

The Costs of Squadding Up: Determining the Employment Status of High-Profile Esports Streamers

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I. INTRODUCTION

In July 2019, a sixteen-year-old high school student from Pennsylvania, Kyle “Bugha” Giersdorf, won the largest individual prize in esports history.¹ By taking first place among the 100 finalists competing in the 2019 Fortnite World Cup, Giersdorf won the grand prize of \$3,000,000.² During this three-month event, 40,000,000 competitive gamers competed for a share of one of the largest prize pools in esports history: \$30,000,000.³

Esports has been characterized in a variety of different ways,⁴ but all definitions include “professional video game matches where players compete against other players before an audience.”⁵ The most popular esports leagues are Overwatch League (“OWL”), League of Legends of Championship Series (“LCS”), Call of Duty World League, Rocket League Champions

1. Derrick Bryson Taylor & Niraj Chokshi, *This Fortnite World Cup Winner is 16 and \$3 Million Richer*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/us/fortnite-world-cup-winner-bugha.html> [<https://perma.cc/6W8W-NRYY>].

2. *Id.* The 2019 Fortnite World Cup finale was held in New York’s Madison Square Garden, though it was not the first esports event to be hosted in the famous New York arena. Jeffrey L. Wilson, *How I Learned to Stop Hating and Love Esports*, PC MAG. DIGIT. EDITION (June 5, 2017), <https://www.pcmag.com/opinions/how-i-learned-to-stop-hating-and-love-esports> [<https://perma.cc/3E4U-STLD>].

3. Every solo player, or duo team of two players, who qualified for the Fortnite World Cup in 2019 was guaranteed \$50,000 merely for qualifying for the final event. Recently, the Fortnite World Cup 2019 prize pool, previously the largest prize pool in esports history, was surpassed by Dota 2’s The International 2019, which crowdfunded for generous portions of its prize pool. Matt Perez, *‘Fortnite’ World Cup by the Numbers*, FORBES (July 26, 2019, 3:50 PM), <https://www.forbes.com/sites/mattperez/2019/07/26/fortnite-world-cup-by-the-numbers/#7f9cc9cb6be0> [<https://perma.cc/Z7HU-76A8>]; Mike Stubbs, *The International 9 ‘Dota 2’ Tournament Prize Pool Breaks \$30 Million*, FORBES (July 27, 2019, 5:06 PM), <https://www.forbes.com/sites/mikestubbs/2019/07/27/the-international-9-dota-2-tournament-prize-pool-breaks-30-million/#95fecda2c07c> [<https://perma.cc/6MSY-8W76>].

4. See John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 319, 415 (2019); AJ Willingham, *What is Esports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> [<https://perma.cc/PZD6-JVBK>] (“eSports describes the world of competitive organized video gaming . . . watched and followed by millions of fans all over the world, who attend live events or tune in on TV or online.”); Hannah Dwan, *What Are Esports?: A Beginner’s Guide*, TELEGRAPH (Oct. 18, 2017, 1:15 PM), <http://www.telegraph.co.uk/gaming/guides/esports-beginners-guide> [<https://perma.cc/PZD6-JVBK>] (defining “esports” as “competitive [video] gaming at a professional level”); Juho Hamari & Max Sjöblom, *What Is Esports and Why Do People Watch It?*, 27 INTERNET RES. 211, 212 (2017) (“[E]sports commonly refer to competitive (pro and amateur) video gaming that is often coordinated by different leagues, ladders and tournaments, and where competitors customarily belong to teams or other ‘sporting’ organizations who are sponsored by various business organizations.”).

5. Katherine E. Hollist, *Time to Be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 825 (2015).

Series, and PUBG Global Championship.⁶ Elite players compete in tournaments, scrimmages, and public games in front of a live audience.⁷ The gameplay is also broadcasted via the internet to a secondary audience.⁸ When broadcasting gameplay online, esports gamers are called “streamers” or “content creators.”⁹

The legal status of these professional esports players as employees or independent contractors remains an unsettled issue.¹⁰ That is, the employment status of high-profile gamers who are signed to an esports “clan,” is not obvious.¹¹ For the purposes of this Comment, a clan is an organization comprised of a group of content creators who all play, stream, and upload under a common name. This issue is further complicated by the ability of content creators to work remotely and stream videos on their own time.

Moreover, California’s new legislation, Assembly Bill No. 5 (“AB 5”), creates a new employment test—commonly known as the “ABC” test—that will likely have dramatic consequences for employment status because many streamers, and some of the largest clans, are based in California.¹² California is also the home to many game developers and the base location for various teams, players, and leagues.¹³ With the recent change in California’s employment classification system, the status of esports players must be determined because it likely drives the future of esports in the state.

This Comment focuses on the employment relationship of esports competitors signed to high profile teams. Specifically, players who are

6. Nick Fernandez, *The Biggest Esports Tournaments and Leagues in 2019 and Beyond*, ANDROID AUTH. (Aug. 18, 2019), <https://www.androidauthority.com/esports-tournaments-leagues-963799/> [<https://perma.cc/QH8Z-VSPJ>].

7. *Id.*

8. *Id.*

9. *Id.*

10. See Holden & Baker, *supra* note 4.

11. *Id.* at 391.

12. AB5 – Employment Status, CA.GOV, https://edd.ca.gov/Payroll_Taxes/ab-5.htm [<https://perma.cc/F4AE-W69D>]; While there are rumors of it leaving, Faze Clan currently resides in a mansion in Hollywood, CA. Mike Kent, *Faze Fortnite Pro Moving into Hollywood Mansion Next Door to Faze Owners and Clout House*, DEXTRO (July 4, 2018), <https://www.dexerto.com/fortnite/faze-fortnite-pros-moving-into-hollywood-mansion-next-door-to-faze-owners-and-the-clout-house-112119> [<https://perma.cc/K32H-TXFL>]. California is also home to Team Solo Mid (“TSM”). Arash Markazi, *Team SoloMid to Begin Construction on \$13-Million Esports Training Center in Playa Vista, L.A.* TIMES (Sept. 11, 2019, 11:49 AM), <https://www.latimes.com/sports/story/2019-09-11/largest-esports-training-center-north-america-los-angeles> [<https://perma.cc/9UYU-CZN7>].

13. Holden & Baker, *supra* note 4, at 421.

signed to an esports clan and stream their content live. Section II provides general background about esports, focusing on its rise and structure. This section also outlines some additional, common issues facing players. Next, it looks at South Korea's esports industry and the steps their government has taken to protect esports players. Lastly, the section concludes with a rationale on why further analysis into the employment status of content creators signed to a clan adds to the existing literature.

Section III lays out three tests used to classify workers as employees or independent contractors. These tests are the common law agency test, the economic realities test, and California's ABC test codified by AB 5. Section IV then applies these tests to a high-profile streamer who recently left his clan and extrapolates from these results the employment status of gamers working under similar conditions.

Section V proposes solutions to the various issues addressed in this Comment. These solutions not only suggest what the players and organizations should do, but how aspiring professionals in the legal community can get involved in esports. Section VI concludes this comment with suggestions for future research.

II. BACKGROUND

A. *The Roaring Expansion of Esports*

Electronic sports, or esports, have been around since the early 1980s,¹⁴ but professional esports today barely resemble the early days of Tetris and PacMan tournaments at the local arcade.¹⁵ With the introduction of Atari's Pong in 1975, the home gaming console started to replace public arcades.¹⁶ While the early 1980s saw a "crash" due to an oversaturated console market, competition from computer gaming, and an influx of over-promised but under-delivered games, the introduction of the Nintendo Entertainment System revived an otherwise declining market.¹⁷ The latest generation of home consoles, specifically Sony's PlayStation4 and Microsoft's Xbox One, have sold 102.8 million and 43.6 million systems respectively since

14. Tyler F.M. Edwards, *Esports: A Brief History*, ALL DAY ALL NIGHT ALL IN (Apr. 30, 2013), <http://adanai.com/esports/> [<https://perma.cc/8BAK-JCV7>].

15. Local area network (LAN) parties, in which individuals met in a specific location, became popular in the 1990s. With the rise of high-speed internet, LAN parties expanded into large-scale events viewed by a live audience and a secondary audience watching through streaming websites. The latter resembles the landscape of esports today. *Id.*

16. *Video Game History*, HISTORY (Sept. 1, 2017), <https://www.history.com/topics/inventions/history-of-video-games> [<https://perma.cc/95XL-2688>].

17. *Id.*

their release in 2013.¹⁸ Likewise, the rise in popularity of the home computer helped expand esports into the industry it is today.¹⁹ Although classic stand up games paved the way, the home console and personal gaming computer have solidified their roles in esports competition.²⁰

The popularity of esports in the United States has rapidly increased since 2016.²¹ Audience sizes grew approximately 35% between 2016 and 2018—from 281 million viewers in 2016 to 380 million views in 2018.²² By 2021, it is estimated that this number will grow to 557 million audience members.²³ Activate, a technology consulting firm, predicts that by the year 2021 esports in the United States will have more viewers than every professional sports league excluding the National Football League.²⁴

In addition to its rapid increase in viewership, esports popularity is also reflected in its revenue.²⁵ The esports industry generated over \$1 billion in revenue in 2019,²⁶ an increase from \$905 million in 2018 and \$655 million in 2017.²⁷ Esports have also drawn the attention of many investors, “One of the biggest changes there is [right now] is the rise of competitive online gaming, or eSports . . . To put it another way, eSports is, or has the

18. Joel Hruska, *Why the PlayStation 4 Triumphed Over the Xbox One*, EXTREME TECH (Nov. 1, 2019, 8:14 AM), <https://www.extremetech.com/gaming/301380-why-the-playstation-4-triumphed-over-the-xbox-one> [https://perma.cc/N2Z7-PEBC].

19. See T. L. TAYLOR, RAISING THE STAKES: ESPORTS AND THE PERSONALIZATION OF COMPUTER GAMING 3 (2012).

20. *Id.* at 5–7.

21. *The Incredible Growth of eSports*, INFLUENCER MKTG. HUB (Jan. 6, 2020), <https://influencermarketinghub.com/growth-of-esports-in-2019-stats/> [https://perma.cc/PH2R-J394].

22. *Id.*

23. *Id.*

24. *With Viewership and Revenue Booming, Esports Set to Compete with Traditional Sports*, WHITMAN SYRACUSE UNIV. (Jan. 18, 2019), <https://onlinebusiness.syr.edu/blog/esports-to-compete-with-traditional-sports/> [https://perma.cc/LN58-9Q7H].

25. James Ayles, *Global Esports Revenue Reaches More Than \$1 Billion as Audience Figures Exceed 433 Million*, FORBES (Dec. 3, 2019, 6:36 PM), <https://www.forbes.com/sites/jamesayles/2019/12/03/global-esports-revenue-reaches-more-than-1-billion-as-audience-figures-exceed-433-million/#6f4c73c71329> [https://perma.cc/LH6C-5CG4].

26. *Id.*

27. Matt Perez, *Report: Esports to Grow Substantially and Near Billion-Dollar Revenues in 2018*, FORBES (Feb. 21, 2018, 11:00 AM), <https://www.forbes.com/sites/mattperez/2018/02/21/report-esports-to-grow-substantially-and-near-a-billion-dollar-revenues-in-2018/#68dada2f2b01> [https://perma.cc/5NKF-RART].

potential to be really big money.”²⁸ Celebrities such as Mark Cuban, Michael Jordan, Shaquille O’Neal, Ashton Kutcher, and Drake have realized the potential in esports’ emerging market and invested in the industry.²⁹ Esports is already a major industry that is expected to continue its growth³⁰ as the culture becomes more mainstream.³¹

B. The Unique Structure of Esports

Today, gamers can take what was once considered a hobby and turn it into a career. With the availability and popularity of video games today,³² it is no surprise that children and adults alike aspire to become professional esports players.³³ Two main paths exist for those looking to turn their passions into a career. However, the two are not mutually exclusive as the most popular esports players utilize both.

First, players with exceptional skill can compete with the hopes of playing for a clan that competes in a league, such as the afore mentioned LCS.³⁴ A clan chooses gamers to represent its brand due to their exceptional skill

28. Martin Tillier, *The Incredible Rise of eSports*, NASDAQ (Jan. 12, 2018, 10:25 AM), <https://www.nasdaq.com/articles/incredible-rise-esports-2018-01-12> [<https://perma.cc/G2RJ-SQ24>].

29. Tom Huddleston Jr., *From Michael Jordan to Drake: The Athletes and Celebs who Invested Millions in Esports in 2018*, CNBC (Dec. 27, 2018, 9:30 AM), <https://www.cnbc.com/2018/12/19/from-michael-jordan-to-drake-athletes-celebrities-invested-millions-esports.html> [<https://perma.cc/WJ5D-UXYN>].

30. Jesse Maida, *Global Esports Market 2019-2023*, BUS. WIRE (July 30, 2019, 7:00 AM), <https://www.businesswire.com/news/home/20190730005426/en/Global-Esports-Market-2019-2023-Growing-Popularity-Custom> [<https://perma.cc/8UN6-W5XT>].

31. Stefanie Fogel, *Ninja: First Esports Player Featured on ESPN Magazine Cover*, VARIETY (Sept. 18, 2018, 1:53 PM), <https://variety.com/2018/gaming/news/ninja-espn-magazine-cover-1202947409/> [<https://perma.cc/YEV7-7Z96>]; REDBULL, *Tyler ‘Ninja’ Blevins*, <https://www.redbull.com/us-en/athlete/tyler-ninja-blevins> [<https://perma.cc/PN2K-8L9L>] (featuring an esports player on the popular and well-respected ESPN Magazine, which evidences esports’ shift into the mainstream).

32. *2018 Sales, Demographics and Usage Data: Essential Facts about the Computer and Video Game Industry*, ENT. SOFTWARE ASS’N (Apr. 2018), https://www.theesa.com/wp-content/uploads/2019/03/ESA_EssentialFacts_2018.pdf [<https://perma.cc/98BB-WP9A>].

33. Alex Andrejev, *Her Son is a Pro Gamer. Here’s How She Came to Understand the World of Esports*, WASH. POST (Oct. 21, 2019, 5:10 AM), <https://www.washingtonpost.com/video-games/esports/2019/10/21/her-son-is-pro-gamer-heres-how-she-came-understand-world-esports/> [<https://perma.cc/8X44-US77>].

34. 100 Thieves is an example of such a clan playing in the LCS. 100 Thieves paid \$10 million for their franchise, or permean partnership, with the creators of the game, Riot Games. 100 Thieves placed 2nd in its first season in LCS. *About 100 Thieves*, 100 THIEVES, <https://www.100thieves.com/about> [<https://perma.cc/DN3F-NA8R>]; Pete Volk, *NA LCS is Franchising. Here’s What that Means*, RIFT HERALD (June 1, 2017, 9:04 AM), <https://www.riftherald.com/2017/6/1/15720812/na-lcs-franchising-explanation-summary-lol-revenue-sharing> [<https://perma.cc/K8ED-FJLY>].

and ability to capture an audience.³⁵ In other words, one must compete at the highest level, as one of the best in the game, if he or she wants to get signed to a well-established clan.

The other way players launch their esports career is through streaming.³⁶ Gamers may compete in esports tournaments from a remote location while still maintaining an audience, no longer requiring them to travel to a centralized location.³⁷ More importantly, these platforms offer players a way to earn money outside of tournaments.

With platforms like Twitch, Mixer, YouTube and Facebook, players now have the option to broadcast their casual gameplay to an audience tuned in on their computers or mobile devices.³⁸ These streamers, or content creators, make money through sponsorships, direct donations from viewers, subscription revenue, and advertisements.³⁹ With streaming services such as Twitch and Mixer increasing the ability for gamers to pursue an esports career, signing with a professional organization is not the only option for competitors.⁴⁰ Some esports competitors, such as Brett “Dakotaz” Hoffman, even ended

35. See Robert Capps, *How to Make Billions in E-Sports*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/interactive/2020/02/18/magazine/esports-business.html> [<https://perma.cc/PXF8-2QL7>].

36. The worker would depend upon only themselves for continued employment, no one would control the content creator’s actions except the player, and the worker would be free from the control and direction of any hiring entity as none exist. Thus, under the three tests explained throughout this comment, content creators would be considered independent contractors.

37. For example, the 2019 Fortnite World Cup had a ten-week try-out process. Each week the tournament gave out over one million dollars to the qualifiers. Many gamers streamed their qualification games. Perez, *supra* note 3.

38. Twitch, acquired by Amazon in 2017 for \$1 billion, claims over 100 million monthly viewers to its channels. YouTube grew its streamer base by 343 percent in 2017. Joshua Fruhlinger, *You Won’t Find the New Pop Stars in Movies. You’ll Find Them on Twitch*, DIGIT. TRENDS (June 9, 2019, 6:00 AM), <https://www.digitaltrends.com/gaming/the-popularity-of-twitch-youtube-gaming-other-streaming-sites-on-the-rise/> [<https://perma.cc/7BCV-FQZR>].

39. Supreme Gaming, *Top Twitch Donations and Reactions of All Time*, YOUTUBE (Jan. 20, 2018), <https://www.youtube.com/watch?v=ZcC2GHqXV0c> [<https://perma.cc/N8GB-M9YA>]; Disguised Toast, *How Much Money do Twitch Streamers Really Make? (Inside Look from a Top Streamer)*, YOUTUBE (Oct. 4, 2018), https://www.youtube.com/watch?v=6m5P_n5njCQ& [<https://perma.cc/4GST-5G74>].

40. Twitch has up to 500,000 performers live streaming daily and more than 1,000,000 users watching at one time. Joel Golby, *Trigger Happy: The Amazing Rise of Twitch*, GUARDIAN (Sept. 8, 2019, 7:00 AM), <https://www.theguardian.com/global/2019/sep/08/how-did-twitch-become-as-big-as-youtube-by-live-streaming-video-game-players> [<https://perma.cc/QVE5-RBWM>].

their affiliation with their professional team and avoided tournaments in order to pursue a full-time career on Twitch and YouTube.⁴¹

C. Glitches in Esports Worldwide

The rapid emergence of esports has not been without significant drawbacks; not just in America, but also in South Korea and worldwide.⁴² In 2016, to take action against the cheating in esports, the United States established the Esports Integrity Coalition (“ESIC”) to investigate and prosecute all forms of dishonesty in American esports.⁴³ As a not-for-profit members association, ESIC works with esports stakeholders such as game developers, esports leagues, and tournament organizers to protect the integrity of esports competition.⁴⁴ According to the ESIC, the most significant threats to esports were “cheating software, online attacks to slow or disable an opponent, match fixing, and doping.”⁴⁵

Notably missing from ESIC’s list of issues facing esports professional gamers are wage concerns, limited financial security, and limited legal access.⁴⁶

As with any professional career, esports is not just about perfecting one’s craft. It is also about being better than those in the same sphere. This excessive drive to continue practicing and improving likely stems from the “never-ending stream of replacement players pushing some competitors to engage in risky practice that undermine their health and safety.”⁴⁷ About 40 million players “participated in qualifiers” for the Fortnite World Cup while only 100 solo players qualified to compete.⁴⁸ Therefore, if one professional falls off due to being overwhelmed with a grueling practice schedule, there would be two other players fighting to take the spot. Some competitors even drop out of school to keep up with the rigorous training schedules—often up to fourteen hours a day of practice with only four

41. See *Dakotaz*, FANDOM, https://youtube.fandom.com/wiki/Dakotaz#Joining_and_leaving_TSM [<https://perma.cc/G32X-Z2AL>].

42. See Emin Ozkurt, *Esports in South Korea: A Short Overview of the Legal Ecosystem*, L. IN SPORT (Apr. 10, 2019), <https://www.lawinsport.com/content/articles/item/esports-in-south-korea-a-short-overview-of-the-legal-ecosystem> [<https://perma.cc/Z5AH-PVVD>].

43. *Who We Are*, ESPORTS INTEGRITY COAL., <https://esic.gg/about/> [<https://perma.cc/2JYJ-D68A>].

44. *Id.*

45. Ozkurt, *supra* note 42.

46. See Dylan Walker, *Esports Is the Wild West: The Sad Truth About Gaming Orgs*, YAHOO SPORTS (Mar. 9, 2016, 4:43 PM), <http://www.sports.yahoo.com/esports-is-the-wild-west-the-sad-truth-about-234343295.html> [<https://perma.cc/HVJ6-A6QQ>].

47. Holden & Baker, *supra* note 4, at 415.

48. Perez, *supra* note 3.

hours of sleep—to stay relevant in the competitive scene.⁴⁹ Overall, this pressure creates the risk of “death by gaming” causing some players to push their bodies beyond the point of exhaustion.⁵⁰

Internet addiction is also a growing health threat for adults and adolescents alike.⁵¹ Approximately 11.7% of South Korea’s adolescents are considered to have internet addiction.⁵² Compared with the United States’ 3.7% rate,⁵³ South Korea’s internet addiction rates, fueled by “the world’s most intense gaming culture” are serious.⁵⁴ Internet addiction, including online gaming, has serious consequences on adolescents, including lower perceived health status and quality of life (both subjective and objective), elevated levels of anxiety, depression, and aggressive behavior.⁵⁵ Moreover, spending excessive amounts of time playing online video games negatively impacts both academic performance and exercise levels.⁵⁶

Furthermore, unlike traditional sports leagues such as football and baseball, the virtual games played in esports tournaments are proprietary property—one cannot own the game of football, but Epic Games owns the game Fortnite.⁵⁷ The reality of the third-party game developer—the intellectual property owner—poses an additional obstacle to esports players when it

49. Harrison Jacobs, *Here’s the Insane Training Schedule of a 20-Something Professional Gamer*, BUS. INSIDER (May 11, 2015, 10:05 PM), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5> [https://perma.cc/PN9Z-YKLJ]; Agence France-Presse Seoul, *From High School Drop-Out to Korean Gaming Superstar*, NATION THAI (July 20, 2018), <https://nationthailand.com/sports/30350451> [https://perma.cc/D3G5-4TZG].

50. Holden & Baker, *supra* note 4, at 415.

51. Jiun Choi et al., *Effect of the Online Game Shutdown Policy on Internet Use, Internet Addiction, and Sleeping Hours in Korean Adolescents*, 62 J. ADOLESCENT HEALTH 548, 549 (2018).

52. *Id.*

53. D.J. Kuss et al., *Internet Addiction in Adolescents: Prevalence and Risk Factors*, 29 COMPUT. IN HUM. BEHAV. 1987, 1991 (2013).

54. Soonhwa Seok & Boaventura DaCosta, *The World’s Most Intense Online Gaming Culture: Addiction and High-Engaged Prevalence Rates Among South Korean Adolescents and Young Adults*, 28 COMPUT. IN HUM. BEHAV. 2143, 2143 (2012); Choi et al., *supra* note 51.

55. Choi et al., *supra* note 51.

56. *Id.*

57. Elizabeth Wolfe & Brian Ries, *A Fortnite Superstar has been Banned for Life for Cheating*, CNN (Nov. 6, 2019, 1:54 PM), <https://www.cnn.com/2019/11/06/entertainment/faze-jarvis-fortnite-ban-trnd/index.html> [https://perma.cc/VT9M-SLHF].

comes to maintaining longevity and financial security.⁵⁸ This third-party obstacle is only doubled for content creators as they must additionally comply with the policies of their streaming platform.⁵⁹

A recent example of the consequences for breaking a game's terms of service made news when Jarvis "Faze Jarvis" Khattri was banned for life from Fortnite after publicly using cheating hacks.⁶⁰ When broadcasting his gameplay on Twitch, Khattri used an aimbot, a cheating software that automatically targets other players in the game and gives the user inhuman accuracy.⁶¹ Although Khattri was in a private game, and thus not using the hack to gain an unfair advantage against other players in a public game, the repercussion of his actions were extremely severe.⁶²

Confirming their decision, Epic Games stated they "have a zero-tolerance policy for the usage of cheat software. When people use aimbots or other cheat technologies to gain an unfair advantage, they ruin games for people who are playing fairly."⁶³ Undoubtedly, players must be aware of the terms of service of their game creators, their streaming platforms, the tournaments they compete in, and, if they are lucky, the clan they are signed with.

D. South Korea Paves the Way

South Korea has one of the most robust, developed esports industries in the world.⁶⁴ The history of esports in South Korea goes back over twenty years.⁶⁵ Much of the success of this esports industry can be attributed to three factors: (1) a national broadband network established by the South Korean government in the late 1990s,⁶⁶ (2) the rise and popularity of electronic

58. Gamers' financial security remains an obstacle because the proprietor of the game can ban content creators, effectively ending their careers and income from the game. *See id.*

59. For example, Twitch's terms of service prohibit certain conduct such as impersonating any person or entity, making unsolicited offers, advertisements or proposals, and attempting to circumvent any content filtering techniques employed by Twitch. Furthermore, Twitch services are not available to users under the age of 13 from owning or operating any account, and only those 13-years-old to 18-years-old are able to use Twitch's services with the supervision of a parent or legal guardians who agrees to be bound by Twitch's terms of service. *Terms of Service*, TWITCH, <https://www.twitch.tv/p/legal/terms-of-service/#9-prohibited-conduct> [<https://perma.cc/Y8W2-JHUU>].

60. Wolfe & Ries, *supra* note 57.

61. *Id.*

62. *Id.*

63. *Id.*

64. Florian Larch, *Seoul-The Home of eSports*, INT'L SOC'Y FOR PROSTHETICS AND ORTHOTICS (Jan. 10, 2019), <https://www.ispo.com/en/markets/seoul-how-city-addicted-esports> [<https://perma.cc/9NC4-CMK4>].

65. *Greetings*, KESPA, http://e-sports.or.kr/page_kespa2018.php?_module=kespa&_page=greeting [<https://perma.cc/WY32-YN9B>].

66. Ozkurt, *supra* note 42.

cafes (known as “PC Bangs”),⁶⁷ and (3) the ability to reach a wide audience by broadcasting tournaments using a developed media presence.⁶⁸

Recognizing the issues facing the esports industry such as player welfare, doping, and cheating, the South Korean Government, under the Ministry of Culture, Sports, and Tourism, founded the Korea e-Sports Association (“KeSPA”) in 2000.⁶⁹ KeSPA was established to improve the legitimacy of esports, manage and regulate sports tournaments, and distribute broadcasting licenses to channels.⁷⁰ KeSPA’s information page states “the Association has been striving to establish a systematic system of domestic pros and armatures to meet the changing esports environment and create services for esports fans . . . spar[ing] no effort to help Korean esports players maintain the world’s best skill.”⁷¹ Insightfully, KeSPA recognizes “if esports are to be recognized around the world, [it] must try to make Korea’s esports culture the global sports culture.”⁷² Striving to be the pinnacle of esports, KeSPA has taken steps to protect their players such as providing literacy trainings, holding esports stakeholder workshops, and creating a Long-Term Development Committee.⁷³ Likewise, it also provides an authorized supplies and partners list to confidently select products from.⁷⁴

KeSPA is part of the International e-Sports Federation (“IeSF”), which is an organization aimed at furthering and promoting esports on a global scale, and hosts tournaments in forty-six nations.⁷⁵ The United States is listed as having an esports federation belonging to IeSF.⁷⁶ However, unlike KeSPA, the United States eSports Federation (“USEF”), is a “non-for-profit organization” seeking to promote and develop “eSports as part of the fabric of our community.”⁷⁷ Thus, the American system lacks backing from the

67. *Id.*

68. Larch, *supra* note 64.

69. Ozkurt, *supra* note 42; *KeSPA*, LIQUIPEDIA, <https://liquipedia.net/starcraft/KeSPA> [https://perma.cc/YT2D-MNR7].

70. Ozkurt, *supra* note 42.

71. *KeSPA*, *supra* note 65.

72. *Id.*

73. *Korea e-Sports Association History 2006*, *KeSPA*, http://e-sports.or.kr/board_kespa2018.php?b_no=9&_module=kespa&_page=view&b_no=9&b_pid=9999994200 [https://perma.cc/2RJ2-PBKT].

74. *Authorized Supplies and Partners*, *KeSPA*, <http://e-games.or.kr/service/service.php> [https://perma.cc/ZU27-9MDR].

75. *About IeSF*, *IeSF*, <https://www.ie-sf.org/iesf/> [https://perma.cc/8HYJ-Q6JD].

76. *Member Nations*, *IeSF*, <https://www.ie-sf.org/about/#member-nations> [https://perma.cc/Y27M-5ZFR].

77. *Id.*

U.S. government to enforce its regulations, something KeSPA currently enjoys.⁷⁸

In 2011, the South Korean government took proactive steps to protect gamers' health and safety by passing the Youth Protection Reversion Act, or the "Shutdown Law."⁷⁹ The Shutdown Law prohibits children under the age of sixteen from playing online video games between 12:00 a.m. and 6:00 a.m.⁸⁰ These laws are not effective and have largely failed to prevent internet addiction, but the government's attempt to protect adolescents from developing internet addictions and improving their health through increased sleep is noteworthy.⁸¹

Furthermore, in 2018, the South Korean government passed a bill commonly known as the "Anti-Boosting Law," criminalizing "any form of seeking profit in a fashion that the game business did not provide or sanction, by earning points or achievements so that it disturbs the normal process of games, as well as the promotion/offering of such activities."⁸² An example of this is "bot farming," using computer characters, or "bots," to collect resources for an extended period of time to then transfer to a player's primary account for sale.⁸³

Undoubtedly, South Korea is years ahead of the United States when it comes to player safety, administrative government organizations, and legitimacy. Taking a lesson from this esports mecca, the United States must establish similar infrastructures to protect its citizens from the drawbacks that accompany the expansion of esports. It is in the best interest of all parties to prevent increased levels of internet addiction and ensure fair workplace practices between employers and workers.

E. Turner "Tfue" Tenney Disconnects from Faze Clan

In their pioneering article comparing three esports leagues to several traditional sports leagues, John T. Holden and Thomas Baker established the foundations for understanding an esports competitor's employment status under federal and California Law.⁸⁴ Holden and Baker explain why the unique structure of each esports league, as compared to traditional

78. *Id.*

79. Ozkurt, *supra* note 42.

80. *Id.*

81. *See* Choi et al., *supra* note 51.

82. *South Korea to Legislate Law that Punishes Video Game Boosters*, FOX SPORTS ASIA (Dec. 4, 2018), <https://www.foxsportsasia.com/esports/991069/south-korea-to-legislate-law-that-punishes-video-game-boosters/> [<https://perma.cc/KHG8-VBCD>].

83. Francois Triquet, *Bots in the Gaming World: What, Who, How and Why?*, SAP CONVERSATIONAL AI BLOG (Sept. 1, 2016), <https://cai.tools.sap/blog/bot-in-video-games/> [<https://perma.cc/4ADX-VNHH>].

84. *See generally* Holden & Baker, *supra* note 4.

sports leagues and other esports organizations, leads to a dramatic disparity when classifying esports competitors.⁸⁵ However, at the outset, comparing the emerging esports industry to the corporate behemoths of professional sports leagues raises concerns.

All of the “big four” sports leagues—the National Football League, the Major League Baseball, the National Basketball Association, and the National Hockey League—each had around a century to develop into the professional organizations they are today.⁸⁶ Players’ unions were simply non-existent when these leagues were initially created.⁸⁷

NFL players, for example, did not start unionizing until the 1960s, where they faced push back from team owners—those approving the players’ salaries—along the way.⁸⁸ In 1976, about eighty-four years after the first professional football team was founded, and fifty-six years after the league was formed, the players union emerged victorious in court.⁸⁹ Perhaps, it will take a similar battle for esports players.

Without getting bogged down in details about the challenges NFL players overcame when forming a recognized players’ association,⁹⁰ the point remains that neither the NFL, nor any professional sports organization, initially focused on the health and safety of its players.⁹¹ With the history of the NFL players’ union in mind, the esports industry must continue focusing on the issues affecting its players and persevering over the obstacles to unionization.⁹²

85. *Id.* at 394.

86. Basketball is the “youngest” of the big four, with the Basketball Association of America, the to the NBA, founded in 1946. *Major Professional Sports Leagues in the United States and Canada*, WIKIPEDIA, https://en.wikipedia.org/wiki/Major_professional_sports_leagues_in_the_United_States_and_Canada [<https://perma.cc/G5LX-XQXS>].

87. Michael Macklon, *The Rise of Labor Unions in Pro Sports*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx> [<https://perma.cc/2ZWL-YJA2>].

88. *About NFLPA History*, NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, <https://www.nflpa.com/about/history> [<https://perma.cc/M86H-9BN6>].

89. *See id.*; *Chronology of Professional Football*, PRO FOOTBALL HALL OF FAME, <https://www.profootballhof.com/football-history/chronology-of-professional-football/> [<https://perma.cc/TQS3-JDCX>].

90. *See NFL Explained: The Evolution of the National Football League*, NFL FILMS, <http://www.nfl.com/videos/nfl-videos/0ap3000001053541/The-Evolution-of-the-NFL> [<https://perma.cc/M947-X246>].

91. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, *supra* note 88.

92. There has been a lot of talk about the need for esports players to unionize. However, the issue and implications of such a union are complex as unionization implicates

Moreover, Holden and Baker’s analysis fails to discuss the employment status of a substantial portion of gamers—the streamers and content creators signed to a clan.⁹³ With “millions of casual players, thousands of competitive ones, hundreds of elites, and a precious few superstars,” the skill gap between competitors signed to a professional team and the average players is vast.⁹⁴ Nonetheless, some esports tournaments, like the 2019 Fortnite World Cup, feature open invitationals where all casual players are eligible to try out for the potential to play in the final event.⁹⁵ Thus, because many esports players signed to a clan do not compete in these professional leagues, the employment status of such content creators remains unanswered in Holden and Baker’s article.⁹⁶

As Holden and Baker’s article recognizes, the structure of the esports leagues are unique, often encompassing a variety of game titles across many leagues.⁹⁷ A problem for analyzing clans—an issue that does not arise when applying these three tests to leagues like LCS and Overwatch League—is the lack of relevant information available. Large portions of the business strategies of these teams are bound by non-disclosure agreements or are simply unavailable to the public.⁹⁸ Unlike the LCS, ESL, and Overwatch League, clans do not often disclose their corporate structure or employment agreements freely.⁹⁹ Fortunately, a recent lawsuit between a high profile clan,¹⁰⁰ Faze Clan and one of their former stars, Turner “Tfue” Tenney has

anti-trust and employment law issues due to economic circumstances of esports. See Harris Peskin, *Unionization in Esports*, 1 ESPORTS B. ASS’N J. 1, 1 (2019).

93. Holden & Baker, *supra* note 4, at 395.

94. Will Partin, *The Esports Pipeline*, POLYGON (July 11, 2019, 9:00 AM), <https://www.polygon.com/features/2019/7/11/18632716/esports-amateur-pro-players-teams-talent-process> [<https://perma.cc/ER77-ARGE>].

95. Brittany A. Roston, *Fortnite World Cup 2019 Detailed: Qualifiers, Finals, and Everything Else*, SLASH GEAR (Feb. 22, 2019), <https://www.slashgear.com/fortnite-world-cup-2019-detailed-qualifiers-finals-and-everything-else-22566957/#:~:text=Epic%20is%20allowing%20players%20who,which%20means%20no%20undisclosed%20violations> [<https://perma.cc/9NJR-RX9Q>].

96. Holden & Baker, *supra* note 4, at 395.

97. *Id.* at 392–93.

98. In Faze Clan’s countersuit they claimed “Tenney is taking the valuable information he learned from Faze Clan, *which he is obligated to keep secret*, and using it to create a rival. . . .” Julia Alexander, *Faze Clan Sues Fortnite Star Tfue, Claims He Earned More than \$20 Million from Streaming*, VERGE (Aug. 1, 2019, 4:06 PM) (emphasis added) <https://www.theverge.com/2019/8/1/20750678/faze-clan-tfue-lawsuit-20-million-streaming-earnings-rival-esports-team> [<https://perma.cc/K575-34AV>].

99. Graham Corking, *Josh Marcus – MKM Group – Why Tfue vs FaZe Could Be a Landmark Case for Esports*, ESPORTS INSIDER (May 24, 2019), <https://esportsinsider.com/2019/05/josh-marcus-mkm-group-why-tfue-vs-faze-could-be-a-landmark-case-for-esports/> [<https://perma.cc/3HN3-H4QE>].

100. What started in 2010 as a group of friends creating viral Call of Duty clips, has blossomed into one of the most popular and recognizable clans in all of esports. In 2018,

given the public long awaited insight into the innerworkings of Faze Clan's operations.¹⁰¹ Although Faze Clan recognizes "contracts are different with each player," a general idea of the control Faze Clan has over its players can be gleaned from the information available.¹⁰²

One of the initial steps to ensuring sufficient health and safety regulations for esports players is to classify them as employees.¹⁰³ Therefore, determining the employment status of streamers signed to a clan who rarely compete in sanctioned tournaments, but rather stream their content online, is the next logical step for an analysis of esports employment. Applying these three tests to clans, a prominent branch of esports, will give competitors belonging to similar organizations a more solid understanding of their employment status.

III. LABOR LAW BACKGROUND

Extrapolating from one of the most popular esports clans, Faze Clan,¹⁰⁴ the employment status of many signed esports players can be determined. Both federal and California law must be considered in evaluating the employment relationship for esports players signed to Faze Clan.¹⁰⁵ Faze Clan, although incorporated in Delaware, has its principal place of business—

Faze Clan had approximately 71 million YouTube subscribers, more than 6.1 million Twitch followers, 40 million Twitter followers, 35 million Instagram followers, and 2.5 million Facebook fans actively consuming their social media presence. Brian Mazique, *How Faze Clan is Redefining what Celebrity –And a Team Can Be*, BLEACHER REP. (July 23, 2018), <https://bleacherreport.com/articles/2787086-Fazeclan-esports-fortnite-power-50> [<https://perma.cc/P6PR-VFLQ>].

101. Complaint at 1, *Tenney v. Faze Clan*, (No. 52704) (Cal. Sup. Ct. May 20, 2019) [hereinafter *Tenney*].

102. Alexander, *supra* note 98.

103. "If competitors are found to be employees, then the leagues would owe them legal responsibilities that include (1) paying payroll taxes, (2) complying with minimum wage and overtime requirements, (3) providing meal and rest breaks, and (4) maintaining workers' compensation insurance." Holden & Baker, *supra* note 4, at 418.

104. Making their debut on YouTube in 2010, Faze Clan has grown into one of the largest esports organizations to date. *Faze Clan*, FANDOM, https://youtube.fandom.com/wiki/FaZe_Clan [<https://perma.cc/4E7Q-CBQA>]; Andrew Marino, *Faze Clan CEO Talks Growing Pains, Global Expansion, and Lawsuits*, VERGE (Dec. 10, 2019, 2:38 PM), <https://www.theverge.com/2019/12/10/21004897/podcast-vergecast-lee-trink-faze-clan-interview-apparel-lawsuits-expansion> [<https://perma.cc/3FL5-V2JJ>].

105. Faze Clan, formerly Faze Sniping, is an American esports organization and social media company based in Los Angeles California. *Id.*

content creation mansion—in Los Angeles, California.¹⁰⁶ Many players in Faze Clan also live together in a Hollywood Hills mansion.¹⁰⁷ Thus, it is only appropriate that California law should be applied to these clans.

To determine the employment status of esports players signed to a clan like Faze Clan, this comment will rely on three tests, two of which are federal tests, (1) the common law agency test and (2) the economic realities test,¹⁰⁸ and one California test, (3) the California ABC test.¹⁰⁹

A. *The Common Law Agency Test*

The common law agency test examines the extent to which an employer is able to control what, how, when, and where the worker engages in their job.¹¹⁰ For this test, the relevant inquiry is “the hiring party’s right to control the manner and means by which the product is accomplished,”¹¹¹ focusing on facts such as:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹¹²

The relevant consideration when applying the common law test is to determine who has the right to control “what must be done” and “how must it be done.”¹¹³ This decision requires inquiry into the facts and circumstances surrounding the relationship between worker and employer.¹¹⁴ Each factor must be considered and weighed in light of the facts and circumstances, however, “no one factor is controlling.”¹¹⁵ If the relationship satisfies the

106. *Faze Clan v. Tenney (1:19-cv-07200-JSR) District Court, S.D. New York*, COURT LISTENER (Aug. 1, 2019), <https://www.courtlistener.com/recap/gov.uscourts.nysd.520353/gov.uscourts.nysd.520353.1.0.pdf> [<https://perma.cc/M27V-2B48>] [hereinafter Faze Clan].

107. Kent, *supra* note 12.

108. See Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, 125 MONTHLY LAB. REV. 1, 5 (Jan. 2002).

109. See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018).

110. *How to Apply the Common Law Control Test in Determining an Employer/Employee Relationship*, SOC. SEC. ADMIN., https://www.ssa.gov/section218training/advanced_course_10.htm [<https://perma.cc/29QE-FVG2>].

111. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

112. *Id.*

113. SOCIAL SECURITY ADMINISTRATION, *supra* note 110.

114. *Id.*

115. *Id.*

requirements of the common law test, a worker is considered an employee.¹¹⁶ But if the test does not reflect the existence of such a relationship, the worker is most likely an independent contractor or self-employed.¹¹⁷

The common law agency test is employed by a variety of federal agencies including the Internal Revenue Service (“IRS”) and the Social Security Administration (“SSA”).¹¹⁸ To properly comply with IRS and SSA regulations, it is essential to know whether an employee and employer relationship exists between the individual worker and the firm receiving services.¹¹⁹

B. The Economic Realities Test

The economic realities test self-descriptively focuses on the economic relationship between the worker and employer.¹²⁰ It also governs minimum-wage and overtime obligations under the Fair Labor and Standards Act.¹²¹ Under this test, if a worker depends on the employer for continued employment, the worker is considered an employee.¹²² An employee is dependent upon the employer for their primary source of income, whereas an independent contractor would typically work for, and be compensated by, many different employers.¹²³ The United States Supreme Court has held that there is no single rule or test for determining employee-employer relationship status for purposes of the Fair Labor and Standards Act and that the total activity or situation controls the determination.¹²⁴ However, the economic realities test encompasses many of the factors the Court considers significant for making a determination about employee and employer relationships.¹²⁵

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Muhl, *supra* note 108, at 6–7.

121. *Id.* at 6 (“Fair Labor Standards Act uses the following uninformative definition of ‘employee’ in the statutory language: ‘any individual employed by an employer.’ However, Congress and the courts have recognized that, because of its primary focus on protecting workers, the definition of ‘employee’ under the Act is the broadest one used pursuant to the economic realities test.”).

122. *Id.* at 7.

123. *Id.*

124. *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB., WAGE AND HOUR DIV. (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs13.htm> [<https://perma.cc/8FPB-Z5U4>] [hereinafter *Fact Sheet*].

125. *Id.*

The test considers seven different factors when making its determination: (1) “[t]he extent to which the services rendered are an integral part of the principal’s business;” (2) “[t]he permanency of the relationship;” (3) “[t]he amount of the alleged contractor’s investment in facilities and equipment;” (4) “[t]he nature and degree of control by the principal;” (5) “[t]he alleged contractor’s opportunities for profit and loss;” (6) “[t]he amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;” and (7) “[t]he degree of independent business organization and operation.”¹²⁶

According to the Department of Labor, “there are certain factors which are immaterial in determining whether there is an employment relationship . . . [and] are not considered to have a bearing on determinations as to whether there is an employment relationship.”¹²⁷ These factors include “the place where work is performed, the absence of a formal employment agreement, [and] whether an alleged independent contractor is licensed by State/local government.”¹²⁸ Furthermore, the U.S. Supreme Court noted that the “time or mode of pay” is irrelevant to determination of employee status as contrasted to the common law agency test.¹²⁹

C. California’s ABC Test

The California Supreme Court developed a new test, the ABC test, in *Dynamex Operations West, Inc. v. Superior Court* to determine a worker’s employment status for the purpose of wage and benefits claims.¹³⁰ Under *Dynamex*, a worker performing services for the hiring party is presumed to be an employee of the hiring party.¹³¹ Put another way, a worker is an independent contractor *only* if the hiring party can prove all three factors:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Anthony Zaller, *Understanding the ABC Test for Independent Contractors in California*, CAL. EMP. L. REP. (Mar. 29, 2019), <https://www.californiaemploymentlawreport.com/2019/03/understanding-the-abc-test-for-independent-contractors-in-california/> [<https://perma.cc/L4ZL-DRSN>].

131. Assemb. B. 5, 2019 (Cal. 2019).

(C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.¹³²

With the passage of AB 5, California codified the *Dynamex* test.¹³³ AB 5 does not reject the *Borello* test used in California to determine employment status,¹³⁴ but rather supplements the existing law.¹³⁵ However, AB 5 “exempt[s] specified occupations from the application of *Dynamex*, and would instead provide that these occupations are governed by *Borello*.”¹³⁶ Such occupations include, but are not limited to, “licensed insurance agents, certain licensed health care professionals . . . commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services”¹³⁷

The employment status test in AB 5 provides a strict and narrow approach to determine a worker’s classification and generally limits an employer’s ability to classify workers as independent contractors.¹³⁸ Some have gone so far as to call this new bill “the death of free will in employer-employee relations.”¹³⁹ Taking a deeper look into the details of each prong reveals the relevant details to the court’s determination.

The “control and direction” prong in AB 5 is a robust measurement looking at three factors of control: behavioral, financial, and relationship control, with no single factor considered definitive.¹⁴⁰ The “work outside” prong focuses on the “core function of a specific business.”¹⁴¹ For example,

132. *Id.*

133. AB 5 went into effect on January 1, 2020. *Id.*

134. The *Borello* test looks at thirteen factors when determining a worker’s classification. The last five factors were borrowed from the Fair Labor Standards Act. For the factors, see Zaller, *supra* note 130.

135. *Garcia v. Border Transp. Grp., L.L.C.*, 28 Cal. App. 5th 558, 571 (2018).

136. Assemb. B. 5, 2019 (Cal. 2019).

137. *Id.*

138. Jean Murray, *What is the ABC Test for Independent Contractors? The Dynamex Case and Independent Contractor Status*, THE BALANCE SMALL BUS. (Sept. 20, 2019), <https://www.thebalancesmb.com/what-is-the-abc-test-for-independent-contractors-4586615> [<https://perma.cc/A8W9-R2XP>].

139. RAD Radio: Rod, Anybody & Dawn Show, 12.12. *RAD Full Show*, WILLIAMS BROAD., INC., at 1:35:27 (Dec. 12, 2019), https://content.production.cdn.art19.com/validation=1598230492,4cd6ad91-8bc3-55f8-a56d-22a5599b3d61,T3OafreCPd8mh-46UG8hQP_IH3w/episodes/56deaf6a-78af-4a5a-9ef7-2bb2148f5877/28130a3b4fc137f1d34c73e736273795fdb1bc223b20eb25eefcac2f17a0b61d94035ae9999e0325550352209813bc081c81de3ed0dfe9eedb71afd1ed16a579/12.12.19%20RAD%20Full%20Show.mp3 [<https://perma.cc/QP5U-3K56>].

140. Murray, *supra* note 138.

141. *Id.*

the core function of the rideshare company Lyft is the transportation of passengers.¹⁴² Drivers would fall within the usual course of Lyft’s business, whereas workers in human resources, technical support, and payroll would be outside Lyft’s core function.¹⁴³ Assuming all other prongs are met, if Lyft were to hire a worker outside of their usual scope of business, this worker would be considered an independent contractor.¹⁴⁴ The “customarily engaged in” prong therefore limits independent contractors to only licensed professionals.¹⁴⁵ Occupations such as barbers, massage therapists, and chiropractors thus satisfy this prong.¹⁴⁶ In addition to the occupations listed as independent contractors, the IRS provides a non-exhaustive list of occupations generally considered to be independent contractors including doctors, lawyers, accountants, contractors, and public stenographers.¹⁴⁷

IV. ANALYSIS OF EMPLOYMENT RELATIONS IN ESPORTS

After qualifying for the 2019 Fortnite World Cup, Turner “Tfue” Tenney filed a lawsuit against Faze Clan, his now former clan.¹⁴⁸ Foremost, Tenney claims the agreement is illegal because Faze Clan acted as an unlicensed talent agency in violation of California’s Talent Agency Act.¹⁴⁹ Tenney’s lawsuit also alleges several other causes of action against his former clan including unfair business practices, breach of written contract, and breach of fiduciary duties.¹⁵⁰ Ultimately, he seeks declaratory relief by termination of the “gamer agreement”—the agreement between a gamer and his or her organization.¹⁵¹

142. See *Lyft Culture*, LYFT, <https://www.lyft.com/careers/life-at-lyft> [<https://perma.cc/3XKS-H9U2>].

143. Currently, Proposition 22 (2020) is on the ballot in California. If passed, this proposition would grant ride-sharing applications such as Uber and Lyft an exemption from the AB 5 test, effectively granting them a carveout to be classified as independent contractors and not employees. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) [<https://perma.cc/66V5-5Z63>].

144. Murray, *supra* note 138.

145. *Id.*

146. *Id.*

147. *Independent Contractor Defined*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [<https://perma.cc/BY6K-EPYW>].

148. Andre Hayward, *The Latest on Turner ‘Tfue’ Tenney’s Suit Against FaZe Clan*, ESPORTS OBSERVER (May 25, 2019), <https://esportsobserver.com/tenney-faze-clan-lawsuit-update/> [<https://perma.cc/R7C8-2QQ2>].

149. Tenney, *supra* note 101, at 3.

150. *Id.*

151. *Id.*

Tenney argues the agreement is “grossly oppressive, onerous, and one sided” and claims Faze Clan was entitled to a “finder’s fee of up to eighty percent of the revenue paid by third-parties for Tenney’s services.”¹⁵² However, the proportion and amount of revenue Faze Clan collected from Tenney is in dispute.¹⁵³

Section 5.a of the contract between Tenney and Faze Clan limits what Tenney can say publicly about his former clan or his former players and regulates the content he can post on social media.¹⁵⁴ This section also provided Tenney shall not:

Throughout the Term (the “Exclusivity Period”), unless Gamer has obtained Company’s prior written consent . . . (i) provide services or otherwise work for or be employed by a gaming company or other gaming brands or any companies that already have an agreement with Company; (ii) appear in, sponsor or be sponsored by, or otherwise promote or endorse, directly or indirectly, any brands, products or services other than the brands, products and services approved in writing by Company; (iii) promote, sponsor, endorse (using Gamer’s Name and Likeness or otherwise) or render services for or on behalf of any companies with products or services competitive with a product or service of Company or a sponsor or advertiser of Company.¹⁵⁵

Tenney argues that “[t]hese conspicuously anti-competitive provisions, which are probably found in every Faze Clan Gamer Agreement” violate California Business and Professions Code section 16600 by being an unlawful restriction in a profession.¹⁵⁶

Lastly, Tenney claims Faze Clan retained payments from third-parties and Tenney’s sponsorship deals, and failed to distribute payments for Tenney’s services according to the gamer agreement, thus violating the fiduciary duty of loyalty.¹⁵⁷ Tenney’s lawsuit illustrates the power imbalance in the esports industry as it “seeks to shift the balance of power to the gamers and content creators/streamers” while also forcing the community to “take notice of what is going on and help to clean up esports.”¹⁵⁸

Faze Banks, the Chief Operating Officer of Faze Clan, claims he taught Tenney to “be more than just a skilled gamer” and gave him business, social

152. *Id.*

153. Faze claims that they take a maximum of 20 percent from tournament winning and content revenue, while Tenney claims Faze takes 80 percent of all revenue Tenney makes through sponsored videos on Twitch and YouTube. Alexander, *supra* note 98.

154. Tenney, *supra* note 101.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

media, and gaming advice.¹⁵⁹ In its counter suit, Faze Clan similarly claims it shared the “business, social media and gaming practices that have made Faze Clan successful” with Tenney, which allowed him to earn over \$20,000,000 since April 2018, when he earned “virtually nothing” before.¹⁶⁰ Furthermore, it alleges Tenney “secreted away” this money against the terms of the gamer agreement.¹⁶¹

Overall, Faze Clan believes Tenney’s initial lawsuit was a ploy for Tenney to “tear up the agreement he made with Faze Clan . . . and keep everything for himself.”¹⁶² To support this conclusion, Faze Clan points to the fact that it offered several revised gamer agreements to Tenney, including those with “a seven-figure annual salary, or no revenue split for Faze Clan at all,” but that Tenney rejected each offer.¹⁶³ Likewise, Faze Clan offered to increase Tenney’s revenue shares and expressed its willingness to relieve Tenney of many of his obligations, yet Tenney turned down the offers.¹⁶⁴ Faze Clan believed it was “clear that nothing would satisfy Tenney and his advisors” except getting out of the contract.¹⁶⁵ Faze Clan’s conclusion is supported by a YouTube video posted by Tenney with the caption “I want to make it very clear that I tried multiple times for months to get out of this contract. This is what had to be done.”¹⁶⁶ Undoubtedly, discrepancies remain as to the facts behind each of the opposing claims.

While an unfortunate situation for the world of esports, Tenney and Faze Clan’s respective lawsuits provide a look into the interworking of the largest and most influential esports clans.¹⁶⁷ Applying the common law agency test, the economic realities test, and the California ABC test to the gamer agreement will help players such as Tenney know their rights and obligations. Likewise, it will give the owners of these teams a better understanding of how to classify their competitors for tax purposes and the duty of care they owe to these esports athletes, thus avoiding potential liability.

159. Alexander, *supra* note 98.

160. Complaint at 5, Faze Clan Inc. v. Tenney, 407 F. Supp. 3d 440 (S.D.N.Y. 2019).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Faze Clan has been expanding their brand beyond video games, now supplying sports conversations and reality programing as part their catalog of content. Mazique, *supra* note 100.

A. Common Law Agency Test Applied to Faze Clan

Starting with the common law agency test, the crucial inquiry is the extent to which a worker's job is controlled by the employer.¹⁶⁸ To determine if "the hiring party's right to control the manner and means by which the product is accomplished," the following factors appear relevant to Faze Clan's control over the details behind Tenney's work: the skill required; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the method of payment; and whether the work is part of the regular business of the hiring party.¹⁶⁹ Considering that each factor must be weighed in light of the facts and circumstances and that no one factor is controlling,¹⁷⁰ the details extracted from Tenney's lawsuit can be applied to determine the relationship between Faze Clan and its content creators.

The skill level required for the average gamer to become signed to a clan such as Faze Clan is immense.¹⁷¹ One must be an "exciting prospect" and a "skilled gamer" to get noticed by an organization like Faze Clan.¹⁷² This notoriety in the esports community and aptitude for gaming does not come naturally to most, and even those who are "early stars" like Tenney must continue to practice and create content in order to stay relevant.¹⁷³ The statistics behind those who tried to qualify for the 2019 Fortnite World Cup demonstrates the skill gap between causal and professional gamers as the large pool of would-be competitors was narrowed down into a small handful of qualified players.¹⁷⁴ Tenney was one of only one hundred players to earn a spot in the 2019 Fortnite World Cup Finals solos tournament, while 40,000,000 tried out.¹⁷⁵

Next, the location of work factor, though determinative for many employees, does not have the same impact for streamers. The ability to stream and upload content from anywhere in the world allows content creators great flexibility when it comes to location. Although some notorious streamers,

168. SOCIAL SECURITY ADMINISTRATION, *supra* note 110.

169. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

170. SOCIAL SECURITY ADMINISTRATION, *supra* note 110.

171. Jacobs, *supra* note 49.

172. Alexander, *supra* note 98.

173. *Id.*

174. Perez, *supra* note 3.

175. *Id.*

like Tenney, live in houses owned by their clan,¹⁷⁶ it is likely that the overwhelming majority of streamers are not living in dedicated streaming houses with 54,000 channels live on Twitch at any one time.¹⁷⁷ For content creators who live in streaming houses, the factor weighs more for classification as employees, whereas this factor weighs towards classification as independent contractors for those who stream from their own homes.

As a factual and circumstantial test, the duration of any given relationship will vary across individual agreements, consequently shifting this factor in each instance. Using Tenney's gamer agreement as a guide, the initial term of six-months automatically extended for three more years.¹⁷⁸ Regardless of the length of the agreement, Tenney was also subject to confidentiality obligations for the duration of the gamer agreement plus an additional three years.¹⁷⁹ In total, the relationship between Tenney and Faze Clan would last a minimum of six years and six months. Thus, such a lengthy, continuing relationship would weigh in favor of finding Faze's content creators as employees.¹⁸⁰ If provisions contained in Tenney's contract are truly "found in every Faze Clan Gamer Agreement" as Tenney alleges, then all content creators signed to this clan would have this factor weigh in favor of such employment status.¹⁸¹

For the assigning additional projects factor, Tenney alleges Faze Clan controls which projects he undertakes. Tenney states, "[a]cting in the capacity of Tenney's agent, Faze Clan rejected at least one sponsorship deal on Tenney's behalf."¹⁸² This suggests that Faze Clan had the ability to assign additional projects to Tenney on behalf of their organization. Thus, this factor would also weigh in favor of finding Tenney being an employee of Faze Clan.

On the other hand, the method of payment factor would weigh towards finding Tenney to be an independent contractor. Unlike traditional employer and employee relationships, where the money flows into the employer's business which is then used to pay the employee's salary, Faze Clan's gamer agreement states that Tenney was the initial recipient of the income, which he would then remit to Faze Clan.¹⁸³ However, their payment compensation to Tenney was in the form of a monthly fee, a share of income from cash

176. Kent, *supra* note 12.

177. *2019's 36 Most Incredible Twitch Stats*, 99 FIRMS (Apr. 23, 2019), <https://99firms.com/blog/twitch-stats/#gref> [<https://perma.cc/F9LK-KYVC>].

178. Alexander, *supra* note 98.

179. *Id.*

180. "An individual who has a continuing relationship with the person for whom he works is more likely to be an employee than one who is engaged for a single job or for sporadic or infrequent jobs." SOCIAL SECURITY ADMINISTRATION, *supra* note 110.

181. Tenney, *supra* note 101.

182. Tenney, *supra* note 101, at 4.

183. *See* Faze Clan, *supra* note 106, at 16.

prizes won at esports tournaments, and a share of revenue from certain merchandise, apparel, brand deals, and other activities.¹⁸⁴ Furthermore, Tenney claims Faze Clan withheld payment from him for services performed for sponsors.¹⁸⁵ This would suggest Tenney's payment method more closely resembles that of a traditional employer-employee agreement.

Nonetheless, content creators like Tenney have more than one method of payment associated with their streaming, even if represented by their clan while earning this income. Receiving donations from independent viewers watching their channel and the revenue from subscribers to their channels goes straight to the streamers, making up a sizable percentage of their revenue.¹⁸⁶ Content creators are not beholden to their clans for their income,¹⁸⁷ making this factor more fact-specific and dependent on the notoriety of the streamer.

Regarding the regular business of the hiring party factor, Faze Clan is a self-described "esports and entertainment organization that competes in video game tournaments and creates social media content."¹⁸⁸ They became popular as a result of their members playing video games and gaining notoriety on the internet.¹⁸⁹ Likewise, Tenney is a self-proclaimed "professional gamer and content creator/streamer."¹⁹⁰ Tenney's addition to Faze Clan and the work he did for the this organization fits into its regular business. Thus, this factor would weigh in favor of finding an employer-employee relationship.

The information extracted from Tenney's lawsuit and Faze Clan's counter suit suggests that overall, Tenney would be considered an employee of Faze Clan. Although the method of payment and work location factors may support a contrary conclusion, these factors are not conclusive considering all the facts and circumstances. Because Tenney engages in the regular business of Faze Clan and Faze Clan has discretion to assign Tenney additional projects through sponsorship, the test reflects the nature of the relationship which would render Tenney an employee of Faze Clan.

184. *Id.* at 9.

185. Tenney, *supra* note 101, at 4.

186. Platforms like Twitch take a percentage of the donations and subscription revenue received by the content creators. *See* Disguised Toast, *supra* note 39 (breaking down how top content creators such as Tyler "Ninja" Blevins and Turner "Tfue" Tenney make income from streaming).

187. *See id.*

188. Faze Clan, *supra* note 106, at 7.

189. *Id.*

190. *See* Tenney, *supra* note 101, at 2.

B. Economic Realities Test Applied to Faze Clan

In applying the economic realities test, a worker will be considered an employee if the worker is dependent upon the employer for continued employment.¹⁹¹ The rationale behind this “dependence” test is that a typical employee’s primary source of income is from their employer, whereas an independent contractor works for, and is compensated by, many different employers.¹⁹²

The seven relevant factors of the economic realities test are: (1) “[t]he extent to which the services rendered are an integral part of the principal’s business;” (2) “[t]he permanency of the relationship;” (3) “[t]he amount of the alleged contractor’s investment in facilities and equipment;” (4) “[t]he nature and degree of control by the principal;” (5) “[t]he alleged contractor’s opportunities for profit and loss;” (6) “[t]he amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;” and (7) “[t]he degree of independent business organization and operation.”¹⁹³

The first factor, the extent to which services rendered are an integral part of business factor, looks at the type of business the principle engages in.¹⁹⁴ Here, Faze Clan is an esports and entertainment organization focused on uploading video game related content.¹⁹⁵ Tenney, as a content creator, plays a significant role in providing Faze Clan with content to share with its fanbase. However, to go so far as to say Tenney’s role is integral may be placing too much emphasis on his importance with the organization. Faze Clan was a successful esports clan before Tenney joined in 2018 and continues to remain relevant after Tenney’s separation one year later.¹⁹⁶ Nonetheless, as one of many content creators signed to Faze Clan, Tenney’s services are necessary for the continued success and relevance of the organization. Thus, the services rendered by Tenney would be considered an integral part of Faze Clan’s principle business and would weigh towards finding Tenney as an employee.

The permanency of the relationship factor, similar to the duration of relationship factor in the common law agency test, considers that Tenney and Faze Clan entered an agreement for three years with a confidentiality agreement extending another three years afterwards.¹⁹⁷ This lengthy agreement suggests that the relationship was more permanent than sporadic. Thus,

191. Muhl, *supra* note 108, at 6.

192. *Id.* at 7.

193. Fact Sheet, *supra* note 124.

194. *Id.*

195. *See* Faze Clan, *supra* note 106, at 7.

196. *See id.* at 1–2.

197. *Id.* at 9.

this factor similarly weighs for finding Faze Clan's content creators, and those signed to other clans, to be employees.

For the investment in facilities and equipment factor, there are facts supporting alternative conclusions. Suggesting that Tenney would be an independent contractor is the fact that he obtained his own gaming computer before being signed to Faze Clan.¹⁹⁸ Likewise, before moving, Tenney lived with his family in their Florida house.¹⁹⁹ On the other hand, after being signed to Faze Clan, Tenney moved into their dedicated streaming house.²⁰⁰ This abode is no small cottage but rather a multimillion-dollar mansion in Los Angeles rented by Faze Clan,²⁰¹ which allows their content creators to be free from distraction when honing their craft.²⁰² Likewise, Tenney received a \$20,000 gaming setup after being signed to Faze Clan and while living in the Faze mansion.²⁰³ With facts giving weight to both conclusions, it would be rash to hold that this factor sufficiently weighs for a single employment status, making it largely irrelevant for Tenney.

With regards to the nature and degree of control factor, Faze Clan had control over which sponsorship deals Tenney could accept.²⁰⁴ More notably, Tenney's lawsuit originated with the proposition that Faze Clan had too much control over Tenney's work and that content creators must "shift the balance of power."²⁰⁵ This information, taken with the extending confidentiality agreement,²⁰⁶ suggests that Faze Clan had a high degree of control over Tenney's work. Thus, this factor weighs towards finding an employee status for these streamers.

When it comes to the contractor's opportunity for profits and loss, Tenney's prevalence and success in the industry suggests that he had significant opportunity for profits and losses. Making an estimated \$20,000,000 over

198. Tenney uploaded his own content and videos before being recruited to join Faze Clan in April 2018. This suggests that he bought his own equipment for streaming and did not rely on Faze Clan for such. *Id.*

199. Noah Smith, *The Unique, Unlikely Celebrity of Tfue*, WASH. POST (Jan. 13, 2020), <https://www.washingtonpost.com/graphics/2020/video-games/the-unique-celebrity-of-tfue-fortnite-standout-and-twitch-star/> [<https://perma.cc/7NCJ-S5GN>].

200. *See* Kent, *supra* note 12.

201. *Id.*

202. *See* Faze Clan, *supra* note 106, at 1.

203. Tfue, *My \$20,000 Fortnite Gaming Setup*, YOUTUBE (Dec. 18, 2018), <https://www.youtube.com/watch?v=WIERHmmmEm8> [<https://perma.cc/QKG8-6AUF>].

204. *See* Tenney, *supra* note 101.

205. *Id.* at 4.

206. Faze Clan, *supra* note 106, at 11.

his first year with Faze Clan, Tenney was truly a rising star.²⁰⁷ A key feature of being a content creator is making business decisions about what to stream, and in cases like Khattri, what not to stream. Thus, because Tenney could gain or lose money from his business decisions, this factor weighs towards him being an independent contractor.²⁰⁸

Moving to the initiative, judgment, or foresight for the success of the worker, this factor further suggests that Tenney would be an independent contractor. Content creators are only as popular as their content is entertaining, and with such a highly saturated market, streamers like Tenney must have an ability to understand what the community wants and produce creative content. Tenney, as one of the most popular content creators today,²⁰⁹ is undoubtedly successful when it comes to these skills. While Faze Clan's "innovativeness and its trade secrets . . . are critical to its success" and Tenney's popularity dramatically increased after the announcement of his joining,²¹⁰ the pressure to create content ultimately rests on the players and not the organization itself. Thus, this factor weighs in favor of classifying Tenney as an independent contractor.

Finally, the independent business organization and operation factor must be considered. Unfortunately, the gamer agreement does not offer much insight into the way Faze Clan is organized. Continuously referring to its "trade secrets" Faze Clan keeps this aspect of its organization unknown.²¹¹ Giving this factor weight for either employment status would be erroneous with the information available through the lawsuits.

To conclude, while not every factor in the economic realities test weighs in favor of finding Tenney to be an independent contractor, the totality of the circumstances supports this conclusion. As the name of the test suggests, the economic reality of the situation is that Tenney is not beholden to Faze Clan for his primary income. As previously noted, content creators have a variety of avenues available to them for income.²¹² This major distinction between streamers and tournament players could be the difference between the former being independent contractors under this test, while the latter would be employees of their teams. Overall, the facts and circumstances show that under this test, Tenney would be considered an independent contractor.

207. *Id.* at 1.

208. *See* Fact Sheet, *supra* note 124.

209. Kevin Webb, *Ninja is No Longer the Most-Watched Video Game Streamer on Twitch, According to New Data*, BUS. INSIDER (July 16, 2019, 9:23 AM), <https://www.businessinsider.com/most-watched-twitch-streamers-ninja-tfue-2019-7> [<https://perma.cc/7XK2-GRA4>].

210. Faze Clan, *supra* note 106, at 8, 2–4.

211. *Id.* at 19.

212. Disguised Toast, *supra* note 39.

C. California's ABC Test Applied to Faze Clan

Shifting to California law, which uses the ABC test, if a clan wants to classify its content creators as independent contractors and not employees, it must prove:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) the person performs work that is outside the usual course of the hiring entity's business; and
- (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.²¹³

For element A, “[a] business need not control the precise manner or details of the work in order to be found to have maintained the necessary control.”²¹⁴ 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.).²¹⁵ According to the terms of the gamer agreement, Faze Clan had negative control over Tenney's action, limiting not only what he can do, but also what he can say.²¹⁶ Because *Dynamex* emphasized the broad applicability of the ABC test,²¹⁷ Faze Clan would likely struggle convincing a court there was sufficient freedom.

When it comes to element B, Faze Clan will likely fail to establish that the work Tenney performed was outside their “usual course of business.”²¹⁸ Drawing on the same facts for the ordinary business factor in the common law agency test, Faze Clan's business of creating content is exactly the work that Tenney performed. Players are foundational for these organizations, as revenue is generated by their talent and success, and without content creators there would be no viewers, sponsors, fans, and ultimately no

213. Assemb. B. 5, 2019 (Cal. 2019).

214. *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903, 958 (2018).

215. Michael Arin, *Esports & Employment After Dynamex*, 1 ESPORTS B. ASS'N J. (Oct. 2019), <https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex> [<https://perma.cc/KU9B-GTS8>].

216. Faze Clan, *supra* note 106.

217. *Dynamex Operations W., Inc.*, 4 Cal. 5th at 953.

218. Assemb. B. 5, 2019 (Cal. 2019).

revenue.²¹⁹ Thus, players' services are central, not incidental, to a clan's business,²²⁰ which likely makes them employees of their respective clan.

Finally, for element C of the test, it must be determined if the worker decided to go into a profession typically associated with self-employment—shown through incorporation, licensure, advertisements, and offering to provide services.²²¹ However, this element is “deceptive given the independent streamer market and ability for some players to enter tournaments independently.”²²² Because streamers are more likely to protect themselves through limited liability vehicles than professional players,²²³ content creators like Tenney who are signed to a clan, as opposed to those who stream independently, are more likely to satisfy this element. However, “it is unclear if the court would consider on-the-side streaming as the same trade as professional tournament play” and could conflate the two,²²⁴ thus increasing the chances of finding the worker to be an independent contractor.

Under the ABC test, Faze Clan is extremely unlikely to prove any one element was sufficiently met with Tenney's gamer agreement. While elements A and C are difficult to overcome, Faze Clan will find it almost impossible to prove element B, that Tenney's work as an esports content creator was not part of its usual course of business. Thus, Tenney and all other content creators for Faze Clan would be considered employees under the California AB 5 test.

After applying the three employment tests, Tenney is likely considered an employee under two, the common law agency test and the California ABC test. Because the common law agency test is the one employed by the IRS and SSA,²²⁵ Tenney, and other content creators by extension, can rely on this to help establish his status as an employee and demand wage regulations. Furthermore, as Faze Clan's principal place of business is in Los Angeles, California,²²⁶ Faze Clan could not escape obligations by classifying their streamers as independent contractors under the California ABC test. Therefore, it is reasonable to conclude that content creators must be afforded the same health, wage, and safety standards as all other employees, and be given the same legal protections as all other unions should this solution be pursued.

219. Arin, *supra* note 215.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Holden & Baker, *supra* note 4, at 420; *see also* SOCIAL SECURITY ADMINISTRATION, *supra* note 110.

226. Faze Clan, *supra* note 106, at 7.

V. PROPOSED SOLUTIONS

A. *The Gamers Achieving Collective Bargaining Power*

For professional esports players, employment status not only determines potential workplace protections but also governs whether players can unionize and collectively bargain.²²⁷ The NLRA does not recognize unions formed by independent contractors, precluding such workers from collective bargaining.²²⁸ While independent contractors can technically join a union, they are not “subject to the same privileges and protections as a regular bargaining unit” such as protection from employer reprisals under the NLRA.²²⁹ Likewise, unionization leaves gamers vulnerable to antitrust lawsuits as they would legally be small business operators.²³⁰ Thus, gaining status as employees is the first step in forming a properly recognized and powerful union.

For any professional esports player or streamer signed to a clan in California, AB 5 surely classifies them as an employee. For those not in California, using the common law agency test gives them a viable argument for the same status. These gamers should argue for the same benefits that are otherwise afforded to an employee, such as a minimum wage and health care options.²³¹ Establishing esports players as employees bolsters their authority, resources, and support when it comes to unionization.²³²

Nonetheless, potential unionization in esports faces additional challenges beyond employment status of players. Initially, challenges are created by the “lack of standardization” across the industry.²³³ With so many genres of games, game titles, and variations across the leagues,²³⁴ there may be

227. See *My Employer Says I Am an Independent Contractor. What Does This Mean?*, COMMUNICATIONS WORKERS OF AMERICA, <https://www.cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean> [<https://perma.cc/4SD8-F7GY>].

228. See Kim Velsey, *Disorganized Labor: Can Independent Contractors Come Together?*, HUFFPOST (May 30, 2010, 10:04 AM), https://www.huffpost.com/entry/disorganized-labor-can-in_n_511523 [<https://perma.cc/WWC9-J8N5>].

229. COMMUNICATIONS WORKERS OF AMERICA, *supra* note 227.

230. See Velsey, *supra* note 228.

231. Holden & Baker, *supra* note 4, at 418.

232. COMMUNICATIONS WORKERS OF AMERICA, *supra* note 227.

233. Carleigh Morgan, *Gaming the System: Esports Players Face Many Challenges in Unionizing*, VICE (Aug. 10, 2016, 07:00 AM), https://motherboard.vice.com/en_us/article/53dwn5/esports-unionization-challenges [<https://perma.cc/JT63-ACYE>].

234. Holden & Baker, *supra* note 4, at 394.

no one-size-fits-all solution to esports unions. For example, LCS created a player's association but the group's structure does not resemble the player's associations seen in traditional sports and it struggles to effectively represent players in negotiations with the league.²³⁵

Forming a union for each and every esports is neither practical nor desirable. However, targeting the largest esports games currently lacking a union, such as Dota 2 and Fortnite, would allow these issues to be recognized and corrected. As more unions are formed around popular games, and as the membership bases of these unions grows, the power imbalance will begin to shift back to the players. Starting with the largest gaming communities and esports groups at the top and working down would eliminate many of the entry barriers of unionization while also addressing some of the most prevalent issues in the industry.

However, the corporations that develop the games—an essential third party in the industry—may not be welcoming to such a relationship between organizations and players.²³⁶ Because many esports players still lack the star power to organize,²³⁷ they may not want to challenge the corporations that own the intellectual property essential to their livelihood, and will likely face challenges in gaining traction against these billion-dollar corporations.²³⁸ Holden and Baker argue “the lack of star status . . . limits [competitors'] leverage in negotiations and their ability to build and capitalize upon their publicity rights.”²³⁹ They also note that “publicity rights problems are compounded by highly restrictive contractual provisions that grant league operators perpetual rights to the competitor's name, image and likeness.”²⁴⁰

On the other hand, the star power obstacle is less important for players with celebrity status compared to those still “hidden behind their on-screen avatars in competitions.”²⁴¹ With many streamers such as the afore mentioned Tenney “Tfue” Turner, Tyler “Ninja” Blevins, and Brett “Dakotaz” Hoffman gaining popularity and name recognition, they may be able to bring the issue behind professional gaming to the fanbase and general public, thus putting

235. See Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union/> [<https://perma.cc/6F48-FCWZ>].

236. See Morgan, *supra* note 233.

237. See Jesse Ghiorzi, *Esports Stardom is About More than Just Playing the Game*, VENTURE BEAT (Feb. 2, 2018, 3:30 PM), <https://venturebeat.com/2018/02/02/esports-stardom-is-about-more-than-just-playing-the-game/> [<https://perma.cc/3W6Q-M8FY>]; see also Holden & Baker, *supra* note 4, at 436.

238. See Kogel, *supra* note 235; Morgan, *supra* note 233.

239. Holden & Baker, *supra* note 4, at 436.

240. *Id.*

241. *Id.*; see Ghiorzi, *supra* note 237 (explaining skill alone only gives a player so much recognition before something more, such as a player's own personal brand, is needed to elevate the player to star status).

pressure on large corporations to give way when negotiating. Likewise, if these individuals are not solely reliant on the gaming company for their continued income, they will not be starved out when continuing to fight for unionization. For example, Blevins receives money for his likeness from companies such as Samsung, Adidas, and even the NFL.²⁴² If Blevins is not dependent on the game to make a living, he can afford to negotiate on behalf of all players without worry of losing his livelihood. Game developers thrive off the exposure from these popular streamers who are called “influencers” for a good reason. Thus, if a large group of influencers pool their power together, they will be able to overcome these obstacles to unionization and ultimately create a healthier gaming culture for esports.

Moving forward, the focus for professional gamers in the esports industry should be to gain employment status from their clans. Using this status, players may then come together to begin negotiating for better working conditions, privileges, and protections. At the forefront of these negotiations should be the popular streamers who can bear the burden of arguing on behalf of their fellow esports gamers. By coming together, players will have the ability to make demands so that gaming does not lead to over-exhaustion, addiction, and even death.

B. The Legislature Establishing an Esports Governing Body

The United States government should set up a governing body to address the competition, occupation, and health concerns facing professional esports players, similar to South Korea’s KeSPA. Organizations like the USEF, although a significant step in improving the health and safety of players and the esports industry, lack the same authority as the government backed KeSPA. Unlike its South Korean equivalent, the USEF only has authority over those who voluntarily join, making the opt-in program less effective than the mandatory compliance aspect of KeSPA. Without the backing of the United States government, the USEF will not be able to influence and monitor esports in the United States as KeSPA has in South Korea. It is unreasonable to believe American esports leagues would voluntarily want more bureaucracy and regulations limiting their resources. It is also unrealistic to believe that a system without government oversight will be beneficial to players. The only way that a regulatory body will be able to

242. Julia Alexander, *Ninja Stars in NFL Super Bowl Ad Alongside Peyton Manning and Michael Strahan*, VERGE (Jan. 31, 2019), <https://www.theverge.com/2019/1/31/18206058/nfl-super-bowl-ninja-ad-peyton-manning-fortnite-commercial> [<https://perma.cc/T37G-ZEXR>].

handle the issues facing esports effectively and efficiently is to have this regulatory body backed by the government.

Thus, a United States esports association, the United States Esports Competition and Health Organization (“US ECHO”), should be created. Most logically, the US ECHO would belong to the Department of Health and Human Services (“DHHS”). The DHHS’s mission is to “enhance and protect the health and well-being of all Americans.”²⁴³ Therefore, US ECHO would fit perfectly into the already established branch of the government as esports faces issues concerning players’ health and safety.²⁴⁴ Furthermore, US ECHO would need cooperation from the Federal Communication Commission (“FCC”) to distribute broadcasting licenses for esports tournaments, as KeSPA does in South Korea.²⁴⁵

US ECHO should have three main goals: (1) ensure the health and well-being of esports players, (2) establish uniform rules and guidelines for esports competitions, and (3) serve as a protecting body for young players entering the world of esports.

The first goal can be achieved by US ECHO taking complaints about abusive practices and cheating in esports. Serving as an investigatory body, the organization should scrutinize the allegations surrounding illegal labor practices and make recommendations to the proper authorities.²⁴⁶ It should not act as judge and jury, but as detectives looking into claims like the unfair labor practices and breach of fiduciary duties brought up in Tenney’s lawsuit. By giving players a government body to turn to, clans and tournament organizers alike will be encouraged to ensure no illegal practices occur.

For goal two, US ECHO should serve as a regulatory body for esports tournaments. US ECHO should focus on ensuring fair competition between players by writing overarching rules for esports. Such provisions should include the following:

- It is prohibited for any individual to use any unauthorized programs for hacking, cheating, and/or changing or facilitating

243. *About HHS*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/about/index.html> [<https://perma.cc/L52H-K8EX>].

244. Issues for professional esports players with over-exhaustion—possibly leading to death—and addiction would certainly be classified as health and safety issues. Likewise, DHHS provides recourses for mental health and substance abuse, combating issues common to esports players. *Mental Health & Substance Abuse*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/programs/prevention-and-wellness/mental-health-substance-abuse/index.html> [<https://perma.cc/JYQ7-MGM2>].

245. Ozkurt, *supra* note 42.

246. It would be both logical and beneficial to combine US ECHO with the Esports Integrity Coalition (ESIC), as the ESIC is already experienced in investigating issues related to dishonesty and cheating. ESPORTS INTEGRITY COALITION, *supra* note 43.

gameplay in a manner that is not expressly allowed by the game developer.

- Game developers will then take appropriate steps to combat this prohibited behavior including, but not limited to, account bans, software bans, and/or IP bans.
- Players caught using such unauthorized programs will be disqualified from all sanctioned esports competitions where there is a monetary prize.
- The use of drugs, such as Adderall, will be prohibited unless authorized by a medical professional. Any players caught abusing such drugs will be disqualified from esports competitions where there is a monetary prize.

Similarly, US ECHO should help enforce a version of South Korea's Anti-Boosting Laws, making it illegal to seek profit from a game in a manner that the business does not sanction, such as the afore mentioned "bot" farming. US ECHO will be responsible for handling complaints, launching investigations, and making recommendations for sanctions. For those caught boosting, a ban should be implemented by working with the game creator. By identifying the boosters and giving their information to game developers—just one of the victims of the booster's actions—US ECHO can curtail this unfair practice.

For its final goal, US ECHO should host literacy trainings for new professional esports players so they may become better familiarized with the laws and regulations of esports. These trainings should focus on the basics of contract and labor law and be taught by professional in the esports industry—like those listed in the next section. These optional informational sessions will give players the opportunity to learn about the esports industry when contemplating signing to a team. Players will be incentivized to participate in these trainings as learning about industry standards behind contracts and employment law will help protect them from being exploited. Furthermore, players will have easier access to more reliable sources, as opposed to if they had to gather this information for themselves.

US ECHO should also continue to connect players with experienced, fair professionals beyond these training sessions. Access to reliable attorneys, accountants, and consultants will allow players to feel more confident in the choices they make and the responsibilities they take on. It will also give them a path to resolve any issues that may arise during their career. Thus, providing a list of professionals already familiar with the innerworkings

of esports will allow players to connect with those who can assist them best.

US ECHO should follow KeSPA's funding model of deriving revenue from several sources,²⁴⁷ thus, spreading the burden around to all involved. Some of US ECHO's funding should come from annual membership dues paid by the professional leagues and professional gamers who compete in these leagues. Another portion should come from corporate sponsorship deals. For example, KeSPA receives funding from Shinhan Bank who has sponsored the Pro League for many years.²⁴⁸ Likewise KeSPA hosts an "e-Sports Games," and amateur competition meant to help portray esports as an activity for all.²⁴⁹ Having US ECHO host a similar event would not only produce this same inclusionary message, but would also attract corporate sponsors. US ECHO can also get a portion of its funding from its distribution of broadcasting licenses for these games.

Additional funding for US ECHO should come from game developers and end users. If developers want to create a product available to the general public, it is reasonable that they be asked to contribute in order to ensure their product does not harm users. The cost of making video games comes from creating the content itself, not burning physical discs. Thus, any sales tax on a per item basis would come back to the end user. Accordingly, charging the game developers a variable fee based on the volume of units sold to the public, as well as a tax at the point of purchase, will spread the fundraising around so all parties share the burden.

C. The Legal Community's Potential Contributions

Esports is not only entangled in issues facing employment and labor law, but also those in contract law, intellectual property law, entertainment law, and sports law. As the esports industry continues to grow, the public pressure to solve these issues will likely increase as well. However, the need to develop solutions has not gone unnoticed as some in the legal community have already made progress.

In May 2018, Bryce Blum founded the Esports Bar Association ("EBA").²⁵⁰ The EBA's mission is to provide "a forum for discussion, expertise, and

247. See TAYLOR, *supra* note 19, at 161.

248. *Id.*

249. *Id.*

250. Bryce Blum is a pioneer for esports law. He is the founder of Electronic Sports and Gaming Law, serves as general counsel for premiere Western esports teams, and works as a consultant and esports industry expert. *Founder Bio Bryce Blum*, ELEC. SPORTS AND GAMING L., <https://esglaw.com/founder> [<https://perma.cc/9YEG-U6ER>]; Bryce Blum (@esportslaw), TWITTER (May 14, 2018, 12:55 PM), <https://twitter.com/esportslaw/status/996116862562791424?s=12> [<https://perma.cc/A2X8-YEH4>].

professional development for practicing attorneys, law students, and other professionals in esports.”²⁵¹ The organization expects to move “esports forward by fostering public engagement, promoting business and professional standards, increasing access for underrepresented groups, encouraging legal and academic work, and advocating for sensible public policy.”²⁵² The EBA also produces an annual conference focusing on current legal issues facing esports and hosting elite speakers from the legal community.²⁵³

The development of the EBA not only illustrates that esports is a legitimate industry full of opportunity, but also highlights the need to support this industry’s growth. For those in the legal community who are interested in pushing esports forward, joining the EBA provides a start to getting more insight into the happenings of the legal esports community. Bringing interested parties together not only facilitates creative problem solving, but also builds the foundation for productive discussions and problem solving.

With many seats at the table—gamers, content creators, clans, leagues, game developers, and streaming platforms—the complexity of the esports industry will require the legal community to adopt unique solutions and protections for all parties involved. The legal community cannot ignore the fact that this emerging market needs direction and support as it develops. By joining organizations like the EBA, rising attorneys and established partners can continue working towards building esports into the thriving industry it promises to be. For the legal community, simply getting involved and contributing to the marketplace of ideas will help shape the future of the esports industry.

VI. CONCLUSION

The esports industry today was only a fantasy decades ago, but like with many realizations, it is not free of dilemmas. At the forefront of the industry is the worker classification of professional esports players and content creators signed to a clan. Employee status allows these players the opportunity to unionize and bargain collectively. With California’s AB 5, esports players signed to clans are likely classified as employees, making unionization more possible and probable. Even beyond California, gamers

251. *Mission*, ESPORTS BAR ASS’N, <https://esportsbar.org/mission> [<https://perma.cc/7G8G-RYLA>].

252. *Id.*

253. *Home*, ESPORTS BAR ASS’N, <https://esportsbar.org/> [<https://perma.cc/9ADF-FSUF>].

will be able to rely on the common law agency test to make an argument for employee status.

While the industry continues to expand, issues relating to health and safety will become more prevalent. It is crucial to understand what obstacles stand in the way of player health and safety, and to contemplate the best approach to overcoming them. Gamers, legislatures, and the legal community all have a role to play in preparing the next generation of esports players with a thriving gaming industry.

Regarding future generations of gamers, further research should explore the employment consequences for minors earning money as professional esports players. With many gamers and content creators under the age of eighteen, the issues addressed in this Comment are only compounded in a rapidly expanding esports market. Classifying all esports competitors as employees would raise additional issues for underage competitors.²⁵⁴ These issues are further compounded considering the average age and legal sophistication of competitors—in many cases high school and college-aged students.²⁵⁵ Their lack of life experience, unfamiliarity with the law, and minimal professional experience often leads to players' interests being underrepresented.²⁵⁶ Thus, it would be beneficial to analyze the applicable laws surrounding such esports players and offer solutions such as the drafting of new laws or creating exclusions for underage gamers entering the esports industry.

Video games are here to stay, and with the help of all parties, the esports industry will be too. Growing with the industry instead of growing as a result of the industry is crucial to this longevity which starts with fair and legitimate labor practices.

254. See CAL. LAB. CODE § 1308.7 (1993) (“No minor shall be employed in the entertainment industry more than eight hours in one day of 24 hours, or more than 48 hours in one week.”); Since competitors can train for up to fourteen hours per day, minors would legally be able to practice their skill for as much time as necessary to stay relevant and competitive. Jacobs, *supra* note 49.

255. *Average Age in Esports vs. Major Sports*, ESPN (Sept. 17, 2017), https://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl [<https://perma.cc/3WQT-JT7P>].

256. See Dan L. Burk, *Owning ESports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1536 (2013) (discussing the interplay between player-generated performance and a developer-generated world).