

## Exploring the Esports Approach of America’s Three Major Leagues

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## I. INTRODUCTION

Esports is a global phenomenon that is rapidly gaining traction with adolescent teens and young adults in the United States. Given esports' meteoric growth over the last decade, the potential legal issues and complications stemming from the National Football League's ("NFL"), National Basketball Association's ("NBA"), or Major League Baseball's ("MLB") (collectively, the three "Major Leagues") venture into esports are ripe for discussion.

Some would-be traditional "stick and ball" players have dropped their gloves to pick up joysticks, controllers, and keyboards. Rather than compete on the field, these esports players compete over the internet and from behind a screen.<sup>1</sup> Most esports players receive compensation through salaries, prize money, college scholarships, living expenses, or a combination of the four.<sup>2</sup> Often, players contract with an esports organization, similar to Major League Baseball players contracting with a Major League club.

An umbrella term, "esports" broadly encompasses video games played professionally (i.e., for money or other compensation). Esports is best defined as ultra-competitive video-game competitions where prizes are at stake and/or the competitors are compensated for participating. Some of these competitions are structured much like the Major Leagues, while others are structured as tournaments. The leagues and tournaments range in levels of sophistication in both their structure and the legal issues that plague them. Though some competitions are televised like Major League games, people predominately consume esports competitions through the internet. Streaming services, such as Twitch.tv or YouTube, broadcast these competitions with play-by-play analysis, player interviews, and even pre-match lead-in

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<sup>1</sup> Similarly, both esports players and traditional professional players compete in sold-out arenas to loyal, cheering fans.

<sup>2</sup> An esports organization will usually require the esports players to live and practice in what is known as a "gaming house." Here, the esports athlete spends the vast majority of his or her time practicing and perfecting their video game skills.

shows that rival the production quality of television networks' Sunday-morning NFL kickoff shows.

No matter one's opinion as to whether this activity constitutes a "sport," esports continues to attract investors willing to pay millions of dollars for a piece of the evasive esports-pie.<sup>3</sup> Beyond attracting fan and investor attention, some esports endeavors have successfully obtained lucrative advertisement deals with Fortune-500 companies.<sup>4</sup> Esports players, meanwhile, have leveraged their burgeoning popularity to both raise money for charity<sup>5</sup> and supplement their incomes by commentating on their personal gaming-sessions, otherwise known as "streaming."<sup>6</sup> Given this investment of time, resources, and money, it is no surprise that many esports organizations employ analytics teams to parse statistics, analyze data, and scout opponents to improve performance.<sup>7</sup>

Though more entities continue to enter the fray—looking to capitalize on esports's emergence—video game publishers maintain control over not

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<sup>3</sup> See, e.g., Adam Fitch, *Esports Partnerships and Sponsorships Highlights for December 2019*, ESPORTS INSIDER (Jan. 1, 2020), <https://esportsinsider.com/2020/01/partnerships-and-sponsorships-december-2019/> [<https://perma.cc/6FQM-HWTC>]; Jacob Wolf, *Cloud9 Receives \$25 Million in Series A Funding from WWE, Hunter Pence and Others*, ESPN (Oct. 24, 2017), [http://www.espn.com/esports/story/\\_/id/21125519/esports-cloud9-receives-25-million-series-funding-wwe-hunter-pence-others](http://www.espn.com/esports/story/_/id/21125519/esports-cloud9-receives-25-million-series-funding-wwe-hunter-pence-others) [<https://perma.cc/ZTD4-9PLC>]; Jacob Wolf, *Lynch, Straban, J.Lo Part of \$15 Million Investment in NRG Esports*, ESPN (Sept. 28, 2017), [http://www.espn.com/esports/story/\\_/id/20851460/marshawn-lynch-rod-part-15-million-investment-round-nrg-esports](http://www.espn.com/esports/story/_/id/20851460/marshawn-lynch-rod-part-15-million-investment-round-nrg-esports) [<https://perma.cc/VTA9-UMFQ>]; Imad Khan, *Joe Montana, Hunter Pence and More Invest in Esports Organization Cloud9*, ESPN (Oct. 22, 2017), [http://www.espn.com/esports/story/\\_/id/18970231/joe-montana-hunter-pence-more-invest-esports-organization-cloud9](http://www.espn.com/esports/story/_/id/18970231/joe-montana-hunter-pence-more-invest-esports-organization-cloud9) [<https://perma.cc/4VHN-JPDT>].

<sup>4</sup> Press Release, *The Overwatch League, Overwatch League Unveils Brand Sponsors Ahead of 2019 Season: Coca-Cola, Toyota, T-Mobile, HP and Intel* (Mar. 1, 2019), <https://esports-marketing-blog.com/overwatch-league-unveils-brand-sponsors-ahead-of-2019-season-coca-cola-toyota-t-mobile-hp-and-intel/> [<https://perma.cc/XE9R-2LTV>].

<sup>5</sup> See, e.g., James Hale, *DrLupo Raises Record \$2.3 Million for St. Jude With 24-Hour #BuildAgainstCancer Livestream*, TUBEFILTER (Dec. 23, 2019), <https://www.tubefilter.com/2019/12/23/drlupo-st-jude-buildagainstcancer-twitch-livestream-record-fundraising/> [<https://perma.cc/X6FR-758U>].

<sup>6</sup> Tae Kim, *Tyler 'Ninja' Blevins Explains How He Makes More Than \$500,000 a Month Playing Video Game 'Fortnite'*, CNBC (Mar. 19, 2018), <https://www.cnbc.com/2018/03/19/tyler-ninja-blevins-explains-how-he-makes-more-than-500000-a-month-playing-video-game-fortnite.html> [<https://perma.cc/8CNS-U39S>].

<sup>7</sup> Andrew Wooden, *How Big Data is Revolutionising the Future of Esports*, INTEL, <https://www.intel.co.uk/content/www/uk/en/it-management/cloud-analytic-hub/big-data-powered-esports.html> [<https://perma.cc/5BBU-M5DY>].

only the product (i.e., the video game itself) but also esports organizations, esports players, and the esports competitions. As the esports sector has matured over the years, legal issues stemming from this control have concomitantly emerged.

This Article focuses on the NBA's, MLB's, and the NFL's forays into esports through the popular video games NBA 2K, MLB The Show, and Electronic Arts' Madden NFL franchise, respectively.<sup>8</sup> In turn, this Article details MLB's MLB China eSports League, the NFL's Madden Championship Series, and the NBA's NBA 2K League, which represents the most sophisticated approach of the trio. This article then uses the NBA 2K League as a model to analyze the myriad legal issues facing esports leagues as a whole.

## II. COMPARATIVE ESPORTS SYSTEMS OF AMERICA'S THREE MAJOR LEAGUES

### A. Major League Baseball

Major League Baseball ("MLB") has been hesitant to enter the esports industry. In February 2019, Rob Manfred, the Commissioner of Major League Baseball, stated that entering the esports industry was a priority for the MLB.<sup>9</sup> Then in July 2019, the MLB announced its splash in the esports market with the formation of the MLB China eSports League.<sup>10</sup> Up to that point, it was the only one of the three Major Leagues not to have an esports operation.<sup>11</sup> Before the MLB China eSports League, MLB's only involvement with esports came in the form of the virtual reality Home Run Derby held

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<sup>8</sup> Each Major League has taken a different approach to esports. For example, the NBA has a sophisticated set-up that mirrors its own professional basketball teams, while MLB is in the planning stage of its overseas esports league. While these represent the traditional Major Leagues' endeavors, other grassroots tournaments occur across the United States, ranging in size, sophistication, and relationship to either the video game publisher or the Major League itself. Along with the three Major Leagues, the National Hockey League ("NHL") and Major League Soccer ("MLS") have also dipped their toes into these murky waters through their popular games NHL 2K and Electronic Arts' FIFA, respectively.

<sup>9</sup> Will Strickland, *MLB Likely to Enter Esports in 2019*, DOT ESPORTS (Mar. 1, 2019), <https://dotesports.com/business/news/mlb-likely-to-enter-esports-in-2019> [<https://perma.cc/CHL4-BQMC>].

<sup>10</sup> Ed Dixon, *MLB Makes First Esports Venture with Chinese Tournament Launch*, SPORTSPRO MEDIA (July 8, 2019), <http://www.sportspromedia.com/news/mlb-first-esports-venture-chinese-tournament-launch> [<https://perma.cc/PY7W-B4TU>].

<sup>11</sup> Diamond Leung, *How Major League Baseball Is Approaching Future Entry into Esports*, SPORTTECHIE (Feb. 15, 2018), <https://www.sporttechie.com/how-mlb-approaching-future-entry-esports/>; see also Strickland, *supra* note 9.

at the MLB's All-Star Game and the Little League World Series each year.<sup>12</sup> That said, to date, MLB has released few details of its MLB China eSports League. After its announcement in July 2019, MLB has reported no other updates, so it seems MLB has postponed its launch of the MLB China eSports League.

If the MLB China eSports League moves forward, the players will be competing on the video game MLB The Show ("The Show").<sup>13</sup> While MLB and its Players Association license its intellectual property to Sony for use in The Show, and now other video game platforms,<sup>14</sup> MLB publishes its own competing video game—R.B.I. Baseball.<sup>15</sup> Thus, the MLB China eSports League will be played on a competitor to R.B.I. Baseball. That said, The Show has been considered the objectively superior baseball video game, and most of the local tournaments in the competitive baseball simulation video game market are played on The Show.

The League will comprise eight teams,<sup>16</sup> and eight different esports organizations have partnered with the League to field each team.<sup>17</sup> Players will compete over three months, and the League will consist of a regular season and playoffs,<sup>18</sup> similar to the Major Leagues. The regular season will be played in Chongqing, Chengdu, Xi'an, Beijing, Hangzhou, and Suzhou,

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<sup>12</sup> Dixon, *supra* note 10.

<sup>13</sup> See *id.* Similar to both NBA 2K and Madden, MLB The Show is a sports simulation video game. NBA 2K, Madden, and MLB The Show simulate NBA basketball, NFL football, and MLB baseball, respectively. Also, until recently, MLB The Show has only been available on the PlayStation consoles, but in December 2019, MLB, MLBPA, Sony, and San Diego Studios reached partnerships that will bring MLB The Show to console platforms beyond PlayStation. Chris Bengel, *MLB The Show is no longer a PlayStation exclusive, will be released on other consoles*, CBS (Dec. 10, 2019), <https://www.cbssports.com/mlb/news/mlb-the-show-is-no-longer-a-playstation-exclusive-will-be-released-on-other-consoles/> [https://perma.cc/J8E8-HWAZ].

<sup>14</sup> *MLB, MLBPA, Sony Extend Video Game Partnership*, MLB.COM NEWS (Dec. 9, 2019), <https://www.mlb.com/news/mlb-mlbpa-sony-extend-video-game-partnership> [https://perma.cc/6RCK-LF3K].

<sup>15</sup> R.B.I. Baseball is published by Major League Baseball Advanced Media ("MLBAM"), which is Major League Baseball's internet and interactive arm. Prior to MLBAM's 2014 release of R.B.I. Baseball, the video game had not been published since 1995.

<sup>16</sup> Dixon, *supra* note 10.

<sup>17</sup> *MLB Announces an Esports League in China*, 71 REPUBLIC (July 23, 2019), <https://71republic.com/2019/07/23/mlb-announces-esports-league-china/> [https://perma.cc/EA4H-ARJS].

<sup>18</sup> Anthony DiMoro, *Major League Baseball Announces MLB China eSports League*, GAMACTICA (July 9, 2019), <https://gamactica.com/news/2019/07/09/major-league-baseball-announces-mlb-china-esports-league/> [https://perma.cc/JN68-NB48].

and the playoffs will be held in Shanghai.<sup>19</sup> For those unable to participate in the League, MLB plans to host an MLB Experience carnival to help fans experience China's baseball culture.<sup>20</sup> As the first of the three Major Leagues to launch an entirely international esports league, the MLB China eSports League will carry a unique dynamic that other esports entities will surely follow closely. Through the MLB China eSports League, the MLB likely aims to both (i) grow the game of baseball in China, and (ii) engage a younger fan base.

First, the MLB China eSports League should help expand baseball's international market. Along with the MLB China eSports League, MLB has engaged in additional efforts to grow baseball in China. In late 2017, MLB partnered with Beijing Enterprises Real Estate Group to build 20 baseball facilities in China.<sup>21</sup> In 2018, MLB reached a multi-year deal with Tencent<sup>22</sup> to live stream 125 MLB games on various platforms.<sup>23</sup> Most recently, MLB signed an agreement with the Chinese Baseball Association to relaunch the China National Baseball League.<sup>24</sup> Given its size, China represents a market with great growth potential, and MLB is likely seeking to use esports to capitalize on that potential.

Second, as for reaching a younger fan base, Shao Yinxin, MLB China's Director of Marketing and Media, said, "By appealing to a younger demographic with games that they enjoy, this will help increase the penetration of baseball into their lives."<sup>25</sup> It is no secret that the average esports viewer is much younger than the average baseball viewer.<sup>26</sup> It seems as though the

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<sup>19</sup> Matt Traub, *Major League Baseball to Launch Esports League in China*, SPORTSTRAVEL (July 10, 2019), <https://www.sportstravelmagazine.com/major-league-baseball-to-launch-esports-league-in-china/> [https://perma.cc/2FV8-2CN7].

<sup>20</sup> Chenglu Zhang, *Major League Baseball Announces Chinese Esports League*, ESPORTS INSIDER (July 9, 2019), <https://esportsinsider.com/2019/07/mlb-china-esports-league/> [https://perma.cc/H7EG-2FSK].

<sup>21</sup> Dixon, *supra* note 10.

<sup>22</sup> Tencent is a behemoth technology corporation and a leading provider of comprehensive Internet Services in China. Additionally, Tencent owns Riot Games, the publisher of one of the most popular esports video games, League of Legends.

<sup>23</sup> Dixon, *supra* note 10.

<sup>24</sup> Ed Dixon, *MLB Agrees to Chinese Baseball League Collaboration*, SPORTSPRO MEDIA (Aug. 19, 2019), <http://www.sportspromedia.com/news/mlb-chinese-baseball-league-collaboration> [https://perma.cc/3VQ8-6J5C].

<sup>25</sup> Dixon, *supra* note 10.

<sup>26</sup> As of 2017, the average esports fan was 31 years old and the average Major League Baseball fan was 57 years old. See Zorine Te, *The average age of the esports fan is 31, according to latest Nielsen report*, YAHOO SPORTS (May 10, 2017), <https://sports.yahoo.com/average-age-esports-fan-31-according-latest-nielsen-report-002654718.html> [https://perma.cc/JN7L-WGM4]; Jason Notte, *The sports with the*

MLB is trying to remedy this problem by supplanting Major League Baseball into China, which is considered the most potent esports market in the world. And because of China's strong esports market, it is generally understood that MLB believes that the League will be able to have long-term success.

Only time will tell if MLB's esports ventures will grow the game of baseball. And what might prove equally interesting is whether MLB will use *The Show*, or even R.B.I. Baseball, to develop a domestic esports league to grow its American fanbase and cut into the other, more popular esports leagues' market share.

### B. *The NFL and EA Sports' Madden Championship Series*

The NFL's esports approach has differed from that of the NBA and MLB. Indeed, while the NBA created and operates an esports league<sup>27</sup>—and MLB is attempting the same<sup>28</sup>—the NFL has partnered with Electronic Arts (“EA”)<sup>29</sup> to establish a series of Madden Tournaments dubbed the Madden Championship Series.<sup>30</sup> EA, as part of its Competitive Gaming Division, is the operator of the Madden Championship Series (“MCS”), but the NFL remains involved. Because the NFL's esports operation differs from MLB's and the NBA's, it provides a different perspective into a sports league's esports operation.

The Madden NFL video game franchise (“Madden”)<sup>31</sup> has existed since 1988, with new versions of the game released annually.<sup>32</sup> In its simplest

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*oldest – and youngest – TV audiences*, MARKETWATCH (June 30, 2017), <https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30> [https://perma.cc/K7RM-CPPT].

<sup>27</sup> The NBA created the NBA 2K League along with Take-Two Interactive, NBA 2K's publisher. *See also infra* Part II.C.

<sup>28</sup> *See supra* Part II.A.

<sup>29</sup> Similar to Take-Two in the NBA 2K League, EA Sports is the publisher of the Madden NFL series.

<sup>30</sup> For background regarding the Madden Championship Series, see generally *Madden Nation 4*, ESPN (Oct. 22, 2008), <https://web.archive.org/web/20081109041116/http://sports.espn.go.com/videogames/news/story?id=3047668>; *Madden NFL 06 Madden Nation*, EA SPORTS, <https://web.archive.org/web/20080923211738/http://www.easports.com/madden06/maddennation.jsp>; *Madden NFL 07*, EA SPORTS, <https://web.archive.org/web/20070516034701/http://www.easports.com/madden07/index.jsp?ncc=1>.

<sup>31</sup> The game is named after former Oakland Raiders head coach, broadcasting legend, and NFL Hall of Famer, John Madden.

<sup>32</sup> James Brady, *Exploring the (Weird) Story of the Very First 'John Madden Football' Game*, SB NATION (Aug. 7, 2018), <https://www.sbnation.com/2018/8/7/17599240/>

form, Madden NFL is a football simulation video game where an individual plays as an NFL team against an opponent who plays as another NFL team.<sup>33</sup> Madden's popularity has led to gaming competitions and local tournaments, usually operated by grassroots organizers.<sup>34</sup> Besides these local tournaments, EA Sports, a division of EA, remains active in competitive Madden, having introduced the Madden Challenge in 2001.<sup>35</sup>

The Madden Challenge may well be one of the earliest esports ventures. In 2005, EA partnered with ESPN Original Entertainment to create a reality television show, *Madden Nation*, that documented the lives of top-ranked Madden players.<sup>36</sup> *Madden Nation* featured a tour-bus full of Madden competitors and NFL players traveling across the United States to a final tournament with a \$100,000 grand prize.<sup>37</sup> *Madden Nation* lasted four seasons, through 2008,<sup>38</sup> and each season culminated in the Madden players competing in New York City's Times Square.<sup>39</sup>

In 2015, EA Sports, likely realizing the paradigm shift and increasing popularity in esports, created the EA Sports Competitive Gaming Division.<sup>40</sup> As part of EA's Competitive Sports Division, the MCS was created.

The MCS is a video game competition to determine the best Madden player in the country, with each season comprising four tournaments.<sup>41</sup> The

john-madden-football-apple-ii-genesis-original-story-trip-hawkins [https://perma.cc/AF9S-KY9S]. In 1988, the game was titled *John Madden Football*. Madden NFL video games have evolved so much that early versions most likely would not be recognized as the same game if played today.

<sup>33</sup> The video game contains other game modes, but the most popular game mode is players competing head-to-head.

<sup>34</sup> Madden did have brief stints of media attention, including the rise and fall of the American reality television series *Madden Nation*. See *Madden Nation*, IMDB, https://www.imdb.com/title/tt0758421/ [https://perma.cc/6F7A-DPEL].

<sup>35</sup> *2008 EA Sports Madden Challenge Presented by Best Buy Kicks Off a New Season*, IGN (June 14, 2012), https://www.ign.com/articles/2008/09/17/2008-ea-sports-madden-challenge-presented-by-best-buy-kicks-off-a-new-season [https://perma.cc/X95G-65XX].

<sup>36</sup> See *Madden Nation 4*, *supra* note 30.

<sup>37</sup> See *id.*

<sup>38</sup> See *Madden Nation*, *supra* note 34.

<sup>39</sup> See *Madden Nation 4*, *supra* note 30.

<sup>40</sup> *Announcing the EA Competitive Gaming Division, Led by Peter Moore*, ELECTRONIC ARTS (Dec. 10, 2015), https://www.ea.com/news/announcing-the-ea-competitive-gaming-division-led-by-peter-moore [https://perma.cc/729V-JUUS].

<sup>41</sup> *The Madden NFL 20 Championship Series*, ELECTRONIC ARTS, https://www.ea.com/games/madden-nfl/madden-nfl-20/compete/overview [https://perma.cc/R298-CRVR]; *Madden Championship Series Official Rules*, EA SPORTS [hereinafter *MCS Rules*], https://www.ea.com/games/madden-nfl/madden-nfl-20/com-



MCS launched in 2016 with the Madden NFL 17 Championship Series.<sup>42</sup> Shortly after its inception, the MCS began evolving. In 2017, the NFL became more involved with the MCS by partnering with EA to create the expanded version of the NFL Club Championship.<sup>43</sup> The NFL Club Championship is a tournament that provides fans the chance to represent their favorite NFL team and compete against one another in Madden.<sup>44</sup> Before this initiative, only a select number of NFL franchises participated in the Club Series (now known as the NFL Club Championship).<sup>45</sup> Today, all 32 NFL teams participate in the Club Championship, as one Madden player represents each team in a 32-player tournament.<sup>46</sup>

The MCS continues to develop and, today, awards \$1.255 million in total prize money for the Madden NFL 20 Championship Series.<sup>47</sup> The MCS has also landed notable sponsors, including Snickers, Starbucks, and Pizza Hut.<sup>48</sup> Pizza Hut has a unique sponsorship deal with the MCS, as MCS

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[pete/madden-nfl-20-championship-series-official-rules](https://perma.cc/86X7-XJRA) [https://perma.cc/86X7-XJRA].

<sup>42</sup> Joe Bartel, *Madden Continues to Cultivate a Community Over a Year into Esports Initiative*, ESPN (May 12, 2017), [https://www.espn.com/esports/story/\\_/id/19366979/madden-continues-cultivate-community-year-esports-initiative](https://www.espn.com/esports/story/_/id/19366979/madden-continues-cultivate-community-year-esports-initiative) [https://perma.cc/4JUX-A9EC]; *Madden Bowl: Schedule, How to Watch, and Live Stream*, EA SPORTS (Jan. 20, 2017), <https://www.easports.com/madden-nfl/news/2017/where-to-watch-madden-bowl> [https://perma.cc/PY3X-44T2].

<sup>43</sup> Eric Fisher & Ben Fischer, *NFL, EA Team for Esports*, SPORTS BUS. J. (Aug. 21, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/08/21/Leagues-and-Governing-Bodies/Madden.aspx> [https://perma.cc/WK2B-GS4H].

<sup>44</sup> *Madden Club Championship*, ELECTRONIC ARTS, <https://www.ea.com/games/madden-nfl/madden-nfl-20/compete/events/madden-nfl-20-madden-club-championship> [https://perma.cc/4HRJ-3GKC].

<sup>45</sup> *NFL Partners with EA for Dive Into the World of 'Madden NFL' Competitive Gaming*, NAT'L FOOTBALL LEAGUE, <https://nflcommunications.com/Pages/NFL-Partners-With-EA-for-Dive-Into-the-World-of-%27Madden-NFL%27-Competitive-Gaming.aspx> [https://perma.cc/Q25H-9T2Y]. Some of the original participating teams included: Minnesota Vikings, New England Patriots, Buffalo Bills, Seattle Seahawks, Jacksonville Jaguars, Pittsburgh Steelers, San Francisco 49ers, and the Kansas City Chiefs. *EA SPORTS Madden 17 Club Series Bring the Competition to Markets Around the NFL*, NAT'L FOOTBALL LEAGUE, <https://nflcommunications.com/Pages/EA-SPORTS-Madden-17-Club-Series-Brings-the-Competition-to-Markets-Around-the-NFL.aspx> [https://perma.cc/LA4N-87W5].

<sup>46</sup> Fisher & Fischer, *supra* note 43; Tom Huddleston, Jr., *The NFL and EA Sports Are Launching a 'Madden NFL' E-Sports Tournament*, FORTUNE (Aug. 21, 2017), <https://fortune.com/2017/08/21/nfl-ea-madden-esports-tournament/> [https://perma.cc/3YHY-6W5S].

<sup>47</sup> *MCS Rules*, *supra* note 41.

<sup>48</sup> *Madden NFL 20 Championship Series Announced by EA*, ESPORTSNOW (Aug. 2, 2019), <https://www.esportsnow.bet/madden-nfl-20/> [https://perma.cc/7ERL-

tournaments will be held in Pizza Hut Stadium—a virtual stadium. This marks the first virtual stadium-rights deal in esports.<sup>49</sup>

As stated, the MCS comprises four major tournaments: Madden Classic, Madden Club Championship, Madden Challenge, and Madden Bowl (“Majors”).<sup>50</sup> By competing in the first three Majors—the Madden Classic, Madden Club Championship, and Madden Challenge—players can earn not only cash prizes, but, more importantly, points that can qualify them for the Madden Bowl.<sup>51</sup> The Madden Bowl is the last Major of the season, and the winner of the Madden Bowl is recognized as the winner of the competition and the champion of the MCS.<sup>52</sup> For the Madden NFL 20 MCS, the NFL and EA have decided to host each Major alongside a key moment in the NFL season, with one Major partnered with the start of the NFL season, the NFL Playoffs, the Super Bowl, and the NFL Draft, respectively.<sup>53</sup>

This illustrates a difference between the NBA 2K League and the MCS. The MCS seems to be a mechanism used to increase fan engagement with

WPQ6]; Richard Lawler, *Madden 20 Championship Series Ties Its Schedule to NFL Events*, ENGADGET (July 26, 2019), <https://www.engadget.com/2019/07/26/madden-esports-nfl/> [https://perma.cc/23XB-2PVJ].

<sup>49</sup> Lawler, *supra* note 48.

<sup>50</sup> *The Madden 20 Championship Series*, *supra* note 41.

<sup>51</sup> Will Partin, *What Is the Madden Championship Series*, VARIETY (Aug. 27, 2018), <https://variety.com/2018/gaming/features/what-is-the-madden-championship-series-1202917409/> [https://perma.cc/23AE-Z4LF].

<sup>52</sup> *MCS Rules*, *supra* note 41. Sixteen players compete in the Madden Bowl. In order to qualify, one must finish in first or second in the Madden Classic, the Madden Challenge, or the Last Chance Qualifier (while not a “major,” it is another tournament to help players qualify for a spot in the Madden Bowl); finish in one of the top four spots in the Madden NFL Club Championship; or be one of the top six MCS point earners at the conclusion of the first three major events. *Ways to Qualify for the Madden Bowl*, ELECTRONIC ARTS, <https://www.ea.com/games/madden-nfl/madden-nfl-19/compete/events/madden-nfl-19-bowl#qualify> [https://perma.cc/F8NA-HLBY].

<sup>53</sup> Adam Fitch, *Madden NFL 20 Championship Series Announced*, ESPORTS INSIDER, (Aug. 1, 2019), <https://esportsinsider.com/2019/08/madden-nfl-20-championship-series/> [https://perma.cc/8P8L-N4UD]; *Electronic Arts and NFL Announce EA Sports Madden NFL 20 Championship Series*, (July 26, 2019), <https://www.businesswire.com/news/home/20190726005187/en/Electronic-Arts-NFL-Announce-EA-SPORTS-Madden> [https://perma.cc/94D4-5SZV]. This year, the Madden NFL 20 Classic was hosted from August 30, 2019 to September 1, 2019 in conjunction with the start of the NFL season. The Madden NFL Club Championship took place from December 18, 2019 to December 20, 2019, near the NFL Playoffs. The Madden Challenge took place between January 30, 2020 and February 1, 2020, in association with the Super Bowl. Lastly, the Madden Bowl is scheduled to be held from April 23, 2020 to April 25, 2020, in connection with the NFL Draft.

the NFL—similar to the MLB’s venture into esports—while the NBA and the NBA 2K League focus on the promotion and sustainability of the NBA 2K League itself.<sup>54</sup> The NFL has its eyes set on possibly becoming a more developed esports league, with the NFL Club Championship representing its first test for potential viability.<sup>55</sup>

As for development and involvement in esports, it may help to think of America’s three Major Leagues on a spectrum. On the “lack of involvement” end of the spectrum is Major League Baseball and the MLB China eSports League; toward the middle of the spectrum is the NFL and the MCS; and on the “heavy involvement” end of the spectrum is the NBA, with its NBA 2K League.

### C. *The NBA 2K League*

#### 1. League Structure

The NBA 2K League is a professional esports league in which players, and, collectively, teams, compete against each other in the NBA 2K video game.<sup>56</sup> The NBA 2K League is a joint venture between the NBA and Take-Two Interactive (“Take-Two”).<sup>57</sup> The NBA and Take-Two announced plans to launch the NBA 2K League (“League”) in February 2017, with its inaugural season taking place in 2018.<sup>58</sup> With this initiative, the NBA 2K

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<sup>54</sup> See NFL, EA Launch ‘Madden NFL 19’ Championship Series, NAT’L FOOTBALL LEAGUE (Aug. 6, 2018), <http://www.nfl.com/news/story/0ap3000000945212/article/nfl-ea-launch-madden-nfl-19-championship-series> [<https://perma.cc/R6Y8-KTWL>] (“We view esports as a key accelerant to growing the NFL as it enables new ways for young fans to engage in the sport through Madden NFL competition.”).

<sup>55</sup> Fisher & Fischer, *supra* note 43.

<sup>56</sup> *League Info*, NBA 2K LEAGUE, <https://2kleague.nba.com/league-info/> [<https://perma.cc/HM9E-N6QL>]. NBA 2K is a basketball simulation video game. The user is able to play with actual NBA teams and rosters against either the game itself or another person, whether in person or online. NBA 2K is a video game like any other; it is owned by millions of people around the world—it is not only professional gamers that play NBA 2K but casual fans as well. Other than professional gamers, individuals play NBA 2K for fun or competitively in tournaments against one another. NBA 2K is not the only form of organized competition in the NBA 2K world, either.

<sup>57</sup> *Id.* Take Two Interactive is the company that publishes (creates) the game NBA 2K.

<sup>58</sup> *Id.*; *Timeline of Key Dates in NBA 2K League History*, NBA 2K LEAGUE (Feb. 9, 2019), <https://2kleague.nba.com/news/timeline-of-key-dates-in-nba-2k-league-history/> [<https://perma.cc/9DYH-BPKZ>].

League became the first official esports league operated by a United States professional sports league.<sup>59</sup>

The League consists of teams operated by NBA organizations, with one exception for a global team.<sup>60</sup> For example, the Cleveland Cavaliers operate the NBA 2K team Cavs Legion GC, the Celtics operate Celtics Crossover Gaming, and so on. The League saw 17 teams take the virtual court in its inaugural 2018 season.<sup>61</sup> By 2019, the League added four new teams.<sup>62</sup> And in the offseason before the 2020 season, two more teams joined the League: Hornets Venom GT and Gen. G,<sup>63</sup> which is a global esports organization based in Shanghai that is partnering with the NBA 2K League to provide the first NBA 2K team outside the United States.<sup>64</sup> Gen. G is not affiliated with any NBA franchise. With the addition of Hornets Venom GT and Gen. G, the League will feature 23 teams in the 2020 season. Notably, a

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<sup>59</sup> *League Info*, *supra* note 56.

<sup>60</sup> *Frequently Asked Questions*, NBA 2K LEAGUE, <https://2kleague.nba.com/frequently-asked-questions/> [<https://perma.cc/7ZB7-EZXS>]. Gen G., the League's first international team, is the only team not affiliated with an NBA franchise.

<sup>61</sup> *17 NBA Teams to Take Part in Inaugural NBA 2K Esports League in 2018*, NAT'L BASKETBALL ASS'N (May 4, 2017), <https://www.nba.com/article/2017/05/04/nba-2k-esports-league-17-nba-teams-participate-inaugural-season> [<https://perma.cc/LHN2-A2MR>]. The teams that participated in the inaugural season, with respective NBA franchise listed in parenthesis, were: Celtics Crossover Gaming (Boston Celtics), Cavs Legion GC (Cleveland Cavaliers), Mavs Gaming (Dallas Mavericks), Pistons GT (Detroit Pistons), Warriors Gaming Squad (Golden State Warriors), Pacers Gaming (Indiana Pacers), Grizz Gaming (Memphis Grizzlies), Heat Check Gaming (Miami Heat), Bucks Gaming (Milwaukee Bucks), Knicks Gaming (New York Knicks), Magic Gaming, (Orlando Magic) 76ers GC (Philadelphia 76ers), Blazer5 Gaming (Portland Trail Blazers), Kings Guard Gaming (Sacramento Kings), Raptors Uprising GC (Toronto Raptors), Jazz Gaming, (Utah Jazz) and Wizards District Gaming (Washington Wizards).

<sup>62</sup> The four additional teams included: Hawks Talon GC (Atlanta Hawks), Lakers Gaming (Los Angeles Lakers), NetsGC (Brooklyn Nets), and T-Wolves Gaming (Minnesota Timberwolves). See Jacob Wolf, *NBA Welcomes Hawks, Nets, Lakers, Wolves Franchises to NBA 2K League*, ESPN (Aug. 15, 2018), [https://www.espn.com/nba/story/\\_/id/24381282/nba-welcomes-4-new-franchises-nba-2k-league](https://www.espn.com/nba/story/_/id/24381282/nba-welcomes-4-new-franchises-nba-2k-league) [<https://perma.cc/Z46Q-XGNW>].

<sup>63</sup> Adam Fitch, *Charlotte Hornets Enters NBA 2K League as Hornets Venom GT*, ESPORTS INSIDER (June 30, 2019), <https://esportsinsider.com/2019/06/nba-2k-league-hornets-venom-gt/> [<https://perma.cc/S8P6-FT6H>]; Kathryn Kuchefski, *The NBA 2K League Is Expanding Internationally With A Team In Shanghai*, MEDIUM (Nov. 5, 2019), <https://medium.com/instant-sponsor/the-nba-2k-league-is-expanding-internationally-with-a-team-in-shanghai-63d86cecc7e1> [<https://perma.cc/69SG-M6ZX>].

<sup>64</sup> Kuchefski, *supra* note 63.

spot in the League comes at a price—in each of the League’s first two years, the entrance fee totaled \$750,000 for three years of participation.<sup>65</sup>

The League was created with hopes of great potential, with the NBA hoping that the League would be mutually beneficial for itself as well as for the NBA as a whole.<sup>66</sup> The NBA and its affiliated teams saw the NBA 2K League as a “win-win”: either the League would be a large success or the NBA teams would gain an increasingly elusive younger market demographic.<sup>67</sup>

While the NBA 2K League is the most popular esports venture of America’s three Major Leagues, it still faces challenges. The League is not widely popular outside active fans of the NBA 2K video game, probably both because traditional sports fans would prefer to watch NBA games instead and because traditional esports fans do not consider sports video games to be on the same esports-level as other video games, such as League of Legends and Overwatch.

## 2. Gameplay

On its surface, the concept of individuals playing video games against each other may seem simple, but the gameplay is more intricate than that. The gameplay is analogous to that of an NBA game. Two teams compete against each other in a five-player-versus-five-player (five-on-five) basketball game. Structurally, each team consists of six players—five starters and a sixth player.<sup>68</sup> Like the NBA, the five starters include a point guard, a shooting guard, a small forward, a power forward, and a center.<sup>69</sup> The sixth player is a reserve who begins the game on the bench.<sup>70</sup>

In stark contrast with the NBA, the NBA 2K League does not feature any NBA players’ names, images, or likenesses on the court. Instead, players create their own personal player based on pre-existing archetypes with spe-

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<sup>65</sup> Wolf, *supra* note 62. It has been stated that the fee is not set to change for teams who will be entering the league for its third season. *See id.*

<sup>66</sup> *See e.g.*, Imad Khan, *Adam Silver vows to develop esports entity as ‘fourth league in our family’*, ESPN (Apr. 4, 2018), [https://www.espn.com/esports/story/\\_/id/23029042/nba-commissioner-adam-silver-welcomes-fourth-league-nba-2k-esports-league](https://www.espn.com/esports/story/_/id/23029042/nba-commissioner-adam-silver-welcomes-fourth-league-nba-2k-esports-league) [https://perma.cc/YY22-CCUE].

<sup>67</sup> Telephone Interview with NBA 2K Employee(s) (Oct. 12, 2019).

<sup>68</sup> Alex Kennedy, *FAQ: Everything You Need to Know About the New NBA 2K League*, HOOPS HYPE (Apr. 4, 2018), <https://hoopshype.com/2018/04/04/faq-everything-you-need-to-know-about-the-new-nba-2k-league/> [https://perma.cc/H2XM-SPDQ].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

cific attributes and trait variations.<sup>71</sup> For example, players can choose a point guard who is either a Shot-Creating Slasher, Shot-Creating Sharpshooter, Slashing Playmaker, Sharpshooting Playmaker, or Playmaking Shot Creator.<sup>72</sup> Similar trait variations exist for the remaining positions.<sup>73</sup> To level the playing field, all of these archetypes have the same overall rating so certain players will not have an inherent advantage over others.<sup>74</sup> This allows the game to be strategic as teams can create mismatches and game plans, just as teams do in the NBA. Much like the NBA, both traditional and advanced stats are used to evaluate these players and scheme for future matchups.

### 3. Competition and Playoff Structure

The NBA 2K League season includes regular-season matchups, tournaments, the NBA 2K League Playoffs (“Playoffs”), and the NBA 2K League Finals, all played over a three-month period.<sup>75</sup> The 2018 and 2019 season schedules were very similar, with only a few changes implemented in the 2019 season.<sup>76</sup> Both seasons included weekly matchups between squads.<sup>77</sup> Besides the Playoffs, the League has hosted three intra-season tournaments throughout each of the first two seasons: THE TIPOFF, THE TURN, and THE TICKET.<sup>78</sup> These tournaments do not count toward a team’s regular

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* A shooting guard can be a Playmaking Slasher, Sharpshooting Defender, Slashing Shot Creator, Sharpshooting Shot Creator or Pure Sharpshooter. A small forward can be a Shot-Creating Slasher, Sharpshooting Shot Creator, Pure Sharpshooter, Slashing Defender or Sharpshooting Slasher. A power forward can be a Slashing Rim Protector, Rebounding Athletic Finisher, Slashing Post Scorer, Two-Way Rebounder or Sharpshooting Rim Protector. Lastly, a center can be a Post-Scoring Athletic Finisher, Slashing Rebounder, Pure Rim Protector, Slashing Stretch Five or Rebounding Post Scorer.

<sup>74</sup> *Id.*

<sup>75</sup> *NBA 2K League Introduces Competition Structure For Inaugural Season*, NBA 2K LEAGUE (Apr. 6, 2018), <https://2kleague.nba.com/news/nba-2k-league-introduces-competition-structure-for-inaugural-season/> [<https://perma.cc/6VFA-BE8D>]. The 2018 season ran from May to September, while the 2019 season ran from April to August.

<sup>76</sup> The 2019 season increased League play from seventeen weeks to eighteen weeks, but the season started in early April instead of early May. Three bye weeks were also added, and the playing time for regular season games was also adjusted. *See NBA 2K League Tips Off 2019 Season on Tuesday, April 2*, NBA 2K LEAGUE (Feb. 25, 2019), <https://2kleague.nba.com/news/nba-2k-league-tips-off-2019-season-on-tuesday-april-2/> [<https://perma.cc/GLD4-BL2D>].

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

season records, but serve as tiebreakers for the Playoffs.<sup>79</sup> After the regular season concludes, eight teams begin preparing for the Playoffs.

Playoff teams are decided as follows: the seven teams with best regular season records, as well as the winner of THE TICKET make the Playoffs. If the winner of THE TICKET has one of the seven best records in the League, then the teams with the eight best regular season records will make the Playoffs.<sup>80</sup> The Playoffs proceed with the quarterfinals, the semifinals, and the NBA 2K League Finals. The inaugural season saw Knicks Gaming, the New York Knicks' NBA 2K League affiliate, take home the first ever NBA 2K League championship. T-Wolves Gaming, the Minnesota Timberwolves NBA 2K League affiliate, took home the hardware for the 2019 season.<sup>81</sup>

#### 4. Joining the League

It is not easy for players to enter the NBA 2K League. First, a player must meet certain eligibility requirements: a player must (1) be at least 18 years old; and (2) have graduated high school or, if the player did not graduate from high school, the class with which the player would have graduated had he graduated from high school has graduated.<sup>82</sup> One must also be extremely talented to find his or her way into the League. Individuals looking to enter the League must compete in a qualifier with thousands of participants.<sup>83</sup> Qualifiers then compete in the NBA 2K League Combine (“Com-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Brian Mazique, *NBA 2K League Finals Recap, Prize Money: Knicks Gaming Complete Cinderella Run to Win Championship*, FORBES (Aug. 25, 2018), <https://www.forbes.com/sites/brianmazique/2018/08/25/nba-2k-league-finals-recap-prize-money-knicks-gaming-complete-cinderella-run-to-win-championship/#62d75b37710c> [<https://perma.cc/W267-7MDF>]; Kyle Newport, *NBA 2K League Finals 2019: T-Wolves' Top Highlights, Prize Money*, BLEACHER REP. (Aug. 4, 2019), <https://bleacherreport.com/articles/2848350-nba-2k-league-finals-2019-t-wolves-top-highlights-prize-money> [<https://perma.cc/8URE-NU9W>].

<sup>82</sup> *Introducing The NBA 2K League Combine*, NBA 2K LEAGUE (Feb. 9, 2018), <https://2kleague.nba.com/news/introducing-the-nba-2k-league-combine/> [<https://perma.cc/52WV-HCCU>].

<sup>83</sup> In 2019, the League held international qualifying events for potential draft eligible players in London (European Invitational) and Hong Kong (APAC Invitational), in addition to U.S. based qualifying tournaments. See *NBA 2K League To Host First International Qualifying Event*, NBA 2K LEAGUE (Jan. 23, 2019), <https://2kleague.nba.com/news/nba-2k-league-to-host-first-international-qualifying-event/> [<https://perma.cc/YV88-2237>]; *NBA 2K League to Host First Qualifying Event in Europe*, NBA 2K LEAGUE (Nov. 14, 2019), <https://2kleague.nba.com/news/european-invitational/> [<https://perma.cc/FB5P-2KA9>].

bine”).<sup>84</sup> Following the Combine, the top 200 players must complete a 30-minute interview with a League representative.<sup>85</sup> The League will then narrow down the number of players based on these interviews and extend conditional offers to those who will be eligible for the upcoming draft.<sup>86</sup> Even after a player is drafted to a team, a player may be cut or traded during designated transaction windows, much like those in the NBA.<sup>87</sup>

## 5. Compensation

Beyond the glory that comes with being a professional video game player, NBA 2K players also receive salaries, benefits, and chances to win prize money from a \$1 million purse.<sup>88</sup> The combination of these three forms of compensation can provide a player with a respectable source of income.<sup>89</sup> The income a player receives is also secure, as all salaries in the NBA 2K League are guaranteed.<sup>90</sup> Notably, the NBA—not individual teams—pays players’ salaries.<sup>91</sup> That said, players’ salaries are paid from the franchise dues that each participating team must pay to the League.<sup>92</sup> Each player is signed to a six-month contract, but not all salaries are uniform.<sup>93</sup> Players that were taken in the inaugural draft were subject to different sala-

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<sup>84</sup> *NBA 2K League Combine Info*, NBA 2K LEAGUE, <https://2kleague.nba.com/combine-info/> [https://perma.cc/E59P-CPD2].

<sup>85</sup> Brian Mazique, *NBA 2K League Should Share Combine Statistics for Top 200 Players*, FORBES (Jan. 6, 2019), <https://www.forbes.com/sites/brianmazique/2019/01/06/nba-2k-league-should-share-combine-statistics-for-top-200-players/#516f52d3f6a5> [https://perma.cc/B9XB-29M4].

<sup>86</sup> For the 2019 Draft, the League extended 150 conditional offers. *See NBA 2K League Combine Info*, *supra* note 84.

<sup>87</sup> *See generally* Kohrman Jackson & Krantz LLP, *Hacking Esports Investment and the Law*, FACEBOOK (Feb. 26, 2020), <https://www.facebook.com/kjklaw/videos/559949294617928/>.

<sup>88</sup> *\$1 Million Prize Pool for Inaugural NBA 2K League*, NBA 2K LEAGUE (Feb. 9, 2018), <https://2kleague.nba.com/news/1-million-prize-pool-for-inaugural-nba-2k-league-season/> [https://perma.cc/9ZLZ-Z3SC].

<sup>89</sup> Eder Campuzano, *Which NBA 2K League player made the most in 2018? Top earner won nearly \$100,000*, OREGONIAN (Aug. 29, 2019), <https://www.oregonlive.com/life-and-culture/erry-2018/08/386c1a1b9b4020/which-nba-2k-league-player-mad.html> [https://perma.cc/C7ZZ-RPXW]. Dayvon Curry, known as Goofy757, collected nearly \$100,000 in the first year of the NBA 2K League as a member of Knicks Gaming. *See id.*

<sup>90</sup> *League Info*, *supra* note 56.

<sup>91</sup> Telephone Interview, *supra* note 67.

<sup>92</sup> *Id.*

<sup>93</sup> *\$1 Million Prize Pool for Inaugural NBA 2K League*, *supra* note 88.



ries based on their draft status.<sup>94</sup> Players taken in the first round of the NBA 2K League Draft received a base salary of \$35,000 and all other players received a \$32,000 base salary.<sup>95</sup> It is also important to note that these salaries are fixed and little to no negotiation occurs between a player or his agent (if the player is represented) and the team.<sup>96</sup>

After the inaugural season in 2018, the League likely realized that if new players were unable to join the League and rosters were to be clogged with players from the first League year, it would not see the best new 2K players in the League, diminishing quality of play. Moreover, four new teams entered the League after the first season, creating 24 new roster spots to be filled.<sup>97</sup>

In response, the League implemented an expansion draft similar to those that have been conducted by the traditional Major Leagues.<sup>98</sup> Existing teams were allowed to “protect” two players, which prevented the specified players from being selected in the expansion draft.<sup>99</sup> After the expansion draft, existing teams had the option to retain two other players from their first year’s roster who were not selected in the expansion draft.<sup>100</sup> But this came at a price: to retain additional players, teams had to forfeit their draft picks in the 2019 NBA 2K League Draft (“2019 Draft”).<sup>101</sup> Teams were also allowed to trade draft picks in a designated trade window during this time.<sup>102</sup> Players who were not protected by their teams or selected in the expansion draft then fell into the draft eligible pool for the 2019 Draft, along with the new players who made it through the qualifier and the combine.<sup>103</sup> Players who were retained by an NBA 2K team after their first year were awarded a six-month contract with a base salary of \$37,000.<sup>104</sup> Players who were selected in the first round of the 2019 Draft received a base salary

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<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> Telephone Interview, *supra* note 67.

<sup>97</sup> *NBA 2K League Announces Four Expansion Teams for 2019 Season*, NBA 2K LEAGUE, <https://2kleague.nba.com/news/nba-2k-league-announces-four-expansion-teams-for-2019-season/> [<https://perma.cc/4MYN-859F>].

<sup>98</sup> *NBA 2K League Expansion*, NBA 2K LEAGUE, <https://2kleague.nba.com/expansion/> [<https://perma.cc/W8R8-99L9>].

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *NBA 2K League Increases Prize Pool to \$1.2 Million for 2019 Season*, NBA 2K LEAGUE (Feb. 14, 2019), <https://2kleague.nba.com/news/nba-2k-league-increases-prize-pool-to-1-2-million-for-2019-season/> [<https://perma.cc/2WNT-6PWP>].

of \$35,000, and all others received a base salary of \$33,000.<sup>105</sup> These salaries are very similar to those of NBA G-League players, who receive a salary of \$35,000 for a five-month contract.<sup>106</sup>

While NBA 2K salaries may seem paltry, these salaries are supplemented by benefits. Besides a guaranteed, albeit fixed, salary, players received the same benefits—e.g., health insurance, 401k, and some travel expenses—that NBA players receive.<sup>107</sup> These benefits can be quite robust and help offset a players' expenses. NBA 2K League teams must also provide housing to their players.<sup>108</sup> Often times, the players will live together in a gaming house throughout the season, which facilitates practices.<sup>109</sup> Xavier Vescovi, an NBA 2K player for Warriors Gaming Squad, stated, "If it was just the base salary and no other sources of income, I'm not sure if I could live in the Bay Area."<sup>110</sup> Vescovi and the rest of the NBA 2K players have found the supplemental benefits very helpful.<sup>111</sup>

Subject to its guidelines, the League also permits its players to enter into streaming and endorsement deals.<sup>112</sup> The League's guidelines prohibit a team or player from receiving endorsements in protected categories such as soft drinks, energy drinks, or salted snacks, for example.<sup>113</sup> This prohibition severely narrows a player's ability to supplement his or her income. Teams are also subject to these same prohibitions but have found endorsement success in local products and businesses.<sup>114</sup> For example, the Cavs Legion GC is sponsored by Goodyear, a business headquartered in the Cleveland area.<sup>115</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> Scooby Axson, *G League Players To Receive Salary Increase*, SPORTS ILLUSTRATED (Apr. 17, 2018), <https://www.si.com/nba/2018/04/17/g-league-salary-increase> [<https://perma.cc/9EP8-2J3X>].

<sup>107</sup> See *Frequently Asked Questions*, *supra* note 60; Telephone Interview, *supra* note 67.

<sup>108</sup> \$1 Million Prize Pool for Inaugural NBA 2K League, *supra* note 88.

<sup>109</sup> Telephone Interview, *supra* note 67.

<sup>110</sup> Eric Ting, *The Warriors Pay Him \$35k a Year to Play NBA 2K and He Can Still Afford the Bay Area. Here's How*, SFGATE (July 24, 2019), <https://www.sfgate.com/warriors/article/Warriors-35K-a-year-play-NBA-2K-Xavier-Vescovi-14120097.php> [<https://perma.cc/T793-SKEG>].

<sup>111</sup> *Id.*

<sup>112</sup> Jack Holmes, *At the NBA 2K League Draft, I Witnessed the Surreal Future of What It Means to Go Pro*, ESQUIRE (Mar. 7, 2019), <https://www.esquire.com/sports/a26684917/nba-2k-league-draft-esports/> [<https://perma.cc/CWU2-SX57>].

<sup>113</sup> Telephone Interview, *supra* note 67.

<sup>114</sup> *Id.*

<sup>115</sup> See *Partners*, CAVS LEGION GC, <https://cavslegion.nba.com> [<https://perma.cc/ZT7N-S9QM>].

While these added benefits are enticing, most NBA 2K League players are content simply playing video games for a living.

Prize money is another major component to the compensation equation for NBA 2K players. When prize money is won, it is split evenly among team members.<sup>116</sup> In 2018, prize money available for NBA 2K players totaled \$1 million.<sup>117</sup> The second season saw the prize pool money increase \$200,000, bringing the total to \$1.2 million.<sup>118</sup> Players have four opportunities to win prize money throughout the NBA 2K season.<sup>119</sup> They can win money through each of the three intra-season tournaments and the NBA 2K League Finals.<sup>120</sup> The prize money between 2018, 2019, and 2020 broke down as follows:

	2018 prize money (\$1 million total) <sup>121</sup>	2019 prize money (\$1.2 million total) <sup>122</sup>
THE TIPOFF	\$100,000	\$120,000
THE TURN	\$150,000	\$180,000
THE TICKET	\$150,000	\$180,000
NBA 2K League Play-offs: 1st place	\$300,000	\$360,000
NBA 2K League Play-offs: 2nd place	\$100,000	\$120,000
NBA 2K League Play-offs: 3rd and 4th place	\$50,000	\$60,000
NBA 2K League Play-offs: 5th-8th place	\$25,000	\$30,000

<sup>116</sup> Eder Campuzano, *Six guys made over \$50,000 playing 'NBA 2K' for the Blazers this summer*, OREGONIAN (Aug. 25, 2018), [https://www.oregonlive.com/trending/2018/08/blazer5\\_gaming\\_trail\\_blazers\\_esports\\_team\\_made\\_50000\\_each.html](https://www.oregonlive.com/trending/2018/08/blazer5_gaming_trail_blazers_esports_team_made_50000_each.html) [<https://perma.cc/HSK2-GAVP>].

<sup>117</sup> *NBA 2K League adds \$200,000 to prize pool*, ESPN (Feb. 16, 2019), [https://www.espn.com/esports/story/\\_/id/26012847/nba-2k-league-adds-200000-prize-pool](https://www.espn.com/esports/story/_/id/26012847/nba-2k-league-adds-200000-prize-pool) [<https://perma.cc/7UZZ-2ENY>].

<sup>118</sup> *NBA 2K League Increases Prize Pool to \$1.2 Million for 2019 Season*, *supra* note 104.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *NBA 2K18*, ESPORTS EARNINGS, <https://www.esportsearnings.com/games/538-nba-2k18> [<https://perma.cc/2HVH-F3Z7>].

<sup>122</sup> Doyle Rader, *Mavs Gaming Enters NBA 2K League Playoffs With A Shot At \$360,000*, FORBES (July 24, 2019), <https://www.forbes.com/sites/doylerrader/2019/07/24/mavs-gaming-nba-2k-league-playoffs-shot-at-360000-prize-money/#70188d721a0a> [<https://perma.cc/KHV9-H6X5>]; *NBA 2K League Increases Prize Pool to \$1.2 Million for 2019 Season*, *supra* note 104.

As stated earlier, Knicks Gaming and T-Wolves Gaming won the first two championships in league history.<sup>123</sup> As a result, Knicks gaming took home \$300,000 for their championship victory in 2018, and T-Wolves gaming won \$360,000 in August 2019.<sup>124</sup>

The NBA 2K League is the most developed esports league to be established by any of America's three Major Leagues. Moreover, while different in many ways, the NBA 2K League resembles a traditional sports league in its early stages. As a result, it provides an opportunity for analysis through the many legal doctrines that have molded traditional sports leagues into their current forms.

### III. LEGAL EVOLUTION OF THE NBA 2K LEAGUE

Of the esports initiatives launched by America's three Major Leagues, the NBA 2K League is most analogous to America's traditional sports leagues.<sup>125</sup> This section will explain the legal issues facing the formation and development of an esports league. It will compare the legal evolution of the NBA 2K League to that of America's three Major Leagues by analyzing, in turn, the following topics through the lens of the NBA 2K League: Commissioner and League Authority; Uniform Player Contracts; Antitrust Challenges; Age Eligibility Restrictions; Injury Grievances; Intellectual Property Rights; and Franchise Relocation and Expansion.

#### A. *Commissioner and League Authority*

Similar to the traditional Major Leagues, the NBA 2K League and its Managing Director Brendan Donahue have enacted rules and policies to form the building blocks and catalyze the success of the NBA 2K League. As Managing Director, Donahue holds a position much like that of the Commissioner in traditional sports leagues, as he and his management team oversee League governance.<sup>126</sup> Donahue and his management team, conse-

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<sup>123</sup> See Mazique, *supra* note 81.

<sup>124</sup> See Newport, *supra* note 81.

<sup>125</sup> Other more prominent esports leagues exist such as the League of Legends Championship Series, The Overwatch League, and the Call of Duty League, but for effective educational purposes, this chapter will solely focus on an analysis of the NBA 2K League.

<sup>126</sup> *Career Opportunities—Brendan Donohue*, NAT'L BASKETBALL ASS'N, <https://careers.nba.com/executive/brendan-donohue/> [<https://perma.cc/3SSC-G8LH>]. Prior to his position as Managing Director of the NBA 2K League, Donahue served as the Senior Vice President of the NBA's Team Marketing and Business Operations Department.

quently, maintain the authority to implement rules and policies as the League's governing body.<sup>127</sup> The policies that the League has implemented are much like those of traditional sports leagues, and include policies on gambling, conduct occurring "on and off the court," and more.

To control the conduct, or more appropriately, the misconduct of the players, the NBA 2K League enacted its Code of Conduct.<sup>128</sup> Like the policies enacted in the NFL, MLB, and NBA to control the conduct of their players, this set of rules describes prohibited conduct and corresponding discipline.<sup>129</sup> All players are subject to this policy because, to play in the League, each player must sign a copy of the Code of Conduct, warranting that they have read the policy and agree to its terms.<sup>130</sup> It is important to clarify that all of these policies are directed toward the conduct of the players, not the conduct of the player-controlled avatar.<sup>131</sup> For example, a player will not be suspended for a flagrant-2 foul that his or her avatar commits during a game; it is more likely that the player will be punished for using offensive language during a stream.<sup>132</sup> The Code of Conduct is most like the NFL's Personal Conduct Policy in that virtually all "off-court" conduct is governed by the policy.<sup>133</sup>

Teams, like individual players, also have obligations under the League's Code of Conduct.<sup>134</sup> Similar to traditional sports leagues, if a team is aware of conduct attributable to a player that may violate the policy, it must report that conduct to the League.<sup>135</sup> In response, the League will decide whether an investigation is justified.<sup>136</sup> If the League decides to investigate,

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<sup>127</sup> It is important to note that the NBA 2K League is run solely by the management team that the NBA has assigned to oversee the League. There is virtually no involvement by Take-Two Interactive, the publisher of the game. The structure functions more similarly to a licensing agreement between the NBA and Take-Two in which Take-Two provides a non-exclusive license to the NBA to use NBA 2K for commercial use.

<sup>128</sup> Andre2K, *Why The NBA 2K League Needs A Player Union*, SPORTS GAMERS ONLINE (Nov. 27, 2018), <http://www.sportsgamersonline.com/why-the-nba-2k-league-needs-a-player-union/> [https://perma.cc/642Y-4N44].

<sup>129</sup> This is similar to the NFL's "conduct detrimental" and the MLB's and NBA's "best interest" standards.

<sup>130</sup> Telephone Interview, *supra* note 67.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See PERSONAL CONDUCT POLICY, NAT'L FOOTBALL LEAGUE, <https://nfl-labor.files.wordpress.com/2013/06/personal-conduct-policy.pdf> [https://perma.cc/GEU6-4DH5].

<sup>134</sup> Telephone Interview, *supra* note 67.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

it will make factual findings and decide either to discipline the player or to dismiss the conduct.<sup>137</sup>

If a player is disciplined for his or her conduct under the Code of Conduct, then the player has the right to appeal the decision.<sup>138</sup> The right to appeal has never been exercised by any players in the League.<sup>139</sup> This is because the League is not as developed and successful as the traditional sports leagues. Because of this, players' salaries fall within the \$35,000 range, a salary that would not make retaining representation a financially wise decision.<sup>140</sup> Players do not have agents or lawyers, leaving them unprepared and disadvantaged in navigating the appeal process. What's more, NBA 2K players are not unionized and thus, unlike the NFL, MLB, and NBA players, have no union representatives to advise them in these proceedings.<sup>141</sup> Players would most likely rather accept the disciplinary action and return to playing as soon as possible, rather than waste time appealing a decision that they are unfit to challenge.

There have been a few notable examples of players disciplined under the League's Code of Conduct. One player was suspended under the Code of Conduct for posting inappropriate and offensive videos on social media.<sup>142</sup> In April 2019, three players were suspended as a result of a physical altercation that occurred following a match.<sup>143</sup> Lastly, Boo Painter, the League's leading scorer at the time, was dismissed and disqualified from the League for violating the Code of Conduct for an undisclosed reason.<sup>144</sup>

Beyond the League's Code of Conduct, the League has also grappled with other issues faced by traditional sports leagues—namely, gambling and diversity. As for gambling, NBA 2K Players are subject to the same anti-

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<sup>137</sup> See, e.g., Bill Cooney, *NBA 2K League players fined and suspended following on stage brawl*, DEXTERO (Apr. 12, 2019), <https://www.dexerto.com/nba-2k/nba-2k-league-players-fined-suspended-following-brawl-540510> [https://perma.cc/2GVD-NQJE].

<sup>138</sup> Telephone Interview, *supra* note 67.

<sup>139</sup> *Id.*

<sup>140</sup> See *NBA 2K League Increases Prize Pool to \$1.2 Million for 2019 Season*, *supra* note 104.

<sup>141</sup> Derek Helling, *Time is Right for NBA 2K League Players to Unionize*, BASKETBALL WRITERS (Feb. 18, 2020), <https://bballwriters.com/nba-2k/the-time-is-right-for-nba-2k-league-players-to-unionize/> [https://perma.cc/K9XB-XE9B].

<sup>142</sup> *Eric Donald Suspended for 2019 NBA 2K League Season*, NBA 2K LEAGUE (Mar. 5, 2019), <https://2kleague.nba.com/news/eric-donald-suspended-for-2019-nba-2k-league-season/> [https://perma.cc/86VN-7C8A].

<sup>143</sup> Cooney, *supra* note 137.

<sup>144</sup> Sam Bishop, *The NBA 2K League bans its first player*, GAMEREACTOR (Nov. 14, 2018), <https://www.gamereactor.eu/the-nba-2k-league-bans-its-first-player/> [https://perma.cc/C3V8-CWRE].

gambling guidelines as NBA players.<sup>145</sup> Action was taken under this policy for the first time in September 2019 when Basil Rose, known as “24K Dropoff,” was dismissed and disqualified from the League for providing inside information to gamblers.<sup>146</sup> The NBA 2K League’s ban of Basil Rose is much like punishments rendered in the three Major Leagues, most notably to Pete Rose and Jack Molinas, who received bans from the MLB and NBA, respectively, for gambling.<sup>147</sup> This shows the NBA 2K League’s concern for competitive balance and preventing match-fixing.

Another issue that permeates the esports industry and is exemplified by the NBA 2K League is females’ underrepresentation. It was not until the NBA 2K League’s second season that a woman was available in the NBA 2K League Draft pool when both Chiquita Evans and Brianna Novin were eligible.<sup>148</sup> And only Evans was selected by an NBA 2K team, with Warriors Gaming selecting her in the fourth round of the 2019 NBA 2K League Draft.<sup>149</sup> Contrastingly, over one-hundred men are drafted into the League each year.<sup>150</sup>

### B. Uniform Player Contracts

To participate in the NBA 2K League, players need to sign a standard contract with the League.<sup>151</sup> These contracts are analogous to the Uniform Player Contracts (“UPCs”) of America’s three Major Leagues and detail the provisions of each player’s employment with the League. But the specific

<sup>145</sup> Telephone Interview, *supra* note 67.

<sup>146</sup> Owen S. Good, *NBA 2K League bans player for gambling association*, POLYGON (Sept. 12, 2019), <https://www.polygon.com/2019/9/12/20863301/nba-2k-league-player-banned-gambling-inside-information-24k-dropoff-esports> [https://perma.cc/9LAP-RY6N].

<sup>147</sup> PETER A. CARFAGNA, *SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA’S THREE MAJOR LEAGUES* 20–21 (West, 3d ed. 2017).

<sup>148</sup> Jake Seiner, *1st female gamers qualify for NBA 2K League draft pool*, SEATTLE TIMES (Mar. 4, 2019), <https://www.seattletimes.com/business/1st-female-gamers-qualify-for-nba-2k-league-draft-pool/>. Two women were eligible to be taken in the 2019 NBA 2K League Draft: Chiquita Evans and Brianna Novin.

<sup>149</sup> *Warriors draft first woman player into NBA 2K esports league*, NAT’L BASKETBALL ASS’N (Mar. 6, 2019), <https://www.nba.com/article/2019/03/06/warriors-draft-first-woman-nba-2k-league> [https://perma.cc/9W7X-SXVS].

<sup>150</sup> *2019 NBA 2K League Draft Board*, NBA 2K LEAGUE, <https://2kleague.nba.com/2019-nba-2k-league-draft-board/> [https://perma.cc/5UE4-YBSS].

<sup>151</sup> Telephone Interview, *supra* note 67. This is dissimilar from traditional sports, as in the NFL, MLB, and NBA, players sign contracts with the individual team, not the League.

provisions of the standard contracts used in the NBA 2K League differ from the UPCs in many ways.

The salary structure for an NBA 2K player is vastly different to that of an athlete in one of the three Major Leagues.<sup>152</sup>

NBA 2K League Salaries		
	2018 (inaugural) season salary	2019 season salary
1st round draft choice	\$35,000	\$35,000
Subsequent draft choice	\$32,000	\$33,000
Returning players	N/A	\$37,000

While average salaries for those in the three Major Leagues range from about \$2.5 million to \$6.5 million, the NBA 2K League's are 50-100 times lower.<sup>153</sup> The salaries in the League are most comparable to the salaries of a player in the NBA G-League, the minor league system for the NBA, in which a player receives, on average, a salary of \$35,000 for a five-month regular season.<sup>154</sup> This is understandable because revenue generally dictates player salaries, and the League has not generated even a fraction of the revenue of the MLB, NFL, and NBA.

Moreover, NBA 2K players' salaries are slotted, meaning that the League has a take-it-or-leave-it, non-negotiable compensation system, with salaries following the above player designations. So if a player is a first-round draft choice, he or she must either choose to accept a \$35,000 salary or refuse to sign the contract. The salary structure is very simple in comparison to America's three Major Leagues. First, draft picks in the League will immediately know their salary, which is even simpler than the collectively bargained salary-slotting draft systems of the NBA and NFL. Returning players cannot negotiate contracts, either. If a player was protected in the expansion draft or later retained, he or she will receive a \$37,000 salary. Team expenditures are also not as developed and complex as the NBA and the NFL. For example, there is no salary cap, salary cap exceptions, or minimum and maximum salary windows, among others.

Another distinction of the League is that players are employed and salaries are paid by the NBA 2K League itself. By contrast, in the MLB,

<sup>152</sup> See *supra* Section I.C.5.

<sup>153</sup> CARFAGNA, *supra* note 147, at 79.

<sup>154</sup> NBA G League Announces Player Salaries For 2018-2019 Season, NAT'L BASKETBALL ASS'N G LEAGUE (Apr. 17, 2018), <https://gleague.nba.com/news/nba-g-league-announces-player-salaries-2018-2019-season/> [https://perma.cc/A6JB-NVC3].



NFL, and NBA, all players are employed and contracts are paid by the respective teams. For example, a member of the Cleveland Cavaliers will be paid by the Cleveland Cavaliers, while a member of Cavs Legion GC will be paid by the NBA 2K League. Even though salaries are paid by the League, the majority of the money used to pay these salaries comes not from League-generated revenue but from the pool of team participation fees discussed earlier.

Beyond base salary, another form of monetary income for a player is prize money from the League's tournaments.<sup>155</sup> Prize money is split evenly among the players on a team. Players also receive benefits from both the League and individual teams to help supplement their income. The League provides medical benefits,<sup>156</sup> a retirement plan,<sup>157</sup> and travel expenses to all players.<sup>158</sup> Moreover, each team must provide certain benefits to players, while providing other benefits is optional. For instance, teams must house the players, but it is optional for teams to provide players with food and training facilities.<sup>159</sup>

As for player transactions and assignment of contracts, the NBA 2K League is more basic than traditional sports. The League implemented two trade windows for teams to execute trades with each other.<sup>160</sup> This is like a trade deadline in traditional sports league in that there is a certain period in which trades must be completed. But in the NBA 2K League, this time frame is shorter than in traditional sports leagues. What's more, in the first years of the League, the trades must have a one-to-one trade asset ratio, with

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<sup>155</sup> See *supra* Section II.C.5.

<sup>156</sup> This includes dental coverage, vision coverage, and more. See *Frequently Asked Questions*, *supra* note 60.

<sup>157</sup> The NBA 2K League establishes a 401K plan for players. See *\$1 Million Prize Pool for Inaugural NBA 2K League*, *supra* note 88; Telephone Interview, *supra* note 67.

<sup>158</sup> Every game is played at the NBA 2K League Studio in Long Island City, NY but the teams are based in their host cities. Therefore, the teams have to fly to and from Long Island City to play their games. See *Frequently Asked Questions*, *supra* note 60.

<sup>159</sup> Evan Dammarell, *Cleveland Cavaliers Continue To Grow Esports Brand With New Training Facility*, FORBES (Aug. 7, 2019), <https://www.forbes.com/sites/evandammarell/2019/08/07/cleveland-cavaliers-continue-to-grow-esports-brand-with-new-training-facility/> [<https://perma.cc/3NMB-D4AK>]; Imad Khan, *Sacramento Kings create esports facility for 2K League*, ESPN (Dec. 8, 2017), [https://www.espn.com/esports/story/\\_/id/21712910/sacramento-kings-create-esports-facility-2k-league](https://www.espn.com/esports/story/_/id/21712910/sacramento-kings-create-esports-facility-2k-league) [<https://perma.cc/6G9V-S3KJ>]. For example, both Cavs Legion GC and Kings Guard Gaming opened esports facilities for their teams.

<sup>160</sup> *Transactions*, NBA 2K LEAGUE, <https://2kleague.nba.com/transactions/> [<https://perma.cc/Q3P8-XP8C>].

players and draft picks constituting “assets.”<sup>161</sup> Thus, teams can trade any combination of players and draft picks as long as they receive the same number of players and draft picks, collectively, in return. As a result, player movement is much more restricted in the League. Furthermore, the structure of the transaction for the assignment of contracts is unique. For example, if an MLB player is traded to another team, his respective contract is assigned to that team. In the NBA 2K League, because players are employed by the League, if a player is traded, his contract would not be assigned to the other team. Instead, he would remain under contract with the League, just playing for a different franchise. Additionally, due to League expansion, player movement is volatile, as detailed in Section II.C.5. This volatility has created a high turnover rate for players in the NBA 2K League.

Lastly, the advertisement and sponsorship opportunities for NBA 2K players are highly regulated by the League. Players are subject to League restrictions with regard to which brands they can engage with for advertisement and sponsorship opportunities.<sup>162</sup> For example, the League partnered with Champion Athleticwear ahead of the 2019 Draft.<sup>163</sup> If another apparel company approached a player for an advertising opportunity, he or she would be prohibited from doing so. What’s more, players are limited not only by the League’s current sponsors, but also by its future sponsors.<sup>164</sup> The League has carved out over 20 exclusive sponsorship categories for itself to preserve League revenue.<sup>165</sup> As a result, teams and players are not allowed to execute sponsorship deals in these categories. Most of the preempted categories are endemic to the esports industry, which leaves players and teams searching for niche regional sponsorship deals.<sup>166</sup> While these carveouts seem like a significant restriction on player marketability, most NBA 2K players likely do not have the popularity or following to generate sponsorships or advertisements that would conflict with League carveouts. Yet the question remains whether the League will eventually interfere with players economic rights if the League grows at the rate that the NBA hopes.

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<sup>161</sup> *Id.*

<sup>162</sup> Telephone Interview, *supra* note 67.

<sup>163</sup> *NBA 2K League Announces Partnership With Champion Athleticwear Ahead Of March 5 Draft*, NBA 2K LEAGUE (Feb. 12, 2019), <https://2kleague.nba.com/news/nba-2k-league-announces-partnership-with-champion-athleticwear-ahead-of-march-5-draft/> [<https://perma.cc/2LAP-CBUH>].

<sup>164</sup> Telephone Interview, *supra* note 67.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

*C. Antitrust Analysis of the NBA 2K League*

In the legal background of every Major League sits a breadth of anti-trust jurisprudence. Given that sophisticated esports leagues are fairly new, there is no antitrust jurisprudence specifically pertaining to esports. For example, unlike Major League Baseball,<sup>167</sup> there is no judicially created anti-trust exemption for esports. In fact, there are few legal disputes in the court systems related to esports in general. But because esports' league structures are similar to—and sometimes indistinguishable from—those of the traditional Major Leagues, general sports-focused antitrust jurisprudence could be applied by a court that decides an esports antitrust issue. Of course, it is unknown whether a court would interpret an esports league the same way as a traditional Major League. But one can make a compelling case for antitrust enforcement in esports under both § 1 and § 2 of the Sherman Antitrust Act.<sup>168</sup>

As mentioned above, the nonstatutory labor exemption does not apply to today's non-unionized esports environment.<sup>169</sup> Though strides have been made in recent years to create a collective bargaining unit in some esports,

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<sup>167</sup> See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

<sup>168</sup> 15 U.S.C. §§ 1–2 (2018).

<sup>169</sup> The non-statutory labor exemption is a judge-made doctrine that was created to give employers the same protections and incentives that employees have in negotiations over mandatory subject of collective bargaining with employer(s). The exemption recognizes that collective bargaining imposes some otherwise anticompetitive restraints, but that the restraints are necessary to give effect to labor laws. See *CARFAGNA*, *supra* note 147, at 129. The scope of the non-statutory labor exemption is not fully defined, but in its simplest terms, it provides that mandatory subjects of collective bargaining that are lawfully imposed under labor law are preempted from antitrust scrutiny (*i.e.* where there is a conflict between collective bargaining and antitrust law, the result of the collective bargaining process will govern and preempt an antitrust challenge). See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004); *Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976). Because the NBA 2K League is not unionized and therefore does not have the power to compel collective bargaining on behalf of the League, antitrust claims are not preempted by the non-statutory labor exemption.

there are currently no collective bargaining units in the industry.<sup>170</sup> There are thus no collective bargaining agreements that could forbid an antitrust claim under the nonstatutory labor exemption.

Because § 1 of the Sherman Antitrust Act bars any “combination” or “conspiracy” in restraint of trade,<sup>171</sup> the League’s players would need to claim that the NBA 2K League is restraining their trade, i.e., the players’ right to traverse freely from team to team or wage suppression. If the players made such allegations, the court would then need to determine whether an unreasonable restraint of trade exists. An unreasonable restraint of trade can be shown in two ways: (1) an illegal per se restraint of trade<sup>172</sup>; or (2) through a rule of reason analysis.<sup>173</sup> In a typical business structure, competition is essential to success, but the League’s structure differs greatly, similar to the traditional Major Leagues. It is essential for the League, like the traditional Major Leagues, to horizontally restrain competition if the product is to be available at all.<sup>174</sup> Therefore, acts by the League would rarely be considered illegal per se.<sup>175</sup> As a result, a court would likely proceed to a rule of reason analysis.

Under § 1, a court would likely proceed through the rule of reason analysis in the following way. The court would first define the market.<sup>176</sup> This definition is important because esports is very broad globally, but the NBA 2K League could be considered part of a smaller, NBA 2K esports league-specific market. This market may include not only the League but also other NBA 2K leagues and tournaments that have emerged in recent years. The NBA 2K League, however, is the predominate NBA 2K esports league in terms of its sophistication, prize winnings, and player compensation; its competitors may be considered akin to independent baseball leagues competing with Major League Baseball or the various upstart professional

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<sup>170</sup> See *NA LCS Players Association Announces Results of Inaugural Executive Officer Election*, ESPORTS OBSERVER (June 14, 2018), <https://esportsobserver.com/na-lcs-players-association-president/> [<https://perma.cc/N9ET-A5PJ>].

<sup>171</sup> 15 U.S.C. § 1 (2018).

<sup>172</sup> CARFAGNA, *supra* note 147, at 120.

<sup>173</sup> See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978); CARFAGNA, *supra* note 147, at 121.

<sup>174</sup> See CARFAGNA, *supra* note 147, at 124.

<sup>175</sup> See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–01 (1984) (declining to apply per se rule to NCAA because some “horizontal restraints on competition are essential if the product is to be available at all”).

<sup>176</sup> *Cf. id.* at 111 (discussing market definition).

football leagues competing with the National Football League.<sup>177</sup> An argument against broadening the market to other grassroots leagues would be that the League is played on an iteration of NBA 2K not available to the public, meaning that these other leagues are not actually playing the same video game.

Beyond simply an NBA 2K-specific market, a court may look to other esports leagues pertaining to sports video games. An even broader market definition exists by arguing that all of esports co-exist in the same esports environment. A plaintiff may argue against these broader market definitions by proving that the viewing audience between the League and other esports leagues do not overlap, and the skills needed to play NBA 2K at a professional level differ from that of other esports. Moreover, the objective and gameplay of NBA 2K differs from other esports, including the sport-based video games. Overall, sport-based video games are thought of differently, and even looked down upon, in the esports environment; some fans of other esports leagues, such as League of Legends' League Championship Series, may scoff at the thought of considering League of Legends and NBA 2K as competitors in the market. In any event, the market definition analysis of esports may prove to be the most important step in an antitrust dispute given how broad the market can become or how narrowly it can be defined.<sup>178</sup>

After the market is defined, the court would likely next weigh any anticompetitive effects against any procompetitive effects to determine whether the challenged conduct is an unreasonable restraint of trade. If the anticompetitive effects outweigh the procompetitive effects, an unreasonable

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<sup>177</sup> Brian Mazique, "NBA 2K20' MyTeam Unlimited \$250k Esports Contest Heads Into Its 2nd Year," FORBES (Oct. 10, 2019), <https://www.forbes.com/sites/brianmazique/2019/10/10/nba-2k20myteam-unlimited-250k-esports-contest-heads-into-its-2nd-year/#7782bd1a3f29> [https://perma.cc/52PR-LJVM]; Jonno Nicholson, *2K Games Announces NBA 2K20 Global Championship*, ESPORTS INSIDER (Sept. 22, 2019), <https://esportsinsider.com/2019/09/nba-2k20-global-championship/> [https://perma.cc/Y5AX-9X8X]. It is important to note that while the other NBA 2K leagues are played with NBA 2K, the NBA does not sponsor or organize these other leagues. Some esports leagues have exclusive intellectual property agreements with the video game publisher and developer to not allow other, similar leagues, but the NBA and Take-Two Interactive, NBA 2K's publisher, have no such agreement. The lack of exclusive agreement between the two may be due to the fact that the League is played on a different iteration of NBA 2K not available to the public.

<sup>178</sup> Although there is no formula to determine how a court may analyze and define a market, esports is fairly new and the wide array of esports leagues means that educating a court on the differences and similarities between and among the esports may be the most important factor in an esports antitrust dispute.

restraint of trade has occurred and § 1 of the Sherman Act has been violated. For example, because the player acquisition window in the League is limited and not collectively bargained, if a plaintiff can show that the player acquisition window restricts the players' ability to obtain fair and competitive compensation for their skills, the League has created an anticompetitive effect. Then, the defendant—presumably the League—would likely need to show procompetitive effects of the restraint. If no procompetitive effects are offered, the conduct will be determined a naked restraint of trade, and thus a violation of § 1. After the defendant establishes the procompetitive effects of the restraint, the plaintiff will need to show that there are less restrictive means available for achieving the same effect. The court will then weigh the procompetitive effects with the anticompetitive effects. The same analysis applied in other § 1 antitrust disputes regarding the Major Leagues would likely be applied in an esports antitrust § 1 dispute.

To defend a § 1 claim, a defendant can claim that it is a single entity. After all, how can one conspire to restrain trade with oneself? This is called the single entity defense. The NFL unsuccessfully asserted this defense in *American Needle, Inc. v. National Football League*,<sup>179</sup> and the NBA 2K League would likely suffer the same fate. From *American Needle*:

[A] parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. . . . [A]lthough a parent corporation and its wholly owned subsidiary are “separate” for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not “depriv[e] the marketplace of independent centers of decisionmaking.”<sup>180</sup>

This test puts an emphasis on the substance of the entities over the form of the entities:

[T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved “seem” like one firm or multiple firms in any metaphysical sense. The key is whether the alleged “contract, combination . . . or conspiracy” is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a “contract, combination . . . or conspiracy” amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.<sup>181</sup>

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<sup>179</sup> 560 U.S. 183 (2010).

<sup>180</sup> *Id.* at 194 (citations omitted).

<sup>181</sup> *Id.* at 195 (citations omitted).

In the League, the teams are controlled by their NBA counterparts. Similar to the NFL teams in *American Needle*, a court would likely decide that there is no single entity, i.e., the League office or even the NBA itself, controlling the League teams. That said, because player salaries are paid by the League and not the individual teams, the argument for the single entity exception may be more viable for the League than it was for the NFL in *American Needle*.

Given that NBA teams own their counterparts in the NBA 2K League, a court could view the ownership structure as concerted activity, which is per se illegal under § 1 antitrust jurisprudence. The NBA, however, is enacting the rules and is doing so on behalf of the League teams as economic actors distinct from their NBA counterparts. Given the NBA's relationship with Take-Two Interactive, the publisher of NBA 2K, an argument for concerted activity between them may also exist.<sup>182</sup> That said, Take-Two and the NBA do not compete over the same market. Instead, the NBA and the NBA 2K League compete over the viewership of their respective audiences, while Take-Two competes for customers looking to purchase the actual video games it publishes. This is an important distinction because not all of NBA 2K's casual, non-professional players consume the League. Given the similarities between playing an NBA-based video game and watching the League or NBA games, there may be some overlap. In fact, the traditional Major Leagues could be using the esports leagues to create more of an audience for NBA, MLB, and NFL games both in the United States and overseas, where esports is much more popular and accepted in mainstream society. Moreover, the market for the sports-based video games is a younger age demographic than the viewing audience of the traditional Major Leagues' actual games.<sup>183</sup>

Beyond the § 1 restraint of trade and concerted activity antitrust claims that have traditionally been brought against the Major Leagues, § 2 claims have been theorized with regards to esports.<sup>184</sup> Although from the above esports-market discussion it would be difficult to determine that any one entity has a monopoly, a tying claim may be viable because the developer and publisher are usually associated with the esports league.<sup>185</sup> These tying claims also implicate § 3 of the Clayton Act,<sup>186</sup> but are often brought under §§ 1–2 of the Sherman Act as well. In essence, a tying claim begins

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<sup>182</sup> NBA 2K is a joint venture between the NBA and Take-Two Interactive.

<sup>183</sup> See Te, *supra* note 26; Notte, *supra* note 26.

<sup>184</sup> See Max Mirotff, *Tiebreaker: An Antitrust Analysis of Esports*, 188 COLUM. J.L. & SOC. PROBS. 177 (2019).

<sup>185</sup> See *id.*

<sup>186</sup> See 15 U.S.C. § 14 (2018).

by alleging that one product is intricately tied to another product, and this relationship has helped the tied product gain a monopoly in the marketplace.<sup>187</sup> In esports, this scenario could occur when the publisher controls the intellectual property rights of the video game and only allows one esports league to use its video game. The publisher controls who can and cannot have an esports league in that video game. Meaning that the publisher, here Take-Two, could be liable under a tying claim.

These types of claims do not occur in the traditional Major Leagues because the NBA does not control who can and cannot play basketball. Major League Baseball cannot march out to an Independent League ballclub and demand that the game be stopped. And the NFL cannot send credible cease and desist letters to the XFL and the like. In esports, on the other hand, a publisher can forbid the unauthorized use of the video game under intellectual property rights. This crucial detail may be an integral part in an antitrust challenge in esports in the future. A court may have to decide whether to prioritize a competitive market or intellectual property rights.

#### D. Age Eligibility

Like the traditional Major Leagues, the League requires its players to meet certain eligibility requirements. A player must first be at least 18 years old and have graduated high school, or, if the player did not graduate from high school, the class with which the player would have graduated had he graduated from high school must have graduated.<sup>188</sup> For example, a player who left high school as a junior in the spring of 2018 would meet the high school graduation requirement that following spring, in 2019, when the player's high school class would graduate, so long as that player in our example is also 18 in the spring of 2019. This is similar to a high school baseball player being drafted by an MLB team following high school or a high school basketball player like LeBron James being drafted by an NBA team before implementing the "one and done" rule.<sup>189</sup>

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<sup>187</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (en banc) ("There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.").

<sup>188</sup> *Introducing the NBA 2K League Combine*, NBA 2K LEAGUE (Feb. 9, 2018), <https://2kleague.nba.com/news/introducing-the-nba-2k-league-combine/> [https://perma.cc/CZG5-58CB].

<sup>189</sup> *First Year Player Draft Rules*, MAJOR LEAGUE BASEBALL, <http://mlb.mlb.com/mlb/draftday/rules.jsp> [https://perma.cc/U6L9-8S3T].



International players are also eligible for the NBA 2K League. To search for elite talent, League qualifying events were held in Hong Kong and London for potential draft eligible players in 2019.<sup>190</sup> Similar to the NBA, international players are drafted into the League. This differs from MLB, where international players do enter not through the draft system but through free agency.<sup>191</sup> Four international players were selected in the 2019 NBA 2K League Draft.<sup>192</sup>

There are no other formal requirements to becoming a professional NBA 2K player in the League. Even so, one has to be extremely talented to find his or her way into the League. Individuals looking to enter into the League must compete in a qualifier with thousands of participants. If the player can pass through the qualifier, he or she then advances to the NBA 2K League Combine, where the person's NBA 2K skills are put to the test much like an NBA or NFL draft participant. After the combine, the top 200 players must complete a 30-minute interview with one of the League's representatives.<sup>193</sup> The League then narrows down the number of potential players based on these interviews and extends conditional offers to those players who will be eligible for the upcoming draft.<sup>194</sup>

Age eligibility presents interesting legal issues for the League, and antitrust laws are the most likely to be implicated. In the Major Leagues, age eligibility rules are collectively bargained for and therefore exempt from antitrust scrutiny under the nonstatutory labor exemption.<sup>195</sup> However, as previously stated, the League's age eligibility rules are not collectively bargained for and therefore not protected by the nonstatutory labor exemption. As a result, these rules are subject to antitrust scrutiny as referenced in Section III.C.

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<sup>190</sup> See *NBA 2K League Expansion*, *supra* note 98.

<sup>191</sup> *International Amateur Free Agency & Bonus Pool Money*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money> [<https://perma.cc/6KWE-B7J6>].

<sup>192</sup> *2019 NBA 2K League Draft: Four International Players Make The League*, ONE ESPORTS (Mar. 6, 2019), <https://www.oneesports.gg/nba2k/2019-nba-2k-league-draft-four-international-players-make-the-league/> [<https://perma.cc/6444-BUAJ>].

<sup>193</sup> Mazique, *supra* note 85.

<sup>194</sup> For the 2019 NBA 2K League Draft, the League extended offers to 150 players. See *NBA 2K League Expansion*, *supra* note 98.

<sup>195</sup> See *CARFAGNA*, *supra* note 147, at 153; see also *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004).

### E. Injury Grievances

Although NBA 2K players do not sustain many injuries, the League still has an injury policy in place.<sup>196</sup> For example, if a player suffers an injury, his or her NBA 2K team may designate him or her as “injured” and prevent him or her from playing.<sup>197</sup> Players are also required to provide accurate information to the team regarding injury, and in turn, all teams must accurately report any injury to the League.<sup>198</sup> This helps provide transparency throughout the League.

NBA 2K players also have provisions in their standard players contracts relating to injuries, which resemble those of players in the three Major Leagues.<sup>199</sup> For example, players are prohibited from engaging in certain “extreme activities.”<sup>200</sup> This clause reduces the risk of injury by limiting dangerous activities. Even so, all NBA 2K player contracts are guaranteed against injury, meaning if a team terminates the contract of a player because of injury, the player will still receive his or her allotted salary.<sup>201</sup> This is much like the guarantees seen in most MLB and NBA contracts. Ultimately, the League has modeled its injury policy to that of America’s three Major Leagues, despite injuries rarely occurring.

### F. Intellectual Property Rights

The issues of intellectual property rights in the NBA 2K League can be complex based on the different rights and parties involved. Under copyright law, the game publisher—here, Take-Two—owns the copyright to the game that it creates or publishes, here, NBA 2K.<sup>202</sup> As a result, it has the right to control the reproduction, distribution, and licensing, among other rights, of its product at its discretion.<sup>203</sup> This is an aspect of esports unseen

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<sup>196</sup> Telephone Interview, *supra* note 67.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* For an analysis of the Uniform Player Contracts in the Major Leagues, see CARFAGNA, *supra* note 147, at 53.

<sup>200</sup> The UPC in the NFL, NBA, and MLB all have clauses that prohibited players from participating in certain ultrahazardous or dangerous activities. Specifically, § 5.b of the MLB UPC, § 12 of the NBA UPC, and § 3 of the NFL UPC. See MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT 340 (2017); NAT’L BASKETBALL ASS’N COLLECTIVE BARGAINING AGREEMENT A-11 (2017); Nat’l Football League Collective Bargaining Agreement 334 (2020).

<sup>201</sup> Telephone Interview, *supra* note 67.

<sup>202</sup> 17 U.S.C. § 102 (2018).

<sup>203</sup> 17 U.S.C. § 106 (2018).

in traditional sports. As mentioned previously, no person or entity owns baseball, football, or basketball, and therefore cannot prohibit another from establishing a respective sports league. This dynamic creates many differences vis-a-vis intellectual property rights.

Traditionally, because the game publisher creates the game, it owns all intellectual property rights in the game.<sup>204</sup> But the NBA 2K League is slightly different in that the League has broad intellectual property rights. If an esports league is not run by the game publisher, a league's rights will be dictated by the licensing agreement with the publisher.<sup>205</sup> Take-Two Interactive is the publisher of NBA 2K but, per the licensing agreement between the NBA and Take-Two, Take-Two relinquishes all game-related intellectual property rights to the League.<sup>206</sup> First, the League owns the rights to the gameplay.<sup>207</sup> With regard to game broadcasts, the League has struck a deal with Twitch, the preeminent streaming service for esports, for exclusive live streaming rights for all NBA 2K games in the United States.<sup>208</sup> While Twitch owns the right to broadcast the games, the League owns the rights to the footage.<sup>209</sup> Also, for the second season, the League expanded its international reach and partnered with Tencent, a Chinese technology conglomerate, to broadcast NBA 2K League games in China.<sup>210</sup> Still, the League owns the rights to the broadcast footage.<sup>211</sup> The NBA 2K League's practices resemble traditional media rights agreements. For example, the NFL sells the rights to broadcast NFL games to television networks such as CBS, Fox, ESPN, and NBC, but the NFL still owns the rights to the game footage.<sup>212</sup>

However, the licensing agreement executed between Take-Two and the League discussed above is not exclusive.<sup>213</sup> For that reason, Take-Two is not

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<sup>204</sup> 17 U.S.C. § 102 (2018).

<sup>205</sup> Telephone Interview, *supra* note 67.

<sup>206</sup> *Id.*; see also Kohrman Jackson & Krantz LLP, *supra* note 87.

<sup>207</sup> Telephone Interview, *supra* note 67.

<sup>208</sup> Todd Spangler, *Twitch Locks Up NBA 2K League Exclusive Live-Streaming Esports Rights*, VARIETY (Apr. 18, 2018), <https://variety.com/2018/digital/news/twitch-nba-2k-league-exclusive-esports-streaming-1202757037/> [<https://perma.cc/4EYH-CRKH>].

<sup>209</sup> Telephone Interview, *supra* note 67.

<sup>210</sup> *NBA 2K League, Tencent Sign Deal for Chinese Broadcasts*, ABC NEWS (July 23, 2019), <https://abcnews.go.com/Entertainment/wireStory/nba-2k-league-tencent-sign-deal-chinese-broadcasts-64505975> [<https://perma.cc/Y2BM-6FPB>].

<sup>211</sup> Telephone Interview, *supra* note 67.

<sup>212</sup> See Jabari Young, *With Football Ratings on the Rise, NFL Officials Look to Raise TV Broadcast Fees on Multiyear Media Deals*, CNBC (Dec. 30, 2019), <https://www.cnbc.com/2019/12/30/nfl-ratings-recovering-new-media-deals-could-be-on-the-2020-agenda.html> [<https://perma.cc/BG5N-GBZV>].

<sup>213</sup> Telephone Interview, *supra* note 67.

prohibited from licensing the NBA 2K game to other parties for use in a competitive landscape. As a result, other NBA 2K leagues and tournaments may enter the market to compete with the currently existing League. In fact, in September 2019, the NBA and the NBPA partnered with the Esports League (“ESL”) to create the NBA 2K20 Global Championship.<sup>214</sup> This is a global head-to-head NBA 2K tournament separate from the NBA 2K League that ran from October 2019 to February 2020.<sup>215</sup>

The League also owns the intellectual property rights to the logos created by the League.<sup>216</sup> When the League was established, it created a new logo to differentiate itself from the rest of the NBA properties, and each individual team also created a distinct logo for itself.<sup>217</sup> As in traditional sports, the League owns the NBA 2K League logo and the right to monetize the logos created and owned by each of the teams, while the individual teams own their own logos.<sup>218</sup> The League’s management of its marks, resembling that of America’s three Major Leagues, seeks to promote the League and generate revenue for it.

As discussed in sections II.C.5 and III.B above, the League allows players to license their individual intellectual property rights. These rights, however, extend to attributes distinct to the players themselves—namely, their gamertags. Unlike traditional sports, where players are identified by their names, NBA 2K players are identified by their gamertags. A gamertag is essentially an in-game name that a player creates on his or her behalf. For example, two rostered players on Cavs Legion GC were “All Hail Trey” and “Lykapro.”<sup>219</sup> But this has not gone without controversy. Sometimes, gamertags are inappropriate or offensive, and if the League believes they are, it can veto them.<sup>220</sup> The League also has the right to veto gamertags that resemble any current or former NBA players.<sup>221</sup> Additionally, NBA 2K players were prohibited from wearing the number of any rostered player on the NBA affiliated team.<sup>222</sup> For example, a player on Lakers Gaming, the Los Angeles Lakers esports team, could not suit up in a number 23 jersey

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<sup>214</sup> *2K announces inaugural NBA 2K20 Global Championship*, NAT’L BASKETBALL ASS’N (Sept. 17, 2019), <https://pr.nba.com/2k-announces-inaugural-nba-2k20-global-championship/> [<https://perma.cc/6ZH2-GZLP>].

<sup>215</sup> *Id.*

<sup>216</sup> Telephone Interview, *supra* note 67.

<sup>217</sup> See *League Info*, *supra* note 56.

<sup>218</sup> Telephone Interview, *supra* note 67.

<sup>219</sup> Roster, CAVS LEGION, <https://cavslegion.nba.com/roster/> [<https://perma.cc/P2T8-M5N5>].

<sup>220</sup> Telephone Interview, *supra* note 67.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

because LeBron James wears that number for the Los Angeles Lakers. The League also controls the players' marketability.<sup>223</sup> As stated, the League restricts individual players from capitalizing on their rights of publicity through advertisement and sponsorship preemption to the point where the rights are virtually hollow. As a result, the majority of NBA 2K players have failed to capitalize on their individual publicity rights, but if the League continues to garner strength and popularity, players may be able to become marketable.

Finally, as stated in Section II.C.2, NBA 2K players compete as avatars instead of as current or former NBA players. While it may seem as though the League is doing this to create its own marketable players, the reason comes back to collectively bargained policies. The NBA 2K game played by the League is a different model than one a customer would play if he or she bought NBA 2K from the store.<sup>224</sup> The group licensing rights that Take-Two secures when creating NBA 2K do not extend to the model of the game used in the League. Thus, if the NBA 2K League wanted to use the likenesses of current or former NBA players, they would have to pay the National Basketball Players Association for those rights under the group licensing program of the Collective Bargaining Agreement.<sup>225</sup> To avoid this cost, the League decided not to license the likenesses of current and former NBA players.<sup>226</sup>

### G. Franchise Relocation and Expansion

While the NBA 2K League is still in its infancy stages, expansion has occurred rapidly, while relocation has not yet occurred.<sup>227</sup> The inaugural NBA 2K season saw 17 teams take the court. The entrance fee was \$750,000 for three years of participation in the League.<sup>228</sup> Following the first year, four more teams joined the League at the same entrance fee.<sup>229</sup> The League's 22nd and 23rd teams have entered the League for the its third season.<sup>230</sup> The League seems to be more focused on expansion rather than relocation. Eventually, the League hopes to have all NBA teams participate

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<sup>223</sup> *Id.*

<sup>224</sup> Telephone Interview, *supra* note 67.

<sup>225</sup> *Id.*

<sup>226</sup> Kohrman Jackson & Krantz LLP, *supra* note 87.

<sup>227</sup> See *supra* Section II.C.1.

<sup>228</sup> The players' salaries are paid by the League from these fees. Telephone Interview, *supra* note 67.

<sup>229</sup> See *supra* Section II.C.1.

<sup>230</sup> *Id.*

in the League, each with an esports team of its own.<sup>231</sup> What's more, the NBA intends to grow the League internationally with teams in different countries competing in international competitions. In fact, the League took its first step into international expansion when it partnered with Gen G., an esports organization based in Shanghai, to create its first international and 23rd overall team to compete in the League.<sup>232</sup> International competition is not uncommon in the esports industry. Esports have a more global presence than traditional American sports, so the market is more prime for international expansion.<sup>233</sup>

The unique structure of the League affects team relocation and expansion. As stated, all NBA 2K teams, except one, are owned by an NBA-affiliated team.<sup>234</sup> Because of this, the League has found itself primarily limited to domestic expansion. And, with regard to relocation, almost all of the League teams are tied to their respective NBA affiliate.<sup>235</sup> As a result, League teams will most likely have trouble relocating to another city. Using the Cleveland Cavaliers and Cavs Legion GC as an example, Cleveland Cavaliers and Cavs Legion GC owner Dan Gilbert is unlikely to relocate Cavs Legion GC to another city as long as the Cavaliers play in Cleveland. League teams will be tied to their NBA affiliate and follow it wherever it goes.

Questions surround the relocation process for a League team. For example, if an NBA affiliate and the NBA 2K team try to relocate but the League does not let them, could the two teams possibly challenge both the NBA and the League on antitrust grounds? Could the NBA 2K team stay if the NBA team relocates? The questions to these answers are not yet known. Sometime in the future, however, these questions could be answered, developing a body of law around this area of esports.

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<sup>231</sup> See Kohrman Jackson & Krantz LLP, *supra* note 87.

<sup>232</sup> Kuchefski, *supra* note 63; While international expansion has been discussed with regard to traditional sports, no international teams outside Canada participate in the NFL, MLB, or NBA. Also, while the three Major Leagues engage in activities and initiatives in other countries, and are even affiliated with sports leagues in other countries, an NFL, MLB, or NBA franchise has not been established in those countries.

<sup>233</sup> It is generally understood that esports has hundreds of millions of viewers worldwide which outshines traditional American sports, such as football, viewership numbers overseas. See ROUNDHILL INVESTMENTS, *Esports Viewership vs. Sports in 2019*, ROUNDHILL BLOG, <https://www.roundhillinvestments.com/blog/esports-viewership-vs-sports> [<https://perma.cc/8AYZ-XJUN>].

<sup>234</sup> See *supra* Section II.C.1.

<sup>235</sup> See *supra* Section II.C.1.

#### IV. CONCLUSION

The world of esports is developing exponentially. A recent report projected that the esports industry is likely to reach three billion dollars by 2022.<sup>236</sup> To capitalize on this popularity, MLB, the NFL, and the NBA have each established an esports league. The MLB China eSports League is a China-based esports league that will see players compete on MLB The Show. The NFL partnered with Electronic Arts to establish a series of tournaments called the Madden Championship Series, which is run by EA's Competitive Gaming Division. Lastly, The NBA has taken the most aggressive approach to esports by creating a league, in connection with Take-Two Interactive, and managing the entire operation.

While the development and sophistication of these respective leagues differ greatly, core similarities exist. The most important similarities, and yet also some of the biggest unknowns, are the legal issues surrounding each of the leagues. The legal landscape of esports has yet to develop, but America's three Major Leagues help explain the issues that may face these esports leagues. Notably, a dissection of the NBA 2K League illuminates the potential issues and solutions confronted when forming and developing an esports league, including those related to Commissioner and League Authority; Uniform Player Contracts; Antitrust Challenge(s); Age Eligibility Restrictions; Injury Grievances; Intellectual Property Rights; and Franchise Relocation and Expansion.

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<sup>236</sup> Darren Heitner, *Goldman Sachs Says Media Rights Will Boost Esports Industry To \$3B In Revenue By 2022*, THE SPORTS BIZ (Nov. 9, 2018), <https://www.thesports.biz/goldman-sachs-esports-report/> [<https://perma.cc/K4RV-LF7D>].

