; PuppySwarm, *TGS 2019—Momochi and the Japan Esports Pro License*, CHICAGO TEKKEN (Sept. 16, 2019), https://www.chicagotekken.com/home/momochi-pro-gamer-license_

²¹² Holden, *supra* note 46, at 539 (“Nintendo exerted its copyright authority to pull its title *Super Smash Bros. Melee* from live and streamed competition in the Evo tournament.”); HOPPE, *supra* note 156, at 58–62.

²¹³ Adam Fitch, *Japanese Organisations Join Forces to Create Japan Esports Union*, ESPORTS INSIDER (Feb. 1, 2018), <https://esportsinsider.com/2018/02/japan-esports-union-formed/>; *Rise of the Japan eSports Union*, AKIHABARA NEWS (July 13, 2020), <http://akihabaranews.com/rise-of-the-japan-esports-union/>.

²¹⁴ *About Us*, JAPAN ESPORTS UNION, https://jesu.or.jp/contents/union_summary/ (last visited Mar. 5, 2021) (noting a list of member companies); Brandon Brathwaite, *The JeSU’s Akihito Furusawa on Growing Esports in Japan*, ESPORTS OBSERVER (Sept. 19, 2018), https://esportsobserver.com/jesu-building-esports-japan/#jeg_loginform.

²¹⁵ Gz Brain Co., 2018 年日本 e スポーツ市場規模は 48.3 億円と推定 ～ G z ブレイン発表～, PR TIMES (Dec. 11, 2018, 3:00 PM),

and increased popularity played a part in prompting some publishers that were once reluctant to enter esports to begin their forays in earnest.²¹⁶

This is not to say that the situation has become perfect: there are still reports of unlicensed players being underpaid or entering into “unfair” arrangements, much as was noted with KeSPA.²¹⁷ Furthermore, the model which JeSU operates, to issue an “esports player license” to individuals and selectively include member institutions with the government’s support, raises some concerns that it affords an alarming degree of control over who can participate in Japan’s esports market that borders on monopolistic or anti-competitive.²¹⁸ But, JeSU’s success thus far illustrates how consolidation and government involvement in an esports association can be of benefit; if not for the Japanese government’s willing cooperation, and for the fact that the separate esports associations had agreed to merge into a single entity, JeSU probably would have never managed to create

<https://primes.jp/main/html/rd/p/000005308.000007006.html>. Please note, the original domain, Gzbrain, has moved to Kadokawa linkage. The report referenced to in this article was previously published in the Gzbrain domain. HOPPE, *supra* note 156156, at 40–43.

²¹⁶ HOPPE, *supra* note 156, at 40–43, 60–62.

²¹⁷ See, e.g., Choysauce, *Momochi to Only Receive 1% of the Prize Money from TGS 2019 Tournament*, TOPTIER (Sept. 16, 2019), <https://wp.tptr.dev/momochi-to-only-receive-1-of-the-prize-money-from-tgs-2019-tournament/>; Mark Pratt, *Momochi Tweet Highlights Japan’s Unfriendly Esports Laws*, ESPORTZ NETWORK (Sept. 18, 2019), <https://www.esportznetwork.com/momochi-tweet-highlights-japans-unfriendly-esports-laws/> (noting that Yusuke “momochi” Momochi would only receive 60,200 yen for winning a tournament with an advertised prize of 50,000,000 yen); PuppySwarm, *supra* note 211.

²¹⁸ See, e.g., Brian Ashcraft, *The Japanese Esports License System Is A Mess*, KOTAKU (Jan. 30, 2020, 6:30 AM), <https://kotaku.com/the-japanese-esports-license-system-is-mess-1841348143> (noting that even with the licensing system, local statements by the Consumer Affairs Agency have stated that “monetary awards in a tournament [fall] under goods and services paid . . . for work and not as a gift,” which means that having such a license is redundant). See also Takashi Kiso, 日本eスポーツ連合さん、うっかり自ら「プロ制度は不要」を証明してしまう, YAHOO JAPAN (Sep. 12, 2019), <https://news.yahoo.co.jp/byline/takashikiso/20190912-00142276/> (noting the above contradiction); Virginia Glaze, *Licensed to Play: How Japan’s Pro Gaming Licenses Are Affecting Asia’s FGC*, REDBULL (Feb. 24, 2018), <https://www.redbull.com/us-en/japan-pro-gaming-license-asia-fgc> (discussing the impact of Japanese regulation of esports licenses); PuppySwarm, *supra* note 211.

the pro gaming licenses, and esports might have never come to flourish in Japan.²¹⁹

C. *The United Kingdom Esports Association and its heir, the British Esports Association*

What happens, then, if an association is formed without the official support or oversight of the government? As one legal scholar notes, a case study of UKeSA shows that the association would likely fail, and “supports the idea that government involvement may be necessary to ensure that a national eSports association does not fold.”²²⁰ The UKeSA claimed to be “the [United Kingdom’s] official esports governing body” at the time of its founding in 2008, and sought to “[work] with government, industry and community to develop, support, encourage, and promote the growth of a professional competitive esports framework.”²²¹ The result was a spectacular failure: the year following its formation was a disaster of “uncompleted tournaments and unpaid prize money,” which eventually led to UKeSA’s filing for bankruptcy.²²²

Little material on the UKeSA remains publicly available; its website and many online materials no longer exist.²²³ However, the events that unfolded during its time strongly support the conclusion that the lack of government support detracted from the association’s ability not only to survive, but to operate effectively and consistently.²²⁴ That is, consider the alternative: the UKeSA probably would not have failed to complete its tournaments, left prize pools unpaid, or filed for bankruptcy if the body had been run, supported, or at least overseen by the government or an

²¹⁹ See David Hoppe, *The Remarkable Success of the Japanese Esports Union (JeSU)*, Gamma L., (Sep. 9, 2019), <https://gammalaw.com/the-remarkable-success-of-the-japanese-esports-union/>.

²²⁰ *Time to be Grown-ups*, *supra* note 7, at 843–44.

²²¹ *You Must Construct Additional Pylons*, *supra* note 9, at 759–60 (citing Goodeh, *UKeSA Launches*, ESPORTS HEAVEN (Oct. 31, 2008, 6:05 PM), <http://www.esportsheaven.com/news/view/47606/ukesa-launches> [<https://perma.cc/H88REG3U>]).

²²² *You Must Construct Additional Pylons*, *supra* note 9, at 760; Andra Ciubotaru, *Government-backed “British Esports Association” established*, Dotablast (Jul. 5, 2016) <https://dotablast.com/british-esports-association/>.

²²³ Multiple research efforts by the author returned no results.

²²⁴ *Time to be Grown-ups*, *supra* note 7, at 843–44.

entity thereof.²²⁵ Thankfully, this cautionary tale of the UKeSA's lack of authority seems to have been heeded, as the UKeSA was succeeded by the British Esports Association (BEA) as of 2016, which received the support of the British government.²²⁶

D. *The World Esports Association, the International Esports Federation, and the Esports Integrity Coalition*

Considering our discussion above, some may raise the argument that there need not be government involvement because esports should be regulated on an international level. A viable version of this argument is that if esports is such an international phenomenon, then would it not be best for there to be standard practices for all jurisdictions through a global governing body, like FIFA for football or the Olympic Council for the Olympics?²²⁷ Three associations have been formed with the aim of becoming such an institution, but all have amounted to little, arguably because none hold the sufficient authority of law or enforcement mechanisms to enforce their goals.²²⁸ Indeed, “[t]he groups lack the enforcement mechanisms necessary to enforce rules and regulations in the

²²⁵ *See id.*

²²⁶ *About Us*, BRITISH ESPORTS ASS'N, <https://britishesports.org/about-us/> (last visited Mar. 1, 2021); *You Must Construct Additional Pylons*, *supra* note 221, at 760; Callum Leslie, *The UK Launches an Official Governing Body for Esports*, DOT ESPORTS (July 1, 2016, 8:52 AM), <https://dotesports.com/general/british-esports-association3537> [<https://perma.cc/8TJ4-RAX9>] (noting commentary that it is necessary for a governing body in the UK to be government driven or sponsored); Ciubotaru, *supra* note 222.

²²⁷ *See* Marissa Payne, *Paris Mulling Inclusion of Esports in 2024 Olympic Program*, WASH. POST (Aug. 8, 2017, 5:57 PM), <https://www.washingtonpost.com/news/early-lead/wp/2017/08/08/paris-mulling-inclusion-of-esports-in-2024-olympic-program/> (noting that the Olympic committee is hesitant to include esports in the Olympics because it lacks a recognized and stable international organization or structure that can be considered stably and sufficiently regulated, like the Fédération Internationale de Football Association (“FIFA”) for soccer).

²²⁸ *The Challenges of Implementing a Governing Body*, *supra* note 9, at 510; Jas Purewal & Isabel Davies, *The eSports Explosion: Legal Challenges and Opportunities*, A.B.A., https://www.americanbar.org/groups/intellectual_property_law/publications/lan-dslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/ (last visited Sept. 14, 2021).

esports industry,” and are “independent coalitions [that] are not government-backed and are not viewed as legitimate.”²²⁹ Thus, if a member of an association disagreed with its rules or policies, they could simply leave with no repercussions due to the association’s lack of bargaining power.²³⁰

WESA is a new regulatory body that aims to introduce elements of player representation and standardized regulations—particularly as to players’ rights—to the esports market through its membership, which now consists exclusively of competitive teams but no esports leagues or publishers.²³¹ It has provided an interesting solution in the form of its conflict resolution and arbitration system, a medium through which players and institutions can resolve infractions and disputes.²³² Further, WESA’s creation of a Player Council, consisting of individuals elected by players to review competitive mechanics, policies, and rules, was a step forward in establishing players’ rights and maintaining their representation in esports governance.²³³ But WESA is still “not viewed as legitimate and does not have regulation enforcement powers.”²³⁴ It “aims to gain legitimacy by being an organization founded and run by major esports brands[,]” but maintains no exclusivity or absolute authority over the games or leagues of the esports market.²³⁵ Further, FaZe Clan’s comments on WESA’s shortcomings when it left the association for a time in 2016 suggest that WESA’s limited scope, in its lack of inclusion of North

²²⁹ *The Challenges of Implementing a Governing Body*, *supra* note 9, at 510.

²³⁰ See, e.g., Jacob Wolf, *FaZe Clan Officially Leaves WESA*, ESPN (May 25, 2016), https://www.espn.com/esports/story/_/id/15721431/faze-clan-officially-leaves-wesa (noting FaZe’s opinion that WESA needed a larger scope to help the esports scene, and concerns “about the lack of North American organizations[—]leagues, teams and players[—]to be included.”).

²³¹ WESA, <http://www.wesa.gg/> (last visited Mar. 4, 2021) (the page scrolls seamlessly from WESA’s introductory statement to its list of members); Holden et al., *supra* note 46, at 556.

²³² See *Arbitration Rules*, WESA, <https://www.wesa.gg/rr/arbitration-rules/> (last visited Feb. 28, 2022).

²³³ Joost, *Esports Governance and its Failures*, MEDIUM (Oct. 21, 2018), <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea>; Martinelli, *supra* note 9, at 507.

²³⁴ Martinelli, *supra* note 9, at 507; Holden et al., *supra* note 46 at 556 (noting that WESA “represents player interests, but is not a traditional union”).

²³⁵ Martinelli, *supra* note 9, at 507.

American leagues, teams, and players, led to WESA's ineffectiveness.²³⁶ Thus, WESA technically has no force behind its regulatory or enforcement powers, and does not appear to have the scope necessary to meaningfully effect the needs esports market.²³⁷

The IeSF is another living example of an international esports regulatory body that some may find lacking.²³⁸ Granted, it has hosted tournaments internationally, and does possess a general regulatory structure as well as alliances with esports regulatory bodies across the world, including KeSPA.²³⁹ It operates by its own ratified statutes, primarily through a board elected every three years that spreads its authority to different committees to handle different matters.²⁴⁰ The IeSF's competitions, however, are few: its four-fold mission statement does not include any form of standard-setting or regulation;²⁴¹ its membership primarily consists of national regulators and does not have any direct influence on the major esports leagues;²⁴² and, much like WESA, apparently has not received the licenses to many of the games on which

²³⁶ See Wolf, *supra* note 230.

²³⁷ See Martinelli, *supra* note 9, at 507.

²³⁸ See Joost, *supra* note 233 (“The IeSf has a structure closely resembling traditional GSOs. Its members are national esports federations. This organizational structure is not suited well for esports.”).

²³⁹ INT’L E-SPORTS FED’N, <https://ie-sf.org/> (last visited Nov. 2, 2020).

²⁴⁰ IeSF Statutes, INT’L E-SPORTS FED’N (Dec. 13, 2019), <https://ie-sf.org/wp-content/uploads/2020/04/IESF-Statutes.pdf> (of note is that Membership is through application, that the main leadership is a “Board” through “elections” of its members, that issues are resolved through “general meetings” and “special meetings” that require a “quorum” among other things.); See also Committees, INT’L E-SPORTS FED’N, <https://ie-sf.org/governance/committees> (last visited Oct. 31, 2020) (noting the committees are, respectively, the World Championships and Events Committee, which organizes and oversees the IeSF events and activities; the Members’ committee, which oversees the implementation of the IeSF’s statutes, provides support to its members evaluates the applications of prospective members; the Legal Committee, which makes recommendations on the IeSF’s regulations and supervises and ensures the IeSF’s compliance; and the Partnership’s committee, which evaluates and develops opportunities for partnerships and collaborations).

²⁴¹ *What We Do*, INT’L E-SPORTS FED’N, <https://ie-sf.org/about/what-we-do> (last visited Oct. 31, 2020) (noting official directives as to increase membership, to promote global standardization, to train and educate officials, managers and professionals, and to host global tournaments and championships).

²⁴² *Members*, INT’L E-SPORTS FED’N, <https://ie-sf.org/about/members> (last visited Mar. 10, 2020).

the esports' market thrives.²⁴³ It also does not appear that they hold any real form of authority for policing or regulating the international competitive environment; its rules only govern those who are a party to its membership, and there is nothing stopping its constituent members from backing out without losing out on a particular esports or suffering consequences from publishers, who hold the ultimate authority over their games.²⁴⁴ There does not appear to be notable controversies demonstrating the IeSF's regulatory effectiveness. Nor does it appear that the IeSF has resolved the controversies that have been plaguing the esports and video game industries.²⁴⁵ This could imply that, while the IeSF might proclaim to promulgate regulations through international collaboration with esports regulatory bodies, it fails to confer any meaningful action or effect.

A third, non-government backed organization, which is dedicated to enforcing competitive regulations is the ESIC, was established in 2015 to address corrupt or unethical practices by identifying and prosecuting match-fixing, in-game cheating, and doping through its own codes and regulations.²⁴⁶ But, like WESA and the IeSF, its scope is limited to only

²⁴³ *News*, INT'L E-SPORTS FED'N, <https://ie-sf.org/news/category/iesf-news> (last visited Oct. 31, 2020). Of note, the latest competition included only DoTA 2, eFootball, and Tekken. But DoTA's own "The International" is far more prominent; FIFA holds its own esports league, which is rather prolific; and Tekken is more famous for operating as one of the many fighting games under the EVO Tournament. In fact, there has been little coverage on any tournaments listed in the IeSF's page in mainstream e-Sports media. *See also Events*, INT'L E-SPORTS FED'N, <https://iesf.org/events> (last visited Oct. 31, 2020) (listing the games for this year).

²⁴⁴ *See supra*, Section I.

²⁴⁵ *See, e.g.*, Kruthika N. S., *supra* note 150, at 349 (noting that even with an IeSF statute on non-discrimination and promoting female participation, the statute "does not elucidate the exact nature of such 'appropriate' measures, leaving it to the discretion of the stakeholders [of the IeSF]").

²⁴⁶ Will Green, *Establishing Esports Oversight: The Groups, Issues, And Potential Challenges*, LINES <https://www.thelines.com/esports-oversight-overview-and-challenges/> (last updated Jan. 22, 2018); *Who We Are*, ESPORTS INTEGRITY COAL., <https://esic.gg/about/> (last visited Mar. 2, 2021); *Our Codes*, ESPORTS INTEGRITY COAL., <https://esic.gg/codes/> (last visited Mar. 2, 2021) (containing ESIC's Code of Ethics, Code of Conduct, Anti-Corruption Code, Anti-Doping Code, a complementary prohibited substances list referred to as the ESIC PROHIBITED LIST, and a procedural manual for disciplinary adjudication); *See also*, Sam Bishop, *Match Fixing, Doping, and the Dark Side of Esports*, GAMEREACTOR (Feb. 12, 2019, 5:26 PM),

those tournament operators that agree to join and be bound by it²⁴⁷ and, so far, of all the mainstream esports leagues, only ESL and Dreamhack have submitted to its authority.²⁴⁸ Moreover, despite its admittedly impressive record in adjudicating regulatory violations, ESIC still struggles to handle match-fixing controversies, and its jurisdiction is so limited that corrupt and immoral market participant misconduct, such as in-game cheating and doping, still occurs in esports leagues and tournaments both under and beyond its jurisdiction.²⁴⁹ Thus, ESIC's limited success in "tak[ing] responsibility for disruption, prevention, investigation and prosecution" of market participant misconduct does demonstrate that an international regulatory body could work.²⁵⁰ However, its failures illustrate the precise concern this paper noted earlier: ESIC only affects those tournament operators and leagues that pledge themselves to its authority and nonetheless fails to curtail regulatory violations.²⁵¹

VI. LOOKING AT OTHER AMERICAN SPORTS AUTHORITIES.

The regulatory bodies examined above provide important lessons on how a centralized regulatory body for all esports in each jurisdiction can benefit that jurisdiction's esports ecosystem. Further, the case studies point out certain lessons to keep in mind for a hypothetical equivalent in the United States.²⁵² However, these regulatory bodies either belong to foreign jurisdictions with different laws, or to no specific jurisdiction which exerts influence through the power of contract; this may explain the ease with which, or the extent to which, they are able to exert influence

<https://www.gamereactor.eu/match-fixing-doping-and-the-dark-side-of-esports/>; Martinelli, *supra* note 9, at 506.

²⁴⁷ *Who We Are*, ESPORTS INTEGRITY COMM'N, <https://esic.gg/about/> (last visited Mar. 3, 2020) ("Each member has signed their commitment to these Principles and ESIC will be diligent in making their regulatory ambitions for the sport a reality through the Codes and Procedures . . .").

²⁴⁸ *Members & Supporters*, ESPORTS INTEGRITY COMM'N <https://esic.gg/members/> (Last visited Mar. 3, 2020) (listing all the esports leagues/tournament operators under its jurisdiction).

²⁴⁹ *See supra* Section II.

²⁵⁰ *Who We Are*, ESPORTS INTEGRITY COMM'N, <https://esic.gg/about/> (last visited Mar. 3, 2020).

²⁵¹ *See supra* Section III.

²⁵² *See discussion supra* Section III.

over their respective jurisdictions.²⁵³ Thus, what makes it possible or even acceptable for these organizations to possess the powers they do from both a legal and political standpoint may not apply here.²⁵⁴ However, it is noted that, except for the physical aspects, the fundamental principles belying esports are largely similar to those of conventional sports;²⁵⁵ and with “esports leagues increasingly mirroring traditional sports leagues,” it would be reasonable to compare the regulatory ecosystem of esports to conventional sports in the United States to gain some insight.²⁵⁶

On a broader level, the regulatory ecosystem of esports is not completely unlike that of conventional sports.²⁵⁷ In fact, the “governance and commercialization of esports” is said to “emulate[] the traditional sports industry,” and the current state of esports has also been “compared to the state of American baseball when the first vestigial forms of the current team, league, and ownership structures were emerging.”²⁵⁸ Most professional conventional sports are run by a single official body, referred to as a “sports league,” which “enjoys significant control over governance issues.”²⁵⁹ Similarly, individual esports leagues regulate their particular games through varying levels of control granted by game publishers through a central body.²⁶⁰ Further, esports leagues and many of the primary conventional sports leagues are not government-run or owned.²⁶¹ For example, the entities that run the League Championship Series, the

²⁵³ See, e.g., Miroff, *supra* note 31, at 180–82 (noting an example of how an antitrust-related dispute in Korea would have succeeded had it occurred and been brought to court in the United States).

²⁵⁴ *Id.* at 183–84.

²⁵⁵ See generally Mark Filchenko, *A Comparison Between Esports and Traditional Sports* (final class paper for Art 108: Introduction to Games Studies, San Jose State Univ. (May 1, 2018)) (noting that despite the distinction that some parties may make between conventional sports and esports, esports requires just as much dedication and involves much the same principles, skills and abstract concepts as conventional sports, translated into a different context).

²⁵⁶ NABEL & CHANG, *supra* note 30, at 426.

²⁵⁷ See *id.*

²⁵⁸ Chao, *supra* note 9, at 742 (citing David Zarley, *The Sporting Singularity: How Traditional Sports and Esports Are Dovetailing*, VICE (Nov. 9, 2016), https://sports.vice.com/en_us/article/mgz7eb/the-sportingsingularity-how-traditional-sports-and-esports-are-dovetailing and Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013)).

²⁵⁹ *Id.* at 742; See also Ridenhour, *supra* note 66, at 1867.

²⁶⁰ See Chao, *supra* note 9, at 744.

²⁶¹ See generally Chao, *supra* note 9.

Overwatch League (“OL”), and the EVO Tournament are all privately owned; as are the NFL, the NBA and the MLB.²⁶² Also, much like in esports, it appears that the legal and governance structures of conventional sports leagues were purposefully constructed to allow for vertical integration, thus creating a chain of authority for each sport among its market participants.²⁶³ That is, conventional sports consist of independent economic parties with “upstream competition organizing services and downstream clubs participating in the competition,” in much the same way that esports publishers are at the top of the chain and license out certain powers over their games’ esports scene downstream.²⁶⁴

Further, common to both esports leagues and conventional sports leagues is that one body tends to hold a monopoly on their particular sport or sport “in spite of the Sherman Antitrust Act.”²⁶⁵ For example, the “Big Four” sports leagues—the NBA, the NFL, the MLB, and the NHL—are all said to have virtually monopolistic control over professional basketball, football, baseball, and hockey, respectively.²⁶⁶ This, again, is very similar to esports, where game publishers essentially maintain ultimate control over their products that produce a competitive esports scene.²⁶⁷ Unsurprisingly, this fact has led to concerns about the large degree of control that conventional sports leagues have held over the commercialization of the individual teams, and arguments for the establishment of a monolithic regulator for all professional-level conventional sports.²⁶⁸

²⁶² See Wong, *supra* note 39, at 128 (noting that, in the LCS case, it has “an extremely close relationship with Riot Games” to such an extent as to be considered “an alter ego of[] Riot Games.”); Ian Walker, Sony Buys Evo, Kotaku (Published Mar. 18, 2021) <https://kotaku.com/sony-buys-evo-1846507520>. Evo has now been acquired by Sony. See also Ridenhour, *supra* note 66, at 1867 (discussing franchising structure of the “Big Four,” which includes the NFL, NBA, and MLB).

²⁶³ See discussion *supra* Section I.

²⁶⁴ Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Sports Leagues Should Look More Like McDonald’s and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 222 (2006).

²⁶⁵ Ridenhour, *supra* note 66, at 1867. See Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 4, (1964) (noting that every professional sport is, individually, “a natural monopoly”).

²⁶⁶ See Grow, *supra* note 107, at 575; Ridenhour, *supra* note 66, at 1867.

²⁶⁷ See *supra* Section I.

²⁶⁸ See Grow, *supra* note 107, at 577; Ross & Szymanski, *supra* note 264, at 216–19 (noting the control that individual sports leagues have over the

However, unlike conventional sports, in which most leagues subscribe to a joint venture model for governance,²⁶⁹ esports sees the use of multiple governance structures which vest varying degrees of authority in one or more entities, based on the publisher's desired degree of control over their games.²⁷⁰ Additionally, while an organizational body can be formed by multiple parties who agree to regulate the professional play of a particular conventional sport, in esports, organizational bodies must "license[] the right to play titles created by game developers."²⁷¹ Thus, member franchises share control over tournament organization and the sports leagues' actions in conventional sports,²⁷² while esports tend to cede tournament organization to a competitive operator with oversight from the publisher as another higher body of authority.²⁷³ This is also, in large part, the result of how intellectual property rights leave the degree of the esports market participants controls' to the mercy of the publisher, who is beyond the authority of an esports league, of which, conventional sports has no analogue.²⁷⁴ That is, the publisher of any game in esports invariably owns the intellectual property rights granting the publishers ultimate control over what happens in a particular game's competitive scene, which is impossible for any party in conventional sports.²⁷⁵

competitive restraints, marketing, team management and locations, and player rights raise some concerns; concluding that it would be more efficient to abandon the joint venture model and manage sports as a single firm.)

²⁶⁹ See Ross & Szymanski, *supra* note 264, at 223.

²⁷⁰ See *supra* Section I; Ross & Szymanski, *supra* note 264, at 223. *But see* Ridenhour, *supra* note 66, at 1867 (noting that the Women's National Basketball Association and Major League Soccer are single-entity leagues).

²⁷¹ Chao, *supra* note 9, at 744.

²⁷² See *supra* Section I; Ross & Szymanski, *supra* note 264, at 223.

²⁷³ *An Introduction to the Esports Ecosystem*, ESPORTS OBSERVER (Oct. 5, 2021) <https://archive.esportsobserver.com/the-esports-eco-system/>.

²⁷⁴ See discussion *supra* Section I. See also Chao, *supra* note 9, at 749 ("Copyright is likely to be the lynchpin in any dispute.") (citations omitted).

²⁷⁵ See discussion *supra* Section I. See also, Chao, *supra* note 9, at 741 (citing Andreas Rahmatian, *Cyberspace and Intellectual Property Rights*, RSCH. HANDBOOK ON INT'L LAW & CYBERSPACE 72, 76 (Nicholas Tsagourias & Russell Buchan eds., 2015) ("The international nature of cyberspace with separate (private, property-holding) individuals and companies as actors within the cyberspace can potentially blur the legal division between sovereignty and property So he who has quasi-proprietary power over the cyberspace may very well acquire quasi-sovereignty over people")).

Thankfully, both the conventional sports and esports ecosystems appear to handle most of the legal issues presented in Section II in the same manner, leading some parties to conclude that many regulatory issues in esports “can be addressed within the confines of traditional sports governance.”²⁷⁶ This conclusion makes sense: Matters of discrimination, immigration and contract disputes, for example, are all already subject to legal proceedings pursuant to the relevant statutes and legal principles.²⁷⁷

On the other hand, issues that are not touched or strictly prohibited by the law, such as market participant misconduct, corruption, and gambling in conventional sports, are subject to administrative tribunals, investigations, and subsequent sanctions.²⁷⁸ The determinative question is a matter of which parties are involved.²⁷⁹ Moreover, esports and conventional sports also both maintain technical rules and codes of conduct.²⁸⁰ Esports face “a fundamental quandary[,]” however, because they are played in a digital medium, “where physical analogues provide no precedent,” thus forcing the rules for esports play to deviate somewhat from those of conventional sports.²⁸¹ This is largely explained by the fact that, unlike in conventional sports, where the mechanics and fundamental rules of the sport tend not to change, a video game’s features are constantly changed to balance the game and make competitive play more fair or interesting.²⁸² This leads to the establishment of a constantly fluxing “metagame,” where the strategies and preferences of competitive play evolve constantly, causing the regulations of an esports game to evolve accordingly, usually at a higher rate than in conventional sports.²⁸³

Lastly, most conventional sports have a players association to represent the players’ interests and provide a means of collective

²⁷⁶ Chao, *supra* note 9, at 740. Chao notes that, “the dovetailing between esports and traditional sports, and the increasing regulatory legitimacy of esports, indicates that many of these issues can be addressed within the confines of traditional sports governance.” *Id.* See also David E. Schwartz, et al., *Sports Law in the USA*, LEXOLOGY (Mar. 21, 2019), <https://www.lexology.com/library/detail.aspx?g=27995df4-a1da-4b5c-bb5d-682e792471f4>.

²⁷⁷ Schwartz, et.al, *supra* note 276.

²⁷⁸ See discussion *supra* Section II.

²⁷⁹ See discussion *supra* Section II.

²⁸⁰ See Chao, *supra* note 9, at 751–52.

²⁸¹ *Id.* at 741.

²⁸² *Id.* at 752.

²⁸³ *Id.*

bargaining on behalf of the players for that sport, which incidentally, helps the conventional sport address some antitrust issues.²⁸⁴ While there have been arguments for their establishment, few esports games have players associations, in fact, only two of them have one, and there is no such union for all esports players.²⁸⁵ Moreover, despite the high-monopoly they have over their respective sports, conventional sports leagues receive antitrust exemptions through Congress and even monetary support from the federal government.²⁸⁶ However, there does not appear to be any support or restrictions from the federal government for esports, in legislation or court opinions thus far.²⁸⁷

VII. THE EFFECTIVENESS OF A MONOLITHIC REGULATOR

So far, the observations above provide the following revelations: the legal issues that esports face in antitrust, immigration, gambling, discrimination, harassment, employment, and market participant conduct already have mechanisms to help resolve them.²⁸⁸ Specifically, one can execute legal processes pursuant to relevant statutes, or petitions with the relevant departments to resolve any conflicts those laws touch upon. As for the problems that cannot be resolved in such a manner, usually as they pertain to policy and conduct, there is typically some guidance from the esports market participants' individual conduct and policies, as well as government policies, which the courts cannot address.²⁸⁹ But, it is clear that the relevant laws will require some amendment or elucidation to bring esports into their purview and provide a clearer perspective on where and how esports activities and issues interact with them.²⁹⁰

As for the several esports regulatory bodies in other jurisdictions, their successes and failures provide insight on the prospect of a monolithic

²⁸⁴ Hollist, *supra* note 7, at 834 (“Unlike e[s]ports professionals, traditional athletes have successfully applied their collective bargaining power to secure better working conditions for players.”); Ridenhour, *supra* note 66, at 1869–74.

²⁸⁵ See discussion *supra* Section II; see also Hollist, *supra* note 7, at 836 (“The two solutions most commonly discussed for eliminating bargaining power discrepancies are antitrust law and unionization. However . . . neither option is feasible for today’s e[s]ports players.”).

²⁸⁶ Grow, *supra* note 107, at 578.

²⁸⁷ Chao, *supra* note 9, at 741.

²⁸⁸ See discussion *supra* Section II.

²⁸⁹ See discussion *supra* Section II.

²⁹⁰ See discussion *supra* Section II.

regulatory body for all esports in the United States.²⁹¹ The UKeSA and its successor organization, the BEA, demonstrate the importance of having government involvement or an arrangement to strong arm compliance with regulations and inclusion.²⁹² Additionally, KeSPA demonstrates that government support can resolve the industry's controversies, to an extent, but it also demonstrates that there must be active supervision and interaction by the several parties of the esports market to ensure fair representation for all.²⁹³ The JeSU demonstrates the effectiveness of consolidating multiple associations into a single government supported entity and shows how providing legal support to change the country's interpretation of its legislation can untie legal Gordian Knots that hinder growth of esports in a jurisdiction.²⁹⁴ WESA and the IeSF show that simply leaving this matter to an international body would not suffice for the interests of esports market participants in the United States, let alone at an international level, if left without the requisite force of authority behind their regulatory oversight.²⁹⁵

This paper has also remarked on the similarities between the regulatory ecosystem of conventional sports and esports, from which one can make the following conclusions: both seem to have singular, near monopolistic regulatory bodies for each sport or game that are privately owned, both set forth their own policies and regulations as to conduct between players and teams, and both are granted some degree of control over.²⁹⁶ Esports differs both in how the publishers of the game maintain ultimate control over any of the decisions or arrangements made in the competitive scene which arise from its products, and in that esports is based on games that are subject to constant change, thus requiring that their regulations change and adapt as well.²⁹⁷

Further, esports does not have unions for all players or for players of every game, and esports has not yet been fully addressed by the government as to how antitrust applies, nor has it been graced with any form of exemption.²⁹⁸ Moreover, other sports associations in the United

²⁹¹ See discussion *supra* Section II.

²⁹² See discussion *supra* Section III.

²⁹³ See discussion *supra* Section III.

²⁹⁴ See discussion *supra* Section III.

²⁹⁵ See discussion *supra* Section III.

²⁹⁶ See discussion *supra* Section IV.

²⁹⁷ See discussion *supra* Section IV.

²⁹⁸ See discussion *supra* Section IV.

States show that individual sports can remain individually regulated and managed through separate leagues.²⁹⁹ So, individual games can be sufficiently managed and regulated through individual leagues or operators.³⁰⁰

The above observations may lead some to reasonably conclude that the number of issues esports faces, with respect to legislation and policy, cannot be fully resolved through private legal maneuvers alone.³⁰¹ Others may take these realities as a premise for arguing that the establishment of a central monolithic regulator for all esports in the United States is needed to resolve the issues and promote the growth of esports in the United States.³⁰² Yet, this paper presents this tentative counterargument: it is doubtful that a monolithic regulator for all esports could solve a majority of the present issues.³⁰³ In fact, at present, a monolithic regulatory body for all United States esports may be unnecessary and even prove to be redundant or harmful.³⁰⁴ This is because questions of policy have more to do with the legislature and the relevant governing departments revising their definitions, than it does the work of a national regulator.³⁰⁵ Therefore, the esports market would benefit more from a court opinion or a declaration from Congress giving certain terms or providing an opportunity for legislative change through lobbying than the establishment of a regulatory body designed to monitor and regulate these issues.³⁰⁶ Thus, the methods and means for handling the matters above are either at the mercy of law or market participant-based policy or regulation.

With respect to employment concerns, there is little a private party to employment arrangements can do to circumvent or supersede the NLRA,

²⁹⁹ See discussion *supra* Section IV.

³⁰⁰ See discussion *supra* Section IV.

³⁰¹ 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. 509, 533-80 (2020).

³⁰² See Grow, *supra* note 107, at 577; Ross & Szymanski, *supra* note 264, at 216-19.

³⁰³ See discussion *supra* Introduction.

³⁰⁴ See discussion *supra* Introduction.

³⁰⁵ See discussion *supra* Section III.

³⁰⁶ Robert B. Dove, *Enactment of a Law*, U.S. SENATE PARLIAMENTARIAN (1997) <https://www.congress.gov/help/learn-about-the-legislative-process/enactment-of-a-law> (noting the general overview of the interplay between national regulators and legislatures).

outside of negotiating favorable terms between the relevant parties.³⁰⁷ As previously mentioned, “[t]he relationship between an employee and an employer is governed by law, not by the employer’s judgment.”³⁰⁸ Aside from the ways in which parties to an agreement draft their terms, there is no way for these parties to proactively define the relationship, and thus the rights owed, between them contrary to such laws.³⁰⁹ Parties that do enter some sort of employment relationship with another, for example, a player with a professional team or even a publisher are accorded the right to form a union for collective bargaining.³¹⁰ But for the most part, such a union must be established on the player’s volition; the players across or within individual esports games have not, of their own volition, begun unions of their own, as evidenced by the fact that no such unions exist.³¹¹

Immigration, too, is hardly within the control of esports market participants.³¹² With the USCIS being, essentially, the decision maker as to who may receive a visa, the only other authority is the law pursuant to which the USCIS issues its visas.³¹³ The most that market participants may do is petition to the USCIS, as Riot Games did, or lobby for a change in definitions that would recognize esports as a legitimate purpose for issue.³¹⁴ With respect to discrimination, harassment, and market participant misconduct, the law generally provides restrictions and a remedy for those violations through legal process.³¹⁵ With regards to what is not touched upon or prohibited by the law, particularly with market participant misconduct and gambling, these concerns can be addressed by regulations set forth by the publishers based on their downstream control.³¹⁶ Further, publishers, operators, individual players, and high-

³⁰⁷ See *supra* Section II; see generally Wong, *supra* note 39.

³⁰⁸ Wong, *supra* note 39, at 130.

³⁰⁹ Brandon I. Weinreb, *Esports and Harassment: Analyzing Player Protections in a Hostile Work Environment*, 57 *Ca. W. L. Rev.* 473, 479–486 (2021).

³¹⁰ National Labor Relations Act, 29 U.S.C. §157 (noting that employees have the right to self-organize and collectively bargain for their collective aid or protection).

³¹¹ See discussion *supra* Section II; Holden et.al., *supra* note 46, at 550–54.

³¹² See discussion *supra* Section II.

³¹³ See discussion *supra* Section II.

³¹⁴ See discussion *supra* Section II.

³¹⁵ See discussion *supra* Section II.E.

³¹⁶ See discussion *supra* Section II.C; see also Miroff, *supra* note 31, at 182.

profile individuals in the industry, have practiced a type of a “cancel-culture” to effectively deny participation or profit of individuals suspected of discrimination and harassment.³¹⁷ Moreover, most publishers have also implemented in-game systems of reporting and communication to reduce and address instances of harassment.³¹⁸ Given market participants’ healthy pattern of response towards the community’s calling in allegations and incidents of misconduct, discrimination, and harassment, the filing of lawsuits on behalf of aggrieved parties would serve to reinforce this mechanism of socially based policy reform.

As for antitrust concerns, a government-sponsored monolithic regulator of all esports would likely not comport with the United States’ respect for sports associations and regulatory bodies.³¹⁹ Rather, these conventional sports bodies have been left to be privately governed and given antitrust exemptions, and the government has also funded their continued operations.³²⁰ By analogy, it would be unlikely the government would take a different course with respect to esports, because doing so would trample the game publishers’ intellectual property rights. Even if the government attempted to accomplish this by altering federal legislation pursuant to the Copyright Clause, or embedding video games into the purview of an existing regulatory bureau, this would set a dangerous and unpopular precedent.³²¹ Further, despite the Sherman Act being described as ill-suited to regulate the central regulatory bodies for conventional sports—warranting a national, monolithic regulator—market participants would benefit more from clearer legislation, tighter vigilance, and action from existing bodies.³²² It may be reasonable to claim that establishing a larger monolithic regulatory body would encourage greater degrees of vigilance towards monitoring and enforcing the existing policies and regulations in esports, but whether this will occur remains unclear.³²³

³¹⁷ See discussion *supra* Section II.

³¹⁸ See discussion *supra* Section II.E.

³¹⁹ See discussion *supra* Section IV.

³²⁰ See discussion *supra* Section II; See Grow, *supra* note 107, at 576–77.

³²¹ See U.S. CONST. art. I, § 8, cl. 8. (The Copyright Clause is interpreted as providing Congress the power to create Copyright Laws, which affords Congress the right to make exceptions in the case of video games if lobbied, but this is unlikely); see also Chao, *supra* note 9, at 761.

³²² See discussion *supra* Section II.

³²³ See discussion *supra* Section III.

Even if this monolithic regulator were a corporate or otherwise privately-owned entity, with no government involvement (which would run contrary to the lessons of the UKeSA), it would probably implicate antitrust law to a greater extent than if the games were regulated separately notwithstanding a government based exemption or neglect.³²⁴ It is noted that “[t]raditional sports . . . leagues do not adequately address the interests of all stakeholders but, instead, tend toward collusive practices[,]” such as encouraging the regional monopolistic statuses of conventional American sports leagues.³²⁵ The JeSF is a living indicator that allowing a monolithic regulatory body to govern all of esports, even with government support, would lead to reasonable concerns that such a body would engage in highly selective practices that border on anticompetitive conduct.³²⁶ As such, allowing a monolithic regulator of all esports in the United States would probably cause more trouble absent appropriate counter measures being put in place.³²⁷

As for the intangible, murky area that the law does not touch, this paper concedes that a monolithic body overseeing all esports might be more effective at handling such matters and could lead to improvement of the industry’s standards. As other scholars have noted, a monolithic body would provide a forum for the esports community and market participants to interact and address their grievances, promote regulatory stability, and lend much needed legitimacy to esports.³²⁸ A collective effort would cultivate greater momentum towards effecting change in the policies of market participants as well as those belying legislation and the government. Finally, a consolidated body of all market participants can address the policy issues that are systemic to the esports market through mass lobbying or widespread standardization.³²⁹

But there remains the question of whether such reforms are worth the redundancy and trouble of a regulatory body, and whether the degree of success this regulatory body would enjoy is highly conditional on the regulatory body possessing a questionable degree of power over the

³²⁴ See Grow, *supra* note 107, at 576–77; discussion *supra* Section III.

³²⁵ Chao, *supra* note 9, at 761–63.

³²⁶ See discussion *supra* Section IV.

³²⁷ See generally discussion *supra* Section IV.

³²⁸ Chao, *supra* note 221, at 764.

³²⁹ See discussion *supra* Section II; See also INT’L E-SPORTS FED’N, *supra* note 239.

esports' market.³³⁰ To ensure that leagues, tournament operators, and publishers address non-legal issues through their codes of conduct, competitive regulations, and end user license agreements, it is necessary for the authority to be binding, lest the issues of WESA, the IeSF and the UKeSA come to pass.³³¹ Even with the establishment of a monolithic regulatory body, there is no guarantee that such issues will be enforced, that parties would comply to those new standards, or that conduct contrary to the newer standards would be curtailed, unless it provides specific task forces on a rigorous schedule to address such issues, as we have seen with ESIC and KeSPA.³³² If anything, while a regulatory ecosystem with separate bodies regulating separate esports has proven incapable of preventing non-legal abuses and infractions, it remains beyond the control of the law, the publishers, or operating esports leagues.³³³

VIII. FEATURES OF A MONOLITHIC BODY

To recapitulate, a monolithic regulatory body for all esports in the United States is not necessary to address the issues it currently faces because the legal issues that are present already have mechanisms for resolution, and the issues not prohibited by the law are addressed through the market participants' policies and regulations.³³⁴ However, to address some of esports' systemic issues by improving the market's standards and policies, a monolithic entity which would represent the interests of all esports market participants and equalizes their representation and bargaining power, would be beneficial.³³⁵ In other words, rather than mandating that everyone abide by a charter or submit to an authority, one should attempt to form a global forum to affect policy change.³³⁶ Thus, assuming *arguendo* that it is absolutely necessary or mandated for such a body to exist, there are a few features it should or should not possess in light of the conclusions and observations above.

³³⁰ See discussion *supra* Section II.

³³¹ See discussion *supra* Sections II–III.

³³² See discussion *supra* Section III.

³³³ See discussion *supra* Section III.

³³⁴ See discussion *supra* Section I–III.

³³⁵ See generally discussion *supra* Sections I–III.

³³⁶ See Ross & Szymanski, *supra* note 264, at 216 (arguing that “entertainment in . . . competitive sports leagues can be produced through a structure in which coordination of the particulars of the competition (playing rules, distribution of revenues, terms of competition) is provided by a separate entity . . . distinct from the clubs participating in the competition.”).

The key is to ensure that the hypothetical United States Esports Association (USESA) possesses a binding legal force, lest it remain ineffective at accomplishing any regulation or reform, as was the case with the UKeSA, WESA and the IeSF.³³⁷ That said, it is entirely possible for the hypothetical USESA to be a private entity formed contractually and still possess a “force of authority” to back its powers.³³⁸ The very existence of the American conventional sports authorities show that it is possible. But, to prevent the mistakes of the UKeSA, the IeSF and WESA, and in consideration of how conventional sports leagues’ monopolistic degrees of control bely their regulatory effectiveness, there should be some form of exclusivity agreement from the publishers to submit to such an authority. After all, since the individual publishers hold ultimate downstream control over their products, their agreement to submit their games’ competitive esports scenes to the hypothetical USESA’s ultimate regulatory authority is the only way to bind all other parties in the market.³³⁹ In such a case, matters that involve criminal issues would be referred to the appropriate authorities regardless. Further, because many of the issues surrounding esports are either addressed by pre-existing law or policy, one could argue that there is no need for large scale government or legislative intervention.

Nonetheless, a tentative route for government involved regulation is preferable.³⁴⁰ It would be practical for the federal government to pass and sign relevant legislation to form the USESA pursuant to its power to regulate interstate commerce.³⁴¹ Esports, and online multiplayer in general, are conceivably a multi-state affair involving a sort of commerce between states over the internet by providing digital goods and services from one state to another. Moreover, with most issues facing esports being already addressed by federal law, there is further justification for the hypothetical monolithic regulator to derive its authority from federal law.³⁴² Incidentally, if the authority of the hypothetical USESA would derive from federal legislation, this route would also maintain the legal force necessary

³³⁷ See discussion *supra* Section III.

³³⁸ See discussion *supra* Section II.D.

³³⁹ See discussion *supra* Sections I & II.C.

³⁴⁰ See, e.g., Chao, *supra* note 9, at 762–63. (“UKeSA’s failures, in conjunction with the limited successes of KeSPA, support the notion that federal support and regulatory intervention is necessary to ensure the success of a national esports governing body.”).

³⁴¹ See U.S. CONST. art. I, § 8 (granting Congress the power to regulate commerce among states, foreign nations, and Indian Tribes).

³⁴² See discussion *supra* Section IV.

to bind all parties that supersedes even the authority of the publishers.³⁴³ This legislation should also grant USESA the powers it needs to exercise regulatory authority in much the same way that the Securities Exchange Act of 1934 created and delegated certain authorities to the Securities and Exchange Commission.³⁴⁴ Although, as noted before, given the government's previous non-involvement in conventional sports, this is unlikely, especially because doing so would override the rights of the publishers to hold intellectual property.³⁴⁵ This would also likely be ill-preferred by the several publishers, as their control over derivative markets from their products would essentially remain at the whims of lawmakers.³⁴⁶

Moreover, a monolithic regulator for esports must be able to maintain the protective nature of the existing regulatory ecosystem and prevent abuse on the part of the regulators and publishers or leagues' control.³⁴⁷ Thus, it must be stressed that a particular competitive title's inclusion into the purview of the monolithic regulatory body should not be governed by vote, but by classification. That is, if a competition based on a video game wishes to conduct an activity that meets the definition set forth by the regulatory body, then it is classified as an esports, and must submit to the authority of the regulatory body. This avoids the pitfall in the joint venture model of conventional sports and the JeSU: giving constituent representatives, particularly the developers, a choice on whether to include or recognize a particular league runs the risk of bias and possibly even runs afoul of antitrust provisions.³⁴⁸ This is because the developers participate in the competitive market that is the esports market; and, participants in competitive markets are conceivably incentivized to make more money by ensuring that others do not take away from the consumers of their products. Thus, allowing these developers to decide whose products should be deemed "official" under a regulatory body would probably lead to anti-competitive activity.³⁴⁹ Government backing

³⁴³ See discussion *supra* Section IV.

³⁴⁴ See Securities Exchange Act, 48 Stat. 891 (1934) (codified as 15 U.S.C. §78j(b)).

³⁴⁵ See discussion *supra* Section IV.

³⁴⁶ See discussion *supra* Section IV.

³⁴⁷ See, e.g., Chao, *supra* note 9, at 761. ("Since joint-venture and developer-sponsored leagues have historically exhibited anticompetitive behavior, esports regulators must consider governance that protects consumer demands and stymies anticompetitive practices.")

³⁴⁸ See discussion *supra* Section III.

³⁴⁹ See discussion *supra* Section III.

or involvement is justified on this ground as well, since it would at least provide the contingency of checking against interests of the regulatory body's constituents as a public entity.³⁵⁰

The regulatory body must be a consolidated single entity, and the extra bodies that claim the same jurisdiction must be either merged into the monolithic body or eliminated. This was made clear from the success of JeSU and the failure of the international regulatory bodies, as well as the prior revelation that “[h]aving multiple regulatory organizations creates confusion and lacks cohesion” to effectively regulate the esports ecosystem.³⁵¹ A main “board” should also exist to maintain representation, through which all regulatory issues must pass in a manner that does not lead to significant disparity in bargaining power between esports market participants. Consequently, this board’s membership also needs to ensure a fair representation of relevant parties, major game publishers, key platform providers, individual league operators, the federal government, and perhaps, several competitive organizations. This would ensure that the interests of all are equally accounted for. Assuming that publishers and developers would like to maintain a certain degree of autonomy, whatever institution ends up binding the majority of the esports market participants (i.e. the publishers, developers, operating leagues, franchises and teams) to the authority of the USESA, it may arrange a contractual agreement which allows for such autonomy.³⁵²

Additionally, to address the matters that existing law and legal process do not reach, such as esports market participant policies and conduct, there must also be an enforcement and investigation wing to serve in the function that their name suggests.³⁵³ Further, it is recommended, pursuant to the KeSPA model, that there be a pseudo-judiciary wing to the regulatory body.³⁵⁴ Preferably, this wing would be comprised of lawyers and developers representing the several leagues who will not only adjudicate regulatory violations, but also advise on the regulations and conflict resolution in light of developments in the industry and legislation. This will, at least, ensure that forthcoming developments and controversies in the esports market maintain integrity and security and will

³⁵⁰ See discussion *supra* Section III.

³⁵¹ Martinelli, *supra* note 9, at 506; See also discussion *supra* Section III.

³⁵² See discussion *supra* Section II.

³⁵³ See discussion *supra* Section II.C.

³⁵⁴ See discussion *supra* Section III.

be addressed or considered—even if the several publishers and esports leagues do not do so.

IX. CONCLUSION: GOOD LUCK, HAVE FUN

In sum, the study above has examined several pressing legal issues in esports, several central regulators of esports in other jurisdictions, similarities between conventional sports and esports regulatory systems, the effectiveness of a potential monolithic regulator, and the features that a monolithic regulator should possess if it must exist. Reasonable minds could differ as to whether a monolithic central regulatory body for all U.S.-based esports should exist or not. Of greater import, however, is that there are still plenty of legal and policy-based questions that must be resolved before any meaningful progress on the issues currently plaguing the esports market can be made. All signs point to esports becoming a much greater phenom in the future, one which the U.S. Government may no longer afford to ignore. Thus, it is likely that some kind of order will be established, be it by the controlling interests of the esports market or policy makers, or a combination of both; and it is the hope of the author that this note will provide some guidance on the matter.