Traditional Sports and Esports: The Path to Collective Bargaining

Kelsey F. Ridenhour

ABSTRACT: Esports is a rising industry that has seen rapid growth in recent years. With an explosion in investment and revenue, competitive leagues have begun to form for most popular esports with lucrative winnings. However, not all players win big, and the existing systems in place for players are often inadequate to protect them from unfair labor practices. This Note examines the current competitive esports landscape and compares it to traditional sports leagues to show that esports players’ unions are an attractive option for players to eliminate harsh working conditions and gain a seat at the bargaining table. Examples from the history of traditional players associations show that although there are legal and market constraints on the formation of esports players’ unions, eventually, collective bargaining will be a reality in the industry. This Note first highlights relevant labor law issues and antitrust realities of traditional sports. This Note then explores what current esports players endure and how the industry impacts efforts at forming a union. Next, this Note considers the shape and form an esports players’ union might take. Finally, this Note argues that a players’ union modeled after traditional sports players associations is the best means for players to better their condition, despite antitrust suits and governance structures being available as interim solutions as well.

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I. INTRODUCTION

The sports industry has a new competitor: Esports, which includes a diverse and ever-changing landscape of competitive video games, has become a fast-growing alternative to traditional sports. In 2017, the world championship for League of Legends, one of the most popular esports, had 106 million viewers.¹ That number trailed behind the 2017 Super Bowl’s 111 million viewers by only five million.² Compare those viewership numbers with tallies from 2018: League of Legends boasted an impressive peak of 200

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². Tom Huddleston Jr., Here’s How Many People Watched the Super Bowl, FORTUNE (Feb. 6, 2017), http://fortune.com/2017/02/06/super-bowl-111-million-viewers. The amount of 2017 Super Bowl viewers reflects a decrease from recent years and that the peak viewership for a Super Bowl was in 2015, when the New England Patriots faced the Seattle Seahawks, drawing 114.4 million spectators. Êd.
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million viewers during its world championship,3 but the Super Bowl’s
viewership declined to only 103.4 million.4 While esports competitions are
not novel, they have recently grabbed multiple headlines for a variety of
reasons besides rising spectator numbers, including lucrative sponsorship
deals,5 heavy investments from celebrities,6 and even an active shooter at a
local tournament.7 While there is no way to gauge the esports industry’s
longevity, market experts project that revenue will climb, along with
popularity and viewership.8

Many readers may be asking a simple question: What are esports?“Oversimplified, esports is competitive video game play. . . . [that] involves
head-to-head, real-time competition.”9 While the rules and intricacies of each
video game differ, this basic definition underlies the industry. Traditionally,
esports competitions were limited to tournaments.10 The increasing

3. Xing Li, Peak Viewership for Worlds 2018 Nearly Doubles from Last Year, DOT ESPORTS (Dec.
6, 2018, 3:56 PM), https://dotesports.com/league-of-legends/news/peak-viewership-for-worlds-
2018-nearly-doubles-from-last-year [https://perma.cc/B93B-AMJM]. This figure should “be
taken with a strong dose of salt,” however, as some experts question the accuracy of Chinese
viewing numbers. Id. According to one source, “the World Championship Finals had roughly [a]
75% increase in viewership [between 2017 and 2018], from 56.7 million to 99.6 million unique
viewers.” Alan Bernal, League of Legends: By the Numbers Report Show Huge Spike in Viewership
for 2018 World Championship, Dexerto (Dec. 12, 2018, 6:15 PM), https://www.dexerto.com/league-
championship-251639 [https://perma.cc/B2T4-32ME]. While the exact viewership numbers
may be elusive, there is no doubt that spectatorship is trending upwards.

4. Joe Otterson, TV Ratings: Super Bowl LII Slips 7% from 2017 to 103.4 Million Viewers,
1202687239 [https://perma.cc/JVS2-7X2S].

5. On September 19, 2018, Mastercard became a global sponsor for League of Legends
(and its parent company, Riot Games) and the bargain is similar to those Mastercard has with
“the Grammy Awards and golf’s British Open.” Lester Wong, eSports: Mastercard Comes on Board as
Global Sponsor for League of Legends in Multi-Year Deal, STRAITS TIMES (Sept. 19, 2018, 3:29 PM),
https://www.straitstimes.com/sport/esports-mastercard-comes-on-board-as-global-sponsor-for-
league-of-legends-in-multiyear-deal [https://perma.cc/85HQ-5TTS].

6. See Max Miceli, Michael Jordan Invests in Team Liquid Parent aXiomatic, Joins $26M Funding
Round, ESPORTS OBSERVER (Oct. 25, 2018), https://esportsobserver.com/michael-jordan-
invests-team-liquid-parent-axiomatic-joins-26m-funding-round [https://perma.cc/T5ZP-LWXT]
(discussing recent investments in esports by celebrities).

7. Noah Smith, ‘It Was Only a Matter of Time’: Security of Esports Events Scrutinized After
news/sports/wp/2018/08/29/it-was-only-a-matter-of-time-security-of-esports-events-scrutinized-
after-jacksonville-shooting [https://perma.cc/WG7F-EBSF] (reporting on a shooting in a
Jacksonville mall during an esports event). Furthermore, while some competitions are at larger
venues and have the security usually expected at those venues, small-scale events often have
security lapses. Id. One competitor was shot in the thumb as a result of the lax security in
Jacksonville. Id.

8. Ingraham, supra note 1.

9. Aaron D. Lovacs, Esports: A Whole Different Ball Game, 26 NEV. LAW., Aug. 2018, at 26, 26
(2018).

10. Andrew Webster, Why Competitive Gaming Is Starting to Look a Lot Like Professional Sports,
VERGE (July 27, 2018, 10:00 AM), https://www.theverge.com/2018/7/27/17616532/overwatch-
the popularity of esports has led to a new phenomenon: the development of leagues that resemble traditional sports organizations, like Major League Baseball and the National Football League.11

The increasing viability of the esports industry has led to an interesting array of legal questions. Issues of intellectual property,12 sports betting,13 and player doping have all generated scholarship.14 One area that has not been fully explored, however, is the potential for unionizing esports competitors.15

Specifically, this Note compares traditional sports unions to the current esports landscape. By examining traditional sports and the development of their player unions, this Note provides context and support to conclude that esports unions are legally possible and are already coming down the pipeline in a way that mirrors traditional player unions.

Part II introduces the relevant background information for this Note. Specifically, Section II.A of this Note addresses labor law’s collective bargaining rules under the National Labor Relations Act (“NLRA”). Section II.B describes the traditional sports industry, including the unique application of the Sherman Antitrust Act to the league competition model. Next, Section II.C introduces player unions for traditional sports players, looking at their genesis in the top three leagues as well as the current negotiated terms of the members’ collective bargaining agreements. Lastly, Section II.D discusses the rising phenomenon of esports and two of the most popular esports leagues, League of Legends and the Overwatch League.

Part III exposes the existing problems that justify an esports players’ union and provides analysis of whether such a union is legally available.

11. See generally Ingraham, supra note 1.
Section III.A shows that esports player conditions create an extremely demanding work environment, similar to those of traditional sports. Further, Section III.B discusses the bargaining power disparity between players, teams, and game developers that creates strained employer–employee relationships. Given these conditions and the huge amount of control game developers have over the viability of professional competition, Part III ultimately shows that players need additional protections through a collective bargaining agreement. Section III.C analyzes the obstacles facing esports players’ union efforts, including players’ employee status, the bargaining unit issue, various contractual constraints, and unique market conditions that may dissuade players from pursuing union status.

In Part IV, this Note recommends following the path of traditional sports leagues to develop players’ unions. While other alternatives do exist, none are as effective at representing players’ interests to the same extent or provide the same level of bargaining power as a traditional league-modeled players’ union. Esports players can follow the examples of traditional professional sports players’ unions to improve conditions for all esports league competitors.

II. BACKGROUND

Before delving into the esports players’ unions issue, some basic background on unions, traditional sports, and esports is necessary, and this Part examines each in turn. First, Section II.A briefly examines the purpose of collective bargaining and the NLRA’s various provisions that govern labor law’s protections and requirements. This includes a discussion of how unions are formed under the NLRA and what kinds of benefits inure to union members. Next, Section II.B explores the traditional sports industry, focusing on the structure of the league model and how that model interacts with antitrust law, which makes professional leagues possible. Section II.C looks at how unions developed in three of the biggest sports leagues, highlighting player conditions and market constraints that led to the need for collective bargaining. Also included is a brief description of the current bargaining agreements between ownership and players. Lastly, Section II.D explains the rise of the esports industry and its similarities to traditional sports. Special focus is given to two of esports’ biggest competitors, League of Legends and Overwatch, which both follow the same league model as traditional professional league sports.
A. COLLECTIVE BARGAINING & DEVELOPMENT OF UNIONS UNDER THE NATIONAL LABOR RELATIONS ACT

Labor law has a long and detailed story,\textsuperscript{16} which can be summarized as a struggle between capitalist employers trying to maximize profits and the efforts of workers to gain rights against exploitation. Modern labor law was born as a byproduct of the Industrial Revolution, which created greater competition between employers and ultimately led to worse conditions for employees.\textsuperscript{17} Workers struggled to improve their treatment under oppressive employment regimes, often resulting in a great deal of conflict\textsuperscript{18} and substantial disruptions in commerce.\textsuperscript{19} After a long battle for recognition,\textsuperscript{20} labor law found its ultimate champion in the NLRA, a product of the New Deal, which is still standing today.\textsuperscript{21} So, what does the NLRA do?

At the most basic level, “[t]he NLRA establishe[s] employee rights to organize, join unions, and engage in collective bargaining.”\textsuperscript{22} The NLRA puts forward “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . when they have occurred by encouraging the practice and procedure of collective bargaining.”\textsuperscript{23} In effect, the NLRA regulates both employers and organized labor groups in an attempt to streamline conflicts by protecting employee and employer rights, minimizing harms and maximizing commerce.\textsuperscript{24} The NLRA has been supplemented by amendments, as well as other statutory schemes,
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to achieve this purpose. The National Labor Relations Board ("NLRB") is the agency which enforces and adjudicates its provisions. The NLRA thus provides the necessary statutory framework for legal collective bargaining, but to qualify for its protections, laborers and employers must operate within prescribed boundaries.

One of these threshold questions is whether workers fit the definition of "employees" under the NLRA. Under Section 152(3) of the NLRA, "[t]he term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family . . . or any individual having the status of an independent contractor." To determine whether a laborer is an employee, the Supreme Court has held that the common law definition of employee must be used.

Therefore, "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." However, as a matter of agency expertise, the Court has noted that "the [NLRB]'s construction of that term is entitled to considerable deference." As a result, the NLRA has expanded "employee" to be "more than the technical and traditional common law definition[]." Ultimately, the NLRB must


26. See 29 U.S.C. § 153; see also id. § 156 (giving the NLRB "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter").

27. See id. § 157; see also NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89 (1995) ("[N]LR]A rights belong only to those workers who qualify as 'employees' as that term is defined in the Act.").


30. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) ("Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . . No one of these factors is determinative."

31. See Town & Country Elec., Inc., 516 U.S. at 94 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 881, 891 (1984)) (stating that the lack of clear definition of "employee" within the NLRA necessitates deference to the NLRB in construing that term, so long as that construction is reasonable and "consistent with the common law").

32. See NLRB v. E.C. Atkins & Co., 337 U.S. 388, 403 (1949) ("[T]he Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation
determine that a laborer falls within that modified definition for NLRA protections to inure to worker conditions.

While not all workers qualify for protections under the NLRA, workers determined to be employees enjoy substantial benefits. Section 7 of the NLRA states that

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 158(a)(5) of this title.33

The NLRA leveled the playing field between employees and employers by giving employees the right to create and join (or not join) labor organizations, which can then bargain on their behalf or take part in concerted activities (such as demonstrations or strikes).34 Though employees gain many rights by collective bargaining, the NLRA’s true strength lies within Section 8, which regulates unfair labor practices by both employers and employees.

For employers under Section 8, these unfair labor practices include: interfering with Section 7 rights, controlling or supporting a labor organization, discriminating against labor organization members in hiring or firing, and failure to bargain with representatives.35 According to the NLRB, this means “[f]or example, employers may not respond to a union organizing drive by threatening, interrogating, or spying on pro-union employees, or by promising benefits if they forget about the union.”36 For employees and unions, unfair labor practices include: interfering with Section 7 rights, causing discrimination against non-union members, and failure to bargain with the employer.37 Any Section 8 violation can result in remedies to the

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34. See GLENN M. WONG, ESSENTIALS OF SPORTS LAW 518 (4th ed. 2010).
36. Interfering with Employee Rights (Section 7 & 8(a)(1)), NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 [https://perma.cc/PQC3-S8U8].
37. 29 U.S.C. § 158(b).
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injured party. The NLRB is tasked with enforcing penalties and preventing Section 8 violations.

Another important function of the NLRB is deciding whether a group of employees makes up an appropriate bargaining unit. “[I]n order to assure employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .” This determination consists of a balancing of many factors, but the main condition sought is “a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group.” Similar to employee status determinations, the NLRB determination of an appropriate bargaining unit “is accorded broad discretion” by the courts. The community of interest standard “serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.”

38. “If an employer is found to have breached any Section 8(a) articles, there are six possible remedies: (1) back pay; (2) reinstatement; (3) bargaining order; (4) rerun election; (5) cease and desist order; (6) injunctive relief.” WONG, supra note 34, at 519. “If a labor organization is found to have breached any of the articles in Section 8, there are five possible remedies: (1) injunctive relief; (2) bargaining order; (3) cease and desist order; (4) damages; (5) disestablishment of the union or withdrawal of recognition.” Id.

39. See 29 U.S.C. § 160(a) (establishing the powers of the NLRB “to prevent any person from engaging in any unfair labor practice . . . affecting commerce”).

40. Id. § 159(b).

41. PCC Structurals, Inc., 365 N.L.R.B. No. 160, 2017 WL 6507219, at *5–6 (2017) (stating that the determination “requires the Board to assess whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised” (quoting United Operations, Inc., 338 N.L.R.B. 123, 123 (2002))).

42. Id. at *6.


44. Id. at 172–73.
There are several ways for employees to form a union, but once formed and certified, the union and the employer must negotiate. The topics that must be negotiated are "wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." If the employers and employees disagree on these "mandatory" elements of an agreement, "[o]ne side may threaten a strike or lock-out potentially causing significant financial harm to force the other party to agree." Once the parties reach a final agreement, union members ratify that agreement to create a binding collective bargaining agreement ("CBA"). Although there is plenty more to learn about labor law, these basics are enough to move on to a quick study of the sports industry, including a foray into how antitrust and labor law interact in that unique market.

B. THE SPORTS INDUSTRY AS A CASE STUDY

In 2010, the United States sports industry was valued at over $213 billion and a major part of that value comes from professional sport leagues. While the sports industry can be divided into six activity groups, this Note focuses primarily on professional sport leagues. The professional sport

45. To bargain on behalf of workers, the labor union needs to be recognized by the employer and receive certification. WONG, supra note 34, at 524. Typically, one of the hardest steps in unionizing is the initial process of finding employees with a common set of interests for collective bargaining. See Hegem, supra note 15, at 450. In order to be certified, there needs to be an NLRB election, voluntary recognition by the employer, or board-ordered recognition without election. WONG, supra note 34, at 524. An NLRB election can occur if 30 percent of workers have declared an intent to unionize, leading to an election requiring more than half of workers voting to unionize for success. Id. Alternatively, the potential union may have enough support from workers that the employer decides to forego this technical process, and the employer can voluntarily recognize the union. Id. For the biggest traditional sports leagues, employer recognition was the means followed to reach certification. See id. at 525. If the NLRB believes that the union has enough support, it can also order recognition without an election. Id. at 524.


47. Id. These required bargaining items include "[r]ate and method of pay . . . [w]ork rules, discipline, drug testing . . . [s]afety . . . [g]rievance and arbitration procedures . . . [h]ealth insurance, pensions, and layoff compensation." WONG, supra note 34, at 527 exhibit 11.1.

48. WONG, supra note 34, at 527. In contrast, "[p]ermissive subjects are topics that may be bargained at the table if both sides are willing to do so, but if one side does not want to discuss a permissive topic, it is not required to do so." Id.

49. Id. at 528.

50. Id. at 3.


52. WONG, supra note 34, at 2. Those six groups consist of (1) professional sport leagues, (2) intercollegiate athletics, (3) the Olympics, (4) interscholastic athletics, (5) public/private associations for professional and recreational sports, and (6) facilities, agency firms and media. Id. at 2–3. It may be of interest that esports has also begun spreading into intercollegiate athletics. See Sean Morrison, List of Varsity Esports Programs Spans North America, ESPN (Mar. 15, 2018),
leagues can be broken down into two distinct subgroups: the “Big Four,” comprised of the National Basketball Association (“NBA”), the National Football League (“NFL”), the National Hockey League (“NHL”), and Major League Baseball (“MLB”), and the single-entity leagues, which includes Major League Soccer (“MLS”) and the Women’s National Basketball Association (“WNBA”). The organizational differences between the Big Four and the single-entity leagues are important, but their competitive structure is the same.

The structure of each of these professional leagues follows a general franchising model, which allows for regional market monopolies. Each league is made up of a set number of teams, dictated by the league’s rules, so that new competitors are disallowed from joining except under specific conditions. Most of these teams are owned by private entities, “including sole proprietorships, partnerships, and corporations.” While there are rules put in place by the league to maintain fair competition, the “teams may compete against one another as rival companies, just as they would in any other business.” A large proportion of income for professional sports teams comes from broadcasting contracts and sponsorship deals, but they also benefit from regular attendance by fans and from selling merchandise. In contrast to the Big Four, single-entity leagues allow for operator-investors instead of team owners, which allows for a single entity to control more than one team (and often, all the teams; hence, the namesake). Additionally, instead of having teams sign players directly, the league itself has a direct contract with players, who are then assigned to a team.

One important legal aspect of these professional leagues is their existence in spite of the Sherman Antitrust Act. Originally passed in 1890, the Sherman Antitrust Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among


33. WONG, supra note 34, at 2.
34. See id. at 466. It should be noted that some leagues do allow for more than one franchise within a region. A clear example of this comes from the NBA: The Los Angeles Lakers and the Los Angeles Clippers clearly share regional market space.
35. See id. at 466.
36. Id. at 4.
37. Id.
38. See id. at 6–13. As the reader is probably aware, teams offer tickets at a variety of price points, with the most desirable and sought-after seats or experiences going for premium rates. Id. at 10. Season tickets, for example, are often a lucrative marketing scheme for teams. Id.
39. Id. at 15.
40. Id.
the several States, or with foreign nations, is declared to be illegal." According to Justice Stevens, “[t]he basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels.” While many league rules and activities constitute a constraint on commerce, they do not generally fall victim to the Sherman Antitrust Act because of their unique need for cooperation. “When ‘restraints on competition are essential if the product is to be available at all,’ per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.” As a result of that analysis, professional leagues are often allowed to enter into agreements that would normally run afoul of the Sherman Antitrust Act.

To a keen observer, it should be apparent that labor and antitrust principles are at odds with one another. While Congress attempted to statutorily rectify these competing principles, the Supreme Court ultimately invented the nonstatutory labor exemption to protect collective bargaining agreements from antitrust attacks. That protection extends “to parties within the bargaining relationship and to matters of fundamental employee

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63. As stated by Justice Stevens:

Football teams that need to cooperate are not trapped by antitrust law. . . . The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.

64. Am. Needle, Inc. v. NFL, 560 U.S. 183, 202 (2010) (citation omitted). "As Judge Bork has noted: ‘[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.’ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984) (alteration in original) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 278 (1978)); see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) (“Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.”)."

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interest.”66 In Mackey v. National Football League, a court applied the nonstatutory labor exemption to professional sports for the first time.67 In Brown v. Pro Football, Inc., the Supreme Court further extended the exemption’s applicability by holding that it applied even after collective bargaining agreements expire.68 These developments allow for the professional leagues to exist as they do today. Now, this Note examines the culmination of these legal principles: the players associations.

C. PLAYERS ASSOCIATIONS

A players association denotes the general term for unions in the realm of sports. All the professional leagues have players associations to represent members’ interests. “Beyond their primary responsibility of negotiating and administering the league collective bargaining agreement, players associations also work with players who have filed for grievance arbitration, as per the collective bargaining agreement, with the league.”69 When collective bargaining agreements fail, players have resorted to strikes, which have led to significant game cancellations.70 These cancellations have included an entire season of professional football and a World Series in professional baseball.71

Prior to players associations and the collective bargaining agreements they create, “the member clubs enjoy[ed] a monopsony control, a buyers’ monopoly, over their employees.”72 Players were subject to blacklisting, nonnegotiable contract terms, and poor working conditions.73 Despite these factors, several legal writers of the time believed that professional sport unions were “neither feasible nor practical.”74 Those conclusions stemmed from several views. One was the fact that professional sports was “an industry of ‘stars,’” where individualism reigned in contract negotiations.75 Another factor was the belief “that many athletes are not solely motivated by the profit motive,” such “that the athletes themselves do not feel a need for a union.”76 Additionally, some believe that players had brief careers that were too “migratory and seasonal” for labor union formation.77 The following brief history of the development of players associations in baseball, basketball, and

66. Id. at 1052.
69. WONG, supra note 34, at 585.
71. Id.
73. Id. at 750–59 (discussing the many issues that players faced).
74. Id. at 759.
75. Id. at 759–60.
76. Id. at 760.
77. Id. at 761.
football highlights the challenges that players encountered along the path to unionizing.

1. Major League Baseball and Major League Baseball Players Association

The first professional sports players’ union started in baseball. It began as an attempt to improve players’ working conditions and to combat the disparity between player and owner bargaining power. Although there were many reasons for players to pursue collective bargaining, one of the most egregious reasons players sought collective bargaining was because they were subject to a reserve system. “The reserve system was first a secret ‘gentleman’s agreement’ among owners that provided a list of five players on each team to be protected and reserved for the owner of each team.” The reserve clause allowed owners to set players’ salaries at the time of contract renewal and, if a player refused to comply, he could be forced to retire by the owner. The owners’ control over players prevented high player salaries by restricting player movement to new teams as well. Additionally, “owners had no qualms about openly blacklisting any player who protested the terms of his contract or tried to negotiate better terms with another club.”

Players, unhappy with these monopolistic activities, began organizing to strengthen their position. The first players’ union formed as the Brotherhood of Professional Baseball Players in 1887. Unfortunately, the union was short-lived and ultimately failed. In 1946, players of the Pittsburgh Pirates formed the American Baseball Guild, a single team-based union that ultimately folded that same year. However, “after decades of life under the thumb of the owners, and with frustration boiling over as salaries stagnated and working conditions deteriorated,” the Major League Baseball Players Association

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78. For a detailed history of MLB unionization efforts, see generally KRISTER SWANSON, BASEBALL’S POWER SHIFT: HOW THE PLAYERS UNION, THE FANS, AND THE MEDIA CHANGED AMERICAN SPORTS CULTURE (2016).

79. Dryer, supra note 70, at 268.

80. Id.

81. Id.

82. SWANSON, supra note 78, at 8. “The clause placed each player in a one-bidder system when it came time to negotiate his salary for the upcoming season. The only factor that prevented a club from paying a player more than mere subsistence wages was the desire to keep the player relatively happy.” Id.

83. Id. at xi-xii.

84. WONG, supra note 34, at 534.

85. The Brotherhood of Professional Baseball Players lasted until 1891 but was reestablished briefly from 1900 to 1902. Id.

86. Id.

“MLBPA”) formed in 1953. At first, the MLBPA struggled to achieve any meaningful gains for players and failed as a union, in large part due to the failings of its representative, Robert Cannon. Cannon, representative from 1959–1965, was more concerned with pleasing owners than with representing players. At that time, the MLBPA was funded by MLB itself, preventing it from being recognized as a union under the NLRA. While the MLB subsidized the MLBPA, the MLBPA had only managed “to negotiate a meager pension plan.” To strengthen their position, players looked for a new representative and found Marvin Miller, who described baseball players as “the most exploited group of workers I had ever seen—more exploited than the grape pickers of Cesar Chavez.” In an effort to undercut players’ efforts, owners removed the subsidy provided to the MLBPA. Miller, however, capitalized on this development to file for union certification. After hiring Marvin Miller to represent the players from 1966 until 1982, the MLBPA took off and quickly gained formal certification under the NLRA.

Today, the MLBPA and MLB’s CBA is seen as one of the strongest in the United States but the original CBA was quite modest. It only set a minimum salary for players of $10,000 and established a procedure for resolving disputes by having the Commissioner arbitrate. In 1970, renegotiations led to a $5,000 minimum salary increase and a new optional procedure for dispute resolution which operated outside of the Commissioner’s purview.

88. Wong, supra note 34, at 534.
89. Al Neal, Thanks, MLBPA and Marvin Miller: 50 Years Since First Pro Sports Union Contract, PEOPLE’S WORLD (June 13, 2018, 3:14 PM), https://www.peoplesworld.org/article/thanks-mlbpa-and-marvin-miller-50-years-since-first-pro-sports-union-contract [https://perma.cc/4S3F-SSQP]; see also Swanson, supra note 78, at 99–110 (describing how Robert Cannon was more concerned with pleasing the owners as opposed to looking out for the best interest of the players).
90. Moser, supra note 87 ("The new MLBPA head’s first move was to maneuver around the owners’ revocation of their previous subsidization of the association. Subsidization by management was illegal, and the owners sought to pull the rug out from under the union by stopping payment before a new financial structure could be implemented, effectively leaving Miller without a contract and forcing the players to negotiate headlessly [sic]. Miller, however, saw it as an opportunity to bring MLB and the union under the applicable federal labor laws, most notably the Wagner Act and Taft-Hartley Act, whereas organized baseball had previously flouted such legal mandates."). Under Section 8 of the NLRA, an employer cannot support its labor organization. 29 U.S.C. § 158(a)(2) (2012).
91. Moser, supra note 87.
92. Id.
93. Id.
94. See id.
95. Id. A copy of the current MLBPA collective bargaining agreement is available at Collective Bargaining Agreement, MLB PLAYERS, https://www.mlbplayers.com/cba [https://perma.cc/ER87-R858].
96. Dryer, supra note 70, at 269.
97. Id.
The most recent CBA sets a minimum salary of $535,000 for 2017, with increases set for each subsequent year. Also included is a salary arbitration process, expense allowance provisions, termination pay provisions, disciplinary protections, safety and health provisions, a revenue sharing plan, and many other agreed-upon provisions. A uniform player contract is attached, player expectations are established, and management rights are set forward.

2. National Basketball Association and National Basketball Players Association

In the NBA, the National Basketball Players Association (“NBPA”) was formed in 1954, but did not reach formal status as a recognized union until 1964, after several prominent players threatened to strike and boycott the 1964 All-Star game. Initially, unionization efforts were led by Boston Celtics star player Bob Cousy, the first president of the NBPA (president from 1954–1958). Prior to the union’s existence, “[t]here was no pension plan, no per diem, no minimum wage, no health benefits and the average player salary was $8,000.” Initially, the NBA would not even agree to meetings with the NBPA, but slowly came to terms with the fact that its players would be unionizing. In 1964, the CBA gave players “an eight dollar per diem and a pension plan.” The NBPA has renegotiated the CBA several times with the NBA to gain additional player protections. In 1976, the Robertson Settlement Agreement resulted in an altered draft and a new right of first refusal for players, but most importantly, it removed reserve and option...
clauses which prevented player mobility.\textsuperscript{114} In addition, players have used antitrust lawsuits to push for stronger bargaining positions.\textsuperscript{115}

The current CBA between the NBA and NBPA provides many protections to both players and owners. The minimum player salary in the current CBA is $815,615.\textsuperscript{116} There are compensation protections,\textsuperscript{117} extensive player pension and post-career income benefits,\textsuperscript{118} and player conduct expectations.\textsuperscript{119} Unlike the MLB CBA, there is a maximum player salary and a salary cap that helps owners.\textsuperscript{120} These caps signify a stronger owner bargaining position.\textsuperscript{121} Additionally, players are prevented from striking, lock-outs, orconcerting contract breaches.\textsuperscript{122}


For the NFL, the National Football League Players Association (“NFLPA”) was created in 1956, but only gained prominence and efficacy after 1967.\textsuperscript{123} At the time of the NFLPA’s formation, “players had virtually no bargaining power, and although several proposals, such as a minimum salary requirement, were made to the owners, those proposals were likely not even considered.”\textsuperscript{124} In 1963, “[t]he average football player’s career extend[ed] from four to five years.”\textsuperscript{125} Players went on strike in 1968.\textsuperscript{126} The players threatened another strike in 1970, which led to an agreement that “solidified the NFLPA as an established entity and formidable bargaining force” and “provid[ed] for a minimum wage and an improved pension and insurance plan.”\textsuperscript{127} Despite reaching an agreement, the “NFL players fought for increased benefits and increased player mobility in the courts and on the

\begin{itemize}
\item \textsuperscript{114} Dryer, \textit{supra} note 70, at 275.
\item \textsuperscript{115} Id.
\item \textsuperscript{117} See id. at 22–32 (enumerating compensation protections for lack of skill, death, injury or illness, and mental disability).
\item \textsuperscript{118} See id. at 65–82, 92–99.
\item \textsuperscript{119} See id. at 116–24.
\item \textsuperscript{120} See id. at 35–43, 159–66. “[T]he NBA was the first professional sports league to establish a salary cap.” Dryer, \textit{supra} note 70, at 276.
\item \textsuperscript{121} However, the salary cap required owners to share league revenue with the players. See id. at 275. Thus, the salary cap came at a huge price for owners as the sharing of league revenue was a significant release of funds.
\item \textsuperscript{122} NBA CBA, \textit{supra} note 116, at 390.
\item \textsuperscript{123} WONG, \textit{supra} note 34, at 531.
\item \textsuperscript{124} Dryer, \textit{supra} note 70, at 281.
\item \textsuperscript{125} Krasnow & Levy, \textit{supra} note 72, at 753 n.12.
\item \textsuperscript{126} WONG, \textit{supra} note 34, at 531.
\item \textsuperscript{127} Dryer, \textit{supra} note 70, at 281.
\end{itemize}
Several strikes occurred over the following decade, and several antitrust cases provided greater bargaining power for players.129

Like the CBA for the MLB and the NBA, the NFL CBA aims to protect both players and owners. The 2018 minimum salary for players during the regular season is between $480,000 and $1,015,000.130 There are “No Strike/Lockout” and “No Suit” provisions to prevent players and owners from work stoppages during the CBA’s effect.131 However, there are uniform contracts attached which must be used, as well as player conditions that must be met to qualify for portions of salary payment.132 Draft procedure and rookie compensation are covered,133 as well as free agency conditions.134 There is a guaranteed amount of revenue sharing for players and owners, as well as a salary cap.135 The CBA also has arbitration requirements for disputes within certain Articles of the CBA.136 Additionally, there are provisions on minicamps, preseason training, and practices for set working conditions.137

D. THE ESPORTS INDUSTRY

Even though the esports industry is quite distinct from the traditional sports industry, esports share many similarities with traditional sports and may be considered an offshoot branch of the larger entertainment industry. While online gaming has been available for quite some time, the 1997 “Red Annihilation tournament . . . is widely considered by gamers as the first

128. WONG, supra note 34, at 531.
129. Id. See generally Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (holding that nonstatutory labor exemption extends beyond impasse); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (holding that the player draft ran afoul of Sherman Antitrust Act); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (holding that while nonstatutory labor exemption applies, the NFL’s “Rozelle Rule” still violated the Sherman Antitrust Act).
131. Id. at 7 (“[N]either the NFLPA nor any of its members will engage in any strike, work stoppage, or other concerted action interfering with the operations of the NFL or any Club for the duration of this Agreement, and no Clubs, either individually or in concert with other Clubs, will engage in any lockout for the duration of this Agreement . . . . The NFLPA agrees that neither it nor any of its members, nor agents acting on its behalf, nor any member of its bargaining unit, will sue, or support financially or administratively, or voluntarily provide testimony or affidavit in, any suit against the NFL or any Club with respect to any claim relating to any conduct permitted by this Agreement, or any term of this Agreement . . . .”).
132. See id. at 9–15.
133. See id. at 17–25.
134. See id. at 32–45.
135. See id. at 65–91.
136. See id. at 116–19.
137. See id. at 141–48.
Although a relative newcomer to mainstream attention, the esports industry has had rising revenue for several years now, reaching a projected value of $900 million in 2018.\(^{139}\) While new, it is clear that esports now makes up a promising component of the entertainment industry that competes directly with the traditional sports industry for viewership.

For several reasons, the esports industry is unique compared to the traditional sports industry. First, there are different games involved,\(^{140}\) separate platforms for the games to be played upon,\(^{141}\) and many different leagues.\(^{142}\) Second, team organizations involved in esports tend to field competitors in multiple esports,\(^{143}\) meaning they employ professional players with unique skillsets especially suited to distinct competitions. Third, game

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\(^{140}\) See Top Games Awarding Prize Money, ESPORTS EARNINGS, https://www.esportsearnings.com/games [https://perma.cc/N8HM-C4Z8] (showing a non-exhaustive list of esports games that players compete in). As of January of 2020, the top esports games of 2020 ranked by prize pool have been: (1) Dota 2, (2) Counter-Strike: Global Offensive, (3) Fortnite, (4) League of Legends, and (5) Starcraft II. *Id.*

\(^{141}\) See Jeff Dunn, *Here Are the Most Popular Platforms for Video Game Developers*, BUS. INSIDER (Mar. 15, 2017, 4:35 PM), https://www.businessinsider.com/most-popular-game-platforms-developers-chart-2017-3 [https://perma.cc/P7BL-DBNM] (noting the three traditional major platforms are PC/Mac, Sony’s PlayStation, and Microsoft’s Xbox). It should also be noted that each platform supports games that the other platforms do not, termed “exclusives.” *Exclusives*, GEMATSU, https://www.gematsu.com/exclusives [https://perma.cc/SL93-TRNJ]. While many games are available on multiple platforms, each platform has its own hardware and software for running those games, leading to platform-exclusive control features. Chris Kemp, *Platform Exclusivity Is Bad for Gamers, Developers and Everybody*, NAG (Dec. 7, 2015), https://www.nag.co.za/2015/12/07/platform-exclusivity-is-bad-for-gamers-developers-and-everybody [https://perma.cc/BDM4-FMMY]. As a result, it is possible for a game to have simultaneous leagues on different platforms. Additionally, some game developers have begun pushing towards cross-platform play: By enabling the different platforms to interface with one another, a player on one platform can compete against another player on a different platform. Steven Petite, *All Cross-Platform Games (PS4, Xbox One, Nintendo Switch, and PC)*, DIGITAL TRENDS (Feb. 17, 2020, 8:16 AM), https://www.digitaltrends.com/gaming/all-cross-platform-games [https://perma.cc/SP07-RJ7R].

\(^{142}\) For a non-exhaustive listing of esport leagues that have been formed, see Browse Leagues, ESPORTS EARNINGS, https://www.esportsearnings.com/leagues [https://perma.cc/q6ET-3MX7].

developers hold nearly limitless power over teams and players, and fourth, there are no collective bargaining agreements between players and their teams or their leagues. Another significant difference between esports and traditional professional league sports is the global market.

In a much greater degree than the NBA, NFL, and MLB, esports is an international phenomenon. Esports has a wide global audience and proud international competitive scene, with many top players competing against one another while in different countries. This has led to the creation of international tournaments more akin to the Grand Slam tournaments of tennis or the Olympics, as compared to the NFL’s Super Bowl or the NBA Finals, which are both more narrowly tailored to a United States audience. While the United States does enjoy a thriving esports industry of its own, it by no means completely dominates the market. According to one source, players from the United States collectively earned the highest overall prize winnings compared to any other nation, but also had the most competitors, clocking in with $129.8 million of prize winnings split amongst 14,970 players in 2019. Due to this international aspect, there is a significant disconnect between what law applies in the United States and elsewhere. Because of that jurisdictional hurdle, this Note focuses on recent efforts by various esports to develop leagues more similar to traditional sports instead of looking at international tournaments.

The push in the United States to expand esports toward a franchise model is a recent development. “Traditionally, teams participating in esports were self-organized. Teams would find the necessary players to participate and join leagues and tournaments by paying an entry fee.” However, with the increase of revenue streams, including “sponsorships, merchandise, branded skins, and advertising opportunities on streaming platforms,” esports has developed its own ownership groups. Some traditional sports organizations have been quick to invest in esports, such as the Philadelphia 76ers’

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144. See Mitch Reames, Player Representation and the Future Structure of Esports Leagues, SPORTTECHIE (June 12, 2018), https://www.sporttechie.com/player-representation-and-the-future-structure-of-esports-leagues [https://perma.cc/F3L4-JUVS] (“’The primary agenda will always be what makes the developers money,’ Hall continued. ‘The games’ economics are driven by who is buying their game and how many people are playing. Sports economics are driven by who is watching, not who is playing . . . Imagine if the whole point of the NFL was to sell footballs.’” (alteration in original) (quoting Jace Hall, Chairman of Twin Galaxies)).

145. Neal, supra note 138.

146. See About the League, OVERWATCH LEAGUE, https://overwatchleague.com/en-us/about (detailing the global nature of the sport).


149. Id.

150. Id.
ownership organization, which bought two esports franchises in 2016. \(^{151}\) Recently, collegiate athletics have entered the field, as many programs have begun developing, featuring extensive recruiting and scholarship opportunities. \(^{152}\)

However, for several reasons, the way organizers have structured esports leagues has led to a system where players are almost entirely barred from organizing. To illustrate, this Note examines two of the top esports leagues, the North American League of Legends Championship Series ("NA LCS") and the Overwatch League ("OWL"), although there are dozens more which operate differently. \(^{153}\)

1. League of Legends

One of the top esports, League of Legends, \(^{154}\) has a league organized by the League of Legends Championship Series ("LCS"). \(^{155}\) LCS develops its own rule system, which places requirements on players, teams, coaches, and other league participants. \(^{156}\) Given the global nature of League of Legends' esports competitions, there are currently 13 professional leagues which operate in different regions. \(^{157}\) All 13 professional leagues are represented at the League of Legends World Championship, known colloquially as "Worlds," and teams are selected based on their performance record within their region. Most relevant to this Note is the North American League of Legends Championship Series ("NA LCS"), where teams organized within the United States compete.

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\(^{151}\) Andrew Webster, The Philadelphia 76ers Just Acquired an E-Sports Team, VERGE (Sept. 26, 2016, 10:24 AM), https://www.theverge.com/2016/9/26/13057934/nba-philadelphia-76ers-buy-esports-team-dignitas [https://perma.cc/4ZXC-NXS5]; see also Webster, supra note 10 (detailing the many esports groups that have been acquired by various sports franchise owners).

\(^{152}\) Lovaas, supra note 9, at 27.

\(^{153}\) For most popular video games, some form of a league has formed, even if the games do not invoke the traditional imagery of competitive sports. One recent newcomer that has gathered a lot of media attention is "Farming Simulator," developed by GIANTS Software, which has announced a new league for players to compete for a grand prize of $100,000. Samwell Fawcett, Understanding the Success of Farming Simulator in Esports, ESPORTS.NET (Jan. 31, 2019), https://www.esports.net/understanding-success-farming-simulator-esports [https://perma.cc/9SY2-SS2B]. "The contests will be multiplayer team-based affairs, that feature two teams of three players that have to be the best in the field by carrying out tasks such as harvesting and stacking bales of hay." Id.


\(^{155}\) Baylis, supra note 15, at 364. "The exact relationship between Riot Games and the LCS is not precisely clear." Id.


The NA LCS is made up of ten teams and features 18 matches per team every year.\(^{158}\) Matches occur throughout two three-month “splits,” where each “split” has a “Regular Season” that culminates in “Playoffs and Finals.”\(^{159}\) Teams that win first place in the NA LCS “splits” qualify for the international League of Legends events.\(^{160}\) The NA LCS, as well as each of the other regions, has rules put in place specifically for its regional operation.\(^{161}\) LCS requires that “[a]ll Players on the Full Team Roster must have a written contract with the Team they are playing for (a ‘Player Services Agreement’).”\(^{162}\) Prior to 2018, the NA LCS had teams compete for spots within the league, but it has recently updated to a franchising model.\(^{163}\)

2. Overwatch League

Another one of the top esports, Overwatch,\(^{164}\) which is developed by Blizzard Entertainment, Inc., is available on multiple platforms and has its own global league, OWL.\(^{165}\) For the 2018 season, OWL featured “permanent franchises representing major cities across the globe. The Atlantic and Pacific Divisions, comprising six teams each, . . . [compete] for the Overwatch League championship, as well as for the USD $3.5 million in performance bonuses.”\(^{166}\) In 2019, OWL expanded to 20 cities total and offered players “up

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159. Id.

160. Id.


to $5 million in total prize pool money.\textsuperscript{167} The teams joining OWL paid a steep price “between $30 and $60 million for the rights to join the league.”\textsuperscript{168} While the full rules for the OWL have not been released, an early version was leaked online.\textsuperscript{169} The leaked copy, while not acknowledged by OWL officials as being official or accurate, contains severe restrictions on individual players’ streaming rights, drug restrictions (including “alcohol or marijuana”), and a section devoted to “the rights to turn the players’ entire lives into a reality show, if they so choose.”\textsuperscript{170}

III. RISING PROBLEMS IN ESPORTS & ANALYSIS OF THE CURRENT LEGAL FRAMEWORK TO ADDRESS THOSE PROBLEMS

In the context of labor law, traditional sports, and esports, this Note now examines the problems professional esports players face and analyzes the potential for union certification. Section III.A shows the general player sentiment in favor of unionization and greater bargaining power it brings. Section III.A then discusses the player conditions which drive this desire, as well as the power structure that currently exists that leaves players without a voice. Section III.B focuses on the legal and economic barriers to an esports players’ union. Section III.B includes discussion of employment status, the appropriate bargaining unit, certain contractual issues, and finally market conditions that adversely affect the prospect of an esports players’ union.

A. RISING PROBLEMS IN ESPORTS

With the new level of exposure and ever-climbing revenues, professional esports players and others have asserted concern with the lack of protections afforded by the current structure. There is a “significant lack of transparency in the world of e[s]ports [which] makes it difficult for players to determine what constitutes fair compensation.”\textsuperscript{171} In 2016, disgruntled esports professional players from multiple teams published a joint letter detailing their displeasure with their employers and league organizers.\textsuperscript{172} In an effort to

\begin{itemize}
  \item \textsuperscript{168} Kevin Webb, Eight Teams Paid More than $30 Million Each to Join the Overwatch League—Here’s Everything You Need to Know Before the New Season Starts, BUS. INSIDER (Dec. 29, 2018, 8:00 AM), https://www.businessinsider.com/overwatch-league-season-2-2018-9 [https://perma.cc/BR4M-YCG2].
  \item \textsuperscript{169} Maddy Myers, Overwatch League’s Code of Conduct Got Leaked [UPDATE], KOTAKU (Mar. 23, 2018, 8:00 PM), https://compete.kotaku.com/overwatch-leagues-code-of-conduct-got-leaked-182403824 [https://perma.cc/JA6S-YV8U].
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Nguyen, supra note 143.
  \item \textsuperscript{172} Scott “SirScoots” Smith, An Open Letter to the Professional Esports Association, Its Member Teams, and the Counter-Strike Community, MEDIUM (Dec. 21, 2016), https://medium.com/@sirs
gather greater bargaining power, there have been calls for player unions.\textsuperscript{173} Several attempts at forming collective bargaining groups have already occurred. Within OWL, there have been efforts “to form a model like the other major North American sports unions.”\textsuperscript{174} Another effort includes players from two separate leagues for the same game.\textsuperscript{175} In 2017, Riot Games founded its own player organization for League of Legends, but it has not been recognized as an official union and is still largely controlled by the company.\textsuperscript{176} To some, it may not be readily apparent that esports players need a union: After all, the players are just playing video games, right?

1. Player Conditions

As it turns out, esports players share many similarities with traditional sports players when it comes to working conditions. While esports do not invoke the traditional image of an athletic competition, many of “\textsuperscript{177}these games require strategic movement and intense hand-eye coordination.”\textsuperscript{177} Additionally, to reach the peak level of performance and competitiveness that a league demands, some professional gamers endure a “relentless practice schedule of 10 to 12 hours per day, six days a week.”\textsuperscript{178} One top esports player, Faker, stated, “I practise a minimum of 12 hours a day. Sometimes 15 hours a day when it’s close to a match.”\textsuperscript{179} As a result of such a heavy commitment, esports players face similar health issues to those faced by traditional sports athletes. “Carpal tunnel syndrome, a wrist injury, has ended many a gaming career.”\textsuperscript{180} Those issues include mental and physical issues.\textsuperscript{181} “\textsuperscript{173}Jordan Ashley, \textit{TSM Myth Calls for Unionization After Fortnite Backlash}, ESPORTS.NET (Jan. 29, 2019), https://www.esports.net/tsm-myth-unionization-fortnite-backlash [https://perma.cc/N9Y6-CUDF]. \textsuperscript{174}Liz Mullen, \textit{Two Groups Vie to Establish Esports Players Associations}, L.A. BIZ (Mar. 13, 2018, 8:44 AM), https://www.bizjournals.com/losangeles/news/2018/03/13/two-groups-vie-to-establish-esports-players.html [https://perma.cc/FCK2-VGYR?type=image]. \textsuperscript{175}Id. Both leagues compete in the popular “Counter-Strike” esport. \textit{Id.} \textsuperscript{176}Id. \textsuperscript{177}Bayliss, \textit{supra} note 15, at 363. \textsuperscript{178}Samwell Fawcett, \textit{Why Do Some Esports Stars Burn Out so Young?}, ESPORTS.NET (Dec. 24, 2018), https://www.esports.net/esports-stars-burn-out-young [https://perma.cc/CM4R-E9R]. \textsuperscript{179}Simon Hattenstone, \textit{The Rise of Esports: Are Addiction and Corruption the Price of Its Success?}, GUARDIAN (June 16, 2017, 7:24 AM), https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports [https://perma.cc/EE76-JAG4]. \textsuperscript{180}Paula Cocoza, \textit{You Have to Keep Fit to Stay in Gaming}, GUARDIAN (Oct. 16, 2018, 12:27 PM), https://www.theguardian.com/sport/shortcuts/2018/oct/16/keep-fit-to-stay-in-gaming-esports [https://perma.cc/T5JG-PUHH]. \textsuperscript{181}Fawcett, \textit{supra} note 178. “From repetitive strain injuries such as carpal tunnel syndrome affecting a gamer’s ability to play, to the wide range of mental health issues that hamper an
a huge amount of pressure . . . they face a constant barrage of withering scrutiny on Twitter and Reddit. . . . [M]ental health issues such as panic attacks and acute anxiety have become equally, if not more problematic, than the physical issues . . . .”182 Because of these pressures and the strains of a professional esports career, many players retire young, with the average retirement age set around 25.183

Similar to traditional sports, an esports career and its early retirement age can lead to other problems. “Esports players sometimes leave education early to fully immerse themselves in the competitive scene, which can be a problem when they cannot find a suitable position within the industry after their competitive careers draw to a close.”184 Retired players only have a limited number of employment opportunities within the esports industry where their prior experience is marketable, such as becoming coaches, advisors, analysts, or commentators.185 Due to this early retirement age and the lack of continuing opportunities, players can be left without the ability to sustain themselves in the future, especially if they incur medical or counseling costs that exceed their competitive salaries.

These player conditions are endured by many video game players in the pursuit of greater competition, but there are also several benefits, like hefty paychecks for top players. The best esports athletes earn in the millions, and lucrative bonuses and sponsorships can add to their base salary.186 For non-star esports players, however, the salary is much less lucrative, coming in at “an average salary of around $60,000.”187 At the highest levels of competition, esports organizations maintain facilities for training players. Once signed to a team, esports organizations “often pay for amenities such as housing, water and electricity, coaches and trainers, and the team’s food and gaming peripherals.”188 Living in these training facilities, players “practice constantly” and experience “genuine fear for their livelihood because they didn’t have a good game.”189 Due to these conditions, it would be tough to characterize esports players as any less deserving of protections than traditional athletes.

individual’s approach to the game, it seems that there are more than a few reasons as to why ‘burnout’ has become such a feared aspect of professional esports gaming.” Id. 182. Id.


184. Id.

185. See id.

186. Hattenstone, supra note 179.


188. Nguyen, supra note 143.

189. Lajka, supra note 187.
For some esports players, a possible career in esports can become addictive and may even turn deadly. One psychiatrist recounted stories of “addicts . . . who wear nappies so they don’t have to leave their game to go to the toilet; the gamers so obsessed that they stop eating and sleeping altogether.”190 The stories get worse. One player that was treated for an esports addiction “killed himself two months after completion of the treatment. . . . ‘The fact that he thought he had lost all his social relationships led to his suicide.’”191 While an extreme, this example certainly illustrates the pitfalls of pursuing a competitive esports career.

2. Power Disparity

Beyond playing and living conditions, another key factor to consider for esports players is the power disparity in the current market. Players are effectively at the mercy of their employers. “From the lack of security in fighting for a place on a team, to the punishing esports tournament schedules, it has been felt that there is very little in the way of protection for young gamers.”192 The power that game developers possess over players is immense. “Game developers . . . own the games, and completely control the leagues. Players hold almost no power, and player strikes are unheard of.”193 Because they own all the intellectual property and software rights to the programs the athletes use to compete, game developers can collapse an entire professional league market without much consequence. This is not an illusory fear for players: Blizzard Entertainment cancelled the professional esports league for one of its products, *Heroes of the Storm*, ending hundreds of careers.194 As a result, “[t]he entire competitive element of the game died . . . for some people . . . because they aspired to be professional players.”195 One esports team responded to the closure by highlighting that “[t]his is a full ecosystem with hundreds of young adults relying on its existence. To just pull the plug on it overnight is entirely irresponsible.”196 The reality is that for game developers, the focus is on profitability, not player rights or equal distribution of revenue.197

190. Hattenstone, supra note 179.
191. Id.
192. Fawcett, supra note 178.
193. Reames, supra note 144.
195. Id.
197. “The primary agenda will always be what makes the developers money.” Reames, supra note 144.
Besides the threat of leagues collapsing, game developers can also change the rules of the competitions. One esports company, Epic Games, publisher of the popular *Fortnite* title, released a new patch (which alters the software at the code level, meaning players are completely unable to ignore the changes) on the same day as a $500,000 tournament.\(^{198}\) This was, unsurprisingly, met with a great deal of criticism by competitive players, who quickly had to adjust playing styles.\(^{199}\) This happened despite “Epic . . . committing to doing various things to help their community function” because it had complete discretion to “do[] the opposite.”\(^{200}\) This is a concrete example of a phenomenon which could occur in any game and any esports league.

Also, while the relative bargaining position of an individual player pales in comparison to the power held by a game developer, players are also forced into an inferior bargaining position with their team organizations.\(^{201}\) As a result, there are two entities which might seek to depress wages and rights of players: the developers and the team organizers. Although professional esports players are normally employed directly by their team\(^{202}\), some leagues place direct constraints on those player-team relationships and ultimately exercise a great deal of control over players.\(^{203}\) The esports industry model itself is a barrier to players’ unions. Every year, new games are created and published by developers which might displace a formerly popular esports event.\(^{204}\) “[E]sports titles are constantly falling in and out of favor . . . . Initiating, supporting, and maintaining an esport for a short-lived title may disincentivize players, owners, and representatives from pursuing unionization.”\(^{205}\) While that may not ultimately be a concern for established esports leagues,\(^{206}\) it does suggest that new leagues may take advantage of players in the short term and that players “will be willing to accept the punishing demands faced by the esports teams, as there is very little in the way

\(^{198}\) Ashley, supra note 173.

\(^{199}\) Id.

\(^{200}\) Id.


\(^{202}\) Id. at 366.

\(^{203}\) Id. at 372, 375–83 (detailing the “Minimum Player Compensation” that is required for participation in LCS and the significant level of control that can be exerted by Riot through bans).


\(^{206}\) Burk, supra note 204 (“New games, whether electronic or physical, may be quickly adopted by consumers for personal play; however, professional play in competitive games of any sort requires some time for the game to become stabilized, for a fan base to develop, and for the business and vocational infrastructure to accumulate. New physical sports sometimes enter the Olympic or professional canon, but not with great frequency, and not immediately with popularity. Some of the same dynamics are apparent in the [esports] arena.”).
of a guarantee that they will get another chance to earn money from video gaming."

The players themselves pose some difficulties for collective bargaining because they have to come together collectively in order to gain power. One issue is that players are relatively short-lasting within the esports scene. Most players end their competitive careers some time before they hit the age of 30. On that basis, sacrificing playing time to strike or collectively organize could deprive players of income, popularity, and competitive opportunities, which are naturally limited in number. Further, some above average or star esports players might also push against unionizing efforts, on the basis that they are compensated better than their less skilled competitors. While these issues were just as present within traditional sports leagues and were ultimately overcome, it could be that the continually changing market will disincentivize players from sacrificing valuable playing time. Despite that disincentive, however, many players have spoken out about the need for heightened player protections. "Players are very aware that they are not the most qualified to be dealing with legal issues such as contracts . . . ." Rather, leagues and teams are in a much better bargaining position than players, which leads to lower league costs, but at the price of more sacrifices for players. In sum, given player conditions and the power disparity between the leagues and the players, a players’ union would help to even out the balance.

B. ANALYSIS OF THE CURRENT LEGAL FRAMEWORK TO RESOLVE PROBLEMS

As addressed in Part II, there are certain requirements that must be met before union certification is granted. This Section analyzes the employee status and bargaining unit requirements, as well as other contractual restraints on organization that would need to be dealt with to form a union. The Section concludes with a look at some market constraints that a players’ union would face.

207. Fawcett, supra note 178.
208. See id.
210. See Krasnow & Levy, supra note 72, at 759–61 ("Professional sports represent an industry of ‘stars,’ of employees whose jobs depend entirely on their individual abilities . . . [and] tend to be very individualistic . . . [which] results in athletes’ displeasure with standardized contracts. . . . [However,] many athletes are not solely motivated by the profit motive . . . [and] the brief duration of an athlete’s career . . . emphasizes both the need for less burdensome conditions which affect the length of an athlete’s active playing life, and the need for pension and retirement plans.” (footnotes omitted)).
212. Id.
213. See supra Section II.A.
2020] TRADITIONAL SPORTS AND ESPORTS

1. Employee Status

One of the biggest legal challenges facing players’ unions for esports is the independent contractor bar. As previously discussed, the NLRA states that the term “employee” within the scope of the act “shall not include . . . any individual having the status of an independent contractor.” Currently, “it is unclear whether [esports] professional players are employees or independent actors.” In both the OWL and the NA LCS, players are required, as a condition of participation in the league, to have contracts with their teams. However, these contracts are kept confidential and are not available to the public.

Within the Overwatch League’s Official Rules, Terms and Conditions document, there is a section specifically devoted to employment status. It states:

Each Team Member acknowledges and agrees that by adopting and enforcing these League Rules, the League Office is not creating an employment relationship with Team Members. Each Team Member is employed solely by his or her Team. Nothing in this Agreement may be construed or reasonably relied upon as evidence that the League Office is an employer, joint-employer, and/or co-employer of any Team Member. Furthermore, nothing in these League Rules may be relied upon as evidence that a Team Member has a contract of employment for any particular period of time.

Additionally, the rules contain a provision conditioning eligibility for competition, stating “each [p]layer must be retained as an employee of his or
her respective Team using the then-current form player professional services agreement as specified by the League Office.”

Within the NA LCS, there is a similar rule provision devoted to employment status. It states:

Members of the Full Team Roster may not be employees of Riot Games Inc. (“RGI”), North America League of Legends Championship Series LLC (“NALCS LLC”), the League of Legends [Esports] Federation LLC or any of their respective affiliates at the start of or at any point during the LCS Competitive Season.

While not as direct as the provision given within the Overwatch League Rules, the goal is apparently the same: Players competing within the League are not to be considered employees of the League. If these provisions were upheld in court, professional esports players would be completely barred from unionizing in the traditional league structure. There were additional contract elements required by the NA LCS in 2018:

All players on the Full Team Roster must have a written contract with the Team they are playing for (a “Player Services Agreement”). . . . The Service Agreements must represent the entirety of obligations between the player/Head Coach and the Team. Any obligation outside of the Service Agreements which has not been submitted to the League will not be recognized by the League.

There was also a restriction on veteran players in the lower league competition, the North American League of Legends Academy Championship Series (“LACS”), which prevents players who “started over 50% of eligible regular season games . . . [for] the last three splits,” which necessarily prevents seasoned players from dropping down into an easier tier.

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221. Id. at 5.15(b).

222. 2019 OFFICIAL RULES: LCS AND LACS, supra note 158, at 5.

223. Id. (emphasis omitted) (“‘Affiliate’ is defined as any person or other entity which own[s] or controls, is under the ownership or control of, or is under common ownership or control with, an owner. ‘Control’ shall mean the power, through any means, to determine the policies or management of an entity, whether through the power to elect, appoint or approve, directly or indirectly, the directors, officers, managers or trustees of such entity or otherwise.” (emphasis omitted)).


226. 2018 OFFICIAL RULES: NA LCS AND NA LACS, supra note 225, at 10. This was removed in the 2019 rules. See 2019 OFFICIAL RULES: LCS AND LACS, supra note 158, at 50.
If players are under contract with their leagues and those contracts state the players are not employees, the leagues can argue that the NLRA, and therefore collective bargaining protection, is not applicable. The NLRB “has the duty of determining in the first instance who is an employee . . . and . . . the Board’s determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law.” While there are many factors involved in determining employment status, “[t]he key question . . . is the alleged employer’s . . . control over the manner and means by which the work is performed.” After balancing relevant factors, one scholar has argued that “the scales tip toward classifying pro players as employees” because players are subject to “significant control” by the leagues.

Looking at traditional sports players associations, the employee requirement of the NLRA was no bar to the certification of traditional player unions. Prior to union certification, scholars recognized that “[a]thletes in team sports would probably have no difficulties in meeting the Board’s interpretation of the term ‘employee.’” The MLBPA itself gained union recognition from the MLB in the first collective bargaining agreement by pressuring owners through negotiations and fervent public opinion pieces, without any need for the NLRB to determine employee status. “[T]he players associations that were formed in football, hockey, and basketball grew out of the players’ desire to break through the joint opposition of the owners and the commissioners who were opposed to player participation in the formulation of league standards and conditions.” All of the professional leagues had similar employee and employer relationships to those within the esports industry. “[A] combination of oppressive conditions, unreasonable refusals by the owners to negotiate with the players, leadership by recognized figures in the sport, threat of coercion, good timing, and favorable public

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227. See Bayliss, supra note 15, at 361–62 (stating that employment status affects the legal rights of players, especially in the realm of collective bargaining). The leagues can also attempt to argue that the NLRA is inapplicable on the basis of jurisdiction, but “[m]ost professional sports have been recognized to have a substantial effect on interstate commerce,” and there is little reason why esports would be an exception. Id. at 383–85.
229. Bayliss, supra note 15, at 386. “Determining employee status is . . . a fact-bound determination applying the common law principles of agency” and “a reviewer must determine both the technical and traditional concepts of employee and employer, as well as the economic realities of the situation.” Id. at 385–86.
230. Id. at 391. While the Bayliss Note focuses on League of Legends, the analysis is equally applicable to other esports leagues, such as OWL.
231. See Krasnow & Levy, supra note 72, at 781. “[T]he Board has held free lance [sic] artists, screen writers, and announcers, all of whom do considerable individual contracting of their services, to be employees . . . .” Id.
232. Id.
233. SWANSON, supra note 78, at 121–27.
234. Krasnow & Levy, supra note 72, at 764.
reaction resulted in the successful formation of these associations.” Esports could likewise face such a perfect storm of conditions.

2. Bargaining Unit

The next barrier to the certification of esports players’ unions is the bargaining unit determination by the NLRB. That provision “implies that the initiative in selecting an appropriate unit resides with the employees,” but ultimately the NLRB resolves any dispute if the unit is appropriate. The most important factor used in determining an appropriate unit is the existence of a community of interest among the employees.” As a result, bargaining units can be formed at multiple levels: It would be possible to have an esports players’ union at the team level, team-organization level, league level, or even at the industry-wide level. League level organization is analogous to the players associations present in traditional sports and would probably qualify as a bargaining unit, but the other possibilities have unique characteristics that make this determination more difficult.

At the team level, it may be difficult for players to unionize. Within the esports industry, owner organizations often have several teams that compete in different games and different leagues. The NLRB has recognized that players could theoretically organize within those organizations, in either employer-wide or game-specific units, to collectively bargain with ownership at a single-team level. However, the NLRB has also stated that certifying a single-team bargaining unit might upset stability in a league market, so there is some doubt whether they would approve such a unit. Additionally, a game-specific bargaining unit might not be the most effective given the

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235. Id. at 765.
237. Feldacker & Hayes, supra note 22, at 38.
238. For example, one single team from a league, akin to if the Chicago Bulls had their own individual union apart from all other NBA teams.
239. For example, one esports team organization that fields multiple individual teams, such as Team SoloMid (“TSM”) which has a League of Legends team, Fortnite team, and many other competitive gamer units. See Our Teams, TSM, https://tsm.gg [https://perma.cc/DC82-WKMG].
241. Id. (“They each have a League of Legends team, a Counter-Strike: Global Offensive team, an Overwatch team, etc.”). By way of comparison, imagine if one organization (hypothetically named Los Angeles Sports) owned the Los Angeles Dodgers (a baseball team), the Los Angeles Rams (a football team), and the Los Angeles Lakers (a basketball team), which all participate in different leagues.
242. Nw. Univ., 362 N.L.R.B. 1350, 1354 (2015) (“Such an arrangement is seemingly unprecedented; all previous Board cases concerning professional sports involve leaguewide bargaining units.”).
243. Id.; see also NLRA v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951) (“Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.”).
relative bargaining strength gained.244 Also, having a game-specific union for all teams within an organization might pose a prohibitive cost issue.245 Alternatively, if players attempt to form a unit made up of all teams within an organization, their bargaining strength would increase and the overall cost might decrease, but the “community of interest” principle may be harder to meet given that player conditions across games might differ.246 The most ambitious bargaining unit that could be formed is industry-wide. That would mean that all esports players participating in any league or under any team owner could be a party to the union.247 However, the “community of interest” principle would again be a barrier and, given that working conditions across all teams is likely different, convincing the NLRB of efficient collective bargaining might be incredibly difficult.248

3. Contractual Constraints

While not a direct bar under the NLRA, the league rules of the OWL and the NA LCS both contain language that could substantially constrain any early efforts at union organization. The NLRA does, however, specifically protect against such constraints when employees try to collectively bargain.

Within the OWL, there are provisions which might impact any attempt at unionizing, located within the “Cheating and Game Integrity” section. It states that “[c]ollusion, match fixing or any other action to intentionally alter, or attempt to alter, the results of any game, match or tournament” is considered cheating and “will not be tolerated.”249 There are also restrictions on actions which “could reasonably be expected to be, detrimental to the image or reputation of, or result in public criticism of or reflect badly on” league affiliates.250 A players’ strike or other organizational efforts could qualify as violations of these provisions.

There is also a dispute resolution section within the league rules. Within that section, all disputes are subject to arbitration. The rules state “[a]ll Rules

244. See Heggem, supra note 15, at 455 (“[I]f the players’ unions get too small—for instance, Team SoloMid’s five League of Legends players form a union—they may not have the [sic] enough power to do any good.”).

245. See id. at 454–55 (stating that if unions developed for each game, “existing esports organizations would need to enter into multiple CBAs—an expensive, perhaps even cost-prohibitive, proposition”).

246. Recall that the test for a community of interest has many factors and the determination is fact dependent. See supra notes 40–44 and accompanying text. If all players within an organization, regardless of which team they played on, shared common characteristics such as the same supervisors, work schedules, amenities, and obligations, the likelihood of a positive determination by the NLRB would increase.

247. Heggem, supra note 15, at 454 (“[C]ould all players form a single union that spans multiple esports titles? Such a union would be large (and probably powerful) . . . .”).

248. Id.

249. OWL OFFICIAL RULES, supra note 217, at 6.2.

250. Id. at 6.3(b).
Disputes and Arbitration Disputes will be governed by and construed under the laws of the United States of America and the law of the State of New York, without regard to choice of law principles.”

The NA LCS also has conditions on collusion. In the 2018 rules, one clause defines collusion to include “any agreement among two (2) or more players to not damage, impede or otherwise play to a reasonable standard of competition in a game. . . . [Including d]eliberately losing a game for compensation, or for any other reason, or attempting to induce another player to do so.” The rules also prohibit “[a]ny other further act, failure to act, or behavior which, in the sole judgment of League officials, violates these Rules and/or the standards of integrity established by LCS for competitive game play.” Therefore, any players’ strikes in an attempt to bargain collectively could be punished by league officials at their discretion.

The NA LCS 2018 rules also contains a provision limiting the speech of players, which states, “Team Members may not give, make, issue, authorize or endorse any statement or action having, or designed to have, an effect prejudicial or detrimental to the best interest of LCS, Riot Games or its affiliates, or League of Legends, as determined in the sole and absolute discretion of LCS.” Efforts to organize and spread awareness of bad labor practices could effectively be punished under this provision.

Player trades and signings are also subject to league approval. As a result, the league could effectively block players from the league if they spread information counter to the league’s interests. Another provision states that:

League officials at all times may act with the necessary authority to preserve the best interests of the LCS. This power is not constrained by the lack of any specific language in this document. League officials may use any form of punitive actions at their disposal against any entity whose conduct is not within the confines of the best interests of the LCS.

Clearly, these punishments can be used to prevent collective bargaining by the players.

The NLRA has specific protections to prevent these contractual provisions from being used against collective bargaining efforts. As discussed in Section II.A, the NLRA details what constitutes an unfair labor practice. Those unfair practices include “to interfere with, restrain, or

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251. Id. at 9.4(a).
252. 2018 OFFICIAL RULES: NA LCS AND NA LACS, supra note 225, at 44.
253. Id. at 45.
254. Id. at 46.
255. Id. at 12-15.
256. Id. at 50.
258. See id. § 158; see also supra Section II.A.
coerce employees in the exercise of the rights guaranteed in \[S\]ection \[7\]."  

Under Section 8(a)(1), employers cannot “[t]hreaten employees with adverse consequences, such as closing the workplace, loss of benefits, or more onerous working conditions, if they support a union, engage in union activity, or select a union to represent them,” Therefore, if a league enforced the above provisions against organizing and freedom of speech in order to restrict players’ ability to organize a collective bargaining group, players could seek NLRB enforcement. Players would need to file a charge with the NLRB, which would lead to an investigation by NLRB agents and, if enough supporting evidence is found and if the parties do not reach a settlement, the NLRB itself files a complaint that results in a hearing before an administrative judge.

Additionally, an employer cannot “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” As discussed above, one game developer has created a players association. Under the NLRA provision quoted above, that group cannot qualify for union certification because it is funded by the employer, Riot Games. Riot has indicated that the players association was formed to “give players a voice in any league decisions, as well as provide the players with the supportive services of outside consultants such as agents, lawyers and financial advisers.” A similar situation existed in the early days of baseball when the organization was able to receive union certification only after sufficiently distancing itself from the employer, as discussed in Section II.C.1. The example of the early MLBPA, which lacked any real strength to influence league decision-making, merely maintained the status quo. While Riot has indicated that the players association is intended to become a certified union in the future, there are no guarantees that will actually happen. With the right guidance, however, this early effort at a players association could blossom into a certified union by following in the MLBPA’s footsteps.

259. 29 U.S.C. § 158(a)(1). For a description of Section 7 rights, see supra Section II.A.

260. Interfering with Employee Rights (Section 7 & 8(a)(1)), supra note 36.


263. See supra notes 174–76 and accompanying text.


265. Id.

266. See supra Section II.C.1.

267. See Goslin, supra note 264 (encouraging “the possibility of the Players’ Association becoming a fully independent Players’ Union in the future”).
4. Market Constraints

In addition to legal constraints on professional esports players' unions, there are also market factors which may limit esports players' collective bargaining efforts. This Section considers alternative employment options, possible current preemptive efforts to curb unions, and the idea that one union might lead to further preemptive efforts.

For esports players, participation in a league may decrease salary potential. Successful esports players often have an alternative revenue source available in “livestreaming,” which allows spectators to watch them compete in real time through online platforms. For some players, the potential revenue from livestreaming is many times greater than what is offered through participation in a league. While not all professional esports players are guaranteed massive sums through livestreaming, participation in a league can remove that potential almost entirely. Both the OWL and the NA LCS have conditioned eligibility for competition on streaming exclusivity in the past, although it is unclear if such restrictions exist now. Because esports league participation may remove this revenue source, some qualified players may simply abandon the league instead of organizing within it. In collective bargaining elections, research supports the argument that “[t]he greater the alternative employment opportunities . . . the less likely are workers to vote for union representation.” Therefore, the ability to proverbially jump ship may be a more attractive offer to potential union leaders than sacrificing earnings for the betterment of other players’ position.


269. See Hollist, supra note 268, at 830 (detailing how one professional esports player retired to exclusively livestream to the tune of an $800,000 yearly salary).

270. In the OWL, the leaked rules place direct constraints on livestreaming: “A Player may endorse products and services so long as the Player and the endorsement (i) do not mention, reference or include any video game content of Overwatch . . . .” OVERWATCH LEAGUE, PLAYER STREAMING POLICY § 3.B (2018), available at https://www.documentcloud.org/documents/4420166-OWL-Rulebook.html [https://perma.cc/76E7-HMCV]. Players livestreaming rights are curtailed further when "stream[ing] any video game content" where "more than two Players are playing a game." Id. § 3.C. For additional restrictions, see id. §§ 5–6.

In the LCS, player contracts that leaked in 2013 revealed the existence of a ‘restricted games’ clause, which prohibited players from streaming online while playing specific other games” from other developers that directly competed with Riot Games. Bayliss, supra note 15, at 305. That restriction was removed from the LCS rules and is not located within the 2018 NA LCS rules, but it is possible the clause may still be included in player-team contracts, which are kept secret. Id. at 305–06. See generally 2018 OFFICIAL RULES: NA LCS AND NA LACS, supra note 225 (lacking a “restricted games” clause for player streaming).

Another market constraint on unionizing is that game developers and teams have begun responding to player concerns. “[R]ising wages are assumed to increase the utility associated with remaining nonunion, and thereby [assumed] to increase the likelihood that workers will vote against representation by a union.” Following this premise, it can be assumed that any benefits provided to players would also ostensibly decrease the chances of organizing. The OWL established a standard player contract that requires a minimum yearly salary of $50,000, as well as “employer-sponsored housing, health insurance and a retirement savings plan.” This was done largely to combat stability issues for players and “provide a good example of how esports could look after its competitors in the future.” One esports organization, Immortals, provides a sports psychology consultant for players. These efforts may be genuine attempts to remove player anxiety, but the overall effect may be player complacency. Players could receive better benefits through collective bargaining, but organizations will attempt to find the bare minimum of compensation that preempts union formation.

It is also possible that the formation of a single players’ union within esports would fundamentally alter the landscape. If one esports players’ union arose, it might alter the behavior of future esports league creators in an attempt to avoid a similar fate. One theory within collective bargaining is “that as an industry becomes more highly organized, workers in non-union firms in that industry determine that there is less utility associated with union representation, because . . . such workers benefit from increasing union threat effects that drive up nonunion wages.” Therefore, if a strong players’ union develops for one game or league, other owners or league organizers might attempt to prevent the formation of a union in their sector by raising wages or providing other benefits, without any need for collective bargaining efforts by their own players.

IV. Recommendations

Following in line with traditional sports leagues, the formation of a players association is an attractive solution for addressing the growing concerns of player conditions and the vast power disparity between players and their leagues. Like traditional sports player unions, esports players could
use a union to negotiate limited practice hours, guaranteed retirement funds, and better health conditions. Given the vast amounts of revenue in esports, it would also be possible for esports players to negotiate a raised minimum salary, making the average salaries more comparable to traditional sports. By leveling the playing field between game developers and esports players, both groups could work together to create a marketable product that does not have to severely impair players’ future livelihoods by allowing negotiation on any important issue. The presence of a union might also attract star livestreaming players that had turned away from the competitive scene due to the increased benefits. Also, having guaranteed player protections might influence talented potential players to focus on joining the industry because of the reduced opportunity cost in pursuing a competitive career.

Esports players would not be the only ones to benefit from a players association. “[T]he formation of esports players associations and unions may be in the best interests of both players and owners. Collective bargaining may bring player cost certainty for owners, while insuring [sic] that someone is looking after the players’ best interests.” As discussed above, the collective bargaining agreement between the NBA and NBPA contains several provisions that limit player salary. Also, leagues could negotiate for protective clauses, such as hazardous activity limits and no-strike policies. Another facet of reaching a collective bargaining agreement: The nonstatutory labor exemption would benefit esports organizations because it would provide protection against antitrust actions under certain circumstances.

There are some potential negatives that may accompany unionization, but they do not outweigh the positives. Any union presence would have an

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277. See NBA CBA, supra note 116, at 333–39; NFL & NFL PLAYERS ASS’N, supra note 130, at 143–48; see also MLB PLAYERS ASS’N, supra note 98, at 6 (“There shall be one off-day with no workouts scheduled . . . .”); id. at 272 (letter regarding mini-camps).


279. See MLB PLAYERS ASS’N, supra note 98, at 55–65; NBA CBA, supra note 116, at 344–59; NFL & NFL PLAYERS ASS’N, supra note 130, at 175–78.

280. Mullen, supra note 174.

281. See supra Part II.

282. See J.J. Pristanski, Note, No Risky Business: A Proposal to Modify the Hazardous Activities Clause in Professional Sports, 14 DEPAUL J. SPORTS L. 67, 69–70 (2018) (proposing a modification to the hazardous activities clause, which is currently used in some form in the CBAs of each of the Big Four leagues).

283. See supra Part II.

284. See supra Section II.C.2.

285. See supra Section II.C.3.
effect on esports leagues: The share of revenue to owners and game developers would likely decrease as the players’ share increased. Also, a union developing in one league might start a domino effect in other leagues: Once players see how attractive a CBA can be in action, players on the fence would be more likely to take the plunge. However, given the severe player conditions and the lack of transparency offered by game developers, these are necessary sacrifices to correct a career path that currently results in massive burnout and extreme mental and physical stresses.

The traditional league model of a players’ union is likely the only feasible option. Players would have a great deal of power by being able to collectively strike within the league, possibly during championship events to severely undercut developers’ and team owners’ bottom line, similar to the cancellation of the MLB World Series. Players would also not have to make as many concessions as a larger league would necessitate, letting localized issues be addressed appropriately. For these reasons, the best path forward for unionization would likely be to stick to the traditional league level players’ union, and the NLRB has approved of such a bargaining unit in many instances, removing most of the danger that union certification would not be recognized.

While the relative bargaining power of players would likely increase with the amount of participation, an industry-wide union could potentially be quite powerful but ultimately fail to address specific team or player complaints. Also, if an industry-wide players’ union became certified, it would put major strains upon the industry. As all esports players would qualify for the union, any new leagues would face a heightened barrier to enter and compete. Players could immediately demand enforcement of any CBA that is reached and cause costs to skyrocket before a new league could find its footing, requiring an enormous amount of capital investment. This argument also cuts the opposite direction, however: Heightened barriers to enter and compete would prevent the industry from gaining new competitors and bolster the prominence of pre-existing league structures, helping current esports organizations by creating a near monopoly through excessive start-up costs.

Additionally, a small team-specific union also could have quite a few issues. Such a small union would have substantially less power in bargaining with owners, as well as very limited bargaining power over an entire league, but would probably be a better advocate for fixing localized issues the players have. Also, such a union might raise costs for a team organization exponentially compared to their competitors, forcing them out of actual competitiveness.

Until a union does form, players still need protections now. One possibility for impatient players would be to bring antitrust actions against the leagues. This avenue was often utilized by traditional athletes in professional

286. See supra Section II.C.
league sports prior to, and even during, collective bargaining. However, this is not a one-size-fits-all solution. As discussed in Part II, leagues receive some insulation from the Sherman Antitrust Act due to the need for cooperation to create a market. Therefore, any antitrust suit against an esports league would need to find an angle of attack that would be supported by either the _per se_ rule or the Rule of Reason. As a result, an antitrust action could not accomplish nearly as much as collective bargaining in improving player conditions or the power disparity, but it might alleviate some of the most egregious behaviors. Additionally, even if an esports players’ union does form, antitrust suits are still an option for gaining leverage in court.

Another option for uneasy players would be to seek outside governance and direction through legislative, administrative, or nongovernmental avenues. A few countries have taken this approach, including South Korea, France, and the United Kingdom. In South Korea, “the Korea [Esports] Association (‘KeSPA’) was established as a nongovernmental organization after approval and support from South Korea’s Ministry of Culture and Tourism, and it has long been involved in regulating national gaming and esports.” The organization “can officiate and organize tournaments, manage esports venues . . . , enforce professionalism and ethical standards,” and more. In the United Kingdom, a similar venture was created, but ultimately folded due to lack of funds. Afterwards, a new group, the British Esports Association, was founded through government action to oversee competitive gaming. The United States could follow suit, using either direct legislation or administrative agencies to regulate esports. This strategy would certainly benefit players, but it is uncertain if these efforts would be solely in the players’ interest like a union would provide, as many other stakeholders might seek protections in the legislation or governing organization.

These alternatives to collective bargaining are somewhat effective, but the formation of a players’ union is ultimately the best path forward for players. The unique situation of a players’ union is that it allows for game developers, team owners, and players to determine, with minimal outside interference, what balance is needed within their own industry. For players to combat poor conditions that they themselves endure and solve the existing power disparities to gain an equal seat at the table, collective bargaining is the

287. _See supra_ Part II; _see also supra_ note 64 and accompanying text.
288. _See supra_ Section II.C.
290. _Id. at_ 758.
291. _Id._ (footnotes omitted).
292. _Id. at_ 759–60.
293. _Id. at_ 760.
294. For a conversation on the potential for such governance, see _id._ at 760–65.
best solution. The traditional league model allows for a union that has an equal balancing of bargaining power and responsiveness to player issues. Therefore, this Note’s recommendation is to establish an esports players association at the league level to provide a balance between bargaining power and localized attention with little risk of NLRB rejection. To gain initial bargaining power, this Note also suggests seeking out potential antitrust suits against leagues to encourage all parties to come to the table.

V. CONCLUSION

One industry insider “believe[s] formation of a players association, or more accurately multiple players associations across different publishers, leagues and games, is inevitable.” 295 Players’ unions in the esports industry seem destined to form, without any substantial legal obstructions. There are certain market constraints that may be hard to overcome, but if players want to sufficiently protect their interests, a union is the best path forward. The development of players associations in the MLB, the NBA, and the NFL all provide evidence that an esports players’ union would be highly beneficial and that current barriers have been overcome before. Player conditions and the power disparity between the players and the league are often oppressive within current esports leagues, and any new leagues that start out may have even worse conditions until they become fully established. It is possible that a players’ union could form for teams, leagues, or industry-wide, each with its own benefits and limitations, but the best option is likely to follow the precedent set by other players associations in pursuing league-wide bargaining units. There are some alternatives to unionization, including antitrust suits and the establishment of governance oversight, but a union will be most responsive to player interests. The successful models of the players associations of the MLB, the NBA, and the NFL are available to guide any attempts of unionizing and collective bargaining by esports players.

295. Mullen, supra note 174.