



IT'S IN THE GAME: THE ESPORTS LEGAL PLAYBOOK

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Miller Thomson offers a national, multi-disciplinary network of lawyers who understand the legal and business challenges unique to the Esports industry. We leverage our industry-related experience, as well as our broad expertise in advising emerging and high growth companies and their stakeholders, to provide creative, tailored solutions for our clients.

Introduction

Gone are the days when video games were seen as nothing more than a hobby. The booming industry of “electronic sports”, better known as “Esports”, has brought video gaming into the mainstream. As described in our [previous article](#) regarding the meteoric rise of the industry, Esports has dramatically increased in popularity over a short period of time. Players, game publishers, team owners and investors all wish to capitalize on the sector’s wide potential and significant business opportunities.

Just like any other industry, Esports presents its own disparate set of legal issues. From game developers creating intellectual property to investors purchasing a team, industry stakeholders are advised to consider the legal implications of their actions. Similar to traditional sports, the legal questions that arise in Esports relate to myriad areas of the law. The following is a summary of some of the key legal issues facing industry participants.

M&A, Securities and Corporate Finance

The popularity of Esports has been snowballing for years, leading to a now captive audience of over 454 million worldwide and a projected audience of 645 million by 2022. Despite soaring engagement levels, current Esports revenue streams are only generating around \$1 billion per year, which is relatively low in comparison to other



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industries that generate income from viewership. For example, in 2015, Instagram had an estimated 400 million active users and despite not having a settled monetization strategy, it generated approximately \$700 million in revenue and was valued at \$35 billion. Today, Instagram has over 1 billion active users, will generate roughly \$14 billion in revenue and is valued at over \$100 billion. While there are obvious differences between Esports today and Instagram in 2015, the similarities of snowballing engagement levels and untapped potential for monetization suggest that the Esports industry is ripe with investment opportunities.

Against this backdrop, swathes of investors are scrambling to get their foot in the door while attempting to determine where and how to best invest in Esports. The Esports industry has already seen a number of going public transactions, private placements, acquisitions and other transactions involving Esports leagues, organizations, teams and publishers. Moving forward, we are likely to see increased movement in mergers and acquisitions, private investing and capital markets as movers jockey to capture their share of the burgeoning market.

Investors need to know what they are investing in and how that investment fits into the broader scope of the ever-shifting Esports landscape. The investment opportunities on the horizon will present unique challenges and complexities requiring expert advice on:

- securities regulation;
- deal structuring;
- due diligence; and
- continuous disclosure obligations.

Marketing and Advertising

Direct brand sponsorship and advertising is the largest revenue stream in Esports and accounts for over 40% of the market. Esports sponsorship has attracted big name brands, some of which include Coca-Cola, Nike and Honda. These brands are non-endemic, meaning that their products and/or services are not directly linked to the market. Athletics and luxury brands have jumped on the opportunity to reach the Esports audience as well. For instance, Louis Vuitton recently created a bespoke carrying case for the trophy awarded at the 2019 League of Legends World Championship. Brands like Adidas, Champion and PUMA have also added Esports to their laundry list of sports sponsorships.



Esports provides an easy way for marketers to reach millennials and Gen Z, whose combined spending power is projected to surpass \$4 trillion within the next decade. With the decline of cable television, brands can now reach a massive audience on a daily basis through non-conventional, easy-to-access sources and streaming services, such as Twitch and YouTube. Tournaments present an opportunity to bolster brand recognition within a large market. Beyond streaming and competing, players engage with their fans online through social media platforms like Twitter and Instagram. Teams and players have mass online followings, transforming Esports players into social media “influencers” and luminaries.

When engaging in online promotion, gamers and brands must ensure that they comply with applicable legislation, such as the Competition Act, Criminal Code, product/service-specific statutes, privacy legislation and consumer protection legislation. Additionally, there are several industry self-regulatory bodies that administer their own codes of practice, such as the Canadian Marketing Association and Ad Standards.

For example, when creating sponsored posts and videos, gamers and brands should ensure that sponsored content is clearly communicated as commercial content, and that the material connection between the gamer and the brand is transparent. A “material connection” is any relationship between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation that may affect the weight or credibility of the representation, and includes benefits and incentives such as: monetary or other compensation; free products with or without any conditions attached; discounts; gifts; contest and sweepstakes entries; and any employment relationship.

Further, to safeguard its investment, a brand should ensure that it has a well-drafted contract with clearly defined exclusivity obligations. For example, Nike recently entered into a four-year contract with the League of Legends Pro League to outfit all 16 Esports teams in China. The athletic brand has created head-to-toe apparel featuring the Nike logo, but it is unclear whether players will be prohibited from seeking other sponsorships on their own. Players and teams will likely be approached by multiple brands to sign endorsement deals; thus, it is in their best interest to ensure that any exclusivity clause is not unduly restrictive.

While players, teams and brands may be eager to seek opportunities for lucrative advertisement partnerships, their success is dependent on their awareness of the regulatory framework and ability to manage legal risks. Interested parties are encouraged to seek legal advice on issues such as:

- advertising, especially through social media and when targeting minors;
- influencer marketing;
- sponsorship and endorsement agreements; and
- promotional contests and sweepstakes.

Intellectual Property

Media companies, Esports teams and game developers face novel issues with respect to intellectual property. The evolution of Esports raises complex legal questions that have yet to be answered in legislation. For example, while a traditional sports team has an owner, the right to play specific types of sports is generally not controlled by an owner: anyone can play a game of soccer or hockey without worrying about licensing or copyright infringement. By analogy, each video game is equivalent to a separate “sport” (i.e. each has a unique internal structure, story, gameplay and rules) and unlike a traditional sport, each of these games is owned and controlled by the company that created the game, namely the publisher. This construct raises a host of separate issues, many of which revolve around the rights of the publisher over its game, including the requirement to have a license in order to play the game and to broadcast the playing of the game, control over tournaments and players, and whether betting will be permitted on competitions involving the publisher’s game.

With respect to copyright law, the copyright that results from a player playing an Esport is unclear. By playing the game, is a player creating copyright in the form of a performance? Or does the player’s play, which generates code, constitute the creation of original content that is copyright protected?

It is also unclear how the owners of copyright in Esports may choose to assert their copyright. Individual players may livestream their gameplay for thousands of people, while gamers in tournaments compete in front of millions. Will publishers favour game promotion over copyright enforcement? In such a competitive market, developers risk losing critical and lucrative rights if their games are not protected. To maintain control of the underlying intellectual property rights in their games, some game publishers host their own tournaments and have even brought broadcasting of the tournament play in-house. Riot Games, which is the publisher of the most played PC game in the world, League of Legends, holds regional finals across the globe and a yearly championship tournament, and the arrangements for these events ensure that Riot Games maintains complete control over the use of the game.

Trademark registration is another means for players and teams to protect their intellectual property relating to Esports. Players develop a “gamertag” relating to their unique marketable personalities. This is a nickname a player uses when gaming. If such gamertags are utilized in association with goods and/or services, the player may hold common law trademark rights in the gamertag. It may also be possible, in some instances, to seek trademark registration for a gamertag in particular countries. Teams also develop their own brands that can be high value assets and may, in some cases, achieve trademark protection. However, it is not enough just to create a brand, as trademark rights may be lost if a brand does not maintain its distinctiveness. With so many companies vying for consumers’ attention, it is imperative for both players and teams to shield their brands from misappropriation and from the use of confusingly similar brands by other teams or players in the industry.

Industry stakeholders are advised to consult an experienced intellectual property lawyer who can help navigate these novel and complex legal issues with respect to, among other things:

- patent, industrial design, copyright and trademark registrations;
- IP assignments and licenses;
- IP issues relating to Esports contracts; and
- IP infringement and passing-off.

Immigration and Employment

As Esports continues to grow, teams will increasingly traverse the globe to compete in tournaments. When recruiting and inviting players internationally, teams should be aware of immigration laws that may create unanticipated barriers. For example, a number of professional Esports teams have “team houses” where players, many from countries outside of Canada, live and train together. Arrangements like these would require players from abroad, who are considered to be foreign nationals, to obtain the appropriate visas authorizing their stay and ability to compete in North America.

Esports players can apply under various categories in the U.S., including the O-1A (for individuals with an extraordinary ability or achievement) or EB-1A green card (for permanent residence). However, in recent years, U.S. Citizenship and Immigration Services has notably begun approving Esports players under P-1A petitions (for professional and amateur athletes). This enables Esports players to remain in the U.S. for up to five years and compete for payment and/or prize money. One of the first Esports players to obtain this visa was Stephen Le, a Canadian player from Edmonton, who was initially refused entry at the U.S.-Canada border as he had attempted to enter the U.S. as a business visitor but would be earning a salary as a team member on an American squad, in addition to any prize money received. This is considered “working” in the U.S. and requires a petition, such as the P-1A that Le eventually secured. European countries are also adapting their immigration laws and regulations to accommodate Esports; for example, Germany recently released draft legislation to provide short-term visas for non-European Union Esports players.

Similar to the employment contracts of traditional athletes, Esports contracts may provide for compensation, player conduct rules, trading and assignment. However, the Esports league structure requires some additional considerations. Unlike traditional sports leagues, each Esports league brings a distinct set of rules and requirements for players and teams playing within that ecosystem. Further, it is in a team owner’s interest to restrict competitors from playing in other leagues. Game developers and team owners may also seek to prohibit players from streaming certain competitor games while playing for their team. Players must be careful not to agree to any overly-restrictive, career-limiting contractual provisions, including restrictive non-compete clauses. When agreeing to join a team, players should also ensure that provisions for sponsorships and endorsements are not unreasonable or one-sided.

Competitors, team owners and developers should be aware of immigration and employment laws in the relevant jurisdictions. Miller Thomson regularly advises clients on concurrent immigration and employment law issues, and is well-placed to provide industry players with legal advice with respect to, among other things:

- visitor visas and work permits; and
- Esports player contracts.

Real Estate

Until recently, almost all Esports action in North America was experienced from the viewer’s couch. Realizing the opportunity for growth, team owners, publishers, entrepreneurs, sponsors and other major players are quickly redefining the space by introducing live event venues. Some venues can host thousands of fans and gamers, and even include dedicated training facilities. The largest gaming facility in North America is E-Sports Stadium Arlington, which takes up approximately 100,000 square feet and has a capacity of 2,500 fans. This venue is soon to be outdone by Fusion Arena, which will have a capacity of 3,500 fans and is currently under construction in Philadelphia next to the Wells Fargo Center, where the Flyers and 76ers play.

While impressive, these Esports mega arenas only account for a fraction of the development in Esports live-event spaces: the majority of Esports events are still being held in small, local venues that cater to the 95 percent of gamers who are not professionals. These spaces are opening up in shopping malls, nightclubs, old office complexes and on university campuses such as the University of Washington, Ohio State and the University of North Texas. Even Walmart has recently launched Esports arenas inside some of their locations as a way to incentivize shoppers to continue frequenting Walmart's brick-and-mortar stores.

With the expansion of Esports venues, interested parties seeking to purchase or lease property relating to the industry will need to rely on legal advice to ensure that the agreement in question (i.e. a lease or an agreement of purchase and sale) meets the desired standards and specifications for an Esports venue, including:

- compliance with zoning and use restrictions, including the ability to sell and serve alcoholic beverages and the consumption of cannabis;
- verification of title to ensure that Esports usage does not infringe on any existing exclusivities or violate any restrictive covenants;
- ensuring sufficient utilities (i.e. electrical capacity and high speed internet);
- ensuring sufficiency of parking and determining if parking ratios allow for same;
- determining signage rights and specifications; and
- ensuring that the underlying agreement provides for the space to be delivered in a state that would enable the Esports operator to perform its build-out work in a cost-effective manner.

Gambling

Esports betting platforms are arguably one of the largest market opportunities in the industry. Similar to traditional sports betting, websites and event venues can provide users with the opportunity to place bets on Esports in a variety of ways, including: Esports fantasy challenges; betting on team outcomes in tournaments; and betting on the performance of individual players.

While gambling is one of the most promising opportunities arising from Esports, it also has some of the largest hurdles, including the need to uphold the integrity of Esports matches. While one may not immediately associate performance enhancing drugs with video games, there is serious concern regarding Esports players using psychostimulants, such as Ritalin and Adderall, to increase concentration and gain an overall edge against competitors. Other important concerns include match-fixing and hacking, all of which must be addressed if Esports betting is to become mainstream.

Another significant hurdle is the complicated and ever-changing legal landscape which governs betting in Canada. Online gambling is currently defined as criminal activity except when provincial governments "conduct and manage" the activity. However, Ontario's budget recently unveiled plans to legalize online betting within the province, which has the potential to open up a sizable market for online gambling sites and may lead the way for more provinces to follow suit. There has also recently been pressure on the federal government to decriminalize single-event wagering which, if decriminalized, is expected to further spark gaming activity. Compliance with betting legislation will require legal advice on, among other things, evolving regulatory issues and licensing.

Conclusion

While the above overview of legal issues is not exhaustive, it provides a flavour for the types of complexities fostered by the ongoing progression of Esports. To navigate these choppy waters, Miller Thomson offers a national, multi-disciplinary network of lawyers who are mindful of the unique legal and business challenges facing this sector. We leverage our industry-related experience in Esports, as well as our broad expertise in advising emerging and high growth companies (throughout their lifecycles) and their stakeholders, to provide creative, tailored solutions for our clients.

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