

OVERVIEW OF SELECT LEGAL ISSUES WITH ESPORTS

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INTRODUCTION

As eSports continues to grow in the United States, so too will the legal issues that loom over the business and industry that is competitive gaming. This paper will provide an overview of some of these issues, with an emphasis on two core issues—gambling and intellectual property under current U.S. law.

As an initial note, there is not yet a globally accepted definition of eSports.¹ To some, this term primarily connotes organized, multiplayer, skill-based video game tournaments between professional video game players, often with significant prize money for the winning teams and live broadcasts of the event. At the other end of the spectrum, two friends (or strangers) can privately compete against each other for bragging rights or money. Between the two, there is a wide array of activities that may constitute or qualify as eSports. It is beyond the scope of this article to fully cover the range of activities that might fall within the scope of eSports (or the interchangeably used terms). However, some of the significances of these differences will be touched on, particularly in the context of addressing what eSports activities constitute gambling.

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¹ Many other terms, with potentially different meanings, are often used interchangeably. These terms include electronic sports, competitive gaming, and professional gaming, among others.

The number of people participating in eSports is staggering. While various sources cite different statistics, the numbers are huge and rapidly increasing.² Among the most compelling statistics include those related to the prizes awarded at major eSports tournaments and the immense audience these tournaments attract. The prize money for some tournaments exceed tens of millions of dollars, exceeding even that of classic pro sports competitions such as the Masters Golf Tournament.³ The live, in-person audience for eSports events can number in the tens of thousands, comparable to traditional professional sports events.⁴ Meanwhile, the online audience can number in the tens of millions, exceeding most sports events other than the Super Bowl.⁵

Regardless of the source, the growing significance of the industry is indisputable. The prize money is in the millions of dollars per year and increasing.⁶ The viewership is in the tens of millions per event (for some of the biggest events) and growing.⁷ Interestingly, the primary medium of distribution is streaming, not traditional television broadcast. The overall value of the eSports market is at least in the hundreds of millions of dollars per year and growing.⁸ Additionally, the demographic composition of the viewers is predominantly under thirty-five years old and nearly forty percent women—the demographic with

² See Darren Heitner, *Why 2016 Should Be A Year Of Tremendous Growth For eSports*, FORBES (Dec. 31, 2015), <https://www.forbes.com/sites/darrenheitner/2015/12/31/why-2016-should-be-a-year-of-tremendous-growth-for-esports/#78b98ab04767>.

³ See Alex Hinds, *You'd Be Surprised Just How Big 'e-Sports' is Getting*, THE GUARDIAN (June 6, 2015, 4:59 EDT), <https://www.theguardian.com/technology/2015/jun/06/dota-2-prize-pool-record-e-sports> (describing the growing prominence of the e-Sports industry).

⁴ *Supra* note 2.

⁵ See Ben Casselman, *Resistance is Futile: eSports is Massive . . . and Growing*, ESPN (May 22, 2015), http://www.espn.com/espn/story/_/id/13059210/esports-massive-industry-growing (providing statistics associated with e-Sports compared to statistics associated with traditional pro sports competitions).

⁶ *Supra* note 2.

⁷ *Id.*

⁸ *Id.*

whom the “traditional” broadcasters are struggling to connect.⁹ Simply put, the eSports phenomenon is big and expanding into a highly desirable demographic.

Invariably, with the size and growth of the industry, new entrants will flock to the space. These new entrants will adopt innovative business models in all aspects of the eSports ecosystem. These new models will likely push the legal envelope, particularly with gambling and intellectual property issues, as addressed below.

I. GAMBLING ON ESPORTS AND ESPORTS AS GAMBLING

The gambling issues with eSports can be complex and highly fact specific. The legal issues require consideration of various factors. At a high level, there are two big issues. The first is how the legality of eSports events is based on how the events are structured. And the second is the practice of betting on eSports events (by individuals who are not participating in the eSports event). These issues require an analysis of both state and federal gambling laws. Most states have both anti-lottery and anti-gambling laws. As discussed below, these laws often have both overlapping components and significant differences.

A. GAMBLING IN THE UNITED STATES

There are several federal laws that govern gambling. Some cover any gambling, while others are specific to gambling on sports. Most of these federal anti-gambling laws give the federal government jurisdiction over activities that constitute illegal gambling under state or federal law, but do not separately define what constitutes illegal gambling. Others are substantive

⁹ Joss Wood, *New Research: Esports Fans May Not Be Exactly Who You Think They Are*, ESPORTS BETTING REPORT (June 20, 2016 5:50 PM), <http://www.esportsbettingreport.com/esports-fan-demographic-research>.

statutes that outlaw certain specific activities. An overview of some of these laws is provided below.

1. The Wire Act

The Wire Act prohibits the use of interstate wire communication to place or transmit bets or wagers on the outcome of any sporting event or contest.¹⁰ The Wire Act states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.¹¹

Until recently, there was debate about whether this covered bets or wagers on any contest or just sports. In a memo released in 2011, the Department of Justice opined that this law is limited to bets or wagers on sporting events or sports contests.¹²

2. Professional and Amateur Sports Protection Act (PASPA)

In 1991, Congress enacted PASPA to further address sports betting.¹³ PASPA effectively outlawed sports betting within individual states nationwide, except for a few states that

¹⁰ 18 U.S.C. § 1084 (2012).

¹¹ *Id.*

¹² Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. *11 (Sept. 20, 2011), 2011 WL 6848433, <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

¹³ *See* Professional and Amateur Sports Protection, 28 U.S.C. §§ 3701–3104 (2012). This Act is also known as the Bradley Act.

were grandfathered through exceptions under the law.¹⁴ Specifically, PASPA provides that:

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.¹⁵

3. The Unlawful Internet Gambling Enforcement Act

The Unlawful Internet Gambling Enforcement Act (UIGEA)¹⁶ precludes certain financial transactions for any activity that is illegal gambling under federal or state laws.¹⁷ However, UIGEA does not define what constitutes illegal gambling. In essence, it creates leverage over the acceptance of any financial instrument for unlawful Internet gambling (i.e.,

¹⁴ See 28 U.S.C. § 3704 (delineating the applicability of PASPA). Sports lotteries conducted in Delaware, Montana, and Oregon, and licensed sport pools in Nevada were exempt from PASPA due to previously enacted laws in their respective states related to these forms of sports betting. Chad Millman, *Sports Leagues Sue to Block Betting*, ESPN (July 24, 2009), <http://www.espn.com/espn/news/story?id=4353948>.

¹⁵ 28 U.S.C. § 3702 (2012).

¹⁶ 31 U.S.C. §§ 5361–5367 (2012).

¹⁷ See 31 U.S.C. § 5363.

related to “betting or wagering”) and was enacted in 2006, partly “because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”¹⁸ Under UIGEA, a “bet or wager” is defined, in part, as follows:

The term “bet or wager”—

(A) means the staking or risking by any person of something of value upon the outcome of **a contest of others, a sporting event, or a game subject to chance**, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome; [and]

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance)¹⁹

From the definition, Congress explicitly excluded the following:

[P]articipation in any game or contest in which participants do not stake or risk anything of value other than (i) personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or (ii) points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor.²⁰

B. ARE ESPORTS SPORTS? AND ARE PARTICIPANTS PROFESSIONAL ATHLETES?

No U.S. court has yet ruled on whether eSports are sports or whether eSports participants are professional athletes

¹⁸ § 5361.

¹⁹ § 5362(1) (emphasis added).

²⁰ § 5362(1)(E)(viii).

for purposes of these gambling laws. However, an unrelated Immigration Law ruling may shed some light on these designations.

Under U.S. Immigration Law, some eSports players have been granted P-1 visas, which apply to individuals who “are coming to the U.S. temporarily to perform at a specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.”²¹ There is no blanket category for eSports participants, as each individual must demonstrate that they qualify under this classification. Accordingly, a U.S. Court has effectively determined that some eSports contestants are professionals. The conclusion will be fact specific depending on the underlying game being played and other factors.

If this immigration law analysis is applied for gambling purposes, this arguably means that at least some eSports players may be deemed professional athletes and some eSports events may be deemed to be a sporting event/contest. Such a conclusion would be a relevant factor in an analysis under the Wire Act, PASPA and/or UIGEA.

C. IS BETTING ON ESPORTS ILLEGAL?

Assuming *arguendo* that an eSports contest constitutes a game “in which amateur or professional athletes compete,” a scheme enabling individuals not participating in an eSports contest to bet on the outcome of the eSports contest would likely be illegal under federal law. If it is a sport and the participants are deemed professional, or even amateur, athletes, it would likely be illegal under PASPA (assuming this law remains

²¹ *P-1A Internationally Recognized Athlete*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete> (last visited Mar. 24, 2017).

valid).²² If the betting involves interstate wire communications, it could be illegal under the Wire Act as well. For whoever engages in certain financial transactions for those activities, UIGEA could apply.

Moreover, as detailed below, except where specifically authorized, betting or wagering is illegal in many states as well. In short, absent a change in the laws, betting or wagering on eSports is likely to present legal challenges. Consequentially, it is necessary to answer the question of what constitutes betting or wagering for gambling purposes under these laws. A more detailed analysis of this is presented below in conjunction with a discussion of whether participation in eSports contests themselves constitutes illegal gambling.

D. DOES PARTICIPATION IN ESPORTS CONTESTS CONSTITUTE GAMBLING?

The more complex question is whether eSports itself constitutes gambling. For most of the major, professionally-organized, skill-based games, the presumed answer is that it is not gambling. However, a determination of whether any particular event termed an eSports event or contest constitutes illegal gambling requires a more detailed factual assessment.

1. Bet or Wager

As noted above, to constitute a “bet or wager” under UIGEA, an individual must stake or risk something of value on the outcome of a *contest of others, a sporting event, or a game subject to chance*.²³ Applying the foregoing to eSports, an eSports contest would likely not constitute “a contest of others.” Rather, the contest is a contest among the participants. Assuming the game is a skilled-based game—as many of the current eSports games arguably are—it is not a “game subject to chance.” Thus, the primary question is whether eSports involves “staking or risking” something of value upon the outcome of “a sporting event.” Assuming *arguendo* that eSports is a sporting

²² See *NCAA v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3344 (U.S. Oct. 12, 2016) (No. 16-477) (challenging PASPA on constitutional grounds as an impermissible “take-over” of the regulatory power of the States).

²³ See 31 U.S.C. § 5362(1)(A).

event, the question is then whether an entry fee constitutes “staking or risking” something of value.

A number of courts have addressed what it means to “stake or risk” something of value in the context of a bet or wager. In *Humphrey v. Viacom*,²⁴ the United States District Court for the District of New Jersey found that entry fees for a season long fantasy sports competition were not a bet or wager when: (1) the entry fees are paid unconditionally; (2) the prizes offered to contestants are for amounts certain and are guaranteed to be awarded; and (3) the party offering the prizes does not compete for the prizes.²⁵ The court further noted:

Courts have distinguished between bona fide entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize). Courts that have examined this issue have reasoned that when the entry fees and prizes are unconditional and guaranteed, the element of risk necessary to constitute betting or wagering is missing.²⁶

²⁴ *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 U.S. Dist. WESTLAW 1797648 (D. N.J. June 20, 2007).

²⁵ *Id.* at *24.

²⁶ *Id.* at *20-21 (quoting *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961) (“A prize or premium differs from a wager in that in the former, the person offering the same has no chance of his gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss The fact that each contestant is required to pay an entrance fee where the entrance fee does not

In contrast, when the prize is determined by the number/amount of entry fees, and is not fixed in advance, gambling is more likely to be found.²⁷

Under PASPA, and again assuming that eSports is a game “in which amateur or professional athletes participate” and that the underlying game is skill-based, the activities of participants likely would not be deemed to constitute illegal gambling because it is not “a lottery, sweepstakes, or other betting, gambling, or wagering scheme,” for reasons similar to those stated above.

The Wire Act proscribes certain activities involving “bets or wagers” relating to a “sporting event or contest” using interstate transmissions of wire communications. Again, even if eSports is deemed to be a sporting event or contest, the payment of a bona fide entry fee by participants to compete in the eSports event should not be deemed a bet or wager, assuming the conditions are satisfied.

2. Under State Law

In most states, there are two potential sets of state laws that are relevant to assessing whether participating in an eSports contest constitutes illegal gambling—state lottery laws and state gambling laws. The following is an outline of some of the key issues pertaining to these laws.²⁸

a. Lottery Laws

State lottery laws generally preclude a scheme where a prize is awarded, based on chance, and there is some

specifically make up the purse or premium contested for does not convert the contest into a wager.”)).

²⁷ *See id.* at *20.

²⁸ This is a general discussion of common principles of state laws. There may be nuances associated with various states laws that may affect the analysis. Additionally, state gambling laws are often broad and/or vague. The following outline applies the prevailing views on the likely interpretation of the law. An Attorney General or court could conclude otherwise and, as indicated, the specific facts of a case matter.

consideration paid for the chance to win.²⁹ ESports contests may avoid running afoul of state lottery laws by removing one of these three elements—the prize, the chance, or the consideration.³⁰ If there is no prize offered, most state lottery laws will not apply. If the eSports contest is free to enter, likely there is no consideration to be paid. Finally, if the outcome of the contest (i.e., the underlying game) is determined by skill, then the chance component is not met, and the contest would not constitute an illegal lottery.

The chance vs. skill component may be difficult to assess, however, as the test for whether a contest is chance-based or skill-based can vary by state and is often fact specific. In some states, chance exists if the outcome is determined by any element of chance. However, in other states the test is whether the outcome is predominantly determined by chance or skill.³¹

The card game of poker is often viewed as a benchmark for this determination. While some legislators view poker as a game of chance, professional poker players vehemently disagree.³² While many games that are popular in the world of

²⁹ See Jennifer Hibbs, *What is “Consideration” in a Sweepstakes?*, MARDEN-KANE DIGITAL PROMOTIONS (Mar. 31, 2014), <http://www.mardenkane.com/articles/consideraton-sweepstakes.html>. This is often referred to as the “Prize, Chance, Consideration Test.” See *id.*

³⁰ See *Sweepstakes, Contests and Lotteries: Unless You’re a Church or State Government, You’d Better Know the Difference*, FROST BROWN TODD LLC, <http://www.frostbrowntodd.com/resources-1069.html> (last visited Mar. 24, 2017).

³¹ See, e.g., *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 151 (1905).

³² See *Nebraska Senators Reject Bill Defining Poker as Skill Game*, KETV (Jan. 14, 2016, 4:13 PM), <http://www.ketv.com/article/nebraska-senators-reject-bill-defining-poker-as-skill-game/7657426>; Carl Sampson, *Poker: Skill or Chance?*,

eSports are arguably games of skill, it is a fact-specific determination and merely calling a contest “eSports” will not ensure that it is viewed as a game based on skill. Many of the current professionally organized eSports tournaments are based on multiplayer games that require strategy and skillful execution. These games are argued by many in the game industry to be skill-based games.

However, an eSports tournament that is a purely chance-based game that charges for entry and awards prizes based on the amount of entry fees collected will probably be considered an illegal lottery. For example, assume the game is the well-known card game “War.” In War, all of the cards are dealt out randomly and players play cards according to well-defined rules. As such, little to no skill is involved. A tournament like this would most likely be an illegal lottery as the random dealing of cards and the rules determine the outcome.

Ultimately, eSports contests will likely not run afoul of state lottery laws if no entry fee is paid. Moreover, even if an entry fee is paid, the contest still will likely not be considered an illegal lottery (in most states) if the contest is based on an underlying game of skill.

b. State Gambling Laws

Gambling laws vary by state. Many of these laws were written long before the Internet, video games, or the proliferation of eSports.³³ A dearth of legal precedent in many states may at times complicate the applicability of these laws to modern concepts (e.g., eSports).

The inconsistency of these state laws makes determining legality and ensuring compliance complex. Nonetheless, many of these laws have language similar to the lottery laws (i.e., prize, chance, and consideration). The chance vs. skill distinction is often relevant and a finding that the outcome is determined based

CASINOLIFE (Feb. 21, 2017, 08:20 PM),

<http://www.casinolifemagazine.com/article/poker-skill-or-chance>.

³³ See, e.g., Roger Dunstan, *History of Gambling in the United States*, LIBRARY.CA.GOV, <https://www.library.ca.gov/CRB/97/03/Chapt2.html> (last visited Mar. 18, 2017).

on skill can be dispositive.³⁴ In some states, it is not illegal gambling to offer a prize to participants in a skill-based contest, even if the contestants have to pay an entry fee to participate, provided certain conditions are met.³⁵ Those conditions typically include fixed prizes determined in advance by the tournament sponsor, where the prizes offered are paid only to participants of the underlying event, and the participants themselves determine the outcome.³⁶

However, skill alone may not be sufficient to get around the gambling laws. In some states, it is illegal to place a bet or wager regardless of whether the outcome is based on chance or skill. For example, in Arizona, it is illegal to place a bet or wager on a game or contest, regardless of whether the game or contest is one of chance, skill, or based on a future contingent event.³⁷ This raises the question of what constitutes a bet or wager.

The definition of bet or wager varies under different state laws. Courts have drawn distinctions between bets and wagers on the one hand and bona fide entry fees on the other.³⁸ For this reason, the analysis of whether an eSports contest involves illegal gambling under certain states' laws, in part, turns on whether there is a bet or wager. This fact specific inquiry requires assessment of each of the specific state statutes.³⁹ The following are some general principles applicable in some states.

³⁴ See, e.g., IDAHO CODE § 18-3801 (1992) (showing an example of state law where if skill is found, then it is not gambling).

³⁵ See, e.g., N.M. STAT. ANN. § 30-19-1(B)(2) (LexisNexis 2017) (showing an example of state law where prizes can be offered in contest of skill, and nothing explicitly stated in the statute says that the entrants are prohibited from paying an entry fee).

³⁶ *Humphrey*, 2007 WL 1797648, at *7.

³⁷ ARIZ. REV. STAT. ANN. § 13-3301(4) (1998).

³⁸ *Humphrey*, 2007 WL 1797648, at *8.

³⁹ See, e.g., Laura A. D'Angelo & Daniel I. Waxman, *No Contest? An Analysis of the Legality of Thoroughbred Handicapping Contests*

Several states take the position that if the entry fees paid by the contestants are aggregated to make up the prize pool, or “purse,” that the contestants are competing to win, there is an increased level of risk that the scheme may be found to be a wagering transaction.⁴⁰ An entry fee to compete will also become an illegal bet, stake, or wager if the one offering the prize may compete to win it. That is to say, the prize is not fixed in advance or guaranteed to be awarded.

Returning to the Arizona example, although it is illegal to place a bet or wager on a contest of chance or skill, Arizona courts have held that entry fees are not bets or wagers.⁴¹ In *State v. American Holiday Ass’n*,⁴² the Supreme Court of Arizona held:

Obviously it is not illegal for the directors of a contest, for example the national spelling bee or the local rodeo, to charge an entrance fee. We think it equally obvious that not every contest charging an entry fee and awarding a prize becomes an illegal gambling operation. The distinction seems well taken; an entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even literary or essay competitions

Under Conflicting State Law Regimes, 1 KY. J. OF EQUINE, AGRIC., AND NAT. RES. L. 1, 8 (2008–09).

⁴⁰ *See id.*

⁴¹ *See, e.g., State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807 (Ariz. 1986) (en banc) (holding that payment of an entry fee is not an illegal bet or wager in an otherwise legal competition for prizes to be awarded by a non-participant, at least where the entry fees do not specifically make up the purse); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961) (addressing the distinction between typical gambling operations and contests charging an entry fee, and stating that the fact that each contestant is required to pay an entry fee, where entry fee does not specifically make up the purse or premium contested for, does not convert a permitted contest into an illegal wager).

⁴² *State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807 (Ariz. 1986) (en banc).

are all illegal gambling operations. . . . Spelling bees, golf tournaments, and American’s word games lack many of the attributes of what we commonly refer to as “gambling.” First, such contests are not like most bookmaking operations because prizes are not awarded on the basis of the outcome of some event involving third parties. The prize offered is paid only to participants and the participants themselves determine the outcome. Second, such contests do not involve bets between participants in a contest; it is known from the start that some nonparticipating party — the sponsor — will award the prize. Finally, such contests are dissimilar to any gambling operation because the amount of the prizes to be awarded is known from the start and does not depend on the bookies’ “odds” or the number or amount of entry fees actually received.⁴³

Other courts have focused on the distinction between gambling winnings and prizes. The Montana Supreme Court has stated that a bet is a situation in which the money or prize belongs to the persons posting it, each of whom has a chance to win it.⁴⁴ Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, whom has no chance to win it and who is unconditionally obligated to pay it to the successful contestant.⁴⁵

⁴³ *Id.* at 809; *see also* Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85 (Nev. 1961) (holding that the golfer who pays an entry fee to participate in a hole-in-one golf contest is relying entirely on his own skill and not someone else’s).

⁴⁴ *Toomey v. Penwell*, 245 P. 943, 945 (Mont. 1926).

⁴⁵ *See id.*

Stated differently, some courts have found no gambling exists where a third party (e.g., tournament sponsor) offers a prize that is fixed in advance where that party (the sponsor) has no chance of winning or keeping the prize.⁴⁶ Assuming any consideration paid is an entry fee rather than a bet or wager, and the outcome of the contest is based on skill, the eSports contest would not likely amount to gambling under most state gambling laws.

II. ADDITIONAL LEGAL ISSUES FACING ESPORTS

A. INTELLECTUAL PROPERTY

Another legal area where issues will undoubtedly arise is the field of intellectual property. Various eSports implicate various forms of intellectual property law, including copyright, trademarks, patents, and trade secrets.

1. Copyright

Copyrights may exist in various aspects of eSports events. In some respects, the copyright issues will likely be analogous to the copyright issues in professional sports (e.g., broadcast rights). While the act of playing professional sports (e.g., baseball) is not copyrighted, the video recording the game is.⁴⁷

One issue where eSports may present copyright issues distinct from traditional professional sports is with the underlying game itself. With eSports, the underlying game (e.g., video game) being played is subject to copyright owned by the game publisher.⁴⁸ This gives rise to the question of whether conducting and/or broadcasting a live public eSports video game tournament, without the permission of the copyright-holding

⁴⁶ *See id.*

⁴⁷ Some have argued that the players of the game are in fact the authors (or creators) of the work that is ultimately output and subject to copyright, but courts have disagreed. *See* Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1545–47 (2013) (discussing challenges to authorship, and thus copyright ownership, in the context of video games).

⁴⁸ ANDY RAMOS ET AL., *THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES* 89–91 (World Intellectual Prop. Org., 2013).

game publisher, constitutes copyright infringement? Or is it a right that someone who purchases an authorized copy of the video game rightfully possesses?

Copyright law gives the creator of a work an exclusive set of rights and allows the copyright holder to prevent others from infringing those rights.⁴⁹ In the case of audiovisual works, those rights include, among others: (i) the right to reproduce and distribute copies of the work; (ii) the right to prepare derivative works based upon the work; and (iii) the right to publicly perform the work, each of which may be implicated by holding and/or broadcasting an eSports contest.⁵⁰

Video games are typically licensed, not sold. The license for online games typically is known as a terms of service (or “TOS”), while the license for a downloaded game is known as an end user license agreement (or “EULA”). As owners of a copyright in the underlying game (i.e., the owner can obtain copyrights to the underlying code as a literary work and in the artwork and sound created for the game as an audiovisual work), game publishers have discretion over what rights to license.⁵¹ This applies to whether the game may be copied, publicly performed, or maybe even whether a stream or broadcast of an eSports contest or tournament may be distributed to the public.⁵²

⁴⁹ 17 U.S.C. § 106 (1976).

⁵⁰ *Id.*; see also § 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.”).

⁵¹ *Video Games and the Law: Copyright, Trademark and Intellectual Property*, NEW MEDIA RIGHTS (Feb. 23, 2011, 11:27 AM), http://newmediarights.org/guide/legal/Video_Games_law_Copyright_Trademark_Intellectual_Property#What%20parts%20of%20the%20video%20game%20are%20copyrightable?.

⁵² See *id.*

Absent a separate agreement, the TOS or EULA likely will control in any infringement analysis for unauthorized use of a video game in an eSports event in violation of the terms of the license.⁵³ It is likely that this issue will be tested in court someday. In many cases, game publishers are involved in and permit eSports tournaments and streaming thereof, often pursuant to an agreement with the tournament organizer. However, it is inevitable that someone will create an eSports tournament based on a game without that game publisher's permission.

To best position themselves for that inevitability, game publishers would be wise to ensure that their TOS and EULAs grant only the rights they truly want to grant and expressly exclude those they don't. For example, if the game publisher wants to preclude the use of the public display/performance of the game in an eSports event and/or the broadcast thereof, the TOS or EULA should expressly say so. While TOS and EULA provisions may be challenged in court, copyright owners have broad discretion in granting or excluding certain rights in such licenses, provided the TOS or EULA is drafted properly.⁵⁴

Some game publishers have granted users limited licenses to play their game in a strictly non-commercial manner. For example, the Terms of Use for the popular eSports title *League of Legends* states:

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 and expressly conditioned upon your compliance with the terms of this Agreement. Unless otherwise expressly authorized by us in a signed writing, you may not sell, copy, exchange, loan, reverse engineer, decompile, derive source code from, translate, lease, grant a security interest in, transfer, publish, assign or otherwise distribute

⁵³ Also relevant is any defenses to infringement, such as the fair use defense. A detailed analysis of this is beyond the scope of this paper.

⁵⁴ See Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 471–72 (2014).

any of the Riot Services or any of Riot Games' intellectual property, including any computer code associated therewith.⁵⁵

2. Trademarks

Many of the trademark issues will be similar to those in traditional professional sports. However, in the near term, trademark issues may arise in connection with eSports teams and individual players. Unlike the traditional professional sports leagues, the rights of players versus teams are not always fully ironed out. As team owners and the team/player contracts get more sophisticated, these issues will likely get more attention.

3. Patents

Patents are ubiquitous with any new technology/business model. Many game companies are filing patent applications specific to eSports, such as applications related to enhancing the spectator experience. Many other aspects of the technology that will enhance the eSports experience will also be patented.

4. Trade Secrets

The actual play of eSports is typically public and thus not subject to trade secret protection. However, there are certain aspects of eSports that could be. For example, as teams get even more sophisticated, their playbooks for training and other confidential team information could be trade secret. If a player leaves one team for another, misuse of any such trade secrets could arise. Teams would be well advised to ensure they mark trade secret materials as confidential, require players to sign confidentiality agreements, and take other reasonable steps to protect the confidentiality of such materials.

⁵⁵ *League of Legends Terms of Use (NA)*, LEAGUE OF LEGENDS (May 31, 2016), <http://na.leagueoflegends.com/en/legal/termsfuse>.

B. MATCH-FIXING AND DOPING

Two additional issues that currently exist with eSports include match-fixing and doping. These issues are not unique to eSports. Many sports over the years have had competitors try to cheat the system by engaging in these activities.

Match-fixing needs little explanation. Various professional sports have been marred by match fixing over the years. If there is a quick buck to be made, some people will sacrifice integrity for it. The eSports industry should look to the other leagues to adopt best practices, adapted as necessary to the unique aspects of eSports to minimize this issue.

For some people, the concept of doping in eSports is perplexing. While doping in other sports involves performance enhancing drugs that enhance strength, endurance, or other physical attributes, performance doping in eSports involve drugs that enhance one's mental focus, such as Adderall. While there is a physical element to eSports, one need not have the body of a triathlete to compete effectively. However, the mental focus needed is high, and it is necessary to perform at this level for an extended amount of time.

As in other sports, the solution to these problems lies primarily in effective policies of detection and deterrence, coupled with strong penalties for those who are caught engaging in these activities.

CONCLUSION

The foregoing is a brief overview of some of the legal issues with eSports. It is likely just the tip of the iceberg. One of the main takeaways is that many of the legal issues that will arise will require fact specific analysis under a myriad of different laws. For those entering the eSports arena with innovative ideas and business models, be sure to get an early legal assessment. As with other innovative ideas and business models, some will be illegal and not worth pursuing. More often however, an idea can be tweaked, with the help of a lawyer, to avoid or at least mitigate potential legal risks. It is usually much easier, and less costly, to make any changes early on.
