

# Georgia State University Law Review

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Volume 37  
Issue 3 *Spring 2021*

Article 8

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8-1-2021

## Professional Gamers are Today's Professional Athletes

Troy Viger

*Georgia State University College of Law*, [tviger1@student.gsu.edu](mailto:tviger1@student.gsu.edu)

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### Recommended Citation

Troy Viger, *Professional Gamers are Today's Professional Athletes*, 37 GA. ST. U. L. REV. 1001 (2021).  
Available at: <https://readingroom.law.gsu.edu/gsulr/vol37/iss3/8>

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## PROFESSIONAL GAMERS ARE TODAY'S PROFESSIONAL ATHLETES

**Troy Viger\***

### ABSTRACT

*Recall the adversities faced by many in the entertainment industry. Freddie Mercury tried to join several bands before forming Queen. Judy Garland signed with Metro-Goldwyn-Mayer at age thirteen after performing with her sisters throughout her childhood. Babe Ruth signed his first professional baseball contract with the minor-league Baltimore Orioles. Those same historic adversities faced by these giants of the entertainment industry are being repeated today in a closely related field—the Esports industry.*

*Esports, a form of competitive video gaming, attracts audiences that “rival some of the world’s great sporting events.” A thorough due diligence review of the industry-norm contract must be undertaken. Esports professionals continue to fall victim to handshake deals put to paper like so many entertainers before them. Esports organizations use heavy-handed contracts to severely limit professionals from exploring other options and strip them of most of their earnings.*

*Turner “Tfue” Tenney’s lawsuit against FaZe Clan brought to the forefront the lack of regulation in the Esports industry and the question of whether gamers should be entitled to similar protections as actors, artists, and athletes, and other entertainers. The Talent*

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\* Research Editor, *Georgia State University Law Review*; J.D. Candidate, 2021, Georgia State University College of Law. Thank you to my father, mother, sister, and David Mongeau for your unwavering support throughout my academic career. I would also like to thank my cousin, Brandon, and Nick Morris (Swizy), Anthony Rich (Quicks), Justin Rich, and Bryan McManus (Im worried), friends I have met online through Xbox, who sparked my passion for video games from *Halo 2* to *Call of Duty: Warzone*. Thank you to Brooke Wilner and my friends, colleagues, and professors from Georgia State University College of Law for your mentorship, guidance, and introduction into the legal profession. In addition, thank you to the *Georgia State University Law Review* for your edits, notes, and dedication in preparing this Note for publication. Also, thank you to my friends outside of law school for your support and encouragement throughout my academic career. Follow your passion—you do not know where or how it will take you to the next opportunity.

*Agency Act (TAA) and the Miller-Ayala Athlete Agents Act (MAA) apply different standards to the representation of artists and athletes. By dismantling the pros from the cons of these two Acts, legislatures can craft new Esports-specific legislation to protect the creative minds of these professionals.*

*Specifically, the proposed legislation should further define “artist” and “other entertainment enterprises” from the TAA to account for the new characters in the entertainment industry, such as professional gamers and influencers. The legislation should also define “athlete” to help guide courts in determining if professional gamers are better labeled as an athlete, artist, or a combination of the two.*

*This is not the first time the entertainment industry has prioritized agents’ financial gains over artists’ and athletes’ freedom to contract and livelihoods, but hopefully courts, legislatures, and lawyers can use the past lessons of Freddie, Judy, Babe, and the countless others to better protect professional gamers.*



## INTRODUCTION

Esports, a form of competitive video gaming, is a worldwide phenomenon projected to eclipse \$1.8 billion in global revenue by 2022.<sup>1</sup> The immediate and continuing societal impact of video games cannot be overstated, but few remember the first Esports event in 1972.<sup>2</sup> That event featured the video game *Spacewar!* and offered only a year's subscription to *Rolling Stone* as the meager grand prize.<sup>3</sup> Nearly half a century later, the sixteen-year-old Kyle Giersdorf won \$3 million in the first-ever *Fortnite* World Cup.<sup>4</sup> Giersdorf's winnings greatly exceeded that of the victors of the Masters, the PGA Championship, and nearly matched the U.S. Open earnings.<sup>5</sup> His win propelled the world of competitive video gaming into a fast-growing, international spectacle with millions of fans and billions of dollars up for grabs.<sup>6</sup> Giersdorf and other Esports

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1. *Guide: What Are E-Sports?*, BBC, <https://www.bbc.co.uk/newsround/37773832> [<https://perma.cc/J4ET-U57Y>] (Apr. 6, 2017, 2:50 PM) (“Some players might train for up to 14 hours a day to make sure they have extremely quick reflexes and reactions. Players might make more than 300 ‘actions’ per minute, so they have to be able to multi-task extremely well.”); *see also* Jurre Pannekeet, *Global Esports Economy Will Top \$1 Billion for the First Time in 2019*, NEWZOO (Feb. 12, 2019), <https://newzoo.com/insights/articles/newzoo-global-esports-economy-will-top-1-billion-for-the-first-time-in-2019/> [<https://perma.cc/Z6CQ-Y6P7>].

2. *The History and Evolution of Esports*, BOUNTIE GAMING (Jan. 3, 2018), <https://bountiegaming.medium.com/the-history-and-evolution-of-esports-8ab6c1cf3257> [<https://perma.cc/834P-5E83>].

3. *Id.* (“[I]t wasn’t until 1980 whereby the first video game competition was held. The Space Invaders Championship had a great attendance of 10,000 participants and received widespread media attention since Space Invaders . . . was a household name at that point of time.”).

4. Patrick Smith, *E-Sports Practices Get Boost with Teen’s Fortnite Win*, LAW.COM: THE AM. LAW. (Aug. 5, 2019, 10:16 AM), <https://www.law.com/americanlawyer/2019/08/05/e-sports-practices-get-boost-with-teens-fortnite-win/> [<https://perma.cc/T7QB-W87S>].

5. *Id.*; *Masters 2019: How Much the Winner of the Masters Makes*, PGA (Apr. 15, 2019), <https://www.pga.com/events/masters/masters-2019-how-much-winner-masters-makes> [<https://perma.cc/H3JF-2QXJ>]; James Crabtree-Hannigan, *U.S. Open Prize Money: How Much Will the Winners Make in 2019? Purse, Breakdown for Field*, SPORTING NEWS (Sept. 7, 2019), <https://www.sportingnews.com/us/tennis/news/us-open-prize-money-2019-purse-breakdown/eao43nwd21551a3j5yzvdfnfeq> [<https://perma.cc/UJ9L-LH6B>]; *2019 PGA Championship: Purse and Winner’s Share*, PGA (May 19, 2019), <https://www.pga.com/events/pgachampionship/2019-pga-championship-purse-and-winners-share/> [<https://perma.cc/68MZ-67R4>].

6. 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/> [<https://perma.cc/D64Q-2T6Z>] (“Streaming services and live events have turned casual gamers into serious stars who can sometimes rake in seven-figure earnings and massive brand

participants are far from the “perpetuated stereotype of video games being played by overweight teenagers huddled in dark basements”—evident by the 380 million-person global Esports audience in 2018, 165 million of whom were dedicated viewers.<sup>7</sup>

Nothing less than a modern gold rush, Esports’ success has led many to mention it alongside other more traditional sports like baseball, but “the comparison may not be apt.”<sup>8</sup> The term Esports “has been assigned to the practice,” but whether lawmakers and regulators agree that the contests are indeed sports remains to be seen.<sup>9</sup> “Often referred to as the ‘wild wild west,’ esports law is a rowdy, unrestrained, and often lawless legal landscape”<sup>10</sup> that is “rapidly gaining mainstream attention.”<sup>11</sup>

When approaching Esports, legislators and courts must be careful not to hinder its growth but rather take into account the unique nature of the industry and help Esports professionals continue to climb the ladder of global success.<sup>12</sup> Video game jurisprudence will likely grow quickly as courts face tough decisions—such as determining whether “esports [are] ‘sports’ in the traditional athletic sense.”<sup>13</sup> And one new lawsuit started challenging courts to answer the debate of

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endorsements.”).

7. John T. Holden et al., *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 47 (2017); Pannekeet, *supra* note 1.

8. John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 391 (2019).

9. Holden et al., *supra* note 7 (“[R]egulators . . . and . . . courts need to address the normative question most competitive activities deal with at their nascent stage: Are esports ‘sports’ in the traditional athletic sense? Or are video game competitions more closely aligned with professional wrestling and other types of performing arts and/or skill-based entertainment?” (footnotes omitted)).

10. Ellen M. Zavian & Jim Schmitz, *Genesis of an Industry: The Emerging Workforce and Regulations of Esports*, 37 ACC DOCKET 24, 26 (2019) (stating that the audience has surpassed spectator numbers for traditional sports, like the National Football League’s 22.2 million live viewers versus Esports’ 143 million).

11. Holden et al., *supra* note 7, at 46.

12. Though the Esports industry is growing exponentially, it is still in a very vulnerable position. Just a single misguided law or misinformed judicial opinion could topple a movement that represents a source of employment for many professionals, and a form of entertainment for many more across the world.

13. Holden et al., *supra* note 7; Zavian & Schmitz, *supra* note 10 (“[Video games] differ from traditional sports because the game publishers own their intellectual property. . . . [I]n esports, publishers definitely own their games and thus are in complete control of the emerging industry . . .”).

“whether professional gamers are athletes, performers or something else” where video games, players, and money converge in a new market.<sup>14</sup>

This Note explores the classification of professional gamers and the legal implications that result from that classification. Part I discusses the background surrounding Esports and introduces the debate of whether professional gamers are athletes, artists, or perhaps both. Part II provides an analysis of how governing agencies have applied laws differently to athletes and artists, the results of that bifurcated application, and how agencies have applied similar laws to athletes in traditional sports. Part III proposes a solution to the debate over the legal classification of professional gamers, modeled from the approach applied to traditional athletes but with a twist to account for the unique landscape of those working in professional gaming, which is a “predatory and largely unregulated industry that systematically exploits its talent.”<sup>15</sup>

## I. BACKGROUND

Regardless of whether society views Esports as a hobby, an expensive waste of time, or an actual sport, the industry is growing exponentially.<sup>16</sup> Notwithstanding any negative attitude toward video games, “esports will continue to grow as an industry—and a pastime—for the foreseeable future” due to its seemingly unstoppable cultural momentum.<sup>17</sup> Young people are participating

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14. Jessica Conditt, *Tfue's Lawsuit Against FaZe Has Been a Long Time Coming*, ENGADGET (May 21, 2019), <https://www.engadget.com/2019/05/21/tfue-sue-faze-esports-contracts-agent-youtube-twitch-influencer> [<https://perma.cc/ZNJ9-8FGU>]; Zavian & Schmitz, *supra* note 10, at 27 (“Players are as young as 15 years old when they enter into their first contract.”).

15. Hailey Konnath, *Pro Gamer Slams 'Unregulated,' 'Oppressive' Esports Industry*, LAW360 (May 20, 2019, 10:28 PM), <https://www.law360.com/articles/1161538/pro-gamer-slams-unregulated-oppressive-esports-industry> [<https://perma.cc/3SYM-CEPH>].

16. Zavian & Schmitz, *supra* note 10.

17. Willingham, *supra* note 6 (“Colleges have even gotten in on the action. More than 50 colleges have varsity eSports programs, recognized by a governing body called the National Association of Collegiate Esports [(NACE)]. NACE championships dole out thousands of dollars in prize money, which is put towards scholarships for the winners.”).

progressively more in high school and in collegiate Esports; in fact, the industry is affording a select few the option to pursue a career in not just a single genre but a single video game itself.<sup>18</sup> One of the most popular Esports games, *Overwatch*, is described as “an intense . . . action game that emphasizes teamwork and individual skill. Players choose heroes with diverse and powerful abilities, then clash on a variety of maps.”<sup>19</sup> Another popular game is *League of Legends*, which is a strategy role-playing game where “[t]wo teams of five ‘champions’ compete to take down the other team’s base.”<sup>20</sup> *Overwatch* and *League of Legends* are a part of one of the “quickest-growing segments of the entertainment industry”: competitive video gaming.<sup>21</sup>

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18. William Stark et al., *Antitrust Issues Grow Out of Esports' Success*, L.J. NEWSLS. (June 2019), <http://www.lawjournalnewsletters.com/2019/06/01/antitrust-issues-grow-out-of-esports-success/?sreturn=20190828144655/> (explaining that the intellectual property rights game developers possess pose interesting antitrust and fair use issues that this Note will not explore).

19. Steve Lubetkin, *Online Computer Gaming Gains Validation with \$50M Esports Arena in Philadelphia Sports Complex*, GLOBEST.COM (Mar. 26, 2019, 4:00 AM), <https://www.globest.com/2019/03/26/online-computer-gaming-gains-validation-with-50m-esports-arena-in-philadelphia-sports-complex/?sreturn=20190828145528/> [https://perma.cc/UWZ5-KPR6]; *Overwatch*, BLIZZARD ENT., <https://playoverwatch.com/en-us/> [https://perma.cc/QJ9Q-BYSM]. A \$50 million next-generation Esports and entertainment venue will be built in the Philadelphia Sports Complex. Lubetkin, *supra*. This arena will be the largest of its kind in the Western Hemisphere specifically built for the Esports industry and will accommodate 3,500 guests. *Id.* Setting the gold standard for Esports, this project propels the industry into an equally exciting light as major traditional sports. *Id.*

20. LEAGUE OF LEGENDS, <https://na.leagueoflegends.com/en/> [https://perma.cc/UUH3-HG8E]; Mike Snider, *After a Decade, 'League of Legends' Remains at the Top of Its Game*, USA TODAY: VIDEO GAMES, <https://www.usatoday.com/story/tech/gaming/2019/10/15/online-video-game-league-legends-turns-10-looks-future/3930899002/> [https://perma.cc/399K-5D8T] (Oct. 17, 2019, 10:35 AM) (“It is probably the closest thing to taking chess out of the physical environment with all these additional layers of critical thinking on top of it . . .” (quoting Ann Hand, CEO and Chairman of Super League Gaming, a national amateur Esports organization)).

21. Holden et al., *supra* note 7, at 46 (“*Esports*, as the practice of competitive video gaming has been named, is a term that represents a variety of different game types and game titles.”); Katherine E. Hollist, Note, *Time To Be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 825–26 (2015). Katherine Hollist provides the following description of Esports:

Put simply, “eSports” are professional video game matches where players compete against other players before an audience. In the past few years, eSports have emerged as an increasingly popular alternative to other spectator sports, particularly among younger viewers. Like their traditional sports counterparts, eSports players compete in events with a variety of styles—some compete directly against other competitors in one-on-one events (like tennis); others play in team events where teammates assume



### A. Investing in an Esports World

“Professional teams and players have fueled much of esports’ explosive growth, supported by significant investments from traditional sports franchise owners . . . and increased visibility on traditional media outlets.”<sup>22</sup> Scrambling to compete for the valuable youthful attention evidenced by rapidly rising viewership numbers, major professional sports leagues have poured a “significant influx of investment capital” into the explosive growth and commercial opportunity in Esports.<sup>23</sup>

Cavs Legion, an Esports team affiliated with the Cleveland Cavaliers of the National Basketball Association (NBA), announced a plan to open “a new facility in Cleveland that will cater to players and fans of the fast-growing esports industry.”<sup>24</sup> Following suit,

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different roles and work cooperatively to score points against other teams (like basketball); and still others compete by allowing each competitor to take a turn and then compare their ultimate times/scores (like Olympic skiing or gymnastics). Today’s most popular eSports events center on team-based play. In League of Legends, for instance, competitors face off as two teams of five. From their seats on stage-left or stage-right in sold-out arenas, each player selects from an ever-expanding set of in-game avatars, each equipped with five unique in-game abilities. Ten player-controlled avatars materialize in the virtual League of Legends arena, where they will skirmish one another, kill nonplayer minions for in-game gold (which they can exchange for virtual items to increase their avatar’s power), and ultimately fight to eliminate the opposing team by storming their opponent’s base. The game operates like a combination of capture the flag and chess, with the additional spectator appeal of the lightning-fast reflexes required to anticipate and avoid the maneuvers of the human-controlled enemy players. Teams face off in weekly match-ups during the regular season, and the teams with the best records continue on to the championship rounds, where they can compete for enormous prizes.

Hollist, *supra* (footnotes omitted).

22. P. William Stark & Steve Walkowiak, *Growing Esports to a \$1.6B Industry and Corruption Risks*, LAW.COM: TEX. LAW. (Jan. 25, 2019, 12:31 PM), <https://www.law.com/texaslawyer/2019/01/25/growing-esports-to-a-1-6b-industry-and-corruption-risks/> [<https://perma.cc/4UNY-RFMG>].

23. LONN A. TROST ET AL., 5 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 74A:71.50, Westlaw (database updated Apr. 2020); Zavian & Schmitz, *supra* note 10.

24. Matthew Guarnaccia, *NBA’s Cavs Roll Out Plans for Esports Facility in Cleveland*, LAW360 (July 19, 2019, 4:31 PM), <https://www.law360.com/articles/1180211/nba-s-cavs-roll-out-plans-for-esports-facility-in-cleveland> [<https://perma.cc/7YE3-QB6M>] (“[The facility] will house a central stage with two stacked rows of computers on each side. Each bank of six computers will face one another, providing enough room for 12 competitors at a time, and will sit directly below a video display stretching 5 feet high and 16 feet wide.”).

game publishers such as Activision, Blizzard, and Riot Games, which produce game titles such as *League of Legends*, *Call of Duty*, *Overwatch*, and *Halo* have poured in investments.<sup>25</sup> Also joining the fray are venture capital firms and sports celebrities.<sup>26</sup> Dallas Cowboys owner, Jerry Jones, bought Complexity Gaming, a team that will now play in Dallas, home of Esports Stadium Arlington.<sup>27</sup> And Dallas Mavericks owner Mark Cuban owns Mavs Gaming, which sponsors a team playing in the NBA 2K League.<sup>28</sup> Perhaps most prominently, actor Will Smith is among the new investors in the Esports franchise Generation Gaming, which accounted for a new \$46 million round of financing.<sup>29</sup>

### B. Esports Compared to Its Traditional Counterpart

To many, the idea that video game players have comparable skills to the highest caliber of traditional professional athletes may be laughable, but a growing number of people realize the unique talent, skill, and dedication of professional gamers necessary to rise above a saturated market and make a name in Esports.<sup>30</sup> Major Esports events attract audiences that “rival some of the world’s great sporting

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25. Zavian & Schmitz, *supra* note 10; Trent Murray, *Newzoo Report Projects Global Esports Revenue to Reach \$1.1B in 2019*, ESPORTS OBSERVER (Feb. 12, 2019), <https://esportsobserver.com/newzoo-2019-report/> [https://perma.cc/85H7-BVUG].

26. Zavian & Schmitz, *supra* note 10, at 25.

27. Brenda Sapino Jeffreys, *Munck Wilson Mandala Boosts Esports Expertise in Dallas*, LAW.COM: TEX. LAW. (May 17, 2019, 9:34 AM), <https://www.law.com/texaslawyer/2019/05/17/munck-wilson-mandala-boosts-esports-expertise-in-dallas/> [https://perma.cc/52QA-MEKH].

28. *Id.* (“Technology-focused law firm Munck Wilson Mandala has hired video gaming trademark lawyer D. Wade Cloud Jr. . . . Munck Wilson isn’t the only firm in Texas beefing up its video gaming expertise. Late last year, Greenberg Traurig . . . launched a multi-office, cross-practice team to do work for esports clients . . .”).

29. Eben Novy-Williams, *Will Smith Takes Slice of Esports Team’s US\$46 Million Financing*, BNN BLOOMBERG (Apr. 17, 2019), <https://www.bnnbloomberg.ca/will-smith-takes-slice-of-esports-team-s-46-million-financing-1.1245904> [https://perma.cc/DUP5-A36V] (“The coming years are going [to] see our company really start to crystallize its identity, not just as a brand, but also as an enterprise . . .”).

30. Paul Tassi, *The U.S. Now Recognizes eSports Players As Professional Athletes*, FORBES (July 14, 2013, 11:27 AM), <https://www.forbes.com/sites/insertcoin/2013/07/14/the-u-s-now-recognizes-esports-players-as-professional-athletes/#3e1d81333ac9> [https://perma.cc/U3SB-6HUI] (“I do believe the scene will continue to grow the way it has the past few years, and though it may never catch traditional sports, it’s going to be a much more accepted and less niche past time in the future.”).

events.”<sup>31</sup> In many ways, “the eSports industry is similar to the traditional sports from which it derives its name: it is an entertainment industry built around competition, fan loyalty, and spectatorship.”<sup>32</sup> Unlike traditional professional athletes, Esports gamers are not backed by unions or players associations, making Esports dramatically different from those traditional sports—and giving rise to important legal questions.<sup>33</sup> Two California laws could decide an Esports gamer’s lawsuit against their employing company: the Miller-Ayala Athlete Agency Act (MAA)<sup>34</sup> and the Talent Agencies Act (TAA).<sup>35</sup> These two laws have the potential to reshape contracts in the Esports industry and tame the meteoric growth of Esports.<sup>36</sup>

Under the TAA, any business or individual who acts like an agent must do so with an agent or agency license obtained through California’s Labor Commission.<sup>37</sup> In debate, Esports lawyers always

31. TROST ET AL., *supra* note 23 (“Although still in a growth stage, the eSports industry has millions of international fans, dedicated arenas and facilities, sophisticated leagues, lucrative media rights agreements and other elements of traditional sports leagues.”).

32. Hollist, *supra* note 21, at 826. The combination of video game matchups, commentators, merchandise, and ticket venue sales make up the Esports industry. *Id.*

33. Duran Parsi, *All in the Game*, 42 L.A. LAW. 26, 27 (2019); Zachary Zagger, *Fortnite Gamer’s Suit Puts Pressure on Esports Contracts*, LAW360 (May 29, 2019, 10:12 PM), <https://www.law360.com/articles/1162206/fortnite-gamer-s-suit-puts-pressure-on-esports-contracts> [<https://perma.cc/LCC9-4WXC>] (noting that one legal issue asks “the question of whether gamers should be entitled to the same agent protections as actors and artists in the traditional entertainment industry”).

34. CAL. BUS. & PROF. CODE § 18895 (West 2017).

35. CAL. LAB. CODE § 1700 (West 2013).

36. Turner “Tfue” Tenney’s lawsuit is “spurring conversations across influencer and esports spaces alike,” and if he prevails, the lawsuit will set “new, overdue standards for the esports industry overall.” Conditt, *supra* note 14; *see also* Konnath, *supra* note 15. Additionally, other players’ contracts with gaming companies could be called into question, potentially “shift[ing] the balance of power to the gamers . . . who are actually . . . driving the industry.” Complaint at 4, *Tenney v. FaZe Clan Inc.*, No. 19STCV17341 (Cal. Super. Ct. May 20, 2019), 2019 WL 2195136; *see also* Michael McCann, *Inside the Lawsuit That Could Shake Up the Entire Esports Industry*, SPORTS ILLUSTRATED (May 30, 2019), <https://www.si.com/more-sports/2019/05/30/turner-tenney-faze-clan-esports-lawsuit-fortnite> [<https://perma.cc/P594-8NDF>]. A Tfue victory “would be a very significant piece of precedent because it would take a lot of existing regulations that have not applied to esports” and finally apply them to the industry. Zagger, *supra* note 33 (“Morrison said he expects to see ‘near instant changes to contracts’ and expects teams to start to preemptively renegotiate deals with their top gamers.” (quoting Esports attorney Ryan Morrison)).

37. CAL. LAB. CODE § 1700.5 (West 2013) (“No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. The license

highlight that teams currently in the Esports industry actually have a license, which is required to negotiate or bring deals to the players.<sup>38</sup> Further, once the agent obtains a license, they must abide by the regulations set forth in the statute, “which include submitting form contracts and fees to the state, posting bond, and prohibitions against discrimination and certain types of conflicts of interest.”<sup>39</sup> Since the TAA’s enactment in 1978, many lawsuits have challenged its loopholes and flaws that undermine the California legislature’s intent in passing the Act: to prevent agents from taking advantage of artists.<sup>40</sup>

The MAA bans sports teams from acting as representatives for their players and puts in place a registration system with an enhanced system of civil and criminal liability.<sup>41</sup> Before acting as an athlete’s agent in California, any person, even a licensed California attorney, must register with the secretary of state and provide all information

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shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency. Licenses issued for talent agencies prior to the effective date of this chapter shall not be invalidated thereby, but renewals of those licenses shall be obtained in the manner prescribed by this chapter.”); McCann, *supra* note 36.

38. Thoorin, *Esports Salon Episode 19: A Few Good Contracts (Feat. Ryan Morrison, Bryce Blum & Richard Lewis)*, YOUTUBE (June 30, 2019), <https://www.youtube.com/watch?v=8vTgtDpcj04>.

39. Myles L. Gutenkunst, *Talent Managers Acting As Agents Revisited: An Argument for California’s Imperfect Talent Agencies Act*, 37 HASTINGS COMM’NS & ENT. L.J. 113, 119 (2015); CAL. LAB. CODE § 1700.23 (West 2013) (“Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof. Such approval shall not be withheld as to any proposed form of contract *unless* such proposed form of contract is *unfair, unjust and oppressive to the artist*. . . . There shall be printed on the face of the contract in prominent type the following: ‘This talent agency is licensed by the Labor Commissioner of the State of California.’” (emphasis added)); CAL. LAB. CODE § 1700.24 (West 2013) (“Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation . . .”).

40. See Gutenkunst, *supra* note 39, at 122 n.72 (discussing how clashes between talent managers and artists form when the manager procures employment and how the artist holds out on commission because the manager is not a licensed agent).

41. See *Chiapparelli v. Henderson*, No. F046363, 2005 WL 1847221, at \*5 (Cal. Ct. App. Aug. 5, 2005) (deeming a contract between a mixed martial artist and his agent void because of a failure to follow the requirements of the MAA); Robert P. Baker, *The Unintended Consequence of the Miller-Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation*, 12 UCLA ENT. L. REV. 267, 270 (2005); Conditt, *supra* note 14.

required under the MAA.<sup>42</sup> The MAA provides athletes with a remedy by deeming noncompliant contracts “void and unenforceable.”<sup>43</sup> Overall, the MAA’s main purpose “is to ensure that agents act in the best interests of their principals, and not for their own personal gain.”<sup>44</sup>

### C. Turner “Tfue” Tenney’s Gamer Agreement

Given the rate at which Esports audiences and businesses are expanding, many of the contracts in place originally grew out of an underground gaming culture; now there is a present need for thorough due diligence review of gamer contracts.<sup>45</sup> For many, becoming an Esports pro “marks their first ‘real’ job with a salary and benefits, meaning they frequently lack experience to adequately understand their rights and advocate for themselves.”<sup>46</sup> These

42. CAL. BUS. & PROF. CODE § 18896 (West 2017); Baker, *supra* note 41, at 273.

43. Joel M. Smith, *Increasing Penalties to Catch California’s First Unscrupulous Athlete Agent*, 43 MCGEORGE L. REV. 538, 543 (2012). The MAA provides for various penalties for different violations:

Failure to follow the Miller-Ayala Act can result in civil and criminal penalties. The Miller-Ayala Act allows for any person, educational institution, or league to bring a civil action if they are “adversely affected” by the acts of an athlete agent. Plaintiffs are allowed to recover the greater of fifty-thousand dollars or actual damages, including punitive damages, court costs, and attorney fees. Any contract that does not comply with the Miller-Ayala Act is “void and unenforceable.” Although the legislature intended civil enforcement, a violation of the Miller-Ayala Act is a misdemeanor and punishable by a fine of no more than fifty-thousand dollars, imprisonment for not more than one year, or both. Also, “the court may suspend or revoke” an athlete agent’s privilege of being an athlete agent in California. Finally, the statute of limitations for a violation of the Miller-Ayala Act was one year after commission of the violation.

*Id.* at 543–44 (footnotes omitted) (quoting CAL. BUS. & PROF. CODE § 18897.63 (West 2017)).

44. Marc Edelman, *Disarming the Trojan Horse of the UAAA and Sparta: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 147 (2013).

45. TROST ET AL., *supra* note 23; *see also* Mike Ozanian et al., *The World’s Most Valuable Esports Companies*, FORBES (Oct. 23, 2018, 5:50 AM), <https://www.forbes.com/sites/mikeozanian/2018/10/23/the-worlds-most-valuable-esports-companies-1/#7f1fbdb16a6e> [<https://perma.cc/3TCW-XLCA>]; Zavian & Schmitz, *supra* note 10, at 29 (“As of 2018, the top 12 esports companies fielded a total of 588 players on 97 teams.”).

46. Uriah Tagle, *As North American Esports Levels Up, Its Players Lag Behind*, 19 TEX. REV. ENT. & SPORTS L. 81, 82 (2019); Zavian & Schmitz, *supra* note 10, at 26–28 (explaining that professional gamers in the early days were deemed “independent contractors” because earnings solely came from prize money, but now gamer agreements involve a “level of control typically wielded by an employer” making gamers “wear certain brands or logos . . . , stream their play on specific platforms, reside in

“contracts have routinely favored organizations’ financial progress over players’ best interests.”<sup>47</sup> This continues to exploit and force Esports professionals to work for low salaries on unfavorable terms.<sup>48</sup> Stated more bluntly, Esports players do not realize the rights they are contractually giving away.<sup>49</sup>

Among the Esports professionals that are too “young, inexperienced with the workforce, and seemingly too busy to stop and consider if their job conditions seem fair,” Turner “Tfue” Tenney also fell victim to a “handshake deal, put to paper.”<sup>50</sup> Tfue is a “social media celebrity and professional player of the video game *Fortnite*.”<sup>51</sup> Tfue, in 2019, was one of the most popular players in the world of *Fortnite*—a multiplayer phenomenon known as “an open-world survival game, in which players collect resources, make tools and weapons, and try to stay alive as long as possible.”<sup>52</sup> Tfue’s lawsuit alleged that FaZe Clan (FaZe), the Esports organization he signed with, violated California labor laws.<sup>53</sup> FaZe is an “esports and

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specific locations, . . . and, more crucially, require that the player provide services *exclusively* to that company”).

47. Conditt, *supra* note 14; *see also* Tim Rizzo & Nick Geracie, *Evolved Talent CEO Ryan Morrison Breaks Down Tfue’s Lawsuit Against FaZe Clan*, INVEN GLOBAL (May 20, 2019), <https://www.invenglobal.com/articles/8253/evolved-talent-ceo-ryan-morrison-breaks-down-tfues-lawsuit-against-faze-clan> [<https://perma.cc/85WR-MSLR>] (“When a non-esports attorney comes in and reviews an esports contract, what they usually comment is along the lines, ‘This is breaking the law in 19 different ways. None of this is okay.’”).

48. Tagle, *supra* note 46, at 81 (“An attorney who represents professionals further described them as ‘socially awkward,’ and ‘uncomfortable to ask for things.’ . . . Without the protections of labor organizations like those available to young professionals in traditional sports leagues, esports professionals often unknowingly sign contracts that deprive them of their rights.”).

49. McCann, *supra* note 36 (“There are also larger themes at stake. A key one is the notion that esports players are inadequately informed about the contracts they sign. A relatively straightforward . . . remedy to that concern would be for players to hire attorneys, particularly those with esports expertise.”).

50. Tagle, *supra* note 46; TROST ET AL., *supra* note 23. *See generally* Conditt, *supra* note 14.

51. *FaZe Clan Inc. v. Tenney*, 467 F. Supp. 3d 180, 183 (S.D.N.Y. 2020) (emphasis added).

52. Sarah LeBoeuf, *What is ‘Fortnite’?: A Look at the Video Game That Has Become a Phenomenon*, NBC NEWS, <https://www.nbcnews.com/tech/tech-news/what-fortnite-look-video-game-has-become-phenomenon-n887706> [<https://perma.cc/EVF6-BYB5>] (June 30, 2018, 11:27 AM); Conditt, *supra* note 14.

53. Conditt, *supra* note 14 (explaining that the TAA is designed to protect entertainers in California from raw representation deals and that the MAA is more restrictive than the TAA because the MAA bans sports teams from acting as representatives for their players). Rohan Nadkarni, *The Stream Team*, SPORTS ILLUSTRATED (June 10, 2021), <https://www.si.com/tech-media/2021/06/10/daily-cover-faze>

entertainment organization that competes in video game tournaments and creates social media content.”<sup>54</sup> His important lawsuit raises the question of “whether gamers should be entitled to the same agent protections as actors and artists in the traditional entertainment industry,” or rather as professional athletes.<sup>55</sup>

Under the “nebulous nature of esports,” Tfue’s lawyers presented their client as an “artist,” which shined the light on gamers as “professional competitors and online entertainers in equal measure.”<sup>56</sup> Professional gamers’ work is “arguably akin to performing art and athletic performance,” but some debate the connection between Esports and athletics.<sup>57</sup> For its part, the International Olympic Committee, in considering whether to add Esports to the Olympic Games, reviewed the definition of “athleticism,” which includes “the kinds of hand-eye skills and other traits essential to esports.”<sup>58</sup>

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clan-kyler-murray-bronny-james [https://perma.cc/W3C2-74YN] (“Trink is the CEO of FaZe Clan, a gaming collective born in 2010 as a YouTube channel for creative ‘killshots’ performed in the video game Call of Duty. Now, depending on which side of the millennial–Gen Z line you sit, FaZe has grown into either a confusing digital behemoth that serves as a stark reminder of how the world has passed you by, or a cultural (and merchandising) force that bonds a disparate groups of gamers, athletes, musicians, influencers and content creators into an amorphous digital squad that has become the internet’s version of the cool kids’ table in your high school cafeteria.”).

54. *FaZe Clan*, 467 F. Supp. 3d at 183 (quoting Anderson Decl. ¶ 2, ECF No. 47-3).

55. Zagger, *supra* note 33; Conditt, *supra* note 14 (explaining that Tfue’s Twitter biography states that he is a “professional athlete,” but his lawyer seems to paint him with a different description).

56. Conditt, *supra* note 14 (quoting Barry Lee, senior agent at Evolved Talent Agency) (“The Miller-Ayala Athlete Agents Act is more for athletes, and if you look at how battle royale players have been monetizing, they’re esports players, but the way they make the bulk of their money is as influencers . . . . Legally, as a *Fortnite* streamer, Tfue is an entertainer first, not an athlete.” (quoting Barry Lee, senior agent at Evolved Talent Agency)).

57. McCann, *supra* note 36 (“Tenney’s complaint stresses that esports players perform, act, direct and edit their videos and then stream those videos to their millions of followers through YouTube and Twitch. With numerous views of the videos, advertising dollars and sponsorship opportunities are generated. . . . Tenney is the *most watched* Fortnite streamer on Twitch. Tenney’s complaint emphasizes that ‘sponsors are willing to pay for Tenney to perform in and create videos that will, at least in part, promote their goods, services and brands.’ Yet the deal he signed with FaZe Clan limits his capacity to profit from his talents.” (emphasis added) (quoting Complaint, *supra* note 36, at 2)).

58. *Id.*; *Paris 2024 Olympics: Esports ‘in Talks’ to Be Included As Demonstration Sport*, BBC: SPORT (Apr. 25, 2018), <https://www.bbc.com/sport/olympics/43893891> [https://perma.cc/J2FC-9SBP] (“[The International Olympic Committee] said it is open to exploring the possibility of including esports in future Games, before stating at a November summit it ‘could be considered a sporting activity’ . . .”).

Regardless of how Esports players are categorized, however, Tfue’s lawsuit emphasized the state of Esports’ legal landscape. Specifically, Tfue has “tor[n] into the manner” in which Esports companies use “heavy-handed” gamer agreements to “own” professional gamers in an industry “so new it lacks needed oversight and talent protection.”<sup>59</sup> Due to this lack of industry oversight and scores of gamers unwilling or unable to stand up to it, Tfue argued that FaZe “enjoyed the fruits of this illegal business model with impunity”—but as the legal landscape around Esports evolves, “those days are over.”<sup>60</sup>

## II. ANALYSIS

For some, Tfue’s lawsuit is comparable to a “high school band getting the[ir] first record deal” in that many Esports players eagerly sign the first contract thrown at them.<sup>61</sup> Tfue’s attorneys painted the contract (Gamer Agreement) as one of the worst in talent history, but his employers begged to differ.<sup>62</sup> Tfue contended that FaZe was

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59. Konnath, *supra* note 15 (“FaZe Clan exploits and takes advantage of young, ‘unsophisticated, unseasoned and trusting’ gamers, saddling them with contracts that ‘severely limit’ them from exploring deals with other companies and strip them of most of their earnings . . . .” (quoting Complaint, *supra* note 36, at 2–3)).

60. *Id.* (stating that Tfue seeks injunctive relief against FaZe and that a win for Tfue would reshape contracts in the Esports industry); Hailey Konnath, *FaZe Clan Counterstrikes Esports Gamer with \$20M Suit*, LAW360 (Aug. 1, 2019, 11:13 PM), <https://www.law360.com/articles/1184611/faze-clan-counterstrikes-esports-gamer-with-20m-suit> (“This is the first time in the history of esports that an organization has had the audacity to try and enforce contractual provisions that are so clearly illegal against one [of] its gamers.” (alteration in original)). The conditions are quite worrisome:

Player conditions are particularly troubling when one recalls that many of these professional players are minors. Although Riot has a self-imposed minimum age of 17 for its professional *League of Legends* players, other developers and leagues can—and do—allow teams to contract with even younger teenagers. In traditional sports, collectively bargained agreements handle questions of age minimums; in their nascent stages, traditional American sports also accepted players of all ages. It took decades of negotiation and litigation to reach the point where leagues included age restrictions as part of a collectively bargained agreement.

Hollist, *supra* note 21, at 835 (emphasis added) (footnotes omitted).

61. Thoorin, *supra* note 38.

62. ‘Fortnite’ Gamer Tfue’s Contract with FaZe Clan Finally Revealed!, THE BLAST [hereinafter *Tfue’s Contract*], <https://theblast.com/esports-gamer-tfue-faze-clan-contract-revealed/> [<https://perma.cc/TX9C-7ETD>] (June 11, 2019, 10:56 PM) (“This is the most unfair contract I have ever



operating as a talent management firm while not licensed to do so under California law and that several parts of the contract violated laws dealing with anticompetition.<sup>63</sup>

Tfue and FaZe’s “relationship does not seem much different from a sports agency model for an athlete or an entertainment agency representing talent,” but the lawsuit poses an important question as to what law regulates representatives of Esports gamers.<sup>64</sup> If Esports are a “sport” and professional gamers are “athletes,” then the MAA applies.<sup>65</sup> If Esports are “media and entertainment,” then the TAA applies.<sup>66</sup> Esports could also be something entirely new—perhaps an entity comprised of “influencers” that requires new regulations.<sup>67</sup> The need for new regulations is clear given state legislatures’ unintentional division of athletes in different statutes and the presence of unartfully drafted, conflicting definitions of “athlete.”<sup>68</sup> The industry is changing, and Tfue’s lawsuit finally brought to the forefront the issue of the lack of regulation in the Esports industry

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seen in almost 30 years of practicing law.” (quoting Bryan J. Freedman, attorney for Tfue)).

63. *Id.* (explaining that Tfue’s major concern is that the Gamer Agreement entitles FaZe to millions if the agreement is extended for another three years).

64. Jeremy Evans, *5 Solutions to the Esports Industry Regulation Dilemma*, SPORTS RADIO AM.: SPORTS BUS. (July 7, 2019), <https://sportsradioamerica.com/2019/07/07/5-solutions-to-the-esports-industry-regulation-dilemma/> [<https://perma.cc/J9YB-WCQK>] (opening with the solution of creating a professional gamer’s union, but then quickly dismantling the proposal because unions do not solve all players’ concerns, specifically those of individual athletes because some professional video games are single-player).

65. CAL. BUS. & PROF. CODE § 18895 (West 2017); Evans, *supra* note 64 (stating that attorneys fall in “legislative purgatory” because they will be required to get an agency license, file a disclosure statement, and pay a small fee).

66. CAL. LAB. CODE § 1700 (West 2013); Evans, *supra* note 64.

67. Evans, *supra* note 64 (explaining how the Esports industry is changing traditional entertainment and media industries and proposing a new model in regulation in light of a newly crafted and unique Esports industry).

68. Diane Sudia & Rob Remis, *Athlete Agent Legislation in the New Millennium: State Statutes and the Uniform Athlete Agents Act*, 11 SETON HALL J. SPORT L. 263, 277 (2001) (chastising the vagueness and overbreadth of the statutes, paired with the numerous constitutional defects, which result in statutory loopholes from unartfully drafted language); Rob Remis & Diane Sudia, *Escaping Athlete Agent Statutory Regulation: Loopholes and Constitutional Defectiveness Based on Tri-Parte Classification of Athletes*, 9 SETON HALL J. SPORT L. 1, 3–4 (1999) (harping on the fact that many athlete agent statutes are so poorly drafted that some legislatures purposely limit the scope of the statute to avoid regulating some types of athletes, and that other legislatures inadvertently use terminology that overreaches to different types of athletes).

and the confusing and outdated regulations applicable to a predominantly older industry.<sup>69</sup>

#### A. *Talent Agency Act*

Tfue’s lawyers portrayed Tfue as an artist, not an athlete, zealously advocating that Tfue should be afforded the protection from “raw representation deals” given by California’s TAA.<sup>70</sup> Indeed, the California Courts of Appeal has stated: the TAA “should be liberally construed” to protect agents’ clients.<sup>71</sup>

Tfue claimed his agreement with FaZe violated the TAA by procuring employment for Tfue without a license and allowed FaZe to take “grossly high commissions.”<sup>72</sup> In cases considered by the California Labor Commission where the alleged agent did not have a license, the vast majority of the corresponding agreements were found to be void.<sup>73</sup> In fact, the *Waisbren v. Peppercorn Productions*,

69. Evans, *supra* note 64. *See generally* Joost, *Esports Governance and Its Failures*, MEDIUM (Oct. 16, 2017), <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea> [<https://perma.cc/LYG4-RE75>] (examining the lack of a unified source of governance in creating two other significant issues: the absence of regulations for competitive integrity and the lack of policy concerning a duty of care towards players).

70. Conditt, *supra* note 14 (highlighting that Tfue’s lawsuit is spurring conversation across influencer and Esports spaces). *But see* Tfue (@TTfue), TWITTER (May 2014), [https://twitter.com/TTfue?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/TTfue?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) [<https://perma.cc/PJR8-QUXT>] (highlighting “Professional Athlete” in his biography).

71. *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 441–42 (Ct. App. 1995) (“[T]he Act should be liberally construed to promote the general object sought to be accomplished . . . . To ensure the personal, professional, and financial welfare of artists, the Act strictly regulates a talent agent’s conduct.” (footnotes omitted) (citing *Henning v. Indus. Welfare Com.*, 46 Cal. 3d 1262, 1269 (1988)); David Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 984–85 (2003). The TAA’s purpose is to protect artists from ill-willed representatives, for example:

[I]t prohibits agents from giving their clients false or misleading information concerning employment engagements; from sending them to unsafe places; from allowing “prostitutes, gamblers, [or] intoxicated persons . . . [to] be employed in . . . the place of business of the talent agency”; from arranging unlawful employment for minors; and from splitting fees with the employers who hire their clients.

Zelenski, *supra* (alterations in original) (footnotes omitted) (quoting CAL. LAB. CODE § 1700.35 (West 2013)).

72. Zagger, *supra* note 33.

73. Determination of Controversy at 4, 8, *Beaudoin v. Macalpin*, No. TAC 48086 (Cal. Lab. Comm’n Dec. 11, 2018) (finding invalid and unenforceable an agreement between a popular online

*Inc.* decision stands for the bright-line rule that any unlicensed activity is covered by the TAA.<sup>74</sup> In *Waisbren*, a personal manager brought an action against puppet creators for an alleged breach of an agreement to pay him the right percentage of their profits.<sup>75</sup> Citing the California Entertainment Commission, the court highlighted the simple approach to the regulation of agents and managers: “one either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage . . . in any activity relating to the services which a talent agent is licensed to render.”<sup>76</sup> The court held that the personal manager who procured employment for the artist, even as an incidental portion of his business, was subject to the licensing requirements of the TAA and granted summary judgment for the puppet creators.<sup>77</sup> Looking through the lenses of the *Waisbren* court, surely the absence of FaZe’s license cuts in favor of Tfue’s claim.

If a client’s representative violates the TAA, the client can complain to the Labor Commissioner, who has exclusive authority to hear and resolve disputes unless arbitration is required.<sup>78</sup> In the spirit

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personality—and an aspiring television and motion picture actor—and the manager for failure to procure a license); Determination of Controversy at 9, *Goldsmith v. Klein*, No. TAC 46430 (Cal. Lab. Comm’n May 24, 2018) (finding invalid and unenforceable an oral contract between an actor performing in television shows, commercials, and motion pictures and an unlicensed talent agent); Determination of Controversy at 7, *Johnson v. Healey*, No. TAC 16243 (Cal. Lab. Comm’n Oct. 8, 2018) (finding invalid and unenforceable an endorsement contract between a world-renowned model and an unlicensed talent agency and ordering the talent agency to disgorge amount due); Thoorin, *supra* note 38.

74. 48 Cal. Rptr. 2d at 444; *Gutenkunst*, *supra* note 39, at 120.

75. *Waisbren*, 48 Cal. Rptr. 2d at 437.

76. *Id.* at 444. The California legislature created the California Entertainment Commission in 1982 to study the laws of California, New York, and other key entertainment cities in relation to licensing of agents of artists in the entertainment industry to recommend a model bill regarding licensing. *Id.* at 442–43.

77. *Id.* at 437.

78. CAL. LAB. CODE § 1700.44(a) (West 2013) (“In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo.”); *Zelenski*, *supra* note 71. *See generally* *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (holding that the Federal Arbitration Act preempts the TAA and reversing and remanding the California Court of Appeal’s decision to deny arbitration and grant personnel in the motion picture–television industries’ motion to stay action pending proceedings before Labor Commissioner).

of the policy behind the TAA, California law provides a remedy where any “unlicensed person’s contract with an artist to provide the services of a talent agent is illegal and void.”<sup>79</sup> If viewed in this light by a court, Tfue’s contract with FaZe could be declared illegal and void. FaZe’s lawyers opposed Tfue’s claims, arguing alongside other managers that the Labor Commissioner had wrongfully disgorged or negotiated away payments to managers, which were estimated to cost the profession more than half a billion dollars.<sup>80</sup>

Under the TAA, a talent agent or agency engages in procuring employment for an artist.<sup>81</sup> Additionally, the TAA defines “artist” as follows:

[A]ctors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and *other entertainment*

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79. *Styne v. Stevens*, 26 P.3d 343, 349 (Cal. 2001) (“The Act is remedial; its purpose is to protect artists seeking professional employment from the abuses of talent agencies.” (first citing *Waisbren*, 48 Cal. Rptr. 2d at 437; and then citing *Buchwald v. Superior Ct.*, 62 Cal. Rptr. 364 (Ct. App. 1967))); *Buchwald*, 62 Cal. Rptr. at 367 (holding that contracts of the members of a professional musical group and an unlicensed talent manager were entitled to relief, and annulling orders of the superior court); *Waisbren*, 48 Cal. Rptr. 2d at 437; *Gutenkunst*, *supra* note 39, at 118.

80. *See generally* Nat’l Conf. of Pers. Managers, Inc. v. Brown, 690 F. App’x 461, 461 (9th Cir. 2017) (granting a motion to dismiss by holding in part that the TAA did not violate due process or the Commerce Clause and did not implicate the First Amendment); *Showbiz Personal Managers Say Talent Agencies Act Unconstitutional*, DEADLINE (Nov. 13, 2012, 2:05 PM), <https://deadline.com/2012/11/showbiz-personal-managers-say-talent-agencies-act-unconstitutional-371031/> [<https://perma.cc/8SLW-MSKL>].

81. CAL. LAB. CODE LAB. § 1700.4(a) (West 2013). The statute provides as follows:

“Talent agency” means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

*Id.*; *see also* Zelenski, *supra* note 71, at 985.

*enterprises.*”<sup>82</sup>

This catchall provision under the decades-old statute’s definition of “artist” plays a key point in classifying Tfuue as an artist or athlete, thus determining the applicable law.

A string of California cases provides some insight into entities violating the TAA and how courts have handled such violations. In *Marathon Entertainment, Inc. v. Blasi*, Marathon sued Rosa Blasi for breach of contract and sought recovery of unpaid commissions.<sup>83</sup> Blasi argued that Marathon procured employment as an unregistered talent agent in violation of the TAA.<sup>84</sup> The labor commissioner concluded that “any person who procures employment—any individual, any corporation, any manager—is a talent agency subject to regulation” and that Marathon violated the TAA because it failed to secure a license and thus “voided the parties’ contract *ab initio* and barred Marathon from recovery.”<sup>85</sup>

In *Parapluiie, Inc. v. Mills*, the plaintiff acted as the defendant’s representative and secured her a number of opportunities, including appearances on the *Larry King Show* and the *Celebrity Apprentice*, a

82. LAB. § 1700.4(b) (emphasis added).

83. 174 P.3d 741, 744 (Cal. 2008). The court characterized their relationship as follows:

In 1998, Marathon and Blasi entered into an oral contract for Marathon to serve as Blasi’s personal manager. Marathon was to counsel Blasi and promote her career; in exchange, Blasi was to pay Marathon 15 percent of her earnings from entertainment employment obtained during the course of the contract. During the ensuing three years, Blasi’s professional appearances included a role in a film, *Noriega: God’s Favorite* (Industry Entertainment 2000), and a lead role as Dr. Luisa Delgado on the television series *Strong Medicine*.

*Id.*

84. *Id.*; Determination of Controversy at 5, *Blasi v. Marathon Ent., Inc.*, No. TAC 15-03 (Cal. Lab. Comm’n Jan. 30, 2004) (arguing that a California corporation individually procured an audition, appearances on talk shows, and acting roles for an actress).

85. *Marathon Ent.*, 174 P.3d at 744, 747. The Labor Commissioner stated:

In sum, petitioners have proved that respondents procured or attempted to procure work for petitioners through contacting casting directors, sending out demo tapes of petitioner Blasi, submitting petitioner Blasi for certain roles as an actress, and securing auditions in plays and appearances on talk shows. Respondents, however, have not met their burden of proving that each one of these engagements was requested by Bressler-Kelly and done in conjunction with Bressler-Kelly. Consequently, respondents are in violation of the Act.

Determination of Controversy, *supra* note 84, at 7.

deal with TrimSpa, deals with PSDI USA and Gemini Fragrances, the chance to be a judge for the Miss USA pageant, and guest appearances on the daytime drama *Days of Our Lives*.<sup>86</sup> The defendant argued that the plaintiff was not a licensed talent agent, and the plaintiff conceded this point but defended on the grounds that the defendant was not an artist.<sup>87</sup> The court concluded that the defendant was an artist under the broad language of the TAA, specifically the clause covering “*other entertainment enterprises*.”<sup>88</sup> Thus, the court found that the TAA did apply to the contract in dispute and granted the defendant’s motion for summary judgment.<sup>89</sup>

*Marathon* and *Mills* provide a framework to guide a consideration of the Gamer Agreement at the heart of Tfue’s relationship with FaZe. The Gamer Agreement is similar to the endorsement contract at issue in *Marathon*, and the broad interpretation of the definition of “artist” in the statute would seem to include professional gamers under the broad language of “*other entertainment enterprises*.” Further, the consistent entertainment value and notoriety of Tfue’s employment with FaZe rise at least to the artistic level of the variety of entertainment “odd jobs” secured by the talent agency for the defendant in *Mills*. FaZe’s lack of compliance in obtaining a license would thus likely lead a court to “void[] the parties’ contract *ab initio*.”<sup>90</sup>

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86. No. CV 11-02548, 2012 WL 12887556, at \*3, \*14 (C.D. Cal. Apr. 30, 2012).

87. *Id.* at \*13 (“Plaintiff does not dispute that neither it nor Blanchard are licensed. It contends, however, that Heather is not an ‘artist’ within the meaning of the TAA, and that the statute therefore does not apply.” (citing CAL. LAB. CODE § 1700.5 (West 2013))).

88. *Id.* at \*14 & n.78 (emphasis added) (“Heather testified that she did not consider herself an ‘actor,’ but a ‘TV presenter.’ . . . Her characterization of her work is *not dispositive*, however, and the statute’s broad definition of artist appears to encompass a ‘TV presenter’ as well.” (emphasis added) (citation omitted)).

89. *Id.* at \*16.

90. *Marathon Ent.*, 174 P.3d at 744. The following actions provide an example of a contract voided *ab initio*:

After obtaining a stay of the action, Blasi filed a petition with the Labor Commissioner alleging that Marathon had violated the Act by soliciting and procuring employment for Blasi without a talent agency license. The Labor Commissioner agreed. The Commissioner found Marathon had procured various engagements for Blasi, including a role in the television series *Strong Medicine*. Concluding that one or more acts of solicitation and procurement by Marathon

### B. Miller-Ayala Athlete Agents Act

Alternatively, Tfue's lawyers could have chosen to present Tfue as an athlete to access the protections of the MAA.<sup>91</sup> The MAA became effective January 1, 1997.<sup>92</sup> In support of the MAA, California Assembly Member Gary Miller compared "sports agents to drug dealers who prey on kids."<sup>93</sup>

The MAA's restrictions on athlete agents are more stringent than those placed on talent agents by the TAA.<sup>94</sup> The MAA broadly defines an "athlete agent" but fails to define what an athlete is.<sup>95</sup> In addition, the MAA quickly sets forth that an "athlete agent" does not include a talent agency.<sup>96</sup> The closest definition provided to clarify what an athlete is, with respect to professional sports, states that it is one who has "employment as a professional athlete," including both endorsement and professional services contracts.<sup>97</sup> Further, the MAA defines "endorsement contract" as an agreement where a person is employed because of "publicity, reputation, fame, or *following obtained because of athletic ability or performance.*"<sup>98</sup>

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violated the Act, the Commissioner voided the parties' contract *ab initio* and barred Marathon from recovery.

*Id.* (footnote omitted).

91. Conditt, *supra* note 14.

92. CAL. BUS. & PROF. CODE § 18895 (West 2017).

93. Baker, *supra* note 41, at 267.

94. Maryn Oyoung, *Chapter 63: Renegotiating the Role of Athlete Agents*, 43 MCGEORGE L. REV. 528, 529 (2012).

95. CAL. BUS. & PROF. CODE § 18895.2(b)(1) (West 2017). The statute provides:

"Athlete agent" means any person who, directly or indirectly, recruits or solicits an athlete to enter into any agent contract, endorsement contract, financial services contract, or professional sports services contract, or for compensation procures, offers, promises, attempts, or negotiates to obtain employment for any person with a professional sports team or organization or as a professional athlete.

*Id.*; see also Baker, *supra* note 41, at 272; Smith, *supra* note 43.

96. BUS. & PROF. § 18895.2(b)(2)(C) ("Athlete agent" also does not include a talent agency . . .").

97. BUS. & PROF. § 18895.2(c) ("Employment as a professional athlete" includes employment pursuant to an endorsement contract or a professional sports services contract."); Oyoung, *supra* note 94.

98. BUS. & PROF. § 18895.2(d) (emphasis added) ("Endorsement contract" means any contract or agreement pursuant to which a person is employed or receives remuneration for any value or utility that the person may have because of publicity, reputation, fame, or following obtained because of athletic ability or performance.").

In *Fighters Inc. v. Electronic Arts Inc.*, a dispute arose when Electronic Arts (EA) used professional boxers' images in a video game after the group of boxers signed a group licensing agreement with Fighters.<sup>99</sup> EA argued that the agreement was invalid because (1) Fighters did not comply with the requirements of the MAA, (2) Fighters qualified as an "athlete agent" based on interactions with professional boxers, and (3) the use of their images qualified as an endorsement contract.<sup>100</sup> The court declined Fighters' motion for preliminary injunction, stating that "because Fighters is arguably constrained by the requirements of the Miller Ayala Act, the Agreement's validity remains unclear at this stage."<sup>101</sup>

The *Fighters* case provides a comparison for Tfue's Gamer Agreement with FaZe. A clear reading of the Agreement demonstrates it is similar to both the licensing agreement at issue in *Fighters* and an endorsement contract as defined in the MAA. Thus, following the Court's reasoning in *Fighters*, FaZe would similarly be found in jeopardy of not complying with the MAA's strict requirements, and the Gamer Agreement could be declared void and unenforceable.

Interestingly, soon after the passage of the MAA, the National Collegiate Athletic Association and others from the National Conference of Commissioners of Uniform State Laws drafted a model law regulating athlete agents.<sup>102</sup> The model legislation became

99. No. CV 09-06389, 2009 WL 10699504, at \*3–4 (C.D. Cal. Oct. 30, 2009).

100. *Id.* at \*3.

101. *Id.* at \*4.

102. Baker, *supra* note 41, at 271; *Athlete Agents Act*, UNIF. L. COMM'N, [uniformlaws.org/committees/community-home?CommunityKey=cef8ae71-2f7b-4404-9af5-309bb70e861e](https://uniformlaws.org/committees/community-home?CommunityKey=cef8ae71-2f7b-4404-9af5-309bb70e861e) [https://perma.cc/2CYU-7VPK]. The Uniform Law Commission produced the following statement with regard to the legislation adopted by many states besides California:

The Revised Uniform Athlete Agents Act (RUAAA) is an update of the Uniform Athlete Agents Act of 2000, which has been enacted in 42 states. The 2000 Act governs relations among student athletes, athlete agents, and educational institutions, protecting the interests of student athletes and academic institutions by regulating the activities of athlete agents. The Revised Act was promulgated in 2015 and makes numerous changes to the original act, including expanding the definition of "athlete agent" and "student athlete"; providing for reciprocal registration between states; adding new requirements to the signing of an agency contract; and expanding notification requirements. The RUAAA was amended in 2019 to allow student



known as the Uniform Athlete Agents Act (UAAA); currently thirty-nine states have adopted the UAAA.<sup>103</sup> California opted not to formally adopt the UAAA, choosing instead what some have called a “draconian system of regulating and penalizing” athlete agents.<sup>104</sup> California’s choice, like that of the few other nonadoptive states, has played an enabling hand in the confusing and conflicting definitions, classifications, regulations, prohibited conduct, and possible penalties between the various statutes governing athletes and their agents.<sup>105</sup>

### C. Overall Gamer Agreement

FaZe and Tfue’s relationship soured just a year after entering into the Gamer Agreement. The split gave rise to three lawsuits: (1) Tfue’s action before the California Labor Commissioner arguing that the Agreement was void under the TAA, (2) Tfue’s action in California Superior Court arguing the Agreement was void *ab initio* under the MAA, and (3) FaZe’s lawsuit in the U.S. District Court for the Southern District of New York asserting four causes of action for breach of the Agreement and five related tort and quasi-contract claims.<sup>106</sup>

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athletes more freedom and flexibility when choosing between entering a professional draft or continuing their collegiate education.

*Athlete Agents Act, supra.*

103. Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807; Chris Deubert, *What’s a “Clean” Agent to Do? The Case for a Cause of Action Against a Player’s Association*, 18 JEFFREY S. MOORAD SPORTS L.J. 1, 5 (2011).

104. Baker, *supra* note 41, at 299; Smith, *supra* note 43.

105. Deubert, *supra* note 103.

106. FaZe Clan Inc. v. Tenney, 467 F. Supp. 3d 180, 183–84 (S.D.N.Y. 2020). With regard to Tfue’s first action, the Southern District of New York stated that the “merits of Tenney’s TAA claims are not properly before this Court [because] California law designates the [California Labor Commission] as the original tribunal for all TAA claims.” *Id.* at 186. One of FaZe’s causes of actions was for unjust enrichment. *Id.* at 194. Tfue moved for conditional summary judgment in his favor arguing that a declaration that the Gamer Agreement was void under the TAA would “also bar FaZe Clan from recovering under a theory of unjust enrichment.” *Id.* (arguing that “the policy rationale of the TAA is so strong that the statute forbids unlicensed talent agents from recovering from their clients either in contract or in quasi-contract” (citing *Yoo v. Robi*, 24 Cal. Rptr. 3d 740 (Ct. App. 2005))). The court disagreed and pointed to the narrow reading of this point in *Marathon Entertainment* where the Supreme Court of California found that the TAA permits partial recovery for an unlicensed talent agency operating in violation of the statute. *Id.* at 194 (citing *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008)). Thus, the court denied Tfue’s motion for summary judgment on this claim. *Id.*

FaZe brought claims under New York law against Tfue for breach of contract, intentional interference with contract, tortious interference with prospective business advantage, and unjust enrichment.<sup>107</sup> Tfue counterclaimed and asserted defenses under the TAA.<sup>108</sup> The parties filed cross-motions for summary judgment.<sup>109</sup>

Tfue's chief complaint about his contract with FaZe was that the "representatives of esports players . . . need to be regulated much like the agents of film and TV stars."<sup>110</sup> The Gamer Agreement was originally created April 27, 2018, and was to last for six months, with an automatic extension for an additional thirty-six months provided Tfue met certain conditions.<sup>111</sup> FaZe could elect to extend the contract at its sole discretion and could increase or decrease Tfue's salary by as much as 25%.<sup>112</sup>

Tfue accused FaZe of unlawfully acting as his agent and brought to light whether gamers should be entitled to the same agent protections as actors and artists in the traditional entertainment industry.<sup>113</sup> Tfue claimed FaZe collected up to 80% of the revenue from third parties and prevented him from signing lucrative sponsorships.<sup>114</sup> Further, he claimed that the agreement was both "grossly oppressive, onerous, and one-sided" and unjust because Tfue was the artist performing the services and his celebrity status

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107. *Id.* at 180.

108. *Id.*

109. *Id.*

110. Michael Hassall, *Tfue Hits FaZe Clan with Lawsuit*, UPCOMER (May 20, 2019), <https://old.upcomer.com/fortnite/story/1418257/tfue-faze-clan-lawsuit> [<https://perma.cc/ZZ8E-V8N7>].

111. *Tfue's Contract*, *supra* note 62. The Agreement states:

[I]nitial Term of this Agreement shall be six (6) months from the Effective Date ("Term"). At the end of the Term, and notwithstanding anything to the contrary set forth in this Agreement (including the T&Cs), . . . (this) Agreement shall be automatically extended for an additional thirty-six (36) months, provided the following conditions have been met[:] Play on the Team, which includes participating in tournaments and training sessions with the Team and representing the Team, including at events arranged by Company or where Company decides to participate, and provide publicity and promotional services as required by Company.

*Id.*

112. McCann, *supra* note 36.

113. Zagger, *supra* note 33.

114. Conditt, *supra* note 14.

was the primary draw to the profitable endorsements.<sup>115</sup> Tfue’s complaint stressed that Esports players “perform, act, direct and edit their videos and then stream those videos” in a similar fashion to artists and that FaZe has rejected some sponsorship deals due to a glaring conflict of interest.<sup>116</sup> Tfue and his lawyers described the Gamer Agreement and the terms within as unconscionable and in violation of laws governing artists or athlete representation.<sup>117</sup>

FaZe swiftly denied the allegations and claimed it had only received \$60,000 from the Gamer Agreement and had not collected any money from Tfue’s online tournament winnings.<sup>118</sup> FaZe also asserted that Tfue voluntarily and lawfully signed the Gamer Agreement at a legal age—which will be a key argument in FaZe’s defense.<sup>119</sup> California courts, like most, are wary of calling contracts unfair, and Tfue’s formal complaint exemplified this reality by failing to include a cause of action that claimed the contract was unconscionable.<sup>120</sup>

The Gamer Agreement required Tfue to strictly adhere to many different terms such as playing in tournaments and training sessions, using three days a month for “publicity and promotional services,” wearing FaZe clothing and merchandise associated with sponsors, participating in social media campaigns, and representing FaZe

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115. *Id.*; McCann, *supra* note 36.

116. McCann, *supra* note 36. Consider the following description:

Tenney’s complaint asserts that he created and performed in a video for sponsor Digital Storm, a manufacturer of gaming computers. The video garnered over [nineteen] million views, but Tenney insists without accompanying financial gain to him. Tenney charges that FaZe Clan has unlawfully retained payments that should have been paid to Tenney. . . . This purported deal would have been with HyperX, makers of headsets and headphones. Tenney claims that FaZe Clan “passed on the sponsorship deal” because it “perceived that HyperX was a competitor of another sponsor that did business with FaZe Clan.” Tenney argues that in passing on the deal, “FaZe Clan knowingly acted against Tenney’s interest by preventing third-parties from helping Tenney source sponsorship deals.”

*Id.* (quoting Complaint, *supra* note 36, at 12).

117. Zagger, *supra* note 33.

118. Conditt, *supra* note 14.

119. McCann, *supra* note 36.

120. Thoorin, *supra* note 38.

exclusively within the industry.<sup>121</sup> In return, FaZe would pay Tfue \$2,000 per month as a fixed fee and claim 50% of Tfue’s creator code income, 80% from brand deals brought to Tfue by FaZe, and 50% from brand deals brought to FaZe by Tfue (despite the fact that Tfue himself brought in the deal).<sup>122</sup>

Even more restrictive, the exclusivity period following lawful termination of the Gamer Agreement, if elected, allowed FaZe to automatically exercise exclusive rights to Tfue’s services in a manner similar to the past restricted free agency in the National Football League.<sup>123</sup> Further, if the parties did not strike a deal during the exclusivity period and Tfue signed with another team, FaZe could still match the offer.<sup>124</sup> Tfue could only sign with another team after two full months without any type of restriction from FaZe.<sup>125</sup> Finally,

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121. McCann, *supra* note 36.

122. *Tfue’s Contract*, *supra* note 62 (“In the gaming industry, ‘creator code income’ can be astronomical. . . . [S]ources say Tfue’s income is pushing \$10 million dollars per year.”). Also, the “contract states that FaZe will pay Tfue ‘\$2,000 per month’ as a fixed fee, plus ‘[a]ll other income (including, but not limited to, salaries, earnings, fees, royalties, bonuses, share of profits, and gifts, etc.) generated in connection with Gamer’s Services (whether individually or as part of the Team).” *Id.*; *FaZe Clan Inc. v. Tenney*, 467 F. Supp. 3d 180, 183–84 (S.D.N.Y. 2020). The Southern District of New York considered whether the Gamer Agreement obligated Tfue to split this revenue with FaZe. *FaZe Clan*, 467 F. Supp. 3d at 189 (finding the term “in-game merchandise” vague and the definition of “in-game/sticker” . . . totally unhelpful in discerning its meaning” and therefore looking to extraneous evidence to determine the parties’ intent). The court concluded that Tfue introduced overwhelming evidence that the parties, prior to litigation, did not intend the term “in-game merchandise” to encompass Tfue’s sales through the Support-A-Creator Program. *Id.* Thus, this evidence raised a genuine factual dispute as to whether the parties intended the Gamer Agreement to cover the revenue stream, warranting denial of FaZe’s motion for summary judgment. *Id.* at 190.

123. *See FaZe Clan*, 467 F. Supp. 3d at 192. The Agreement provides:

[If] Gamer receives an offer from another “Fortnite” team to join such team upon lawful termination of the Agreement by Gamer (“Offer”), Gamer shall be obligated to provide the Offer to Company and the identity of the party providing the Offer, and Company shall have the right to match such Offer during a period of fifteen (15) business days following Company’s actual receipt of the Offer (the “Matching Right”). If Company elects to exercise the Matching Right, Company shall inform Gamer within said fifteen (15) business day period, and Company shall, automatically have exclusive rights to Gamer’s services on the same terms as the Offer, as supplemented by all of the terms and conditions of the Agreement.

*Tfue’s Contract*, *supra* note 62.

124. McCann, *supra* note 36.

125. *Id.*

if FaZe fired Tfue for a material breach, Tfue would be forced to sit idle for six months and not play video games professionally.<sup>126</sup>

The Southern District of New York denied FaZe's motion for summary judgment against Tfue's counterclaims and defenses under the MAA.<sup>127</sup>

Evident by the Gamer Agreement's terms, the Esports industry-norm contract needs to be shredded, and the relationship between professional gamers and organizations needs to be reevaluated.<sup>128</sup> Esports is a growing industry and is in the midst of creating structure, and Tfue's lawsuit started to pave the way into forcing Esports companies into regulatory schemes similar to ones governing traditional artists and talent agencies.<sup>129</sup> Ultimately, FaZe and Tfue settled the lawsuit.

#### D. Gamer Agreement Compared to Traditional Sports and Modeling

Tfue's lawsuit and his Gamer Agreement with FaZe highlight how fascinating the sports law field is and the interesting changes currently happening with the explosion of Esports.<sup>130</sup> For top-tier professional gamers, video games are more than just a hobby or pastime—to some it is a source of livelihood.<sup>131</sup> Some may be

126. *Tfue's Contract*, *supra* note 62 (“In the event of termination for a Gamer Material Breach, Gamer shall be prohibited from playing video games publicly (on-line or in live tournaments) or professionally for a period of six (6) months from the effective date of such termination.”).

127. *FaZe Clan*, 467 F. Supp. 3d at 187 (finding that the restrictions mentioned *supra* “fall within the ambit of [the MAA]”).

128. Thoorin, *supra* note 38.

129. Tricia Gorman, *Online Gamer Fights Allegedly Exploitive Esports Contract*, 37 WESTLAW J. COMPUT. & INTERNET 12, 12 (2019); Thoorin, *supra* note 38. Recently, Tfue and FaZe settled their lawsuit. Julia Alexander, *Tfue Settles Lawsuit Against FaZe Clan over 'Oppressive' Gaming Contract*, THE VERGE (Aug. 26, 2020, 5:08 PM), <https://www.theverge.com/2020/8/26/21403052/tfue-faze-clan-lawsuit-settled-streaming-events-competition-esports> [<https://perma.cc/ZJP2-ZVMK>]. See generally *FaZe Clan Inc. v. Tenney*, 19-CV-7200, 2020 WL 4597321 (S.D.N.Y. Mar. 9, 2020).

130. Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 JEFFREY S. MOORAD SPORTS L.J. 11, 44 (1994).

131. Hannah Dwan, *What Are Esports? A Beginner's Guide*, TELEGRAPH (Oct. 18, 2017, 1:15 PM), <https://www.telegraph.co.uk/gaming/guides/esports-beginners-guide/> [<https://perma.cc/8J6M-76X8>]. On other fronts, Derek Micheau's varsity-level scholarship for the nation's first varsity Esports team to play *League of Legends* also suggests considering him as a traditional athlete. Rianne Coale, *If You Don't Think Pro Gamers Are Athletes, Consider This*, CHI. TRIB. (June 21, 2016, 2:59 PM),

hesitant to place professional gamers in the same category as baseball or football stars, but there are “many factors supporting such a classification.”<sup>132</sup> Esports tournaments are frequently held in traditional sports venues and receive coverage from major sports television networks.<sup>133</sup> These major cable networks such as TBS and ESPN broadcast matches of video games including *StarCraft* and *Counter-Strike: Global Offensive*.<sup>134</sup>

Tfue’s position with regard to FaZe displays the major tension in the sports industry today: young, naïve gamers potentially worth millions must “wade through a pool of sports agents who, like barracudas, swarm the athlete and use any means necessary to sap just a little bit of that athlete’s economic lifeblood for their own benefit.”<sup>135</sup> However, these agents would be out of business in the world of professional sports before the 1970s because of the “Soviet

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<https://www.chicagotribune.com/redeye/redeye-esports-athlete-chicago-video-games-20160616-story.html> [https://perma.cc/XSD5-LAES].

132. Coale, *supra* note 131 (“Our interest isn’t going away and will continue to grow as eSports continues to grow . . . . We recognize the fact that there is an audience there. You’ll continue to see us making progressive and incremental moves and our interest intensify in the future.” (quoting John Lasker, ESPN Vice President of Programming and Acquisitions)); Maryanne Kline, *The Thrill of a Visa, the Agony of Denial: Visa Challenges for the Esports Athlete*, NAT’L L. REV. (Feb. 22, 2019), <https://www.natlawreview.com/article/thrill-visa-agony-denial-visa-challenges-esports-athlete> [https://perma.cc/4ZXX-8ZEV].

133. Jacob Wolf, *League of Legends to Be Broadcast on ESPN+*, ESPN: ESPORTS (May 24, 2018), [https://www.espn.com/esports/story/\\_/id/23597723/league-legends-broadcast-espn](https://www.espn.com/esports/story/_/id/23597723/league-legends-broadcast-espn) [https://perma.cc/6H6C-KH9G]; Kline, *supra* note 132 (“For example, the League of Legends Championship has been held at Madison Square Garden and the Staples Center and has been broadcast by ESPN.”).

134. Basim Usmani, *Is It Time for eSports Gamers to Be Recognised As Athletes?*, THE GUARDIAN (June 8, 2016, 6:00 PM), <https://www.theguardian.com/technology/2016/jun/08/esports-pro-video-gamers-recognised-athletes> [https://perma.cc/JJ53-2PU9]. Esports viewership is on the rise:

While there have been scant studies about the popularity of eSports versus traditional televised sporting events among young people, there’s no reason to believe eSports won’t grow in viewership. Super Smash Bros Melee came out in 2001, but the largest Super Smash Bros Melee tournament ever is taking place this July at Evo 2016. Last year, the Evo stream for Super Smash Bros Melee broke the 200,000 viewer mark, setting a new record for concurrent viewers at a fighting game event.

*Id.*

135. Brian Charles Lea, Note, *Sports Are Big Business, So Stop Playing Games: Why Federal Regulation Should Require Every Sports Agent to Possess a J.D.*, 1 J. ENT. & SPORTS L. 20, 21 (2009).

model” used by teams where “a player became . . . property . . . for as long as the team desired.”<sup>136</sup>

The reserve clause cemented in the Tfue’s Gamer Agreement is reminiscent of a similar clause in Curt Flood’s lawsuit against the Major League Baseball.<sup>137</sup> Flood argued that the reserve clause essentially equated players to property and, in so arguing, set in motion the process that “would lead to freedom of career choice and bargaining power for professional athletes in all leagues,” but the Supreme Court ruled against him.<sup>138</sup> Flood’s case paved the way for Peter Seiz’s arbitration case, where Seiz relied on Flood’s same arguments and successfully brought about free agency in baseball.<sup>139</sup> Almost half a century later, and in a context few would have imagined at the time, Tfue’s reserve clause draws on those same sentiments to illuminate how FaZe prevented deals on his behalf.<sup>140</sup> Tfue also asserted that the restraints embedded in the Gamer Agreement denied him the opportunity to seek his own deals and fully profit from the use of his name, image, and likeness—an argument similar to the one raised in Ed O’Bannon’s lawsuit against the NCAA.<sup>141</sup>

In addition, the U.S. government has shown a willingness to recognize gamers as athletes in the traditional sense. Esports

136. *Id.* at 23.

137. Flood v. Kuhn, 407 U.S. 258, 258 (1972). The reserve system is depicted as follows:

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days. He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

*Id.* at 289 (Marshall, J., dissenting) (footnote omitted); see also McCann, *supra* note 36.

138. Lea, *supra* note 135, at 23 n.19 (“[Flood] helped usher in a new era that allowed the players to exercise greater control of their careers and to share in the owners’ economic prosperity.” (quoting BRAD SNYDER, A WELL-PAID SLAVE 349 (2006) (alteration in original))). Also, Flood, “the talented centerfielder for the St. Louis Cardinals baseball team,” refused to be traded and chose to give up a couple of years of playing rather than be traded against his will. *Id.* at 23; Flood, 407 U.S. at 266; McCann, *supra* note 36.

139. McCann, *supra* note 36.

140. *Id.*

141. *Id.* See generally O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049 (9th Cir. 2015).

“athletes” are permitted to enter the United States on business visitor and athlete visas due to the parallels drawn to traditional sports.<sup>142</sup> The United States Citizenship and Immigration Services (USCIS) approved an athlete visa for an Esports competitor for the first time in 2013, which expanded the category for nontraditional athletes.<sup>143</sup> The USCIS has total discretion to determine what types of activities and competitors fall within the visa criteria because neither “sport” nor “athlete” is clearly defined.<sup>144</sup> The USCIS has demonstrated a “willingness to expand the meaning of ‘athlete’” beyond traditional sports by weighing the components of fine-tune motor controls and mental dexterity rather than the physical conditions in traditional sports.<sup>145</sup> In addition, over 117,000 signatures supported a petition urging that the term “athlete” includes Esports competitors in response to the denial of a Swedish competitor’s visa because *Super Smash Brothers Melee* was not considered a legitimate sport by the U.S. government.<sup>146</sup> After the outcry, the USCIS changed its mind and approved the visa.<sup>147</sup>

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142. Kline, *supra* note 132. The article highlights the following:

P visa policy for athletes is somewhat fragmented and can be found in a number of sources including statutes, regulations, and the Foreign Affairs Manual. . . . And USCIS has demonstrated a willingness to expand the meaning of “athlete” beyond traditional sports, allowing individuals whose competitions involve mental dexterity (as opposed to physical) to be classified as athletes. The P-1A classification applies to individuals coming to the United States temporarily to perform as athletes at an internationally recognized level of performance, with provisions for both amateur and professional athletes. Petitions for an internationally recognized athlete must include documentation of at least two evidentiary criteria, and major esports athletes seem well-positioned to satisfy these criteria. Examples include evidence of having participated to a significant extent in international competition with a national team, or a written statement from a member of the sports media detailing how an applicant or team is internationally recognized.

*Id.* (footnotes omitted).

143. *Id.* (“The first competitive esports player to obtain a P-1 visa was Canadian Danny Shiptur, a well-known competitor of the game League of Legends, a multiplayer battle arena game. He was followed by Korean Kim Dong-hwan, known for his skilled play of StarCraft II, a science fiction strategy game.” (footnotes omitted)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*



Unlike traditional sports, it remains unclear whether Esports professionals are employees or independent contractors.<sup>148</sup> Neither legislation nor court decisions have given clear answers, and the Esports industry lacks a formal union that other traditional sports have to effectively advocate for players.<sup>149</sup> The difference between the two is an important consideration in contracts for Esports professionals because employee status can provide many benefits, including collective bargaining rights.<sup>150</sup> The major difference between being an employee and an independent contractor is that “[i]ndependent contractors are free from supervision, direction, and control in the performance of their duties” and work for themselves.<sup>151</sup> The key question in analyzing the two is the suspected

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148. Hunter A. Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional ESports Players*, 22 WASH. & LEE J.C.R. & SOC. JUST. 359, 362 (2016). Esports has failed to unionize:

Currently, players have not attempted to form a collective bargaining unit and the NLRB has not asserted jurisdiction over eSports. There is no guarantee that the LCS, after learning of the potential for a collective bargaining action, will not stop providing payment (in an attempt to eliminate the employee relationship) or dissolve altogether. However, by embracing the employee status of professional employees, the LCS can further legitimize itself as an actual sport. This, in turn, would likely bring more potential players into League of Legends (increasing the game’s profitability) while also bringing more viewers to LCS events.

*Id.* at 408 (footnote omitted).

149. Ariel Sodomsky, Note, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 273 (2014). Other industries have unions to protect their people:

In addition to legislation, another idea is to create a union for models like those that exist in other areas of the entertainment industry, such as for actors and directors. By having an organization looking out for the models’ best interests, it would be much more difficult for agencies to take advantage of the models, and even if the agencies tried to take advantage, it would be much more difficult for the agencies to get away with it. A large issue within the industry is that models stay silent about indiscretions committed against them. A union is one way to make models feel more comfortable talking about these transgressions, as the models would know that they have an organization standing behind them and protecting them.

*Id.* at 301 (footnote omitted).

150. See 29 U.S.C. § 157 (granting employees the right to collectively bargain without restraint); Bayliss, *supra* note 148. See generally Nicholas C. Daly, *Amateur Hour Is Over: Time for College Athletes to Clock In Under the FLSA*, 37 GA. ST. U. L. REV. 471 (2021), for an excellent look into the importance of employee status in relation to college athletes.

151. Sodomsky, *supra* note 149, at 287 (alteration in original).

employer's ability to control the supposed employee by looking at the manner and means by which the work is performed.<sup>152</sup>

The language of the Gamer Agreement indicated that Tfuë is an independent contractor for FaZe, but California law may recognize him as an employee.<sup>153</sup> In hopes that California law will recognize him as an employee, Tfuë views his relationship with FaZe as one between a “client artist and a talent agency.”<sup>154</sup> Tfuë is not the only one—many early contracts for Esports teams try to categorize the players as independent contractors, which is likely a misclassification.<sup>155</sup> FaZe attempted to blur the lines of its relationship with Tfuë by treating him like an employee while acting as his agent, putting behavioral standards on him, placing financial limitations on him, paying him a salary, and claiming exclusivity on sponsorships; the whole tangled web of problems further justifies voiding the Gamer Agreement.<sup>156</sup> Despite the strong argument for classifying Esports professionals as employees rather than

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152. Bayliss, *supra* note 148, at 386–87 (“Though evidence of economic control is not per se proof of the control necessary to show an employee-employer relationship, the economic realities of the parties must not be overlooked. . . . Further, control over manner and means of performance is also a difficult matter to determine.” (footnotes omitted)); *see also* Johnson v. VCG-IS, LLC, No. 30-2015-00802813, 2019 WL 1245311, at \*1 (Cal. Super. Ct. 2019); Tony Marks, *The California Supreme Court Deals a Blow to Independent Contractors*, FORBES (May 29, 2018, 8:16 PM), <https://www.forbes.com/sites/tonymarks/2018/05/29/the-california-supreme-court-deals-a-blow-to-independent-contractors/?sh=752eaafa70a1> [<https://perma.cc/7YHF-B57T>]. The Supreme Court of California adopted a new standard that presumes that workers qualify as employees instead of contractors:

Under the newly adopted “ABC test,” a worker is an independent contractor to whom a wage order does not apply only if the hiring entity establishes *all* of the following: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Marks, *supra*.

153. McCann, *supra* note 36.

154. *Id.*

155. MICHAEL D. SCOTT, SCOTT ON MULTIMEDIA LAW § 24.13 (4th ed. 2020) (“Even under normal employment analysis, a contract that requires an esports athlete to live in a house with his/her teammates, practice full-time, and participate in competitions and travel to events at the whim of the team owner would constitute an employment agreement regardless of what it is labeled.”).

156. Thoorin, *supra* note 38.

independent contractors, the industry may have never expanded by starting with employees because, in the early days, it would not have been economically feasible to pay gamers an employee salary for one niche video game in the context of the entire Esports industry.<sup>157</sup> However, as a seasoned player, Tfue “is performing work within the usual course of FaZe Clan’s business” to support a classification of employee.<sup>158</sup>

### III. PROPOSAL

Esports, once on the periphery of the gaming culture, has erupted in popularity in recent years and does not seem to be slowing down in the years to come.<sup>159</sup> Following the traditional sports’ playbook, Esports events attract enormous audiences, comparable to top-tier sporting events by catering to a “desirable, content hungry youth[ful] demographic that advertisers find appealing.”<sup>160</sup> Unfortunately,

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157. *Id.*

158. McCann, *supra* note 36. *But see* FaZe Clan Inc. v. Tenney, 467 F. Supp. 3d 180, 188 (S.D.N.Y. 2020) (“Tenny was not FaZe Clan’s employee.”). The court based its classification of Tfue as an independent contractor on the language of the Gamer Agreement itself. *Id.*

159. TROST ET AL., *supra* note 23 (“Major eSports events attract audiences that rival some of the world’s great[est] sporting events.”); SCOTT, *supra* note 155 (“While many are still struggling with the value of playing videogames, the industry is largely announcing that esports have ‘finally hit the mainstream . . . .’”); Megan Lovell, *Esports Revenues to Reach \$1B—Huge Opportunities for IT Vendors, Especially in Education*, FUTURESOURCE CONSULTING (June 5, 2019), <https://www.futuresource-consulting.com/insights/esports-revenues-to-reach-1b-huge-opportunities-for-it-vendors-especially-in-education/?locale=en> [<https://perma.cc/5RNH-QCJS>] (“Major competitions such as the Intel Extreme Masters already attract more than a hundred thousand spectators, and millions of fans follow esports broadcasts on streaming channels like Twitch. . . . [O]verall esports industry revenues are set to exceed \$900 million this year, with an 18% 2019–2023 CAGR expected, driving revenues through the billion-dollar mark in 2020 and onto \$1.8 billion by 2023.”); Smith, *supra* note 4 (“Esports have a growing, dedicated following . . . that is poised to surpass \$1 billion this year, representing 27% . . . year-over-year growth in valuation and more than double its sub-\$500 million valuation in 2016.”).

160. TROST ET AL., *supra* note 23; *see also* Steven T. Taylor, *Young but Experienced: Attorney Brings Skills & Esports Knowledge to LA Firm*, 36 OF COUNS.: LEGAL PRAC. & MGMT REP. 19, 22 (2017) (“It’s very interesting and fun for me to help individuals who are so passionate about the new frontier in sports and are *not only redefining how to define athletes but redefining sports*, how sports are consumed, how consumers interact with sports figures.” (emphasis added) (quoting Esports attorney Aaron Swerdlow)). In addition, Esports is already a \$1 billion industry and soon will be a multibillion-dollar-a-year industry. Taylor, *supra*, at 20; TROST ET AL., *supra* note 23 (“[Esports is a] rapidly growing form of entertainment, driven in part by the growing provenance of online gaming and online broadcasting

Esports remains widely fragmented in terms of industry-norm contracts, the utter lack of regulation of the industry, and most importantly, the ambiguous statutory scheme that fogs the classification of professional gamers as athletes, artists, or something anew.<sup>161</sup> Therefore, California’s legislature or the U.S. Congress remain responsible for preventing the ethereal foundations of the Esports industry from collapsing and dissolving a new citadel of sport—professional gaming.<sup>162</sup> By dismantling the pros from the cons of the TAA and MAA, legislatures can craft new Esports-specific legislation to account for this *sui generis* industry and allow it to function to its fullest potential.

Half a century later, the Labor Commissioner repeatedly uses outdated reasoning from the first cases interpreting the TAA despite the evolving entertainment industry giving rise to new and exciting creative minds. The TAA and MAA give no clear answers as to whether professional gamers are professional athletes, artists, or something anew. In addition, neither legislation, executive orders, nor court decisions have paved a path to sound reasoning, which could cause this confusion to persist for decades. An influencer- or gamer-specific legislation could give definitive classification to these new, evolving roles in society.<sup>163</sup> By looking at the dismantled pros of the TAA and the MAA, legislatures can effectively craft a law that makes sense for professional gamers, encompassed by the role of influencers in all industries.

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technologies. . . . [C]ommercial opportunity . . . has led to a significant influx of investment capital . . .”).

161. Stark & Walkowiak, *supra* note 22 (“Perhaps no game—or more accurately collection of games—is harder to regulate than esports.”); Thoorin, *supra* note 38.

162. Stark & Walkowiak, *supra* note 22.

163. Sodomsky, *supra* note 149, at 297–98. An example of specific legislation:

[T]he best solution may be to create model-specific legislation to govern the diverse and complex relationships within the modeling industry. . . . By having an organization looking out for the models’ best interests, it would be much more difficult for agencies to take advantage of the models, and even if the agencies tried to take advantage, it would be much more difficult for the agencies to get away with it. . . . While working to build numbers, the Model Alliance could also try to get more big name models to join them.

*Id.* at 297–302.

Four decades ago, California's legislature designed rules tailored to protect Hollywood talent from atrocious impulses in the entertainment and media industry.<sup>164</sup> This harsh industry, where a single misstep can be punished, implores creative talent and their representatives to venture through a jungle of various employment and service opportunities.<sup>165</sup> The TAA has been on the books since 1978—with its roots entrenched in earlier Hollywood days—and is now at the front and center of heightened controversy between artists and agents.<sup>166</sup> Although formulated in good faith to protect artists from capitalizing agents, the TAA's current state benefits artists who use the Act as a tool to repudiate now undesirable contracts.<sup>167</sup>

Legislatures and courts have grappled with the TAA's harshness, and the legislature amended the TAA in 1982 with sunset provisions.<sup>168</sup> Courts have also bowed down to the exclusive authority of the Labor Commissioner in analyzing these contracts and have avoided overruling any of the Commissioner's decisions.<sup>169</sup>

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164. David Ng, *The Latest Wrinkle in the Writer-Agent War: A State Law Widely Seen As Outdated*, L.A. TIMES (Apr. 30, 2019, 8:30 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-talent-agencies-act-20190430-story.html> [<https://perma.cc/2TBF-G76X>] (“Although the statute was initially intended to protect the weak, some experts say it now gives agents a captive client base, enthroneing them in positions of impregnable power.”).

165. *Id.*

166. *Id.*

167. Keith Warren & Ryan Wechsler, “*An Offer California Can’t Refuse*”: *How an Efficient and Adaptable Framework Can Improve Remedies Under the Talent Agency Act and Correct the Issues with Its Interpretation*, 21 UCLA ENT. L. REV. 79, 93 (2014).

168. CAL. LAB. CODE § 1700.44(c)–(d) (West 2013); *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 753 (Cal. 2008); Warren & Wechsler, *supra* note 167, at 89 (“[T]he Legislature amended the TAA in 1982 by imposing a one-year statute of limitations, eliminating criminal sanctions for violations, and establishing a ‘safe harbor’ for managers to procure employment when acting in conjunction with a licensed agent.” (footnotes omitted) (quoting LAB. § 1700.44(d))).

169. LAB. § 1700.44; Warren & Wechsler, *supra* note 167, at 94. The Labor Commissioner has exclusive jurisdiction to resolve disputes that arise under the TAA. *Id.* The Labor Commissioner's jurisdiction is limited by section 1700.45, which allows the parties to arbitrate the contract in limited circumstances. CAL. LAB. CODE § 1700.45 (West 2013); *see also Marathon Ent.*, 174 P.3d at 753. The Supreme Court of California summarized:

We recognize, however, that in more recent decisions, the Labor Commissioner has expressly adopted the position Blasi advocates: severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license. . . . [T]he Labor Commissioner's assessment of the legislative history and case law is mistaken . . . . We are thus unpersuaded and decline to follow the Labor Commissioner's interpretation.

Thus, the Labor Commissioner maintains impregnable power to strip away earnings from agents.<sup>170</sup> Contrary to the TAA’s original purpose, artists fail to “employ the TAA as a shield” to ensure the protections originally contemplated by the legislature and instead use the TAA as a sword to strike down contracts—hopelessly leaving agents to the mercy of artist-wielded swords.<sup>171</sup>

This proposed legislation should change and adapt the statutory text in the TAA’s definition of “artist” to account for professional gamers and ultimately influencers by more appropriately defining “other entertainment enterprises.”<sup>172</sup> This would avoid the problems the TAA is currently struggling with by revising outdated language. In light of the fierce war between artist and agent, scholars on both sides believe “the application . . . feels outdated.”<sup>173</sup> Surely, the drafters of the TAA meant well in providing the catch-all provision in defining “artist”; but did they anticipate the booming industry of Esports in light of almost half-century-old technology?<sup>174</sup> Decisions throughout the past half century appear bent on maintaining the TAA’s purpose when analyzing differing creative talent as artists or not.<sup>175</sup> Historically, California’s Labor Commission has held that a

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*Marathon Ent.*, 174 P.3d at 754 (citations omitted).

170. Warren & Wechsler, *supra* note 167, at 96.

171. *Id.* at 93–94, 96.

172. *See supra* Section II.A.

173. Ng, *supra* note 164 (“The laws were put in place to protect talent from being abused and taken advantage of . . . It’s the *application that feels outdated.*” (emphasis added) (quoting New York entertainment attorney Jason Boyarski).

174. CAL. LAB. CODE § 1700.4 (West 2013). The statute provides:

“Artists” means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and *other entertainment enterprises.*

*Id.* (emphasis added).

175. Determination of Controversy at 6, *Bluestein v. Prod. Arts Mgmt.*, TAC 24–98 (Cal. Lab. Comm’n Nov. 3, 1999). The Commission stated:

Occasionally assisting in shot location or stepping in as a second director as described by petitioner, does not rise to the creative level required of an “artist” as intended by the drafters. Virtually all line producers or production managers engage in de minimis levels of creativity. There must be more than incidental creative input. The individual must be primarily engaged in or make a significant showing of a creative contribution

person is an “artist” when the professional services are *creative in nature*; despite this open-ended formula, the Labor Commissioner limits this inquiry when the services are in connection with an entertainment enterprise.<sup>176</sup> In *American First Run v. OMNI Entertainment Group*, the Labor Commissioner did not believe the legislature intended for such a “radically far-reaching result” and thus imposed this limitation.<sup>177</sup> Therefore, conflicting views enshroud the TAA’s definition of “artist” in a heavy veil of fog most likely not applicable to professional gamers.

Further, license requirements should be removed to eliminate the ambiguity in procuring employment for professional gamers by a manager, agent, or someone on similar footing—this distinguishes the chilling effect on lawyers who do not have an agency license. Many agents feel the TAA is overly vague in different statutory sections in defining various moving parts and players in the entertainment industry.<sup>178</sup> Specifically, the TAA’s definition of “procurement” remains unclear and leaves agents, at best, to guess what activities are determined to be procurement.<sup>179</sup>

This ambiguity has long haunted entertainers’ agents, especially with the possible hard-hitting penalties for violating the TAA, with

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to the production to be afforded the protection of the Act. We do not feel budget management falls within these parameters.

*Id.*; see also Warren & Wechsler, *supra* note 167, at 107.

176. Determination of Controversy at 4, Patchett v. DLM LA, Inc., TAC 47367 (Cal. Lab. Comm’n Oct. 18, 2018).

177. Order Dismissing Petition to Determine Controversy at 5, Am. First Run v. OMNI Ent. Grp., TAC 32–95 (Cal. Lab. Comm’n Apr. 8, 1996) (cleaned up); Determination of Controversy, *supra* note 176, at 4 (“Without such a limitation, virtually every ‘person rendering professional services’ connected with an entertainment project . . . would fall within the definition of ‘artists.’”).

178. Richard Busch, *Walking on the California Talent Agency Act’s Thin Ice: Personal Managers Beware!*, FORBES (Mar. 25, 2013, 11:19 AM), <https://www.forbes.com/sites/richardbusch/2013/03/25/walking-on-the-california-talent-agency-acts-thin-ice-personal-managers-beware/#101dc3f7609f> [https://perma.cc/9K7D-6UMP].

179. *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 750 (Cal. 2008). The Supreme Court of California has noted:

We note we are not called on to decide, and do not decide, what precisely constitutes “procurement” . . . . The Act contains no definition, and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist’s career and which stray across the line to illicit procurement.

*Id.*

even a minor infraction resulting in losses of past and future earnings and cancellation of the contract.<sup>180</sup> The confusion may result in a chilling effect on the work of agents, deterring them from doing customary work for their artists due to the fear of severe consequences.<sup>181</sup> Scholars estimate that the California Labor Commission has canceled over \$250 million in personal management commissions for such violations, and the *Waisbren* court seems to support this finding: “the most effective weapon for assuring compliance with the Act is the power . . . to . . . declare any contract entered into between the parties void from the inception.”<sup>182</sup> Removing the license requirement in the new statute would help everyone involved in the industry by removing the possibilities of severe sanctions and fines.

Unlike the trend of the Labor Commissioner and previous decisions, the burden of production should also be shifted to the professional gamer or influencer who challenges the contract. In past decisions, the burden of proof seemed to be placed on the agent, with the artist contesting the contract receiving a favorable attitude from the Labor Commissioner. “Under federal evidence law and the common law of contracts, the party attempting to void a contract generally bears the burden of showing the court that the contract should indeed be voided.”<sup>183</sup> Further, every affirmative defense to a contract’s enforceability places the burden on the challenging party.<sup>184</sup> In addition, when viewing the contract, the Labor

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180. See, e.g., *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 90, 92 (Ct. App. 2007); *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 751 (Ct. App. 2005); *Park v. Deftones*, 71 Cal. App. 4th 1465, 1465 (1999); *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 438–40 (Ct. App. 1995); *Busch*, *supra* note 178.

181. See generally *Busch*, *supra* note 178.

182. *Waisbren*, 48 Cal. Rptr. 2d at 446–47 (quoting CAL. ENT. COMM’N, REPORT TO LEGISLATURE AND GOVERNOR ON THE TALENT AGENCIES ACT 17 (1985)); see also *Busch*, *supra* note 178.

183. *Warren & Wechsler*, *supra* note 167, at 107.

184. *Id.* at 107 n.187. Examples of affirmative defenses include:

For example, the party asserting the affirmative defense of impossibility bears the burden of proving a real impossibility and not a mere inconvenience or unexpected difficulty. . . . Further, the burden of proof for the affirmative defense of unconscionability is on the party claiming the contract is unconscionable. . . . In terms of the affirmative defense of fraud, courts have held a fundamental essential to a valid defense of fraud is that the defendant must show that it relied on the alleged



Commissioner should determine the main purpose of the contract. If the main purpose of the contract is not to engage in illegal procurement, the Labor Commissioner should, in light of the *Marathon* decision, use the doctrine of severability to prevent unjust enrichment.<sup>185</sup> These new requirements for the piece of legislation would greatly alleviate the strain between agents and professional gamers, and “contracts under this suggestion would be less likely to be voided in their entirety.”<sup>186</sup>

On the MAA front, the harsh criminal penalties should be eliminated in the new legislation to avoid deterring agents from procuring deals for professional gamers. The new legislation should also account for a definition of “athlete” that the MAA so heedlessly ignored. This would rectify the disastrous problems the MAA created initially when it replaced prior law and repealed several sections of California’s Labor Code.<sup>187</sup> Under prior law, the Labor Commissioner played an important role similar to the one it played under the TAA; the provision required athlete agents to register with the Labor Commissioner.<sup>188</sup> Unlike the TAA, the MAA imposes an enhanced and harsh system of not only civil liability but also criminal liability for slight violations of the statute.<sup>189</sup> Further, these harsh

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misrepresentation. . . . The burden was on the defendant to prove that element. . . . Duress and undue influence are affirmative defenses which may invalidate a contract, and the defendant bears the burden of proof to establish them.

*Id.* (citations omitted).

185. *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008) (“In deciding whether severance is available, we have explained ‘[t]he overarching inquiry is whether “the interests of justice . . . would be furthered” by severance.’” (alteration in original) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000))). The court went further in explaining the interests of justice:

Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

*Id.* (quoting *Armendariz*, 6 P.3d at 696).

186. Warren & Wechsler, *supra* note 167, at 110.

187. Baker, *supra* note 41.

188. CAL. LAB. CODE § 1510 (repealed 1996).

189. CAL. BUS. & PROF. CODE § 18897.8 (West 2017). The statute provides:

Any professional athlete, or any student athlete, or any elementary or secondary school, college, university, or other educational institution, or any league, conference,

penalties include a minimum \$50,000 civil penalty or misdemeanor carrying up to a year in county jail.<sup>190</sup> Additionally, the prevailing party may recover punitive damages, court costs, and reasonable attorneys' fees.<sup>191</sup> Despite these harsh penalties, there is no doubt in passing the MAA that the California legislature acted in good faith to protect athletes, and new legislation should follow in its good-faith footsteps when eliminating these harsh criminal penalties.<sup>192</sup>

This amendment or new legislation should also relinquish its death grip on the practice of law for attorneys in California. The benefit of this piece of legislation would be to encourage attorneys to become influencer agents without worrying about grueling statutory requirements like licenses. In doing so, the new legislation would avoid problems seen in the MAA. Incidental to any good-faith effort shown by the legislature, the MAA brought under its ambit rules governing the practice of law in California.<sup>193</sup> The MAA required any licensed agent to post either an insurance policy or \$100,000 in collateral that cuts in favor of securing judgments by athletes versus agents.<sup>194</sup> Why should attorneys post any collateral to practice law? The entry fee of \$100,000 of liquid net worth is unnecessary and was

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association, or federation of the preceding educational institutions, or any other person may bring a civil action for recovery of damages from an athlete agent, if that professional athlete, that student athlete, that institution, any member of that league, conference, association, or federation, or that other person is adversely affected by the acts of the athlete agent or of the athlete agent's representative or employee in violation of this chapter.

*Id.*; CAL. BUS. & PROF. CODE § 18897.93(a) (West 2017). The statute also provides:

An athlete agent or athlete agent's representative or employee who violates any provision of this chapter is guilty of a misdemeanor, and shall be punished by a fine of not more than fifty thousand dollars (\$50,000), or imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

BUS. & PROF. § 18897.93(a); Baker, *supra* note 41.

190. BUS. & PROF. § 18897.93(a).

191. BUS. & PROF. § 18897.8(b) ("A plaintiff that prevails in a civil action brought under this section may recover actual damages, or fifty thousand dollars (\$50,000), whichever is higher; punitive damages; court costs; and reasonable attorney's fees.").

192. Baker, *supra* note 41, at 278.

193. *Id.*

194. BUS. & PROF. § 18897.87(a) ("A policy or policies of insurance against liability imposed on or against the agent by law for damages arising out of claims in an amount for each claim of at least one hundred thousand dollars (\$100,000)."); Baker, *supra* note 41.

put in place by a special interest that has resulted in a chilling effect, discouraging attorneys from becoming athlete agents and entrusting the field to “less scrupulous, unlicensed persons.”<sup>195</sup>

In addition, the new legislation needs to provide a thorough definition of “athlete” to help guide courts in determining if an influencer is an athlete, artist, or a combination thereof. This would benefit both sides of influencer contracts and eliminate ambiguity in determining what type of conflicting law applies by establishing a benchmark definition to refer to when analyzing influencer contracts. This would also avoid ambiguities evident in the MAA. Most troublesome, the MAA fails to define what an “athlete” is.<sup>196</sup> Further, California failed to adopt the UAAA and relies on a “draconian system of regulating and penalizing” athlete agents.<sup>197</sup> California and the MAA have sanctioned the complicated and unsettled area of defining, classifying, regulating, and penalizing athletes, their agents, and the relationship between the athletes and their agents.<sup>198</sup>

Overall, after redefining “artist” and finally defining “athlete,” the legislation should account for a combination of characteristics and traits that allude to both an artist and an athlete to account for professional gamers’ unique, creative content making, and to allow for a flexible framework for future creative content makers.

## CONCLUSION

The Esports industry is experiencing rapid growth, and it is certainly an exciting and pivotal time to be involved in the Esports market.<sup>199</sup> California law is ill-fitted to the Esports industry and gives

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195. Baker, *supra* note 41, at 279.

196. *See supra* Section I.B.

197. Baker, *supra* note 41, at 299; Smith, *supra* note 43.

198. Deubert, *supra* note 103, at 4.

199. Kyle Kenny, *How Visa Issues Combined with Recent Franchising Agreements Effect Current Esports Players and the Future Landscape of Esports*, PENN. ST. U. J.L. & INT’L AFFS.: BLOG (Oct. 30, 2018), <https://sites.psu.edu/jlia/1256-2/> [<https://perma.cc/7338-2CFW>] (“At its current growth rate, the esports industry is poised to rival, if not surpass traditional sports in viewership and player rate.”); Jay Massaad, *Report: Esports to Be Worth Almost \$2b by 2022*, ESPORTS INSIDER (Oct. 18, 2017), <http://www.esportsinsider.com/2017/10/report-esports-worth-almost-2b-2022/> [<https://perma.cc/Y7MC->

no clear answers in classifying professional gamers as athletes, artists, or something else. Video games and the Esports industry have been misunderstood for a long period of time, and now those unfamiliar with the industry are uncertain of how old laws govern the skyrocketing industry. Is Esports a sport, or is it some sort of entertainment activity, like going to the movies?

It is up to California's legislature or the U.S. Congress to enact new, unique legislation to put an end to this debate. By enacting new influencer- or gamer-specific legislation, professional gamers and agents can better understand their relationship and enjoy the protections afforded to other creative minds in the entertainment industry. The combination of factors from the TAA and the MAA asserted in this Note provides a worthy framework in drafting new legislation without frustrating the overall purpose of the two acts. Overall, California's legislature must assert its authority and voice to implement new legislation for a unique, complex industry to allow it to function to its fullest potential. After all, Esports participants are far from the "perpetuated stereotype of video games being played by overweight teenagers huddled in dark basements"—they account for the global revenue of Esports' predicted value of \$1.1 billion in 2020, up 26% from 2018.<sup>200</sup> It is time they start being treated as a valuable part of the American workforce.

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200. See Holden et al., *supra* note 7.