

# Esports Bar Association Journal

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

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## Preface

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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

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## Integrity and Fair Play: Can Federal Prosecution Tame the Wild West of Professional Esports?

Jullian Haley†

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### Introduction<sup>1</sup>

Unlike the established sports industry, esports is the undeveloped wild west.<sup>2</sup> While games such as Quake, Counter Strike, and World of Warcraft provided a foundation for the early esports scene, present-day professional esports dwarf their predecessors in both scale and scope. Today, professional esports players can be highly compensated for both their in-game expertise and the exposure they provide to sponsors and their team.<sup>3</sup> But where the prize money stops short, match-fixing begins.<sup>4</sup>

Like traditional sports, the betting scene surrounding professional esports enables fans to place bets on the outcome of matches and tournaments. If an individual knows a certain outcome to a future game or match, then betting on that match could be extremely lucrative. The classic example is when a player on an esports team bets against himself and voluntarily loses or “throws” a match resulting in the player receiving a lot of money.<sup>5</sup>

Although esports is a lucrative business, only players on top tier teams earn a considerable salary.<sup>6</sup> This imbalance leaves many mid-to-low tier professionals with the attractive option of voluntarily losing

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<sup>1</sup> *Integrity and Fair Play*, BLOG.COUNTER-STRIKE.NET (Jan. 26, 2015), <https://blog.counter-strike.net/index.php/2015/01/11261>.

<sup>2</sup> Leo Lewis, *Esports: The Wild West of Gaming That Investors Can’t Ignore*, FINANCIAL TIMES (Sept. 20, 2018), <https://www.ft.com/content/b3359c2e-bceb-11e8-8274-55b72926558f>.

<sup>3</sup> Pavle Marinkovic, *Esports Pro Gamers: How Much Do They Earn?*, SUPER JUMP MAGAZINE (July 8, 2020), <https://superjumpmagazine.com/esports-pro-gamers-how-much-do-they-earn-f03a1d047190>.

<sup>4</sup> See Elias Andrews, *The Potential for Esports Match-Fixing Is as High as Ever*, THE SPORTS GEEK (Apr. 18, 2020, 8:00 AM), <https://www.thesportsgeek.com/blog/esports-match-fixing-potential-high-as-ever>; see also Chris Godfrey, *‘It’s Incredibly Widespread’: Why Esports Has a Match-Fixing Problem*, THE GUARDIAN (July 31, 2018), <https://www.theguardian.com/games/2018/jul/31/its-incredibly-widespread-why-esports-has-a-match-fixing-problem>.

<sup>5</sup> See Gökhan Çakır, *What is Match-Fixing in Esports?*, DOT ESPORTS (Apr. 17, 2021, 12:52 PM), <https://dotesports.com/general/news/what-is-match-fixing-in-esports>.

<sup>6</sup> Andrews, *supra* note 4.

games to earn vastly more money than they may make throughout their professional career.<sup>7</sup>

Currently, there are few serious repercussions for match-fixing.<sup>8</sup> However, change is on the horizon; the FBI has established a sports betting unit that investigates claims of match-fixing in CSGO's North American Mountain Dew League based on evidence submitted by the Esports Integrity Commission ("ESIC").<sup>9</sup>

Previous regulation and litigation surrounding esports in the United States concentrated primarily on the civil and business-oriented areas of the law.<sup>10</sup> The establishment of the FBI's Sports Betting Investigative Unit portends possible federal criminal prosecution of match-fixing, the threat of which may change the landscape of competitive integrity in esports. Given that the inherent interstate nature of internet-based esports allows for broad federal jurisdiction, federal prosecution over match-fixing has become a real threat.<sup>11</sup>

Part I of this article looks at the history of esports match-fixing and criminal charges. Part II focuses on the federal crimes that esports professionals are most likely to be charged under and the reasoning behind each strategy. Part III looks at the impact of juvenile status in charging federal crimes. Finally, Part IV looks at alternative solutions to federal prosecution that would aid in preventing match-fixing from becoming mainstream in esports.

## I. Esports Betting and Match-fixing

As long as there is betting, there is match-fixing. Professional esports has a strong gambling scene similar to professional sports.<sup>12</sup> However, esports also has a long history of underpaid professionals

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<sup>7</sup> *Id.*

<sup>8</sup> Çakır, *supra* note 5.

<sup>9</sup> ESIC focuses on working with stakeholders to apply ethical standards in regular sports to the esports professional scene. For more information, see [www.ESIC.org/about](http://www.ESIC.org/about). For a list of ESIC's esports investigations, see *Open Investigations Register*, ESIC (Aug. 2021), <https://esic.gg/open-investigations-register>; Slash32, "It's Players Being Bribed By Outside Betting Syndicates" – ESIC Ian Smith // Interview, YouTube (Mar. 31, 2009), <https://www.youtube.com/watch?v=DjhnRKBaNwA> (hereafter "Ian Smith Interview").

<sup>10</sup> For more subject areas typically dealt with by law firms dealing in esports see Patrick J. McKenna, *ESports Practice Becoming a Lucrative Micro-Niche for Law Firms*, THOMSON REUTERS: L. EXEC. INST. (Mar. 28, 2019), <https://web.archive.org/web/20201126094229/https://www.legalexecutiveinstitute.com/micro-niche-esports-practice>.

<sup>11</sup> For the proposition that wire fraud is a catchall federal crime often prosecuted due to its ease in proving the elements, see Darryl A. Goldberg, *Don't Underestimate The Gravity of Wire Fraud Charges*, GOLDBERG DEFENSE (Sept. 28, 2016), <https://www.goldbergdefense.com/blog/2016/09/dont-underestimate-the-gravity-of-wire-fraud-charges>.

<sup>12</sup> See sources cited *supra* note 4.

throwing games for monetary gain.<sup>13</sup> With intrastate sports betting and mobile sports betting becoming legalized after the United States Supreme Court's decision in *Murphy v. National Collegiate Athletic Association*,<sup>14</sup> the ability for mass betting on esports has broadly expanded.<sup>15</sup> This broad expansion has the possibility of extending the avenues in which match-fixing enterprises can earn money.

#### A. *Past Examples of Match-Fixing and Criminal Charges*

This subsection unpacks increasingly more complex esports match-fixing examples from individual efforts to fully functional criminal enterprises. The focus will primarily be on the two clear examples of law enforcement bringing criminal charges against individuals involved in esports match-fixing. These examples provide insight into the different angles that the FBI might consider when investigating the professionals involved in the North American Mountain Dew League match-fixing. The different examples will be ordered in levels of criminal sophistication from least to most.

##### 1. Australian Friends and Their Match-fixing

In comparison to a more developed professional esports scene with investment opportunities and sponsorships, the Australian scene with its lack of capital creates a weak mid-tier professional scene that makes it ripe for match-fixing incidents.<sup>16</sup> On August 23, 2019, Victoria Police released a press statement announcing they had arrested six people regarding suspicious betting activity surrounding an esports league.<sup>17</sup> Around five matches were thrown with over twenty bets placed on those matches.<sup>18</sup>

Officials interviewed the defendants about “engaging in conduct that corrupts or would corrupt a betting outcome of event or event contingency, or use of corrupt conduct information for betting purposes.”<sup>19</sup> Five charged individuals faced up to 10 years in prison. The

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<sup>13</sup> See sources cited *supra* note 4.

<sup>14</sup> 138 S. Ct. 1461 (2018).

<sup>15</sup> David Hoppe, *These Four States Are on Track to Legalize Esports Betting*, GAMMA L. (Mar. 9, 2020), <https://gammalaw.com/these-four-states-are-on-track-to-legalize-esports-betting>.

<sup>16</sup> Nino Bucci & Sarah Curnow, *Australian Esports Criminal Investigation Reveals Video Game Industry is Ripe for Corruption*, ABC NEWS (Sept. 23, 2019), <https://www.abc.net.au/news/2019-09-24/fears-world-of-esports-is-ripe-for-corruption/11521008>.

<sup>17</sup> *Six People Arrested Re Esports Investigation*, VICTORIA POLICE (Aug. 22, 2019), <https://web.archive.org/web/20190827114718/https://www.police.vic.gov.au/six-people-arrested-re-esports-investigation>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

level of sophistication in this scheme was simple and all of the players involved knew each other. “They had gone to the same high school and university. They had no prior entanglements with police[.]”<sup>20</sup>

## 2. 2015 Korean StarCraft 2 Match-Fixing

The South Korean StarCraft professional scene is also rife with scandal. More sophisticated than the Australian incident, the web of individuals involved was vast and deeply rooted in the esports scene. In 2010, the web of corruption went beyond the players and involved the broader esports scene, which included coaches, journalists and esports personalities.<sup>21</sup>

Leading teams have been accused of intentionally losing matches and leaking information to gambling syndicates...Retired pro gamers are said to have made the initial contact between the gambling organisations and the teams. Match commentators and reporters are also said to be involved, while team coaches are alleged to have accepted money for changing their team's line-ups.<sup>22</sup>

In 2015, scandal again hit the Korean professional StarCraft 2 scene.<sup>23</sup> South Korean police arrested twelve individuals.<sup>24</sup> According to a translation of an organization’s press release, members of a criminal organization paid these professional players to throw multiple matches, which were consequently bet on illegally.<sup>25</sup> Soon after, the Changwon Regional Prosecution Service investigated the match, detailing the “network of players, brokers, financial backers and illegal betting sites.”<sup>26</sup>

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<sup>20</sup> Stoyan Todorov, *Australian Men Face up to 10 Years Imprisonment for Esports Match-Fixing*, GAMBLING NEWS (May 4, 2020), <https://www.gamblingnews.com/news/australian-men-face-up-to-10-years-imprisonment-for-esports-match-fixing>.

<sup>21</sup> Oli Welsh, *Betting Scandal Hits Korean StarCraft*, EUROGAMER (Apr. 14, 2010), <https://www.eurogamer.net/articles/betting-scandal-hits-korean-starcraft-scene>.

<sup>22</sup> *Id.*

<sup>23</sup> Emanuel Maiberg, *9 People Have Been Arrested for Fixing ‘StarCraft’ Matches*, VICE (Oct. 19, 2015, 6:20 AM), <https://www.vice.com/en/article/3dkxew/9-people-have-been-arrested-for-fixing-starcraft-matches>; see also Wesley Yin-Poole, *Korean Starcraft Rocked by Another Match-Fixing Scandal*, EUROGAMER (Oct. 19, 2015), <https://www.eurogamer.net/articles/2015-10-19-korean-starcraft-rocked-by-another-match-fixing-scandal>.

<sup>24</sup> Yin-Poole, *supra* note 23.

<sup>25</sup> Maiberg, *supra* note 23.

<sup>26</sup> Waxangel, *Match-Fixing: Prosecutor’s Report*, TL.NET (Oct. 19, 2015), <https://tl.net/forum/starcraft-2/496889-match-fixing-prosecutors-report>. For the original Korean version, see *StarCraft 2 Match-fixing Case Investigation Results*, CHANGWON DISTRICT PROSECUTOR’S OFFICE (Oct. 19, 2015), [https://web.archive.org/web/20151126155441/http://www.spo.go.kr/changwon/notice/press/press.jsp?mode=view&article\\_no=605393&pager.offset=0&board\\_no=2&stype=](https://web.archive.org/web/20151126155441/http://www.spo.go.kr/changwon/notice/press/press.jsp?mode=view&article_no=605393&pager.offset=0&board_no=2&stype=).

These are the players, the middlemen, the brokers, and the financial backers.<sup>27</sup>

Middleman	"A"(age 31) Gerrard: Head coach of StarCraft 2 pro team BLANK (Prime). Indicted and arrested.
Professional players	"B"(22) YoDa, "C"(29) BBoongBBoong: StarCraft 2 pro-gamers. Indicted and arrested.
Brokers	"D"(33) Enough (former SC1 pro and journalist), "E"(39), "F"(38), "G"(28): Brokers. Indicted and arrested.
Financial Backers	"H"(36, member of criminal organization X). "I"(26, member of criminal organization Y): Financial backers. Indicted and arrested.
Recruiters	"J"(25), "K"(38): Recruiters for gambling sites. Indicted, not arrested.

In this situation, two players threw the five games, YoDa and BBoongBBoong.<sup>28</sup> Gerrard made the introductions, acting as the middleman.<sup>29</sup> He convinced the players to manipulate the results of the match and either introduced the players to brokers or directly solicited the match-fixing himself.<sup>30</sup>

The brokers approached the players in a variety of ways. The prosecutor's report mentioned three methods used. The first was to pose as a sponsor.<sup>31</sup> "Brokers approached under the guise of being sponsors. Acquired services through [Gerrard], then approached players directly. They later forced match-fixing services through extortion."<sup>32</sup> In this specific case, after the first match-fix through Gerrard, E and F contacted the players directly, and, by threatening exposure of the match-fixing, manipulated additional matches without paying the players.<sup>33</sup>

Enough, an ex-pro-gamer and gaming journalist executed the broker's second method.<sup>34</sup> His status in the community, his connections with the pro scene, and his relationship with Gerrard and YoDa allowed Enough to approach them and arrange match-fixing for a large fee.<sup>35</sup>

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<sup>27</sup> Waxangel, *supra* note 26.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



The broker's third method was G's attempt to solicit match-fixing through social media offers.<sup>36</sup> G would try to "blindly offer match-fixing opportunities to pro-gamers or their acquaintances through Facebook posts."<sup>37</sup> Although this method was not useful nor successful in actually recruiting professional players to throw matches, the broker was able to receive thousands of dollars from "financial backers under the premise of 'operating funds.'"<sup>38</sup>

The financial backers in this situation were all members of organized crime groups in Korea.<sup>39</sup> The two financial backers in this enterprise employed two different methods.<sup>40</sup> In the first method, the financial backer, or *H*, promised the broker funds to arrange the manipulation, and then used the illegal gambling websites to bet on the matches.<sup>41</sup> The winning funds were then recycled into further match-fixing.<sup>42</sup>

The second method consisted of the financial backer giving funds to the broker to arrange the match-fixing.<sup>43</sup> Once the financial backer received information on matches to be fixed, he made gambling site recruiters go to net cafes and recruit members for a betting club.<sup>44</sup> The financial backer received a 30% commission from what ended up being fifty club members.<sup>45</sup>

On March 31, 2016, multiple parties in this incident received their sentence.<sup>46</sup>

Gerrard, YoDa, and BBoongBBoong were sentenced to eighteen months in prison, but had their sentences suspended for three years. Former pro-gamer Enough who acted as a broker received a two-year sentence, suspended three years . . . The other brokers and financial backers involved received sentences between 10 and 18 months, also suspended.<sup>47</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

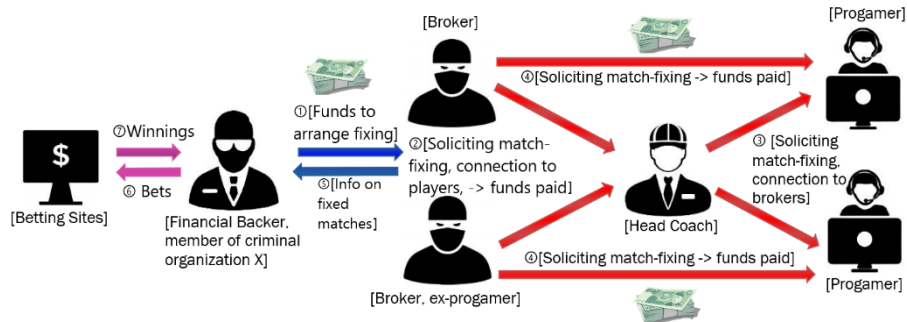
<sup>45</sup> *Id.*

<sup>46</sup> Lee Jeong-hoon, '스타크2' 승부조작 집행유예...법원 "이번만 선처  
YONHAP NEWS AGENCY (Mar. 31, 2016, 3:24 PM), <https://www.yna.co.kr/view/AKR20160331136100052>. For the English translation, see Waxangel, *PRIME Match-Fixers Given Suspended Sentences*, TL.NET (Mar. 31, 2016), <https://tl.net/forum/starcraft-2/506723-prime-match-fixers-given-suspended-sentences>.

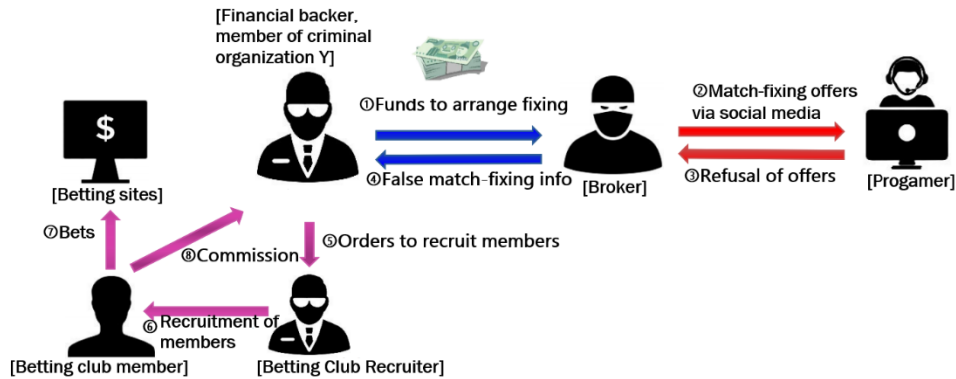
<sup>47</sup> Waxangel, *supra* note 46.

The illustrations created by the Changwon District Prosecutors' Office below show how the money moved in these match-fixing schemes.

### Match-fixing in StarCraft 2 (1)



### Match-fixing in StarCraft 2 (2)



#### B. FBI Takes Action Towards MDL Match-fixing

A recent interview with ESIC's Commissioner Ian Smith highlighted that the FBI was looking into a string of match-fixing incidents within the ESEA Mountain Dew League.<sup>48</sup> The Mountain Dew League (MDL), also known as ESEA Premier, is the league right below the ESL Pro League, one of the highest ranked CS:GO professional circuits in the world. The winners of the MDL are given the opportunity to move up to the ESL Pro League and the MDL players are considered the feeder pool for the more well-regarded professional teams. Not only are the matches between the MDL teams regularly streamed on

<sup>48</sup> Ian Smith Interview, *supra* note 9.

platforms like Twitch and YouTube, but they are also regularly posted on betting websites.

Smith draws a contrast between Australia and the MDL match-fixing, saying that Australia's match-fixing was just a group of players organizing the fixings.<sup>49</sup> Regarding the MDL match-fixing, Smith mentions that "in North America it's much more serious and it is what [we] would describe as classic match fixing. [The] players [are] being bribed by outside betting syndicates in order to fix matches rather than players . . . and it's been going on for longer."<sup>50</sup> As such, Smith mentions that ESIC is working with the FBI's newly created Sports Betting Investigative Unit—created to respond to the legalization of sports betting in the United States as a result of *Murphy*.

With the introduction of *Murphy* and Covid-19, esports betting in the United States has blown up. Given the evidence that ESIC has gathered, along with the possibility that esports betting can be readily abused, it only makes sense that the FBI would investigate.

## II. Federal Crime Selection: Pros and Cons to Prosecution Methods

With the FBI looking into the MDL match-fixing, it would be valuable to look at the relevant federal crimes that could be used to prosecute the match-fixing defendants. This section focuses on different approaches that the FBI might consider instead of looking to see if the individual players fulfill the elements of the individual criminal statutes.

### A. Traditional Match-fixing Laws and Their Nonapplication to Esports

Federal crimes targeting strict definition match-fixing are narrow laws and have been hardly found to be useful over the past century. Prior to the establishment of RICO, there was the Federal Wire Act (1961),<sup>51</sup> a statute targeting organized crime, and the Sports Bribery Act (1964),<sup>52</sup> a statute focusing on bookmaking and match-fixing. The Sports Bribery Act is incredibly inefficient, having only generated sixteen reported decisions, one pending indictment, and a total of zero decisions implicating professional team sports.<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 18 U.S.C. §§ 1081–84.

<sup>52</sup> 18 U.S.C. § 224.

<sup>53</sup> John Holden & Ryan Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, in Florida State University Symposia, [https://chaselaw.nku.edu/content/dam/chase/docs/lawreview/symposia/8\\_Rodenberg\\_Sports%20Bribery%20Act.pdf](https://chaselaw.nku.edu/content/dam/chase/docs/lawreview/symposia/8_Rodenberg_Sports%20Bribery%20Act.pdf); see also John Holden and Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY L. REV. 453, 460 (2016).

With the recent legalization of sports betting in the United States, these statutes deserve a second look. The Federal Wire Act essentially bans interstate “wire communication (internet)” in betting or wagering on any sporting event or contest where the transmission of the communication would entitle the recipient to receive money as a result of the betting or for information assisting in the placing of bets or wagers.<sup>54</sup> However, it is extremely limited in scope due to its straightforward focus on sports events and contests, as ruled by two Federal Courts of Appeals.<sup>55</sup> Similarly, in the recent *New Hampshire* decision, the First Circuit focused on matching the Department of Justice Office of Legal Counsel’s 2011 opinion that the Wire Act only applied to sports gambling.<sup>56</sup>

Since the holdings that limit the Federal Wire Act focus purely on sports events and contests, it is unlikely that it would apply to esports despite their similarities. Given the strict treatment that the Federal Wire Act has been given, limiting its power to pure sport contests, it is likely that the Sports Bribery Act would also not apply for similar reasons.

### *B. The Use of RICO in Broad Application to the MDL Criminal Enterprise*

Instead of the specific requirements under the Federal Wire Act and Sports Bribery Act that necessitate encompassing esports within the narrow definition of ‘sporting contest,’ the use of more generalized federal crime statutes is entirely more likely in these circumstances due to the broader application of these laws.<sup>57</sup> The use of a federal action under the Racketeer Influenced and Corrupt Organizations (RICO) Act could be a starting point for federal prosecutors.<sup>58</sup>

RICO, although initially intended to clamp down on gang activity and its infiltration into legitimate businesses, applies well to the

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<sup>54</sup> See 18 U.S.C. § 1081.

<sup>55</sup> See *In re Mastercard Int’l*, 313 F.3d 257, 262-63 (5th Cir. 2002); see also N.H. Lottery Comm’n v. Rosen, 986 F.3d 38 (1st Cir. 2021); see also William Moschella, Scott Scherer, Mark Starr, BROWNSTEIN HYATT FARBER SCHRECK, *Wire Act Ruling a Win for iGaming and Lotteries, Status Quo for Sports Betting—for Now*, JD SUPRA (Jan. 28, 2021), <https://www.jdsupra.com/legalnews/wire-act-ruling-a-win-for-igaming-and-9102417> (explaining that the recent New Hampshire decision finds that “the Wire Act applies only to gambling activities on sporting events and does not prohibit other forms of gambling conducted over the internet—including online casino gaming (iGaming) or online lotteries (although iGaming or online lotteries may be prohibited by other laws in various states)”).

<sup>56</sup> See generally, *Rosen*, 986 F.3d 38. Also, the Department of Justice’s Opinion came to that conclusion based on the text, legislative history, and underlying policy purposes of the Act.

<sup>57</sup> For more background information on RICO, see U.S. DEP’T OF JUST., JUST. MANUAL § 9-110.100 (2018) (hereafter “JUSTICE MANUAL”).

<sup>58</sup> See 18 U.S.C. §§ 1961-68.

situation at hand.<sup>59</sup> RICO “provides powerful criminal penalties for persons who engage in a ‘pattern<sup>60</sup> of racketeering activity’ or ‘collection of an unlawful debt’ and who have a specified relationship to an ‘enterprise’ that affects interstate or foreign commerce.”<sup>61</sup>

The number of crimes covered under “racketeering activity”<sup>62</sup> and what can be considered an “enterprise” makes RICO broadly applicable.<sup>63</sup> “Under the RICO statute, ‘racketeering activity’ includes state offenses involving murder, robbery, extortion, and several other serious offenses . . . and more than one hundred serious federal offenses.”<sup>64</sup> Similarly, an enterprise is broadly defined as “includes any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity.” In this situation, the crimes charged would be the relevant crimes in subsections (1)(A) and (1)(B):<sup>65</sup>

18 U.S.C. Section 1961(1)(A): gambling, bribery, extortion as charged under state law and punishable by imprisonment for more than one year; or

The following relevant acts under 18 U.S.C. Section 1961(1)(B): 18 U.S.C. Section 224 (sports bribery); Section 1084 (relating to the transmission of gambling information); section 1341 (mail fraud); section 1343 (wire fraud); section 1952 (relating to racketeering), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity).

This article will not focus on an analysis of whether the MDL match-fixing fulfils the elements of the individual RICO crimes, but will instead focus on the likelihood of a federal prosecutor bringing a RICO action against these teams.

Looking at the list of crimes elaborated above, and considering that a pattern of only three crimes is required, it is likely that the prosecutor could find that RICO is applicable against the MDL match-

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<sup>59</sup> Andrew Boggs, *Integrity and Esports | Cheating in Competitive Games* (Aug. 7, 2021), <https://www.strafe.com/esports-betting/news/integrity-and-esports-cheating-in-competitive-games>.

<sup>60</sup> *Id.*

<sup>61</sup> U.S. DEP'T OF JUST., CRIME & GANG SEC., *CRIMINAL RICO: 18 U.S.C. §§ 1961-1968 A MANUAL FOR FEDERAL PROSECUTORS* 15 (2016), <https://www.justice.gov/archives/usam/file/870856/download> (hereafter “*Criminal RICO*”).

<sup>62</sup> See 18 U.S.C. § 1961(1).

<sup>63</sup> See 18 U.S.C. § 1961(4).

<sup>64</sup> See 18 U.S.C. § 1961 for full list of offenses.

<sup>65</sup> The other subsections concern labor and union organizations, securities fraud, dealing with controlled substances, the Currency and Foreign Transactions Reporting Act, and the Immigration and Nationality Act and as such they do not apply.

fixing enterprise and its individuals, especially given the longer timeline of the match-fixing and higher frequency of matches.

The considerations that a federal prosecutor would have to take are plenty, but a prosecution like this would fulfill many of the considerations required prior to seeking an indictment.<sup>66</sup> RICO can help combine the related offenses which would have to otherwise be prosecuted inefficiently and separately. Additionally, RICO would allow for a reasonable expectation of forfeiture proportionate to the underlying criminal conduct.<sup>67</sup>

The forfeiture aspect is valuable in this situation due to the specific factual scenario at play.<sup>68</sup> Much like the Korean StarCraft match-fixing, there are financial backers that not only pay the professional players to throw the match, but they also use their own money in match-fixed bets. The federal government's main focus in this prosecution is unlikely to be on the individual players, but the financial backers who organized and funded the match-fixing criminal enterprise. Given the relatively young ages of the professional players and their value in providing information about the financial backers, the best strategy for the younger players would be to provide information regarding those financial backers in exchange for a reduced sentence.

### C. Individual Crimes

Considering the strict requirements that the Department of Justice has to follow before a prosecutor can file a RICO case, an alternative action would be to charge the individuals with the underlying individual RICO crimes, but not under the RICO Act. It could be quicker and less work to piecemeal prosecute each defendant, although you forgo the ability for forfeiture under RICO.

Given the substantial level of evidence that ESIC had submitted to the FBI, evidence that clearly outlines the specific actions of individuals and their degree of involvement in the conspiracy, federal prosecutors can be expected to quickly charge the individuals after a brief investigation.

For a clearer perspective and a recent example, the 2021 United States Capitol Attack is instructive. Politics aside, this is an example of a complex federal prosecution of hundreds of individuals tied to a singular event, and yet individualized prosecutions are being brought forth based on evidence found that is unique to each individual.

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<sup>66</sup> JUSTICE MANUAL, *supra* note 57, § 9-110.310 (considerations prior to seeking indictment).

<sup>67</sup> *Id.*

<sup>68</sup> *Criminal RICO*, *supra* note 61, at 220 (“[RICO’s forfeiture statutes] authorize the forfeiture of not only proceeds and interests obtained by the defendant from any racketeering activity but also all of the defendant’s various interests in the charged ‘enterprise.’”).

For example, as of June 11, 2021, 465 individuals have been arrested in connection with the attack.<sup>69</sup> Within that 465, 440 were charged with entering or remaining in a restricted building or grounds. One-hundred thirty individuals have been charged with assaulting, resisting, or impeding officers.<sup>70</sup> Forty individuals have been charged with using a deadly weapon against an officer.<sup>71</sup> Thirty-five defendants have been charged with conspiracy, twenty-five charged with theft of government property, and more than thirty charged with destruction of government property.<sup>72</sup>

The federal government pieced together evidence against these individuals through its extensive campaign.<sup>73</sup> They received “more than 270,000 digital media tips, 15,000 hours of surveillance and body-worn camera footage, with 80,000 reports and 93,000 attachments related to law enforcement interviews.”<sup>74</sup>

Similarly, in this case, the FBI could pick and choose individual crimes to charge based on the information that they received from ESIC. This information includes “corroborating evidence from discord, various chat logs, screenshots, and recordings of players.”<sup>75</sup> These chatlogs could matchup with specific performance issues in specific games where it was suspected matches were thrown. Additionally, the FBI would have the ability to follow the money and trace it as it moves from the betting syndicates to the individual players.

### III. The Impact of Juvenile Status in Federal Prosecution

This is a situation where the age of the professionals is significant. In the MDL circuit—where many players are on the cusp of reaching the highest tier of professional play—some players are juveniles. Their juvenile status plays a large role in how they would be treated under a federal prosecution charge.

In the United States, juveniles are treated very differently from the adults in the criminal justice system.<sup>76</sup> Many jurisdictions have juvenile courts which focus on rehabilitating the juvenile criminal offender in hopes that they can remedy the underlying issues that brought these offenders to court.<sup>77</sup> This includes massively reduced

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<sup>69</sup> Clare Himes, Cassidy McDonald & Eleanor Watson, *What We Know About the "Unprecedented" Capitol Riot Arrests*, CBS NEWS (June 11, 2021, 6:36 PM), <https://www.cbsnews.com/news/capitol-riot-arrests-latest-2021-06-11>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Ian Smith Interview, *supra* note 9.

<sup>76</sup> *Youth in the Justice System: An Overview*, JUVENILE L. CTR., <https://jlc.org/youth-justice-system-overview>.

<sup>77</sup> *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice>.

sentencing, more probation activity and deferred dispositions with treatment alternatives that try their best to support rehabilitation.<sup>78</sup>

Similarly, the federal government hesitates before charging a juvenile with a federal crime. The courts define a juvenile as “someone who committed a federal crime before the age of 18 and who has not yet reached the age of 21 at the time charges are brought.”<sup>79</sup> To successfully bring a federal charge against a juvenile, you need to file a juvenile information and a certification on the grounds that warrant federal jurisdiction over the juvenile.<sup>80</sup>

The certification is a preventative barrier to juvenile federal prosecution. The U.S. Attorney must “certify either that: (1) the state or juvenile court does not have jurisdiction or refuses to assume jurisdiction over the juvenile as to the alleged conduct; (2) the state cannot provide juvenile services; or (3) the offense charged is a felony crime of violence or is one of the Title 21 offenses or federal firearms statutes enumerated in the JDA, and there is a substantial federal interest in the case to justify the exercise of federal jurisdiction.”<sup>81</sup>

In many cases, states have jurisdiction over these types of federal crimes<sup>82</sup> and they often can provide juvenile services.<sup>83</sup> All of these match-fixing crimes are not crimes of violence. It is likely that the case would be dismissed, unless charges are brought after the juvenile turns twenty-one or unless they continue committing the match-fixing past their eighteenth birthday.<sup>84</sup>

The FBI is more likely to offer either larger deals or dismissals to juvenile offenders in hopes of retaining information about the more significant financial backers, who in this case are the betting websites and criminal syndicates who are setting up the throws.

#### IV. Possible Additional Alternative Solutions for Match-fixing

This subsection explores possible solutions to stifle match-fixing in esports before it can be normalized.<sup>85</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> 18 U.S.C. § 5031; see also *Criminal RICO*, *supra* note 61, at 461.

<sup>80</sup> 18 U.S.C. § 5032; see also JUSTICE MANUAL, *supra* note 57, § 9-8.110.

<sup>81</sup> *Criminal RICO*, *supra* note 61, at 462.

<sup>82</sup> The state courts have jurisdiction over similar state crimes.

<sup>83</sup> For match-fixing alternatives, look at the services provided at sentencing to the Korean StarCraft players who match-fixed in 2010, see Ambasa, *BW Matchfixing Sentencing*, TL.NET (Oct. 22, 2010), <https://tl.net/forum/community-news-archive/162856-bw-matchfixing-sentencing>.

<sup>84</sup> *Criminal RICO*, *supra* note 61, at 464, 471.

<sup>85</sup> Suggestions in this section are adopted from the symposium by authors Holden and Rodenberg, see *supra* note 53, where the authors focus on how to make the Sports Bribery Act more effective, but the suggestions broadly apply in esports match-fixing as well.



### A. Educating Stakeholders

The relevant parties in esports need to educate themselves more. Stakeholders in professional esports might include team owners, tournament organizers, video game creators and professional players. Education about match-fixing's possible impact on the integrity of esports is important. Perceptions about the legitimacy of semi-professional leagues have dipped due to continuous match-fixing in relatively unregulated regions.<sup>86</sup>

### B. Whistleblowing Incentives

Tournament organizers and teams could issue rewards for players who blow the whistle when they catch a hint of match-fixing impropriety. For example, the United States Security and Exchange Commission has a whistleblower program that is famous for the generous rewards that the whistleblower receives when they report possible securities violations.<sup>87</sup> A similar system, set up through a commission like ESIC, could help prevent the creation of a sophisticated match-fixing system.

### C. Stiff Visible Punishments

Stiff visible punishments can be an effective deterrent towards match-fixing. In the iBuypower incident, Valve's strict punishment of an indefinite ban on those professional players led to no obvious match-fixing among the highest level of CS:GO play.<sup>88</sup> Although this might not present enough of a threat for the semi-professional level, where the gains outweigh the losses in fixing matches, federal prosecution could be the kick that stops this corruption.

However, ESIC's recent actions could present an alternative to federal prosecution that would specifically target the semi-professional

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<sup>86</sup> For match-fixing in the CIS region, see Rohan Samal, *ESIC finds potential Matchfixing and Betting Fraud in CIS RMR Event*, ESPORTS.GG (June 9, 2021), <https://esports.gg/news/cs-go/esic-cis-rmr-matchfixing>. For match-fixing in China, see Richard Lewis, *Match Fixing In Chinese CS:GO*, YOUTUBE (July 4, 2017), <https://www.youtube.com/watch?v=y2Dz3Nwn-v0>.

<sup>87</sup> Press Release, SEC. EXCH. COMM'N, *SEC Awards \$22 Million to Two Whistleblowers* (May 10, 2021), <https://www.sec.gov/news/press-release/2021-81> ("Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed \$1 million.").

<sup>88</sup> Richard Lewis, *New Evidence Points to Match-Fixing at Highest Level of American Counter-Strike*, DOT ESPORTS (Jan. 16, 2015, 4:03 PM), <https://dotesports.com/general/news/match-fixing-counter-strike-ibuypower-netcode-guides>.

scene with realistic visible harsh punishments. In late August 2021, ESIC launched their “Transparency Initiative” to better show the world its processes in investigating and sanctioning professional esports players.<sup>89</sup> Along with the release of their Transparency Initiative, ESIC gave an update regarding their progress in the MDL investigation.<sup>90</sup> ESIC sanctioned three players and provided virtually industry-wide bans as short as 111 days to as long as 5 years.<sup>91</sup>

Although this might be effective towards professional and semi-professional players, it doesn’t present enough of a threat to the criminal enterprises that were part-and-parcel of the MDL match-fixing, rendering it a partially effective solution.<sup>92</sup> However, ESIC seems aware of their limited role as an integrity commission and works together with law enforcement so the relevant government bodies can impose the criminal penalties on the responsible organized crime groups and foreign betting syndicates.<sup>93</sup>

### Conclusion

Esports betting is a growing industry and has the potential for similar growth of illegal activity if not curtailed. With growing mobile betting and esports’ larger role in online gambling, billions of dollars depend on the actions of these professional players. Semi-professional players have a large incentive to match-fix due to the massive benefits of match-fixing. Federal prosecution is the punishment or threat needed to prevent large scale match-fixing. Given the many crimes that prosecutors can use to charge players, this threat along with the alternative solutions should stop match-fixing in esports before it successfully enters the mainstream.

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<sup>89</sup> Press Release, ESPORTS INTEGRITY COMM’N, *ESIC Launches ‘Transparency Initiative’ to Bolster Visibility of Investigative Work and Outcomes* (Aug. 21, 2021), <https://esic.gg/press-release/esic-launches-transparency-initiative-to-bolster-visibility-of-investigative-work-and-outcomes>.

<sup>90</sup> Press Release, ESPORTS INTEGRITY COMM’N, *ESIC Update Regarding NA ESEA Match-Fixing Investigation* (Aug. 23, 2021), <https://esic.gg/press-release/esic-update-regarding-na-esea-match-fixing-investigation>.

<sup>91</sup> *Id.* These bans essentially prevent the sanctioned players from playing in any tournaments hosted by the ESIC partners, which cover the vast majority of the professional Counter Strike scene.

<sup>92</sup> Press Release, ESPORTS INTEGRITY COMM’N, *ESIC Update Regarding NA ESEA Match-Fixing Investigation* (Aug. 23, 2021), <https://esic.gg/press-release/esic-update-regarding-na-esea-match-fixing-investigation>.

<sup>93</sup> *Id.*

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## Shield and Sword: Trademark Rights in Esports

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Alex Robertson<sup>†</sup>

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### Introduction

Esports has quickly become one of the world's most popular, and valuable, entertainment and multimedia fields, surpassing over \$1 billion in revenue in 2020.<sup>1</sup> One major part of this growth has been the evolution of where value lies in the industry, and the surging relevance, economic, and legal importance of brand protection.

Even only a few years ago, the large recognized “brands” in the esports industry were primarily AAA<sup>2</sup> game producers, goods manufacturers (hardware, software, ancillary goods), platforms which transmit/host/broadcast content, and potentially a select few high profile esports teams, and even fewer individual players. However, now individual players, content creators, streamers, commentators, esports teams, gaming orgs, and multi-channel networks, are all recognizable and valuable brands.<sup>3</sup> Despite this, trademark protection is still very rare in this field. Of the top 20 most watched Twitch.tv (“Twitch”) streamers, less than half have any trademark protection.<sup>4</sup> With this growing recognition, and subsequent value and power, it is an increasing imperative that gamers understand their intellectual property rights in their brand. Even more important however is understanding also how to utilize those rights to proactively protect themselves, and fully exploit, monetize, and benefit from those rights.

This article will discuss the importance of trademark rights in the esports field, particularly protecting gamertags, team names, and other brand identifying features. Section II will provide a general explanation

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<sup>1</sup> See Mariel Soto Reyes, *Esports Ecosystem Report 0.012632: The Key Industry Companies and Trends Growing the Esports Market Which Is on Track to Surpass \$1.5B by 2023*, BUSINESS INSIDER (Aug. 3, 2021), <https://www.businessinsider.com/esports-ecosystem-market-report>.

<sup>2</sup> Alexander Bernevega & Alex Gekker, *The Industry of Landlords: Exploring the Assetization of the Triple-A Game*, GAMES & CULTURE 1 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/15554120211014151>.

<sup>3</sup> See Reyes, *supra* note 1; see also Justin D. Hovey & Callie A. Bjurstrom, *Esports Industry Report*, PILLSBURY (Dec. 28, 2020), <https://www.pillsburylaw.com/images/content/1/4/v8/144736/Esports-Report-FINAL.pdf>.

<sup>4</sup> See Tim Lince, *Research Finds That Most Major Twitch Streamers Have Not Obtained Registered Trademark Protection for Their Brands*, WORLD TRADEMARK REV. (Aug. 4, 2020), <https://www.worldtrademarkreview.com/brand-management/research-finds-most-major-twitch-streamers-have-not-obtained-registered-trademark-protection-their-brands>.

of trademark law, and Section III the process of obtaining a trademark. Section IV will explain the benefits a gamer or team could have from registering their trademark. Additionally, this article will briefly look at trademark usage in the industry, give examples of high-profile individuals who made mistakes in this process, highlight their consequences, and illustrate some positive examples in the field.

## I. Trademark Law Basics

### A. *What is a Trademark*

A trademark is any word, name, symbol, or design, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another, and to indicate the source of the goods.<sup>5</sup> In essence, a trademark will indicate who provides or sells a good or service. Trademarks protect words (wordmark), or logos or designs, which can be a combination of words and design elements or solely design elements (stylized marks). In the context of esports, this means that there would be separate trademarks, one for a gamertag as well as a unique gamer logo (if one exists), which each require a separate application.<sup>6</sup>

Trademark owners generally have the right to exclude others from using the same or similar mark on the same or similar goods or services in the marketplace.<sup>7</sup> The ability to offer goods or services connected to an exclusive trademark, that no one in the marketplace can copy, is what allows trademark owners to build up “goodwill” or value in their mark<sup>8</sup>. For example, one of the reasons people purchase brand name products over generic products is because of the “goodwill” associated with that brand, whether that be product quality, market recognition, customer service, corporate ethos, etc.<sup>9</sup> With some of the most essential streams of income for esports athletes and teams being official websites, merchandise, and content on social media platforms, it is crucial that athletes and teams have an exclusive right to offer their goods and services through these platforms in connection with their brand identity.<sup>10</sup> To be eligible for protection, trademarks have two main

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<sup>5</sup> See 15 U.S.C. § 1127.

<sup>6</sup> *Trademark, Patent, or Copyright*, USPTO, <https://www.uspto.gov/trademarks/basics/trademark-patent-copyright> (last visited Oct 11, 2021).

<sup>7</sup> See 15 U.S.C § 1114.

<sup>8</sup> *Assignments, Licensing, and Valuation of Trademarks International Trademark Association*, INT’L TRADEMARK ASS’N, <https://www.inta.org/fact-sheets/assignments-licensing-and-valuation-of-trademarks> (last updated Nov. 9, 2020).

<sup>9</sup> See Marshall Hargrave, *Why Goodwill Is Unlike All the Other Intangible Assets*, INVESTOPEDIA (Jan. 24, 2021), <https://www.investopedia.com/terms/g/goodwill.asp>.

<sup>10</sup> Tim Maloney, *How Do Esports Teams Make Money?*, ROUNDHILL INVS. (Feb. 12, 2020), <https://www.roundhillinvestments.com/research/esports/how-do-esports-teams-make-money>.

requirements: the mark must be distinctive,<sup>11</sup> and must be used in commerce.

### *B. Distinctiveness Requirement*

The first requirement, “distinctiveness,”<sup>12</sup> looks at the mark’s ability to be distinguished from the goods or services relates to. The distinctiveness of a trademark is broken down into four categories: arbitrary/fanciful, suggestive, descriptive, and generic.<sup>13</sup> On one side of the spectrum, a mark would be considered “arbitrary/fanciful”<sup>14</sup> if the mark has no connection to, or does not describe, the goods or services it is associated with (e.g.: “APPLE” for computers<sup>15</sup>). An arbitrary/fanciful mark is considered inherently distinctive and would be granted exclusive protection based on priority of use. “Suggestive” marks, while still distinctive, are slightly down the spectrum in that it contains a characteristic of the goods/services it is associated with (eg: “NETFLIX” for digital movie rentals).<sup>16</sup> A “descriptive” mark describes the goods or services it is associated with, and will be entitled to protection if it has some “secondary meaning”; if it is a famous or widely recognized trademark in the eyes of the public. (e.g.: “HOLIDAY INN” for hotel services;<sup>17</sup> the mark potentially describes the services, but the mark is also widely known to indicate a specific hotel service). Secondary meaning is also required when protecting a personal name or geographic location as a trademark. Finally, “generic” marks directly describe the goods or services they are associated with, and will never be allowed trademark protection (e.g.: trying to trademark “APPLE” for apples.<sup>18</sup> Trademarks cannot be used to give people monopolies over common terms).<sup>19</sup>

### *C. Use in Commerce Requirement*

The second main requirement for trademark protection is that the mark is “used in commerce,” meaning goods or services are sold or offered for sale in connection with the mark.<sup>20</sup> If at the time of

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<sup>11</sup> *Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 1580 (Fed. Cir. 1990) (the mark must be considered in context, i.e., in connection with the goods).

<sup>12</sup> *Id.*

<sup>13</sup> See Trademark Manual of Examining Procedure (TMEP) § 1209.01 (July 2021).

<sup>14</sup> *Fact Sheet: Introduction to Trademarks*, INT’L TRADEMARK ASS’N, <https://www.inta.org/fact-sheets/trademark-strength> (last updated Nov. 5, 2020).

<sup>15</sup> See APPLE, Registration No. 3,928,818.

<sup>16</sup> See NETFLIX, Registration No. 3,194,832.

<sup>17</sup> See HOLIDAY INN, Registration No. 592,540.

<sup>18</sup> 15 U.S.C. 1052(e)(1).

<sup>19</sup> See TMEP § 1209.01.

<sup>20</sup> See 15 U.S.C. § 1127.

application a trademark has not been “used in commerce,” the applicant can still apply for an “Intent to Use” application, so long as they have a bona fide intent to use the mark in commerce at a future date (limited to within three years).<sup>21</sup> In the context of esports, the main focus of brand identity would be things like gamertags, handles, or team names. Using gamertags as an example, “use in commerce” for goods could potentially look like using a gamertag in connection with the sale of apparel or computer equipment.<sup>22</sup> For services, “use in commerce” could be participation in video game competitions, production of streams or content, or talent management services connected to the mark.<sup>23</sup> A trademark must be applied for in connection with the goods and/or services it will be used in association with.<sup>24</sup> There must be a demonstration of “use in commerce” for each good and/or service the mark is applied in connection with.<sup>25</sup>

## II. Process of Getting A Trademark

### A. Trademark Search

Once it has been determined that a mark is properly distinctive, and there has been appropriate use in commerce (or alleged intent to use), the final requirement is that there are no marks currently registered which are the same or similar to your proposed mark, in connection with the same or similar goods and services.<sup>26</sup> This is referred to as “likelihood of confusion,” and the examination looks at the similarity between the proposed marks and currently registered ones, and the similarity of the goods and services.<sup>27</sup> The analysis is a sliding scale; the more similar the marks, the less comparative similarity that needs to be found between goods/services to find “likelihood of confusion.”<sup>28</sup> The more similar the goods/services, the less comparatively similar the marks need to be to find “likelihood of confusion.”<sup>29</sup>

Because trademark protection is a “First to Use” priority system, the first person to use a mark in commerce (or apply for intent to use) will be given the exclusive rights to use that mark.<sup>30</sup> It is crucial that a gamer, team, organization, or clan, conduct a trademark clearance

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<sup>21</sup> See 15 U.S.C. § 1051.

<sup>22</sup> 15 U.S.C. § 1127.

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* Part III.B.

<sup>25</sup> *Id.*

<sup>26</sup> See TMEP § 1207.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

<sup>30</sup> See TMEP § 901.

search to ensure that a mark is not prior-used or prior-registered before they start expending time and money building brand value and goodwill with a certain mark or brand identity.

### *B. Goods and Services Identifications*

A trademark cannot be applied for generally; the application must list the particular goods and/or services on or in connection with which the applicant uses, or has a bona fide intention to use, the mark in commerce.<sup>31</sup> Similar goods and services are grouped together into classes, and when applying for a trademark, each classification of goods/services which the mark is used in connection with must be identified. The application fee is based on the number of classes applied for, currently \$250 per class for the TEAS-plus application.<sup>32</sup>

To fully complete the registration process, you will need to show an example of use of the mark in commerce in connection with the goods or services it was applied for (this is called a “Specimen of Use”).<sup>33</sup> This means when applying for a trademark, the applicant must ensure they are applying for the correct goods or services which they sell in the marketplace, or “use in commerce,”<sup>34</sup> or else they will not be able to complete registration and risk having their application abandoned.

For a practical example, we can look at esports personality Michael Grzesiek, aka “Shroud.”<sup>35</sup> In seeking protection for the “Shroud” trademark, Grzesiek had to identify all of the goods and services which the “SHROUD”-marks were used (or intended to be used) in connection with and apply for each. Below are some examples of the goods and services which Grzesiek has identified for protection as part of his “SHROUD”-marks.<sup>36</sup>

- Class 041 - Entertainment Services
  - Arranging, organizing and performing live and online shows featuring video game playing;
  - Production of an ongoing series featuring an esports athlete distributed online;
  - Live show performances and non-downloadable visual and audio recordings being recorded performances featuring video game playing
- Class 016 - Printed Materials

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<sup>31</sup> See TMEP § 1402.01.

<sup>32</sup> See *USPTO Fee Schedule*, USPTO (June 25, 2021), <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule>.

<sup>33</sup> See TMEP § 904.

<sup>34</sup> See TMEP § 901.

<sup>35</sup> *Shroud*, WIKITUBIA, <https://youtube.fandom.com/wiki/Shroud> (last visited Oct. 8, 2021).

<sup>36</sup> See SHROUD, Registration Nos. 88,697,996; 88,697,943; 88,697,992; 90,039,324; 90,039,347; 90,039,342.

- Printed materials: namely, posters, event programs, comics, sports trading cards
- Class 028 - Toys or Action figures
  - Toy action figures and toy action figure accessories;
  - Console game controllers
- Class 009 - Electronic Goods
  - Esports-related gaming gloves: namely, virtual reality data gloves

The goods and services which Grzesiek has cited in trademark applications can be very instructive to other individuals or entities in the esports field seeking information on how to identify goods or services for their applications. The above goods and services are things which are commonly offered for sale, or promoted in connection with a gamertag or other uniquely source identifying mark, in the esports field. To the extent that anyone has promoted, sold, or offered for sale any of the above goods or services in connection with their gamertag (or any uniquely source identifying mark), they will likely be entitled to federal protection for that mark.

With the above information it becomes clear why it is first very important to be aware of the requirements of a trademark in order to be eligible for protection. Then, conducting a clearance search to ensure your intended mark is free to use before investing time and capital into a mark you may need to change in the future. Next, identify what goods and services the mark is used in connection with (because you will be required to prove that use as part of the registration process). And finally, applying for the mark as soon as possible.

### **III. The Benefits of Trademark Protection and State of Trademarks in the Esports Field**

#### *A. Benefits of Trademark Protection*

Although the trademark clearance process may seem onerous, the protection it provides far outweighs any administrative hurdles. Part of the importance of the trademark clearance process is to ensure that your mark is not infringing on any prior marks, which could necessitate your changing of marks or an inability for protection down the line. Below are some examples the benefits of trademark protection.

#### **1. Licensing Agreements**

Trademarks allow for rights holders to enter into licensing agreements with third-parties to exploit and monetize their mark, as well



as publicly distribute goods without liability.<sup>37</sup> Valid trademark registration can enable teams, athletes, and organizations to sell merchandise featuring their logo through third-party manufacturers and distributors. For example, a t-shirt maker will usually not enter into a licensing deal with an esports athlete or a team to produce merchandise with their logo or mark on it, unless that athlete or team can provide proof of a trademark registration showing their exclusive rights to use that mark.<sup>38</sup> This is because without a trademark registration, that third-party cannot be sure they are not manufacturing and distributing merchandise with someone else's trademark.

## 2. Athlete/Individual Bargaining Power

Now more than ever in the esports world, value is in the hands of individual athletes, creators, and personalities. When entering into contract negotiations with teams, organizations, or any entity, if the individual has registered trademark rights (e.g., their gamertag) they can withhold assigning these rights and specifically negotiate for the value of their trademark rights as a licensing deal in addition to the larger agreement. It is important for a player to register before signing with a team because team contracts may include clauses that assign the ownership of any player's IP to the team itself.

As an important note, it is crucial that an athlete applies for their trademark protection before competing on behalf of a team, as it could cause potential legal issues for who actually owns the mark. As described in Section III(a), trademark rights are a "first to use" system, meaning that the first to use a mark in commerce has the exclusive rights to that mark.<sup>39</sup> If an athlete competes on behalf of a team in a competition without protecting their gamertag and the team uses the athlete's gamertag as part of the competition, it is possible the team may have just used the gamertag in commerce and that team may then have priority rights for using that mark in connection with gaming competitions.

## 3. Social Media Takedowns

Brand protection and policing what is distributed to the public in connection with one's brand are some of the greatest powers of trademark registration. Trademark registration will greatly assist in

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<sup>37</sup> *Trademark Licensing: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/trademark-licensing> (last visited Oct. 8, 2021).

<sup>38</sup> Crystal Broughan, *The Pros and Cons of Trademark Licensing*, MARKS GRAY (Apr. 12, 2019), <https://www.marksgrey.com/the-pros-and-cons-of-trademark-licensing>.

<sup>39</sup> Widerman Malek, *Trademark Law: First to Use v. First to File*, WIDERMAN MALEK (Apr. 1, 2013), <https://www.legalteamusa.net/trademark-law-first-to-use-v-first-to-file>.

maintaining and policing the legitimacy of online accounts across social media platforms. Twitter,<sup>40</sup> Instagram,<sup>41</sup> Facebook,<sup>42</sup> YouTube,<sup>43</sup> and Twitch<sup>44</sup> all allow for trademark rights holders to take down accounts infringing on federal trademarks. As the main areas of distribution and consumption of content (and potentially goods and services) in the esports world, it is crucial to have the ability to police and take down infringing uses of your brand across these platforms.

Cheaters and impersonators are also a growing issue in esports.<sup>45</sup> Individuals will attempt to impersonate popular gamers or athletes to trade off the goodwill, status, or value built up in that athlete's identity. To the extent an athlete's gamertag is a registered trademark, that athlete would have recourse to takedown any instances of any impersonators trying to distribute any goods or services in connection with that registered trademark. In the context of the esports field, an athlete with a registered trademark gamertag in connection with "entertainment service" could likely prevent, and demand takedown, of any imposters from posting any videos in connection with that mark. However, without a trademark registration, the athlete would have little to no recourse to prevent or demand a takedown of said imposter's material.

#### 4. Legal Recourse and Remedies

As esports tournaments and events expand, so do the instances of bad actors and contractual disputes.<sup>46</sup> One benefit of a trademark registration is an added legal recourse should there be a contractual dispute or a need to seek remedies for damages or unpaid obligations.

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<sup>40</sup> See *Twitter's Trademark Policy | Twitter Help*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-trademark-policy> (last visited Oct. 11, 2021).

<sup>41</sup> See *Instagram Help Center, What If an Instagram Account Is Using My Registered Trademark As its Username?*, INSTAGRAM, <https://help.instagram.com/101826856646059> (last visited Oct. 11, 2021).

<sup>42</sup> See *Reporting Trademark Infringements: Facebook Help Center, Reporting Trademark Infringements*, FACEBOOK, <https://www.facebook.com/help/440684869305015> (last visited Oct. 11, 2021).

<sup>43</sup> See *Trademark - YouTube Help*, GOOGLE, <https://support.google.com/youtube/answer/6154218?hl=en> (last visited Oct. 11, 2021).

<sup>44</sup> See *Twitch.tv - Trademark Policy*, TWITCH.TV, <https://www.twitch.tv/p/en/legal/trademark-policy> (last visited Oct. 11, 2021).

<sup>45</sup> See Rob LeFebvre, *'Overwatch' Streamer Destroys His In-Game Imposter*, ENGADGET (Feb. 22, 2017), <https://www.engadget.com/2017-02-22-overwatch-streamer-destroys-imposter.html>.

<sup>46</sup> See Alex Nealon, *Riot Games Rioting Over Esports Team's Trademark Infringement*, LEXOLOGY (Feb. 6, 2020), <https://www.lexology.com/library/detail.aspx?g=9680ca84-769b-41e0-9b48-498f915eb2cf>; Christina Settimi, *Fortnite Star Tfue Settles Dispute With FaZe Clan, Ending Esports' First Major Employment Lawsuit*, FORBES (Aug. 26, 2020, 1:59 PM), <https://www.forbes.com/sites/christinasettimi/2020/08/26/fortnite-star-tfue-settles-dispute-with-faze-clan-ending-esports-first-major-employment-lawsuit>.

For example, in the context of an esports tournament or competition, to the extent that the compensation for an individual or a team's participation was based on a "licensing fee" for the use of that individual/team's trademark, a non-payment of any monies owed can be construed as a material breach of contract, and unauthorized use of the mark after that point can potentially be seen as infringement, which could be pursued for damages. Unless contractually documented, monies owed such as a tournament prizes or other compensation for participation can be very difficult to recover. The same could apply to a team's use of an individual's mark. Designing compensation around a licensing deal gives an individual or team a potentially very clear and creative avenue for legal recourse if that compensation is threatened. In addition to breach of contract, there could be a federal cause of action for trademark infringement, which could also bring the potential of enhanced damages not available solely through breach of contract.<sup>47</sup>

### *B. State of Trademarks in the Esports Field*

Despite the great benefits of trademarks, the esports field is surprisingly slow to adopt the practice of trademark protection for brands, individuals, organizations, or teams. Taking a look at some examples of statistics and specific high-profile individuals helps elucidate the current issue. While not an exact metric, the popularity and notoriety of personalities in the esports world can be roughly correlated to social media followings, such as their Twitch follower count. Out of the top 100 most followed Twitch streamers, only around one-third have any trademark registrations.<sup>48</sup> Among the top twenty individuals, over half do not have trademark protection, with some unable to ever receive such protection in the future due to their potential marks being ineligible or blocked by prior registrations.<sup>49</sup>

One of the largest gaming personalities in the esports world is Tyler Bevens, aka "Ninja."<sup>50</sup> Surprisingly, Ninja does not have any trademark protection for the gamertag "Ninja," and most likely will not receive them. Ninja has attempted to apply for three different trademarks with the word "NINJA" (both as a word, and as that word combined with this logo), and all iterations have been issued refusals because of prior registered marks.<sup>51</sup> Because of the prior registered marks however, Ninja will most likely not be able to receive trademark

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<sup>47</sup> See 15 U.S.C. § 1117.

<sup>48</sup> See *Top 100 Most Followed Twitch Accounts (Sorted by Followers Accounts)*, SOCIALBLADE, <https://socialblade.com/twitch/top/100> (last visited Oct. 11, 2021).

<sup>49</sup> See Lince, *supra* note 4.

<sup>50</sup> See Ben Gilbert, *Ninja Just Signed a Multi-Year Contract That Keeps Him Exclusive to Amazon-Owned Twitch*, BUS. INSIDER (Sept. 10, 2020, 1:52 PM), <https://www.businessinsider.com/ninja-signs-multi-year-exclusivity-contract-with-amazon-twitch-2020-9>.

<sup>51</sup> See NINJA, Registration Nos. 88,206,561; 88,206,555; 88,481,530.

protection for his name in connection with any multimedia or entertainment goods or services. The implications of this are serious and should be a strong wakeup call to content creators. Despite being an incredibly high profile and recognized individual, Ninja will be unable to have the exclusive rights to his brand name, which could have serious repercussions on his ability to enter into licensing agreements, enforce legal penalties, or police infringement or imposters. Imagine “NIKE” not being able to have the exclusive rights to use the mark “NIKE” in connection with selling shoes. How much would that affect the brand “NIKE”?

While some high-profile streamers and esports athletes may have trademark application issues, others surprisingly have absolutely zero trademark filings, despite having brands worth millions of dollars in Twitch revenue alone. For example, the following streamers all have over \$1 million in yearly Twitch revenue alone, yet have zero trademark filings<sup>52</sup>:

Lirik	AlanZoka	Pokimane
NickMercs	Sodapoppin	XQCOW

However, on the other side of spectrum are individuals like Grzesiek<sup>53</sup> with 29 filings across a variety of goods and entertainment services; and teams like “Counter Logic Gaming”<sup>54</sup> with two active trademarks across entertainment services; and “100 Thieves”<sup>55</sup> with over 12 registrations across entertainment, apparel, and lifestyle goods and services. With the exclusive rights to their respective trademark, these rights holders are able to enjoy the legal benefits and protections their trademarks afford.

For example, in 2019 the esports team 100 Thieves held a limited-release apparel merchandise drop where they sold out of over \$500,000 worth of branded merchandise in under 5 minutes.<sup>56</sup>

<sup>52</sup> See Lince, *supra* note 4.

<sup>53</sup> See sources cited *supra* note 36; see also *Shroud, Inc. Trademarks*, TRADEMARKIA, <https://www.trademarkia.com/company-shroud-inc-5310540-page-1-2> (last visited Oct. 11, 2021) (showing 29 results).

<sup>54</sup> COUNTER LOGIC GAMING, Registration No. 6,209,609; CLG, Registration No. 5,457,919.

<sup>55</sup> LOS ANGELES THIEVES, Registration Nos. 90,303,274; 90,303,297; 90,303,313; 90,303,327; 90,303,337; 90,303,348; HONOR AMOUNG THIEVES, Registration No. 90,269,452; 100 THIEVES, Registration Nos. 6,079,647; 5,689,916; 5,514,617; 5,976,650; 100T, Registration No. 5,785,576.

<sup>56</sup> See Andrew Webster, *How 100 Thieves Became the Supreme of E-Sports*, THE VERGE (Sept. 5, 2019 8:30 AM), <https://www.theverge.com/2019/9/5/20849569/100-thieves-nadeshot-esports-supreme-drake>.

Trademark rights in the “100 Thieves” mark, in connection with merchandise such as apparel, gave the team the exclusive rights and ability to sell apparel with their mark, and hence the ability to conduct an exclusive limited-edition branded merchandise sale. This example is just one way in which trademark rights can be used to exploit and monetize the value in a player or team/organization’s brand. On the other side of the spectrum however is the lawsuit filed by Riot Games against the esports team “Riot Squad” for trademark infringement of the “RIOT” trademark.<sup>57</sup> This lawsuit highlights the risk of an esports team proceeding with a name they could not protect and infringing on an existing mark.<sup>58</sup>

### Conclusion

For any gamer, esports team, or attorney practicing in the field, there should be three takeaways from this article. First, the importance of trademark protection, both in terms of profiting from and protecting your brand. Esports athletes and teams are primarily represented by their gamertag, moniker, or handle. To the extent that a player or team does not have exclusive rights to use that gamertag, moniker, or handle in connection with the goods or services they provide and make money from, this could greatly impact their brand and ability to transact, or even be seen, in the marketplace. Next, trademark registration is a powerful tool for monetizing and capitalizing on the value your brand has accrued (also known as “goodwill”). Trademark rights allow you to enter into exclusive licensing agreements for the use of your mark in connection with the third-party sale of goods and services,<sup>59</sup> as well as specifically negotiate compensation for the use of the trademark in agreements with other organizations, competitions, or events. Finally trademark rights give the ability to police infringing uses of the mark and easily takedown infringement from social media platforms.

Second, a general idea of the trademark process; the requirements for something to be considered a trademark, and the process of applying for a trademark. It may seem intimidating from the outside, but hopefully a brief overview helps to demystify the process. Importantly, trademarks can’t be applied for generally, they must be applied for in connection with goods and/or services which the mark is used in connection with.<sup>60</sup> As part of the trademark application process, you will need to prove you have used the mark “in commerce,” or, sold

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<sup>57</sup> Nicole Carpenter, *Riot Games Files Lawsuit Against Esports Organization Over ‘Riot’ Trademark*, POLYGON (Oct. 10, 2019, 11:37 AM), <https://www.polygon.com/2019/10/10/20908027/riot-games-copyright-trademark-lawsuit-riot-squad>.

<sup>58</sup> *Id.*

<sup>59</sup> See *Trademark Licensing*, *supra* note 37.

<sup>60</sup> See TMEP § 901.

goods/services in connection with your mark.<sup>61</sup> We discussed a number of common listings for goods and services, which most streamers and esports athletes commonly use their trademarks in connection with.<sup>62</sup>

The final thing which readers should come away from this article with is the shocking lack of trademark protection in this field, especially among the industry's top earners. The ability to exclusively put out content and merchandise in connection with a gamertag, handle, or name, is an integral part of the business for esports athletes and teams. As such, trademark protection should be an immediate and serious consideration for anyone transacting, or intending to conduct, business in this field. The early effort will pay major dividends in the future, not only in the ability to monetize and capitalize your brand, but also protect and prevent intellectual property or infringement issues. In the enigmatic and wise words of Halo's Cortana: "*I am your shield...I am your sword.*"<sup>63</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> See *supra* Part II.B.

<sup>63</sup> HaloBaseLegend, *Halo 3 – First Announcement Trailer [HD] – E3 2006*, YOUTUBE (June 14, 2012), <https://www.youtube.com/watch?v=T9Ezd2FqxAU&t=53s>.

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## Sexual Harassment Hinders Esports' Potential

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Tram Nguyen<sup>†</sup>

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### Introduction

Esports is one of the fastest-growing entertainment industries in the world.<sup>1</sup> With the advent of Covid-19, giants<sup>2</sup> in the video game industry have witnessed an astronomical rise in both revenue and viewership.<sup>3</sup> The video game industry's global market reached \$162.32 billion in 2020, with esports recording a net revenue of \$947.1 million.<sup>4</sup> Due to the video game industry's growth, esports revenue is expected to reach \$1.61 billion by 2024.<sup>5</sup> Comparatively, the recorded music industry's total revenue amounted to \$23.1 billion in 2020,<sup>6</sup> though the music industry has had over a 100-year head start.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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>.

<sup>4</sup> 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>.

<sup>5</sup> *Id.*

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

<sup>7</sup> Roger Beardsley & Daniel Leech-Wilkinson, *A Brief History of Recording to ca. 1950*, CHARM, [https://charm.rhul.ac.uk/history/p20\\_4\\_1.html](https://charm.rhul.ac.uk/history/p20_4_1.html) (last visited Aug. 29, 2021).

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> For example, 44% of female gamers report experiencing gender discrimination, and they make up less than 10% of college esports players.<sup>12</sup>

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.<sup>13</sup> Due to the severity of sexual harassment, a few females who have reached professional levels have left the industry.<sup>14</sup>

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

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<sup>9</sup> 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>.

<sup>10</sup> *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](https://assets.evilgeniuses.gg/dei/EG_YouGov_GamingForAll.pdf).

<sup>11</sup> 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).

<sup>12</sup> 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>.

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>15</sup> Approximately 90% of this revenue is through sponsorships and advertising.<sup>16</sup> 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,<sup>17</sup> 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.<sup>18</sup> The second

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<sup>15</sup> 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/>.

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

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

<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> These forms of stereotyping occurred because some male gamers believed that women were invading a space that belonged to men.<sup>21</sup> 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.<sup>22</sup> Gamers are no stranger to comments such as, “she’s pretty good for a girl”<sup>23</sup> or “go back to the kitchen.”<sup>24</sup> 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.<sup>25</sup> The accusing players stated that if Kim could prove she was not cheating, they would apologize and quit professional *Overwatch*.<sup>26</sup> 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.<sup>27</sup> Three of her accusers apologized and quit professional *Overwatch*.<sup>28</sup> 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%.<sup>29</sup> As the only female professional *Overwatch* player, these baseless accusations reflect the sentiment that some males in the

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 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>.

<sup>22</sup> 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).

<sup>23</sup> Gardner, *supra* note 13.

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

<sup>25</sup> 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>.

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

<sup>27</sup> Chalk, *supra* note 25.

<sup>28</sup> Myers, *supra* note 26.

<sup>29</sup> 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.<sup>30</sup> In 2016, Creveling’s debut as a standout support player with Team Renegades received intense scrutiny.<sup>31</sup> She suffered constant bullying, harassment, and ridicule from other players and fans, simply for being female and transgender in esports.<sup>32</sup> Anytime she performed less-than-perfect, trolls would launch massive verbal messages that attributed her “bad gaming skills” to her gender.<sup>33</sup> Unfortunately, in December 2019, Creveling passed away in her sleep.<sup>34</sup> After her passing, aspiring female and LGBTQIA+ professional gamers came forward to share their own experiences with sexism.<sup>35</sup> Creveling had inspired many to pursue their dreams of becoming professional esports players.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Therefore, if female and LGBTQIA+ gamers

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<sup>30</sup> 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>.

<sup>31</sup> 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>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 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>.

<sup>35</sup> Seiner, *supra* note 31.

<sup>36</sup> *Id.*

<sup>37</sup> *Gaming for All*, *supra* note 10.

<sup>38</sup> *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.<sup>39</sup> 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.<sup>40</sup> Even if there were "[LGBTQIA+] people in the industry, they probably wouldn't feel very comfortable talking about it."<sup>41</sup> 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

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<sup>39</sup> 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](https://www.researchgate.net/publication/277933924_I_Can_Defend_Myself_Women's_Strategies_for_Coping_With_Harassment_While_Gaming_Online).

<sup>40</sup> 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>.

<sup>41</sup> 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.<sup>42</sup> However, the number of women game developers have increased to about 22% by 2015<sup>43</sup> and, with that, more inclusive mobile titles have also led to an increase in women gamers.<sup>44</sup> 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.<sup>45</sup>

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.”<sup>46</sup> 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.<sup>47</sup> In May 2019, 150 Riot employees walked out in protest over harassment lawsuits filed against the company.<sup>48</sup> 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.<sup>49</sup> Riot agreed to pay at least \$10 million to settle the lawsuit.<sup>50</sup> 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

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<sup>42</sup> 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>.

<sup>43</sup> 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>.

<sup>44</sup> Welch, *supra* note 40.

<sup>45</sup> Clement, *supra* note 43.

<sup>46</sup> Welch, *supra* note 40.

<sup>47</sup> 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>.

<sup>48</sup> 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>.

<sup>49</sup> 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>.

<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> In response to the allegations, Blizzard stated that the DFEH lawsuit contained “distorted, and in many cases false, descriptions of Blizzard’s past.”<sup>54</sup> More than 2,600 current and former Blizzard employees have united to sign an open letter in support of the DFEH lawsuit.<sup>55</sup> 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

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<sup>51</sup> 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>.

<sup>52</sup> 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>.

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

<sup>54</sup> 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>.

<sup>55</sup> 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.”<sup>56</sup> 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,<sup>57</sup> 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.<sup>58</sup> He received a four-game suspension and a \$2000 fine for these homophobic comments.<sup>59</sup> For Lengyel, who is a millionaire,<sup>60</sup> this fine is minuscule. Contrast Lengyel to another player who received a thirty-game suspension and a \$9000 fine for offenses related to cheating.<sup>61</sup> 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.<sup>62</sup> 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,

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<sup>56</sup> 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>.

<sup>57</sup> *Id.*

<sup>58</sup> Mock, *supra* note 18.

<sup>59</sup> *Id.*

<sup>60</sup> 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>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

videos, and public display of their videogames.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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

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<sup>63</sup> 17 U.S.C. § 106.

<sup>64</sup> *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>.

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

<sup>66</sup> Chang et. al., *supra* note 17.



loss of profits.<sup>67</sup> 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.<sup>68</sup> 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.

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<sup>67</sup> 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>.

<sup>68</sup> 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>.

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