# Tiebreaker: An Antitrust Analysis of Esports

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*Electronic sports (esports) offers a novel case study in how antitrust analysis should approach multi-sided markets that rely on the ability of numerous entities to access intellectual property (IP). A game publisher's IP in its game allows for permissible monopolization, but also creates opportunities for anticompetitive IP misuse. Tournament organizers, teams, players, broadcasters, spectators, and advertisers all need access to publishers' IP to participate in esports markets. As publishers vertically integrate into the downstream market for esports content in their games, they rationally seek to minimize competitive pressure from other entities in the market. A publisher can do this by using its IP monopoly in its game to dominate the downstream esports market in its game by, for example, refusing to license broadcast rights to independent tournament organizers. This Note argues that in order to promote consumer welfare through market competition, antitrust law should restrict game publishers from using IP rights in their games to monopolize the downstream esports market for those games. Because multi-sided markets which rely on access to IP and blur the lines between producer, intermediary, and consumer are likely to grow, the stakes for effective antitrust analysis in these markets will only continue to climb.*

*Part I introduces the esports industry and overviews how antitrust law can be used to shape more competitive markets for the benefit of esports consumers. Part II provides an economic analysis of esports in order to define antitrust-relevant esports markets in which enforcement could be appropriate. Part III outlines the structure of a tying claim against publishers that use their IP monopoly over their games to acquire or maintain a monopoly over esports content produced with their games. Part IV contends that a publisher's IP rights should not insulate it from liability for downstream anticompetitive behavior. Part V argues that antitrust enforcement would be superior both to the creation of an independent esports governance body, because such enforcement would facilitate market solutions rather than top-down rulemaking, and to the*

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*creation of a fair use exemption for esports, because such an exemption would be comparatively overbroad.*

## I. INTRODUCTION — ESPORTS AND THE RELEVANCE OF ANTITRUST LAW

Electronic sports (esports) is a burgeoning entertainment industry in which viewers worldwide watch professionals compete in video games like *League of Legends*, *Overwatch*, and *StarCraft*.[1] Just as with conventional sports, dedicated fans flock to tournament stadiums, watch live broadcasts of events, and view past broadcasts which have been uploaded to websites like YouTube.[2] Esports content generally consists of audiovisual footage of competitive gameplay with live color commentary and analysis, interspersed with shots of players, pre- and post-game interviews, highlight reels, and similar sorts of sports entertainment staples.[3] Esports has experienced astronomical revenue growth, from $120 million in 2012 to $696 million in 2017, with projections that revenue will reach $1.48 billion by 2020.[4] Forty-six million unique viewers watched the most popular tournament of 2017, Intel Extreme Masters Katowice — almost half of the 111 million who watched the Super Bowl.[5] In 2017, over 17,000 players competed for a total of $114 million in

1. Hannah Dwan, *What Are Esports? A Beginner's Guide*, TELEGRAPH (Oct. 18, 2017), https://www.telegraph.co.uk/gaming/guides/esports-beginners-guide/ [https://perma.cc/38DK-N47Y].

2. *Guide: What Are Esports?*, BBC (Apr. 6, 2017), http://www.bbc.co.uk/newsround/37773832 [https://perma.cc/U7A2-8U93].

3. *See id.*

4. *Esports Market Revenue Worldwide from 2012 to 2020 (in Million U.S. Dollars)*, STATISTA (2018), [https://perma.cc/7NE3-4NQP].

5. 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/ [https://perma.cc/Z7SR-RQHW]; STATISTA, *Number of Unique Viewers of Selected Esports Tournaments Worldwide from 2012 to 2017 (in Millions)* (2018), https://www.statista.com/statistics/507491/esports-tournaments-by-number-viewers-global/ [https://perma.cc/4EMX-ET59].

Unique viewer statistics generally track how many unique IP addresses view a broadcast at some point during its duration. *See, e.g.*, *Understanding Analytics- Unique Viewers vs. Views*, STREAMSPOT (Sep. 21, 2018) https://support.streamspot.com/hc/en-us/articles/360009522114-Understanding-Analytics-Unique-Viewers-vs-Views [https://perma.cc/96YT-QLTK] (defining a "unique viewer," for the purposes of a representative streaming analytics service, as "a unique public IP address for the event or time period specified" which would not take into account multiple viewers using the same public IP Address).

prize money across more than 4000 tournaments,[6] with the single largest prize pool of over $24 million for The International 2017, a *Dota 2* tournament.[7] Tournaments and teams are sponsored by companies like Intel, Coca-Cola, and Mountain Dew which target a wealthy, young, and predominantly-male viewer demographic.[8] In light of esports' rising popularity, traditional sports organizations like the National Football League, or NFL, are positioning to enter the market.[9]

Esports appears a vibrant, growing industry with healthy competition (in both senses of the word), unafflicted by cartels, price-fixers, and other classic anticompetitive culprits. Embedded within esports' fundamental technological and social features, however, is a core antitrust concern: a single game producer owns monopoly rights to the game being played, and exercises those rights in the context of a substantial downstream market of viewers, players, teams, broadcasters, and advertisers.[10] Nobody owns football, soccer, or tennis, but

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6. *Top Games of 2017*, ESPORTS EARNINGS, https://www.esportsearnings.com/history/2017/games [https://perma.cc/RHF3-Y48Z] (last visited Nov. 11, 2018).

7. *Largest Overall Prize Pools in Esports*, ESPORTS EARNINGS, https://www.esportsearnings.com/tournaments [https://perma.cc/S5YL-T98L] (last visited Oct. 18, 2018). Dota 2 is a multiplayer online battle arena in which two opposing teams of five players attempt to destroy their adversaries' base; Each player controls 1 of 115 unique heroes, allowing myriad possible team compositions and strategies. For an introduction to watching Dota 2, *see* Victoria Rose, *The Flying Courier's Newcomer Guide to Watching Dota 2*, THE FLYING COURIER (Aug. 21, 2018), https://www.theflyingcourier.com/2018/8/21/17723390/how-to-watch-dota-2-newbie-first-time [https://perma.cc/3RFM-8ETB].

8. Brett Molina, *Why Watch Other People Play Video Games? What You Need to Know About Esports*, USA TODAY (Jan. 12, 2018), https://www.usatoday.com/story/tech/news/2018/01/12/more-people-watch-esports-than-x-dont-get-here-basics/1017054001/ [https://perma.cc/B2GG-GY6U]; Andrew Meola, *The Biggest Companies Sponsoring Esports Teams and Tournaments*, BUSINESS INSIDER (Jan. 12, 2018, 9:23 AM), http://www.businessinsider.com/top-esports-sponsors-gaming-sponsorships-2018-1 [https://perma.cc/LL2L-UJ5H]. NEWZOO, 2017 GLOBAL GAMES MARKET REPORT 18 (2017), https://resources.newzoo.com/hubfs/Reports/Newzoo_The_2017_Global_Games_Market_Report_Light.pdf?submissionGuid=dc6da20e-f7a5-4aa6-b326-972d0ed6243e [https://perma.cc/4249-URLA].

9. Oliver Ring, *A Job Advert Suggests the "eNFL" Could Be Next*, ESPORTS INSIDER (Jan. 15, 2018), http://www.esportsinsider.com/2018/01/job-advert-suggests-enfl-next/ [https://perma.cc/N9VT-L8TW].

10. Stephen Ellis, *Esports Is Growing Up: IP Law and Broadcasting Rights*, ESPN (Jan. 25, 2016), http://www.espn.com/esports/story/_/id/14644531/ip-law-broadcasting-rights-esports [https://perma.cc/LWB4-WUVU] ("Can one entity own the entire esports ecosystem? . . . It's possible, and the main reason for this is the power of intellectual property (IP) law and its growing importance in the burgeoning esports industry."). For a thorough analysis of copyright control in esports, *see* Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PENN. L. REV. 1535 (2013).

companies *do* own esports games. The NFL cannot ban people from playing football in the NCAA, or in their backyards, but Valve Corporation (Valve) could permanently ban anyone from playing its popular game *Counter-Strike*.

Intellectual property (IP) rights in esports currently account for 14% of the total global revenue stream from the industry, with $95.2 million spent on the acquisition of media rights in 2017 — a monumental 81.5% increase from 2016.[11] And, though hundreds of games comprise the esports market, prize money (a proxy for viewership and revenue) is highly concentrated at the very top. In 2017, the top ten esports titles accounted for 82% of all $111 million prize revenue split primarily across games owned by three major publishers: Valve (50%), Activision Blizzard (Blizzard) (17%), and Riot Games (Riot) (10.5%).[12] Assuming for simplicity that prize revenue corresponds roughly with market share,[13] the HHI[14] of the esports market[15] — a metric of measuring market concentration used in antitrust merger analysis — is over 2900, well above what the Department of Justice considers to be a "highly concentrated marketplace."[16]

Moreover, IP control over the fundamental asset undergirding all esports — the games themselves — gives game publishers exclusive rights to effectively control all of the downstream conduct of tournament organizers, broadcasters, teams, and

11. NEWZOO, 2017 GLOBAL GAMES MARKET REPORT, LIGHT VERSION 13 (2017), https://resources.newzoo.com/hubfs/Reports/Newzoo_The_2017_Global_Games_Market_Report_Light.pdf?submissionGuid=dc6da20e-f7a5-4aa6-b326-972d0ed6243e [https://perma.cc/4249-URLA].

12. Calculated from data taken from ESPORTS EARNINGS, *supra* note 6.

13. Prize revenue is an imperfect metric for assessing esports market share. For example, a publisher might expend more money on the prize pool of a relatively less popular game in order to attract players, broadcasters, and viewers to a higher-stakes tournament. In that case, the prize pool would imply a greater market share than is actually the case. However, in the absence of more detailed economic statistics about esports, prize revenues are at least suggestive of market share.

14. The Herfindahl-Hirschman Index (HHI) measures market concentration by squaring the market share of each firm competing in a market, and then summing the resulting numbers. HHI can range from 0 to 10,000. The Department of Justice considers an HHI below 1500 to represent an unconcentrated market, an HHI between 1500 and 2500 to represent a moderately concentrated market, and an HHI above 2500 to represent a highly concentrated market. *See* U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES 18–19 (2010).

15. *See infra* Part II for a discussion on defining esports markets.

16. U.S. DEP'T OF JUSTICE, *supra* note 14. Part 2 more thoroughly addresses what comprises the "esports market."

players.[17] For example, three years of licensing disputes between the Korean E-Sports Association (KeSPA) and Blizzard concerning the broadcast of *StarCraft* — the most popular esport in South Korea — culminated in 2010 litigation in that nation's courts.[18] Blizzard, the publisher of *StarCraft*, had entered into an exclusive partnership with Gretech-GomTV for the broadcast and operation of televised *StarCraft* tournaments.[19] Other television networks, failing to reach a licensing agreement, made unsanctioned broadcasts of tournaments organized by KeSPA, which advanced the novel argument that *StarCraft* should be considered part of the public domain.[20] If KeSPA had been able to bring suit in the United States, it could also have argued that Blizzard's monopoly power over the *StarCraft* esports market[21] and its concerted refusal to provide an "essential facility"[22] on reasonable terms to KeSPA constituted an antitrust violation

17. Jochen Harttung, The Issue of "Deep Control" in Professional E-Sports-A Critical Analysis of Intellectual Property Structures in Electronic Gaming (2015) (unpublished LLM thesis, University of Toronto) https://tspace.library.utoronto.ca/bitstream/1807/70431/1/Harttung_Jochen_201511_LLM_thesis.pdf [https://perma.cc/Z8HY-LA6G].

18. Selith, *Blizzard Officially Sues MBCGame*, TEAM LIQUID (Nov. 1, 2010, 2:11 GMT), http://www.teamliquid.net/forum/community-news-archive/165379-blizzard-officially-sues-mbcgame [https://perma.cc/8WL9-3MG3].

19. Tom Goldman, *Blizzard Prepares to Sue Over Illegal* StarCraft *TV Broadcasts*, ESCAPIST MAGAZINE (Dec. 4, 2010), http://www.escapistmagazine.com/news/view/105854-Blizzard-Prepares-to-Sue-Over-Illegal-StarCraft-TV-Broadcasts [https://perma.cc/7XTR-RJV8].

20. Goldman, *supra* note 19. For an argument that *StarCraft* should be treated as a quasi-public good, *see* Jacob Rogers, *Crafting an Industry: An Analysis of Korean StarCraft and Intellectual Properties Law*, HARV. J.L. & TECH. (2012), http://jolt.law.harvard.edu/digest/crafting-an-industry-an-analysis-of-korean-starcraft-and-intellectual-properties-law [https://perma.cc/6TCR-WKP2], discussed *infra* Part V, note 200.

21. Assuming something like "the *StarCraft* esports market" is a valid market definition, which is discussed in Part II.

22. In antitrust, the "essential facility" doctrine is a specific theory of competitive harm which alleges that a business with exclusive access to a necessary market input — the essential facility — has unreasonably restricted access to that input. Though the Supreme Court has never explicitly recognized the "essential facility" doctrine, precedent suggests courts may take the necessity of a product into consideration when assessing antitrust violations. For recent scholarship arguing for the revitalization of the essential facility doctrine in new digital economies, *see, e.g.*, Maxwell Meadows, *The Essential Facilities Doctrine in Information Economies: Illustrating Why the Antitrust Duty to Deal is Still Necessary in the New Economy*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 795 (2015); Lisa Mays, *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe*, 83 GEO. WASH. L. REV. 721 (2015); Zachary Abrahams, Comment, *Essential Data*, 124 YALE L.J. 867 (2014–2015); *but see* Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004) (noting that the Supreme Court "ha[s] never recognized" the essential facilities doctrine).

under the Sherman Act.[23] While this monopolization claim would have been far from a sure bet, it highlights the important regulative role which antitrust law could — and should — play in multi-sided markets which have the potential to be dominated by IP monopolization.

The Blizzard-KeSPA dispute highlights the tension between IP and antitrust law, which shapes the legal landscape of multi-sided digital markets like esports. Namely, IP owners can exert substantial downstream control over the behavior of entities which rely on their IP (e.g. tournament organizers, broadcasters, players, viewers, and advertisers). Jochen Harttung calls this the problem of "deep control" in the esports market, and conceptually it can be thought of as a variant of tying: an antitrust violation in which a monopolist uses its monopoly power[24] in one market to acquire power in another market.[25] In this hypothetical Blizzard-KeSPA antitrust case, Blizzard uses its legitimately-granted monopoly power in the *StarCraft* IP to acquire and exert market power in *StarCraft* esports content production and broadcasting. Whether this sort of tying theory, which is similar to that which the Supreme Court embraced in *Eastman Kodak*, would be successful is discussed in Part III.[26] What matters at this stage is

23. Section 2 of the Sherman Act prohibits monopolization. A Section 2 violation has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). In this hypothetical, KeSPA could allege that (1) Blizzard possesses monopoly power in the Korean *StarCraft* esports market through its exclusive ownership of *StarCraft* IP and (2) Blizzard's denial of *StarCraft* IP licensing rights to KeSPA constitutes the willful maintenance of its monopoly power.

24. The Supreme Court defines monopoly power as "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 401 (1956) (discussing monopolies in the cellophane market). Monopoly power is an extreme form of market power, which is a seller's ability to "exercise some control over the price it charges." U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT : CHAPTER 2 (Jun. 25, 2015), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 [https://perma.cc/ECT4-MP8B] (explaining the concepts of market power and monopoly power as used in United States antitrust law).

25. Harttung, *supra* note 17.

26. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992). Independent servicers of photocopying machines alleged that Kodak, in a bid to corner the servicing market, restricted their access to necessary replacement parts. Kodak used its complete control over the market for Kodak parts to restrain competition in the aftermarket for the servicing of Kodak machines. A jury eventually awarded independent servicers of Kodak parts $72 million in treble damages for Kodak's violation of Section 2 of the Sherman Act. Kodak was also forced to sell its machine parts for ten years at

that game publishers, which have been granted monopoly rights through IP, may unilaterally control esports markets in ways which harm competition and trigger antitrust scrutiny. Part IV presents and criticizes the argument that game publishers need strong IP protection to adequately incentivize them to create esports games.

The esports industry now stands at a juncture which will determine not only its own fate, but the shape of other multi-sided IP markets yet to be developed. This decision implicates the fundamental reasons the Sherman Act and other U.S. antitrust legislation were enacted in the late nineteenth and early twentieth centuries: the choice between decentralized and monopoly commerce.[27] Esports developed as a grassroots movement which brought enthusiasts together to celebrate the games they loved to play.[28] When Blizzard was developing *StarCraft*, it had no idea the game would give rise to an esport

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reasonable, non-monopolistic, and nondiscriminatory prices. Image Tech. Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1996).

27. *See*, *e.g.*, PHILLIP AREEDA ET. AL., 7 ANTITRUST ANALYSIS: PROBLEMS, TEXTS, AND CASES (2013) at 34–42 (overviewing the historical and legislative motivations underlying the Sherman Act); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) ("Throughout the history of these statutes [the antitrust laws, including the Sherman Act] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."); *but see* Robert H. Bork, *The Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 10 (1966) (criticizing Judge Hand's reasoning in United States v. Aluminum Co. of America and arguing that "[t]he legislative history [of the Sherman Act], in fact, contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare").

28. *See* T.L. TAYLOR, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 136 (2012) ("[W]hile e-sports has its roots in grassroots gaming communities, the formal organization of competitions and tournaments has been an important part of the history of professionalization from the beginning."). By "formal organization of competitions and tournaments," Taylor refers to tournaments organized by independent professional organizations like the Cyberathlete Professional League rather than publisher-sponsored tournaments. *See also* Yong Ming Kow et al., *Crafting the Metagame: Connected Learning in the Starcraft II Community*, Connected Learning Working Papers (Apr. 23, 2014), https://dmlhub.net/wp-content/uploads/files/craftingthemetagame.pdf [https://perma.cc/ZFX8-6S69] ("StarCraft's development into an esport was initially catalyzed by players' desire to compete. In 1999, South Korean youth commonly frequented Internet cafés. Imagine that in one of these Internet cafés, groups of two to eight young people sat together in clusters of personal computers. Each group was a clique consisting of friends from school. The other cliques were from neighboring schools. These different cliques began to compete with each other in StarCraft. Internet café operators saw how much attraction lay in youth competition and rivalry. These operators started organizing mini-tournaments with prizes. Soon Korean broadcasters witnessed this emerging peer culture, and they began to invest in national tournaments that were broadcast over TV. StarCraft had become a sport.").

that would be televised on multiple channels in South Korea for over twenty years.[29] Without Blizzard's help, the *StarCraft* community created its own leagues, developed a rich metagame[30] that gave the game competitive depth, and hosted tournaments.[31] When Blizzard finally sought to claim a piece of the esports pie,[32] it fractured the *StarCraft* community and harmed tournament organizers, broadcasters, players, and viewers.[33]

The fundamental normative question is whether esports should retain its decentralized character to encourage competition and experimentation, or whether game publishers should be allowed to use their IP rights to consolidate the esports market for their games. This Note argues that antitrust law can and should be used as a tool to promote decentralization in the esports industry. Broadly speaking, there are two shapes the industry can take: one in which a number of independent tournament organizers license IP from publishers in order to produce and distribute esports content (the "decentralized model"), and one in which publishers take on the tournament organizing role themselves (the "centralized model"). In the

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29. *See, e.g.*, Jeremy Reimer, *The Dawn of* Starcraft*: E-Sports Come to the World Stage*, ARS TECHNICA (Apr. 1, 2011, 12:30 AM), https://arstechnica.com/gaming/2011/03/the-dawn-of-starcraft-e-sports-come-to-the-world-stage/ [https://perma.cc/KT6P-K99N] ("For years Blizzard had paid little attention to the huge success that pro *StarCraft* had found in Korea, other than being happy that they sold lots of copies of the game there."); Will Partin, *'Starcraft II': How Blizzard Brought the King of Esports Back from the Dead*, VARIETY (Jul. 13, 2018), https://variety.com/2018/gaming/features/starcraft-ii-esports-history-1202873246/ [https://perma.cc/X76K-X4LJ] (explaining that "[t]he success of [StarCraft:] Brood War as an esport caught the company off-guard").

30. A metagame comprises a set of informal norms about optimal play strategies in a game which are not mandated by the game rules themselves. *See* Kow et al., *supra* note 28, at 12 (explaining that a metagame stems from "the analysis of game mechanics and shifting social discourses of strategies within the [game] community [which] come from deep analysis of high-level gameplay and active participation in online forums and video commentaries"). For a detailed example of how the metagame evolved in a single *StarCraft* II tournament, *see* Blizzard Entertainment, *Metagame Evolution at IEM Katowice*, StarCraft II World Championship Series (Mar. 8, 2017), https://wcs.starcraft2.com/en-us/news/20565044/Metagame-Evolution-at-IEM-Katowice/ [https://perma.cc/9Q84-TJ8T].

31. *See* Taylor, *supra* note 28; Kow et al., *supra* note 28.

32. Which, to be fair, had been baked with its IP.

33. Reimer, *supra* 29 (As part of their IP dispute, "Blizzard was throwing down the gauntlet, effectively telling KeSPA that they intended to make *Starcraft 2* a global e-Sport, with or without their help. KeSPA's response was to forbid any of their *Starcraft 1* players from playing *Starcraft 2* and launch a media blitz attacking the game and Blizzard itself. They even convinced the Korean government to threaten to give the game an 'adults-only' rating for violence. . . . [T]he backlash had its impact — sales of *Starcraft 2* in Korea were much lower than expected."). For a thorough narrative account of the Blizzard/KeSPA dispute, *see* Taylor, *supra* note 28, at 161–173.

decentralized model, tournament organizers must compete for access to the game publisher's IP as a necessary input for the production of esports content. Conversely, game publishers must compete for access to the production and league management skills of independent tournament organizers. In the centralized model, on the other hand, this competition is eliminated because the game publisher is the only organizer for its game(s). Because esports viewers are relatively unlikely to substitute viewership of a publisher's game for a rival's game,[34] a centralized publisher has fewer incentives to improve the quality or price of esports content. With the decentralized model, viewers, teams, and players dissatisfied with particular tournament policies have the option of expressing their dissatisfaction by switching to an alternate tournament for the same game. The decentralized model thus allows tournament quality, content pricing, and player treatment to improve through efficiently-operating markets rather than through any centralized governance structure.[35] Moreover, the decentralized model preserves the potential for revitalizing the experimentation and autonomy which defined esports in its nascence and led to its success.

Esports also highlights the thorny intersection of antitrust and IP law by presenting difficult questions of market definition (e.g., is the primary market for a game really distinct from the derivative market of esports in that game?), IP scope (e.g., should a game publisher's monopoly in its game extend downstream to all esports uses of that game?), and how the two should be reconciled in multi-sided digital markets. The answers to these questions rest on an understanding of competition in the esports market. Despite their seeming opposition, both antitrust and IP draw their normative and legal force from the same mission of promoting competitive markets which foster consumer-benefitting innovation.[36] As such, careful consideration of the

34. Esports viewers are primarily motivated by gaining more knowledge about how a particular game is played at a high level, which makes it unlikely that they will expend the effort to learn an entirely new game in response to price or quality pressures. This proposition and the motivational studies which support it are discussed *infra* Part II.C.

35. Laura Chao has proposed the formation of a centralized governing body for all esports. Her proposal is reviewed in Part V. Laura L. Chao, Note, *"You Must Construct Additional Pylons": Building a Better Framework for Esports Governance*, 86 FORDHAM L. REV. 737 (2017).

36. *See, e.g.*, U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (2017) ("The intellectual property laws and the antitrust laws share the common purpose of promoting innovation

economics of the esports market yields conclusions about the appropriate way to apply these legal frameworks.

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## II. DEFINING THE ESPORTS MARKET

Antitrust law seeks to enhance consumer welfare by promoting competitive markets.[37] As such, much in antitrust analysis turns on defining the relevant market in which competition should be measured[38] Whether the relevant market for competition analysis is all esports, esports in a particular genre, or a single esport significantly affects any subsequent legal analysis. Market definition matters because it sets the parameters for assessing the market power of firms — the degree to which they may profitably raise prices above the price point to which firms in a perfectly competitive market would be constrained[39] — as well as the relevant effects of firm behavior.

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and enhancing consumer welfare."); Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.").

37. *See* AREEDA ET AL, *supra* note 27, at 9–10 (overviewing the policy motivations underlying antitrust law).

38. Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J. 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.").

39. AREEDA ET AL., *supra* note 27, at 396 (explaining that a firm's market power "is the capacity to act different from a perfectly competitive firm" and concerns "whether it is

While market definition even in traditional one-sided markets like aluminum manufacturing is hardly straightforward,[40] much recent antitrust scholarship and enforcement strategy has focused on the particular difficulties of market analysis in two-sided markets like Internet broadband and online retail.[41] These challenges compound when analyzing multi-sided IP markets, such as esports. This Note first investigates the economics of esports in the broadest sense before turning to the question of defining the antitrust-relevant esports market through tools like the hypothetical monopolist test.

### A. ENTITIES IN THE ESPORTS MARKET

Market analysis involves identifying entities and the economic relations between them.[42] In esports, the relevant entities include the following[43]:

- ***Publishers***: Companies like Valve, Blizzard, and Riot own and fund the development of the games at the heart of esports.[44]
- ***Organizers****:* Esports tournaments and leagues can range from informal gatherings of individual

profitable for a firm to raise prices above the competitive level by a significant amount, or whether price increases would result in too many lost customers to be a viable strategy for the profit-maximizing firm").

40. United States v. Aluminum Co. of America, 148 F.2d 416, 424–425 (2d Cir. 1945) (concluding after extended market definition analysis that the Aluminum Company of America possessed a monopoly in the market for virgin aluminum ingot because its "control over the ingot market must be reckoned at over ninety percent; that being the proportion which its production bears to imported 'virgin' ingot").

41. *See, e.g.*, Renata B. Hesse, *Two-Sided Platform Markets and the Application of the Traditional Antitrust Analytical Framework*, 3 COMPETITION POL'Y INT'L 1 (Spring 2007); DIRECTORATE FOR FIN. AND ENTER. AFF. COMPETITION COMM., ROUNDTABLE ON TWO-SIDED MARKETS: NOTE BY THE DELEGATION OF THE UNITED STATES (2009).

42. DAVID S. EVANS, *Two-Sided Market Definition*, *in* ABA SECTION OF ANTITRUST LAW, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES, 435, 452 (2012) ("A natural way to map out the contours of the market is to identify the groups of customers served by the subject of the inquiry and its likely rivals, and then identify the various businesses that serve these customers.").

43. *An Introduction to the Esports Ecosystem*, THE ESPORTS OBSERVER, https://esportsobserver.com/the-esports-eco-system/ [https://perma.cc/P6EX-ZP9Q] (last visited Nov. 11, 2018).

44. Andrew Webster, *Why Competitive Gaming is Starting to Look a Lot Like Professional Sports*, THE VERGE (Jul. 27, 2018, 10:00 AM), https://www.theverge.com/2018/7/27/17616532/overwatch-league-of-legends-nba-nfl-esports [https://perma.cc/RMJ4-4KP9] (describing Valve, Blizzard, and Riot's involvement in esports).

enthusiasts all the way up to multimillion-viewer leagues run by organizations dedicated solely to esports organizing, like ESL[45] or KeSPA.[46]

- ***Broadcasters***: These include online streaming services like Twitch[47] and AfreecaTV,[48] media platforms like YouTube[49] and Facebook,[50] as well as conventional cable networks like OGN,[51] Disney,[52] and ESPN.[53]
- ***Teams***: With few exceptions,[54] most professional esports players are members of a team. Teams provide coaching, negotiate sponsorships, and fund player salaries and travel.
- ***Professional players***: These are the professional gamers who compete in leagues and tournaments.[55]
- ***Viewers***: The primary consumers of esports are young, relatively wealthy men.[56]

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45. Jessica Conditt, *Swedish Media House Buys World's Largest Esports Company*, ENGADGET (July 1, 2015), https://www.engadget.com/2015/07/01/esports-mtg-acquires-esl/ [https://perma.cc/CAM7-TR4B].

46. Eric Van Allen, *South Korea's KeSPA Discontinues Starcraft ProLeague After 14 Years*, ESPN (Oct. 20, 2016), http://www.espn.com/esports/story/_/id/17821061/south-korea-kespa-discontinues-starcraft-proleague-14-years https://perma.cc/S5F2-EY9Z] (noting that KeSPA is the "South Korean esports officiating body").

47. Jacob Wolf, *Overwatch League to be Streamed on Twitch.tv in Two-year, $90 million Deal*, ESPN (Jan. 12, 2018), http://www.espn.com/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal [https://perma.cc/W99K-8FVJ].

48. Kyle Wolmarans, *AfreecaTV Announces PUBG League and Dedicated Studio*, CRITICAL HIT GAMING (Nov. 24, 2017), https://www.criticalhit.net/gaming/afreecatv-announces-pubg-league-dedicated-studio/ [https://perma.cc/V7GW-QW27].

49. Robert Elder, *YouTube Has Made Its Biggest Esports Investment Yet*, BUSINESS INSIDER (Mar. 16, 2017), http://www.businessinsider.com/youtube-has-made-its-biggest-esports-investment-yet-2017-3 [https://perma.cc/9DAV-TYTM].

50. Phuc Pham, *Facebook's Giant Step Into Esports May Be A Look At Its Future*, WIRED (Jan. 18, 2018), https://www.wired.com/story/facebook-esl-esports-streaming-partnership/ [https://perma.cc/3EXF-2236].

51. *Ongamenet (OGN)*, THE ESPORTS OBSERVER, http://database.esportsobserver.com/company/ongamenet-ogn [https://perma.cc/46HN-UFZP] (last visited Nov. 11, 2018).

52. *See* Jeff Grubb, *Esports TV Ratings Aren't Great . . . Except for Candy Crush*, VENTUREBEAT (July 19, 2017, 4:15 PM), https://venturebeat.com/2017/07/19/esports-tv-ratings-arent-great-except-for-candy-crush/ [https://perma.cc/LTL8-BEHC].

53. *See id.*

54. Timothy Lee, *Teamless ByuN Triumphs in GSL Code S*, ESPN (Sept. 10, 2016), http://www.espn.com/esports/story/_/id/17511913/teamless-byun-triumphs-gsl-code-s [https://perma.cc/ZHA2-KE2U].

55. For an analysis of the esports player labor market, *see* Katherine E. Hollist, *Time to be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823 (2015).

56. According to consumer analytics firm NewZoo, male esports enthusiasts aged 21–35 make up 37% of the esports audience (a plurality). As compared to the general online

- ***Advertisers***: Companies such as Coca-Cola and Intel run advertisements or sponsor tournaments in order to promote new products or general brand awareness.[57]

One entity may wear several of these hats. A publisher can act as an organizer, as Riot has with its *League of Legends* Championship Series.[58] A broadcaster can also act as an organizer, as with OGN's Starleague.[59] Increasingly, publishers are beginning to also act as both organizers *and* broadcasters. Riot, for example, has opened a tournament venue with broadcasting capability for its *League of Legends* Champions Korea (LCK) in September 2018.[60]

Entity overlap complicates competition analysis in the esports market, because it means economic relations are not neatly horizontal or vertical.[61] For example, Riot's decision to vertically integrate and broadcast LCK on its own dealt "a brutal blow to [OGN]," the network which previously had broadcasting rights to the tournament.[62] Prior to Riot's entry into the South Korean

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population, esports enthusiasts are more likely to have a high income (53% vs. 37%), have a full-time job (65% vs. 48%), and spend more on digital media subscriptions. NEWZOO, 2016 GLOBAL GAMES MARKET REPORT 18 (2016), https://newzoo.com/wp-content/uploads/2016/01/Newzoo_2016_Global_Games_Market_Report_Dummy.pdf [https://perma.cc/XUT8-7T5F].

57. Consumer analytics firm NewZoo lists Intel, SteelSeries, G2A, HyperX, Coca-Cola, SK Telecom, MasterCard, and Samsung as esports sponsors and advertisers. *Id.*

58. *Riot Games Shares Its Vision for the Future of Esports, Reveals Initial Details of League of Legends Championship Series*, RIOT GAMES (Aug. 6, 2012), https://www.gamasutra.com/view/pressreleases/175418/Riot_Games_Shares_Its_Vision_for_the_Future_of_eSportsReveals_Initial_Details_of_League_of_Legends_ChampionshipSeries.php [https://perma.cc/DW53-5QS8].

59. Mithax, *Kespa-OGN Launch SC2 Leagues*, SK GAMING, http://www.sk-gaming.com/content/53264-KeSPAOGN_launch_SC2_Leagues [https://perma.cc/TM5R-WLER] (last visited Oct. 18, 2018).

60. Jay Massaad, *Riot Korea Announces LoL Park, Will Broadcast LCK Themselves*, ESPORTS INSIDER (Nov. 16, 2017), http://www.esportsinsider.com/2017/11/riots-new-lol-park-will-see-seize-greater-authority-lck/ [https://perma.cc/GRM9-AN3S]; Trent Murray, *Riot Games Unveils New Korean League of Legends Arena*, THE ESPORTS OBSERVER (Sept. 17, 2018), https://esportsobserver.com/riot-games-lol-park/ [https://perma.cc/8CKT-68RN].

61. Entities which compete against one another at the same stage of production are said to be horizontally related. Entities which compete against one another at successive stages of production are said to be vertically related. For example, in the consumer goods market, retailers are horizontally related to other retailers because they compete over the sale of finished goods to retail consumers. In that same market, retailers are vertically related to manufacturers because retailers purchase finished goods as inputs from manufacturers who produce those goods as outputs. *See* Robert L. Steiner, *Vertical Competition, Horizontal Competition, and Market Power*, 53 ANTITRUST BULLETIN 251 (2008) (assessing horizontal and vertical competition in the consumer goods market).

62. Massaad, *supra* note 60.

esports broadcasting market, Riot acted as a vertical supplier of *League of Legends* and its corresponding IP rights to OGN.[63] Its entry transformed it into a horizontal competitor to OGN broadcasting — a competitor with complete market power over a necessary input to the *League of Legends* broadcasting business.[64]

As publishers expand their efforts to capture value from increasingly-lucrative downstream esports markets, they are incentivized to establish their own exclusive tournament and broadcasting operations. Doing so avoids creating positive externalities[65] for competing publishers. For example, contracting with independent tournament or broadcast organization indirectly benefits competing publishers, which work with those same organizations.[66] Viewers of tournament content for one game may spill over to watch another. Revenues generated from esports content for one game may be used to improve programming for another. The underlying principle is that tournament organizers benefit from network effects resulting from the multi-sided nature of the esports market.

Non-integrated publishers also face heightened competitive pressures that they would prefer to avoid. When publishers are absent from the downstream tournament/broadcast market, they are forced to compete for access to the best tournaments and broadcast channels. For example, publishers seeking to partner with the best independent tournament organizers may be incentivized to reduce licensing fees, implement better in-game esports infrastructure (e.g., by offering game users the ability to spectate live tournament games in real-time), and invest in game

63. *Id.*

64. *Id.*

65. For a general overview of externalities, *see* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 190–206 (8th ed. 2016) (explaining that "[a]n externality arises when a person engages in an activity that influences the well-being of a bystander but neither pays nor receives compensation for that effect. If the impact on the bystander is adverse, it is called a *negative externality*. If it is beneficial, it is called a *positive externality*.").

66. Suppose two competing publishers work with the same independent tournament organization to host an event, providing broadcast rights to their IP and up-front financial support in exchange for a cut of advertising sales and ticket fees. The independent tournament organization could spend money provided by one publisher on goods or services which also benefit its competitor, such as improving video production quality, renting out a larger event venue, and marketing the tournament. Even if competing publishers provide nothing except access to IP, a more popular game could effectively subsidize a less popular game by "headlining" for the event. That is, viewership and revenue generated by the more popular game could have spillover benefits for the less popular game.

balance and quality. Conversely, independent tournament organizers competing for access to publishers' games have incentives to improve production quality. While these competitive pressures further consumer welfare in the esports market as a whole, individual publishers rationally aim to minimize their exposure to competition through vertical integration or restrictive vertical licensing agreements.[67]

When vertically integrated, publishers can profitably restrict competitor broadcasters and tournament organizers from using their IP. Non-integrated publishers lose out on licensing fees when they refuse to negotiate with organizers and broadcasters. Integrated publishers also lose licensing income when they refuse to negotiate, but can recoup lost licensing fees by enticing their competitors' customers to switch to their tournament organizing or broadcasting services in order to access exclusive content. Recent challenges to mergers between cable broadcasters and content creators have argued that integrated broadcaster-creator entities can leverage threats of content restriction against their competitors in anticompetitive ways.[68] Publisher-organizer-broadcaster mergers could enable the same sort of anticompetitive behavior.

## B. DEFINING ANTITRUST-RELEVANT ESPORTS MARKETS

What is referred to as "the esports market" might not actually constitute a relevant market for antitrust analysis.[69] Assessing the anticompetitive effects of a firm's conduct, or its degree of market power, requires delineating the set of economic actors and

67. A firm will rationally aim to avoid competition, which limits its ability to set prices. For a primer on the economics of firms in competitive and non-competitive markets, *see* MANKIW, *supra* note 65, at 267–354.

68. *See, e.g.*, Complaint, United States of America v. AT&T Inc., 310 F. Supp.3d 161 (D.D.C. 2018), *appeal docketed* No. 18-5214 (D.D.C. Aug. 6, 2018), (No. 1:17-cv-02511), 2017 WL 5564815. Notably, the district court disagreed with the Department of Justice's contention that "permitting AT&T to acquire Time Warner is likely to substantially lessen competition in the video programming and distribution market nationwide by enabling AT&T to use Time Warner's 'must have' television content to either raise its rivals' video programming costs or, by way of a 'blackout,' drive those same rivals' customers to its subsidiary, DirecTV" and approved the merger. *AT&T Inc.*, 310 F. Supp.3d at 164.The Department of Justice has appealed the decision. Proof Brief of Appellant United States, *AT&T Inc.*, 310 F. Supp.3d 161 (No. 18-5214).

69. U.S. DEP'T OF JUSTICE, *supra* note 14, at 8 ("Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term 'market.'").

relations which can relevantly be affected by that firm and which determine its competitive constraints.[70] For example, suppose the antitrust-relevant market for analyzing Riot's conduct in refusing to license broadcast rights for LCK to OGN were *League of Legends* broadcasting in South Korea. Because LCK comprises the overwhelming majority of *League of Legends* broadcasting in the country,[71] that market definition would lead to the conclusion that Riot possesses a monopoly in an antitrust-relevant market. Suppose, on the other hand, that the antitrust-relevant market is all esports broadcasting in South Korea. This broader market definition would help insulate Riot against antitrust claims for anticompetitive conduct, because Riot could point to its relatively smaller role in the country's esports broadcasting market.

Choosing between different potential market definitions requires analyses of demand elasticity, the availability of substitutes, and barriers to entry with respect to the products in question.[72] If players and viewers are readily willing to switch (i.e., cross-elasticity of demand[73] is high) from *League of Legends* to, say, *Overwatch* (i.e., *Overwatch* substitutes for *League of Legends*), then any restrictions Riot imposes on licensing *League of Legends* are less likely to have anticompetitive effects for esports broadcasters that can simply license *Overwatch* instead (i.e., barriers to entry in broadcast licensing of *Overwatch* are low). In this example, *Overwatch* acts as an effective substitute for *League of Legends* because broadcasters can readily display it to consumers who will be just as happy with it as they are with *League of Legends*.

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70. *See, e.g.*, Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L. J. 729, 731–733 (2013) (explaining the analytic necessity of market definition).

71. Liquipedia, which aggregates an informational list of *League of Legends* esports events, shows that LCK is the only organization which hosts "Premier" events in Korea. Premier events "offer an outstanding prize pool and feature the best players from all around the world. They are commonly held by well-established franchises and are considered especially prestigious amongst the community." *Premier Tournaments*, LIQUIPEDIA, https://liquipedia.net/leagueoflegends/Premier_Tournaments [https://perma.cc/2XZY-88GF] (last visited Oct. 18, 2018).

72. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 401 (1956) (stating that the "market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered").

73. Cross-elasticity of demand "refers to the rate at which consumers change their consumption of one product in response to a price change for another. Thus, the cross-elasticity between Coke and Pepsi may be high, while that between Coke and beer is negligible." AREEDA ET AL., *supra* note 27, at 538–39.

Market definition generally focuses on such demand substitution factors, and seeks to identify the narrowest market that includes all goods consumers find reasonably substitutable for the good at issue.[74] The Department of Justice's process for coming up with a correct market definition is instructive, both for its analytic merits and due to the Department's role in antitrust enforcement.[75] The process begins with selecting some market definition and asking whether a hypothetical monopolist over the selected market could profitably impose a small but significant and non-transitory increase in price, or SSNIP.[76] If the hypothetical monopolist could, then the selected market definition is plausible (though potentially too broad).[77] If the hypothetical monopolist could not, then the selected market definition is overly narrow.[78]

It is well-recognized that conventional market definition analysis, including the SSNIP test, breaks down when applied to multi-sided markets.[79] Because the SSNIP test considers price

74. *See*, *e.g.*, *id.* at 802 (for market definition in merger analysis, "the 'relevant' market is usually the smallest market satisfying the hypothetical monopoly test according to the guidelines"); U.S. DEP'T OF JUSTICE, *supra* note 14, at 7 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."). Notably, even though this analytic method was developed explicitly for horizontal merger analysis, "[t]he techniques of market definitions are fundamentally similar in monopoly and merger cases." AREEDA ET AL., *supra* note 27, at 764.

75. *See* U.S. DEP'T OF JUSTICE, *supra* note 15, at 7–15 (describing how antitrust agencies approach market definition).

76. *See id.* at 9 (also noting that "[t]he Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value," but that "what constitutes a 'small but significant' increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' position in it . . . ").

77. *See id.*

78. *See id.* at 9–10.

79. *See*, *e.g.*, Lapo Filistrucchi, *A SSNIP Test for Two-Sided Markets: The Case of Media* 1 (NET Inst., Working Paper No. 08-34, 2008) (In "a two-sided market the traditional SSNIP test cannot be applied as it is usually conceived . . . "); Katarzyna Tosza, *Payment Card Systems as an Example of Two-sided Markets – a Challenge for Antitrust Authorities*, 2 YEARBOOK OF ANTITRUST AND REGULATORY STUDIES 125, 134 (2009) ("Due to [two-sided markets'] specific characteristics, an antitrust analysis faces several problems that cannot be solved in a way analogue to single-sided markets."); D. Daniel Sokol & Jinguyuan (Mary) Ma, *Understanding Online Markets and Antitrust Analysis*, 15 NW. J. OF TECH. & INTELL. PROP. 43, 46 (2017) ("[M]arket definition is more complicated in a multi-sided market."). Evans, *supra* note 42, at 436. ("In antitrust cases involving two-sided platforms, market definition and market power analyses must take into account several economic issues that do not arise in other contexts."); Ralf Dewenter et al., *Market Definition of Platform Markets* 5 (Helmut Schmidt Universitat, Working Paper No. 176,

levels rather than price structure,[80] it can yield overly-narrow market definitions by failing to consider that an otherwise-profitable SSNIP on one side of the market might reduce profitability on the other side of the market.[81] For example, suppose that Riot could impose a SSNIP on *League of Legends* broadcast viewership by charging a five dollar per year subscription fee for viewing live and recorded tournament broadcasts. Presently, Riot charges no subscription fee whatsoever for these broadcasts.[82] Therefore, assuming even a single viewer remains to pay the new subscription fee, Riot has raised the profitability of the viewer-side *League of Legends* broadcast market. However, if the subscription fee results in a decrease in viewership for *League of Legends* broadcasting, that decrease in viewership would incur a corresponding decrease in advertising sales on the other side of the market. This means the net result of the SSNIP could very well be a profit decrease for Riot. Even though the SSNIP test suggests the antitrust-relevant market for *League of Legends* broadcasting could be *League of Legends* broadcasting itself, this is not necessarily the case without further analysis of how different price-structuring strategies would affect profitability.[83]

The previous example highlights the importance of taking network effects[84] and other platform interdependencies[85] into account when conducting antitrust analysis.[86] In esports, these interdependencies are particularly complex because of the

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2017). ("[A]vailable analytical tools of market definition are not applicable for markets with interconnected demands as they consider price levels instead of price structure.").

80. In a multi-sided market, price level is the sum of prices charged on each side of the market while price structure is the way prices are allocated to each side of the market. *See* Dewenter et al., *supra* note 79, at 2.

81. *See id.* at 5.

82. Live broadcasts of Riot-run *League of Legends* tournaments are available for free on video sites YouTube and Twitch, as are videos-on-demand of previous broadcasts. *See, e.g.*, LOL ESPORTS, YOUTUBE, https://www.youtube.com/user/LoLChampSeries/featured [https://perma.cc/TBP9-8XTG] (last visited Oct. 17, 2018); RIOT GAMES, TWITCH, https://www.twitch.tv/riotgames [https://perma.cc/3TXS-63NJ] (last visited Oct. 17, 2018).

83. *See* Sokol & Ma, *supra* note 79, at 47.

84. A network effect describes a phenomenon where additional users of a good improve the quality of that good, as with a social network like Facebook. *See id.* at 50.

85. A platform interdependency for a firm participating in a multi-sided market occurs when a business action on one side of the platform (e.g., the end-user-facing side) affects the outcomes on another side of the market (e.g., the advertiser-facing side). *See id.* at 47.

86. *Id.* ("[A]ntitrust authorities and courts need to consider the interdependencies on the multi-sided platform.").

extensive number of potential monetization strategies at different levels of the esports production chain. Altering price with respect to one monetization strategy could drastically affect the viability of other monetization strategies at different positions in the market. A non-exhaustive list of these monetization strategies follows:

**Publisher's** monetization strategy with respect to:

- ***Broadcasters***: charge a flat licensing fee to broadcast publisher-owned IP, charge a percentage commission of broadcast sponsorship and advertising revenue, force broadcast of a less-popular title in exchange for broadcast of a more-popular title, demand broadcast viewer statistics and analytics for market research, and receive advertising simply on the basis of displaying the publisher's game.
- ***Organizers***: charge a flat licensing fee to use publisher-owned IP, charge a percentage commission of tournament sponsorship and advertising revenue, force inclusion of a less-popular title in exchange for inclusion of a more-popular title, and receive advertising simply on the basis of displaying the publisher's game.
- ***Teams***: charge a fee as a precondition for competing and impose restrictions on competing in competitor games, thereby concentrating fan viewership in one's own games.
- ***Players***: impose restrictions on competing in competitor games and to concentrate fan viewership in one's own games, impose restrictions on playing in unofficial tournaments, and impose restrictions on streaming play of competitor games.
- ***Advertisers***: sell user data, and sell in-game advertising.
- ***Viewers***: sell esports games, sell in-game items, sell game subscriptions, and sell user data.

**Broadcaster's** monetization strategy with respect to:

- ***Advertisers***: sell advertising placement and viewer data.
- ***Viewers:*** sell tickets to view broadcast events.

**Organizer's** monetization strategy with respect to:

- ***Publishers***: receive support for tournament and league organization.
- ***Broadcasters***: sell broadcasting rights.

- ***Teams***: charge fees for tournament entry.
- ***Players***: charge fees for tournament entry.
- ***Advertisers***: sell advertising and merchandise placement.
- ***Viewers***: sell tournament tickets.

**Team's** monetization strategy with respect to:

- ***Broadcasters***: sell exclusive team broadcasting rights.
- ***Organizers***: win event prizes.
- ***Advertisers***: sell sponsorships and merchandise placement.
- ***Viewers***: sell exclusive content and merchandise.

**Player's** monetization strategy with respect to:

- ***Broadcasters***: split advertising revenue for livestream broadcasts.
- ***Organizers***: win event prizes.
- ***Teams***: receive salary.
- ***Advertisers***: sell sponsorships and merchandise placement.
- ***Viewers***: sell player-branded merchandise.

**Advertiser's** monetization strategy with respect to:

- ***Organizers***: sell branded merchandise to tournament venues.
- ***Teams***: sell branded merchandise.
- ***Players***: sell branded merchandise.
- ***Viewers***: sell advertised products.

Commentators suggest that the complex nature of multi-sided markets warrants caution when contemplating antitrust enforcement.[87] D. Daniel Sokol and Jingyuan Ma, citing work by David S. Evans, point out that market share data for multi-sided online markets can be misleading because it fails to take into account the potential for innovative disruption given the low

87. *See, e.g.*, David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms* 3 (Univ. of Chi. Coase-Sandor Working Paper Series in Law & Econ., No. 753, 2016) ("[T]he existence of a group of customers who are served for free highlights the importance of considering the other interdependent [market] sides in assessing market power"); Sokol & Ma, *supra* note 79, at 52 ("The case for antitrust intervention in [multi-sided] online markets requires great caution. . . . Mistaken antitrust intervention in such markets threatens innovation.").

barriers to entry for Internet businesses.[88] The general trend has been to warn antitrust authorities against over-enforcement, rather than under-enforcement, in multi-sided markets.[89] Concerns about over-enforcement arise in part from the notion that competition in multi-sided digital markets is "just a click away,"[90] with reference made to cases like Google's overthrow of Yahoo's search empire[91] and Facebook's more recent challenge to YouTube's dominance in online video.[92] For example, Evans notes that the low capital cost of entry[93] for "online attention seekers" — platforms like Facebook and Twitter that harvest and sell user attention — combined with the ease of product-switching for consumers[94] creates "intense dynamic competition" in multi-sided platforms of this nature.[95]

Though the esports industry ultimately operates upon the same principles of harvesting and selling user attention as the aforementioned multi-sided platform markets, notable differences suggest that over-enforcement may be less of an issue. Capital costs of entry for developing an esports game are greater on average than capital costs of entry for developing other IP that

88. *See* Sokol & Ma, *supra* note 79, at 49 (listing various digital markets with low barriers to entry).

89. *See, e.g.*, Evans, *supra* note 87, at 5 ("[C]ourts and competition authorities should exercise caution, and adjust their tools, in analyzing market power for online platforms.").

90. A concept popularized by Google's spokespersons in response to investigation by antitrust authorities. *See, e.g.*, *The Power of Google: Serving Consumers or Threatening Competition? Hearing before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 6 (2011) (Statement of Eric Schmidt, Executive Chairman, Google) ("We do not trap our users. If you do not like the answer that Google search provides you can switch to another engine with literally one click."). For an argument that competition is *not* "one click away," *see* Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain its Inaction on Source Bias*, HARV. J.L. & TECH. OCCASIONAL PAPERS SERIES (July 2013), http://jolt.law.harvard.edu/assets/misc/Pasquale.pdf [https://perma.cc/T3MZ-LCMR].

91. *See* Sokol & Ma, *supra* note 79, at 48 ("Challengers may overtake incumbent firms through new ideas and technologies. . . . Yahoo leapfrogged AltaVista and Google leapfrogged Yahoo."). For a brief overview of how Google overtook Yahoo, *see* Fred Vogelstein, *How Yahoo Blew It*, WIRED (Feb. 1, 2007), https://www.wired.com/2007/02/yahoo-3/ [https://perma.cc/QB5R-MQ4Y].

92. *See* Sokol & Ma, *supra* note 79, at 49 ("We see low barriers to entry in a number of markets. For example, Facebook has become a major competitor to YouTube in video visualizations in a very short period of time.").

93. *See* Evans, *supra* note 87, at 21 ("The capital cost of starting an attention seeker is low and that has intensified dynamic competition.").

94. *See id.* at 21 ("It is easy for consumers to reduce the amount of attention they provide one platform, or drop it altogether, and increase the amount of attention they provide another platform.").

95. *See id.* at 31 ("Particular care is needed to online platforms . . . because of the importance of . . . intense dynamic competition.").

could serve as the basis for a multi-sided online market, such as software for a WhatsApp or Facebook competitor. For example, initial development of *League of Legends* cost Riot $12 million,[96] whereas professional developers have estimated the cost of developing software for a WhatsApp competitor at around $200,000.[97] More fundamentally, viewers are less likely to switch from one esport to another because of the complexity of learning a new set of rules, their attachment to particular teams or players, and the general lack of aesthetic interchangeability[98] between distinct games.[99] If existing publishers continue to position themselves as tournament organizers and broadcasters, pushing out independent organizers and broadcasters, newcomers would not just have to develop their own games, but also their own leagues and channels — from scratch. Multi-sided platform markets thus face "chicken-and-egg" dilemmas in which customers on one side of the market (e.g., retailers which sell through eBay) only participate if there are ample customers on the other side of the market (e.g., consumers which buy from retailers on eBay), and vice versa.[100] Esports markets face a particularly severe variant of the dilemma, as they rely on the simultaneous coordination of at least seven different entities.[101] Finally, the deep control a publisher can exert through IP over the entire esports market downstream from its games presents further potential barriers to competition.

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96. *See* Quinten Plummer, *'League of Legends' a billion-dollar winner for Riot Games*, TECH TIMES (Oct. 13, 2014), http://www.techtimes.com/articles/17803/20141013/league-of-legends-a-billion-dollar-winner-for-riot-games.htm [https://perma.cc/VUM9-6SKK].

97. *See* Jennifer Fu, *How Much Does it Cost to Make An App in 2017?*, CODEMENTOR (Apr. 25, 2017), https://www.codementor.io/blog/how-much-does-it-cost-to-make-an-app-in-2017-1nqj6ehste [https://perma.cc/GX2D-BC4G].

98. For a pronounced example of this lack of aesthetic interchangeability between distinct games, compare the radically-different visual experiences of spectating Counter-Strike (a semi-realistic first-person perspective shooting game) as compared to *League of Legends* (a cartoonish top-down perspective multiplayer online battle arena). *Compare, e.g.*, ESL COUNTER-STRIKE, *LIVE: FaZe vs. Fnatic – Grand Final – IEM World Championship Katowice 2018*, YOUTUBE (Mar. 4, 2018), https://gaming.youtube.com/watch?v=56Tj_MgHpI0 [https://perma.cc/B2U3-MCFZ], *with e.g.*, LOL ESPORTS, *SSG vs. SKT | Finals Game 1 | 2017 World Championship | Samsung Galaxy vs SK telecom T1*, YOUTUBE (Nov. 4, 2017), https://www.youtube.com/watch?v=yTzV-XaBlYM [https://perma.cc/4ECW-647G].

99. Motivational studies supporting the unlikelihood of viewer switching are discussed *infra* note 108.

100. Evans, *supra* note 87, at 341 (discussing how multi-sided platforms face a chicken-and-egg problem when they start).

101. The aforementioned game publishers, broadcasters, tournament organizers, teams, players, advertisers, and viewers.

## C. A SINGLE ESPORT GAME CAN CONSTITUTE AN ANTITRUST-RELEVANT MARKET

The problem of esports market definition crystallizes when posed as the question of whether a single esport game can constitute a market. Harttung briefly highlights some problems with defining an antitrust-relevant market around a single game, but ultimately leaves open whether such a market definition is proper.[102] In context of conventional sports like football, the Supreme Court has repeatedly held that a single sport constitutes an antitrust-relevant market, and that an entity with exclusive control over the broadcast of that sport has market power.[103]

Conventional antitrust market definition assesses demand substitution factors, which the Antitrust Division of the Department of Justice notes are those factors affecting "customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price-change such as a reduction in product quality or service."[104] As discussed in the previous Part,[105] multi-sided markets present challenges for demand substitution analysis because customer behavior on one side of the market reciprocally influences customer behavior on the other side of the market. For example, esports viewers may, all else equal, be quite willing to switch games in response to increased broadcast fees, but could be even more likely to stay with their chosen game if increased broadcast fees are used to improve broadcast production quality.

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102. Harttung, *supra* note 17, at 45. ("Not every game creates its own market. Games which belong to the same genre are probably substitutable to some extent from the view of the players as well as the consumers of e-sports matches.").

103. *See*, *e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 112 (1984) ("[R]espondents have demonstrated that there is a separate market for telecasts of college football. . . . It inexorably follows that if college football broadcasts be defined as a separate market — and we are convinced they are — then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts."); Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 252 (1959) (finding that *championship* boxing contests comprised an antitrust-relevant market, even as separate from the market for boxing contests generally).

104. U.S. DEP'T OF JUSTICE, *supra* note 14, at 7.

105. *See supra* notes 79–86.

Assessing viewer-side demand substitution in esports presents further challenges due to the relative novelty of esports studies[106] and the proprietary nature of consumer analytics for the industry.[107] One study found that *Overwatch* viewers' consumption of that content was most strongly motivated by the aesthetic value of high-level *Overwatch* play, acquisition of knowledge to improve their own *Overwatch* play, and enjoyment of professional *Overwatch* skills.[108] These factors all presume substantial engagement with particular features of *Overwatch*, suggesting[109] that viewers would not easily substitute viewership of other games. Another study, surveying esports viewers generally, found viewers to be motivated primarily by acquisition of knowledge and escapism.[110] Whereas the latter motive suggests easy substitutability with other escapist activities like watching television, the former indicates some consumer lock-in based on knowledge particular to a game.[111]

Consumer analytics firm EEDAR similarly found in 2015 that viewers most cited low-substitutability factors like watching high level play of a particular game (cited by 65–70% of viewers) and improving their own gameplay in a particular game (61–65%) as reasons for watching esports, in contrast to high-substitutability

106. *See* Thomas Weiss, *Fulfilling the Needs of eSports Consumers: A Uses and Gratifications Perspective*, BLED 2011 PROCEEDINGS 572 ("[R]esearch in eSports has so far only attracted little scientific interest.").

107. For example, consumer analytics firm NewZoo charges $7500 per year for access to its "Global Esports Market Report." NEWZOO, GLOBAL ESPORTS MARKET REPORT (2018), https://newzoo.com/solutions/standard/market-forecasts/global-esports-market-report/ [https://perma.cc/44KF-7A4C].

108. Andrew J. Curley et al., What Motivates Esports Fans? A Data-Driven Approach to Business and Development Strategy, 5 (2016) (unpublished M.A. thesis, Southern Methodist University Guildhall), https://static1.squarespace.com/static/563e65aee4b0e5c70f6963c9/t/59e97e8218b27dc94c4aaede/1508474499280/Curley_ThesisPaper.pdf [https://perma.cc/73DR-HXK9].

109. Areeda, Edlin, and Kaplow note that judgments about consumer willingness to change their consumption of one product in response to a price change in another (i.e., the cross-elasticity of demand between the two products) "might be based on intuition in some cases" — particularly when sufficient data are not available. AREEDA ET AL., *supra* note 27, at 538. While the motivational studies referenced in this Note are suggestive, the conclusions drawn from them remain squarely in the realm of intuition and would benefit from additional research in this area.

110. Juho Hamari & Max Sjoblom, *What is eSports and Why Do People Watch It?*, 27 INTERNET RESEARCH 229 (2016).

111. By analogy to conventional sports, an appreciation for high-level *Overwatch* may not be readily substitutable for an appreciation for high-level *Counter-Strike* in the same way an appreciation for high-level badminton may not be readily substitutable for an appreciation of high-level football.

factors such as social aspects (30–35%).[112] Consumer analytics firm NewZoo surveyed viewers of three major esports games and found that 70% watch only one game, suggesting a low rate of multi-homing (i.e., participation in multiple platforms or communities)[113] for esports viewers.[114] This low rate of multi-homing among viewers suggests that the cost of simultaneously maintaining viewership in multiple esports is relatively high compared to the benefits (e.g., because the time investment in learning the specialized game knowledge necessary to appreciate esports content is too great).[115] Player-side demand substitution — the willingness of professionals to begin competing at another game — may be more elastic than viewer-side demand substitution.[116] Harttung suggests that skills are readily transferable between esports games, citing the example of a *Warcraft III* player who moved to *StarCraft II*, another game within the real-time strategy genre.[117] However, that player's performance as measured by prize winnings declined after his switch, evidencing the difficulty of skill transfer even in games of the same genre.[118] Likewise, of the top thirteen players in the most competitive *StarCraft II* circuit in 2017, only five had previously competed in its highly similar prequel, *StarCraft*.[119]

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112. ELECTRONIC ENT. DESIGN AND RESEARCH, ESPORTS CONSUMER ANALYSIS WHITEPAPER 18 (2015).

113. For an analysis of the implications of multi-homing for tying arrangements in two-sided markets, *see* Jay Pil Choi, *Tying in Two-Sided Markets with Multi-Homing* (CESifo, Working Paper No. 2073, 2007) http://www.cesifo-group.de/DocDL/cesifo1_wp2073.pdf [https://perma.cc/ED9B-RCRF].

114. Jurre Pannekeet, *Esports, A Franchise Perspective: 70% Watch Only One Game and 42% Do Not Play*, NEWZOO (May 11, 2017), https://newzoo.com/insights/articles/esports-franchises-70-watch-only-one-game-and-42-dont-play/ [http://perma.cc/2RFW-TGSV].

115. For a more thorough discussion of how multi-homing affects market power analysis in multi-sided markets, *see* Kate Collyer et al., *Measuring Market Power in Multi-Sided Markets*, COMPETITION POL'Y INT'L ANTITRUST CHRON. 5–7 (2017).

116. Harttung, *supra* note 17, at 45.

117. *Id.* Harttung points out that professional gamer Manuel "Grubby" Schenkhuizen made the switch from *Warcraft 3* to *StarCraft II to Heroes of the Storm*.

118. Schenkhuizen's performance decreased substantially in each subsequent game. He earned $298,210.21 from a total of 99 Warcraft III events, $58,205.73 from 53 *StarCraft II* events, and has not earned any money from Heroes of the Storm. *Manuel "Grubby" Schenkhuizen – Warcraft III Player*, E-SPORTS EARNINGS https://www.esportsearnings.com/players/1140-grubby-manuel-schenkhuizen [http://perma.cc/4PVV-GS7K] (last visited Oct. 17, 2018).

119. Player rankings taken from *2017 StarCraft II World Championship Series: Standings*, LIQUIPEDIA, http://liquipedia.net/starcraft2/2017_StarCraft_II_World_Championship_Series/Standings, (last visited Oct. 17, 2018) [http://perma.cc/5V6G-WLRT], with player history taken from players' individual

Even assuming skill development is neither time-consuming nor game-specific (and thus lacks a significant switching cost), teams and leagues can contractually bar players from playing other games.[120]

Given these presuppositions on demand substitution, a hypothetical monopolist of a single esports game could likely impose a SSNIP.[121] Suppose that the hypothetical monopolist is a game publisher that has established its own exclusive tournament organization system and broadcasting channel. If the SSNIP involved raising broadcast viewing fees, viewership would likely decrease, causing advertising revenues to decrease on another side of the market. The relevant question is whether the increase in viewership revenues would profitably offset the decrease in advertising revenues.[122] If viewer demand substitution were sufficiently low, as motivational studies suggest it might be,[123] then such a SSNIP would be profitable for the hypothetical monopolist. Because the SSNIP would be profitable, a single esports game could define an antitrust-relevant market.

Alternatively, suppose that the hypothetical monopolist is a game publisher that has *not* established its own exclusive tournament organization system and broadcasting channel. In this case, projecting the profitability of a SSNIP is complicated by the fact that the actual effect of the SSNIP on consumers depends on whether, to what extent, and to whom independent tournament organizers and broadcasters pass on the price increase. Imagine that the game publisher raises the fee to

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Liquipedia pages (e.g., *Stats*, LIQUIPEDIA, http://liquipedia.net/starcraft2/Stats [http://perma.cc/TN22-YUP6] for the professional gamer Kim "Stats" Dae Yeob).

120. For example, Riot temporarily modified *League of Legends* player contracts to bar professional gamers from streaming themselves playing other games. Because online streaming provides an additional income source for professional gamers, Riot's ban made it much less appealing for *League of Legends* players to practice other games. This, in turn, would make it difficult for a *League of Legends* player to switch games. Peter Bright, *Riot Tells Pro* League of Legends *Players They Can't Stream Competing Games*, ARS TECHNICA (Dec. 4, 2013), https://arstechnica.com/gaming/2013/12/riot-tells-pro-league-of-legends-players-they-cant-stream-competing-games/ [http://perma.cc/LG3N-XDL8]. *But see* Julian Benson, *Riot Relax Streaming Restrictions for LCS Players*, PC GAMES N (Dec. 7, 2013), https://www.pcgamesn.com/leagueoflegnds/riot-relax-streaming-restrictions-lcs-players) [http://perma.cc/B5MA-WJ2G].

121. *See* the discussion starting *supra* note 76.

122. The question follows from the hypothetical monopolist test, discussed *supra* notes 74–83.

123. *See* the studies discussed *supra* notes 108, 110, and 112.

license its IP to these tournament organizers and broadcasters. Based on the substantiality of the fee increase, it might remain profitable for tournament organizers and broadcasters simply to accept the fee increase and pass some or all of the cost on to viewers (e.g., by charging higher ticket prices) or advertisers (e.g., by charging more for ad placements and sponsorships). If advertisers have higher demand elasticity than viewers,[124] which they likely do under the assumption that esports viewers across different games are relatively demographically homogeneous, it is more likely that costs will be passed on to viewers. In that case, the post-SSNIP outcome in a non-vertically-integrated scenario looks identical to that in the previous scenario where a game publisher has a vertical monopoly in tournament organizing and broadcasting.[125]

The apparent similarity between the vertically-integrated and non-vertically-integrated cases might suggest that vertical integration does not adversely affect consumers in the esports market. This is not the case, however, because non-vertically-integrated publishers must compete with other non-vertically-integrated publishers for the business of tournament organizers and broadcasters. Even though publishers have monopoly power with respect to their IP, they cannot necessarily extract monopoly profits from independent tournament organizers and broadcasters that have access to competing games. Furthermore, barriers to entry in integrated markets are higher because an entrant must not only develop and market an esports game, but also deploy its own tournament organization and broadcasting functionality.

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124. That is, advertisers are more likely to switch from purchasing advertising on Esport A to Esport B in response to a cost increase in Esport A advertising than viewers are to switch from watching Esport A to Esport B in response to a cost increase in Esport A viewership. This follows from two assumptions. First, that esports viewers across different games are relatively demographically homogeneous such that advertisers are primarily concerned with reaching the greatest number of esports viewers for the lowest cost. In other words, advertisers are looking to reach "esports viewers" as a category, rather than e.g."*Overwatch* viewers" or "*Counter-Strike* viewers." Second, that esports viewers do not see different games as interchangeable such that they are primarily concerned with viewing *any* esports game at the lowest cost possible. These assumptions require additional empirical research outside the scope of this Note.

125. This result is consistent with the single monopoly profit theory, which posits that a monopolist which vertically integrates cannot further raise prices, because there is but a single monopoly profit to be extracted from downstream consumers. *See* AREEDA ET AL, *supra* note 27, at 410, 450.

It is possible that a single esports game can constitute an antitrust-relevant market if, for example, viewer demand substitution is low enough for a game publisher to impose a SSNIP. Motivational studies suggest that esports viewer demand substitutability is indeed low, because viewers watch for game-specific reasons like acquiring knowledge about playing that particular game. As such, and consistent with Supreme Court precedent addressing conventional sports,[126] game publishers with IP rights to a particular esport game can plausibly be considered to have monopoly power over the esports market in that game.[127] But because courts and enforcement agencies may be reluctant to define markets as narrow as single-esports-game markets,[128] the next logical market definition is all esports.

## D. ESPORTS CAN CONSTITUTE AN ANTITRUST-RELEVANT MARKET

If a monopolist for a single esports game could profitably impose a SSNIP, as discussed above, it follows that an all-esports monopolist could also profitably impose a SSNIP.[129] Indeed, the hypothetical all-esports monopolist would have additional flexibility in imposing the SSNIP, because it could take advantage of viewer demand substitution across games to price-discriminate in ways that a hypothetical single-esports monopolist could not. Specifically, the all-esports monopolist could raise prices for viewing a single game past the price-point

126. *See supra* note 103.

127. In general, IP rights do not raise a presumption of monopoly power or even market power in an antitrust-relevant market. *See*, *e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006) ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee."). For example, the fact that a company owns a patent over a certain smartphone design does not necessarily give it market power in the antitrust-relevant market of smartphones. The company would have monopoly power in the narrowly-defined market of its own patented smartphones, but this would probably not comprise an antitrust-relevant market. *But see* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992), in which the Supreme Court found antitrust-relevant markets in Kodak parts and Kodak aftermarket service. The question of how a game publisher's potential monopoly power in the antitrust-relevant market for its game should interact with its rights to use its IP in its game is taken up in Part IV.

128. They may wish to avoid the thorny IP-antitrust intersection brought about by this definition, which implies that each game publisher automatically possesses monopoly power over the esports market in its game.

129. The all esports monopolist could just impose a SSNIP on licensing for a single esports title, just as with the single esports monopolist.

that would be profitable for the single-esports-monopolist. It could do so because it knows that the esports viewer will likely substitute viewership of another esport (which the all-esports monopolist also owns) if they choose to jump ship from their currently-preferred esport.

## III. VERTICAL COMPETITION VIOLATIONS IN ANTITRUST-RELEVANT ESPORTS MARKETS

Having established the plausibility of various antitrust-relevant esports markets, the natural question is what sort of conduct, done by whom, could trigger antitrust scrutiny within those markets.[130] The game publisher is the most natural candidate, given the deep control it can exert on every party downstream that relies on access to its IP.[131] Indeed, tournament organizers,[132] broadcasters,[133] teams,[134] players,[135] viewers,[136] and

130. Establishing that a firm has monopoly power in an antitrust-relevant market satisfies the first prong of the Sherman Act § 2 violation; showing that a firm acts to acquire or maintain that monopoly power satisfies the second prong. *See infra* note 141.

131. *See, e.g.*, Harttung, *supra* note 17, at 48 ("Publishers can exert *deep control* beyond the market of the original product into e-sports as a downstream market. Such control entails detrimental consequences with respect to both dynamic and static efficiency.").

132. A multi-year conflict between Blizzard and KeSPA over the licensing of *StarCraft* in South Korea contributed to a decline in the game's popularity as an esport. After Blizzard declined to continue its partnership with KeSPA and licensed the new *StarCraft II* to the newly-formed Global StarCraft League, KeSPA barred its players from entering *StarCraft II* competitions. These restrictions hurt the competitive scenes of both games. *See* Oliver Herrman, *Why Korea's Starcraft II scene crumbled*, PC GAMER (Oct. 19, 2016), http://www.pcgamer.com/why-koreas-starcraft-ii-scene-has-crumbled/ [http://perma.cc/EN3Z-NNZU ] ("Blizzard . . . entered into an Intellectual Property Rights conflict with KeSPA[ ] over broadcasting rights for Starcraft II . . . The conflict resulted in a deep split between KeSPA, which still held Brood War tournaments, and the fresh Starcraft II scene — hostility that definitely did lasting damage."); Waxangel, *[Update] KeSPA Speaks Out On Intellectual Property Rights*, TEAM LIQUID (May 3, 2010), http://www.teamliquid.net/forum/brood-war/123275-update-kespa-speaks-out-on-intellectual-property-rights) [http://perma.cc/A9HA-WG2J] ("Blizzard would have limited the usage period of a game to only one year . . . which would make it difficult to run a stable E-sports league. In addition, Blizzard requests that all aspects of league management would have to be authorized by them beforehand. . . . Blizzard made other unreasonable requests . . . such as royalties and sub-licensing fees on sponsorships and broadcasting fees, the right to audit KeSPA's finances, as well as ownership of secondary content created through our unique resources . . . ").

133. Media company CJ E&M and game publisher Riot have been in dispute over ownership of the trademark to League of Legends Champions Korea, the most prominent *League of Legends* competition in South Korea. *See* Angelos Anastasopoulos, *CJ E&M Leaves KeSPA Over Trademark Rights Dispute*, THE ESPORTS OBSERVER (Dec. 27, 2017), https://esportsobserver.com/cj-leaves-kespa/ [http://perma.cc/APG4-YY27]; Brandon Storck, *OGN vs Riot: A Brood War Déjà Vu*, GAMING INSTINCTS (Dec. 15, 2015), https:

other entities[137] have all complained (not necessarily through litigation) about the unfair competitive practices of game publishers in esports markets. Because esports involves a global market with tournaments worldwide, a number of different antitrust claims against publishers are available, depending on the jurisdiction. This Note focuses on United States antitrust doctrine because the largest esports game publishers — Valve, Riot, and Blizzard — are all located in the United States.[138] Specifically, this Note assesses whether the Sherman Act, as the cornerstone of United States anti-monopolization law, would provide a basis for private or public litigants to bring antitrust claims against game publishers.[139] Such claims could be brought by antitrust enforcement agencies, such as the Department of Justice or the Federal Trade Commission, or by private plaintiffs (like tournament organizers) directly damaged by anticompetitive conduct.[140]

Section 2 of the Sherman Act outlaws conduct by persons "who shall monopolize, or attempt to monopolize." A prima facie monopolization claim under Section 2 must demonstrate that 1)

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//www.gaminginstincts.com/ogn-vs-riot-a-brood-war-deja-vu/ [http://perma.cc/ZH3N-T6GV].

134. Paresh Dave, *Owners of professional video game teams in a battle of their own*, LA TIMES (June 11, 2016), http://www.latimes.com/business/technology/la-fi-tn-esports-owners-20160526-snap-htmlstory.html [http://perma.cc/CXP7-NY66].

135. *See* the discussion about Riot's ban on allowing *League of Legends* players to stream other games, *supra* note 120.

136. Daniil Volkov, *Riot will build LoL PARK LCK Stadium in 2018*, REALSPORT (Nov. 13, 2017), https://realsport101.com/news/sports/esports/league-of-legends/riot-will-build-lol-park-lck-stadium-2018/ [http://perma.cc/Y8PM-DRNM] (anticipating a drop in the production quality of a South Korean *League of Legends* esports league after its takeover by Riot).

137. PC café owners petitioned the South Korean FTC to investigate Blizzard's allegedly unfair licensing practices for its game, *StarCraft*, which is the most popular esport in South Korea. Bree Royce, *Korea's FTC to Investigate Blizzard's Starcraft: Remastered Hourly Fees*, MASSIVELY OVERPOWERED (Aug. 14, 2017), http://massivelyop.com/2017/08/14/koreas-ftc-to-investigate-blizzards-starcraft-remastered-hourly-fees/ [http://perma.cc/5G2U-E8WY].

138. *See supra* note 12, discussing publishers' market shares as estimated by the prize money offered for esports tournaments in those publishers' games.

139. *See* AREEDA ET AL, *supra* note 27, at 3 (describing the Sherman Act as "the basic statute" of the federal antitrust laws).

140. The Sherman Act grants district courts jurisdiction to "prevent and restrain violations" of Section 2 of the Sherman Act, and gives United States attorneys the duty to "institute proceedings in equity to prevent and restrain such violations." 15 U.S.C. § 4 (2012). The Clayton Act provides a private remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," including by violation of the Sherman Act. 15 U.S.C. § 15 (2012).

the defendant has monopoly power in an antitrust-relevant market and 2) the defendant acted willfully to maintain or acquire a monopoly in that antitrust-relevant market.[141] As discussed above, there are plausible arguments supporting the conclusion that a single esports game can constitute a relevant esports market. Assuming that a game publisher has monopoly rights over an esports game, it follows that the publisher has monopoly power generally over the esports market surrounding their game.[142]

The Supreme Court has cautioned, however, that IP rights do not necessarily confer market power.[143] Similarly, the Department of Justice has affirmed that it "do[es] not presume that intellectual property creates market power in the antitrust context."[144] Leading antitrust scholars Phillip Areeda and Herbert Hovenkamp proclaim that "market power cannot be inferred, even presumptively, from the possession of intellectual property" because "[a] trademark, copyright, or patent excludes others from duplicating the covered name, word, or product (etc.) but does not typically exclude rivals *from the market*."[145] Though a single esports game might constitute an antitrust-relevant market, prospective plaintiffs may be baffled to learn that the publisher with an IP monopoly over the game does not necessarily have an antitrust-relevant monopoly over the market.[146]

Professor Ariel Katz identifies two main tenets which underlie the "virtual consensus among economists" against the IP-monopoly presumption.[147] First, that the market power conferred by IP rights is not antitrust-relevant market power.[148] Second, that as a matter of fact most IP rights lack any commercial value

141. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

142. For example, a publisher could bring suit to enjoin the production or reproduction of esports content using its game on the basis of its copyright in the game's graphical assets (e.g., player characters, enemies, levels, spell effects). For a thorough analysis of a publisher's copyright in its game, *see* Burk, *supra* note 10.

143. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006).

144. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (2017).

145. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 138 (2d ed. 2002).

146. *Id.*

147. Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 839 (2007) (quoting Ill. Tool Works Inc. v. Indep. Ink, Inc., 54 U.S. 28 (2006)).

148. *Id.*

whatsoever, let alone commercial value which confers market power.[149] Because esports IP clearly possesses commercial value,[150] only the first tenet is relevant for the market power debate. With regard to the first tenet, Katz notes that IP-monopoly denialists face a double-bind.[151] In order to argue that IP does not necessarily confer market power, denialists must point to the availability of close substitutes that prevent IP owners from exerting their rights to raise prices to supra-competitive levels.[152] But in order to argue that IP is economically effective whatsoever, denialists must affirm that IP owners can raise their prices to supra-competitive levels — something that would not be possible if close substitutes were really available.[153] Indeed, because the primary theoretical justification for IP is that it allows investors to recoup innovation costs by allowing them to price above production costs, as Katz states, "[m]arket power is the intended result of IP."[154]

Katz argues convincingly that the establishment of a general presumption that IP does or does not confer market power cannot be supported in the abstract for all cases.[155] Rather, whether a presumption is appropriate depends on the normative goals for antitrust generally, as well as the specific anticompetitive use to which the IP is being put.[156] The focus in each case should be "on the precise anticompetitive effect of a challenged practice."[157]

Suppose the challenged practice is the game publisher's use of its monopoly power in the primary market for its game to enhance its market position in the secondary downstream esports market for its game.[158] This can involve, for example, a tying

149. *Id.* at 839–840.
150. *See* the discussion of economic value of the esports market *supra* Part I.
151. Katz, *supra* note 147, at 851.
152. *Id.* at 856.
153. *Id.*
154. *Id.* at 863.
155. *See*, *e.g.*, *id.* at 908 ("[The anti-presumption of market power] is unrealistic and unnecessary."); *id.* at 893–900 (arguing that a presumption of no market power in tying cases could be justified if those cases are analyzed under a per se rule, and that the opposite presumption could be justified if those cases are analyzed under the rule of reason).
156. *See*, *e.g.*, *id.* at 897–98 (arguing that "different theories of harm may lead to different results concerning the desirability of a presumption of market power" and contrasting an efficiency-maximizing goal with a consumer-choice-maximizing goal").
157. *Id.* at 908.
158. *See*, *e.g.*, Massaad, *supra* note 60 (describing Riot's withdrawal of broadcast rights from an independent broadcaster and creation of its own tournament league, venue, and broadcasting station in South Korea).

scheme in which the publisher uses its monopoly in the primary market for Game X to force consumers, advertisers, teams, and players to view, sponsor, and play exclusively in the publisher's own Game X tournaments. Traditionally, a five-factor test has been used to determine whether an illegal tying arrangement exists, considering whether (1) the tying and tied products are separate, (2) the alleged monopolist has market power in the tying market, (3) the tying arrangement in some way coerces market participants, (4) the tying arrangement substantially forecloses commerce which would exist in its absence, and (5) any procompetitive justification for the tying arrangement is outweighed by its harms.[159]

An esports tying claim would be more complicated than the one at issue in *Independent Ink*, the landmark decision in which the Supreme Court held that IP rights do not necessarily confer antitrust-relevant market power.[160] In *Independent Ink*, an ink manufacturer alleged that its competitor, a printer and ink manufacturer, illegally conditioned the purchase of its printer (the tying product) on subsequent purchases of its ink (the tied product).[161] Illinois Tool Works sold patented printers and unpatented ink.[162] To retain customers in the ink aftermarket, Illinois Tool Works sold its patented printers under the condition that purchasers would only use Illinois Tool Works ink to fill or refill the printers.[163]

The nature of the tying claim in the esports context is more complicated because, unlike the printer and ink market in *Independent Ink*, esports is a multi-sided market. The Supreme Court has identified that the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either does not want at all, or

159. Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULLETIN 287, 292–295 (2004). *But see* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (holding that "the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products," and reasoning generally that technologically novel tying arrangements warrant rule of reason analysis). Whether the per se rule or the rule of reason applies to the esports tying case is irrelevant for the purposes of this Note, because the tying problem persists either way.

160. Ill. Tool Works Inc. v. Indep. Ink, Inc., 54 U.S. 28 (2006).

161. *Id.* at 32.

162. *Id.* at 31.

163. *Id.* at 32.

might have preferred to purchase elsewhere on different terms."[164] In one-sided markets, the same buyer who purchases the tying product also purchases the tied product. In multi-sided markets, the buyers of the tying and tied products may be different, with the first buyer's purchase of the tying product compelling a second buyer to purchase the tied product.

For example, suppose the tying product in the esports hypothetical is Game X. The game publisher has a monopoly in Game X, but assume it has not yet entered the tied market for Game X esports. The Game X esports market thus initially comprises a number of different independent tournament organizers which license Game X from the publisher, produce esports content (e.g., live game footage with commentary) involving Game X, and sell that content to broadcasters and tournament attendees. Suppose the publisher wants to break into the Game X esports market, and in order to ensure its success it refuses to renew its license with any independent tournament organizer and instead begins operating its own tournament organization business. Then, any broadcaster that wishes to broadcast esports content for Game X must purchase that content from the publisher. Any team that wishes to play in esports relating to Game X must purchase access to the publisher's tournaments. Any viewer that wishes to view esports relating to Game X must view that publisher's tournaments. And any advertiser that wishes to target consumers of Game X esports must negotiate sponsorships with that publisher. In this scenario, the game publisher "exploit[s] . . . its control over the tying product," Game X, to force downstream buyers into the purchase of a tied product — Game X esports — which these buyers "might have preferred to purchase elsewhere on different terms" from independent tournament organizers.[165] Consumers want to pay for one product — esports content — and are forced to pay for another — game licensing.

From the viewer and broadcaster perspective, the tying product is Game X esports content and the tied product is Game X. Viewers and broadcasters are interested only in Game X esports content, and would only pay for (rights to) Game X insofar as this was necessary to obtain Game X esports content.

164. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).
165. *Id.*

However, from the publisher's perspective, the tying product is Game X and the tied product is Game X esports content. The publisher has complete control over the market for Game X, and uses this to exert control over the market for Game X esports content production. Consumers, whether they are broadcasters or viewers, only ever seem to be purchasing one product: esports content. In the hypothetical non-tied market, only the tournament organizers purchase game licensing. In the hypothetical tied market, game licensing seems to disappear completely from the picture because the publisher charges itself nothing for access to its own content. However, the publisher can be thought of as a conglomerate which sells licensing rights to itself.

These complications result from the multi-sided nature of the esports market, in which tournament organizers act as intermediaries between game publishers and broadcasters by purchasing game licensing rights as an input from the former and selling esports content as an output to the latter. Esports content is tied to game licensing rights only insofar as the latter are a necessary input for independent tournament organizers to make the former. Viewers explicitly purchase esports content, but only implicitly purchase game licensing rights because the cost of these rights is passed down through the esports market. These rights, in addition to being a production cost, are part of the finished esport content product as well — tournament organizers must secure a license not just to host their tournament, but to sell footage of the games played during the tournament as well.[166]

The seemingly inextricable link between Game X esports content and Game X might suggest that there are not separate markets for the two. It is a fundamental prerequisite for any tying claim that the tying and the tied products are separate.[167] Two tests exist for determining separability: the market test and the consumer test.[168] The market test asks whether there exists

166. A license is required because a publisher's copyright grants it the exclusive right to create and display derivative works from its game under 17 U.S.C. § 106(2) (2012). For a more thorough look at intellectual property rights in esports, *see* Burk, *supra* note 10.

167. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 20–21 (1984) (noting that "a tying arrangement cannot exist unless two separate product markets have been linked").

168. The majority in *Jefferson Parish* adopted the market test, and the concurrence adopted the consumer test. Richard M. Steuer, *Exclusive Dealing after Jefferson Parish*, 54 ANTITRUST L.J. 1229, 1230 (1985) ("[T]he majority framed the test for finding two products as whether there exists 'a sufficient demand for the purchase of [the tied product]

separate demand for each product, and the consumer test asks whether a consumer would ever purchase either product as a stand-alone.[169] The two products — the esports game (and its corresponding licensing rights) and esports content about that game — clearly satisfy either test. People acquire rights to esports-suitable games (for example, to download and play them) without consuming any esports content.[170] People also watch esports without necessarily acquiring rights to the esports game itself (i.e., they do not download or play the game they watch).[171]

The market power, substantial foreclosure, and coercion requirements are readily met. A publisher has a monopoly over the esports game, which plausibly constitutes an antitrust-relevant market.[172] By using its monopoly in the esports game, the publisher forces all consumers in the downstream esports content market to purchase all of their esports content for that game from the publisher, foreclosing 100% of the market.[173] Finally, because broadcasters, players, teams, viewers, and advertisers might prefer to do business with independent tournament organizers rather than the publisher,[174] the foreclosure of the esports content producer market satisfies the coercion element of the tying test.

Game publishers can offer two major procompetitive justification for their market consolidation, one ex ante and one

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separate from [the tying product].'. . . Justice O'Connor formulated a different test. She stated, 'For products to be . . . distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product.").

169. *Id.*

170. Pannekeet, *supra* note 114 (finding that 45–61% of consumers engaged with selected esports titles play but do not view).

171. *Id.* (finding that 18–30% of consumers engaged with selected esports titles view but do not play).

172. *See* Part II.C for a discussion of whether the esports market for a single game constitutes an antitrust-relevant market.

173. Market foreclosure occurs when a dominant firm denies "access to an essential good it produces, with the intent of extending monopoly power from that segment of the market (the bottleneck segment) to an adjacent segment (the potentially competitive segment)." Patrick Rey and Jean Tirole, *A Primer on Foreclosure*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION (vol. 3, 2007).

174. For example, an independent tournament organizer competing with other independent tournament organizers in the market for a particular esport has less bargaining power than a vertically-integrated publisher which faces no such competition. As such, broadcasters, players, teams, viewers, and advertisers would prefer to do business with independent tournament organizers because they would likely secure more favorable prices and terms than from a vertically-integrated publisher.

ex post.[175] Ex ante, the prospect of vertically integrating into the esports market for its game in order to recoup development costs incentivizes publishers to create games in the first place. Ex post, vertical integration enables publishers to promote a uniform creative vision beneficial to professional play and incentivizes constant game improvements to maintain player and viewer interest. The first justification relies on the notion that game publishers would not have developed their game unless they were able to use their IP rights to monopolize the esports content production market for their game. Even if it might be true that independent tournament organization might be better for consumers, it would be much worse for consumers if there were no game to organize tournaments around at all. The second justification implicates the publisher's authorial rights to implement their creative vision not just through the game itself, but also through its use as an esport. A publisher might be best suited to organize esports events because of its unique insights into the design, balance, and technical features of its own game.

## IV. A PUBLISHER'S IP RIGHTS SHOULD NOT INSULATE IT FROM ANTITRUST LIABILITY

It is no coincidence that these two procompetitive justifications — incentivization to create and incentivization to efficiently improve — are also the two major justifications for granting game publishers IP rights in the first place.[176] The government grants a monopoly to a publisher, allowing it to charge a supra-competitive price,[177] in order to induce it to invest resources into expensive game development.[178] After the game is complete, a publisher is justified in retaining exclusive control over the game because such control encourages it to find efficient uses for its creation.[179] In antitrust disputes centered on IP, the

175. *See* Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004) for a conceptual analysis of ex ante and ex post justifications for IP rights.

176. *Id.* at 129.

177. A supra-competitive price is a price above that which would obtain in a competitive market.

178. Lemley, *supra* note 175, at 131 ("We grant creators exclusive rights in their works — permitting them to charge a supracompetitive price — to encourage them to make such works in the first place.").

179. *Id.* at 132 ("[One] ex post theory for intellectual property justifies protection as a means of encouraging efficient use of existing works.").

IP holder often argues that its otherwise anticompetitive behavior should be permitted because it falls "within the scope" of its legitimate rights.[180] The key question is therefore whether anticompetitive behavior in the downstream esports market falls within the scope of a publisher's copyright,[181] and the answer requires weighing the relative merits of IP and antitrust policy in the case of esports.[182]

Conclusively evaluating the ex ante justification for esports monopolization would involve determining the effect of allowing such monopolization on a publisher's marginal incentive to develop an esports-suitable game[183] in the first place, an empirical question outside the scope of this Note. However, some preliminary observations about the esports market can structure how this question should be approached. Given that Blizzard developed *StarCraft*, one of the longest-lasting[184] esports games in the history of gaming, without any intention of capitalizing on the then-nonexistent esports market,[185] there is no necessary connection between the prospect of esports monopolization and

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180. *See*, *e.g.*, Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 SAN DIEGO L. REV. 515, 515–16 (2015) ("For a century-and-a-half, the Supreme Court has described perceived abuses of patents as conduct that reaches "beyond the scope of the patent.") (quoting Coupe v. Royer, 155 U.S. 565, 576 (1895)); Stephen Zinda, *Preserving the Copyright Balance: Why Copyright Misuse Should Invalidate Software Licenses Designed to Prohibit Resale and Oust Service Market Competition*, 48 HOUS. L. REV. 1241, 1252 (2012) ("The antitrust-based [copyright] misuse doctrine consists of a two-part test similar to that of patent misuse. The first part of the test asks whether the restraint is within the scope of the rights granted by copyright law."); Giovanni B. Ramello, *Copyright and Antitrust Issues*, THE ECONOMICS OF COPYRIGHT: DEVELOPMENTS IN RESEARCH AND ANALYSIS (Wendy Gordon and Richard Watt, eds., 2003) ("[C]harged with anti-competitive practices, [Microsoft] appealed directly to the exclusive rights conferred by copyright in [its] defence [sic], pointing out the margin of uncertainty which exists between legitimate use of copyright and the protection of competition.").

181. The relevant question is *not* whether a publisher should have copyright in its game in the primary market of game sales.

182. *See*, *e.g.*, FTC v. Actavis, Inc., 133 S. Ct. 2223, 2231 (2013) (announcing in the analogous case of patent rights that "patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'— and consequently antitrust law immunity — that is conferred by a patent").

183. An esports-suitable game is one which could, in principle, facilitate competitive play of that game. Some games are not esports-suitable for technical or aesthetic reasons. On the technical side, for example, a game might not allow for multiplayer interaction. On the aesthetic side, a game could be drastically imbalanced or unappealing for viewers to watch. Any analysis of ex ante incentivization must take care to focus on the development of esports-suitable games, rather than games in general.

184. Graham Corking, *Three of the Longest Lasting Esports Games*, ELECSPO (Feb. 25, 2018), https://www.elecspo.com/competitions/three-of-the-longest-lasting-esports-games.

185. Partin, *supra* note 29 ("The success of [StarCraft:] Brood War as an esport . . . caught the company off-guard.").

the incentive to develop esports-suitable games. The burden should thus be placed on publishers to prove that but for their expectation of full control over the downstream esports market for their games, they would not have developed those games (or comparable esports-suitable games) in the first place.

On its face, the development-incentivization argument fails. The bulk of a publisher's revenues come from primary game sales and in-game transactions, not esports earnings.[186] Even supposing esports earnings overtake conventional game sale earnings, publishers would benefit both directly and indirectly even if they could not monopolize the downstream esports markets for their games. Directly, publishers would earn money from selling licensing rights to produce esports content involving their games. Indirectly, publishers would benefit from the increased popularity that esports viewership brings to their games. These benefits would flow to the game publisher regardless of its ability to dominate the downstream esports market for its game.

Furthermore, if it is true that a decentralized esports market would generate more economic value due to increased competition,[187] then a publisher would prefer ex ante to enter a market in which decentralization rather than centralization is the norm. In this case, antitrust can be used to solve a collective action problem. Each game publisher might individually prefer to monopolize its downstream esports market in order to inhibit competitors and extract as much value as possible from its game. However, such monopolization would on the whole harm innovation and customer satisfaction in the esports market because it would yield diminished competition, and hence diminished incentive to improve product quality. Indeed, a publisher in a centralized esports market might earn less than a publisher in a decentralized esports market. As such, it could be rational for game publishers to collectively refrain from

186. For example, compare Blizzard's net revenues in the fourth quarter of 2017 alone of $2.139 billion to the total global revenue from all esports of $655 million in all of 2017. Most of Blizzard's games are not just esports-suitable, but also have active e-ports communities. *See Quarterly Results-Fourth Quarter 2017*, ACTIVISION BLIZZARD (Feb. 8, 2018), https://investor.activision.com/static-files/0212ede8-9901-4889-a710-a52fc60ec20b [https://perma.cc/2F2Y-TYJB]; Ferguson Mitchell, *Newzoo: $655M Global Esports Revenue in 2017, Est. $906M in 2018*, THE ESPORTS OBSERVER (Feb. 21, 2018), https://esportsobserver.com/newzoo-esports-report-2017/.

187. *See supra* Part I.

monopolizing the downstream esports market for their games. There is, however, a prisoner's dilemma here: it would be individually rational for any game publisher in a decentralized market to defect and vertically monopolize, because by doing so it could secure additional market share at the expense of its competitors.[188] Prohibiting vertical publisher monopolization in the esports market solves the publishers' collective action problem by eliminating the option (and fear) of defection.

Assessing the ex post justification also requires answering difficult empirical questions about the effect of vertical monopoly on publishers' marginal incentives to invest in maintaining and improving esports-suitable games. But, again, some preliminary considerations may be drawn. The basic argument is that a publisher possesses a greater incentive to maintain and improve its already-published games if it can exert monopoly power in the downstream esports market. If a publisher could not exert such power, then it would be reluctant to invest further resources into developing its IP.

The improvement-incentivization argument fails for reasons similar to the development-incentivization argument. Publishers are already incentivized to improve their games because doing so allows them to maintain and attract paying players. Improving games after release satisfies existing players and thus increases the chances that they will spend more on post-purchase in-game transactions or encourage others to purchase the game. Post-release improvements also attract potential players because ongoing bug fixes and balance changes improve game quality. Improved game quality can also contribute to a better esports experience,[189] which in turn means more esports interest and viewership. More viewership creates heightened advertisement sales, which improves esports' profitability. Publishers will want to maximize esports profitability regardless of whether they can vertically monopolize the esports market for their games, because

188. For example, the publisher of a popular esports game could demand as a prerequisite for licensing that independent tournament organizers stop producing content for a competing game. The publisher could further use the threat of vertical integration to ensure compliance.

189. This relationship does not always hold. For example, players might prefer a graphical update which reduces the size of explosions in order to make it easier to visually assess an unobstructed battlefield. Viewers, on the other hand, might prefer a graphical update which increases explosion size in order to make the game more fun to look at.

in either case they will increase their revenues — either through licensing or direct ad sales in publisher-run tournaments.

Another ex post justification is that esports will be better off if publishers are allowed to craft a unified vision for their games' competitive scenes. Having a single, publisher-sponsored league would ensure a stable infrastructure for competition by providing consistency to players, teams, broadcasters, and viewers. However, even if such consistency is desirable, it is unclear why a decentralized esports market would not provide it.[190] Independent tournament organizers also want to maximize viewership and attract the best players, and would standardize league rules to the extent such standardization proved competitively advantageous. Enforcing decentralized esports markets leaves open the possibility for consistency without foreclosing the possibility for desirable experimentation.

Even more fundamentally, esports comprises a dynamic and joint production which depends just as much on players, tournament organizers, and enthusiastic audiences as it does on publishers.[191] Copyright relies on a delicate balance between securing investment into creative works through monopoly and safeguarding a vibrant public domain from which the raw material necessary for those very same creative works can be drawn.[192] Esports-suitable games exemplify this tension at the heart of copyright because they are at once open platforms for further creative development and finished artistic products.[193] In their former aspect, they are akin to programming languages like Python or Java because they too comprise "a complex set of

190. Or, indeed, why a decentralized esports market would not provide it *better* than a centralized market. *See* Lemley *supra* note 175, at 135 (criticizing ex post justifications for IP because "[i]t is competition, not the skill or incentives of any given firm, that drives the market to efficiency").

191. On the collaborative nature of esports production, *see* Taylor, *supra* note 28. For example, at 170, Taylor notes that "[t]he constitution of pro e-sports is not simply a result of each of their sole initiatives, but comes from a diverse and motley mix of actions, policies, and practices from a range of actors."

192. Timothy K. Armstrong, *Dueling Monologues on the Public Domain: What Digital Copyright Can Learn from Antitrust*, 1 U. CIN. INTELL. PROP & COMPUTER L.J. 15 (2016) (surveying "[t]he view that authorship depends on a vibrant, vital public domain").

193. Consider a text-processing program such as Microsoft Word, or a photo-editing program such as Adobe Photoshop. Such programs are also both creative products and open platforms for further creative development. To say that a publisher, by merit of producing its game, should have rights over the esports content produced with its game is analogous to saying that Microsoft, by merit of producing its text-processing software, ought to have rights over the written content produced with Word — like this Note!

possible instructions [i.e., player inputs] and associated syntax [i.e., game rules] that can be combined to cause a computer to achieve particular results [i.e., executing gameplay]."[194] These instructions and their execution just happen to take place in a virtual world which is more dynamic and graphically-rich than a typical programming console. Strong arguments militate against the copyright-eligibility of programming languages, although the question has not been conclusively decided.[195] Of course, in their latter aspect as finished artistic products, esports suitable games are analogous to digital videos, which are clearly copyright-eligible subject matter.[196] But the dual-status of esports-suitable games warrants caution in determining the proper balance of rights between the publishers and the public.

Given copyright scholar Timothy K. Armstrong's contention that "strong consensus exists among disinterested copyright experts that the structure of existing law excessively restricts the public domain and thereby disserves the public interest," the default presumption should be less rather than more copyright control.[197] Such a presumption would not entail that all esports usage of a publisher's game should be treated as fair use, or that esports games constitute a quasi-public good.[198] Announcing such blanket exceptions without a careful analysis of economic dynamics would introduce doctrinal confusion without necessarily improving the efficiency of esports markets. Caution rather suggests that a publisher should not be able to use its IP rights to insulate itself from antitrust liability for otherwise uncompetitive behavior.

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194. Dennis S. Karjala, *Oracle v. Google and the Scope of a Computer Program Copyright*, 24 J. INTELL. PROP. L. 1, 16 (2016) (defining a programming language and arguing that programming languages should be ineligible for copyright protection).

195. *See, e.g.*, Karjala, *supra* note 194 ("computer programming languages, if they are to have intellectual property protection at all, must seek them under patent law rather than copyright law."); A. Samuel Oddi, *An Uneasier Case for Copyright than for Patent Protection for Computer Programs*, U. NEB. L. REV. 351, 400–02 (1993); Elizabeth G. Lowry, Comment, *Copyright Protection for Computer Languages: Creative Incentive or Technological Threat?*, 39 EMORY L.J. 1293, 1335 (1990).

196. They are "audiovisual works" or "pictorial or graphic works" under 17 U.S.C. § 102(a) (2012). For a thorough analysis of copyright in esports, *see* Burk, *supra* note 10.

197. Armstrong, *supra* note 192, at 71.

198. These proposals, suggested by Harttung, *supra* note 17 and Rogers, *supra* note 20, are discussed *infra* Part V.

## V. ANTITRUST IS THE BEST REGULATORY VEHICLE TO PROMOTE HEALTHY COMPETITION

Proposals to solve the problem of undue publisher influence on the esports market have run the gamut from creating an international esports governing body[199] to declaring esports games a quasi-public good.[200] These proposals go too far. The fundamental advantage of using antitrust law to regulate the esports industry is that it carves out space for the market to resolve difficult questions of league structure, rather than attempting to craft holistic solutions ex ante as with a governance approach. And, whereas extending fair use to commercial esports content production would blunt a publisher's incentives by denying it esports revenues downstream from its game, antitrust law permits reasonable licensing schemes which would align publisher and tournament organizer incentives.[201] At minimum, antitrust authorities should make clear that a publisher that seeks to vertically integrate into tournament organization must continue to offer IP licensing at reasonable royalties to its horizontal competitors, or else face antitrust liability. By doing so, the publisher's interest in recouping development costs and exercising creative direction will coexist with the viewers' and players' interest in a diverse, accessible, and competitive esports industry.

Esports scholar Laura L. Chao proposes establishing a "pan-esports governing body" that "determine[s] minimum standards for consumers, players, teams, and leagues" but does not organize its own tournaments in order to protect consumers and stymie anticompetitive practices.[202] She contrasts her proposal to alternatives like joint-venture leagues (which characterize conventional sports leagues) and developer-sponsored leagues.[203] Her critique of these alternative models relies on the argument that these leagues tend toward cartel and monopoly behavior,

199. Chao, *supra* note 35.

200. Rogers, *supra* note 20.

201. *See*, *e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992), *supra* note 26, in which Kodak was ultimately ordered to sell its machine parts at reasonable rates to independent downstream Kodak parts servicers.

202. Chao, *supra* note 35, at 761–762.

203. *Id.*

respectively, both of which hurt consumers by reducing competition.[204]

While Chao correctly diagnoses the problem of publisher dominance[205] her proposed solution of a centralized governing body for esports would strengthen the very anticompetitive problems it aims to solve. While she emphasizes that the governing body must be independent and include representatives from multiple stakeholders, the body would be subject to regulatory capture and outsized influence exerted by the largest publishers.[206] Imposing membership fees, league pre-approval requirements, mandatory player registration, and uniform contracting requirements would favor entrenched stakeholders and raise barriers to entry in a field where capital costs already exceed those in other multi-sided IP markets.[207] Developing uniform rules across the entire worldwide esports industry, which comprises hundreds of games with tens of thousands of players competing at thousands of tournaments, would impose enormous transaction costs (if all stakeholders were really invited to the table[208]) and stifle organic experimentation.[209]

Even if these issues were solved, publishers that felt that governance standards promoted the interests of other stakeholders at their own expense would simply opt out. Recall

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204. *Id.* at 761 ("Since joint-venture and developer-sponsored leagues have historically exhibited anticompetitive behavior, esports regulators must consider governance that protects consumer demands and stymies anticompetitive practices.").

205. *Id.* at 755–756 (noting that "[a] game developer that doubles as a league owner has complete control over the players," and discussing anticompetitive practices like restrictive player contracts and league structures which "prioritize developer interests over public uses").

206. *Id.* at 762 ("Such an entity would, ideally, be structured with an advisory board of multiple stakeholders — such as government regulators representing consumer welfare, players' unions, and professional team owners — to oversee the functions of joint-venture and developer-sponsored leagues and to facilitate negotiations with esports game developers."). In contrast, "antitrust has the comparative advantage of well-behaved doctrine that, at least currently, is reasonably free of special interest pressure." Herbert Hovenkamp, *Innovation and the Domain of Competition Policy*, 60 ALA. L. REV. 103, 117 (2008).

207. *Id.* at 762 (listing features of an esports governing body).

208. Chao notes that "[c]ompared to the traditional sports industry, the esports industry is comprised of more stakeholders: the game developers, the league or tournament organizational bodies, the teams that contract to play within the organizational body, the professional players that contract to play on teams, the sponsors, and, often, a streaming site as the content distributor." *Id.* at 744. Now that's a big table.

209. *Top Games Awarding Prize Money*, E-SPORTS EARNINGS, https://www.esportsearnings.com/games [https://perma.cc/6E4Q-K6MM] (last visited 25 Oct. 2018) (listing game, tournament, and player statistics).

the KeSPA-Blizzard dispute, in which the national governing body for esports in South Korea lost a legal battle for control of *StarCraft* licensing rights against a game publisher who wanted to raise fees.[210] Chao recognizes the threat of publisher opt-out, and suggests granting enforcement authority to a government agency to take punitive action against noncompliant publishers.[211] Unless the government agency simply enforced the rules developed by the governing body (which could create constitutional concerns about impermissible delegation to private actors[212]), it would have to devise its own standards for permissible publisher conduct. These would invariably be tied to the specific anticompetitive consequences of certain publisher behavior, the assessment of which would inevitably involve an analysis of market structure and power. In other words, the government agency would have to engage in antitrust analysis and make its decision based on the market circumstances particular to each given case. If this sort of antitrust analysis will be the end result of a viable esports governing body, then the body itself is redundant: what matters is antitrust enforcement.

Harttung and Rogers both consider the extension of the fair use doctrine to automatically cover esports licensing, effectively removing a publisher's control over the esports market downstream from their IP.[213] Rogers proposes that tournament organizers should be allowed to appeal to fair use in order to avoid negotiating licensing based on a totality-of-the-circumstances approach which "protects the interests of all stakeholders in order to do the most total good, rather than protect the [publisher] above all else."[214] On the one hand, this gives courts an unworkably vague standard which leaves them to perform a task of cost-benefit analysis better suited for executive agencies and the legislature. On the other hand, this would boil down to an analysis of the anticompetitive conduct of the game publisher within the particular context of the esports market for

210. *See supra* Part I.

211. Chao, *supra* note 20, at 762–763.

212. *See, e.g.*, A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 537 (1935) ("[Could Congress] delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

213. *See*, *e.g.*, Harttung, *supra* note 17, at 35–41; Rogers, *supra* note 200.

214. Rogers, *supra* note 200.

their game. The fair use component would only add doctrinal confusion to what is fundamentally a question for antitrust law.[215] Furthermore, "antitrust has the comparative advantage of well-behaved doctrine that, at least currently, is reasonably free of special interest pressure" as compared to patent and copyright law.[216]

Harttung suggests that a fair use exception might be appropriate for non-commercial competitive events, but that allowing for-profit use of publisher IP without licensing fees would disincentivize publisher support for esports.[217] While a non-commercial fair use exception might allow for the existence of an amateur esports scene, this scene would remain relatively small in the face of for-profit leagues with millions of dollars in prizes and sponsorship revenues.[218] Amateur leagues which became too successful would incur liability for copyright infringement, and there would be difficult line-drawing issues at the margins. Antitrust enforcement would thus remain necessary, even with an amateur fair use exception.

Professor Hovenkamp has suggested that antitrust law should take renewed interest in "markets — particularly those subject to fast moving technology — in which tying can frustrate entry and limit the growth of rivals."[219] Investigating and challenging anticompetitive publisher conduct in the esports market offers just such an opportunity for effective modern antitrust enforcement.

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215. For a related example recognizing copyright-antitrust doctrinal confusion, see In re *Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1102–05 (N.D. Cal. 2002) (surveying copyright misuse doctrine and noting that "confusion arises because while courts have repeatedly stated that misuse is different from antitrust, they still rely on antitrust-like inquiries in determining what licensing agreements violate public policy"). For an argument that "antitrust law is in a much better position to accommodate concerns about innovation than patent law," *see* Herbert J. Hovenkamp, *Intellectual Property and Competition*, Faculty Scholarship 6 (2017), https://perma.cc/Z3WC-C6P7.

216. Hovenkamp, *supra* note 206, at 117.

217. Harttung, *supra* note 17, at 40–41.

218. *Id*. at 41 ("[W]ithout commercial exploitation of the game it is hardly possible to obtain the financial resources to finance tournaments which could seriously compete with the publishers' ones.").

219. Hovenkamp, *supra* note 206, at 130–131. Hovenkamp acknowledges the irrationality of a per se prohibition against tying, but notes favorably the D.C. Circuit's analysis of Microsoft's allegedly illegal tying of Internet Explorer with Windows under a rule of reason approach in *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

## VI. CONCLUSION

Publishers wield enormous might in the esports industry. They have used their might to unilaterally impose restrictions and fees even on powerful industry players like national esports organizations (e.g., KeSPA). Publishers control esports markets through their monopoly on the IP to which all downstream entities must have access in order to compete. The more control publishers exert over the downstream esports market, the harder it is for independent tournament organizers, broadcasters, and teams to successfully participate in the market. When publishers vertically integrate by establishing their own tournaments and broadcasts, independent entities are pushed out of the market because they are prohibited from using publisher IP. A vertically monopolized market harms consumers because it decreases incentives for price and quality competition by eliminating intra-game competition for viewership and players.

Antitrust law offers the best legal strategy for curtailing anticompetitive conduct by publishers without unduly harming the incentive to create and maintain esports games. Antitrust enforcement agencies should carefully monitor vertical integration by publishers in the esports market, and challenge restrictive or exclusive licensing arrangements that unreasonably reduce the number of independent tournament organizations. The antitrust approach alleviates anticompetitive harms by promoting efficient market competition, without the need for developing unwieldy esports governance bodies or pushing the doctrinal bounds of fair use in copyright.