Esports Bar Association Journal

Volume 2019

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Preface

We would like to thank all of the authors that contributed to the first iteration of the Esports Bar Association Journal. In addition, we are gracious for the 2019 Publications Committee for their initial curation and editing of Volume 2019, as well as the 2021 editorial board who helped conform these articles to the standard set in 2020. Most of all, we thank our readers for their continued patronage.

Sincerely,

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

Thirty-Five Years Without Player Rights in Gameplay: Is a New Challenger Approaching?

By Ryan Fairchild†

Introduction

The fundamental legal issue underlying the esports industry is copyright. Under federal statute, protection for a copyright is provided to "original works of authorship fixed in any tangible medium of expression."[1] The clearest original works within esports are the video games themselves. Publishers own the copyrights in those video games and therefore control the outward (or downward) flow of rights from the original copyrights in the games. That flow of rights also largely and presently correlates with the flow of money in esports. Any party—a league, tournament organizer, sponsor, content producer, streamer, player—who wants to use video game content will only be able to do so under certain circumstances, typically either by (a) doing so pursuant to an End-User License Agreement ("EULA"), if the EULA allows for such use, (b) paying the publisher for a license to use that content, or (c) risking a cease-and-desist or other legal action.[2]

This article examines a theory of player rights in video gameplay. If esports players and video game influencers were to possess rights in their gameplay of a video game, teams, content producers, sponsors, and other similarly situated stakeholders would have to pay not just video game publishers for a license to use the video game, but also players and influencers for a license to use their gameplay. Such rights would also diminish current risks players face. Indeed, the current dynamic in esports is for teams to acquire a license from players for rights to player content, regardless of whether players have such rights.[3] Teams also typically require players to indemnify the team in the event of third-party suits (see, e.g., by a publisher who wants to enforce its

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[1] 17 U.S.C. § 102(a). *See also infra* note 13.

[2] Sometimes a publisher "tolerates" otherwise infringing use. *See, e.g.*, Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008) ("'Tolerated use' is a term that refers to the contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works."). But tolerated infringement can quickly turn to intolerable infringement, in which case the infringer should expect a cease-and-desist letter and possibly other legal action.

[3] The author has worked on dozens, if not hundreds of player deals.

copyrights). If players were to acquire autochthonous rights in their gameplay, those risks would abate.[4]

While courts to date have effectively held that video game players have no copyrights in their gameplay, those decisions derive from games like *Pac-Man* and *Galaxian*, which bear little resemblance to contemporary games. With the rise of increasing video game complexity, more sophisticated play, and new judicial tests involving copyrights in software output, a legal window may be opening for a player or influencer to challenge old precedent.

I. *Midway Manufacturing* and Its Progeny Presently Preclude Player Performance Rights in Gameplay

The year was 1983 and the United States Court of Appeals for the Seventh Circuit was dealing with two questions of first impression: (1) did copyright law protect a video game, and (2) could a player of a video game create a new, copyrightable work by playing the video game?[5] Midway Manufacturing Company, creator of the now-iconic titles *Pac-Man* and *Galaxian*, brought suit against Artic International, Inc. According to Midway, Artic had infringed *Galaxian* by producing a hardware modification that sped up *Galaxian*'s gameplay and sounds.[6] Artic had also allegedly infringed Midway's rights in *Pac-Man* by creating a nearly identical game with the highly original title of "Puckman."[7]

While Artic's actions might strike us now as fairly clear examples of copyright infringement, courts in 1983 were just beginning to consider whether video games fell under the definition of an "audiovisual work" under Section 101 of the 1976 Copyright Act.[8] At that time, the clear applications for what constituted an "audiovisual work" were film and television. But as the court in *Midway* objectively noted, video games are different from film and television. "[E]ach time a video game is played, a different sequence of images appears on the screen of the video game machine—assuming the game is not played

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[4] Some might argue that publishers have little to no incentive to punish players for playing the publishers' games without rights. That may be the present reality, but that may change. Furthermore, as attorneys, we should always be concerned about our clients' liability, even if only possible liability.

[5] *See* Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1011–12 (7th Cir. 1983).

[6] *Id.*

[7] *Id.* at 1011.

[8] Audiovisual works are defined under Section 101 of the 1976 Copyright Act as

> works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objections, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101.

exactly the same way each time."[9] Notwithstanding that difference, the Seventh Circuit Court of Appeals held that video games were "audiovisual works" under the Copyright Act, relying on Congress's initial intention for a broad reading of the Act.[10]

A second question remained: does a player of a video game create a new copyrightable work by merely playing the game?[11] The player could change what happened on the screen by moving a joystick, which the court said could be "a little like arranging words in a dictionary into sentences or paints on a palette into a painting."[12] But was playing a video game sufficiently similar to writing or painting so that each performance of a video game could be considered the work of the player instead of the game's creator?[13] The court answered no: "Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture."[14] At that time, because of the static nature of the map, the camera view, the options of play, and so forth, the player could not

> create any sequence he wants out of the images stored on the game's circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paints stored in its collection.[15]

Those sentences sum up the status of a player's performance rights in video game play for the last thirty-five years.

The holding in *Midway Manufacturing* was reaffirmed, and in some ways expanded, over the following decades. In *Red Baron-Franklin*

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[9] *Midway Mfg.*, 704 F.2d at 1011.
[10] *Id.*
[11] *Id.* This question is, or at least should be, of particular interest to esports players.
[12] *Id.*
[13] The primordial requirement of copyrightability is originality. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). But the required amount of originality is quite low. *Id.* ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." (internal quotation marks and citations omitted)). For protection under the Copyright Act, works must be both original and "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102. Given the low threshold required for originality, the current failure of courts to find copyrightability in gameplay is surprising.
[14] *Id.* at 1012.
[15] *Id.*

Park, Inc. v. Taito Corp., 883 F.2d 275 (4th Cir. 1989), the Fourth Circuit Court of Appeals held that playing a video game in an arcade constituted a public performance under Section 101 of the Copyright Act.[16] In that case, Red Baron operated arcades with various video games, including the game Double Dragon.[17] Taito, the creator of Double Dragon, had registered the game for copyright in the United States. Taito argued its rights in Double Dragon included rights of distribution and public performance, part of the typical copyright bundle under Section 101. Red Baron had acquired grey market copies of Double Dragon and had not obtained a license or other permission from Taito. The district court had held that the first sale doctrine extinguished "all rights [Taito] had under the copyright laws, including the right of public performance, so that Red Baron did not infringe."[18] In reversing the district court, the Fourth Circuit reasoned that, while the first sale doctrine precluded infringement based on the right of distribution under copyright law, the doctrine did no remove any other rights under copyright law, including the right of public performance.[19] Red Baron had therefore infringed Taito's copyright because it had not obtained a license to publicly perform the game.[20]

Later, in a case involving Valve, creator of Dota 2 and Counterstrike: Global Offensive, the United States District Court for the Western District of Washington cited *Red Baron* favorably in rejecting a defendant's argument that "playing video games in public is not a public performance."[21] The court in *Valve* also contrasted *Red Baron* with the decision from the Ninth Circuit Court of Appeals in *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996). In *Allen*, the Ninth Circuit held that playing board games in public did not constitute a "public performance."[22] Despite that holding, the end result

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[16] *Id.* at 279 (concluding both that the "operation of a video game constitutes a performance" under Section 101 and that, because "video arcades are open to the public," playing Double Dragon at an arcade was a public performance). *Red Baron* built upon the foundation established by *Midway Manufacturing*, noting that the Fourth Circuit had agreed previously with the Seventh Circuit (in *Midway Manufacturing*) that "video games are copyrightable as audiovisual works." *Id.* at 278. From there, the Fourth Circuit simply applied the plain language of 17 U.S.C. § 101—that to perform a work "publicly" meant to perform it "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered"—which applied to playing a video game in an arcade open to the public. *Id.* at 278–79.

[17] *Id.* at 277.

[18] *Id.* at 277–78.

[19] *Id.* at 280–81.

[20] *Id.* at 281.

[21] *See* Valve Corp. v. Sierra Ent. Inc., 431 F. Supp. 2d 1091, 1097 (W.D. Wash. 2004).

[22] *See id.* (citing Allen v. Academic Games League of Am., Inc., 89 F.3d 614 (9th Cir. 1996)). The Ninth Circuit's decision appears to be based in large part on policy:

of *Red Baron* and its progeny is that publishers also hold rights in the public performance of their games, to the exclusion of players.

II. A New Challenger Approaches? New Cases Provide a Window for Player Rights

Only in the last year have decisions emerged that provide the groundwork for pushing back on *Midway Manufacturing* and its thirty-five-year preclusion of players developing rights in their gameplay.

First, in 2018, Epic Games sued various creators of software cheats for its game, Fortnite.[23] Though only considering the matter on default judgment, the court in *Epic Games* openly questioned why the logic of *Allen* should not apply to video games as well.[24] The Ninth Circuit in *Allen* had reasoned that the term "play," which had traditionally applied to playing music or records, had

> not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers.[25]

Despite the compelling logic of *Allen*, the court in *Epic Games* declined to consider whether to apply that same logic to video games, noting that it lacked full briefing on the matter because it was considering only a motion for default judgment.[26]

> The term "play" [as defined in Section 101 of the Copyright Act] has not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers.
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> Whether privately in one's home or publicly in a park, it is understood that games are meant to be "played."

Allen, 89 F.3d at 616–17. Perhaps the court in *Allen* would have come out differently if the players of the board games possessed merely a license, as is now often the case with video games, instead of "us[ing] their own games, purchased from Allen." *Id.*

[23] *See* Epic Games, Inc. v. Mendes, No. 17-CV-06223-LB, 2018 WL 2926086, at *1 (N.D. Cal. June 12, 2018).

[24] *Id.* at *9 ("The concerns the *Allen* court had about giving copyright owners too much control over when and where purchasers of their games can play them might logically apply to video games too. Are video games different?").

[25] 89 F.3d at 616.

[26] 2018 WL 2926086, at *9 ("[T]he court declines to rule on whether posting a video on YouTube of gameplay from a video game does or does not infringe upon a copyright holder's 17 U.S.C. § 106(4) rights.").

Second is the case of *Rearden LLC v. Walt Disney Company*,[27] which examined copyright issues surrounding the software used to create the lifelike depictions of Grand Moff Tarkin and Princess Leia in Star Wars and other similar motion capture animations of human faces. In that case, the United States District Court for the Northern District of California reasserted a test for computer programs in a way that provides a potential window for players to gain rights in their gameplay. Disney had used the MOVA Contour Reality Capture Program—owned by Rearden—to create the motion capture animation for a number of films including *Beauty and the Beast*, *Deadpool*, *Terminator*, and others.[28]

Rearden brought two principal claims against Disney. The first was that Disney violated Rearden's patent for the MOVA software by using the software without authorization via a third-party contractor. But the second claim was novel: Rearden argued that Disney had infringed Rearden's copyright *in the output from the MOVA software*. In other words, Rearden was arguing that it owned whatever audiovisual images Disney had created with the MOVA software.[29] The parallel question in esports is whether the owner of software (a game publisher) can claim copyright in the output from the software (the player's gameplay).

Rearden's arguments and the court's rebuttal both focused on a case called *Torah Soft v. Drosnin*.[30] The *Rearden* court, in explaining *Torah Soft* and rejecting Rearden's copyright claim, stated that "[a]ssuming that a copyright in a computer program may extend to its output, Rearden must adequately plead that the MOVA Contour program does the 'lion's share' of the creating and that the end-user's role in creating the final product is 'marginal.'"[31] The court focused on the film actor's role in creating the output from the MOVA software:

> Here, unlike in *Torah Soft*, where the user merely inputs a word into the program, MOVA Contour's user inputs a two-dimensional camera capture that may range from Dan Stevens'[s] 'facial expressions of all the scenes we had done on previous days' to the 'subtle and dynamic motions performed by the actor [Josh Brolin playing Thanos in Guardians of the Galaxy [sic]' to 'Brad Pitt's 44-year-old-face.'[32]

Because the creative input was deriving from the actor—or in the esports comparison, the player—and not from the program itself, Rearden could not claim copyright in the MOVA software's output.[33] Indeed, while

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[27] 293 F. Supp. 3d 963 (N.D. Cal. 2018).
[28] *Id.* at 967–69.
[29] *See id.* at 969–70.
[30] 136 F. Supp. 2d 276 (S.D.N.Y. 2001)
[31] *Rearden*, 293 F. Supp. 3d at 970 (quoting *Torah Soft*, 136 F. Supp. 2d at 283).
[32] *Id.* at 971.
[33] *Id.*

Rearden tried to emphasize the work done by the MOVA software, the court noted that Rearden "repeatedly acknowledge[d] the actors' contributions throughout the complaints."[34]

Conclusion

The holding in *Rearden*, echoing *Torah Soft*, provides a potential test in a new context that could help to displace *Midway Manufacturing* and its thirty-five-year prohibition on player gameplay copyrights. Long gone are the days of *Pac-Man* and its static level design and its comparison to changing channels on a television. Now, players control camera angles and placement. They engage in complex multiplayer matches while making unending split-second strategic decisions, often on three-dimensional maps. The skill level and, yes, even artistry of their play attracts millions of viewers.[35] At this point, players do the "lion's share" of creating the output that is their gameplay. Maybe all that is needed to overturn thirty-five-year-old precedent—and to reap the corresponding economic rewards—is a new challenger.[36]

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[34] *Id.*

[35] Bolstering this position is the fact that some foreign esports players are now being granted EB-1A visas. Matt Best, *Huhi Becomes Permanent North American Resident*, VPEsports (July 15, 2018), https://www.vpesports.com/leagueoflegends/clg-huhi-greencard-visa-north-american-resident. Obtaining an EB-1A visa requires demonstrating "extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim." *Employment-Based Immigration: First Preference EB-1*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1 (last visited April 25, 2019).

[36] A lingering question is whether a game publisher can recapture any gameplay rights via the terms of use included as part of licensing a game. While this article and its author are not as concerned about a player's rights in gameplay vis-à-vis the publishers (as opposed to a team, tournament organizer, content producer, sponsor, etc.), terms of use or terms of service *may* constitute a contract of adhesion depending on how they are worded. *See, e.g.*, Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007) ("The TOS are a contract of adhesion. Linden presents the TOS on a take-it-or-leave-it basis. A potential participant can either click 'assent' to the TOS, and then gain entrance to Second Life's virtual world, or refuse assent and be denied access. Linden also clearly has superior bargaining strength over Bragg. Although Bragg is an experienced attorney, who believes he is expert enough to comment on numerous industry standards and the 'rights' or participants in virtual worlds . . . he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the TOS that Linden offered."); *see also* Evans v. Linden Research, Inc., 763 F. Supp. 2d 735, 740–42 (E.D. Pa. 2011) (contrasting the facts of *Bragg* in finding that changes to Linden's terms of service no longer made the arbitration clause unconscionable).

Unionization in Esports

By Harris Peskin†

Introduction

Much has been made of the players need to unionize across esports[1] though there is little understanding of the implications of such a union, and the complexity associated with establishing one. As a preliminary matter, and for purposes of this paper, the term "esports" should be understood to mean the industry that encompasses the competitive playing of video games, including League of Legends ("LoL"), Overwatch, Defense of the Ancients 2 ("DOTA 2"), Super Smash Brothers and many more.[2] Similar to how there are several different sports that comprise the sports industry, there are many different video game titles that make up the esports industry. As it would be impracticable, and possibly illegal, for NFL, MLB, NHL, and NBA players to form one collective union in negotiations against one collective association of their respective leagues, the same can be said for each individual esport. To the extent there will be unionization, it will come within the confines of each individual esport ecosystem.[3]

It remains unclear how wise unionization would be for the players. As unionization implicates antitrust and employment law, and issues arise under these areas of law due to economic circumstance, the economics of esports must be understood at a fundamental level to properly evaluate the wisdom of unionization.

Part 1 of this paper will provide a glimpse into the murky and unclear esports ecosystem, while also shedding light on how other professional sports leagues have approached the problem of inflated player salaries. Part 2 will explore the interactions of a player's union with player salary caps, drafts, and similar restrictive practices. Finally, Part 3 will recommend an approach on a moving forward basis

[1] *See* Pat Evans, *How Players Associations Could Help Improve Esports' Infrastructure*, FRONT OFFICE SPORTS (Mar. 8, 2019), https://www.sportsbusinessdaily.com/Journal/Issues/2018/03/12/Esports/PAs.aspx; *see also* Maddy Myers, *Pro Gamers Are Getting Serious About Unionizing*, KOTAKU (March 14, 2018), https://compete.kotaku.com/pro-gamers-are-getting-serious-about-unionizing-1823770452.

[2] *See* Dictionary.com, https://www.dictionary.com/browse/esports.

[3] *See* Kieran Darcy, *Riot's Players' Association Lays Groundwork for Unionization*, ESPN (June 12, 2017), https://www.espn.com/esports/story/_/id/19617991/riot-players-association-lays-groundwork-unionization.

I. The Esports Ecosystem

In 2019, the esports ecosystem is dominated by the game developers who control the intellectual property around their games including formation of esports leagues, through application of Section 106 of the Copyright Act. One hundred percent of game revenues inure to the benefit of the game developer despite leagues acting as a marketing tool for the games. Game developers control the flow of esports league-wide revenues, which often include media rights deals, league wide sponsorships, ticketing revenues, and other similar sources of revenues. While recently some teams have been successful in bargaining for a share on league-wide revenue, most team revenues continue be sourced from the monetization of their players as influencer assets in the form of sponsorships.[4] Industry reports note that player salaries alone often exceed the revenue of professional esports teams.

> NewZoo analyst Jurre Pannekeet, who sees the revenues for 14 esports teams, says the majority of teams are operating at a loss, but declined to say how much on average, citing nondisclosure agreements. When pressed whether that majority was closer to 51 percent or 90 percent of teams operating at a loss, he said: "If you looked into it, it's probably closer to 89 percent than 50 percent.[5]
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> Much of that is likely due to players' salaries, which Fields describes as being 'at completely unsustainable levels.' Some reports indicate that North American League of Legends pros earned $105,000 a year on average in 2017. After the league franchised in 2018, the average went up to $320,000. Some players have made closer to a million dollars per year. 'The revenue has not yet equaled what the salaries demand,' Fields said. Esports organizations have to pay those salaries, on top of the $10 to $13 million that they pay to Riot Games to be in the league at all.[6]

ESPN reports that recently teams have paid between $30 and $60 million dollars to participate in the Overwatch League, which is in its

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[4] Cecilia D'Anastasio, *Shady Numbers and Bad Business: Inside the Esports Bubble*, KOTAKU (May 23, 2019), https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843.
[5] *Id.*
[6] *Id.*

second year of operation.[7] The first year of the Overwatch League reportedly averaged 80,000-170,000 concurrent viewers on its English language Twitch broadcast.[8]

With such large costs and uncertain revenues, an estimated 70% to 80% of which come from sponsorships,[9] the highest of which do not exceed a reported $3 million per year,[10] the fact that teams are operating at a loss is hardly surprising. Esports teams are not dissimilar from professional sports teams in this regard and may continue mirroring professional sports teams' path towards monetization and ecosystem stabilization. Professional sports teams have a history of losing money. Prior to the implementation of Financial Fair Play rules in 2013,[11] the preceding five years saw 99% of the English Premier League's revenues consumed by player wage growth.[12] Today, exceeding a 70% wages to ratio threshold subjects any UEFA club to investigation and a requirement for said club to submit "break-even information."[13] Deloitte states: "UEFA's Financial Fair Play Regulations have contributed towards European clubs' much improved financial results and reduced debt situation since 2012." In 2018, the wages to revenue ratio in the English Premier League was a more sustainable 59%.[14]

Similarly, in the 2002-03 NHL season, 73% of all hockey related revenues was paid to players.[15] To combat this the NHL adopted a more stringent salary cap. The National Hockey League formulates its salary cap by projecting the aggregate hockey related revenue of all its member

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[7] Jacob Wolf, *Sources: Overwatch League Expansion Slots Expected to be $30 Million to $60 Million*, ESPN (May 10, 2018), https://www.espn.com/esports/story/_/id/23464637/overwatch-league-expansion-slots-expected-30-60-million.

[8] *See Overwatch League*, TWITCHTRACKER, https://twitchtracker.com/overwatchleague/streams.

[9] *See* Steve Van Sloun, *Esports Franchise Economics*, LOUP VENTURES (Mar. 9, 2018), https://loupventures.com/esports-franchise-economics ("The breakdown of income varies by organization, team, and game. The vast majority of revenue (roughly 70-80%) for esports organizations comes from sponsorships and advertising.").

[10] Wolf, *supra* note 7.

[11] UEFA, the governing European Football body requires clubs to balance their spending with their revenues. In doing so, it restricts clubs from accumulating debt. Teams are permitted to spend up to 5 million Euros more than they per for each assessment period (three years). *See Financial Fair Play: All You Need to Know,* UEFA (June 30, 2015), https://www.uefa.com/community/news/newsid=2064391.html.

[12] *See* Bill Wilson, *Premier League Finances Enter New Era, Says Deloitte*, BBC NEWS (June 2, 2016), https://www.bbc.com/news/business-36412394.

[13] UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS, art. 62 Break-Even Information (2012), https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf.

[14] *See Deloitte Annual Review of Football Finance 2019*, DELOITTE (May 2019), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2019.pdf.

[15] Jonathan Kotler, Note, *Parallel Unionism in Professional Hockey: Redefining the Nonstatutory Labor Exemption to the Antitrust Laws,* 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 847 (2007).

teams for the following year. It then takes that number and divides it by the number of member teams participating in the league; 50% of this number is equal to the salary cap "Midpoint." NHL teams are prohibited from exceeding 115% of the Midpoint and spending less than 85% of the Midpoint.[16]

Given the success Financial Fair Play Regulations have had on reducing wage expenditure in European soccer, and the salary cap has had in mitigating wage expenditure in the NHL, the economics of the industry may force esports teams to seriously consider the adoption of a similar salary cap model. Though people in the industry have often endorsed the formation of a players' union, such a decision should not be taken lightly. The establishment of a union, and the existence of collective bargaining would necessitate the reality that league owners would immediately attempt to cut their financial expenditures by implementing a salary cap, among other things like a league wide player draft. Before doing so, teams and players should familiarize themselves with the legalities of a salary cap under both anti-trust and labor laws. Players must honestly assess whether unionization is wise in a market where they receive far more revenue than they generate for their employers. That assessment should be colored with an understanding of the benefits of unionization and the relaxation of strict antitrust laws that flow from a collectively bargained relationship.

II. Antitrust Restrictions

A. *History of Antitrust Law*

The history of anti-trust law in sports is a complicated one. The Sherman Antitrust Act of 1890 forbids any "contract . . . or conspiracy, in restraint of trade or commerce." In interpreting this provision, the US Supreme Court has formulated two rules with which to judge whether a particular restraint of trade promotes or hinders competition: the *per se* rule and the rule of reason. The *per se* rule invalidates arrangements that are by nature adverse to competition.[17] Typically actions like price-fixing and group boycotts are subject to the *per se* rule. By contrast, the rule of reason analyzes the reasonableness of a challenged restraint, the aim is to determine whether the restraint is justified by a legitimate business purpose, in its effect and purpose, as well as the availability of less restrictive alternatives and the balance being struck between pro-competitive and anti-competitive effects on the restraint.[18]

In the early 1900's, union actions began to clash with the Sherman Anti-Trust Act. A problem arose when unions, which naturally intend to

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[16] *See Collective Bargaining Agreement*, NHLPA, https://www.nhlpa.com/the-pa/cba.
[17] Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911).
[18] Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1047–48 (1994).

limit the employer's bargaining power and therefore necessarily fall under the restraint of trade prohibition found in the Sherman Anti-Trust Act, began to organize more aggressively.[19] To satisfy the union lobby, Congress passed both the Clayton Act and the Norris-Laguardia Act. The Clayton Act opined:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[20]

The statutes provide statutory immunity for union tactics like strikes and boycotts, but do not discuss the collective bargaining agreements unions often reach with management as a result of their organization.

In the 1930s and 40s, Congress passed the National Labor Relations Act and Labor Management Relations Act, each of which sought to promote collective bargaining. The NLRA encouraged self-organization and the process by which workers could designate representatives to negotiate terms and conditions of employment.[21] It states in pertinent part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,

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[19] *See generally* Allen Bradley Co. v. Local Union No. 3, 159 F.2d 669 (2d Cir. 1947); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 803–06 (1945) (tracing the struggle between the congressional attempt to protect rights of labor to organize and judicial aim of preserving competitive business economy through Sherman, Clayton, and Norris-LaGuardia Acts).

[20] 15 U.S.C. § 17 (1914).

[21] 29 U.S.C. § 151 (1947) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce[.]").

> for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[22]

In order to give meaning to this declaration of policy without running afoul of the Sherman Anti-Trust Act, courts have recognized what has come to be known as a nonstatutory "labor exemption."[23] In *Amalgamated Meat Cutters v. Jewel Tea Co.,* the Supreme Court stated that "union-employer agreements" are beyond the reach of the Sherman Act. The rule created by *Jewel* suggests that legitimate employee concerns outweigh anticompetitive practices to parties within the bargaining relationship, even if the bargaining yields practices which would otherwise be violative of the Sherman Act.

Since the nature of collective bargaining suggests that workers may end up striking a deal that inhibits their interests, the nonstatutory labor exemption has been used by employers as a shield against anti-trust criticisms surfaced by employees who are unhappy with the results of the bargaining. In the context of professional sports, the nonstatutory labor exemption has been used to defend the imposition of (1) a mandatory, multi-employer imposed fixed individual salary of $1000 per week for all NFL development players,[24] (2) a maximum salary limitation in the form of a salary cap[25], and (3) a college draft, among other things,[26] from antitrust attacks.[27] The standard to meet for the nonstatutory exemption is relatively straight forward and easily attainable within the context of a collectively bargained deal with a labor union.

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[28]

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[22] *Id*.

[23] Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 682 (1965).

[24] *See* Brown v. Pro Football, 518 U.S. 231 (1996).

[25] *See* Wood v. Nat'l Basketball Ass'n., 602 F. Supp. 525 (S.D.N.Y. 1984).

[26] *Id.*

[27] *See generally Amalgamated Meat Cutters*, 381 U.S. 676.

[28] Mackey v. Nat'l Football League, 543 F.2d 606, 614–15 (8th Cir. 1976) (internal citations omitted).

In 1995, the Supreme Court of the United States affirmed the DC Circuit Court of Appeals decision which upheld the imposition of a fixed $1000 per week development squad salary on the nonstatutory labor exemption's grounds. The Court of Appeals noted in pertinent part:

> [W]e believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are as defined by the federal labor laws. The system established by those statutes offers employees many benefits: recognition of organized workers as a bargaining unit, thereby giving them bargaining strength; establishment of mandatory subjects of bargaining; protection of the right to strike; allowance for the possibility of negotiated grievance procedures and pooled benefit plans; and judicial enforcement of collective bargaining agreements. Further, it establishes a significant list of employer actions that, if taken, constitute unfair labor practices for which employees and unions may seek redress before the NLRB.[29]

B. Antitrust Law Applied to Esports

Applied to esports there is clearly a choice that players can make. Should they choose to avail themselves of the benefits afforded to NLRB recognized unions, they would gain the benefit of additional bargaining strength, protection of the right to strike, and numerous other statutory rights. They would also open themselves up to the possibility of a collectively bargained salary cap, which would reduce earnings for esports players. Alternatively, the players can refuse to avail themselves of the benefits of unionization, and thus deny teams the nonstatutory labor exemption's protection.

Up until now this has been the choice, either wittingly or unwittingly, of the players. Nevertheless, it is worth noting that several notable esports figures have pushed for the unionization of players in specific esport titles.[30] Such an approach is not necessarily improper; as suggested above this is a calculation that employees must make. Inherent in the calculation is the thought that continuous losses suffered

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[29] Brown v. Pro Football, 50 F.3d 1041, 1057.

[30] *See* Ryan Morrison, *Future of Esports Players Unions*, ROBOT CONGRESS EPISODE 72 (May 8, 2018), https://open.spotify.com/episode/2QRwje2t0OEb7mehDRdzhp?si=NetyaTdpSNWXDQr6sfxhSw (Ryan Morrison advocating for a union collectively bargaining on behalf of the overwatch league players); Scott Smith (@SirScoots), TWITTER (June 26, 2015), https://twitter.com/SirScoots/status/614424193015222272 (Sir Scoots advocating for a CS:GO Player Union).

by the industry is not a sustainable solution and may lead to the unilateral imposition of a salary cap without employee consent. Given the unique three-party structure of esports, one that sees revenue and governance split between league operators (who may double as the game developer), teams, and players, the imposition of a salary cap need not even come directly from the team owners. A leaked Overwatch League Memorandum revealed the possible existence of a competitive balance tax in the Overwatch League[31], and while such a cap has never been confirmed, its possible existence raises interesting questions as to whether league organizers would unilaterally seek to protect the health of the leagues by imposing such a soft cap. While such an action may lead to a lawsuit, it would not be unfounded and may ultimately be permitted on an anti-trust basis, by the rule of reason.

In 1994 a District Court in the Southern District of New York stated in dictum:

> Even under a rule of reason analysis, however, it appears that the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive. The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences. Indeed, the Salary Cap seems to operate as a mechanism to distribute 53 per cent defined gross revenue to the Players.[32]

Ultimately the District Court's decision was determined on labor grounds after appeal to the Second Circuit Court of Appeals.[33]

In 1976 the Eight Circuit Court of Appeals reviewed what was then known as the "Rozelle Rule", a rule which was unilaterally implemented in 1963, and provided that when a player's contractual obligation to a team expired and he signed with a different club, the signing club was obligated to compensate the player's former team. The court ultimately found that because the Rozelle Rule originated before the existence of a collectively bargained agreement, it was not the result of bona fide bargaining and thus not shielded by the nonstatutory labor exemption.

The inquiry then turned on whether the Rozelle Rule was shielded by the rule of reason. While ultimately the *Mackey* court found that the restraint was unacceptable due to its numerous anticompetitive effects, which were "significantly more restrictive than necessary", the court

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[31] *See* Richard Lewis, *Leaked Overwatch League memo drastically shifts housing requirements, confirms "luxury tax"*, DEXTERO (Aug. 7, 2019, 9:14 PM), https://www.dexerto.com/overwatch/overwatch-league-leak-housing-requirements-luxury-tax-888650.

[32] Nat'l Basketball Ass'n V. Williams, 857 F.Supp. 1069, 1079 (S.D.N.Y. 1994).

[33] *See* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995).

noted that the NFL had a "strong and unique interest in maintaining competitive balance among its teams."[34] Such an analysis may be even more pervasive in the esports industry, an industry where 70% of revenues are derived from sponsorships and where league operators represent another party with whom league revenues must be split.

Absent regulation to the contrary, top teams may continue to tighten their grip on the sponsorship market as their high match viewership represents value to sponsors. The European Premier League tells us that sponsors often flock to teams that demonstrate a history of competitive excellence.[35] "Clubs are in fierce competition when it comes to commercial deals, as they tend to be sold on a club-by-club basis. This model may seem advantageous for certain clubs as it provides an opportunity to obtain a competitive advantage over other teams."[36] While those teams may be able to better afford high player wages, in order to maintain competitive league balance less well-known teams have been forced to aggressively raise capital to afford players of a high competitive caliber. Without a return on investment, a trend of rising player costs, and an additional stakeholder to share league revenues with, the sustainability of the esports team model for all but a few teams has been called into question, and some have speculated that the industry may experience a significant market correction whereupon there is a consolidation of teams and thus less players employed in the industry.

Maintenance of the overall health of the industry provides a compelling argument for the imposition of a salary cap on antitrust rule of reason grounds, even absent the existence of a collectively bargained agreement. While this reasoning was ultimately shot down on factual grounds in *Mackey,* the esports industry, and the market forces at play, may provide a compelling enough reason to swing the balancing test in favor of the teams, provided such a cap were instituted on the least restrictive grounds possible.

III. Next Steps

The structure of the esports industry provides unique challenges toward maintaining its economic stability. Players and teams must be

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[34] *Mackey*, 543 F.2d at 621–22.

[35] DELOITTE, *supra* note 14, at Chart 8 Premier League and Championship clubs' average revenues (In 2017/18 40% of a UCL club's revenue was generated from commercial sources (primarily sponsorships, whereas only 25% of a UEL team's revenues were generated from commercial sources, and only 13% of other premier league team's revenues were generated from commercial sources. Here UCL teams comprised Chelsea, Liverpool, Manchester City, Manchester United and Tottenham Hotspur, and UEL teams comprised Arsenal and Everton. In the history of the English Premier League, only six (6) teams have won the league championship title (Manchester United, Chelsea, Manchester City, Arsenal, Blackburn Rovers, and Leicester City).).

[36] *Id.* at 23.

cognizant of the challenges that they face in years to come. This necessarily includes market realities which will impact the long-term viability of the industry. As a matter of first concern, players should immediately begin taking steps towards familiarizing themselves with team economics. Losing money in perpetuity is not a viable path toward success and it should not be assumed that this is a market condition which teams, and their investors, are prepared to live with forever.

After this has been done, players will need to make a calculated decision about whether they should get out in front of a potential salary cap by organizing and beginning the collective bargaining process. Players must weigh what they would gain in the form of a more standardized player contract with agreeable uniform terms and other benefits against the status quo, which can be attained by standing idly by whilst market competition prolongs player wage inflation and in turn necessitates potential league operator intervention or a consolidation of industry competition. It should be noted that consolidation of industry competition will result in fewer jobs.

There is also the issue of game developer power, a separate yet equally important topic of consideration for players. While Riot Games has taken initial steps towards erecting a fully functional players association, executives within professional sports have wondered aloud whether Riot's funding of the association presents an apparent conflict of interest.[37] The concept that league organizers might attempt to cull player-team coordination is not a new one. This question was explored by Bryce Blum and Stephen Fisher in a March 2014 Foster Pepper White Paper.

The formation of a LoL Players Association is significantly more complex than in other sports, primarily because three parties would need to be involved in the bargaining process. The players and teams sign two sets of contracts – one with each other and the other with Riot. The two primary bargaining topics within professional sports leagues are similarly split: player-team contracts govern the majority of the terms and conditions of employment, while the LCS rules and the contracts signed with Riot control the means of allocating players and restricting their mobility. This complexity would not prevent the three parties from engaging in formal collective bargaining; however, the precise structure and nature of the bargaining would need to be carefully considered.[38]

While much is made of the relationship between teams and players, and league operators and teams, very little is ever made of the

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[37] Darcy, *supra* note 3, (Paul Kelly, former executive director of the National Hockey League Players' Association: "Obviously there is certainly the potential for conflict of interest, and the potential for [Riot] to assert control over the players through [the association] if they're the primary or only funding source.").

[38] *See* Foster Garvey, https://www.slideshare.net/slideshow/embed_code/key/Moo4dR8qWoO52p (exploring whether teams and players should negotiate against Riot) (last visited Oct. 10, 2019).

relationship between league operators and players. Teams are seen as a pass-through entity by which league operators impose contractual terms, and reap some benefits of league monetization, including by way of merchandising, media rights, and league wide sponsorships. In the path toward a more stable ecosystem, teams and players, though traditionally adversaries in professional sports, find themselves aligned in significant ways as their continued existence and financial stability results directly from the success, and available revenue streams, of the league.

To be clear, this note does not advocate for the unionization of players in esports; its purpose is to bring awareness to the economic issues presently facing the esports industry and to discuss possible ways to resolve these issues. At some point in the not-too-distant future, the status quo will cease to be a viable option. At that inflection point players will be faced with a choice. They should fully understand the consequences and economic realities associated with that choice.

Diversity in Esports

By Anna Chang, Krista Hiner, Jessica Linton & Carly Manger†

Introduction

Esports has grown exponentially over the last decade, both as a hobby and as a profession. With that growth comes growing pains. For many, video games were a safe place to escape the stresses of everyday life. With the advent of the Internet and online multiplayer gaming, however, video games have, for some, morphed from a place of refuge to a place of hostility. Consequently, esports news stories are replete with reports on inappropriate, sexist, or discriminatory comments and behavior.

To facilitate discussion on best practices to address discrimination, online and in the workplace, in esports, the Esports Bar Association (EBA) requested anonymous testimonials from minorities in the esports community about their experiences with discrimination. The overwhelming response highlighted key challenges faced by underrepresented groups. Each testimonial, while unique, had the same underlying theme: there is a systemic problem with how people treat one another in esports, and that problem has a powerfully negative effect on both the lives of affected individuals and the development of this nascent industry.

This article focuses on the experiences of marginalized members of the esports community, as described by those members, in two separate arenas: in-game and in the workplace. By highlighting what are often otherwise silenced experiences, the EBA hopes to spark more dialogue about how to make esports welcoming to all and how to prevent behavior that drives valuable community members away from the hobby or profession they love.

I. The Online Disinhibition Effect

Anonymity plays a major role in how members of minority and marginalized groups are treated online. Under the Internet's cloak of anonymity, actors are free to express themselves without concern for perception or repercussions in real life. In fact, online anonymity is put forth as one of the reasons why esports communities that originated almost entirely online (e.g., PC-based games) are more entangled with overt discrimination than the fighting game community (FGC), which originated in arcades where players stand mere inches from each

† The authors wrote this article on behalf of the Diversity Committee of the Esports Bar Association.

other.[1] (This is not to say, however, that the FGC is free of discrimination.)

The cloak of anonymity lowers the inhibitions of bad actors. This "online disinhibition effect" or "toxic disinhibition," as coined by John Suler, Ph.D.,[2] clears the way for hateful and prejudicial communications, especially those targeting members of minority or marginalized groups. Many illustrations of this were reported by the testimonials the EBA received, including the following:

> I am . . . Jewish[.] After the events of the synagogue shooting last year I played a few games where folks were talking about it. It was upsetting and I asked them to stop. They asked why, I said I was Jewish . . . my team chose to express their frustrations with the concept of circumcision. I asked them to again stop. They did not. I left voice chat. And they started typing hateful things to me. I left the game.
>
> It sucks to see people be called 'gay' or 'faggot'. I don't mention I'm queer out of fear.
>
> Language used in 'gamer' spaces is awful and alienates all groups of people.
>
> I am…autistic…and seeing others being called retarded and being called retarded myself is a cruel reminder that [to those people] I am nothing more than a punchline.

These experiences illustrate how those persons targeted by discrimination are silenced and intimidated. But this silence and intimidation often extends to bystanders. As reported by The Washington Post: "With no clear methods to effectively monitor, halt or eliminate toxic behavior, many in the gaming community have simply tried to ignore it and continue playing anyway."[3] The result is that the aggressor's behavior goes unchecked.

> I [am a female and] started playing Overwatch when I was 16. Every time I would talk [in in-game chat], then make a

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[1] Mitch Bowman, *Why the Fighting Game Community is Color Blind*, POLYGON (Feb. 6, 2014, 12:01 PM), https://www.polygon.com/features/2014/2/6/5361004/fighting-game-diversity.

[2] John Suler, *The Online Disinhibition Effect*, 7 INT'L J. OF APPLIED PSYCHOANALYTIC STUD. 321–26 (2004).

[3] Noah Smith, *Racism, Misogyny, Death Threats: Why Can't the Booming Video-game Industry Curb Toxicity?*, WASH. POST (Feb. 26, 2019), https://www.washingtonpost.com/technology/2019/02/26/racism-misogyny-death-threats-why-cant-booming-video-game-industry-curb-toxicity/?utm_term=.deb531c2ad60

> mistake, people would tell me to 'get raped' or to stop showing my [genitals] for boosts. I learned to get good at the game and never talk in voice chat. Not once did anyone defend me.

Anonymity makes it easy for some bystanders to ignore toxicity aimed at other individuals, passively allowing toxicity to persist. But unconventional uses of anonymity can provoke toxicity, too. Earlier this year, a male gamer known as "Punisher" leveraged anonymity to conduct a so-called "social experiment". Punisher masqueraded as a female Overwatch player, "Ellie," who, despite being previously unknown and playing on a newly created account, quickly began to climb the leaderboards and was signed by Second Wind, a team in the Blizzard-sanctioned Overwatch Contenders League. Almost as quickly, Ellie drew criticism. Some criticisms were legitimate, questioning whether a male player of Ellie's skill would have been so quickly signed (indeed, Punisher had not been signed to any teams). Others repeated the age-old question of whether a girl could actually be a skilled gamer. (Kim "Geguri" Se-yeon, the first female to play in OGN Overwatch Apex and the Overwatch League, faced similar criticisms[4] and was forced to prove on stream that she was, indeed, as skilled as she demonstrated during tournament play.) Such criticisms snowballed into harassment and threats of doxxing. Though Second Wind defended Ellie's decision to stay anonymous, Ellie eventually quit her team.

Punisher was later outed as Ellie, igniting debate over the challenges faced by females in gaming as well as accusations that women receive special treatment based on gender. While Punisher may have shed more light on the unique adversity faced by female gamers, he likely did more damage than good. Indeed, by assuming the identity of Ellie, Punisher has given more anecdotal ammunition to bad actors who target women and minorities.

II. Battle Royale: Office Edition

Unsurprisingly, discrimination in esports is not limited to the recreational side of the industry. Workplaces in corporate America have consistently failed to reflect the diversity of America's population. Although many companies proclaim strong commitments to diversity,

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[4] Young Jae Jeon, *Geguri to Become First Female Competitor in Overwatch APEX*, ESPN (Aug. 6, 2017), http://www.espn.co.uk/esports/story/_/id/20269551/geguri-become-first-female-competitor-overwatch-apex. (Se-yeon's entry into the world of competitive Overwatch was fraught with controversy because of her gender. Her gameplay as Overwatch character Zarya in 2016 was so precise that her male tournament opponents accused her of cheating. She livestreamed her Zarya gameplay within a monitored studio setup to disprove her accusers.)

Women in the Workplace 2018,[5] a study published by LeanIn.Org and McKinsey & Company, reveals that progress across industries has effectively stalled. This systemic lack of progress, coupled with the online esports culture discussed above, has led to everyday discrimination against women and minorities in esports workplaces. Indeed, at least one esports title publisher, Riot Games, has identified a correlation between an employee's in-game toxicity and their workplace toxicity.[6] Simply put, online toxicity spills over into the real world, affecting esports workplaces everywhere.

Last year, Kotaku published an exposé on what it termed the "culture of sexism" at Riot Games.[7] The article prompted a number of Riot Games employees and former employees to share with their own experiences with sexism and "bro culture" at Riot Games. In response, Riot Games issued an official apology and pledged to expand its Culture, Diversity, and Inclusion Initiative; hire consultants to help reshape its work culture; improve its internal reporting and investigation process; increase anti-harassment training; and hire a Chief Diversity Officer. In November 2018, two women sued Riot Games for gender discrimination.[8] The case is still pending.

The testimonials that the EBA received from esports professionals mirror the experiences of those referenced in the Riot Games exposé. Those testimonials further validate the prevalence of discrimination as reported by Women in the Workplace 2018 and, predictably, indicate that discrimination is not limited to one company. Rather, discrimination is pervasive throughout the esports industry. A common theme in the testimonials is the implication that women are employed in esports, not because of their specialized skills, experience, aptitude or acumen, but only because they used sex (either with male coworkers or prospective bosses) as a currency to obtain their positions.

> As a woman, I constantly was asked who I slept with to get my position. My own boss treated me as lesser than my

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[5] *Women in the Workplace Study 2018,* LEAN IN, https://leanin.org/women-in-the-workplace-report-2018/men-still-outnumber-women-at-every-level# (last visited Apr. 25, 2019).

[6] *Riot Games: Assessing Toxicity in the Workplace*, RE:WORK, https://rework.withgoogle.com/case-studies/riot-games-assessing-toxicity/#results (last visited Apr. 25, 2019) (Riot Games reviewed *League of Legends* in-game logs for its employees, and determined that employees who demonstrated unusually high in-game toxicity were more likely to demonstrate an affinity for passive aggression and intimidation in the workplace. Riot Games reportedly used data to confront employees directly, which sparked some employees to become more considerate).

[7] Cecilia D'Anastasio, *Inside the Culture of Sexism at Riot* Games, KOTAKU (Aug. 7, 2018, 3:00 PM), https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483.

[8] McCracken v. Riot Games, Inc., No. 18STCV03957 (filed Nov. 15, 2018), https://www.classaction.org/media/mccracken-et-al-v-riot-games-inc.pdf.

male counterparts. I was ignored, and my opinions were invalidated. [They] made me feel like I was less; like I was unworthy of my position.

Over the four years I worked with the organization, I endured massive amounts of sexual harassment by the CEO. Unnecessary lewd comments were peppered into nearly every conversation with him. . . . [After an incident involving unwanted touching,] [t]he sexual remarks lessened for a short period of time, but unfortunately came back. [U]pon my inquiry into being able to go to an event in order to cover it for the website[,] [t]he CEO met my request with a scoff, telling me the only way I could be flown out is if I would sleep with someone on the team. I knew in that moment he would never take me or my work seriously. . . . It felt as though I was only kept around as a source of entertainment. It was humiliating. After summoning the courage to distance myself from the organization and cut all ties, I still find it troubling to have confidence in my work. I'm fearful I may never be taken seriously.

One thing I find difficult in navigating the industry as a woman is receiving/dealing with/rejecting romantic advances from male counterparts. . . . I've felt like I have to avoid directly/deliberately shooting down colleagues in the industry who flirt/dm me (luckily nothing more than flirting) out of fear that it could affect my career in a negative way. . . . [N]ot feeling like you're able to openly tell someone ‘sorry I'm not interested in you romantically at all and find this way of speaking to another professional in the industry grossly inappropriate’ is frustrating at best, utterly disempowering at worst. Romance in the workplace is a fact of life. Plenty of people who work in the same office, let alone the same industry, enter into romantic relationships. . . . I don't think that these men are bad people. All of them dropped it once they got the hint and have either treated me with respect or left me 100% alone after getting it. . .I’d prefer it if they talk[ed] to me about the down and dirty of League of Legends. Whether I think Korea actually has a chance at worlds this year. Ask me how I feel about Caps leaving Fnatic and Perkz role swapping to bot. Ask me about my itemization preferences for a certain ADC or what I think a team's macro problems were in the games this weekend. . . . Just ask me ANYTHING besides ‘were you the girl I thought was cute at the *insert event name here* party?’ I am a

> hardworking, League obsessed writer, manager, assistant, and translator who has worked just as hard (if not harder) to be in this industry.

Another common theme in the testimonials is that women, even if they are in a position of authority, are often the target of microaggressions. Microaggressions are more covert acts of discrimination, such as "subtle snubs, slights, and insults" directed at, and default disregard of minorities, women, and other historically stigmatized groups.[9] Microaggressions are demeaning and discourage inclusivity. The following testimonials are replete with examples of microaggression:

> I am a [woman of color]. . . . I constantly have to prove to everyone that I know what I'm doing. At work, every time I meet someone new, I have to build trust and respect from the ground up. Meanwhile, that new person automatically trusts and respects the white man who has the same title as me (despite the fact that I am the team lead). I have to prove that I know things about the game I work on all week, and that I know things about the players in the league I work on. I have to prove that I'm a "real" gamer- that I am playing "real" games despite already spending [more than]40 hours of my week on games at work. It's frustrating and makes me feel like I'm not accepted- having to prove that I belong rather than belonging by default, especially given my company's extremely rigorous hiring process. I'd imagine passing that process would be enough to prove to people that I belong here, but even after working here for more than two years, it's a constant struggle.

> I [am female and] have faced difficulty managing and supervising male students. They are dismissive of my authority, argumentative when assigned a task, and become terribly defensive and aggressive when you check up on their work. I also work closely with our scholarship players who are all male. Their managers are female and they show plenty of disrespect for them. They refuse to listen and deem their game knowledge as minimal, therefore not warranting their respect (according to their logic). When we try to address issues of toxicity, professionalism, language and behavior, the female staffers and admins are met with disdain and annoyed

[9] Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSP. ON PSYCH. SCI. 138–69 (Jan. 11, 2017).

> looks across the table. . . . Male students only respect and listen to our male admin and regard only his word to be final.

Many of the employees whom the EBA heard from were very quick to credit and give thanks to those male coworkers they viewed as allies ("The players often asked me if I was okay and were overall very supportive"; "I am 100% confident that if I tell someone 'no' for any form of romantic advances that my bosses (yes all of them) will have my back . . . . [M]y team is also full of men who ask me about my opinion on things like the Japanese esports scene, League of Legends, etc. and they don't just hear me. They LISTEN.") However, support from coworkers was unfortunately not enough in some cases, and several employees reported eventually leaving their jobs.

In contrast, some organizations proactively punish toxic and discriminatory conduct of their employees and affiliates. For example, in 2019, the Overwatch League committed to publishing a public list of players who are punished for toxicity (among other rules violations).[10] While this exact method of discipline does not translate to every workplace, it is a good example of how accountability is a valuable tool for discouraging bad behavior, and how all actors in the space, both individuals and corporations, must take proactive measures to increase inclusivity and eliminate discrimination.

Conclusion

As the esports industry matures, actors within the industry must take proactive steps to eliminate toxicity, both in-game and in the workplace. Marginalization in any community is unacceptable. It is especially troubling to see how frequent and severe discrimination occurs in esports. Unfortunately, there is no one-size-fits-all solution. Instead, individual allies and companies must each take dedicated, consistent, meaningful actions to increase inclusion. At a minimum, we must look inward to identify how we each contribute to the problem and then take initiative to correct that behavior. In the case of the individual, this can be as simple as speaking out against witnessed discrimination. In the case of developers who provide the means to communicate, this can be as simple as more closely monitoring in-game chat.

In esports workplaces, eliminating discrimination requires allies to pay attention and respond to both overt discrimination and more subtle microaggressions. Those with authority must use their positions to determine why diversity may be lacking in certain departments or at

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[10] *2019 Player Discipline Tracker*, THE OVERWATCH LEAGUE (Dec. 21, 2018), https://overwatchleague.com/en-gb/news/22823906/2019-player-discipline-tracker; Bill Cooney, *Overwatch League: Blizzard launches plater discipline tracker for 2019*, DEXERTO (Dec. 21, 2018, 6:30 PM), https://www.dexerto.com/overwatch/overwatch-league-blizzard-launches-player-discipline-tracker-for-2019-261347.

certain points in the company's hierarchy and take action to promote and ensure diversity at all levels. Intracompany efforts must be tailored to each company and its employees to be effective.

This problem will not be solved overnight, but before we see meaningful progress, we must see meaningful commitment.

Esports & Employment After *Dynamex*

By Michael Arin†

Introduction

An important issue to the esports industry is whether esports players are employees of their teams under the Fair Labor Standards Act of 1938 (FLSA)[1] and derivative state laws. Although there has been some work analyzing the issue,[2] the recent California Supreme Court decision in *Dynamex Operations West v. Superior Court (Lee)*[3] adds new factors to the discussion. Players fall across a spectrum, but *Dynamex* favors finding an employment relationship, despite the difficulty of defining an esports organization's "business." Organizations new and old to the industry should be wary of the dangers of misclassification, particularly since the analysis under *Dynamex* is different than the tests for FICA payroll taxes and the FLSA. Prior to analyzing the status of esports players under *Dynamex*, it is necessary to give a brief description of the players and teams.

I. Putative Employees: Players

Players can be affiliated (either sponsored or hired by an organization) or unaffiliated, and fall along an influencer-professional spectrum. While it will prove critical that independent players are

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[1] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2018).

[2] *See* Hunter Amadeus Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional Esports Players*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 359 (2016) (concluding that the LCS, the league operator for professional play of League of Legends in the United States, and the teams would be joint-employers of the players under the 2016 California labor code, FLSA, and the National Labor Relations Act). Since the Note, the LCS has split into the LCS (governing North America) and the LEC (governing Europe) and has switched from a relegation system to a "franchise system." The NBA 2K and Overwatch Leagues have also experimented with franchise-leagues. The franchise system gives much more stability to teams; they no longer depend on player performance to maintain their position within the league. Stephen D. Fisher, Foster Pepper, PLAYER CONTRACTS: DEFINING EXPECTATIONS TO AVOID CONFLICT (Aug. 2014), www.foster.com/documents/foster-pepper-white-paper/playercontracts_definingexpectionstoavoidconflict_.aspx.

[3] Dynamex Operations W. v. Superior Court, 416 P.3d 1 (Cal. 2018).

successful, [4] the focus of this article is on the nature of the affiliation between players and the hiring organization.[5] Professionals are competitors in leagues with structures similar to major league sports franchises.[6] Meanwhile, influencers—or content creators—are players that act as brand ambassadors for their organization while streaming and interacting on social media. Players fall along a spectrum with some influencers joining competitive tournaments and some professionals livestreaming casual play.

Professionals play their video games, either competitively, for practice, or for show (streaming), up to fifteen hours a day.[7] While some professionals rely on their own gaming gear, sponsors of players, teams, or tournaments often also provide equipment.[8] In certain instances, professionals may live in gaming houses, owned or rented by their employing organization, and shared with their fellow teammates, in

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[4] *See, e.g.,* James Loke Hale, *Here's a Candid Breakdown of Exactly How much Money Twitch Streamers Earn per Month*, TUBEFILTER (Oct. 10, 2018), https://www.tubefilter.com/2018/10/10/twitch-streamers-earn-per-month-breakdown-disguisedtoast (discussing the success of Jeremy 'DisguisedToast' Wang, a Hearthstone player). *See also*, *infra*, Part III.C (discussing requirement of an independently established trade).

[5] This article uses the term "organization" and "team" interchangeably. Esports organizations mirror traditional sports teams. However, esports organizations may field multiple teams in different game titles. *See infra* Part II.

[6] See, *e.g.,* Imad Khan, *Riot Releases Details on NA LCS Franchising with $10M Flat-Fee Buy-in*, ESPN (Jun. 1, 2017), http://www.espn.com/esports/story/_/id/19511222/riot-releases-details-na-lcs-franchising-10m-flat-fee-buy-in. However, consider the unique market for Dota 2 professional play, which is, arguably, not dominated by a developer-controlled league. Major leagues include The International (and the associated Major and Minor tournaments), ESL One Birmingham and Katowice, DreamLeague, the Summit, StarLadder, Dota Pit, and many more. However, most teams are formed with the singular goal of winning the International due to the disproportionate prize pool.

[7] Graham Ashton, *What is the Optimum Training Time for Esports Players?*, ESPORTS OBSERVER (Dec. 18, 2017), https://esportsobserver.com/optimum-player-training-time (building off of Harrison Jacobs, *Here's the Insane Training Schedule of a 20-Something Professional Gamer*, BUSINESS INSIDER (May 11, 2015), https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5?r=UK&IR=T, comparing the training schedules of North American Team Liquid players (minimum team-required eight hours) with their Korean counterparts (up to twelve to fourteen hours a day)). One great question is whether hours filled playing the contracted-for game on a personal streaming site should contribute to work hours. Additionally, while teams often require a minimum required amount of training, players often go beyond to ensure peak performance. *Id.* This environment makes hourly wage structures very risky.

[8] Paul "Redeye" Chaloner (@PaulChaloner), TWITTER, (Sept. 12, 2018, 3:26 AM), https://twitter.com/PaulChaloner/status/1039792388510822400 (discussing expectations of organizations from the perspective of an esports host and commentator).

which they eat, practice, and sleep.[9] Because of the varied nature of esports, professionals compete in team games (e.g., *League of Legends* or *Overwatch*), paired games (e.g., *Fortnite*), or solo games (e.g., *Hearthstone*). In turn, the players are generally salaried and share in the profits of competition earnings;[10] they may also derive additional income from streaming donations, sponsorships, and advertising revenue.[11]

Organizations may also gather streamers under their brand, even if the streamer does not play in organized competitive tournaments.[12] These players are referred to as influencers or content creators. While professionals focus on winning tournaments, influencers focus on developing a brand and reputation in order to monetize a social media presence.[13] Much like models and other social media personalities, influencers act as an ambassador when creating content and attracting viewers towards his or her organization's sponsors and advertisers.[14] Like the greater esports industry, the influencer economy is dependent

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[9] Although once popular, gaming houses are now disfavored because of the injurious mental health effects, and teams have moved towards team training facilities. Alex Jang, *Are Gaming Houses Worth it for Pro Teams?*, ASHKON ESPORTS (Mar. 16, 2018), https://www.akshonesports.com/article/2018/03/are-gaming-houses-worth-it-for-pro-teams.

[10] For an example of an esports player agreement, see T.L. Taylor, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING app. (2012). Estimates of average LCS salaries are around $320,000. Joseph Ng, *The Explosive Growth of Esports*, BERKELEY ECON. REV. (Oct. 24, 2018), https://econreview.berkeley.edu/the-explosive-growth-of-esports. However, other leagues do not boast such numbers, and some players' earnings may depend on performance and are therefore highly volatile.

[11] Sam Nordmark, *Live Streamer or Competitive Gamer — Which Career Makes the Most Sense?*, DOT ESPORTS (Jul. 22, 2018), https://dotesports.com/general/news/esports-vs-streaming-money-career-31144. As mentioned, professionals may dabble in casual streaming. Traditionally, teams take no part in the revenue generated on a player's personal livestreaming site, even if the page is wrapped in the organization's marks and brand. Therefore, professionals are incentivized to livestream through sites like Twitch that allow viewers to subscribe or donate to the player. Mansoor Iqbal, *Twitch Revenue and Usage Statistics*, BUSINESS OF APPS (Feb. 27, 2019), http://www.businessofapps.com/data/twitch-statistics.

[12] *See infra* Part II.

[13] *Influencer Marketing in eSports | The Rise of eSports' Influence on Brands*, INFLUENCER MARKETING HUB, https://influencermarketinghub.com/influencer-marketing-esports (last visited Mar. 23, 2019).

[14] Organizations use influencers for reputation rental. Like any celebrity, fans trust the opinion of an influencer. Therefore, the esports influencer has access to the unique market of tech-savvy, ad-block using, men and women aged 18 to 34 from relatively wealth backgrounds. *Id.*; Nicole Carpenter, *Report: Women Make up Nearly One-Third of Esports Viewers*, DOT ESPORTS (June 7, 2017), https://dotesports.com/culture/news/women-in-esports-report-15095. Organizations use these influencers for the benefit of its sponsors.

on social media sites like Twitter, Twitch, and YouTube that serve as platforms for the influencer's opinions and video content.[15]

II. Putative Employers: Esports Organizations

The primary putative employer in esports is the esports organization. Esports organizations form with the intent to sign players, organize teams, and monetize talent. The organization draws in revenue through sponsorships and advertising, merchandising, and revenue-sharing agreements involving media rights.[16] Sponsorship and advertising revenue might be recognized through revenue-sharing agreements with the league[17] or through direct product placements on an organization's apparel, in-game banner, or video content.[18] Esports merchandising strategy mimics traditional sports in the sale of apparel and fan gear (e.g., posters, keychains, etc.) and adds the additional product offerings of computer gaming equipment like mice, mouse pads, and headsets.[19] Finally, organizations in leagues participate in revenue-sharing agreements to share in the monetization of online videos and, more-recently, tickets sales from physical attendees.[20]

While sponsorships are the biggest source of revenue for major teams, newer teams hope to prove themselves prior to any sponsor investment by identifying and engaging top talent—both professionals and influencers—to play for their organizations. A newer organization may specialize in a particular game, but organizations tend to diversify across titles, house academy-tier teams, and branch out to include even all-female rosters.[21] As mentioned above, the team can also sponsor individuals playing in tournaments and individual streamers to help promote their brand.[22]

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[15] Nicolas Miachon, *Esports is the Next Biggest Frontier in Influencer Marketing,* FORBES (June, 28, 2018), https://www.forbes.com/sites/forbescommunicationscouncil/2018/06/28/esports-is-the-next-biggest-frontier-in-influencer-marketing/#6e37f1206d7b.

[16] Steve Van Sloun, *Esports Franchise Economics*, LOUPVENTURES (Mar. 9, 2018), https://loupventures.com/esports-franchise-economics.

[17] *Id.*

[18] *Id.*

[19] *See, e.g.*, *Store*, CLOUD9, https://www.cloud9.gg/collections/all (last visited April 13, 2019). Some leagues also share revenue from in-game icons users buy to show their support for a particular organization. *E.g.*, Riot Katana, *Fandom Favs: Unlock an Esports Team Icon*, LEAGUE OF LEGENDS (Jan. 18, 2019), https://na.leagueoflegends.com/en/news/store/sales/fandom-favs-unlock-esports-team-icon.

[20] Sloun *supra* note 16.

[21] *See, e.g.*, *Teams*, CLOUD9, https://www.cloud9.gg/pages/teams (last visited Jan. 19, 2019). *See generally*, *An Introduction to the Esports Ecosystem,* ESPORTS OBSERVER, https://esportsobserver.com/the-esports-eco-system (last visited Jan. 2, 2019).

[22] *See, e.g.*, *Pro Players*, CLOUD9, https://www.cloud9.gg/pages/pro-players (last visited Jan. 19, 2019).

III. Esports Employment After *Dynamex*[23]

The FLSA and California have differing tests for employee status. Under the FLSA, an employee is any individual employed by an employer.[24] Employ means "to suffer or permit to work."[25] An employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee."[26] Similarly, the California Labor Code defines an employee as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."[27] Statutes and wage orders in many states, including California, frequently define "employ" as "to suffer or permit to work."[28]

Under the FLSA, courts and the IRS[29] apply an economic-realties or right-to-control test questioning whether the worker is economically dependent upon another's business.[30] While courts have considered several dozen factors, the question is ultimately one of control. The difficulty of managing the amalgam of factors led some states, such as California, to adopt in limited circumstances,[31] an ABC test that shortcuts the fact-intensive control test, questioning the freedom of the worker from the hiring entity's control only if the employer proves that

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[23] For a European perspective on the employee classification debate, see Jas Purewal & Pete Lewin, *Esports Players as Employees: What European Teams and Players Need to Know*, MEDIUM.COM (Feb. 8, 2017), https://medium.com/@purewalandpartners/esports-players-as-employees-what-european-teams-and-players-need-to-know-dc2e156cb684. *See also* Ferguson Mitchell, *Esports Primer: Understanding Independent Contractors vs. Employees*, ESPORTS OBSERVER (Jan. 21, 2016), https://esportsobserver.com/esports-primer-understanding-independent-contractors-vs-employees (discussing, without deciding, whether esports players are employees).

[24] 29 U.S.C. § 203(e)(1) (2018).

[25] 29 U.S.C. § 203(g) (2018).

[26] 29 U.S.C. § 203(d) (2018).

[27] CAL. LAB. CODE. § 3351 (2018).

[28] *See, e.g.*, Order Regulating Wages, Hours, and Working Conditions in the Amusement and Recreation Industry, 8 CA ADC § 11100(2)(E) (2001).

[29] Rev. Rul. 87-41, 1987-1 C.B. 296.

[30] Goldberg v. Whitaker House Co-Op., Inc., 366 U.S. 28 (1961) ("[T]he 'economic reality' rather than 'technical concepts' is to be the test of employment."). *See also* Rest. (2d) Agency § 220(1) (1958) (emphasizing the employer's right to control). The economic realities test is a multifactor test. The factors addressed vary by jurisdiction, but the IRS provides an excellent summary in Form SS-8 (as opposed to its infamous twenty-factor test) by looking at behavior, finances, and type of relationship. Understanding Employee vs. Contractor Designation, I.R.S. FS-2017-09 (July 20, 2017).

[31] The number of tests for the employment relationship are numerous in California. Depending on the circumstances, the court may apply an economic realities test, a common law test, the *Borello* test, or now, the ABC test.

the worker is performing work outside the normal course of business, and that there is an independently established trade.[32]

Dynamex Operations West v. Superior Court (Lee) decided how "workers should be classified as employees or independent contractors *for purposes of California wage orders*, which impose obligations related to the minimum wages, maximum hours, and a limited number of very basic working conditions."[33] In *Dynamex*, the California Supreme Court affirmed the applicability of the "suffer or permit to work" standard and adopted the three-part ABC test already applied in New Jersey[34] and Massachusetts[35]:

> **Part A:** Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?
>
> **Part B:** Does the worker perform work that is outside the usual course of the hiring entity's business?
>
> **Part C:** Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?[36]

The employer's failure to prove any of the parts is sufficient to find the worker an employee.[37] The substantial shift is that even if the employer exerts no control over the worker, the worker may still be considered an employee.

A. Control by the Hiring Entity

The principal factor in the test, Part A looks to both the contractual relationship and the performance of the contract to determine if the worker is free from the control of the putative employer.[38] "A business need not control the precise manner or details of the work in order to be found to have maintained the necessary

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[32] *E.g.* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 39–40 (Cal. 2018); Mass. Gen. Laws Ch. 149 § 148(B)(a)(1–3) (2018).

[33] *Dynamex Operations W.*, 416 P.3d at 5. Let it be clear that *Dynamex* is not the only employment test in California. For non-wage-order cases, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 38 Cal.3d 341 (1989), and *Martinez v. Combs*, 49 Cal.4th 35 (2010) provide alternative tests for particular circumstances. Esports players may fall within the definition of an Amusement of Recreation Industry, 8 CA ADC § 11100, Broadcasting Industry, § 11110 (but see question of whether esports broadcasts are "through the medium of radio or television"), or Motion Picture Industry, § 11120, which are regulated by California wage orders.

[34] Hargrove v. Sleepy's LLC, 220 N.J. 289 (2015).

[35] Mass. Gen. Laws Ch. 149 § 148B(a)(1–3) (2018).

[36] *Dynamex Operations W.*, 416 P.3d at 36–38.

[37] *Id.* at 40.

[38] *Id.* at 36.

control."[39] While the court did not analyze this factor for the case at hand, it referenced *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* and *Martinez v. Combs,* cases that have interpreted the "suffer or permit to work" standard as broader than the FLSA test.[40]

Control can be exerted both affirmatively (e.g. directions, time management, apparel, branding, dedicated space on personal sites, etc.) and negatively (e.g. restrictions on player behavior, non-competes, activity blackouts, etc.). Organizations control their players' practice schedules and apparel, may require them to live in a gaming house, and may contract for the players to perform additional services through advertising, branding, and interviews.[41] Coaches provide consistent supervision and direction over the team or player; however, the player ultimately chooses how to play (relying on the player's skill and game knowledge). Influencers generally retain more freedom with their brand and are not subject to the same organizational control. Regardless, *Dynamex* emphasized the broad applicability of the ABC test, and the hiring entity is likely to struggle in convincing a court that there is sufficient freedom.[42]

B. Outside the Usual Course of the Hiring Entity's Business

Part B asks if the worker's role is within the usual course of the hiring entity's business. In essence, the employer cannot hire someone to perform similar duties to that of its recognized employees and misclassify them as an independent contractor. The court recognized that while an electrician hired to install a new electrical line falls outside the scope of a clothing manufacturing company's business, an at-home seamstress hired to make dresses from patterns supplied by a clothing manufacturer would fall within the scope. [43] The question ultimately turns on whether the worker is among those "individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor."[44]

But how does the court determine the hiring entity's business? [45] In *Dynamex*, it was clear that the delivery drivers were in the same business as the employer, a delivery company. Post-*Dynamex* cases are

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[39] *Id.*
[40] *Id.* at 35–36.
[41] *See supra* notes 7–9 and accompanying text.
[42] *See also*, *Dynamex Operations W.*, 416 P.3d at 37 n. 27.
[43] *Dynamex Operations W.,* 416 P.3d at 37.
[44] *Id.*
[45] Legal academics point to this expansive Part as a plausible death knell for the shared and gig-economies without additional clarification because platforms, like Uber, will be found to be employers of independent entrepreneurs. James F. Morgan, *Clarifying the Employee/Independent Contractor Distinction: Does the California Supreme Court's* Dynamex *Decision Do the Job*, 69 LAB. L.J. 4194899 (2018).

equally uninstructive because the workers often form the very foundation of the business.[46] Massachusetts, from whom the California Supreme Court took the ABC test, defines the business using the putative employer's own public-facing definition and then compares that to the realities of the business operations.[47] Next the court determines whether the services are necessary to the employer's business or merely incidental.[48] The Massachusetts Supreme Court has given several examples of employees under Part B: an art instructor performing *regular* services for an art museum, a musician performing as a *usual and customary* activity at a beer bar, and an organist playing music at a funeral home's business.[49] Combining the *Dynamex* Court's instruction along with clarification from Massachusetts caselaw, the analysis has three parts: (1) define the business based on the employer's own public-facing definition, (2) look to the realities of the business operations, including its classification of workers, to see if the worker performs services central to the business, and (3) compare the worker to other employees in the business and those found to be traditional independent contractors.

First, having reviewed major esports teams and their websites, the descriptions of the organizations generally promote three things: innovative partnerships (i.e. sponsorships), (recruitment and development of) renowned talented players, and fan engagement.[50] Second, the realities do not appear to differ from this characterization and the classification of players has generally shifted from contractors to employees.[51] The players form the foundation of the organization; revenue generation through the sale of sponsorships or competition earnings depend on the players' talent and success. Third, players will be compared with their colleagues and traditional independent contractors. The internal comparison will be fatal to organizations attempting to classify solo competitors as independent contractors while they field a team of employees. The court's external comparison will likely be similar to traditional sports where, under a different test for

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[46] *See, e.g.*, Johnson v. VCG-IS, LLC, 2018 WL 7636473 (Cal. Super. 2018) (finding exotic dancers to perform services within the adult entertainment establishment's usual course of business).

[47] Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 333 (2015)

[48] *Id.*

[49] Valle v. Powertech Indus. Co. Ltd., 2019 WL 1437865, at *10 (Dist. Ct. Mass. 2019) (slip op.) (citing Carey v. Gatehouse Media Mass. 1, Inc, 92 Mass. App. Ct. 801, 807 (2018)).

[50] *E.g.*, About, COUNTER LOGIC GAMING, https://www.clg.gg/about (last visited Apr. 15, 2019); About Us, FLYQUEST, https://flyquest.gg/about-us (last visited Apr. 15, 2019). Some esports organizations also emphasize apparel, but it would be a stretch to say that is the business of the organization. *See, e.g.*, About, 100 THIEVES, https://www.100thieves.com/about (last visited Apr. 15, 2019).

[51] Roger Quiles, *Are Esports Players Actually Independent Contractors?,* QUILES LAW (Apr. 17, 2015), http://www.esports.law/blog/are-esports-players-actually-independent-contractors (recognizing the trend to classify players as independent contractors but arguing they would be considered employees under New York law).

employment, the Employment Development Department of California has said that athletes playing in team sports, "where the player competes under the direction and control of a coach or manager," are employees; meanwhile, athletes competing in individual sports competitions, "where the athlete is normally free to determine his/her own style and manner of performing," are independent contractors.[52] However, the coach's impact on the players in the esports context is rather limited, even in the team scenario, because of the game knowledge of the players. But this external comparison conflates Parts A and B, and the business of traditional sports teams is to recruit and develop talented athletes, meaning the services thereof are central to the business.

Without players, there would be no viewership, no sponsorship, no fan engagement, and no revenue. Players in an organization's team provide services central—not incidental—to the business or organized competitive play. A single player competing under an organization's banner provides services central to the business of organized competitive play and sale of sponsorships. Strict application of Part B is a sweeping classification of employment that may not be intended by the California Supreme Court. [53] Even organizations merely sponsoring an influencer fail to satisfy this requirement, because the influencer provides services—streaming—central to the sale of sponsorships, thereby leaving them on the hook for wage order protections.

C. Independently Established Trade

Part C questions if the worker is one who has decided to go into business for herself. Individuals can show independence through incorporation, licensure, advertisements, and offerings to provide services.[54] California Part C is more stringent than Part C under Massachusetts caselaw: "The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself."[55] The primary evidence of an

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[52] *Total and Partial Unemployment TPU 415.4: Professional Athlete*, EMP. DEV. DEP'T OF CALIF., https://www.edd.ca.gov/uibdg/Total_and_Partial_ Unemployment_TPU_ 4154.htm (last visited Apr. 13, 2019).

[53] Dynamex Operations W. v. Superior Court, 416 P.3d 1, 41 (Cal. 2018) ("[T]he trial court . . . appears to have adopted a literal interpretation of the suffer or permit to work language that, if applied generally, could potentially encompass the type of traditional independent contractor . . . who could not reasonably have been viewed as the hiring business's employee.").

[54] *Id.* at 39.

[55] *Id.* at 39. The court differentiated employees from drivers that worked for other companies or personal customers or who had their own employees. *Id.* at 42. *See also* Garcia v. Border Transportation Group, LLC, 239 Cal. Rptr. 3d 360, 372–74 (Cal. Ct. App. 2018) (citing Kirby of Norwich v. Adm'r, Unemployment Compensation Act (2018), 328 Conn. 38 (2018)).

independently established trade would be an actual contract to perform similar services to another entity at the same time as the hiring organization.[56] Other evidence includes an employee-maintained home office, independent licensure, independent business cards, solicitation of outside work, independent liability insurance, and advertisements.[57]

Part C is deceptive given the independent streamer market and ability for some players to enter tournaments independently.[58] Streamers, more so than professional players, incorporate in personal limited liability vehicles, advertise to potential sponsors, and provide exclusive content to paid subscribers.[59] However, players, generally, do not play for multiple teams.[60] Furthermore, it is unclear if the court would consider on-the-side streaming as the same trade as professional tournament play. As the exclusivity of the contract increases, so too do the chances of a court determining the player to be an employee under Part C.

Conclusion

The employment status of esports players was unclear, but *Dynamex*'s ABC shortcut (perhaps too) broadly crystallized the employment status in the wage order context. Under the ABC test, courts are running towards finding an employment relationship. This classification impacts a broad array of legal obligations of the employing organization including taxes, tort liability, working conditions, and, most importantly, overtime and minimum wage provisions. Organizations should be wary of employee misclassification, especially with the multiplicity of tests determining separate liability for non-payment of wages, FICA payroll taxes, and benefits. An attorney should be consulted regarding this issue.

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[56] *Garcia*, 239 Cal. Rptr. 3d. at 374.
[57] *Kirby*, 328 Conn. at 51.
[58] The situation is different in a permanent league structure whereby players cannot enter a tournament without being hired by a league-member.
[59] *See generally supra* Part I.
[60] But consider the practice of loaning a player to another team. NORTH AMERICAN LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, 2018 OFFICIAL RULES NA LCS AND NA LACS § 4.5 (2018).

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* (21st ed. 2020). Please cite to articles herein using the following example: Ryan Fairchild, *Thirty-Five Years Without Player Rights in Gameplay: Is a New Challenger Approaching?*, 2019 ESPORTS B. ASS'N J. 1 (2019).

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