WHAT'S IN A GAME: COLLECTIVE MANAGEMENT ORGANIZATIONS AND VIDEO GAME COPYRIGHT

Tori Allen

INTRODUCTION

For those of us clinging to the last vestiges of youth, the mention of video game tournaments may conjure up images of teenagers huddled around a twenty-inch television in a buddy's basement, engrossed in the final lap of *Mario Kart*. Or perhaps you imagine the joy of finally completing the quest in *World of Warcraft,* which you and six of your closest internet pals have been working at all afternoon. But in recent years, video game tournaments have grown up and moved out of the basement into slightly more impressive lodgings — like Madison Square Garden.[1]

Like other forms of popular media, video games have evolved greatly over time; developing from the simplicity of the *Pong* arcade games, to the rise of CD-ROM home gaming, to the vast range of multiplayer online worlds of *Everquest* and *League of Legends*.[2] With this evolution came massive global connectivity, or to put it plainly, "[t]he idea of competing against others from around the globe in video games came about fairly early . . . . [a]fter all, once you'd vanquished everyone on your block, who was left to challenge you?"[3]

Video game tournaments — otherwise known as eSports — now occupy a spot in the global market worth billions of U.S. dollars.[4] Similarly, both live and online streaming viewers number in the millions; it is not uncommon for the larger eSports tournaments to sell out large ballrooms and arenas like Madison Square Garden and San Jose's SAP Center.[5] On the other side of the equation are the

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[1] Jennifer Booton, *27 Million Watched this Video Game Tournament — Matching NCAA Final Audience*, MARKETWATCH (July 29, 2015, 7:45 AM), http://www.marketwatch.com/story/a-new-sports-industry-is-blossoming-online-and-its-already-worth-billions-2015-05-29.

[2] *Video Game History Timeline*, STRONG NAT'L MUSEUM PLAY, http://www.museumofplay.org/about/icheg/video-game-history/timeline (last visited Feb. 16, 2018).

[3] Andrew Lynch, *Tracing the 70-Year History of Video Games Becoming eSports*, FOX SPORTS (May 6, 2016, 6:30 PM), http://www.foxsports.com/buzzer/story/esports-explainer-league-of-legends-heroes-of-the-storm-hearthstone-cs-go-dreamhack-050616.

[4] Booton, *supra* note 1.

[5] *Id.*

players, who are often gaming professionals who compete at elite levels. These players, just like any basketball or football superstars, are bonafide celebrities in their industry and enjoy the adoration of avid fans.[6] As with many popular sports, a whole new institution of gambling has cropped up around the eSports industry. To illustrate, in 2016 an estimated $649 million was wagered on eSports games.[7]

However, the public performance and live-streaming of video game play during eSports tournaments raises important questions regarding copyright of the underlying games. Unfortunately, despite the rapid competitive gaming boom, copyright protection for video games failed to catch up and remains almost as loosely defined as it was when the first games came on the market.[8] Several different types of intellectual property within video games are protectable under copyright law, and the right to publicly perform those elements is reserved exclusively for the copyright holder.[9] Without a license issued by the rightsholder, publicly performing a video game during a live or online-streamed tournament can infringe on those rights.[10] Moreover, because the type of protectable intellectual property varies from game to game, there is no blanket classification of copyright protection for video games.[11] Until legislation catches up with advancing technology, the task of determining which video game elements are copyrightable must generally be decided on a case-by-case basis.[12] Consequently, determining if copyright infringement occurred can be difficult because not every video game receives equal copyright protection.[13]

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[6] Henry Young, *Seven-Figure Salaries, Sold-Out Stadiums: Is Pro Video Gaming a Sport?*, CNN (May 31, 2016), http://edition.cnn.com/2016/05/31/sport/esports-is-professional-gaming-a-sport/.

[7] Chris Grove, *Esportsbook Betting: Overview and FAQ*, ESPORTS BETTING REP. (May 10, 2016, 4:49 PM), http://www.esportsbettingreport.com/sites/esportsbooks/. “”

[8] *Video Games*, WIPO, http://www.wipo.int/copyright/en/activities/video_games.html (last visited March 10, 2018) [hereinafter *Video Games*] (“As a result, questions related to the legal regime applicable to video games do not have obvious answers. For some countries, video games are predominantly computer programs, due to the specific nature of the works and their dependency on software. Whereas in other jurisdictions, the complexity of video games implies that they are given a distributive classification. Finally, few countries consider that video games are essentially audiovisual works.”).

[9] 17 U.S.C. § 106 (2012).

[10] H.R. Rep. No. 94-1476, at 52-53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693.

[11] *Video Games*, supra note 8 (“In parallel, the level of complexity is growing significantly due to the fact that in recent years the market for video games has continued to evolve exponentially. As a consequence, current video game development can involve a greater number of specialists engaged in complex works of authorship.”).

[12] Andy Ramos et al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WORLD INTELL. PROP. ORG. 1, 93 (2013), http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf [hereinafter *“Legal Status*”].

[13] *Id.*

With eSports tournaments still in their infancy, it is in the best interest of all parties to avoid possible infringement. For example, in 2013 Nintendo pulled their game *Super Smash Bros. Melee* from the live and streamed Evolution Championship Series ("Evo") video game tournament.[14] Although Nintendo eventually reversed their decision, the event highlighted the legal challenges that video game tournaments create.[15] As Joey Cuellar, co-founder of Evo, stated in response to Nintendo's decision, "[i]t's their [intellectual property], they can do whatever they want, and they didn't present us with any options to keep it open . . . we respect Nintendo's decision to protect their IP. . .."[16]

Despite these challenges, the rise of eSports tournaments shows no sign of slowing down. To encourage this growth and the many benefits that accompany it, efforts must be made to both clarify and harmonize the copyright protection of publicly-performed video games. In the absence of legislative involvement, we must find alternative solutions for copyright issues. This note proposes the creation of a video game performance rights organization[17] as one such potential alternative solution. Part I will provide a basic overview of current U.S. copyright law and will explain how the law applies to video games and tournaments. Part II will examine the history of other performance rights organizations and explain the basic function of such organizations. Part III will consider the application of performance rights organizations to other types of creative content and suggest an approach on how a similar organization could be structured to cope with the complicated issues of video game performance rights. Finally, Part IV will examine the potential impact that the formation of a performance rights organization would have upon various stakeholders.

I. BASIC COPYRIGHT LAWS AND THEIR APPLICATION TO VIDEO GAME TOURNAMENTS

A. Applicable U.S. Copyright Laws and Powers

Copyright law as applied to video games is complex and often ambiguous. However, there are several legal fundamentals that are universally applicable in determining how copyright law should apply to video games and eSports tournaments. In the U.S., copyright protection is created in two places: Article I of the U.S. Constitution and the Copyright Act of 1976.[18] Article I, Section 8, Clause

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[14] Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (July 11, 2013, 1:59 AM), http://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee.

[15] *Id*.

[16] *Id.*

[17] This note will interchangeably use the terms "performance rights organization" and "collective management organization." The terms are more thoroughly defined in Part II.

[18] *Legal Status*, *supra*, note 10, at 90-94.

8 of the U.S. Constitution — known as the Copyright Clause — gives Congress the right to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[19] The Clause creates two distinct powers: 1) the power for authors to secure exclusive rights to their writing for a limited time and 2) the power for inventors to secure exclusive rights to their discoveries for a limited time.[20] Thus, this clause actually creates powers for Congress to copyright and patent. Moreover, the term "useful Arts" refers to the works of "artisans or people skilled in a manufacturing craft."[21]

1. The Copyright Act of 1976

The predominant source of U.S. copyright law comes from Title 17 of the United States Code. Its origins began as early as the eighteenth century with the Copyright Act of 1790 (hereinafter the "Copyright Act"), which provided copyright protection to authors in order to promote "the encouragement of learning."[22] Over the years, the act was revised several times to provide longer terms and wider boundaries of protection.[23] Prior to 1976, the last time the Act had been adapted was in 1909 — quite some time before television, film, audio recordings, and radio were developed or widely adopted.[24] Therefore, revisions were made to the Act to address the challenges that advancing technology posed to copyright laws.[25] These revisions were adopted into law as Title 17 of U.S. Code in 1976,[26] and today, the Copyright Act is considered the primary governing law

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[19] U.S. CONST. art. I, § 8, cl. 8.

[20] *Id.*

[21] Robert J. Rando, *America's Need for Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters*, 63 FED. LAW. 12, 13 (2016) (explaining the Copyright Clause).

[22] Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (repealed 1802).

[23] *To Promote the Progress of Science and Useful Arts*, SW. EDUC. DEV. LABORATORY, RES. EXCHANGE, https://web.archive.org/web/20141210022618/ http://www.ncddr.org/products/researchexchange/v08n01/1_promote.html (last visited Feb. 17, 2018).

[24] H.R. REP NO. 94-1476, *supra* note 10, at 47.

[25] *Id.*

[26] U.S. Copyright Off., Circular 92, Copyright Law of the United States and Related Laws Contained in Tıtle 17 of the United States Code v (2016) [hereinafter Circular 92] ("The United States copyright law is contained in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code. The Copyright Act of 1976, which provides the basic framework for the current copyright law, was enacted on October 19, 1976, as Pub. L.
No. 94-553, 90 Stat. 2541. The 1976 Act was a comprehensive revision of the copyright law in title 17."); *Copyright Timeline: A History of Copyright in the United States*, ASS'N. RES. LIBR. https://web.archive.org/web/20141210022618/http:// www.ncddr.org/products/researchexchange/v08n01/1_promote. html (last visited March 10, 2018); *see generally* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

for modern copyright in the U.S.[27]

Under Title 17, an individual may obtain protection for:

> [O]riginal works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> . . .
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings;[28]

It is noteworthy that although "video games" are not mentioned specifically in this list (unlike motion pictures or sound recordings), some of the creative elements that make up a video game may fall into the enumerated Title 17 categories. The various creative elements that make up video games will be discussed in the following section of this note.

An individual who can establish ownership of copyright in one of those categories is awarded certain exclusive rights to the copyrighted material. For the purposes of this note, the two most important rights are the rights "in the case of literary, musical, dramatic . . . and motion pictures and other audiovisual works, to *perform the copyrighted work publicly*"[29] and "in the case of sound recordings, to *perform the copyrighted work publicly by means of a digital audio transmission*."[30]

Finally, the Copyright Act makes a distinction between the ownership of copyright and the ownership of a material object in which the work is embodied.[31] This means the "transfer of ownership of any material object, including the copy. . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object."[32] This distinction is crucial when it comes to regulating video game tournaments because many video games are sold on physical discs and cartridges. This section of the Act provides that physical ownership of a copy of a video game disc does not grant that individual the right

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[27] Copyright law in the United States is primarily governed by federal law. Marketa Trimble, *U.S. State Copyright Laws: Challenge and Potential*, 21 STAN. TECH. L. REV. 66, 67 (2017); The Copyright Act of 1976 is the main source of federal copyright law. Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1872 (2015).

[28] 17 U.S.C. § 102 (2012).

[29] *Id*. § 106(4) (emphasis added).

[30] *Id*. § 106(6) (emphasis added).

[31] *Id.* § 202.

[32] *Id*.

to publicly perform the game without the copyright owner's consent.[33] Therefore, an individual who owns copyrights to a game may still be protected from infringement by individuals who own physical copies of the game. Consequently, if a video game is found to be a copyrightable work, then the author must give permission for the game to be performed — i.e. played — publicly.

B. Copyrightable Elements of Video Games

Of course, determining whether particular video games are copyrightable works is easier said than done. Although Title 17 establishes copyright for original works of authorship, the list of copyrightable works in Section 102 is limited and does not exclusively include video games — as it does with motion pictures and sound recordings.[34] The list, however, is by no means exhaustive. In fact, Section 102 was written specifically to be broad, inclusive, and "illustrative" of the types of works protected by the Copyright Act.[35] Indeed, the rapid evolution of technology "may require adjustments in the law. . ..The desire to let markets evolve does not mean that the law must remain frozen."[36] When interpreted flexibly, Section 102 protects any type of 1) original work that is 2) fixed 3) in any tangible medium 4) that can be perceived, reproduced, or communicated 5) directly or through a machine or device.[37]

However, Section 102 does not necessarily allow all original works to be protected as a whole. That is to say, a work that is composed of two or more types of media must obtain separate copyright protection for each type of media.[38] The various types of media that compose an entire work (i.e. audio, text, computer code, etc.) are often referred to as the copyrightable "elements."[39] Granted, an author may register copyrights for the separate elements in one single application.[40] However, each element receives separate copyright protection.[41] If the author wishes to enforce that protection, each element's protection must be

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[33] H.R. Rep. No. 94-1476, *supra* note 10, at 79 ("This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, *but it does mean that they could not be enforced by an action for infringement of copyright.* Under section 202 however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.") (emphasis added).

[34] 17 U.S.C. § 102.

[35] *Id.* (emphasis added).

[36] MARYBETH PETERS, U.S. COPYRIGHT OFFICE, REP. ON COPYRIGHT AND DIGITAL DISTANCE EDUC. 144 (1999) [hereinafter PETERS].

[37] 17 U.S.C. § 102.

[38] U.S. COPYRIGHT OFFICE, CIRCULAR 55, COPYRIGHT REGISTRATION FOR MULTIMEDIA WORKS 1 (2013) [hereinafter "CIRCULAR 55"].

[39] Legal Status, *supra* note 10, at 8.

[40] CIRCULAR 55, *supra* note 34, at 2.

[41] Charles-Edouard Renault & Rob H. Aft, *From Script to Screen: The Importance of Copyright in the Distribution of Films*, 6 CREATIVE INDUSTRIES BOOKLET 3, 12 (2011).

enforced separately.[42]

This can become complicated when a single work is composed of several elements and each element has a different author.[43] Motion pictures, one of the enumerated copyrightable works under Section 102, are prime examples of this. A motion picture is "essentially a collection of copyrights" that can include the "screenplay, possibly based on a book, music, directing talent, actors' performances, as well as the contributions of creative technical crew such as costumers and set designers."[44] Crucially, although a film is one cohesive work, the author of each copyrightable element is entitled to independent copyright protection for their contribution.[45]

So how might video games be protected by the Copyright Act? As it turns out, that is the question that makes video game copyright law so complex.[46] In order for a multimedia work to get protection, it must have at least one copyright-protectable element.[47] On the surface, it seems clear that video games should be copyrightable works. Within most video games are several elements that are considered copyrightable.[48] These are typically broken down into three categories: visual elements, audio, and computer code.[49] Over the years, courts have protected these elements under the Copyright Act fairly consistently.[50] However, video games are unique because of one element that continues to plague video game copyright law: the interactive nature of the games. Indeed, even the players may be entitled to public performance rights for certain player-created content that is shown during live eSports tournaments.[51]

1. Code

Video games first obtained copyright protection through the software code.

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[42] *Id.*

[43] *See id.* at 44.

[44] *Id.*

[45] *See id.*

[46] *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878, 880 (D.C. Cir. 1989); Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009 (7th Cir. 1983).

[47] *See generally* CIRCULAR 55, *supra* note 34 (explaining the process of obtaining a copyright).

[48] *Legal Status*, *supra* note 10, at 8.

[49] *Id.*

[50] Software code has been somewhat less consistently protected than audio and visual works, in part because of its novelty. However, in 1980, the Copyright Act was amended to specifically protect computer code as a "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result," 17 U.S.C. § 101 (2012). Three years later, the Third Circuit determined that computer code is copyrightable as a literary work, Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1249 (3d Cir. 1983).

[51] Jennifer Lloyd Kelly & Nicholas Plassaras, *Copyrighting Player-Generated Content in Video Games*, VENTUREBEAT (Jan. 7, 2015 2:00 PM), http://venturebeat.com/2015/01/07/copyrighting-player-generated-content-in-video-games/ [hereinafter "Kelly"].

When the Copyright Act was amended in 1980, Congress broadened the law's reach to protect software code.[52] Under the amended Copyright Act, software code was defined as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[53]

Moreover, software code was determined to be protectable like any other literary work.[54] Several landmark cases clarified how the exigent copyright law should apply to video game code. One of the first cases was *Atari, Inc. v. Amusement World, Inc.*, a 1981 U.S. District Court case from Maryland in which the computer game company Atari sued on the grounds that a competing company, Amusement World, had infringed Atari's game *Asteroids*.[55] *Asteroids* was a cabinet-style arcade game "in which the player commands a spaceship through a barrage of space rocks and enemy spaceships" and the highest-selling video game of its time.[56] Two years after the release of *Asteroids,* Amusement World released the game *Meteors*, which the court noted shared at least twenty-two design similarities with *Asteroids*.[57] The court also noted that the principal idea of the games was the same: the player must maneuver a spaceship through rocks and enemy ships.[58] The court held that Atari's software code for *Asteroids* was properly "fixed in the medium of circuitry on a printed circuit board" as a means of expressing the copyrightable elements.[59] It was also determined that Amusement World had based *Meteors* on the idea of the game *Asteroids*.[60] However, an idea — no matter how original — is not copyrightable.[61] Therefore, the court found that Amusement World had not infringed on Atari's work because the design elements (and subsequently the code that accompanied them) were intrinsic to the idea of the game and would have occurred in any similar game; essentially the "similarities [were] inevitable, given the requirements of the idea of a game involving a spaceship combatting space rocks and given the technical demands of the medium of a video game."[62]

2. Audio/Visual Elements

Copyright law can also provide protection for audio and visual elements of video games.[63] Within the audio category are elements including: musical

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[52] Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028.
[53] 17 U.S.C. § 101 (2012).
[54] *See Apple Comput. Inc*, 714 F.2d at 1249; *see also*17 U.S.C. § 102(a).
[55] Atari, Inc. v. Amusement World, Inc., 547 F. Supp. 222, 223-24 (D. Md. 1981).
[56] *Id.* at 224.
[57] *Id.* at 224-25.
[58] *Id.* at 224.
[59] *Id.* at 226.
[60] *Id.* at 230.
[61] *Id.*
[62] *Id.* at 229.
[63] *See Legal Status*, *supra* note 10, at 10.

composition, sound recordings, voice recordings, and sound effects.[64] Visual elements, on the other hand, may include photographic images, moving images, animation, or text.[65]

Atari v. Amusement World further influenced how the world interpreted visual elements of video games under copyright law. In that case, Amusement World attempted to argue both that 1) Atari could only obtain copyright for the software code element of *Asteroids*, and 2) that Atari had failed to register their copyright properly by not submitting an actual circuit board to satisfy the "fixed" requirement under Section 102.[66] The court eventually found that Atari's game could not be infringed because the intrinsic nature of the gameplay made it more of an idea than an expression.[67] However, the court did indicate that a more expressive video game would be copyrightable as both an audiovisual work and as a motion picture.[68]

The holding in *Amusement World* was partially based on a decision from an earlier case where a *Scrabble* video game was held to be an interactive audiovisual work or motion picture because "popularity of a video game depends on the creativity of its audiovisual display, not on the form of its computer program."[69] In that case, the court set the standard that the audiovisual and software code elements of a video game are independently copyrightable because "[a]n author's work does not become any less original after he has found a means to replicate it."[70] The court went on to note that, in certain situations, the audiovisual elements of a game can receive copyright protection even if the code element cannot.[71]

Granted, cases decided since *Amusement World* have found that simple "idea-based" design elements may be copyrightable. However, the decision in *Amusement World* is still standing law and establishes that the simpler a game is, the less copyrightable certain audiovisual elements are.[72] In earlier times, the video game's "rudimentary composition made the narrow line between idea and expression" difficult to discern.[73] As games have advanced, determining whether a game element is copyrightable comes down to "whether the game is predominantly code or predominantly visual art."[74]

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[64] *Id.* at 8.
[65] *Id.*
[66] *Amusement World, Inc.*, 547 F. Supp. at 226.
[67] *Id.* at 230.
[68] *Id.* at 226.
[69] Stern Elecs., Inc. v. Kaufman, 523 F. Supp. 635, 639 (E.D.N.Y. 1981).
[70] *Id.*
[71] *Id.*
[72] *Amusement World, Inc.*, 547 F. Supp. at 229.
[73] *Legal Status*, *supra* note 10, at 90.
[74] Rexford Brabson, *Hit Or Miss – Video Games and Computer Code Under U.S. Copyright Law*, L. OFF. ERIC B. ALSPAUGH (June 2, 2014), http://alspaughlaw.com/hit-or-miss-video-games-and-computer-code-under-u-s-copyright-law/.

3. The Interactivity of Video Games

However, the statutory requirements of copyright law do not factor in the interactive nature of video games. Video games, unlike a film shown in a movie theatre or a portrait hanging in an art gallery, typically require human interaction.[75] What is a game without its players? Video games often feature certain malleable aspects that the player has control over. In the earlier days of video game copyright law, it was not uncommon for defendants to argue that a video game could not be protected because "the player, not the game's creator, was the true author of the audiovisual work."[76] This argument was seen in *Atari Games v. Oman*, when the Register of Copyrights refused to register a video game because it determined the audiovisual elements "are created randomly by the player and not by the author of the video game."[77] However, the Register's denial was overturned in *Oman* in favor of the game's author, on the grounds that "the player of a video game does not have control over the sequence of images that appears on the video game screen. . .. The most he can do is choose one of the limited number of sequences the game allows him to choose."[78]

But technology is ever-changing, and legal challenges remain in the wake of evolution. *Oman* was decided in 1989.[79] Player interfaces of video games are markedly more complex today than they were in 1989. Today's video games often include content into which players themselves put vast amounts of creative input.[80] Consider a game like *Minecraft*, a building game where the gameplay is "more a function of the player's creativity than of game-imposed limitations."[81] Games like *Minecraft*, a game where players build intricate block structures, typically "have no underlying story and, instead, simply encourage players to be creative."[82] This user-generated content has the potential to be both "original and . . . copyrightable by the player."[83]

Granted, it is possible that courts could chose to regulate copyrights of video game tournaments in the same way that some have chosen to regulate live sporting events. There are admitted similarities between eSports events like the *League of Legends* world championship and your average NBA game.[84] Courts have

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[75] *Legal Status*, *supra* note 10, at 10.

[76] Greg Lastowka, *Copyright Law and Video Games: A Brief History of an Interactive Medium*, 1, 13 (2013), https://ssrn.com/abstract=2321424.

[77] Atari Games Corp. v. Oman, 888 F.2d 878, 880 (D.C. Cir. 1989).

[78] *Id.* at 884 (quoting Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir.1982)).

[79] *Id*. at 878.

[80] Kelly, *supra* note 51.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Ruby Morgan, *eSports vs Traditional Sports: 7 Shocking Similarities*, FUNKYIT (June 23, 2016), http://www.funkykit.com/blogs/esports-vs-traditional-sports-7-shocking-similarities/; CML, *Sports Vs. eSports, According To A Law*yer, KOTAKU

previously held that the underlying gameplay of live sporting events was not copyrightable because "[s]ports events are not 'authored' in any common sense of the word."[85] Even though the live gameplay is spontaneous and created exclusively by the athletes, only the broadcast, not the live gameplay may be copyrighted.[86] With more games providing players with a creative outlet, it is possible that courts will begin to see more questions involving player copyright. The legal approach to player-created content is, therefore, something worth keeping an eye on in the future.

4. Putting it All Together

There is one final hurdle in the process of deciphering a video game's copyright potential. Due to the "fragmented" case history which resulted in determinations of video games' copyright eligibility being made on a case-by-case basis, every video game must be examined individually to determine which elements are copyrightable.[87] Case law shows that it is possible for any video game to have the potential to receive protection for a certain element.[88] In practice, however, this is not always the case. As we can see from *Amusement World*, copyright law protects the expression of ideas, not the ideas themselves. Thus, determining which elements of a game are copyrightable — and therefore, which creators will be granted copyrights— may vary drastically from game to game.

Further, if a creator wishes to register the copyright of a work with the U.S. Copyright Office, the creator must register the work under the authorship of the dominant element.[89] For example, in their registration guide, the Copyright Office states:

> [B]ecause computer programs are literary works, registration as a "Literary Work" is usually appropriate. However, if pictorial or graphic authorship predominates, registration as a "Visual arts work" may be made. Similarly, if motion picture authorship or audiovisual material predominates, registration as a "Motion picture/audiovisual work" may be made.[90]

(Aug. 31, 2015, 3:11 PM), http://kotaku.com/sports-vs-esports-according-to-a-lawyer-1727766965.

[85] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997).

[86] *Id*.

[87] *Legal Status*, *supra* note 10, at 90-91.

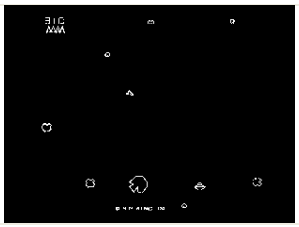
[88] Mary Patricia Culler, *Copyright Protection for Video Games: The Courts in the Pac-Man Maze*, 32 CLEV. ST. L. REV. 531, 556 (1984).

[89] *Legal Status*, *supra* note 10, at 90 ("The criterion applied by the U.S. Copyright Office is that a single registration may be made for a computer program and its screen displays. According to the Copyright Office, when answering the 'Type of work being registered' question on the application form, the copyright holder shall 'choose the type most appropriate to the predominant authorship'.").

[90] *Id*.

In the U.S., copyright registration is an important — although not mandatory — step to protect against infringement.[91] Without copyright registration, certain elements of video games become susceptible to infringement.[92]

Moreover, as *Amusement World* established, games with simple ideas may not even be copyrightable as audiovisual works.[93] Again, consider a game like *Minecraft.* As "a game about placing blocks . . . . . .going on adventures . . . . . .and build[ing] amazing things,"[94] *Minecraft* may be interpreted as sharing some characteristics of idea-based games like *Asteroids* and *Meteors*. Where *Asteroids* and *Meteors* confined players to act as spaceship pilots within a video game context, *Minecraft* confines players to act as builders within a video game context. To be fair, the visual elements of *Minecraft* are arguably more advanced than the rough-hewn *Asteroids* and *Meteors*:



Gameplay screenshot, Atari's *Asteroids*[95]

Gameplay screenshot of a user's building from *Minecraft*[96]

That raises the question: when does a video game become an *expression* of an idea, as opposed to *just* an idea?

Undoubtedly, this is the point where obtaining copyright permission for video game tournaments becomes especially troublesome. Someone wishing to license a multimedia work like a video game "must have confidence that they are licensing the rights from the . . . undisputed copyright holder."[97] Locating the true copyright holder for every copyrightable element in a multimedia work is even more difficult because there are often multiple authors as well as multiple copyrightable elements.[98] Larger, more established game companies often contract to keep blanket ownership of the various copyrights in a video game to themselves.[99] But as new game platforms and small, start-up video game studios take the stage, game

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[91] *Id.* at 90, 92.
[92] Culler, *supra* note 85, at 556.
[93] Atari, Inc. v. Amusement World, Inc., 547 F. Supp. 222, 228 (D. Md. 1981).
[94] *Minecraft Wii U Edition*, NINTENDO, https://www.nintendo.com/games/detail/minecraft-wii-u-edition (last visited Jan. 3, 2018).
[95] *File: Asteroi1.png*, WIKIPEDIA, https://en.wikipedia.org/wiki/Asteroids_(video_game)#/media/File:Asteroi1.png (last visited Jan. 3, 2018).
[96] *File: Minecraft city hall.png*, WIKIPEDIA, https://en.wikipedia.org/wiki/Minecraft#/media/File:Minecraft_city_hall.png (last visited Jan. 3, 2018).
[97] Renault & Aft, *supra* note 37, at 12.
[98] *See id*.
[99] *Legal Status*, *supra*, note 10, at 91.

creators are contracting to protect a stake in their copyrights.[100] Throw user-generated content from games like *Minecraft, Second Life,* and *World of Warcraft* into the mix and suddenly the list of potential copyright holders for a single video game can become extensive.[101]

This complex "paperwork nightmare"[102] is exactly why a collective performance rights organization is a viable solution for video game copyright. In 1999, Register of Copyrights Marybeth Peters explained to Congress the legislative challenges of performance copyrights in the digital age:

> As a fundamental premise, the Copyright Office believes that emerging markets should be permitted to develop with minimal government regulation. When changes in technology lead to the development of new markets for copyrighted works, copyright owners and users should have the opportunity to establish mutually satisfactory relationships. A certain degree of growing pains may have to be tolerated in order to give market mechanisms the chance to evolve in an acceptable direction.[103]

The Copyright Office therein acknowledges that self-management is sometimes preferable to legislative intervention when it comes to copyright in the face of technological adaptation.[104] In the case of video game copyright, a collective management organization may indeed be the ideal alternative to legislative intervention. Video games have grown and evolved, so copyright regulation should follow suit. A collective management organization would create a centralized group whose sole purpose is to clarify and simplify the process of rights licensing.[105] Creating such an organization would shift the burden of locating video game rightsholders from the performance licensees to a professional, third-party organization.[106] Shifting the burden of copyright management to a centralized organization not only simplifies the process for licensees, but it increases the chances that all eligible rightsholders may receive the protection they are due. Moreover, choosing a rights organization over legislative intervention gives video game creators a chance to continue to grow without forcing legislative bodies to make rushed statutory amendments.

II. A BRIEF OVERVIEW: COLLECTIVE MANAGEMENT ORGANIZATIONS

Collective performance rights organizations are not, by any means, a

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[100] *Id*.
[101] Kelly, *supra* note 48.
[102] Renault & Aft, *supra* note 37, at 12.
[103] PETERS, *supra* note 32, at 144.
[104] *See id.*
[105] *See Collective Management of Copyright and Related Rights*, WORLD INTELL. PROP. ORG., http://www.wipo.int/copyright/en/management/ (last visited Jan. 3, 2018).
[106] *See id.*

novelty.[107] Nor are they unique to the United States.[108] Rather, performance rights organizations are widespread and fall within the greater category of "collective rights management."[109] Further, although there are several types of collective management organizations ("CMOs") which serve varying purposes, the core functions of these organizations are nearly universal.[110] This note primarily focuses on a performance rights CMO as a possible solution for simplifying the process of obtaining copyrights permission for the purpose of video game tournaments. However, due to the multimedia and interactive nature of video games, it is worth noting that other types or even a hybrid of several CMOs may be more viable for video game rights management. Accordingly, some background information is necessary to instruct on how a CMO functions and what its primary goals are.

A. Brief History

Collective rights management for creative works has existed in some form since the eighteenth century.[111] In 1777 France, a group of twenty-two authors of dramatic works came together to form what is considered to be the world's first CMO, the Société des Auteurs et Compositeurs Dramatiques (SACD).[112] SACD worked to combat infringement of dramatic works by French theatres troupes; in particular, the French royal theatre, Comédie Française.[113] Spearheading this group of authors was famed writer, Pierre Augustin Caron de Beaumarchais.[114] Beaumarchais filed a complaint against Comédie Française for their unauthorized performance of his play "Barbier de Séville."[115] However, this complaint was by no means the first complaint to be leveled against the theatre. Indeed, prior to Beaumarchais's complaint, the twenty-two other authors of SACD had all been unsuccessful in halting infringing performances of their own works.[116] However,

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[107] Tarja Koskinen-Olsson & Nicholas Lowe, *Module 6: Management of Rights in Dramatic Works*, WORLD INTELL. PROP. ORG. 1, 10 (2012), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_6.pdf [hereinafter "Olsson"].

[108] *Id.*

[109] *The Importance of Collective Management*,' INT'L CONFEDERATION SOC'YS AUTHORS & COMPOSERS 1, 2 (2015), http://www.cisac.org/content/download/1137/19653/file/CISACUniversity_The_Importance_of_Collective_Management_FINAL.pdf [hereinafter *"Importance*"].

[110] *The Role of Collective Management*, INT'L CONFEDERATION SOC'YS AUTHORS & COMPOSERS 1, 3 (2015), http://www.cisac.org/content/download/1135/19647/file/CISACUniversity_The_Role_of_CMOs_FINAL.pdf [hereinafter *"Role*"].

[111] Olsson, *supra* note 103, at 10.

[112] OLUKUNLE OLA, COPYRIGHT COLLECTIVE ADMINISTRATION IN NIGERIA 14 (2013).

[113] *The History of Collective Management*, INT'L CONFEDERATION SOC'YS AUTHORS & COMPOSERS', 1, 2 (2015), http://www.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf [hereinafter *"History*"].

[114] OLA, *supra* note 108, at 13.

[115] *Id*.

[116] *Id*. at 14 (citing *A Field of Honor: Intermission*, GUTENBERG-E, http://www.guten

where the other authors failed, Beaumarchais was successful, due in large part to his high social and political rank and proven skills as an "astute manipulator of public opinion."[117] Recognizing the power of his social and political influence, Beaumarchais invited other authors to join him in the fight against creative infringement by forming the SACD.[118] By joining forces with Beaumarchais, the formerly voiceless authors presented for the first time a formidable force protecting against rampant infringement.[119]

Following the success that SACD had in the field of dramatic work, creators of other types of creative works followed suit. Twenty-two years after the formation of SACD, French authors and musical composers formed the Society of Authors, Composers and Music Publishers ("SACEM").[120] Like SACD, SACEM's origins stem from frustrated creators who recognized "that in practice it was difficult to monitor and enforce the performing right on an individual basis."[121] With the signing of the Berne Convention for the Protection of Literary and Artistic Works in 1886, authors and composers were awarded public performance rights as a fundamental copyright for the first time.[122] In spite of differences among nations' varying approaches to copyright law, CMOs continued to grow and adapt to new technology across the world.[123] Over the years, CMOs have developed to answer the legal demands of radio and television broadcasting, satellite transmission, cable distribution, CD and DVD copying, and internet streaming.[124]

Although the impact of CMOs can be seen globally, several CMO success stories can also be found here in the United States. Two organizations in particular, ASCAP and MPLC, have made great strides in collectively managing performance rights. ASCAP, or the American Society of Composers, Authors and Publishers, is a performing rights organization "of more than 650,000 songwriters, composers and music publishers" that provides public performance licenses for songs and scores to varying businesses.[125] It "is the only performing rights organization in the U.S. owned and governed by songwriters, composers, and music publishers."[126] In 2015 alone, ASCAP had a reported revenue of $1.014 billion and total distribution of $867.4 million.[127] In addition to the traditional

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berg-e.org/brg01/print/brg05.pdf (last visited Feb. 20, 2018)).

[117] *Id.*

[118] *Id.*

[119] *See id*.

[120] *History*, *supra* note 109, at 2.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 3.

[124] *Id.* at 3.

[125] *About Us*, ASCAP, https://www.ascap.com/about-us (last visited Feb. 20, 2018).

[126] *Governance*, ASCAP, https://www.ascap.com/about-us/governance (last visited Jan. 5, 2018).

[127] *2015 Annual Report*, ASCAP 1, 6 (2015), https://www.ascap.com/-/media/files/pdf/

rights management duties, ASCAP provides members with a benefits package that includes discounts on hotel and car rental for travel; health, dental, instrument, and life insurance; and online marketing tools.[128]

Meanwhile, the Motion Picture Licensing Corporation ("MPLC"), "grants organizations permission to show legally obtained audiovisual programs without the need to report titles, dates or times of exhibition."[129] MPLC provides users with an "Umbrella License" that protects public performance licensees from violating Title 17.[130] Currently, over "1,000 Hollywood, independent, faith-based, television, special interest, and international motion picture studios and producers" are represented by MPLC.[131] MPLC boasts more than thirty years of experience in the collective rights management field, and employs experts who possess both passion and "unmatched core competency in motion picture copyright compliance to help . . . clients navigate the complex and confusing copyright landscape."[132] MPLC is particularly relevant to the collective management of video game rights because, as discussed above, motion pictures are similarly comprised of many different artists and creators.[133] Granted, motion pictures are specifically included within Title 17's list of copyrightable media.[134] However, many of the multimedia elements (audio, visual, underlying script or text) are the same between motion pictures and video games. As such, it is reasonable to conclude that a CMO could be formatted to function for the purpose of video game management.

B. Functions of Collective Management Organizations

What does a CMO do? Traditionally, CMOs were "set up by right owners at a national level to manage one or more of the rights of one or more categories of right owners and to grant licenses to commercial users on their behalf."[135] The U.K. Monopolies and Mergers Commission describes CMOs as having three principal functions:

> *1*. to license the use of the rights they manage;
> *2*. to monitor that use in order to enforce the conditions upon which the license has been granted; and
> *3*. to collect and distribute the royalties, payable as a result of the licensed use.[136]

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about/annual-reports/2015-annual-report.pdf.

[128] *ASCAP Member Benefits*, ASCAP, https://www.ascap.com/music-creators/benefits (last visited Jan. 5, 2018).

[129] MOTION PICTURE LICENSING CORP., http://www.mplc.org (last visited Jan. 5, 2018).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See supra* Part I.B.

[134] *Id.*

[135] *Importance*, *supra* note 105, at 2.

[136] *Role*, *supra* note 106, at 2.

Essentially, CMOs simplify the formation and enforcement of licensing agreements between users and CMO copyright holding members.[137] CMOs may utilize "blanket licenses" that provide licenses for all creative works under the management of the CMO.[138] Alternatively, a CMO could choose to license and enforce an individual license on behalf of the rightsholder.[139]

In some cases, a CMO may "organi[z]e technical and legal cooperation among their members to assist in the constant fight against piracy."[140] This is a basic driving force behind many CMOs. Recall SACD and Beaumarchais, which found strength in numbers.[141] CMOs also permit creators to maintain many of their exclusive rights, while limiting excessive legislative intervention.[142]

III. COLLECTIVE LICENSING AS A SOLUTION

As discussed above, video games are protectable in the same manner — and under the same laws — as many other forms of creative content. Likewise, the responsibilities that users have to content creators is equally similar: a convention center cannot host an eSports tournament without permission any more than a theatre can show a film without first obtaining the rights. As with other forms of creative content, passing copyright allocation duties onto a collective management organization has been an important tool in reducing the risks of copyright infringement while simultaneously opening up opportunities between creators and their audience. Ultimately:

> [Multimedia software] is not a separate or new type of work. Indeed, it is typically a computer program combined with a database that contains more than one type of work, and there is nothing about a multimedia product that warrants a departure from long-established rules.[143]

With that in mind, there is no reason a collective management organization cannot be an equally viable solution for video and console games.

In fact, the very nature of gaming makes it particularly ripe for collective rights management. Gaming almost always requires user interaction. To illustrate, a film does not necessarily need a viewer in order to "function." That is to say, a film could be played in an empty theatre and every frame of film would play exactly as its creators intended. Without a player, a typical video game simply does not function. Consequently, game creators need players to play their games in

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[137] *Id*.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 3.
[141] *See* OLA, *supra* note 108, at 14.
[142] WORLD INT'L PROP. ORG., WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 47 (1998) [hereinafter "WIPO FORUM]."
[143] *Id.* at 27.

order to be successful in their field.[144] With video game tournaments enjoying a seemingly endless rise of popularity, it can be said that a game's creator would benefit from providing tournament players with performance access.[145]

Collective management organizations can be particularly useful to this end, effectively promoting "cultural variety and . . . freedom of information"[146] between the users and the content creators. When game creators or producers hold all the power, the flow of creativity to the users may be stifled.[147] Game producers may choose to license their games exclusively to big name players, thereby limiting the number of "ordinary" people who may partake in public performance of the games.[148] Consequently, CMOs present a neutral party whose sole purpose is to "meet the needs of rights owners and users whatever the scale of their business,"[149] thus opening up game access to a variety of users.[150] Similarly, CMOs can also encourage the innovation of new games, as it is not unheard of for CMOs to "channel undistributed royalties towards activities such as the support of emerging talent."[151] With more games being created, more games can be made available to the public, thereby promoting "cultural variety."[152]

IV. POTENTIAL IMPACT OF CREATING A VIDEO GAME PERFORMANCE RIGHTS ORGANIZATION

As seen with other types of CMOs, collective rights management can provide essential infrastructure to uncertain areas of law. Creating a CMO or even several CMOs for video game performance rights has the potential to positively impact all interested parties: the users (players and tournament organizers), the game developers and creators, and the tournament hosts.

A. The Players and Tournament Organizers

Gaming competitors and tournament organizers share many responsibilities when it comes to securing licensing rights for video game tournaments. It is therefore logical to group them together when considering how a CMO may impact them.

One of the biggest impacts that players and organizers may experience as a result of creating a video game CMO is easier access to "fair" licensing of

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[144] *See* James Batchelor, *The New Rules of Video Games Marketing*, MCV (Feb. 27, 2013, 1:19 PM), http://www.mcvuk.com/news/read/the-new-rules-of-games-marketing/0111541.

[145] *See generally id.*

[146] WIPO FORUM, *supra* note 138, at 46.

[147] *Id*. at 45.

[148] *See id*.

[149] *Role*, *supra* note 106, at 2.

[150] WIPO FORUM, *supra* note 138, at 46.

[151] *Role*, *supra* note 106, at 4.

[152] WIPO FORUM, *supra* note 138, at 46.

performance rights. This is the much sought after "freedom of information"[153] discussed previously in this note. By creating a CMO to function in the shadow of current copyright laws, players and organizers have a better chance at obtaining fair licensing terms. Consider, for example, the cost of obtaining a performance license. Without an organization to standardize the licensing cost, the rightsholder could potentially raise licensing fees so high that it would be prohibitive for individuals looking to organize a tournament.[154] But even if the CMO, players, and organizers disagree on licensing terms, a federal judge could be empowered by an agreement entered into between the CMO and the Department of Justice to decide the appropriate rate for the licenses.[155] Thus, the current laws would keep the CMO in check and the CMO framework would ensure that a wider variety of individuals could access the rights.

Creating a CMO also potentially reduces the chances of game developers shutting down tournaments at the last minute. Recall the Evo *Super Smash Bros. Melee* tournament as mentioned in the Introduction to this note.[156] In that situation, Nintendo was capable of canceling a prominent game tournament at the very last minute.[157] Evo may not have had to deal with the threat of cancellation had a CMO organized the necessary licenses well in advance of the tournament.[158] With a CMO acting as a facilitator to create some sort of binding performance license, players and organizers may have more confidence that their tournaments will be carried out smoothly.

Further, by shifting the copyright management to a centralized organization, players and tournament organizers can ensure they get the correct type of copyright licensing for their particular tournament. This note has focused predominantly on public performance rights during live tournaments. However, a CMO could also simplify the process of licensing for tournaments that are live streamed online. Live streaming a video game raises additional copyright issues under the Digital Millennium Copyright Act and the doctrine of fair use.[159] Although certain live streaming may be considered fair use, other live streaming situations will require the user or organizer to obtain special streaming licenses.[160] However, determining what use is fair use and what use requires a license can be a

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[153] *Id*.

[154] *See generally Role*, *supra* note 106, at 2.

[155] Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 7 (Daniel Gervais ed., 2d ed. 2010).

[156] Pitcher, *supra* note 12.

[157] *Id*.

[158] *See* WIPO FORUM, *supra* note 137, at 46.

[159] Seth Northrop & Li Zhu, *Legal Streaming: Build Your Audience Without Getting GG'ed*, TECHCRUNCH (Nov. 28, 2015), https://techcrunch.com/2015/11/28/legal-streaming-build-your-audience-without-getting-gged/.

[160] Dan Graziano, *The Complete Guide to Streaming Games on Twitch*, CNET (Sep. 4, 2014, 8:50 AM), https://www.cnet.com/how-to/the-complete-guide-to-streaming-games-on-twitch/.

bit of a puzzle.[161] As full-time game copyright specialists, a CMO would be in a better position to make a determination on whether potential streamers need to obtain a license or not, thereby reducing the risk of infringement and the potential removal of a gamer's content.

Finally, CMOs are better equipped to stay up to date with copyright law as it adapts to accommodate player copyright. There is uncertainty regarding how copyright law may protect player-created content.[162] However, CMOs are more likely to be "informed by [their] direct experience of the practicalities and challenges of authors' rights [and] copyright administration acquired through their day-to-day licensing activities."[163] By providing structure to the squishy rules of player-created content, CMOs can potentially help shape the future of copyright law.

B. Game Developers and Content Creators

At the same time, it is important to consider video game "authors." Game developers and content creators have a fundamental interest in preserving their Title 17 rights.[164] Those rights are myriad, including everything from "the right of public performance, the broadcasting right, reproduction rights for certain uses, remuneration rights for private copying, reprographic reproduction of literary and graphic works, making works available online, and the visual artist's resale right."[165] And "because . . . copyright owners cannot be in an indefinite number of places at the same time,"[166] it is simply a matter of practicality for game creators to be able to pass the burden of licensing to a third-party.

Furthermore, working with a CMO can give smaller or less financially powerful game developers more bargaining power.[167] Think back to Beaumarchais, the SACD, and the origin of CMOs.[168] Before that group of twenty-two authors formed SACD, the lesser known or politically-weak authors were unable to protect their work from unauthorized performances.[169] However, the authors found strength in numbers (with a little help from Beaumarchais's

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[161] *See* Colin Campbell, *Everything You Need to Know About the YouTube Copyright Crisis and Why You Should Care*, POLYGON (Dec. 14, 2013, 2:57 PM), http://www.polygon.com/2013/12/14/5208782/everything-you-need-to-know-about-the-youtube-copyright-crisis.

[162] *See* Wagner James Au, *Second Life Avatar Sued for Copyright Infringement*, GIGAOM (July 4, 2007, 2:10 AM), https://gigaom.com/2007/07/04/second-life-avatar-sued-for-copyright-infringement/.

[163] Role, *supra* note 106, at 3.

[164] *See generally* 17 U.S.C. § 102 (2012).

[165] *Importance*, *supra* note 105, at 2.

[166] *Id.* at 3.

[167] *Id.*

[168] *See generally supra* Part II.A.

[169] *See id*.

political and social influence).[170] Although video game tournaments may appear far removed from the theatres of eighteenth-century France, the creators' fundamental interests remain the same. Likewise, by banding together in a CMO, game creators can have strength in numbers coupled with "the necessary infrastructure and systems" that a CMO creates.[171] CMOs essentially level the playing field by "putting the individual and small user on the same footing as their more powerful and influential colleagues," and allow for "small, specialist, and less popular repertoires to access the market."[172]

Finally, CMOs can be extremely cost efficient for rightsholders. Without a centralized licensing source, many creators must individually negotiate license terms with users.[173] This is often both impractical and economically prohibitive for many smaller content creators.[174] CMOs provide a means "for users to clear rights for a large number of works, where individual negotiations to obtain the necessary permissions from every right owner, both national and foreign, would be impractical and entail prohibitive costs."[175] Given the high number of copyrightable elements and often multiple authors that contribute to a single video game, CMOs are an efficient way to create a one-stop-shop for users to obtain the proper licensing for all of the individual elements.

C. Hosts and Spectators

Another crucial stakeholder in video game performance rights are the game tournament hosts. With video game tournaments growing in popularity and the number of spectators increasing, the demand for larger tournament spaces has increased.[176] Many of the larger tournaments have therefore made their homes in world famous arenas and stadiums.[177]

A specific market of interest are casinos that act as hosts to video game tournaments. Las Vegas, Nevada , in particular, has been earmarked as a "future eSports hotspot[178] Recently, *eSports Arena Las Vegas*, a thirty-thousand square foot venue, opened at the Luxor Hotel & Casino in a space previously occupied by LAX nightclub.[179] Nonetheless, gaming license restrictions could pose a challenge to the city's future as the next big locale in eSports.

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[170] *See id*.
[171] *Role*, *supra* note 106, at 3.
[172] *Importance*, *supra* note 105, at 3.
[173] *See id.* at 2.
[174] *Id.* at 3.
[175] *Id*.
[176] *See* Booton, *supra* note 1.
[177] *Id*.
[178] *See id*.
[179] Taylor Hatmaker, *The Las Vegas Strip's First Legit eSports Arena Just Opened for Business*, YAHOO ENT. (Mar. 28, 2018), https://www.yahoo.com/ entertainment/las-vegas-strip-apos-first-231029018.html.

In Nevada, the failure to adhere to federal law, including the Copyright Act, could cost a casino its gaming license.[180] To keep the Nevada gaming industry "free from criminal and corruptive elements,"[181] the Nevada Gaming Control Board and Commission have the power to revoke the gaming license of any gaming establishment that threatens "public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry . . .."[182] Violation of the Copyright Act would be a blatant violation of a federal copyright law and, thereby, violate the Nevada Gaming Control Board requirement that a gaming establishment maintain morals and good order.

Granted, it does not appear that any casinos have yet faced the threat of gaming license revocation as a result of copyright infringement suits. Yet one can envision how a big Las Vegas casino could find itself embroiled in copyright infringement suit and license revocation by hosting a video game tournament without proper licensing. A CMO could provide peace of mind to gaming establishments looking to host video game tournaments while ensuring that all copyright holders for a particular game receive remuneration.[183] Tournament hosts, casinos in particular, certainly have an incentive to keep the content creators happy. Current estimates show that eSports betting raked in "roughly $649 million in total handle for e[S]portsbook betting in 2016."[184] One could only imagine the effects that an event similar to the *Super Smash Bros. Melee* tournament could have on an industry of that size.

CONCLUSION

With video game regulation still very much up in the air, there is a need to find a means — either temporary or permanent — of standardizing game copyright management. A CMO tailored specifically towards video games presents a valid option to fill the current regulatory gap while legislation plays catch up to technology. Indeed, a CMO could actually function in tandem with current copyright laws, and could continue to operate even if and when copyright

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[180] The Nevada Gaming Commission's Regulations dictate: Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation: . . . [omitted] 8. Failure to comply with or make provision for compliance with all federal, state and local laws and regulations. . .The Nevada Gaming Commission in the exercise of its sound discretion can make its own determination of whether or not the licensee has failed to comply with the aforementioned, but any such determination shall make use of the established precedents in interpreting the language of the applicable statutes. Nothing in this section shall be deemed to affect any right to judicial review, Nev. Gaming Comm'n Reg. 5.011(8) [hereinafter "Regulation 5"].

[181] NEV. REV. STAT. § 463.0129(1)(b) (2016).

[182] Regulation 5, *supra* note 178; *see also id.* § (1)(d).

[183] *See* Role, *supra* note 106, at 3.

[184] Grove, *supra* note 7.

laws are adjusted. Crucially, a CMO preserves the autonomy of creators and developers by giving them the power to choose whether or not to join the CMO. Ultimately, a CMO would make a suitable alternative until the fuzzy white noise of video game copyright can be more clearly defined.