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## ***Tfue v. FaZe Clan and Newly Created Players Associations: What Has Happened and How Will it Impact the Future of Esports?***

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# ***TFUE V. FAZE CLAN AND NEWLY CREATED PLAYERS ASSOCIATIONS: WHAT HAS HAPPENED AND HOW WILL IT IMPACT THE FUTURE OF ESPORTS?***

CHASE CRIPE\*

## INTRODUCTION

In 2018, individuals tuned in to watch Esports streaming content more than they watched HBO, Netflix, Hulu, and ESPN combined.<sup>1</sup> The popularity of Esports has gone through the roof and, naturally, revenues have similarly skyrocketed.<sup>2</sup> However, with this popularity and influx of money comes an increase in problems; specifically related to the rights of those actually playing the games and participating in competitions.<sup>3</sup> Many involved in the growing industry view the current landscape as one of labor inequality, and often the solution to such inequalities is found through the organization of an association or union where players in a similar position or profession unite for their rights against their employer.<sup>4</sup> “Through collective action, public pressure campaigns, sit-downs, boycotts, and threats to strike, workers have the ability to take control of their working environments and level the playing field when it comes to labor-management relations through collective bargaining.”<sup>5</sup>

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<sup>1</sup> Lucas Fortney, *How Amazon's Twitch Platform Makes Money*, INVESTOPEDIA (Oct. 20, 2019), <https://www.investopedia.com/investing/how-does-twitch-amazons-video-game-streaming-platform-make-money/>.

<sup>2</sup> Al Neal, *The eSports Union Revolution Is Coming*, GRANDSTAND CENTRAL (Aug. 4, 2018), <https://www.google.com/amp/s/grandstandcentral.com/2018/sports/esports/esports-union-is-coming/amp/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

For years there have been rumors in the Esports world of unionization and the formation of players associations in spite of the numerous obstacles that do not work in their favor.<sup>6</sup> In 2018, a ‘Counter-Strike’ players association was formed and there has been even more of a push ever since then for further unionization in the gaming community.<sup>7</sup> Just this past October, a Fortnite players association was established, and it would seem more games will continue to follow.<sup>8</sup> Interestingly, it is not only the players seeking uniformity, but also teams and even the leagues themselves.<sup>9</sup> Some saw, and continue to see, the development of Esports players associations as an inevitability and could see the industry begin to move towards unions.<sup>10</sup> Given the current landscape and the fact that there has been some formation of player associations already, it is less about “if” and more about “when” or “how” the teams, players, leagues, and developers will advance.

While the process over the past year hasn't been as rapid as some may have previously anticipated, the change is coming with more and more groups sure to pop up in the coming months or years. There are many caveats and nuances that come with the issue, and while other organizations have indeed formed groups, it is unsurprisingly far more complicated than that.<sup>11</sup> Although groups are finally being formed, they are not full blown “unions” as one may normally visualize or think of and as such, true collective bargaining may not come. Regardless, the Esports revolution is upon us, and the current cases and groups will likely have a significant impact on the industry should they develop.

## I. THE CURRENT STRUCTURE OF ESPORTS

The world of Esports has quickly ballooned into a billion-dollar industry spanning the globe.<sup>12</sup> Long gone are the overplayed tropes and stereotypes of gamers.<sup>13</sup> Now, professional gamers have personal trainers, coaching staffs, team houses, set training schedules, and can even boast six-figure salaries with

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<sup>6</sup> *Id.*

<sup>7</sup> Jacob Wolf, *Counter-Strike Pros form the Counter-Strike Professional Players Association*, ESPN (Jun. 29, 2018), [https://www.espn.com/esports/story/\\_/id/23947731/counter-strike-pros-form-counter-strike-professional-players-association](https://www.espn.com/esports/story/_/id/23947731/counter-strike-pros-form-counter-strike-professional-players-association).

<sup>8</sup> Fortnite Professional Players' Association (@FNPPA), TWITTER (Oct. 4, 2019, 2:00 PM) <https://twitter.com/FNPPA/status/1180226187630645248>.

<sup>9</sup> Paresh Dave, *In E-sports, It's the Bosses Who Are Rallying for a Union*, L.A. TIMES (May 26, 2017), <https://www.latimes.com/business/technology/la-fi-tn-esports-unions-20170526-htmllstory.html>.

<sup>10</sup> Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, THE ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union/>.

<sup>11</sup> *See generally* Minnie Che, *Is Riot Games in Violation of the NLRA for Funding Its Own Union?*, ON LABOR (May 1, 2019), <https://onlabor.org/is-riot-games-in-violation-of-the-nlra-for-funding-its-own-union/>.

<sup>12</sup> *Id.*

<sup>13</sup> *See generally id.*

individual prizes eclipsing the seven-figure mark.<sup>14</sup> What seems even crazier for some, is the fact that these professional players tend to all live together, with their teammates, in one big house or mansion.<sup>15</sup> This live-in trend started roughly twenty years ago in the early 2000s when some of the first professional gamers all moved in together in South Korea.<sup>16</sup> After some successes, others quickly began to follow the trend and now it is widely regarded as the norm when playing on this advanced level.<sup>17</sup> “A kind of communal team living quarters, the team house is a (typically) sponsor-purchased facility in which professional players live and train together.”<sup>18</sup> Some of these sponsors, however, are titans of the tech industry, which can lead to a lot of pressure for the players living-in to continue to perform at a high level.<sup>19</sup>

For many of these kids or young adults, this is the only job they have ever known.<sup>20</sup> Even with the money that is pouring in, “their day-to-day training regimen demonstrates the kind of intense focus they bring to the game. Like any skill at the competitive or professional level, practice is the key to success, especially in a cutthroat field like [E]sports.”<sup>21</sup> As for the games they are playing, some of the biggest competitive titles include Counter-Strike, Fortnite, League of Legends, and Overwatch.<sup>22</sup>

As mentioned, and unlike college athletes, these teens are paid; and often quite handsomely.<sup>23</sup> “Last year, the NCAA had to take notice of [E]sports and consider its regulation and support of varsity competitions.”<sup>24</sup> Esports has become so popular at colleges and universities across the country that schools have had to drastically increase the scholarships being awarded to their video game players.<sup>25</sup> “The University of Utah, a top-five conference school, went as far as recruiting an entire esports team.”<sup>26</sup> This effect has trickled down even to the high school level.<sup>27</sup> Recently the National Federation of State High School Associations (NFHS) partnered with an online gaming network in an effort to “[legitimize] gaming as a ‘real’ sport” and to “recognize [Esports], organize

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<sup>14</sup> *Id.*

<sup>15</sup> Maddy Myers, *How Pro Gamers Live Now: Curfews, Personal Chefs, and All of It on Camera*, KOTAKU (June 21, 2018), <https://compete.kotaku.com/how-pro-gamers-live-now-curfews-personal-chefs-and-a-1827017564>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Matt Kim, *Is the Secret To Esports Success Living Together?*, INVERSE (Feb. 16, 2017), <https://www.inverse.com/article/27923-esports-house-cloud9-tour>.

<sup>19</sup> *Id.*

<sup>20</sup> Myers, *supra* note 15.

<sup>21</sup> Kim, *supra* note 18.

<sup>22</sup> Che, *supra* note 11.

<sup>23</sup> Myers, *supra* note 15.

<sup>24</sup> Neal, *supra* note 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Caroline Knorr, *Everything Parents Need to Know About Esports*, WASH. POST (Oct. 15, 2018), <https://www.washingtonpost.com/lifestyle/2018/10/12/everything-parents-need-know-about-esports/>.

them, and reward them in the same way as traditional teams.”<sup>28</sup> Starting in 2018, high schools could begin to organize and field Esports teams that train and compete both against each other and other schools.<sup>29</sup>

So far, according to the National Association of Collegiate Esports (NACE), as much as \$9 million has been awarded in Esports scholarships and aid in just the last three years.<sup>30</sup> More and more colleges and universities are coming on board and getting involved every day and there is even discussion about the upcoming Olympic Games and adding Esports as a “demonstration sport.”<sup>31</sup>

#### A. *Who Controls What, Why, and How?*

Currently, many casual observers or those entirely unfamiliar with the industry do not completely understand the lengths to which Esports reach. There are numerous contractual agreements, sponsorships, appearances, and even sometimes video or streaming requirements, some of which are tied to being able to live-in as discussed above. Many Esports professionals stream on Twitch or a similar site as it is quite lucrative and can provide them with opportunities after their playing career, even if it is not required by their house or team.<sup>32</sup>

As of now, generally, the world of Esports is dominated by the developers.<sup>33</sup> These game developers create the games being played and thus control all of the intellectual property (IP) surrounding their game and its respective leagues, competitions, and streams.<sup>34</sup> “Game developers control the flow of Esports league-wide revenues, which often include media rights deals, league wide sponsorships, ticketing revenues, and other similar sources of revenues.”<sup>35</sup>

To provide a real example of how these relationships function, an article illustrated the concept with League of Legends and its developer, Riot Games:

Riot Games owns the intellectual property, i.e. the League of Legends videogame, and its streaming rights. It operates the League of Legends Championship Series (LCS), the esports league. Although the exact relationship between LCS and Riot Games is unclear, LCS is a subsidiary of Riot Games acting under the same penalties and regulations; the two entities can

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Myers, *supra* note 15.

<sup>33</sup> Harris Peskin, *Unionization in Esports*, ESPORTS BAR ASS'N, INC., <https://esportsbar.org/journals/2019/9/11/unionization-in-esports> (last visited Oct. 10, 2019).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

be seen as two branches of the same tree. Riot Games then licenses its IP rights to a tournament organizer who broadcasts the game via streaming sites like YouTube or Twitch. Players will compete with their teams, and the prize money is usually a combination from Riot Games, the tournament organizer, and other sponsors.<sup>36</sup>

This, interestingly enough, when contrasted with the individual streamers (streaming alone or with friends, but from home), has, or has the potential to, completely flip(ped) marketing in the industry upside down.<sup>37</sup> “A relatable, attractive, and charismatic gamer taking a sip of Red Bull between *Fortnite* matches might have more impact on Red Bull as a company than a couple of Esports pros wearing a jersey with the company’s logo.”<sup>38</sup> So much of the money pouring into Esports is through sponsorships, and it makes more sense to go to the individual but as will be seen later, this often times requires going through the league or at the very least, a player’s team.<sup>39</sup> Given the immense impact and amount of control developers have, it is possible, perhaps even probable, that they may be considered a joint-employer, along with a player’s team, when it comes to labor decisions and disputes.<sup>40</sup>

Esports is a unique field, only in its infancy in comparison to most professional sports leagues, and as such, presents many unique challenges.<sup>41</sup> Decisions being made now, as well as some that have already been made by players, leagues, teams, and developers, will have no shortage of impact on the future of Esports in the coming years.<sup>42</sup>

### *B. Revenues and Winnings*

As mentioned above, so much of the money coming into Esports is from sponsorships, but there is no shortage of advertising dollars being spent.<sup>43</sup> According to industry sources, as much as \$337 million was spent on Esports sponsorships in 2018 and it is believed that number may have climbed as high as \$460 million in 2019.<sup>44</sup> Specific to the team side, a team-wide sponsorship deal may net an Esports squad anywhere from \$100,000 to \$3 million

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<sup>36</sup> Che, *supra* note 11.

<sup>37</sup> See Cecilia D’Anastasio, *Shady Numbers and Bad Business: Inside the Esports Bubble*, KOTAKU (May 23, 2019), <https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Che, *supra* note 11.

<sup>41</sup> Peskin, *supra* note 33.

<sup>42</sup> *Id.*

<sup>43</sup> D’Anastasio, *supra* note 37.

<sup>44</sup> *Id.*

annually.<sup>45</sup> Each sponsor is hoping to catch the eye of one of the hundreds of thousands of viewers who may be watching any given stream.<sup>46</sup>

Speaking of streaming, these platforms themselves have come to sport unbelievable valuations.<sup>47</sup> Back in 2014, Amazon beat out Google in order to purchase Twitch, likely the most popular game streaming platform, for \$1 billion.<sup>48</sup> Since this purchase, Twitch's arrow has only continued to point upwards with its valuation now soaring to roughly \$3.79 billion, a nearly 300% increase in just three years.<sup>49</sup> For those unfamiliar with Twitch, it is described as "a platform that allows gamers to be broadcasters, viewers, and participants in online gaming communities. Users can live-stream their gameplay, watch Esports tournaments remotely, and cheer on their favorite competitive players."<sup>50</sup> Twitch is free to join and use, mainly backed by advertisements, but also through subscription services that provide users with (mostly aesthetic) bonus content for a small fee.<sup>51</sup> Further, given its obvious attachment to its parent company, users are given access to Twitch Prime when they link Twitch to their Amazon Prime account.<sup>52</sup>

Money aside, the viewership is nearly unmatched. This Comment opened by mentioning that in 2018 more people tuned in to watch video game streams than many other popular forms of entertainment combined.<sup>53</sup> Consider that as far back as 2016 there were already as many as 162 million people watching Esports streams regularly with another 131 million who tuned in occasionally.<sup>54</sup> While this was bested by world-cup viewership, it far surpassed the viewership of the Super Bowl. The largest single event in all of sports, viewed all over the world, is easily surpassed by gaming streams on a regular basis.<sup>55</sup> An average day on Twitch boasts 15 million viewers on live streams.<sup>56</sup>

Given the massive revenues being generated and the giant prize pools up for grabs, there are questions being raised, with greater frequency, about who is actually making money off of these games and competitions.<sup>57</sup> This was recently apparent in Fortnite player Bugha winning \$3,000,000 at the world championships. Bugha was asked about how much he actually took home, how

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Fortney, *supra* note 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Fortney, *supra* note 1.

<sup>54</sup> Neal, *supra* note 2.

<sup>55</sup> *Id.*

<sup>56</sup> Fortney, *supra* note 1.

<sup>57</sup> Shannon Liao, *Fortnite Is Big Money -- So Who's Getting Rich?*, CNN BUS. (Aug. 1, 2019), <https://www.google.com/amp/s/amp.cnn.com/cnn/2019/08/01/tech/fortnite-esports-profit/index.html>.

much was lost to taxes, and how much may be taken by his team.<sup>58</sup> Interestingly, Bugha himself was listed as being one of eight North American representatives in the recently established Fortnite players association.<sup>59</sup>

### *C. Lack of Governance for Games*

Due to the numbers above, those at various levels of the Esports industry have already begun to look toward other professional sports leagues in hopes of finding control and stability.<sup>60</sup> Again, this is so unique in comparison to other sports as the game developers have so much more control in how their titles are used and disseminated.<sup>61</sup> No one owns other sports or leagues, and thus, this level of control in governance is unprecedented.<sup>62</sup> The game developers have worked with leagues, tournaments, teams, and players, but at the end of the day there is no overarching governance for disputes when they arise.

Unsurprisingly, disputes have already begun to pop up. This should not be particularly surprising given the exorbitant amount of money changing hands and with the growth of this industry, the disputes are only going to continue and intensify until there is some sort of intervention; be it contractual, legislative, or judicial.

## II. ONGOING LITIGATION

Individual Fortnite players had commented on the need for unions, and there is perhaps no greater indicator or evidence of this need than the litigation between popular streamer, Tfuue, and FaZe Clan, his team.<sup>63</sup>

### *A. Tfuue v. Faze*

Turner Tenney, known better by his streaming name and gamertag (“Tfuue”), is one of the most popular streamers in the entire world, and he also happens to play for one of the most popular teams in the world, FaZe Clan.<sup>64</sup> Tfuue boasts

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<sup>58</sup> Melany M., *How Much Did Bugha Make in the Fortnite World Cup?*, WIN (Aug. 9, 2019), <https://www.google.com/amp/s/amp.win.gg/news/1958/how-much-did-bugha-make-in-the-fortnite-world-cup-question-mark>.

<sup>59</sup> Fortnite Professional Players' Association, *supra* note 8.

<sup>60</sup> Neal, *supra* note 2.

<sup>61</sup> Stephen Ellis, *IP Law, Broadcasting Rights and Esports*, ESPN (Jan. 25, 2016), [https://www.espn.com/esports/story/\\_/id/14644531/ip-law-broadcasting-rights-esports](https://www.espn.com/esports/story/_/id/14644531/ip-law-broadcasting-rights-esports).

<sup>62</sup> *Id.*

<sup>63</sup> Patricia Hernandez, *The Fight Between Fortnite Star Tfuue and Faze Is Only Getting Messier*, POLYGON (May 23, 2019), <https://www.google.com/amp/s/www.polygon.com/platform/amp/2019/5/23/18637455/tfuue-banks-faze-lawsuit-turner-tenney-ricky-banks-esports>.

<sup>64</sup> Ben Kessler, *A 'Fortnite' Player's Lawsuit Against His Own Team Is Taking on the 'Wild West' of Esports*, NBCNEWS (May 26, 2019), <https://www.google.com/amp/s/www.nbcnews.com/news/amp/ncna1010161>.



more than 10 million subscribers on YouTube and more than 10 million people typically tune in to watch him stream Fortnite.<sup>65</sup> “In the [E]sports world, [Tfue] is also a genuine celebrity. He is one of the most prominent influencers of products and services.”<sup>66</sup> Simply put, Tfue is one of the top players in the entire world and considered by some to be the LeBron James or Kobe Bryant of Esports.<sup>67</sup>

### 1. The Dispute and Tfue’s Lawsuit

In Tfue’s opinion, the contract he signed with FaZe Clan is “grossly failing to capture his high standing within esports.”<sup>68</sup> Tfue actually filed a complaint against FaZe in a California district court in May of 2019.<sup>69</sup> The complaint alleges that FaZe is in violation of the California Talent Agency Act and describes the contract signed by Tfue as “grossly oppressive, onerous, and one-sided.”<sup>70</sup> Further, they are arguing that the contract is in violation of California law.<sup>71</sup> The impact of such claims could be quite wide in scope, calling into question similar agreements signed not only by those also with FaZe Clan, but all around the Esports community.<sup>72</sup>

Specifically, there are issues being raised about the percentage of revenue being paid to Tfue by third-parties as FaZe may be entitled to a “finder’s fee” of up to eighty percent.<sup>73</sup> While he is entitled to eighty percent of tournament winnings, other sources of income must be split evenly, fifty-fifty, between he and FaZe.<sup>74</sup> Additionally, there is an extensive “exclusivity/non-compete clause that ensures that [Tfue] won’t endorse other gaming companies or join other Fortnite teams.”<sup>75</sup> The original contract was signed for a six month term, but included a three-year option that was picked up by FaZe unilaterally and kept Tfue’s base pay at only \$1,500-\$2,500 monthly.<sup>76</sup> Tfue will be unable to sign with any other team during this three-year period (unless voided or bought out) and will be subjected to a process that has been compared to restricted free agency in other sports.<sup>77</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Michael McCann, *Inside the Lawsuit That Could Shake Up the Entire Esports Industry*, SPORTS ILLUSTRATED (May 30, 2019), <https://www.google.com/amp/s/amp.si.com/more-sports/2019/05/30/turner-tenney-faze-clan-esports-lawsuit-fortnite>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Kesslen, *supra* note 64.

<sup>70</sup> *Id.*

<sup>71</sup> McCann, *supra* note 66.

<sup>72</sup> *Id.*

<sup>73</sup> Kesslen, *supra* note 64.

<sup>74</sup> McCann, *supra* note 66.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Taken directly from the complaint: “[u]ntil now, FaZe Clan has enjoyed the fruits of this illegal business model with impunity because no one could or was willing to stand up to FaZe Clan. . . . Those days are over.”<sup>78</sup> FaZe took to its Twitter account to deny the claims publicly.<sup>79</sup> What makes this dispute so interesting is that Tfue actually has the audience and influence to take a stand against his team that most people simply cannot for various reasons.<sup>80</sup> Some familiar with the parties and situation believe “‘both parties have a similar amount of capital and resources,’ making the case ‘as fair of an arbitration as you could ever get,’ yet gives [Tfue] an opportunity to really change industry standards.”<sup>81</sup> Tfue and his attorneys are seeking that the FaZe contract “be rendered void and unenforceable” along with payment of sponsorship fees, commissions, compensatory and punitive damages in addition to a permanent injunction barring FaZe from entering similar agreements with other players going forward.<sup>82</sup>

## 2. FaZe’s Countersuit

In August, just months after Tfue filed his suit, FaZe Clan fired back with a countersuit of their own in New York claiming Tfue had violated his contract with the gaming organization by “disparaging the company and trying to form a rival e-sports organization.”<sup>83</sup> FaZe claims that the streamer pocketed over twenty million dollars and shared next to nothing with FaZe.<sup>84</sup> The company was seeking damages as compensation in addition to injunctions preventing the release of confidential information, public disparagement, and other interference in business.<sup>85</sup>

FaZe believes, from the complaint, that it was their teaching and guidance that led to Tfue’s success in gaming, business, and social media, that put him in the position to earn such a substantial amount of money in just over a year. He leaked some of this confidential information, they felt he was contractually obligated to keep private, to the media and various publications.<sup>86</sup>

Faze Clan’s [*sic*] countersuit also claims that [Tfue’s] goal is to set up a rival e-sports company, alleging that “Tenney is taking

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<sup>78</sup> Kesslen, *supra* note 64.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> McCann, *supra* note 66.

<sup>83</sup> Julia Alexander, *Faze Clan Sues Fortnite Star Tfue, Claims He Eamed More than \$20 Million from Streaming*, THE VERGE (Aug. 1, 2019), <https://www.google.com/amp/s/www.theverge.com/platform/amp/2019/8/1/20750678/faze-clan-tfue-lawsuit-20-million-streaming-earnings-rival-esports-team>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

the valuable information he learned from Faze[sic] Clan, which he is to keep secret, and using it to create a rival to Faze[sic] Clan or otherwise support rival gamers and gaming organizations.<sup>87</sup>

The true heart of the dispute however is the disagreement over earnings with FaZe claiming they took only \$60,000 from the partnership with Tfue collecting far more and Tfue, as discussed above, claiming the opposite.<sup>88</sup>

Despite Tfue originally filling in California, FaZe claims that the agreement they entered is governed by, and requires parties file and submit to, the state of New York.<sup>89</sup> In addition to disputing the extent of FaZe's financial gain from Tfue, the complaint, and statements from FaZe Clan owner Ricky Banks, "[stress] that [Tfue] is neglecting to acknowledge the instrumental role played by Banks and FaZe Clan in helping him to become an [E]sports star."<sup>90</sup>

### 3. Who is Really Making Money and Why?

This very heated and public dispute, centering around the division of money between one of the world's most popular streamers and one of the most well-known organizations, has brought a great deal of attention to that issue in addition to Esports generally being "the Wild West" and lacking governance, uniformity, and control.<sup>91</sup> "But behind the drama is a larger story: a labor dispute in a burgeoning and largely unregulated \$1.1 billion industry ripe with questionable contracts agreed to by people who often aren't yet of legal drinking age."<sup>92</sup> Most Esports players are young kids who happen to be chosen solely because of their demonstrated skills on the sticks.<sup>93</sup> "[T]hese players are told they'll be turned into a star, making thousands of dollars, and making their hobby into a career . . ." and often this does indeed come true.<sup>94</sup> Problems begin however given the inequitable balance of power and teams being less than forthcoming or transparent with their prospective players.<sup>95</sup> Normally, they are required to make these potentially life-altering decisions quickly, sometimes in less than forty-eight hours, and the contracts can be upwards of thirty pages in length.<sup>96</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> McCann, *supra* note 66.

<sup>90</sup> *Id.*

<sup>91</sup> Kesslen, *supra* note 64.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

The teams and organizations do try and take a larger cut of profits in some situations, and this does actually make perfect sense.<sup>97</sup> These teams are taking a risk on many of these players, and sometimes, in spite of the development and resources, the player just simply does not pan out.<sup>98</sup> Many in the industry understand this, and why teams would want this larger percentage, as the success is not always guaranteed.<sup>99</sup> “Players often start with only a small social following that the organizations help build up. This takes a significant amount of financial investment . . .” and it should be expected that the teams seek compensation for this assumption of risk and investment.<sup>100</sup>

#### 4. Representation, or the Lack Thereof

Clearly, an issue that pops up in the above section is the lack of understanding about what is being signed and the commitments that are being made; a sentiment that has been expressed by Tfue himself.<sup>101</sup> Some believe these young athletes are “easy prey” for the much more sophisticated and well-versed teams and gaming companies.<sup>102</sup> Often the players, and sometimes their families as well, are drawn in to signing these contracts early without being adequately advised on the legal and business ramifications of their decisions.<sup>103</sup>

In many situations, such as Tfue’s, this simply may not matter.<sup>104</sup> “One key argument will be the most basic: [Tfue] as an adult, voluntarily and lawfully signed the contract that he is now protesting.”<sup>105</sup> Generally in California a person eighteen years or older is bound when they sign an agreement and enter into a contract.<sup>106</sup> Signing at the age of twenty, as Tfue was when he signed with FaZe, is legally binding for the purposes of contract law and places him in the same age range as many other professional athletes and entertainers when they are signing their first contracts.<sup>107</sup> Regretting a decision or entering a less than ideal agreement is not a legal claim.

Age and Tfue’s specific situation aside, this key element of players not being adequately informed or represented from the outset persists.<sup>108</sup> Sure, the player or his or her family could hire an attorney, even one specializing in Esports, to assist with both drafting and understanding the contract matters, but even this

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<sup>97</sup> Kessler, *supra* note 64.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> McCann, *supra* note 66.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> McCann, *supra* note 66.

<sup>108</sup> *Id.*

solution may not be perfect.<sup>109</sup> Again, given the lack of uniformity and transparency, even the most well-informed and highly specialized attorney may not have the full picture and clarity of the Esports landscape when it comes to salaries and various conditions or provisions.<sup>110</sup> This is changing, with more and more attorneys becoming involved in Esports and with awareness on the rise, but it seems like somewhat of an imperfect solution with availability problems and obstacles that may stand in the way of access for all.<sup>111</sup>

### *B. Other Potential Suits*

There is so little information out there in the way of legal authority making issues hard to analyze, even with a long history of common problems such as not paying salaries or otherwise violating valid agreements.<sup>112</sup> While these disputes were too expensive for players to litigate in the past, that is no longer the case.<sup>113</sup> Age of consent for these agreements varies depending on location with a few exceptions in some instances—an important thing to note given the number of professional Esports players outside the United States.<sup>114</sup> Often agreements are not reviewed properly, as discussed above. Even when complaints do arise, they are often dismissed by players to not make waves with their teammates.<sup>115</sup>

For example, owners point to contractual provisions requiring players to attend promotional events. Players bark back that they hadn't realized the commitments. They organize with colleagues on chat apps then take to Twitter with name-calling- and finger-pointing. They use the supportive rancor of their fans to pressure management into acquiescing.<sup>116</sup>

Owners can be difficult, only willing to make change after significant pressure from the public or game developers, but they are not alone in this as the players too can be difficult to handle or even awkward at times.<sup>117</sup> In the past, practices such as handing players unlimited fines to bully them into

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Rohan, *Dota 2 Needs a Players Union to Properly Represent Players' Concerns*, ESPORTS-BETTING-TIPS.COM (Sept. 20, 2018), <https://esports-betting-tips.com/dota-2-needs-a-players-union-to-properly-represent-players-concerns/>.

<sup>113</sup> *Id.*

<sup>114</sup> Jim Schmitz & Ellen M. Zavian, *Genesis of an Industry: The Emerging Workforce and Regulations of Esports*, 37 ACC DOCKET, Apr. 1, 2019, at 24, 27.

<sup>115</sup> Dave, *supra* note 9.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

submission were common while now there are caps to fines, which must be justified.<sup>118</sup> For every bit of progress, however, there are a seemingly equal number of setbacks.<sup>119</sup>

### III. PLAYERS ASSOCIATIONS AND UNIONIZATION

Those familiar with Esports believe that the formation of players associations and unions are beneficial to both the players and the owners as they would provide certainty and security.<sup>120</sup> Player activism in Esports has already led to some limited success, and the owners are even open to the further creation of players associations.<sup>121</sup> It is thought that even with the best of intentions the teams can only do so much, and true change must come in the form of independent unions similar to those that are present in other professional sports.<sup>122</sup> One major area that could use significant improvement and would benefit from such organization would be in preparation for the future given the low age and limited number of prime competitive years a player has.<sup>123</sup> “[M]any players ‘peak’ at 24 years old. Like professional athletes, seasoned gamers are susceptible of being replaced by younger, faster players. A union could help these gamers prepare for what should be decades of a post-playing career.”<sup>124</sup> Further, uniformity would bring stability to what is currently a volatile industry, which would in turn increase sponsorship dollars as businesses are more inclined to partner in an industry with a peaceful and predictable labor outlook than one that may be upended at any time.<sup>125</sup>

#### *A. Applicability of National Labor Rights Act (NLRA)*

The term “union,” while at times used rather broadly, means a very specific thing according to United States law.<sup>126</sup>

A union is a group of employees working collectively and certified by the National Labor Relations Board (NLRB). The NLRB is the watchdog/enforcer of the [NLRA] passed by

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Liz Mullen, *Two Groups Vie to Establish Esports Players Associations*, SPORTS BUS. J. (Mar. 12, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/03/12/Esports/PAs.aspx>.

<sup>121</sup> Dave, *supra* note 9.

<sup>122</sup> Eben Novy-Williams, *Gamers Fight for Rights as Billion-Dollar Esports Market Matures*, BLOOMBERG (May 29, 2019), <https://www.bloomberg.com/news/articles/2019-05-29/gamers-fight-for-rights-as-billion-dollar-esports-market-matures>.

<sup>123</sup> McCann, *supra* note 66.

<sup>124</sup> *Id.*

<sup>125</sup> Dave, *supra* note 9.

<sup>126</sup> Kogel, *supra* note 10.

Congress in 1935. The NLRA is the real meat-and-potatoes of effective unionization in the United States, and a staple for collective bargaining. . . .<sup>127</sup>

While “union” is the term often used, a “labor organization” is defined by the NLRB “as any organization in which employees participate and that deals with employers over ‘grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.’”<sup>128</sup> Engaging in traditional and formalized collective bargaining is not a requirement for a group’s classification as a labor organization.<sup>129</sup> This is significant as Esports players associations, or any collective group of employees for that matter, need not be a traditional “union” for the NLRA to apply.<sup>130</sup>

Unions and players associations for athletes in North America have led to a number of benefits across the board according to experts.<sup>131</sup> Likewise, owners too receive benefits as controlled costs and assurances bring stability and confidence to their dealings and investments.<sup>132</sup> “Forming a successful union often takes false starts, the right leader and strong funding.”<sup>133</sup> In other sports, such as Major League Baseball, unionization efforts took years to get off the ground and required significant outside involvement and public pressure.<sup>134</sup> Esports, however, presents its own issues that are more nuanced and complicated than other sports that go further than just the differences between individual games.<sup>135</sup>

Beyond the titles, [E]sports is also a worldwide industry, playable anywhere in the world, unlike traditional sports. The major US sports unions are geographically based in the US, wherein their games are played, and affairs are handled. Any athletes who wish to participate in a US-based sport would need to relocate to the US and play matches in the US. Esports players on the other hand, reside all over the world.<sup>136</sup>

A number of entire teams are located in foreign countries, and for at least a few games, an overwhelming majority of the players, game developers, and

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<sup>127</sup> *Id.*

<sup>128</sup> Che, *supra* note 11; *see also* 29 U.S.C. § 152(5) (2020).

<sup>129</sup> Che, *supra* note 11.

<sup>130</sup> Neal, *supra* note 2.

<sup>131</sup> Dave, *supra* note 9.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Kogel, *supra* note 10.

<sup>136</sup> *Id.*

tournaments are foreign-based as well.<sup>137</sup> Obviously, this presents a number of unique issues as any organizations that come into existence may extend further than the NLRA itself.<sup>138</sup> Regardless, the issue persists, and the players need a “collective voice,” even if only for their respective game.<sup>139</sup>

Further issues exist past this, however. To form a labor organization under the purview of the NLRA, at least thirty percent of a player base must consent to, and support, the formation through the signing of formal authorization cards.<sup>140</sup> If this is somehow not met, an employer can still choose to respect the formation if a majority of employees wish to be represented.<sup>141</sup> While experts have stated that the goal would be to model Esports organizations after those of the other major professional American sports, it is obviously far more difficult and presents more issues than any of these leagues or associations faced at their inception.<sup>142</sup> Clearly, many believe there is a need for governance in Esports whether they be named players associations, labor organizations, or unions. However, given its incredibly broad scope, the NLRA may not be the best vehicle for formation in every situation and may ultimately be up to the players themselves.<sup>143</sup> Obviously, both the NLRA and NLRB do indeed provide a number of benefits should these players choose to avail themselves of them; it may simply not be prudent in some cases.<sup>144</sup>

### *B. Current Unionization*

Given the incredible growth, along with all the aforementioned issues and benefits, creation of labor organizations for players has become a top priority for several of the more popular games in Esports.<sup>145</sup> Some question whether the employer in Esports would be the team, the game, or essentially both; the definition of joint employer and the question of two or more organizations employing the same employees have recently been revised by the NLRB.<sup>146</sup> Obviously, being designated as an employee has certain implications, and while this designation is clear with other professional athletes, the lines have yet to be firmly drawn for Esports players.<sup>147</sup> Early indications, as stated previously, do seem to be that organizations would be modeled after North American professional sports unions with their existence drastically lowering the costs

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<sup>137</sup> *Id.*

<sup>138</sup> Rohan, *supra* note 112.

<sup>139</sup> *Id.*

<sup>140</sup> Kogel, *supra* note 10.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Rohan, *supra* note 112.

<sup>144</sup> Peskin, *supra* note 33.

<sup>145</sup> Rohan, *supra* note 112.

<sup>146</sup> Schmitz & Zavian, *supra* note 114, at 28.

<sup>147</sup> Kogel, *supra* note 10.



associated with legal representation.<sup>148</sup> While it may be a shock to some, a few players associations already exist.<sup>149</sup>

### 1. League of Legends – The First Players Association

In 2017, Riot Games, the owner and developer of the popular title “League of Legends” created the first Esports players association (LoLPA).<sup>150</sup> The interesting part obviously, is that it was founded by the developer and not the players themselves.<sup>151</sup> Riot Games founded the organization making it a “company union” which drew criticisms that it would have no real legal basis in representing League players.<sup>152</sup> Riot Games and its attorney, a former NBAPA attorney, disagree however stating, “The players have not given up any rights under the NLRA,” and that, “Riot exerts no control over the LOLPA.”<sup>153</sup> Regardless of its implications and effectiveness while not being a “real union,” this was a significant step in giving North American players a voice in dealings with both their teams and Riot.<sup>154</sup> There are now contract length restrictions in place as well as minimum salaries and the ability for players to move amongst teams.<sup>155</sup> Riot expects to play a significant role if a true organization is created in the future.<sup>156</sup> Still, in spite of the clear progress, there are problems that exist.<sup>157</sup> “Riot Games’ funding of its own union poses an obvious legal question: Are Esports players employees of Riot Games, making it a violation for Riot Games to fund their own labor union under the NLRA?”<sup>158</sup> While players are usually associated with their team, they are also associated specifically with the game in which they play leading some to believe that Riot Games may be a joint employer.<sup>159</sup>

### 2. Overwatch

Another player association movement is in the Overwatch community, a tremendously popular title globally.<sup>160</sup> The Overwatch Players Association (OWPA) is headed up by a current Overwatch coach and former player and

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<sup>148</sup> Mullen, *supra* note 120; *see also* Rohan, *supra* note 112.

<sup>149</sup> Mullen, *supra* note 120.

<sup>150</sup> *Id.*

<sup>151</sup> Neal, *supra* note 2.

<sup>152</sup> Schmitz & Zavian, *supra* note 114, at 31.

<sup>153</sup> *Id.* at 30.

<sup>154</sup> Kogel, *supra* note 10.

<sup>155</sup> Dave, *supra* note 9.

<sup>156</sup> *Id.*

<sup>157</sup> Che, *supra* note 11.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Schmitz & Zavian, *supra* note 114, at 31.

looks toward the NFLPA for guidance in its creation.<sup>161</sup> A significant obstacle in this is the global nature of *Overwatch* with only nine of the twelve professional teams located in the U.S.<sup>162</sup> “A ‘union’, one like the *Overwatch* team is trying to form, has a particular meaning under United States law.”<sup>163</sup> Some commentators believe that the OWPA is not a union and, despite using the word “association” as other professional sports players associations do, the effects are not the same as they are not a real union.<sup>164</sup> Similarly to League of Legends, those familiar with the situation do not see the vision and believe the OWPA is a true union, viewing it as more of a trade association which would then have antitrust implications that would be key in negotiations moving forward.<sup>165</sup> “To form a union, you need employees, with an employer, who band together for the purpose of bargaining with, and some would say against, the employer. And that’s not what’s being envisioned here.”<sup>166</sup>

### 3. Counter-Strike

The Counter-Strike Professional Players Association (CSPPA) is looking to sign more than 225 professional players spanning the globe across two of its professional leagues.<sup>167</sup> Many signed quickly, over seventy players as of March 2018, and continued to do so indicating that they were behind the movement and wanted to be a part of the association.<sup>168</sup> As has been the case with the other games, a number of players are located internationally, and Counter-Strike is perhaps the most popular internationally with less than twenty-five percent of the professional players located in the United States.<sup>169</sup> Because of this, the CSPPA is not even trying to form a union under the laws of the United States.<sup>170</sup> Instead of using formal authorization cards as needed in the U.S., the CSPPA is instead having players sign “membership letters[.]”<sup>171</sup> The board of founders is made up of seven professionals from all over the world, and more than 90 of the games top players had joined as of April 2019.<sup>172</sup> “Unlike the Riot PA, this association is notably independent. While they are in their infancy, the group

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<sup>161</sup> *Id.*

<sup>162</sup> Mullen, *supra* note 120.

<sup>163</sup> Kogel, *supra* note 10.

<sup>164</sup> Neal, *supra* note 2.

<sup>165</sup> Schmitz & Zavian, *supra* note 114, at 30-31.

<sup>166</sup> Neal, *supra* note 2.

<sup>167</sup> Mullen, *supra* note 120.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Schmitz & Zavian, *supra* note 114, at 32.

will no doubt have to jump hurdles as it deals across borders, confronting multiple labor laws around the globe.”<sup>173</sup>

#### 4. Fortnite

The Fortnite Professional Players’ Association (FNPPA) is the most recent group to enter the fold, only recently coming into existence in October of 2019.<sup>174</sup> This “union” was formed by sixteen professional players, now the board, across North America and Europe after disagreements and voiced discontent from others, similar to Tfue.<sup>175</sup> “Their goal is to have a direct line with Epic Games, essentially a productive platform to voice their opinions about the state of the competitive scene.”<sup>176</sup> The intent behind the FNPPA is not to be so grand or encompassing as it is in other sports, but it is intended to get the players a seat at the table and have their voices heard when decisions that affect their livelihood are being made.<sup>177</sup> The “union” will not speak for the players with respect to all their interests, only “when development alters gameplay at the highest level,” though eventually it may evolve and grow to a place more similar to the other major professional sports.<sup>178</sup>

#### 5. Analogous to Other Sports?

While the various leagues and Esports titles seek to be more like traditional sports leagues, it remains to be seen whether these “unions” will too evolve into traditional sports unions or if they will move more in the vein of the music and entertainment industries.<sup>179</sup> One difference that has been only briefly mentioned is that Esports will always differ from traditional sports leagues.<sup>180</sup> “[T]he game publishers own their intellectual property. No one owns the game of American football, so anyone can start a new league. . . .”<sup>181</sup> As such, the developers will always have more control in this industry.<sup>182</sup> This structure has presented issues with some developers taking more active roles in league development while other studios have remained passive.<sup>183</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> Brett Makedonski, *A Handful of Fortnite Pros Have Banded Together to Form a Players Association*, DESTRUCTOID (Oct. 7, 2019), <https://www.destructoid.com/a-handful-of-fortnite-pros-have-banded-together-to-form-a-players-association-568984.phtml>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Novy-Williams, *supra* note 122.

<sup>180</sup> Schmitz & Zavian, *supra* note 114, at 26.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

There are similarities to the creation of other professional players associations however, with some comparing the creation of the LoLPA, the illusion of power through a company union, to the original vision many had for the MLBPA.<sup>184</sup> Despite the clear differences, this is still viewed by those close to the situation as a big step in the right direction and do not consider the associations to be wildly different from traditional major professional sports players associations.<sup>185</sup> The complaint filed by Tfuе against FaZe brings memories of Curt Flood and disputes with Major League Baseball; the historical impact of which could be similar looking back on the dispute.<sup>186</sup> The issues raised by Tfuе were very similar in some ways to those brought by Flood all those years ago<sup>187</sup> Similarly, the questions over the use of profiting off of name and likeness stir memories of Ed O’Bannon and litigation against the NCAA.<sup>188</sup> Various leagues and games have been proactive and already begun addressing some of these issues, proof that the power dynamic has started to shift away from the owners and teams. These associations certainly look toward other sports, and there certainly are similarities in disputes, but it remains to be seen if drawing from other leagues will lead to success or if the significance of the similarities will be more easily noted and appreciated in hindsight.<sup>189</sup>

## 6. Why Have There Been No Agreements?

Even though some of the most popular games now have players associations capable of negotiating for the other members of their association, no actual collective bargaining agreement has been reached.<sup>190</sup> These union arms have been created, and have negotiating power, but that power is yet to be used.<sup>191</sup> Some of this is indeed due to differences that exist between games and the area being entirely unprecedented, even despite many issues being the same ones that concern other players associations.<sup>192</sup> “The things that players have complained about are very similar to issues in traditional sports, such as the rights to their intellectual property (image, likeness, avatar); a balanced daily routine; quality and term of housing; year-round medical insurance; workers compensation; post-career development; and media training.”<sup>193</sup> These are clearly the same

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<sup>184</sup> Neal, *supra* note 2.

<sup>185</sup> Mullen, *supra* note 120.

<sup>186</sup> McCann, *supra* note 66.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Neal, *supra* note 2.

<sup>190</sup> Peskin, *supra* note 33.

<sup>191</sup> *Id.*

<sup>192</sup> Schmitz & Zavian, *supra* note 114, at 26.

<sup>193</sup> *Id.* at 33 (some internal parentheticals omitted).

issues, or very close equivalents, that face professional athletes across most major sports.<sup>194</sup>

Perhaps this is because in most cases these associations are not true unions, but just a way for players to gain a seat at the table for certain decision-making that will impact competitions, and therefore their livelihood.<sup>195</sup> Gamers lack the freedom other athletes have, and also face different types of pressures that may be more difficult to put into uniform contractual and collectively bargained terms; again, this is entirely uncharted territory.<sup>196</sup> “The [Tfue] lawsuit has sparked a wider conversation about competitive video gaming, and whether its infrastructure and player protections have caught up to the fact that Esports in now generating serious money.”<sup>197</sup> Clearly, economic stability is a concern in any such deal.<sup>198</sup> “The structure of the Esports industry provides unique challenges toward maintaining its economic stability.”<sup>199</sup> Maybe true unions and collectively bargained agreements are in the future, but they may be unnecessary; the aim of these players and associations are much lower than standard associations and they may be able to achieve the goals and changes they seek without such formalities.<sup>200</sup>

### C. The Future of “Unionization”

Establishing “unions” has been an incredibly popular talking point across Esports though not always with an appreciation for the complexities and intricacies of the situations at hand.<sup>201</sup> One commentator went so far in 2018 as to say, “I believe formation of a players association, or more accurately multiple players associations across different publisher, leagues, and games, is inevitable.”<sup>202</sup> Though it was not clear from the outset who would fund these associations, players or outsiders, the problems presented through funding by the developer are clear moving forward.<sup>203</sup> Given the increased interest, participation, and ownership of NBA players and owners, the NBAPA may in the end be an important supporter and ally for the esports associations.<sup>204</sup> Further, more and more attorneys are becoming familiar with, and better-versed in, the industry and its issues which will improve development and access.<sup>205</sup>

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<sup>194</sup> Neal, *supra* note 2.

<sup>195</sup> Makedonski, *supra* note 174.

<sup>196</sup> Novy-Williams, *supra* note 122.

<sup>197</sup> *Id.*

<sup>198</sup> Peskin, *supra* note 33.

<sup>199</sup> *Id.*

<sup>200</sup> *See generally* Makedonski, *supra* note 174.

<sup>201</sup> Peskin, *supra* note 33.

<sup>202</sup> Mullen, *supra* note 120.

<sup>203</sup> Dave, *supra* note 9.

<sup>204</sup> *Id.*

<sup>205</sup> Schmitz & Zavian, *supra* note 114, at 26.

## 1. Desire, Need for Uniformity

There is a need for uniformity in the Esports world, but given the complexities and delicate touch required, it remains to be seen in many instances how this is best accomplished or how soon it may happen.<sup>206</sup> “Standards need to be created, and a lot have been created for video game publishers and teams, . . . [b]ut it would be great to have more standards from the players.”<sup>207</sup> Until the very recent past however, not many players had given real consideration to the creation of these associations.<sup>208</sup> Given the publicity of some disputes and the likelihood of more to come, the jurisprudence will grow and working with precedent will necessarily add elements of uniformity and predictability.<sup>209</sup>

## 2. Semantics for Some Game Styles

As things stand currently, the players associations discussed above are the only ones that have been developed with all other competitive games still being entirely ungoverned.<sup>210</sup>

In professional sports there are different unions individualized for each sport and set up in accordance with the different league structures and governance.<sup>211</sup> It would seem likely, perhaps necessary legally even, that each game would continue to be viewed as its own professional league with its own union and collective bargaining agreement specifically tailored to its game and players and with its association being contained within the personal ecosystem of that game.<sup>212</sup> What works in one game, will not work for all games as they can differ greatly.<sup>213</sup> “[T]here are tons of [E]sports titles and leagues, from *League of Legends*, to *Starcraft II*, to . . . competitive *Tetris*[:] . . . [t]hus, for one, it may be counterproductive and wasteful to establish incongruous and decentralized [E]sports unions for the many, many titles [that] are involved in the [E]sports industry.”<sup>214</sup> Does it stop here however? While having a “union” for each game makes sense, it may eventually be necessary to even have an organization for each sport in each country.<sup>215</sup>

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<sup>206</sup> See Dave, *supra* note 9.

<sup>207</sup> Dave, *supra* note 9 (quoting Mike Rufail, Managing Director of popular Esports team Team EnVyUs).

<sup>208</sup> See Dave, *supra* note 9.

<sup>209</sup> Schmitz & Zavian, *supra* note 114, at 26.

<sup>210</sup> Makedonski, *supra* note 174; see Mullen, *supra* note 120; see also Schmitz & Zavian, *supra* note 114.

<sup>211</sup> Peskin, *supra* note 33.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Kogel, *supra* note 10.

<sup>215</sup> Dave, *supra* note 9.

### 3. What Could be Covered in the Future Agreements and Changes?

“To secure the prospect of a profitable future, owners say they are willing to work with a union and dole out more compensation and protections to workers.”<sup>216</sup> Any future agreement that may come into existence would likely need to encompass most, if not all, of the issues discussed above: intellectual property, wages, insurance, housing, balance in routine, dispute resolution, and continued education and development for a post-playing career.<sup>217</sup> Owners will also want to invite growth through fans and sponsors.<sup>218</sup> This could come through “adopting hallmarks of traditional sports – leagues, union, drafts – and create a financial machine rivaling long-established professional sports organizations.”<sup>219</sup>

Further, assurances and guaranteed input with developers would likely be a must have.<sup>220</sup> This has been a concern for other popular players such as Ali ‘Myth’ Kabbani (TSM Myth) of Team Solo Mid (TSM).<sup>221</sup> “Myth’s criticism of Epic Games and subsequent calls for unionization [were] met with overwhelming support from the community, especially from pros like himself who have been struggling to stay competitive due to the developer’s decision making.<sup>222</sup> “Epic’s sudden release of new items during . . . tournaments were business driven.”<sup>223</sup> Many close to the playing community think having a voice and their opinions heard is incredibly important for the future of the game given the vast increase in winnings.<sup>224</sup>

As always, communication is key.<sup>225</sup> In the past, there was very little communication between developers, leagues, and players and this is likely to change.<sup>226</sup> Communication should improve as well as players rights and access to representation and dispute resolution.<sup>227</sup> More global organizations are likely to emerge and Esports may end up in the Olympics.<sup>228</sup> As such, future initiatives may be wise to look less toward traditional major sports unions and more

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<sup>216</sup> *Id.*

<sup>217</sup> Schmitz & Zavian, *supra* note 114, at 33; *see also* Neal, *supra* note 2.

<sup>218</sup> Dave, *supra* note 9.

<sup>219</sup> *Id.*

<sup>220</sup> *See* Kogel, *supra* note 10.

<sup>221</sup> *Fortnite Pro Player Pushes for Pro Player Union*, FOX SPORTS ASIA (Jan. 2, 2019), <https://gurugamer.com/esports/fortnite-pro-urges-for-an-union-to-protect-players-interests-975>.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Matt Porter, *TSM Myth Clarifies Why He Wants a Fortnite Players Union*, DEXERTO (Jan. 3, 2019), <https://www.dexerto.com/fortnite/tsm-myth-clarifies-why-he-wants-a-fortnite-players-union-272031>.

<sup>225</sup> *See id.*

<sup>226</sup> Peskin, *supra* note 33.

<sup>227</sup> *See* Dave, *supra* note 9; *see also* Schmitz & Zavian, *supra* note 114.

<sup>228</sup> Schmitz & Zavian, *supra* note 114, at 34.

towards international organizations such as the International Olympic Committee or FIFA.<sup>229</sup>

#### CONCLUSION

When you take the fact that no agreements have been formed yet, coupled with the lack of legislation and judicial opinions available right now, the world of Esports is still essentially the wild-west. Players seemingly just want a seat at the decision-making table, these associations and players, like Tfue, taking a stand may get that. While these players associations may never evolve into the grandiose, all-powerful players associations and unions that exist in the major American sports that does not mean they cannot still be useful tools and vehicles to affect change in the industry. Although analogous in some ways, Esports is still an entirely new and uncharted territory for North American and global sports. It is one that involves incredibly talented, yet young and inexperienced, people who at times lack the necessary knowledge and resources.<sup>230</sup> “Underneath all this is something more concrete: the fact that people love to play games and love to watch players who are better than they are . . . experts . . . don’t think that’s going to change any time soon.”<sup>231</sup> Many changes may be coming in the world of Esports, but for everyone, fans and players most of all, these all seem to be positive changes for the better and steps made in the right direction.

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<sup>229</sup> *Id.*

<sup>230</sup> Kim, *supra* note 18.

<sup>231</sup> D’Anastasio, *supra* note 37.