

INTELLECTUAL PROPERTY AND ESPORTS AT HOME AND ABROAD

*This topic was presented as part of a second panel and moderated by California Western School of Law International Law Journal's Executive Director of Symposia and Outreach, Sasha Ramirez. The panel included Professor Jodi S. Balsam and Roger Quiles. The subsequent transcript only includes Roger Quiles' excerpt as Professor Balsam discussed her article, which is published in this edition of the Journal.*¹

MS. RAMIREZ: At this point, we will be starting our second panel. We are joined by Roger Quiles. Mr. Quiles is one of the world's first Esports attorneys who started his own practice in 2014, "Quiles law." As a pioneer of Esports law, he has serviced an international clientele consisting of Esports teams, players, tournament providers, media companies, and businesses that operate in the Esports space.

Mr. Quiles, we've heard from Professor Balsam who discussed trademark law in traditional sports. However, Esports is a relatively new field. How and why does intellectual property (IP) present a different ecosystem in Esports in comparison to traditional sports?

MR. QUILES: I think the biggest distinction is the fact that Esports is inherently tied to intellectual property simply because of the fact that the players are playing video games. Due to the very nature of video games, the developer would own the rights to the entirety of the usage, the entire commercial expression of how that game gets played, including when that game gets played, where it gets played, and who plays it professionally. If someone is comparing that to traditional sports, no one owns football, no one owns baseball. This creates an interesting power dynamic throughout the entire space because of the

1. This introduction was not part of the conference. Parts of this transcript have been edited for grammar and readability. The substance of the transcript remains unchanged.

fact that developers get to unilaterally control how their intellectual property is utilized. Developers can establish their own terms as to how everyone is going to interact with that game, effectively giving the developer unilateral control over any league, event, or tournament. Some developers will take a very restrictive approach and handle all of that in-house or through a production subsidiary, which would be indicative of a centralized Esports title ecosystem. Others will be a more hands off and license competitive operations out to third parties that want to run tournaments, which would be indicative of a decentralized Esports title ecosystem. These licenses may be free or “pay to play.”

Thus, depending on the nature of the ecosystem you are dealing with, whether it’s centralized or decentralized, the power dynamics of that Esports’ structure shifts. Generally speaking, in a centralized Esports ecosystem, where the developer is also the league body and has control over every aspect of how teams and players commercialize around their game (including sole disciplinary authority), the league has nearly endless authority because the developer maintains a monopoly over the usage of its intellectual property. Below the developers, the next group who is afforded some authority within a game’s structural hierarchy would be the pro teams, who are afforded those rights via a license or partnership agreement with the developer/league. Lastly, at the bottom of the structural hierarchy are the players, who are limited by agreements with both the league directly and the teams. That leaves very little authority for the players themselves, many of which feel like they are allowed to play professionally for a team (a commercialized use of the developer’s IP and their team’s IP) at the good graces of the league and teams.

Whereas, in a decentralized system, where the developer has licensed the ability to have tournaments, events, or leagues to third parties, the fact that these licenses are typically non-exclusive actually affords greater authority to players. The developer devolves, by its license, its authority to operate and run any event. The teams, interestingly enough, then are squeezed into a position of needing to appease both the leagues and the players because the players recognize that there are now multiple options for leagues, tournaments or events for their game. Thus, this particular expression of the developers IP rights creates a very interesting power dynamic across the space, which is utilized as leverage. That leverage will get utilized in any form of commercial setting. Ultimately, because this is such a digital first

ecosystem, you cannot escape intellectual property. It is all around, and it is involved in everything, even down to sponsorships.

Primarily, all of your sponsorship activation is digital, it may be what logos you put on the game's screen, a type of video you are creating and uploading to YouTube, or how you activate that on social media and how all of the various related licenses are handled. Thus, it is very rare for you to touch any agreement in Esports and have there be zero intellectual property involvement.

MS. RAMIREZ: In addition, what are the pressing intellectual property issues within Esports that are occurring at the moment, both domestically and abroad?

MR. QUILES: There's tons. A good thing to bear in mind here is that Esports is still very young, at least in terms of its industry stature. There's still a significant amount of growing pains occurring on all sides of the space. One of the biggest concerns on the talent side, with respect to intellectual property, is understanding what your image rights are and how image rights are utilized. For example, understanding how licensing works, what you can and what you cannot ask for, and how that system entirely operates. It is something that is largely foreign to talent.

Obviously, it's not so foreign on the business end of things with respect to the teams and leagues. So, there's an incredible amount of overreach that happens there. For example, clauses to license your likeness in perpetuity were relatively common, even as recent as maybe two years ago. Now that's been significantly cut back as a result of talent getting attorneys involved who simply will not stand for that.

However, we cannot go a couple months without hearing about a company—be it a sponsor, league, or team—overreaching on image rights. There will be shifts, certainly as players themselves or even creators, since most organizations employ creators, understand the concept more. It's becoming more of a known and understood concept. First, the fact that they even have image rights, and more importantly how to be able to monetize them. Simply because their stature has elevated and they are receiving more attention, there's now much more at stake for any contract that they enter into because the numbers are getting bigger. Accordingly, they are starting to professionalize. Players are starting to put people around them that can advise accordingly and

420 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

can teach them what their rights are, what they mean, and how to maximize the value of them.

Another significant issue is, there is always concern with respect to how inherently international Esports is. If you are on the developer's side, how do you then effectuate and protect your intellectual property rights abroad? This is an industry that largely grew internationally together. So, you'll have a single league, that consists of a single developer operating multiple leagues throughout the world, and then trying to effectively draw their straight line across all of their platforms to have consistent policies, consistent legal protection, and logic. And how they do that is an incredible balancing act. I am not jealous of in-house counsel for that. There is certainly always a concern with respect to intellectual property usage in Asia, and how that gets effectuated and protected. Certainly, on the media right side there's been more of a push and pull; worldwide exclusive media rights deals have been carving out territories where the rights holder may have greater protection utilizing a local media company instead. This is particularly prevalent with China, which is a huge Esports market. While the need for multiple media rights deals does afford greater protection and monetization opportunities worldwide, it also creates some operational headaches to create a singular, or highly similar, viewership experience regardless of the rights holder.

MS. RAMIREZ: You did mention that Esports is inherently international. With the growth of the Esports market, how is the governing law keeping pace both domestically and internationally?

MR. QUILES: It is not keeping up, to say the least. Esports is similar to, as I describe my job, fitting a square peg into a round hole every day. Esports borrows as much as it can from traditional law. Obviously, we have a ton of precedent from sports, entertainment, and media law. That said, the United States is doing an okay job as far as it's keeping pace with Esports. For instance, Esports players are allowed to come into the United States on athlete visas. So, basically the United States is shoehorning Esports players' right into that existing structure.

State legislation is also creating more incentives towards bringing in Esports events, whether they be certain sizes, investment amounts, or employee amounts. Even on the gambling front, there's been a push

with the increase in sports betting, to adopt Esports betting. And that's been a harder pill to swallow considering there's a lot of misconceptions about what Esports is and, more importantly, who's playing and who's watching. Specifically, misconceptions about Esports consumers being kids leads many to believe that allowing Esports betting is tantamount to encouraging kids to gamble. The reality is that most Esports consumers are not minors.

Internationally, it really depends on the regions and the countries that you are looking at. Some countries have been very Esports forward. Certainly, South Korea has been the Mecca of Esports, long before it was Esports. So, it is incredibly regulated there. It is very well organized and there's a healthy body of law behind it. Whereas other countries not so much, and they are trying to pick it up along the way.

On the gambling front internationally, there has been a shoehorning of Esports betting into existing betting legislation. So, for instance, you can register an Esports betting platform in Malta as well as the Isle of Man, which are very popular licensing jurisdictions for sports betting platforms. Other places, you see much more of an early-stage ecosystem. Latin America has been a hotbed of Esports talent, despite not having a significant Esports infrastructure, or even not having the greatest internet infrastructure within the region. Countries and regions are starting to adapt to this ever increasing and ever aware powerhouse that is certainly growing more and more every day.

MS. RAMIREZ: Thank you for your expertise.