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## Pausing the Game: Esports Developers' Copyright Claims to Prevent or Restrict Tournament Play

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# Pausing the Game: Esports Developers' Copyright Claims to Prevent or Restrict Tournament Play

## ABSTRACT

*Unlike traditional sports, esports are—at their core—video games, which must be designed and programmed by a game company. These video game developers are the copyright owners of the esports titles they create, which, in turn, results in continued developer control even after a player has purchased or downloaded the game. Because there is no relevant court precedent that is directly applicable to the world of esports, game developers unimpededly exert their copyright authority in order to restrict third-party tournaments that utilize their games, and in some cases, prevent those events from occurring altogether. This use of copyright authority is an overly broad construction of copyright law that deprives gaming communities of valuable events and fails to protect one of the most important interests of the copyright holder: consumer trust.*

*This Note argues that control over third-party tournaments does not fall within the rights guaranteed to copyright owners by the Copyright Act of 1976. While esports developers should maintain some level of control over their titles, the right to conduct tournaments for their games is one that should not be held exclusively. This Note proposes a compulsory licensing scheme for esports titles as a superior alternative to the current approach. After publishing its game, a developer would register its title with a licensing collective, which could grant conditional licenses to any third party that wishes to organize tournaments using that game. This scheme sufficiently balances the interests of both video-game developers and third-party tournament organizers.*

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In 2013, the US government officially recognized full-time *League of Legends* players as professional athletes, which allowed foreign players to come to the United States on work visas.<sup>1</sup> In 2019, the *League of Legends World Championship* semifinal match between European giant G2 Esports and three-time world champion SK Telecom T1 became the most-watched match in esports history, peaking at 3,985,787 concurrent viewers.<sup>2</sup> In April 2021, the International Olympics Committee (IOC) announced the inclusion of an esports competition in the 2024 Olympic Games.<sup>3</sup> Esports, best described as organized video game competition, is growing at an incredible rate, with industry projections continuing on an upward trajectory.<sup>4</sup>

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1. Tom Sykes, *US Government Recognizes League of Legends Pros as Professional Athletes*, PC GAMER (July 13, 2013), <https://www.pcgamer.com/us-government-recognises-league-of-legends-pros-as-professional-athletes/> [https://perma.cc/A9XL-B9ZL].

2. Tyler Esguerra, *G2's Worlds 2019 Semifinals Victory over SKT Is Now the Most-Watched Esports Match*, DOT ESPORTS (Nov. 3, 2019, 12:52 PM), <https://dotesports.com/league-of-legends/news/g2s-worlds-2019-semifinals-victory-over-skt-is-now-the-most-watched-esports-match> [https://perma.cc/HS6P-2FXN].

3. Des Bieler, *IOC Announces Inaugural Slate of Olympic-Licensed Esports Events*, WASH. POST (Apr. 22, 2021, 7:34 PM), <https://www.washingtonpost.com/video-games/esports/2021/04/22/ioc-olympics-esports/> [https://perma.cc/W9MD-6HX3].

4. See *Esports Viewership vs. Sports in 2020*, ROUNDHILL INVS., <https://www.roundhillinvestments.com/research/esports/esports-viewership-vs-sports> [https://perma.cc/N97C-F5UH] (Sept. 25, 2020).

In many ways, the esports industry parallels that of traditional sports.<sup>5</sup> But, one aspect of esports that differs from traditional sports is ownership.<sup>6</sup> The games that underlie traditional sports, such as baseball, arguably exist in the public domain.<sup>7</sup> In the case that they do not, it would be difficult to argue that some distinct entity owns the game.<sup>8</sup> For esports, however, the underlying game is a video game that is owned by a video-game developer.<sup>9</sup> This gives rise to several legal issues regarding the rights of developers who wish to exert control over their respective games and the tournaments that use their games.<sup>10</sup> A number of esports game developers have already attempted to control certain aspects of third-party tournaments by imposing limitations on prize pools or entry fees and, in some instances, forcing organizers to cancel their tournaments entirely.<sup>11</sup>

Developers argue that copyright law grants them the power to regulate the use of their games in third-party tournaments because such tournaments, whether through use of the game, through gameplay broadcasts, or through gameplay itself, constitute performance of the developers' copyrighted works.<sup>12</sup> However, the extent of developers' intellectual property rights is unclear due to a lack of precedent on the issue.<sup>13</sup>

On the other side, third-party tournament organizers, as well as amateur and professional players, have been outspoken regarding the harms that developers' stringent regulations inflict on gaming communities and their efforts to expand esports competitions.<sup>14</sup> These restrictions can make third-party tournaments unappealing to participants and impractical for organizers.<sup>15</sup> Where developers have

5. See *infra* Section I.A.

6. Duran Parsi, *All in the Game*, 42 L.A. LAW. 26, 27 (2019).

7. *Id.*; see Jonathan Tong, Abid Ahmed, & Desmond J. Christy, *It's in the Game: The Esports Legal Playbook*, MILLER THOMSON (Feb. 10, 2020), <https://www.millerthomson.com/en/publications/articles/its-in-the-game-the-esports-legal-playbook/> [https://perma.cc/SNT5-6TTQ].

8. See Tong, *supra* note 7.

9. See *id.*

10. See *id.*

11. See Owen S. Good, *Smash Bros. Tournament the Big House 10 Canceled over Netcode*, POLYGON (Nov. 19, 2020, 4:53 PM), <https://www.polygon.com/2020/11/19/21578200/super-smash-bros-tournament-the-big-house-10-canceled-nintendo-c-d> [https://perma.cc/FM3G-JM9A].

12. See 17 U.S.C. § 106.

13. See Tong, *supra* note 7.

14. See *infra* Section II.B.

15. See Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (July 11, 2013, 1:59 AM), <https://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee> [https://perma.cc/8P56-T8D3]; Preston Byers, *Epic Games Has Put a \$10,000 Prize Pool Cap*

stopped tournaments entirely, in some cases, community backlash has even forced the developers to relent on exerting their authority, thereby allowing those tournaments to resume.<sup>16</sup>

However, this is often the exception rather than the rule; in most cases, esports players and enthusiasts only make up a small fraction of a game's player base, and developers can often afford the community backlash.<sup>17</sup> On occasion, developers may want to stifle third-party tournaments to maintain a certain image.<sup>18</sup> Ultimately, the extent of developers' intellectual property rights must be determined by balancing the interests of developers with those of the consumers.

This Note argues that developers do not have the authority under US copyright law to control third-party tournaments, and additionally, stopping third-party tournaments is detrimental to the developers themselves. Part I of this Note provides a history of the esports industry and juxtaposes it with traditional sports. It further explains the varying ways in which developers have interacted with or created esports tournaments. Later, this Note provides examples of developers' use of copyright to control tournaments organized by third-party organizations.<sup>19</sup> Part II follows by analyzing and comparing developers' arguments supporting their authority over third-party tournaments. It then goes on to explain why developers should not have such authority—namely, that third-party tournaments do not fall under any of the enumerated provisions of the Copyright Act to which copyright owners have exclusive rights.<sup>20</sup> Additionally, Part II analyzes the most relevant incentives a developer might have to allow or disallow third-party tournaments. Finally, Part III suggests a statutory solution that adequately protects the salient interests of both developers and consumers with respect to regulating third-party tournaments.

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on *Third-Party Fortnite Tournament Organizers*, DOT ESPORTS (July 21, 2018, 1:22 PM), <https://dotesports.com/fortnite/news/fortnite-prize-pool-cap-10k-31326> [https://perma.cc/Z4RH-5LY6].

16. See Pitcher, *supra* note 15.

17. See Chirag Pattni, *Will Nintendo Embrace the Esports Scene Further?*, NINTENDO ENTHUSIAST (Aug. 8, 2020), <https://www.nintendoenthusiast.com/nintendo-esports-embrace-scene-further/> [https://perma.cc/33UB-NE6S].

18. See *id.*

19. See *infra* Section I.B.

20. See *infra* Section II.A.

## I. BACKGROUND: ESPORTS AND COPYRIGHT LAW IN VIDEO GAMES

A. *What Are Esports?*

The term “esports,” short for electronic sports,<sup>21</sup> is a fairly broad one, but generally describes playing video games competitively, in a manner parallel to traditional sports.<sup>22</sup> Almost every aspect of traditional sports has some analogous counterpart in the esports industry.<sup>23</sup> In the same way that a professional American football player spends many hours each day training or practicing drills, so too does a professional *League of Legends* player practicing the game each day.<sup>24</sup> Just as traditional sports have commentators who provide commentary on a game in real time, esports have “shoutcasters” who serve the same function.<sup>25</sup> Shoutcasters are even split into “Play-by-Play” and “Colour” casters, further mirroring sports commentators.<sup>26</sup> And just as sports commentators are recognizable and may be applauded or criticized for their commentary, so too may shoutcasters.<sup>27</sup>

Each esports game, or title, has its own professional scene and players that form the personalities of that scene.<sup>28</sup> Most professional-level tournaments are streamed live on online platforms, such as Twitch or YouTube.<sup>29</sup> Professional esports viewership has been growing rapidly in the last decade.<sup>30</sup> In 2012, total esports viewership was 134 million.<sup>31</sup> By 2018, that number had grown to 395 million, representing a growth of 195 percent.<sup>32</sup> In 2019, the *League of Legends*

21. Tong, *supra* note 7.

22. See Alex Gray, *The Explosive Growth of Esports*, WORLD ECON. F. (July 3, 2018), <https://www.weforum.org/agenda/2018/07/the-explosive-growth-of-esports/> [<https://perma.cc/4UVB-YMVL>].

23. See *id.*

24. See Noah Smith, *‘It’s Not as Awesome as People Imagine’: Esports Players Say ‘Dream Job’ Is More than Fun and Games*, WASH. POST (Dec. 13, 2018), <https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/> [<https://perma.cc/653M-WM6W>].

25. See Indiana Black, *Shoutcasting 101*, LEARN WITH LEAGUE, <https://oce.learnwith-league.com/shoutcasting-101> [<https://perma.cc/S6L8-EFYD>] (last visited Nov. 1, 2021).

26. *Id.*

27. See generally James Clarke, *Top 10 Esports Shoutcasters to Follow in 2020*, GAMER ONE (Feb. 21, 2020), <https://gamerone.gg/top-shoutcasters-to-follow> [<https://perma.cc/DM4J-P7RK>].

28. See Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating Esports*, 26 U. MIA. INT’L & COMPAR. L. REV. 499, 502 (2019).

29. See Gray, *supra* note 22.

30. See *Esports Viewership vs. Sports in 2020*, *supra* note 4.

31. *Id.*

32. *Id.*

*World Championship* broke streaming records on Twitch, boasting 1.7 million concurrent viewers on the platform, peaking at roughly 3.98 million concurrent viewers overall.<sup>33</sup> Audiences can watch live games, pre and postgame interviews with the players, and how-to guides made by their favorite players.<sup>34</sup> Tickets to attend the largest events often sell out in a matter of hours and can fill large sporting venues like the Staples Center in Los Angeles.<sup>35</sup> Additionally, individual players may use the aforementioned platforms to stream their own gameplay and interact with viewers, which allows them to build their own fandoms.<sup>36</sup>

Compensation for professional esports players is not insignificant when compared to that of traditional sports players as well.<sup>37</sup> In 2019, Epic Games, developer of the esports title *Fortnite*, paid out \$64.42 million in prize money, giving \$3 million to the winner of a single *Fortnite* event.<sup>38</sup> Across all esports titles, over \$211 million was awarded in prize money throughout 2019—a 29 percent increase from the \$163 million paid out in 2018.<sup>39</sup> Similarly, developers have also received huge revenues for the most popular esports titles, with global revenues projected to surpass \$1.084 billion in 2021, much of which comes from sponsorships and media rights.<sup>40</sup> This value represents a growth of roughly 15 percent from 2020.<sup>41</sup> Of this, the sale of digital goods is projected to be the fastest-growing source of revenue, slated to grow from \$7.1 million in 2020 to \$17.2 million by 2023.<sup>42</sup> While the

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33. *Id.*; Esguerra, *supra* note 2.

34. *See* Martinelli, *supra* note 28, at 502–03.

35. *See* Paul Tassi, *League of Legends Finals Sells Out LA's Staples Center in an Hour*, FORBES (Aug. 24, 2013, 9:28 PM), <https://www.forbes.com/sites/insertcoin/2013/08/24/league-of-legends-finals-sells-out-las-staples-center-in-an-hour/#7d55141432b8> [https://perma.cc/VA9U-X8GV]. The Staples Center has since been renamed the Crypto.com Arena.

36. AJ Willingham, *What Is Esports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> [https://perma.cc/2KVX-QWSD].

37. *See Esports Viewership vs. Sports in 2020*, *supra* note 4.

38. Kevin Hitt, *The Top 10 Esports of 2019 by Total Prize Pool*, ESPORTS OBSERVER (Dec. 27, 2019), <https://esportsobserver.com/biggest-esports-2019-prize-pool/> [https://perma.cc/4XQB-TLSW].

39. *Id.*

40. *Global Esports & Live Streaming Market Report*, NEWZOO (Mar. 9, 2021), <https://newzoo.com/insights/trend-reports/newzoos-global-esports-live-streaming-market-report-2021-free-version/> [https://perma.cc/27JF-YYM7].

41. *Id.*

42. Dean Takahashi, *Newzoo: Global Esports Will Top \$1 Billion in 2020, with China as the Top Market*, VENTUREBEAT (Feb. 25, 2020, 7:00 AM), <https://venturebeat.com/2020/02/25/newzoo-global-esports-will-top-1-billion-in-2020-with-china-as-the-top-market/> [https://perma.cc/89GV-L22M].

numbers may not yet rival those of traditional sports,<sup>43</sup> esports revenues are far from insignificant.<sup>44</sup>

In spite of all the similarities, the analogy between traditional sports and esports is not perfect.<sup>45</sup> One of the most pertinent problems with the analogy arises when one considers who owns the underlying games used in esports tournaments. In traditional sports, anyone can play a game of soccer or hockey without considering problems of licensing or copyright infringement.<sup>46</sup> Unlike traditional sports though, the companies that developed the products own and control the esports titles.<sup>47</sup> Riot Games owns *League of Legends*;<sup>48</sup> Blizzard Entertainment (Blizzard) owns *Overwatch*, *Starcraft*, and *Hearthstone*;<sup>49</sup> and Nintendo owns the *Super Smash Bros.* series.<sup>50</sup> This ownership raises questions concerning intellectual property law and the extent to which a developer can exert control over its game.

When a third party wishes to organize a tournament that features a video game title, can that title's developer require the party to have a license to play the game or broadcast gameplay? Can the developer control the tournament's rulesets or its prize pools? Can the developer decide whether betting will be permitted? Without well-defined answers to these questions, third parties organizing events using esports titles are not fully aware of what developers can require of their events, or, more pressingly, under what circumstances their events might be terminated entirely.<sup>51</sup>

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43. See Omri Wallach, *How Does the Value of Esports Companies Compare with Regular Sports Teams?*, WORLD ECON. F. (Feb. 10, 2021), <https://www.weforum.org/agenda/2021/02/sports-esports-value-comparison-gaming/> [<https://perma.cc/5ZTX-CC99>].

44. See Takahashi, *supra* note 42.

45. See Wallach, *supra* note 43.

46. See Tong, *supra* note 7.

47. *Id.*

48. *We Are Rioters*, RIOT GAMES, <https://www.riotgames.com/en/who-we-are/values> [<https://perma.cc/Y9LR-VRAZ>] (last visited Nov. 1, 2021).

49. BLIZZARD, <https://www.blizzard.com/en-us/> [<https://perma.cc/7P58-5N9W>] (last visited Nov. 1, 2021).

50. See Pitcher, *supra* note 15.

51. See *infra* Section I.B.



*B. Developers and Third Parties*

When electronic games for in-home use were first developed, the games were simply released and sold to the public with no mind for revenue-generating tournaments.<sup>52</sup> Formally organized video game tournaments were not commonplace, with the majority of tournaments relying on communities of players and fans to marshal themselves into competitions.<sup>53</sup> Most of these tournaments were run by third-party organizations that had no relationship with game developers and were organized using fan sites, internet forums, and other online communities.<sup>54</sup> The first documented tournament took place in 1972 when Stewart Brand and a number of other students hosted a tournament for the game *Spacewar!*.<sup>55</sup> The tournament's winner was rewarded with a one-year subscription to *Rolling Stone* magazine and the right to call himself the "Intergalactic *Spacewar* Champion of 1972."<sup>56</sup>

In 2005, Blizzard began hosting its annual convention, "Blizzcon," where it hosted tournaments for its titles, such as *StarCraft*.<sup>57</sup> However, for the rest of the year, all other tournaments for its titles were run by third-party organizations, almost none of which were officially licensed or authorized by Blizzard.<sup>58</sup> Recognizing the potential of esports as a spectator-based phenomenon, Riot Games, developer of *League of Legends*, became the first major esports developer to take control of its title's professional scene.<sup>59</sup>

Riot Games created the *League of Legends Championship Series* (LCS), the professional circuit for North American *League of Legends* players, a wholly owned subsidiary of Riot Games.<sup>60</sup> The tournament

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52. See Riad Chikhani, *The History of Gaming: An Evolving Community*, TECHCRUNCH (Oct. 31, 2015, 10:00 AM), <https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/> [https://perma.cc/JT8C-CAP7].

53. See Parsi, *supra* note 6, at 28.

54. *Id.*

55. Chris Baker, *Stewart Brand Recalls First 'Spacewar' Video Game Tournament*, ROLLING STONE (May 25, 2016, 9:02 PM), <https://www.rollingstone.com/culture/culture-news/stewart-brand-recalls-first-spacewar-video-game-tournament-187669/> [https://perma.cc/KX6T-ZFJQ].

56. *Id.*

57. Parsi, *supra* note 6, at 28.

58. *Id.*

59. See David Segal, *Behind League of Legends, E-Sports's Main Attraction*, N.Y. TIMES (Oct. 10, 2014), <https://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html> [https://perma.cc/97G8-6V5L].

60. See Billy Studholme, *Major Structural Changes Made to LCS 2021, New Tournament Introduced*, ESPORTS INSIDER (Dec. 14, 2020), <https://esportsinsider.com/2020/12/major-structural-changes-made-to-lcs-2021-new-tournament-introduced/> [https://perma.cc/WJ7R-2U9H].

runs two “splits” over the course of a year and culminates in the *League of Legends World Championship*, where the top teams from other regions’ professional tournaments, all also owned by Riot Games, compete against one another.<sup>61</sup> Following this example, Blizzard acquired Major League Gaming, one of the largest gaming leagues, which now runs the most prominent tournament for *Overwatch*—*Overwatch League*.<sup>62</sup> In contrast to the LCS and *Overwatch League*, Electronic Sports League (ESL) is a league independent of any game developer that runs some of the largest tournaments for esports, such as *CS: GO Pro League* for *Counter-Strike: Global Offensive*, or the *Dota Major Championships* for *Dota 2*, which are both titles owned by Valve.<sup>63</sup>

Overall, *League of Legends* dominates as the most prominent and popular esports title, both in player and viewership numbers.<sup>64</sup> Riot Games’ rationale—that developers are in the best position to absorb startup costs associated with a new sports league and to know what their gaming communities want—appears to have been on the mark.<sup>65</sup> By and large, today, esports developers more often than not follow Riot Games’ example.<sup>66</sup>

With more developers taking a proactive approach to building their gaming communities, the efforts of third-party organizations hoping to host tournaments or events using an esports title may be threatened, and in some cases, have been threatened already.<sup>67</sup> For example, in 2013, Nintendo, developer of *Super Smash Bros. Melee*, attempted to prevent the Evolution Championship Series (EVO) from hosting a tournament for its game entirely.<sup>68</sup> EVO tournament organizers eventually convinced Nintendo to allow the tournament to continue, but only without a live online broadcast.<sup>69</sup> It was not until

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61. See Bridget A. Tong, *A New Player Has Entered the Game: Immigration Reform for Esports Players*, 24 JEFFREY S. MOORAD SPORTS L.J. 351, 359 (2017).

62. See *Major League Gaming Esports*, ESPORT BET, <https://esportbet.com/major-league-gaming/> [<https://perma.cc/ALK3-QW9R>] (last visited Nov. 2, 2021).

63. See *Professional Esports Leagues in 2021*, ESPORT BET, <https://esportbet.com/leagues/> [<https://perma.cc/KA6M-VEV5>] (last visited Nov. 2, 2021).

64. See *Esports Viewership vs. Sports in 2020*, *supra* note 4; Segal, *supra* note 59.

65. See Segal, *supra* note 59.

66. See *id.*

67. See, e.g., Pitcher, *supra* note 15; Byers, *supra* note 15.

68. EVO is known for operating the largest and longest-running fighting game tournaments in the world. See *EVO Championship Series*, EVO, <http://evo.shoryuken.com/> [<https://perma.cc/3JF3-KXPA>] (last visited Nov. 2, 2021); Pitcher, *supra* note 15.

69. See Pitcher, *supra* note 15.

negative feedback and pressure from consumers reached Nintendo that it backed down and allowed the tournament to be streamed.<sup>70</sup>

In addition to shutting down tournaments altogether, developers have also taken other approaches to control third-party tournaments.<sup>71</sup> Blizzard, for example, requires tournament organizers to apply for particular licenses before any event may be hosted for its titles.<sup>72</sup> Each of these licenses is conditioned upon limiting the tournament's prize pool and sponsor contributions, as well as prohibiting sponsorship by companies that sell or promote certain products, such as pornography, alcohol, or tobacco.<sup>73</sup> For *Overwatch*, in particular, the name of any third-party tournament must include the word "community"—as a way to distinguish said tournament from Blizzard's official tournaments—and the tournament cannot be broadcast at a time that competes with *Overwatch League*.<sup>74</sup>

Riot Games and Epic Games have each published sets of guidelines and terms under which they will grant tournament organizers a limited license to host tournaments for their games.<sup>75</sup> Notably, both guidelines restrict the total value of tournament prize pools and sponsor contributions and prohibit companies that sell or promote certain products or services from sponsoring a tournament that uses their games.<sup>76</sup> Given Epic Games' payouts for its own *Fortnite* tournaments, with over \$15 million prize pools in 2019,<sup>77</sup> Epic Games has faced backlash from community members who believe it is stifling grassroots events when it limits the prize pools of third-party events.<sup>78</sup>

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70. See John T. Holden, Marc Edelman, & Thomas A. Baker III, *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. ILL. L. REV. 509, 539 (2020).

71. See, e.g., *Blizzard Tournament License*, BLIZZARD ESPORTS, <https://communitytournaments.blizzardesports.com/en-us/> [<https://perma.cc/A5MX-LS3V>] (last visited Nov. 2, 2021); *Fortnite Event License Terms*, EPIC GAMES, <https://cdn2.unrealengine.com/Fortnite+Esports%2Fevents%2FFORTNITE-EVENT-LICENSE-TERMS-c38f9b1d4be13268ec98c015cc021ce0fe0ee890.pdf> [<https://perma.cc/8HC2-BSRE>] (last visited Nov. 2, 2021); *Policies*, RIOT GAMES, <https://developer.riotgames.com/policies/general> [<https://perma.cc/NL2E-NTY8>] (Oct. 1, 2020).

72. See *Blizzard Tournament License*, *supra* note 71.

73. See *id.*

74. See *id.*

75. See *Fortnite Event License Terms*, *supra* note 71; *Policies*, *supra* note 71.

76. See *Fortnite Event License Terms*, *supra* note 71; *Policies*, *supra* note 71.

77. See Hitt, *supra* note 38.

78. See Byers, *supra* note 15.

*C. Copyright Law in the World of Video Games*

Developers' authority to limit third-party organizers from using their titles is predicated on the Copyright Act of 1976.<sup>79</sup> As the creator of an original work—the video game—the developer owns a copyright in said game, which grants the developer several exclusive rights under Section 106 of the Copyright Act.<sup>80</sup> Specifically, Section 106 grants the right: (1) to reproduce the work; (2) to create derivative works based on the work; (3) to distribute copies of the work; and (4) to perform the work.<sup>81</sup> It is well settled that a video game is the intellectual property of the developer, and thus, a developer could claim that one or more of these rights are violated if a third party were to host a tournament for its title without the developer's permission.<sup>82</sup>

*Atari Games Corp. v. Nintendo of America Inc.* provides a precedent that video games constitute a “work” that can be “reproduced” under the Copyright Act.<sup>83</sup> Nintendo produced the home video game system Nintendo Entertainment System (NES) and designed a program, 10NES, which prevented the system from accepting unauthorized game cartridges.<sup>84</sup> Each authorized game cartridge contained a chip that the program read and subsequently allowed the NES to play the cartridge.<sup>85</sup> Nintendo licensed its technology under strict conditions to other video game companies, including Atari, so that those companies could create games compatible with the NES.<sup>86</sup> Atari obtained a copy of the 10NES source code and, after deciphering it, developed its own program named Rabbit.<sup>87</sup> Engineered to generate signals indistinguishable from those of the 10NES program, Rabbit allowed Atari to produce games compatible with the NES without subjecting itself to Nintendo's licensing conditions.<sup>88</sup>

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79. See 17 U.S.C. § 106.

80. See *id.* §§ 102, 106.

81. See *id.* § 106. This section of the code also grants the exclusive right to display the copyrighted work publicly and perform the copyrighted work by means of digital audio transmission, but these provisions apply specifically to other forms of media and thus are not discussed here. See *id.*

82. See *id.*; Pitcher, *supra* note 15.

83. See *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992).

84. *Id.* at 835.

85. *Id.* at 836.

86. *Id.*

87. *Id.*

88. *Id.* at 837.

After Atari developed Rabbit, Nintendo sued in federal court.<sup>89</sup> The US Court of Appeals for the Federal Circuit found that the 10NES program contained Nintendo's "protectable expression" under the Copyright Act, and that Atari's Rabbit program incorporated those elements.<sup>90</sup> The Rabbit program included a number of features from the 10NES—such as shutting down upon receipt of an erroneous message from the NES—that were distinct from its main function: unlocking the NES.<sup>91</sup> While the Copyright Act did not prohibit Atari from developing a program that would allow it to work around the NES's protection, the facts showed that Rabbit was a "copy" of the 10NES program, meaning it was substantially similar enough to violate Nintendo's copyright.<sup>92</sup>

The Copyright Act defines a "derivative work" as one that is based upon "one or more preexisting works."<sup>93</sup> Courts, notably the Ninth Circuit, have held that this statutory definition is overly broad and created a two-part test that a work must satisfy in order to qualify under the definition of a derivative work: (1) the work must exist in a "concrete or permanent form;" and (2) it must "substantially incorporate protected material from the preexisting work."<sup>94</sup> These criteria are most applicable to video games and esports in the form of "mods" (short for modifications), which are alterations created by players or fans that change one or more aspects of a video game.<sup>95</sup> In some cases, such as Blizzard's *Warcraft III: Reign of Chaos* or Bungie's *Halo* series, games will give users the ability to create unique or custom assets within the game itself.<sup>96</sup> In most contexts, esports tournaments do not implement

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89. *Id.*

90. *Id.* at 845.

91. *Id.*

92. *Id.*

93. 17 U.S.C. § 101.

94. See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998); *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984).

95. See *Games Modding – Why You Should Do It*, INTO GAMES (Aug. 11, 2020), <https://into-games.org/news/how-to-mod> [<https://perma.cc/78LG-5S8K>].

96. In the context of video games, "asset" refers to anything that can be in a video game, such as characters, object, sound effects, levels, maps, etc. See Mark Langshaw, *Warcraft 3: Reign of Chaos Retrospective – Still Reigns Supreme*, DIGIT. SPY (Sept. 8, 2014), <https://www.digitalspy.com/videogames/retro-gaming/a589262/warcraft-3-reign-of-chaos-retrospective-still-reigns-supreme/> [<https://perma.cc/WLL8-YD25>]; Adam Bankhurst, *2.6 Million Player-Created Game Types Transferred to Halo: The Master Chief Collection From Halo 3, 4, and Reach*, IGN, <https://www.ign.com/articles/2019/08/15/26-million-player-created-game-types-transferred-to-halo-the-master-chief-collection-from-halo-3-4-and-reach> [<https://perma.cc/LP7C-KBEG>] (Aug. 14, 2019, 9:34 PM); *Game Development Terms*, UNITY, <https://unity.com/how-to/beginner/game-development-terms> [<https://perma.cc/ZSW9-VCFV>] (last visited Nov. 2, 2021).

custom elements from the games but instead use complete copies of games distributed by developers.<sup>97</sup>

A developer might argue that hosting a tournament for its game constitutes a “performance” of the game that violates its rights as the copyright holder.<sup>98</sup> Although there is no case law that specifically addresses this argument in the context of esports, the Ninth Circuit’s decision in *Allen v. Academic Games League of America, Inc.* provides guidance with regard to how courts interpret “performance of the work.”<sup>99</sup> In *Allen*, plaintiff Robert W. Allen was involved in the development of academic board games.<sup>100</sup> For several years, starting in the mid-1980s, Allen hosted annual competitions for his games under the name National Academic Games Project (NAGP), of which he was the sole proprietor.<sup>101</sup>

In 1992, a third-party organization, the Academic Games League of America (AGLOA), began hosting national tournaments that used some of Allen’s academic board games.<sup>102</sup> At each of AGLOA’s tournaments, the games were played under rulebooks developed by an AGLOA committee; tournament rulebooks used at NAGP tournaments were not copyrighted by Allen.<sup>103</sup> Moreover, AGLOA bought copies of each game from Allen to sell directly to participating schools and did not copy any of Allen’s copyrighted materials in its tournaments.<sup>104</sup>

Allen brought a copyright infringement claim against AGLOA in an attempt to prevent the organization from hosting tournaments that featured his games, arguing that AGLOA’s national tournament constituted a “public performance” of his protected works, namely, the board games.<sup>105</sup> The Ninth Circuit, however, concluded that playing a game does not constitute a performance for the purposes of the Copyright Act.<sup>106</sup> The court held that AGLOA was “merely [the] organizer[]” of the event.<sup>107</sup> The students, schools, and school districts

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97. See *Global Rules*, ESL PLAY, <https://play.eslgaming.com/rules> [<https://perma.cc/RZ37-2C77>]. But see *Project M: About*, PROJECT M UNOFFICIAL, <https://pmunofficial.com/en/about/> [<https://perma.cc/Q48G-EFVG>] (last visited Jan. 16, 2021), for a discussion of Project M, a popular, though no longer being updated, mod for Nintendo’s *Super Smash Bros. Brawl* which rebalanced the game for Smash enthusiasts.

98. See 17 U.S.C. § 106.

99. See *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616–17 (9th Cir. 1996).

100. *Id.* at 615.

101. *Id.*

102. *Id.* at 615–16.

103. *Id.* at 616.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 617.

all used their own games, which had been purchased from Allen, in the tournaments.<sup>108</sup> Noting that “games are meant to be played,” the court found in favor of AGLOA.<sup>109</sup>

The *Allen* court also recognized the applicability of the fair use doctrine if these tournaments did somehow constitute a form of copyright infringement, performance or otherwise.<sup>110</sup> The Copyright Act outlines the factors to be considered in determining whether “fair use” creates a limitation on the rights of exclusivity, and the Supreme Court of the United States, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, noted that the effect on the market value of the copyrighted work is the most important factor.<sup>111</sup> Courts have taken this to mean, in order for fair use to apply, the reproduction or performance must not deprive the rights holder of revenues that stem from people opting to purchase or view the infringing copy rather than the original.<sup>112</sup>

In the context of esports, games generally fall into one of two categories: free-to-play and pay-to-play.<sup>113</sup> *League of Legends* is the most prominent example of the former, in which the game itself is, as the name would suggest, free to download and play online.<sup>114</sup> The game’s revenue comes entirely from microtransactions built into the game.<sup>115</sup> Microtransactions often take the form of cosmetics—such as an alternative visual theme, called a skin, for a character—or simple enhancements which unlock playable characters more quickly.<sup>116</sup> In the latter category, pay-to-play, which includes games such as *Overwatch*, players purchase the license or a physical copy of the game.<sup>117</sup> Revenue for these games can consist of microtransactions similar to those of their free-to-play counterparts, but they undeniably include the initial purchase of the game.<sup>118</sup>

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108. *Id.*

109. *Id.* at 616.

110. *See id.* at 617.

111. *See* 17 U.S.C. § 107; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

112. *See Atari Games*, 975 F.2d at 843; *see also* *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d. Cir. 2015).

113. *See* Jalen Lopez, *What Does F2P Mean in Gaming?*, DOT ESPORTS (Mar. 13, 2021, 2:56 PM), <https://dotesports.com/general/news/what-does-f2p-mean-in-gaming> [<https://perma.cc/E9QC-27QV>].

114. *See* Segal, *supra* note 59.

115. “Microtransactions” refer to virtual, in-game items that can be purchased for small amounts of money. *See id.*

116. *See id.*

117. *See* Blizzard Ent., *Overwatch*, BATTLE.NET, <https://us.shop.battle.net/en-us/family/overwatch> [<https://perma.cc/7G2M-87PK>] (last visited Jan. 16, 2021).

118. *See id.*

In third-party tournaments for esports video games, players must be able to play the game in order to compete.<sup>119</sup> For games such as the *Super Smash Bros.* series, which are sold as physical copies, tournament organizers must provide the copies of these games for use during the tournament.<sup>120</sup> For games such as *Overwatch*, for which Blizzard sells licenses to the game, players must purchase a license prior to the tournament to take part in the competition.<sup>121</sup> Finally, for free-to-play games, such as *League of Legends*, players play using their own accounts after downloading the game for free.<sup>122</sup> In almost no case can tournament organizers give out items available through microtransactions within the game as prizes, at least not without purchasing the microtransactions themselves or being licensed to do so by the developer.<sup>123</sup>

Apart from revenue from the game itself, some developers such as Riot Games organize their own esports events.<sup>124</sup> With regard to fair use, these developers might claim that players who chose to participate in tournaments organized by third parties may have participated in the developer's own tournaments otherwise. It should be noted, however, that the LCS, *Overwatch League*, and most if not all of Epic Games' tournaments cater to players at the professional level of their respective games.<sup>125</sup> Third-party tournaments are often marketed towards amateur players, and any third-party tournaments that are for professional players are often licensed by developers and do not conflict with the developer's own tournaments.<sup>126</sup>

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119. See Parsi, *supra* note 6, at 28.

120. See *id.*

121. See *id.*

122. See *id.*

123. See, e.g., *Triumphant Ryze*, LOLSKINSHOP, <https://lolskinshop.com/product/triumphant-ryze/> [<https://perma.cc/B2A9-3HWJ>] (last visited Jan. 16, 2021).

124. See Segal, *supra* note 59.

125. See Hitt, *supra* note 38.

126. See Austen Goslin, *League of Legends Will No Longer Feature at IEM Tournaments*, RIFT HERALD (May 23, 2017, 4:20 PM), <https://www.riftherald.com/2017/5/23/15682296/iem-lol-league-of-legends-riot> [<https://perma.cc/4AUC-6M73>].



## II. ANALYSIS: DEVELOPERS' COPYRIGHT AUTHORITY AND INCENTIVES

A. *Developers' Copyright Claims*

While game developers certainly own the copyright to the games they produce, it is less clear whether their rights under that copyright are violated when third-party organizations host tournaments for those games without their permission.<sup>127</sup> The first exclusive right granted by the Copyright Act is that of “reproduction.”<sup>128</sup> In *Atari*, the court found that there was a violation of Nintendo’s copyright when Atari’s Rabbit program included nearly identical elements to those in Nintendo’s 10NES apart from its main function of unlocking the NES.<sup>129</sup>

In the context of third-party tournaments, there is no reason to believe that organizations hosting tournaments are reproducing any part of the games they use in this way.<sup>130</sup> Tournament organizers are not reproducing the developer’s work in production of a game because tournament organizers are simply not producing games; rather, they are conducting events that feature the games created by the developer.<sup>131</sup> Thus, it does not appear that developers’ copyright claims against third-party tournament organizers can arise from the illegal “reproduction” of their copyrighted works.<sup>132</sup>

The second exclusive right granted to the copyright holder is the right to create derivative works “based upon” the original work.<sup>133</sup> Derivative works in video games mostly exist in the form of mods or built-in tools to create custom maps or other assets.<sup>134</sup> These mods or custom assets exist in “concrete form” because they are shared through gaming communities and can be used by anyone to modify the game and receive the same experience.<sup>135</sup> They also “substantially incorporate protected material from the preexisting work” because the custom assets are ultimately utilizing the work of a developer, the game’s base systems and mechanics, albeit with some modifications.<sup>136</sup> Whether mods and custom assets give rise to a developer’s copyright claims is

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127. See *infra* Section II.A.

128. See 17 U.S.C. § 106.

129. See *Atari Games*, 975 F.2d at 845.

130. Cf. *Allen*, 89 F.3d at 616.

131. Cf. *id.*

132. See 17 U.S.C. § 106.

133. See *id.*

134. See *Games Modding – Why You Should Do It*, *supra* note 95; Langshaw, *supra* note 96.

135. See *Micro Star*, 154 F.3d at 1110.

136. See *id.*

open to debate, but it ultimately matters little to the vast majority of third-party tournaments.<sup>137</sup> Tournament organizers, in most cases, are not utilizing mods or custom elements from the games for which they are hosting tournaments.<sup>138</sup> For this reason, developers' copyright claims cannot be based on the illegal creation of derivative works.<sup>139</sup>

The third exclusive right granted to the copyright holder is the right to distribute copies of the work by "sale or other transfer of ownership, or by rental, lease, or lending."<sup>140</sup> For online tournaments, players must either already own a copy of the game, have purchased a license of the game, or have downloaded the game for free (in the case of free-to-play games) in order to participate.<sup>141</sup> At live events, for those sold as physical copies, tournament organizers provide copies of the game, legally purchased, for participants, and then collect these games from players at the end of the tournament.<sup>142</sup> For games that require a license to download or are downloaded for free, the same requirements apply to every player.<sup>143</sup> It is impossible for one to participate—even at a live event—without an account for the game, which requires the player to have purchased the license for the game.<sup>144</sup> Third-party tournament organizers rarely distribute copies of games to tournament participants, so "distribution" cannot be the right that developers' claims are based upon.<sup>145</sup>

As for the right to "perform" the work, the facts of *Allen* are significantly analogous to what would be a hypothetical case involving third-party esports tournaments.<sup>146</sup> *Allen* argued that AGLOA could not conduct its tournament because to do so would be a "public performance" of his copyrighted work.<sup>147</sup> However, the court in *Allen* found that playing a game does not constitute a performance for the purposes of the Copyright Act.<sup>148</sup> The tournament's participants all acquired their games legally from *Allen*, the developer of those games,

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137. See NYU, *The IP Implications of Video Game Mods*, JIPEL BLOG (Feb. 29, 2016), <https://blog.jipel.law.nyu.edu/2016/02/the-ip-implications-of-video-game-mods/> [<https://perma.cc/2Z9X-X9U9>].

138. See Parsi, *supra* note 6, at 29.

139. See 17 U.S.C. § 106.

140. See *id.*

141. See Parsi, *supra* note 6, at 28.

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*; 17 U.S.C. § 106.

146. See *Allen*, 89 F.3d at 615–16.

147. *Id.* at 616.

148. *Id.*

and AGLOA was “merely [the] organizers” of the tournament.<sup>149</sup> Similarly, participants in a third-party esports tournament must all access the game legally, whether by being present where physical copies are available or by having an account that legally has access to the game.<sup>150</sup> The third-party tournament organizer is just that—“merely the organizer.”<sup>151</sup> Therefore, an esports tournament is not a “performance,” and developers may not rest copyright claims on infringement in this way.<sup>152</sup>

Even if tournaments run by third parties could be considered a violation of a developer’s rights under the Copyright Act, third-party tournament organizers also have an arguable case under the fair-use defense to overcome these exclusivity rights.<sup>153</sup> The most important consideration in determining whether fair use applies is the effect of the use on the copyrighted work’s market value, in this case, that of the game.<sup>154</sup> Thus, for fair use to apply, third-party tournaments must not deprive developers of significant revenues that would have been acquired via their games.<sup>155</sup>

With respect to profits from sales of the games themselves, third-party tournaments do not cost developers any revenue.<sup>156</sup> Free-to-play games do not garner any profit in this regard, as these games can be downloaded and played by anyone for free; therefore, third-party tournaments for free-to-play games such as *League of Legends* do not deprive developers of any revenue.<sup>157</sup> For games that require physical copies to play, such as console games like Nintendo’s *Super Smash Bros. Brawl*, tournament organizers must supply copies of the game for use at the tournament, and those copies necessarily have been purchased from the developer.<sup>158</sup> Participants legally have access to the game by being present where those physical copies are located.<sup>159</sup> For games that require a license to play, players must have purchased a license to create an account, which a player must have to log in and participate in a tournament, regardless of whether the

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149. *Id.*

150. *See Parsi, supra* note 6, at 28.

151. *See id.*

152. *See* 17 U.S.C. § 106.

153. *See id.* § 107.

154. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

155. *See Atari Games*, 975 F.2d at 843; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d. Cir. 2015).

156. *See infra* Section II.A.

157. *See Lopez, supra* note 113.

158. *Cf. Allen*, 89 F.3d at 617 (arguing fair use applied when participants of AGLOA tournaments had to have purchased games from Allen).

159. *Cf. id.*

tournament is a live event or wholly online.<sup>160</sup> Thus, tournaments do not deprive developers of revenue from the sale of physical copies or licenses for their games via this type of third-party tournament.<sup>161</sup>

Just as third-party tournaments do not deprive a developer of revenue from the sale of its games, neither is the developer's revenue from microtransactions reduced by allowing third-party tournaments to operate.<sup>162</sup> Third parties simply do not have the means, unless directly licensed and then given the means by the developers themselves, to grant tournament participants in-game items normally acquired through microtransactions.<sup>163</sup> The only way that a third-party could provide these in-game items to a player (i.e., as a prize or for participation) is for that party to purchase that item for the player itself, thus providing the revenue that the developer would have acquired from the sale of that item as if directly sold to the individual.<sup>164</sup> Accordingly, third-party tournaments do not deprive developers of any revenue from microtransactions.<sup>165</sup>

With regard to tournament participation, however, a third-party tournament is less likely to fall under the protective umbrella of fair use.<sup>166</sup> For any given title, there are a finite number of professional teams and players.<sup>167</sup> Professional esports leagues that employ a franchise model, such as Riot Games' *League of Legends Championship Series* and Blizzard's *Overwatch League*, derive part of their value from their exclusivity; if a person wants to watch professional esports teams play, the leagues are the only sources through which to do so.<sup>168</sup> If, for instance, Team Solomid (TSM), one of the oldest professional *League of Legends* teams and one of the LCS's current franchises,<sup>169</sup> could compete in non-LCS events, the LCS would lose the value of this exclusivity.<sup>170</sup> Moreover, Riot Games and Blizzard can use this exclusivity to secure media rights deals and sponsorships, like how the National Basketball Association reaps the rewards of its monopoly in

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160. See Parsi, *supra* note 6, at 28.

161. See *id.*

162. See Segal, *supra* note 59.

163. See *id.*

164. See *id.*

165. See *id.*

166. See Parsi, *supra* note 6, at 29.

167. See Holden, *supra* note 70, at 528, 558.

168. Xander Torres, *One Year Later: How Franchising Changed the LCS*, RIFT HERALD (Mar. 28, 2019, 3:00 PM), <https://www.riftherald.com/2019/3/28/18285641/lcs-franchising-changes> [<https://perma.cc/G4R5-735T>].

169. See *id.*

170. See *Teams: Main Roster*, TSM FTX, [tsm.gg/teams/lol](https://tsm.gg/teams/lol) [<https://perma.cc/E9S6-4JME>] (last visited Feb. 13, 2021).

professional basketball.<sup>171</sup> With this in mind, professional-level esports tournaments have the potential to substantially decrease revenue opportunities for developers by shifting participation, and thus viewership, away from the developer's event to a competing event.<sup>172</sup>

### *B. Developers' Incentives to Control Third-Party Tournaments*

Esports developers have a number of reasons to suppress third-party tournament organizers from hosting tournaments for their games.<sup>173</sup> From a directly financial perspective, esports developers who invest in their games' professional-esports scenes invest large amounts of money—in Riot Games' case, over \$100 million annually—in organizing and promoting those events, and thus need to receive a commercial benefit from doing so.<sup>174</sup> Professional-level third-party tournaments threaten to substantially decrease the direct revenue and value of the developer's own tournaments, which generates a clear incentive for developers to quash those tournaments whenever possible.<sup>175</sup>

Conversely, amateur events, which make up a vast majority of the third-party esports tournaments in question,<sup>176</sup> do not threaten developers' revenues in the aforementioned ways.<sup>177</sup> Professional teams rarely, and in the case of franchise-model league teams, never, due to prohibition, participate in amateur-level tournaments.<sup>178</sup> Most third-party tournaments are organized as events purely for fun, entertainment, or social purposes, and are often organized by individuals or small groups.<sup>179</sup> Amateur-level tournaments and most amateur players have minimal fan following, which results in limited commercial detriment to the value of developers' professional-level

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171. See, e.g., James Fudge, *Grubhub Named Official Partner of LCS*, ESPORTS OBSERVER (Jan. 14, 2021), <https://esportsobserver.com/grubhub-partner-lcs/> [<https://perma.cc/8HGN-WJGD>].

172. See Torres, *supra* note 168; Fudge, *supra* note 171.

173. See Alex Calvin, *Riot Isn't Even Close to Breaking Even on League of Legends Esports – But that Has Been Okay Until Now*, PC GAMES INSIDER (Aug. 30, 2018, 8:54 AM), <https://www.pcgamesinsider.biz/news/67702/riot-isnt-even-close-to-breaking-even-on-league-of-legends-esports/> [<https://perma.cc/U28J-XEHZ>]; see also *supra* Section II.A.

174. See Calvin, *supra* note 173.

175. See *supra* Section II.A.

176. See Will Partin, *The Esports Pipeline Problem*, POLYGON (July 11, 2019, 9:00 AM), <https://www.polygon.com/features/2019/7/11/18632716/esports-amateur-pro-players-teams-talent-process> [<https://perma.cc/G4K4-C4MQ>].

177. See *id.*

178. See Max Miceli, *How the Franchising Model Shook Up North American Esports in 2018*, ESPORTS OBSERVER (Jan. 28, 2019), <https://esportsobserver.com/franchising-north-america-2018/> [<https://perma.cc/D4R4-XA4W>].

179. See *Policies*, *supra* note 71 (describing “Tier 3” *League of Legends* tournaments).

tournaments when it comes to viewership, and only if there is a time conflict.<sup>180</sup> Additionally, even if game developers do organize tournaments for players at the amateur level, those players and teams are rarely forced to choose between tournaments in which to participate and often take part in multiple tournaments weekly or even daily.<sup>181</sup>

Participation in third-party tournaments also has the potential to increase player retention and viewership of a developer's own tournament.<sup>182</sup> Players that participate in third-party tournaments have increased exposure to the game itself, as well as esports tournaments in general, which makes them more likely to become viewers of professional tournaments.<sup>183</sup> Additionally, amateur players and teams that participate in competitive play often watch professional tournaments to learn the optimal strategies or "builds" from their professional-level counterparts.<sup>184</sup>

Moreover, as previously stated, many esports titles, both free-to-play and otherwise, rely on microtransactions for some, if not all, of their revenue.<sup>185</sup> Even after the initial purchase or free download, developers have the potential to generate additional revenue from a player through the in-game offerings, such as characters, items, and cosmetics.<sup>186</sup> The longer players actively participate in a game, the longer they will be exposed to in-game marketing for microtransactions.<sup>187</sup> Third-party tournaments not only allow players to take part in the game competitively but also give players incentive to practice for competitive play outside of the tournaments, both of which

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180. *Compare LCS Proving Grounds 2021 Spring*, ESPORTS CHARTS (Apr. 26, 2021), <https://escharts.com/tournaments/lol/lcs-proving-grounds-2021-spring> [https://perma.cc/2JGS-D3WD] (showing peak viewership for a non-professional *League of Legends* tournament at twenty-six thousand), with Tom Daniels, *Esports Viewership Breakdown with Esports Charts: April 2021*, ESPORTS INSIDER (May 20, 2021), <https://esportsinsider.com/2021/05/esports-viewership-breakdown-with-esports-charts-april-2021/> [https://perma.cc/QRT8-XJL3] (showing peak viewership for the same LCS season at four hundred fifteen thousand).

181. Parsi, *supra* note 6, at 29.

182. See Jurre Pannekeet, *Esports, a Franchise Perspective: 70% Watch Only One Game and 42% Do Not Play*, NEWZOO (May 11, 2017), <https://newzoo.com/insights/articles/esports-franchises-70-watch-only-one-game-and-42-dont-play/> [https://perma.cc/WX9W-CHCS].

183. See *id.*

184. See *id.* A "build" refers collectively to a player's pre- and in-game choices to augment his/her character's stats or performance. See Michael Caruso, *The Ascent: Character Build Guide*, THEGAMER (Aug. 16, 2021), <https://www.thegamer.com/the-ascent-character-build-guide/> [https://perma.cc/PRR5-MHNT].

185. See *supra* Section I.C.

186. See Segal, *supra* note 59.

187. See *id.*

increase players' exposure to the game.<sup>188</sup> This, in turn, leads to increased playtime, potential future purchases, and player retention.<sup>189</sup> As such, there is reason to believe that third-party tournaments actually benefit developers by providing and promoting more opportunities to play and interact with the game.<sup>190</sup>

Esports developers may also seek to quash third-party tournaments in efforts to maintain their corporate image. As evidenced by the terms found in many esports' community tournament licenses, developers are wary of allowing tournaments for their games to be sponsored by companies that sell or promote certain products, such as pornography, alcohol, or tobacco.<sup>191</sup> Some tournament organizers have even opted to ban teams that are sponsored by such companies from their events.<sup>192</sup> These precautions stem from potential negative effects to consumer perception or negative associations with the company and those products.<sup>193</sup> Research conducted on traditional sports shows that sponsorships of this type can be negatively received by viewers, although less so in the United States than other countries.<sup>194</sup> Given the high similarity in structure to traditional sports, this type of publicity can poorly impact esports developers (who risk much greater losses than a traditional sports team) due to their investment into the initial game creation.<sup>195</sup>

On the other hand, shutting down or even restricting third-party tournaments can also negatively affect consumer perception.<sup>196</sup> For example, Epic Games experienced community backlash for merely limiting the prize pools that third-party tournaments are permitted to award players.<sup>197</sup> Nintendo received significant pressure from fans and had to walk back from its attempt to shut down EVO's *Super Smash*

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188. See Jonathan Pan, *An Overview of Console Esports*, MEDIUM (Apr. 2, 2018), <https://jonpan.medium.com/an-overview-of-console-esports-a03b402693ad> [<https://perma.cc/FWV8-6L6U>].

189. See *id.*

190. See *id.*

191. See *Blizzard Tournament License*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71; *Policies*, *supra* note 71.

192. See Josh Bury, *Team YP Banned from All ESL Events Over Pornographic Sponsor*, THE SCORE ESPORTS (Apr. 23, 2016), <https://www.thescorreesports.com/sc2/news/7479-team-yp-banned-from-all-esl-events-over-pornographic-sponsor> [<https://web.archive.org/web/20210210152855/https://www.thescorreesports.com/sc2/news/7479-team-yp-banned-from-all-esl-events-over-pornographic-sponsor>].

193. See Fredric Kropp, Anne M. Lavack, Stephen J.S. Holden & Vassilis Dalakas, *Attitudes Towards Beer and Tobacco Sports Sponsorships*, SPORT MKTG. Q., Jan. 1999, at 49.

194. See *id.*

195. See *id.*

196. See *supra* Section I.B.

197. See Byers, *supra* note 15.

*Bros. Melee* tournament in 2013.<sup>198</sup> More recently, after a long history of nonsupport for the competitive *Smash Bros.* scene, Nintendo sent a cease and desist letter to organizers of the “Big House” tournament, another prominent annual *Super Smash Bros.* tournament, in 2020.<sup>199</sup> Soon after, the hashtags “Free Melee” and “Save Smash” were trending on Twitter as outraged fans protested and denounced Nintendo.<sup>200</sup> As evidenced by these events, when developers attempt to shut down tournaments, they often upset and alienate some of their most devoted players and consumers, which results in negative consumer perception and loss of trust in the company.<sup>201</sup>

### III. SOLUTION: COMPULSORY LICENSING FOR ESPORTS TOURNAMENTS

While developers, such as Nintendo, have long exerted copyright authority to restrict or cancel third-party tournaments, they may not even have that right under the Copyright Act.<sup>202</sup> However, to suddenly remove that authority would greatly harm developers.<sup>203</sup> Developers would not be able to protect their interests and investments in game development, which would disincentivize production of high-quality esports titles or operation of leagues such as the LCS.<sup>204</sup> Any plan to protect third-party tournament developers must also protect developers, lest the esports ecosystem falls apart for lack of games to center itself around.<sup>205</sup>

Section 115 of the Copyright Act details the process by which one may obtain a “compulsory license” for the music industry; the most common users of this process are streaming services such as Spotify or Apple Music, using it to obtain blanket licenses for musical works in

198. See Pitcher, *supra* note 15.

199. See Good, *supra* note 11.

200. See Damien McFerran, *Nintendo’s President Explains ‘Embarrassing’ Lack of Financial Support for Smash Bros. Esports*, NINTENDO LIFE (Jan. 9, 2020), [https://www.nintendolife.com/news/2020/01/nintendos\\_president\\_explains\\_embarrassing\\_lack\\_of\\_financial\\_support\\_for\\_smash\\_bros\\_esports](https://www.nintendolife.com/news/2020/01/nintendos_president_explains_embarrassing_lack_of_financial_support_for_smash_bros_esports) [<https://perma.cc/SH5F-8TJL>]; Mason Sansonia, *Super Smash Bros. Fans Protesting Big House Shutdown*, GAME RANT (Nov. 24, 2020), <https://gamerant.com/super-smash-bros-fans-protesting-big-house-shutdown/> [<https://perma.cc/WX9U-LWAD>]; Angelo M. D’Argenio, *Opinion: Nintendo Shutting Down the Big House 2020 Is Heartless*, GAMECRATE (Dec. 1, 2020), <https://gamecrate.com/opinion-nintendo-shutting-down-big-house-2020-heartless/26401> [<https://web.archive.org/web/20201202194122/https://gamecrate.com/opinion-nintendo-shutting-down-big-house-2020-heartless/26401>].

201. See McFerran, *supra* note 200; Sansonia, *supra* note 200; D’Argenio, *supra* note 200; *supra* Section I.B.

202. See *supra* Section II.A.

203. See *supra* Section II.A.

204. See Calvin, *supra* note 173.

205. See *id.*



exchange for songwriter royalties.<sup>206</sup> Under this compulsory licensing system, there is no “opt-out,” such that musical artists are compelled by law to enter into the licenses.<sup>207</sup> The Act itself places general conditions on the compulsory license, such as a requirement of notice to the copyright holder.<sup>208</sup>

Additionally, the Music Modernization Act established the Mechanical Licensing Collective (MLC), an agency with authority to grant blanket licenses to music services.<sup>209</sup> Among other things, the MLC is tasked with maintaining a database of musical works and the copyright owners of those works.<sup>210</sup>

Some developers, such as Riot Games, Blizzard, and Epic Games, have already provided example models which could become the general form of a compulsory license regime for esports tournaments.<sup>211</sup> This Note suggests that, by statute, Congress should similarly introduce a compulsory licensing scheme for the organization of third-party esports tournaments. This proposed “Esports Modernization Act” would primarily focus on the rights granted to third-party tournament organizers and the conditions put on the license to protect the interests of developers.

While this Note cannot write the entirety of a Congressional bill, it will develop the core points necessary to ensure that third-party tournaments can exist while simultaneously protecting the developer’s interests. First, the Esports Modernization Act (the “Act”) must establish an analogous agency to the MLC, a so-called Esports Tournament Licensing Collective (ETLC).<sup>212</sup> The ETLC would—like the MLC—be tasked with maintaining a database that contains information about video games, including each game’s copyright owner, while also being responsible for distributing licenses for such games.<sup>213</sup> After producing a game, a developer would have the ability to register with the ETLC and simultaneously submit a “prohibited sponsor and

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206. See Annette I. Kahler, *Implementation of the Music Modernization Act: Copyright Office Issues Solicitation for Mechanical Licensing Collective*, HRFM TODAY (Feb. 21, 2019), <https://www.hrftoday.com/2019/02/ip-frontiers-implementation-of-the-music-modernization-act-copyright-office-issues-solicitation-for-mechanical-licensing-co.html> [https://perma.cc/55YF-FBMJ]; see also 17 U.S.C. § 115.

207. See 17 U.S.C. § 115.

208. See *id.*

209. See *id.*

210. See *id.*

211. See *Blizzard Tournament License*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71; *Policies*, *supra* note 71.

212. See 17 U.S.C. § 115.

213. See *id.*

advertiser list.”<sup>214</sup> This list would fall under the information that the ETLC would compile in its database. To prevent developers from creating an overly broad list of prohibited sponsors, thereby effectively preventing third-party tournaments from receiving any kind of sponsorship, “reasonableness” guidelines for these lists would be included. The ETLC must possess the authority to strike down unreasonably prohibited sponsors. This Note will not explore this issue, but it is important to consider.

The Act should first outline the scope of a tournament license and conditions for obtaining one that uses language from existing tournament licenses. Unlike the MLC, the ETLC must distribute licenses by title, rather than as blanket licenses, because of the potential differences between licenses of different games.<sup>215</sup> Thus, a third-party tournament organizer must specify with the ETLC which game or games it wishes to use for its event:

Section 1. Compulsory License to Event Organizer—A person, the Licensee, may, by complying with the provisions of this section, obtain a compulsory, non-exclusive, non-transferable, limited license (the “License”) to organize and operate an event (the “Event”) for the software title (the “Game”) identified in the registration of the Event. The license shall allow the Licensee to do the following:

- (a) Operation and use of the Game during the Event;
- (b) Promotion of the Event using the title of the Game;
- (c) Live online transmission or broadcast of the Game using video streaming services during the Event; and
- (d) Recording of the Game during the Event, and retransmission of such recording via video streaming services.<sup>216</sup>

Each of these provisions is necessary for esports tournaments as they exist today.<sup>217</sup> Without the ability to promote a third-party tournament, there would be no way to attract players to participate in

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214. See *Policies*, *supra* note 71.

215. See 17 U.S.C. § 115.

216. See *Policies*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71; Valve Corp., *Dota 2 Tournament License and Paid Spectator Service Agreement*, DOTA 2, [http://cdn.dota2.com/apps/dota2/leagues/league\\_terms\\_new.pdf](http://cdn.dota2.com/apps/dota2/leagues/league_terms_new.pdf) [https://perma.cc/TE3T-DZ7W] (last visited Feb. 13, 2021).

217. See 17 U.S.C. § 115.

the tournament in the first place.<sup>218</sup> Moreover, esports as an industry thrives due to livestreams on Twitch and YouTube.<sup>219</sup> If a title's copyright owner does not grant live-streaming rights to tournament organizers, players, and fans who are unable to attend the event live would lose the opportunity to engage with the event; this would harm not only the interests of third-party tournament organizers but also those of developers.<sup>220</sup> Notably, the compulsory license provisions limit the Game's rights of use only to tournament play and the broadcast thereof; it does not extend to the game itself.<sup>221</sup> This narrow construction protects the developer's rights in the creation of its titles.<sup>222</sup>

Next, the Act must protect the developer's interest in its corporate image through a condition on the compulsory license allowing for a prohibited sponsor and advertiser list. If a developer has not yet registered with the ETLC or submitted its own prohibited sponsor and advertiser list, the Act should include several items on a default list:

Section 2. Prohibited Sponsor and Advertiser List—The Event may not be sponsored by any companies that sell or promote any of the following:

- (a) Any video game aside from the Game;
- (b) Any video game developer or publisher other than that of the Game;
- (c) Any video game consoles;
- (d) Any esports or other video game tournament, league, or event;
- (e) Any business that promotes the use of in-game hacks, cheating, or exploits;
- (f) Any business that encourages illegal activities or violates applicable law; or
- (g) Any of the products or services on the Game's specific Prohibited Sponsor and Advertiser List.<sup>223</sup>

Aside from any sponsors that a developer determines would harm its corporate image, such as alcohol or tobacco companies, this default list would prevent tournaments that use a developer's game

218. See *Policies*, *supra* note 71; Valve Corp., *supra* note 216 (both of which include in their licenses the right to promote their tournament using the name of the game).

219. Ben Popper, *Field of Streams: How Twitch Made Video Games a Spectator Sport*, VERGE (Sept. 30, 2013, 9:00 AM), <https://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming> [https://perma.cc/3YBN-ESLU].

220. See *supra* Section I.A.

221. See *supra* Section I.C.

222. See *supra* Section I.C.

223. See *Policies*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71.

from promoting the developer's competitors. In the same vein, developers may want to ensure that third-party tournament organizers do not misrepresent their relationship with the developer.<sup>224</sup> As such, a provision should be included to prevent such misrepresentation or misunderstanding on the part of participants:

Section 3. Trademarks or Affiliation—

(a) The Licensee must not use the name, logos, or trademarks of the Developer to promote the Event or on the website for the Event. The Licensee may not otherwise suggest that the Event or the website for the Event is endorsed or approved by, or affiliated with, the Developer in any way.

(b) The following notice must be included in a clear and conspicuous manner on all competition materials for the Event: "This event is not affiliated with or sponsored by (Developer)."<sup>225</sup>

While third-party tournaments are unlikely to deprive developers of revenue from the sale of games themselves or microtransactions, developers might take issue with the sale of their other merchandise.<sup>226</sup> To that end, there must be a provision in place to protect this interest:

Section 4. Merchandising — The Licensee may not sell any Game, Developer, or similarly branded merchandise at the Event.

With regard to royalties, it is unclear whether such a system is as applicable to esports as it is to the music industry. Developers do not lose revenue from the games themselves when third-party tournaments operate.<sup>227</sup> Accordingly, if there is a need for royalties from such events, it must stem from lost revenue from a developer's own tournaments.<sup>228</sup> However, again, it is dubious whether third-party tournaments actually reduce the commercial value of professional-level tournaments due to variance in target audiences and participant pools.<sup>229</sup> Moreover, many third-party tournaments are organized by individuals or small groups who are unable to pay exorbitant royalty fees.<sup>230</sup> Therefore, this Note recommends that the Act omit a royalty-bearing requirement for the use of a developer's games in third-party tournaments. However, in the case that such a consideration is unfeasible, royalty fees should be set as a percentage of the revenue earned by the tournament itself. This

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224. See, e.g., *Policies*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71.

225. See, e.g., *Policies*, *supra* note 71; *Fortnite Event License Terms*, *supra* note 71.

226. See, e.g., *Policies*, *supra* note 71.

227. See *supra* Section II.A.

228. See *supra* Section I.B.

229. See *supra* Section II.B.

230. See *supra* Section II.B.

would adequately compensate developers for any possible lost revenue and protect small tournament organizers from hosting events that result in a net loss. Further research would be necessary, however, to determine at what rate these royalties should be paid, and an independent board may be required to set this rate.

Finally, the Act should not exclude all provisions allowing developers to limit prize pools awarded at third-party tournaments. Again, most third-party tournaments are organized by individuals or small groups who do not have the means by which to offer large prize pools, absent prohibitive entry fees which discourage players from participating.<sup>231</sup> Additionally, in the case that third-party tournaments evolve and are able to offer prize pools that compete with professional tournaments organized by the developer, any potential issues that arise could be remedied by means of royalty payments set as a percentage of the revenue that the organizer accrued from the tournament.<sup>232</sup>

Moreover, as demonstrated by Epic Games' experience, it may not be in developers' best interests to set limits on prize pools, even when, or perhaps especially when, those developers are organizing their own events.<sup>233</sup> Epic Games faced public backlash for "stifling grassroots events" when it limited third-party tournament organizers to a prize pool of no more than \$10,000.<sup>234</sup> This limitation was especially irksome when compared to Epic's \$8 million payouts over eight weeks of tournaments.<sup>235</sup> When esports fans and players, game developers' most devoted consumers, perceive that those developers do not value hosts and organizers of smaller events, they are quick to criticize those developers and exert significant pressure on them.<sup>236</sup>

#### IV. CONCLUSION

Developers hold a significant amount of power in the esports industry.<sup>237</sup> While some companies have pushed the industry to evolve and innovate through their own efforts and by encouraging third parties to host events for titles those companies have developed, others have taken a hands-off approach to esports, lending little-to-no support

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231. See *supra* Section II.B.

232. This issue might also have implications in anti-competitive conduct and antitrust law. See Max Miroff, *Tiebreaker: An Antitrust Analysis of Esports*, 52 COLUM. J.L. & SOC. PROBS. 177, 219 (2019).

233. See Byers, *supra* note 15.

234. See *id.*

235. *Id.*

236. See *id.*; McFerran, *supra* note 200; Pitcher, *supra* note 15.

237. See *supra* Section I.B.

to the competitive scenes for their titles.<sup>238</sup> Still, others have sought to stifle third-party tournaments, exerting their copyright authority to force organizers to cancel highly anticipated events.<sup>239</sup>

The Copyright Act, which grants developers many exclusive rights to their games, should not be read to allow developers to exert control over third-party tournaments that utilize said games.<sup>240</sup> Third-party tournaments cannot be said to constitute (1) reproduction of the game; (2) derivative works of the game; (3) distribution of copies of the game; or (4) performance of the game, as they have been defined by precedent.<sup>241</sup>

Taking into consideration developers' desire to control third-party tournaments using their games,<sup>242</sup> this Note recommends adopting a compulsory licensing scheme for third-party tournaments, with conditions placed upon the third parties to protect the salient interests of developers. These conditions are based on what copyright law suggests developers are entitled to from third-party tournaments.<sup>243</sup> They are also based on what developers have chosen to include in the licenses they currently grant to competitive communities, namely, protecting the developers' corporate image through control of third-party tournaments' sponsors and protection against loss of revenue from merchandise sales that might naturally accompany those events.<sup>244</sup> While this Note advocates against requiring that royalties be paid to the developer, if royalties become necessary, this Note recommends that royalties be set as a percentage of revenue generated by a tournament, at a rate determined by an outside party.

Ultimately, third-party tournaments are beneficial to developers.<sup>245</sup> They have minimal, if any, negative effects on the revenues generated by developers through game sales and proprietary tournaments.<sup>246</sup> In fact, third-party tournaments often serve as a way for players to engage with a developer's game, giving those players the opportunity to purchase microtransactions and merchandise while becoming first-time or more engaged viewers of professional play.<sup>247</sup>

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238. See *supra* Section I.B.

239. See *supra* pp. 2–3.

240. See 17 U.S.C. § 106.

241. See *supra* Section II.A.

242. See *supra* Section II.B.

243. See *supra* Section II.A.

244. See *supra* Section II.B.

245. See *supra* Section II.B.

246. See *supra* Section II.B.

247. See *supra* Section II.B.

In instances where developers have resorted to serving cease and desist letters on organizers of third-party tournaments, developers have often been met with outrage from their most devoted customers.<sup>248</sup> Nonetheless, esports developers are concerned about third-party tournaments, and those concerns must be addressed and their interests protected in any potential solution, lest developers lose the drive to continue creating games.<sup>249</sup> A compulsory licensing scheme should effectively protect the most salient interests of developers while also ensuring that third-party tournaments can operate. The developers behind both *League of Legends* and *Super Smash Bros. Melee*—the former, the most invested in its competitive gaming scene, and the latter, the least—can both attribute their success to robust fan communities, thanks in large part to the efforts of third-party tournaments.<sup>250</sup>

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248. See *supra* Section II.B.

249. See *supra* Section II.B.

250. See *supra* Section I.A.

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