

eSports - Is it a Sport, a Business or Both?

A Look at the eSports Industry as it Enters a New Decade

Emma Johnsen, Senior Associate at Marque Lawyers, comments on previous decade of eSports and what's on the agenda for the 2020s.

Unless you've been hiding under a rock, or outside in fresh air engaging in outdoor sport, you will have seen the explosion of what is known as eSports (a.k.a. electronic sports). As the Washington Post recently noted: "In the years between 2010 and 2020, esports — organized, professional video game competition — grew from a niche, online subculture into a burgeoning cultural powerhouse. While such leagues and events had existed for years prior, it was this decade in which esports experienced major growth spurt."¹ Here, we provide a brief introduction into eSports and discuss what are the main issues facing the eSports industry in 2020 and beyond.

What is eSports?

eSports is competitive video gaming. Whether eSports is considered a 'sport' is up for debate, however, what cannot be contested is that eSports has the ability to capture mainstream audiences globally and has grown into a billion dollar industry.

We are talking about global audiences of over 380 million, prize money of up to \$25 million per tournament and crowds big enough to sell out Madison Square Garden three nights running. The eSports industry is tipped to have a market value of \$1.79 billion US dollars by 2022 and global audiences expected to reach 557 million by 2021

The minefield of legal issues

Think about a legal issue. Got one? It's probably an issue in eSports.

The rapidly changing and complex industry triggers a range of commercial, policy and legal issues including broadcast rights, intellectual property, piracy, gambling regulation and employment issues. Doping and match fixing are also causing problems.

Cheating in eSports

Just like any sporting competition, eSports has strict regulations to prevent cheating within the games. Referees in eSports tournaments monitor to ensure there is no rogue access to the internet or to the code, including by preventing the use of keyboards or mice which can allow for the new code to be installed.

With respect to ensuring integrity is upheld in the game in the industry, the Esports Integrity Coalition (ESIC) was established in 2015 to detail with "integrity challenges" to eSports which can include game hacking by way of software cheats, match fixing and online attacks which will cause opponents to slow down, or in some instances, entirely disable the opponent's game.

For example, in 2018, the ESIC placed a 5-year ban on player Nikhil "forsaken" Kumawat after he was caught cheating at a tournament in Shanghai. Tournament personnel had inspected Kumawat's computer and found that cheating software had been installed and upon inspection Kumawat tried to delete the software.

The ESIC works with a number of eSports companies and is charged

with determining and issuing punishments as well as publishing Code of Conduct, an Anti-Corruption Code and an Anti-Doping Policy.

The ESIC has also recently announced the introduction of Talent Agent Regulations in January 2020 which is a global regulatory scheme introduced to talent agents. ESIC has stated that the overarching purpose of the scheme is to ensure youth protection and professional integrity in the administration of talent agent operations.²

Lawsuits and investigations galore

With the rise in revenue streams and interest in the industry, comes the rise of lawsuits. One of the biggest lawsuits in the industry was filed by Turner 'Tfue' Tenney against eSports organisation FaZe Clan.

Tfue is one of the world's premier eSports players, with 120 million views on Twitch, more than 10 million YouTube subscribers and 5.6 million followers on Instagram. Initially filed in early 2019 in California (as that is where much of Tfue's work was undertaken) Tfue claims that FaZe Clan's Gamer Agreement is unfair and predatory as it allegedly allows FaZe to take 80% of Tfue's revenue, and that the contract hinders Tfue from pursuing and earning money from sponsorship deals that FaZe Clan hasn't allowed.

FaZe Clan filed a counter-claim in August 2019 whereby FaZe alleged, among other things, misuse of confidential information and breach of contract. Relying on the

¹ Will Partin, The 2010s were a banner decade for big money and tech - and esports reaped the rewards' *The Washington Post*, accessible at <https://www.washingtonpost.com/video-games/esports/2020/01/28/2010s-were-banner-decade-big-money-tech-esports-reaped-rewards/>.

² <https://esic.gg/esic-announces-introduction-of-talent-agent-regulations/>

jurisdictional clause in the contract, the counter claim was filed in the federal district court in New York City and the matter has now morphed into a complex, multi-jurisdictional piece of litigation expected to be heard in March 2020.

Meanwhile back in Australia, the first major investigation into corruption in eSports commenced in 2019 after it was reported in September 2019³ that Victoria Police were pursuing a number of eSports related criminal investigations following a number of reports being made to the Victoria Police force's Sporting Integrity Intelligence Unit about alleged match fixing in Counter-Strike: Global Offensive games. The investigations have raised concerns about what were described as 'clear shortcomings' in eSports governance, such as what publishers can do to assist in preventing corruption in the industry.

What's the situation with IP in eSports?

eSports is a big web of licensed rights. Practically speaking, each different game could be thought of as a different "code" of eSport. The structure of rights in eSports is very top heavy, in that the individual publishers of each of the games have ultimate control over the rights to each game.

Under Australian copyright law, computer programs are protected by copyright. The game is also protectable as a cinematograph film. The owners of the rights in the games are typically the developers and publishers. The level of IP protection available to the owners of eSports is not available in 'traditional sport', meaning that the owners of each eSport have an increased level of control.

This creates an industry where the owners of each eSport can control the reproduction and dissemination of the game and, as a result, the

ownership and exploitation of the IP rights is incredibly valuable. The owner of the eSport can then license the rights to the game to tournament organisers, broadcasters, merchandisers and sponsors.

One of the most precarious elements of the rise of eSports is with respect to 'Streamers' and the IP considerations that livestreaming brings. Streamers are not professional eSports players; they are personalities who run their own channels to which users can subscribe. Streamers can attract lucrative sponsorship contracts. However, the streamer may not have obtained the rights from the owner of the IP - in the particular eSport. This could cause downstream problems as streamers develop value in a brand which exploits a product in which they have no enforceable legal interest. Kind of a new form of cybersquatting. While it is the streamer who will usually retain any royalties generated from the views of their content, these streamers can actually help to assist the popularity of a game and as a result, the publishers will turn a blind eye to the copyright infringement that is taking place and in some instances actually assist the streamer to generate more views.

With eSports viewership tipped to make up 10% of all sports viewership in the US within the next 2 years, the industry is one to watch.

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3 <https://www.abc.net.au/news/2019-09-24/fears-world-of-esports-is-ripe-for-corruption/11521008>