

**OWNING THE WORLD’S BIGGEST ESPORT: INTELLECTUAL
PROPERTY AND DOTA**

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I. INTRODUCTION

Electronic Sports — or eSports — is a booming industry. In 2017, global revenue grew by 41% to \$696 million.¹ Market research firm Newzoo estimates that the industry will be worth \$1.5 billion by 2020.² The lion’s share of revenue growth stems from “brand investment

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1. NEWZOO, 2017 GLOBAL ESPORTS MARKET REPORT 14 (2017).

2. *Id.*

revenues” — media rights, sponsorships, and advertisements.³ Media rights, of course, include intellectual property (“IP”). As the eSports market develops, so too will the IP law protecting that market, and the business strategies exploiting those protections.

Part II of this Note explores a small slice of the developing legal landscape of eSports, beginning with a brief overview of eSports history. Then, it dives into the history of Defense of the Ancients (“DotA”)⁴, a fan-made video game modification from which the world’s biggest eSports spawned. Next, Part III explores two cases that dealt with DotA’s ownership. The first resolved a dispute between two major video game companies — Blizzard and Valve — over the DOTA trademark. The second set the stage for a battle over the amorphous copyrights of the growing DotA franchise. Taken together, these two cases provide a tentative answer to the question: does anyone own DotA?

Finally, with the legal history of DotA as a guide, Part IV addresses the business aspect of eSports IP. While undoubtedly financially valuable, securing IP rights to video games may, as in the case of DotA, come with trade-offs. In securing user-generated IP, a video game company must consider how to craft a proper end user license agreement (“EULA”) that encourages creativity yet maintains control over potential blockbusters. Perhaps more importantly, a company needs to understand how securing user-generated IP will impact its consumer base.

II. A PRIMER: ESPORTS AND DOTA

A. eSports: Rising from the Ashes

The popularity of video game tournaments is not new. The first video game tournaments emerged in the 1980s, with magazines such as *Life* covering such events.⁵ The nascent video game industry, represented then primarily by arcade machines, was worth over \$8 billion.⁶ However, as technology developed, the scene shifted from the arcade to home media. By the 1990s, local area network (“LAN”) parties had replaced the arcade scene.⁷ Video games simultaneously became more

3. *Id.*

4. This Note refers to Defense of the Ancients as “DotA,” to Valve’s successor game as “Dota 2,” and to the related trademark as “DOTA.”

5. Michael Borowy, Public Gaming: eSport and Event Marketing in the Experience Economy 39–40 (July 6, 2012) (unpublished M.A. thesis, Simon Fraser University) (on file with Summit-Institutional Repository, Simon Fraser University).

6. DAVID SHEFF & EDDY ANDY, GAME OVER: HOW NINTENDO CONQUERED THE WORLD 149 (1999).

7. See Borowy, *supra* note 5, at 69–70.

private and more communal.⁸ Tournaments were relegated to a form of advertising for these home video game systems.⁹

The evolution of video game tournaments to eSports begins with video game tournaments transitioning from a form of advertising, to events in and of themselves. In the late 1990s, companies that had a stake in the video game industry began to sponsor video game leagues.¹⁰ Each league was sponsored by several industry giants.¹¹ These leagues used the enthusiasm of the players to promote competitive video gaming, thereby bolstering the market for high-end hardware.¹² An unforeseen consequence of this business strategy was the incubation of eSports.

In 1998, the PGL league's prize pool was a modest \$250,000 split between two games.¹³ Prize pools remained relatively stagnant — for example, in 2007, the CPL league, by then an industry leader, offered \$300,000.¹⁴ But in 2011, just four years later, video game company Valve announced a staggering \$1.6 million prize pool for its capstone tournament, The International ("TI"), which featured its new video game Dota 2.¹⁵ In one event, eSports became a million-dollar industry.

The industry continues to grow tremendously. In 2017, the seventh TI tournament, TI 7, boasted a prize pool of over \$23 million¹⁶ — representing a 1400% increase in prize pools over six years. The winning team took home around \$11 million.¹⁷ The significance of this prize pool is clearer when compared to a more established sport: golf. In golf, performance, rather than employment contracts, drives

8. *See id.*

9. *See* SHEFF & ANDY, *supra* note 6, at 190–91 (arguing that the film *The Wizard*, which depicted children travelling to California for a video game tournament, was a promotion for Nintendo's Super Mario Bros. 3. This promotion "proved more valuable than any paid advertising ever could.>").

10. Borowy, *supra* note 5, at 74.

11. For example, Intel, Nvidia, and Hitachi sponsored the Cyberathlete Professional League (CPL). José Tavares & Licínio Roque, *Games 2.0: Participatory Game Creation*, VI BRAZILIAN SYMP. ON COMPUTER GAMES & DIGITAL ENT., Nov. 2007, at 2. Likewise, AMD, Logitech, and GameSpot sponsored the AMD Professional Gamer's League (PGL). Borowy, *supra* note 5, at 74.

12. Borowy, *supra* note 5, at 94.

13. *Id.* at 74.

14. *Id.* at 75.

15. Mike Stubbs, *The History of The International 'Dota 2' Tournament*, FORBES (July 31, 2017), <https://www.forbes.com/sites/mikestubbs/2017/07/31/the-history-of-the-international-dota-2-tournament/#547719aa3caf> (last visited May 5, 2018).

16. *Id.*

17. Marissa Payne, *These Five Gamers Just Won \$11 Million Playing 'Dota 2.'* WASH. POST (Aug. 12, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/08/12/these-five-gamers-just-won-11-million-playing-Dota-2/?utm_term=.fd4e3466fc74 [https://perma.cc/34AT-TDAB].

compensation.¹⁸ This is largely true in eSports,¹⁹ at least for the time being. The winner of the 2017 U.S. Open golf tournament — one of the four major golf tournaments²⁰ — brought home just under \$2.2 million.²¹ Split between five team members, each TI 7 winner could potentially earn \$2.2 million.²² While eSports may have some catching up to do with other, more lucrative sports,²³ the cultural, economic, and legal impact of eSports will undoubtedly continue to grow. At the center of this industry is the progenitor of Dota 2, the community-made video game modification DotA.²⁴

B. The Significance of Dota

TI, now an established series of annual tournaments, dominates the eSports industry. These tournaments, and thus Dota 2, represent the top four largest prize pools in eSports history.²⁵ The fifth largest prize pool, at a respectable \$5 million, came from the 2016 League of Legends (“LoL”) World Championship.²⁶ Dota 2 and LoL share a fascinating history: they both trace their roots to the video game modification

18. Robert Damron, *Tour Secrets: Eight Things You Didn't Know About Being a Pro Golfer*, FOX SPORTS (Aug. 3, 2015), <https://www.foxsports.com/golf/story/pga-tour-secrets-eight-things-you-didn-t-know-about-being-a-pro-golfer-080315> [<https://perma.cc/VXP9-LAGN>].

19. See Darren Heitner, *From Near Bankruptcy To Making Millions in eSports*, FORBES (Sept. 30, 2015), <https://www.forbes.com/sites/darrenheitner/2015/09/30/from-near-bankruptcy-to-making-millions-in-esports/#4b0bff6478a1> (last visited May 5, 2018) (discussing the lack of guaranteed compensation). *But see* Jonathan Pan, *Better Humans Become Better Athletes*, THE NEXUS (Dec. 25, 2015), <https://nexus.vert.gg/better-humans-become-better-athletes-c6fd451aa5fd> [<https://perma.cc/C2E5-PJ7P>] (noting that members of *League of Legends* team Ember had salaries of up to \$92,000).

20. Monte Burke, *Which Golf Major Is the Most Prestigious?*, FORBES (June 12, 2012), <https://www.forbes.com/sites/monteburke/2012/06/12/which-golf-major-is-the-most-prestigious/#238767806b5e> [<https://perma.cc/PRs5-N5VP>].

21. Kyle Porter, *2017 U.S. Open Prize Money, Purse: Payouts for Each Golfer from \$12 Million Pool*, CBS (June 18, 2017), <https://www.cbssports.com/golf/news/2017-u-s-open-prize-money-purse-payouts-for-each-golfer-from-12-million-pool/> [<https://perma.cc/8A8F-YYTN>].

22. Payne, *supra* note 17.

23. See, e.g., Jason Gerwitz, *World Cup Big Prize Money Is Getting Even Bigger — Just as US Men Are Fighting To Hang On*, CNBC (Oct. 5, 2017), <https://www.cnbc.com/2017/10/05/us-mens-soccer-team-fifa-boosts-prize-money-before-russia-world-cup.html> [<https://perma.cc/32A8-MYH5>] (reporting that the 2018 FIFA World Cup has a \$400 million prize pool).

24. A video game modification, or “mod,” is an alteration of a video game, which can range from making “changes in the physics of the virtual world to total conversions in game play that can lead to changes in story line and game type.” Hector Postigo, *Of Mods and Modders: Chasing Down the Value of Fan-Based Digital Game Modifications*, 2 GAMES & CULTURE 300, 301 (2007). People who do this are generally called “modders.” *Id.*

25. *Largest Overall Prize Pools in eSports*, E-SPORTS EARNINGS (2017), <https://www.esportsearnings.com/tournaments> [<https://perma.cc/B5YD-97F3>].

26. *Id.*

DotA.²⁷ This Section discusses the intertwined history of Dota 2 and LoL, beginning with their progenitor, DotA. It then outlines other video games that spawned from the DotA universe.

1. The “Eul” Era of DotA

DotA began as a mod for Blizzard’s award-winning video game, Warcraft III.²⁸ Warcraft III included a “World Editor,” which enabled players to create new settings, maps, and characters using the game’s engine.²⁹ In 2002, a modder — known then only by his screenname “Eul” — created DotA.³⁰ The Eul era established the basic mechanics of DotA: the win condition, “setting, heroes, rules, and name.”³¹ Because Warcraft III mods were all open source, Eul deliberately “locked” his mod by corrupting certain data elements to prevent unauthorized access.³² However, in 2004, Eul retired from the scene, “unlocking” his mod and announcing, via a forum post: “from this point forward, DotA is now open source. Whoever wishes to release a version of DotA may without my consent, I just ask for a nod in the credits to your map.”³³ This ended the Eul era of DotA.

2. The “Guinsoo” Era of DotA

Another then-anonymous modder, “Guinsoo,” combined several DotA mods and used them as the base of his own line of mods.³⁴ By early 2005, Guinsoo’s version of DotA was becoming the “dominant” mod in the Warcraft III scene.³⁵ This began the Guinsoo era of DotA. Under his leadership, DotA grew from a mod into a community.³⁶ Unlike Eul, Guinsoo incorporated features — such as design work and programming — created by other people.³⁷ Indeed, Guinsoo considered himself “a ‘chieftain’ of sorts.”³⁸

27. *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *15 (N.D. Cal. May 16, 2017).

28. *Id.* at *7–9.

29. *Id.* at *7.

30. *Id.* at *8–9 (noting also that Eul’s real name is Kyle Sommer).

31. *Id.*

32. *Id.* at *9. Even prior to Eul unlocking DotA, several versions of DotA appeared. Two anonymous modders, “Meian” and “Madcow,” combined the best of these into DotA Allstars. *Id.* at *10–11.

33. *Id.* at *9–10.

34. *See id.* at *11 (noting also that Guinsoo’s real name is Steve Feak).

35. *Id.* at *13.

36. *See* Paul Dean, *The Story of DOTA*, EUROGAMER (June 4, 2014), <http://www.eurogamer.net/articles/2011-08-16-the-story-of-dota-article> [<https://perma.cc/Y38J-V4C5>] (describing the growth of the DotA community).

37. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *11–12.

38. *Id.* at *12.

Under Guinsoo's reign as DotA's "chieftain," a system of norms developed. Contributors had varying levels of input, creating different tiers of input and authority.³⁹ Guinsoo then had final authority to decide what went into the next version of DotA.⁴⁰ Finally, Guinsoo gave credit where credit was due.⁴¹ And in 2004, under Guinsoo's tenure, the first DotA league was born.⁴²

3. The "Icefrog" Era of DotA

By 2005, Guinsoo had passed the reins to "Neichus."⁴³ Neichus brought in experienced programmer and community member "Icefrog" to be his co-developer.⁴⁴ Soon after, Neichus left the project, making Icefrog the sole successor to Guinsoo.⁴⁵ In contrast to Guinsoo's "somewhat informal" oversight, Icefrog "regularly enlisted a team of helpers."⁴⁶ Community member "Pendragon" helped maintain the player base through a website, DotA-allstars.com.⁴⁷ Under Icefrog's leadership, DotA's competitive scene slowly came to be, with 2006 marking the beginning of a rapid rise in the number and prize pools of DotA tournaments.⁴⁸

4. DotA Legacies: From Community Ownership to Corporate Dominance

From freeware to community to leagues and finally, to tournaments, DotA had come a long way. But that was just the beginning. In 2005, Blizzard, the owner of Warcraft III, launched Blizzcon, its seminal video game convention.⁴⁹ While Blizzard spent most of the convention promoting its new games, it also had an unusual offering: a DotA

39. *Id.*

40. *Id.*

41. *See id.* Sometimes, credit would manifest in-game. For example, Guinsoo included a character named "Terrorblade" based on the ideas of community member "Terrorblaze." *See id.*

42. *DotA History*, LIQUIPEDIA (2017), http://liquipedia.net/dota2/index.php?oldid=490288&title=Dota_History [<https://perma.cc/E3FF-AGE6>].

43. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *12 (noting also that Neichus's real name is Stephen Moss).

44. *Id.* at *13 (noting also that Icefrog's real name is Abdul Ismail).

45. *Id.* at *13–14.

46. *Id.* at *14.

47. *Id.* at *14–15, 15 n.10 (noting also that Pendragon's real name is Steve Mescon).

48. *See Events for Defense of the Ancients*, E-SPORTS EARNINGS, <https://www.esportsearnings.com/games/163-defense-of-the-ancients/events> [<https://perma.cc/EEK9-SRH4>].

49. Phenteo (Shawn Silverman), *Blizzcon®: A Look Back*, BLIZZARD ENT. (Apr. 22, 2014), <https://blizzcon.com/en-us/news/13874223/%D1%80%D0%B5%D1%82%D1%80%D0%BE%D1%81%D0%BF%D0%B5%D0%BA%D1%82%D0%B8%D0%B2%D0%B0-blizzcon%C2%AE-22-04-2014> [<https://perma.cc/LA5X-XTDR>].

tournament.⁵⁰ Blizzard hosted a game that it had not created. Blizzcon 2005 revealed that corporations were now interested in this community-created video game.

In 2006, video game development company S2 Games recruited Icefrog to work on a stand-alone game called Heroes of Newerth (“HoN”).⁵¹ HoN is just one of many professional-grade successors to DotA, including LoL by Riot Games (“Riot”) and Dota 2 by Valve.⁵² Original members of the DotA community also supported these games. Riot employed Guinsoo and Pendragon.⁵³ Valve recruited Eul and, after his tenure at S2, Icefrog.⁵⁴ Late to the party, Blizzard, developer of the base game Warcraft III, released in 2015 its own spin on DotA — Heroes of the Storm (“HotS”).⁵⁵ With all of these games derived from DotA, there was one obvious question: did anyone own DotA?

Table 1: DotA Successors and Their Ties to DotA

DotA Successor Game	Year	Developer	DotA Community Members Involved
Heroes of Newerth (“HoN”)	2010	S2	Icefrog
League of Legends (“LoL”)	2009	Riot	Guinsoo, Pendragon
Dota 2	2013	Valve	Icefrog, Eul
Heroes of the Storm (“HotS”)	2015	Blizzard	None, but developed by the creators of Warcraft III

50. *Blizzcon Invitational*, BLIZZARD ENT. (Mar. 3, 2016), <https://web.archive.org/web/20070702160920/http://www.blizzard.com/blizzcon05/tournaments.shtml> [https://perma.cc/LK86-4VZV].

51. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *14.

52. *See id.* at *15.

53. Suzie Ford, *League of Legends: Marc Merrill Q&A*, WARCRY NETWORK (Jan. 23, 2009, 8:51 PM), <http://www.warcry.com/articles/view/interviews/5686-League-of-Legends-Marc-Merrill-Q-A> [https://perma.cc/BLP4-STWA].

54. *See Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *15.

55. Press Release, Blizzard Entm’t, Inc., Blizzard’s Worlds Collide When *Heroes of the Storm*™ Launches June 2 (Apr. 20, 2015), <https://www.businesswire.com/news/home/20150420005352/en/Blizzard%E2%80%99s-Worlds-Collide-Heroes-Storm%E2%84%A2-Launches-June#.VTUx1VVhBe> [https://perma.cc/R4WL-DUUL].

III. INTELLECTUAL PROPERTY CASES INVOLVING DOTA

A. Blizzard v. Valve (The DOTA Trademark)

Blizzard and Valve were — and still are — industry giants. Blizzard’s video game portfolio currently consists of 20 released video games;⁵⁶ Valve, 18.⁵⁷ In 2010, Blizzard, a subsidiary of publicly traded company Activision Blizzard, reported revenues of \$1.5 billion.⁵⁸ Market data firm SuperData estimated that Valve, a privately held company, had 2014 revenues of \$730 million.⁵⁹ In 2011, the United States Patent and Trademark Office published Valve’s application to trademark “Defense of the Ancients; DotA; Dota; [and] DOTA.”⁶⁰ It was inevitable that Blizzard and Valve would clash.

Blizzard was aware of Valve’s intent to trademark DOTA as early as October 2010. In an interview with gaming magazine *Eurogamer*, Blizzard game designer Rob Pardo said that “Blizzard was confused by Valve’s move” to register the DOTA mark⁶¹ — establishing that, at the very least, Blizzard was aware of Valve’s actions. Pardo continued that Blizzard “believe[d] it ha[d] the right to use the term in the name of its free StarCraft II mod, Blizzard DOTA”⁶² Blizzard highlighted three arguments that would eventually make their way to its opposition. First, that “DOTA came out of the Blizzard community.”⁶³ Second, that Valve was trying to exclusively trademark something that has “been freely available.”⁶⁴ Third, “that [DOTA] should continue to be available to Blizzard and to [its] community.”⁶⁵

One year later, Blizzard reiterated these arguments with force. The grounds for Blizzard’s opposition to Valve’s trademark registration were (1) priority and (2) likelihood of confusion.⁶⁶ These grounds

56. *See Games*, BLIZZARD ENT. (2018), <http://us.blizzard.com/en-us/games/> [<https://perma.cc/TW29-C4Q4>].

57. *See Games*, VALVE, <http://www.valvesoftware.com/games/> [<https://perma.cc/4M2R-8SM6>]; *Games: Back Catalog*, VALVE, <http://www.valvesoftware.com/games/back-catalog.html> [<https://perma.cc/677G-EQ3K>].

58. ACTIVISION BLIZZARD, 2010 ANNUAL REPORT 1 (2010).

59. Phil Savage, *Market Data Firm Claims Valve Made \$730 Million Last Year*, PC GAMER (2015), <http://www.pcgamer.com/market-data-firm-claims-valve-made-730-million-last-year/> [<https://perma.cc/7Z6U-38N9>].

60. *See* Notice of Opposition, *Blizzard Entm’t Inc. v. Valve Corp.*, Opp’n No. 91202572 to App. Serial No. 85/102245 (TTAB Nov. 16, 2011).

61. Oli Welsh, *Valve Shouldn’t Trademark DOTA - Blizzard*, EUROGAMER (2010), <http://www.eurogamer.net/articles/2010-10-23-valve-shouldnt-trademark-DotA-blizzard> [<https://perma.cc/692L-7HLB>]; *see generally* Notice of Opposition, *supra* note 60.

62. Welsh, *supra* note 61.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Notice of Opposition, *supra* note 60, ¶¶ 23–25.

correspond to § 2(d) of the Lanham Act, which prohibits registering a trademark if the mark

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to *cause confusion*, or to cause mistake, or to deceive⁶⁷

To successfully oppose Valve’s application, Blizzard therefore had to show that: (1) the DOTA mark was previously used in the United States, (2) this use was by another, (3) its use has not been abandoned, and that (4) the mark was reasonably likely to cause consumer confusion.

Blizzard’s opposition articulated that (1) the DOTA mark was previously used in the United States by arguing that it “ha[d] been used as the popular name for a Warcraft III software ‘mod’ that has been distributed, marketed, and promoted by Blizzard and its fans (under license from Blizzard).”⁶⁸ This parenthetical is important: Blizzard later claimed that it, and not Valve, deserved the trademark. Blizzard later added that “DotA Mods have been downloaded and played by hundreds of thousands of people throughout the United States and the world.”⁶⁹ Blizzard then clarified that (2) Valve never used the DOTA mark “with any product or service that currently is available to the public” prior to the application.⁷⁰ By contrast, Blizzard asserted that its use of the DOTA mark had been continuous and (3) therefore the company had not abandoned it.⁷¹ Lastly, Blizzard claimed that Valve filed the application (4) “in order to confuse consumers as to Blizzard’s sponsorship, affiliation, or endorsement of Valve’s products.”⁷²

Blizzard’s opposition had one more nuance. Rather than simply opposing Valve, Blizzard had set the stage for registering the DOTA mark. The “under the license from Blizzard” parenthetical was Blizzard’s first jab — introducing the theory that developing DotA using software that Blizzard had licensed to its creators gave Blizzard an ownership interest in it. Blizzard then advanced a legal argument. In 2008, Guinsoo and Pendragon “each assigned all of their rights in and

67. 15 U.S.C. § 1052(d) (2012) (emphasis added).

68. Notice of Opposition, *supra* note 60, ¶ 1.

69. *Id.* ¶ 14.

70. *Id.* ¶ 2.

71. *See id.* ¶ 1 (noting that the DOTA mark “for more than seven years ha[d] been used exclusively by Blizzard and its fan community, under license from Blizzard”).

72. *Id.* ¶ 22.

to the DotA Mods . . . to ‘DotA-Allstars, LLC.’”⁷³ DotA-Allstars, LLC was then transferred to Riot, who then transferred it to Blizzard.⁷⁴ Thus, Blizzard argued, it possessed Guinsoo’s and Pendragon’s ownership interests.⁷⁵

It is likely that, as a threshold issue, Blizzard would have had to show that it had standing to oppose the trademark under the Lanham Act.⁷⁶ The Federal Circuit requires “a reasonable basis for believing [an opposer] would suffer damage if the mark is registered” which must have “a basis in fact.”⁷⁷ Having a registered mark — a direct way to show standing — did not apply in Blizzard’s case.⁷⁸ Neither could Blizzard have shown that the DOTA mark “denigrate[ed] [its] values.”⁷⁹ Indeed, Blizzard’s own use of the DotA name would likely have precluded such an argument.⁸⁰ Blizzard’s most viable argument, that it “used the DOTA Marks extensively and consistently in interstate commerce,”⁸¹ ignored the fact that someone else created DotA.⁸² To establish standing, Blizzard would have had to convince a court to conclude that, as a matter of law, corporations can register marks created by unaffiliated individuals.

The case never went to trial because Blizzard backed down. On May 11, 2012, Blizzard issued a press release noting that, although it would retain the right to use the DOTA mark non-commercially, “Valve [would] continue to use DOTA commercially.”⁸³ Likely deciding that the risk of trial was too high, Blizzard struck a deal with Valve.⁸⁴ Considering the controversy this lawsuit created within the gaming community,⁸⁵ settling with Valve was a valid move. And, considering that Blizzard did not create DotA, it was probably the right

73. *Id.* ¶ 21.

74. *Id.*

75. *Id.*

76. *See* 15 U.S.C. § 1063 (2012) (requiring a trademark opponent to “believe[] that he would be damaged by the registration of a mark”).

77. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012) (internal quotation marks and citation omitted).

78. *Cf. id.* at 1377 (finding standing when the party opposing the mark has a registered mark of record).

79. *Ritchie v. Simpson*, 170 F.3d 1092, 1098 (Fed. Cir. 1999) (holding that a petition indicating nationwide moral opposition to the mark satisfied the Lanham Act’s standing requirement).

80. Notice of Opposition, *supra* note 60, ¶ 16.

81. *Id.*

82. *See supra* Section II.B.

83. Mathew McCurley, *Blizzard and Valve Settle on DOTA*, ENGADGET: THE LAWBRINGER (May 18, 2012), <https://www.engadget.com/2012/05/18/the-lawbringer-blizzard-and-valve-settle-on-DotA/> [<https://perma.cc/MVH3-MBYW>].

84. *See id.*

85. *See, e.g.*, Richard Cobbett, *DOTA vs Dota 2: Valve and Blizzard Go to War*, PC GAMER (Aug. 23, 2011), <http://www.pcgamer.com/dota-vs-dota-2-valve-and-blizzard-go-to-war/> [<https://perma.cc/Y4DQ-M3YX>] (“What’s interesting about this fight is that it’s set to be primarily one for the hearts and minds of players rather than a duel of lawyers.”).

move. Blizzard renamed Blizzard DOTA to Blizzard All-Stars, and eventually, HotS.⁸⁶ Meanwhile, Valve developed Dota 2. The DOTA trademark, as of 2018, is still registered to Valve.⁸⁷

B. Blizzard v. Lilith (The DotA Copyrights)

The settlement reached by Blizzard and Valve was apparently more than just an amicable parting of ways — it was a partnership. Copyright records show that Blizzard and Valve share ownership over several DotA copyrights.⁸⁸ In 2015, Blizzard, together with Valve, brought suit against Lilith and uCool for allegedly infringing the DotA copyrights.⁸⁹ Both of these companies created smartphone games which Blizzard and Valve alleged were based on the DotA universe: Lilith created DotA Legends, and uCool created Heroes Charge.⁹⁰ In this case, the court concluded that although the plaintiffs had “plausibly alleged ‘ownership of a valid copyright,’” they failed “to apprise uCool or the court of which ‘Heroes Charge’ characters infringe[d] which characters from which of Blizzard or Valve’s numerous games.”⁹¹ The court therefore dismissed Blizzard and Valve’s initial filing with leave to amend.⁹²

Two years later, the same court rejected uCool’s motion to dismiss Blizzard and Valve’s amended complaint.⁹³ uCool then moved for partial summary judgment on the grounds that “neither Blizzard nor Valve had adequately pled ownership of the original DotA.”⁹⁴ In rejecting uCool’s motion, the court turned its attention on three issues: first, the validity of the DotA copyrights; second, the original ownership of the copyrights; and third, the assignment of the copyrights.⁹⁵ It then concluded that, although the DotA copyrights were indeed valid, there was

86. Evan Narcisse, *Blizzard’s Diablo/Starcraft/WoW Crossover Has a New Name*, KOTAKU (Oct. 17, 2013, 2:30 PM), <https://kotaku.com/blizzard-s-diablo-starcraft-wow-crossover-has-a-new-nam-1447238984> [<https://perma.cc/ZY4G-FKU6>].

87. *Trademark Guidelines*, VALVE (2018), <http://www.valvesoftware.com/trademarkguidelines.html> [<https://perma.cc/DMQ5-C23F>].

88. *See, e.g.*, DOTA 6.68, Registration No. TX0008153084; DOTA 6.83, Copyright No. TX0008149056.

89. *See* Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd., 149 F. Supp. 3d 1167, 1169–70 (N.D. Cal. 2015).

90. *Id.* at 1170. One can surmise that there are significant similarities between DotA and DotA Legends from the name alone. As for Heroes Charge, Blizzard and Valve later alleged that uCool copied music, artwork, and character names from DotA. *See* First Amended Complaint ¶¶ 45–54, Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd., No. 3:15-cv-04084-CRB (N.D. Cal. May 16, 2017).

91. *Blizzard*, 149 F. Supp. 3d at 1172, 1175.

92. *Id.* at 1176.

93. *See* Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd., No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *31 (N.D. Cal. May 16, 2017). Lilith did not join uCool’s motion. *Id.*

94. *Id.* at *16–17.

95. *See id.* at *18.

a genuine question of fact as to original ownership and proper assignment.⁹⁶

1. The Existence of the DotA Copyrights: A Question of Law

Traditionally, a modification of a video game is considered a derivative work that infringes upon the base game's copyright.⁹⁷ The leading case, *Midway Manufacturing Co. v. Artic International, Inc.*, dealt with a "speeded-up" video game,⁹⁸ which, in essence, is a video game mod.⁹⁹ The *Midway* court held that "[t]he owner of the copyright on the game should be entitled to monopolize [the speeded-up version]."¹⁰⁰ This approach was imported to the Ninth Circuit via *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*¹⁰¹ That case dealt with the Game Genie — a device that "allow[ed] players to alter up to three features of a Nintendo game."¹⁰² Although the *Lewis Galoob* court held that the Game Genie was not a derivative work under *Midway* because it did not "physically incorporate a portion of a copyrighted work, nor . . . supplant demand," it nevertheless acknowledged *Midway* as good law within the Ninth Circuit.¹⁰³ *Blizzard v. Lilith*, in accord with the traditional approach, acknowledged DotA mods as derivative works,¹⁰⁴ and therefore as copyrightable.¹⁰⁵

uCool did not challenge Blizzard and Valve's assertion that the DotA mods, as derivative works, were entitled to copyright protection.¹⁰⁶ However, it argued that all of the DotA mods, taken together, constituted a "collective work"¹⁰⁷ — i.e., a "work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."¹⁰⁸ Under 17 U.S.C. § 201, "the owner of copyright in the collective work is presumed to have acquired *only* the privilege of *reproducing and distributing* the

96. *Id.* at *21–27.

97. *See* *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1013–14 (7th Cir. 1983).

98. *Id.* at 1013.

99. *See supra* text accompanying note 24.

100. *Id.* at 1014.

101. *See generally* 964 F.2d 965 (9th Cir. 1992).

102. *Id.* at 967.

103. *Id.* at 969 (applying but limiting *Midway* because "[s]tretching [*Midway*] further would chill innovation and fail to protect 'society's competing interest in the free flow of ideas, information, and commerce.'").

104. *See* *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *19 (N.D. Cal. May 16, 2017) (citing 17 U.S.C. § 101). Notably, the court did not cite to *Midway* or *Lewis Galoob*.

105. *See* 17 U.S.C. § 103 (2012).

106. *See* Motion to Dismiss First Amended Complaint filed by uCool, Inc. at 5–11, *Blizzard*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639 (N.D. Cal. Sept. 8, 2015).

107. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *20.

108. 17 U.S.C. § 101 (2012).

contribution as part of that particular collective work.”¹⁰⁹ Under uCool’s theory, copyrights in the DotA mods would not prevent other companies from creating derivative works of their own. But *Blizzard v. Lilith* rejected uCool’s contention that all of DotA is a collective work.¹¹⁰ Although certain versions of DotA, such as DotA Allstars, combined different versions of DotA together,¹¹¹ “each version of DotA Allstars [was] no collective work.”¹¹² Each version of DotA is therefore a unitary, derivative work and entitled to full protection under the Copyright Act.¹¹³

2. The Ownership of the DotA Copyrights: A Question of Fact

Blizzard v. Lilith then tackled the difficult issue of who originally held the rights to DotA. It is established Ninth Circuit law that the mastermind of a work is considered the author of that work under the Copyright Act.¹¹⁴ Whether a particular modder is the author of any given DotA version is a question of fact.¹¹⁵ The court conceded that there were several versions of DotA, and that we may never know who created each of them.¹¹⁶ But because ownership is a question of fact that must go to the jury, the court held that summary judgment on this issue was improper.¹¹⁷ A jury may therefore ultimately decide the fate of the DotA copyrights.

This holding is sound. Despite having inputs from other members of the DotA community,¹¹⁸ “Eul, Guinsoo, and Icefrog were the masterminds of their respective versions.”¹¹⁹ Receiving recommendations from the DotA community is insufficient to challenge the authorship of a given DotA version. Although case law on the authorship of derivative video games is sparse, adjudication of movie authorship is instructive. In *Aalmuhammed v. Lee*, Spike Lee was sued over the authorship of the movie *Malcolm X*.¹²⁰ Plaintiff Aalmuhammed attempted to assert co-authorship of the movie, showing that he contributed “at least two entire scenes with new characters, translated Arabic into English for subtitles, supplied his own voice for voice-overs, selected the proper prayers and religious practices for the characters, and edited parts of the

109. 17 U.S.C. § 201 (2012) (emphasis added).

110. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *21.

111. *See id.* at *10.

112. *Id.* at *21.

113. *Id.*

114. *Cf. Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (defining an “author as the person to whom the work owes its origin and who superintended the whole work”).

115. *See id.* at 1236 (holding that authorship is a question of fact).

116. *See Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *21.

117. *Id.* at *23–24.

118. *See supra* Sections II.B.2–3.

119. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *22.

120. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1229 (9th Cir. 2000).

movie during post production.”¹²¹ The Ninth Circuit held this insufficient to show a genuine issue of fact regarding authorship.¹²² The court found that Aalmuhammed’s contributions stemmed from mere recommendations, and Spike Lee was not bound to accept any of them.¹²³ Thus, “Aalmuhammed lacked control over the work, and absence of control is strong evidence of the absence of co-authorship.”¹²⁴

Evidence may well show — or refute — that Eul, Guinsoo, and Icefrog had final say in what went in their respective DotA versions. Whether a suggestion makes it into a movie, or in this case a video game mod, is irrelevant under *Aalmuhammed*.¹²⁵ It should be left to a jury, as the proper fact-finder, to decide whether Eul, Guinsoo, and Icefrog — in contrast to Spike Lee — shared control with others. But as the *Blizzard v. Lilith* court pointed out, while other people may have had a hand in creating a given DotA version, their cases are “not uCool’s [] to make.”¹²⁶ Unlike *Aalmuhammed*, neither uCool nor Lilith were involved when Eul, Guinsoo, or Icefrog made their DotA versions.¹²⁷ Note Judge Breyer’s parenthetical: “a reasonable jury could (*and perhaps must*) conclude that Eul, Guinsoo, and Icefrog are the authors of the various works at issue here.”¹²⁸ This was a thinly-veiled signal of the court’s disposition, should uCool or Lilith rely on the “collective work” argument again.

3. The Validity of DotA’s Assignments: A Question of Fact

Notwithstanding the possibility that the copyrights at issue never originally belonged to Eul, Guinsoo, or Icefrog, the court turned to the validity of copyright assignment.¹²⁹ It confined this analysis to Eul and Icefrog’s assignment of their DotA-related rights to Valve.¹³⁰ Guinsoo’s absence is interesting. On the one hand, it made sense for the court to skip over Guinsoo — after all, Guinsoo was affiliated with Riot, and therefore neither Blizzard nor Valve could assert his copyright(s).¹³¹ But at the same time, the court went to great lengths to

121. *Id.* at 1230.

122. *Id.* at 1232–33.

123. *Id.* at 1235.

124. *Id.*

125. *See id.*

126. *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *31 (N.D. Cal. May 16, 2017).

127. At the very least, they do not allege this. *See generally Blizzard*, 2017 U.S. Dist. LEXIS 74639.

128. *Id.* at *23 (emphasis added).

129. *Id.* at *27.

130. *Id.*

131. *Cf. id.* (“Valve concedes that it must have validly acquired Eul’s and Icefrog’s copyrights in DotA and DotA Allstars by assignment to assert copyrights in those games.”).

discuss Guinsoo's impact on the DotA copyrights.¹³² The court even stated that "the record contain[ed] ample evidence that Eul, Guinsoo, and Icefrog were the masterminds behind their respective versions of DotA and DotA Allstars."¹³³ What *Blizzard v. Lilith* implies is this: its analysis applies to Guinsoo. Section III will address the significance of this implication.

Turning to the merits of assignment, there are three sub-issues. First, did Blizzard's Warcraft III World Editor EULA, under which all versions of DotA were created, prevent valid copyright assignment?¹³⁴ Second, did Icefrog previously assign his rights to S2 when developing HoN?¹³⁵ Third, in posting "from this point forward, DotA is now open source," did Eul abandon his ownership interests?¹³⁶ The court ruled against uCool on the first two sub-issues. First, although the court found that there was a provision in Blizzard's Warcraft III EULA that explicitly prevented Eul and Icefrog from using "their creations for commercial purposes," uCool "twice failed to argue that the ban prevented Eul and Icefrog from validly assigning their rights to Valve."¹³⁷ Understandably, the court ruled that uCool waived the argument.¹³⁸ Second, the court rejected uCool's contention that Icefrog, while an employee of S2, had already previously assigned his DotA rights to S2.¹³⁹ S2 did indeed own "intellectual property rights that Icefrog 'created in connection' with Heroes of Newerth."¹⁴⁰ S2's ownership, however, did not apply to intellectual property rights created in connection with DotA.¹⁴¹ Thus, neither the EULA argument nor the S2 argument succeeded in voiding Valve's copyright interest in DotA.

The third issue was more contentious. Recall Eul's forum post: "from this point forward, DotA is now *open source*. Whoever wishes to release a version of DotA may *without my consent*, I just ask for a *nod in the credits to your map*."¹⁴² Judge Breyer dissected this into three sections. Two cut in favor of abandonment. First, declaring DotA "open source" would allow a reasonable jury to find complete abandonment.¹⁴³ Second, Eul's language, "[w]hoever wishes to release a version of DotA without my consent," may, ironically, be interpreted as consent.¹⁴⁴ The third, however, cuts against abandonment. One could

132. *See id.* at *11–13.

133. *Id.* at *22 (emphasis added).

134. *See id.* at *27–28.

135. *See id.* at *30.

136. *See id.* at *9–10, 28–29.

137. *Id.* at *27–28.

138. *Id.* at *28.

139. *Id.* at *30.

140. *Id.* (citing Icefrog and S2's 2006 Agreement).

141. *Id.*

142. *Id.* at *9–10 (emphasis added).

143. *Id.* at *28 (citing *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998)).

144. *See id.* at *28–29.

interpret asking for a “nod in the credits to your map” as a limited license.¹⁴⁵ Ultimately, Judge Breyer concluded that there is a genuine dispute as to a material fact — whether Eul abandoned his ownership interest.¹⁴⁶ Thus, the fate of the DotA copyrights may turn on a jury’s interpretation of a 2004 forum post, written by then-high school student Kyle “Eul” Sommer.

The fate of the DotA copyrights is uncertain; *Blizzard v. Lilith* is ongoing. On September 29, 2017, Blizzard and Valve filed an unopposed motion to amend their complaint,¹⁴⁷ which the court granted.¹⁴⁸ Lilith, heretofore uninvolved, filed a motion to dismiss.¹⁴⁹ So too did uCool.¹⁵⁰ On March 8, 2018, the court denied both motions to dismiss with respect to the DotA IP.¹⁵¹ Thus, litigation is set to proceed.

IV. BUSINESS IMPLICATIONS OF THE DOTA STORY

The dust has begun to settle around DotA IP. However, the aftershocks of the fight for DotA’s IP will have significant consequences — not only on DotA, but also on other mods or community-created content that may one day become multimillion-dollar franchises. Battles over the IP of other eSports have yet to begin. This Section discusses the future of DotA and extrapolates tactics that future entrants to the eSports industry can use to secure their IP.

A. *The Fate of the DOTA Trademark*

Post-*Blizzard v. Valve*, the DOTA trademark is fairly stable. Legally, the mark is registered to Valve.¹⁵² But there seems to be some contractual agreement between Blizzard and Valve that, at the very

145. *Id.* at *29.

146. *Id.* at *29–30.

147. Plaintiff’s Motion for Leave To File Second Amended Complaint, *Blizzard*, No. 3:15-cv-04084-CRB (N.D. Cal. Sept. 29, 2017).

148. Order by Judge Breyer Granting Motion for Leave To File Second Amended Complaint, *Blizzard*, No. 3:15-cv-04084-CRB (N.D. Cal. Nov. 1, 2017).

149. Motion by Defendant To Dismiss Plaintiff’s Second Amended Complaint, *Blizzard*, No. 3:15-cv-04084-CRB (N.D. Cal. Nov. 17, 2017).

150. Defendants’ Motion To Dismiss Plaintiffs’ Corrected Second Amended Complaint, *Blizzard*, No. 3:15-cv-04084-CRB (N.D. Cal. Dec. 5, 2017).

151. Order by Judge Breyer Granting in Part and Denying in Part 216 Motion To Dismiss by Lilith; Denying 228 Motion to Dismiss by uCool Defendants., *Blizzard*, No. 3:15-cv-04084-CRB (N.D. Cal. Dec. 5, 2017). The district court granted in part Lilith’s motion insofar as Blizzard failed to provide specific examples of Lilith allegedly infringing its Starcraft and Diablo IP. *See id.* at 10. But because Blizzard and Valve “sufficiently allege[d] representative examples” related to at least one iteration of the Warcraft games, DotA, Dota 2, Hearthstone, and HoS, the court denied Lilith’s motion to dismiss. *Id.*

152. *Trademark Guidelines*, VALVE (2018), <http://www.valvesoftware.com/trademark-guidelines.html> [<https://perma.cc/K4WP-BZ2A>].

least, permits Blizzard to use the mark non-commercially.¹⁵³ Like most settlements, the terms of the Blizzard-Valve agreement are not public; we can only speculate as to Blizzard's allowed use. Based on Blizzard and Valve's cooperation in *Blizzard v. Lilith*, however, the settlement may have led to an IP alliance. But for now, the only clarity is that Valve has a registered mark — and it plans to protect it.¹⁵⁴

It has been over five years since *Blizzard v. Valve*, and thus grounds for trademark cancellation under 15 U.S.C. § 1064 are more limited.¹⁵⁵ Several grounds for trademark cancellation, namely on claims of actual harm, or harm from trademark dilution, are statutorily barred by time.¹⁵⁶ The remaining grounds are: misrepresentation of source,¹⁵⁷ abandonment,¹⁵⁸ registration fraud,¹⁵⁹ “genericide,”¹⁶⁰ and loss of control.¹⁶¹ Valve is a large company deriving a significant portion of its revenue from Dota 2,¹⁶² therefore the odds that it misrepresents or abandons the DOTA mark are slim. Valve, as a dominant player and early mover in the eSports space,¹⁶³ has no incentive to risk its trademark by misrepresentation. For the same reason, Valve will not let its trademark lapse. It is also unlikely that a rival company will allege that Valve fraudulently obtained its trademark. In *Blizzard v. Lilith*, Blizzard, another large — and sophisticated — company¹⁶⁴ did not challenge Valve's registration.¹⁶⁵ Presumably, Blizzard anticipated that a fraudulent registration challenge would fail; other companies may conclude the same.

153. See McCurley, *supra* note 83.

154. See VALVE, *supra* note 152.

155. See 15 U.S.C. § 1064 (2012) (governing the grounds under which one may petition to cancel a trademark).

156. *Id.*

157. *Karoun Dairies, Inc. v. Karoun Dairies, Inc.*, No. 08cv1521-L(WVG), 2010 U.S. Dist. LEXIS 94872, at *27 (S.D. Cal. Sept. 13, 2010) (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 20:60 (4th ed. 2010)) (“A cancellation claim for misrepresentation under § 14(3) requires a pleading that registrant deliberately sought to pass off its goods as those of petitioner.”).

158. 15 U.S.C. § 1064(3).

159. *Id.*

160. 1–2 ANNE GILSON LALONDE & JEROME GILSON, GILSON ON TRADEMARKS § 2.02(7)(a) (2017) (“Trademark owners will lose their rights if the purchasers of their products come to relate the word to the products themselves and no longer to the trademark owner as the source [O]ften termed ‘genericide’”).

161. 15 U.S.C. § 1064(5).

162. See Savage, *supra* note 59 (estimating Valve's 2014 annual revenue at \$730 million of which Dota 2 and two other games represent approximately \$400 million).

163. See *supra* Section II.A.

164. See, e.g., ACTIVISION BLIZZARD, 2010 ANNUAL REPORT 1 (2010), http://files.shareholder.com/downloads/ACTV/5739601430x0x461467/F432BA16-3D54-4EDB-9269-4F744E33B771/Activision_Blizzard_2010_ARS_Final_PDF.pdf [<https://perma.cc/VXU8-X9ZX>].

165. See *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *1–31 (N.D. Cal. May 16, 2017).

DotA is unlikely to become a generic name under 15 U.S.C. § 1064(3)¹⁶⁶ because of the video game industry’s efforts to deter consumers from using the colloquial term, “DotA clone.”¹⁶⁷ Under Ninth Circuit precedent, a trademark becomes generic when it “enter[s] our public discourse and become[s] an integral part of our vocabulary.”¹⁶⁸ In other words, if a trademark becomes too colloquial — for example Aspirin¹⁶⁹ — it ceases to be a valid trademark. This is genericide.¹⁷⁰ Since 2009, a number of so-called “DotA clones” have entered the market, heralding a new genre of video games.¹⁷¹ Had the industry acknowledged this genre as “DotA clones” or worse, plainly “DotA” games, Valve’s DOTA trademark may well have joined the ranks of “thermos,” “cellophane,” and “escalator”: generified brands.¹⁷²

But Riot was so keen on avoiding the “DotA clone” label that it coined its own name for the genre: Multiplayer Online Battle Arenas (“MOBA”).¹⁷³ Riot wanted to differentiate LoL from its predecessor.¹⁷⁴ So too did Valve — in a 2011 Dota 2 promotional, Valve CEO Gabe Newell created his own term: “Action Real Time Strategy” (“ARTS”).¹⁷⁵ Whether by chance or by design, the widespread use of the terms MOBA and ARTS¹⁷⁶ will likely prevent DotA’s genericide. It distances the genre from the terms’ origin: DotA. Introducing one genre label may cause fewer people to refer to such games as “DotA clones” or “DotA-like;”¹⁷⁷ introducing two forces a branding war.¹⁷⁸ With players compelled to pick sides, the number of people who would

166. 15 U.S.C. § 1064(3).

167. See, e.g., Alex P. Leith, *League of Legends*, in 100 GREATEST VIDEO GAME FRANCHISES 102, 102 (Robert Mejia, Jaime Banks & Aubrie Adams eds., 2017) (explaining that in 2009, there existed a “standard ‘DotA clone’ tag”); see also Drew S. Dean, *Hitting Reset: Devising A New Video Game Copyright Regime*, 164 U. PA. L. REV. 1239, 1249–50 (2016) (noting the often pejorative use of the term “clone” for games that “copy salient aspects of other games’ mechanics, graphics, or stories . . .”).

168. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002).

169. *Bayer Co. Inc. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

170. GILSON LALONDE & GILSON, *supra* note 160.

171. Leith, *supra* note 167.

172. See GILSON LALONDE & GILSON, *supra* note 160.

173. Leith, *supra* note 167.

174. See *id.*

175. See Christian Nutt, *The Valve Way: Gabe Newell and Erik Johnson Speak*, GAMASUTRA (Aug. 29, 2011), https://www.gamasutra.com/view/feature/6471/the_valve_way_gabe_newell_and_.php?page=3 [<https://perma.cc/Y6BE-N8DU>].

176. See John Funk, *MOBA, DOTA, ARTS: A Brief Introduction to Gaming’s Biggest, Most Impenetrable Genre*, POLYGON (Sept. 2, 2013), <https://www.polygon.com/2013/9/2/4672920/moba-DotA-arts-a-brief-introduction-to-gamings-biggest-most> [<https://perma.cc/4BCT-F8U8>].

177. Cf. John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFFALO INTELL. PROP. L.J. 154, 160 (2004) (noting that genericide will occur if trademarked name has no publically-accepted alternative).

178. See, e.g., *The Epic Brand War in Indian Advertisement*, LITMUS BRANDING (May 10, 2017), <https://www.litmusbranding.com/blog/brand-war-in-indian-advertisement/> [<https://perma.cc/86NA-KMFC>] (listing brand wars).

invoke the DotA name when referring to the genre will continue to decrease.¹⁷⁹ Regardless of the war's outcome, DOTA will not become generic.

Lastly, Valve is unlikely to lose control of its trademark because its only known licensee, Blizzard, does not actually use the DotA brand. In the Ninth Circuit, a company loses control of its trademark if it engages in naked licensing,¹⁸⁰ which occurs if the company failed to: "(1) retain[] contractual rights to control the quality of the use of its trademark; (2) actually control[] the quality of the trademark's use; or (3) reasonably rel[y] on [a licensee] to maintain the quality."¹⁸¹ Blizzard's press release reveals that the *Blizzard v. Valve* settlement includes only one carve out for the use of the DotA name: "Blizzard will preserve *noncommercial use* of DOTA for its community with regard to *player-created maps for Warcraft III and StarCraft II*."¹⁸² These two restrictions are evidence that Valve is keeping Blizzard on a short leash with regards to using the DOTA mark. The "noncommercial use" restriction means that Blizzard is unlikely to invest heavily on a product using the DOTA mark — a company will rarely expend resources on a product it cannot profit from. The "player-created maps" restriction ensures that Blizzard's use of the DOTA mark will not leave the confines of two games that are already, at this point, over seven years old.¹⁸³ Thus, even without knowing the express terms of the Blizzard-Valve settlement, Valve's restrictions on Blizzard's use of the DOTA trademark seems limited enough to mitigate the risk of naked licensing.

B. The Fate of the DotA Copyrights

Unlike the DOTA trademark, the status of the DotA copyrights is in flux. Under *Blizzard v. Lilith*, there is no single DotA copyright; each version — and each author — has its own independent copyright. Although Judge Breyer, potential reversal notwithstanding, held that Blizzard and Valve presumably hold the copyrights to the Guinsoo and

179. *Compare Search Results - Multiplayer Online Battle Arena*, REDDIT (Mar. 9, 2018), https://www.reddit.com/search?q=multiplayer+online+battle+arena&restrict_sr=&sort=relevance&t=all [<https://perma.cc/U35M-2S68>] (listing forum posts discussing MOBA), *with Search Results - "Action Real Time Strategy"*, REDDIT (Mar. 9, 2018), https://www.reddit.com/search?q=%22action+real+time+strategy%22&restrict_sr=&sort=relevance&t=all&count=22&after=t3_luakd [<https://perma.cc/JP43-UG57>] (listing forum posts discussing ARTS).

180. *Barcamerica Int'l USA Tr. v. Tyfield Imps., Inc.*, 289 F.3d 589, 591 (9th Cir. 2002).

181. *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 512 n.1 (9th Cir. 2010).

182. McCurley, *supra* note 83 (emphasis added).

183. *Warcraft III* was released in 2002. *Warcraft III: Reign of Chaos*, BLIZZARD ENT., <http://us.blizzard.com/en-us/games/war3/> [<https://perma.cc/SQ4V-C2QW>]. *StarCraft II* was released in 2010. *StarCraft II: Wings of Liberty*, BLIZZARD ENT., <http://us.blizzard.com/en-us/games/sc2/> [<https://perma.cc/8VE5-XRQN>].

Icefrog versions, a jury will decide the status of the Eul version.¹⁸⁴ There are three potential outcomes. First, Blizzard and Valve prevail and collectively own the copyrights to all three versions. Second, uCool prevails and Eul's version belongs to the public. Third, the parties settle.

If the jury finds for Blizzard and Valve, it would effectively consolidate the copyrights of the three DotA versions. But that still does not definitively answer the question of who owns them. In its opposition in *Blizzard v. Valve*, Blizzard claimed ownership over Guinsoo's version.¹⁸⁵ Meanwhile, Valve employed Eul and Icefrog to work on Dota 2.¹⁸⁶ Without knowing the details of Blizzard and Valve's copyright ownership arrangement,¹⁸⁷ a reasonable presumption is that Blizzard owns Guinsoo's DotA, while Valve owns Eul's and Icefrog's. The details may be buried in a private agreement between the two companies. Given their partnership in *Blizzard v. Lilith*, Blizzard and Valve likely have a protocol for dealing with potential copyright disputes over DotA.¹⁸⁸ Thus, they are more likely to turn to negotiations, rather than the courts, to resolve potential copyright disputes.

If the jury finds for uCool, then only Guinsoo and Icefrog's copyrights would remain consolidated. Assuming that the jury finds that Eul gave up his copyright, Eul's DotA would be available to the public. Under 17 U.S.C. § 106(2), which grants "the owner of copyright . . . exclusive rights to . . . prepare derivative works based on the copyrighted work,"¹⁸⁹ Blizzard and Valve can control the future versions of DotA derived from Guinsoo and Icefrog's versions. But they would not be able to control versions that derive from Eul's publicly-owned version. Eul's version was the primordial DotA, from which "[d]ifferent strains of DotA quickly grew."¹⁹⁰ It is likely that a court would find that Eul created the initial look and feel of the game, or, at the very least, that Eul "conceived of DotA's setting, heroes, rules, and name."¹⁹¹

This alternative finding — that Eul's copyright is in the public domain — would be a disaster for Blizzard and Valve. In 2014, the Seventh Circuit faced this scenario in the context of Sherlock Holmes.¹⁹² The court in *Klinger v. Conan Doyle Estate*, rather than dealing with an abandoned progenitor — e.g. Eul's DotA — dealt with an expired

184. *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *29–30 (N.D. Cal. May 16, 2017).

185. Notice of Opposition, *supra* note 60, ¶ 21.

186. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *15.

187. *See, e.g.*, DOTA 6.68, Registration No. TX0008153084; DOTA 6.83, Registration No. TX0008149056.

188. *See Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *3 ("Blizzard and Valve, who themselves settled copyright disputes between them, are now suing Lilith and uCool.").

189. 17 U.S.C. § 106(2) (2012).

190. *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *10.

191. *Id.* at *9.

192. *See Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 496 (7th Cir. 2014).

progenitor: early Sherlock Holmes stories.¹⁹³ The court rejected an argument that “a ‘complex’ character in a story, such as Sherlock Holmes or Dr. Watson, whose full complexity is not revealed until a later story” would retain copyright protection until their full story entered the public domain.¹⁹⁴ Post-*Klinger*, anyone could use, or even modify, early versions of Sherlock Holmes characters as they were no longer under copyright protection, even though later versions still were.¹⁹⁵ Eul’s DotA would be similar in status to early, unprotected Sherlock Holmes stories; Valve and Blizzard’s ownership of later versions could not prevent companies like uCool from building on Eul’s DotA.

The third scenario, albeit unlikely, is a settlement. If Blizzard and Valve choose to settle with uCool, the terms will likely include either an injunction,¹⁹⁶ or a license to uCool in exchange for royalties.¹⁹⁷ Perhaps they may even invite uCool into their DotA IP alliance. However, the benefit of this arrangement is temporary at best. While settlement will not result in the invalidation of Eul’s DotA copyright(s), Blizzard and Valve would set a different precedent: a willingness to settle after suing for infringement. Other companies seeking to capitalize on DotA would have no incentive not to infringe. If Blizzard and Valve settle with a company that had no previous ties to the franchise, then they could conceivably be willing to settle with anyone. A settlement with uCool would just delay the inevitable trial on the merits.

Regardless of outcome, Blizzard and Valve face one more legal threat to their ownership of the DotA copyrights. In *Blizzard v. Lilith*, the court concluded that if other contributors to DotA feel cheated, they may litigate.¹⁹⁸ This invites the other DotA creators to demand a slice of the pie. Other DotA developers, such as Neichus, Meian, or Madcow,¹⁹⁹ may not push their claims directly; instead, companies looking for an entry into the franchise may push claims for them.²⁰⁰ The

193. *Id.* at 497.

194. *Id.* at 498, 500–02.

195. *Id.* at 501. (“The ten Holmes-Watson stories in which copyright persists are derivative from the earlier stories, so only original elements added in the later stories remain protected.”).

196. *Cf.* Consent Judgment at 5, *Augusta National, Inc. v. CustomPlay Games Ltd.*, No. 1:11-cv-00119 (S.D. Ga. Sept. 27, 2011) (enjoining a video game company from using a family of trademarks as part of a copyright infringement settlement).

197. Tomo Inc. allegedly sold pirated Atari software. *See* Complaint, *Atari Interactive, Inc. v. Wan*, No. 2:11-cv-05224 (C.D. Cal. Jun. 22, 2011). The parties settled, and their settlement included a licensing agreement. Stipulation of Dismissal with Prejudice Pursuant to Federal Rule of Civil Procedure 41(a) at 2, *Atari*, No. 2:11-cv-05224 (C.D. Cal. Jan. 6, 2012).

198. *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639, at *31 (N.D. Cal. May 16, 2017).

199. *See supra* text accompanying note 32.

200. A related phenomenon occurs with patent trolls, who buy patents only to assert them against companies for money. *See generally* Patricia S. Abril & Robert Plant, *The Patent Holder’s Dilemma: Buy, Sell, or Troll?*, 1 COMM. A.C.M. 36 (2007). In the eSports context, a similar mechanism may occur with a different payout: rather than money, winning the case means entry into the franchise.

Blizzard and Valve partnership may be tested against companies backing other claimants to the DotA throne.

C. Lessons from DotA: What Should Businesses Do?

In securing IP, a threshold issue is preemption. In the context of trademark, early registration means an early priority date. There is also the added benefit of limiting the grounds for cancellation under 15 U.S.C. § 1064.²⁰¹ Had Blizzard registered the mark first, for instance, Valve would have been the one challenging the mark. Securing the modders' — or at the very least Eul's — copyrights would again have kept the DotA IP away from Valve.

Blizzard had the tools to preemptively secure the DotA IP: it knew of DotA prior to Valve, and, as DotA started as a mod for Warcraft III, had access to it. More importantly, as DotA was developed within the confines of Warcraft III, Blizzard had a EULA.²⁰² The EULA however, merely “restrict[ed] any distribution of ‘New Materials . . . on a stand-alone basis . . . through any and all distribution channels . . . without the express written consent of Blizzard.’”²⁰³ That is, the DotA creators could not sell the DotA mod. But the EULA did not forbid the sale of the concept. And, more importantly, the EULA did not assign Blizzard rights. As more and more gamers engage in modding,²⁰⁴ the odds that the next DotA comes to be by the hand of an enthusiast — as opposed to a professional developer — grows. Indeed, the video game industry has embraced modding, with many companies providing tools to help modders.²⁰⁵ These video game developers should consider drafting EULAs that assign them rights.

But an overly restrictive EULA may not yield the best mods. One thing Blizzard did right was encouraging innovation. Blizzard owned the Warcraft III IP; it chose to license this IP to modders. The free-form license promoted creativity.²⁰⁶ After all, the only restriction was to keep its use noncommercial.²⁰⁷ Although Blizzard can indisputably claim that it created the environment that led to the creation of DotA, it cannot

201. See 15 U.S.C. § 1064 (2012).

202. Notice of Opposition, *supra* note 60, ¶ 8.

203. *Id.* ¶10.

204. *Cf. Mods*, NEXUSMODS, <https://www.nexusmods.com/mods/> [<https://perma.cc/3BTS-2CBC>] (listing 237,072 available mods).

205. See Ryan Wallace, *Modding: Amateur Authorship and How the Video Game Industry Is Actually Getting It Right*, 2014 B.Y.U.L. REV. 219, 252 (2014) (discussing Valve's “Steam Workshop”).

206. Warcraft III, released in 2003, has over 5,800 mods. See *Maps*, HIVE (2018), <https://www.hiveworkshop.com/repositories/maps.564/> [<https://perma.cc/SG6N-GEJM>]; *cf. C&C Generals Zero Hour*, MODDB, (2018), <http://www.moddb.com/games/cc-generals-zero-hour/mods> [<https://perma.cc/QVD5-9LA9>] (showing that the game with the fourth most mods, *C&C Generals Zero Hour* — also released in 2003 — only has 266 mods).

207. Notice of Opposition, *supra* note 60, ¶ 10.

claim that it owns DotA. Crafting a EULA that encourages innovation, yet also captures marketable assets, is a delicate act. Like the IP system in general, it is a question of incentives versus control. Too much control and arguably no DotAs will be created; too little control and the DotAs may end up with competitors.

Perhaps the solution is to go for a right of first refusal. That is, have the EULA state, “Blizzard reserves the right to purchase the creations of any of its users prior to their sale to any other entity.” While not free, this maintains, or even creates further incentives for, creativity. While not absolute control, it does prevent competitors from swooping in and freely capturing potential blockbusters. But the most significant boon is that it fosters community loyalty. Knowing that Blizzard values modders as creators and is willing to monetarily reward them for their work, can only help Blizzard’s image.

A more complicated concept that needs to be taken to account is balancing IP protection with the goodwill of the gaming community. The story of DotA is the story of a community. Many members of the DotA community feel that they contributed to its creation.²⁰⁸ In some ways, their contributions are immortalized in-game. The Dota 2 hero Terrorblade is, as mentioned above, named after community member Terrorblaze.²⁰⁹ The hero Kunkka is named after DotA loading screen artist Kunkka.²¹⁰ The DotA player base may be fractured between fans of Dota 2, LoL, HoN, and HotS, but much of the base still shares respect for the developers the original DotA.²¹¹ The current owners of the DotA IP, Blizzard and Valve, may therefore have a tenuous hold on their player base if consumers play their games because of legitimate ties to DotA. Indeed, Riot, which does not hold an IP interest in DotA, is

208. See, e.g., Artyom Kutateladze, *DotaCinema Brings the Spirit of Community Created Heroes Back with New Custom Game Mode*, CYBERSPORT (Sept. 16, 2017), <https://cybersport.com/post/dotacinema-brings-the-spirit-of-community-created-heroes-back-with-new-custom-game-mode> [<https://perma.cc/LL4D-7ECB>].

209. See *supra* text accompanying note 41.

210. G|League, *T14 Interview - Legendary DotA Artist Kunkka*, YOUTUBE (July 20, 2014), <https://www.youtube.com/watch?v=IRnQQ8srk6s> (last visited May 5, 2018).

211. See, e.g., theScore eSports, *Ask the Dota 2 Pros: If You Could Have Lunch with Ice-Frog, What Would You Say to Him*, YOUTUBE (Aug. 27, 2016), <https://www.youtube.com/watch?v=9P50Tc3La2A> (last visited May 5, 2018); Corey Hospes, *Valve, Dota 2 and the New Player Experience: Are We On the Right Path?*, CYBERSPORT (Sept. 11, 2017), <https://cybersport.com/post/valve-dota-2-and-the-new-player-experience-are-we-on-the-right-path> [<https://perma.cc/9L2V-C7LM>] (“When a large patch is released, we fall to our knees and praise the mighty icefrog.”).

Blizzard and Valve's chief competitor.²¹² Why? Possibly because they have the support of Guinsoo and Pendragon.²¹³

Should the current (disputed) owners of DotA choose to exercise market power, they risk alienating their player base. Traditionally, a target of a copyright infringement suit may defend on the grounds of non-infringement or fair use.²¹⁴ In the case of DotA suits, they may have another option: appeal to the community. The value of the DotA name is intertwined with the loyalty of its player base.²¹⁵ Should Blizzard and Valve target the wrong company — perhaps one that has access to the likes of Neichus, Meian, or Madcow — they may very well win the battle but lose the war.²¹⁶ Furthermore, a mass defection of Eul, Guinsoo, Icefrog, and even Pendragon to another company could similarly harm Blizzard, Valve, and even Riot.²¹⁷ Where they lead, the community might just follow.

But the story of DotA is not over. As Dota 2 and LoL mature, they are developing their own communities.²¹⁸ Presumably, so are HoN and HotS.²¹⁹ Eventually, the original DotA community's influence will pale in comparison to its successors'. Valve is already starting to encourage this development. In 2014, Valve released *Free to Play*, a documentary on three cyber athletes who competed in the first Dota 2 tournament, TI.²²⁰ One cyber athlete featured in the documentary, Dendi, had become “the Face of Dota” by 2016.²²¹ Productions like this are creating

212. David Segal, *Behind League of Legends, E-Sports's Main Attraction*, N.Y. TIMES (Oct. 10, 2014), <https://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html> (last visited May 5, 2018) (“League of Legends has more than eight times the number of active players as Dota 2, its *closest rival* in the genre known as multiplayer online battle arena.” (emphasis added)).

213. Cf. Ford, *supra* note 53 (leveraging Riot's involvement with Guinsoo and Pendragon to promote LoL's launch).

214. See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHTS § 10:9 (2017).

215. Cf. Kevin Knocke, *Why Prize Pools Don't Matter in eSports Anymore*, IGN (Aug. 10, 2016), <http://za.ign.com/dota-2/100366/feature/why-prize-pools-dont-matter-in-esports-anymore> [<https://perma.cc/ZTR9-PSRY>] (arguing that, unlike other eSports whose viewership fluctuates, Dota 2 enjoys a consistently and “fiercely loyal” fan base).

216. Cf. Yan Chernyshev, *Why Dota Fans Don't Like Riot Games*, CYBERSPORT (Nov. 28, 2017), <https://cybersport.com/post/why-dota-fans-don-t-like-riot-games> [<https://perma.cc/GL6T-LBM3>] (noting the dislike engendered among players by Riot's complicity in Blizzard suing Valve).

217. Cf. *supra* Section II.B.4 (noting the competition among companies to hire original DotA developers).

218. See *Most Watched Games on Twitch*, NEWZOO (Dec. 2017), <https://newzoo.com/insights/rankings/top-games-twitch/> [<https://perma.cc/7VSM-3A9Y>] (showing that people spent 32.4 million hours watching Dota 2, and 69.6 million hours watching LoL, in December 2017).

219. Data is sparse regarding these lesser known games.

220. Valve, *Free to Play: The Movie (US)*, YOUTUBE (Mar. 19, 2014), <https://www.youtube.com/watch?v=UjZYM11zB9s> (last visited May 5, 2018).

221. theScore esports, *The Story of Dendi: The Face of Dota*, YOUTUBE (June 8, 2017), https://www.youtube.com/watch?v=YCt_5gt1o9U (last visited May 5, 2018).

a new mythos for the genre, with new personalities capturing the hearts and minds of gamers.

V. CONCLUSION

IP will become increasingly important as eSports revenue potential approaches \$1.4 billion.²²² Commercialized forms of a video game mod called DotA arguably started the eSports phenomenon; they still dominate the industry.²²³ Thus far, two lawsuits have been filed over the ownership of the DotA IP.²²⁴ Valve is, and will likely remain, the owner of the DOTA trademark, due to the unlikelihood of trademark cancellation. While the question of the DotA trademark seems to be settled, the question of the DotA copyrights has been relegated to a jury. *Blizzard v. Lilith* is an active case, and one possible outcome is that DotA copyrights were never assigned to Valve in the first place.²²⁵ Further, other interested parties, who may have more ties to the genesis of DotA than either uCool or Lilith, may dispute Valve and Blizzard's copyright interests.²²⁶ In an age where community-created projects can translate to billion-dollar enterprises, companies offering incubators for such projects must consider two things: a proper EULA that encourages creativity yet maintains control over potential blockbusters, and the impact securing IP may have on the community's loyalty.

222. NEWZOO, *supra* note 1, at 14.

223. See John Gaudisi, *These Are the Most Popular ESports Games on Twitch*, FORTUNE (Apr. 6, 2016), <http://fortune.com/2016/04/06/most-popular-esports-games-on-twitch/> (last visited May 5, 2018); *Top Games Awarding Prize Money*, E-SPORTS EARNINGS (2017), <https://www.esportsearnings.com/games> [<https://perma.cc/9N2B-9S6K>]; NEWZOO, *supra* note 1, at 19; *supra* Section II.A.

224. *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, No. 3:15-cv-04084-CRB, 2017 U.S. Dist. LEXIS 74639 (N.D. Cal. May 16, 2017); Notice of Opposition, *supra* note 60.

225. See *Blizzard*, 2017 U.S. Dist. LEXIS 74639, at *27.

226. See *id.* at *31 ("If helpers feel cheated, they may come to court."). It still must be asked: "who were the 'authors' of [the DotA] works? For many versions of DotA and DotA Allstars, we might never know." *Id.* at *21.