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Quinn A. Stigers

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LEGAL AND PRACTICAL BARRIERS TO THE VIABILITY OF TRADITIONAL ESPORTS TITLES AS OLYMPIC MEDALING SPORTS

QUINN A. STIGERS*

INTRODUCTION

Picture an internationally viewed and beloved sporting event, with millions of at-home viewers, advertising and sponsorship deals, and athletes from across the world competing for a first-place medal. While this description might invoke images of the Olympics, it is also an accurate description of an esports event. In July of 2021, the Free Fire World Series drew 5.41 million peak viewers, making it the most watched esports event of all time.¹ Around the same time, the 2020 Summer Olympics, held in the summer of 2021 due to Covid-19, drew an average of 15.5 million primetime viewers.² Currently, esports are not affiliated with the Olympics, however as they grow in popularity it is natural for fans to wonder when traditional esports titles will be recognized by, and included in, the Olympics as medaling events.

This comment recounts the history of both the Olympics and esports as they developed over time. It will detail the requirements that a given sport must meet to become an Olympic sport, and it will explain the benefits that the Olympics could derive from traditional esports. This comment will ultimately detail the

* Quinn A. Stigers is a third-year student at Marquette University Law School. She is a Sports Law Certificate candidate through the National Sports Law Institute and the Editor-in-Chief of the Marquette Sports Law Review. Upon graduation in May of 2022, Quinn will join Husch Blackwell in Milwaukee as an Associate in the Labor & Employment practice group. Quinn would like to thank esports attorney Roger Quiles for his assistance in the research and writing of this comment. This comment would not have been possible without his valuable insight into the esports industry. Quinn would also like to thank her family and friends for their endless love and support.

1. Christina Gough, *Leading eSports Tournaments Worldwide 2021*, by *Peak Viewers*, STATISTA (July 1, 2021), <https://www.statista.com/statistics/507491/esports-tournaments-by-number-viewers-global/#:~:text=The%202021%20Free%20Fire%20World,almost%203.99%20million%20peak%20viewers>.

2. Ed Dixon, *NBC's Tokyo 2020 Audience Lowest Since 1988 Olympics*, SPORTSPRO MEDIA (Aug. 11, 2021), <https://www.sportspromedia.com/news/tokyo-2020-olympics-nbc-bbc-tv-ratings-audience-peacock-streaming/>.

numerous legal and practical barriers standing in the way of traditional esports titles joining the Olympics as medaling events. This comment concludes that although the Olympics could benefit greatly from the addition of traditional esports titles to the Olympic games, and although certain esports titles may become part of the Olympics in some capacity, due to the number of legal and practical barriers, traditional esports titles are unlikely to become medaling Olympic sports anytime soon.

I. THE OLYMPICS, HISTORY OF THE INTERNATIONAL OLYMPIC COMMITTEE, AND IOC RECOGNITION OF SPORTS

The Olympic Movement “is the concerted, organized, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism.”³ The International Olympic Committee (IOC) was created to be the supreme authority of the Olympic Movement and all members of the movement are required to abide by its rules and decisions.⁴ It is the IOC that determines which sports will be included in the Olympic Movement.⁵ The Olympics are governed by the Olympic Charter and Bylaws.⁶ “The Olympic Charter is the codification of the fundamental principles of Olympism, and the rules and bye-laws adopted by the International Olympic Committee.”⁷ Because the charter establishes and governs the relationship between International Federations (IFs), National Olympic Committees (NOCs), and the Olympic Movement, it is essentially the law of the Olympics.⁸ Many of the “legal” issues arising in the context of this comment involve noncompliance with the Olympic Charter and Bylaws.

In order for a sport to be recognized by the IOC, it must first be governed by an International Federation (IF) that is recognized by the IOC.⁹ An IF is defined by the Olympic Charter as an international, non-governmental organization governing one or more sports at the global level.¹⁰ The IOC recognizes the IFs as the “worldwide governing body for its particular sport.”¹¹

3. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 253 (5th ed. 2020).

4. *Id.* at 254.

5. *Id.*

6. *Olympic Charter*, INT’L OLYMPIC COMM. 1, 6 (Aug. 8, 2021), <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-OlympicCharter.pdf?ga=2.185838572.452916736.1634416733-447067342.1634225568>.

7. *Olympic Charter*, INT’L OLYMPIC COMM., <https://olympics.com/ioc/olympic-charter> (last visited Dec. 1, 2021).

8. *Id.*

9. *Olympic Charter*, *supra* note 6, at 56.

10. *Id.*

11. MITTEN, *supra* note 3, at 254.

The IF's main responsibilities include creating and enforcing the rules of the sport, dictating eligibility criteria for competition (subject to the approval of the IOC), selecting referees for competition, providing for avenues of dispute resolution, and taking control of the sport during the Olympic games.¹² Each IF is made up of National Governing Bodies (NGBs) and National Federations (NFs) that operate within each country.¹³

The sport must be in conformity with the Olympic Charter, the World Anti-Doping Code (WADC), and the Olympic Movement Code on the Prevention of Manipulation of Competitions.¹⁴ These various codes are essentially the governing laws of the Olympics.¹⁵ Each IF maintains its autonomy in the governance of the sport but must comply with the governing documents.¹⁶

There is a difference, however, between being a recognized Olympic sport and a sport being a competing/medaling event.¹⁷ Some sports, such as chess and bowling, are recognized sports, but are not competing events at the Olympics.¹⁸ This is because, in order to become a part of the Olympics, the IF must apply by filing a petition with the IOC.¹⁹ In the petition, the IF must establish that it meets the criteria set forth by the IOC.²⁰ For the IOC to accept a sport, it must be practiced widely and meet various criteria.²¹

II. OVERVIEW OF ESPORTS

The term 'esports' refers to the broader category consisting of many different professionally played video games, also known as titles, in much the same way the term "sports" refers to the broader category made up of football, basketball, baseball, hockey, etc.²² Also similarly to regular sports, there are

12. *Id.*

13. *Id.*

14. *What Are the Conditions Required for a Sport to be Recognized by the IOC?*, INT'L OLYMPIC COMM., <https://olympics.com/ioc/faq/sports-programme-and-results/what-are-the-conditions-required-for-a-sport-to-be-recognised-by-the-ioc> (last visited Dec. 1, 2021).

15. *Id.*

16. *Olympic Charter*, *supra* note 6, at 56.

17. *How Are Sports Chosen for the Olympics?*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/story/how-are-sports-chosen-for-the-olympics> (last visited Dec. 1, 2021).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Sports, Programme and Results FAQ*, INT'L OLYMPIC COMM., <https://www.olympic.org/faq/sports-programme-and-results> (last visited Dec. 1, 2021); *The Olympic Programme Evolution*, OLYMPIC STUD. CTR. 4 (June 28, 2018), https://library.olympic.org/Default/doc/SYRACUSE/174657/the-olympic-programme-evolution-the-olympic-studies-centre#_ga=2.111876804.135955340.1613232588-1743369050.1613232588.

22. Abby Long et al., *The Emergence of Esports & the Advertising Opportunities Within the Ecosystem*, PMG (2018), <https://www.pmg.com/wp-content/uploads/2018/06/eSports-Marketing->

many genres of esports and each comes with unique rules, audiences, and tournament styles.²³ One common genre of esports titles is Multiplayer Online Battle Arenas MOBAs).²⁴ This genre includes well recognized games such as League of Legends (LoL), Dota 2, and Arena of Valor.²⁵ These games tend to have a strategy element and require players to team up to defeat opponent teams in a form of battle.²⁶ Another genre of titles is First Person Shooter games (FPS).²⁷ Popular titles in this genre include Call of Duty (CoD), Counter-Strike: Global Offensive (CS:GO), and Valorant.²⁸ For clarity, I will refer to the individual esports games as “titles” or “esports titles,” and I will only use the phrase “esports” when referring to the collective. Additionally, I will often refer to the previously mentioned titles as “traditional” esports titles as opposed to video games that mimic real sports, which I will refer to as “virtual sports titles” or “sport simulation titles.” Traditional esports titles tend to be far more popular in the esports community than virtual sports titles.²⁹

Esports parallel traditional sports in other ways as well; there are leagues, tournaments, teams, coaches, and players.³⁰ There are some critical distinctions, however. Unlike traditional sports which have many of their own state and federal statutes, as well as decades of case law, there is no general body of law relating to esports.³¹ Esports are, however, inherently governed by intellectual property law and contract law because the titles at the center of esports are the intellectual property of game developers.³² Developers such as Riot (LoL and Valorant), Blizzard (Overwatch), and Valve (Dota2), own the rights to the games they’ve created and either license the rights to competition organizers, or

PMG-Whitepaper.pdf.

23. See generally Lauren Petruzzo, *The Different Genres of Esports Explained*, AMERICAN ESPORTS, <https://americanesports.net/blog/the-different-genres-of-esports-explained/> (last visited Dec. 1, 2021).

24. *The 20 Most Popular MOBA Games Right Now*, GAMEDESIGNING, <https://www.gamedesigning.org/gaming/best-moba/> (last visited Dec. 1, 2021).

25. *Id.*

26. *What Are MOBA Games? Your Guide to One of Gaming’s Biggest Genres!*, PLARIUM (Apr. 4, 2019), <https://plarium.com/en/blog/moba-games-guide/>.

27. Petruzzo, *supra* note 23.

28. Samuel Horti et al., *The Best FPS Games You Can Play Right Now*, GAMESRADAR+ (Sept. 23, 2021), <https://www.gamesradar.com/best-fps-games/>.

29. See generally Werner Geyser, *The Biggest Esports Games Every Gamer Should Know*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/biggest-esports-games/> (Aug. 27, 2021) (explaining the top 15 most popular esports titles, none of which are sport simulation titles).

30. See John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. ILL. L. REV. 509, 528 (2020).

31. Jas Purewal & Isabel Davies, *The eSports Explosion: Legal Challenges and Opportunities*, A.B.A., https://www.americanbar.org/groups/intellectual_property_law/publications/landslide_/2016-17/november-december/esports-explosion-legal-challenges-opportunities/ (last visited Dec. 1, 2021).

32. *Id.*

run the competitive leagues surrounding their games themselves.³³ Because the developers own the games, they have a huge amount of control over the esports industry, and this control creates many of the legal issues discussed later in this comment.³⁴

III. ANALYSIS

There are a number of aspects at play in the struggle between the Olympics and esports. Although some esports titles may have a viable path to becoming Olympic medaling sports, there are several legal and practical barriers standing in the way, which make it highly unlikely that traditional esports titles will join the Olympics.

A. Benefits the Olympics Could Derive from the Inclusion of Esports

Esports are rapidly growing in popularity and possess certain qualities that the Olympics could benefit from greatly. Esports are incredibly flexible in terms of how, when, and where they are played. Additionally, esports have a young audience that is precisely the demographic advertisers prefer. Finally, esports are arguably the most inclusive sports for those with different abilities. All of these benefits are expanded upon in the following discussion.

Esports bring the type of flexibility to the table that the Olympics need. When Covid-19 shut down the entire world in March of 2020, the Olympics shut down with it.³⁵ The 2020 Olympics were postponed to 2021.³⁶ Esports shut down too, for a short time, but were already back by the end of March, albeit in a slightly different form.³⁷ As an aside, there were a number of new considerations esports had to make before returning, such as how to ensure fairness of competition.³⁸ For example, in a typical competition, esports arenas are full of referees that ensure the players are not cheating with special software.³⁹ This is obviously much more difficult when the players are not in the same place. Additionally, there was the issue of individual player's internet strength.⁴⁰ Esports had to consider what would be done if a player experienced

33. *Id.*

34. See Holden et al., *supra* note 30, at 520.

35. Ahiza García-Hodges et al., *Tokyo 2020 Olympics Postponed Over Coronavirus Concerns*, NBC NEWS, <https://www.nbcnews.com/news/world/tokyo-2020-olympics-postponed-over-coronavirus-concerns-n1165046> (Mar. 24, 2020, 9:03 AM).

36. *Id.*

37. Matthew Gault, 'Something Needs to Fill That Void.' As Stadiums Go Quiet, Esports Are Having a Moment, TIME (Mar. 31, 2020, 12:23 PM), <https://time.com/5812633/esports-coronavirus/>.

38. *Id.*

39. *Id.*

40. *Id.*

lag or even a full internet crash.⁴¹ Would the match start over? Would that player be disqualified? Obviously, Covid-19 caused practical issues, but overall, esports were flexible enough to weather the storm and the Olympics were not. Esports were able to adapt to new circumstances much faster than regular sports and the Olympics as an institution.

To this point, it is important to remember that “esports” refers to many different individual titles put together.⁴² There were singular IOC recognized sports, such as golf, that were able to continue their seasons due to the ability to social distance while competing.⁴³ Although golf was able to continue competition, the Olympics were not going to expend resources holding the Olympic Games with the only event being golf. It would be impractical and costly for only one event. Esports, conversely, are made up of enough individual titles or sports that the Olympics could feasibly hold an entirely virtual Olympic Games with only esports events. If esports were an Olympic sport, at least part of the 2020 Olympics could have happened.

Another major benefit that esports as a whole could bring to the Olympics is its much younger audience.⁴⁴ The average viewer of the Olympics is getting older.⁴⁵ According to a Nielsen study conducted in 2017, “viewership inched up from a median age of 45 in 2000 to 53 in 2016.”⁴⁶ Additionally, from the 2012 London games to 2016, viewership ages eighteen to forty-nine decreased by twenty-five percent.⁴⁷ The IOC President, Thomas Bach, has indicated that the Olympics need to attract more millennial viewers.⁴⁸ Esports could do just that.⁴⁹ Esports have a much younger audience than any other major sports, “which makes esports uniquely attractive to advertisers” and could boost the Olympics’ advertising revenue.⁵⁰ “Seven out of ten esports fans are males that range from 18 to 34 years of age.”⁵¹ The average fan, according to a Nielsen study, is 26

41. *Id.*

42. Long et al., *supra* note 22.

43. Bob Harig, *How the PGA Tour Got Through a Pandemic and Finished Its Season*, ESPN (Sept. 8, 2020), https://www.espn.com/golf/story/_/id/29830626/how-pga-tour-got-pandemic-finished-season.

44. *Id.*

45. Betsey Guzior, *How NBC Is Luring Younger Viewers for Olympics*, BUS. J. (Feb. 8, 2018, 10:18 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2018/02/how-nbc-is-luring-younger-viewers-for-olympics.html?page=all>.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. David Bloom, *What Olympic Recognition Could Mean for Esports, and Vice Versa*, FORBES (Oct. 18, 2018, 3:23 PM), <https://www.forbes.com/sites/dbloom/2018/10/18/esports-olympics-recognition-ioc-esl-advertising-sponsors/?sh=74243bcc3b05>.

51. Abby Long et al., *supra* note 22, at 12.

years old.⁵² In fact, “among ‘American male millennials (age 21 to 35), esports [are] just as popular as baseball or ice hockey, with 22% watching [them].’”⁵³ The inclusion of at least some esports titles could be extremely beneficial to the Olympics in terms of ad revenue and regaining the popularity it once had with a younger generation.⁵⁴

Finally, esports level the playing field in a way that even the Olympics cannot. People of all abilities are able to compete against each other in esports.⁵⁵ “Anyone who didn’t get picked for kickball, or who had to sit on the sidelines during gym due to a physical condition, understands the stress of not being able to participate.”⁵⁶ In order to level the playing field, the Olympics and Paralympics have always been planned by separate committees and held separately.⁵⁷ Although the Olympics have made great strides as far as inclusivity by changing the name of the United States Olympic Committee (USOC) to the United States Olympic and Paralympic Committee (USOPC), there is not even a need for separate versions of esports in the first place.⁵⁸ Esports remove many of the barriers to competition that people with disabilities or people who are not considered “athletic” face and allow anyone to be an athlete.⁵⁹

For example, an esports athlete named Mike “Brolylegs” Begum was born with arthrogryposis and scoliosis.⁶⁰ He is confined to a wheelchair, but through esports, has become a well-known competitor in the Street Fighter community.⁶¹ Brolylegs initially learned to play video games by holding the controller with his wrists and pushing buttons with his face and mouth.⁶² He competes against able-bodied people in the Street Fighter community and has reached professional status in the game.⁶³ While there are additional barriers facing the

52. *Id.*

53. *Id.* (alteration in original).

54. *Why Sports & Brands Want to Be in Esports*, NEWZOO (Oct. 12, 2016), <https://newzoo.com/Insights/trend-reports/why-sports-brands-want-to-be-in-esports/>.

55. Joseph Giampapa, *S-S-S-S-Stigma Breaker: Gamers with Disabilities Are Taking the Fighting Game Scene by Storm*, ABLEGAMERS CHARITY (July 26, 2020), <https://ablegamers.org/stigmabreaker/>.

56. Steven Hoy, *5 Ways Esports Levels the Playing Field for All Students*, ESCHOOL NEWS (July 24, 2020), <https://www.eschoolnews.com/2020/07/24/5-ways-esports-levels-the-playing-field-for-all-students/>.

57. See generally *U.S. Olympic Committee Changes Name to U.S. Olympic & Paralympic Committee*, TEAM USA (June 20, 2019, 12:47 PM), https://www.teamusa.org/News/2019/June/20/US-Olympic-Committee-Changes-Name-To-US-Olympic-Paralympic-Committee?fbclid=IwAR2Da-618y5btrzy22c5JZ2cw4jw_qJMfMAjx65rfbeUL_eI-QMjrAPMQj8.

58. *Id.*

59. Giampapa, *supra* note 55.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

members of the esports community with physical disabilities, such as travel to competitions, the actual esports titles lend themselves to be played by anyone.⁶⁴ To be clear, this is not a critique of the U.S. Olympic and Paralympic athletes being separated for competition. It is the nature of the various sports, the requirement of uncertain outcomes, and the fairness of competition that require the Olympics to separate athletes of different abilities.⁶⁵ However, there is no need for this separation in esports, which is why esports would make a great addition to the Olympics.

It is undeniable that esports could offer benefits such as flexibility, a younger audience, and inclusivity of those with different abilities to the Olympics. On the surface, it seems that it could be the perfect partnership. However, the following section will explain a number of barriers, which in practice, may prevent the partnership from ever manifesting.

B. Legal Barriers to the Viability of Esports Titles as Medaling Olympic Sports

There are currently a number of legal barriers that stand between traditional esports titles joining the Olympics as medaling Olympic sports. These barriers arise from three main sources of law: Olympic law, intellectual property law, and contract law. First, the Olympics are governed by the Olympic Charter.⁶⁶ If a sport does not comply with the charter or bylaws, there is no possibility of it being recognized by the Olympics.⁶⁷ Additionally, there are several intellectual property issues that arise surrounding esports. Esports are the intellectual property of developers and are therefore controlled entirely by the developers.⁶⁸ Finally, there are some unexplored contractual issues that may arise from sponsorships of esports leagues that would make it not feasible for esports titles to join the Olympics.

1. Olympic Laws: Noncompliance with the Olympic Charter

As things stand right now, esports do not meet the requirements dictated in the Olympic charter to be recognized as an Olympic sport for two reasons. First,

64. *Id.*

65. See generally MITTEN, *supra* note 3, at 5-6 (discussing that in order for sports to function there must be competitive balance and uncertain outcomes).

66. *The Olympic Charter*, A.B.A. (Nov. 27, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/the-olympic-charter/#:~:text=The%20Olympic%20Charter%20is%20the,athletes%20competing%20in%20the%20Games.

67. *What Are the Conditions Required for a Sport to be Recognized by the IOC?*, *supra* note 14.

68. Purewal & Davies, *supra* note 31.

esports do not have an IF.⁶⁹ Second, some genres of games are seen as too violent to fit within the Olympic Values dictated in the charter.⁷⁰ This is problematic for esports, because the charter is seen as a sort of “constitution” for the Olympics.⁷¹ It contains the “laws” of the Olympics and in order to be recognized as an Olympic sport by the IOC, a sport must comply with the charter.⁷²

The first reason that esports do not comply with the Olympic charter is that there is currently no recognized IF.⁷³ The main purpose of a sports federation is to represent its stakeholders’ interests either at a player, national, or international level to another overarching body which, in this case, would be the Olympics.⁷⁴ These types of governing bodies also become necessary to provide disciplinary action for player or team misconduct and for governing the rules of the sport.⁷⁵

As esports gained popularity, a number of federations were created in an attempt to regulate esports internationally.⁷⁶ There are many different types of federations, each with distinct goals, however only some federations have come forward seeking IOC recognition or indicating that they might in the future.⁷⁷ One potential IF is the International eSports Federation (IeSF), which on the surface seems like it has all the requirements of an IOC recognized IF.⁷⁸ IeSF is truly an international body and it has been compliant with the World Anti-Doping Code since 2013, which is required of all IOC recognized IFs.⁷⁹ Another federation, which was at one point in contention for IOC recognition, is the Global Esports Federation (GEF) which has ties to the massive technology

69. Ellen M. Zavian, *Who Is Snubbing Who? Esports, The IOC and International Federations Need to Listen to One Another Closely*, FORBES (May 11, 2021, 9:05 PM), <https://www.forbes.com/sites/ellenzavian/2021/05/11/whos-is-snubbing-who-esports-the-ioc-and-international-federations-need-to-listen-to-each-other-closely/?sh=674b1ff888b4>.

70. See *Olympic Charter*, *supra* note 6, at 13.

71. *Id.* at 6.

72. *What Are the Conditions Required for a Sport to be Recognized by the IOC?*, *supra* note 14.

73. Zavian, *supra* note 69.

74. Graham Ashton, *Governing the Wild West—An Introduction to Esports Federations and Associations*, ESPORTS OBSERVER (Jan. 3, 2019), <https://esportsobserver.com/esports-federations-intro/>.

75. *Id.*

76. *Id.*

77. See generally Chris Thursten, *How Viable Is the World Esports Association?*, PC GAMER (May 18, 2016), <https://www.pcgamer.com/how-viable-is-the-world-esports-association/>; Scott Polacek, *International e-Sports Federation to Apply to Be Recognized as Olympic Sport*, BLEACHER REP. (Apr. 18, 2016), <https://bleacherreport.com/articles/2633871-international-e-sports-federation-to-apply-to-be-recognized-as-olympic-sport>.

78. Polacek, *supra* note 77.

79. *IeSF Became an Official Signatory of WADA*, IESF NEWS (June 2, 2013), <https://ie-sf.org/news/3753>.

conglomerate, Tencent.⁸⁰

It became clear that the IOC had no intention of recognizing one of these federations in 2020 when the IOC indicated that it would not recognize GEF as an international federation.⁸¹ Along with the rejection, it warned esports not to join GEF, reasoning that the IOC already has strong ties to the esports community and wants to maintain its direct relationship rather than communicate through third party federations.⁸² This was a confusing statement to many considering an IF is a requirement to become an Olympic sport.⁸³ The final blow came when the IOC informed all summer and winter federations that it would not recognize any global esports governing body at this time.⁸⁴ This announcement by the IOC temporarily closed the door on the idea of esports joining the Olympics, however it does not seem permanent. The IOC merely stated that it has no intentions of recognizing an IF *at this time*, but it did not give away its intentions for the future. There is a chance that someday the IOC will recognize an esports federation, which would make esports one step closer to becoming an Olympic sport.

Even if the IOC comes around and recognizes an esports IF, there would have to be an IF to begin with, which is unlikely given developers' reluctance to give away governing authority to an IF.⁸⁵ Developers and competition organizers are the end-all be-all for how an esports is governed, and they are often the same entity.⁸⁶ In some situations, such as with Riot and its LCS league, the developer is both the owner of all of the intellectual property for the video game and is the competition organizer.⁸⁷ As it stands, the developers/organizers also act as judge, jury, and executioner for all disciplinary measures.⁸⁸ It is important to note that because the developers/organizers play all of these roles, they often have the entire role of a federation covered, meaning developers/organizers believe there is no need for a federation, because the

80. Kevin Hitt, *IOC Will Not Recognize Any World Governing Body for Esports Including Tencent-Backed GEF*, ESPORTS OBSERVER (Oct. 30, 2020), <https://esportsobserver.com/ioc-says-no-to-esports-feds/>.

81. *Id.*

82. Duncan Mackay, *Blow for Global Esports Federation as IOC Warn Olympic Sports Not to Join Them*, INSIDE THE GAMES (Oct. 29, 2020), <https://www.insidethegames.biz/articles/1100130/ioc-warn-sports-of-joining-gef>.

83. *Id.*

84. Hitt, *supra* note 80.

85. *See generally An Introduction to the Esports Ecosystem*, ESPORTS OBSERVER, <https://esportsobserver.com/the-esports-eco-system/> (last visited Dec. 1, 2021).

86. *Id.*

87. *Id.*

88. Steven Asarch, *'League of Legends': The Problem with Riot Being Judge, Jury, and Executioner*, PLAYER.ONE (May 15, 2016), <https://www.player.one/league-legends-problem-riot-being-judge-jury-and-executioner-533853>.

developers/organizers already do everything that a federation would.⁸⁹ The reason this is important is that it often means that developers are hesitant to support any IF in esports.⁹⁰ The unwillingness of developers to give power to an IF could be the reason for esports continued noncompliance with the Olympic charter and the reason why esports will not be eligible to be an Olympic sport.

Even if all the stars aligned, meaning the IOC agreed to recognize an IF and video game developers relinquished some control to said IF, esports would still run into the issue of being noncompliant with the Olympic charter due to the violent nature of many games. Violence is banned in the Olympic charter, which states that the mission and role of the Olympics is, “to encourage and support the promotion of ethics and good governance in sport as well as education of youth through sport and to dedicate its efforts to ensuring that, in sport, the spirit of fair play prevails and violence is banned.”⁹¹ In 2018, the president of the IOC and former Olympic Fencer, Thomas Bach, made it clear that “‘so called killer games’ which promote violence or discrimination” cannot be brought into accordance with the “Olympic values” and therefore should not be recognized by the Olympics.⁹² In 2019, the IOC agreed to “incorporate and cooperate” with esports that simulate real-life sporting events such as FIFA and NBA 2K.⁹³ The issue with that decision is that the esports with the largest following are those sports such as League of Legends and Dota 2 that have a mortal element to them.⁹⁴ This memo from the IOC president essentially dismissed the possibility of working with any game with a mortal element.⁹⁵ Any game with a mortal element, therefore, does not fit within the values defined by the Olympic charter and is ineligible to become recognized by the IOC.⁹⁶

2. Intellectual Property: Rights to the Esports Titles and Potential Conflicts Arising from the Licensing of Those Rights

The area of law that would likely be the most implicated by esports joining the Olympics is intellectual property law. As mentioned previously, esports are heavily controlled by intellectual property law because video games are the

89. See generally Ashton, *supra* note 74.

90. Qi Peng et al., *Esports Governance: Exploring Stakeholder Dynamics*, MDPI (Oct. 8, 2020), <https://www.mdpi.com/2071-1050/12/19/8270>.

91. *Olympic Charter*, *supra* note 6, at 16.

92. *Esports ‘Too Violent’ to Be Included in Olympics*, BBC NEWS (Sept. 4, 2018), <https://www.bbc.com/news/newsbeat-45407667>.

93. Pearce Bates, *Olympics Will Only Incorporate Esports Simulation Titles*, SPORTSPRO (Dec. 13, 2019), <https://www.sportspromedia.com/news/olympics-esports-simulation-ioc>.

94. *Id.*

95. *Id.*

96. *Id.*

intellectual property (IP) of developers like Riot, Blizzard, and Valve.⁹⁷ Many feel that the IOC views the commercial ownership of these games, i.e., the fact that the developers own all the IP, as too large a hurdle to clear.⁹⁸

Developers own multiple types of intellectual property, including the copyright of the games themselves and all trademark rights related to the esports leagues that play the games.⁹⁹ A common issue arising out of esports is that there is inconsistency internationally as to what type of IP protection developers have.¹⁰⁰ In some countries, video games are treated as computer software, while in the United States, they are treated as literary works.¹⁰¹ This sort of distinction determines the way licensing works in different parts of the world.¹⁰² To get around this issue, developers tend to create contracts detailing the licensing and use of the game by a third party as well as how to organize and market the events the game will be used for.¹⁰³ This method seems to work well for developers and the third-party tournament organizers, however it gets infinitely more complicated when the Olympics are added into the mix.

Typically, a publisher licenses the use of their video games for a fee.¹⁰⁴ Because developers own all the IP rights to their games, and those games' respective leagues in some cases, the developers have all the bargaining power.¹⁰⁵ It is highly unlikely that the Olympics will want to pay any type of money for the games, and if that is the case, it will be nearly impossible for the two parties to come to an agreement. Inherent in IP rights is that the owner gets to choose how that IP is used.¹⁰⁶ It does not have to license its IP or allow anyone to use the IP if it does not want to.¹⁰⁷ On top of this, the Olympics do not have much to bargain with. Esports have become so popular and diverse that they could easily hold their own Olympic-like games without the constraints of the Olympic charter. Long story short, the Olympics will not want to pay the developers for their IP, and the developers do not need the Olympics to be successful. This unequal bargaining power between the developers and the Olympics will make it such that the parties may not be able to come to a

97. See Holden et al., *supra* note 30, at 532, 536-538.

98. Kevin Hitt, *IOC Delivers Blow to Esports' Quest for International Legitimacy*, ESPORTS OBSERVER (Nov. 4, 2020), <https://archive.esportsobserver.com/ioc-no-to-esports-governing-body/>.

99. See Roman Brtko, *Intellectual Property in the World of eSports*, IP WATCHDOG (Apr. 2, 2018), <https://www.ipwatchdog.com/2018/04/02/intellectual-property-esports/id=95245/>.

100. Purewal & Davies, *supra* note 31.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *See id.*

106. *Id.*

107. *See generally id.*

reasonable agreement.

3. Contract Law: Potential Sponsorship Issues

A major amount of esports revenue, much like the Olympics' revenue, comes from sponsorship.¹⁰⁸ Because the developers are often the same entity as the esports league organizers, there are often league-wide sponsorship deals.¹⁰⁹ The ESL Pro League, for example, is sponsored by Intel.¹¹⁰ The Olympics are also currently sponsored by Intel,¹¹¹ but if the Olympics were sponsored by a competitor of Intel, IBM for example, what would happen? Would esports leagues be in violation of their sponsorship agreement by joining in the Olympic games? This question is largely unanswered and would likely serve as yet another legal hurdle governed generally by contract and intellectual property law.

C. Practical Barriers to the Viability of Esports Titles as Olympic Medaling Sports

Even if esports and the Olympics were able to clear all the legal hurdles involved, there are a number of practical barriers that make it highly unlikely that traditional esports titles will join the Olympics as medaling sports. The intentions of the IOC, the complicated nature of merging esports into one Olympic event, and the necessity of negotiating complicated business relationships make the possibility of traditional esports titles joining the Olympics nearly nonexistent.

Some argue that esports are “desperately looking for validation on a global scale” and feel esports will achieve that by being recognized by the Olympics.¹¹² Many others would argue that esports are doing just fine on their own.¹¹³ Touched on previously in this comment, the first practical barrier is that neither the IOC nor esports have a desire to join together.¹¹⁴ The IOC was clear that it

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

109. *See* ESL PRO LEAGUE, <https://pro.eslgaming.com/csgo/proleague/> (last visited Dec. 1, 2021) (listing league wide sponsors at the bottom of the page).

110. *Id.*

111. *IOC and Intel Announce Worldwide TOP Partnership Through 2024*, INTEL NEWSROOM (June 21, 2017), <https://newsroom.intel.com/news-releases/ioc-intel-announce-worldwide-top-partnership-through-2024/#gs.sznla0>.

112. Hitt, *supra* note 98.

113. *Id.*

114. *Id.*

had no plans to recognize an esports IF at the present time.¹¹⁵ On top of that, esports would likely prefer to operate without the constraints of the Olympic charter. Even if both parties wanted to join, there are additional practical barriers to clear.

Remember, the term ‘esports’ refers to a broader category consisting of many different professionally played video games, or esports titles.¹¹⁶ The esports market is extremely fragmented, meaning there are many types of different esports with different rules, audiences, and governance structures.¹¹⁷ It is important to remember this distinction, because it presents yet another practical barrier. Attempting to bring an entire set of sports into the Olympics is a much more difficult and time-consuming task than a single sport, and it just might not be worth the effort.¹¹⁸ Attempting to bring “esports” as a general category into the Olympics is like trying to bring “sports” as a general category into the Olympics. Each video game, or title, is its own entirely separate sport.¹¹⁹ Here, the IOC’s only options would be to either accept all esports, as a whole, into the Olympics, or pick and choose which esports are eligible. As previously mentioned, it would be impractical to get all the esports to work together under a single IF and it would be time consuming for the Olympics to choose which esports are eligible and which are not.

Returning to the discussion of video game developers, another major practical issue is the impracticality of the Olympics having to negotiate with video game developers such as Riot, Activision, and Valve.¹²⁰ Unlike regular sports where anyone is able to play without a license, esports revolve around video games, which are the intellectual property of developers.¹²¹ When the Olympics adds new sports, it can easily do so without negotiating a business relationship or securing a license. It merely has to recognize an IF and ensure that IF is following its charter. If the Olympics were to add esports, they would need to not only recognize the specific esports titles as a sports, but negotiate a business relationship with some or all of the developers.¹²² Additionally, the so-called lifespans of titles are short.¹²³ This means a title may be popular for a

115. *Id.*

116. Long et al., *supra* note 22, at 4.

117. Hitt, *supra* note 80.

118. *Id.*

119. *See generally id.*

120. *List of Video Game Publishers Officially Supporting Esports*, ESPORTBET.COM, <https://esportbet.com/gaming-publishers/> (last visited Dec. 1, 2021).

121. *See* Holden et al., *supra* note 30, at 536-538.

122. *See* Hitt, *supra* note 80.

123. *Esports Are Coming to the Tokyo 2021 Olympics*, TOP 10 ESPORTS, <https://www.top10esports.com/5-esports-are-coming-to-the-tokyo-2021-olympics/> (last visited Dec. 1, 2021).

year, and one year later the esports crowd has moved on to the next big title.¹²⁴ Selecting which titles should be included and negotiating contracts to use them would be time consuming, expensive, and would require the Olympics to be able to predict which titles will still be popular years later when the Olympics finally take place.¹²⁵ None of these things are feasible for the Olympics.

D. Progress Towards Inclusion of Esports Titles in the Olympics

Although it is highly unlikely that we will ever see traditional esports titles become medaling events, it is possible that some esports titles, such as sports simulation titles, could one day join the Olympics. In April of 2021, the IOC announced the Olympic Virtual Series, which demonstrated that the Olympics were warming up to the idea of esports.¹²⁶ Through the Olympic Virtual Series, the IOC joined forces with five IFs and game developers to create Olympics-licensed titles that mimic traditional sports.¹²⁷ The Virtual Series was a showcase, rather than a medaling Olympic event, that included sports simulation titles such as baseball, cycling, rowing, sailing, and racing.¹²⁸ Notably, the showcase did not include a single traditional esports title such as LoL, Overwatch, CS:GO, or Valorant.¹²⁹ When the Olympic Virtual Series took place in the summer of 2021, it made few waves in the esports community.¹³⁰ Those from the esports community that watched it felt it was entertaining but “out of touch,” noting that the broadcasting was poorly planned and the presentation and production were severely lacking.¹³¹ A major complaint was that it seemed that the presenters had no familiarity with esports whatsoever and the Olympic Virtual Series was not given the same respect and planning as the other Olympic events.¹³² At the same time as the Virtual Series, Intel held the Intel World Open, an esports tournament that featured traditional esports titles.¹³³ The event was supported by the IOC and the Tokyo 2020 Summer

124. *Id.*

125. *Id.*

126. *IOC Makes Landmark Move into Virtual Sports by Announcing First-Ever Olympic Virtual Series*, INT’L OLYMPIC COMM. (Apr. 22, 2021), <https://olympics.com/ioc/news/international-olympic-committee-makes-landmark-move-into-virtual-sports-by-announcing-first-ever-olympic-virtual-series>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Entertaining but Out of Touch – Was the Olympic Virtual Series a Success?*, TOP 10 ESPORTS, <https://www.top10esports.com/entertaining-but-out-of-touch-was-the-olympic-virtual-series-a-success/> (last visited Dec. 1, 2021).

131. *Id.*

132. *Id.*

133. *Intel*, INT’L OLYMPIC COMM., <https://olympics.com/tokyo-2020/en/intelworldopen/> (last

Olympics were referred to as the “Official Esports Event Partner” for the tournament.¹³⁴

Including esports titles in the Olympics as a showcase and supporting external esports tournaments shows that the IOC recognizes the benefit of drawing a younger crowd through embracing esports, but it seems the IOC isn’t sure who their target market is and it is unclear whether their attempts will be effective at drawing more viewers.¹³⁵ Young people who are traditional sports fans would likely prefer to watch actual rowing, racing or cycling events rather than the virtual versions of those events.¹³⁶ Likewise, traditional esports fans would rather watch traditional esports titles than the five titles the Olympics showcased at the Virtual Series.¹³⁷ So, efforts to draw the traditional esports crowd by using sports simulation titles is a futile effort.

Although these recent developments indicate the IOC is embracing esports, including the Virtual Series made up of sports simulation titles in the Olympics while merely partnering with a tournament focused on traditional esports titles is further evidence that the Olympics have not, and likely will not, come around to traditional esports joining the Olympics as medaling events any time soon. Instead, the IOC will stick to sports simulation titles for the time being.

CONCLUSION

For traditional esports titles to be internationally recognized by the IOC and accepted as a medaling event, they would need to clear all the previously mentioned hurdles. Although the Olympics could benefit from the addition of traditional esports titles, and although sports simulation titles may be close to Olympic inclusion, in the end, the hurdles for traditional esports titles are too high to clear. It is unlikely that traditional esports titles will join the Olympics as medaling sports, at least for now.

visited Dec. 1, 2021).

134. *Id.*

135. *IOC Makes Landmark Move into Virtual Sports by Announcing First-Ever Olympic Virtual Series*, *supra* note 126.

136. *See Entertaining but Out of Touch – Was the Olympic Virtual Series a Success?*, *supra* note 130.

137. *Id.*