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IP and Rights Package: Legal issues to consider in eSports endorsements and sponsorships (Part 2)

(This is the second part on the same topic. Part one can be found at www.couchmansllp.com/Part1-IPandtherightspackage)

Agreement Timing and Length

In all sports, timing is crucial in delivering value—a personal endorsement from a tennis player is far more valuable in the build up to Wimbledon in June than in November. As such, the start and end dates on contracts should be thought about practicably for when the player or team will be in the strongest position to negotiate.

Commercial partners will want the relationship to coincide with major tournaments like the Dota 2 or League of Legends championships, as this will provide maximum exposure for their brands. There is, of course, a risk for them that the player or team will not qualify for the tournament, but traditionally these arrangements finish at the end of the season, or the end of the year's major tournament, which tend to always be at around the same time of year.

The length of the agreements should be thought about as partners are likely to want to 'lock in' for several years up and coming teams whilst their rights are relatively cheap to acquire. The team needs to consider whether having a lengthy contract will allow a steady source of income, or if shorter arrangements will allow for a stronger negotiating position later on.

There are, of course, legal mechanisms that can be added into contracts to address the length issues. One commonly seen is the 'break clause,' in which one of the parties can end the agreement early under certain circumstances. An example of this could be a 5 year agreement whereby either party can end it without any compensation after 3 years. In addition, there could be termination provisions that mean the contract ends if specified conditions aren't met, like qualifying for specified tournaments.

Finally, the parties may agree to a whole range of other clauses that look to increase the length of the relationship, from 'renewal rights' that provide for a new contract if certain conditions are met, or 'matching rights' that mean if a different commercial partner offers more money, the current partner can elect to match the offer and retain the contract. These are all very common in most sports and reflect the strength of the parties' negotiating positions.

Payment Terms

The timing of when the money or goods are received will always be one of the most important parts of a commercial agreement. In traditional sports, payment dates often mimic defined periods, like the beginning of a season/event, or at its conclusion.

This allows a certain level of flexibility, as the exact date of a concluding match or tournament may not be known years in advance, but there is certainty that the event will take place, which will trigger payment. In eSports, this is likely to be linked to major tournaments like The International, or after the last fixture in the Call of Duty World League.

It is important for players and teams to be aware of when payments are due, so that they can effectively plan around this, as well as track what is owed. Many of the commercial arrangements that will be concluded can have an instant promotional association for the commercial party if they are allowed to immediately announce the association. As a result, it would not be considered unreasonable for the player or team to ask for a percentage of their fee at the beginning of the agreement, and then staggered payments throughout the year or in line with tournaments and/or

events. Clarity is key, knowing when, and how much is due to be received is one of the most important considerations of any contract.

Jurisdiction

This is a clause that is often overlooked in commercial contracts and could have a major impact on the agreement should there be a dispute. It usually governs both which country's laws will apply to the agreement, and if there is a dispute, which country's courts will hear the matter.

This is disproportionately relevant in eSports as by its very nature it is truly global and transcends borders. Teams may be from one country, compete against teams in another, on a game that is hosted on computers in a third country. Whilst traditional sports do of course have an international element to them, the fact that they are not played online means that this multi-jurisdictional element is less pervasive.

As a result of this uniqueness in eSports, it is key to agree on a suitable jurisdiction to control any agreements. It is very common for contracts with an international element to be based on English law and subject to English courts as it is recognized as being a neutral place for litigation, is relatively quick, and uses one of the world's most common languages. However, for most players, the use of the English courts is likely to be difficult and it would be reasonable for them to push for the courts of their home country or state.

Without having a clause dealing with this issue, in the event of a dispute, there could be a lengthy argument over where any the case will be heard. The team will argue that it should be in their base country, as that is where their rights derive from, and the commercial entity could say that it is where they exploited the rights, or where the services took place. Having a brief clause addressing this will save both time and money before any dispute has even truly begun.

Conclusion

The importance of making sure that a player's or team's legal position is secure cannot be underestimated. As shown above, a one page deal sheet can mean that there are a considerable amount of questions and issues to be worked out by the parties which may make up only a small fraction of a contract.

Understanding the position from the start will ensure that eSports organizations can continue to gain from the popularity of eSports while minimizing the possibility of problems arriving later down the line. When it comes to the legal aspects of commercial contracts, Biggie had it right—'Mo Money, Mo Problems'—and we will no doubt see the fallout from this in the next 5 years.

In Part 1, Daniel looks into agreement timing and length, payment terms, and jurisdiction. (www.couchmansllp.com/Part1-IPandtherightspackage)

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