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## Discovering the Governing Forces of eSports, an Intellectual Property Gold Mine

Dave Gravely

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## COMMENT

### DISCOVERING THE GOVERNING FORCES OF ESPORTS, AN INTELLECTUAL PROPERTY GOLD MINE

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I.	Introduction—the Basics of eSports .....	574
	A. Brief History and Context .....	576
	B. A Representative Example: Fortnite.....	577
	C. Another Example: VALORANT.....	579
II.	The Forces That Predominantly Govern eSports.....	580
	A. Contracting and Private Sponsorship.....	582
	B. Governance: Rules of the Game, plus Rules of the Tournament.....	583
	C. Is Regulation Necessary?.....	585
III.	Reconciling eSports and United States Intellectual Property Law.....	588
	A. Copyright.....	588
	1. Creative Uses of Video Game Intellectual Property Rights .....	593
	B. Trademark .....	596
	C. Other Evolving Issues.....	598
IV.	Conclusion .....	600

## I. INTRODUCTION—THE BASICS OF ESPORTS

An electronic sport (eSport)<sup>1</sup>, in its simplest sense, occurs when two individuals compete formally through the medium of a video game's software, oftentimes involving a reward.<sup>2</sup> A “digitally mediated competition” of sorts, eSports involves two individuals (or entities if the competition is team-based) agreeing to compete within the specified rules of that video game's software code.<sup>3</sup> eSports have emerged as a hybrid subset of the gaming and streaming industries, where professional gaming competitions are held featuring each game's most skillful players and broadcast to a global audience.<sup>4</sup> These competitions are normally streamed online in real-time via internet platforms such as Twitch or YouTube.<sup>5</sup>

As society progresses into the modern era, eSports continues to bloom in both viewership and revenue due to the industry's significant user involvement and billowing worldwide audience.<sup>6</sup> In fact, both the video gaming industry and its eSports subculture have grown considerably in tandem throughout the past few decades.<sup>7</sup> Well into today's internet era,

1. Max Miroff, Note, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J.L. & SOC. PROBS. 177, 178 (2018).

2. See Devin Pickell, *What Is Esports and How Did it Become a \$1 Billion Industry?*, G2 (Aug. 20, 2019), <https://learn.g2.com/esports> [<https://perma.cc/6RUP-QVC5>] (“[Esports is] a form of competition where professional gamers square off either in teams or individually. Competitions take place in a multiplayer setting, and there are typically cash prizes awarded at the end of tournaments.”).

3. See Dan Burk, *Ownning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 UNIV. PA. L. REV. 1535, 1536–37, 1560–61 (2013) (explaining how eSports competitions are “by definition mediated by computer game software,” which means players' actions are limited by the game itself).

4. See John Holden & Mike Schuster, *Copyright and Joint Authorship as a Disruption of the Video Game Streaming Industry*, 2020 COLUM. BUS. L. REV. 942, 951–53 (2020) (attributing eSports' incessant growth largely to the video gaming and streaming industries).

5. See *Global Esports & Live Streaming Market Report*, NEWZOO 34 (2021), [https://resources.newzoo.com/hubfs/Reports/2021\\_Free\\_Global\\_Esports\\_and\\_Streaming\\_Market\\_Report\\_EN.pdf?utm\\_campaign=GEMR%202021&utm\\_medium=email&\\_hsmi=114762550&\\_hse\\_nc=p2ANqtz-\\_ynAmjbnb3tQOMe5S5YQcx6tMVOecjfGm8yMcgYhX3TBSft-x1Vbiy059aDjp2Qrj46Cgm\\_FHcwl5kTPxbm4CbrH\\_r0IS5eWUTFUt-0YCYQV11Xc&utm\\_content=114762550&utm\\_source=hs\\_automation](https://resources.newzoo.com/hubfs/Reports/2021_Free_Global_Esports_and_Streaming_Market_Report_EN.pdf?utm_campaign=GEMR%202021&utm_medium=email&_hsmi=114762550&_hse_nc=p2ANqtz-_ynAmjbnb3tQOMe5S5YQcx6tMVOecjfGm8yMcgYhX3TBSft-x1Vbiy059aDjp2Qrj46Cgm_FHcwl5kTPxbm4CbrH_r0IS5eWUTFUt-0YCYQV11Xc&utm_content=114762550&utm_source=hs_automation) [<https://perma.cc/A26K-T7GP>] (defining live-streaming as “the act of simultaneously recording and broadcasting content (including gaming) to a live audience through social platforms,” including Twitch and YouTube); see also Zachary Beals, *Oversight in Collegiate Esports: Is the NCAA the Answer?*, 9 ARIZ. ST. SPORTS & ENT. L.J. 78, 81–83 (2019) (identifying Twitch and YouTube as leading platforms for live-streaming).

6. See *Global Esports & Live Streaming Market Report*, *supra* note 5, at 31 (depicting the size and growth prospects of the global eSports audience); see also Miroff, *supra* note 1, at 178–79 (highlighting the industry's growing global audience).

7. See Andrew Beattie, *How the Video Game Industry is Changing*, INVESTOPEDIA (Aug. 10, 2021), <https://www.investopedia.com/articles/investing/053115/how-video-game-industry-changing.asp>

society now largely accepts eSports as a legitimate industry with real promise.<sup>8</sup>

Curiously, U.S. copyright law allows the owner of a copyright, the game developer (or publisher), the exclusive right to display and perform its copyrighted audiovisual works—the game’s software output—“publicly by means of a digital audio transmission.”<sup>9</sup> As a result, the fate of every eSport’s governance depends primarily on how the game developer decides to handle its copyright.<sup>10</sup> Game developers often license out the use of its copyright to third-party tournament organizers and sponsors that seek to hold and broadcast eSports events.<sup>11</sup> It is important to note, however, that game developers hold the original rights to host competitive gaming tournaments.<sup>12</sup> In some instances, game developers will sponsor

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[<https://perma.cc/AG9T-A4JB>] (“The video game sector is immensely large. In fact, it is larger than the movie and music industry combined.”); Florian Larch, *The History of the Origin of eSports*, ISPO (Jan. 1, 2019), <https://www.ispo.com/en/markets/history-origin-esports> [<https://perma.cc/2BK9-CQ9Q>] (tracking eSports’ development over time); *Top 25 Public Companies by Game Revenues*, NEWZOO, <https://newzoo.com/insights/rankings/top-25-companies-game-revenues/> [<https://perma.cc/J3Q7-VUUB>] (ranking video game companies based on quarterly revenues reported in Q2 2021).

8. See *The Rise of eSports Investments*, DELOITTE, <https://www2.deloitte.com/us/en/pages/advisory/articles/the-rise-of-esports-investments.html> [<https://perma.cc/P5YE-2WTB>] (“Over \$4.5 billion was invested in [eSports] in 2018 alone.”); Christina Settimi, *The Most Valuable eSports Companies 2020*, FORBES (Dec. 5, 2020), <https://www.forbes.com/sites/christinasettimi/2020/12/05/the-most-valuable-esports-companies-2020/?sh=67738d8a73d0> [<https://perma.cc/MWG2-X9LX>] (noting how billions of dollars in venture capital investment have been designated to eSports organizations).

9. 17 U.S.C. § 106; see *id.* § 101 (defining “Audiovisual works” as encompassing game software output).

10. See Michael Arin, Note, *Competing Competitions: Anticompetitive Conduct by Publisher-Controlled eSports Leagues*, 104 MINN. L. REV. 1585, 1587–88 (2020) (“Without attention and regulation, the publisher decides on the existence of the market, for the publisher as copyright holder over the game has exclusive control over the if, when, and how the game can be streamed to others.”).

11. James Gatto & Mark Patrick, *Overview of Select Legal Issues With eSports*, 6 ARIZ. ST. SPORTS & ENT. L.J. 427, 444 (2017); see Laura L. Chao, “You Must Construct Additional Pylons”: *Building a Better Framework for eSports Governance*, 86 FORDHAM L. REV. 737, 744 (2017) (identifying tournament organizers and sponsors as key entities within the eSports industry); Miroff, *supra* note 1, at 187–89 (2018) (explaining the role of publishers, tournament organizers, teams, advertisers, and other actors within eSports); *Fortnite Event License Terms*, EPIC GAMES, [https://cdn2.unrealengine.com/Fortnite+Esports%2FFortniteEventLicenseTerms%2FFortnite-Event-License-Terms\\_04.01.20-2f1b6cda1fccf3e3ddb23f7a0b03fb6d3131946.pdf](https://cdn2.unrealengine.com/Fortnite+Esports%2FFortniteEventLicenseTerms%2FFortnite-Event-License-Terms_04.01.20-2f1b6cda1fccf3e3ddb23f7a0b03fb6d3131946.pdf) [<https://perma.cc/Z8FM-J95R>] (specifying qualification criteria for licensing Fortnite events).

12. Arin, *supra* note 10, at 1587–88.

competitive events directly, retaining the ability to profit fully from their intellectual property rights.<sup>13</sup>

This Comment will address the structural and regulatory implications of concentrating original ownership of an eSport entirely into a game developer's hands. Additionally, examples will be provided of private forces, which set forth the necessary regulation to ensure proper governance within the eSports industry. Part I aims to provide context, educating the reader about what eSports are and how they exist as a subset of the gaming and streaming industries. Part II will then identify and explain the private forces that influence the structure and function of some of the world's most prominent eSports leagues. And finally, Part III will speak to how video games and eSports fit into, and take advantage of, today's U.S. intellectual property laws.

#### A. *Brief History and Context*

Competitive video gaming first originated during the 1950s and 60s, growing modestly, yet gaining steady momentum through the close of the twentieth century.<sup>14</sup> The first ever eSports tournament was held in 1972 featuring the game *Spacewar!* hosted by Stanford University's Artificial Intelligence Laboratory.<sup>15</sup> Although earlier gaming events were smaller and local, over time, the significant value in commercializing gaming began to dawn on people.<sup>16</sup>

Advancements in technology made during the turn of the twenty-first century served as a major catalyst for the eSports industry's surge in popularity.<sup>17</sup> Two major factors driving the gaming industry's growth are favorable demographics and the increasing prevalence of internet activity

13. *Epic Games Will Provide \$100,000,000 for Fortnite Esports Tournament Prize Pools in the First Year of Competitive Play*, EPIC GAMES (May 21, 2018), <https://www.epicgames.com/fortnite/en-US/news/epic-games-will-provide-100-000-000-for-fortnite-esports-tournament> [<https://perma.cc/T96W-DQF7>] [hereinafter *Epic Will Provide \$100,000*] (representing Epic Games as a direct sponsor and overseer of *Fortnite* eSports).

14. See Larch, *supra* note 7 (highlighting the origins and growth of competitive gaming, decade by decade).

15. *Id.* (noting twenty-four registered players competing for a yearlong *Rolling Stone* magazine subscription).

16. See Holden & Schuster, *supra* note 4, at 948–50 (recounting competitive gaming's history and development).

17. See Larch, *supra* note 7 (noting how advancements in technology have helped democratize competitive gaming); see also Chris Morris, *Why We Like Video Games (Maybe We're Control Freaks)*, AARP (Apr. 20, 2021), <https://www.aarp.org/home-family/personal-technology/info-2021/video-games-pastimes.html> [<https://perma.cc/28GN-FJKG>] (noting increasing interactivity within video games).

within one's life.<sup>18</sup> With respect to demographics, the gaming industry has grown consistently over the years because it is an industry cherished by younger generations.<sup>19</sup> As younger gaming generations age on, they will likely introduce their own children to gaming, indicating the gaming industry may be particularly well-suited for future growth.<sup>20</sup> Pairing the gaming industry's strong, younger audience with its increasing base of older gamers, the legitimacy of competitive gaming grows year after year.<sup>21</sup>

B. *A Representative Example: Fortnite*

*Fortnite*, a free-to-play title created by Epic Games, demonstrates one of the most openly competitive, laissez-faire examples of an eSport.<sup>22</sup> This video game is of the battle-royale genre, where 100 players drop into one large map and earn points by surviving and eliminating other players. The game's overall goal is to be the last individual remaining in the online server.

Although the game is free to play, Epic Games generated roughly \$2.4 billion in 2018 alone, mostly by way of microtransactions (in-game purchases made by players).<sup>23</sup> Epic Games, the game developer, then took a piece of this revenue and began sponsoring online, in-game competitive events as a way to both market the game and incentivize dedicated players to continue playing at the same time.<sup>24</sup>

Players log on and compete in these events either as individuals or small teams. Given a specified time-block, typically three hours for ten matches,

18. See Morris, *supra* note 17 (discussing the ubiquity of internet activity in the twenty-first century); Gatto & Patrick, *supra* note 11, at 428–29 (noting eSports are viewed by a predominantly younger audience, including nearly forty percent of the audience being women).

19. *The Rise of ESports Investments*, *supra* note 8 (describing viewers aged twenty-one to thirty-five as a significant subset of the eSports fan base).

20. See Joan Colleran, *Multiplayer Mode: How Balancing the Rights of Video Game Developers and Intellectual Property Owners Will Lead to Growth of the Video Game Industry*, 15 OHIO ST. BUS. L.J. 265, 265–67 (2021) (discussing dramatic growth in video game consumption in recent years).

21. See *The Rise of ESports Investments*, *supra* note 8 (discussing demographics within the gaming industry); Beattie, *supra* note 7 (“People are playing games both earlier and later in life, and the gender mix is nearing par.”).

22. See *In-Game Competitions*, EPIC GAMES (2021), <https://www.epicgames.com/fortnite/competitive/en-US/events/ingame-tournaments> [<https://perma.cc/2597-5JX7>] (“Here you’ll find tournaments that may include rewards and prizes for top performers.”).

23. Matthew Handrahan, *Fortnite Tops SuperData’s 2018 Chart with \$2.4 Billion Digital Revenue*, GAMEINDUSTRY (Jan. 19, 2019), <https://www.gamesindustry.biz/articles/2019-01-16-fortnite-tops-2018-superdata-chart-with-usd2-4b-digital-revenue> [<https://perma.cc/H6HN-N5RX>].

24. *Epic Will Provide \$100,000*, *supra* note 13 (providing an example of a game developer pledging to sponsor its game as an eSport directly).

players compete in-game seeking to maximize their points in hopes to earn prize pool money, qualify for a more valuable event, or sometimes both.<sup>25</sup> These events are playable by anyone who downloads *Fortnite* and assents to Epic Games' Terms of Service and End-User License Agreement.<sup>26</sup> Even for regional online qualifying events, Epic Games often pledges a significant prize pool.<sup>27</sup> These smaller, regional qualifying events are meant to culminate into larger, in-person global events—such as the Fortnite World Cup.<sup>28</sup> Viewers typically watch these qualifiers either by tuning into an individual player's live stream or watching the *Fortnite* event production streaming channel.<sup>29</sup> Smaller qualifying events are typically held online; however, major global events are held in-person and conducted via local area network (LAN).<sup>30</sup> Using a LAN helps better ensure consistent connectivity, faster computing responses, and optimized gameplay.<sup>31</sup>

The Fortnite World Cup was an in-person LAN event held in Queens, New York, where roughly forty million players competed in-game to qualify for two hundred tournament spots.<sup>32</sup> Two competitions were held: one

25. See *In-Game Competitions*, *supra* note 22 (listing competitive events); *Fortnite Esports Wiki*, FANDOM, [https://fortnite-esports.fandom.com/wiki/Fortnite\\_Esports\\_Wiki#](https://fortnite-esports.fandom.com/wiki/Fortnite_Esports_Wiki#) [<https://perma.cc/4KWG-3RE2>] (containing a live database of player power rankings and upcoming events).

26. See *Terms of Service*, EPIC GAMES, <https://www.epicgames.com/site/en-US/tos> [<https://perma.cc/TVB7-TW2U>] (“You are permitted to use the Services for your personal, non-commercial use only or legitimate business purposes related to your role as a current or prospective customer of Epic.”); *Fortnite® End User License Agreement*, EPIC GAMES, <https://www.epicgames.com/fortnite/en-US/eula> [<https://perma.cc/G25F-G7U6>] (stipulating licensing rights).

27. See Matt Perez, *Fortnite' World Cup: By the Numbers*, FORBES (July 26, 2019), <https://www.forbes.com/sites/mattperez/2019/07/26/fortnite-world-cup-by-the-numbers/?sh=77d41d036be0> [<https://perma.cc/59TT-GH2S>] (awarding \$1 million each week to Fortnite World Cup qualifiers winners).

28. *Id.* (providing an example of the qualification process).

29. See *Fortnite*, TWITCH, <https://www.twitch.tv/directory/game/Fortnite> [<https://perma.cc/KJ3V-BG9P>] (showing an example of where viewers can access live streams).

30. See *What is a LAN (local area network)?* CLOUDFARE (2021), <https://www.cloudflare.com/learning/network-layer/what-is-a-lan/> [<https://perma.cc/MFA2-E33F>] (“LAN is a network contained within a small geographic area, usually within the same building.”); Burk, *supra* note 3, at 1540 (explaining how eSports tournaments are regularly held using a LAN connection).

31. See CLOUDFARE, *supra* note 30 (stating LANs “usually share a centralized Internet connection”).

32. Perez, *supra* note 27.

solos competition and one duos competition. From the event's \$30 million prize pool, the winner was to receive a life-changing \$3 million prize.<sup>33</sup>

Fortnite offers us a curious example of an individually-based eSport as opposed to a team-based eSport. The game's free-for-all nature has played a significant role in assisting the proliferation of individual gamers' personal brands over the past few years.<sup>34</sup>

### C. *Another Example: VALORANT*

*VALORANT*, of the first-person shooter (FPS)<sup>35</sup> genre, is a team-based tactical eSport where two teams of five players compete, seeking to either control a point of interest or eliminate the opposing team.<sup>36</sup> The game is played round-by-round, and the winner is decided on a best of twenty-five basis. *VALORANT* was developed by Riot Games, a publisher known for sponsoring eSports as a way to foster its game's growth.<sup>37</sup>

This year, Riot Games sponsored the *VALORANT* Champions Tour 2021 (VCT 2021), where professional teams competed over many months in a series of qualifying tournaments, aiming to qualify for the end-of-year, marquee Champions event held in Berlin, Germany.<sup>38</sup> Smaller, regional qualifying tournaments were held across the world and streamed to a globally interested audience throughout the year, demonstrating the scope

33. *See id.* (noting all qualifying players received a guaranteed \$50,000 baseline payout).

34. *See Fortnite Esports Wiki*, *supra* note 25 (containing individual player power rankings); John C. Bat, Note, *Pre-Game Strategy for Long-Term Win: Using Trademark Registration and Right of Publicity to Protect Esports Gamers*, 29 CATH. UNIV. J.L. & TECH. 203, 214–15, 219–22 (2020) (discussing how individuals can use trademark to help protect their individual brand).

35. Pickell, *supra* note 2 (listing eSports genres).

36. *See* Dean Takahashi, *How Riot Games is Gunning for its Second Big Esport with Valorant*, VENTUREBEAT (Dec. 23, 2020), <https://venturebeat.com/2020/12/23/how-riot-games-is-gunning-for-its-second-big-esport-with-valorant/> [<https://perma.cc/6BVK-WPSD>] (analogizing *VALORANT* to another prominent eSport, *Counter-Strike: Global Offensive*).

37. *Id.*

38. *See VALORANT Champions Tour 2021*, LIQUIPEDIA [https://liquipedia.net/valorant/VALORANT\\_Champions\\_Tour/2021](https://liquipedia.net/valorant/VALORANT_Champions_Tour/2021) [<https://perma.cc/AJZ9-VTHK>] (noting the VCT 2021 qualification format, sequence, and results); *2021 VALORANT Champions Tour Overview*, RIOT GAMES (Mar. 26, 2021), <https://playvalorant.com/en-gb/news/esports/2021-valorant-champions-tour-overview/> [<https://perma.cc/TRN9-8LHM>] (citing the rules of qualification for VCT 2021); *VALORANT Champions 2022*, LIQUIPEDIA (Nov. 15, 2022), <https://liquipedia.net/valorant/VCT/2022/Champions> [<https://perma.cc/DTH2-AJ3F>] (containing information on VCT 2022, held in Istanbul, Turkey).



and magnitude of both player and audience participation within eSports.<sup>39</sup> With respect to smaller tournaments, Riot Games often elects to license its right to host eSports tournaments to third-party tournament organizers; however, larger global LAN events are almost always carried out and overseen directly by Riot Games.<sup>40</sup>

Technically, any team accumulating enough circuit points could qualify for VCT 2021; yet, the overwhelming majority of qualifying teams were fully sponsored by professional eSports organizations.<sup>41</sup> Professional eSports organizations often pay players to play a game like it is their full-time job, allowing signed players a seemingly easier avenue to qualify for valuable gaming tournaments in comparison to unfunded, independent gamers.<sup>42</sup> The actions of professional eSports organizations demonstrate the significant investment involved in qualifying for these revealed global LAN events. It should be evident at this point that a week-long international eSports event like *VALORANT* Champions 2021 has the potential to capture an Olympics-sized audience for a significantly lengthy period of time—signifying the prospects of profitability within eSports.<sup>43</sup>

## II. THE FORCES THAT PREDOMINANTLY GOVERN ESPORTS

Most eSports leagues begin when the game developer makes a conscious decision to begin sponsoring competitive play on its platform.<sup>44</sup> From this original right gained via U.S. copyright law, game developers are given the sole power to approve of the use of public displays featuring their

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39. See LIQUIPEDIA, *supra* note 38 (providing a chart denoting qualifying teams by region); see also *Global Esports & Live Streaming Market Report*, *supra* note 5, (showing a firm uptrend in eSports audience growth).

40. See LIQUIPEDIA, *supra* note 38 (“Organized by Riot Games in collaboration with third-party partners.”).

41. See RIOT GAMES, *supra* note 38 (discussing the circuit point process for qualifying teams); LIQUIPEDIA, *supra* note 38 (containing a comprehensive list of qualifying teams along with the tournament’s geographical distribution).

42. See Katherine E. Hollist, Note, *Time to be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 844–45 (2015) (discussing the prospect of designating paid players as employees instead of independent contractors).

43. See *VALORANT Champions Tour 2021*, ESPORTS CHARTS, <https://escharts.com/tournaments/valorant-champions-tour-2021> [https://perma.cc/7HX5-GEMP] (recording 46,048,311 hours watched between December 1–12, 2021, for *VALORANT* Champions Tour 2021).

44. See Arin, *supra* note 10, at 1587–88 (2020) (“[T]he publisher decides on the existence of the market.”); see also Miroff, *supra* note 1, at 205 (identifying the game developer as a primary suspect for antitrust scrutiny).

copyrighted audiovisual works.<sup>45</sup> Most high-level eSports are conducted in a decentralized manner, governed by private, contractual forces instead of controlled by a central, seemingly omnipotent regulatory agency.<sup>46</sup> In this decentralized structure, the game developer is free to license its intellectual property right to third-party tournament organizers, who then use this license to hold competitive gaming events.<sup>47</sup>

On the other hand, there are game developers that use their intellectual property rights to exert a greater, more centralized degree of control over an eSports league.<sup>48</sup> Critics claim that U.S. intellectual property law allows game developers to exert “deep downstream control” over its eSports market, signifying potential antitrust issues.<sup>49</sup> Leagues run in a more centralized fashion allow the game developer a more active role in overseeing league affairs, oftentimes electing to adopt a franchise system, thus creating somewhat of a joint venture between the game developer and professional teams that comprise the league.<sup>50</sup> Some have criticized these joint venture-style franchise leagues as anticompetitive; however, the franchise system does allow professional teams to exert some control over the league’s governance.<sup>51</sup> The Overwatch League, for example, designates

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45. See 17 U.S.C. § 101 (defining audiovisual works); 17 U.S.C. § 106 (bestowing copyright holders an exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission”).

46. See Miroff, *supra* note 1, at 184–85 (explaining the “decentralized model”).

47. Arin, *supra* note 10, at 1588–90 (describing the role of third-party tournament organizers). It is worth re-noting that a game developer, via its copyright, acts as an eSport’s primary point of centralization.

48. Miroff, *supra* note 1, at 184–85.

49. Arin, *supra* note 10, at 1587 (“Highly-structured intellectual property strategy allows the game publisher to exert deep downstream control over the esports market.”); Miroff, *supra* note 1, at 205; see Jochen Harttung, *The Issue of “Deep Control” in Professional E-sports—A Critical Analysis of Intellectual Property Structures in Electronic Gaming* (2015) (unpublished LL.M. thesis, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/70431/1/Harttung\\_Jochen\\_201511\\_LLM\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/70431/1/Harttung_Jochen_201511_LLM_thesis.pdf) [<https://perma.cc/LQ5U-M9LX>] (critiquing deep control of downstream markets based on ambiguities in United States copyright jurisprudence); see also U.S. DEPT OF JUST. & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017) (discussing antitrust considerations for intellectual property).

50. See Jackson Wong, *More Than Just a Game: The Labor and Employment Issues Within Esports*, 11 UNLV GAMING L.J. 123, 127–28, 137–38 (2020) (describing the Overwatch League’s franchise characteristics); see also Arin, *supra* note 10, at 1605 (discussing joint ventures); Chao, *supra* note 11, at 761 (stating joint venture leagues oftentimes create “geographic artificial scarcity”).

51. See Chao, *supra* note 11, at 761 (“Whereas control in a joint-venture model is spread equally across all franchises, teams and players within a developer-sponsored league forfeit any control.”).

a league office tasked with overseeing league governance along with interpreting, applying, and enforcing the league's official rules.<sup>52</sup>

#### A. *Contracting and Private Sponsorship*

To play a video game, users are normally required to assent to the game developer's Terms of Service<sup>53</sup> or End-User License Agreement (EULA).<sup>54</sup> Many of these agreements include provisions that state a user may only use the game's software for non-commercial purposes.<sup>55</sup> In light of the recent streaming boom, a few game developers began loosening the language in their terms of service, allowing players certain rights associated with their user generated content (UGC).<sup>56</sup> This forgiving, tolerant language better recognizes the reality of today where gamers often post gameplay content online as a method to build and develop a personal brand.<sup>57</sup>

The money pouring into eSports comes mostly through private investment.<sup>58</sup> Specifically, the most significant revenue streams involved within eSports relate to sponsorship, media rights, digitized sales, publisher

52. *Summary of Official Rules of Code of Conduct 2020 Season*, OVERWATCH LEAGUE (Feb. 9, 2019), [https://bnetcmsus-a.akamaihd.net/cms/page\\_media/wg/WG2YO9KJ01511587056527743.pdf](https://bnetcmsus-a.akamaihd.net/cms/page_media/wg/WG2YO9KJ01511587056527743.pdf) [<https://perma.cc/46KR-B2LB>] (codifying rules adopted by the Overwatch League); *see also* Graham Ashton, *Guide to the Overwatch League 2019—Teams, Their Owners, and Investors*, THE ESPORTS OBSERVER (Feb. 14, 2019), <https://archive.esportsobserver.com/guide-to-the-overwatch-league-teams/> [<https://perma.cc/NRR4-SQ3Y>] (discussing the Overwatch League's franchise characteristics).

53. *See Riot Games® Terms of Service*, RIOT GAMES (Apr. 30, 2021), <https://www.riotgames.com/en/terms-of-service#id.loh2anyyz380> [<https://perma.cc/4DKD-R7AQ>] (stipulating contractual rights associated with video game software use); *Terms of Service, supra* note 26 (specifying terms of service).

54. *See Fortnite® End User License Agreement, supra* note 26, (stipulating licensing rights); *see also* Holden & Schuster, *supra* note 4, at 957–63 (discussing EULA, Terms of Use, and Terms of Service contract agreements for video games).

55. *Riot Games® Terms of Service, supra* note 53 (“We grant you a limited, non-exclusive, non-transferable, revocable license to use and enjoy the Riot Services (and any Virtual Content) for your individual, non-commercial, entertainment purposes only and expressly conditioned upon your compliance with these Terms.”); *cf. Terms of Service, supra* note 26 (“You are permitted to use the Services for your personal, non-commercial use only or legitimate business purposes related to your role as a current or prospective customer of Epic.”).

56. *Fortnite® End User License Agreement, supra* note 26 (“‘UGC’ includes without limitation . . . gameplay, experiences . . . music, sounds, sound recordings . . . and other types of works.”); *see also* *Global Esports & Live Streaming Market Report, supra* note 5 (discussing the recent boom in streaming).

57. *See Fortnite, supra* note 29 (signifying a location where individuals post gameplay content).

58. *See* H.B. Duran, *Key Esports Sponsorships and Partnerships, July 2021*, ESPORTS INSIDER (Aug. 10, 2021), <https://esportsinsider.com/2021/08/key-esports-sponsorships-and-partnerships-july-2021/> [<https://perma.cc/4PNM-7W6M>] (discussing partnerships between eSports organizations and private sponsors); *see also* Settini, *supra* note 8 (listing the most valuable eSports companies and their owners).

fees, tickets, merchandise, and streaming.<sup>59</sup> Sponsorship by private actors is the largest source of revenue within the eSports industry.<sup>60</sup> Very commonly, private sponsors will contribute money toward funding eSports events in exchange for the opportunity to advertise during the event's broadcast.<sup>61</sup> Even through the pandemic years, eSports continues to thrive humbly, attracting a great deal of attention and investment from both viewers and sponsors.<sup>62</sup> All in all, the eSports industry is heavily funded by private investment and regulated mostly by private contractual agreements.

B. *Governance: Rules of the Game, plus Rules of the Tournament*

As previously stated, video games typically operate in strict accordance with the game's software code.<sup>63</sup> In comparison to traditional sports, where rules are enforced by human referees, the rules shaping professional gamers' conduct are implemented automatically and instantaneously through an electronic medium.<sup>64</sup> This method makes it seemingly impossible for professional gamers to bend the game's rules in their favor without first altering the game's code. Given this phenomenon, eSports competitions are rarely interrupted due to rules violations, demonstrating less of a need for high-maintenance rule enforcement mechanisms during events.

Game developers, as owners of the game's software, will often tinker with the game's settings, adapting the code's rules to better suit audience preferences.<sup>65</sup> Software code settings are also adjusted to guard against ever-dominating strategies, forcing players to adapt creatively and adopt new

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59. See *Global Esports & Live Streaming Market Report*, *supra* note 5 (identifying key streams of revenue funding eSports).

60. *Id.* (stating sponsorship made up fifty-nine percent of eSports revenue in 2021).

61. See *VALORANT Champions 2022*, *supra* note 38 (listing private sponsors like Red Bull, Secretlab, Verizon, HyperX, and Prime Gaming).

62. See Ethan May, *Streamlabs and Stream Hatchet Q2 Live Streaming Industry Report*, STREAMLABS (July 27, 2021), <https://streamlabs.com/content-hub/post/streamlabs-and-stream-hatchet-q2-live-streaming-industry-report> [<https://perma.cc/S2EJ-WSLV>] (showing a doubling in viewership on Twitch from Q2 2019 to Q2 2021); *The Rise of Esports Investments*, *supra* note 8 (discussing private investment in eSports).

63. See Burk, *supra* note 3, at 1563 (“[S]oftware constrains player choice.”).

64. Holden & Schuster, *supra* note 4, at 972 (comparing the copyrightability of traditional sports with video games); see also Peter Carfagna, *Exploring the Esports Approach of America's Three Major Leagues*, 11 HARV. J. OF SPORTS & ENT. LAW 115, 118–34 (2020) (recognizing traditional sports leagues assimilating into the eSports industry).

65. See Chao, *supra* note 11, at 752 (discussing a video game's evolution and adaptation via software updates enacted by the developer).

strategies instead of allowing the game to become stale.<sup>66</sup> As a result, professional gamers are largely at the mercy of the developer with respect to a game's rules.

When eSports competitions are held, another layer of rules are imposed: rules of the tournament.<sup>67</sup> Prominent eSports leagues today will post their league rules publicly, specifying nearly all aspects of league governance along with any rules of competition.<sup>68</sup> By stipulating league and event rules at the onset, many potential rule disputes can be handled in an easier, more efficient manner.

At this point, the eSports industry is regulated mostly through private agreement, with the game developer being the most influential actor.<sup>69</sup> Despite the developer's massive influence, this double-layered system of rules serves as the primary mechanism adopted in helping ensure professional eSports competitions are administered fairly and transparently.<sup>70</sup> As of today, attempts at establishing an independent regulatory agency may be seemingly futile, especially considering the immense power held by game developers in controlling the use of their copyrighted material.<sup>71</sup> ESports have existed for decades, being run under a system effectively dominated by private agreement, which suggests that

66. *See id.* (explaining how game developers guard against simple, overly dominant strategies within their video game).

67. *See id.* (stating how video game software rules are supplemented by tournament rules during eSports competitions).

68. *See generally* LCS & LCS Academy League, *2020 Official Rules (v. 20.1) LCS and LACS*, RIOT (Jan. 17, 2020), [https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1\\_6bkbwz26cgp7fngat6a.pdf](https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1_6bkbwz26cgp7fngat6a.pdf) [<https://perma.cc/22H2-38YR>] (stipulating league and tournament rules); *see generally* *Summary of Official Rules of Code of Conduct 2020 Season*, *supra* note 52 (stipulating rules that govern the Overwatch League); *see generally* *2021 Fortnite Online Tournament Rules Library*, EPIC GAMES (2021), <https://www.epicgames.com/fortnite/competitive/en-US/rules-library> [<https://perma.cc/2KM8-BA2A>] (containing an archive of rule sets for past-held online *Fortnite* competitive events).

69. *See* Chao, *supra* note 11, at 749 (“[E]sports teams are subject to the control of the game developer.”).

70. *See id.* at 752 (discussing existing rule systems for eSports governance); *see also* Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating Esports*, 26 U. MIAMI INT'L & COMP. L. REV. 499, 506–11 (2019) (analyzing foreign and domestic regulatory efforts and prospects within eSports).

71. *See* 17 U.S.C. § 106 (codifying a copyright owner's exclusive right to do and to authorize certain actions associated with their intellectual property); Martinelli, *supra* note 70, at 509–12 (noting regulatory obstacles faced by the eSports industry); *cf.* Chao, *supra* note 11, at 758–59 (mentioning marginal regulatory success achieved by the Korean eSports Association).

instituting an omnipotent regulatory agency may not be necessary or beneficial for the industry's professional sphere.<sup>72</sup>

### C. *Is Regulation Necessary?*

As previously mentioned, the growth and governance of eSports is tied significantly to private forces, allowing for open competition and considerable flexibility in making deals via contract.<sup>73</sup> Given the industry's seemingly decentralized nature, critics often comment that eSports as a whole deserves heavier regulation.<sup>74</sup> However, eSports exist largely in a standalone fashion, and games rise to popularity largely on an individual basis. Due to the individual nature of eSports, permanent guidelines are nearly impossible for independent regulatory agencies to develop and administer.<sup>75</sup> To be effective, an independent regulatory body would likely have to obtain the authority to control rules of any published video game software. This solution lacks practicality because it requires a significant overhaul of a game developer's rights obtained via U.S. copyright law.<sup>76</sup>

Attempts at establishing a governing body overseeing eSports have yielded mixed results.<sup>77</sup> Regulatory bodies have been established in several countries, many aiming to either represent individual gamer's interests or combat unjust practices such as match-fixing or substance use.<sup>78</sup> With respect to the industry's professional sphere, there has been little success in controlling the administration of eSports tournaments for a number of reasons. First, eSports competitions take place all over the world, often

72. See Larch, *supra* note 7 (noting the lifespan and development of eSports).

73. See Holden & Schuster, *supra* note 4, at 957–63 (discussing EULA contracts and private agreements within gaming); see also *Fortnite® End User License Agreement*, *supra* note 26 (providing an example of an end-user license agreement); Bat, *supra* note 34, at 236 (discussing contract negotiations between independent gamers and professional eSports organizations).

74. See Hollist, *supra* note 42, at 841–45 (offering solutions for helping regulate the eSports industry); Martinelli, *supra* note 70, at 512–14 (discussing attempts to regulate eSports, specifically respecting gambling).

75. See generally *V.ALORANT Champions 2022*, *supra* note 38 (containing an archive of eSports-related data, organized by game).

76. See 17 U.S.C. § 106 (codifying rights obtained via copyright).

77. See LI Zihao, *The Copyright Protection of Video Games From Reskinning in China—A Comparative Study on UK, US and China Approaches*, 11 *TSINGHUA CHINA L. REV.* 293, 331–37 (2019) (comparing United States, United Kingdom, and China's approaches to regulating video games); Martinelli, *supra* note 70, at 506–09 (discussing attempts to establish regulatory agencies governing eSports); Chao, *supra* note 11, at 757–60 (scrutinizing recent regulatory approaches adopted by South Korea and the United Kingdom).

78. See Martinelli, *supra* note 70, at 506, 508 (listing regulatory objectives adopted by various agencies worldwide).

building up to international events where host locations may vary for each event.<sup>79</sup> This increased level of internationality demonstrates how difficult it would be for all participating countries to agree on any uniform set of regulatory procedures. Achieving globally harmonic regulation appears to be a daunting task because each participating nation will seek to exert its influence throughout the rulemaking process. Another reason why it is difficult regulating eSports on a global scale is because many countries have already created their own local regulatory agency, signifying possible fragmentation within regulatory efforts.<sup>80</sup> Since local regulatory agencies are dispersed throughout the world, it will be extremely difficult to establish any kind of uniform set of policies and procedures governing eSports without first establishing one, omnipotent regulatory body. Without government backing and harmonic compliance among participating nations, achieving global regulation within professional eSports will not be easy.<sup>81</sup>

Despite only marginal success in further regulating professional eSports, meaningful strides have been made in establishing a regulatory body overseeing collegiate-level eSports. College eSports programs have become increasingly popular over the past few years, gaining steady traction ever since Robert Morris became the first university to offer eSports scholarships to students in 2014.<sup>82</sup> Just four years later, over ten million dollars was spent by roughly 200 universities on collegiate eSports scholarships, a figure that continues to grow.<sup>83</sup> College eSports programs typically distinguish between varsity, club, and privately formed recreational teams, where typically only

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79. See Riot Games, *2021 VALORANT Champions Tour Overview*, PLAY VALORANT (Mar. 26, 2021), <https://playvalorant.com/en-gb/news/esports/2021-valorant-champions-tour-overview/> [<https://perma.cc/TRN9-8LHM>] (demonstrating the scale of global qualifiers); see also Hollist, *supra* note 42, at 842 (discussing professional athlete visas and international eSports events).

80. See Will Green, *Establishing Esports Oversight: The Groups, Issues, and Potential Challenges*, THE LINES (July 12, 2016), <https://www.thelines.com/esports-oversight-overview-and-challenges/> [<https://perma.cc/6UW8-L3AS>] (citing several eSports regulatory bodies, many of which are aiming to achieve global influence).

81. See Martinelli, *supra* note 70, at 510 (discussing lack of enforcement mechanisms available to independent regulatory coalitions).

82. See Bat, *supra* note 34, at 208 (noting Robert Morris offering eSports scholarships starting in 2014).

83. See *id.* (discussing the growth trajectory of collegiate eSports investment); see also Collegiate Sports Management Group, *The Rise of Collegiate Esports Programs*, ADU, <https://www.athleticdirector.uconn.edu/articles/the-rise-of-collegiate-esports-programs/> [<https://perma.cc/G4T2-DJ99>] (measuring eSports program growth and scholarships awarded).

varsity-level players receive school sponsorship.<sup>84</sup> The popularity of eSports in the collegiate realm calls for the establishment of a regulatory body soon followed.

Although there have been several attempts to establish an entity tasked with governing college eSports, no National Collegiate Athletic Association (NCAA)-like entity exists within eSports.<sup>85</sup> Several scholars, however, recognize the National Association of Collegiate Esports (NACE) as one of the leading administrators of collegiate competitive eSports events.<sup>86</sup> Made up of over 170 member schools, NACE is a non-profit membership association that promotes varsity eSports programs among United States universities.<sup>87</sup> This organization maintains a board of directors along with several committees tasked with administering competitions and enforcing eligibility requirements.<sup>88</sup> Considering a game developer's exclusive right to control the use of its video game software, it is initially difficult to confirm the validity of entities such as NACE. The rights bestowed by U.S. copyright law could presumably allow a game developer to completely bar the use of its titles within collegiate eSports. The increasing adoption of

84. Thomas A. Baker III & John T. Holden, *College Esports: A Model for NCAA Reform*, 70 S.C. L. REV. 55, 64–66 (2018) (distinguishing and analyzing college eSports program types).

85. *See id.* at 67–68 (listing the Collegiate Starleague, Texas eSports Association, and National Association of Collegiate Esports as entities administering college eSports events); Beals, *supra* note 5, at 97–98 (highlighting the American Collegiate Esports League, a student-run non-profit organization); *see also* Collegiate Sports Management Group, *supra* note 83 (claiming the National Junior College Athletic Association and the Eastern Collegiate Athletic Conference are “the only collegiate esports associations to offer and provide true governance”).

86. *See* Beals, *supra* note 5, at 84 (asserting NACE acts more as more of a tournament administrator than a governing body); Baker & Holden, *supra* note 84, at 67 (comparing the *NACE Official Policy Handbook* to the *NCAA Division I Manual*); *Complete Guide to Esports Scholarships*, NEXT COLLEGE STUDENT ATHLETE, <https://www.ncsasports.org/college-esports-scholarships> [<https://perma.cc/V6ZX-DAVF>] (representing NACE as “the only official governing body for varsity esports”); The National Association of Collegiate Esports, *What is NACE?*, NACESPORTS (2022), <https://nacesports.org/about/> [<https://perma.cc/U4TX-PM9W>] (boasting \$16 million in scholarships and aid to eSports). Private sponsors also host collegiate level competitive gaming tournaments. *See Red Bull Campus Clutch*, RED BULL, <https://www.redbull.com/int-en/event-series/red-bull-campus-clutch-2022> [<https://perma.cc/9E2P-FBMD>] (last visited Nov. 17, 2022) (“[A] global [*VALORANT*] tournament for university students . . . [s]panning across 50 countries with nearly 400 events slated.”); The Competitive Fortnite Team, *Fall 2022 – Fortnite Collegiate Cup Official Rules*, EPIC GAMES (Sept. 1, 2022), <https://www.epicgames.com/fortnite/competitive/en-US/news/fall-2022-fortnite-collegiate-cup-official-rules> [<https://perma.cc/SL24-ZWHT>] (explaining rules governing the *Fortnite* Collegiate Cup, hosted by Epic Games).

87. The National Association of Collegiate Esports, *supra* note 86 (“[O]ver 94% of all varsity esports programs in the U.S. are members of NACE . . .”).

88. *Id.* (listing board and committee members hailing from universities across the nation).



collegiate eSports programs demonstrates the impracticality of a game developer strictly enforcing its copyright. In reality, both game developers and college eSports programs benefit from this phenomenon: Students find an easier path towards gaining a college education while game developers cash out on increased user involvement and low-cost marketing.<sup>89</sup>

In sum, there has been significant difficulty in establishing an independent regulatory organization for the oversight of eSports. Since the fate of an eSport primarily depends on how a game developer chooses to license its rights under United States copyright law, private contractual agreements, and sponsorships will continue to control the eSports industry. Until there is a significant reworking of developers' exclusive rights under U.S. copyright law, the imposition of an omnipotent regulatory agency for professional eSports seems unlikely.

### III. RECONCILING eSPORTS AND UNITED STATES INTELLECTUAL PROPERTY LAW

The United States Constitution allows Congress to adopt legislation “to promote the [p]rogress of [s]cience and useful [a]rts.”<sup>90</sup> This clause serves as the primary source of United States intellectual property law jurisprudence. Game developers, when publishing video game software, often seek copyrights and trademarks as a means to preserve their right to profit from their intellectual property.<sup>91</sup>

#### A. Copyright

United States copyright law bestows upon the game developer several valuable rights associated with the use and dissemination of its video game software.<sup>92</sup> As a result, copyright holders are awarded a considerable

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89. See *Complete Guide to Esports Scholarships*, *supra* note 86 (noting scholarships ranging from \$500–\$8,000 per year); see also *Search Collegiate Esports Programs and Discover an Esports Community That's Right for You*, LOOKING FOR GROUP (2022), <https://lfgroup.gg/> [https://perma.cc/Z4QF-99CC] (providing a searchable database for collegiate eSports programs).

90. U.S. CONST. art. I, § 8 cl. 8.

91. See Gatto & Patrick, *supra* note 11, at 443 (examining the use of copyright); Yen-Shyang Tseng, *Protecting the First Amendment Rights of Video Games from Lanham Act and Right of Publicity Claims*, 48 PEPP. L. REV. 425, 433–34 (2021) (discussing purposes of trademark law).

92. See 17 U.S.C. § 106 (codifying the scope of a U.S. copyright).

amount of power as licensors of their protected works.<sup>93</sup> The United States Code states:

[T]he owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>94</sup>

Focusing on the statute's fifth subsection, video game software is commonly interpreted as a form of audiovisual work.<sup>95</sup> Written broadly enough to encompass video game software, the statute allows game developers exclusive control over their protected products.<sup>96</sup> In addition, the statute's sixth subsection respecting public performance is more closely applicable to holding eSports competitions and streaming gameplay online.<sup>97</sup> Consider the following definition:

To perform or display a work "publicly" means—

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93. See Arin, *supra* note 10, at 1587–88 (“[T]he publisher as copyright holder over the game has exclusive control over the if, when, and how a game can be streamed to others. The market is dependent upon a single actor: a potential monopolist.”).

94. 17 U.S.C. § 106.

95. See 17 U.S.C. § 101 (“Audiovisual works are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.” (internal quotation marks omitted)).

96. See *id.* (“A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”).

97. 17 U.S.C. § 106 (stating the copyright owner has the exclusive rights over audiovisual works to perform them publicly).

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>98</sup>

Considering the aforementioned statutory language, both video games and eSports competitions fall comfortably within the provisions of existing copyright law. Copyrightable materials include “original works of authorship fixed in any tangible medium of expression” and exclude “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>99</sup>

Game developers who believe their copyright has been infringed upon may seek legal recourse to combat the misappropriation of their intellectual property. A well-known statutory defense in copyright infringement cases is fair use.<sup>100</sup> In measuring fair use, courts will carefully balance the following factors:

(1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>101</sup>

If a court ascertains that protected intellectual property has been used fairly, the court will find no infringement has occurred. Turning the lens towards video games, it is a common custom for gamers to post their gameplay content online for others to see.<sup>102</sup> Game developers, on the other hand, often aim to control as many aspects of their game as possible, which can be seen in the limitations imposed on individual gamers via terms of

98. 17 U.S.C. § 101.

99. 17 U.S.C. § 102; *see* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (defining an author as one “who actually creates the work . . . translat[ing] an idea into fixed, tangible expression”).

100. *See* 17 U.S.C. § 107 (stating fair use is not considered a copyright infringement).

101. *Id.*; *see* Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 800 (9th Cir. 2003) (copyright infringement case involving fair use).

102. *See Fortnite*, *supra* note 29 (signifying a location where video gameplay content is posted regularly).

service agreements.<sup>103</sup> Even though game developers regularly attempt to limit the use of their games to non-commercial purposes via contracts, there is very little reason why game developers would seek legal recourse from every individual who posts clips of gameplay online.<sup>104</sup> Instead, it is likely that game developers are seeking to protect their ability to strike down inappropriate uses of their copyrighted material.<sup>105</sup>

Factoring in these considerations, video games present a curious example of a type of copyrightable material different from most other works of authorship. Compared to protectable works such as books or movies, video games are largely participatory in nature and often require a significant amount of interactivity.<sup>106</sup> Although video game software limits a user's choices within circumscribed parameters, the user still retains considerable control over the sequence and timing of computing inputs that control transmitted display outputs.<sup>107</sup> As mentioned previously, it is an extremely common custom for gamers to post gameplay clips online and watch other individuals' gameplay via streaming websites.<sup>108</sup> As more time passes, there grows an increasing need to adapt United States intellectual property law in a way that does not completely shut out individual gamers' interests. By recognizing the gaming industry's participatory and interactive culture, lawmakers can help better suit the law towards reality without destroying game developers' right to profit off their intellectual property.

103. See, e.g., *Riot Games® Terms of Service*, *supra* note 53 (“We grant you a limited, non-exclusive, non-transferable, revocable license to use and enjoy the Riot Services . . . for your individual, non-commercial, entertainment purposes only.”).

104. See Burk, *supra* note 3, at 1545 (“Ownership of casual game performances is largely a moot point, not because a particular game publisher’s ToS is dispositive, but simply because there is usually not enough at stake for anyone to seriously challenge it.”).

105. See Holden & Schuster, *supra* note 4, at 955 (discussing compliance with the Digital Millennium Copyright Act (“DMCA”) in removing infringing content); see also Mark Peterson, Article, *Fan Fair Use: The Right to Participate in Culture*, 17 U.C. DAVIS BUS. L.J. 217, 239–42 (2017) (discussing DMCA takedown notices); 17 U.S.C. § 512 (limiting infringement liability among internet service providers involved in passively possessing copyrightable materials posted on its websites).

106. See Peterson, *supra* note 105, at 249 (arguing fair use should encompass participatory works); see also Gatto & Patrick, *supra* note 11, at 428 (recognizing the large number of people participating in eSports and the huge audiences the tournaments draw); *Browse*, TWITCH, <https://www.twitch.tv/directory> [<https://perma.cc/3VED-3J4X>] (showing millions interacting with gaming streams).

107. Holden & Schuster, *supra* note 4, at 970–71 (noting significant variability and interactivity associated with video gameplay).

108. See *Browse*, *supra* note 106 (showing streaming website Twitch’s channel directory); *Global Esports & Live Streaming Market Report*, *supra* note 5 (discussing increasing viewership of gaming streams).

Playing a video game is more akin to playing an instrument than reading a book or watching a movie, especially considering how much participation is required. The “command-response system” in which video games operate allows gamers to experience “innumerable gameplay variations,” permitting nearly infinite possible permutations of gameplay results.<sup>109</sup> Gamers are limited by a finite number of computing commands available, similar to how piano players are limited to producing music through a finite number of keys. Despite these input limitations, the participant is in primary control of the timing, magnitude, and frequency of inputs, allowing for nearly countless combinations of possible outputs. Consumers of literary works often sit back, digesting content solely in its finite form. Gamers often sit back as well. However, gamers are interacting heavily with a video game’s software, aiming to encourage desired outcomes by controlling the transmission of input commands to their computing device.<sup>110</sup> Etching out a participatory fair use exception for interactive video games within U.S. copyright law seems like a decent solution, but lawmakers need to be creative in crafting statutory language that incentivizes game developers to continue creating video games.<sup>111</sup>

In carving out a path towards change, the best initial action to take would be to adapt common language used in private contractual agreements between game developers and individual gamers. Terms of service and end-user license agreements include restrictive language that seeks to limit individual gamers’ rights and remedies.<sup>112</sup> Recently, certain game developers have begun to include provisions recognizing user generated content, a great first step in acknowledging the reality that gamers often save, stream, and disseminate their own personal gameplay content.<sup>113</sup> Nevertheless, this seemingly generous language involving user generated content often comes with limitation.<sup>114</sup> Given the tremendous influence of private contractual agreements within the gaming industry, altering common contractual

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109. Holden & Schuster, *supra* note 4 at 969–70.

110. *See id.* (“[C]ompetitive players can engage in hundreds of commands per minute.”).

111. *See* Peterson, *supra* note 105, at 248–51 (analyzing prospects of adopting a fair use exception for participatory works).

112. *See* Riot Games® *Terms of Service*, *supra* note 53 (including liability limitation provisions); *see also* Fortnite® *End User License Agreement*, *supra* note 26 (stipulating licensing rights); Holden & Schuster, *supra* note 4, at 957, 960–61, 984 (discussing important EULA considerations).

113. *See* Fortnite® *End User License Agreement*, *supra* note 26 (providing terms governing user generated content).

114. *See id.* (“You are not entitled to receive any compensation, fees, consideration, or other remuneration in connection with your UGC for any reason.”).

provisions appears to be the most effective way to settle rights between game developers and individual gamers.

Also, it is worth noting that these private licensing agreements present enforceability issues.<sup>115</sup> Gamers, many of which are minors, normally have little to no bargaining power in negotiating these video game licensing agreements, signifying potential issues involving unconscionability.<sup>116</sup> Some of these agreements may even be considered void as violative of public policy.<sup>117</sup> On top of these obstacles, jurisdictional issues involving contract enforcement are left to be addressed, especially considering gaming's global scope of participation.<sup>118</sup> All in all, adjusting provisions within video game licensing agreements will settle and solidify rights held by each contracting party while also adapting these agreements more closely to reality.

### 1. Creative Uses of Video Game Intellectual Property Rights

When a hit video game becomes globally popular, the value of a game developer's intellectual property skyrockets, unlocking a rich source of opportunity to profit in a wide variety of ways.<sup>119</sup> Recently, game developers have become increasingly creative in implementing new substrategies to increase the profitability of their intellectual property.<sup>120</sup> For example, online video games will often sell purchasable virtual items such as character

115. Holden & Schuster, *supra* note 4, at 958, 997 (considering the enforceability of click-through EULA contractual agreements).

116. *See id.* at 958–60 (discussing potential arguments against the enforceability of EULAs); *see also* Kelly v. United States, No. 7:10-CV-172-FL, 2014 WL 4793009, at \*3–7 (E.D.N.C. Sept. 25, 2014) (asserting liability waivers for minors are unenforceable, yet parents can execute these agreements on their child's behalf).

117. Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 965 (2012).

118. Holden & Schuster, *supra* note 4, at 997; *see Global Esports & Live Streaming Market Report*, *supra* note 5 (recognizing a global gaming audience).

119. *See* Jalen Lopez, *Riot Releases VALORANT Champions 2021 Anthem, 'Die for You'*, DOT ESPORTS (Nov. 22, 2021), <https://dotesports.com/valorant/news/riot-releases-valorant-champions-2021-anthem-die-for-you> [<https://perma.cc/YNM3-BNPG>] (highlighting the release of an event-specific anthem one week before VCT 2021); Dylan Kelly, *Moncler Partners With Fortnite on In-Game Outfits, Accessories and More*, HYPEBEAST (Nov. 19, 2021), <https://hypebeast.com/2021/11/fortnite-moncler-collaboration-outfits-accessories-loading-screen> [<https://perma.cc/9ZH4-6VT4>] (discussing in-game merchandising collaborations between *Fortnite* and luxury clothing brands such as Balenciaga and Moncler).

120. *See* Miroff, *supra* note 1, at 195–96 (discussing monetization strategies); Colleran, *supra* note 20, at 294 (noting the use of merchandising and filmography as ways to further monetize a successful game).

skins or weapon camouflages, which caters to users seeking to express their individuality in-game.<sup>121</sup>

The VCT 2021 offers us a curious example of a game-developer funding its eSports tournament prize pool partly by way of in-game item sales revenues.<sup>122</sup> Game developer Riot Games released its Champions 2021 Skin Collection in anticipation of VCT 2021, pledging to redistribute fifty percent of the skin-sale's net proceeds back to teams that qualified for the international event.<sup>123</sup> *VALORANT*, a globally reveled title, demonstrates the staggering commercial scale in which international eSports events operate. The strategy of electing to distribute in-game sales proceeds towards funding eSports prize pools has played a significant role in making the eSports industry more profitable at the player-level.<sup>124</sup> Nowadays, there are eSports events with total prize pools eclipsing \$40 million in value.<sup>125</sup> This crowd-funded prize pool system helps a game developer market its game as an eSport and promote user interaction simultaneously.

Recently, there has been a surge of private actors collaborating directly with game developers to release in-game branded virtual merchandise.<sup>126</sup> A practice that is becoming more normal is private brands partnering with game developers and selling in-game merchandise as a method to increase

121. See Miroff, *supra* note 1, at 195 (recognizing the sale of virtual cosmetic items). Selling virtual, in-game merchandise can be somewhat analogized to non-fungible token (NFT) sales, where a gamer is merely purchasing a license to use that virtual item while interacting with the game's software. See Anjali Srinivasan, *How NFTs Compare to Rare In-Game Skins and Items*, AMBCRYPTO (Apr. 22, 2021), <https://ambcrypto.com/how-nfts-compare-to-rare-in-game-skins-and-items/> [<https://perma.cc/64ZQ-4K2U>] (“[I]here is one clear difference: these game-based items are not found on the blockchain but are instead found on the game servers themselves.”).

122. See *VALORANT Champions 2021*, *supra* note 38 (noting over \$7.5 million raised during the event's first seven days); Fariha Bhatti, *Champions 2022 Skins Generate \$16 Million for Valorant Esports*, WIN (Sept. 17, 2022), <https://win.gg/news/champions-2022-skins-generate-16-million-for-valorant-esports/> [<https://perma.cc/T7ZL-9GRK>] (“In 2021, the simple yet elegant championship bundle collected approximately \$18.7 million, yielding \$9.36 million for the teams. This year, the collection has doubled as Riot has announced \$16 million just for qualified Valorant Champions competitors.”).

123. *Id.* (supplementing the event's \$1 million prize pool with over \$450,000 for each team).

124. See *Dota 2 Prize Pool Tracker*, VALVE, <https://dota2.prizetrac.kr/> [<https://perma.cc/72ZQ-LX3E>] (“[A] prize pool funding system that uses sales from the tournament's Dota TV tickets/bundles in order to increase their overall prize pool.”).

125. *Id.* (listing \$40,018,195 in total prize pool money for The International 10 *DOTA 2* event).

126. Fandom, *Fortnite Wiki*, COLLABORATIONS, <https://fortnite.fandom.com/wiki/Collaborations> [<https://perma.cc/RFY7-ZMFY>] (listing in-game collaborations involving notable private figures such as Travis Scott, Rick Sanchez, and Ariana Grande).

publicity.<sup>127</sup> This trend of inserting high-end fashion brands into video games started roughly at the beginning of 2020 when Louis Vuitton partnered with the video game *League of Legends*, releasing a full array of hybrid-branded luxury clothing along with several forms of in-game purchasable content.<sup>128</sup> Demonstrative of the dominance of private agreement within gaming, popular private brands are beginning to grasp this opportunity to sell merchandise to a global audience.<sup>129</sup> Private brands can sell virtual apparel in video games without producing any physical clothing and only facing expenses primarily associated with licensing and virtual design.<sup>130</sup> Considering the gaming industry's growing global audience, this phenomenon is a golden opportunity for popular brands to increase the profitability of their likeness.<sup>131</sup>

Another form of private dealing that game developers employ to profit from their game's intellectual property is partnering with musicians. Two examples of this type of arrangement are in-game concerts and songs released in association with the video game.<sup>132</sup> These collaborations usually happen on an event-by-event basis, signifying a convenient advantage associated with the game developer's licensing process.

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127. See *id.* (mentioning collaborations with private brands like Air Jordan, Marvel, and the NFL); Kelly, *supra* note 119 (providing additional examples of private brands seeking to sell virtual merchandise via video game).

128. Jake Silbert, *Louis Vuitton Drops 'League of Legends' Apparel Collaboration*, HYPEBEAST (Dec. 9, 2019), <https://hypebeast.com/2019/12/league-of-legends-louis-vuitton-apparel-collaboration-collection-accessories> [<https://perma.cc/JLV8-WRXY>] (describing specifics of the "Louis Vuitton x *League of Legends*" apparel drop).

129. See *Global Esports & Live Streaming Market Report*, *supra* note 5 (tracking the online population).

130. See Fandom, *supra* note 126 (demonstrating the scale and ease in which private brands can integrate themselves within a video game).

131. See *Global Esports & Live Streaming Market Report*, *supra* note 5 (discussing the growing global eSports and streaming audience).

132. Ethan Millman, *Fortnite Thrived With its Virtual Concert Stage. Now it's Going Global*, THE ROLLING STONE (Sept. 27, 2021), <https://www.rollingstone.com/pro/news/fort-nite-concert-series-soundwave-global-artists-tones-and-i-mohamed-hamaki-1233168/> [<https://perma.cc/RX5K-QVA4>] (highlighting *Fortnite* in-game concerts featuring Travis Scott and Ariana Grande along with *Roblox* concerts featuring Twenty One Pilots and Lil Nas X); see also VALORANT, *Die For You ft. Grabbitz // Official Music Video // VALORANT Champions 2021*, YOUTUBE (Nov. 22, 2021), <https://www.youtube.com/watch?v=h7MYJghRWt0> [<https://perma.cc/Y87X-QVKS>] (amassing nearly 2.5 million views and 246,000 likes within two days of release); VALORANT, *Fire Again ft. Ashnikko // Official Music Video // VALORANT Champions 2022*, YouTube (Aug. 22, 2022), <https://www.youtube.com/watch?v=DqgK4llE1cw> [<https://perma.cc/595F-ZSDU>] (generating 8.9 million views in less than two months).



### B. *Trademark*

Trademark is another dimension of U.S. intellectual property law that maintains heavy influence over eSports and video gaming rights, especially in the litigation realm. Consider the following statutory definition:

The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.<sup>133</sup>

Trademark law is dual-purpose: protecting the public from confusion about what they are purchasing and protecting the right holder from those attempting to misappropriate their mark.<sup>134</sup> Courts can even choose to recognize an unregistered trademark.<sup>135</sup> With respect to gaming and eSports, trademark infringement causes of action can manifest themselves in a number of different ways.<sup>136</sup> Whether a mark is misappropriated physically or virtually, trademark law allows holders legitimate avenues of enforcement in defending their protected marks.<sup>137</sup>

In handling trademark infringement cases, courts will often apply the *Rogers*<sup>138</sup> test when resolving conflicts between Lanham Act trademark provisions and the First Amendment.<sup>139</sup> The *Rogers* test attempts to combat

133. 15 U.S.C. § 1127.

134. *Id.* (describing the statute's intent); *see* Tseng, *supra* note 91, at 433 (analyzing trademark's dual-purpose); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (stating the core purpose of trademark is "avoiding confusion in the marketplace"); *see also* *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (discussing the "basic objectives of trademark law").

135. 15 U.S.C. § 1127; *see* Bat, *supra* note 34, at 214–15 (discussing trademark qualifications).

136. *See* *Faze Apparel, LLC v. Faze Clan, Inc.*, No. 18-cv-02052, 2018 WL 3830027 at \*3, \*4 (C.D. Cal. 2018) (showing a trademark infringement action based on apparel sales); *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1096–98, 1100–01 (9th Cir. 2008) (recounting a trademark infringement action involving a virtual strip club included in *Grand Theft Auto: San Andreas*); *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013) (presenting a trademark infringement action involving the use of NFL Legend Jim Brown's realistic features in a *Madden NFL* video game).

137. *See* *Faze Apparel*, 2018 WL 3830027 at \*3 (citing *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 630 (9th Cir. 2005)) ("To prevail on a claim of trademark infringement, the plaintiff 'must prove: (1) that it has a protectable ownership interest in the mark[,] and (2) that the defendant's use of the mark is likely to cause consumer confusion.'").

138. *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1988).

139. *See id.* at 998 (construing Lanham Act restrictions "narrowly" to avoid conflict with the First Amendment).

the use of misleading titles in literary works, which contain no artistic relevance.<sup>140</sup> This test has even been applied to expressive bodies of work in addition to titles.<sup>141</sup> The Ninth Circuit serves as the primary administrator of *Rogers* tests relating to video games, which is to be expected given that many game developers operate in California.<sup>142</sup> Despite extensive litigation within the Ninth Circuit, issues involving trademark rights with respect to video games have yet to be completely settled.<sup>143</sup> Courts will generally uphold First Amendment protections unless misappropriating works have no artistic value or are explicitly misleading.<sup>144</sup> The *Rogers* test plays an important role in trademark jurisprudence; however, the test simultaneously surrenders significant deference to the First Amendment, limiting actionable trademark infringement claims mainly to instances where one party explicitly misleads in the process of misappropriating the mark.<sup>145</sup>

Although using a trademark has proven to be an effective tool in helping corporate mark holders protect their brands, trademarks can also be used to protect individual gamers' brands.<sup>146</sup> One scholar has even gone so far as to recommend that individual gamers register a trademark as a way to garner more favorable licensing when dealing with corporate or franchise entities.<sup>147</sup> Considering how internet streaming allows individuals access to a global viewing audience, gamers who attract significant attention should consider trademarking aspects of their personal brand to help increase

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140. *Id.* at 999; *see* Colleran, *supra* note 20, at 292 (discussing the *Rogers* test's first prong of artistic relevance).

141. *See* E.S.S. Ent. 2000, 547 F.3d at 1099 (applying the *Rogers* test to a body of work); *see also* *Mattel v. Walking Mountain*, 353 F.3d at 809 n.17 (suggesting the acceptability of applying the *Rogers* test for non-titular claims); *Brown*, 724 F.3d at 1245 (stating the *Rogers* test applies to expressive works).

142. *See* Tseng, *supra* note 91, at 436–38 (discussing Ninth Circuit jurisprudence respecting the *Rogers* test); *Video Game Companies in Los Angeles & Orange County*, GAMESMITH (Mar. 1, 2021), <https://gamesmith.com/video-game-companies-in-los-angeles-orange-county/> [<https://perma.cc/BNU7-24BR>] (listing video game companies operating in California).

143. *See* Colleran, *supra* note 20, at 272 (“Courts have struggled to agree on how trademark rights should be apportioned in the context of video games.”).

144. *See* *Rogers*, 875 F.2d at 1005 (choosing to ease Lanham Act restrictions in light of the First Amendment); *see also* *Brown*, 724 F.3d at 1242–47 (favoring First Amendment protection after considering both prongs of the *Rogers* test).

145. *See* *Mattel v. MCA Records*, 296 F.3d at 902 (analyzing both prongs of the *Rogers* test and finding no actionable claim due to a lack of explicit misleading).

146. *See* Tseng, *supra* note 91, at 433 (discussing purposes of trademark law).

147. *Bat*, *supra* note 34, at 235.

negotiation power during potential sponsorship talks.<sup>148</sup> The internet's explosive growth over time has allowed individuals to more easily establish personal brands, which is why gamers should consider employing trademark instruments as a method to preserve the profitability of their image and likeness.<sup>149</sup> In sum, trademark law plays a tremendously important role in helping determine rights within both gaming and eSports.

### C. *Other Evolving Issues*

Considering the topics addressed in this Comment, many unsettled issues exist in the world of gaming, streaming, and eSports that ought to be addressed. First, common law principles have yet to fully clarify whether professional eSports gamers should be classified as employees or independent contractors.<sup>150</sup> For example, the Overwatch League and League of Legends Championship Series already provide traditional employment benefits to professional players.<sup>151</sup> However, not all eSports have the capital to provide these sorts of benefits, which is why many professional gamers are treated as independent contractors.<sup>152</sup>

Another large issue affecting the future of eSports is the trending consolidation of game developers, along with the increasing expense of producing video games.<sup>153</sup> As game developers concentrate into larger

148. *See id.* at 227 (mentioning competitive gamers trademarking gamertags and logos); *see also Global Esports & Live Streaming Market Report*, *supra* note 5 (capturing the scale of global online streaming viewership).

149. *See Bat*, *supra* note 34, at 219–21 (discussing the prospect of gamers controlling their image and likeness via state laws supporting right of publicity).

150. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)) (listing factors that classify a worker as an employee); *see also Wong*, *supra* note 50, at 131–34 (considering the National Labor Relations Board's interpretation of the employer-employee relationship); *Hollist*, *supra* note 42, at 844–46 (weighing the prospect of classifying professional gamers as employees instead of independent contractors).

151. *See Wong*, *supra* note 50, at 128, 135–37 (“[S]igned players are paid a minimum annual salary set by the league, provided health and retirement benefits, housing, training support, and bonuses.”).

152. *See Hollist*, *supra* note 42, at 838–39 (discussing professional gamers' treatment as independent contractors).

153. *See Game Developer Demographics and Statistics in the US*, ZIPPIA, <https://www.zippia.com/game-developer-jobs/demographics/> [<https://perma.cc/S4AY-AK8H>] (providing statistics on game developer company size distribution); *Top 25 Public Companies by Game Revenues*, *supra* note 7 (ranking public companies by gaming revenue); Raph Coster, *The Cost of Games*, VENTUREBEAT: GAMESBEAT (Jan. 23, 2018), <https://venturebeat.com/2018/01/23/the-cost-of-games/> [<https://perma.cc/H24K-M7PX>] (showing a steady uptrend in both cost per game and bytes per game).

corporate behemoths, smaller gaming companies may face a tougher time producing hit video games.<sup>154</sup> Having fewer developer winners could also result in fewer big-hit video games, signaling stagnation within the eSports industry. In combination with this consolidation trend, video games are becoming increasingly more expensive to produce, making it harder for game developers to conceive new eSports titles.<sup>155</sup> For example, in 1995, a high-budget video game cost about \$1.5 million to develop; by 2013, Rockstar Games spent \$265 million to create *Grand Theft Auto V*.<sup>156</sup> Today, 343 Industries spent roughly \$500 million to develop *Halo Infinite*.<sup>157</sup> The growing cost of producing video games may hinder the creation of new eSports, allowing deep-pocketed developers to thrive because of this higher barrier of entry.

Finally, it is worth briefly noting the free-for-all, frenzied nature of broadcasting rights revolving around professional eSports competitions. Game developers, often in association with online streaming platforms such as Twitch or YouTube, will license their event broadcasting rights to commentators and analyst crews throughout the world.<sup>158</sup> On top of this, individual streamers nowadays often host viewing parties in lieu of these events, broadcasting them via live stream and reacting to the events in front of viewers.<sup>159</sup> Many of these viewing parties are unlikely to license any sort of official broadcasting rights from the game developer. If the host has an audience, significant profit may be realized from these viewing parties.<sup>160</sup> These examples demonstrate the scale and prevalence of unresolved legal issues within gaming.

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154. See Brian Murphy & Einav Mor-Samuels, *The Great Merger—Acceleration in Gaming M&A Is Changing the Face of the Industry*, APPSFLYER: BLOG (Oct. 7, 2021), <https://www.appsflyer.com/blog/trends-insights/gaming-mergers-acquisitions/> [<https://perma.cc/JZ7L-TMWR>] (noting trending consolidation among gaming studios).

155. See Coster, *supra* note 153 (tracking rising costs in producing new video games).

156. Colleran, *supra* note 20, at 267.

157. Daniel Trock, *How Much Did Halo Infinite Cost to Make?*, GAMER JOURNALIST (Dec. 27, 2021), <https://gamerjournalist.com/how-much-did-halo-infinite-cost-to-make/> [<https://perma.cc/E4T3-888E>].

158. *VALORANT Champions 2022*, *supra* note 38 (listing broadcasting crews in over twenty different countries).

159. See Holden & Schuster, *supra* note 4, at 946 (discussing joint authorship).

160. See Beals, *supra* note 5, at 81–82 (analyzing monetization for streamers on Twitch and YouTube).

## IV. CONCLUSION

Essentially, eSports are governed predominantly by private contractual forces, where the regulations are often stipulated privately on a game-by-game basis. Game developers, the most powerful actors within eSports, exert a tremendous amount of influence in both creating an eSport and crafting its league's regulatory structure. Prominent eSports leagues today largely adopt a double-layered private system of regulation, where game developers maintain significant authority over both rules of their video game software along with rules governing the administration of professional eSports competitions. Instituting an independent regulatory body in charge of all eSports appears to be an unlikely solution, especially considering the game-by-game basis in which eSports conduct themselves. Collegiate eSports, on the other hand, are much more likely to adopt a centralized regulatory body.

U.S. intellectual property law today gives game developers near-complete control over the use and dissemination of their game's software code outputs, an approach ill-fitted to today's reality where gamers post gaming content into the public domain ubiquitously. Lawmakers should attempt to recognize the participatory nature of gaming and reconcile statutory language in a way that better accommodates the individual gamer's right to profit from his or her own user-generated content. As time passes, modern copyright and trademark law struggles to keep up with internet-based industries like gaming and eSports, resulting in the aggregation of unresolved legal conundrums. Possible solutions involve reworking common private contractual provisions included in video game licensing agreements, instituting an independent regulatory entity, and reworking the statutory language of existing fair use provisions within U.S. intellectual property law to account for gaming's participatory nature. Although the eSports industry continues to grow, taking proper legislative action will contribute greatly to cultivating the industry's sustainable development into the future. By recognizing the internet's contribution to the proliferation of brands, lawmakers can better protect an individual's freedom to profit from their gameplay content. It is time for lawmakers to consider taking some of the power out of game developers' hands and shifting that power to users.