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Level-Up: Towards a More Competitive & Labor-Friendly E-Sports Industry

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LEVEL-UP: TOWARDS A MORE COMPETITIVE & LABOR-FRIENDLY E- SPORTS INDUSTRY

INTRODUCTION

The e-sports¹ industry has expanded exponentially in the latter half of the past decade and seized prominence throughout the North American, Asian, and European markets. There are two prevailing theories regarding how to regulate this booming industry and its actors as it continues to grow. The first suggests creating a highly centralized, global governing body to standardize the rules and procedures for international e-sports, thereby creating a system to govern the interactions between game developers and downstream actors, that additionally serves to stabilize the industry and solidify sponsor investment and fan expectations.² The second proposes expanding host nations' antitrust laws in order to curb the incredible amount of control game developers have over individual e-sports and allow market forces to keep the developers in check.³ This Note proposes that the standards of international labor law and collective bargaining are better suited to regulating player conditions and creating standardized rules for e-sports than either of the prevailing theories.

Part I of this Note will sketch the recent history of e-sports, explain the current landscape of the industry on an international level, and highlight some of the major regulatory concerns the industry is currently facing. Part II will contrast the United States (US) model of e-sports regulation⁴ with the regulatory schemes of two other entities—South Korea⁵ and the Eu-

1. E-sports is a term which refers to the “world of competitive, organized video gaming.” A.J. Willingham, *What is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM EDT), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html>.

2. See generally Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating ESports*, 26 U. MIAMI INT'L & COMP. L. REV. 499 (2019).

3. Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. L. J. & SOC. PROBS. 177, 177 (2019).

4. See *infra* Section II-A.

5. See *infra* Section II-B.

ropean Union (EU)⁶—and discuss the impact various non-governmental organizations (NGOs) have had in their attempts to provide oversight to various aspects of the e-sports industry. Part III will look at provisions of international labor law promulgated by the International Labor Organization—a specialized agency of the United Nations (UN)—and discuss its applicability to international e-sports. This Part will focus in particular on applying the core conventions of the International Labor Organization to developing labor standards for athletes, enshrining the right of e-sports athletes to collectively bargain for more favorable working conditions and minimum pay, and generally offset the centralized control of industry game developers. Finally, Part IV will compare the existing theories for regulation with the potential impact of international labor law and propose that the standards of international labor law will more directly protect the rights of e-sports athletes and other downstream actors in the face of the massive control game developers currently hold over the industry.

I. BRIEF HISTORY OF E-SPORTS, THE CURRENT STATE OF THE INDUSTRY, THE RELEVANT ACTORS AND THE REASONS FOR REGULATION

Like other modern technological phenomena, e-sports have grown from humble origins.⁷ The first e-sports athletes were college students that gathered for a tournament at Stanford University in 1972, playing the game *SpaceWar!* to win a year-long subscription to *Rolling Stone* magazine.⁸ The first formally organized e-sports competition took place in 1980, was hosted by Atari, and boasted 10,000 participants playing *Space Invaders*⁹ against each other in order to win a copy of *Asteroids*.¹⁰

6. See *infra* Section II-C.

7. See Willingham, *supra* note 1; see generally Bountie Gaming, *The History and Evolution of Esports*, MEDIUM (Jan. 3, 2018), <https://medium.com/@BountieGaming/the-history-and-evolution-of-esports-8ab6c1cf3257>.

8. Bountie Gaming, *supra* note 7; see also Florian Larch, *The History of the Origin of eSports*, ISPO (Jan. 11, 2019), <https://www.ispo.com/en/markets/history-origin-esports>.

9. Larch, *supra* note 8. An early arcade game – the player controls a pixelated spaceship and is tasked with destroying a fleet of similarly pixelated alien invaders. See *Space Invaders*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Space-Invaders> (last modified Apr. 8, 2015).

With the advent of the Internet in the 1990s, the concept of competitive gaming took root and rapidly gained popularity.¹¹ The internet allowed players to connect and play video games with their friends without leaving their home.¹² The subsequent popularity of household games like *Quake*, *StarCraft*, and *Counter-Strike* prompted tournaments to offer gamers the chance to win \$15,000 or to drive off with a game developer's Ferrari.¹³

In the US, from those humble beginnings—competing to win magazine subscriptions at Stanford or a copy of a different video game—arose a sports phenomenon with an estimated “307 million casual viewers and 250 million enthusiasts – people who watch professional e-sports content more than once a month”—by 2021.¹⁴ The allure of e-sports is by no means limited to the US; the December 2018 *League of Legends* World Championship alone reached 99.6 million unique viewers worldwide.¹⁵ Nor is interest limited solely to gamers; for example, owners of NFL teams have purchased franchises for local e-sports teams in their cities.¹⁶ In stark contrast to the prizes of the 1990s, the total prize money of worldwide e-sports tournaments in 2019 was over \$225,000,000, with an average prize pool of \$35,997.¹⁷

Alongside the growth of tournament prizes, the amount of money at play in industry-supporting transactions has also in-

10. Another similar early arcade game, where the player controls a spaceship in an asteroid field patrolled by flying saucers. See Larch, *supra* note 8.

11. *Id.*

12. *See id.*

13. Bountie Gaming, *supra* note 7.

14. John T. Holden, Marc Edelman & Thomas A. Baker, *A Short Treatise on Esports and the Law: How America Regulates its Next National Pasttime*, 2020 U. ILL. L. REV. 509, 522 (2020).

15. See Thomas Terraz, *League of Legends European Championships – Challenging the Boundaries of Sport in EU Law*, ASSER INT'L SPORTS L. BLOG (May 20, 2019), <https://www.asser.nl/SportsLaw/Blog/post/league-of-legends-european-championships-challenging-the-boundaries-of-sport-in-eu-law-by-thomas-terraz>.

16. Garrett Reim, *Los Angeles Rams Owner Stan Kroenke Buys E-sports Team*, LOS ANGELES BUS. J. (Aug. 10, 2017), <https://labusinessjournal.com/news/2017/aug/10/los-angeles-rams-owner-stan-kroenke-buys-e-sports/>.

17. *The Incredible Growth of eSports [+eSports Statistics]*, INFLUENCER MKTG. HUB (Jan. 6, 2020), <https://influencermarketinghub.com/growth-of-esports-in-2019-stats/>.

creased dramatically. In 2016, Riot Games¹⁸ struck a \$300 million deal with BAMTech¹⁹ for joint technological and commercial development.²⁰ In January 2018, the *Overwatch* League²¹ negotiated a \$90 million, two-year deal with Amazon-owned Twitch.tv²²—a streaming platform initially known for streaming video games that has grown into one hosting streams of a wide variety of content²³—granting Twitch exclusive distribution rights to every regular and post-season contest of the league.²⁴ In 2020, the e-sports industry reached \$957.5 million in revenue, with more than \$747 million of that money coming from sponsorship and media rights.²⁵ New investments came from such companies as Coca-Cola, BMW, and Mercedes-Benz in 2017, alongside the involvement of celebrities like Mar-

18. Riot Games is a U.S.-based game developer. *See Values*, RIOT GAMES, <https://www.riotgames.com/en/who-we-are/values> (last visited Feb. 14, 2021).

19. BAMTech is a sports streaming service which works with Major League Baseball, Major League Soccer, and World Wrestling Entertainment. *See* BAMTECH MEDIA, <https://www.bamtechmedia.com/> (last visited Feb. 14, 2021).

20. Darin Kwilinski, *MLB's BAMTech Inks \$300M exclusive deal with Riot Games*, ESPN, (Dec. 16, 2016), https://www.espn.com/esports/story/_/id/18292308/mlb-bamtech-streaming-platform-inks-300-million-exclusivity-deal-riot-games-league-legends.

21. The official website for the professional e-sports league dedicated to the video game, *Overwatch*. *About*, THE OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/about> (last visited Jan. 5, 2020).

22. Amazon purchased Twitch.tv for \$1.1 billion in August 2014. David Carr, *Amazon Bets on Content in Deal for Twitch*, N.Y. TIMES (Aug. 31, 2014), <https://www.nytimes.com/2014/09/01/business/media/amazons-bet-on-content-in-a-hub-for-gamers.html>.

23. Nick Wingfield, *What's Twitch? Gamers Know, and Amazon is Spending \$1 Billion on It*, N.Y. TIMES (Aug. 25, 2014), <https://www.nytimes.com/2014/08/26/technology/amazon-nears-a-deal-for-twitch.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> (explaining that Twitch.tv is a website which allows users called “streamers” to broadcast live videos of their play and commentary of a video game for the streamer’s viewers, other users of the website); *see also* Jacob Yaden, *What is Twitch?*, DIGITALTRENDS (Jan. 29, 2021), <https://www.digitaltrends.com/gaming/what-is-twitch/> (last visited Mar. 13, 2021).

24. Ben Fischer, *Sources: Overwatch League-Twitch Deal Worth At Least \$90M*, SPORTS BUS. DAILY (Jan. 9, 2018), <https://www.sportsbusinessdaily.com/Daily/Closing-Bell/2018/01/09/overwatch.aspx>.

25. *The Incredible Growth of eSports*, *supra* note 17.

shaw Lynch,²⁶ Shaquille O’Neal,²⁷ Jennifer Lopez,²⁸ and NFL owner Robert Kraft.²⁹

Whether or not a game that makes it through development, distribution, and marketing³⁰ can earn enough popularity to warrant investment as an e-sport, however, is no simple matter or easy guarantee; as of August 2017, out of the hundreds of games produced every year, seven major titles attracted over 200 million players worldwide.³¹ Independent leagues hosting a variety of games used to be commonplace, but the cost of running said leagues outweighed any revenue they brought in.³² Major League Gaming (MLG), for example, “one of the largest and most established independent eSports circuits, saw profits

26. Marshawn Lynch is a retired football player and community figure in Oakland, CA. *Marshawn Lynch*, WIKIPEDIA, https://en.wikipedia.org/wiki/Marshawn_Lynch (last visited Jan. 10, 2020).

27. Shaquille O’Neal is a former National Basketball Association All-Star, current sports commentator and part-time EDM artist. *Shaquille O’Neal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Shaquille_O%27Neal (last visited Jan. 10, 2020).

28. Jennifer Lopez is a singer, dancer, actress, fashion designer, and businesswoman. *Jennifer Lopez*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jennifer_Lopez (last visited Jan. 10, 2020); see also Jesse Steinberg, *The Explosive Growth of Esports – Trends to Watch in 2018*, HOLMES REPORT (Jan. 8, 2018), <https://www.holmesreport.com/agency-playbook/sponsored/article/the-explosive-growth-of-esports-trends-to-watch-in-2018>.

29. Robert Kraft is the owner of the New England Patriots and New England Revolution, a football and soccer team respectively. *Robert Kraft*, WIKIPEDIA, https://en.wikipedia.org/wiki/Robert_Kraft (last visited Jan. 10, 2020).

30. For an explanation of the development process, which concludes with marketing and distribution, see Ralph Edwards, *The Game Production Pipeline: Concept to Completion*, IGN ENT. (June 16, 2012), <https://www.ign.com/articles/2006/03/16/the-game-production-pipeline-concept-to-completion>.

31. *Number of Players of Selected eSports Games Worldwide as of August 2017*, STATISTA (Oct. 11, 2017), <https://www.statista.com/statistics/506923/esports-games-number-players-global/>.

32. Katherine E. Hollist, *Time to Be Grown-Ups about Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 828–29 (2015). MLG was later acquired by Activision-Blizzard at the end of fiscal year 2015. Dawn Chmielewski, *Activision Blizzard Acquires eSports Firm Major League Gaming*, VOX (Jan. 4, 2016), <https://www.vox.com/2016/1/4/11588462/activision-blizzard-acquires-esports-firm-major-league-gaming>.

in back-to-back quarters for the first time at the end of 2013—over ten years and \$69 million after it launched.”³³ Game developers today are trending towards hosting their own leagues, which typically showcase their own games rather than the variety of games an independent league would include.³⁴ As these developers own the league’s underlying game or games, it follows that those leagues emphasize and drive popularity to their own product.³⁵ Game developers are better suited to absorbing the costs associated with league operation because they also earn revenue through the sale of their entire roster of games, in-game purchases, and merchandise sales.³⁶ By absorbing these costs, developers ensure their e-sports leagues are “far more viewer-friendly and accessible than ever before . . .” thus enhancing and profitability and visibility of their properties.³⁷

MLG’s own acquisition by a game developer serves as a prominent example of this trend playing out in reality.³⁸ Upon its acquisition of MLG in 2016, developer Activision-Blizzard had designs to make it “the ESPN” of e-sports.³⁹ The developer was well-positioned to absorb the costs of running a league, but following the acquisition, MLG—a previously prominent independent league—stopped hosting its prior variety of games and began solely emphasizing Activision-Blizzard-owned titles.⁴⁰

The customer convenience and stability that developer-sponsored leagues offer to consumers come with significant drawbacks. Players signing with a developer-sponsored league are frequently required to compete exclusively in that particular league with that developer’s games and not participate in or publicize competing games.⁴¹ With the advent of game develop-

33. Hollist, *supra* note 32, at 828–29.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See Nick Wingfield, *Activision Buys Major League Gaming to Broaden Role in E-Sports*, N.Y. TIMES (Jan. 4, 2016), <https://www.nytimes.com/2016/01/05/technology/activision-buys-major-league-gaming-to-broaden-role-in-e-sports.html?smid=tw-share&r=1>.

39. *See id.*

40. See MAJOR LEAGUE GAMING, <http://www.mlg.com/> (last visited Jan. 19, 2021) (listing its supported games as Overwatch, the Call of Duty franchise, StarCraft II, World of Warcraft and Hearthstone – all Activision-Blizzard owned titles).

41. Hollist, *supra* note 32, at 829.

ers' ownership of e-sports leagues, however, an athlete wanting to compete at the highest level will likely need to sign one of these contracts, which are drafted by, and consequently favor, the developer, to ply their trade. The accompanying restrictions have two effects: reducing the athlete's bargaining power by limiting the transferability of the player to different leagues and reducing possible revenue streams for the athlete.⁴²

In terms of limiting bargaining power, athletes not only have to deal with the non-compete clauses in developer contracts and abide by a particular developer's code of conduct, but they also are limited in terms of their professional transferability between leagues.⁴³ Most e-sports athletes are experts in one particular type of game⁴⁴ and each type of game requires a specialized skillset—typically a different sort of coordination, technical specialty, and attention to different sorts of game mechanics—thus making it difficult for players to switch from one game to another, even within the same genre.⁴⁵ A professional *Overwatch* player could not refuse to sign with the *Overwatch* League and simply go play professional *StarCraft II* in much the same way as a professional basketball player cannot simply become a professional baseball player overnight.⁴⁶ E-sports careers are frequently built around an incredible amount of practice to develop a professional-level skill set for one particular game; that skillset might not be transferrable to a different game genre, or even between different games in that same genre.⁴⁷

42. *Id.*

43. *Id.*

44. A few of the most prevalent e-sports game variants right now are first-person shooter games (for example, *Overwatch* or *Counter-Strike: Global Offensive*), real-time strategy games (for example, *StarCraft II*), digital card games (for example, *Hearthstone*), and massive online battle arena games (for example, *League of Legends* or *DOTA 2*). *Biggest Esports Games Every Gamer Should Know*, INFLUENCER MKTG. HUB (June 23, 2020), <https://influencermarketinghub.com/biggest-esports-games/>.

45. Miroff, *supra* note 3, at 201.

46. Michael Jordan famously retired from basketball to attempt a career in minor league baseball in 1994, and subsequently returned to basketball. Steve Wulf, *Gonzo Jordan: The True Story of Michael Jordan's brief but promising baseball career*, ESPN (Apr. 5, 2019), https://www.espn.com/mlb/story/_/id/26449232/the-true-story-michael-jordan-brief-promising-baseball-career.

47. See Miroff, *supra* note 3, at 201-202 (explaining that the earnings of an e-sports athlete dropped substantially when he switched from playing one

Not all major leagues are equally restrictive. For example, the ESL Pro League⁴⁸ does not restrict teams or players from playing in any other league, so long as those players adhere to the ESL Pro League's rules.⁴⁹ This league is not directly owned by the developer which created its game⁵⁰ and instead binds itself to the rules and regulations of the E-Sports Integrity Coalition (ESIC) rather than have a developer directly dictate the rules for its league, as does Blizzard with The *Overwatch* League, or Riot Games with the LCS.⁵¹ The ESIC is an NGO and self-styled watchdog for e-sports cheating, including match manipulation and substance abuse.⁵² In the modern world where a game developer also owns a league, most leagues choose to dictate their own rules rather than hold themselves to the standards of an NGO like the ESIC.⁵³ This means that two different leagues can establish significantly different rule sets and standards for players, where the only effective difference between those Leagues is the organization of competition and the specific game being played.⁵⁴

Developer contracts can also limit players from pursuing alternative revenue streams through their professional status.⁵⁵ While certain developer-backed leagues have adopted a minimum salary floor similar to those of the MLB and NBA, these contracts often contain provisions that require the athletes to avoid publicizing their play of certain competitors' video games.⁵⁶ This effectively prohibits many professional gamers from "streaming" or broadcasting their video game matches, frequently with their own commentary, on a website like

real-time strategy game to another, and disappeared altogether when he switched to a different genre of game); *see also* Hollist, *supra* note 32, at 832.

48. The ESL Pro League is a preeminent league for Valve Corporation's CounterStrike: Global Offensive. *See* ESL PRO LEAGUE, <https://pro.eslgaming.com/csgo/proleague/> (last visited Jan. 18, 2021).

49. John Holden & Thomas A. Baker, *The EContractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L. J. 2, at 11 (2019).

50. *Id.*

51. *Id.*

52. Now referred to as the Esports Integrity Commission. *See* Esports Integrity Commission, <https://esic.gg/about/> (last visited Jan. 18, 2021).

53. Miroff, *supra* note 3, at 180–81.

54. *See* Hollist, *supra* note 32, at 835–36.

55. *Id.* at 836.

56. Holden, Edelman & Baker, *supra* note 14, at 555 (explaining that the *Overwatch* League and LCS, have implemented minimum player salaries of \$50,000 and \$12,500, respectively); Hollist, *supra* note 32, at 829.

Twitch.tv, which allows users to watch the match.⁵⁷ The minimum salary amount paid to professional players by leagues is estimated at around \$25,000 annually—not including any prize money—but streaming can amount in some cases to a salary of thousands of dollars a day.⁵⁸

Not only do teams, players, tournament organizers and broadcasters lack bargaining power when contracting with developer-sponsored leagues, but the pressure to remain a professional once a player reaches that level can create stressful and unhealthy conditions.⁵⁹ In 2015, the training schedule for Team Liquid, a professional *League of Legends* team, included a minimum of fifty hours of practice a week.⁶⁰ Most Team Liquid players spent their personal time reviewing game strategy or simply playing more *League of Legends* on their personal accounts.⁶¹ Two teammates were known for practicing between twelve to fourteen hours a day, and getting an average of four hours of sleep.⁶² That intensity stems from the pressure of an endless supply of other players ready to take their place, a concept known in traditional professional sports as “next-man-up.”⁶³ This similar degree of intensity is being brought to bear on a sport with more minors than in traditional sports; some players retire at nineteen or twenty, and players considered “old” in e-sports are typically only in their early twenties.⁶⁴

That pressure also incentivizes players to spend as much time possible playing and, in some cases, to reach for illicit substances to fuel marathon professional and personal practice

57. Hollist, *supra* note 32, at 830.

58. *Id.*

59. *Id.* at 833.

60. See Harrison Jacobs, *Here's the Insane Training Schedule of a 20-Something Professional Gamer*, BUS. INSIDER (May 11, 2015), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5>.

61. *Id.*

62. *Id.*

63. Curtis Rush, *The Next-Man-Up Philosophy Working Like Charm for Toronto Raptors*, FORBES (Jan. 9, 2020, 10:49 AM EST), <https://www.forbes.com/sites/curtisrush/2020/01/09/the-next-man-up-philosophy-working-like-charm-for-toronto-raptors/#6078f80f154b>. The “next-man-up” philosophy is the principle favoring the play of bench or practice squad players if starting athletes become injured or underperform. *Id.*

64. See Ben Richmond, *E-Sports Reveal How Our Brains Age*, VICE, (Apr. 10, 2014 3:00 PM), https://www.vice.com/en_us/article/78xba9/e-sports-reveal-how-our-brains-age.

sessions.⁶⁵ The Electronic Sports League cracked down on drug use among its players in 2015 after a player casually mentioned that players in a tournament were “all on Adderall.”⁶⁶ In 2014, a top Korean player jumped out of a twelfth story window after revealing that their teams were attempting to fix matches by betting heavily against their own team and then throwing a high-profile match.⁶⁷

Game developers are incentivized in the modern e-sports landscape to heavily centralize their league, thereby maximizing viewer convenience, accessibility, and decreasing operating costs and consumer costs.⁶⁸ This centralized control also means that teams and players need to sign contracts with developers as a prerequisite to play at the professional level, which has two major implications for the players involved: Firstly, a player’s leverage to negotiate their contract is reduced when the developer owns the only professional league for that game. Second, the developer’s ownership of the league and restrictive covenants in their player contracts both restrict that player’s subsequent mobility to transfer to other leagues or games in the same or other genres.⁶⁹

Further entrenching this heavy degree of developer control are the varying rule sets among individual leagues.⁷⁰ Each major league can follow a ruleset dictated by the game developer, or that league could adopt the rulesets of any number of NGOs purporting to regulate the e-sports industry, and subject their league to different regulations.⁷¹ Many nations recognize e-

65. See Kevin Loria, *Some Competitive Video Gamers are Abusing Drugs to Get an Edge*, BUS. INSIDER (Jan. 15, 2016, 3:44 PM), <https://www.businessinsider.com/esports-doping-scandal-investigated-by-espns-otl-2016-1>.

66. *Id.*

67. Owen S. Good, *Top Korean League of Legends Player Fixed Matches Before Attempting Suicide, Says eSports League*, POLYGON (Mar. 18, 2014, 12:30 PM EDT), <https://www.polygon.com/2014/3/18/5522192/korean-league-of-legends-player-fixed-matches-suicide>; see also Hollist, *supra* note 32 at 833-834.

68. See, e.g. Hollist, *supra* note 32, at 828.

69. *Id.* at 829.

70. Miroff, *supra* note 3, at 220 (describing “enormous transaction costs” for standardizing rules across the e-sports industry).

71. Martinelli, *supra* note 2, at 506–09 (explaining that regulatory bodies such as the ESIC, the World Esports Association (WESA) – which hopes to become the FIFA of e-sports – or the International E-Sports Federation have

sports teams and players as athletes,⁷² but there is still a lack of uniformity regarding labor and competition standards for those competitors, organizers, broadcasters and other downstream actors.

II. CURRENT REGULATORY SCHEMES

As a burgeoning industry, regulation of e-sports varies widely from country to country. This section will contrast the current US model of e-sports regulation with the regulatory schemes of South Korea, the EU, and detail the attempts of various NGOs to provide some form of oversight to the e-sports industry.

A. Regulatory Scheme in the United States

The e-sports industry in the US is largely decentralized.⁷³ Particularly in the case of game developer-owned leagues, the league and its operation are not specifically regulated but are instead left to set their own rules for entry and participation by broadcasters, teams, and players.⁷⁴ This is because the game developers own the underlying intellectual property which allows developers to control the access of the remaining actors necessary to operate a league.⁷⁵ Game developers' control of these leagues is so complete that they retain the power to remove a player from their league or even ban players from playing that game at the professional level whatsoever.⁷⁶ This power transcends that of traditional sports organizations in the US; for example, while the NFL can similarly ban players from its league, banned players can always join alternative leagues like the Canadian Football League, whereas the game developers' control of their intellectual property can explicitly prohibit alternative professional leagues for banned e-sports athletes.⁷⁷

Given this largely decentralized industry, most of the regulatory problems facing e-sports are not current issues, but rather ones identified by scholars and industry observers as upcoming

all attempted to standardize particular rules to e-sports with varying degrees of success).

72. *Id.* at 503.

73. *See, e.g.*, Miroff, *supra* note 3, at 184.

74. *See Id.* at 180–82.

75. *Id.* at 180 (noting that game publishers can control the conduct of tournament organizers, broadcasters, teams, and players).

76. *Id.*

77. *See Id.*

problems.⁷⁸ One such issue under US employment law specific to players are whether the e-sports players are properly classified as employees or independent contractors of their teams.⁷⁹ Unsurprisingly, the current common practice for teams is to classify their team members as independent contractors; this designation keeps the team's labor costs down, as independent contractors have fewer legal protections in place than full-time employees do.⁸⁰ US courts have not yet had chance to weigh in on an e-sports competitor misclassification issue, and while the specific tests to determine worker classifications vary by jurisdiction and on fact-specific analyses,⁸¹ scholars believe that competitors would likely have employee relationships with both their specific teams and with the leagues in which they play.⁸² Classification of athletes as employees would result in teams and leagues being required to comply with statutory requirements on employers, such as: (1) paying payroll taxes; (2) complying with minimum wage and overtime requirements; (3) providing meal periods and rest periods; and (4) maintaining adequate worker's compensation insurance.⁸³ These protections could also address the unhealthy and widely varying workplace conditions facing professional e-sports players.

Another employment law issue brought about by the decentralized nature of the US e-sports industry is the potential unionization of e-sports athletes and other downstream actors.⁸⁴ The creation of an e-sports player's association, similar to the players' associations in traditional sports leagues such as the NBA⁸⁵ or NFL,⁸⁶ would allow the players more leverage to en-

78. See generally Miroff, *supra* note 3; Holden & Baker, *supra* note 49, at 15; Holden, Edelman & Baker, *supra* note 14, at 533.

79. Holden, Edelman & Baker, *supra* note 14, at 556.

80. *Id.*

81. Holden & Baker, *supra* note 49, at 19 (discussing three of the most common tests involved in worker classification; the "(a) economic realities test; (b) common law agency (right of control) test, and (c) the California independent contractor tests").

82. See Holden, Edelman & Baker, *supra* note 14, at 556; see also Holden & Baker, *supra* note 49, at 26.

83. Holden & Baker, *supra* note 49, at 18.

84. Holden & Baker, *supra* note 49, at 29.

85. NATIONAL BASKETBALL PLAYERS ASSOCIATION, <https://nbpa.com/> (last visited Jan. 18, 2021).

86. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, <https://www.nflpa.com/> (last visited Jan. 18, 2021).

gage in collective bargaining with league ownership for higher salaries and more flexible contracts.⁸⁷ There has been little appetite, however, among the leagues, teams, and even the players for unionization; teams and leagues are trying to keep costs down,⁸⁸ and players shy away from involving attorneys in contract negotiations, let alone engage in collective bargaining.⁸⁹ Instead, some leagues have adopted the player interest standards of the World E-Sports Association (WESA),⁹⁰ and some game developers have preemptively tried to prevent the formation of a players' association by unilaterally establishing minimum player salaries and developing a developer-run player's association.⁹¹

The extreme level of down-market control game developers hold over the other actors in the US e-sports industry has also been the subject of speculation for future regulation through antitrust laws.⁹² Given the potential monopoly power game developers have over access to an "essential facility" of that market—namely, access to the specific game in question—some suspect that this would make game developers susceptible to an antitrust claim which could be used to curtail the otherwise-unchecked control developers have over access to their owned leagues.⁹³ This is a burgeoning and unexplored issue in US courts, as no Sherman Act claim has yet been made against a league-owning game developer in the US with respect to a single, anticompetitive league.⁹⁴

87. Al Neal, *The eSports Union Revolution Is Coming*, GRANDSTAND CENTRAL (Aug. 4, 2018), <https://grandstandcentral.com/2018/sports/esports/esports-union-is-coming/>.

88. Holden, Edelman & Baker, *supra* note 14, at 556.

89. Garrett Reim, *Light Crowd for E-Sports Union: Players Shrug at Push to Form Pro Association*, LOS ANGELES BUS. J. (Jul. 7, 2017), <https://labusinessjournal.com/news/2017/jul/07/riot-games-e-sports-union-league-of-legends/>.

90. See Martinelli, *supra* note 2, at 506–07; see also Joost, *Esports Governance and its Failures*, MEDIUM (Oct. 16, 2017), <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea>.

91. Holden, Edelman & Baker, *supra* note 14, at 556–57.

92. Miroff, *supra* note 3, at 182.

93. *Id.*

94. See *id.* at 181–186 (prospectively assessing whether Sherman Act liability could hypothetically attach to developer-run leagues in lieu of US judicial guidance); see also Violetta Bourd and Tong Lap Way, *Antitrust challenges in (mobile) eSports: App store restrictions and beyond*, NORTON ROSE

B. Regulatory Scheme in South Korea

In 2014, when the video game culture in the US was just starting to flourish, the South Korean e-sports industry was already mature.⁹⁵ Professional e-sports players are treated like celebrities, and contests are broadcast over television, watched, and analyzed by South Koreans country-wide.⁹⁶ South Korea employs a markedly different regulatory scheme; the South Korean government created the Korean eSports Association (KeSPA) to oversee the industry in 2000.⁹⁷ KeSPA remains responsible for organizing and broadcasting tournaments, and also manages other e-sports industry matters.⁹⁸ This association is even a reserved member of the Korean Sports & Olympic Committee.⁹⁹

Despite South Korea's longer history with e-sports and its greater impact on domestic culture, there are concerns that government regulation has held back the South Korean game industry and sabotaged the competitiveness of local developers in the market.¹⁰⁰ These are regulations that other countries' game industries have not adopted; a regulation related to selling randomized virtual items, for example, enacted to limit overspending and gambling in the relevant games,¹⁰¹ and an-

FULBRIGHT (Jul. 2020), <https://www.nortonrosefulbright.com/en/knowledge/publications/b7837afc/antitrust-challenges-in-mobile-esports-app-store-restrictions-and-beyond> (last visited Jun. 4, 2021) (noting that while an e-sports developer has brought antitrust actions against Google and Apple's app stores in EU enforcement for anticompetitive conduct, no such challenge has been brought against the e-sports developers themselves).

95. Paul Mozur, *For South Korea, E-Sports is National Pastime*, N.Y. Times (Oct. 10, 2014), <https://www.nytimes.com/2014/10/20/technology/league-of-legends-south-korea-epicenter-esports.html?auth=login-email&login=email>.

96. *Id.*

97. Andrea Rizzi, Nicoletta Serao & Liam Nowak, *Esports in Italy: An Industry Ready to Take Off (or Still in Search of its Regulatory Soul)?*, 2 INTERACTIVE ENT. L. REV. 42, 47 (2019).

98. *Id.*

99. *Id.*

100. Baek Byung-yeul, *Korea's Heavily-Regulated Game Industry to Lose its Edge*, KOR. TIMES (Jul. 29, 2018), https://www.koreatimes.co.kr/www/tech/2018/12/134_252776.html.

101. *Id.* (This regulation refers to "loot boxes," or prizes earned through playing a game which offers a randomized set of prizes for in-game advancement or aesthetic customizations); see also Sok Min Yun, *A Comparative*

other law prohibiting children under the age of sixteen from playing online games between midnight and 6 a.m.¹⁰² These laws have seen pushback from Korean game industry representatives, such as the Korean Mobile Game Association and the Korean Association of Game Industry.¹⁰³ These organizations argue that the regulations are not only sabotaging Korean game developer competitiveness in the international game market but also create a negative stigma against playing video games and the video game industry as a whole.¹⁰⁴

KeSPA does not limit its activity in the e-sports space to regulation alone; in 2010, KeSPA sued American video game developer Blizzard in Korea for entering into an agreement allowing one Korean television company to broadcast tournaments of *StarCraft*, which necessarily made broadcasts of KeSPA-organized tournaments on other networks unlicensed.¹⁰⁵ While the case settled and terms of that settlement were not disclosed, that the situation progressed to litigation demonstrates the tension between a state regulatory body and the control game developers retain over their IP.¹⁰⁶

C. Regulatory Schemes in the European Union

There is no unified approach to e-sports regulation in the EU; e-sports regulations vary between France, Germany and Italy, for example, and the EU itself has been grappling with industry-specific regulation since mid-2019.¹⁰⁷ To try to provide that uniformity, in April 2019 national e-sports organizations from

Overview of Esports Against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating and Gambling, 37 *CARDOZO ARTS AND ENT. L. J.*, 513, 538 (2019) for an overview of the debate between whether or not the inclusion of loot boxes in e-sports constitutes gambling.

102. Byung-yeul, *supra* note 100.

103. *Id.*

104. *Id.*

105. Miroff, *supra* note 3, at 181.

106. Rizzi, Serao & Nowak, *supra* note 97, at 47.

107. *See id.* at 48-49; *see also* Mathias Bogusch, *eSports Coming to the Fore for Policymakers in Europe*, WHITE & CASE (Oct. 4, 2017) <https://www.whitecase.com/publications/article/esports-coming-fore-policymakers-europe>; *see also* Nick Breen & Hunter Thompson, *The Onslaught of Regulation Against Games and Esports* (Aug. 19, 2019), <https://www.gamesindustry.biz/articles/2019-08-16-the-onslaught-of-regulation-against-games-and-esports>.

twelve countries¹⁰⁸ agreed to establish an independent e-sports federation, called the European Esports Federation (EEF).¹⁰⁹ The result of this agreement was The Berlin Declaration (hereinafter, the Declaration), a two-page document indicating the EEF's position not to be a governing body, but instead a "moderating partner" for the industry and European countries.¹¹⁰ The Declaration utilizes concepts from both the US and South Korean regulatory regimes; it emphasizes respect for the rights bound up in IP ownership,¹¹¹ as the US currently does, while concurrently acknowledging the importance of emphasizing consumer rights and the potential medical and social impacts of video games on young people in particular, as seen in South Korea.¹¹² The EEF has yet to influence any specific EU directive,¹¹³ but appears to be an attempt to harmonize the e-sports industry throughout Europe in light of new and incoming EU regulations.¹¹⁴

This attempt is prudent, as European countries currently differ on whether e-sports are indeed sports; for instance, France has not legally recognized e-sports as sports but, in 2016, passed laws allowing their operation so long as they give notice to the French government.¹¹⁵ France did so by passing two different laws: The first requires that video game competitions take in less fees from players than it gives out as prize money, and also protects minor players by requiring parental permis-

108. These twelve countries are the United Kingdom, Belgium, Germany, Austria, Hungary, France, Russia, Slovenia, Serbia, Sweden, Turkey and Ukraine. Graham Ashton, *European Esports Federation to Form with 12 National Members*, ESPORTS OBSERVER (Apr. 18, 2019), <https://esportsobserver.com/european-esports-federation-formed/>.

109. *Id.*

110. Breen & Thompson, *supra* note 107; see also *The Berlin Declaration; An Esports Vision for Europe*, ESPORTS EUROPE (Apr. 10, 2019) <https://esportseurope.org/wp-content/uploads/sites/3/2019/04/The-Berlin-Declaration-An-Esports-Vision-for-Europe.pdf> (last visited Mar. 13, 2021).

111. This appears to be a nod to the game developers also present at the EEF's meeting.

112. A position reminiscent of South Korea's ban on child gaming from midnight to 6 a.m.; see Byung-yeul, *supra* note 100.

113. At the time of this writing, the EEF website announces its founding as of February 2020, but otherwise contains only its mission statement; see ESPORTS EUROPE, <https://esportseurope.org/> (last visited Jan. 18, 2021).

114. *Id.*

115. Bogusch, *supra* note 107; see also Rizzi, Serao & Nowak, *supra* note 97, at 48.

sion for participation.¹¹⁶ The second governs when players can sign employment contracts with developers, and allows those players eligibility to labor security and health protections by subjecting those contracts to French labor laws.¹¹⁷ These new regulations have been criticized as doing nothing to deal with the issues created by game developers' use of IP rights, but are generally seen as a flexible regulation that could facilitate dialogue between industry actors to respect both developers' IP rights and player protections.¹¹⁸

In contrast, the German government refuses to admit e-sports into the German Olympics Sports Confederation for lack of "a self-motivic performance."¹¹⁹ This treatment by the German government paradoxically seems to exempt e-sports from Germany's criminal code for betting fraud.¹²⁰ Similarly, Italy does not currently recognize competitive video gaming as a "sport," but is listed by sports promoting bodies as a "sports activity" and is considering adopting a new regulatory scheme similar to that of France.¹²¹

D. Regulatory Schemes of Non-Governmental Organizations

Adding to this spectrum of regulatory schemes are a number of NGOs focused on providing standardized rules or ethical codes with the purpose of injecting stability and predictability into the e-sports industry on national and international levels.¹²² The ESIC partnered with the ESL Pro League, and has also had its anti-corruption code applied to *Dota 2*, *League of*

116. Arthur Stadler & Oliver Völkel, *The Pioneering French Regulation on Esports*, STADLER VÖLKE (Jan. 2, 2019), <https://www.svlaw.at/en/the-pioneering-french-regulation-on-esports>.

117. *Id.*

118. Rizzi, Serao & Nowak, *supra* note 97, at 48–49.

119. Bogusch, *supra* note 107.

120. *Id.*

121. See Rizzi, Serao & Nowak, *supra* note 97, at 46.

122. See Martinelli, *supra* note 2, at 506; see also *Who We Are*, ESPORTS INTEGRITY COMMISSION, <https://esic.gg/about/> (last visited Jan. 18, 2021); *Members & Supporters*, Esports Integrity Commission, <https://esic.gg/members/> (last visited Mar. 13, 2021) (listing the ESL Pro League as an ESIC partner as of 2017); See *Rules for Pro League Season 13*, ESL PRO LEAGUE, 21, <https://cdn.eslgaming.com/misc/media/lo/ESL%20Pro%20Tour%20-%20CSGO%20General%20Rules.pdf>.

Legends, and *StarCraft*.¹²³ WESA is a collective of eight worldwide gaming corporations focused on representing players in matters of player rights and fairness policies.¹²⁴ Several members of the WESA board are ESL members, however, leading to the appearance of WESA being a means to accomplish the ESL's industry goals.¹²⁵ The International E-Sports Federation is made up of national e-sports federations with the goal of international recognition of e-sports as a legitimate sport, but has had little regulatory impact.¹²⁶ This is unfortunately a common theme for many of these NGO actors: the World eSports Council was launched to be a global governing body for the industry; the British eSports Association is oriented at representing player interests across all e-sports levels; France, Russia and the Middle East have all launched federations aimed at regulating e-sports on a national or international level, and all have had negligible global impact.¹²⁷

III. THE INTERNATIONAL LABOR ORGANIZATION AND APPLICABLE LABOR STANDARDS

This section will sketch a brief history of the International Labor Organization (ILO) and lay out how the applicable core ILO conventions, if adopted in each country which hosts e-sports tournaments, would provide greater leverage and labor protection for e-sports players and other downstream actors.

A. *The History of the International Labor Organization*

The International Labor Organization (ILO) was founded as part of the Treaty of Versailles at the end of World War I in 1919 and has been a specialized agency of the UN since 1946.¹²⁸ It is the only tripartite agency of the UN, meaning that its executive membership is made up of three distinct groups: workers, employers, and governments.¹²⁹ The ILO has four objectives at the heart of its current agenda:

123. Martinelli, *supra* note 2, at 506.

124. *Id.* at 507.

125. Joost, *supra* note 90.

126. Martinelli, *supra* note 2, at 508.

127. *See id.* at 508–10.

128. *History of the ILO*, INT'L LABOR ORG., <https://www.ilo.org/global/about-the-ilo/history/lang—en/index.htm> (last visited Jan. 18, 2021).

129. *Id.*

(1) to set and promote standards and fundamental principles and rights at work; (2) create greater opportunities for women and men to decent employment and income; (3) enhance the coverage and effectiveness of social protection for all; (4) strengthen tripartism and social dialogue.¹³⁰

The ILO announces its guiding principles in a Constitution¹³¹ and disseminates different types of instruments—conventions, declarations, and recommendations—in pursuit of these principles.¹³² The conventions serve as legally binding international treaties so long as they are ratified by member states.¹³³ Eight of these conventions deal with what the ILO specifically considers fundamental labor rights, which are:

Freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.¹³⁴

These conventions are also specifically recognized by the ILO Declaration on Fundamental Principles and Rights at Work,¹³⁵ which provides that “all member states must respect, promote, and realize the fundamental principles and rights established therein—regardless of which conventions [the member state] has ratified.”¹³⁶ Of the 185 states party to the ILO, 138 have

130. *Mission and Objectives of the ILO*, INT'L LABOR ORG., <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Jan. 18, 2021).

131. *See generally* ILO CONSTITUTION.

132. *ILO Legal Instruments*, INT'L LABOR ORG., <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/lang-en/index.htm> (last visited Jan. 18, 2021).

133. *Conventions and Recommendations*, INT'L LABOR ORG., <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> (last visited Jan. 18, 2021).

134. *Id.*

135. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, INT'L LABOR ORG., <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (last visited Jan. 18, 2021).

136. David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1846 (2014).

ratified the core conventions.¹³⁷ All twenty-eight member states of the EU have ratified the core conventions, while South Korea has ratified four of eight and the US has only ratified two.¹³⁸

B. ILO Labor Standards Relevant to the e-sports Industry

The ILO standard most relevant to the e-sports industry is that promoted by Conventions 87 and 98, which promote the freedom of association. This standard encompasses both the right to organize¹³⁹ and the right to collectively bargain¹⁴⁰ as essential elements of the freedom of association. Under current ILO and US law, the right to collectively bargain inherently includes a duty to bargain over collective bargaining agreements in good faith, which is violated by any “employer economic inducement to give up bargaining rights, employer dominated unions, or employer assistance to unions.”¹⁴¹ The first player’s association in US e-sports seems on track to violate this principle; in 2018, Riot Games founded the North American League of Legends Championship Series Player’s Association, which is currently still funded by Riot Games.¹⁴² Riot allowed the player-representatives they appointed to choose who would head the association and publicly maintain that they eventually want the NALCSPA to attain autonomy.¹⁴³ As long as the association continues to be significantly funded by Riot, however, it will appear that Riot is dominating or otherwise economically assisting the association sufficient to constitute

137. *Id.* at 1844.

138. *Id.* at 1846; see also *Republic of Korea*, INT’L LABOR ORG., https://www.ilo.org/gateway/faces/home/ctryHome?locale=EN&countryCode=KOR&_adf.ctrl-state=w73t8mt54_19 (last visited Jan. 18, 2021).

139. *Id.*

140. *Id.* at 1856.

141. *Id.* at 1857.

142. *NA LCS Players Association Announces Results of Inaugural Executive Officer Election*, E-SPORTS OBSERVER (June 14, 2018), <https://esportsobserver.com/na-lcs-players-association-president/>; Graham Ashton, *NALSC Players Association Executive Director Reflects on First Year of Activity*, E-SPORTS OBSERVER (Jan. 19, 2019), <https://esportsobserver.com/nalcspa-executive-director-interview/> (last visited Jan. 18, 2021).

143. *Id.*

an unfair labor practice, if the association and Riot come to the table to work out a collective bargaining agreement.¹⁴⁴

As the US has not ratified the ILO conventions promoting the freedom of association, several ILO principles more strongly protect workers than US labor law relative to collective bargaining agreements; for example, failure to implement a collective bargaining agreement under the ILO conventions constitutes a violation of the rights to collectively bargain and bargain in good faith, where employers in the US are only obligated to meet and confer in good faith; and the ILO conventions discourage employers' delay of negotiations, while the US allows employers to delay negotiations without engaging in an unfair labor practice.¹⁴⁵ The ILO also makes no distinction for mandatory subjects of a collective bargaining agreement.¹⁴⁶ US labor law indicates that certain subjects of a bargaining agreement are mandatory—those related to “wages, hours, and other conditions of employment that are almost exclusively an aspect of the employer-employee relationship”—while others are non-mandatory, meaning that either party can refuse to discuss the matter or insist on not bargaining over it at all.¹⁴⁷ Under existing US law, employers can unilaterally decide not to discuss any non-mandatory subjects, even if failure to discuss that subject would violate the collective bargaining agreement between the parties.¹⁴⁸ In contrast, the ILO conventions prohibit either party from unilaterally cancelling any bargaining subject, mandatory or not.¹⁴⁹ These ILO principles would provide more leverage for athletes and other downstream actors in the e-sports industry to negotiate better deals against their League owners, but as most of the League owners exist in the US,¹⁵⁰ many US-based teams would therefore lack

144. See *NA LCS Players Association Announces Results of Inaugural Executive Officer Election*, *supra* note 142; see also Weissbrodt & Mason, *supra* note 136, at 1857.

145. *Id.* at 1857–59.

146. *Id.* at 1861.

147. *Id.*

148. *Id.* at 1857–58.

149. *Id.*

150. Riot Games is currently headquartered in California, and Valve is currently headquartered in the state of Washington. Holden & Baker, *supra* note 49, at 21, 23; see also *Studios and Locations*, ACTIVISION, <https://www.activision.com/company/locations/santa-monica> (last visited Mar.

the same protections as players associations in South Korea or the EU may be able to negotiate, limiting the international impact the ILO's principles could have on the global e-sports industry.

C. Current Issues Which Require Regulation

The recent advent of e-sports on the international scale has left the industry's athletes facing a number of problems which current regulation fails to solve.¹⁵¹ The amount of time athletes spend training to compete at the professional level, when combined with the lack of a cap on hours worked, results in some players practicing for fourteen hours a day.¹⁵² In addition to the hours worked, the pressure to remain competitive has led many e-sports competitors to turn to performance-enhancing drugs during competitions to succeed.¹⁵³ Adderall, for example, has been abused at matches and tournaments to decrease reaction time and artificially boost a player's alertness.¹⁵⁴ The incentive to use these drugs is similar to that of the traditional sports world—the winner of a tournament wins massive prize pools¹⁵⁵ and the opportunity for sponsorship benefits.¹⁵⁶

These issues are compounded by the relative youth of the players. The 2019 *League of Legends* Championship Series (LCS) rules allow professional players to begin competing as early as seventeen,¹⁵⁷ and players often retire from the professional circuit at nineteen or twenty.¹⁵⁸ In comparison, the aver-

13, 2021) (specifying that Activision-Blizzard's headquarters is also in California).

151. See Hollist, *supra* note 32, at 831–37.

152. *Id.* at 833.

153. Yun, *supra* note 101, at 528–29.

154. *Id.*

155. Christina Gough, *Leading eSports Tournaments Worldwide as of 2020*, by *Prize Pool*, STATISTA (Nov. 27, 2020), <https://www.statista.com/statistics/517940/leading-esports-tournaments-worldwide-by-prize-pool/> (listing the highest prize pool for e-sports tournaments in 2019 at \$34.33 million).

156. Yun, *supra* note 101, at 530.

157. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, *2019 Season Official Rules* §2.1.1 (Jan. 10, 2019), https://nexus.leagueoflegends.com/wp-content/uploads/2019/01/2019-LCS-Rule-Set-v19.3_uh6o67g0zd58db0o5p08.pdf (last visited Jan. 18, 2021).

158. Hollist, *supra* note 32, at 831.

age age of NBA and NFL players is twenty-six years old.¹⁵⁹ This age gap is significant because e-sports rely more heavily on reflexes than traditional sports to be competitive, and the brain's ability to react to stimuli peaks at twenty-four.¹⁶⁰ Not only are e-sports athletes far younger on average than traditional athletes, but due to their profession's reliance on reflex, they have a smaller career window to remain competitive.¹⁶¹ Finally, the relative youth of e-sports athletes means that most professional e-sports players have no experience negotiating contracts.¹⁶² This inexperience, coupled with the lack of pre-existing player's associations that are found in traditional sports, mean that players are more likely to sign League-favoring contracts without the assistance of an entity ensuring the protection of the player's rights or without attempting to negotiate any terms.¹⁶³ These terms themselves can impose significant restrictions on players; a leaked contract of a player signed with Riot revealed that the player in question granted Riot the indefinite right to use that player's voice and image and limited the independent livestreaming of their personal matches over the internet, a common practice and significant additional revenue stream for e-sports athletes.¹⁶⁴ This particular contract was later amended to be more lenient, but it emphasizes the incredibly disparate bargaining power a game developer/league owner has over its players and highlights the need for more comprehensive regulation.

IV. POTENTIAL SOLUTIONS FOR REGULATING E-SPORTS

The ever-increasing economic investment and incentive throughout the e-sports industry alone warrant regulation, and the unaddressed issues of players' rights and working conditions only emphasize the issue.¹⁶⁵ The South Korean government created an agency to directly regulate the country's e-sports, but game developer organizations worry the regulations have gone too far and stifled the industry.¹⁶⁶ In the US regula-

159. Yun, *supra* note 101, at 530.

160. *Id.* at 531.

161. *See id.*

162. Hollist, *supra* note 32, at 831.

163. *Id.* at 834.

164. *Id.* at 829–30.

165. *Id.* at 841.

166. Byung-yeul, *supra* note 100.

tion is entirely decentralized, which has led to league owners setting and enforcing their own rules for their leagues.¹⁶⁷ A similar lack of regulation in the EU has led to the creation of an organization of various national e-sports organizations and other industry stakeholders, with the goal of shifting EU policy to better address the concerns of involved governments, industry voices, and the teams of athletes.¹⁶⁸ To further muddy the regulatory waters, a variety of NGOs purport to regulate or oversee a variety of aspects of the industry, all with differing degrees of buy-in from the players, teams, and broadcasters.¹⁶⁹ This section will explore the benefits and drawbacks of three proposals for better regulation of the e-sports industry, and propose that the third—regulation through international labor standards and the unionization of players, broadcasters and commentators—will most fairly protect the working conditions and rights of players.

A. The First Solution: A Completely Centralized System of Governance

One proposed solution for the regulation of the e-sports industry is to create a singular, centralized organization that would oversee e-sports globally.¹⁷⁰ The suggestion draws an analogy to the Federation Internationale de Football Association (FIFA), the global governing body of the international sport of association football.¹⁷¹ Like FIFA, proponents of this theory suggest creating a global governing body that can then delegate its power to national bodies to regulate e-sports in the different countries and regions which choose to participate.¹⁷² These national bodies can, in turn, delegate power to game and league specific regulatory bodies to tailor the rules and standards of these national bodies, and require national consistency with the standards put in place by the global governing organ.¹⁷³

167. Miroff, *supra* note 3, at 184–85.

168. Ashton, *supra* note 108; Bogusch, *supra* note 107; Breen & Thompson, *supra* note 107.

169. See Martinelli, *supra* note 2, at 506, 509–10.

170. *Id.* at 515.

171. Martinelli, *supra* note 2, at 515 (FIFA uses the European definition of football, or “soccer” in the US).

172. *Id.*

173. *Id.*

The concept of national e-sports bodies which accommodate regulation of the different e-sports in a country, that are in turn subject to the oversight of global body, appears at least in theory to be flexible enough to accommodate each e-sport internationally.¹⁷⁴ Further, such a system would provide one standard set of regulations to apply internationally to each e-sport, which would clarify the standards leagues, players and other involved actors would need to meet to be involved with the industry.¹⁷⁵ The increased stability brought about by a predictable regulatory structure would likely increase investor confidence in the industry and increase both outside investment and sponsorship agreements in e-sports.

This proposal is not without its own set of problems. In 2015, FIFA faced claims of widespread corruption and bribery, which claimed the career of its President, Sepp Blatter, and collectively accused 30 current and former FIFA officials of corrupt activities.¹⁷⁶ Each of its past two World Cup bidding processes were investigated on bribery charges.¹⁷⁷ Even more concerningly, there are reports of “catastrophic” working conditions in the efforts to build stadiums for the 2022 World Cup in Qatar, including deaths of Nepalese migrant workers.¹⁷⁸ While there is no guarantee that the same endemic corruption would strike an e-sports governing body, the analogy to a FIFA-like model of regulation illustrates that such a centralized body is not immune from abuse by its participants, particularly if increased investment flows to the industry.¹⁷⁹

The adoption of a FIFA-style model of governance also makes no accommodation for the rights of the game developers.¹⁸⁰

174. *Id.* at 519–20.

175. *Id.*

176. *FIFA Corruption Crisis: Key Questions Answered*, BBC (Dec. 21, 2015), <https://www.bbc.com/news/world-europe-32897066>.

177. *Id.*

178. James Thorogood, *Qatar 2022: FIFA Admits Violations of Worker Standards*, DEUTSCHE WELLE, (June 6, 2019), <https://www.dw.com/en/qatar-2022-fifa-admits-violation-of-workers-standards/a-49078052> (last visited Jan. 18, 2021).

179. Miroff, *supra* note 3, at 220 (explaining that a centralized body of industry regulation could be “subject to regulatory capture and outsized influence exerted by the largest publishers.”).

180. *See id.* (hypothesizing that publishers whose interests they felt were not adequately represented by governance standards would simply “opt out.”).

While traditional sports have no sole owners, video games by definition only exist because of developers. At the very least, a FIFA-like organization would need contractual permission from each game's developer to become the regulating body for all e-sports. This is decidedly against the interests of game developers, which currently control the rights to their game, its corresponding e-sport league, and authority over any downstream actor's access to the IP. Given these considerations, an international regulatory body similar to FIFA is unlikely to successfully get off the ground, much less be able to regulate and protect the working conditions of e-sports players.

B. The Second Solution: Domestic Antitrust Regulation

The fact that game developers own the rights to the game the league is based on, particularly when expanded on the global scale, is a significant obstacle to effective regulation.¹⁸¹ One suggestion particular to the US¹⁸² is to hold game developers that use their IP ownership rights to control downstream league access for players, teams, organizers, and broadcasters subject to antitrust laws.¹⁸³ Game developers are naturally incentivized to establish their own tournaments and self-broadcast, as doing so reduces competition with other e-sports, minimizes their operating costs and maximizes their potential revenue.¹⁸⁴ A domestic antitrust regulatory solution explicitly takes issue with the suggestion of creating an international e-sports governing body: such a suggestion would stifle healthy competition and innovation¹⁸⁵ in the same way that industry actors in South Korea have complained about.¹⁸⁶ Allowing the threat of antitrust actions against game developers could prevent those developers from vertically integrating and may subsequently encourage those developers to offer their IP at reasonable royalties, thus encouraging harmony among the developer, viewer and players' interests in a competitive e-sports in-

181. *Id.* at 179 (discussing that game developers exercise "monopoly rights" in the context of downstream viewers, players, teams, broadcasters and advertisers).

182. *Id.* at 206 (noting that many of the largest e-sports game developers are located in the US).

183. *Id.* at 184–85.

184. *Id.* at 190.

185. *Id.* at 219.

186. Byung-yeul, *supra* note 100.

dustry.¹⁸⁷ Under this approach, the players, teams and other downstream entities have their working conditions protected through an efficient market, where an inefficient or highly centralized developer simply causes those players to move to different tournaments for the same e-sport.¹⁸⁸

Domestic antitrust regulation of e-sports would directly handle the heavy IP centralization that game developers currently wield in the e-sports industry; keeping a developer from fully monopolizing a league requires developers to compete for publishing entities to broadcast their product and allows independent publishers to compete for that publishing business in the marketplace.¹⁸⁹ With multiple entities able to compete for the publishing of a league's broadcast, individual players signed to one league could transfer from one tournament or league to another to avoid poor or exploitative conditions, thus providing players with some transferability within a league. These market forces would also incentivize game developers and publishers to adopt similar standards for player working conditions and treatment to avoid losing their athletes and support staff to leagues that implement better labor standards.

The theory of regulation through domestic antitrust is not without fault. While the lack of nationwide regulation and market forces theoretically encourages developers to fairly treat players and other downstream actors, that protection is only as good as the market requires it to be to remain competitive. Even if game developers are prohibited from vertically integrating due to the threat of antitrust enforcement, nothing would prohibit the publishers from racing to keep their viewer engagement high and their costs low to maximize their revenue from developer royalties. This proposal also relies too heavily on government enforcement of antitrust laws to actively and diligently police game developers and publishers to be effective. The merit of domestic antitrust regulation is that it could theoretically provide a stabilizing framework for the e-sports industry, but it also assumes an infallible enforcement agency for the system to work properly. Further, this proposal is specific to US federal antitrust laws; while it would seem conceptually simple to apply EU competition laws in the same manner as

187. See Miroff, *supra* note 3, at 219.

188. *Id.* at 223.

189. See generally *id.*

US federal antitrust laws to e-sports, interpretation of EU competition laws vary by country, and even US federal antitrust enforcement varies by individual states.¹⁹⁰ Finally, antitrust laws would only indirectly regulate the labor concerns for athletes and downstream actors; without minimum workplace standards for conditions and wages, developers are only incentivized to maintain attractive labor and wage conditions by competition, leaving those conditions largely up to the developers' whims, much as they currently are.

C. Final Solution: Unionization under ILO Standards

This Note suggests that e-sports players should unionize under the standards of the ILO to properly ensure that their working conditions and standards are respected. The rationale for the proposal to unionize under the ILO is two-fold: first, most players, at least in the US, are currently categorized as independent contractors by their contracts with professional leagues, meaning that those players lack the standing to legally unionize;¹⁹¹ second, the ILO's standards recognize greater rights to organization and collective bargaining than in the US currently.¹⁹² This proposal is not entirely novel; e-sports players in various leagues have considered organizing since 2018.¹⁹³ In 2018, Riot Games helped found and fund the NALCSPA¹⁹⁴, and professional *Counter-Strike* players formalized unofficial groups into the Counter-Strike Professional Players' Association.¹⁹⁵ These players' associations may run in to additional issues, particularly in the US, when it comes to classification, as independent contractors themselves are seen as engaging in anticompetitive behavior that is itself a violation of antitrust

190. Sanford M. Pastroff & Tilman Kuhn, *Antitrust Law in the United States and European Union: Key Differences*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/antitrust-law-the-united-states-and-european-union-key-differences/.

191. Hollist, *supra* note 32, at 838.

192. Weissbrodt & Mason, *supra* note 136, at 1852, 1860.

193. See Maddy Myers, *Pro Gamers are Getting Serious About Organizing*, KOTAKU (Mar. 14, 2018), <https://compete.kotaku.com/pro-gamers-are-getting-serious-about-unionizing-1823770452>.

194. Ashton, *supra* note 108.

195. Jacob Wolf, *Counter-Strike Pros form the Counter-Strike Professional Players Association*, ESPN, (Jun. 29, 2018), https://www.espn.com/esports/story/_/id/23947731/counter-strike-pros-form-counter-strike-professional-players-association (last visited Jan. 18, 2021).

laws.¹⁹⁶ This aspect of US antitrust law is in tension with ILO standards, which state that organized workers can freely negotiate with their employers without the employer delaying or refusing to bargain over any particular term of the negotiations.¹⁹⁷

Full coverage of the ILO core conventions related to the freedom of association¹⁹⁸ already apply to the countries in the EU, which will allow EU-based teams to organize and negotiate collective bargaining agreements with game developers to agree on minimum standards for hours, pay, and training conditions, among other things.¹⁹⁹ Similar bargaining was successful in the realm of traditional sports in 2011, when the player's association for the NFL secured significant changes to practice requirements, schedules, and decreases in the amount of offseason workouts.²⁰⁰ While the factual terms of the bargaining will assuredly be different for e-sports, having organizations of professional players come to the table with league owners will develop levels of protection specific to individual leagues without overburdening the league as a whole.

Significantly, not every country has ratified ILO Conventions 87 and 98.²⁰¹ Specifically, an organization under the ILO Conventions by US-based players would not be legally recognizable until the US ratified those conventions.²⁰² While this is a significant hurdle, it will not prevent players based in countries that have ratified those Conventions from organizing and carving out protections for their teams. In doing so, those teams could establish a norm for leagues in countries that have not fully ratified the Conventions to follow and force the issue of compliance by establishing global market standards. Another obstacle facing this proposal is the current contractual nature of professional e-sports contracts; as long as those contracts are in force, leagues will likely be unwilling to re-negotiate with players' associations. Players under contract will need to wait to organize and re-negotiate workers' standards until the term of their contracts have expired.

196. Hollist, *supra* note 32, at 838–39.

197. Weissbrodt & Mason, *supra* note 136, at 1861.

198. *Id.* at 1846.

199. *Id.* at 1846.

200. Hollist, *supra* note 32, at 834.

201. Weissbrodt & Mason, *supra* note 136, at 1846.

202. *Id.* at 1845.

CONCLUSION

The e-sports industry has exploded over the past decade in terms of viewership, participation, outside investment, and advertising revenues. As the industry has skyrocketed, game developers have begun acting as their own league owners and operators, vertically integrating their control by internally commenting, broadcasting, and contractually binding professional e-sports players to their league. This centralization has resulted in higher viewership and greater visibility for the industry than ever before. Increased traffic to the industry does not necessarily benefit the professionals on whom the industry is based, however; e-sports professionals subject themselves to extremely long working hours to remain competitive, are relatively unable to transfer their professional skills to other leagues and can be restricted from pursuing independent revenue streams when contracting to play in the professional leagues. Further, the average e-sport athlete both begins their career earlier and ends it earlier than the careers of most traditional athletes. Despite these conditions, the working conditions for e-sports athletes are largely unregulated.

In order to properly regulate the e-sports industry, a combination of antitrust enforcement and labor organization under the principles of the ILO should be utilized. Antitrust enforcement will enforce greater standards of accountability among game developers, preventing the complete vertical integration of their leagues and ensuring that broadcasters, commentators, and organizers are able to compete in the marketplace; at the same time, players should organize pursuant to the ILO's standards and ensure working standards are put in place to protect the players from excessive training hours and establish a more stable professional life, similar to that of traditional athletes. Such a regulatory scheme will promote competition and innovation in the marketplace while simultaneously protecting the players upon whom this growing industry relies.

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