Esports Bar Association Journal

Volume 2020

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† The Esports Bar Association Journal selected Paul Santache as the recipient of the scholarship for the Top Student Submission.
‡ The Esports Bar Association Journal selected Phillip Jones as the recipient of the scholarship for the Student Runner-Up.

Preface

To all the authors that collaborated with us as we adapted to shifting circumstances, to our volunteer editorial team without whom this journal would not exist, and to you for reading Volume 2020 of the Esports Bar Association journal, thank you. We hope you enjoy these works as much as we have.

This was our first year where the Esports Bar Association provided scholarships to two students whose articles we felt represented a meaningful contribution to the field of esports and the law. We would like to congratulate those students and thank the Board of the Esports Bar Association for their generous support of student literature.

Finally, we would like thank the entire Publications Committee, as well as its chair, Harris Peskin, who support this initiative.

Sincerely,

Michael Arin & Ryan Fairchild
Editors-in-Chief of the Esports Bar Association Journal

Foreign Players Join American Teams for the American Dream but Can't American Stream

By Genie Doi† and Samuel Johnson‡

Introduction

Much of the limited research in esports immigration has focused on how the United States lacks a dedicated visa for esports players. However, the United States has steadily imported foreign esports players through traditional athlete visas for nearly a decade.[1] Yet these esports players face unique immigration challenges even after visa approval. The novel and ever-changing nature of esports creates new fact patterns that legislators did not contemplate when creating the nation's immigration framework. For athletes, immigration law outlines permissible activities such as training, competing, and engaging in promotional activities related to their competition.[2] Where legislators in the late 1980s likely understood "promotional activities" to encompass advertisements or press conferences, they could not have imagined that 30 years down the road, gamers would be considered athletes and entertain the masses through streaming. Consequently, the law does not permit esports visa holders to engage in many forms of modern-day streaming.

Part I of this Article will introduce streaming's prevalence in esports. Part II will examine its treatment as employment under U.S. immigration law and how that employment might conflict with the terms of a player's visa. Finally, Part III will offer a practical framework for determining how foreign esports players can stream in a manner consistent with their visa.

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[1] *See* Paresh Dave, *Online Game League of Legends Star Gets U.S. Visa as Pro Athlete*, L.A. TIMES (Aug. 7, 2013), https://www.latimes.com/business/la-xpm-2013-aug-07-la-fi-online-gamers-20130808-story.html.

[2] 8 C.F.R. § 214.2(p)(3) (2020).

I. Why is Streaming Important for Esports Players?

Streaming is the act of live-broadcasting on an internet platform.[3] While the activity is commonly associated with playing video games, streamers often broadcast themselves performing any number of activities, like singing or body painting.[4]

Streaming has long been integral to the esports industry.[5] Professional competitions utilize streaming services to broadcast events, and streaming services have signed up to 90 million-dollar deals for exclusive broadcasting rights.[6] Beyond organized competition, esports players frequently stream themselves when practicing their gameplay. Many esports contracts require or otherwise provide financial incentives for players to stream a significant number of hours each month.[7]

Aside from satisfying contractual obligations, players are motivated to live stream for a variety of reasons, such as building a community and developing a brand.[8] For many, streaming generates revenue to supplement their income.[9] Prominent esports players have even retired from competing professionally to pursue streaming full-time because streaming can be a less stressful, more lucrative endeavor.[10]

II. Understanding Authorized Activities on Common Esports Visas

U.S. immigration law does not permit foreign nationals to engage in employment in the United States without lawful authorization.[11] Such authorization usually takes the form of a temporary work visa sponsored by an employer.[12] Under U.S. immigration law, employment can be understood as services or labor provided by an individual in exchange

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[3] *See* T.L. TAYLOR, WATCH ME PLAY: TWITCH AND THE RISE OF GAME LIVE STREAMING 1–3 (Fred Appel & Thalia Leaf eds., 2018).

[4] Cecilia D'Anastasio, *Twitch's Non-Gamers Are Finally Having Their Moment*, WIRED (Jan. 9, 2020), https://www.wired.com/story/twitch-non-gamers.

[5] *See* TAYLOR, *supra* note 3, at 137.

[6] Jacob Wolf, *Overwatch League to be Streamed on Twitch.tv in Two-Year, $90 Million Deal*, ESPN (Jan. 9, 2018), https://www.espn.com/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal.

[7] TAYLOR, *supra* note 3, at 71.

[8] *Id.* at 69.

[9] Sam Nordmark, *Live Streamer or Competitive Gamer: Which Career Makes the Most Sense?*, DOT ESPORTS (July 22, 2018), https://dotesports.com/general/news/esports-vs-streaming-money-career-31144.

[10] *Id.*

[11] 8 U.S.C. § 1324a(a)(1) (2018).

[12] It is nearly impossible for traditional "freelancers" to obtain work authorization in the United States without first obtaining contracts for work and an agent to serve as a visa sponsor. *See* 8 C.F.R. §§ 214.2(o)(2)(iv)(E), (p)(2)(iv)(E) (2020).

for wages or other remuneration.[13] Simply classifying a foreign national as an independent contractor does not circumvent the need to obtain a visa; in practice, immigration officials are likely to treat almost any provision of services in exchange for compensation (whether deferred, monetary, or non-monetary) as constituting employment.[14]

Accidental employment while on a visitor visa is a common occurrence, as business visitors traveling for meetings in the United States each year operate under the obscure rule that they are permitted to conduct activities that involve "international trade or commerce" and where the employment was a "necessary incident thereto."[15] Despite having no clear rule for international visitors to follow, the consequences for accidental (or even alleged) unauthorized employment are severe.[16] In August 2018, three *Magic: The Gathering* and *Dungeons & Dragons* artists from Europe intended to visit publisher Wizards of the Coast's headquarters in Washington for a concept push,[17] an activity which involves international trade or commerce. The travelers were denied admission, detained for over eleven hours, and removed from the United States.[18]

With consequences ranging from immediate removal to future ineligibility for visas, this experience is not only traumatizing—it could ruin careers.[19] Accordingly, it is of vital importance for all actors in the esports industry to be aware of the specific kinds of activities that are permitted by each visa.

Streaming is one such activity that must be thoughtfully considered by foreign nationals in the United States. Because major streaming platforms are U.S. corporations that dole out payments to streamers, the act of streaming in the United States could be construed by the Department of Homeland Security (DHS) as a service or performance provided in exchange for compensation. It is therefore worth examining whether such employment would be authorized under the terms of the most commonly used visas in esports.

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[13] 8 C.F.R. § 274a.1(f).

[14] While a disputed area of law, this Article recognizes that relevant federal agencies have interpreted the Immigration and Nationality Act to mean independent contractors cannot work in the United States without authorization. See *In re* Garcia, 58 Cal. 4th 440, 462 (2014). For a comprehensive discussion of the ambiguous treatment of workers as independent contractors under immigration law, see Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners "Employees" Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 225 (2008).

[15] *See* Matter of Hira, 11 I & N. Dec. 824, 830 (BIA 1966).

[16] 8 U.S.C. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has failed . . . to comply with the conditions of any such status, is deportable.").

[17] Cecilia D'Anastasio, *Magic: The Gathering Artists Denied Entry to U.S., Detained Overnight*, KOTAKU (Aug. 29, 2018), https://kotaku.com/magic-the-gathering-artists-denied-entry-to-u-s-deta-1828693925.

[18] *Id.*

[19] *See* 8 U.S.C. § 1227(a)(1)(C).

A. Visitor Visas

The B-1/B-2 visa, ESTA, or admission under the Visa Waiver Program are essentially "visitor visas" for business or pleasure.[20] A visitor visa can be obtained quickly, easily, and for a nominal fee, relative to other visa classifications. However, the trade-off for this accessibility is a very limited range of authorized activities.[21] Visitor visas bar nearly all forms of employment with narrow exceptions governed by case law and the Foreign Affairs Manual.[22]

Professional athletes may utilize a visitor visa to compete in a U.S. tournament or event provided that the athlete receives no salary or payment other than prize money for their participation.[23] This exception is commonly utilized in esports and enables foreign visitors to lawfully participate in tournament-style events like EVO or the Fortnite World Cup.[24] However, visitor visas likely do not allow these visitors to stream freely; for example, a Twitch Partner traveling to EVO who streams from their hotel room is actually performing in exchange for compensation from a U.S. corporation. Thus, a competitor on a visitor visa, while lawfully competing at a U.S. event, may inadvertently run afoul of immigration law by clicking a "record" button.

B. O-1A Visa

In the esports context, O-1A visa classification can only be obtained by athletes of "extraordinary ability."[25] A player with an O-1A visa may only perform services for the visa sponsor, usually the team or talent agent.[26] The permissible activities under an O-1A visa are limited to whatever event(s) the applicant states they will be participating in, so long as those activities relate to the event.[27] It is therefore in the applicant's interest to draft their activities broadly to provide more freedom of activity.

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[20] *See* 8 U.S.C. § 1187; 22 C.F.R. § 41.31(b)(1)–(2) (2020).

[21] 8 U.S.C. § 1101(a)(15)(B); *see* Matter of Hira, 11 I & N. Dec. 824, 830 (BIA 1966).

[22] U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL 402.2-2 (2020).

[23] *See Hira*, 11 I&N Dec. 824; U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL 402.2-5(C)(4).

[24] Luke Winkie, *When It Comes to Securing Visas, Sherry Nhan is the Matron Saint of Esports*, WASH. POST (Jan. 22, 2020), https://www.washingtonpost.com/video-games/esports/2020/01/22/when-it-comes-securing-visas-sherry-nhan-is-matron-saint-esports.

[25] 8 C.F.R. § 214.2(o)(3).

[26] 8 C.F.R. § 214.2(o)(4).

[27] 8 C.F.R. § 214.2(o)(1)(i).

Because O-1A classification does not place significant restrictions on the foreign national's activities, it is an attractive option for competitors. For example, a team participating in the League Championship Series (LCS) could present a wide variety of expected activities in the player's visa application, from professional competitions to streaming, management, coaching, or content creation.

Unfortunately for esports players, the O-1A visa is unattainable for most; the regulations require that an applicant prove they are one of a small percentage who has risen to the very top of their field.[28] Only the most accomplished competitors will be able to satisfy the evidentiary burden. By definition, only a fraction of the industry is eligible for this visa.[29] Therefore, while the O-1A is a suitable option for players who wish to stream freely while in the United States, it is also virtually inaccessible for most competitors.

C. P-1A Visa

Due to the employment restrictions of the visitor visa and the demanding evidentiary standard of the O-1A, many esports imports arrive on a P-1A visa.[30] The P-1A classification is available to individual athletes and athletic teams who participate in a major sports league or possess international recognition.[31] DHS has recognized only five sports as major leagues: the National Basketball Association, National Football League, Major League Baseball, Major League Soccer, and the National Hockey League.[32] As a result, esports players must qualify as internationally recognized athletes. This visa is regularly granted to players competing across the LCS, Overwatch League, and more.[33]

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[28] 8 C.F.R. § 214.2(o)(3)(iii).

[29] *See* Temporary Alien Workers Seeking H-1B, O, and P Classifications Under the Immigration and Nationality Act, 59 Fed. Reg. 41,818-01 (Aug. 15, 1994) (to be codified at 8 C.F.R. pt. 214) (rejecting a suggestion that all hockey players in the NHL could be eligible for O-1 classification since extraordinary ability can only be accorded to the small percentage of individuals who have risen to the very top of their field of endeavor).

[30] *See* Bryce Blum, *The Esports Lawyer Breaks Down the Visa Issue Plaguing the LCS*, ESPN (Feb. 2, 2016), http://www.espn.com/esports/story/_/id/14661486/breaking-league-legends-visa-issue.

[31] 8 U.S.C. § 1184(c)(4)(A) (2018).

[32] *See* 8 U.S.C. § 1154(i)(2) (defining "professional athlete" as an individual who is employed as an athlete by "a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage"). USCIS has not publicly recognized any esports competition as a major league sport.

[33] While esports players are often granted P-1A visas, current anti-immigrant policies impacting all athletes have caused P-1A visa disruptions for some notable esports players. *See* Louise Radnofsky, *Athletes Seeking Green Cards Find Proving They're Exceptional Has Gotten Tougher Under Trump*, WALL ST. J. (Dec. 11, 2019),

Applicants seeking P-1A status must show that they seek to enter the United States temporarily and solely for the purpose of performing as an athlete with respect to a specific athletic competition.[34] In recent practice, DHS has paid particular attention to the word "solely," disputing any activities described in the player contract which fall outside the competition (i.e., streaming).[35]

As any sports fan (whether electronic or traditional) knows, athletes commonly engage in activities outside of their specific competition—advertising, charity work, speaking engagements, or promoting merchandise are all part and parcel of being a professional athlete. But unlike the O-1A visa category, the P-1A visa limits an athlete's activities to those that are directly related to the specific athletic competition. Moreover, those activities may only be performed for the sponsoring team;[36] any independent performance for a third party in exchange for compensation constitutes unauthorized employment.[37]

III. *Matter of CSP-C-T-. LLC* and the Promotional Activity Test

For esports athletes, streaming is the electronic equivalent to media appearances, public practices, or exhibition matches. However, DHS officials' unfamiliarity with streaming means that it can easily be mistaken for an unauthorized activity.

The only published decision to address this issue is *Matter of CSP-C-T-. LLC* (the "*Overwatch* decision").[38] In this case, the Administrative Appeals Office (AAO) affirmed the denial of a P-1A visa for

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https://www.wsj.com/articles/elite-athletes-seeking-visas-face-heightened-scrutiny-by-the-trump-administration-11576060200; Jacob Wolf, *Broxah Has Visa Approved, Will Join Team Liquid in NA*, ESPN (Feb. 6, 2020), https://www.espn.com/esports/story/_/id/28648467/broxah-visa-approved-join-team-liquid-na.

[34] *See* 8 C.F.R. § 214.2(p)(1) (2020). Note, DHS focus on the word "solely" is a misapplication of law as the relevant regulations only use the word twice; neither usage corresponds to the activities of P-1A athletes. *See also* 8 U.S.C. § 1101(a)(15)(P)(i).

[35] With increasing frequency, DHS officers parse standard player contracts and contend that clauses requiring the player to participate in content creation for team sponsorships, or the freedom to benefit from independent sponsorships, are prima facie evidence that the player will not be "solely" performing as an athlete with respect to a specific athletic competition. This creates a paradox in light of recent litigation which has caused teams to stipulate (in order to avoid similar litigation) that players do have the freedom to seek independent sponsorships. *C.f., e.g.*, FaZe Clan Inc. v. Tenney, 407 F. Supp. 3d 440 (S.D.N.Y. 2019) (relating to popular gamer Tfue claims that FaZe Clan acted as an unlicensed agent in violation of the California Talent Agency Act by procuring sponsorships on his behalf).

[36] 8 C.F.R. § 274a.12.

[37] 8 C.F.R. § 214.1(e).

[38] *See* Matter of CSP-C-T-, LLC, ID# 2901098, 2019 WL 553287 (AAO Jan. 22, 2019).

an "online Streamer/Influencer and reserve esports player" on the sponsor's Overwatch League Academy team.[39] The AAO determined that the team failed to establish that the player's sole purpose in the United States was to perform as an athlete with respect to a specific athletic competition.[40] Noting that the player's contract required him to spend the majority of his time streaming and promoting the team rather than actually competing, the AAO held that P-1A classification would be inappropriate.[41]

Whether the AAO's ruling in the *Overwatch* decision was the result of the board's misunderstanding of esports or the lackluster merits of an ill-advised visa application is unclear since the petition documents are not public. Regardless, the issue of streaming as a potentially unauthorized activity under a P-1A visa remains problematic for the esports industry. To resolve the ambiguity between authorized and unauthorized P-1A promotional activities, this Article proposes the usage of a "Promotional Activity Test" consisting of three elements:

If the activity:

(1) is a promotional appearance;

(2) conducted for the petitioning employer; that

(3) relates to the player's participation in the competition;

Then the activity falls within the meaning of a P-1A promotional activity.

Given the lack of legal precedent surrounding this topic, it is worth examining how each element of the test has been applied in the past, and how those standards can be applied to streaming.

A. The Activity is a Promotional Appearance

The plain meaning of the word "promotional" dictates that the activity relate to the publicizing of a venture so as to "increase sales or public awareness."[42] However, DHS decisions adopt a more narrow approach, requiring the activity to promote the specific event and not just the employer or sport in general.[43] This narrower interpretation is

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[39] *Id.* at *3.

[40] *Id.* at *6.

[41] *Id.*

[42] *Promotional*, OXFORD ENGLISH DICTIONARY (3d ed. 2007).

[43] *See* Matter of C-G-S-M-, ID# 4888907, 2019 WL 6324081 (AAO Nov. 5, 2019) (denying P-1A visa application where the athlete was expected to "participate in promotional events that promote the sport and the petitioning entity" without limitation to "activities related and/or incidental to specific competitions").

consistent with the AAO's ruling in the *Overwatch* decision. In the *Overwatch* decision, the player's streaming obligations were deemed unauthorized because he was to promote the organization more than the actual competition.[44] This inference was drawn from the fact that his schedule indicated he would spend the majority of his time streaming (even in the off-season) rather than competing.[45]

The *Overwatch* decision further indicates that the timing of the promotional appearance (i.e., in-season as opposed to off-season) may be taken into consideration.[46] Viewed in the context of traditional sports, the merit of this argument is questionable. Traditional athletes regularly create promotional material like television commercials during the off-season; the fact that such services are performed during the offseason does not reduce their promotional value.[47] Nonetheless, the *Overwatch* decision suggests that off-season streaming while in the United States could invite greater scrutiny. Accordingly, whether in-season or off-season, foreign players whose streams discuss past or upcoming matches, or include visuals or links to resources on the competition, will have a stronger claim that the streaming is an authorized promotional activity.

B. The Activity is Conducted for the Petitioning Employer

Athletes in P-1A status must be in the United States to perform services for their employer.[48] Many esports players are required by their teams to stream for a fixed number of hours.[49] These streams typically feature the employer's branding and direct the viewers to the employer's website. Because the stream is conducted to satisfy a contractual obligation to the player's employer, most streams would satisfy this element.

Even so, foreign players must be cognizant of participating in paid activities unrelated to their employment, whether streaming or otherwise. For example, a player who receives remuneration from YouTube for operating a cooking channel unaffiliated with their employer would fail this element of the test and be found to have engaged in unauthorized employment. Alternately, a foreign esports player who designs and sells merchandise, or partners with a brand

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[44] *CSP-C-T-. LLC*, 2019 WL 553287 at *6.

[45] *Id*.

[46] *Id*.

[47] *See* Dirk Hayhurst, *What Do MLB Players Really Do During the Long Offseason Months?*, BLEACHER REP. (Nov. 5, 2014), https://bleacherreport.com/articles/2254876-what-do-mlb-players-really-do-during-the-long-offseason-months.

[48] *See* 8 C.F.R. § 214.2(p)(1)(i) (2020).

[49] TAYLOR, *supra* note 3, at 71.

sponsor independent of their team organization, may also be found to have engaged in unauthorized employment.

C. The Activity Relates to the Player's Participation in the Competition

The final element is the crux of the Promotional Activity Test because the AAO has acutely considered whether the promotional activity was incidental or related to the event.[50] Activities that are closely related to the player's participation in the competition are more likely to be considered authorized under a P-1A visa.[51]

Whether a player's streaming relates to competition is a fact-specific analysis. Facts which could bolster a player's claim could include: the player's contract explicitly requires them to stream for the purpose of competitive practice;[52] the player streams the game they regularly compete in (as opposed to other titles); the player exercises skills on stream that are essential to their performance (i.e., plays other titles, but in the same genre);[53] and the amount of time spent streaming is less than the amount of time spent preparing for competition.[54] Because DHS carries significant discretion in its adjudications, no one fact is likely to be dispositive. DHS will examine whether, viewing all facts, the evidence indicates the player will be streaming in addition to, rather than incidental to, competing.[55]

Given the heightened scrutiny of unauthorized employment by DHS,[56] foreign esports players and their supporting teams or agencies

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[50] *See* Matter of S-I-S- LLC, ID# 73049, 2016 WL 8315759 at *4–5 (AAO Dec. 30, 2016) (denying the appeal of an applicant when the applicant failed to establish their non-competitive activities would be incidental to the competition).

[51] *See* Matter of F-F-S-, LLC, ID# 126527, 2016 WL 5943850 at *4 (AAO Sept. 26, 2016) (finding an athlete could spend time maintaining equipment when such duties tied directly into "preparing for competition").

[52] *Id.* (recognizing the applicant's contract explicitly obligated them to participate in non-competitive activities in preparation for the competition).

[53] *See AAU EAC 96 037 50064* (INS), 1998 WL 34029783 at *7 (AAO Sept. 17, 1998) (finding a non-competitive activity related when such activity continued to practice skills necessary for the performers).

[54] *See S-I-S- LLC*, 2016 WL 8315759 at *5 (noting the applicant's itinerary failed to designate how much time would be spent on non-competitive activities, preventing the AAO from establishing whether such activities were merely incidental to the actual competition).

[55] *See* Matter of V-L-F-, PLLC, ID# 15223, 2016 WL 929671 at *7 (AAO Feb. 4, 2016) (denying a P-1A visa application where the athlete was to provide tennis instruction in addition to participating in athletic competition).

[56] *See* Laura D. Francis, *Outlook 2018: More Scrutiny, Enforcement for Employment Visas*, BLOOMBERG L. (Dec. 19, 2017), https://news.bloomberglaw.com/business-and-practice/outlook-2018-more-scrutiny-enforcement-for-employment-visas.

would do well to consider the Promotional Activity Test when drafting contracts or directing content which involves streaming.

Conclusion

Regrettably, U.S. immigration law does not yet reflect the global, digital, and evolving nature of the esports ecosystem. U.S. immigration is an extremely high-stakes game for esports players; the ability to work and travel to the United States can make or break a career. As a result, it is crucial for teams and players to remain vigilant about a player's activities even after visa acquisition. The simple act of hobby streaming could be interpreted as unauthorized employment and failure to maintain status, resulting in the loss of important immigration benefits.[57] Until such time that sensible immigration policy can be enacted, the Promotional Activity Test can be utilized by teams, players, or practitioners as a practical tool in judging whether certain promotional content is lawful under the P-1A visa.

[57] Applicants must maintain status in order to be eligible for changes in visa classification or extension without having to depart the United States; moreover, extended periods of unlawful employment can result in three or ten-year bars from entering the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I); *see also* U.S. DEP'T OF HOMELAND SECURITY, ADJUDICATOR'S FIELD MANUAL 40.9.2(a)(4)(C) (2018).

Shaky Foundations – The Uncertain Legality of Publicly Funded Esports Venues

By Paul Santache†

Introduction

For better or for worse, it appears that the much-deliberated franchise model for esports leagues is here to stay.[1] Depending on whom you ask, this city-based approach has been heralded as both the future of esports and an undue shackling to traditional sports models of yore.[2] Impugned merits aside, the adoption of franchise-based leagues has fundamentally changed esports. No change has been more drastic than the sudden onslaught of brick-and-mortar esports venues.

The allure of a future filled with purpose-built esports stadiums is understandable. Baseball has its Wrigley Field, football has AT&T Stadium, and soccer Old Trafford—and someday, we hope, esports will have its own grand cathedral. But as esports stadiums get bigger, so too will the checks needed to pay for them. It is for this reason that traditional sports franchises have long sought the financial support of local municipalities, state governments, and even fans.[3] Historically, the ability to levy public funds has been a catalyst for traditional sports'

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[1] Briefly, under a franchise-based model, esports teams must pay the relevant organizer, developer, or game publisher a fee in exchange for a permanent spot within a given league. For example, in order to be eligible to play in the inaugural season of the Overwatch League ("OWL"), Activision Blizzard required each team to commit a reported US$20M. This franchise-based model departs from the promotion/relegation systems typical of early esports—where league positions were not guaranteed, but dependent upon performance. *See* Jacob Wolf, *Teams Hesitant to Buy into Overwatch League Due to High Cost, Undesirable Contract Terms*, ESPN UK (May 9, 2017), https://www.espn.co.uk/esports/story/_/id/19347153/teams-hesitant-buy-overwatch-league-due-high-cost-undesirable-contract-terms.

[2] *See* Josh Chapman, *Esports Leagues: Stop Franchising*, MEDIUM (Feb. 6, 2019), https://medium.com/konvoy/esports-leagues-stop-franchising-2c3ae29c16e9; Max Miceli, *How the Franchising Model Shook Up North American Esports in 2018*, ESPORTS OBSERVER (Jan. 28, 2019), https://esportsobserver.com/franchising-north-america-2018.

[3] The NFL's Green Bay Packers is an example of a fan-funded franchise. *See Executive Committee & Board of Directors*, GREEN BAY PACKERS (Apr. 1, 2020), https://www.packers.com/team/executive-committee.

incredible progress.[4] However, it is a tool that esports may have to do without.

I. A History of Public Funding for Traditional Sports Venues

In the National Football League, nearly every stadium has been subsidized using taxpayer dollars.[5] One such publicly funded venue is the newly minted Mercedes-Benz stadium, home of the Atlanta Falcons, which received contributions of US$200M[6] from the City of Atlanta and an additional US$40M[7] from the State of Georgia. Looking to Major League Baseball, Florida's Miami-Dade County agreed to contribute US$507M to the construction of Marlins Park (thereby covering 80% of the new ballpark's US$634M price tag).[8] The story is very much the same in the National Hockey League and National Basketball Association.[9] In fact, a famed 2005 study of all four major US sports leagues found that between 1991 to 2005, municipal and state governments granted approximately US$12B in subsidies for stadium construction.[10] With a number of mega-stadiums being built since then, today's subsidy total is markedly higher.[11]

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[4] On average, traditional sports franchises have saved US$123M in development costs through public subsidies. Using Major League Baseball as an example, of the twenty-five facilities in use in 2001, 57% of each venue's total development cost can be attributed to public funds—a marked advantage. Judith Grant Long, *Full Count: The Real Cost of Public Funding for Major League Sports Facilities*, 6 J. SPORTS ECON. 119, 121–25 (2005).

[5] CBA MINNESOTA, NFL STADIUM FUNDING INFORMATION (Dec. 2, 2011), https://cbsminnesota.files.wordpress.com/2011/12/nfl-funding-summary-12-2-11.pdf [https://web.archive.org/web/20121222050741/https://cbsminnesota.files.wordpress.com/2011/12/nfl-funding-summary-12-2-11.pdf].

[6] Neil deMause, *Falcons Stadium Cost to Taxpayers Counting Hidden Subsidies: $554 Million*, FIELD OF SCHEMES (Mar. 18, 2013), http://www.fieldofschemes.com/2013/03/18/4735/falcons-stadium-cost-to-taxpayers-counting-hidden-subsidies-554-million.

[7] Neil deMause, *Falcons Stadium Subsidy Nearing $600M Thanks to State-Funded Parking Garage*, FIELD OF SCHEMES (Jan. 20, 2015), http://www.fieldofschemes.com/2015/01/20/8387/falcons-stadium-subsidy-nearing-600m-thanks-to-state-funded-parking-garage.

[8] Timothy Martin et al., *SEC Examines Marlins Stadium Deal*, WALL ST. J. (Dec. 5, 2011), https://online.wsj.com/article/SB10001424052970204826704577077230342369436.html.

[9] Long, *supra* note 4, at 138.

[10] *Id.* at 121–24.

[11] For example, municipal and state governments contributed US$600M to the construction of Lucas Oil Stadium (2008) and US$325M for AT&T Stadium (2009). *See Lucas Oil Stadium Facts & Figures*, STADIUMS OF PRO FOOTBALL, https://www.stadiumsofprofootball.com/stadiums/lucas-oil-stadium (last visited Sept. 22, 2020); *AT&T Stadium Facts & Figures*, STADIUMS OF PRO FOOTBALL, https://www.stadiumsofprofootball.com/stadiums/att-stadium (last visited Sept. 22, 2020).

Leveraging taxpayer dollars to fund professional sports venues is not just a controversial topic but represents an exercise of state power that rests on a shaky legal foundation. More specifically, public funding for professional sports venues ignores a host of statutory limitations on public funding for private for-profit businesses. One such limitation is state-enacted anti-gifting clauses, which, in theory, legally preclude public funding of professional sports stadiums.

II. Legal Considerations: Publicly Funded (E)sports Venues Must Serve a Core Public Purpose

A. Anti-Gifting Provisions

Anti-gifting clauses are legal provisions that prohibit the appropriation of public funds to corporations or individuals for a private purpose.[12] Put differently, such clauses safeguard against public administrative bodies reaching into taxpayers' pockets and passing money on to private industry actors. This anti-gifting regime was a direct response to states' excessive investments in private industries during the 19th century, which ravaged public treasuries, inflated public debt, and generally hamstrung local economies.[13]

Today, almost every state has enacted anti-gifting measures.[14] For example, the Constitution of New York State declares that "[t]he money of the state shall not be given . . . in aid of any private corporation or association, or private undertaking."[15] There is, however, an exception to this general anti-gifting rule. Public money can be granted to private actors when used for a project that will create a *public benefit*.[16] So the frequently litigated question becomes: Do professional sports venues generate sufficient public benefit to fall within this exception?

In short, the majority of cases accept that using public funds for professional sports venues serves a host of legitimate public purposes, such as stimulating local economies; creating new jobs; attracting new businesses; or building new infrastructure in an otherwise underdeveloped area.[17] However, on rare occasions, the courts have found that professional sports venues do not generate enough public benefit to warrant falling within the aforementioned exception. For

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[12] Daniel McClurg, *Levelling the Playing Field: Publicly Financed Professional Sports Facilities*, 53 WAKE FOREST L. REV. 233, 243 (2013).

[13] *Id.*

[14] *Id.* at 246.

[15] N.Y. CONST. art. VII, § 8.1.

[16] *Id.*

[17] *See* Judith Grant Long, *Public-Private Partnerships for Major League Sports Facilities* 8–10 (New York: Routledge, 2012); McClurg, *supra* note 12, at 245.

example, the Supreme Court of Florida quashed the City of Deerfield Beach's proposed issuance of US$1.5M worth of bonds to pay for the Pittsburgh Pirates' new spring training facility.[18] Here, the court held that the public benefit derived from the venue must not be a "mere incidental advantage"—that is, the ability to sidestep anti-gifting legislation should be reserved for projects that deliberately aim to satisfy some core public purpose.[19]

B. Eminent Domain

Another legal issue associated with publicly funded sports venues pertains to the use, or misuse, of eminent domain. Eminent domain is a constitutional power that allows the government to appropriate private property for public use.[20] Also known as the "Takings Clause," the Fifth Amendment to the United States Constitution declares that "no person . . . shall [have] private property be taken for public use, without just compensation."[21] This means that the government may legally take up private land, so long as it is used for a public purpose and the owner is justly compensated.[22] In *Olson v. United States*, the Supreme Court of the United States held "just compensation" to mean that private owners must be put in as good of a *pecuniary* position as if their property had not been taken.[23] This language suggests that compensation is limited to fiscal redress.

Such a broad possessory power carries considerable risk of abuse. This risk was unfortunately realized in the construction of the iconic Dodgers Stadium in Los Angeles, California—a venue that stands on land once populated by a bustling Mexican American community.[24] In 1950, the City of Los Angeles used the eminent domain power to take up some of the neighborhood residents' homes for a community housing project.[25] Despite the project's eventual cancellation, the city never returned land title to the original owners.[26] Conveniently, in

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[18] Brandes v. City of Deerfield Beach, 186 So. 2d 6 (Fla. 1966).

[19] *Id.*

[20] U.S. CONST. amend. V.

[21] *Id.*

[22] Olson v. United States, 292 U.S. 246 (1934).

[23] *Id.* at 255.

[24] Hector Becerra, *Decades Later, Bitter Memories of Chavez Ravine*, L.A. TIMES (Apr. 5, 2012), https://www.latimes.com/local/la-xpm-2012-apr-05-la-me-adv-chavez-ravine-20120405-story.html.

[25] Independent Lens, *Chavez Ravine: A Los Angeles Story*, PBS, https://www.pbs.org/independentlens/chavezravine/cr.html (last visited Aug. 24, 2020).

[26] Becerra, *supra* note 24.

1957, the city then sold this land to Brooklyn Dodgers owner Walter O'Malley to build a new stadium.[27]

The exchange sparked a slew of taxpayer lawsuits, which argued that the sale of the condemned land was illegal for want of public purpose.[28] The Supreme Court of California found in favor of the city, satisfied that the stadium served an adequate public purpose and that private owners were justly compensated.[29] In the wake of the decision, the city forcibly evicted the community's remaining residents and razed their homes.[30] Only a few months later, Walter O'Malley and the city broke ground on the construction of Dodgers Stadium.[31] In setting this precedent, the Supreme Court of California enabled a series of lamentable eminent domain abuses, the legality of which the Supreme Court of the United States most recently affirmed in 2005.[32]

Accordingly, the use of public funds for the construction of private sports (and esports) venues carries a host of legal challenges. Specifically, such taxpayer levies must fit within an authorized exception to state anti-gifting legislation or be a valid exercise of eminent domain power. Both avenues necessitate that the public must benefit in a substantial and direct way.

The government has never used its eminent domain power in an esports context, so courts have yet to interpret what public benefit that future esports venues must adequately serve. As outlined above, examples of valid public benefits for traditional sports venues include stimulating local economies; creating jobs; attracting new businesses; or building new infrastructure in an otherwise underdeveloped area.[33] Relying on these precedents, one can hypothesize that larger esports venues may be more successful in putting courts' eminent domain concerns at ease, as more employees would be required to build, operate, and maintain the facility. This would both stimulate the local economy and create more jobs than a comparatively small esports endeavor. Additionally, prospective esports venues lobbying for eminent domain should consider less developed areas as the location for their proposal.

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[27] Jerald Podair, *Dodger Blue: How the California Supreme Court Saved Dodger Stadium*, CAL. SUP. CT. HIST. SOC'Y (Fall/Winter 2018), https://www.cschs.org/wp-content/uploads/2018/12/2018-Newsletter-Fall-Dodger-Stadium.pdf.

[28] *Id.*

[29] Los Angeles v. Super. Ct. of L.A. Cty., 51 Cal. 2d 423 (1959).

[30] Scott Harrison, *From the Archives: 1959 Evictions from Chavez Ravine*, L.A. TIMES (May 9, 2017), https://www.latimes.com/visuals/photography/la-me-fw-archives-1959-evictions-from-chavez-ravine-20170328-story.html.

[31] *Id.*

[32] *See* Kelo v. City of New London, 545 U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 463 U.S. 1323 (1983); Berman v. Parker, 348 U.S. 26 (1954).

[33] McClurg, *supra* note 12.

III. Policy Considerations: Taxpayer Scrutiny, Diverting Funds Away from Social Programs, and Sharp Dealings

A. Taxpayer Scrutiny

Setting the aforementioned legal hurdles aside, levying public funds for the construction of professional sports venues also invites intense taxpayer scrutiny. An oft-cited concern is that the construction of new sports stadiums will incur substantial cost overruns. For example, in 1976, the City of Montreal, Quebec, initially estimated that their now-infamous Olympic Stadium would cost CA$134M prior to completion.[34] However, after a slew of construction defects and delays, the city—and its taxpayers—were instead presented with a bill for CA$770M.[35] It would not be until 2006 that Montreal would pay off the Olympic Stadium's CA$1.5B debt.[36] In light of this example, and many more like it, taxpayers' concerns about cost overruns are understandable.

B. Diverting Funds Away from Social Programs

Another common argument against using public funds for professional sports venues is that, in doing so, those funds are diverted from more deserving programs such as those addressing education, health, or safety.[37] A thought-provoking example of such a warped prioritization can been seen in Detroit, Michigan, circa 2013. At the time, the city was on the brink of financial ruin.[38] With more than US$18B in debt, and an operating deficit of US$400M, Detroit was forced to shut off 40% of its streetlights to avoid further overruns.[39] With nowhere else to turn, the city declared bankruptcy.[40] Less than a week later, the state of Michigan contributed US$450M to help finance Little Caesars Arena, the new home of the Detroit Red Wings.[41] Of this, the city levied US$250M from properties and businesses in downtown

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[34] Philippe Gohier, *The Big Owe*, MACLEAN'S (May 6, 2008), https://www.macleans.ca/general/the-big-owe.

[35] *1976 Montreal Olympic Stadium*, BALLPARKS, http://olympics.ballparks.com/1976Montreal/index.htm.

[36] *Quebec's Big Owe Stadium Debt Is Over*, CBC (Dec. 19, 2006), https://www.cbc.ca/news/canada/montreal/quebec-s-big-owe-stadium-debt-is-over-1.602530.

[37] McClurg, *supra* note 12, at 242.

[38] Martin Braun, *Detroit Billionaires Get Arena Help as Bankrupt City Suffers*, BLOOMBERG (Sept. 3, 2013), https://www.bloomberg.com/news/articles/2013-09-03/detroit-billionaires-get-hockey-arena-as-bankrupt-city-suffers.

[39] *Id.*

[40] McClurg, *supra* note 12, at 242.

[41] *Id.*

Detroit.[42] The funds were originally reserved for Detroit public schools.[43]

C. Sharp Dealings

The draconian nature of eminent domain powers has forced governments to seriously reconsider the doctrine's application, with Alabama, Delaware, and Texas all passing legislation to limit the doctrine's use in their respective states.[44] Despite these self-imposed limitations, state governments are still finding ways to circumvent the limitations' operation. For example, while the State of Texas was passing *An Act Relating to the Limits on the Use of the Power of Eminent Domain* (which, as the name suggests, sought to narrow the applicability of eminent domain), the City of Arlington was inconveniently in the process of acquiring land for the Dallas Cowboys' new stadium.[45] To ensure that the land in question could still be taken up, Texas legislators added a special provision to the aforementioned statute:

> (c) This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for: . . .
>
> > (6) a sports and community venue project approved by voters at an election *held on or before December 1, 2005*, under Chapter 334 or 335, Local Government Code.[46]

On November 2, 2004—just one month before the eminent domain limiting legislation took effect—Arlington approved the stadium's funding, and the property was legally condemned.[47]

Despite the above legal and policy considerations, traditional sports teams have long relied on public funding for the construction of their venues.[48] However, moving forward, it remains unclear whether esports will be afforded the same privilege. Specifically, esports

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[42] *Id.*

[43] *Id.*

[44] Arline F. Schubert, *A Taxpayer's and a Politician's Dilemma: Use of Eminent Domain to Acquire Private Property for Sport Facilities*, 86 N.D. L. REV. 845, 861 (2010).

[45] *See* S. 7, 79th Leg., 2d Called Sess. (Tex. 2005); Peter Montine, *Forced Turnovers: Using Eminent Domain to Build Professional Sports Venues*, 9 WASH. J.L. TECH. & ARTS 331, 335 (2014).

[46] S. 7, 79th Leg., 2d Called Sess. (Tex. 2005) (emphasis added).

[47] Stadium Election, CITY OF ARLINGTON (Nov. 2, 2004), https://www.arlingtontx.gov/UserFiles/Servers/Server_14481062/File/City%20Hall/Depts/City%20Secretary/Elections/Post%20Election%20Results/November-2-2004-Stadium-Election-Results.pdf.

[48] Long, *supra* note 4.

stakeholders face the enormous challenge of convincing both the judiciary and the general public of their stadiums' purported public benefits.[49] And yet, in some instances, it is a challenge that they have overcome.

IV. Case Studies in Public Funding of Esports Venues

In 2018, the City of Arlington, Texas, contributed US$10M in public funding to help finance Esports Stadium Arlington.[50] The 100,000 square-foot arena has a capacity of 2,500 people and is the largest dedicated esports facility in North America.[51] More importantly, this was the first time that a municipal government levied public funds specifically for the creation of a professional esports venue. Although hesitant at first, regional stakeholders eventually persuaded Arlington Mayor Jeff Williams to commit Arlington taxpayers' funds to the cause.[52] Though the public funding of Esports Stadium Arlington represents a crucial step forward for esports, it now exposes the industry to the very same legal and social issues that have mired the public funding of traditional sports venues.

An authorized exception to the Texas Constitution made Arlington's US$10M tax levy legal, and therefore possible.[53] Section 52-a is Texas's anti-gifting provision and reads, "[T]he Legislature shall have no power to authorize . . . any grant of public [moneys] . . . to any individual, association, or corporation."[54] However, as outlined above, there is an exception—expenditures of public funds for a public benefit or purpose are permissible.[55] Seeing as Arlington's proposed US$10M grant successfully found its way into the city's 2018 budget, it would appear that stakeholders are satisfied that the esports arena holds some genuine public purpose.[56] If the expenditure is challenged, however, it is dubious whether the Texas judiciary would arrive at the same conclusion.

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[49] *See* N.Y. CONST. art. VII, § 8.1.

[50] Melissa Repko, *Arlington Goes All-In on Esports, Transforming Convention Center into $10M Gaming Venue*, DALL. MORNING NEWS (Nov. 21, 2018), https://www.dallasnews.com/business/technology/2018/11/21/arlington-goes-all-in-on-esports-transforming-convention-center-into-10-million-gaming-venue.

[51] Jason Dachman, *Inside Esports Stadium Arlington, North America's Largest—and Most Flexible—Esports Venue*, SPORTS VIDEO GROUP (Jan. 24, 2019), https://www.sportsvideo.org/2019/01/24/inside-esports-stadium-arlington-north-americas-largest-and-most-flexible-esports-venue.

[52] Repko, *supra* note 50.

[53] TEX. CONST. art. III, § 52-a.

[54] *Id.*

[55] Tex. Att'y Gen. Op. GA-0076 (2003).

[56] *City of Arlington FY2019 Adopted Budget*, CITY OF ARLINGTON 15, https://arlingtontx.gov/common/pages/DisplayFile.aspx?itemId=16867054.

Specifically, a prospective court would examine whether the city deliberately aimed to satisfy some core public purpose with the construction of Esports Stadium Arlington.[57] The city's Economic Development and Capital Investment Business Plan cites "help[ing] increase tourism," "promot[ing] and marketing . . . special events," and "increasing [adjacent] hotel occupancy" as the stadium's primary objectives.[58] However, several studies have concluded that there is no correlation between sports venues and economic growth and that sports venues do not increase either local incomes or tax revenues.[59] Additionally, in order for the city to rely on the favorable jurisprudential record of traditional sports venues, they would need to satisfy the court that Esports Stadium Arlington represents an analogous use of public funds—that is, that esports and traditional sports serve parallel purposes.

Reflecting on 2013 Detroit's cautionary tale, it is important to consider what social programs policymakers overlooked in favor of Arlington's US$10M esports levy. For comparison, in 2018, Arlington spent US$8.5M on public libraries,[60] US$2.5M on youth support,[61] and US$461K on school safety[62]—all well short of the city's US$10M esports venture. Taxpayers can only hope that funds allocated to each program are proportional to their public benefit. While the greater Dallas–Fort Worth Metroplex's hardcore esports fans might consider Arlington's US$10M tax levy "money well spent," one can imagine that local librarians, low income youth, and the youths' parents would not.[63]

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[57] TEX. CONST. art. III, § 52-a.

[58] *City of Arlington FY2019 Adopted Budget*, *supra* note 56, at 15.

[59] *See* SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (Roger G. Noll & Andrew Zimbalist eds., 1997); Robert A. Baade, *Stadiums, Professional Sports, and Economic Development: Assessing the Reality*, HEARTLAND INST. (Apr. 4, 1994), https://www.heartland.org/publications-resources/publications/stadiums-professional-sports-and-economic-development-assessing-the-reality-full-text; *Long*, *supra* note 17, at 8–10.

[60] *City of Arlington FY2019 Adopted Budget*, *supra* note 56, at 132.

[61] *Id.* at 138.

[62] *Id.* at 149.

[63] This disproportionate allocation of funds is especially contentious given the host of systemic sexual abuse and harassment issues currently miring the esports industry. For example, in June 2020 alone, more than seventy victims of gender-based discrimination, harassment, and sexual assault came forward with allegations against members of the esports industry. Since then, major actors such as T1 and NRG Esports have pulled sizeable portions of their sponsorship budgets. If such endemic brands are less willing to contribute monetarily to esports, it is realistic to assume governments will be increasingly hesitant to divert public funds away from other social programs in furtherance of the industry. *See* TJ Denzer, *NRG Severs Ties with Smash Bros Player Nairo amid Sexual Misconduct Allegations*, SHACK NEWS (July 2, 2020), https://www.shacknews.com/article/119009/nrg-severs-ties-with-smash-bros-player-nairo-amid-sexual-misconduct-allegations; Taylor Lorenz & Kellen Browning, *Dozens of Women in Gaming Speak Out About Sexism and Harassment*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/style/women-

Though Esports Stadium Arlington's US$10M price tag likely is not material enough to garner tremendous public opposition, other publicly funded esports stadiums just may. Just five days prior to Arlington's foray into esports, the city of Hangzhou, China, unveiled its four-million-square-foot "esports town."[64] Hangzhou paid the equivalent of US$280M to cover 100% of the cost of the esports town's construction.[65] The city also committed to investing the equivalent of an additional US$1.3B in various esports-related projects by 2022.[66] Hangzhou's esports town, however, remains government-operated, so there are presumably no issues related to the misappropriation of public funds to private actors.[67] Regardless, if a North American government were to earmark such an enormous tranche of public funds for esports infrastructure, it would surely rouse scrutiny from taxpayers and put a town-sized target on policymakers should the investment prove fruitless.

V. Moving Forward

Private esports actors embarking on their franchise-modeled journey should do so with the above-described legal and policy concepts in mind. Practically, such actors should prepare for a future where stadiums are built of their own fiscal accord. This necessity for esports stadiums to be self-sufficient creates new hurdles that traditional sports franchises have not encountered—fundamentally altering the way tomorrow's esports stadiums will be financed, built, and operated on a day-to-day basis. That being said, privately funded esports stadiums provide hope that these hurdles may still be overcome.

Fusion Arena in Philadelphia, Pennsylvania, is a crucial experiment. Its success or failure will inform the viability of future esports stadiums. Relying on private funding, Comcast Spectacor and The Cordish Companies financed the bulk of Fusion Arena's US$50M

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gaming-streaming-harassment-sexism-twitch.html; Ian Walker, *Over 50 Sexual Misconduct Allegations Have the Super Smash Bros Community in Turmoil*, KOTAKU (July 9, 2020), https://kotaku.com/over-50-sexual-misconduct-allegations-have-the-super-sm-1844328719.

[64] For scale, Hangzhou's "esports town" is the size of approximately seventy football fields. *See* Aisha Hassan, *Hangzhou Is Investing in Becoming the Esports Capital of the World*, QUARTZ (Nov. 26, 2018), https://qz.com/1475572/hangzhou-china-is-investing-to-be-esports-capital-of-world.

[65] Hongyu Chen, *Hangzhou Opens Esports Town, LGD Gaming and Allied Esports Debut Venue*, ESPORTS OBSERVER (Nov. 21, 2018), https://esportsobserver.com/hangzhou-opens-esports-town.

[66] *Id.*

[67] Adam Fitch, *Hangzhou Opens Its Own Esports Town*, ESPORTS INSIDER (Nov. 21, 2018), https://esportsinsider.com/2018/11/hangzhou-esports-town.

cost.[68] In order to recoup this massive investment, Comcast and company expect to hold more than 120 non-esports events per year in the new arena.[69] Additionally, the naming rights to the stadium will be sold on a ten-year, multi-million-dollar deal.[70] These measures are not only prudent but entirely necessary. In many ways, Fusion Arena's business model was borne out of the legal and political defects inherent in public funding. Should such a privately funded model prove successful, it would set a shining precedent for the esports industry—one that denunciates traditional sports' undue reliance on taxpayers.

Conclusion

Since the esports industry's inception, its fate and that of its traditional sports counterpart have been hopelessly intertwined. Esports' transition to franchise-based leagues is just another iteration of this similarity. Though following the path laid out by traditional sports has perhaps accelerated esports' progression, it also puts esports at risk of making the same missteps as traditional sports—or, perhaps worse, pursuing a path that has since been muddied and rendered uncertain. This path, of course, is the use of public funds for professional sports venues. As the esports industry inches closer to this reality, it becomes increasingly important to reflect on the legal and social consequences involved. Cautionary tales like those of Los Angeles, Montreal, and Detroit must be heeded, as they chronicle a history unworthy of repetition.

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[68] Reina Kern, *Fusion Arena to Become Newest State-of-the-Art Gaming* Facility, NBC SPORTS (Mar. 25, 2019), https://www.nbcsports.com/philadelphia/fusion/fusion-arena-become-newest-state-art-gaming-facility-philadelphia-sports-complex.

[69] Bob Fernandez, *Comcast to Spend $50 Million in South Philly To Create the Nation's First Video Gaming Arena*, PHILA. INQUIRER (Mar. 25, 2019), https://www.inquirer.com/business/comcast-overwatch-fusion-philadelphia-wells-fargo-linc-20190325.html.

[70] Don Muret, *Million-Dollar Naming Rights for Esports?*, VENUES NOW (July 11, 2019), https://venuesnow.com/million-dollar-naming-rights-for-esports.

Cooperative Gaming – Joint Employer Status in Esports

By Phillip Jones†

Introduction

Professional gaming, or esports, is one of the fastest growing industries in the world with $4.5 billion invested in 2018, a year-over-year growth rate of 837 percent compared to 2017, and revenue projections exceeding $1.8 billion by 2022.[1] Viewership is trending upward with an anticipated 646 million fans in 2023, nearly double the 335 million recorded in 2017.[2] In 2018, Forbes estimated that nine esports teams were worth at least $100 million,[3] and over $211 million in prize money was earned from tournaments in 2019.[4] As the esports industry grows, so do the legal issues plaguing gamers, teams, league operators, and game developers. Labor and employment law issues are at the forefront of the industry with concerns over player unionization, wage theft, child labor law violations, Title VII compliance, and player immigration. At the heart of these issues lie questions over the employee-employer relationship.

Scholarship suggests that esports players are employees, and not independent contractors, of their teams; this finding is likely under both the ABC and economic realities tests.[5] This Article accepts that

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[1] Mariel Soto Reyes, *Esports Ecosystem Report 2020: The Key Industry Players and Trends Growing the Esports Market Which is on Track to Surpass $1.5B by 2023*, BUS. INSIDER (Dec. 18, 2019), https://www.businessinsider.com/esports-ecosystem-market-report.

[2] *Id.*

[3] Team Cloud 9 held the highest evaluation at $310 million after a Series B funding of $50 million in October 2018. Mike Ozanian et al., *The World's Most Valuable Esports Companies*, FORBES (Oct. 23, 2018), https://www.forbes.com/sites/mikeozanian/2018/10/23/the-worlds-most-valuable-esports-companies-1.

[4] Kevin Hitt, *The Top 10 Esports of 2019 by Total Prize Pool*, ESPORTS OBSERVER (Dec. 27, 2019), https://esportsobserver.com/biggest-esports-2019-prize-pool.

[5] Jurisdictions apply varying tests to decide whether a worker is an independent contract or an employee; the two most popular tests are the ABC test and economic realities test. Under the ABC test, a hired person is presumed to be an employee unless the hiring party can show that the worker is (A) free from control or direction over their performance; (B) performing a service outside the usual course of the

conclusion and moves on to the issue of whether the teams are the only employers in this relationship. Under the joint employer doctrine, an employee may have a direct employer and a secondary employer.[6] Direct employers typically hire or fire, pay wages, and control the employee's schedule or working conditions.[7] Secondary employers, also known as joint employers, benefit from the employee's work but do not typically exert the same control as the direct employer.[8] A joint employer can be held liable if the direct employer fails to provide certain employee rights including minimum wage, overtime pay, benefits, and concerted activity protections.[9]

Esports leagues, typically sponsored or operated by game developers, make money from media and streaming deals, sponsorship agreements, and revenue from fans purchasing tickets or apparel.[10] As fan viewership drives the value of these various media and sponsorship agreements, and as fans come to watch their favorite players compete, it is fair to say that the leagues benefit from the skill and popularity of the players. Leagues also reserve control to schedule the season and penalize players for breaking league rules.[11] If found to be a joint employer, these entities would be held liable alongside the teams for violations of players' employee rights. Historically, it has not always been easy to identify joint employer status due to the ever-changing tests used by the relevant governing bodies.[12] Consequently, the Department of Labor (DOL) and National Labor Relations Board (NLRB) have recently established federal regulations adopting new tests to determine joint employer status under the Fair Labor Standards Act (FLSA) and National

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employer's business; and (C) engaged in an independently established profession. *See* Michael Arin, *Esports & Employment After* Dynamex, ESPORTS B. ASS'N J. (Oct. 2019), https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex (applying the ABC test to esports). The economic realities test examines a list of factors to determine if, as a matter of economic reality, the worker is dependent upon a potential employer. *See Are Esports Players Actually Independent Contractors?*, QUILES LAW (Apr. 17, 2015), http://www.esports.law/blog/archives/04-2015 (applying the economic realities test to esports).

[6] TODD H. LEBOWITZ, BAKER HOSTETLER, FIVE THINGS YOU SHOULD KNOW ABOUT JOINT EMPLOYMENT (2018), https://www.employmentlawspotlight.com/wp-content/uploads/sites/18/2018/10/Five-Things-You-Need-to-Know-About-Joint-Employment.pdf.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* Nicole Pike, *Esports Playbook for Brands 2019*, NIELSEN, https://www.nielsen.com/wp-content/uploads/sites/3/2019/05/esports-playbook-for-brands-2019.pdf (last visited July 25, 2020); Reyes, *supra* note 1.

[11] *See* OVERWATCH LEAGUE, *RULES OF COMPETITION AND CODE OF CONDUCT* § 6 (2020), https://overwatchleague.com/en-us/news/21568602/rules-of-competition-and-code-of-conduct.

[12] *See* STEVE BERNSTEIN & JOHN POLSON, FISHER PHILLIPS, *5 THINGS YOU NEED TO KNOW ABOUT THE LABOR BOARD'S NEW JOINT EMPLOYMENT RULES* (2020), https://www.fisherphillips.com/resources-alerts-5-things-you-need-to-know-about.

Labor Relations Act (NLRA), respectively.[13] The new regulations are employer-friendly, as they tend to disfavor a joint employer designation, which bodes well for the leagues.

This Article outlines the DOL and NLRB's recent regulations and, using the Overwatch League (OWL) as an example, discusses the potential liability and joint employer status of esports leagues in relation to the players.

I. The Tests

A. Department of Labor

In January 2020, the DOL's Wage and Hour Division issued a regulation adopting a four-part balancing test for determining joint employer status under the FLSA.[14] The test considers whether a second, potential joint employer:

(1) hires or fires the employee;

(2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

(3) determines the employee's rate and method of payment; and

(4) maintains the employee's employment records.[15]

The factors' weight is determined on a case-by-case basis, with no one factor dispositive in determining status.[16] Additional factors may be considered if they show that a potential joint employer significantly controls the terms and conditions of an employee's work.[17] An employee's economic dependence on a potential employer does not determine joint employer status.[18] DOL guidance indicates that the potential joint employer's ability, power, or reserved right to control the employee through one or more of the four factors does not automatically demonstrate status without some direct or indirect exercise of that control; however, such ability may be relevant in determining status.[19] The rule identifies two scenarios where joint employer status may be found under the FLSA; in the relationship of esports teams and leagues, we are primarily concerned with the first scenario, when "the employee

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[13] *See infra* Parts I.A–B.

[14] *See* James J. Plunkett, *Department of Labor Issues Final Joint-Employer Regulation*, OGLETREE DEAKINS (Jan. 14, 2020), https://ogletree.com/insights/department-of-labor-issues-final-joint-employer-regulation.

[15] 29 C.F.R. § 791.2(a)(1)(i)–(iv) (2020).

[16] 29 C.F.R. § 791.2(a)(3)(i).

[17] 29 C.F.R. § 791.2(b).

[18] 29 C.F.R. § 791.2(c).

[19] 29 C.F.R. § 791.2(a)(3)(i).

has an employer who suffers, permits, or otherwise employs the employee to work, . . . but another person simultaneously benefits from that work."[20]

Employers under the FLSA provide non-exempt employees a federal minimum wage and overtime pay at least one-and-one-half times regular pay for hours worked over forty in a workweek.[21] The FLSA also defines compensable time, regulates child labor, requires certain employer record keeping, and establishes exemption status for certain employees.[22] An employer under the FLSA is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[23] Joint employers are "responsible, both individually and jointly, for compliance with the FLSA."[24]

Esports has been rife with concerns over player exploitation and wage theft. Wage theft is an employer's failure to provide wages or benefits earned by an employee.[25] There have been numerous complaints over esports teams not paying players their contractual salary or prize money winnings.[26] If players are found to be employees of the teams, and not independent contractors, as previously referenced, then players can seek remedies under the FLSA for wage theft claims.[27] Additionally, the leagues, if found to be joint employers, would be liable for a team's lack of payment.[28] Leagues often send prize money winnings to the team organization and have limited control over the disbursement to players or the payment of players' contractual

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[20] 29 C.F.R. § 791.2(a)(1).

[21] *Wages and the Fair Labor Standards Act*, DEP'T OF LABOR, https://www.dol.gov/agencies/whd/flsa (last visited June 1, 2020).

[22] *Id.*

[23] 29 U.S.C. § 203(d) (2018).

[24] Zachary v. Rescare Oklahoma, Inc., 471 F. Supp. 2d 1175, 1178 (N.D. Okla. 2006).

[25] Specifically, an employer may commit wage theft by violating minimum wage and overtime laws, requiring an employee to work off the clock or during a break, or misclassifying an employee based on exemptions or as an independent contractor. *See* David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year.

[26] *See, e.g.*, Preston Byers, *Denial Esports Allegedly Owes Over €100,000 in Salaries and for CWL Pro League Payment*, DOT Esports (May 16, 2019), https://dotesports.com/call-of-duty/news/denial-esports-owes-salaries-pro-league; Scott Robertson, *Besiktas Esports Allegedly Hasn't Been Paying League of Legends or CS:GO Players*, DEXERTO (Aug. 28, 2019, 12:41 PM), https://www.dexerto.com/csgo/turkish-esports-team-non-payment-league-of-legends-940974; Jeff Yabumoto, *HOTS Players' Lawsuit Against Team Owner Alludes to Bigger Problems in Esports*, GAMECRATE (Jan. 21, 2019), https://www.gamecrate.com/hots-players%E2%80%99-lawsuit-against-team-owner-alludes-bigger-problems-esports/22004.

[27] *See Wage Theft: You're a Victim. Now What?*, NAT'L CONSUMER LEAGUE (July 2011), https://www.nclnet.org/wage_theft_you_re_a_victim_now_what.

[28] *See* LEBOWITZ, *supra* note 6.

salaries.[29] Employers willfully violating the FLSA may be required to compensate employees through backpay and liquidated damages.[30]

B. National Labor Relations Board

In February 2020, the NLRB issued its own regulation regarding joint employer status under the NLRA.[31] Under this standard, a joint employer relationship is found only when a second, potential joint employer and the primary employer "share or codetermine the employees' essential terms and conditions of employment."[32] Terms and conditions of employment exclusively include "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."[33] To share or codetermine an employee's essential terms and conditions, a joint employer "must possess and exercise . . . substantial direct and immediate control over one or more essential terms or conditions of their employment" that would meaningfully affect the employment relationship.[34] A potential joint employer's indirect control over essential terms and conditions, contractually reserved but never exercised authority to control the essential terms and conditions, or "control over mandatory subjects of bargaining other than the essential terms and conditions" merely supports but does not solely determine a joint employer relationship.[35] The regulation defines "direct and immediate control" over each of the essential employment terms and conditions.[36] Joint employer status is determined on a case-by-case basis after reviewing all relevant facts.[37]

The NLRA gives employees the right to form or join unions and participate in protected, concerted activities regarding working

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[29] *See, e.g.*, Hongyu Chen, *Chinese Organization Newbee Accused of Not Paying $100k in Prize Money to Fortnite Players*, ESPORTS OBSERVER (July 23, 2020), https://esportsobserver.com/newbee-nonpayment-fortnitewc2019; Cale Michael, *Former Team Manager and Players Accuse Vega Squadron of Not Paying Its Dota 2 Players*, DOT ESPORTS (Sept. 7, 2019, 6:35 PM), https://dotesports.com/dota-2/news/former-team-manager-and-players-accuse-vega-squadron-of-not-paying-its-dota-2-players.

[30] Franczek Radelet, *Wage and Hour Basics Series: Penalties for FLSA Non-Compliance*, WAGE & HOUR INSIGHTS (May 1, 2015), https://www.wagehourinsights.com/2015/05/wage-and-hour-basics-series-penalties-for-flsa-non-compliance.

[31] *See* Mark G. Kisicki & Erica M. Shafer, *Long-Awaited NLRB Joint-Employer Rule Sets Employer-Friendly Standard for Joint-Employer Determinations*, OGLETREE DEAKINS (Feb. 27, 2020), https://ogletree.com/insights/long-awaited-nlrb-joint-employer-rule-sets-employer-friendly-standard-for-joint-employer-determinations.

[32] 29 C.F.R. § 103.40(a) (2020).

[33] 29 C.F.R. § 103.40(b).

[34] 29 C.F.R. § 103.40(a).

[35] *Id*.

[36] 29 C.F.R. § 103.40(c)(1)–(8).

[37] *See* 29 C.F.R. § 103.40(a).

conditions; furthermore, in a unionized workplace, the employer and union are required to collectively bargain in good faith over terms and conditions of employment.[38] Besides certain exempted employees, the NLRA protects most union and non-union employees.[39] An employer is defined as "any person acting as an agent of an employer, directly or indirectly," excluding certain government entities and labor organizations.[40] Under the NLRA, joint employers must participate in collective bargaining with union representation over terms and conditions of employment; picketing directed at a joint employer is primary and lawful; and joint employers may be jointly and severally liable for the direct employer's unfair labor practices.[41]

Unionization is currently a hot topic in the esports industry with players seeking to form unions or players associations in multiple leagues.[42] If leagues are found to be joint employers, and if players seek to form a union under the NLRA, the leagues will be required to participate in collective bargaining along with the teams. Additionally, leagues would be held jointly and severally liable if the teams violated the NLRA through unfair labor practices, such as discriminating on the basis of labor activity or interfering with concerted activity. The NLRB investigates 20,000 to 30,000 charges per year regarding unfair labor practices.[43] Under the NLRA, the NLRB may seek make-whole remedies, informational remedies, or temporary injunctions in response to violations.[44]

II. Overwatch League

The OWL follows a franchise model, similar to traditional sports leagues, controlled and operated by the game's developer, Activision Blizzard.[45] Twenty franchises from cities across the globe compete in

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[38] *Frequently Asked Questions – NLRB*, NLRB, https://www.nlrb.gov/resources/faq/nlrb (last visited June 1, 2020).

[39] An exemption would only apply if esports professionals are considered independent contractors, which this Article does not address. *See* 29 U.S.C. § 152(3) (2018).

[40] 29 U.S.C. § 152(2).

[41] *NLRB Issues Joint-Employer Final Rule*, NLRB (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

[42] Liz Mullen, *Professional Overwatch and CS:GO Will Get Esports Players Associations Soon*, ESPORTS OBSERVER (Mar. 13, 2018), https://esportsobserver.com/pro-overwatch-and-csgo-players-associations.

[43] *About NLRB – Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited June 1, 2020).

[44] *Id.*

[45] Due to Activision Blizzard's total control over the league, the pair will hereinafter be referred to as the OWL.

the titular video game *Overwatch*.[46] Each franchise forms a team with a minimum of eight players through signing free agents, facilitating trades, or exercising team options.[47] Players receive a league imposed minimum salary of $50,000 plus franchise-provided benefits.[48] As the developer, Activision Blizzard holds the licensing rights to the game and imposes strict conditions on any third-party tournament organizers hoping to host an event outside of the OWL; these requirements make it more difficult for other professional leagues to host tournaments, thus limiting where players may compete.[49] Players must sign a contract with a franchise and the OWL, and the franchises have an agreement with the OWL requiring certain terms like the players' minimum salaries.[50] The OWL's Official Rules and Code of Conduct allows the league to create each season's schedule, impose player eligibility and league-sanctioned apparel requirements, restrict player movement, and enforce rules regarding player behavior and conduct.[51]

A. Fair Labor Standards Act

Under the FLSA, it is unlikely that the OWL is a joint employer because the OWL does not hire or fire the players, supervise or control the players' work schedule or conditions of employment, determine the players' rate and method of payment, or maintain the player's employment records. While the OWL may have the ability to ban or suspend a player for violating the code of conduct,[52] these actions would not terminate the contractual relationship between the player and their franchise. The franchise is responsible for signing, trading, and releasing players. Also, as previously referenced, the OWL's power and ability to penalize the players, even if it results in their inability to participate in

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[46] *Homecoming: What's New in 2020*, OVERWATCH LEAGUE (July 16, 2019), https://overwatchleague.com/en-us/news/23059433/homecoming-what-s-new-in-2020.

[47] *2020 Roster Construction Rules*, OVERWATCH LEAGUE (July 30, 2019), https://overwatchleague.com/en-us/news/23051827/2020-roster-construction-rules.

[48] In 2019, the average player earned $114,000 from base salary, prize money, and signing bonuses. Matt Morello, *2020 Team Needs and Player Contract Status*, OVERWATCH LEAGUE (Oct. 4, 2019), https://overwatchleague.com/en-us/news/23178914.

[49] *Organize Your Own Community Esports Competition*, BLIZZARD ENTM'T, https://communitytournaments.blizzardesports.com/en-gb (last visited Aug. 29, 2020).

[50] Adam Melrose, *Legal Analysis of the Overwatch League Structure and the Code of Conduct: A Comparison Study*, LAW OF ESPORTS (Apr. 8, 2018), https://www.lawsofesports.com/single-post/2018/04/07/Legal-Analysis-of-the-Overwatch-League-Structure-and-the-Code-of-Conduct-A-Comparison-Study.

[51] *See generally* OVERWATCH LEAGUE, supra note 11.

[52] *Id.*

the league and therefore inability to fulfill their player contracts, does not automatically impose joint employer status.[53]

Although the OWL is responsible for creating the league's schedule of matches, the franchises control the players' work schedule by designating starting lineups, benching players, and making substitutions.[54] While the franchises' player agreements are not public information, it is likely these agreements further control the players' conditions of employment through enforcing streaming requirements, media obligations, and practice hours. The OWL imposes a minimum player salary within the league, but the franchises negotiate the player contracts; furthermore, the contract terms often go above and beyond the required minimum threshold with bonuses, sponsorship perks, and increased pay based on skill.[55] There is evidence that the OWL imposes a soft salary cap via a luxury tax on franchises which could impact the earning potential of players;[56] however, it is unlikely that a soft salary cap, an indirect control, alone would be sufficient to find a joint employer relationship.

Without further information from the OWL, it is impossible to know whether the player contracts are merely form contracts provided by the league with only a small subset of the terms being negotiated with the players. The extent to which the OWL assists in drafting the player contracts may be a factor in determining joint employer status.

While some may argue the OWL maintains employment records through the code of conduct agreements signed by the players, the regulation clearly states that only records pertaining to the first three factors are considered employment records in this context.[57] The code of conduct agreement does not seem to fit within one of the first three factors, and nothing suggests the OWL maintains additional records that might relate to a factor. Finally, even if the code of conduct agreement was found to be an employment record, the regulation clearly states that satisfaction of this factor alone is insufficient to support a finding of joint employer status.[58]

Finally, while the teams are franchises of the OWL, the FLSA's regulation indicates that operating as a franchisor does not make the joint employer finding more likely.[59]

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[53] *See* 29 C.F.R. § 791.2(a)(3)(i) (2020).

[54] *See* *OVERWATCH LEAGUE*, *supra* note 11, § 5.16 (indicating franchises have the ability to designate starting lineups and manage substitutions).

[55] Morello, *supra* note 48.

[56] Richard Lewis, *Leaked Overwatch League Memo Drastically Shifts Housing Requirements, Confirms "Luxury Tax,"* DEXERTO (Aug. 7, 2019), https://www.dexerto.com/overwatch/overwatch-league-leak-housing-requirements-luxury-tax-888650.

[57] 29 C.F.R. § 791.2(a)(2).

[58] *Id.*

[59] 29 C.F.R. § 791.2(d)(2).

B. National Labor Relations Act

Similarly, it is unlikely that the OWL is a joint employer under the NLRA because the OWL does not have direct and immediate control over the players' wages, benefits, hours of work, hiring, discharge, supervision, or direction. Much like the DOL sets the minimum wage, the OWL sets the players' minimum salary, but the league does not ultimately determine the salary rate for each player. Franchises have full discretion to negotiate any salary above the minimum threshold.[60] The OWL requires that players be provided with housing, healthcare, and retirement benefits, but the franchises are responsible for actually providing these benefits.[61] Per the regulation, the OWL does not exercise direct control of the players' hours of work by establishing the league's operating hours, i.e. the season's schedule.[62] The franchises control player schedules through setting the team's lineup and contracting for practice or streaming hour requirements.

As previously discussed, the OWL does not have direct control to hire or discharge the players; all players are signed and discharged through a contract with a franchise. The OWL's restriction on player movement by setting free agency and trade periods is likely, at most, an indirect control on hiring that would not support a finding of joint employer status. The OWL does not supervise players through performance evaluations or give players instructions. Nor does the OWL direct players by assigning them a work schedule, task, or position.

The OWL does arguably have direct control over discipline through the league's reserved contractual powers under the code of conduct. In the past, the OWL has not hesitated in exercising this power to discipline players breaching the code.[63] This control, however, is likely not enough to favor a finding of joint employment. First, as previously mentioned, the OWL's ability to suspend or ban a player does not directly interfere with the player contract. A suspension may put the player in breach in his contract, but the OWL is not responsible for negotiating or enforcing that agreement; franchises have the option to bench a suspended player while keeping them under contract. Second, the OWL

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[60] Albeit with some limitations from the reported luxury tax. *See* Lewis, *supra* note 56.

[61] *See* Daniel Rosen, *Overwatch League Players Will Have $50,000 Per Year Minimum Salaries, Benefits*, SCORE ESPORTS (July 26, 2017), https://www.thescoreesports.com/overwatch/news/14823-overwatch-league-players-will-have-50-000-per-year-minimum-salaries-benefits.

[62] 29 C.F.R. § 103.40(c)(3).

[63] *See, e.g.*, Bill Cooney, *Blizzard Hands Out Suspensions and Fines to 7 New League Players*, DEXERTO (Dec. 21, 2019, 12:36 PM), https://www.dexerto.com/overwatch/blizzard-hands-out-suspensions-and-fines-to-7-new-overwatch-league-players-261381; Owen S. Good, *Overwatch League Pro Suspended for Homophobic Remark on Livestream*, POLYGON (Jan. 20, 2018, 12:48 PM), https://www.polygon.com/2018/1/20/16913072/overwatch-league-pro-suspended-homophobic-remark.

only has potential control over one of the eight terms and conditions of employment defined under the regulation; a weighing of the factors would likely lead courts to not find a joint employer relationship.

Conclusion

A joint employer finding can open esports leagues to additional liability through the actions of the teams or franchises. Based on the DOL and NLRB's new regulations, it is unlikely that the OWL would be considered a joint employer of the players. Furthermore, other popular tournament series, such as the *Counter-Strike: Global Offensive* Majors, which operate as an open stage tournament series without franchises, are even less likely to have sufficient control to support a joint employer finding.

Postscript

As of the writing of this piece, and in relation to the aforementioned ever-changing tests, the DOL's new rule has recently been challenged by a group of eighteen state attorneys general in a New York federal court.[64] The court struck down key parts of the rule as not falling in line with the FLSA and in violation of the Administrative Procedure Act,[65] especially as related to vertical joint employment relationships.[66] The relevant relationship discussed between the league operators, teams, and players would fall under a vertical joint employment relationship.[67] Specifically, the court found that the rule improperly implements the statutory definitions of the FLSA by focusing solely on the FLSA's definition of "employer," without regards to the definition of "employ" and "employee," when determining joint-employer status; thus, narrowing the FLSA's definition of "employer" and ignoring the definition of "employ" as to "suffer or permit to work."[68] Furthermore, the rule improperly applies different tests for joint and primary employers despite there being no separate tests under the

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[64] New York v. Scalia, No. 1:20-CV-1689-GHW, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

[65] *Id.* at 1.

[66] The court vacated the rule as applied to vertical joint employment but not in relation to horizontal joint employment. *Id.* at 34.

[67] Vertical joint employment "exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and an intermediary business contracting with that employer receives the benefits of the employee's labor." Marty Heller et al., *Federal Judge Strikes Down Key Parts of New Joint Employer Rule*, FISHER PHILLIPS (Sept. 9, 2020), https://www.fisherphillips.com/resources-alerts-federal-judge-strikes-down-parts. Horizontal joint employment exists "where the entities share a common legal or ownership arrangement." *Id.*

[68] *Scalia*, at 15–21.

FLSA.[69] Finally, the court found that the rule was arbitrary and capricious as the DOL did not properly justify the policy change or consider conflicts with the FLSA or the rule's impact on employees.[70]

It is likely that the DOL will either appeal the decision to revive the rule or seek to promulgate a new rule that comports with the recent ruling. In the meantime, employers, and league developers, should stay vigilant as to the rules within their respective jurisdictions. Some jurisdictions, like the Ninth Circuit,[71] will still follow a test similar to the new rule, while other jurisdictions, like the Second Circuit,[72] will follow tests centered on joint employment in light of the employee's economic dependence.

[69] *Id.* at 17–18.

[70] *Id.* at 31–33.

[71] Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).

[72] Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003).

Landlord-Tenant Law as Applied to Team Houses in Esports

By Spencer Mendez†

Introduction

Synergy between the members of an esports organization is important for success. Toward this end, esports organizations have established houses where an entire team of players or content creators can live together.[1] Esports teams—either as direct owners of the building or renters themselves[2]—use these houses both to grow the organization and to attract investors.[3] Whether the talent living in these team houses are classified as tenants, licensees, or invitees will impact the rights of both the talent (as inhabitants) and the organizations (as property owners or renters). Improper classification of talent, or failing to negotiate and establish legal classification at all, can lead to abuse of talent in housing.[4] As the esports industry matures, organizations should properly classify their talent, and talent should understand the implications of that classification.

To aid organizations and players in understanding their rights, this article provides (1) background of the law applicable to housing classification, (2) how the relationship between talent and the organization impacts that classification, and (3) the implication of the classification for each party.

[1] *Team Houses and Why They Matter*, ESL MAG. (Jan. 6, 2014), https://www.eslgaming.com/article/team-houses-and-why-they-matter-1676.

[2] Michael Arin, *Esports and Employment After Dynamex*, ESPORTS B. ASS'N J. (Oct. 11, 2019), https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex.

[3] *See* Justin Ronquillo, Comment, *The Rise of Esports: The Current State of Esports, Its Impact on Contract Law, Gambling, and Intellectual Property*, 23 U.S.F. INTELL. PROP. & TECH. L.J. 81, 84–85 (2019).

[4] Sky Williams, a content creator, allowed professionals and content creators in the *Super Smash Bros.* community stay in houses that he owned. Multiple members of these houses have come forward to describe the abuse that they suffered from Sky. None of these members had housing agreements. Cale Michael, *Sky Williams' Response to Allegations About His "Sky House" Residences Was Taken Down Mid-Broadcast*, DOT ESPORTS (July 7, 2020), https://dotesports.com/fgc/news/sky-williams-response-to-allegations-about-his-sky-house-residences-was-taken-down-mid-broadcast.

I. Possible Classifications

Courts look to landlord-tenant law, which draws upon both contract and property law, to classify common relationships between parties and determine their rights.[5] The potentially different jurisdictions of an esports organization's base of operations and the location of the team house determine which laws apply.[6] Though team houses are beginning to spread across the country and world, this article will focus on California landlord-tenant law because many team houses are located there.[7]

The three possible classifications for talent living in team housing are (1) tenant, (2) licensee, and (3) invitee. The factors in determining classification include how the parties' relationship forms, the rights granted to the inhabitant, and the purpose of the inhabitant being on the property. A few factors are vital: courts primarily look to the agreement between the parties, whether written or oral, as a starting point in determining whether someone is a tenant, a licensee, or an invitee.[8] Without an agreement, courts analyze conduct, such as whether or not the property owner received rent[9] and whether the inhabitant's use of the property benefits the inhabitant or the property owner.[10] Classification is a matter of law, and courts look to the facts of a case in reaching a determination.[11] While the various classifications share some common rights, the difference in classification may determine privacy, habitability, and the duties of each party in the event of a housing dispute.

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[5] *Landlord Tenant Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/landlord-tenant_law (last visited Sept. 25, 2020).

[6] GameDaily Connect, *Legality in Esports | PANEL*, YOUTUBE (Jan. 9, 2020), https://www.youtube.com/watch?v=vAkeEC4Eois&t=581s (Krista Hiner discussing the importance of jurisdiction at 16:03).

[7] *Compare* Arash Markazi, *Team SoloMid To Begin Construction on $13-Million Esports Training Center in Playa Vista*, L.A. TIMES (Sept. 11, 2019), https://www.latimes.com/sports/story/2019-09-11/largest-esports-training-center-north-america-los-angeles, *with* Mike Hume, *Bare Walls, Little Furniture and Big Dreams: A Year Inside D.C.'s Esports House*, WASH. POST (Feb. 8, 2019), https://www.washingtonpost.com/sports/2019/02/08/bare-walls-little-furniture-big-dreams-year-inside-dc-esports-house.

[8] Qualls v. Lake Berryessa Enters., 91 Cal. Rptr. 2d 143, 147 (1999) (citing 6 MILLER & STARR, CALIFORNIA REAL ESTATE § 18:5 (2d ed. 1989)).

[9] 10 MILLER & STARR, CALIFORNIA REAL ESTATE § 34:77 (4th ed. 2015).

[10] Bylling v. Edwards, 14 Cal. Rptr. 760, 762–63 (1961).

[11] *Qualls*, 91 Cal. Rptr. 2d at 147.

A. Tenant

Tenants lease property from landlords in exchange for rent.[12] A lease can be either written or oral, but an oral lease is only enforceable if it expires less than one year from the formation of the agreement.[13] The lease provides tenants with the right to exclusive possession of the property for the duration of the agreement.[14] Indeed, the right to exclusive possession distinguishes a lease, and therefore a tenancy, from a license.[15] An employee might be deemed to be a tenant if they obtain the rights to an apartment, including exclusive possession, as a benefit of their employment, with their employment serving as a form of rent.[16] Exclusive possession gives a tenant the right as the sole possessor of the property against the landlord and anyone else in the world.[17]

On top of exclusive possession, tenants also enjoy the right to a house that is made and kept habitable by the landlord, the right to challenge a landlord's eviction attempts, and the right to privacy, including the right to notice before the landlord visits the property.[18] A landlord is not able to end the tenancy except as provided by law or by the lawful provisions in the lease.[19] Given the foregoing rights, tenancy is the classification most favorable to inhabitants.

B. Licensee

A licensee is one who has permission from the property owner (the licensor) to use property for the licensee's own benefit.[20] A property

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[12] *See Tenant*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/tenant.

[13] MILLER & STARR, *supra* note 9, § 34:33.

[14] Howard v. Cnty. of Amador, 269 Cal. Rptr. 807, 813 (1990) (citing Guy v. Brennan, 60 Cal. App. 452, 456 (1923)).

[15] Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 482 (2009).

[16] *See id.* Here, the plaintiff was an employee of the defendant and the two had entered into a housing agreement that stated the plaintiff would be provided with housing by the employer. The employer tried to remove the plaintiff from the apartment by threatening to shut off the electricity and actually changing the locks. The court found that the plaintiff was actually a tenant and not a licensee and was therefore entitled to the protections afforded to tenants such as the right to quiet enjoyment and against wrongful entry and eviction.

[17] *See id.* This means that no one outside of the tenants signed to the lease would be able to use the property for the duration of the lease. Notably, this means that one tenant would not be able to exclude another tenant on the same lease (i.e., a roommate in a team house).

[18] *Landlord Tenant Law*, *supra* note 5.

[19] 10 MILLER & STARR, *supra* note 9, § 34:5.

[20] *See Licensee*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).

owner will grant a license to someone allowing that person or entity to perform certain actions on the property though the license does not confer any interest in the property itself.[21] Licenses, unlike leases, are typically revocable, unassignable, and terminable, all at the discretion of the licensor.[22]

A licensee is only granted the rights afforded to the licensee by the licensor in their agreement.[23] Tenants, by contrast, receive certain guaranteed rights, such as the right to a habitable residence.[24] The license might grant licensees similar rights to those enjoyed by tenants, but those rights would only exist by virtue of the license and would disappear when the licensor ended the agreement.[25] Importantly, licenses do not grant inhabitants exclusive possession.[26] Courts can find, however, that an agreement is a lease and not a license if the agreement provides for exclusive possession for a fixed amount of time and offers notice for termination, despite the parties' intent for it to be a license.[27] In general, a licensee classification is less favorable to inhabitants than tenancy given that the inhabitant has fewer rights to the property.

Courts can find that a license exists when the inhabitant has a privilege to use the premises under the owner as opposed to a right in the land itself.[28] Furthermore, courts have found a license where the licensee's property use socially benefits the licensee itself rather than provide economic benefit to the property owner, even if the licensee's use also incidentally benefits the property owner.[29] Additionally, when an agreement does not grant the inhabitant title to or interest in the land, courts can find a license instead of a lease.[30] Courts will consider a lack of rent payment as an indicator that the inhabitant may be a licensee.[31]

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[21] Jenson v. Kenneth I. Mullen Co., 259 Cal. Rptr. 552, 554 (1989). Tenancy is a right in property, while a license is an interest in contract.

[22] 10 MILLER & STARR, *supra* note 9, § 34:5.

[23] Qualls v. Lake Berryessa Enters., 91 Cal. Rptr. 2d 143, 147 (1999).

[24] *Landlord Tenant Law*, *supra* note 5.

[25] 10 MILLER & STARR, *supra* note 9, § 34:5.

[26] *Id.*

[27] *In re* Safeguard Self-Storage Trust, 2 F.3d 967, 972 (9th Cir. 1993).

[28] 10 CAL. REAL EST. § 34:5 (4th Ed.).

[29] Bylling v. Edwards, 14 Cal. Rptr. 760, 763–67 (1961) (finding that the plaintiff was a gratuitous licensee, rather than an invitee, because the plaintiff's purpose of being on the property was social in nature, despite the fact that she gave unsolicited help to the defendants).

[30] Qualls v. Lake Berryessa Enters., 91 Cal. Rptr. 2d 143, 147 (1999).

[31] 10 MILLER & STARR, *supra* note 9, § 34:77.

C. Invitee

An invitee is one invited to use the property of another for some economic benefit to the property owner.[32] An invitee and a property owner share some mutual advantage from the invitee's use of the property.[33] Invitees can enter the property through the property owner's invitation.[34]

In contrast to tenants and licensees, invitees normally do not receive much more than the presumption of ordinary care.[35] Ordinary care means that inhabitants can expect that a property owner keep the premises reasonably safe or at least warn inhabitants of any potential risks on the property.[36] A property owner will be held liable for injuries caused to invitees by dangerous conditions on the property that existed as a result of the property owner's negligence or willful conduct.[37]

Courts will classify an inhabitant as an invitee if the use of the property benefits the property owner in some meaningful way, as opposed to the incidental benefit of licensees.[38] Similar to the considerations for licensees, courts will consider whether the owner granted the inhabitant any interest in the property. A court would likely find that an inhabitant is an invitee if he does not have an interest in the property, does not pay rent, and his present on the property benefits the property owner in a meaningful way.[39]

II. Likely Classification of Talent

As explained above, courts look to the agreements and conduct between esports organizations and their talent in determining classification. Ultimately, the distinction between licensee and invitee is insignificant for talent living in team houses: both classifications receive fewer rights than tenants.

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[32] *See Invitee*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).

[33] *Bylling*, 14 Cal. Rptr. at 762–63.

[34] Clawson v. Stockton Golf & Country Club, 34 Cal. Rptr. 184, 190 (1963) (citing RESTATEMENT (FIRST) OF TORTS § 332 (AM. LAW. INST. 1934)).

[35] *Invitee Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/i/invitee (last visited Sept. 25, 2020).

[36] *Id.*

[37] *See Bylling*, 14 Cal. Rptr. at 764.

[38] *Id.* at 762–63.

[39] 10 MILLER & STARR, *supra* note 9, § 34:77.

A. Considerations in Esports

So how might esports players and content creators be classified vis-à-vis team houses? As an initial matter, if the organization itself is a licensee of the property owner of the house, the organization cannot grant tenancy rights to its talent.[40] If the organization owns or rents the property, however, then courts will conduct further analysis. For example, the court in *Qualls v. Lake Berryessa Enterprises, Inc.* was able to look directly to the agreement between the parties, which limited the amount of time the inhabitants could use the property, further limited the ways in which they could use the property, and allowed for others to cross over the property.[41] The lack of exclusive possession allowed the court to find that the plaintiff was a licensee, not a tenant.[42] Conversely, the court in *Spinks v. Equity Residential Briarwood Apartments* handled the appeal of an employee who argued that her housing agreement with her employer constituted a lease and that she was a tenant.[43] It found that the housing agreement between an employee and her employer constituted a lease because the inhabitant enjoyed the right of exclusive possession: the lease did not impose restrictions on her use of the property, and no one other than her had the right to occupy the property.[44] Further, the court held that because evidence existed that she was housed as compensation for her employment, a genuine issue of material fact existed as to the payment of rent.[45] Rent payment points to the existence of a lease rather than a license.[46]

In contrast to the cases above, esports team houses often involve conditions indicating a license, not a tenancy. Members of an organization or staff hired by an organization sometimes live in a team house with the talent. Indeed, coaches and managers might live directly in the house with the talent.[47] Additionally, staff hired by an organization, such as chefs or maids, might enter the house.[48] Talent living in team houses may have little privacy, including cameras filming for content, and enforced curfews (e.g., via the organization shutting off the Internet

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[40] Qualls v. Lake Berryessa Enters., 91 Cal. Rptr. 2d 143, 147–48 (1999) (holding a party cannot grant interest in property greater than the interest that it possesses, and a licensee cannot grant tenancy interests).

[41] *Id.* at 148.

[42] *Id.*

[43] Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 466 (2009).

[44] *Id.* at 482.

[45] *Id.*

[46] *Id.*

[47] Maddy Myers, *How Pro Gamers Live Now: Curfews, Personal Chefs, and All of It on Camera*, KOTAKU (June 21, 2018), https://compete.kotaku.com/how-pro-gamers-live-now-curfews-personal-chefs-and-a-1827017564.

[48] *Id.*

at a certain time).[49] Talent living in these conditions more closely resemble the licensee-plaintiff in *Qualls* because others have access to the property: the talent's actual use of the property seems to be limited by the control of the organization. That is, players and content creators typically do not have exclusive possession.

Examples of talent losing their housing lend further to the classification of talent as licensees or invitees. In the case of the Apex Pride League of Legends team, players were removed from the team house for underperforming as a team.[50] In another instance, the Red Reserve Call of Duty Team had to leave a team house because of the organization's inability to pay for the house.[51] While it is possible that a lease might state that these situations might be grounds for termination, tenants ordinarily receive protections against eviction. Given that lack of protection in the foregoing examples, talent in such situations more closely resemble licensees.

The ability to threaten to take away housing might also point to a person being a licensee. Such was the case with the Meet Your Makers esports team, where the organization threatened to take away the housing of one of its player's parents.[52] The player, Kori, had his mother sign his contract on his behalf because he was a minor at the time.[53] His organization reportedly threatened to take away his mother's house when he attempted to leave the team.[54] A court can look at Kori's situation in light of the *Spinks* decision by looking to the contract signed by Kori's mother to determine if she was a tenant, like the plaintiff in *Spinks*, or if she was a licensee of the organization and was able to be evicted as they had threatened.

The comparison to the plaintiff in *Spinks* can further apply to talent residing in a team house: if the talent are employees of the organization, and housing is part of their compensation, then *Spinks* indicates that the talent's payment of rent for that housing will bolster the argument that they are tenants. Organizations have sometimes paid for housing, as the employer paid for the apartment in *Spinks*.[55] Courts

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[49] *Id.*

[50] Jacob Wolf, *Sources: Apex Pride Asked to Vacate Its House After Underperforming*, ESPN (July 8, 2016), https://www.espn.com/esports/story/_/id/16899820/apex-pride-asked-vacate-house-underperforming.

[51] Reuters, *Red Reserve Call of Duty Players Told to Leave Team House*, ESPN (Apr. 5, 2019), https://www.espn.com/esports/story/_/id/26451033/red-reserve-call-duty-players-told-leave-team-house.

[52] Richard Lewis, *MYM Threatened Kori with Taking His Mother's House*, DOT ESPORTS (Feb. 8, 2015), https://dotesports.com/league-of-legends/news/mym-kori-threatened-unpaid-wages-1434.

[53] *Id.*

[54] *Id.*

[55] Myers, *supra* note 47.

could find that this would satisfy the talent's rent payment in consideration for the talent's classification as a tenant.

B. Impact of Classification in Esports Team Housing

In the end, most team houses appear to be the result of license agreements, rather than leases, between organizations and their talent, and talent are likely classified as licensees or invitees. Absent proper classification, talent residing in team houses might find themselves mistreated[56] or living in inhospitable conditions.[57] If the esports industry is troubled by organizational abuse, then there needs to be change. Proper representation must become the norm in contract negotiations so that, at a minimum, each party comes out of the negotiation knowing their rights in an agreement. Certain parts of the esports industry already mandate that teams provide their talent with housing, at least for a certain amount of time, and the rest of the industry could benefit from this same practice.[58]

Conclusion

Team houses offer immense benefits to esports organizations by fostering a community of talent, attracting investors for the organization, and benefitting talent with sponsorship deals, technology, and equipment. However, talent and organizations should be upfront about the limits of the occupancy relationship. Classifying talent as tenants, licensees, or invitees is important for determining the rights afforded to each party. Without proper classification, avoidable disputes will arise between organizations and their talent over each party's rights in the house, and the full benefits of team houses will never come to fruition.

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[56] *See* Arin, *supra* note 2.

[57] *See* Ronquillo, *supra* note 3, at 92.

[58] Richard Lewis, *Leaked Overwatch League Memo Drastically Shifts Housing Requirements, Confirms "Luxury Tax,"* DEXERTO (Aug. 7, 2019), https://www.dexerto.com/overwatch/overwatch-league-leak-housing-requirements-luxury-tax-888650. The Overwatch League had required that teams provide newly-signed players with housing for their first ninety days.

The Esports Bar Association Journal is published annually. The Journal solicits submissions through the Esports Bar Association website, www.esportsbar.org. Citations conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Please cite to articles herein using the following example: Genie Doi & Samuel Johnson, *Foreign Players Join American Teams for the American Dream but Can't American Stream*, 2020 ESPORTS B. ASS'N J. 1 (2020).

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