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E-SPORTS: MORE THAN JUST A FAD

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On October 4, 2013 at the Staples Center, home of the Los Angeles Kings, Clippers, and Lakers, Riot Games hosted the Season 3 World Championship Grand Finals for *League of Legends*.¹ There, in front of thousands of fans and thirty-two million watching online, Korea's SK Telecom T1 swept China's Royal Club three games to none, securing for themselves the \$1 million prize and title of World Champions.² The event was the largest gaming contest held in North America to date, easily surpassing the prior year's event held at the Galen Center.³ The phenomenon known as e-sports is rapidly growing in popularity and gaining support as a legitimate sport. E-sports has even recently earned a segment on HBO's Real Sports, where it was shown that due to the required mental agility, training, and knowledge, *League of Legends* players might be considered as a form of athlete.⁴ With this recognition, though, comes a need to see how e-sports will fit into current law. As the United States recognizes players as professional athletes, even giving foreign players a specialized visa to come play in the country, this analysis will look at how the law might establish it as a sport and the players as athletes, how

¹ Eddie Makuch, *32 Million People Watch League of Legends Season 3 World Championships*, GAMESPOT (Nov. 19, 2013), <http://www.gamespot.com/articles/32-million-people-watched-league-of-legends-season-3-world-championships/1100-6416259/>.

² *Id.*

³ *Id.*

⁴ *Real Sports with Bryant Gumbel: 199* (HBO television broadcast Oct. 22, 2013). The relevant clip is available at *HBO Real Sports League of Legends* (Scarra), YOUTUBE (Nov. 3, 2013), http://www.youtube.com/watch?v=kMh2b_n7cKw.

collegiate play might be affected if it were established, and what copyright issues might arise between the players and creators of the games.

I. What Is E-Sports?

E-sports, or ‘electronic sports,’ is the term used to refer to professional gaming. Young men and women from around the world make a living playing video games professionally, usually through prize pools in tournaments or from their corporate sponsorships. Unlike in sports like football or hockey, players in e-sports are not generally referred to by their actual names, instead using their ‘handle’ or ‘gamer tag’. Odd spelling, capitalizations, and swapping numbers for letters are the norm in these player-chosen monikers. It is not uncommon to see odd names like ‘Dyrus’, ‘Fatal1ty’, ‘INnoVation’, or ‘MeyeA’⁵. At home with their teammates, on the streets with fans, and in interviews with the sportscasters and news reporters, the players are referred to, and refer to each other, by these handles. One player, Darshan ‘ZionSpartan’ Upadhyaha was so celebrated at his high school for his e-sports success that even his Advanced Placement (AP) Psychology teacher referred to him by his ZionSpartan name⁶.

Age in e-sports also differs rather greatly from the norm in conventional sports. According to a study by Game Research, a Danish group formerly dedicated to the study of video games, the average age of the professional gamer is about twenty-one years old⁷ whereas

⁵ Occasionally names are chosen due to a special meaning, perhaps an old nickname or based off an event in their life, or might be a play on words to evoke something important to the player. MeyeA, for example, is a player who has a glass eye. His name is a combination of ‘eye’ and the acronym MIA, or Missing In Action. Combined the two make note of his eye being missing. Katana Mordeca, *An Interview the Brunch Cluyb’s Support Player MeyeA, aka Ellie Bee*, TEAM-DIGNITAS (Jan. 26, 2013), <http://www.team-dignitas.net/articles/blogs/League-of-Legends/2829/An-Interview-with-The-Brunch-Clubs-Support-Player-MeyeA-aka-Ellie-Bee/>.

⁶ LoLChampSeries, *Even His Teacher Calls Him ZionSpartan*, YOUTUBE (June 13, 2013), <http://www.youtube.com/watch?v=Hb0iA4DM9Hk>.

⁷ Jeppe Bo Pedersen, *Are Professional Gamers Different? – Survey on Online Gaming*, GAME RESEARCH (May 16, 2006), <http://game-research.com/index.php/reports/are-professional-gamers-different-survey-on-online-gaming/>.

in the NFL, average player age is between twenty-five and twenty-seven, depending on the team⁸. Minimum ages are also different. In the NBA, to enter the draft a player must be at least nineteen years old⁹ and in the NHL players must be eighteen by September 15 in the year they are drafted¹⁰. In the *League of Legends* League Championship Series, players must be a minimum of seventeen years old¹¹ and in *StarCraft*, player ages can be even younger, with one gamer winning his first televised event at the early age of thirteen.¹² While football, basketball, and hockey players are capable of remaining competitive well into their thirties and sometimes even forties, professional gamers are generally retiring by age twenty-five to thirty, though with e-sports still in its infancy, there is far too small a sample size to get a real average retirement age.

II. Introduction to the Games

As means of a basic introduction to the newly evolving world of e-sports, there are two primary games played by e-sports athletes: *StarCraft* and *League of Legends*.

A. StarCraft

Created by Blizzard, the gaming powerhouse behind the incredibly popular World of *WarCraft*, *StarCraft* is in its second iteration, with the original *StarCraft* having been released in

⁸ Nick Schwartz, *Ranking All 32 NFL Teams by Average Age*, USA TODAY (Sept. 4, 2013, 6:01 PM), <http://ftw.usatoday.com/2013/09/nfl-teams-ranked-by-average-age/>.

⁹ Steve Aschburner, *Big Business: NBA, NCAA Are Both Wrong in Debate About Age Limit*, SPORTS ILLUSTRATED (Apr. 9, 2008, 2:45 PM), <http://archive.today/5S3BL#selection-2709.0-2709.50> (archived version of story which was removed from its original link)

¹⁰ *Hockey Operations Guidelines*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26377> (last visited Dec. 30, 2013).

¹¹ Matt Marcou, *Season Three Tournament Rules*, LEAGUE OF LEGENDS (Nov. 5, 2012), <http://forums.na.leagueoflegends.com/board/showthread.php?t=2766828>.

¹² Maru, LIQUIPEDIA: STARCRAFT II, <http://wiki.teamliquid.net/starcraft2/Maru> (last visited Dec. 30, 2013).

1998 and its long-awaited sequel in 2010.¹³ Since its initial release, *StarCraft* has been played competitively in South Korea, with some players earning up to \$250,000 or more in a single year from sponsorships and prize winnings.¹⁴ It soon established itself as one of the country's most predominate spectator sports. The game itself is known as a Real-Time Strategy, or RTS. Players generally work alone against a single opponent, though teams of two are also somewhat common. In the game, players control an army, gather resources, build defenses and training grounds for their units, and create additional units to further expand their army. In order to win, a player must destroy all buildings his opponent has constructed. Players interact with the game using a mouse and keyboard, in order to give a command to the game a player clicks on the unit or structure they wish to manipulate, then either presses a key on the keyboard or clicks on the screen to indicate the action they wish that unit or structure to take. Player skill comes from both micro-managing the army's movements and attacks while also macro-managing the base's income, unit training, and construction of new buildings. The management of both of these actions is commonly calculated by 'actions per minute', or APM, which is how many times a player clicks or gives a command in-game.¹⁵ Professional players generally record between 300-400 APM during a game, with the known record currently being 818.¹⁶

¹³ Unless otherwise noted, for this paragraph, see generally *StarCraft*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/StarCraft> (last visited Dec. 30, 2013).

¹⁴ *Gaming Reality*. CNN.COM, <http://www.cnn.com/interactive/2012/08/tech/gaming.series/korea.html> (last visited Sept. 17, 2014).

¹⁵ Gifford Cheung & Jeff Huang, *Starcraft from the Stands: Understanding the Game Spectator*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 763, 766, (Ass'n for Computing Machinery May 2011), available at http://jeffhuang.com/Final_StarCraftSpectator_CHI11.pdf.

¹⁶ *Actions Per Minute*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Actions_per_minute (last visited Sept. 17, 2014).

B. League of Legends

In 2006, Brandon Beck and Marc Merrill founded Riot Games, hoping to create a video game that could be played competitively.¹⁷ Their labors produced *League of Legends*, a Multiplayer Online Battle Arena (MOBA) where two teams of five select from a growing list of avatars and attempt to destroy each other's home base, known as a Nexus.¹⁸ The matches take place on a field comprised of three 'lanes': top, mid, and bot, as well as a middle 'jungle' where neutral enemies can be fought. Players must defeat computer controlled minions as well as players on the other team in order to earn gold, purchase more powerful items, and eventually destroy the other team's buildings. Similarly to *StarCraft*, player interaction is achieved through the use of a mouse and keyboard. Unlike in *StarCraft* however, players only control a single unit, referred to as a 'champion'. The champion has four different abilities it can use, three normal abilities and one 'ultimate' which usually provides a significantly stronger effect in the game than the normal abilities. Players interact with their champion by clicking the mouse to tell it where to go and using the keyboard to activate its various abilities. Player skill is not measured in APM like with *StarCraft*, but is more focused on the 'mechanics,' or knowledge and skill in interaction with the game. The best players have in-depth knowledge of the strengths and weaknesses of individual champions and how best to counteract other player's actions. High-level players are also expected to be skilled in 'last-hitting' the computer controlled enemy monsters, called minions. Getting the final hit that kills a minion nets the player a set amount of

¹⁷ Anthony Gallegos, *Riot Games' League of Legends Announced*, 1UP.COM (Oct. 7, 2008), <https://web.archive.org/web/20131017013542/http://www.1up.com/news/riot-games-league-legends-announced> (archived version of story which was removed from its original link).

¹⁸ Unless otherwise noted, for this paragraph and the next, see generally Taylor Cocke, *How to Play League of Legends, the Biggest Game in the World*, KOTAKU (Oct. 31, 2013 4:27 PM), <http://kotaku.com/how-to-get-into-league-of-legends-the-biggest-game-in-1456272237>.

gold, which can then be spent on upgrades for the player's champion. Possessing the skill and timing necessary to achieve the final hit on as many minions as possible can grant a player a significant advantage against his opponent.

Each team has various positions that the players fill, similar to positions on any given athletic sports team. There is a 'top laner' who generally acts as a defenseman, disrupting the other team and causing havoc whenever he can. Next is the 'mid laner' whose purpose is to outmaneuver the opposition and push into the enemy territory, which creates opportunities for him to interfere with other lanes or secure objectives for his team. In the bot lane there are generally two players, a marksman and a support. The marksman's job is to defeat opponents through proper positioning and timing, gain a substantial amount of gold, and become very strong in the later game. The support's job is to make sure the marksman stays alive through disrupting the other team's efforts, providing vision on the map through the use of 'wards,' and healing or mitigating damage the marksman might take. Lastly is the 'jungler.' This player does not stay in any particular lane, but instead travels all over the map, defeating the neutral monsters in the non-lane areas and attempting to surprise enemy players and secure kills for his teammates. To be successful at the highest level, players must display incredible coordination, communication, planning, and timing.

While *StarCraft* and *League of Legends* are the primary games played competitively, they are not the only ones. Other games, such as *Counterstrike*, *Quake*, *WarCraft*, *DOTA*, and many fighting games such as *Street Fighter*, *Mortal Kombat*, and *Super Smash Bros*, are also played at a competitive level. While they may not be as popular as the main two, these games do still have a significant following and, much like e-sports, are quickly growing in popularity.

III. Is Gaming a Sport?

A major question that must be looked at before delving too far into a legal analysis of e-sports is whether or not professional gamers can even be considered athletes and whether video games can even be considered ‘professional sports’. If it can be classified as a true ‘sport’ then, in certain cases, laws will apply to it differently, as will be discussed later. Deciding what is and isn’t a sport, however, could be a rather daunting task. Even golf, something readily accepted as a sport by much of society, has been the subject of much debate.¹⁹ It becomes a commonly asked and hard to answer question: “what is a sport?” With no one able to truly answer, there is a murky line drawn between what is merely a ‘game’, what is a competition, and what is a sport. A common argument made is “if it can be done while drinking and smoking, then it is not a sport.”²⁰ Such a definition is problematic for defining video games as a true form of ‘professional sport’ (as well as golf, track and field, and many other highly athletic competitions sometimes regarded as sport).

In a legal sense, while there is no real definition of ‘sport’ in US law, a glance at some relevant established law may still be of use. Title 28 U.S.C. § 3701 provides a definition for both professional and amateur sports organizations, making no mention of physical requirements, only that the person or entity “sponsors, organizes, schedules, or conducts a *competitive game* in which one or more...athletes participate.”²¹ Additionally, in a 2011 decision, the Second Circuit affirmed the lower courts holding that, with regard to Title IX issues, competitive cheerleading was merely an ‘athletic activity’ and not a sport.²² The court’s rationale was competitive

¹⁹ John Strege, *Is Golf a Sport? And the Answer Is...It Depends*, GOLF DIGEST (May 29, 2012), <http://www.golfdigest.com/golf-tours-news/blogs/local-knowledge/2012/05/is-golf-a-sport-and-the-answer-is-it-depends.html>.

²⁰ *Is Golf a Sport?*, PROCON.ORG, <http://golf.procon.org/> (last updated Dec. 18, 2013).

²¹ 28 U.S.C § 3701 (2012) (emphasis added).

²² *Biediger v Quinnipiac Univ.*, 691 F.3d 85, 103-04 (2d Cir. 2012).

cheerleading lacked a set of uniform rules throughout the season and had no progressive playoff system; two elements it felt were essential to a 'varsity sport'.²³

Outside of established law there are additional sources that can provide insight into what might be considered 'sport.' Howard Wasserman, a professor of law at Florida International University, argues that a sport must require 'objectivity in scoring and determining winners.'²⁴ According to Wasserman, if a competition comes down to who scored more or completed the objective the fastest, it can be considered a sport, whereas if the competition came down to comparing judge given scores, such as in figure skating, it would not be a sport.²⁵

Anthropologist John Jackson, while writing a tongue-in-cheek article, actually provided a somewhat reasonable, though somewhat lacking, definition of what a sport is.²⁶ First, there must be an external object that organizes everyone's attention. Second, there must be a sense of physical urgency for when the external object is in play, and third that you and your opponent must be at odds and able to thwart each other's efforts to manipulate the object²⁷.

Lacking a truly agreed upon meaning of 'sport,' I propose a new definition that organizes the thoughts of the suggested examples, both in established law and from secondary sources. A sport is an objective-based competition between two or more parties that requires a degree of physical and mental skill, where timing or urgency is required to complete the objective and reaction to the opponent's objective attempts is important. While this definition leaves out

²³ *Id.*

²⁴ Howard Wasserman, *Defining Sport*, SPORTS LAW BLOG (May 6, 2008, 11:04 PM), <http://sports-law.blogspot.com/2008/05/defining-sport.html>.

²⁵ *Id.*

²⁶ John L. Jackson, Jr., *New Rule: You Gotta Have Balls, So Poker Is Not a Sport*, FROM THE ANNALS OF ANTHROMAN (Apr. 26, 2008, 8:36 AM), <http://anthromania.blogspot.com/2008/04/new-rule-you-gotta-have-balls-so-poker.html>.

²⁷ *Id.*

individual skills competitions such as track and field or golf and non-physical competitions like poker or chess, it better incorporates direct competitions such as NASCAR and video games.

IV. Are Gamers Athletes?

The next issue to be determined is whether professional gamers should be considered ‘athletes’. Traditionally, to be an athlete, someone must be physically fit and capable of performing at a high level in a particular physically competitive contest, such as football, track, hockey, or baseball. A variety of dictionaries reveal a surprising number of varying definitions for ‘athlete,’ though most contain somewhat similar language. Merriam-Webster defines it as “a person who is trained in or good at sports, games, or exercise that requires physical skill and strength.”²⁸ Dictionary.com instead says “a person trained or gifted in exercises or contests involving physical agility, stamina, or strength,”²⁹ while the Oxford dictionary states that an athlete is “a person who is proficient in sports and other forms of physical exercise.”³⁰ Additionally, The Free Dictionary requires “a person possessing the natural or acquired traits, such as strength, agility, and endurance that are necessary for physical exercise or sports, especially those performed in competitive contests.”³¹ There are two common themes running throughout all the definitions; that one must participate in a competition or contest, and that one must be physically adept.

There is no doubt that games such as *League of Legends* or *StarCraft* can be considered a form of competition or contest, as already established players on the professional circuit are vying against each other for rather large prize pools. The main question hinges on whether or

²⁸ *Athlete*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/athlete> (last visited Sept. 17, 2014).

²⁹ *Athlete*, DICTIONARY.COM, <http://dictionary.reference.com/browse/athlete> (last visited Sept. 17, 2014).

³⁰ *Athlete*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/athlete (last visited Sept. 17, 2014).

³¹ *Athlete*, FREE DICTIONARY, <http://www.thefreedictionary.com/athlete> (last visited Sept. 17, 2014).

not playing a video game requires a level of physical skill above what a normal person would be capable. A common stereotype of the average gamer, which often rings true outside of the professional scene due to the sedentary lifestyle of gaming, is that they are unfit (if not overweight), uncoordinated, and not possessing of lasting stamina. What an outward glance will not show, however, is the true physical skill that gamers, especially professional gamers, can possess.

According to a study by Dr. Dominic Micklewright from the University of Essex, while gamers are typically incredibly unfit, they possess reaction skills “as finely tuned as fighter pilots.”³² Dr. Micklewright compared professional gamers with high performing physical athletes and found that motor skill and reaction times were on par with professional, physically fit athletes. While a gamer may not be able to keep up with an Olympic Gold Medal sprinter in a footrace, they can match, or even surpass, him in a reaction test. The speed at which a gamer must process information and adjust accordingly to the changes happening in-game is incredibly high and requires equally agile eye-hand coordination in order to be successful.

Outside of base definitions and requirements however, e-sports athletes have also gained governmental recognition. Recently, Riot Games began to lobby to the US government to grant visas to foreign players so that they might compete in this country. After months of work, the government was convinced, and began granting P-1 Visas to foreign players.³³ A P-1 Visa is granted to aliens who “perform as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.”³⁴ The term “internationally recognized” has been defined by the U.S. Citizenship and Immigration Services (USCIS) as “a high level of

³² *Leading Video Gamers Fail on Fitness*, EVENTS AT ESSEX (June 7, 2010), http://www.essex.ac.uk/events/event.aspx?e_id=1670.

³³ Paresh Dave, *Online Game League of Legends Star Gets U.S. Visa as Pro Athlete*, L.A. TIMES (Aug. 7, 2013), <http://articles.latimes.com/2013/aug/07/business/la-fi-online-gamers-20130808>.

³⁴ 8 U.S.C. § 1184(c)(4)(A) (2012).

achievement; evidenced by a degree of skill and recognition substantially above that ordinarily encountered so that the achievement is renowned, leading or well known in more than one country.”³⁵ This same visa is given to exceptional athletes such as David Beckham, who played soccer for the LA Galaxy, or Hyun-Jin Ryu, a Dodgers pitcher who hails from South Korea. While seemingly minor in the grand scheme of e-sports as a whole, this recognition by the government is a huge step towards acceptance of gaming as a sport and gamers as athletes.

In the public eye, e-sports has a long way to go before being accepted as a legitimate sport. Indeed, it may not even ever be officially recognized as a sport, with perhaps ‘e-sports’ becoming an entirely new classification of competition. Until a decision is made, either in the public eye or in a legal sense, the best comparison that can be used for determining how the law might react to different issues that arise is to consider the players athletes and the game a sport.

V. Can E-Sports Transition to Intercollegiate Competition?

As e-sports transitions into consideration as a legitimate sport, support for a collegiate base grows. In September, 2013, The Texas eSports Association rebranded themselves as TeSPA (very similar to the government-supported Korean e-sports association KeSPA) and took on a new vision: establishing communities capable of supporting e-sports in universities and high schools across the nation.³⁶ Already known for their successful ‘Lone Star Clash’ tournaments, where professional *StarCraft II* and *League of Legends* players were invited to compete for cash prizes,³⁷ TeSPA is seeking to expand into the collegiate arena. In fact, at the second Lone Star Clash, the top four college-based *League of Legends* teams were invited for a single elimination

³⁵ *P-1A Internationally Recognized Athlete*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete> (last updated May 4, 2010).

³⁶ Tyler Rosen, *TeSPA Officially Rebrands & Launches National Expansion*, TESPA (Sept. 2, 2013), <http://tespa.org/blog/2013/09/02/tespa-officially-launches-new-model-national-expansion/>.

³⁷ *Lone Star Clash 2*, TESPA, <http://tespa.org/lsc2/> (last visited Dec. 30, 2013).

tournament titled ‘IvyLoL,’ where UC Irvine took first place, beating out Georgia Tech, UT Austin, and UC San Diego.³⁸ TeSPA’s ultimate goal is to create communities with an infrastructure so sufficient and self-supporting that they are capable of hosting their own tournaments, eventually leading into a legitimate and dedicated collegiate e-sport structure.³⁹ Their efforts so far have been rather successful, as communities have already been set up in seventeen different schools across five regions of the United States, including large institutions such as, Ohio State, Texas A&M, and University of North Carolina.⁴⁰ With the organization’s recent success, of course, comes a need to look at relevant law and see how it might affect the growth and sustainability of e-sports in the collegiate realm.

A. Title IX

Title IX is federal legislation that states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.⁴¹

Title IX’s purpose is to even out opportunities for both men and women in athletics and education. Of course, not every athletic activity qualifies for Title IX protection, and the Department of Education has supplied a case-by-case analysis that the Office of Civil Rights (hereafter OCR) uses for determining what does and what does not fall under the statute.⁴² First, the OCR will look at whether the structure and administration of the activity is similar to and

³⁸ *Id.*

³⁹ *Our Vision*, TESP, <http://tespa.org/vision/> (last visited Dec. 30 2013).

⁴⁰ *Communities*, TESP, <http://tespa.org/communities/> (last visited Dec. 30, 2013).

⁴¹ 20 U.S.C. § 1681(a) (2012).

⁴² Letter from Stephanie Monroe, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Colleagues (Sept. 17, 2008), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

consistent with already established intercollegiate sports (Such as football or basketball under the NCAA), including examining the operating budget, support services, scholarships, awards, and recruitment.⁴³ Next, the OCR examines how the team prepares for competition, again comparing it to established intercollegiate sports.⁴⁴ Here, the OCR looks at how practices are conducted, how the regular season is set up and whether there is actual intercollegiate play predetermined by a governing organization, strength of schedule for the teams compared with their capabilities, and whether there is a defined regular season and a subsequent off-season.⁴⁵ The OCR also examines pre/post season play and if the primary purpose of the activity is intercollegiate play.⁴⁶

Compliance with Title IX is not terribly difficult. Schools must portion funding, facilities, housing, and services in such a way as to provide equal opportunity for both sexes.⁴⁷ The Department of Education (previously the Department of Health, Education, and Welfare), in 1979, provided an interpretation of Title IX compliance. Compliance was accommodated in one of the following ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 34. C.F.R. §106.41(c) (2000).

(3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁴⁸

At the moment, since there is no collegiate level league established yet, video games have not been tested under Title IX to determine if they qualify as a sport. This may change in the near future however, with Immigration Services finding professional gamers to be ‘athletes’ for visa purposes⁴⁹ and organizations such as TeSPA working hard to create intercollegiate competition.⁵⁰ In terms of qualification for the purposes of Title IX, moving the current professional e-sports structure into collegiate play would not be difficult. Professional *League of Legends*, for example, already has a regular season and playoffs in the League Championship Series (LCS), with a spring and summer split, a playoff system, and finally a World Championship game.⁵¹ Teams scout and recruit from the top tiers of players (called the Diamond and Challenger tiers).⁵² The main thing lacking from current e-sports systems would be funding. Until e-sports are more widely accepted, organizations like TeSPA may find it difficult in convincing the colleges to accept e-sports as a financially viable endeavor and be

⁴⁸ 1979 Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

⁴⁹ Dave, *supra* note 33.

⁵⁰ *See Our Vision*, *supra* note 39.

⁵¹ Alan Lafleur, *Riot Announces Format for the League of Legends Championship Series*, MOBAFIRE (Jan. 10, 2013, 1:01 PM), <http://www.mobafire.com/esports/news/riot-announces-format-for-the-league-of-legends-championship-series-188>.

⁵² *See Elementz to Become Free Agent; Rhux in as Support for Curse*, REIGN OF GAMING (Apr. 20, 2013), <http://www.reignofgaming.net/blogs/tuck-esports-inquirer/24008-elementz-to-become-free-agent-rhux-in-as-support>; Nicholas “Endspark” Doucet, *TSM Adds Altec as a Substitute*, GOSU GAMERS, <http://www.gosugamers.net/lol/news/25831-tsm-adds-altec-as-a-substitute> (last visited Sept. 17, 2014); Michale “DreXxiN” Lator, *NydusHerMain Now a Sub for CLG*, GOSU GAMERS, <http://www.gosugamers.net/lol/news/25008-nydushermain-now-a-sub-for-clg> (last visited Sept. 17, 2014).

willing to invest money in its expansion, allowing for coaches to be hired to lead teams in official practices, and so that the teams have funding for equipment and support from the school.

Once e-sports grows to the point it can be tested against Title IX, a major issue it will face will be meeting the equality standard. As noted by David Philip Graham, an entertainment and video game attorney with significant experience in the e-sports world, e-sports teams and competitors are currently largely male-dominated.⁵³ In fact, there have been no female players to make it into the LCS and the first real attempt at an all-female team, Team Siren, was met with a large amount of disdain by a portion of the gaming community.⁵⁴ With such a male-dominated sport, finances for intercollegiate sports would be difficult, with e-sports teams potentially pushing out other sports, or getting pushed out themselves, in order to maintain the proper balance of men and women involved in the school's overall athletic program.⁵⁵

B. Training

Training is also an area where intercollegiate e-sports may run into some significant problems. First, professional players generally have to practice for several hours every day, some going ten or more hours to work on strategy, mechanics, and adjusting to changes in the game as new updates and materials are released on a regular basis.⁵⁶ According to the NCAA bylaws, during the playing season athletes are limited to twenty hours of practice per week, and

⁵³ David Philip Graham, *Inviting Regulation: The Sportsification of Video Games*, DPG AT LAW (July 23, 2013), <http://www.dpgatlaw.com/Articles/Inviting-Regulation-The-Sportsification-of-Video-Games.shtml>.

⁵⁴ Kaitlin Silver, *League of Legends Team Siren Disbands: Valuable Lessons Learned*, GAMESKINNY (July 26, 2013), <http://www.gameskinny.com/hzi5j/team-siren-disbands-valuable-lessons-learned>.

⁵⁵ Graham, *supra* note 53.

⁵⁶ Alexander Brown, *A Typical Pro Gamer's Schedule*, RTS GURU (Mar. 15, 2013), <http://www.rtsguru.com/article/5375/A-Typical-Pro-Gamers-Schedule.html>.

at most, four hours of practice per day⁵⁷. During the off season, players are limited to eight hours per week, and no more than two per week on ‘skill-related workouts’ with the rest being spent on weight training and conditioning⁵⁸. On the other hand, the National Association for Intercollegiate Athletics (NAIA), which serves a similar function to the NCAA, but for smaller colleges and universities, does not put a restriction on weekly practice times; only restricting how many weeks teams and players can practice during the school year, with a maximum of twenty-four weeks of practice and competition between August 1 and May 15.⁵⁹

The NAIA system is far better for e-sports purposes, but it also does not serve the larger, more competitive and financially capable schools like Ohio State or the University of Texas. Under the NCAA system, all players would be on the same footing practice wise, but any attempt to make it into the professional scene would be particularly difficult, as their skill level compared to the pro circuit, and players who had foregone college in order to improve their respective skills with the ultimate hope of becoming a professional in their respective games, would be substantially inferior. It is unclear whether players engaging in practice on their own time would constitute ‘practice.’ A look at the NCAA Countable Activities sheet offered to colleges is helpful, but does not give a definite answer.⁶⁰ According to the form, most practices require a coach’s initiation or presence; however, “field, floor or on-court activity” is listed as a countable activity for the limited hours of practice during the play season. The NCAA could easily find a player’s time spent in-game and on the ‘field’ of play, would count as practice for

⁵⁷ Bylaw 17.1.6.1, in NCAA, 2009-10 NCAA DIVISION MANUAL 216 (2009) (“Daily and Weekly Hour Limitations—Playing Season”), *available at* <http://www.ncaapublications.com/productdownloads/D110.pdf>.

⁵⁸ Bylaw 17.1.6.2, in NCAA, *supra* note 57, at 216-17 (“Weekly Hour Limitations – Outside the Playing Season”).

⁵⁹ NAIA, 2014-2015 OFFICIAL & POLICY HANDBOOK 25 (30th ed. 2014), *available at* http://www.naia.org/fls/27900/1NAIA/legislative/docs/NAIA_Official_Handbook.pdf.

⁶⁰ NCAA Countable Activities (2008), *available at* http://www.athletics.wsu.edu/arc/handbook/07_08/sec6/countable.pdf.

the purposes of this rule, and would therefore limit how often players could actually play the game. Another countable activity of note is competition itself. According to the form, competition counts as three hours regardless of length. Generally when teams or players compete, the competition itself takes place over a few days and they play multiple games, sometimes up to nine or ten over the multi-day period. Whether or not the NCAA would count each game or each day as a separate competition would significantly impact practice time for players.

The tools needed to establish e-sports as a collegiate sport are already in place. While such obstacles as Title IX and NCAA practice time may be difficult to overcome, these are small hurdles in the overall growth of e-sports. With TeSPA working to establish a collegiate scene, and e-sports becoming a nationally known and enjoyed spectacle, it would not be surprising if colleges start to buy into the idea of supporting professional gaming teams in the near future.

VI. Copyright

Video games themselves have been the subject of intellectual property rights debate since the early 1980s. One of the first major decisions regarding copyright of games, however, came in 1988 with *Atari Games Corp. v. Oman*⁶¹ where the district court upheld the US Register of Copyright's decision to deny protection for the game *Breakout*, claiming that it lacked “‘minimal artistic expression’ necessary to render copyrightable the design and configuration.”⁶² This decision was appealed twice to the Court of Appeals where future Justice Ruth Bader Ginsburg stated the Register should not “focus on the individual screens, rather than the flow of the game as a whole. The hallmark of a video game is the expression found in the entire effect of the

⁶¹ 693 F. Supp. 1204 (D.D.C. 1988).

⁶² *Id.* at 1207-08.

game as it appears and sounds, its sequence of images.”⁶³ The case was again remanded to the Register⁶⁴ and the copyright was finally granted to Atari⁶⁵.

Even since this decision, however, protection for video games has been difficult. By definition, video games are fluid, with no two playthroughs of a game being the same.⁶⁶ Some modern games even take hundreds of hours to explore the provided landscape and complete the game, making the likelihood of any playthrough being even remotely similar almost impossible.⁶⁷ Professor Lastowka of Rutgers University School of Law theorizes that courts might have been able to relate video games to a scripted play, as actors include their own variances on performances, but even then the base script still remains the same.⁶⁸ While all games are made up of computer code, which can be ‘written’ out in a form understandable by humans, it does not by itself relate what it is the players will actually see, and requires expert help to even understand it in a textual form.⁶⁹ Additionally, in some games, the landscapes players explore are not even pre-set, but are randomly generated when the game is loaded by a player through a process called procedural generation.⁷⁰ A recent example that relies heavily on procedural generation is *Minecraft*, a game where players are placed in a randomly created world, within certain constraints, and are free to do as they please, destroying the world and structures they find in order to gather materials to build their own unique structures.⁷¹ As

⁶³ Atari Games Corp. v Oman, 979 F.2d 242, 245 (1992).

⁶⁴ *Id.* at 247.

⁶⁵ U.S. Copyright No. PA0000610716 (registered Feb. 6, 1987).

⁶⁶ Greg Lastowka, *Copyright Law and Video Games: A Brief History of an Interactive Medium* 11 (Rutgers School of Law, Working Paper 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321424.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Procedural Generation*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Procedural_generation (last visited Dec. 30, 2013).

⁷¹ See generally MINECRAFT, <https://minecraft.net/> (last visited Dec. 30, 2013).

Lastowka notes, courts have managed to get past this performance issue, finding that a player's actions in the game created only a variation on the producer's original design, the producer had already created the audiovisuals that the player sees.⁷²

As access to more powerful computers and technological tools has grown over the last couple of decades, so too has user-generated content. User-generated content, or UGC, is new content for finished games put together by the players and generally made available over the Internet for other users to enjoy.⁷³ This is usually seen in the form of uploaded YouTube videos, wikis,⁷⁴ fan-fiction, and artwork, all of which are nearly indistinguishable from other fan-based works.⁷⁵ Where the real difficulty becomes apparent is when players create works that incorporate or use part of the game software.⁷⁶ Whether using Bethesda's Creation Kit for *Skyrim*⁷⁷ to make an original texture or sound to use in the game (often called a 'mod') or even using the game as provided to create a unique design, as with the previously mentioned *Minecraft*, players are now capable of creating their own independent content that needs to use the software of the game in order to be presented in their audiovisual format.⁷⁸ A somewhat recent case, *Micro Star v FormGen, Inc.*, looked at an issue of authorized 'mods' to the PC game *Duke Nukem 3D*.⁷⁹ Players were allowed, and even encouraged, by FormGen to create new

⁷² Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 856-57 (2d Cir. 1982).

⁷³ See Lastowka, *supra* note 66, at 24.

⁷⁴ These are smaller encyclopedia sites similar in type to Wikipedia but devoted to a single game and generally more in depth than what Wikipedia would offer. They might offer walkthroughs on how to get past a particularly difficult part of the game or detailed statistics on the game's structure and individual parts.

⁷⁵ Lastowka, *supra* note 66, at 25.

⁷⁶ *Id.* at 26.

⁷⁷ See *Creation Kit*, ELDER SCROLLS WIKI, http://elderscrolls.wikia.com/wiki/Creation_Kit (last visited Dec. 30, 2013).

⁷⁸ Lastowka, *supra* note 66, at 26.

⁷⁹ 154 F.3d 1107 (9th Cir. 1998).

game levels and share them online on the company's website forum.⁸⁰ As with most mods, the files could not operate independently and required the game's code in order to function. Micro Star, without authorization from either FormGen or the players who created the files, compiled large collections of the mods and sold them on CDs.⁸¹ The Ninth Circuit held that these creations were, in essence, infringing derivative works that told a new story by placing the graphics already created by FormGen in a new order.⁸²

A recently significant issue with video game copyright ownership that has not yet been addressed is one of avatar ownership. In a video game, the avatar is the in-game representation of the player. Tyler Ochoa, in a recent analysis, divides the concept of an avatar into four different aspects:⁸³

The first is the visual appearance of the avatar. Just as a cartoon character has a distinctive visual appearance, an avatar may have a distinctive visual appearance.

The second are the "abilities" of the avatar, or how it is capable of moving, and what it is capable of doing (running, flying, fighting, casting spells, etc.). The third is the "behavior" of the avatar, or the manner and sequence in which those abilities are used during the course of game play. The fourth is a subset of the third, and consists of any words or "dialogue" spoken by the avatar during the course of game play.⁸⁴

⁸⁰ *Id.* at 1109-10.

⁸¹ *Id.* at 1109, 1113.

⁸² *Id.* at 1110-12.

⁸³ Tyler T. Ochoa, *Who Owns an Avatar?: Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 961-62 (2011-2012).

⁸⁴ *Id.* at 962.

Many games use a pre-generated avatar for the players, one where the player has no say or direction in what the character looks like, what abilities it has, and how it acts other than their control of it during gameplay.⁸⁵ In some games however, especially online games, avatar customization can range from something as minor as changing the color of the clothes⁸⁶ to complete control over nearly everything associated with a player's online persona. Within the player's control is the body structure of the character, what it wears, how it acts, and to an extent, what it says to other characters in the game.⁸⁷ In his article, Ochoa goes into significant detail on the choices available to players in the former massive multiplayer online role-playing game (MMORPG) *City of Heroes*.⁸⁸ While many professionally played games use pre-generated avatars, such as *Counter-Strike* or *StarCraft*, there are a number, such as *World of Warcraft*, where these kinds of options are available to the professional players. Ochoa suggests the avatars are compilations of elements provided by the game creators⁸⁹ while in his recent analysis on proprietary rights for professional gamers, Dan Burk believes that game publishers are likely granting implied permission for players to create a derivative work.⁹⁰ According to Ochoa, statutorily, the creator of an avatar would be able to enforce copyright protection using the rule of joint authorship.⁹¹ The player's creation, of course, depends on what tools are available for

⁸⁵ Some games do not allow players to make meaningful decisions, instead using cut-scenes within the game to progress the story and only allowing the player to carry out the decisions already made for them.

⁸⁶ *Quick Change*, BORDERLANDS WIKI, http://borderlands.wikia.com/wiki/Quick_Change (last visited Dec. 30, 2013).

⁸⁷ See, e.g., *Star Wars: The Old Republic* (Bioware 2012); *Skyrim* (Bethesda 2011); *Mass Effect* (Bioware 2007). In *Mass Effect*, for example, the player's decisions on what to say to other characters can change the story significantly, creating the possibility for a new story to be experienced on a second playthrough.

⁸⁸ Ochoa, *supra* note 83, at 962-64.

⁸⁹ *Id.* at 985-86.

⁹⁰ Dan L. Burk, *Owner E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1547 (2013).

⁹¹ Ochoa, *supra* note 83, at 985.

the player to use.⁹² If the character is already a pre-existing copyrighted product, or the tools only allow for minimal customization, Ochoa believes that it would be a derivative work.⁹³ When, however, the tools are sufficiently complex or provide a variety of options, and are not “substantially similar” to the base template the game provides, then the product is a character born from the mind of the player.⁹⁴ Ochoa compares this to the use of a word processor or painting program, where the writing or art uses the tools provided by the program’s creator, but is so unique that it could not be considered derivative.⁹⁵ With this idea, MMORPGs could be considered collective works, where each player’s unique avatar is an independent contribution to the collective as a whole and therefore, individually copyrightable.⁹⁶ Usually, under 17 U.S.C. § 201(c), “[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution.” Under this ideology, each player who is able to make a sufficiently unique in-game character could gain ownership of the copyright in their created avatar and the game creator, as the owner of the copyright in the collective work as a whole, would have a limited ability to reproduce and distribute the avatar.⁹⁷ The difference that arises with video games is that the game creator did not “select” or “arrange” the avatars, and owners of collective works have copyright protection in the original selection and arrangement of the work.⁹⁸ Without an arrangement to base the game creator’s protection on, the best alternative for copyright ownership of an avatar seems to be joint ownership. Under 17 U.S.C. § 101, “joint works” requires that each party made their

⁹² *Id.* at 982.

⁹³ *Id.*

⁹⁴ *Id.* at 982-83.

⁹⁵ *Id.* at 982.

⁹⁶ *Id.* at 984.

⁹⁷ 17 U.S.C. § 201(c) (2012).

⁹⁸ Ochoa, *supra* note 83, at 984; 17 U.S.C. § 101 (2012).

contribution for the purpose of merger into a larger whole, and will be inseparable.⁹⁹ In the case of the avatar, the player created the work using the template and system provided by the creator. In a joint ownership, where both contributions are inseparable, both authors are co-owners of the copyright.¹⁰⁰ The game creator holds copyright in both the game and the audiovisual elements while player holds a copyright in the avatar, created using the game's system. Both the player and the game creator could gain commercial value from the avatar, and it could give rise to further negotiation between both parties for further commercialization.¹⁰¹ There is skepticism for joint ownership, however, as game companies may not possess the requisite intent to create, jointly with the player, an inseparable work.¹⁰² Game creators are incredibly aware of the intellectual property rights in their products and protect them as best they can through the use of subscription licenses and end user license agreements (EULA).¹⁰³ For example, the EULA for the game *Kerbal Space Program* states, "All title and intellectual property rights in and to the content... is the property of the respective content owner...[t]his EULA grants you no rights to use such content."¹⁰⁴ The license prevents players from vesting rights in their creations and reserves them for the game creator. As a possibility to avoid this restriction for professional players, courts may see that cooperation with tournament organizers and players creates an implied permission to use the game in a competitive capacity, with the knowledge that it will be broadcast using the individual player's own creations, which could be considered an authorized

⁹⁹ An avatar outside of the game in which it is intended is practically useless. In a technical sense it would be mess of computer code and un-textured graphics without a way to represent it in an understandable way. As a result, the avatar is essentially inseparable from its game.

¹⁰⁰ 17 U.S.C. § 201(a).

¹⁰¹ Ochoa, *supra* note 83, at 985.

¹⁰² Burk, *supra* note 90, at 1549.

¹⁰³ *Id.*

¹⁰⁴ *End-User License Agreement*, KERBAL SPACE PROGRAM, <https://kerbalspaceprogram.com/eula.php> (last visited Dec. 30, 2013).

derivative work.¹⁰⁵ This, again, may be circumvented through a new practice instituted by Riot Games, creator of *League of Legends*. Riot pays all participants in the LCS a salary for each split (half) of the season they play in.¹⁰⁶ Players are under a contract with Riot, where they are subject to certain restrictions, at one point even limiting what games the players could stream online in their free time.¹⁰⁷ As a result, it is possible that LCS players may be considered employees for the purpose of “works made for hire.” A work made for hire is something prepared by an employee within the “scope of his or her employment.”¹⁰⁸ To be considered an “employee” for the purposes of works made for hire, a three-prong test was created in *Community for Creative Non-Violence v. Reed* which looks at agency law for determinative factors.¹⁰⁹ While Riot has not released LCS player contracts for us to review, if players were found to be employees by courts, it would not be surprising to see other game companies following suit, employing the professional players and preventing them from vesting any rights in their created avatars.

A larger issue arises when the analysis of property rights goes beyond just the player’s manifestations within the game and instead focuses on their performances *using* the game. Player performance is one of the primary ways in which players can express themselves within the constructs of the game. Not all games have an avatar for players to customize, but all games

¹⁰⁵ Burk, *supra* note 90, at 1549.

¹⁰⁶ League of Legends Championship Series: 2014 Season Official Rules 10 (version 1.01, Nov. 20, 2013), *available at* <http://riot-web-static.s3.amazonaws.com/lolesports/LCS%202014%20Regular%20Season%20Ruleset%201.01%20FINAL.pdf>.

¹⁰⁷ Cody “evoli” Conners & Rod “Slasher” Breslau, *Riot Season 4 LCS Contracts Stipulate Players Cannot Stream Dota 2, Blizzard Games*, ONGAMERS (Dec. 4, 2013), <http://www.ongamers.com/articles/riot-season-4-lcs-contracts-stipulate-players-cannot-stream-dota-2-blizzard-games/1100-261/>. This restriction was eventually removed. Pete Haas, *Riot Games Backs Down on Season 4 Contract, League of Legends Players Can Stream Whatever They Want*, CINEMABLEND (Dec. 8, 2013, 11:32:09), <http://www.cinemablend.com/games/Riot-Games-Backs-Down-Season-4-Contract-League-Legends-Players-Can-Stream-Whatever-They-Want-60947.html>.

¹⁰⁸ 17 U.S.C. § 101 (2012).

¹⁰⁹ 490 U.S. 730, 751 (1989).

will have some way for the player to influence what happens within the game and perform to the player's specifications.¹¹⁰ Similarly to avatars, players are using audiovisual works provided by the game's creators, presented in specific ways.¹¹¹ While everything generated in a player's game session is provided by the game creator, it is the ways in which they are presented that are unique. The number of possible ways to 'play' the game is essentially infinite, and games are so complex now that players may do things in ways the designers had not even considered or desired.¹¹² The question that then arises is whether the unique play session is an "authored" event subject to protection. Even not considering the e-sports implications, established sports law may be of use here, as both sports and video games involve the playing of some kind of game performance. In *National Basketball Association v. Motorola*,¹¹³ Judge Winter found that sports events were not "authored," as they have no script, are competitive in nature, and as a policy reason would impair future competition should a copyright be allowed, such as protection for the T-formation play in professional football.¹¹⁴ Game 'performances' are, essentially, practical rather than expressive.¹¹⁵ Burk disagrees with this holding, believing that a player's performance is analogous to improvisational dance rather than some practical action.¹¹⁶ Players make creative choices in their performances, especially for the purposes of showing off. In traditional sports, this is generally seen in touchdown and goal celebrations, under the leg slam dunks and alley oops, hockey goalie masks, and even hand signals in baseball. In the e-sports realm, creativity is usually expressed by going outside established strategy (called 'meta') and bringing something the other team has never seen, or playing in an inefficient, yet spectacular,

¹¹⁰ Burk, *supra* note 90, at 1548.

¹¹¹ *Id.*

¹¹² *Id.* at 1548-49.

¹¹³ 105 F.3d 841 (2d Cir. 1997).

¹¹⁴ *Id.* at 846.

¹¹⁵ *Id.* at 846-47.

¹¹⁶ Burk, *supra* note 90, at 1567.

way to show that a player is on a completely different skill level from the opponent. Player's creative choices add substantially to the game being played, whether traditional sports or e-sports. Fans don't attend games just to see goals scored; they attend to be entertained and players do their best to satisfying them. The question then, is who would own the copyright in the player's performance? Likely, as mentioned before, if players are employed by the game's creator then they would fall under work for hire.

Intellectual property rights in video games and e-sports are still in their infancy, and there are still significant gaps that cannot be filled by established law. In fact, some of these gaps may *never* be filled, as some issues may never even make it to courts thanks to licensing and contracts limiting player's rights and strengthening those of the game creators.¹¹⁷ The sad fact of a league in its infancy is the leagues and game creators have the financial power to commercialize the rights they possess while the players don't have the financial strength to challenge those rights.¹¹⁸

VII. Conclusion

While it may already be a mainstay in Korea, e-sports is still growing in North America, and will be continue to experience growing pains for foreseeable future. Some have even compared e-sports to the state baseball was in as it first began to take shape as a legitimate league.¹¹⁹ Until it grows into a stable force, there will be complex policy and doctrinal issues that arise under multiple areas of law—understandably, given the entirely new landscape e-sports creates. Geographic loyalty to a team has no meaning here; teams are not based out of a local stadium like current sports teams. Additionally, the turnover rate of players is significantly

¹¹⁷ Lastowka, *supra* note 66, at 28.

¹¹⁸ *Id.*

¹¹⁹ T.L. TAYLOR, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 151 (2012).

higher than that of traditional sports, meaning players are in the system for a shorter time and gain less exposure. E-sports cannot adopt an exact system that its physical equivalent enjoys; alternatively, it must adapt and change the legal landscape in order to grow and establish itself as a legitimate sport.