

2012

## International Intellectual Property Rights and the Future of Global "E-Sports"

Sean Comerford

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Sean Comerford, *International Intellectual Property Rights and the Future of Global "E-Sports"*, 37 Brook. J. Int'l L. (2012).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol37/iss2/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS AND THE FUTURE OF GLOBAL “E-SPORTS”

## INTRODUCTION

Many Americans increasingly turn to video games in their free time. The video game industry now rivals the traditional entertainment behemoth—Hollywood<sup>1</sup>—and as early as 2007, Americans spent more money on video games than music.<sup>2</sup> Games such as *Call of Duty: Modern Warfare 2* have enjoyed extremely high levels of anticipation by gamers, enabling sales to reach astronomical heights immediately upon release.<sup>3</sup> Some commentators have even praised modern interactive video games by comparing them to great literature, equating games as creative achievements on par with more traditional artistic works.<sup>4</sup>

However, while domestic consumption of video games has grown rapidly in a very short time span, the United States is a somewhat “late adopter”<sup>5</sup> in comparison to East Asian countries.<sup>6</sup> For example, even a

---

1.

Last year will go down in history as the point at which the UK videogames industry pulled decisively away from cinema, recorded music and DVD sales to become the country’s most valuable purchased entertainment market, with combined software and hardware sales topping the £4bn mark for the first time: more than DVD and music sales combined, and more than four times cinema box office takings.

Tom Chatfield, *Videogames Now Outperform Hollywood Movies*, OBSERVER, Sept. 26, 2009, at 27.

2. Jacqui Cheng, *Report: Video Game Spending to Surpass Music Spending This Year*, ARS TECHNICA (June 23, 2007, 10:35 AM), <http://arstechnica.com/gaming/news/2007/06/report-video-game-spending-to-surpass-music-spending-this-year.ars>.

3. “Call of Duty: Modern Warfare 2” was released on November 6, 2010 and sold 8 million copies in its first week of release, reaching the \$1 billion sales mark in January 2010. Ben Fritz, *Call of Duty: Modern Warfare 2 Tops \$1 Billion in Sales*, L.A. TIMES (Jan. 14, 2010), <http://articles.latimes.com/2010/jan/14/business/la-fi-warfare-game14-2010jan14>.

4. Commentator Tom Bissell, a contributing editor at Harper’s Magazine, has had experiences “as gripping as any fiction [he has] come across” while playing video games. Chris Suellentrop, *Inside the Box*, N.Y. TIMES (June 18, 2010), <http://www.nytimes.com/2010/06/20/books/review/Suellentrop-t.html> (reviewing TOM BISSELL, *EXTRA LIVES: WHY VIDEO GAMES MATTER* (2010)). He even has described the game “Grand Theft Auto IV” as “the most colossal creative achievement of the last 25 years.” *Id.*

5. In the technology field, “late adopters” is a term used to describe those who “wait for years to pick up on a new gadget . . . sit on their hands, glowering at the new and refusing to buy.” Clive Thompson, *Why Gadget Makers Should Target Late Adopters*,

casual video game player would recognize that Japan occupies an extremely significant position in the gaming world.<sup>7</sup> Japan is the *de facto* international paragon of gaming and the birthplace of many characters familiar worldwide to gamers and non-gamers alike, such as Mario and Sonic the Hedgehog.<sup>8</sup> Japan has long been on the cutting edge of game development, but Western games have recently achieved ostensible parity with their Japanese counterparts.<sup>9</sup>

Western games' increasing prominence is as problematic as it is revolutionary. In particular, as these games grow in popularity worldwide, they become more susceptible to the danger of copying and distribution via online networks.<sup>10</sup> Traditional forms of software piracy, such as downloading via BitTorrent or other peer-to-peer file sharing protocols, remain a massive problem for computer games. *StarCraft II*, the primary game used as an example throughout this note, has been illegally downloaded through BitTorrent 2.3 million times as of mid-November 2010.<sup>11</sup>

However, illegal downloading of game software is not the only intellectual property issue facing game producers. Producers of games that allow for head-to-head, competitive play are starting to realize their games' potential in the world of professional gaming tournaments, known as "e-sports."<sup>12</sup> E-sports are a potentially profitable growth edge

---

WIRED MAG. (May 24, 2010, 12:00 PM), [http://www.wired.com/magazine/2010/05/st\\_thompson\\_techphobes](http://www.wired.com/magazine/2010/05/st_thompson_techphobes).

6. See Hiroko Tabuchi, *Japanese Playing a New Video Game: Catch-Up*, N.Y. TIMES, Sept. 20, 2010, at B1.

7. For example, the ubiquitous Nintendo Entertainment System was created in Japan and recently enjoyed the twenty-fifth anniversary of its North American launch on October 18, 1985 after being released in Japan two years earlier. Craig Kanalley, *Nintendo's 25th Anniversary*, HUFF. POST TECH (Oct. 18, 2010, 1:13 PM), [http://www.huffingtonpost.com/2010/10/18/nintendos-25th-anniversar\\_n\\_766690.html](http://www.huffingtonpost.com/2010/10/18/nintendos-25th-anniversar_n_766690.html). The system has sold 61 million units globally. *Id.*

8. See Tabuchi, *supra* note 6.

9. *Id.*

10. Phil Kollar, *StarCraft II Pirated 2.3 Million Times*, GAMEINFORMER (Nov. 15, 2010, 8:00 PM), <http://www.gameinformer.com/b/news/archive/2010/11/15/starcraft-ii-pirated-over-2-3-million-times.aspx>.

11. *Id.* This is particularly remarkable considering that the game files consist of 7.19 gigabytes of data, showcasing the ability of increased broadband speeds to facilitate infringement. *Id.* The incredibly high piracy rate of the game software, coupled with the massive file size, enabled the game to set a record for the most data sent over BitTorrent for any one file – 15.77 petabytes. *Id.* A petabyte is one million gigabytes. Jesus Diaz, *How Large is a Petabyte?*, GIZMODO (July 8, 2009, 7:30 AM), <http://gizmodo.com/5309889/how-large-is-a-petabyte>.

12. "E-sports" is an abbreviation of "electronic sports," a term used to refer to professional-level competitive computer gaming. See *Pros Clicking at War*, ECONOMIST (Oct. 28, 2010),

for game companies, allowing them to reap the benefits of a previously relatively underutilized aspect of their games while expanding their customer base by courting new fans that are drawn to high-level strategies and fast-paced gameplay.<sup>13</sup>

Sufficient protection of game companies' intellectual property rights—particularly those that may be compromised by the traditionally ignored or unknown use of games as competitive vehicles—is critical to the ability of e-sports and the gaming industry to grow. Copyright law protects all “original forms of expression,” including computer games, and governs who controls the right to their use.<sup>14</sup> These rights reward the creation of new works but are temporally limited in an effort to encourage authors' creativity and thereby enrich the public.<sup>15</sup> E-sports has the potential to be a model application of this utilitarian view of copyright law, giving game producers the incentive to produce compelling and competitively balanced games and run high-energy tournaments for the enjoyment of fans worldwide.

Unfortunately, the nature of the current international intellectual property landscape is too inflexible to address the modern challenges that face producers of e-sports games. When promoting their games as modes of competition abroad,<sup>16</sup> unrelated parties may organize, charge for, and

---

[http://www.economist.com/node/17363780?story\\_id=17363780&CFID=151325369&CF\\_TOKEN=53530069](http://www.economist.com/node/17363780?story_id=17363780&CFID=151325369&CF_TOKEN=53530069). Various organizations have been set up to help promote e-sports as a legitimate mode of competition, including the International e-Sports Federation based in Seoul, South Korea. See *Description of the International e-Sports Federation*, INT'L E-SPORTS FED'N, <http://www.ie-sf.com/eng/company/overview.asp> (last visited Jan. 2, 2010).

13. See *Pros Clicking at War*, *supra* note 12.

14. “The law of copyright protects various ‘original forms of expression,’ including . . . computer software programs.” William Fisher, *Theories of Intellectual Property*, HARV. L. SCH. 1 (2001), <http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf>.

15. The utilitarian theory of intellectual property rights focuses on “the maximization of net social welfare.” *Id.* at 2. Therefore, the rights granted by copyright law are in a sense an attempt “to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.” *Id.*

16. Problems with international enforcement of intellectual property rights has led to the creation of organizations such as the International Intellectual Property Alliance (“IIPA”), which was formed in 1984 as a “private sector coalition . . . of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers.” *Description of the IIPA*, INT'L INTELL. PROP. ALLIANCE [IIPA], <http://www.iipa.com/aboutiipa.html> (last visited Oct. 15, 2011). The Entertainment Soft-

profit from tournaments that rely on a game producer's intellectual property as the mode of competition. This Note will attempt to identify changes that should be made to protect the future of e-sports as a novel form of entertainment and source of business expansion.

Section I of this Note will introduce the example of one modern e-sports game, *StarCraft II*, and how its American designer, Blizzard Entertainment, struggles to protect its copyright control over *StarCraft II* and its predecessor game in South Korea. The *StarCraft* franchise is a particularly salient example of intellectual property in need of protection because of its long-established status as a popular e-sport in South Korea,<sup>17</sup> a country with a history of intellectual property infringement problems.<sup>18</sup> Section II will discuss existing treaties under international law that deal with intellectual property, and interpret their text with an eye towards the enforcement problems endemic to the global use of computer programs, while assessing the treaties' relative strengths and weaknesses. Section III will address the United States-Korea Free Trade Agreement, a bilateral treaty that supplements existing public international law, and evaluate how it may affect problems that exist in the current system. Finally, Section IV presents a conclusion regarding what changes should be made to the current public international law intellectual property regime in order to increase flexibility and strike a balance between the rights of game creators and game players sufficient to protect the growth of the burgeoning worldwide e-sports market.

#### I. BACKGROUND: BLIZZARD ENTERTAINMENT, STARCRAFT II, AND SOUTH KOREA

A shining example of a country where video games have long been accepted as mainstream entertainment is South Korea.<sup>19</sup> In South Korea,

---

ware Association ("ESA") is a member of the IIPA, indicating the game industry's interest in promoting healthy international intellectual property rights enforcement. *Id.*

17. The Global StarCraft II League ("GSL"), which takes place in Seoul, is the biggest e-sports tournament in the world in terms of prize money. *Pros Clicking at War*, *supra* note 12. GSL Season 1 champion Kim Won-Ki, better known to StarCraft II fans by his Korean language gamer ID which translates to "FruitDealer," earned roughly \$87,000 for his efforts. *Id.*

18. South Korea has what can be described as a "massive online piracy problem." IIPA, 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT: SOUTH KOREA (2009) [hereinafter IIPA REPORT: SOUTH KOREA].

19. Note that South Korea's official name is the Republic of Korea. *Korea and the United Nations: Introduction*, U.N., <http://un.mofat.go.kr/eng/am/un/bilateral/intro/index.jsp> (last visited Oct. 15, 2011). This point will become relevant later in this Note when discussing treaties, as South Korea uses its official name when becoming a party to international agreements.

video games are not simply one entertainment option among many, but are the diversion of choice.<sup>20</sup>

In South Korea, however, certain video games transcend mere entertainment.<sup>21</sup> Video game competitions—in particular, competitions featuring a “real-time strategy game”<sup>22</sup> called *StarCraft*—are frequently broadcast on television and therefore expose a large portion of the population to e-sports.<sup>23</sup> Professional gaming teams retain players to train for and compete in tournaments and enjoy major corporate sponsorships.<sup>24</sup> Players even wear jerseys while competing that are adorned heavily with sponsorship logos, much like the jumpsuits racecar drivers wear in the United States.<sup>25</sup> These professional e-sports competitions are so well in-

---

20. South Korea, as “the world’s most wired country,” has “one of the world’s highest penetration rates for high-speed broadband connections at homes,” and is “saturated with PC rooms where gamers spend long hours in front of computer monitors.” Christine Kim, *South Korea to Put Curfew on Online Games for Kids*, REUTERS (Apr. 13, 2010, 2:34 PM), <http://in.reuters.com/article/idINTRE63C1AJ20100413>. Indeed, video games are so widely played in South Korea that the South Korean government has recently announced measures it will take to curb excessive game playing, including cutting off nighttime game access to school-aged children. *Id.* Such measures have become favored after high-profile gaming related tragedies made headlines, including the “sensational case” of starvation of a baby whose parents were too absorbed in an online game to properly feed their child. *Id.*

21. See *Pros Clicking at War*, *supra* note 12.

22. Real-time strategy games (commonly referred to by players as “RTS” games) are games that eschew turn-based gameplay, such as the strategic style found in board games, for gameplay that focuses on the uniform passage of time in relation to all players. Bruce Geryk, *A History of Real-Time Strategy Games*, GAMESPOT, [http://www.gamespot.com/gamespot/features/all/real\\_time](http://www.gamespot.com/gamespot/features/all/real_time) (last visited Oct. 15, 2011). Describing how this style of play affects a player’s strategic decision-making, Geryk writes, “Time was limited, and if you wasted yours, your opponents would probably be taking advantage of theirs.” *Id.* In other words, in a real-time strategy game, the player capable of the smoothest multitasking and time management tends to win. This contrasts with board games, where players tend to have time to deliberate on what move to make next.

23. *StarCraft II Shakes up S. Korea’s ‘National Sport,’* CNN TECH: DIGITAL BIZ (July 27, 2010, 5:00 PM), <http://www.cnn.com/2010/TECH/gaming.gadgets/07/27/south.korea.starcraft> [hereinafter *StarCraft II Shakes up S. Korea*].

24. *Id.*

25. See [GSL] ‘Pride’ - Finals Preview, TEAMLIQUID (Dec. 18, 2010, 3:17 PM), [http://www.teamliquid.net/forum/viewmessage.php?topic\\_id=177682](http://www.teamliquid.net/forum/viewmessage.php?topic_id=177682) (depicting tournament finalist Park Seo Yong, known as TSL\_Rain, wearing his “Team SCV Life” jersey laden with sponsorship logos). Sponsorships are key to being able to pay players. See *Pros Clicking at War*, *supra* note 12.

tegrated into the South Korean entertainment landscape that *StarCraft* has been hailed as the “national sport” of Korea.<sup>26</sup>

The grand success of *StarCraft* as an e-sport in South Korea came somewhat unexpectedly amid the Asian Financial Crisis of the 1990s.<sup>27</sup> In such a bleak economic landscape, video game competitions—relatively cheap to produce and accompanied by a wide, untapped talent pool of players—flourished.<sup>28</sup> As a result of its broad popularity, *StarCraft*'s successor, *StarCraft II*, has become an international hit, selling over three million copies globally in its first month of release.<sup>29</sup> The wild success of a game in a country where games are generally beloved and broadband Internet connections are far faster than those commonly available in the United States is not necessarily so astonishing.<sup>30</sup>

What is astonishing, however, is that *StarCraft* and *StarCraft II* are not Korean creations, but are produced by an American company, Blizzard Entertainment.<sup>31</sup> These two games have still managed to reach an amaz-

---

26. *StarCraft II Shakes up S. Korea*, *supra* note 23.

27. *Id.*

28. *Id.*

29. These sales figures are according to an official Blizzard Entertainment press release. Press Release, Blizzard Entertainment, *StarCraft II: Wings of Liberty One-Month Sales Break 3 Million Mark* (Sept. 1, 2010), *available at* <http://us.blizzard.com/en-us/company/press/pressreleases.html?id=2847879>; *see also* Kollar, *supra* note 10 (highlighting the contrast between 3 million legitimate sales and 2.3 illegal downloads).

30. South Korea has long been known as a “broadband society,” in the past greatly outpacing the United States in terms of technological saturation. John Borland & Michael Kanellos, *South Korea Leads the Way*, CNET NEWS (July 28, 2004, 4:00 AM), [http://news.cnet.com/South-Korea-leads-the-way/2009-1034\\_3-5261393.html](http://news.cnet.com/South-Korea-leads-the-way/2009-1034_3-5261393.html). As early as 2004, the average broadband connection in a South Korean apartment already reached about eight megabits per second—approximately eight times faster than the average broadband connection in an American household at the time. *Id.* Internet gaming was a major factor leading to this extensive broadband development, and use of Internet cafés, called “PC Baangs” (personal computer rooms) in Korean parlance, is largely driven by Internet gaming, with PC Baang use accounting for 43% of Korean gaming revenue in 2002. *Id.*

31. Blizzard Entertainment released the original *StarCraft* on March 31, 1998. *StarCraft*, BLIZZARD ENT., <http://us.blizzard.com/en-us/games/sc/> (last visited Oct. 15, 2011). *StarCraft II* was released on July 27, 2010. *StarCraft II*, BLIZZARD ENT., <http://us.blizzard.com/en-us/games/sc2/> (last visited Oct. 15, 2011). Blizzard Entertainment now comprises one portion of Activision Blizzard, a new company formed as the result of a merger between Activision and Blizzard Entertainment. *Our Company*, ACTIVISION, BLIZZARD, <http://www.activisionblizzard.com/corp/b/aboutUs/ourCompany.html> (last visited Oct. 15, 2011). In the interest of simplicity, I will refer only to Blizzard Entertainment as a separate entity in this note, as the *StarCraft* franchise is only related to Blizzard.

ing level of popularity and ubiquity.<sup>32</sup> *StarCraft* has become such a phenomenon in South Korea that its characters are even used to teach English.<sup>33</sup> In other words, the “gaming capital”<sup>34</sup> of the *StarCraft* franchise in Korea is extremely high—Blizzard has invested much in South Korea with its promotion of *StarCraft*, and in return, South Koreans have invested their energy in *StarCraft* tournaments and made players into celebrities.

*StarCraft II* was recently released and its popularity has not yet solidified.<sup>35</sup> However, its emerging popularity is backed by a large wave of support for its predecessor, and many professional players from *StarCraft* are transferring over to *StarCraft II*, bringing their existing fan bases along with them.<sup>36</sup> Because of the fervor and long-standing pool of gaming capital and consumer goodwill surrounding the original *StarCraft*, Blizzard has a massive stake in the profitability of its new *StarCraft II* in South Korea.<sup>37</sup> “Accrual of gaming capital enhances the value

32. See *StarCraft II Shakes up S. Korea*, *supra* note 23.

33. Borland & Kanellos, *supra* note 30.

34. “Gaming capital” is a term used to describe the investment that an individual makes in the social enjoyment of a game, particularly when “demonstrating game skill for spectators . . . or becoming recognized as an expert.” Dan L. Burk, *Copyright and Paratext in Computer Gaming 2* (UC Irvine Sch. of Law, Research Paper No. 2009-22), available at <http://ssrn.com/abstract=1407640>. Thus, *StarCraft* has a large amount “gaming capital” in South Korea as a game that allows its players to reach professional status and earn wide recognition as gaming celebrities.

35. *StarCraft II* was released on July 27, 2010. *StarCraft II*, *supra* note 31. Since the game’s release, three seasons of the Global *StarCraft II* League have occurred, but the tournament system created by GomTV is scheduled to ramp up into more frequent tournaments in 2011, where players will be categorized into ranks based on their performance in the 2010 tournaments with a chance for promotion or demotion due to continued success or failure. See *2011 GSL for Code S and Code A*, GOMTV.NET, <http://www.gomtv.net/2010gslopens3/news/297> (last visited Oct. 15, 2011).

36. Recent transfers include legendary players such as Lee Yoon Yeol (“NaDa”) who enjoyed incredible success in professional competition in the original game and is a top earner as a result, making an estimated \$200,000 yearly. See *Pros Clicking at War*, *supra* note 12; see also *NaDa*, LIQUIPEDIA, <http://wiki.teamliquid.net/starcraft/Nada> (last visited Oct. 15, 2011) (a detailed fan-made page with information about NaDa’s tournament success).

37.

*StarCraft* is a long-running staple of professional tournament gaming. This is especially the case in South Korea, where the game’s mass popularity played a major role in the birth of the professional-gaming and game-broadcasting phenomena, as well as serving as one of the key drivers behind the growth of the [PC Baang] business.

*Company Profile*, BLIZZARD ENT., <http://us.blizzard.com/en-us/company/about/profile.html> (last visited Oct. 15, 2011). Because of *StarCraft I*’s



and enjoyment of the game, driving adoption of the game, participation in the game, and ultimately increasing revenue under whatever business model is associated with the game.”<sup>38</sup> Therefore, independent of international law, Blizzard has taken some steps on its own in an effort to protect its reservoir of gaming capital.<sup>39</sup> First, Blizzard signed an agreement with a Korean company, GomTV, granting them the exclusive right to host and subsequently broadcast e-Sports tournaments featuring Blizzard games in South Korea.<sup>40</sup> The exclusivity contract is already bearing fruit as three seasons of the GomTV-produced StarCraft II Open tournament (also known as the Global StarCraft II League) took place in Seoul this year.<sup>41</sup> The success of these tournaments portends a successful future for *StarCraft* and other e-Sports in Korea, given the substantial prize purse for each tournament of 200,000,000 South Korean *won* (approximately \$170,000).<sup>42</sup> Corporate tournament sponsorship is also present, with Intel sponsoring season one<sup>43</sup> and Sony Ericsson sponsoring two and three.<sup>44</sup> Additionally, as part of Blizzard’s agreement with GomTV, any Korean tournament organizers other than GomTV must negotiate directly with

---

“mass popularity,” Blizzard clearly wants the “hotly anticipated” (and now released) StarCraft II to be its next Korean hit product. *Id.*

38. Burk, *supra* note 34.

39. This Note will focus on infringement that is harder to prevent with prophylactic measures, particularly unsanctioned tournaments. For example, all StarCraft II play is channeled through Blizzard’s Battle.net service and requires a legitimate account to be registered, which largely eliminates the threat from “traditional” methods of misuse such as illegal copying and downloading of the game software itself by requiring that players be “logged in.” Kollar, *supra* note 10.

40. Letter from Mike Morhaime, Pres., Blizzard Ent., to Korean StarCraft Cmty. (May, 27, 2011) [hereinafter Mike Morhaime Letter], available at [http://www.teamliquid.net/forum/viewmessage.php?topic\\_id=127674](http://www.teamliquid.net/forum/viewmessage.php?topic_id=127674).

41. See generally GOMTV, <http://www.gomtv.net> (last visited Oct. 15, 2011) (GOMTV’s English-language tournament website, featuring videos of matches, interviews with players, and news about upcoming tournaments); see also *TG-Intel StarCraft II Open Season 1*, GOMTV.NET, <http://www.gomtv.net/2010gslopens1/> (last visited Jan. 2, 2012).

42. Michael Radford, *GomTV Announces Huge Cash Prize for SC2* (Aug. 5, 2010, 2:10 PM), [http://www.sk-gaming.com/content/30271-GomTV\\_announces\\_huge\\_cash\\_prize\\_for\\_SC2](http://www.sk-gaming.com/content/30271-GomTV_announces_huge_cash_prize_for_SC2).

43. See *TG-Intel StarCraft II Open Season 1*, *supra* note 41.

44. See *Sony Ericsson STARCRAFT II Open Season 2*, GOMTV.NET, <http://www.gomtv.net/2010gslopens2/> (last visited Nov. 13, 2011); see also *Sony Ericsson StarCraft II Open Season 3*, GOMTV.NET, <http://www.gomtv.net/2010gslopens3/> (last visited Nov. 13, 2011).

GomTV for the rights to run a tournament,<sup>45</sup> essentially establishing GomTV as Blizzard's dedicated e-sports partner in Korea.<sup>46</sup>

Finally, to prevent the use of *StarCraft II* in unauthorized commercial tournaments, all users of *StarCraft II*, whether participating in a tournament or not, are restricted by the Battle.net Terms of Use (hereinafter "Terms of Use").<sup>47</sup> Battle.net is a service comprising a "community of millions" of players through which Blizzard manages all of its games' online play.<sup>48</sup> The legal effect of Battle.net is that it acts as a "gatekeeper," requiring players of any Blizzard game to play while logged in after agreeing to certain terms and conditions, and permission to play is contingent on continued compliance with those terms.<sup>49</sup> *StarCraft II* is also played through Battle.net using this system; before first playing the game, new players must assent to the Terms of Use in order to proceed.<sup>50</sup>

Unsurprisingly, the Terms of Use include many provisions apparently designed to preserve Blizzard's commercial interest in its games.<sup>51</sup> The Terms of Use grants players a "limited license" to use Battle.net strictly for "non-commercial entertainment purposes."<sup>52</sup> This limited license is

---

45. GomTV & Blizzard Ent., GomTV/Blizzard Sign Exclusive Broadcast Agreement (May 27, 2010) [hereinafter GomTV/Blizzard Agreement], available at [http://www.teamliquid.net/forum/viewmessage.php?topic\\_id=127674](http://www.teamliquid.net/forum/viewmessage.php?topic_id=127674).

46. Mike Morhaim Letter, *supra* note 40.

With the release of 'StarCraft II: Wings of Liberty' approaching, we decided we could not delay any further in finding a trustworthy partner who respected our intellectual property rights, and decided it was time to find a new way altogether. As a result of that decision, we signed a contract with GomTV which we announced today, which gives them the exclusive rights to hold and broadcast Blizzard game tournaments in Korea. We have cooperated closely with GomTV in the past, and discovered in the process that we have similar values and goals in e-Sports. Also, we believe that GomTV is a capable partner with whom we can not only advance e-Sports in Korea, but in the entire world as well.

*Id.*

47. *Battle.net Terms of Use*, BLIZZARD ENT. (May 26, 2010), <http://us.blizzard.com/en-us/company/about/termsfuse.html>.

48. *What is Battle.net?*, BATTLE.NET, <http://us.battle.net/en/what-is/> (last visited Oct. 15, 2011).

49. Users of any "authorized, unmodified [Blizzard] Game client" may only use Battle.net subject to "continuing compliance with the Terms of Use agreement." *Battle.net Terms of Use*, *supra* note 47, § 1.

50. *Id.*

51. Use of Battle.net is limited only to "non-commercial entertainment purposes" and may not be utilized "for any other purpose." *Battle.net Terms of Use*, *supra* note 47, § 1.

52. The relevant text reads:

also subject to further limitations, including a prohibition on “exploit[ing] [Battle.net], a Game or any part thereof for any commercial purpose . . . without the express written consent of Blizzard.”<sup>53</sup> Finally, and most importantly, an additional limitation forbids the use of any Battle.net game, which includes *StarCraft II*, “for any ‘e-sports’ or group competition sponsored, promoted or facilitated by any commercial or non-profit entity without Blizzard’s prior written consent.”<sup>54</sup> In order for a tournament organizer to obtain such consent, he or she must first fill out an application form on Blizzard’s dedicated e-sports website.<sup>55</sup> Based on the answers provided in the form, Blizzard will either approve or deny the application.<sup>56</sup> While Blizzard only acknowledges that it takes into account the “scope of the tournament,”<sup>57</sup> the questions asked on the form indicate that the amount of money involved factors into the decision of whether or not to sanction a tournament.<sup>58</sup> However, in the Korean context, Blizzard has contracted with GomTV for exclusive tournament organization rights in South Korea.<sup>59</sup> This means that even small-time tournament organizers seeking to run a tournament without Blizzard’s permission infringe Blizzard’s right to run tournaments as it chooses in

---

Subject to your agreement to and continuing compliance with the Terms of Use agreement, you may use the Service solely for your own non-commercial entertainment purposes by accessing it with a web browser or an authorized, unmodified Game client. You may not use the Service for any other purpose, or using any other method.

*Battle.net Terms of Use*, *supra* note 47, § 1 (“Grant of a Limited License to Use the Service”).

53. *Id.* § 2, para. B.

54. *Id.* § 2, para. C.

55. *E-Sports Tournament Submission Form*, BATTLE.NET, <http://us.battle.net/en/tournament/form> (last visited Oct. 15, 2011) (interactive form allowing users to submit a request to hold a tournament for any Blizzard product).

56. “Most general tournament requests will be approved instantly. Additional review time may be required before the approval of a license request, depending on the scope of the tournament and the number of incoming requests.” (*Sticky Locked*) *StarCraft II Tournament License Reminder*, BATTLE.NET: OFFICIAL BLIZZARD FORUM (Aug. 16, 2010, 4:19 PM), <http://us.battle.net/sc2/en/forum/topic/374722123>.

57. *Id.*

58. The form asks many questions relating to monetary issues. *E-Sports Tournament Submission Form*, *supra* note 55. It asks if a fee will be charged to watch the tournament, if a fee will be charged to participate in the tournament, if the tournament will offer rewards valued at over five thousand dollars, if the tournament will be televised, and if the tournament will have sponsors. *Id.*

59. Mike Morhaim Letter, *supra* note 40.

South Korea, even if the tournament is purely put on for fun and provides no prizes.<sup>60</sup>

While Blizzard has taken some steps on its own to protect its interests, due to the international nature of its game, it is not necessarily dependent on its privately instituted prophylactic measures to shield their games from misuse—it may be able to utilize international law to resolve disputes. What type of protection is afforded Blizzard’s intellectual property under public international law?

## II. THE CURRENT INTERNATIONAL INTELLECTUAL PROPERTY LANDSCAPE

International intellectual property protection of technological works is a topic that rests at the forefront of legal scholarship—particularly with the advent of cheap, widely accessible broadband Internet connections, violation of copyright by overseas actors is a relatively nascent, but nevertheless rampant problem.<sup>61</sup> For example, it would have been virtually impossible for *StarCraft II*’s game files—a 7.19 gigabyte package—to be downloaded 2.3 million times<sup>62</sup> before the advent of BitTorrent technology, which was first invented in April 2001 by Bram Cohen and only entered widespread use in 2004.<sup>63</sup>

However, for creators of the underlying video games used in e-sports, illegal downloading is not necessarily the only (or even primary) source of concern. A company such as Blizzard can shield itself from piracy by requiring all players to register and exclusively play online while “logged

---

60. Blizzard’s understanding of their agreement with GomTV indicates that simply holding tournaments falls within the bounds of the license agreement. *See id.*

61. BitTorrent, a program that enables speedy downloads of large files, was only invented in April of 2001 and is already one of the biggest sources of worldwide Internet traffic. *A History of BitTorrent*, MOZY, <http://mozy.com/infographics/a-history-of-bittorrent> (last visited Oct. 15, 2011).

62. Kollar, *supra* note 10.

63. BitTorrent technology, unlike direct peer-to-peer downloads, which are limited by the sender’s connection speed, allows a user to receive his or her file in a fragments from multiple sources. *A History of BitTorrent*, *supra* note 61. Therefore downloads become “cooperative,” speeding up downloads drastically. *Id.* This technology is very beneficial when used for legitimate purposes—Blizzard actually uses BitTorrent technology to deliver updates for *StarCraft II* and other games more quickly to users. *Id.* The irony is that the same technology also has been used to allow the download of massive pirated files such as its own game. *Id.* Moreover, the cooperative of BitTorrent downloads may be located anywhere worldwide, making Internet piracy a truly global problem; indeed, BitTorrent traffic is estimated to make up 27% to 55% of global Internet traffic and 45% to 78% of global peer-to-peer file transfer traffic, depending on the geographic region. *Id.*

in”<sup>64</sup>—effectively locking players with pirated copies out of the system. As such, Blizzard requires *StarCraft II* players to remain logged in to Battle.net.<sup>65</sup> However, it is much harder to prevent groups from running unauthorized tournaments using technological means, meaning that the law may provide the only recourse, yet the threat of legal action does not necessarily alleviate the problem. For example, even as recently as October 26, 2010, OnGameNetwork, a group without the rights to hold *StarCraft* tournaments under the Blizzard/GomTV agreement,<sup>66</sup> announced that it would run its 2010 “Bacchus” league without Blizzard or GomTV’s consent, prompting a private lawsuit.<sup>67</sup> While such private-sphere, local remedies do exist, this Note demonstrates that current treaties are insufficient to create efficient, cost-effective solutions to the abuse of game manufacturers’ intellectual property for unauthorized but profitable e-sports tournaments. This is largely because current treaties have not taken sub-governmental intellectual property concerns into account.

Several sources of public international law make up the current world intellectual property protection scheme. The United Nations administers most existing international intellectual property treaties through the World Intellectual Property Organization (hereinafter “WIPO”).<sup>68</sup> WIPO is an agency of the United Nations that was created in 1967 in order to advance the global defense of intellectual property.<sup>69</sup> As part of its duties, WIPO administers twenty-four different treaties related to intellectual property.<sup>70</sup> This Note will consider what promise the text of two of these treaties, the Berne Convention for the Protection of Literary and Artistic Works (hereinafter “Berne Convention”) and the WIPO Copyright

---

64. All *StarCraft II* users must be logged in to Battle.net while playing, making pirated copies of the game largely useless without even further hacking, somewhat alleviating software piracy problems. See Kollar, *supra* note 10.

65. *Battle.net Terms of Use*, *supra* note 47, § 1 (“Grant of a Limited License to Use the Service”).

66. “With the recent agreement, the rights to operate and broadcast all Blizzard game leagues including *StarCraft II* belong to GomTV, and [all tournaments] must be run after negotiating with GomTV.” GomTV/Blizzard Agreement, *supra* note 45.

67. *Blizzard Sues OGN*, TEAMLIQUID, [http://www.teamliquid.net/forum/viewmessage.php?topic\\_id=166260](http://www.teamliquid.net/forum/viewmessage.php?topic_id=166260) (last visited Oct. 15, 2011).

68. See *What is WIPO?*, WORLD INTELL. PROP. ORG. [WIPO], [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html) (last visited Oct. 15, 2011).

69. *Id.*

70. *WIPO-Administered Treaties*, WIPO, <http://www.wipo.int/treaties/en> (last visited Oct. 15, 2011) (website providing a list of all WIPO-administered treaties and links to their full text).

Treaty (“WCT”) provides for the protection of e-sports as an activity worth protecting with copyright law.

#### A. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works (hereinafter “Berne Convention”) is the primary treaty under WIPO administration that addresses copyright issues.<sup>71</sup> The Berne Convention, first created in 1886, was last amended in 1979.<sup>72</sup> In light of the rapid development of technology since the nineteenth century, and again since the late 1970s, the Berne Convention is simply outdated. While the Berne Convention purports to protect an extremely wide range of intellectual property, embracing “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,”<sup>73</sup> it does not facially protect rights related to computer programs<sup>74</sup>—therefore it also does not reach e-sports. The popular explosion of games as a “form of expression” could not have been contemplated at the time of the Berne Convention’s inception or at the time of its 1979 amendment.<sup>75</sup>

---

71. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1866)*, WIPO, [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html) (last visited Oct. 15, 2011).

72. *Id.*

73. Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), July 14, 1967, 828 U.N.T.S. 223, 227 [hereinafter Berne Convention], *available at* <http://www.wipo.int/treaties/en/ip/berne>.

74. The most recent iteration of the Berne Convention defines “literary and artistic works” as:

[E]very production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

*Id.*

75. Apple Computer’s “Apple II” is considered to be the world’s first personal computer, and it was not released until April of 1977. *See Personal Computer History*, GREAT IDEA FINDER, <http://www.ideafinder.com/history/inventions/compersonal.htm> (last visited Oct. 15, 2011). Therefore, the fact that the Apple II had been in use for two years at the time of the last revision of the Berne Convention, but the definition of “literary and artis-

The failure of the Berne Convention—the primary WIPO copyright treaty—to address computer software appears to be fatal in an era where personal computer use is so widespread.<sup>76</sup> A writer of one thousand pages of brilliant prose would be within the scope of the Berne Convention and therefore protected worldwide from illegal distribution of his or her book, but a gifted programmer who writes one thousand pages of brilliant code would be in a Berne Convention grey area and therefore exposed to infringement of all types.

### B. The WIPO Copyright Treaty

Fortunately, another treaty administered by the WIPO was created to cure the defect of the Berne Convention's failure to address computer issues.<sup>77</sup> The WIPO Copyright Treaty ("WCT"), created in 1996 but entering into force in 2002, is a special agreement that supplements the Berne Convention in that it requires all contracting parties to comply with the Berne Convention itself, regardless of being a party to that treaty.<sup>78</sup> It was created to "introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments."<sup>79</sup> Given the proliferation of personal computer use in the mid-1990s, the Contracting Parties addressed new "technological developments" in response to the tide of increasing Internet access.<sup>80</sup> Indeed, Article 4 of the WCT explicitly extends the Berne Convention's protection to computer programs, interpreting that treaty's use of the phrase "literary work" to apply to computer software, "whatever

---

tic works" still failed to include any reference to computer-related works, is quite interesting. See Berne Convention, *supra* note 73, art. 2(1), at 227. Perhaps this reflects the parties' lack of prescience on how commonplace personal computer use would become.

76. Even as far back as six years ago, a 2005 study found that 88.9% of American households owned a personal computer. Aaron E. Carroll, et al., *Household Computer and Internet Access: The Digital Divide in a Pediatric Clinic Population*, AMIA ANN. SYMP. PROC. 2005, at 111, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1560660>.

77. *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WIPO, [http://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](http://www.wipo.int/treaties/en/ip/wct/summary_wct.html) (last visited Oct. 15, 2011).

78. *Id.*

79. WIPO Copyright Treaty, pmbl. para. 2, Dec. 20, 1996, 2186 U.N.T.S. 121, 153 [hereinafter WCT].

80. "The 1990s will forever be remembered as the decade when the world came online." *NSF and the Birth of the Internet*, NAT'L SCI. FOUND., [http://www.nsf.gov/news/special\\_reports/nsf-net/textonly/90s.jsp](http://www.nsf.gov/news/special_reports/nsf-net/textonly/90s.jsp) (last visited Oct. 15, 2011).

may be the mode or form of . . . expression.”<sup>81</sup> Therefore, the Berne Convention covers computer software used in e-sports.

Theoretically, when the Berne Convention and the WCT are applied to the context of e-sports, the plain protection of all modes of expression is particularly relevant.<sup>82</sup> A company such as Blizzard might argue that their game should be protected not only when pirated or illegally copied and distributed, but also while being “expressed” when used as the mode of competition in tournament or tournament broadcast. After all, copyright law at its core is intended to prevent the infringement of a creator’s expression of an idea but not the core idea itself.<sup>83</sup> While this breadth of the Berne Convention/WCT combination is promising, unfortunately, as a public international law multilateral treaty, it does not create any sort of special private right of action—it only extends typical local law to foreign intellectual property creators.<sup>84</sup> Of course, domestic intellectual property law is not always sufficient.<sup>85</sup> Additionally, any special remedies available under the treaty are generally weak, limited to only a sort of “proportional retaliation” against only nonmembers, and may not be instituted by a private actor.<sup>86</sup> In particular, Article 6(1) of the Berne Convention provides: “Where any country *outside the [Union of member*

---

81. “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.” WCT, *supra* note 79, art. 4, at 154.

82. *Id.*

83. “The law of copyright protects various ‘original forms of expression,’ including novels, movies, musical compositions, and computer software programs.” Fisher, *supra* note 14, at 1.

84. The Berne Convention stipulates that creators of works will enjoy the same protection that a local author would have in countries other than the “country of origin,” creating kind of a “national treatment” non-discrimination requirement amongst parties to the treaty. Berne Convention, *supra* note 73, art. 5(1), at 231–33. “Country of origin” is defined generally as the member country in which a work was produced. *Id.* art. 5(4), at 233.

85. The IIPA, a group formed to “improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers,” makes periodic reports called “Special 301” reports on the state of various countries’ intellectual property rights protection schemes. *Description of the IIPA*, *supra* note 16. The IIPA made its most recent report on South Korea in 2009. *Country Reports*, IIPA <http://www.iipa.com/countryreports.html> (last visited Oct. 15, 2011). According to the IIPA, while South Korea is making advances, in order for South Korea’s law to be sufficiently rights-protective, “Copyright law modernization, including consolidation of copyright responsibilities in one agency and adoption of a practical regime for administrative sanctions against persistent online infringement” must be instituted in order to tackle Korea’s “massive online piracy problem.” IIPA REPORT: SOUTH KOREA, *supra* note 18.

86. Berne Convention, *supra* note 73, art. 6(1), at 233–35.



*states*] fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are . . . nationals of the other country [emphasis added].”<sup>87</sup> However, no such “proportional retaliation” right is provided by this Article for when countries that are parties to the treaty fail to adequately protect works, and the United States and South Korea are both parties to the treaty.<sup>88</sup> Therefore, any disputes between the two countries would likely have to be resolved either through diplomacy or International Court of Justice action, both of which are methods of recourse specifically mentioned in the Berne Convention.<sup>89</sup> Only large-scale, systematic copyright violations of interest on a national level would probably be brought to international attention in such a manner, particularly due to the fact that the International Court of Justice’s jurisdiction is wholly consent based<sup>90</sup> and is limited to states.<sup>91</sup> Therefore, this method of resolution would not be helpful for the protection of the intellectual property of private parties used in e-sports.

### C. The TRIPS Agreement

The third major international intellectual property protection agreement, beyond the Berne Convention and the WTC, is the Trade-Related Aspects of Intellectual Property Rights Agreement (hereinafter the “TRIPS Agreement”). The World Trade Organization (hereinafter “WTO”) administers the TRIPS Agreement.<sup>92</sup> The TRIPS Agreement was created during the April 1994 ministerial meeting in Marrakesh, Morocco that led to the Agreement Establishing the World Trade Organization.<sup>93</sup> The TRIPS Agreement constitutes Annex 1C of that establishment agreement.<sup>94</sup> The goal of the TRIPS Agreement is to “narrow the gaps in

---

87. *Id.*

88. The Berne Convention entered into force as between the United States and South Korea on August 21, 1996. *Contracting Parties*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited Oct. 15, 2011). At that time, the treaty entered into force with respect to South Korea and had previously entered into force with respect to the United States on March 1, 1989. *Id.*

89. Berne Convention, *supra* note 73, art. 33(1), at 275–77.

90. “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the International Court of Justice, art. 36(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

91. “Only states may be parties in cases before the Court.” *Id.* art. 34(1).

92. *WTO Legal Texts*, WORLD TRADE ORG. [WTO], [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Oct. 15, 2011).

93. *Id.*

94. *Id.*

the way [intellectual property] rights are protected around the world, and to bring them under common international rules” because “protection and enforcement of these rights varied widely around the world.”<sup>95</sup> This uneven application of law had become “a source of tension in international economic relations.”<sup>96</sup>

The TRIPS Agreement attempts to meet this goal by providing specific enforcement provisions in Part III of the Agreement.<sup>97</sup> The TRIPS Agreement therefore primarily differs from the Berne Convention and the supplemental WCT in that it calls for “effective” remedial action, while the latter only stipulate that domestic law apply, regardless of inadequacies.<sup>98</sup> Therefore, at least nominally, the TRIPS Agreement raises the bar of global enforcement to a “baseline” of “effectiveness.”<sup>99</sup> Article 41 of the TRIPS Agreement contains general obligations with which member states must comply:<sup>100</sup>

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.<sup>101</sup>

In addition to these general calls for “effective action,” “expeditious remedies,” and the avoidance of “the creation of barriers to legitimate trade,” the TRIPS Agreement also requires that the enforcement of intellectual property rights by member states be “fair and equitable” without

---

95. *Intellectual Property: Protection and Enforcement*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Oct. 16, 2010).

96. *Id.*

97. Agreement on Trade-Related Aspects of Intellectual Property Rights, Part III, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

98. *See id.* art. 41 (“Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement . . .”). On the other hand, the Berne Convention/WTC combination only grants foreign rights holders “the rights which [local] laws do now or may hereafter grant to their nationals . . .” Berne Convention, *supra* note 73, art. 6(1), at 233–35.

99. TRIPS Agreement, *supra* note 97, art. 41.

100. *Id.*

101. This is the core of Article 41 obligations. The TRIPS Agreement goes on to flesh out these obligations further. *Id.* art. 41, ¶ 1.

imposing unreasonable burdens on those seeking to enforce.<sup>102</sup> Article 41 of the Agreement then sets specific standards for hearings to which member states must adhere.<sup>103</sup> These standards include guarantees of each party's evidence being heard, of judicial opinions in writing, and of an opportunity for review of final judgments.<sup>104</sup> Finally, the TRIPS Agreement states that its enforcement provisions do not require that member states create new judicial bodies dedicated solely to intellectual property or affect member states' ability to enforce their own law.<sup>105</sup> This may be an attempt to assuage the concerns of developing countries that may not have the local capacity to create new bodies devoted to intellectual property, a concern also reflected in the Berne Convention.<sup>106</sup>

Articles 42 through 49 provide civil and administrative procedures and remedies for violations of the Article 41 obligations.<sup>107</sup> These articles impose various requirements that work to enable "right holders" to access "civil judicial procedures" in any member state's territory.<sup>108</sup> At first glance, this does not seem to improve the availability of remedies to computer software companies seeking to protect their products through lawsuits abroad, as it would, of course, limit the ability to enforce abroad to companies that have the resources to initiate extraordinarily international litigation.<sup>109</sup> Moreover, the Berne Convention already provides such a "local" right to a remedy.<sup>110</sup>

---

102. "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." *Id.* art. 41, ¶ 2.

103. *Id.* art. 41, ¶¶ 3–4.

104. *Id.*

105. *Id.* art. 41, ¶ 5.

106. Article 21 of the Berne Convention, "Special Provisions Regarding Developing Countries," references the Appendix to the treaty, which provides special exceptions for "developing countries" (as defined by "conformity with the established [developing country] practice of the General Assembly of the United Nations"). Berne Convention, *supra* note 73, art 21 & app., art. I. Such a country may state that it, due to "its economic situation and its social or cultural needs," it is not "immediately in a position to make provision for the protection of all the rights" enumerated in the Berne Convention. *Id.* app., art. I.

107. TRIPS Agreement, *supra* note 97, arts. 42–49.

108. *Id.* art. 42 ("Fair and Equitable Procedures").

109. Local litigation, let alone overseas litigation, is extremely expensive—just because a United States company has access to foreign courts does not mean that it will be able to afford to do so. "For most litigants, one of the greatest obstacles associated with [intellectual property] litigation is high, if not excessive, costs." Heike Wollgast, *IP Litigation Costs – An Introduction*, WIPO MAG., Feb. 2010, at 2.

110. Berne Convention, *supra* note 73, art. 5(1) (affirming that works created in Berne Convention member states will be given the same protection as local works in other member states).

However, there is a critical distinction contained within the TRIPS Agreement: a footnote to Article 42 adds that the term “right holder” encompasses “federations and associations having legal standing to assert such rights.”<sup>111</sup> This definition would apparently enable organizations that represent game makers, such as the Entertainment Software Association, for example, to defend the intellectual property rights of a member without the resources to travel to Asia and sue.<sup>112</sup> This would theoretically lessen the cost burden of international intellectual property litigation.<sup>113</sup>

Perhaps most significantly for private intellectual property rights holders, Article 50 provides provisional measures that allow “judicial authorities” to take *ex parte*<sup>114</sup> action in an ostensible attempt to quicken the ability of member states to respond to intellectual property rights infringement.<sup>115</sup> These provisional measures are allowed particularly “where any delay is likely to cause irreparable harm to the right holder, or where there is demonstrable risk of evidence being destroyed.”<sup>116</sup>

On its face, the addition of provisional measures would seem to significantly improve upon the Berne Convention and the WCT’s more generalized enforcement approach. In particular, such measures would likely help limit computer program infringement through a more flexible response adapted to the fleeting nature of infringement—due to the ability of a judge to act unilaterally.<sup>117</sup> However, protecting against the kind of infringement that a game company like Blizzard faces, such as unauthorized tournaments held and broadcast for commercial gain, is not the focus of these provisional measures and thus provides little help.<sup>118</sup>

---

111. TRIPS Agreement, *supra* note 97, art. 42 n.11.

112. The Entertainment Software Association is a “U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet.” *About the ESA*, ENT. SOFTWARE ASS’N, <http://www.theesa.com/about/index.asp> (last visited Oct. 15, 2011). As an organization that represents computer gaming publishers, it would presumably have standing to sue on behalf of its members under the TRIPS Agreement’s definition of “right holder.” See TRIPS Agreement, *supra* note 97, art. 42 n.11.

113. See Wollgast, *supra* note 109.

114. Therefore, the TRIPS Agreement provides for the right of a judicial authority to institute a provisional ruling against an infringer “without notice to, or argument by, any person adversely interested.” *Ex parte*, BLACK’S LAW DICTIONARY 616 (8th ed. 2004).

115. TRIPS Agreement, *supra* note 97, art. 50, ¶ 2.

116. *Id.*

117. *Id.*

118. The provisional measures were included in the TRIPS Agreement “in particular to prevent the entry [of copyright-infringing goods] into the channels of commerce.” *Id.* art. 50, ¶ 1(a). When a company like Blizzard Entertainment faces infringement issues related to e-sports, problems arise from abuse of products already within the offending countries’

First, although judicial authorities are imbued with the power to “order prompt and effective provisional measures to prevent an infringement of *any* intellectual property right from occurring [emphasis added],” implicitly, these measures are strongly correlated with large-scale copyright infringement such as the importation of counterfeit goods.<sup>119</sup> Article 50 exemplifies this intent, stating that its goal is “in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance.”<sup>120</sup> This section would almost certainly not be invoked to address the interdiction of small-scale, albeit illegal, commercial operations such as unauthorized e-sports tournaments.

Second, Article 50 states that an additional primary goal of the availability of provisional measures is to “preserve relevant evidence in regard to the alleged infringement.”<sup>121</sup> As above, this might be useful in the context of counterfeit goods, where a judge could order the freezing of a ship in port suspected of importing counterfeit goods to allow time to inspect its contents (the “evidence”). However, this response would almost certainly not have an effect on the copyright infringement problems affecting e-sports entities, namely the inability to sanction and promote their own official tournaments. An unauthorized tournament or commercial misuse of a computer game would not necessarily be of such a scale that it would show up on the radar of a judge as a shipment of counterfeit goods would—even in the case of South Korea, where gaming is big business.<sup>122</sup> In summary, while the availability of provisional measures in the TRIPS Agreement might potentially create an avenue for protection of computer software makers’ interests, its focus is on much larger copyright infringement operations, and it would not be sufficient to stop the abuse of e-sports intellectual property.

The improvement in the TRIPS Agreement with the most potential is the fact that it allows for organizations to sue on behalf of members.<sup>123</sup> As briefly discussed above, a major problem with suing overseas is cost.<sup>124</sup> Overseas courts are available to TRIPS Agreement parties: the TRIPS Agreement creates minimum standards that local law must meet

---

borders, not counterfeit products in the process of being imported, making these provisional measures largely inapplicable. *Id.*

119. TRIPS Agreement, *supra* note 97, art. 50, ¶1(a).

120. *Id.*

121. *Id.* art. 50, ¶ 1(b).

122. *See Pros Clicking at War*, *supra* note 12.

123. TRIPS Agreement, *supra* note 97, art. 42 n.11.

124. Wollgast, *supra* note 109.

in order to provide effective enforcement.<sup>125</sup> Article 41 mandates that WTO members “ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement.”<sup>126</sup> Additionally, South Korea is bound by this provision as a member of the WTO.<sup>127</sup> However, this does not mean that it is logistically or economically feasible for an e-sports company like Blizzard to sue each and every infringer in Korean court. Therefore, the potential of an organization to sue may provide logistical relief, as a group such as the Entertainment Software Association can pool its resources in order to mount a lawsuit campaign abroad.<sup>128</sup> This would ameliorate the problems created by the often staggering cost of intellectual property litigation.<sup>129</sup> However, Blizzard is not currently a member of the Entertainment Software Association, so it would have to rely on its own resources to fund such a litigation campaign.<sup>130</sup>

One final attractive aspect of WTO membership, which also provides the benefits of the TRIPS Agreement, is the WTO’s special dispute resolution process.<sup>131</sup> The process exists to bring “equitable, fast, effective, [and] mutually acceptable” ends to disputes.<sup>132</sup> If the 60-day negotiation stage fails to bring an end to the dispute, a panel of experts is appointed in order to make rulings or recommendations to the larger “Dispute Set-

---

125. “The [TRIPS Agreement] says governments have to ensure that intellectual property rights can be enforced under their laws, and that the penalties for infringement are tough enough to deter further violations.” *Intellectual Property: Protection and Enforcement*, *supra* note 95.

126. TRIPS Agreement, *supra* note 97, art. 50, ¶ 1.

127. The Republic of Korea joined the WTO on January 1, 1995, at the same time as the United States. *WTO Members and Observers*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 15, 2011).

128. *See About the ESA*, *supra* note 112.

129. The high cost of intellectual property litigation was the primary subject of a February 2010 special edition of the WIPO’s magazine: “For most litigants, one of the greatest obstacles associated with [intellectual property] litigation is high, if not excessive, costs.” Wollgast, *supra* note 109.

130. Activision (which has merged with Blizzard) left the ESA in 2008. Ben Kuchera, *Activision/Blizzard Leaves, Still Hopes to Profit from ESA*, ARS TECHNICA (May 5, 2008), <http://arstechnica.com/gaming/news/2008/05/activision-blizzard-leaves-still-hopes-to-profit-from-esa.ars>.

131. *See Understanding the WTO: Settling Disputes*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Oct. 15, 2011) [hereinafter *Settling Disputes*].

132. *Id.*

tlement Body,” which consists of all WTO members.<sup>133</sup> If the Dispute Settlement Body accepts the findings of the panel, then it ensures the implementation of the panel’s rulings and recommendations with the power to punish non-compliance.<sup>134</sup> The key problem with this otherwise attractive settlement system is that it is only open to WTO members—in other words, it is only available to nations with an intellectual property complaint.<sup>135</sup> Private rights holders must still apparently resort to lobbying in an effort to convince their government to make a WTO complaint, or extremely expensive private litigation.<sup>136</sup> Therefore, without changes, current public international law is little help to the creators of intellectual property used in e-sports.

### III. NEW LAW

New law that will affect the relationship between the United States and South Korea with regard to intellectual property exists—primarily the United States-Korea Free Trade Agreement (the “KORUS FTA”)—but it remains to be seen if it will have any revolutionary effect on the problems facing companies such as Blizzard that want to protect their stake in the developing e-sports scene in South Korea.<sup>137</sup> Some aspects of the KORUS FTA indicate that its drafters recognized potential loopholes in current public international law, particularly the TRIPS Agreement, and intended to improve upon them.<sup>138</sup>

The United States and South Korea signed the KORUS FTA on June 30, 2007.<sup>139</sup> After many years of legislative struggle, it was finally approved by the United States Congress and entered into force on March 15, 2012.<sup>140</sup> The passing of the KORUS FTA, one of President Bush’s economic priorities during his presidency,<sup>141</sup> was stalled for several years

---

133. *Id.*

134. *Id.*

135. *Id.*

136. Wollgast, *supra* note 109.

137. Korea-United States Free Trade Agreement, U.S.-S. Kor., June 30, 2007 [hereinafter KORUS FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. The intellectual property rights provisions are contained within chapter 18.

138. *See id.* art. 18.10(4) n.27.

139. *Korea-U.S. Free Trade Agreement*, OFF. OF U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited May 17, 2012).

140. *Id.*

141. “As governor of Texas [Bush] had personal knowledge of the need for immigration reform and free-trade treaties, and he tried hard to pursue both as president, against much opposition within his own party as well as among Democrats.” Jonathan Yardley,

due to contention over provisions dealing with American automobile and beef exports to South Korea.<sup>142</sup> Although the treaty is considered “signed” after being negotiated by the executive branch, resolution of Congressional concerns and subsequent ratification by the Senate is an integral step towards making a treaty binding law within the United States.<sup>143</sup> This can happen either through the traditional “advice and consent” procedure, resulting in a so-called “Article II” treaty,<sup>144</sup> or the “fast-track procedure,” an expedited process used for free trade agreements that allows for the president to negotiate the terms of an agreement with trading partners and then submit the unmodified agreement for an up-or-down vote in Congress.<sup>145</sup> This avoids the problem of the extremely protracted process of approving an Article II treaty, which can easily strain relations with trade partners.<sup>146</sup>

The KORUS FTA introduces numerous provisions affecting additional areas of trade, including new bilateral intellectual property rights protections.<sup>147</sup> According to the International Intellectual Property Association’s 2009 Special 301 report on South Korea, the KORUS FTA is the

---

George W. Bush, ‘Decision Points’: ‘Competent, Readable and Flat’, WASH. POST (Nov. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/06/AR2010110602835.html> (book review).

142. On his recent trip to Asia, President Obama was unable to find compromise with South Korean president Lee Myung-bak over these issues, with both sides citing the need to “give their negotiators more time to work out differences.” Sheryl Gay Stolberg & Sewell Chan, *U.S. and South Korea Fail to Agree on Trade*, N.Y. TIMES (Nov. 11, 2010), <http://www.nytimes.com/2010/11/12/world/asia/12prexy.html>.

143. U.S. CONST. art. II, § 2, cl. 2.

144. *Id.*

145. Natalie R. Minter, *Fast Track Procedures: Do They Infringe upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL’Y 107, 108–09 (1995).

146. *Id.*

147. KORUS FTA, *supra* note 137. The agreement is also supplemented by four “confirmation letters” that address intellectual property issues: “Limitations on Liability for Internet Service Providers”; “Promoting Protection and Effective Enforcement of Copyrighted Works”; “Online Piracy Prevention”; and “Disputes Involving Patent Linkage.” *Id.* This Note will forgo detailed discussion of these confirmation letters, but in general these letters are merely reiterations of overall intellectual property rights goals, not adding any relevant power of enforcement. *Id.* However, one line in the “Online Piracy Prevention” letter is interesting: “Korea agrees to prosecute individuals and companies that profit from developing and maintaining services that effectively induce infringement.” Letter from Ambassador Hyun Chong Kim, Min. of Trade, South Korea, to Ambassador Susan C. Schwab, U.S. Trade Rep. (June 30, 2007), *available at* [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file939\\_12739.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file939_12739.pdf). The wording of this understanding is expansive enough that it could potentially encompass companies that disregard Blizzard’s intellectual property rights and broadcast commercial StarCraft tournaments on their own. *Id.*



single most important intellectual property protection available to South Korea to remedy its “massive online piracy problem.”<sup>148</sup>

The KORUS FTA’s new intellectual property protections are contained within Chapter 18 of the Agreement.<sup>149</sup> Of particular use to companies like Blizzard is a significant improvement over the definition of “right holder” included in the TRIPS Agreement. Article 18.10(4) of the KORUS FTA stipulates, “Each Party shall make available to right holders civil judicial procedures . . . .”<sup>150</sup> However, while echoing the language of the TRIPS Agreement in making these procedures available to “federation[s] or association[s] having the legal standing and authority to assert such rights,”<sup>151</sup> it further defines right holders to include “a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property.”<sup>152</sup> The term “person” as used in the bilateral treaty is defined in Article 1.4 of the KORUS FTA as “a natural person or an enterprise,” with the latter presumably including companies such as Blizzard.<sup>153</sup> This is a significant improvement over the text of the TRIPS Agreement because it explicitly brings individuals and corporations facing infringement within the bounds of the KORUS FTA’s enforcement provisions.<sup>154</sup> Therefore a private actor could assert standing under the authority of the KORUS FTA.<sup>155</sup> Of course, cost would still remain an issue,<sup>156</sup> but the inclusion of this distinction in the KORUS FTA apparently acknowledges a shortcoming of the TRIPS Agreement and moves to correct it in order to extend standing to more parties.

---

148. The IIPA recommended that South Korea remain on its intellectual property watch list, but noted that “ratification and implementation of the copyright provisions of the Korea-US Free Trade Agreement remains a top priority” for the organization to recognize an improvement in South Korea’s intellectual property legislation. IIPA REPORT: SOUTH KOREA, *supra* note 18, at 1. Now that the KORUS FTA is in force, perhaps the IIPA will revise its assessment of South Korea in its next annual report.

149. KORUS FTA, *supra* note 137.

150. *Id.* art. 18.10(4).

151. *Id.* art. 18.10(4) n.27. This text is almost word-for-word identical to the definition of “right holder” included in the TRIPS Agreement: “the term ‘right holder’ includes federations and associations having legal standing to assert such rights.” TRIPS Agreement, *supra* note 97, art. 42 n.11.

152. KORUS FTA, *supra* note 137, art. 18.10(4) n.27.

153. *Id.* art. 18.10(4).

154. *Id.*

155. *Id.*

156. Wollgast, *supra* note 109.

## CONCLUSION

Of the current treaties that address the infringement of intellectual property rights, the one that holds the most promise for the continued health of e-sports is the TRIPS Agreement. The fact that it expressly incorporates the ability for “federations and associations having legal standing” to assert intellectual property rights on behalf of members<sup>157</sup> is a definite step in the right direction. Such collaborative defense of property rights may alleviate one of the obvious hurdles presented by defending intellectual property abroad—extremely high costs.<sup>158</sup> Additionally, in a sense, the expansion of the group of potential plaintiffs shows some degree of willingness by parties to the TRIPS Agreement to acknowledge that governments are not the only entities that deserve to have their concerns heard on an international scale. Nonetheless, under the TRIPS Agreement, the onus still falls upon the private right holder to either be the member of an organization with the wherewithal and willingness to bring a TRIPS-related action, or to lobby its own government to convince it that its particular intellectual property problem is worth national action. Both of these results are unlikely to be effectual for the creators of games used in e-sports such as Blizzard Entertainment. Even if Blizzard were a member of the Entertainment Software Association, not every member of the association creates games used in e-sports, and convincing the organization itself to bring an action might be difficult.<sup>159</sup> Moreover, it is extremely unlikely that the United States government would get involved in a situation where a United States intellectual property holder’s game was being misused for commercial gain in tournaments. Concern at the governmental level would likely only arise in the case of large-scale copyright infringement, such as has become notorious in China.<sup>160</sup>

Therefore, perhaps the best solution that would benefit the e-sports, and other rights holders whose particular problems fall outside of the

---

157. TRIPS Agreement, *supra* note 97, art. 42 n.11.

158. “For most litigants, one of the greatest obstacles associated with [intellectual property] litigation is high, if not excessive, costs.” Wollgast, *supra* note 109.

159. The ESA’s members include game companies, such as Disney and Capcom, and computer hardware makers, such as Nvidia, that are not involved in competitive computer gaming, unlike Blizzard. See *ESA Members*, ENT. SOFTWARE ASS’N, <http://www.theesa.com/about/members.asp> (last visited Oct. 15, 2011).

160. China has long been a “battleground for [intellectual property] rights holders and Internet intermediaries.” Lisa Wang, *Searching for Liability: Online Copyright Infringement in China*, CHINA L. & PRAC., Mar. 2008, available at <http://www.chinalawandpractice.com/Article/1886194/Channel/9937/Searching-for-Liability-Online-Copyright-Infringement-in-China.html>.

scope of larger governmental concern, would be to explicitly expand the TRIPS Agreement's definition of "right holder," as that term is used in the Agreement,<sup>161</sup> to include private actors that are not part of larger "federations and associations having legal standing."<sup>162</sup> The KORUS FTA reflects that sentiment and thus embraces even singular e-sports copyright holders in granting the right to authorize the use of their properties in South Korea.<sup>163</sup> Additionally, the WTO's dispute resolution mechanism should be opened to all actors operating on an international scale, rather than just member states.<sup>164</sup> While this may place a heavy burden on the WTO's dispute resolution system, it would allow private rights holders to complain about ineffective action on behalf of a WTO member government, rather than waiting for a country-to-country dispute to arise before the WTO.<sup>165</sup> In summary, while currently largely ineffective to protect the burgeoning worldwide e-sports industry, expansion of current conflict resolution architecture to private actors, whether local or under the auspices of an organization such as the WTO, would be an important first step towards making profitable overseas operations more feasible for such intellectual property rights holders and would encourage creativity and growth in the field for both rights holders and fans.

*Sean Comerford\**

---

161. For example, see the aforementioned Article 42, where "right holders" are afforded "effective" civil judicial procedures in member countries. TRIPS Agreement, *supra* note 97, art. 42 n.11.

162. *Id.*

163. See KORUS FTA, *supra* note 137, art. 18.10(4) n.27.

164. Currently, disputes between WTO member nations can be resolved through the WTO's dispute resolution process. See *Settling Disputes*, *supra* note 131.

165. *Id.*

\* B.A. Lafayette College (2006); J.D. Brooklyn Law School (expected 2012); Notes and Comments Editor of the *Brooklyn Journal of International Law* (2011–2012). I would like to dedicate this Note to my late father, Brian Comerford, who inspired me to go to law school and to strive to keep learning. I would also like to thank my mother and sister, Carol and Kathleen Comerford, for always helping to keep my spirits up. I also am indebted to Professor Patricia Judd for her guidance and the staff of the *Brooklyn Journal of International Law* for their constructive criticism and editing. Any errors or omissions are my own.