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VOLUME 6 SYMPOSIUM ISSUE 3

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The *Arizona State Sports and Entertainment Law Journal* is edited by law students of the Sandra Day O'Connor College of Law at Arizona State University. As one of the leading sports and entertainment law journals in the United States, the Journal infuses legal scholarship and practice with new ideas to address today's most complex sports and entertainment legal challenges. The Journal is dedicated to providing the academic community, the sports and entertainment industries, and the legal profession with scholarly analysis, research, and debate concerning the developing fields of sports and entertainment law. The Journal also seeks to strengthen the legal writing skills and expertise of its members. The Journal is supported by the Sandra Day O'Connor College of Law and the Sports Law and Business Program at Arizona State University.

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## ARTICLES

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**Editor's Note:** *Below is a loose transcription of Professor Kenneth Shropshire's Keynote Speech at the 2016 Arizona State University Sports & Entertainment Law Journal Symposium. We were honored to have Professor Shropshire on our campus to give this speech, and we hope it has as great of an effect on you (the reader), as it did on those of us in the audience.*

## KEYNOTE:

# THE MISEDUCATION OF THE STUDENT ATHLETE: A MANIFESTO (IN PROGRESS) FOR CHANGE

Kenneth L. Shropshire[1]

Thank you. I appreciate this opportunity. I am in the midst of co-authoring a book that is tentatively titled: *The Miseducation of the Student Athlete: A Manifesto for Change*, which searches for a paradigm shift in both what we discuss in college sports problems and what we should strive to achieve. Thus, although I have these well-scripted notes, some of my thoughts are not fully formed, so please indulge me while I share with you the broad concepts.

At this point, my work is more of the *moral* case for the manifesto, with the details of the "how" still a work in progress. As the novelist Paul Beatty writes of the protagonist in his

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[1] Professor Shropshire is the David W. Hauck Professor at the Wharton School, University of Pennsylvania, Professor of Africana Studies, and Director of the Wharton Sports Business Initiative. The co-author of the forthcoming book is Dr. Collin D. Williams Jr. and some of his ideas find their way into this speech as well. As of July 1, 2017 Professor Shropshire becomes the Adidas Distinguished Professor of Global Sport and CEO of the soon to be developed Global Sport Institute at Arizona State University.

stinging satire of race and class in the United States, *The Sellout* (which won the Man Booker Prize—the first time an American has taken the prestigious fiction award), my conversation today will be "blurring the line between thought and speech."[2] So, please allow me to deliver these high level general thoughts and don't hold me to everything. And, please, enrich me with your ideas if you like the path I am taking you on. The path? College degrees for everyone.

My goal is to direct the conversation—a paradigm shift—toward having college sports being a more significant player in educating young people. I do believe that an eventual societal discussion shift to a focus on degree completion, away from pay for play, is possible.

I have been trying to step back to imagine a new way to reflect on a system I've studied in some way for almost four decades now. Initially, some of my academic writing was on initial eligibility and rules that had a negative impact on educational opportunities for black athletes. A chapter in my 1996 book, *In Black & White: Race and Sports in America,* titled "Colorblind Propositions" focused on initial eligibility rules ranging from the 1.6 rule[3] in the 1960's to the more recent Propositions 48[4] and 16[5]. My conclusion in looking at those rules and the issues surrounding them was that we did not want to put in place rules that would foreclose the opportunity for someone to obtain an education. That included student athletes who, at the time of entering college, may have had very little academic acumen and, in some cases, even less interest in academic success. I believed, very strongly, that if rules prevented individuals from even setting foot on a college campus or from remaining on campus for any length of time, the opportunity for a college education was completely lost.

As I reflect on where we are and how to save the student athletes of today, opportunity is what drives me. In those early works, I focused on the opportunity to receive an education, even in instances when the student athlete did not initially care so

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[2] PAUL BEATTY, THE SELLOUT 23–24 (1st ed. 2015).
[3] KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 122 (1st ed. 1996).
[4] *Id.*
[5] *Id.*

much about his or her educational outcome. Frankly—and maybe it was oversight on my part—I did not focus consistently and specifically on earning the degree. In this work, the continuum on that thought is that obtaining the degree is an even better, and more clearly defined, goal than simply receiving a partial education that does not end in degree completion. Thus, the opportunity this paradigm shift focuses upon is the opportunity for athlete degree completion.

Let me lead by giving you a bit of the data, although discussing graduation rates is a bit of a Pandora's box in and of itself. Let me just say from the outset: there is no debate that graduation rates for student athletes are not 100%. The only debate that exists is on how to properly measure the correct percentage of success.[6]

Without question, many measures show graduation in college sport to be on the rise.[7] A popular statistic is the increase in the graduation rate of African American Division 1 basketball players to 77%, up from previously dismal numbers.[8] However, by contrast, Professor Shaun Harper's work analyzes graduation rates by race and by athletic participation to determine which college student athletes are not fully benefitting from their educational opportunities.[9] That work presents a less positive picture.

The 2016 edition of Harper's study provides some perspective on the level of participation of African American

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[6] Much of the debate over the proper measure comes because of student mobility, transferring, voluntary departures, etc. How should those be calculated into education success rates?

[7] *See Graduation Success Rate*, NCAA, http://www.ncaa.org/about/resources/research/graduation-success-rate (last visited Apr. 21, 2017).

[8] See Michelle Brutlag Hosick, *African-American Men's Basketball Players Succeeding In the Classroom At Highest Rates Ever*, NCAA (Nov. 15, 2016, 1:00 PM), http://www.ncaa.org/about/resources/media-center/news/african-american-men-s-basketball-players-succeeding-classroom-highest-rates-ever.

[9] *See* Shaun Harper, *Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports*, Ctr. for the Study of Race & EQUITY IN EDUC. (2016), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu.equity/files/publications/Harper_Sports_2016.pdf.

men as student athletes relative to other races. His work calculates that black male students represent only 2.5% of the undergraduates in the Power 5 conferences.[10] However, 56.3% of college football players and 60.8% of the men's basketball players are black.[11] While 68.5% of student athletes graduate within six years, only 53.6% of black male student athletes graduated within six years.[12] This compares to 58.5% of black undergraduates overall and 75.4% of undergraduate students overall.[13]

Thus, whatever measure we use, we know that there is room for graduation rate improvement for *all* student athletes. We also know that student athletes are often making an extraordinary contribution to their institutions, and with increased revenues, there is a focus on the return they are receiving for their efforts. It strikes me that as the knowledge of the NCAA's huge revenues began to spread, so did the conversation about paying student athletes.

Let me give you a little framework for why I think this positive change of focusing on degree completion can happen and who (many *whos*) can lead the way. First, let me give you a few words on the academic capabilities of student athletes, and second, on the catalyst that is needed to bring about this degree-obtaining refocus.

First: Athletes and academic acumen. I regularly sit in on lectures and read popular business's books. In doing so, I came across Professor Angela Duckworth's book, *Grit*: *The Power of Passion and Perseverance*, which convinces us that effort is more of a determinant of success in endeavors than any God-given skill.[14] Grit goes beyond sport, but can be found as the catalyst for other achievements as well, even by intellectuals. IQs of successful people are all across the map.[15]

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[10] *Id.* at 1.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See* ANGELA DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE 35–52 (1st ed. 2016).
[15] DUCKWORTH, *supra* note 6, at 14.

Studies show success is more likely to be dictated by effort or grit than baseline IQ.[16] To me, the presence of what Duckworth defines as grit in athletes is an issue that needs little discussion. I think most of us just did not have the label for that trait that successful individuals possess. I believe the most determined class of people on a college campus is often the athletes. The lifetime investment they have made to achieve their outcomes is not something that everyone can do. Athletic ability alone is rarely a determining factor for success on the field of play. That extra element of separation is what Duckworth teaches us is "grit." The point being, if these grit-possessing athletes are focused on a task, such as degree completion, there is an increased likelihood of success. It is the case however, as many find, that success is all a function of where that gritty energy is focused. How do we better energize and elevate the effort toward achieving this goal of degree completion? That is precisely the second framework point.

So, the second framework point answers the question, how do we get the paradigm, the focus, to shift from salary to degrees? This is not so much an "NCAA" focus shift question, but a popular discourse question. For this change to occur, college sport needs what I am calling the "Constructive Disrupter." In recent years, the public discourse on college sport and revenues has focused on paying student athletes or converting power conferences into pro leagues. What we need is disruption that provides the focus, inspiration, and path for as many student athletes to get their degrees as possible.

With my baseline of opportunity and my optimism that grit can focus a person for success – how can we disrupt college sports? I am suggesting here that we take a new approach at thinking about how to fix a scandal-filled institution. And I'm not just pointing to the NCAA, but college sports overall and all of us who simply follow college sports. One good place to look for guidance is a sport that has had its share of scandal – global football. FIFA and global football aren't concerned with student athletes and degrees but they are seeking a paradigm shift to remove long-existing negative problems.

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[16] *Id.*

FIFA is attempting a reboot, primarily focused on integrity, which they outline in *FIFA 2.0: The Vision for the Future*.[17] In that document, FIFA says that it wants to "grow the game, enhance the football experience and build a stronger institution."[18] This document could really be called *How Do We Restore Integrity in Our Game After the Scandals of Sepp Blatter?*

The success of FIFA's efforts to reframe global football required the organization to both solidify its foundation and to make significant reforms to its structure. The effort is focusing on three pillars, which happen to be transferrable to this college sports scenario: investment, innovation, and "greater responsibility for governance."[19]

The investment part is clear. The reason we are in this moment where change can be contemplated is the influx of new revenues into the college sports arena. With college sport seeing an increase in revenues, decisions are being made on how to spend such money. Leadership decisions could look to prioritize degree completion rather than spending on facilities, coaches' salaries, and the like.

Innovation is the most difficult, but let's for now just say the leaders of college sports, led by college presidents, must invest innovatively in the education of these athletes. In doing so, there must be aggressive contemplation and resetting of the educational space beyond four years and beyond the geographic confines of the university. There must also be a new level of counseling and responsibility on the part of leadership to make this happen. Guiding principles for FIFA in their new phase are: transparency, accountability, inclusivity, and cooperation.[20] These are good principles for college sports to follow.

Greater responsibility for governance could be altered to disrupt leadership. It is leadership that will need to disrupt and make the student athlete degree issue a priority.

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[17] *See FIFA 2.0: The Vision for the Future*, FIFA.COM (2016), http://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/fifa_2.0_vision_low_neu.17102016_neutral.pdf.
[18] *Id.* at 17–24.
[19] *Id.* at 25–26.
[20] *Id.* at 27–28.

What should college sports be? Clearly, some see no problems with college sports as it is: great games, Saturday camaraderie, and school spirit. For others, there is a harkening back to days past. For me, I've come to understand that I'm envisioning a brighter future – a day that may be as fanciful as the idea that millions would be watching gamers play on handheld devices. My dream does not hamper current athletic success, but it does mandate a layer to innovatively infuse greater educational opportunity.

Are today's student athletes capable of being my dream student athlete? I look to Duckworth again who wrote, "Our potential is one thing. What we do with it is quite another."[21] How important is the degree? Consider the fact that less than two percent of college athletes become professional athletes.[22] Grit needs to be channeled to achieve degree success while the opportunity exists. But there also needs to be a broadening of the degree completion opportunity.

What is the value of a college degree? Why is this so important? National reports analyzing the value of a college education have revealed a myriad of benefits for both individuals and society.[23]

Not only are college graduates more likely to be employed than high school graduates, they are more likely to find better jobs, earn more money, and have health insurance and pension benefits provided by their employers.[24] They also commit fewer crimes, live longer healthier lives, and contribute to society as productive and civically engaged citizens.[25] On

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[21] DUCKWORTH, *supra* note 6, at 14.
[22] Harper, *supra* note 7, at 19.
[23] Sandy Baum, Jennifer Ma & Kathleen Payea, *Education Pays: The Benefits of Higher Education for Individuals and Society*, COLLEGEBOARD (2013), https://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf.
[24] Sandy Baum, Jennifer Ma & Kathleen Payea, *Education Pays: The Benefits of Higher Education for Individuals and Society*, COLLEGEBOARD 5 (2013), https://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf.
[25] *Why College?* EDVISORS, https://www.edvisors.com/plan-for-college/benefits-of-college/why-college/ (last visited Apr. 10, 2017).

virtually every measure of economic and career success, college graduates are outperforming their less educated peers.[26] In sum, a college education is very valuable. Additionally, college graduates are significantly more likely than high school graduates to report being "very happy."[27]

Greater earning potential is one of the most salient benefits. In 2014, young adults with bachelor's degrees earned on average $49,900 annually, whereas young adults with high school diplomas earned just $30,000.[28] Over a forty-year working life, college graduates earn sixty-six percent, or $1 million more than high school graduates.[29] Even those who begin without completing earn more than those who never start.[30]

College educated individuals are much more likely to have a job at all.[31] The unemployment rate for the college educated is about half of that for high school graduates.[32] For some populations—Black, Latino, and White adults—increases in educational attainment correlate with stark decreases in unemployment rates.[33] Additionally, those who possess a bachelor's degree are three times less likely to live in poverty than those who only possess a diploma.[34]

Economics aside, substantial evidence indicates that college completion, not just individual characteristics, is strongly associated with healthier lifestyles, active citizenship, and increased educational activities and opportunities for the graduates' children.[35] Since information about smoking risks has become public, college graduates have smoked at rates

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[26] *The Rising Cost of Not Going to College*, PEW RESEARCH CENTER (Feb. 11, 2014), http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college.
[27] Baum, *supra* note 21 at 21.
[28] Grace Kena et al., *The Condition of Education 2016*, NATIONAL CENTER FOR EDUCATION STATISTICS 48 (2016), https://nces.ed.gov/pubs2016/2016144.pdf.
[29] *See id.* at xxxii.
[30] *See* Baum, *supra* note 21, at 41.
[31] *Id.* at 5.
[32] *Id.* at 19.
[33] *Id.* at 20.
[34] *Id.* at 25.
[35] *See id.* at 5–6.

significantly lower than those of other adults.[36] College graduates are also more likely to exercise and less likely to be obese.[37] This also holds true for their children, who are more likely to be breast fed, and less likely to be low-birth-weight babies.[38] The college educated display active citizenship by their propensity to donate, volunteer, and vote more.[39] Finally, these individuals engage in more educational activities and are generally better prepared for school.[40]

Thus, college degrees are important. If one of the best statistics has twenty percent or so of athletes not receiving degrees, that is a significant number of individuals not receiving the benefits recited above. In short, athlete degree completion is of greater value than whatever salary could be paid during a college athletic career. This is not to say that payments and degrees would not be a feasible futuristic outcome. This is to say that the receipt of degrees should be prioritized.

This is important for everyone. There is a disproportionate impact on the African American community due to the disproportionate participation of African American men. This is both due to the numbers and, again subject to debate, the role modeling that takes place by this popular segment of the community. I highlight to you too, the problems of this country. College sport is a small sector of the economy but elevating the priority of degree completion can still make a big impact.

The key elements of the forthcoming manifesto will explore:

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[36] *Id.* at 27.
[37] *Id.* at 29.
[38] *See Breastfeeding Rates By Duration and Education Level*, COLLEGEBOARD, https://trends.collegeboard.org/education-pays/figures-tables/breastfeeding-rates-duration-and-education-level (last visited Apr. 10, 2017); *Low-Birth-Weight Rates By Race/Ethnicity and Mother's Education Level 2006*, COLLEGEBOARD, https://trends.collegeboard.org/education-pays/figures-tables/low-birth-weight-rates-race-ethnicity-and-mothers-education-level-2006 (last visited Apr. 10, 2017).
[39] Baum, *supra* note 21 at 31–32.
[40] *See id.* at 7.

1) Prioritizing obtaining a degree;[41]
2) Making sure these are quality degrees. For years there were jokes regarding athletes taking basket weaving. The key here is to avoid any similar descriptors of the degrees athletes are obtaining;
3) Placing strict limits on the number of hours college athletes can participate in team activities, with strict enforcement of such hour limits;
4) Maximizing the use of summers for educational purposes, even at the expense internships;
5) Broadening the right to return. This includes one and done;
6) Expanding the opportunity to get credits for degrees from institutions offering online opportunities. If need be, the NCAA could make schools with powerful online platforms, like ASU and Penn State, be certified hubs for this activity (the key concern here is preventing cheating in the isolation of one's living room);
7) Reducing constraints on tutoring support; and
8) Eliminating athlete-only or athlete-dominant courses. Monitor those that are. The NCAA is focused on this already, to a degree.

Who will be the leader that takes college sports in this direction? Who will be that "Constructive Disruptor"? Any of you could be the one to lead the way. It would take courage. John F. Kennedy said, *"*[t]o be courageous is an opportunity that sooner or later is presented to all of us."[42]

Effort is the key to success in this sports business, the "Grit" as Professor Duckworth describes it, and the sustained effort. My hope is that some of you, those venturing into this space, will accept the challenge set forth in my Manifesto in progress: to revisit college sports; to make it what it has never

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[41] To be inspired that this is true, Google and watch David Shaw's Ted Talk, "Can Football Change the World?" Essentially, the answer is "with hard work." Tedx Talks, *Can Football Change the World? David Shaw at Tedx Stanford*, YOUTUBE (June 20, 2013), https://www.youtube.com/watch?v=WBCkec9csdo.

[42] JOHN F. KENNEDY, PROFILES IN COURAGE 225 (Harpers Collins Pub., 2003).

been, but what it has potential to be, which will have a grander impact on society.

Thank you.

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# NCAA V. UNC: CHALLENGING THE NCAA'S JURISDICTION

Timothy Davis[1]

## I. INTRODUCTION

The National Collegiate Athletic Association's ("NCAA") enforcement staff submitted a Notice of Allegations to the University of North Carolina at Chapel Hill ("UNC") by letter, dated May 20, 2015.[2] As outlined below, the NCAA's Notice of Allegations ("First Notice of Allegations") asserted that UNC engaged in severe breaches of conduct that amount to Level I violations of NCAA bylaws. Consequently, the alleged Level I violations exposed UNC to the most severe sanctions that can be imposed for violations of NCAA bylaws.[3] The First Notice of Allegations focused principally on classes offered in UNC's African and Afro-American Studies Department between the years 2002 and 2011.[4] The NCAA asserts these classes impermissibly aided students in maintaining their academic eligibility, subsequently affecting their eligibility to participate in intercollegiate athletics on behalf of UNC.[5]

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[1] John W. & Ruth H. Turnage Professor of Law at the Wake Forest University School of Law.

[2] Jonathan F. Duncan, *Notice of Allegations, University of North Carolina, Chapel Hill, Case No. 00231*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 20, 2015), http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2015/06/NCAA-NOA.pdf [hereinafter *Notice of Allegations*].

[3] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2016–17 DIVISION I MANUAL §§ 19.1, 19.9 (Aug. 1, 2016) [hereinafter NCAA Manual] (describing the NCAA violation structure and penalties attached to the violations).

[4] *Notice of Allegations*, *supra* note 2, at 1.

[5] *Id.*

In April 2016, the NCAA submitted to UNC an Amended Notice of Allegations[6] based on information allegedly obtained by the NCAA subsequent to the submission of the organization's First Notice of Allegations. To buttress its assertions, the NCAA submitted its Second Amended Notice of Allegations ("Third Notice of Allegations") in December 2016.[7] As discussed below, the NCAA's most recent notice provides a more focused set of allegations and enhances the possibility that the NCAA's Committee on Infractions ("COI") will find the irregularities in UNC's African and Afro-American Studies Department constitute Level I violations of NCAA bylaws.

First, this article discusses the factual background leading to the NCAA's contentions that UNC's conduct violated NCAA bylaws. Second, the article discusses the NCAA's allegations against UNC.[8] Third, the article addresses UNC's responses to the alleged violations of NCAA bylaws,[9] as well as the NCAA's responses to UNC's arguments.[10] Last, the article concludes with a discussion of the implications of the NCAA's action against UNC.

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[6] Jonathan F. Duncan, *Amended Notice of Allegations to the Chancellor of the University of North Carolina, Chapel Hill,* NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 25, 2016), http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2016/04/NOA_Amended_042516_NorthCarolina.pdf [hereinafter *Amended Notice of Allegations*].

[7] Jonathan F. Duncan, *Second Amended Notice of Allegations*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 13, 2016), https://carolinacommitment.unc.edu/files/2016/12/NCAA-third-notice-of-allegations.pdf [hereinafter *Third Notice of Allegations*].

[8] *See infra* text accompanying notes 77–110.

[9] Rick Evrard & Bob Kirchner, *Response to NCAA Amended Notice of Allegations* (Aug. 1, 2016), http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2016/08/UNC-Response-to-2016-ANOA.pdf [hereinafter *Response to NCAA Amended Notice of Allegations*].

[10] Tom Hosty, *Enforcement Written Reply and Statement of the Case, University of North Carolina, Chapel Hill, Case No. 00231.*, THE NEWS & OBSERVER (Sept. 19, 2016), http://media2.newsobserver.com/static/content/multimedia/interactive/uncscandal/pdf/unc-ncaa-response.pdf.

## II. FACTUAL BACKGROUND

In late 2013, the North Carolina State Bureau of Investigation ("SBI") informed UNC that the Bureau would conclude its investigation of alleged irregularities in courses taught at UNC and indict Julius Nyang'oro, former chair of UNC's African and Afro-American Studies Department (hereinafter "AASD").[11] Moreover, the SBI stated it would provide UNC with access to information it had obtained during its investigation.[12] On February 21, 2014, with SBI approval, UNC appointed the law firm of Cadwalader, Wickerstram and Taft ("Cadwalader") to receive the SBI information and to conduct an investigation.[13] On October 16, 2014, Cadwalader completed its report, *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill* ("Wainstein Report").[14]

Cadwalader conducted the investigation in the aftermath of six previous investigations related to the alleged irregularities in courses taken by student-athletes in AASD.[15] One of these investigations was conducted by the NCAA. In 2012, the NCAA investigator concluded that in "light of the fact that these classes

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[11] Kenneth L. Wainstein et al., *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill*, CADWALADER, WICKERSHAM & TAFT LLP (Oct. 16, 2014), http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/UNC-FINAL-REPORT.pdf [hereinafter Wainstein Report]. Effective as of July 1, 2013, UNC's African and Afro-American Studies Department changed its name to the Department of African, African America and Diaspora Studies. *Id.*

[12] *Id.* at 7.

[13] *Id.*

[14] *Id.* at 1.

[15] *See id.* at 10, 24–29.

were available to—and used by—students as well as student-athletes, the NCAA apparently concluded that there was insufficient evidence of an athletic purpose behind the classes to establish an academic integrity violation under the NCAA by-laws."[16]

Subsequently, the NCAA asserted these previous investigations failed to appreciate the complete scope of the academic irregularities due, in part, to the refusal of Nyang'oro and Deborah Crowder, a UNC alumna and former AASD Student-Services Manager, to meet with and cooperate in providing information to investigative bodies, including the NCAA.[17] As discussed below, Crowder orchestrated the classes resulting in the irregularities. The earlier investigations were also conducted without the benefit of the information obtained by the SBI in its investigation. Unlike the other investigations, Cadwalader's investigators were granted access to approximately 1.6 million emails and other evidentiary materials, including transcripts and protected student academic information.[18]

As mentioned above, the bylaw violations, alleged in the NCAA's three notices of allegations, stem from alleged irregularities in courses offered in UNC's AASD. According to the Wainstein Report, the alleged violations emanated from a scheme, devised by Deborah Crowder, which endured from 1993 until 2011, two years after Crowder's retirement in 2009.[19] The initial academic irregularities occurred in independent study classes that were designed and administered by Crowder.[20] The NCAA's notices refer to these classes as "anomalous classes."[21] Both the Wainstein Report and this article refer to these classes as "paper classes."

As outlined in the Wainstein Report, the paper classes were both similar and dissimilar to traditional independent study

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[16] *Id.* at 25.
[17] *See id.* at 1–2, 25.
[18] *Id.* at 12.
[19] *Id.* at 3, 16, 21.
[20] *Id.* at 16.
[21] *Id.* at 20; *Notice of Allegations*, *supra* note 2, at 1.

classes.[22] Like traditional independent study classes offered at UNC, the paper classes entailed no class attendance and required only the submission of a single research paper.[23] Unlike traditional independent study classes, however, students did not meet periodically with faculty to discuss students' progress on their papers.[24] The typical process would have involved a rather extensive effort culminating in a professor assigning the final grade.[25] In the paper classes, no faculty member oversaw students' research and writing.[26] In fact, students enrolled in the paper classes did not have a single interaction with a faculty member.[27] Students interacted with Crowder, who oversaw the paper classes.[28] Crowder, a non-faculty member, provided no instructional content in the paper classes.[29] She registered students for the classes, assigned students their paper topics, received, and graded students' completed papers at the end of the semester; she also recorded students' final grades, which typically were either A's or high B's, regardless of the qualitative content of the papers.[30]

According to the Wainstein Report, Crowder's actions appear to have had the implicit if not the express permission of Nyang'oro.[31] Crowder's ability to assume an important role in the AASD appears to have been facilitated in part by the hands-off administrative approach of Nyang'oro who permitted Crowder to oversee course scheduling, registration, and

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[22] Wainstein Report, *supra* note 11, at 1.
[23] *Id.* at 16.
[24] *Id.* at 16–17.
[25] *Id.*
[26] *Id*.
[27] *Id.* at 17.
[28] *Id.*
[29] *Id.* at 1.
[30] *Id*. at 16–17.
[31] *Id.* at 17.

enrollment.[32] Additionally, Nyang'oro permitted Crowder to sign his name on department matters.[33] It appears that Crowder and Nyang'oro's actions were motivated primarily by their desire to help students and student-athletes for which the UNC curriculum presented academic challenges.[34] Seemingly, Crowder must have been particularly motivated "to help [student-athletes] manage their competing athletic and academic time demands."[35]

In 1999, as a consequence of curricular changes at UNC that limited the number of independent study hours for which students could earn academic credit, Crowder modified the operation of the paper classes.[36] Instead of being offered as independent study classes, UNC offered the paper classes as lecture courses with assigned meeting dates and times with classroom assignments.[37] Unlike traditional lecture courses at UNC and elsewhere, however, students enrolled in these classes did not attend classes, had no interaction with faculty, and students' papers were not graded by faculty but rather by Crowder.[38] In short, notwithstanding their lecture course designation, Crowder designed and managed the lecture classes based on the same model on which she designed and managed the independent study classes.[39]

According to the Wainstein Report, both as independent study and lecture courses, the paper classes were available to all UNC students, but student-athletes, particularly football and men's basketball players, disproportionately enrolled in the classes.[40] Although student-athletes comprised approximately 4.0% of UNC undergraduate students, student-athletes enrollment in paper classes accounted for 1,871 or 47.4% of the 3,933 student enrollments in the paper classes.[41] Football players

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[32] *Id.* at 15, 17.
[33] *Id.* at 15.
[34] *Id.* at 43.
[35] *Id.* at 3.
[36] *Id.* at 17.
[37] *Id.* at 16–17.
[38] *Id.*
[39] *Id.* at 17.
[40] *Id.* at 3–4; *see, e.g.*, *id.* at 34–35.
[41] *Id.* at 19.

comprised 50.9% of the 1,871 total student-athlete enrollments in paper classes.[42] Men's basketball players accounted for 12.2% of student-athlete enrollments, women's basketball players accounted for 6.1%, and athletes in Olympic and other sports accounted for 30.6% of the student-athlete enrollments in the paper classes.[43]

Academic counselors in the Academic Support Program for Student-Athletes ("ASPSA") steered many of the student-athletes, particularly football and men's basketball players, to these classes.[44] According to the Wainstein Report, these counselors' actions were motivated, in part, by the pressure they were under to assist student-athletes in maintaining their academic eligibility to play sports.[45] The Wainstein Report states that ASPSA academic counselors steered many student-athletes to take the courses with knowledge that the paper classes had no faculty involvement and that the courses were "GPA boosters," which permitted student-athletes to earn grades that enabled them to maintain their academic and athletic eligibility.[46] Specifically, the Wainstein Report concludes that certain counselors even suggested to Crowder the grades that student-athletes needed to earn in the paper classes to maintain their academic eligibility.[47]

Students were generally aware that Crowder did not carefully read papers submitted for the paper classes.[48] Consequently, many students submitted papers that included original material in introductions and conclusions, with

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[42] *Id.* at 3, 35.
[43] *Id.* at 4.
[44] *Id.* at 19.
[45] *Id.* at 20.
[46] *Id*. at 4.
[47] *Id*. at 19.
[48] *Id.* at 3.

plagiarized text in between.[49] Moreover, certain ASPSA tutors provided impermissible assistance to student-athletes by partially drafting their papers.[50]

The final grades Crowder assigned in the paper classes confirmed students' understanding that they would receive high grades.[51] The 3.62 average grade awarded in paper classes was higher than the 3.28 earned by all students in regular AASD classes.[52] The average grades awarded to student-athletes in these classes were 3.55 compared to an average of 2.84 earned by student-athletes in regular AASD classes.[53] The Wainstein Report further states that the inflated grades awarded to student-athletes in the paper classes significantly impacted student-athletes' GPAs by an average of .03 grade points.[54] This, in turn, significantly impacted student-athletes' ability to reach the 2.0 grade threshold required for them to remain academically eligible and/or to graduate.[55]

Crowder announced she would retire from her position in 2009 with the AASP Department.[56] The Wainstein Report investigators found that ASPSA football counselors, who had grown dependent on the paper classes, instructed players to submit their papers before Crowder's retirement.[57] These counselors also informed football coaches "that with Crowder's retirement they no longer had access to classes 'that met degree requirements in which [the football players] didn't go to class . . . didn't take notes [or] have to stay awake . . . didn't have to meet with professors [and] didn't have to pay attention or necessarily engage with the material.'"[58]

The Wainstein Report found that during a November 2009 meeting, two ASPSA personnel described to UNC's

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[49] *Id*. at 20.
[50] *Id*.
[51] *Id.* at 70.
[52] *Id*. at 3.
[53] *Id*.
[54] *Id.*
[55] *Id*.
[56] *Id.* at 14, 21, 7 n.1.
[57] *Id*. at 21.
[58] *Id.* at 4.

football coaches, including then UNC head football coach Butch Davis, how the paper classes had been used to help football players remain eligible.[59] The presentation included PowerPoint slides that compared football players' GPAs with and without the aid of the paper classes.[60] The ASPSA personnel emphasized that the coaching staff should recruit better prepared players and encourage them to pay more attention to their studies, [but] the short-term message was a warning that grades were going to fall precipitously with Crowder's retirement.[61] According to the Wainstein Report, the prediction became a reality when in the fall of 2009, UNC football players' GPAs fell to 2.12, the lowest level in approximately 10 years.[62] Following the presentation, the PowerPoint slides were sent to ASPSA's director and to UNC's Senior Associate Director of Athletics.[63] ASPSA personnel also successfully persuaded Nyang'oro to continue to offer the paper classes, which he did, albeit, in more limited numbers.[64]

In 2011, after the media raised concerns regarding irregularities in AASD, UNC's administration began to scrutinize the paper classes.[65] Prior to 2011, UNC employees appear to have possessed varying levels of knowledge of the paper classes and how they operated.[66] According to the Wainstein Report, some ASPSA counselors and members of the UNC Athletic Department staff were aware that student-athletes

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[59] *Id*. at 22 n.20.
[60] *Id*. at 22.
[61] *Id*. at 23.
[62] *Id.*
[63] *Id.* at 22 n.20.
[64] *Id*. at 23–24, 36. Nyang'oro offered two lecture classes, one independent study class, and three bifurcated classes in which some students took these classes in the traditional lecture format and others took these classes in a paper class format. *Id*. at 23–24, 36.
[65] *Id.* at 24.
[66] *Id.* at 63.

had enrolled in the paper classes and how these classes operated—requiring no class attendance and no faculty involvement.[67] These personnel also possessed knowledge that consistently high grades were awarded to student-athletes in the paper classes even for low quality work.[68] In addition to steering student-athletes to the paper classes, certain ASPSA academic counselors allegedly steered student-athletes to African and Afro-American studies majors.[69]

According to the Wainstein Report, certain academic administrators became aware of what might have been irregularities in AASP but failed to follow up.[70] For example, in 2005 or 2006, one administrator questioned Nyang'oro's capacity to supervise over 300 independent studies per year but failed to follow up.[71] The Wainstein Report states that this failure to follow up contributed to the paper class scheme continuing for another five years.[72] Other UNC faculty, administrators in Athletics, and ASPSA were aware that the paper classes lacked academic rigor but decided not to ask critical questions.[73] The Wainstein Report concludes, however, there was no evidence that high level UNC administrators "tried in any way to obscure the facts or the magnitude of this situation."[74]

After they became aware of the paper classes scheme, UNC administrators immediately self-reported potential rule violations to the NCAA.[75] It also commissioned the aforementioned investigations.[76]

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[67] *Id.* at 64.
[68] *Id.*
[69] *Id.* at 67.
[70] *Id.* at 5.
[71] *See id.*
[72] *Id.*
[73] *Id.* at 5–6.
[74] *Id.* at 6.
[75] *Id.* at 2, 96.
[76] *Id.*

## III. THE NCAA'S FIRST AND AMENDED NOTICES OF ALLEGATIONS

### A. FIRST NOTICE OF ALLEGATIONS

Focusing on irregularities in the paper classes, the NCAA contended in its First Notice of Allegations that between 2002 and 2011, UNC "provided impermissible benefits to student-athletes that were not generally available to the student body."[77] The first allegation ("Allegation 1") in the notice is premised on the alleged special arrangements that ASPSA counselors made with Crowder, Nyang'oro, and faculty within AASD.[78] These arrangements included registering athletes in the paper classes, obtaining assignments for student-athletes for these classes, turning in papers on behalf of student-athletes, and recommending grades that should be assigned to student-athletes enrolled in the paper classes.[79] The NCAA also alleges that ASPSA counselors used the paper classes to "help ensure the eligibility of academically at-risk student-athletes."[80] According to the NCAA, this and other conduct constituted a Level I violation in that UNC provided impermissible extra benefits over a nine-year period that "undermined or threatened the integrity of the NCAA Collegiate Model . . . ."[81] In particular, UNC's conduct allegedly undermined student-athletes' participation in their own education.[82] Allegation 1 asserts that the

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[77] *Notice of Allegations*, *supra* note 2, at 1. The NCAA refers to the paper classes as anomalous because the courses deviated from the way in classes are typically taught at UNC in that the classes required minimal if any faculty interaction, had no attendance requirements, and lax standards.
[78] *See generally id.* at 2–35.
[79] *Id.*
[80] *Id.* at 1.
[81] *Id.* at 2.
[82] *Id.*

aforementioned conduct violated NCAA Bylaw 16.11.2.1, which prohibits student-athletes from receiving extra benefits.[83]

The second allegation ("Allegation 2") of the notice focused on the role of Jan Boxill, a former UNC philosophy professor and women's basketball counselor within ASPSA. The allegation asserts that between 2007 and 2010, Boxill knowingly provided extra benefits to women's basketball student-athletes and thus committed a Level I violation.[84] Specifically, Boxill allegedly provided substantial impermissible academic assistance in the form of requesting that Crowder enroll student-athletes into the AASD paper classes, completing course work on behalf of student-athletes, turning in work on behalf of student-athletes, and recommending that Crowder assign certain grades to student-athletes.[85] Boxill's conduct allegedly violated Bylaws 10.1 and 10.1(c) regarding ethical conduct, and Bylaw 16.11.2.1 regarding extra benefits.[86]

The third and fourth allegations ("Allegation 3" and "Allegation 4") of the First Notice of Allegations, allege unethical conduct by Crowder and Nyang'oro, respectively. Allegation 3 asserts that in 2014 and 2015 Deborah Crowder engaged in unethical conduct by refusing to cooperate and provide relevant information (e.g., refusal to submit to an interview with NCAA enforcement staff) to the NCAA relating to its investigation of the irregularities in courses offered in the AASD.[87] The NCAA contends that Crowder's conduct was a severe Level 1 breach.[88] She allegedly violated NCAA Bylaws 19.1.1. and 19.1.1-(c), which impose obligations on institutional employees to cooperate with the NCAA in its investigation.[89] The NCAA makes no reference to violations of the ethical conduct bylaws articulated in Bylaw 10.1. Similarly, Allegation

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[83] *Id.* at 1.
[84] *Id.* at 35.
[85] *Id.* at 35–45.
[86] *Id.* at 35.
[87] *Id.* at 45.
[88] *Id.*
[89] *2014-2015 NCAA Division I Manual*, NCAA 313, 313–14 (Aug. 1, 2014), http://www.ncaapublications.com/productdownloads/D115.pdf [hereinafter *NCAA Division I Manual*].

4 asserts that in 2014 and 2015 Julius Nyang'oro also engaged in unethical conduct by refusing to cooperate and provide relevant information (e.g., refusal to submit to an interview with NCAA enforcement staff) to the NCAA during its investigation of the irregularities in courses offered in the AASD.[90] Moreover, the NCAA contends that Nyang'oro's conduct constituted a severe violation, amounting to a Level 1 breach.[91] Nyang'oro allegedly violated NCAA Bylaws 19.1.1. and 19.1.1-(c),[92] which impose obligations on institutional employees to cooperate with the NCAA in its investigation.[93]

In the fifth allegation ("Allegation 5") of the First Notice of Allegations, the NCAA asserts that the breadth and nature of Allegations 1 and 2 demonstrate UNC lacked institutional control and violated NCAA bylaws when UNC failed to monitor Jan Boxill's activities.[94] The NCAA alleges further that UNC exhibited a lack of institutional control regarding the impermissible extra benefits derived by student-athletes who enrolled in the paper classes in the AASD.[95] Specifically, UNC's alleged failure to effectively monitor the ASPSA and the AASD enabled the paper class scheme to continue for 18 years and allowed ASPSA personnel to maintain the athletic eligibility of student-athletes, particularly football and men's basketball players.[96]

> Although the general student body also had access to the anomalous AFRI/AFAM courses, student-athletes received preferential access to

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[90] *Notice of Allegations*, *supra* note 2, at 48.
[91] *Id.* at 47.
[92] *Id.*
[93] *NCAA Division I Manual*, *supra* note 89.
[94] *Notice of Allegations*, *supra* note 2, at 48.
[95] *Id.*
[96] *Id.* at 48–49.

> these anomalous courses, enrolled in these anomalous courses at a disproportionate rate to that of the general student body, and received other impermissible benefits not available to the general student body in connection with these courses.[97]

The NCAA's Notice of Allegations included factual circumstances that could result in more severe sanctions and mitigating factors that would reduce the severity of the sanctions.[98] The aggravating factors allegedly include: multiple Level I violations, UNC's history of multiple Level I, Level II, or major violations; UNC's lack of institutional control (as described in Allegation 5); the disregard of rules violations and other wrongful conduct by persons in positions of authority; and the alleged unethical conduct of Crowder, Nyang'oro and Boxill.[99] The First Notice of Allegations stated one mitigating factor in relation to Allegation 1—UNC's history of self-reporting Level III or secondary violations.[100]

### B. AMENDED NOTICE OF ALLEGATIONS

In a letter dated April 25, 2016, the NCAA submitted its Amended Notice of Allegations to UNC.[101] The most notable differences between the First and Amended Notices of Allegations is the omission of specific football and men's basketball players in the Amended Notice as well as broad allegations of impermissible extra benefits present in the First Notice of Allegation.[102] In addition, the Amended Notice of Allegations asserted a shortened timeframe of fall 2005 to

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[97] *Id.* at 49.
[98] *Id.* at 50–53.
[99] *Id.*
[100] *Id.* at 51.
[101] *Amended Notice of Allegations*, *supra* note 6.
[102] Andrew Carter, *UNC Accused of No New Major Violations in NCAA's Amended Notice of Allegations*, THE NEWS & OBSERVER (Apr. 25, 2016, 11:11 AM), http://www.newsobserver.com/sports/college/acc/unc/article73736122.html.

summer 2011, within which certain of the alleged violations occurred.[103]

Violations asserted in the Amended Notice of Allegations include Allegation 1, which expands the period of time to include 2003 through 2011 during which Boxill allegedly provided impermissible benefits to student-athletes.[104] Allegations 2 and 3 address the alleged unethical conduct of Crowder and Nyang'oro, respectively.[105] Allegation 4 asserts that from 2005–06 through 2010–11, UNC violated the Principle of Rules Compliance when both academic and athletic administrators failed to sufficiently monitor the ASPSA and AASD.[106] This failure to monitor the operations of the ASPSA and AASD allegedly permitted the paper classes to go undetected. UNC did not document independent study classes and did not address how those classes were taken by students, including student-athletes.[107] The Amended Notice also alleges that UNC failed to sufficiently monitor such activities notwithstanding concerns by UNC personnel that Boxill's relationship with student-athletes was too close.[108]

Allegation 5 of the Amended Notice asserts that UNC violated the Principle of Institutional Control and Responsibility in failing to address the paper classes when concerns were brought to the attention of UNC leaders.[109] The Notice alleges that as a result of UNC's failure to exert control, the problems within AASD continued.[110]

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[103] *Id.*
[104] *Amended Notice of Allegations*, *supra* note 6, at 5–6.
[105] *Id.* at 49–50.
[106] *Id.* at 51–53.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 53–59.
[110] *Id.*

## IV. UNC'S RESPONSE TO THE NCAA'S AMENDED AND SECOND AMENDED (THIRD) NOTICES OF ALLEGATIONS

### A. UNC'S RESPONSE TO THE NCAA'S FIRST AND AMENDED NOTICES OF ALLEGATIONS

UNC conceded to some assertions but asserted several defenses to others in the First and Amended Notice of Allegations.[111] These defenses included estoppel and the NCAA statute of limitations.[112] UNC accepted the allegations regarding Crowder and Nyang'oro's failure to cooperate with the NCAA.[113] UNC also conceded to the allegation that Jan Boxill provided impermissible benefits to student-athletes, but denied allegations that Boxill engaged in unethical conduct because she did not knowingly provide extra benefits.[114] Consequently, UNC

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[111] *See Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 10–11.

[112] UNC contends that because the NCAA previously investigated these irregularities, the NCAA is estopped from raising additional matters relating to such irregularities. *Response to NCAA Amended Notice of Allegations, supra note* 9*,* at 15. UNC also argues that under "Bylaw 19.8.3, the NCAA's prior decision on those matters is 'final, binding, and conclusive'. . . ." *Response to NCAA Amended Notice of Allegations, supra* note 9*,* at 8. UNC also contends that the NCAA Constitutional provision § 2.8.2 and bylaw 19.01.1 entitle that member institutions be afforded fair procedures in proceedings that "reflect fundamental legal concepts of fairness and equity." *Response to NCAA Amended Notice of Allegations, supra* note 9*,* at 8. According to UNC, these principles require the NCAA to adhere to its 2012 decision. *Response to NCAA Amended Notice of Allegations, supra* note 9*,* at 8. Finally, UNC asserts that certain of the allegations are time barred because they fall within the NCAA's four-year statute of limitations. *Response to NCAA Amended Notice of Allegations, supra* note 9*,* at 9.

[113] *Response to NCAA Amended Notice of Allegations, supra* note 9, at 9. *See also* Andrew Carter, *UNC Says Bogus AFAM Classes Don't Fall Under NCAA Jurisdiction*, THE NEWS & OBSERVER (Aug. 2, 2016), http://www.newsobserver.com/sports/college/acc/unc/article93255562.html.

[114] *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 9.

argues that Boxill's conduct did not amount to a Level I violation but was a Level III violation.[115]

UNC's primary argument was that the NCAA lacks jurisdiction to adjudicate matters pertaining to the AASD paper classes because the alleged irregularities related to core academic issues, including course content and structure.[116] In responding to Allegation 5 of the Amended Notice of Allegations, which asserts a lack of institutional control, UNC argues that because the irregularities associated with the paper classes involved core academic issues, they were outside the purview of the NCAA's Constitution and bylaws.

> Issues related to UNC-Chapel Hill's academic irregularities are the proper subject of review by SACSCOC, its accrediting agency – not the NCCA, its athletic association. Accordingly, though conduct related to the anomalous courses presents serious institutional issues, it should not and cannot support a lack of institutional control allegation under the NCAA constitution and bylaws absent an underlying rules violation. In addition, because the anomalous courses did not give rise to Boxill's actions as alleged in Allegations 1 and 4, neither of those allegations independently supports a lack of institutional control.[117]

To bolster its argument, UNC asserts that the Amended Notice of Allegations did not allege that the student-athletes enrolled in the paper classes obtained an impermissible extra benefit.[118]

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[115] *Id.* at 8.
[116] *Id.* at 10.
[117] *Id.*
[118] *Id.* at 12.

UNC also states: "the [Amended Notice of Allegations] acknowledges in Allegation 5 that problems with the anomalous courses were not directed at or limited to student-athletes, but instead affected the 'general student body.'"[119]

### B. THE NCAA SECOND AMENDED (THIRD) NOTICE OF ALLEGATIONS

In a letter dated December 13, 2016, the NCAA submitted to UNC a Second Amended Notice of Allegations (hereinafter the "Third Notice of Allegations").[120] The Third Notice of Allegations followed an October 2016 appearance by UNC before the COI to address the jurisdictional arguments raised by UNC in its response to the Amended Notice of Allegations.[121] In rejecting UNC's jurisdictional and procedural arguments, the COI concluded:

> [T]he procedural claims raised by the institution do not bar the panel's consideration of this case on the merits. In sum, the panel concludes that the record supports that the infractions process is properly invoked to consider the merits of the case and neither the statute of limitations nor principle of fundamental fairness or finality bar the panel's consideration of this case.[122]

Addressing the NCAA's lack of jurisdiction argument, the Committee wrote:

> The NCAA's constitution and bylaws do not generally contemplate the infractions process

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[119] *Id.*
[120] *Third Notice of Allegations*, *supra* note 7.
[121] Greg Barnes, *NCAA COI Chair Greg Sankey's Intervention into UNC Case*, SCOUT.COM (Dec. 22, 2016), http://www.scout.com/college/north-carolina/story/1739981-sankey-s-intervention.
[122] Carol Cartwright et al., *University of North Carolina, Chapel Hill – Case No. 00231*, NCAA (Nov. 28, 2016), https://carolinacommitment.unc.edu/files/2016/12/November-28-2016-letter-from-Committee-on-Infractions.pdf.

> addressing quality and content assessments regarding academic courses. The NCAA membership, however, has recognized an appropriate space for the infractions process to address circumstances involving an athletics department, coaching or athletic staff members, or other institutional personnel improperly influencing student-athletes' eligibility or academic performance. This is particularly true where conduct could demonstrate orchestrated efforts to inappropriately establish, preserve or obtain eligibility. Those issues cut to the core of the NCAA Collegiate Model, the notions of integrity and fair play and the purpose of the NCAA.[123]

The letter also provided guidance that would enable the NCAA enforcement staff to modify its allegations in such a manner as to properly implicate academic allegations. The letter stated that the Committee would hear appropriately framed claims involving unethical academic assistance and academic misconduct where facts support the allegations.[124] The COI requested that the NCAA's enforcement staff make material changes to its allegations that "best position the case for the panel's consideration" and submit a second amended notice.[125]

In the aftermath of the COI's November 28, 2016 letter, the NCAA issued a Third Notice of Allegations that modified its previous notices.[126] This notice states, more sharply, that the conduct of institutional personnel in relation to the paper classes constituted unethical conduct resulting in an extra benefit to

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[123] *Id.* at 2.
[124] *Id.* at 3.
[125] *Id.*
[126] *See Third Notice of Allegations*, *supra* note 7.

student-athletes enrolled in those classes.[127] As discussed *infra*, the allegations attempt to create a nexus between violations of NCAA Bylaws 10.1 and 16.11.2.1.[128]

Unlike the First and Amended Notices of Allegations, the Third Notice of Allegations frames the conduct of Crowder and Nyang'oro so that it falls more clearly within the ambit of NCAA Bylaws 10 and 16. It states that between 2002 and 2011, Crowder and Nyang'oro, "violated the principles of ethical conduct and extra benefit legislation in connection with certain anomalous AFRI/AFAM courses."[129] Emphasizing the role of the athletics department in the paper classes, the Third Notice of Allegations states, "the institution and its athletics department leveraged the relationship with Crowder and Nyang'oro to obtain special arrangements for student-athletes in violation of extra-benefit legislation."[130]

The Third Notice of Allegations also asserts that Crowder and Nyang'oro administered and managed the paper classes so as to "delegate to athletics personnel the authority to manage material aspects of these courses for student-athletes in violation of ethical-conduct and extra-benefit legislation."[131] Noting that the paper classes required little or no work by students enrolled in them, the Third Notice of Allegations states the classes provided an extra benefit to student-athletes.[132] Even though the courses were available to all students, "Crowder and Nyang'oro worked closely and directly with athletics," resulting in student-athletes being "afforded greater access to the [paper classes] and enrolled in these courses at a disproportionately higher rate than students who were not athletes."[133] The Notice goes on to state that "[m]any at-risk student-athletes, particularly in the sports of football and men's basketball, used these courses

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[127] *See id.* at 1–2.
[128] *See id.* at 1–10.
[129] *See id.* at 1.
[130] *See id.*
[131] *See id.*
[132] *See id.* at 1–2.
[133] *See id.*

for purposes of ensuring their continuing NCAA academic eligibility [in violation of bylaws 10 and 16].”[134]

Attempting to establish the intimate nature of the working relationship between Crowder, Nyang’oro, and UNC’s athletic department, the Third Notice of Allegations asserts that UNC and its athletic department leveraged their relationship with Crowder and Nyang’oro to make special arrangements on behalf of student-athletes.[135] While general students worked with Crowder and Nyang’oro, “to access and complete the [paper classes], the institution and its athletics department provided student-athletes with special arrangements that were not generally available to the student body.”[136]

The Third Notice of Allegations provides examples of these special arrangements, which allegedly included athletic department personnel: (1) contacting Crowder and Nyang’oro to enroll student-athletes in the paper classes after the registration deadlines had passed; (2) obtaining assignments for the paper classes on behalf of student-athletes; (3) suggesting to Crowder assignments for student-athletes to complete; (4) submitting papers in the paper classes on behalf of student-athletes; (5) recommending grades to be given student-athletes enrolled in the paper classes; and, (6) requesting on behalf of student-athletes that certain paper classes be offered.[137]

The Third Notice of Allegations concludes that:

> [T]he excessive involvement by the athletic department in student-athletes’ access to and completion of these courses was a benefit not generally available to other students and relieved student-athletes of the academic responsibility of

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[134] *See id.* at 2.
[135] *See id.*
[136] *See id.*
[137] *See id.*

> a general student. In some cases, these courses influenced the student-athletes' NCAA academic eligibility.[138]

The Third Notice of Allegations also states that the scope and nature of the above conduct serves, in part, to demonstrate and support the NCAA's claims of lack of institutional control and "a failure [of UNC] to monitor the conduct and administration of its athletics programs."[139]

Thus, the allegations in the Third Notice of Allegations represents the NCAA's attempt to bring the conduct of UNC personnel and student-athletes within the scope of the ethical conduct and extra benefit legislation in effect when the conduct occurred.[140] Comparing the NCAA's First and Third Notices of Allegations, one commentator appropriately states that the Third Notice of Allegations:

> [P]resents a stronger, more focused case against the classes and the actions associated with them . . . . In [the Third Notice of Allegations], the enforcement staff made clear its stance that the athletic department had "excessive involvement" in the enrollment and completion of those classes, and such involvement was a violation of the spirit of NCAA rules . . . . [The Third Notice of Allegations] makes a clearer argument of a scheme, a conspiracy among Crowder, Nyang'oro and athletic department officials . . . . [The Third Notice of Allegations] states simply that Crowder and Nyang'oro worked closely and directly with athletics.
>
> Another key point: the enforcement staff based Allegation 1 on a supposed violation of bylaws related to sportsmanship and ethical

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[138] *See id.*
[139] *See id.* at 7.
[140] *See id.* at 1.

> conduct. Those bylaws—10.1 and 10.01.1—weren't used as a basis for any allegation in [the First Notice of Allegations]. Using them in [the Third Notice of Allegations] allows the enforcement staff and, eventually the committee on infractions, to condemn the classes as a contradiction to NCAA rules outlining sportsmanship and ethical conduct, which the NCAA would argue are paramount to college athletics.[141]

Now the discussion will turn to an examination of ethical conduct, extra benefits legislation, and NCAA infractions decisions.

### C. UNETHICAL CONDUCT AND EXTRA BENEFIT BYLAWS

NCAA Bylaw 10.1, which covers ethical conduct and was in effect during the relevant timeframe, imposed an obligation on individuals employed or associated with NCAA member institutions, including coaches and student-athletes, to "act with honesty and sportsmanship at all times . . . ."[142] Bylaw 10.1 also proscribed unethical conduct whether committed by a student-athlete or an institutional staff member.[143] Among the illustrations of unethical conduct were Bylaws 10.1(b) and (c), providing that unethical conduct included:

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[141] Andrew Carter, *UNC's Third Notice of Allegations: Questions and Answers*, THE NEWS & OBSERVER (Dec. 24, 2016, 8:00 AM), http://www.newsobserver.com/sports/college/acc/unc/unc-now/article122813999.html.

[142] *2010-11 NCAA Division I Manual,* NCAA (Aug. 1, 2010), http://www.ncaapublications.com/productdownloads/D111.pdf [hereinafter *2010-11 NCAA Manual*].

[143] *Id.* at 49–50.

> (b) Knowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete; [and] (c) Knowing involvement in offering or providing a prospective or enrolled student-athlete an improper inducement or extra benefit or improper financial aid."[144]

NCAA bylaw 16.01.1, in effect during the relevant timeframe, provided that a student-athlete who received an extra benefit, which NCAA legislation has not authorized, rendered the athlete ineligible to participate in all sports.[145] Bylaw 16 then defines an extra benefit:

> An extra benefit is any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation.[146] Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body (e.g., international students, minority students) determined on a basis unrelated to athletics ability.[147]

There is no shortage of examples of NCAA infractions decisions involving impermissible extra benefits. In 2016, the NCAA penalized Arkansas State University for the conduct of a former director of the school's men's basketball operations who provided excessive apparel valued at $5,165 to a men's

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[144] *Id.* at 49.
[145] *Id.* at 219.
[146] *Id.*
[147] *Id.*

basketball student-athlete.[148] The NCAA sanctioned Wichita State University for extra benefits when its former head coach and an administrative assistant provided baseball student-athletes with extra benefits consisting of discounted apparel and other clothing.[149] Other examples of impermissible extra benefits include: impermissible financial aid totaling $5,500 to three members of a men's golf team;[150] a representative of an institution's athletic interest (a booster) providing student-athletes with gifts, meals, money for tuition and for travel expenses;[151] and, assistant coaches and a booster providing lodging, airfare, other transportation and meals to student-athletes and a student-athlete's mother.[152]

In one of the most notable decisions in the NCAA's history, Heisman Trophy recipient and former University of Southern California running back, Reggie Bush, surrendered his Heisman Trophy due to allegations regarding extra benefits. The

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[148] *Arkansas State University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Apr. 13, 2016), https://www.ncaa.org/sites/default/files/2016_ArkansasStatePublicDecision_20160413.pdf.

[149] *Wichita State University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Jan. 29, 2015), https://www.ncaa.org/sites/default/files/Wichita%20State-Infractions%20DecisionPUBLIC.pdf.

[150] *Lamar University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Sept. 22, 2016), https://www.ncaa.org/sites/default/files/Sep2016INF_LamarPublicInfractionsDecision_20160922.pdf.

[151] *University of New Hampshire Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1, 3–5 (June 27, 2014), https://www.ncaa.org/sites/default/files/New%20Hampshire%20Public%20Decision.pdf.

[152] *Report No. 289 Alabama State University*, NCAA DIV. I INFRACTIONS APPEALS COMM. 3–6 (June 30, 2009), https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102516 (showing impermissible housing and meals); *Saint Francis University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1, 3 (Aug. 28, 2014), https://www.ncaa.org/sites/default/files/StFrancisPublicInfractionsDecision.pdf.

COI found that Bush, his family, and his friends received impermissible benefits consisting of cash, merchandise, airline and other transportation expenses (e.g., limousine services), lodging, meals, cash to purchase a car, and the purchase of a home for use by Bush's parents (i.e., under an arrangement whereby Bush's parents paid the agents only $1,400 of the approximately $4,500 monthly mortgage).[153]

In cases involving fraudulent academic behavior, NCAA bylaws regarding ethical conduct and extra benefits converged as illustrated in a 2016 infractions decisions regarding the University of Notre Dame.[154] There, a former athletic trainer committed academic misconduct by partially or totally completing assignments for two student-athletes. The two student-athletes, as well as a third student-athlete, were found to have committed academic misconduct individually by failing to adhere to the school's academic integrity policy.[155] The trainer provided impermissible academic assistance to six other athletes, two of whom violated Notre Dame's academic integrity policy.[156] When the former trainer completed coursework for six football student-athletes in eighteen courses during the 2011–12 and 2012–13 academic years, the COI concluded she provided academic benefits not expressly authorized by NCAA legislation.[157] The COI was not swayed by the former trainer's explanation that she only provided the additional assistance to "'help' the athletes in the institution's academic environment."[158] In this regard, the COI stated "[t]he best help she could have given the student-athletes and herself was to ask a question of the athletics compliance staff *before* engaging in behavior that would

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[153] *University of Southern California Public Infractions Report*, NCAA COMM. ON INFRACTIONS 4–6 (June 10, 2010), http://i.usatoday.net/sports/college/2010-06-10-usc-ncaa-report.pdf.
[154] *University of Notre Dame Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1 (Nov. 22, 2016), https://www.ncaa.org/sites/default/files/2016INF_PublicInfractionsDecisionNotreDame_20161122.pdf.
[155] *Id.* at 1–4, 6.
[156] *Id.* at 1–2, 4–6.
[157] *Id.* at 11.
[158] *Id.*

jeopardize the welfare of the institution and the eligibility of student-athletes."[159]

Similarly, the COI was not persuaded by Notre Dame's argument that the NCAA's actions in penalizing the university for academic misconduct intruded upon "the institution's autonomy over student academic misconduct."[160] According to the COI, the essence of Notre Dame's argument was that "purely academic decisions should not be affected by athletics considerations."[161] "The institution advances the argument that purely academic decisions by an institution could be affected or influenced with the incentive to consider potential NCAA infractions ramifications as it shapes its honor code."[162]

In response to Notre Dame's argument, the COI stated:

> The membership, through its bylaws, expects that member institutions will apply an academic integrity policy fairly to all students, including student-athletes. Bylaw 10 also requires a member institution to report instances of academic misconduct to the NCAA, which happened in this case. The institution's obligation to report such instances exists regardless of any potential penalty consequences. Moreover, the panel, on behalf of the membership, is mindful that institutions should do the right thing regardless of whatever potential NCAA infractions penalties or consequences may result due to any purported academic misconduct. That academic misconduct may implicate potential NCAA

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[159] *Id.*
[160] *Id.* at 11–12.
[161] *Id.*
[162] *Id.* at 11–12.

> violations or penalties does not mean that the NCAA somehow encroaches on purely academic determinations made by a member institution.
>
> Here, it is uncontested that the former student athletic trainer was employed by the institution's athletics department and her activities were subject to NCAA legislation in effect at the time of the violations. The institution conceded at the expedited hearing that the former student athletic trainer was an institutional staff member under the bylaws in effect at that time. The former student athletic trainer was therefore governed by NCAA rules and acted with disregard to the training she received. She had special access to student-athletes by the very nature of her employment in the athletics department, although she had no responsibilities in academics or academic support. It is uncontested that she assisted members of the football team in a way that elevated their academic performance, which was then deemed eventually to invalidate their academic performance, which had retroactive eligibility implications.[163]

In recent decisions involving Georgia Southern University,[164] Southern Methodist University,[165] and Southern Mississippi University,[166] institutional staff members, who completed

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[163] *Id.* at 12.

[164] *Georgia Southern Public Infractions Decision*, NCAA 3 (Jul. 7, 2016), https://www.ncaa.org/sites/default/files/2016INF_GeorgiaSouthernPublicDecision_20160707.pdf.

[165] *Southern Methodist University Public Infractions Decision*, NCAA 33 (Sept. 29, 2015), https://www.ncaa.org/sites/default/files/SMU%20Public%20Decision_Corrected%20Penalties.pdf.

[166] *University of Southern Mississippi Public Infractions Decision*, NCAA 16 (Oct. 7, 2016), https://www.ncaa.org/sites/

coursework for student-athletes, engaged in unethical conduct in violation of NCAA Bylaw 10.1-(b) by virtue of also having knowingly provided an extra benefit to student-athletes in violation of Bylaw 16.11.2.1, prohibiting extra benefits.

The assertions in the Third Notice of Allegations present a more viable case that UNC's conduct, if factually established, falls within NCAA Bylaws 10 and 16.

## VI. CONCLUSIONS AND IMPLICATIONS OF THE UNC CASE

Rather than attempt to predict the outcome of the NCAA's allegations, this article will make observations of what is perceived as the significance of the UNC case. An important implication of the case occurred in April 2016, when the NCAA Division I Council adopted the first major change to Division I academic integrity provisions since 1983.[167] The legislation, which became effective in August 2016, restricts what constitutes academic misconduct to those situations in which improper conduct is also a violation of an institution's academic conduct policies.[168] The NCAA Division I Council articulated the following rationale for the legislative change:

> Under the current regulatory structure, it can be unclear when academic misconduct involving student-athletes fall within the purview of the NCAA and when academic misconduct should be an institutional matter. This proposal will

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default/files/2016INF_MississippiInfractionsPUBLICDecision_20161007.pdf.

[167] Michelle B. Hosick, *DI Council Adopts Academic Integrity Proposal*, NCAA (Apr. 8, 2016, 12:27 PM), http://www.ncaa.org/about/resources/media-center/news/di-council-adopts-academic-integrity-proposal.

[168] *Id.*

> address membership concerns by expanding the application of academic misconduct legislation to any situation in which an institutional staff member is involved and replacing the current academic extra benefit analysis with a specific and limited definition of impermissible academic assistance. In addition, the proposal will require institutional policies and procedures regarding academic misconduct for the general student body and prohibit an individual from knowingly providing false or misleading NCAA Division I Academic Program information.[169]

As noted in the above quotation, to facilitate the new policy, NCAA member institutions are now required to develop academic integrity policies applicable to the entire student body and student-athletes, and adhere to those policies.[170] Thus, NCAA Bylaw § 14.02.1 states that "[p]ost-enrollment academic misconduct includes any violation or breach of an institutional policy regarding academic honesty or integrity (e.g., academic offense, academic honor code violation, plagiarism, academic fraud)."[171]

Misconduct that falls short of academic misconduct may nevertheless violate NCAA bylaws regarding impermissible academic assistance, which has been disassociated from extra benefit bylaws. Impermissible academic assistance is defined as "[s]ubstantial assistance that is not generally available to an institution's students and is not otherwise expressly authorized by Bylaw 16.3, which results in the certification of a student-athlete's eligibility to participate in intercollegiate athletics, receive financial aid, or earn an Academic Progress Rate point . . . ."[172] The illustrations of unethical conduct have been redefined,

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[169] *Academic Eligibility – Academic Misconduct*, COMPLIANCE CORNER 4 (Oct. 2, 2015), http://compliance.pac-12.org/wp-content/uploads/2015/11/Proposal-No.-2015-66.pdf.
[170] NCAA Manual, *supra* note 3, at 175.
[171] *Id.*
[172] *Id.* at 144.

in part, to omit the previous illustration relating to "knowing involvement in arranging for fraudulent academic credit . . . for a prospective or enrolled student-athlete."[173] This, combined with the untethering of impermissible academic assistance, means that the NCAA can charge an institution with impermissible academic assistance, even though the student-athlete who received the assistance is not affected.[174]

Commentators consider the new legislation a direct result emanating from the NCAA's academic related allegations against UNC. One commentator noted that historically, 'extra benefits' suggested "gaining something of monetary value, not free academic grades."[175] This commentator added that by charging UNC with impermissible benefits, the NCAA created confusion regarding the types of improper academic conduct that falls within the scope of NCAA bylaws.[176] The new legislation attempts to decrease the likelihood that any such confusion will occur in the future.

The UNC case also illustrates pressures placed on academic counselors to assist student-athletes in remaining athletically eligible. Apart from academic eligibility, which may translate into more wins than losses, other benefits result from successful student-athlete academic performance. The NCAA's plan to tie the distribution of revenue to colleges based on their athletes' academic performance, and the penalties associated with low Academic Progress Rates are other examples of the importance of student-athlete academic performance and the

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[173] *Id.* at 146; *see also 2010-11 Division I NCAA Manual*, *supra* note 142, at 49.
[174] Jon Solomon, *UNC Scandal Forces NCAA to Redefine its Academic Misconduct Policy*, CBSSPORTS.COM (Apr. 8, 2016), http://www.cbssports.com/college-football/news/unc-scandal-forces-ncaa-to-redefine-its-academic-misconduct-policy.
[175] *Id.*
[176] *Id.*

resulting pressure on those who provide academic assistance to student-athletes.[177] The UNC case brought to the forefront concerns relating to the oftentimes "cozy" relationship between athletes, academic advisors, and athletic departments as well as the influence that coaches and others within athletic departments exercise over athlete academic advisors.[178] Moreover, the UNC case demonstrates the careful balance that athlete academic advisors must try to achieve in providing assistance that does not hinder student-athletes' analytical development and self-sufficiency while at the same time providing them with the level of assistance that will enable them to take advantage of educational opportunities at their institutions.[179] From a practical perspective, the case has and is likely to continue to hasten the call for changes in the reporting structures of academic advisors as a means of lessening the influence of coaches.

Undoubtedly, as the UNC case reaches its conclusion, it will provide a good case study. A case study not only for what does and does not constitute ethical behavior in college athletics, but also for developing structures and techniques by which academic assistance can be provided to student-athletes that genuinely enables them to develop academically.

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[177] Michelle Brutlag Hosick, *DI to Distribute Revenue Based on Academics*, NCAA (Oct. 27, 2016 12:36 PM), http://www.ncaa.org/about/resources/media-center/news/di-distribute-revenue-based-academics.

[178] Jack Stripling, *Athletics Advisers' Ethical Dilemma,* THE CHRON. HIGHER EDUC. (Oct. 24, 2104), http://www.chronicle.com/article/Athletics-Advisers-Ethical/149613.

[179] *Id.*

# OVERVIEW OF SELECT LEGAL ISSUES WITH ESPORTS

James Gatto*
Mark Patrick**

## 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

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[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

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[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

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[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.,

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[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

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[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

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[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

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[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 impressible "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]

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[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

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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

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[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

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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.

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[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

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*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]

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[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

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[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]

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[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

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[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.

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

### 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.

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# "IT'S COMPLICATED": ANALYZING THE POTENTIAL FOR ESPORTS PLAYERS' UNIONS

Timothy Heggem*

## INTRODUCTION

Professional video game competition (more commonly known as "esports") has always lived in the shadow of its bigger, older, more ball-obsessed sibling: traditional professional sports (or, as I like to call it, "analog sports")—football, baseball, basketball, and the like. Pundits and fans understandably compare esports to analog sports, and draw inspiration for the former from the latter. Analog sports professionals generally hire talent agents, wear jerseys, and—coming to the focus of this article—unionize. According to many in the industry, esports professionals should do the same.

The exponential growth of esports in the late 2000s and early 2010s has been accompanied by both prescriptive and descriptive discussions of players' unions. Many say that players should unionize to protect their interests, especially since many of them are young and inexperienced when it comes to matters of contract negotiation and work conditions. Indeed, the average age for players of most esports titles is between 24 and 27 years of age.[1] Others, again seeing a tight analogy between esports and

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[1] Colin Campbell, *How eSports Fans Spend Their Time, and Their Money*, POLYGON (Nov. 5, 2015, 4:00 PM), http://www.polygon.com/2015/11/5/9676764/how-eSports-fans-spend-their-time-and-their-money.

analog sports, simply take the position that esports players' unions are inevitable.[2]

A discussion of players' unions is particularly relevant now in the wake of very public and very polarizing collective actions by team owners and players. *Exempli gratia*, I refer to the recent kerfuffle between the Professional Esports Association ("PEA"), a league formed by seven prominent esports teams, and twenty-five of their professional *Counter-Strike: Global Offensive* players. On December 21, 2016, esports veteran Scott "SirScoots" Smith published an open letter addressed to the PEA on behalf of these players.[3] The PEA responded soon thereafter.[4] As a result of these developments, we now hear once again a chorus of pundits, commentators, and even casual fans calling for players to "organize."

It is not my place or expertise to opine on the advisability of unions generally, let alone in the complicated, unsettled area of esports. I leave that to policymakers, economists, and ultimately the players themselves. But as a lawyer working at a law firm with labor and employment expertise, which has counseled many esports organizations and players over the last couple of years, I can offer some insights regarding the mechanics of unionizing and (more importantly) how unionizing might work in the esports context. In particular, I will discuss some complications that could arise for a players' union specifically in the esports context.

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[2] Dustin Steiner, *NRG Andy Miller: Legal Gambling and Player Unions Are Inevitable Parts of Esports Growth*, PVP LIVE (Mar. 1 2017, 11:54 PM), https://pvplive.net/c/nrg-andy-miller-legal-gambling-and-player-unions.

[3] Scott Smith, *An Open Letter to the Professional eSports Association, its Member Teams, and the Counter-Strike Community*, MEDIUM (Dec. 21, 2016), https://medium.com/@sirscootscs/an-open-letter-to-the-professional-eSports-association-its-member-teams-and-the-counter-strike-db2fb8b55f75#.p0ra022pq.

[4] Steven Cropley, *PEA Responds to Players Rights Movement with Open Letter of Their Own*, WWG (Dec. 23, 2016), http://wwg.com/esports/2016/12/23/pea-responds-to-players-rights-movement-with-letter-to-sirscoots.

## A BRIEF PRIMER ON UNIONS

In any discussion, it's important to start by defining your terms. So, what is a union? Unions fall under Section 501(c)(5) of the Internal Revenue Code, which exempts labor, agricultural, and horticultural organizations from taxation.[5] According to the Internal Revenue Service,

> General usage defines a labor organization as:
> - An association of workers
> - Who have combined to protect or promote the interests of the members
> - By bargaining collectively with their employers
> - To secure better working conditions, wages, and similar benefits.
>
> The term embraces *labor unions*, councils, and committees.[6]

As this definition implies, labor unions are a subset of labor organizations. The IRS explains, "'Labor union' is a somewhat narrower term than 'labor organization.' Labor unions are labor organizations, but not all labor organizations are labor unions. IRC 501(c)(5) labor organizations do not need to be recognized labor unions."[7]

For a discussion of labor unions specifically, we must turn to the National Labor Relations Act ("NLRA").[8] The NLRA governs the rights of employees to organize and to bargain

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[5] John Francis Reilly et al., *IRC 501(c)(5) Organizations*, *Exempt Organizations-Technical Instruction Program for FY 2003* J-4 (July 30, 2012), https://www.irs.gov/pub/irs-tege/eotopicj03.pdf.
[6] *Id*. (emphasis added).
[7] *Id*.
[8] 29 U.S.C. §§ 151–169 (2012)..

collectively with their employers through chosen representatives, and it is the NLRA that permits and limits the formation of labor unions.

Creating a labor union (as opposed to joining a pre-existing one) is difficult and almost always requires the assistance of outside specialists, such as union organizers. The process, simplified for the sake of brevity, generally proceeds as follows:

> The employees constituting the group that seeks union representation will attempt to organize informally through private discussions. This initial step can be a significant hurdle. It may be the case that only a small fraction of the employees want to unionize. And even if all of the employees want to unionize, they may not share common concerns.
>
> If a sufficient number of employees are interested in forming a union, they will then establish an organizing committee. The members of this committee will act as representatives for the employees who want to create the union.
>
> The employees will then need to hold an election. This process starts by employees signing authorization cards. At least thirty percent of the employees must sign the cards, and there are various requirements that the prospective union must satisfy in order for the signed cards to be considered valid.
>
> The employees then use the signed authorization cards to petition the National Labor Relations Board ("NLRB") for approval of a union election. The NLRB will then evaluate the petition.
>
> The NLRB will only conduct a union election if the group of employees constitutes an appropriate bargaining unit, meaning that the employees have a clear and identifiable community of interests. In determining the appropriateness of a bargaining unit, the NLRB will examine whether the employees have similar demands, hold similar positions, are non-management employees, and work in a close geographical area.
>
> If over fifty percent of the employees in the group petition for union formation, the employer(s) can choose

> to recognize the union in what is known as "card check," thereby waiving the secret ballot process. And, under the proposed Employee Free Choice Act ("EFCA"), [9] voluntary recognition by the employer would not be necessary—the union would form automatically. Alternatively, the NLRB can schedule a secret ballot election after the employees submit their authorization cards. The result of a secret ballot election is determined by simple majority vote.

If the union wins the election, the employer must recognize and collectively bargain with the union.

Collective bargaining is the process by which an employer is required by law to bargain in good faith with a union over all "terms and conditions of employment."[10] The NLRA makes it an unfair labor practice for the employer to attempt to bypass the union and negotiate directly with employees.[11] The collective bargaining process yields a collective bargaining agreement (or "CBA") – a negotiated agreement between a labor union and an employer that specifies various employment terms, such as wages, hours, working conditions, benefits, vacation, and paid leave. After a labor union and an employer execute a CBA, the employer cannot change anything detailed in the CBA without the union's approval. Moreover, the employer cannot make any unilateral changes to any "term or condition" of employment without violating the NLRA, with such violation

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[9] *See* H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).
[10] *See* 29 U.S.C. § 158(a)(5), (d) (2010).
[11] *See* N.L.R.B. v. Baltimore News Am. Div., Hearst Corp., 590 F.2d 554, 556 (4th Cir. 1979); N.L.R.B. v. Arkema, Inc., 710 F.3d 308, 320 (5th Cir. 2013); Wayne v. Pac. Bell, 238 F.3d 1048, 1055 (9th Cir. 2001).

subject to an NLRB remedial order.[12] The CBA lasts for a specific period. During this period, the union observes the employer to make sure the employer abides by the CBA. If the union believes an employer has breached the CBA, the union can file a grievance with the NLRB, which may result in further litigation.

Just as important as defining a "union," we should also define what a "union" is not. Here we come upon one of several common misconceptions on this topic. The terms "players' union" and "players' association" are often use interchangeably, but they are different. Associations fall under Section 501(c)(6) of the Internal Revenue Code, which exempts organizations such as business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues.[13] According to the Internal Revenue Service,

> To meet the requirements of IRC 501(c)(6) and Reg. 1.501(c)(6)-1, an organization must possess the following characteristics:
>
> 1. It must be an association of persons having some common business interest and its purpose must be to promote this common business interest;
> 2. It must be a membership organization and have a meaningful extent of membership support;
> 3. It must not be organized for profit;

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[12] *See* First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666, 674–75 (1981); Litton Fin. Printing Div. v. N.L.R.B., 501 U.S. 190, 198 (1991).

[13] John Francis Reilly et al., *IRC 501(c)(6) Organizations, Exempt Organizations-Technical Instruction Program for FY 2003* K-4 (July 30, 2012), https://www.irs.gov/pub/irs-tege/eotopick03.pdf. *See* 26 C.F.R. § 1.501(c)(6)-1 (2001).

> 4. No part of its net earnings may inure to the benefit of any private shareholder or individual;
>
> 5. Its activities must be directed to the improvement of business conditions of one or more lines of business . . . as distinguished from the performance of particular services for individual persons;
>
> 6. Its primary activity does not consist of performing particular services for individual persons; and
>
> 7. Its purpose must not be to engage in a regular business of a kind ordinarily carried on for profit, even if the business is operated on a cooperative basis or produces only sufficient income to be self-sustaining.[14]

In essence, an association furthers the business interests of its members through promotion and advocacy. As you can see from the list of characteristics above, an association does not possess the core feature of a union—namely, collective bargaining. This is not a trivial difference. A players' association, as effective as it might be, cannot legally require team owners to come to the bargaining table.[15]

## COMPLICATIONS OF FORMING AN ESPORTS PLAYERS' UNION

As mentioned at the outset of this article, it is all too easy to compare esports to analog sports. "Esports players should

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[14] *Id*.

[15] *Compare* Reilly 501(c)(5), *supra* notes 5–6 (collective bargaining is an essential feature of labor unions) *with* Reilly 501(c)(6), *supra* note 13 (labor associations do not have a collective bargaining feature).

form a union, just like professional athletes." But it is important to remember that there are some significant differences between esports and analog sports that could at least complicate the formation of esports players' unions.

**THE BARGAINING UNIT WRINKLE**

As briefly mentioned above, a critical step in the creation of a union is the formation—and the NLRB's recognition—of an appropriate bargaining unit. According to the NLRB, "[a] unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining."[16] This is a matter largely left to the broad discretion of the NLRB.[17] Given this discretion, various kinds of bargaining units can form. There can even be multi-employer bargaining units in what is called "centralized bargaining" if multiple employers are grouped together in voluntary associations.[18]

This raises several interesting questions in the esports context. The nature of competition and compensation varies significantly across esports titles. Given these differences, could all players form a single union that spans multiple esports titles? Such a union would be large (and probably powerful), but the NLRB might not find the requisite community of interest for such a diverse group to constitute an appropriate bargaining unit. And even if players' unions form around individual esports titles, there are still complications. Unlike analog sports, most of the major esports organizations field multiple teams for different esports titles. They each have a *League of Legends* team, a *Counter-Strike: Global Offensive* team, an *Overwatch* team, etc. If players' unions existed for each of those titles, existing esports organizations would need to enter into multiple CBAs—an

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[16] *Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, NAT'L LAB. REL. BOARD (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.
[17] *Id*.
[18] *See id*.

expensive, perhaps even cost-prohibitive, proposition. And if the players' unions get too small—for instance, Team SoloMid's five *League of Legends* players form a union—they may not have the enough power to do any good.

**THE INDEPENDENT CONTRACTOR WRINKLE**

Many esports players, if not most of them, are hired as independent contractors, and this could impact the ability of esports players to form a players' union. In 1947, Congress amended the NLRA to exclude independent contractors.[19] Although independent contractors can join a union, a bargaining unit consisting mostly of independent contractors does not enjoy the same privileges and protections as a bargaining unit consisting mostly of employees. For instance, such a union would lose its tax-exempt status.[20] Moreover, even if a minority of the union members are independent contractors, an employer is not required to bargain with a union regarding contract terms for independent contractors. Nor would independent contractors who strike have any protection against employer reprisals under the NLRA.

**THE GAME DEVELOPER WRINKLE**

In the analog sports context, there are basically two sides to the transaction: team owners (which compose leagues) and players. As such, it is feasible for owners and players to bargain collectively and produce CBAs that specify the terms and conditions of players' employment.

At first blush, the esports context seems analogous. There are team owners, and there are players that they employ.

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[19] 29 U.S.C. § 152(3) (1947).

[20] Reilly 501(c)(6), *supra* note 13 ("Where most of an organization's members are entrepreneurs or independent contractors, the organization does not meet the requirements of IRC 501(c)(5). Rev. Rul. 78-288, 1978-2 C.B. 179.").

But the esports context includes a powerful and increasingly influential third party: the game developers and publishers.

In the analog sports context, the manufacturers of the gaming apparatus (e.g., footballs and baseballs) have no say in how the gaming apparatus is used, much less in the employment terms and conditions of professional athletes. Team owners and players purchase this analog gaming apparatus and "own" it in the traditional sense. As such, the manufacturers of analog gaming apparatuses have no seat at the collective bargaining table.

The esports manufacturers context is markedly different. Team owners and players do not "own" the esports titles they play professionally. They play esports titles subject to software licenses governed by U.S. contract and copyright law, including Section 109(d) of the Copyright Act of 1976.[21] Software licenses merely constitute permission to use the software in ways that would otherwise constitute copyright infringement. This difference between analog sports and esports, although seemingly small, is—you will forgive the expression—a game-changer.

Game developers of esports titles have the power to restrict who plays their games and how their games are played. Accordingly, game developers have almost unfettered power to dictate terms to teams/owners. This, in turn, effectively gives game developers the power to specify all sorts of employment terms and conditions for professional esports players. Riot Games, the developer of *League of Legends* (one of the most popular and most played esports titles on the planet[22]), is probably first among game developers in this regard. It specifies all sorts of player contract requirements for organizations that compete in the North American Challenger Series and the League Championship Series, such as term duration, minimum

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[21] 17 U.S.C. § 109(d) (2008).

[22] *New Twitch Rankings: Top Games by esports and Total Viewing Hours*, NEWZOO (Jul. 14, 2016), https://newzoo.com/insights/articles/new-twitch-rankings-top-games-esports-total-viewing-hours.

player compensation, and grounds for contract termination.[23] And this appears to be an increasing trend among game developers. During the 2016 BlizzCon, Blizzard Entertainment announced that it would launch an official league for *Overwatch*, Blizzard's most recent esports title.[24] The *Overwatch* League is set to launch in the third quarter of 2017,[25] but Blizzard has already indicated that each player in the *Overwatch* League will have a contract specifying compensation and benefits.[26] It is not entirely clear what this means, and we do not yet know the details of how the *Overwatch* League will function. But there is certainly the possibility that Blizzard Entertainment, like Riot Games, will heavily influence the employment terms and conditions of professional *Overwatch* players.

Of course, game developer influence over employment terms and conditions does not preclude the existence of players' unions. For instance, a game developer could require minimum player compensation, and a players' union could collectively bargain for compensation above that minimum. But it is also possible to imagine game developers occupying space

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[23] Whalen Rozelle, *Proposed Changes to Player-Team Contracts for 2016*, LEAGUE OF LEGENDS ESPORTS (Nov. 18, 2015), http://www.lolesports.com/en_US/articles/proposed-changes-player-team-contracts-2016.

[24] Dan Szymborski, *Blizzard to Create Professional Overwatch League*, ESPN (Nov. 4, 2016), http://www.espn.com/esports/story/_/id/17968297/blizzard-announces-professional-overwatch-league.

[25] Philip Kollar, *Overwatch League is Blizzard's Ambitious New eSports Org, Includes City-Based Teams*, POLYGON (Nov. 4, 2016), http://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-eSports-org-includes-city.

[26] Tim Mulkerin, *Blizzard's New Professional 'Overwatch' League Comes with Minimum Salaries and Benefits*, MIC: TECH (Nov. 4, 2016), https://mic.com/articles/158637/blizzard-professional-overwatch-league-comes-with-minimum-salaries-and-benefits-esports#.W1nscyYn7.

traditionally occupied by players' unions. For instance, game developers sometimes fine, suspend, or even ban players for misbehavior.[27] Arguably, this would displace the penalty, termination, and dispute resolution procedures typically specified by a traditional players' union.[28] And, because the game developers do not employ professional esports players in any capacity, esports players could not collectively bargain with game developers as a labor union. Thus, potential conflicts between game developers and esports players' unions are foreseeable, and one can only speculate about how they would be resolved.

## CONCLUSION

Even in the face of seemingly simple questions, lawyers often find themselves in the uncomfortable position of having to reply, "It's complicated." In that same vein, questions about the formation of esports players' unions defy easy answers. Forming a labor union is complicated and expensive. Forming an esports players' union would be even more so, especially given the ever-changing state of the esports industry. Can esports players form unions under existing laws? If so, how? Much as I hate to say it, the answer is: it's complicated.

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[27] *See List of Competitive Rulings*, ESPORTSPEDIA (May 24, 2016), http://lol.esportspedia.com/wiki/List_of_Competitive_Rulings.
[28] *Collective Bargaining Agreement*, NFL (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.