

The Rise of Esports and the Fall of Illegal Sports Betting: How They are Related and Why it Matters

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Esports are a form of organized competitive sporting events where participants compete by playing a video game facilitated through a gaming console that is controlled in real-time by a human operator. The Oxford Learner's Dictionary defines an e-sport as "a video game played as a competition for people to watch as entertainment." ¹An individual or a team compete against others, as in a traditional sporting tournament, for a prize pool or the opportunity to advance to a higher-stakes tournament by playing games such as League of Legends, Fortnite, or Call of Duty Warzone. The esports phenomena combines gaming, big tech, media, pop culture, and subsequently, a lot of lawyers.

COVID-19 canceled many live sporting events in 2020 and subjected the nation to watching reruns of favorite games and tournaments on television. Fans and participants turned their attention to gameplay, and streaming platforms such as Twitch, Youtube, and social media enjoyed an increase in viewership. Esports gained traction as a "spectator sport" as levels of gameplay became more advanced and more and more people became interested in watching. "Total esports viewership is expected to grow at a 9% compound annual growth rate between 2019 and 2023, up

¹ See <https://www.oxfordlearnersdictionaries.com/us/definition/english/e-sport>.

from 454 million in 2019 to 646 million in 2023.”² Even when the National Basketball Association (“NBA”) season suspended due to COVID-19, ESPN aired a NBA 2K20³ tournament where sixteen NBA-players competed in the esport-tournament for a chance to donate \$100,000 to a charity of their choice.⁴

The increased attention on esports has created a cottage industry for gaming premises, as well as traditional premises and online operators; all these businesses are finding ways to get in on the action. What was once considered a mere hobby has now evolved into a multi-billion dollar industry triggering multiple legal considerations such as sweepstakes and sponsorship law, gaming regulations, and sports gambling regulation. The problem players are facing now is lack of consistency in the facilitation and regulation of esports. Because the industry is outgrowing the corresponding legislation, the different rules and regulations surrounding different tournaments can vary depending on who is hosting the tournament or where the tournament takes place, resulting in confusion and disorganization in the administration of the tournament.⁵ The surge in popularity has resulted in an increased need for order, organization, and regulation- and legislators are taking notice.

In 2018, the United States Supreme Court struck down the Professional and Amateur Sports Protection Act (“PASPA”), finding that the legislation violated the anticommandeering doctrine of the U.S. Constitution.⁶ PASPA made it unlawful for a State “to sponsor, operate, advertise, promote, license, or authorize by law or compact...a lottery, sweepstakes, or other betting, gambling, or wagering scheme based...on competitive sporting events.”⁷ The United States Supreme Court overturned PASPA when the NCAA sued to enjoin New Jersey from enforcing a constitutional amendment that gave the state legislature the authority to legalize sports gambling in Atlantic City and at horseracing tracks on the grounds that it violated PASPA.⁸ Whereas the Supreme Court did not open the floodgates for sports gambling by overturning PASPA, the Court did open the door to an entirely new legal playing field.⁹

The questions that now arise are: what is a “competitive sporting event,” are esports included in that definition to allow esports betting, and who can have a piece of the pie? The rising popularity of esports, coupled with the United States Supreme Court overturning PASPA, is now catalyzing legislative activity across the nation to answer those exact questions. With the sports betting prohibition lifted, states now have discretion to establish their own regulations, agencies, and

² Mariel Soto Reyes, *Esports Ecosystem Report 2020: The key industry players and trends growing the esports market which is on track to surpass \$1.5B by 2023*, Business Insider (Dec. 19, 2019), available at <https://www.businessinsider.com/esports-ecosystem-market-report>.

³ NBA 2K20 is a basketball simulation video game based on the NBA franchise.

⁴ See NBA players go head-to-head in 1st 'NBA 2K Players Tournament', NBA (Mar. 31, 2020), available at <https://www.nba.com/news/nba-2k-players-tournament-official-release>.

⁵ Sarah Rothermel, *The Esports Gambling Market and Regulations- What You Need to Know*, Nauman, Smith, Shissler and Hall (May 23, 2019), available at <https://www.nssh.com/2019/05/the-esports-gambling-market-and-regulations-what-you-need-to-know/>.

⁶ *Murphy v. Nat'l Collegiate Athletic Assn. et al.*, 2018 WL 2186168 (U.S. May 14, 2018).

⁷ 28 U.S.C. § 3702.

⁸ *Murphy*, 2018 WL 2186168 (U.S. May 14, 2018).

⁹ Elizabeth DeConti, *U.S. Supreme Court Strikes Federal Sports Gambling Ban and Creates Opportunity for State Level Legislation*, GrayRobinson, P.A.

gaming gambling rules-including the regulation of esports. Even though the sports betting industry generates over \$150 billion a year, only \$5 billion of that is legal.¹⁰ This means that there may be close to \$145 billion dollars of untaxed, unaccounted for money that is attributable to the black market of illegal sports betting. As such, many states are cracking down on this black market betting and capitalizing on the growing esports industry by granting licensure- but not without a hefty price tag for licensees.

Pennsylvania, for example, signed an act that regulates daily fantasy sports, authorizes internet gaming, and other online lottery game regulations.¹¹ The ability to facilitate sports wagering comes at a price, however, with the license costing anywhere from \$4-\$10 million alongside a 34% state tax on gaming revenue, a 2% local share tax, and a 0.25% federal excise tax on handle¹². Pennsylvania generated a sports handle revenue of \$525.8 million in October 2020 alone, resulting in the state collecting over \$13.2 million in taxes.¹³

Tennessee, on the other hand, was the first state to regulate online sportsbooks directly, without requiring the hefty price tag for licensure, which is a common qualifier in the other 18 states where betting is legal.¹⁴ Even states traditionally known for harsh sports betting prohibitions, such as South Carolina or Utah, still allow esport tournaments, just without the ability to wager a game. A few states have even found middle ground. New Jersey allows esports betting with the caveat that bets can't be taken if a team has a participant under age 18.¹⁵ Indiana, however, has statutorily banned betting on any esports competition even though betting on traditional sports is permitted.¹⁶ Businesses interested in monetizing esports and sports wagering should not be discouraged by the cost of licensure, however, as many states offer licensure for vendors, suppliers, sponsors and marketing affiliates at a significantly lower rate.

Legislatures are not the only ones paying attention. Lobbyists and interest groups¹⁷ are seeking to promote leagues and provide college scholarships for high school students who compete in esports tournaments, all while prominent celebrities and investors are investing in the industry.¹⁸ Meanwhile, Philadelphia is in the process of building a \$50 million esports arena scheduled to

¹⁰ Alex Sherman, *Legal gambling from your phone could be a \$150 billion market, but making it happen will be tough*, CNBC (April 27, 2019), available at <https://www.cnbc.com/2019/04/27/fanduel-draftkings-race-to-win-150-billion-sports-betting-market.html>.

¹¹ See P.L. 419, No. 42 (Oct. 30, 2017), available at <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2017&sessInd=0&act=42>; see also 4 Pa.C.S.A. PA ST Pt. II.

¹² Sports betting handle" is the total amount of money wagered by bettors. Note that the exact definition may vary from state to state.

¹³ See Pennsylvania Gaming Control Board Monthly Sports Wagering Report (accessed Nov. 17, 2020), available at https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Sports_Wagering_FY20202021.pdf.

¹⁴ See Tenn. Code Ann. § 4-51-301; see also Cassandra Stephenson, *Tennessee sports betting is about to be legal. Here's how it'll work*, Tennesseean (last updated Nov. 1, 2020), available at <https://www.tennessean.com/in-depth/money/2020/10/31/tennessee-sports-betting-online-fanduel-draftkings-betmgm-action-247/6056604002/>

¹⁵ See N.J.A.C. § 13:69N-1.1.

¹⁶ See I.C.A. § 4-38-5-4.

¹⁷ See e.g., the International Game Developers Association, available at <https://protect-us.mimecast.com/s/5VxxC68zW1F0XzpphmJPZ7?domain=igda.org>.

¹⁸ See e.g., Andrew Webster, *Post Malone is now a co-owner of Texas' biggest esports teams*, The Verge (Aug. 28, 2020) available at <https://www.theverge.com/2020/8/28/21406041/post-malone-envy-gaming-dallas-empire-fuel>.

open in 2021 that can host 3,500 spectators¹⁹ and Arlington is the home of the largest dedicated esports facility in North America.²⁰

Whereas we cannot be sure exactly where the legislatures in this country will take esports regulation, one thing we can be sure of is that regulations are imminent. Whether we see an agency form that mirrors a professional sporting associations such as the NBA or NFL, a world-wide organization as large as the Olympics, or a mere reference to esports codified by states, esports fans should expect an influx of regulations over the next few years. Businesses seeking to enter the esports industry should keep a close eye on upcoming regulations and ensure any esports or sports-wagering activities they conduct are legal in their respective states.

¹⁹ See generally, Fusion Arena's website, available at <https://fusionarenaphilly.com/>; see also Sarah Rothermel, *The Esports Gambling Market and Regulations- What You Need to Know*, Nauman, Smith, Shissler and Hall (May 23, 2019), available at <https://www.nssh.com/2019/05/the-esports-gambling-market-and-regulations-what-you-need-to-know/>.

²⁰ See generally, Esports Stadium Arlington's website, available at <https://esportsstadium.gg/#about-us>.