

Esports Bar Association Journal

Volume 2021

Journal Management

Editor-in-Chief
RYAN FAIRCHILD
Odin Law and Media

Editor-in-Chief
MICHAEL ARIN

Publication Committee Chairman
HARRIS PESKIN
ESG Law

Journal Editors

Managing Editor
Michael Rivera

Gregory Lu

Brian King

Emma C. Smizer

Justin Ho

Table of Contents

Prefaceii

Integrity and Fair Play: Can Federal Prosecution Tame the Wild West of Professional Esports?
by Jullian Haley 1

Shield and Sword: Trademark Rights in Esports
by Alex Robertson 16

Sexual Harassment Hinders Esports' Potential
by Tram Nguyen* 28

* The Esports Bar Association Journal selected Tram Nguyen as the recipient of the scholarship for the Top Student Submission.

Preface

Thank you for reading Volume 2021 of the Esports Bar Association Journal. Our editors have worked tirelessly during difficult times, balancing work, school, and their editorial responsibilities. Without their effort, this journal would not be able to publish quality, author-driven articles. As always, we are grateful for your continued patronage as we work to support authorship in the esports legal industry.

Sincerely,

Michael Arin & Ryan Fairchild
Editors-in-Chief of the Esports Bar Association Journal

Sexual Harassment Hinders Esports' Potential

Tram Nguyen[†]

Introduction

Esports is one of the fastest-growing entertainment industries in the world.¹ With the advent of Covid-19, giants² in the video game industry have witnessed an astronomical rise in both revenue and viewership.³ The video game industry's global market reached \$162.32 billion in 2020, with esports recording a net revenue of \$947.1 million.⁴ Due to the video game industry's growth, esports revenue is expected to reach \$1.61 billion by 2024.⁵ Comparatively, the recorded music industry's total revenue amounted to \$23.1 billion in 2020,⁶ though the music industry has had over a 100-year head start.⁷ The video game industry's continued growth has been supplemented by collaborations with the music industry for in-game concerts, such as Ariana Grande's virtual concert in the game *Fortnite*, drawing in a record of 78 million players.⁸

During the Covid-19 pandemic, while other forms of entertainment such as movie theaters, sports, and plays were largely inaccessible, more people have turned to video games to escape the

[†] Tram Nguyen is a student at the Santa Clara University School of Law and current Senior Articles Editor for the Santa Clara High Technology Law Journal (HTLJ). For other correspondence please email nguyen15@scu.edu or follow her twitter @itstramstop. Copyright © 2021 Tram Nguyen.

¹ John T. Holden, Mark Edelman & Thomas A. Baker III, *A Short Treatise on Esports and the Law: How America Regulates its Next National Pasttime*, 2020 U. ILL. L. REV 509, 511.

² A non-exhaustive list of these giants includes Nintendo Co., Ltd., Riot Games, Inc., and Activision Blizzard, Inc. Others that do not publish video games but benefit from video game content include Twitch.tv and YouTube.

³ Noah Smith, *The Giants of the Video Game Industry Have Thrived in the Pandemic. Can the Success Continue?*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/video-games/2020/05/12/video-game-industry-coronavirus>.

⁴ Teodora Dobrilova, *How Much Is the Gaming Industry Worth in 2021? [+25 Powerful Stats]*, TECHJURY (Aug. 5, 2021), <https://techjury.net/blog/gaming-industry-worth>.

⁵ *Id.*

⁶ Global Recorded Music Revenue From 1999 to 2020, STATISTA (Mar. 2021), <https://www.statista.com/statistics/272305/global-revenue-of-the-music-industry>.

⁷ Roger Beardsley & Daniel Leech-Wilkinson, *A Brief History of Recording to ca. 1950*, CHARM, https://charm.rhul.ac.uk/history/p20_4_1.html (last visited Aug. 29, 2021).

⁸ Jade Wickes, *Inside Ariana Grande's Fortnite Virtual Concert*, THE FACE (Aug. 9, 2021), <https://theface.com/music/ariana-grande-fortnite-rift-tour-performance-gaming-vr-mac-miller-travis-scott-lil-nas-x>.

real world and socialize.⁹ However, even when people turned to video games to escape from the pandemic, nearly half of female gamers and more than half of LGBTQIA+ gamers faced discrimination in this space.¹⁰

It should be surprising that esports lack women and LGBTQIA+ gamers because esports, unlike traditional sports, do not limit and segregate athletes based on sex. Esports should allow both men and women to compete on equal playing fields because their physical differences have no effect on the skills necessary to successfully compete in esports. One reason for the lack of women and LGBTQIA+ representation in esports is due to the gender and sexual orientation discrimination they face in this field.¹¹ For example, 44% of female gamers report experiencing gender discrimination, and they make up less than 10% of college esports players.¹²

Ending sexual harassment in video gaming and esports should be a priority for everyone in the industry because, not only should it be the moral and legal standard, it makes commercial sense. Sexual harassment and discrimination turn female and LGBTQIA+ gamers away from gaming and hinder esports' full potential. Females and LGBTQIA+ gamers face sexual harassment from other players, coaches, and even viewers.¹³ Due to the severity of sexual harassment, a few females who have reached professional levels have left the industry.¹⁴

Currently, video games are a billion-dollar industry and its potential for growth could reach even higher levels if the industry were more inclusive. Esports teams mainly gain revenue through

⁹ Megan Farokhmanesh, *More Than Half of Americans Turned to Video Games During Lockdown*, THE VERGE (Jan. 6, 2021), <https://www.theverge.com/2021/1/6/22215786/video-games-covid-19-animal-crossing-among-us>.

¹⁰ *Gaming for All: A Study of Toxicity and Plans for Inclusivity*, EVIL GENIUSES, YouGov (Aug. 1, 2021), https://assets.evilgeniuses.gg/dei/EG_YouGov_GamingForAll.pdf.

¹¹ John T. Holden et al., *The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports*, 52 ARIZ. ST. L.J. 1, 3 (2020).

¹² Lindsey Darwin, *Colleges Nationwide, Esports Teams Dominated by Men*, THE CONVERSATION (Mar. 12, 2021), <https://theconversation.com/at-colleges-nationwide-esports-teams-dominated-by-men-154793>.

¹³ See Matt Gardner, *The Ugly Hatred Faced by Women in Esports, and How We Fight Back*, FORBES (Mar. 19, 2021, 11:00 AM), <https://www.forbes.com/sites/mattgardner1/2021/03/19/the-ugly-hatred-faced-by-women-in-esports-and-how-we-fight-back/?sh=22c711d037d8>. A member of esports team, Team Liquid, talks about “women getting harassed by teammates, simply because they’re a girl.” *Online Harassment Gets Real for Female Gamers*, NPR (Aug. 8, 2012, 1:00 PM), <https://www.npr.org/2012/08/08/158433079/virtual-harassment-gets-real-for-female-gamers> [<https://perma.cc/7XJU-V284>]. Miranda “Super_Yan” Pakozdi, an elite gamer who specialized in fighting games, faced repeated ridicule from her coach and spectators.

¹⁴ See Stefanie Fogel, *Esports Is Getting Bigger Every Year—So Where Are All the Women?*, VARIETY (Nov. 1, 2018, 12:30 PM), <https://variety.com/2018/gaming/features/women-in-esports1203016379> [<https://perma.cc/WD4B-6B4G>].

sponsorships, media rights, publisher fees, merchandise, and tickets.¹⁵ Approximately 90% of this revenue is through sponsorships and advertising.¹⁶ If the industry addressed and combatted sexual harassment, then the already burgeoning esports economy could only stand to benefit from additional revenue through sponsorships by reaching a wider audience.

Part I sets out what sexual harassment and discrimination look like in esports. Part II describes some of the main ways female and LGBTQIA+ gamers deal with sexual harassment. Part III discusses actions that should be taken against sexual harassers. Part IV discusses the root of why sexual harassment and discrimination remain prevalent in esports. And Part V discusses proposals for dealing with sexual harassment and discrimination. This article aims to open dialogue about the level of unnecessary sexual harassment and discrimination in the industry and how this behavior negatively affects everyone, not just the victims.

I. What do Sexual Harassment and Discrimination Look Like in Esports?

There are many reasons why sexual harassment remains prevalent in esports, such as video games originating from a male-dominated culture, anonymity contributing to asocial behavior online,¹⁷ and the shortcomings of current anti-harassment laws. Furthermore, publishers that hold esports competitions and tournaments fail to implement any safeguards to combat sexual harassment. Publishers are more prone to have zero-tolerance policies for cheating but look the other way when sexual harassment is the issue. While many marginalized members of the esports community suffer discrimination and harassment, this article only focuses on sexual harassment against individuals based on gender and gender identification. The discrimination that women and LGBTQIA+ gamers face at a casual level is part of what stops them from pursuing higher levels of achievement.

Two common stereotypes against women who play video games are the “gamer girl” and the “gamer girlfriend.” In 2005, when the phrase “gamer girl” was first coined, the stereotype described women who only liked video games to appear relatable.¹⁸ The second

¹⁵ Christina Gough, *Global Revenue of the Esports Market 2021, by Segment*, STATISTA (June 1, 2021), <https://www.statista.com/statistics/490358/esports-revenue-worldwide-by-segment/>.

¹⁶ Kengo Miyakoshi, *The Economics of Esports*, USC ECON. REV. (Jan. 4, 2019), <https://usceconreview.com/2019/01/04/the-economics-of-esports>.

¹⁷ Anna Chang et. al., *Diversity in Esports*, 2019 ESPORTS B. ASS'N J. 19, 20–21.

¹⁸ Benjamin Mock, *The Toxic Culture of Esports is Keeping Women on Sidelines*, POWER PLAYS (Sept. 14, 2020), <https://www.powerplays.news/p/the-toxic-culture-of-esports-is-keeping>.

stereotype was the “gamer girlfriend.”¹⁹ The “gamer girlfriend” was a woman who liked video games but her acceptance into the gaming community was only if she were to be dated.²⁰ These forms of stereotyping occurred because some male gamers believed that women were invading a space that belonged to men.²¹ Unfortunately, while the industry has slightly improved over time, the sentiment that women do not belong remains.

Additionally, there is a general misconception that women are not as good at video games as males, despite any scientific evidence supporting this view.²² Gamers are no stranger to comments such as, “she’s pretty good for a girl”²³ or “go back to the kitchen.”²⁴ These statements imply that similar performance is not considered equally and that females do not belong in this environment. In reality, there is no female or male standard, but a perpetuated toxic misogynistic culture that originated from a male-dominated field.

Further, when a female or LGBTQIA+ gamer performs better than their male counterparts, a common form of discrimination is to doubt their skills. For example, male players accused Se-Yeon “Geguri” Kim, a professional *Overwatch* player, of cheating because of her performance during a qualifying match for a regional tournament.²⁵ The accusing players stated that if Kim could prove she was not cheating, they would apologize and quit professional *Overwatch*.²⁶ Although a few days after the tournament Activision Blizzard, Inc. (“Blizzard”), *Overwatch*’s publisher, officially cleared her of any wrongdoing, Kim still took the stage to put on an hour-long performance to dispel any lingering doubts.²⁷ Three of her accusers apologized and quit professional *Overwatch*.²⁸ Kim was one of the top Zarya (an *Overwatch* character) players, known for her technical mastery of the character, and had a win rate of 80%.²⁹ As the only female professional *Overwatch* player, these baseless accusations reflect the sentiment that some males in the

¹⁹ *Id.*

²⁰ *Id.*

²¹ Kayleigh Connor, *The Male Domain: Exclusion of Women in Video Games*, DIGITAL AM., <https://www.digitalamerica.org/the-male-domain-exclusion-of-women-in-video-games-kayleigh-connor>.

²² Cuihua Shen et. al, *Do Men Advance Faster Than Women? Debunking the Gender Performance Gap in Two Massively Multiplayer Online Games*, 21 J. COMPUTER-MEDIATED COMM’N 312 (2016).

²³ Gardner, *supra* note 13.

²⁴ James Fletcher, *Sexual Harassment in the World of Video Gaming*, BBC NEWS (June 4, 2012), <https://www.bbc.com/news/magazine-18280000>.

²⁵ Andy Chalk, *Teenage Overwatch Player Accused of Cheating Proves She’s Just That Good with Zarya*, PC GAMER (June 21, 2016), <https://www.pcgamer.com/teenage-overwatch-player-accused-of-cheating-proves-shes-just-that-good-with-zarya>.

²⁶ Maddy Myers, *Geguri Holds No Grudges*, KOTAKU (Apr. 30, 2018), <https://kotaku.com/geguri-holds-no-grudges-1825151718>.

²⁷ Chalk, *supra* note 25.

²⁸ Myers, *supra* note 26.

²⁹ Chalk, *supra* note 25.

industry do not see females as their equals. When a young woman like Kim excels competitively at a video game such as *Overwatch* and the game statistics support her excellence, her skills are still doubted and mired in baseless accusations of cheating.

Another female who faced discrimination was Maria “Remilia” Creveling. Creveling was the first female and transgender *League of Legends* professional player.³⁰ In 2016, Creveling’s debut as a standout support player with Team Renegades received intense scrutiny.³¹ She suffered constant bullying, harassment, and ridicule from other players and fans, simply for being female and transgender in esports.³² Anytime she performed less-than-perfect, trolls would launch massive verbal messages that attributed her “bad gaming skills” to her gender.³³ Unfortunately, in December 2019, Creveling passed away in her sleep.³⁴ After her passing, aspiring female and LGBTQIA+ professional gamers came forward to share their own experiences with sexism.³⁵ Creveling had inspired many to pursue their dreams of becoming professional esports players.³⁶ As the first professional female and transgender player in *League of Legends*, Creveling pioneered the way for other aspiring female and transgender players to pursue their dreams. She endured sexual harassment, discrimination, and toxicity in a sport where there should be no basis for gender bias.

II. How Women Cope with Sexual Harassment and Discrimination

While sexual harassment has not deterred many women from enjoying games, a lack of support from viewers and teammates has fostered a culture of detachment. This detachment contributes to females and LGBTQIA+ gamers being less likely to pursue a career in esports.³⁷ A study conducted by esports team Evil Geniuses and YouGov indicates that 54% of gamers who identify as LGBTQIA+ and 51% of female gamers are the most likely to leave or consider leaving gaming due to sexual harassment.³⁸ Therefore, if female and LGBTQIA+ gamers

³⁰ Mustafa Gatollari, *The Gaming Community Was Shocked to Learn That Remilia Passed Away*, DISTRACTIFY (Dec. 29, 2019), <https://www.distractify.com/p/how-did-remilia-die>.

³¹ Jake Seiner, ‘*The Second They Realize I’m a Woman, I No Longer Have Power*’: Navigating Toxicity, Harassment in Esports, CHI. TRIBUNE (Jan. 3, 2019, 9:00 AM), <https://www.chicagotribune.com/lifestyles/ct-life-women-esports-20190103-story.html>.

³² *Id.*

³³ *Id.*

³⁴ Rollin Bishop, *League of Legends Fans Mourn the Death of Former Pro Player Remilia*, COMICBOOK (Dec. 30, 2019, 2:05 PM), <https://comicbook.com/gaming/news/league-of-legends-remilia-death-reactions>.

³⁵ Seiner, *supra* note 31.

³⁶ *Id.*

³⁷ *Gaming for All*, *supra* note 10.

³⁸ *Id.*

are more likely to leave or consider leaving gaming, then they are less likely to pursue gaming on a professional level.

Female and LGBTQIA+ gamers are so accustomed to sexual harassment that they cope with harassment through five main strategies: disguising their identities, avoiding playing with strangers, deploying their skill and experience, adopting an aggressive persona, or leaving online gaming altogether.³⁹ The issue with these coping strategies is that it puts the burden on the victims. Methods from disguising identities to leaving gaming altogether portray a false idea that there is an absence of women and LGBTQIA+ gamers. These strategies reinforce the idea that women and LGBTQIA+ gamers do not belong in gaming and contribute to the perception that video games are for men only. In turn, this contributes to the nature of video games being a boys' club and results in continual harassment directed at non-male players who have not disguised their identities or avoided playing with strangers.

III. Building a Pipeline for More Females and LGBTQIA+ Gamers in Esports

To build a pipeline for more female and LGBTQIA+ gamers to reach professional levels, they first need to feel comfortable playing video games at a casual level without worrying about being sexually harassed or discriminated against. While coping mechanisms allow females and LGBTQIA+ gamers to play video games and minimize harassment, this workaround is a band-aid. While female and LGBTQIA+ gamers have developed an arsenal of coping strategies, they should not be the only ones fighting back against sexual harassment and discrimination.

The problem with the lack of pipeline leading more females and LGBTQIA+ gamers to esports should be addressed at the roots. Women still face occupational segregation in nearly every industry including video games.⁴⁰ Even if there were "[LGBTQIA+] people in the industry, they probably wouldn't feel very comfortable talking about it."⁴¹ According to a 2011 study by the International Game Developers Association ("IGDA"), 73% of women in the video game industry work in positions outside of developing games and do not have a strong voice in

³⁹ Amanda Cote, *"I Can Defend Myself": Women's Strategies for Coping With Harassment While Gaming Online*, SAGE (Mar. 1, 2017), https://www.researchgate.net/publication/277933924_I_Can_Defend_Myself_Women's_Strategies_for_Coping_With_Harassment_While_Gaming_Online.

⁴⁰ Drew Welch, *Gender Equality Sells: Women in the Games Industry*, USC GAMES (Nov. 23, 2018), <http://games.usc.edu/news/gender-equality-sells-women-in-the-games-industry>.

⁴¹ Bryan Ochalla, *'Out' in the Industry*, GAME DEVELOPER (Mar. 30, 2007), <https://www.gamedeveloper.com/business/-out-in-the-industry>.

the content and character representation involved in games.⁴² However, the number of women game developers have increased to about 22% by 2015⁴³ and, with that, more inclusive mobile titles have also led to an increase in women gamers.⁴⁴ Additionally, LGBTQIA+ gamers made up only 3% of video game developers in 2015, and, although the number has increased to 5% in 2021, there is still a long way to go.⁴⁵

Building a pipeline for more women and LGBTQIA+ in game development “would discourage gender stereotypes, sexual exploitation, and the normalization of violence against women both in the workplace and in games.”⁴⁶ However, this requires a change in culture from the publishers of games as well.

The companies that publish some of the most popular games in esports have faced allegations of sexual harassment and discrimination. In 2018, current and former employees filed a lawsuit against Riot Games, Inc. (“Riot”) alleging unequal pay, discrimination, and a “sexually hostile work environment,” among other things.⁴⁷ In May 2019, 150 Riot employees walked out in protest over harassment lawsuits filed against the company.⁴⁸ The behavior alleged in the suit included sending unsolicited photos of male genitalia to female coworkers, email chains that discussed fantasies of “penetrat[ing] female employees,” and even male managers circulating a list that ranked female employees based on their attractiveness.⁴⁹ Riot agreed to pay at least \$10 million to settle the lawsuit.⁵⁰ Despite this settlement, another employee filed a lawsuit against Riot in January 2021, alleging it wrongfully terminated her after she complained about sexual advances the CEO made towards her. Riot suspended its CEO

⁴² Julie Prescott & Jan Bogg, *Segregation in a Male-Dominated Industry: Women Working in the Computer Games Industry*, 3.1 INT’L J. OF GENDER, SCI., & TECH. 205 (Mar. 17, 2011), <http://genderandset.open.ac.uk/index.php/genderandset/article/view/122/259>.

⁴³ J. Clement, *Distribution of Game Developers Worldwide from 2014 to 2021*, by *Gender*, STATISTA (Aug. 29, 2021), <https://www.statista.com/statistics/453634/game-developer-gender-distribution-worldwide>.

⁴⁴ Welch, *supra* note 40.

⁴⁵ Clement, *supra* note 43.

⁴⁶ Welch, *supra* note 40.

⁴⁷ Erin Carson, *Riot Games Sued for Alleged Gender Discrimination*, CNET (Nov. 7, 2018, 1:22 PM), <https://www.cnet.com/news/riot-games-hit-with-gender-discrimination-suit-by-current-and-former-employees>.

⁴⁸ Keza McDonald, *Riot Games Employees Walk Out over Workplace Harassment Lawsuits*, THE GUARDIAN (May 7, 2019), <https://www.theguardian.com/games/2019/may/07/riot-games-employees-walk-out-over-workplace-harassment-lawsuits>.

⁴⁹ Sam Dean, *Riot Games is Sued by Female Employees Over Alleged Unequal Pay, Sexual Harassment*, LOS ANGELES TIMES (Nov. 6, 2018, 6:46 PM), <https://www.latimes.com/business/technology/la-fi-tn-riot-class-action-20181106-story.html>.

⁵⁰ Steven Musil, *Riot Games Investigating Its CEO Over Sexual Harassment Lawsuit*, CNET (Feb. 9, 2021, 5:34 PM), <https://www.cnet.com/news/riot-games-investigating-its-ceo-over-sexual-harassment-lawsuit>.

and began an overhaul of its internal policies, acknowledging that its work culture had fostered sexual harassment and misogyny.⁵¹

Further, the California Department of Fair Employment and Housing (DFEH) filed a suit against Activision Blizzard Inc. (Blizzard) after it found that the company discriminated against female employees in terms and conditions of employment, including compensation, assignment, promotion, and termination.⁵² The complaint alleged a “frat boy” culture, in which female employees are subjected to “cube crawls” where male employees would come back from drinking alcohol and proceed to visit female coworkers in their cubicles to sexually harass them.⁵³ In response to the allegations, Blizzard stated that the DFEH lawsuit contained “distorted, and in many cases false, descriptions of Blizzard’s past.”⁵⁴ More than 2,600 current and former Blizzard employees have united to sign an open letter in support of the DFEH lawsuit.⁵⁵ Blizzard employees staged a walk-out on July 28, 2021, to protest the company’s handling of sexual harassment charges. Blizzard’s handling of the sexual harassment allegations reflects the publisher’s unwillingness to address and combat such sexual harassment and discrimination. Blizzard’s response to the lawsuit makes it difficult for victims to feel safe coming forward.

Some of the most popular publishers of esports have publicly been involved in sexual harassment and discrimination allegations. It is important to note these companies’ responses to such allegations because it correlates with their responses to sexual harassment and discrimination within esports. These companies must take a stronger stance from within their workplace culture and set the tone and standard for equality within esports.

IV. The Entire Gaming Community Needs to Step Up

Despite blatant sexism in esports, hardly any action has been taken against that behavior, which has allowed it to perpetuate. One

⁵¹ Grace Dean, *The CEO of Riot Games is Being Investigated After a Lawsuit Accused Him of Gender-Based Discrimination and Sexual Harassment*, BUSINESS INSIDER (Feb. 10, 2021, 4:47 AM), <https://www.businessinsider.com/riot-games-ceo-laurent-investigation-sexual-harassment-gender-discrimination-lawsuit-2021-2>.

⁵² Maeve Allsup, *Activision Blizzard Sued Over ‘Frat Boy’ Culture, Harassment*, BLOOMBERG L. (July 21, 2021, 12:25 PM), <https://news.bloomberglaw.com/daily-labor-report/activision-blizzard-sued-by-california-over-frat-boy-culture>.

⁵³ Complaint at 5, *Dept. of Fair Empl. & Housing v. Activision Blizzard*, No. 21-STCV-26571 (Cal. Super. Ct. 2021).

⁵⁴ Nicole Carpenter, *Activision Blizzard Sued California Over Widespread Sexism, Sexual Harassment*, POLYGON (July 22, 2021, 9:14 AM), <https://www.polygon.com/22588407/activision-blizzard-sexual-harassment-sexism-california-lawsuit>.

⁵⁵ Nicole Carpenter, *Activision Blizzard Employees to Walk Out in Support of Harassment Lawsuit*, POLYGON (July 27, 2021, 1:00 PM), <https://www.polygon.com/22595703/activision-blizzard-employee-protest-walk-out-lawsuit>.

professional *Overwatch* player, Timo “Taimou” Kettunen, brazenly commented about a female esports interviewer during an interview with Ongamenet in 2016 stating, “gonna check those pantsus when I’m getting interviewed,” and “I wanna explore that interview girls’ thighs.”⁵⁶ His comfort in publicly stating such sexually harassing and disgusting comments reflects the lack of respect and regard for females in the esports industry. While Ongamenet cited his comments as sexual harassment and revoked his fight money winnings of \$630 for that match,⁵⁷ this revocation is only a slap on the wrist. Moreover, this addresses the issue after the fact rather than preventing it from happening in the first place.

Gaming has inadequately addressed the problem, either ignoring it altogether, or only doing so after a public outcry. During the 2018 *Overwatch* League season, Felix “xQC” Lengyel of the Dallas Fuel made homophobic comments about another player.⁵⁸ He received a four-game suspension and a \$2000 fine for these homophobic comments.⁵⁹ For Lengyel, who is a millionaire,⁶⁰ this fine is minuscule. Contrast Lengyel to another player who received a thirty-game suspension and a \$9000 fine for offenses related to cheating.⁶¹ The different punishments between sexual harassment and cheating demonstrate the industry’s priorities.

More recently, the Dallas Fuel cut long-time player Jonathan “HarryHook” Tejedor Rua from its roster after deeply sexist comments he made on Twitter surfaced.⁶² Dallas Fuel’s decision shows that those exhibiting sexually discriminatory behavior can be held accountable in esports. While the decision is a step in the right direction, their voluntary action is on an individual basis and not a common practice in the industry. For every incident of sexual harassment or discrimination that is addressed, many others are not publicized or ignored altogether. The entire esports industry needs to address sexual harassment and discrimination, not just the voluntary decision of individual esports teams or independent tournaments on an ad hoc basis.

Actions taken by esports teams and independent tournament hosts to combat sexual harassment are commendable, but this is the bare minimum. Publishers wield the most power in esports because the Copyright Act of 1967 gives them exclusive rights to the use, images,

⁵⁶ Ethan Gach, *Overwatch Player Fined for ‘Lewd Comment’ About Interviewer*, KOTAKU (Oct. 15, 2016, 2:10 PM), <https://kotaku.com/pro-overwatch-player-fined-for-lewd-comment-about-inter-1787837655>.

⁵⁷ *Id.*

⁵⁸ Mock, *supra* note 18.

⁵⁹ *Id.*

⁶⁰ Julian, *How Much Money xQcOW Makes & Youtube – Net Worth*, NAIBUZZ (June 22, 2021), <https://naibuzz.com/how-much-money-xqcow-makes-on-twitch-net-worth>.

⁶¹ *Id.*

⁶² *Id.*

videos, and public display of their videogames.⁶³ They set and control conditions of how the league operates. Since publishers hold the ability to significantly curtail sexual and gender harassment the change should start with them.

One way the industry has chosen to combat sexual harassment and discrimination is to create separate girls-only teams, leagues, and tournaments.⁶⁴ This band-aid of a proposition does not make sense in a sport where the skills required are not based on any physical attributes or differences between men and women. This remedy is reminiscent of the Virginia Military Institute's argument in *United States v. Virginia*, which held that female-only institutions are separate but equal.⁶⁵ Segregated facilities, and here leagues, no matter how substantially similar, are inherently never equal. Further, esports is the only sport where men and women can compete on level playing fields. Therefore, it does not make sense to create and foster gender bias in esports.

To begin setting a standard against sexual harassment and discrimination in esports, the companies that publish video games should evaluate their workplace composition and address the lack of women and LGBTQIA+ employees. Further, when employees allege sexual harassment and discrimination, companies should investigate and address these allegations in good faith. “[E]liminating discrimination requires allies to pay attention to and respond to both overt discrimination and more subtle microaggressions.⁶⁶ Diversifying the workplace of the publishers would allow more diverse ideas in the development of video games and esports environments.

Additionally, publishers should create a standard against sexual harassment and discrimination and provide concrete punishments for offenders, rather than leaving esports as a self-regulating industry where professional esports teams and independent tournament organizers punish offenders through an ad-hoc basis. The terms and conditions should clearly define what constitutes sexual harassment and discrimination. Moreover, publishers should set a standard for the number of reports received, verified against those actions, and set punishments to increase based on the repetition and severity of those offenses.

Two reasons these publishers may not have implemented policies to combat sexual harassment and discrimination are the potential for backlash from a male-dominated culture and the resulting

⁶³ 17 U.S.C. § 106.

⁶⁴ *All-Girl SEA Tournament Starting Tomorrow, \$1,800 in Cash Prize Up for Grabs*, GOSU GAMERS (Aug. 3, 2010), <https://www.gosugamers.net/dota2/news/27421-all-girls-sea-tournament-starting-tomorrow-1-800-in-cash-prize-up-for-grabs>.

⁶⁵ See *United States v. Virginia*, 518 U.S. 515 (1996).

⁶⁶ Chang et. al., *supra* note 17.

loss of profits.⁶⁷ However, publisher inaction, whether from fear of losing current players or for other reasons, has hindered the potential of the video game and esports industry from reaching a larger demographic.

Conclusion

Ending harassment in video gaming and esports should be a priority for everyone in the industry because it makes moral, legal, and commercial sense. After all, women comprise a significant portion of the industry. Change in the esports industry needs to start from the top down.⁶⁸ Publishers that promote a safe and inclusive environment will encourage more female and LGBTQIA+ players to play video games. In turn, this will create the conditions for a better pipeline to more female and LGBTQIA+ professional players in esports and normalize the fact that esports is for everyone.

⁶⁷ Caitlin Dewey, *Inside Gamergate's (Successful) Attack on the Media*, WASH. POST (Oct. 20, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/20/inside-gamergates-successful-attack-on-the-media>.

⁶⁸ See Kellen Browning, *More Resignations, but No Sign Yet of a Change in Gaming Culture*, NEW YORK TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/technology/gaming-harassment.html>.

The Esports Bar Association Journal is published annually. The Journal solicits submissions through the Esports Bar Association website, www.esportsbar.org. Citations conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2020). Please cite to articles herein using the following example: Jullian Haley, *Integrity and Fair Play: Can Federal Prosecution Tame the Wild West of Professional Esports?*, 2021 ESPORTS B. ASS'N J. 1.

Articles herein to which the author has not retained a copyright may be duplicated for classroom use provided that the author and Esports Bar Association Journal are identified, proper notice of copyright is affixed to each copy, and the Esports Bar Association Publications Committee is notified of the use.

For inquiries regarding the Esports Bar Association Journal, please contact us via email at publications@esportsbar.org.

Copyright © 2021 by the ESPORTS BAR ASSOCIATION.