

TIME TO BE GROWN-UPS ABOUT VIDEO GAMING: THE RISING eSPORTS INDUSTRY AND THE NEED FOR REGULATION

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Ten years ago, eSports were an eccentric pastime primarily enjoyed in South Korea. However, in the past several years, eSports have seen meteoric growth in dozens of markets, attracting tens of millions of viewers each year in the United States, alone. Meanwhile, the players who make up the various teams that play eSports professionally enjoy few protections. The result is that many of these players—whose average ages are between 18 and 22—are experiencing health complications after practicing as much as 14 hours a day to retain their professional status. This Note will explore why traditional solutions, like existing labor laws, fail to address the problem, why unionizing is impracticable under the current model, and finally, suggest regulatory solutions to address the unique characteristics of the industry.

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INTRODUCTION

On October 19, 2014, 40,000 fans crowded into the sold-out World Cup Stadium in Seoul, South Korea¹ to watch the final match of a world championship series. The venue, which has an estimated capacity of over 65,000 viewers,² has roughly the same amount of seating as the stadiums where the Pittsburgh Steelers, Seattle Seahawks, and Arizona Cardinals play.³

During the pre-game show, fans enjoyed a live performance by Imagine Dragons,⁴ who played a song the group recorded specifically for the championship series.⁵ ESPN broadcasted the game internationally,⁶ and Cinemark sold out viewings in the select theatres where it screened the live broadcast.⁷ Twenty-seven million viewers tuned in to watch the series live, even though for most Americans that meant tuning in between 11:30 p.m. and 2:30 a.m.⁸ Although event viewership fell by several million from that of the previous year, data strongly suggest this was purely the result of inconvenient timing, rather than a lapse in viewer interest.⁹

1. Paul Tassi, *40,000 Korean Fans Watch SSW Win 2014 'League of Legends' World Championship*, FORBES (Oct. 19, 2014), <http://www.forbes.com/sites/insertcoin/2014/10/19/40000-live-korean-fans-watch-ssw-win-2014-league-of-legends-world-championship/>.

2. Stage design planned to limit seating from 65,000 to 45,000 for this event. See Tracey Lien, *League of Legends World Championship Poised to Sell Out 45K Seat Stadium*, POLYGON (Sept. 1, 2014), <http://www.polygon.com/2014/9/1/6094129/league-of-legends-world-championship-poised-to-sell-out-sangam-stadium>.

3. See *List of American Football Stadiums by Capacity*, WIKIPEDIA (last visited Sept. 5, 2015), http://en.wikipedia.org/wiki/List_of_American_football_stadiums_by_capacity.

4. Annette Ekin, *Pro Gamers Battle in Seoul for Championship Trophies*, WALL ST. J. (Oct. 17, 2014), <http://online.wsj.com/articles/pro-gamers-battle-in-seoul-for-championship-trophies-1413541980>.

5. Eddie Makuch, *Chart-topping American Rock Band Writes a Song Called "Warriors" to Help Promote Ongoing World Championship*, GAME SPOT (Sept. 19, 2014), <http://www.gamespot.com/articles/listen-to-the-song-imagine-dragons-wrote-for-leagu/1100-6422431/>.

6. ESPN3, *League of Legends World Championship Final*, ESPN (Oct. 19, 2014), http://espn.go.com/watchESPN/player/_id/2118425/.

7. Karen Robinson-Jacobs, *It's 'Game On', as Cinemark Looks to Boost Non-Movie Revenue*, DALLAS NEWS (Nov. 6, 2014), <http://bizbeatblog.dallasnews.com/2014/11/game-on-as-cinemark-looks-to-boost-non-movie-revenue.html/>.

8. See *Worlds 2014 by the Numbers*, RIOT GAMES (Dec. 1, 2014), <http://www.riotgames.com/articles/20141201/1628/worlds-2014-numbers> (providing statistics on the number of viewers); *League of Legends Worlds 2014 – a Primer to the Grand Finals*, PC GAMER (Oct. 15, 2014), <http://www.pcgamer.com/league-of-legends-2014-world-championship-grand-finals-a-primer/> (recapping the semi-final match and providing information on the start time for the final round).

9. Over the course of the 2015 world championship tournament, fans spent over 179 million hours watching the live matches. The 2014 world championship garnered only 70 million viewership hours. *Id.*

This vast audience gathered to watch the two final teams battle for the title, the million-dollar prize money, and the 70-pound, silver-plated Summoner's Cup that comes with a victory.¹⁰ But instead of toting protective pads or cleats, these contenders sported top-of-the-line headphones. Their arena was a stage on which ten computers were stationed against a backdrop of enormous screens where fans could watch the action unfold.¹¹ This game series was not for a traditional sport but rather for professional players of League of Legends, a video game for computers.¹²

In this Note, I will discuss how this new industry exploits its players—despite the good intentions of the leagues and teams who helped found it. In Part I, I introduce the eSports industry and describe the popular organizational model leagues use today to ensure that players and teams perform at the highest possible level. In Part II, I explain how this model makes it impossible for players to secure fair or reasonable working conditions for themselves or for other players. In Part III, I discuss why collective bargaining options are not available to professional eSports players due to the impracticability of unionizing and the obstacles imposed by antitrust law. In Part IV, I argue for regulating the industry, while recognizing the delicate balance between securing safe working conditions for the players and providing room for this still-nascent industry to grow. Specifically, I will offer three possible solutions: (1) regulating visas given to international players; (2) creating a national eSports association that reports to the existing international eSports association; and (3) formally reclassifying players as employees of their leagues or teams rather than as independent contractors.

I. WHAT ARE ESports?

Put simply, “eSports” are professional video game matches where players compete against other players before an audience.¹³ In the past few years, eSports have emerged as an increasingly popular alternative to other spectator sports, particularly among younger viewers.¹⁴ Like their traditional sports counterparts,

10. David Segal, *Behind League of Legends, E-Sports's Main Attraction*, N.Y. TIMES, Oct. 10, 2014, at BU1.

11. See ESPN3, *supra* note 6.

12. *What is League of Legends?*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/what-is-lol/> (last visited July 26, 2015).

13. *Esports*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Esports> (last visited July 26, 2015).

14. In part because the eSports industry's spike in popularity is so recent, legal scholarship on the industry is sparse. For a general introduction to eSports and some of the more popular titles, see Michael McTee, *E-Sports: More Than Just a Fad*, 10 OKLA. J. L. & TECH. 70 (2014). For a discussion of the interplay between player-generated performance and a developer-generated world, see Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013). See also Sean Comerford, *International Intellectual Property Rights and the Future of Global "E-Sports"*, Note, 37 BROOK. J. INT'L L. 623 (2012). For more information on the difficulties of regulating the industry in light of existing case law, see Robert Bryan Norris, Jr., Recent Development, *It's All Fun and Games Until Someone Gets Hurt: Brown v. Entertainment Merchants Association and the Problem of Interactivity*, 13 N.C.J.L. & TECH. ON. 81 (2011).

eSports players compete in events with a variety of styles—some compete directly against other competitors in one-on-one events (like tennis);¹⁵ others play in team events where teammates assume different roles and work cooperatively to score points against other teams (like basketball);¹⁶ and still others compete by allowing each competitor to take a turn and then compare their ultimate times/scores (like Olympic skiing or gymnastics).¹⁷ Today's most popular eSports events center on team-based play. In League of Legends, for instance, competitors face off as two teams of five.¹⁸ From their seats on stage-left or stage-right in sold-out arenas, each player selects from an ever-expanding set of in-game avatars,¹⁹ each equipped with five unique in-game abilities.²⁰ Ten player-controlled avatars materialize in the virtual League of Legends arena, where they will skirmish one another, kill nonplayer minions for in-game gold (which they can exchange for virtual items to increase their avatar's power), and ultimately fight to eliminate the opposing team by storming their opponent's base.²¹ The game operates like a combination of capture the flag and chess, with the additional spectator appeal of the lightning-fast reflexes required to anticipate and avoid the maneuvers of the human-controlled enemy players. Teams face off in weekly match-ups during the regular season, and the teams with the best records continue on to the championship rounds, where they can compete for enormous prizes.

These matchups—combined with the associated commentary, merchandising, and ticket sales—comprise the eSports industry. Audiences watch the games live, watch pre- and post-game interviews with the players, view how-to guides made by the players discussing key strategic decisions (such as which abilities to level-up first, which items to buy, etc.), and, increasingly, watch unofficial casual matches involving their favorite players. In many ways, the eSports

15. See, e.g., *StarCraft II World Championship Series*, BATTLE.NET, <http://wcs.battle.net/sc2/en/about> (last visited July 26, 2015) (providing information about StarCraft II, one of the most popular eSports to use this format).

16. See, e.g., *About*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://na.lolesports.com/about> (last visited July 26, 2015) (providing information about League of Legends's developer Riot's competitive eSports league—arguably the most popular eSports game and league in the industry as of this writing).

17. See, e.g., Denny Connolly, *Blizzard Wants to Give 'World of Warcraft' an eSports Makeover*, GAME RANT (Sept. 30, 2014), <http://gamerant.com/world-of-warcraft-esports/> (describing game developer Blizzard's efforts to add a “player-versus-environment” eSports component to the game, in which players (or teams) would compete for high scores or fastest times).

18. See ESPN3, *supra* note 6 (depicting the two 5-player teams competing in last year's world finals).

19. Currently, well over 100. See *Champions*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/champions/> (last visited July 26, 2015).

20. See *id.* (listing the available avatars and describing their unique abilities).

21. For a more complete guide on gameplay for League of Legends, see *New Player Guide*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/new-player-guide/> (last visited July 26, 2015).

industry is similar to the traditional sports from which it derives its name: it is an entertainment industry built around competition, fan loyalty, and spectatorship.

Although eSports were negligibly popular a few years ago, the recent growth rate in viewership has been enormous.²² In 2012, the League of Legends World Championship finals drew more than 8,000 attendants and over 8 million TV and online viewers.²³ In 2013, the finals took place in the Staples Center in Los Angeles, and tickets sold out in about an hour.²⁴ Online and TV viewership also increased drastically—the event garnered over 32 million viewers worldwide.²⁵ Figure 1²⁶ shows the comparative viewership of the match with U.S. viewership of other major sporting events from 2013:



Fig. 1: Viewers of eSporting Events

The 2013 League of Legends championship is (as of this writing) the most watched eSports event in history.²⁷ But with more and more viewers streaming games generally, that is likely to change.

Part of the reason for this exponential growth is the emergence of developer-sponsored leagues in which the game developer and the league owner are the same entity. These leagues are better equipped to take on the introductory costs associated with starting a new industry.²⁸ For example, one of the most popular titles for eSports currently is Riot Games's League of Legends.²⁹ The game is noteworthy not only for its popularity, but also for its ability to cultivate a large American

22. Compare *infra*, Fig. 1 (illustrating the 2013 viewership), with Jing, *League of Legends Season Two Championship*, RIOT GAMES (Oct. 17, 2012), <http://www.riotgames.com/articles/20130509/549/league-legends-season-two-championship> (showing viewership in 2012).

23. Jing, *supra* note 22.

24. Paul Tassi, *League of Legends Finals Sells Out LA's Staples Center in an Hour*, FORBES (Aug. 24, 2013), <http://www.forbes.com/sites/insertcoin/2013/08/24/league-of-legends-finals-sells-out-las-staples-center-in-an-hour/>.

25. Redbeard, *One World Championship, 32 Million Viewers*, LEAGUE OF LEGENDS (Nov. 2013), <http://na.leagueoflegends.com/en/news/esports/esports-editorial/one-world-championship-32-million-viewers>.

26. SUPER DATA RESEARCH, *ESPORTS: DIGITAL GAMES MARKET TRENDS BRIEF 4* (Apr. 2014), <http://www.superdataresearch.com/blog/esports-brief/>.

27. Redbeard, *supra* note 25.

28. This makes it challenging to define regulatory lines. See *infra* Part IV.

29. Other popular titles include Dota 2, Counter-Strike, World of Tanks, and Starcraft 2. See *Top 50 Games Awarding Prize Money*, ESPORTSEARNINGS.COM, <http://www.esportsearnings.com/games> (last visited Sept. 16, 2015).

audience—something prior competitors have struggled to do.³⁰ Part of the reason for this is that Riot assumed the costs of launching eSports for the game.³¹ These costs include running tournaments, broadcasting championship rounds, and keeping commentators and players on salary.³² Traditionally, the costs of operating eSports leagues have far out-paced profits, making it all but impossible for leagues to launch. For example, Major League Gaming, one of the largest and most established independent eSports circuits, saw profits in back-to-back quarters for the first time at the end of 2013—over ten years and \$69 million after it launched.³³ Similarly, Riot reported industry losses in 2012 and early 2013.³⁴ However, the difference is that Major League Gaming uses eSports as its primary source of revenue; Riot, on the other hand, saw \$624 million in revenue in 2013 and nearly \$1 billion in revenue in 2014 from in-game purchases.³⁵ Riot is positioned to rapidly absorb the initial losses of creating a professional league, and this explains the industry's sudden ability to grow after decades of stagnancy.

30. See Ben Casselman, *Resistance Is Futile: eSports Is Massive . . . and Growing*, ESPN (June 12, 2015), http://espn.go.com/espn/story/_/id/13059210/esports-massive-industry-growing (“[W]hile eSports have long been biggest in Asia, especially gaming-mad Korea, North America and Europe now claim 28 million eSports fans and the number is growing by 21 percent a year.”). As an example of the growing American audience, the end-of-season LCS match between North American rival teams Team SoloMid and Counter-Logic Gaming sold out Madison Square Garden for its Sunday afternoon match in August of 2015. See Sarah E. Needleman, *Inside the ‘League of Legends’ Championship at Madison Square Garden*, WSJ.COM (Aug. 23, 2015, 9:10 PM), <http://blogs.wsj.com/digits/2015/08/23/e-sports-event-scores-at-madison-square-garden/>.

31. Segal, *supra* note 10.

32. *Id.*

33. Alex Wilhelm, *Esports Giant MLG Swings to an Operating Profit on Strength of Its New Media Strategy*, TECHCRUNCH (Jan. 13, 2014), <http://techcrunch.com/2014/01/13/esports-giant-mlg-swings-to-an-operating-profit-on-strength-of-its-new-media-strategy/>.

34. Jeb Boone, *Why Coca-Cola Is Betting Big on eSports*, THE DAILY DOT (Dec. 10, 2013), <http://www.dailydot.com/esports/coca-cola-riot-games-sponsorship-league-of-legends-esports/>. Notably, Riot's latest statement that it was losing money came before the world championship series of 2013 and the 2014 seasons, both of which involved unprecedented corporate sponsorships. See *id.* In addition, fans who engage with a game by following the game in eSports are more likely to spend large amounts of money on the game—22% compared to 8% of the general player population. NEWZOO, *SIZING & PROFILING eSPORTS' POPULARITY IN THE WEST 5* (Apr. 2014), <http://www.newzoo.com/download/8407/>. Because League of Legends is a free-to-play game with an opt-in pricing model, it is also likely that what the game loses in eSports it recuperates from the increased spending and popularity that result. See Paul Tassi, *Riot's ‘League of Legends’ Reveals Astonishing 27 Million Daily Players, 67 Million Monthly*, FORBES (Jan. 27, 2014), <http://www.forbes.com/sites/insertcoin/2014/01/27/riots-league-of-legends-reveals-astonishing-27-million-daily-players-67-million-monthly> (describing how League of Legends differs from pay-to-win games and discussing its enormous monthly player base).

35. Quinten Plummer, *‘League of Legends’ a Billion-Dollar Winner for Riot Games*, TECH TIMES (Oct. 13, 2014), <http://www.techtimes.com/articles/17803/20141013/league-of-legends-a-billion-dollar-winner-for-riot-games.htm>.

Valve, the developer of popular eSports title Dota 2, illustrated this advantage when it drew national media attention to its \$10.5 million tournament prize pool.³⁶ Not only is the developer able to offer unprecedented prizes to its professional players, but it has begun to tap previously inaccessible markets with its “Newcomer’s Broadcasts”—live broadcasts of the game designed to be viewed by people unfamiliar with eSports, or even Dota 2 in general.³⁷ The end result of these developer-run leagues is that eSports are far more viewer-friendly and accessible than ever before.

Near the end of 2014, Microsoft³⁸ and Sony³⁹ each announced that they will launch eSports leagues. If the recent popularity of eSports can cross into console-gaming—video-gaming that takes place on a console such as an Xbox or PlayStation—that will open still another market for viewership.

However, developer-sponsored leagues introduce a series of complications. Unlike independent leagues, which host events on a number of games, developers like Riot and Valve are interested primarily (if not exclusively) in promoting the games they create—which is, after all, only fair. As a result, players are often placed under restrictions that limit their ability to switch between leagues or even games. For example, in the contract players signed to participate in Riot’s professional league in 2013, players had to agree not to compete in any video game competitions hosted by other leagues, or to publicize their play of certain competitors’ video games.⁴⁰

This put professional players at a substantial disadvantage. It not only minimized their bargaining power (by making it impossible for them to switch circuits or games), but also caused a significant dent in their potential incomes. In addition to their league salaries, prize winnings, and sponsorships, many professional players make money by “livestreaming”—i.e., broadcasting (or, in other words, streaming) their video game matches in real-time over websites such as Twitch.tv (“Twitch”).⁴¹ In fact, professional League of Legends player Wei Han-Dong (known in eSports by his gaming handle, “CaoMei”) retired in August of 2014 from professional gaming to livestream full-time because livestreaming brings a

36. See Vlad Savov, *The New Gladiators: Valve’s Quest to Turn E-sports into Epic Spectacle*, THE VERGE (July 20, 2014), <http://www.theverge.com/2014/7/10/5887087/valves-quest-to-take-esports-mainstream>.

37. See *id.*

38. Eddie Makuch, *Microsoft Announces Halo eSports League*, GAMEPOT (Nov. 6, 2014), <http://www.gamespot.com/articles/microsoft-announces-halo-esports-league/1100-6423409/>.

39. Vikki Blake, *Sony Launches Esports League on Playstation 4*, IGN (Oct. 15, 2014), <http://www.ign.com/articles/2014/10/15/sony-launches-esports-league-on-playstation-4>.

40. Richard Lewis, *How Fair Is an LCS Contract? We Asked a Lawyer*, THE DAILY DOT (Sept. 22, 2014), <http://www.dailydot.com/esports/lcs-contract-analysis-league-of-legends-riot-games/>.

41. Jurica Dujmovic, *Millennial Kids Can Earn \$10,000 a Month Playing Video Games*, MARKETWATCH (Nov. 4, 2014), <http://www.marketwatch.com/story/your-millennial-kid-could-earn-10000-a-month-playing-video-games-2014-11-04>.

much better salary—over \$800,000 a year.⁴² Even for nonsalaried streamers, revenue from livestreaming advertising can amount to thousands of dollars a day.⁴³ With professional player salaries estimated at around \$25,000 annually, these streaming revenues amount to a large percentage of the players' incomes.⁴⁴ If players did not have the ability to stream certain games, that would close off large percentages of their viewership, and consequently, their advertising revenues.

After the contracts detailing these limitations were leaked, Riot amended the terms to include more lenient restrictions on streaming.⁴⁵ However, this begs the question: what would have happened if the contracts had not been leaked? To its credit, Riot made the changes to its contract days after the details became public, but very few contracts between eSports leagues and their players receive such scrutiny.⁴⁶ Similar provisions may exist in other leagues or even under Riot's current, still-secret contracts, and it would be both naïve and, perhaps, unfair to expect that developers would disadvantage themselves by filling their own contracts with terms favoring players, absent any kind of third-party pressure to do so.

For instance, although public outrage led Riot to amend the leaked contract, removing the flat restriction on players' streaming, the developer left a number of other less controversial provisions intact. These include: restrictions imposing a de facto one-year statute of limitations on any claims players may wish to bring against Riot, restrictions against class actions, and a right of publicity clause that gives Riot the right to use a player's voice and image indefinitely—possibly even after

42. Emily Gera, *League of Legends Pro-Player Retires to Stream Games for More than \$800,000*, POLYGON (Nov. 3, 2014), <http://www.polygon.com/2014/11/3/7149137/league-of-legends-pro-player-retires-to-stream>.

43. See, e.g., Tom DiChristopher, *Pro Gamers Story: Get Big, Burn Out, Retire Young*, CNBC (Feb. 3, 2014), <http://www.cnbc.com/id/101380550#> (reporting on an interview with former League of Legends professional player George Georgallidis, in which he stated his livestreaming earnings could be as high as \$2,000 a day).

44. See, e.g., Jeffrey Grubb, *Ban on What League of Legends Pros Can Stream Is Fair if Salaries Are High — and They Probably Aren't*, VENTUREBEAT (Dec. 6, 2013), <http://venturebeat.com/2013/12/06/riots-lockdown-on-what-league-of-legends-pros-can-stream-is-only-fair-if-salaries-are-high-and-they-probably-arent/>; Andy Chalk, *Korean e-Sports Association Proposes Minimum Salaries for Pro Gamers*, PC GAMER (Oct. 30, 2014), <http://www.pcgamer.com/korean-e-sports-association-proposes-minimum-salaries-for-pro-gamers/> (describing a possible deal between Riot and the Korean player's union that would require Riot to pay a minimum of \$20,000 to professional Korean players).

45. See Brian Eddings, *Riot Goes Back on Its Streaming Restrictions*, COMPETITIVE GAMER (Dec. 31, 2013), <http://www.competitivegamer.net/riot-goes-back-stream-restrictions/> (describing the changes Riot made to its player contracts, which now allow players to stream competitors' games, except in settings where players are receiving sponsorship to do so).

46. See, e.g., T.L. TAYLOR, *RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING*, 251–61 (MIT Press ed., 2012) (providing a sample eSports player contract); Michael Poropat, *Contracts in ESports*, COMPETITIVE GAMER (Feb. 23, 2014), <http://www.competitivegamer.net/contracts-in-esports/>.

retirement.⁴⁷ One could understand why Riot would want to keep these terms—and why the company’s own interests prevent it from conceding every point in favor of players’ interests. However, these contract provisions become particularly troubling when one takes into consideration the average age and sophistication level of many of these professional players—high school and college-aged students who, in some cases, have dropped out of school to pursue careers in eSports.⁴⁸

And yet, even if every professional league amended its contracts to be more player-friendly, that would only resolve a fraction of the problems players face. A few hundred players are currently on salary,⁴⁹ but 6.1 million American players actually participate in eSports (amateur or otherwise).⁵⁰ While most of these players are not trying to break into the professional circuit, those that are would not benefit from even the most player-friendly of contracts between professional players and the major eSports leagues. Further, because leagues can form independently of the major companies, small amateur leagues could still form using unfavorable contract provisions. Only a widespread solution can provide protection for all players.

II. THE PROBLEMS PLAYERS FACE UNDER THE CURRENT MODEL

Many professional players are inexperienced and uneducated in the complexities of contract negotiation—an unsurprising fact when one considers their ages. In League of Legends, players can begin playing professionally at 17.⁵¹ For some other eSports, professional play can begin as early as age 14.⁵² Some players retire from the professional circuit at 19 or 20.⁵³ Most of the industry’s players are either teenagers or in their early to mid-twenties.⁵⁴

47. See Lewis, *supra* note 40.

48. See *infra* Part II.

49. Segal, *supra* note 10.

50. NEWZOO, *supra* note 34, at 4.

51. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, 2015 Season Official Rules § 1.1 (Jan. 8, 2015), https://riot-web-static.s3.amazonaws.com/lolesports/Rule%20Sets/2015_LCS_Rule_Set_2.01.pdf (“No player shall be considered eligible to participate in any LCS-affiliated match before his or her 17th birthday, defined as having lived 17 full years. This shall not, however, prevent teams from signing Free Agents who are 16 years old, granted that they may not participate in an LCS match until they turn 17.”).

52. See, e.g., LEE “FLASH” YOUNG HO, http://www.esportsearnings.com/players/1505-flash-lee-young-ho/results_by_age (last visited July 26, 2015) (showing professional player Lee Young Ho’s winnings by age—he was signed onto his first professional Starcraft team at the age of 14).

53. Ben Richmond, *E-Sports Reveal How Our Brains Age*, MOTHERBOARD (Apr. 10, 2014), <http://motherboard.vice.com/read/e-sports-reveal-how-our-brains-age>.

54. See Gi Jung Hyun et. al, *Increased Cortical Thickness in Professional On-Line Gamers*, 10 PSYCHIATRY INVESTIGATION 388, 389 (Dec. 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3902157/pdf/pi-10-388.pdf> (reporting that, in a study of 23 professional gamers, the gamers’ average age was 19.8 ± 1.7 years); Bryce C. Blum & Stephen D. Fisher, *Collective Bargaining: League of Legends Article Series*, FOSTER PEPPER 3 (Mar./Apr. 2014), <http://www.foster.com/documents/foster-pepper-whitepaper/collectivebargainingwhitepaper-fosterpepper>; Vlad Savov, *Inside the Life of a Pro*

No definitive estimates exist on the average career length for professional gamers.⁵⁵ However, studies suggest that cognitive decline begins to affect in-game performance starting at age 24.⁵⁶ League of Legends (at last count) boasts 67 million monthly players, with up to 27 million logging in to play each day.⁵⁷ For frame of reference, the increasingly ubiquitous Netflix projected it would end 2014 with 57 million monthly subscribers.⁵⁸ Only a few hundred of those players are salaried professionals.⁵⁹ With many regular players actively trying to break into the professional circuit, even a few milliseconds of delayed reaction time can create a threat to a player's professional status.

Riot's tournament structure further diminishes player job security. Not only are players susceptible to removal from their teams, but entire teams are also in constant competition to stay in the professional circuit. Each year, there are two professional gaming series called "splits," in which teams compete against each other.⁶⁰ While the top teams have the chance to compete for substantial cash prizes, Riot relegates the three teams with the worst win-loss records to a challenger series where they compete with up-and-coming rival teams for a slot in the next series.⁶¹ As of 2015, the last-ranked team is *automatically* relegated to the challenger tier, while the top-ranked challenger team is automatically moved into the professional tier.⁶² Although Riot is expanding its professional roster to include ten teams,⁶³ that

Gamer, THE VERGE (July 21, 2014), <http://www.theverge.com/2014/7/21/5919973/inside-the-life-of-a-pro-gamer/in/5645086> (describing two "veteran" players who are the most senior members of their Dota 2 team—at ages 22 and 25).

55. However, in a recent study examining 23 professional gamers who were all members of the Korean eSports Players' Association, the average career length of the subjects was 4.0 years. See Hyun, *supra* note 54, at 389. Other estimates put that number lower, especially for reflex-driven StarCraft, where eSports careers are reported to last only two to three years. See Emily Gera, *Why the Unionization of eSports Is a Difficult if not Impossible Road*, POLYGON (July 19, 2013), <http://www.polygon.com/2013/7/19/4506524/gaming-will-be-a-legitimate-profession-for-hundreds-in-next-few-years>.

56. Joseph J. Thompson et. al, *Over the Hill at 24: Persistent Age-Related Cognitive-Motor Decline in Reaction Times in an Ecologically Valid Video Game Task Begins in Early Adulthood*, 9 PLOS ONE 1, 4 (Apr. 2014), <http://www.plosone.org/article/doi/10.1371/journal.pone.0094215&representation=PDF>.

57. Tassi, *supra* note 34.

58. See *Letter to Shareholders*, NETFLIX, INC. (Oct. 15, 2014), http://files.shareholder.com/downloads/NFLX/3508269770x0x786677/6974d8e9-5cb3-4009-97b1-9d4a5953a6a5/Q3_14_Letter_to_shareholders.pdf.

59. Segal, *supra* note 10.

60. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, *supra* note 51, at § 7.3.15.

61. See Rich Greenhill, *Promotion and Relegation Changes for 2014 Season*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Aug. 1, 2013), <http://na.lolesports.com/articles/promotion-and-relegation-changes-2014-season> (describing the relegation process).

62. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, *supra* note 51, at § 7.3.15.

63. See Rick Allen, *2015 Season: 10 Teams, Expansion Tournament & Circuit Points*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Aug. 28, 2014),

still means that twice a year, 30% of all Riot's professional teams must fight to retain their status.

As a result of the combined forces of nearly limitless competition and nonexistent job security, eSports players must practice constantly. For some, that means training 14 hours a day.⁶⁴ This includes about eight hours a day of scrimmage matches against other professional teams the players will face in tournaments,⁶⁵ time spent conducting drills, and time spent streaming.⁶⁶ Some players work even longer—up to 19 hours a day.⁶⁷ Players striving to enter the professional circuit may play as many or more hours a day.

Tragically—if perhaps unsurprisingly—these pressures on young players come at a heavy price. In August of 2015, the Electronic Sporting League became the first major eSports league to subject players to drug testing after at least one player admitted to taking Adderall to enhance his performance.⁶⁸ On October 16, 2014, professional gamer Terrance Moore (“PushaTee88”), then 26 years old, passed away in the middle of a livestream tournament.⁶⁹ In April of 2014, 22-year-old professional League of Legends player Hai Du Lam was hospitalized with a collapsed lung—he continued to log five-hour practice sessions even in the hospital.⁷⁰ Cheon Min-Ki (then 17 years old), another League of Legends

<http://na.lolesports.com/articles/2015-season-10-teams-expansion-tournament-circuit-points>.

64. See, e.g., Patrick Hruby, *So You Wanna Be a Professional Video Game Player?*, ESPN (Oct. 11, 2007), <http://sports.espn.go.com/espn/page2/story?page=hruby/071008> (interviewing a player who practiced 14 hours a day leading up to tournaments); DiChristopher, *supra* note 43 (describing how professional League of Legends player George Georgallidis played for 14 hours a day).

65. See DiChristopher, *supra* note 43.

66. See Chelsea Stark, *Gaming to Pay the Rent*, MASHABLE (Oct. 7, 2014), <http://mashable.com/2014/10/07/gaming-to-pay-the-rent/> (interviewing professional League of Legends player Robert Lee about his daily schedule, which includes eight hours of team practice a day followed by more League of Legends training).

67. See, e.g., Jon Robinson, *Life of a Professional Gamer*, ESPN (Jan. 4, 2012), http://espn.go.com/espn/thelife/videogames/blog/_/name/thegamer/id/7420111.

68. See Saira Mueller, *eSports Drug Testing Update: ESL Announces List of Banned Substances Including Adderall, Cocaine, Pot, Steroids and More*, INT'L BUS. TIMES (Aug. 12, 2015, 10:28 AM), <http://www.ibtimes.com/esports-drug-testing-update-esl-announces-list-banned-substances-including-adderall-2050245>. In an interview, professional player Kory Friesen (“SEMPHIS”), the player who admitted to taking Adderall, stated “We were all on Adderall,” and “everyone does Adderall.” Matt Kamen, *Pro-Gamer Admits to Doping in eSports*, WIRED.CO.UK (July 16, 2015), <http://www.wired.co.uk/news/archive/2015-07/16/esports-doping-admission>.

69. Rob Crossley, *Donations Pour in After Pro-Gamer Dies During Tournament*, GAMESPOT (Oct. 21, 2014), <http://www.gamespot.com/articles/donations-pour-in-after-pro-gamer-dies-during-tour/1100-6423078/>.

70. Ferguson Mitchell, *'League of Legends' Star Plays with a Collapsed Lung from Hospital Bed*, THE DAILY DOT (Apr. 30, 2014), <http://www.dailydot.com/esports/league-of-legends-cloud-9-hai-du-lam/>. To be clear, Hai was not *required* to practice during this time—but this only illustrates the gap between players' required schedules and their actual working hours.

professional, jumped from a 12-story building in an attempted suicide after revealing his team's alleged match-fixing.⁷¹

As potential earnings for professional players increase, the competition for coveted top-tier spots continues to grow—further increasing the pressure on elite players. Despite a growing need, players are unable to negotiate better terms due to a lack of collective bargaining power. In traditional American sports, unions protect players; in eSports, no such union exists. To make matters worse, league contracts are generally unavailable for public view or comment, and individual players are often ill-equipped to negotiate terms.

Unlike eSports professionals, traditional athletes have successfully applied their collective bargaining power to secure better working conditions for players. For instance, on August 1, 2001, Korey Stringer, a professional NFL player for the Minnesota Vikings, became the first professional football player to die from heat stroke.⁷² In the next “real opportunity” to negotiate better labor conditions in 2011, players were able to secure significant changes to practice requirements and schedules.⁷³ The league reduced offseason workouts from 14 weeks to 9 weeks, limited training camps to only one 3-hour padded practice per day, and allowed teams to hold only 14 total padded practices during the regular season.⁷⁴ Padded practices are only one form of practice, and during the 17-week regular season players still endure an intensive practice schedule,⁷⁵ but shaving five weeks of training camp also means that players receive a longer break. Professional eSports players enjoy no such freedom; where NFL players may work 50 hours a week for 16 weeks out of a year, eSports players must play almost constantly to remain competitive, even during the off-season.⁷⁶

In fact, the eSports industry would have to undergo substantial changes just to meet its goal of having collegiate teams because its current model leaves it severely out of compliance with Title IX and NCAA bylaw requirements.⁷⁷ The

71. Ferguson Mitchell, *League of Legends' Pro Attempts Suicide After Match-Fixing Scandal*, THE DAILY DOT (Mar. 13, 2014), <http://www.dailydot.com/esports/league-of-legends-promise-suicide-match-fixing/>.

72. Thomas George, *Pro Football; Heat Kills a Pro Football Player; N.F.L. Orders a Training Review*, N.Y. TIMES, Aug. 2, 2001, at D4.

73. See, e.g., Tom Withers, *NFL 2014: Coaches and Players Alike Struggle with Lack of Contact Practices*, ASSOCIATED PRESS (July 23, 2013), <http://www.foxnews.com/sports/2013/07/23/nfl-2014-coaches-and-players-alike-struggle-with-lack-contact-practices/>. This “next real opportunity” arose as the negotiating opportunity in which the players were able to put their collective bargaining power to real effect.

74. See Chris Deubert et. al, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 74 (2012).

75. During the regular season, players may work up to 14-hour days as many as three days a week. See Matt Bowen, *An Inside Look at 'Game Week' in the NFL*, BLEACHER REPORT (Sept. 2, 2013), <http://bleacherreport.com/articles/1756606-an-inside-look-at-game-week-in-the-nfl>.

76. See Stark, *supra* note 66.

77. See McTee, *supra* note 14.

NCAA requires that players practice no more than 20 hours a week⁷⁸—a far cry from the 60-plus hours needed to stay competitive under the current eSports model. The equal opportunity requirement under Title IX would also prove problematic in an industry overwhelmingly dominated by men.⁷⁹ Meanwhile, collegiate tournaments continue to take place around the country, drawing viewership and advertising revenue opportunities despite their lack of compliance.⁸⁰

Player conditions are particularly troubling when one recalls⁸¹ that many of these professional players are minors.⁸² Although Riot has a self-imposed minimum age of 17⁸³ for its professional League of Legends players, other developers and leagues can—and do—allow teams to contract with even younger teenagers.⁸⁴ In traditional sports, collectively bargained agreements handle questions of age minimums,⁸⁵ in their nascent stages, traditional American sports also accepted players of all ages.⁸⁶ It took decades of negotiation and litigation to reach the point where leagues included age restrictions as part of a collectively-bargained agreement.⁸⁷

The fact that game developers are now also league owners gives them even greater control over the players. In its capacity as the game developer, for instance, Riot polices player behavior to ensure that players conform to the game's rules of conduct.⁸⁸ As the league owner, it wields similar authority—not only can Riot ban

78. See *id.* (discussing the bylaw requirements for both on-season and off-season).

79. See *id.* (discussing the difficulties of complying with the Title IX requirements); see also 34 C.F.R. § 106.41 (2000) (“Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

80. See *North American Collegiate Champion Series*, LEAGUE OF LEGENDS, <http://promo.na.leagueoflegends.com/en/nacc-2015/> (last visited July 26, 2015).

81. See discussion *supra* notes 51–54.

82. See Blum & Fisher, *supra* note 54, at 3; Vlad Savov, *Inside the Life of a Pro Gamer*, THE VERGE (July 21, 2014, 8:46 AM), <http://www.theverge.com/2014/7/21/5919973/inside-the-life-of-a-pro-gamer>.

83. Richmond, *supra* note 53 (explaining that no player under 17 may compete in a match—but allowing teams to sign and practice with 16-year-olds provided they do not participate in professional matches until age 17).

84. See, e.g., Lee “Flash” Young Ho, E-SPORTS EARNINGS, http://www.esportsearnings.com/players/1505-flash-lee-young-ho/results_by_age (last visited Nov. 10, 2014) (charting professional player Lee Young Ho’s winnings by age—he was signed onto his first professional Starcraft team at the age of 15).

85. See, e.g., Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN. ST. L. REV. 341, 353–54 (2010).

86. *Id.* at 343.

87. *Id.* at 343–54.

88. See *The Summoner’s Code*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/summoners-code/> (last visited Nov. 10, 2014) (describing the code of conduct that League of Legends players must adhere to).

a player from the league, but it can also ban a player from the game itself.⁸⁹ In a traditional sports league, even if a league were to eject a player, it would have no power to ban the player from the sport itself—a player ejected from the NBA could not be banned from all of basketball.

In eSports, the game developer also owns the intellectual property rights to the game,⁹⁰ so Riot (as the developer) can issue bans on players in its own league and on players in other, third-party League of Legends leagues. Riot (as the league owner) can also impose fines or issue bans on its league players where players do not follow the rules that Riot (as the developer) has created.⁹¹ Unlike most sports leagues,⁹² players and teams cannot appeal these rulings.⁹³

The two solutions most commonly discussed for eliminating bargaining power discrepancies are antitrust law and unionization. However, for the reasons discussed below, neither option is feasible for today's eSports players. Meanwhile, as the industry continues its explosive growth, the need for a solution becomes increasingly apparent—especially as the window for creating such a solution may simultaneously be closing. Although eSports events are frequently international in nature⁹⁴ (a complicating factor in establishing regulatory norms⁹⁵), the United States enjoys an evanescent regulatory advantage in that the vast majority of the most popular eSports titles on the market today are from developers based in the United States. Ironically, because of the current prevalence of developer-sponsored leagues, the United States could use its monopolistic advantage to establish industry

89. See, e.g., Eddie Makuch, *Pro League of Legends Player Banned for Anti-Semitism*, GAMESPOT (Jan. 24, 2013), <http://www.gamespot.com/articles/pro-league-of-legends-player-banned-for-anti-semitism/1100-6402913/> (describing two lifetime League of Legends bans issued against professional players).

90. There is still debate as to whether a player's own performance within the game—particularly in eSports—triggers any kind of ownership. See Burk, *supra* note 14, at 1536–37; see also *infra* Part IV.

91. See, e.g., Richard Lewis, *No Appeals Process for LCS Fines—TSM's Reginald Must Pay*, THE DAILY DOT (Aug. 20, 2014, 9:52 AM), <http://www.dailydot.com/esports/tsm-reginald-fine-riot-games/> (describing an instance where a professional player was fined \$2,000 for breaking a rule).

92. See, e.g., Michael McCann, *The Legal Arguments Tom Brady May Deploy in His Deflategate Appeal*, SI.COM (June 22, 2015), <http://www.si.com/nfl/2015/06/22/tom-brady-roger-goodell-nfl-deflategate-appeal> (chronicling New England Patriots quarterback Tom Brady as he appeals the controversial “deflategate” penalty that would remove him from the first few games of the 2015–2016 football season—an appeal he is entitled to because the collectively bargained agreement provides him with the right).

93. Although Andy Dinh denied Riot's claim that it had warned him about a certain behavior before imposing a fine (and even offered to match the fine with a donation to charity if it would produce evidence), Riot's decision was final. See, e.g., Lewis, *supra* note 91.

94. See Tassi, *supra* note 1.

95. See, e.g., Vint Cerf, Patrick Ryan & Max Senges, *Internet Governance Is Our Shared Responsibility*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 4 (2014) (discussing the difficulty of regulating in an environment where multiple governments claim jurisdiction).

expectations that would take effect in China, Korea, and other countries where eSports are widely popular.

However, that opportunity may be short-lived for two reasons. First, as this Note has discussed, Riot's (and other developers') efforts to legitimize the eSports industry have resulted in exponential growth—not only in audience, but also in revenue.⁹⁶ A likely result of such growth is that international competitors will begin to enter the professional gaming scene, quickly limiting the enforceability of any regulation passed in the United States to protect its players. (On the other hand, if those regulations have already cemented themselves as industry norms, newcomers will have to adapt to those norms to keep competitive.)⁹⁷ Second, as more popular games are developed internationally,⁹⁸ any one country's regulatory power over the industry as a whole decreases.⁹⁹ In sum, the United States has a chance to set the tone for the working conditions in the industry. But, in a few years, it might be too late.

III. THE COMPLICATIONS WITH COLLECTIVE BARGAINING

The above factors suggest that eSports players might benefit from unionization, but that is a challenge in and of itself. First, where players' unions have formed in sports, high-profile players had to forfeit one or two years' income to help launch the unions.¹⁰⁰ Income forfeiture requires two attributes that today's professional eSports players do not have: (1) average careers longer than two years, and (2) widespread fan loyalty to specific players.

As previously discussed, the eSports model today requires both players and teams to compete for their places on the current season's roster.¹⁰¹ For instance, Riot's rules provide that teams may add or drop players from their professional teams mid-season, in which case Riot's only requirement is to pay the players a prorated sum of the minimum compensation for the games that the players actually played.¹⁰² Teams can (and do) drop players mid-season for up-and-coming players

96. This may explain why, for the first time in ten years, third-party leagues make a quarterly profit. *See* Wilhelm, *supra* note 33.

97. *See infra* Part IV (discussing the Korean eSports Player's Association and its successes in setting norms internationally).

98. Examples of current popular titles from international developers include *Minecraft*, by Sweden's Mojang (the company was later acquired by Microsoft), *Diamond Dash*, by Germany's Wooga, and *Clash of Clans*, by Finland's Supercell. *See* *Clash of Clans*, SUPERCCELL, <http://www.supercell.com/en/games/clashofclans/> (last visited Sept. 16, 2015); *Diamond Dash*, WOOGA, <http://www.wooga.com/games/diamonddash/> (last visited Sept. 16, 2015); MINECRAFT, <https://www.minecraft.net/> (last visited Sept. 16, 2015).

99. *See, e.g.*, Cerf, *supra* note 95, at 4 (discussing the difficulty of regulating in an environment where multiple governments claim jurisdiction).

100. *See* Emily Gera, *Why the Unionization of eSports Is a Difficult if not Impossible Road*, POLYGON (July 19, 2013, 9:15 AM), <http://www.polygon.com/2013/7/19/4506524/gaming-will-be-a-legitimate-profession-for-hundreds-in-next-few-years>.

101. *See supra* Part II.

102. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, *supra* note 51, at § 2.2.

from the pool of would-be professionals.¹⁰³ Because the teams themselves are fighting to retain their places within the leagues, they have an incentive to drop players as soon as they start underperforming. This practice undermines the formation of a player's association on two fronts: it leads to shortened professional careers and to an expectation among fans that their favorite players are replaceable.

The regulatory model is more like the European professional sports model than the American version.¹⁰⁴ However, the American leagues are still subject to American laws, which is problematic for players; the European model is predicated on a foundation of regulation that already resolves many of the problems that American professional players must negotiate by collective bargaining.¹⁰⁵

The problems with unionization are not only limited to the practical issue of league structure. In its league rules, Riot makes it clear that players are independent contractors who are not, and indeed, cannot be Riot employees.¹⁰⁶ Under the National Labor Rights Act ("NLRA"), only employees have a legal right to unionize.¹⁰⁷ It is also an "unfair labor practice" under the NLRA to refuse to engage in collective bargaining only with *employees*.¹⁰⁸ Therefore, even if a large number of professional players were to go on strike and form a collective bargaining group with a representative, Riot and the league teams would be under no obligation to negotiate with them.

Moreover, because of their status as independent contractors, players seeking to unionize risk running afoul of federal and state antitrust laws.¹⁰⁹ Specifically, the kinds of activities engaged in by labor unions, such as collective bargaining, can be viewed as anticompetitive behaviors in violation of 15 U.S.C. § 1, which provides that any "conspiracy[] in restraint of trade or commerce among

103. There is a requirement that a team that won its promotion match to reach the professional circuit keep at least three players from its roster who helped it win that match—there is no similar requirement for established teams. *See id.* § 3.2. Riot has imposed a window that limits the dates when trades can take place. This window allows teams to trade, sign, and drop players until the regular season is nearly 80% complete *See, e.g., id.* § 4.3.2.1.

104. *See* Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 408 (2009).

105. *See, e.g., id.* at 408–09 (describing some of the regulations that exist to protect players; for example, there are rules ensuring that minors are supported in pursuing academics while on professional teams, and that they are not moved too far away from their homes); *see also id.* at n.12 (quoting RICHARD PARRISH & SAMULI MIETTINEN, *THE SPORTING EXCEPTION IN EUROPEAN UNION LAW* 20 (2008) (European sports law, compared to American sports law, "has traditionally stressed, with or without good cause, the more socio-cultural and noncommercialized aspects of its activity.")).

106. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, *supra* note 51, at § 1.4.

107. *See* 29 U.S.C. § 157 (2012).

108. *Id.* § 158(a)(5).

109. *See* Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 168–70 (2005) (discussing how so-called dependent contractors in other fields have struggled with antitrust law despite the fact that their work makes them more similar to typical employees than typical independent contractors).

the several States, or with foreign nations, is declared to be illegal.”¹¹⁰ Because collectively bargaining, or otherwise trying to secure better working conditions as a group, puts a restraint on trade, unionizing without the legal right to do so technically violates the Sherman Act.¹¹¹ This is a problem not unique to eSports players; independent contractors have long grappled with this obstacle to collective bargaining.¹¹² On the other hand, employee-formed unions are protected because 15 U.S.C. § 17 shields labor organizations from liability under the Sherman Act.¹¹³ The Supreme Court of the United States has held that this same protection does not extend to labor organizations formed by independent contractors.¹¹⁴

In sum, players face a triple-threat against unionization. First, the transient nature of each player’s professional status means they lack the practical ability to unionize. Second, as independent contractors, they have no legal rights to form a union; even if they managed to do so, current laws would not require league owners to negotiate with an attempted union. Finally, even if they overcame each of the previous obstacles, they could find themselves facing liability under antitrust laws for using that labor organization to help them negotiate better terms as independent contractors.

There is no doubt that having some kind of a collective organization that acts separately from the leagues themselves could benefit players. In Korea, the Korean e-Sports Association (a government-created group that manages eSports within the country), successfully negotiated with Riot last year to introduce new policies for the upcoming 2015 season, including a one-year minimum contract length for players and minimum player salaries.¹¹⁵ These changes apply only to Riot’s Korean league, but they underscore the impact that organized bargaining can have. Of course, in this case, the bargaining entity is not a player’s association, but a government-created agency.

IV. GETTING THE GOVERNMENT INVOLVED: THE WHY AND THE HOW

Among other barriers, public reluctance to accept professional video gaming as a real career, and the resulting industry as a real industry, impedes the regulation of eSports.¹¹⁶ While it may have amounted to little more than a niche

110. 15 U.S.C. § 1 (2012).

111. *See id.* § 17.

112. *See, e.g.,* L.A. Meat & Provision Drivers Union, Local 626 v. United States, 371 U.S. 94 (1962); Kennedy, *supra* note 109; *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98, 105 (1957).

113. 15 U.S.C. § 17.

114. *See L.A. Meat & Provision Drivers Union*, 371 U.S. at 101.

115. *See* Radoslav “Nydra” Kolev, *KeSPA, Riot, and OGN Finalize the Korean 2015 Circuit Reform*, GOSU GAMERS (Nov. 11, 2014), <http://www.gosugamers.net/lol/news/29039-kespa-riot-and-ogn-finalize-the-korean-2015-circuit-reform>.

116. For an example of this debate, and the argument against recognizing eSports as a legitimate industry, see Vlad Savov & Sam Byford, *Can Video Games Be Sports?*, THE

hobby in the past, the recent astronomical growth of eSports suggests that it is time for the public to take the industry seriously. Twitch, which allows players to stream eSports matches live, hosted the League of Legends championship series. Twitch subsequently emerged in February of 2014 as the fourth largest internet traffic producer in the United States, behind only Netflix, Google, and Apple.¹¹⁷ In 2013 alone, Twitch had 45 million unique viewers who viewed a combined 2.4 billion hours of gameplay.¹¹⁸ A growing number of those viewers are in the United States; as of early 2014, estimates showed that 31.4 million people in the United States either watched or participated in eSports.¹¹⁹ In 2014, Amazon paid \$1.1 billion to acquire Twitch.¹²⁰ In an industry based on spectatorship, these are hardly the kind of numbers that one would associate with a negligible hobby.

Additionally, eSports generates significant advertising revenue opportunities because its consumers represent key advertising demographics.¹²¹ This has encouraged major advertisers to begin sponsoring leagues and events. Coca-Cola recently partnered with Riot Games to sponsor some of its League of Legends eSports games, with one representative stating that League of Legends had a higher viewership in key demographics than the NFL Super Bowl.¹²² In addition to league sponsorships, many organizations are now sponsoring specific teams, including computer hardware companies,¹²³ furniture and marketing companies,¹²⁴ and the U.S. Air Force Reserve.¹²⁵ In 2014, Robert Morris University became the first U.S.

VERGE (July 11, 2014, 1:30 PM), <http://www.theverge.com/2014/7/11/5890907/can-video-games-be-sports>.

117. *Twitch is 4th in Peak US Internet Traffic*, TWITCH BLOG (Feb. 5, 2014), <http://blog.twitch.tv/2014/02/twitch-community-4th-in-peak-us-internet-traffic/>.

118. *See* SUPER DATA RESEARCH, *supra* note 26, at 3.

119. *Id.* at 5.

120. David Carr, *Amazon Bets on Content in Deal for Twitch*, N.Y. TIMES, Aug. 31, 2014, at B1.

121. In the United States, 60% of eSports viewers are between 21 and 35 (43% male and 17% female). NEWZOO, *supra* note 34, at 4. In addition, 52% of eSports viewers are married, and eSports viewers are more likely to be employed full-time than the general population. *Id.* at 4–5.

122. Rod “Slasher” Breslau, *Riot Games: “We See the Shelf Life of LoL as Hopefully Decades,”* ONGAMERS NEWS (Jan. 21, 2014), <http://www.ongamers.com/articles/riot-games-we-see-the-shelf-life-of-lol-as-hopefully-decades/1100-694/> (“The Super Bowl is a massively viewed event with 111+ million viewers every time the Super Bowl happens. But when you start to layer on a gender and certain age split that we’re very interested in as a consumer packaged good company, you layer that on the Super Bowl and it comes pretty far down. An audience that what [*sic*] Riot has created has actually eclipsed it several fold.”).

123. *See, e.g., Sponsors, TEAM SOLOMID*, <http://www.tsm.gg/index.php/p/sponsors/> (last visited July 29, 2015) (listing the current sponsors for professional gaming team Team SoloMid).

124. *See, e.g., id.* (listing as sponsors, among others, marketing company Sideqik and furniture company NEEDforSEAT USA).

125. In 2014, League of Legends team Cloud9 announced the Air Force Reserve sponsorship on its website, becoming the first eSports team to be sponsored by a military

college to offer an athletic scholarship to members of the school's varsity League of Legends team,¹²⁶ and New York University began offering a course in competitive video-gaming: "Introduction to StarCraft."¹²⁷

All told, the eSports industry has no doubt permeated and transformed commerce. Its high economic yields alone should warrant regulation, but the dynamic of players' rights adds another layer of justification. The problem is that eSports is an industry that exists adjacent to—and unquestionably because of—the Internet, and governments have struggled in the past to create efficient and adaptive internet regulations.¹²⁸ However, many of the problems players face are not inherently tied to the Internet or even to the video games themselves, but rather to the structures of the dominant eSports leagues. Borrowing from the European play model but failing to adopt the European safeguards and philosophies, these leagues disadvantage players by giving them the worst of both worlds. Ideally, either the structure would change to more similarly reflect the American sports league system, or eSports leagues would face the same requirements imposed on similarly-modeled European sports leagues.

Another problem with any regulatory scheme—but especially one connected with the Internet—is enforcement.¹²⁹ In particular, it would be difficult, if not impossible, to craft regulations that would affect current and future professional league players without simultaneously penalizing casual, not-for-profit, nationwide leagues. To avoid this problem, regulation would have to be specifically directed toward for-profit leagues—but in an industry where even amateur players and teams generate advertising revenue from streaming their games, drawing a line that properly separates the professional leagues from the amateur is a challenging proposition. This is especially true given the still-evolving nature of the industry; maintaining effective regulation would require constant monitoring of the contours of the leagues and how money is made, shared, or distributed. Even if it could be done, enforcement of such tailored rules could prove an expensive and time-intensive process.

To better achieve enforcement, the federal government could create a private right of action so that players could sue for enforcement of government-created regulations in court. The problem with this model is two-fold: first, it would be challenging to pass a set of laws that would be adaptive enough to keep up with

branch. Jack Etienne, *Air Force Reserve Sponsors League of Legends Gaming Team*, CLOUD9 (May 30, 2014), <http://cloud9.gg/news/air-force-reserve-sponsors-c9>.

126. Douglas Belkin, *Liberal Education: At This College, Videogames Are a Varsity Sport*, THE WALL ST. J. (Sept. 1, 2014, 10:35 PM), <http://online.wsj.com/articles/a-college-offers-videogame-scholarships-for-league-of-legends-1409625331>.

127. *Introduction to StarCraft*, NYU, <https://specialprograms.tisch.nyu.edu/object/OART-UT1615.html> (last visited Jan. 14, 2015).

128. See, e.g., Cerf, *supra* note 95, at 5 ("A fundamental challenge to governing conduct on the Internet is that the speed of innovation on this complex network is so high that traditional regulatory practices can't keep up.").

129. See Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 453 (2000).

the rapidly evolving eSports industry; second, in an industry already famous for its high cost of entry, such regulation might destroy it altogether.

Fortunately, there are three possible solutions that would allow the government to regulate the eSports industry without inhibiting growth or requiring a new set of laws every time a new style of game becomes popular: regulating the visas, forming an eSports association of its own, or reclassifying eSports players as employees.

A. Regulate the Visas

League of Legends made waves in 2013 when it successfully procured athletic visas for its international competitors.¹³⁰ Currently, several of the most high-profile League of Legends players are international players, and Riot regularly hosts international tournaments in the United States and overseas. Other professional or semi-professional leagues also host international tournaments and players. Conversely, amateur and casual leagues almost never seek visas for their international players.

Regulating players' visas would allow the government to impose a few restrictions on professional leagues without compromising the amateur/casual market. For instance, if the government only issued athletic visas for competitive play in leagues with an active player's association, league owners would have an incentive to allow such unions to form. Furthermore, because this method uses an "opt-in" approach, leagues could self-select whether to operate as international organizations or as local leagues. Major eSports teams regularly compete internationally, which would likely mean that all for-profit leagues would want to be eligible for athletic visas to attract major international talent.

This approach is perhaps the simplest, but it is not without risks. Leagues could avoid the regulatory effects of athletic visas by moving their operations overseas, relying on the fact that most of their audience streams the games online anyway. Ironically, this could put players in an even weaker bargaining position than they are in already because teams would have to relocate to allow international teammates to practice together. A player who has relocated with his team to another country (possibly one where he doesn't speak the language or where he knows nobody outside of his team) is ill-positioned to negotiate better contract terms.

However, as eSports continue to grow and live audiences promise ticket, concession, and merchandise sales, this outsourcing solution becomes less attractive to league owners. In addition, with players' associations already operating in several of the most prominent eSports markets, it is unlikely that these companies would go to such lengths and expense to avoid collective bargaining locally. In other words, visa regulation does impose some risks, but they are unlikely to actualize given the other factors in play.

130. See Paul Tassi, *The U.S. Now Recognizes eSports Players As Professional Athletes*, FORBES (July 14, 2013, 11:27 AM), <http://www.forbes.com/sites/insertcoin/2013/07/14/the-u-s-now-recognizes-esports-players-as-professional-athletes/>.

B. Form an eSports Association

Korea has the Korean eSports Association (“KeSPA”), the United Kingdom had the United Kingdom eSports Association (“UKeSA”),¹³¹ and China has the Association for Chinese eSports (“ACE”).¹³² In broader terms, the International e-Sports Federation (“IeSF”), which is made up of associations from dozens of countries,¹³³ represents eSports interests on an international scale. Notably absent from this list is any kind of United States eSports Association.

An organization operating separately from players, game developers, and (to the extent that they are separate from developers) leagues could ensure some uniformity, as well as help to resolve some of the more egregious problems. However, in order to be successful, such an organization would require at least some kind of government support. UKeSA failed in 2009,¹³⁴ with at least one industry insider remarking:

I still believe esports needs a governing body and in particular one in the UK, but it needs to be government driven or sponsored AND must include the community at large, not just those wanting to profit from esports. It will be a long time before an organisation of this nature can make a profit, but the advantages of a combined, rule defining organisation on standards in esport[s] would help tremendously.¹³⁵

In practice, UKeSA’s failure compared to the (admittedly arguable) success of KeSPA supports the idea that government involvement may be necessary

131. UKeSA launched in 2009 and failed in December of the same year. See Greg Lockley, *How eSports Is Becoming a Legitimate Sport*, MCV (Jan. 23, 2014, 3:20 PM), <http://www.mcvuk.com/news/read/how-esports-is-becoming-a-legitimate-sport/0127144>.

132. See Matthew ‘Cyborgmatt’ Bailey, *The Association for Chinese Esports (ACE) Sets Transfer Deadline of August 26th*, ONGAMERS (Aug. 8, 2014), <http://www.ongamers.com/articles/the-association-for-chinese-esports-ace-sets-trans/1100-2073/> (describing one of the recent requirements imposed on teams by ACE).

133. MEMBER NATIONS, INTERNATIONAL E-SPORTS FEDERATION, <http://www.iesf.com/en/about/nations.php> (last visited July 29, 2015).

134. See Sean Daisy, *What’s the Future for eSports in the UK? UKeSA: The Rise and Demise of ‘The Football Association of Gaming’*, POSTDESK (Jan. 24, 2012, 10:00 AM), <http://www.postdesk.com/ukesa-uk-esports-gaming-future>. An elected UKeSA Community Council member had this to say about the organization’s demise:

[T]he masterminds behind UKeSA[] came into the UK e-sports scene like a pack of drunken Vikings emerging from a longboat, and went to work. No subtlety in their approach, they simply started to pump money into the UK eSports scene, taking over things they wanted, even if they didn’t understand exactly why they wanted them.

Richard Lewis, *Gonzorrah: UKESA’s Great Failure*, ESPORTSHEAVEN (Sept. 28, 2009, 7:55 PM), <http://www.esportsheaven.com/articles/view/348>.

135. Tom Souter, *eSports in the UK*, TP REVIEW (July 23, 2013), <http://www.tpreview.co.uk/blog/2013/07/23/esports-in-the-uk/> (quoting Paul “ReDeYe” Chaloner, then head of content and media at Turtle Entertainment, which is the company behind the Electronic Sports League).

to ensure that a national eSports association does not fold; however, the scope of that involvement could be minimal. For example, a North American eSports Association could petition for membership in the IeSF and then largely (or wholly) defer to the larger group's regulations. One advantage of that approach is that it would ensure uniformity between countries, which as this Note has discussed, is one of the obstacles to any eSports regulation. The biggest disadvantage is that it sacrifices U.S. autonomy in shaping the future of the industry¹³⁶—as well as the autonomy of independent league creators from game developers. However, with a uniform set of regulations that enforcers can evenly apply across nations, future entrepreneurs could permeate international markets without having to adjust their competition models first.

C. Require Leagues to Classify Paid Players as Employees

Most of the obstacles to a collectively bargained agreement would be eliminated if professional players were employees, rather than independent contractors. Specifically, players could freely organize under the NLRA and would not be subject to liability under the Sherman Act. There is some legal justification for this classification. Applying the common law agency control test used by the Supreme Court in *Community for Creative Non-Violence v. Reid*¹³⁷ (and then formally adopted in *Nationwide Mutual Insurance Company v. Darden*¹³⁸), professional eSports players arguably qualify as employees notwithstanding Riot's attempts to classify them as independent contractors.

Professionals could achieve employee status if the legislature passed a law designating professional players as employees. This is an unlikely solution, however, given the general lack of awareness of the eSports industry. Alternatively, one or more players could bring suit alleging their league or team has violated some form of labor law.¹³⁹ In determining whether to apply the law, a court would then employ a control test analysis to decide whether the player is eligible for protection as the law provides. Most labor law provisions protect employees but not independent contractors, so this would be a necessary threshold question.

Courts consider a number of nonexclusive factors in determining whether a worker is an employee or an independent contractor.¹⁴⁰ Factors considered include: the location of the work, the source of instrumentalities and tools, whether the work is part of the regular business of the hiring party, and how much the hired party can

136. The international organization functions as a cooperative group. By partnering internationally, a North American chapter would lose some of its ability to self-police in favor of cohesive international standards.

137. 490 U.S. 730, 751–53 (1989).

138. 503 U.S. 318, 323–25 (1992).

139. Choice of law would be determined by that player's individual circumstances. For instance, workers have brought suit for discrimination under the Age Discrimination in Employment Act, *see, e.g., Speen v. Crown Clothing Corp.*, 102 F.3d 625 (1st Cir. 1996); Title VII, *see, e.g., Plaso v. IJKG, LLC*, 553 Fed. App'x 199 (3d Cir. 2014); and ERISA, *see, e.g., Moore v. Lafayette Life Ins.*, 458 F.3d 416 (6th Cir. 2006).

140. *Reid*, 490 U.S. at 752–53.

control his or her schedule or hours.¹⁴¹ Most professional League of Legends teams have a team house where their players come to live and work under supervision of the team manager.¹⁴² They often play using equipment provided by team sponsors (such as keyboards, headphones, etc.).¹⁴³ The work of playing as a professional gamer is certainly part of the regular business of competing in professional gaming competitions. And finally, players have their days scheduled throughout the season and during off-season practices. Each of these factors weighs in favor of finding that the players are employees—if not of Riot, then certainly of the teams themselves.

Of course, these are just a few of the factors available to the courts. There are numerous other factors, with some supporting a finding that the players qualify as employees (such as the lack of control over the “manner and means” by which the competitions are accomplished), and some weighing in favor of finding that they are independent contractors (such as the lack of benefits and the short-term relationship between the players and the teams). Nevertheless, there is enough of an argument that players qualify as employees that the government could require gaming leagues to sign them as such—and if that happened, not only would the players be able to unionize, but the change would trigger the application of a number of already-existing state laws regarding working hours and minors.¹⁴⁴

The biggest drawback with this solution is that, similar to the unionization process referenced above,¹⁴⁵ it requires a professional player to sacrifice his or her career to pursue a drawn-out process whose benefits that player is unlikely to realize. With an average career spanning only a few years, most players cannot afford to take the time to pursue litigation, particularly when the only way to secure sweeping change is to set precedent. However, this method has two primary advantages. First, it overcomes the issue of fan popularity. As mentioned above, professional eSports players lack the fan loyalty and attention that allowed their traditional sports counterparts to break away and form unions in the first place.¹⁴⁶ This severely diminishes the amount of pressure that a player can apply to a league. That same fan loyalty, however, is irrelevant to a court’s determination of whether to classify the player as an employee.

Secondly, this method allows the player to skirt the antitrust issues discussed in Part III. By waiting until after having attained employee status to unionize, the player gains the protections provided for unionizing under the

141. *Id.*

142. *See, e.g., Team Curse House Tour: 2014 Edition*, ONGAMERS.COM, <http://www.ongamers.com/videos/team-curse-house-tour-2014-edition/2300-347/> (last visited Jan. 21, 2015) (showing the house shared by team members of League of Legends team Curse).

143. *See, e.g., Products by Team*, STEELSERIES, <http://steelseries.com/products-by-team> (last visited July 29, 2015) (depicting steelseries products by teams as part of the company’s sponsorship).

144. *See, e.g., CAL. LAB. CODE* § 1308.7(a) (“No minor shall be employed in the entertainment industry more than eight hours in one day of 24 hours, or more than 48 hours in one week[.]”).

145. *See supra* Part III.

146. *See supra* Part II.

NLRA¹⁴⁷ and falls into exceptions of the Sherman Act.¹⁴⁸ This would legitimize any collective bargaining efforts while exposing players to minimal risk.

Ultimately, whether the method is legislative action or judicial determination, this last option offers the best solution. It allows players to resolve their own issues by unionizing rather than imposing governmental regulation on a still-evolving industry. Moreover, it requires the least upkeep and oversight; once players are classified as employees, they automatically are subject to a number of protections under existing law. Of course, because either method could take years to attain this option's goals, the other options might be potential stop-gap solutions.

CONCLUSION

Still in its nascent stages, the eSports industry is poised to overtake many traditional sports in viewership, with advertising and merchandising revenue soon to follow. Although game developer-owned leagues have helped to pioneer this success, they have created an environment where players are ill-equipped to negotiate contracts, secure better working conditions, or seek a better arrangement with a competing league. Even Riot, famously one of the most player-friendly developers and league owners, allows its players—sometimes minors—to work hours that would be illegal if those same players were employees of the California-based company. At the same time, it is unrealistic to task Riot and the like with the responsibility of giving players favorable terms. The problem with the eSports industry is not that the leagues or developers themselves are nefarious; the problem is that the players have no meaningful way to advance their own interests.

Due in part to the brevity of their careers and the relative interchangeability of professional players under the current model, players lack the ability to form unions to collectively bargain for better agreements. Because the leagues currently classify the players as independent contractors, they do not have the right to unionize under the NLRA—doing so may actually expose them to liability under the Sherman Act. In other countries, eSports associations have represented their players' interests and successfully negotiated better terms. No such organization exists in the United States.

Despite lingering incredulity over eSports as a legitimate for-profit industry, the increasing interest by companies like Amazon and Coca-Cola suggests that it is positioning itself to become a major source of entertainment—and one that warrants regulation. Any of the three proposed solutions—regulating visas, creating a national player's association, or reclassifying players as employees—would create a better working environment for players and secure a position for eSports as a recognized industry. More importantly, each option does so without destroying league independence or preventing casual leagues from operating. As discussed, perhaps the most viable option requires leagues to classify their players as employees.¹⁴⁹

147. See 29 U.S.C. § 157.

148. See 15 U.S.C. § 17.

149. See *supra* Section IV.C.

Ultimately, players (as critical as they are) are only a third of the eSports equation. Without the game developers and league operators to provide the backdrop of competitive play, the eSports industry as a whole would not exist. While regulation may be the key to ensure that players are able to secure safe and healthy working conditions, any regulation should only be as restrictive as necessary to accomplish that narrow goal. After all, Riot and other companies are not the villains of the eSports industry. They are the pioneers. They have built an international industry out of what used to be a hobby among only the most devout of gaming enthusiasts. They should be able to enjoy the wild western town they have built—but that does not mean they should not have a sheriff.