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PRE-GAME STRATEGY FOR LONG-TERM WIN: USING TRADEMARK REGISTRATION AND RIGHT OF PUBLICITY TO PROTECT ESPORTS GAMERS

*John C. Bat**

The global electronic sports (“esports”) industry is likely to cross the one-billion-dollar threshold in total revenue in 2019, according to a Newzoo market report.¹ Video games, once considered a unique, modern way to pass the time for hobbyists and bored teenagers, are no longer defined by the home-user, couch-potato stereotype. In pre-COVID-19 society, video games were responsible for filling entire sports arenas.² Today, passionate fans purchase tickets to watch elite esports gamers compete to win, whether that be live in person or virtual. Many esports fans stream competitions online, similar to how football fans watch the NFL on their computers or televisions on Sunday.³

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¹ Hillary Russ, *Global Esports Revenues to Top \$1 Billion in 2019: Report*, REUTERS (Feb. 12, 2019), <https://www.reuters.com/article/us-videogames-outlook/global-esports-revenues-to-top-1-billion-in-2019-report-idUSKCN1Q11XY>.

² Roy Koenig, *E-sports Fans Fill Arenas to Watch People Play Video Games*, AM1390 KRFO (July 19, 2016), <https://krforadio.com/e-sports-fans-fill-arenas-to-watch-people-play-video-games/>.

³ *Esports Viewership vs. Sports in 2019*, ROUNDHILL INV. (Sept. 25, 2020), <https://www.roundhillinvestments.com/research/esports/esports-viewership-vs-sports>; see *With Viewership and Revenue Booming, Esports Set to Compete with Traditional Sports*, SYRACUSE U., <https://onlinegrad.syracuse.edu/blog/esports-to-compete-with-traditional->

During times of quarantine and mass cancellations due to the novel COVID-19 virus, unlike traditional sports, esports proliferated and grew to new heights of popularity.⁴ At one point in time, they were the only live sports broadcast to the world.⁵ In recent years, esports has caused a radical shift in competitive gaming from cozy living rooms and colorful online communities to a mainstream, star-studded entertainment complex that is now, more than ever, being recognized by the largest sports media organizations across the world.⁶

A mainstream debut comes with its moment of reckoning, posing the burning question: is it really a sport? Many gamers believe so, but there is still disagreement.⁷ Ultimately, what a society deems to be a “sport” is a matter of cultural construct.⁸ Some competitive gamers do not even like the name “esports,” but whatever one calls it, the similarities between esports and traditional sports exceeds the differences. In 2020, sports observers could not help but notice how sports journalists, TV networks, and streaming platforms throughout the world quickly pivoted and vied to provide best coverage of esports competition, similar to that live-action gameplay of a football or basketball game. ESPN has dedicated in-depth coverage to esports.⁹ During the COVID-19 shutdown in the US, ESPN broadcast in live simulcast a series of competitive esports game play for world viewers to see.¹⁰ Some of these broadcasts were more serious than others with actual furloughed NBA and MLB players taking over the controllers and competing against other well-known athletes on games, such as *The Show* and *NBA 2K 2020*.¹¹ The message conveyed through the very act of choosing to broadcast esports content on national television rang a truth that many are slowly waking up to: esports are fitting into the groove of what society typically equates with traditional sports.

Colleges now offer scholarships, and the Olympic Committee has even incorporated esports as a major lead-up event to the rescheduled 2020 Summer

sports/ (last visited Oct. 29, 2020) (providing projections that esports is currently and will continue to be a top-streamed sport).

⁴ Amrita Khalid, *ESPN2 is Airing an Esports Marathon Because Covid-19 has Crimped Live Sports*, QUARTZ (Apr. 4, 2020), <https://qz.com/1832674/espn2-airing-esports-marathon-as-coronavirus-crimps-live-sports/>.

⁵ *Id.*

⁶ Michael McTee, *E-sports: More Than Just a Fad*, 10 OKLA. J. L. & TECH. 70 (2014).

⁷ *Is Esports a Sport?*, VIEWSONIC (Aug. 24, 2019), <https://www.viewsonic.com/library/entertainment/is-esports-sport/>.

⁸ *Id.*

⁹ Matt Peckham, *Why ESPN Is So Serious About Covering Esports*, TIME (Mar. 1, 2016), <https://time.com/4241977/espn-esports/>.

¹⁰ Khalid, *supra* note 4.

¹¹ Donovan Russo, *‘Play Ball!’: Pro Athletes Like NBA Star Kevin Durant Turning to Esports During Coronavirus*, CNBC (Apr. 3, 2020), <https://www.cnbc.com/2020/04/03/pro-athletes-turn-to-esports-to-stay-active-during-coronavirus.html>.

Olympics in Tokyo.¹² The gamers who join professional esports teams and leagues to compete for millions of dollars are now signing contracts just like traditional athletes.¹³ Whether or not the gamers are presented with fair terms is a question for the entire esports industry, which is prominently dominated by game developers. Game developers hold the majority of intellectual property rights and control much of the industry's ecosystem.¹⁴ Within the fast-paced money-making environment that currently composes the esports landscape, the gamers responsible for the very competition that draws huge audiences and eyeballs online are acquired in exchange for the chance to compete on a high level. What sometimes happens in the middle of that transaction is a devaluation of a gamer's worth, with terms limiting the ability of gamers to accept advertising and brand opportunities outside of the team's discretion. Reports are now surfacing that suggest lack-luster rights and conditions for esports players, many of whom are young, talented teenagers often pressured to sign contracts with teams.¹⁵ Esports gamers unfamiliar with contract negotiation require greater flexibility for building their own images and brands for potentially long careers. In order to do this, gamers should ask themselves whether they maintain features they wish to preserve now and in the future for marketable ventures. Asking such questions can potentially afford players arrows for their quivers when negotiating and signing deals with teams and leagues. This approach may gradually reset the contracting process between esports gamers and teams, as well as extend longevity and options for gamers to pursue alternative career ventures.

¹² William Collis, *The Real Tokyo Olympics: Esports and the Future of Japanese Soft Power*, JAPAN TIMES (Feb. 5, 2020), <https://www.japantimes.co.jp/opinion/2020/02/15/commentary/japan-commentary/real-tokyo-olympics-esports-future-japanese-soft-power/>; Thomas A. Baker II. & John T. Holden, *College Esports: A Model for NCAA Reform*, 70 S.C. L. REV. 55 (2018).

¹³ See generally Brian O'Connell, *How Much Do eSports Players Make?*, THE STREET (Feb. 12, 2020), <https://www.thestreet.com/personal-finance/how-much-do-esports-players-make-15126931> (explaining the market for professional esports players and the various other ventures that players can capitalize on in order to have successful careers in the industry).

¹⁴ *Copyright in Esports: A Top-Heavy Power Structure, but is it Legally Sound?*, DLA PIPER (Sept. 27, 2008), <https://www.dlapiper.com/en/ireland/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

¹⁵ See Lim Jeong-yeo, *FTC to Probe 'Slave' Contracts of Korean Esports Players*, KOREAN HERALD (Dec. 9, 2019), <http://www.koreaherald.com/view.php?ud=20191209000837> (illustrating the global phenomenon that is unfair contractual systems for many esports gamers, many of whom are just teenagers when they sign their first comprehensive contract; the terms and conditions of such contracts are slowly but surely coming under close scrutiny).

I. ROADMAP

This article identifies existing and future problems with trademarks and personality rights for competitive esports gamers as the industry rapidly grows and evolves. First, this note provides background on the state of the esports industry and how trademarks and intellectual property are situated within the industry as a whole. Second, this note explains two major lines of legal analysis that competitive gamers should consider integrating into their professional goals through, in part, securing trademarkable features. Third, this note provides insights for esports gamers willing to take the necessary steps to protect their images, independent relationships with advertisers, and branding.

Protecting these three main areas can add strength to a gamer's negotiating position, can give competitive gamers control over their own images, and can enable them to effectively communicate with preferred audiences. Overall, this note seeks to persuade competitive gamers that protection of these three main areas is feasible from an early stage in their careers, and that protection of current and future trademarks can be achieved through thoughtful federal registration, licensing, and enforcement.

II. BACKGROUND

Competitive gaming is unlike other forms of sport or entertainment. It is something unique. It is not solely visual. It is not solely auditory. It does not require much physical skill. An enormous amount of strategy is involved in gameplay, both planned strategy and strategy in real-time. Commentators have often referred to esports as a type of mind game, boosting overall cognitive ability.¹⁶

There is a high degree of creativity involved in a gamer's interaction with contemporary video games.¹⁷ In fact, creativity can be necessary if a gamer is serious about winning in a competitive setting.¹⁸ Popular competitive video games, such as *Dota*, *League of Legends*, and *Fortnite*, in which gamers vie against each other in massive tournaments for large sums of money, are nothing to scoff at.¹⁹ Esports tournaments are tremendously popular, even more popular

¹⁶ *Action Games Expand the Brain's Cognitive Abilities, Study Suggests*, SCIENCE DAILY (Dec. 12, 2017), <https://www.sciencedaily.com/releases/2017/12/171212102158.htm>.

¹⁷ Isabela Granic et al., *The Benefits of Playing Video Games*, 69 AM. PSYCHOL. 66, 69 (2014).

¹⁸ Andrew Webster, *Fortnite is Getting a World Cup for Creative Mode, Too*, VERGE (Apr. 18, 2019), <https://www.theverge.com/2019/4/18/18412686/fortnite-world-cup-creative-tournament-esports>.

¹⁹ Noah Higgins-Dunn, *Six-figure Salaries, Million-Dollar Prizes, Health Benefits and Housing Included—Inside the Overwatch League*, CNBC (Sept. 29, 2019),

than most traditionally broadcast entertainment and sports.²⁰ However, the industry remains largely unregulated, and protections for competitive gamers have yet to fully materialize.²¹ The industry has yet to see any significant unionization of players that could collectively advocate for stronger rights, conditions, and leverage over existing power structures.²²

Then sixteen-year-old esports gamer, Kyle Giersdorf, popularly known by the gamer tag “Bugha,” won a \$3 million prize in July 2019.²³ The total prize money in the pot for the entire tournament, which saw upwards of 40 million gamers, was \$30 million.²⁴ In November of 2018, a *League of Legends* tournament attracted 100 million unique viewers, which was more than the Super Bowl during the same year.²⁵ Although the viewership ratings are widely contested, critiques concede that the numbers are impressive in their scope over a short period of time.²⁶ Plans are now underway for Comcast to build the first professional arena dedicated to esports in the US.²⁷ The arena will be located in Philadelphia.²⁸ The owners of major sports teams, including the New England Patriots’ Owner, Robert Kraft, and the Los Angeles Rams’ owners, Stan and Josh Kroenke, have recently committed major financial investments in esports.²⁹

<https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html>.

²⁰ *Esports Viewership vs Traditional Sports: Revenue and Statistics for Investors*, BUS. TEL. (Feb. 17, 2020), <https://www.businesstelegraph.co.uk/esports-viewership-vs-traditional-sports-revenue-and-statistics-for-investors/#respond>.

²¹ See David Hoppe, *The Present State and Uncertain Future of Esports Players’ Unionization in the US*, GAMMA L. (Nov. 25, 2019), <https://gammalaw.com/present-state-and-uncertain-future-of-esports-players-unionization-in-the-us/>; see also Jas Purewal & Isabel Davies, *The eSports Explosion*, LANDSLIDE MAG. (Nov. & Dec. 2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/ (stating that the esports is largely unregulated and highly self-regulated).

²² Hoppe, *supra* note 21.

²³ Mary Hanbury, *This 16-year-old Gamer is \$3 Million Richer After Winning the Fortnite World Cup*, BUS. INSIDER (July 29, 2019), <https://www.businessinsider.com/16-year-old-kyle-giersdorf-wins-3-million-in-fortnite-world-cup-2019-7>.

²⁴ *Id.*

²⁵ Annie Pei, *This Esports Giant Draws in More Viewers Than the Super Bowl, and It’s Expected to Get Even Bigger*, CNBC (Apr. 14, 2019), <https://www.cnbc.com/2019/04/14/league-of-legends-gets-more-viewers-than-super-bowlwhats-coming-next.html>.

²⁶ See generally Cecilia D’Anastasio, *Shady Numbers and Bad Business: Inside the Esports Bubble*, KOTAKU (May 23, 2019), <https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843> (discussing esports ratings are high now and may continue to grow in the future, but there are reasons to doubt how high the ratings truly are).

²⁷ Julie Veloz, *The Growth of Esports and the Sponsorship Opportunities for Tomorrow’s Brands*, FORBES (July 2, 2019), <https://www.forbes.com/sites/forbesagency-council/2019/07/02/the-growth-of-esports-%C2%AD%C2%ADand-the-sponsorship-opportunities-for-tomorrows-brands/#7e0c19b6e119>.

²⁸ *Id.*

²⁹ Higgins-Dunn, *supra* note 19.

High schools and colleges currently offer both intramural and competitive esports teams for students.³⁰

Just one decade ago, collegiate esports scholarships were not being offered by colleges. Then came Robert Morris University in 2014. The university claims that it was the first college in the US to offer an esports scholarship.³¹ Robert Morris University's trailblazing attitude was before its time. The university's decision to offer esports scholarships for the first time in US history is illustrative of how quickly esports has become equated in various settings with other competitive sports. Such an advancement was fueled largely by improvements in technology and investment growth relating to video games.³² The university's decision, without a doubt, began a trend. By 2018, over \$12 million in scholarship opportunities was offered at over 200 colleges throughout the US to aspiring professional gamers.³³

The state of the industry is one of expected and undeniable growth, especially with millennials and Generation Z'ers figuratively cutting the cable cord and opting for digital streaming.³⁴ What the gaming world looks like today reveals how far it has come since William Higinbotham's 1958 invention of the analog-driven *Tennis for Two*.³⁵ Known as one of the world's first video games, *Tennis for Two* was created by Higinbotham by applying mathematical calculations to electricity within an analog vacuum tube computer.³⁶ The result of these precise calculations allowed Higinbotham to modulate the tube within the computer to simulate arch-like movements.³⁷

Today, younger audiences' familiarities and preferences for platforms like Twitch and YouTube have fueled the popularity of esports. Such kinds of

³⁰ Brian Seto McGrath, *High School Gamers are Scoring College Scholarships. But Can Esports Make Varsity?*, NBC (Sept. 20, 2019), <https://www.nbcnews.com/tech/video-games/high-school-gamers-are-scoring-college-scholarships-can-esports-make-n1056671>.

³¹ *RMU Becomes First University to Offer Gaming Scholarships with the Addition of eSports to Varsity*, ROBERT MORRIS U. ILL. (June 11, 2014), <https://www.rmueagles.com/article/907>.

³² Jill Chanen, *Esports Growth Brings Investment Surge and Expanding Revenue Sources, Along with New Challenges, Survey Finds*, FOLEY & LARDNER (Nov. 12, 2019), <https://www.foley.com/en/insights/news/2019/11/esports-growth-expanding-revenue-survey-finds>.

³³ Rebecca Heilwel, *Infoporn: College Esports Players are Cashing in Big*, WIRED (Jan. 21, 2019), <https://www.wired.com/story/infoporn-college-esports-players-cashing-in-big/>.

³⁴ Mike Snider, *Cord-Cutting Isn't Just Happening, It Could Be Escalating*, USA TODAY (June 22, 2018), <https://www.usatoday.com/story/tech/talkingtech/2018/06/22/cord-cutting-isnt-just-increasing-could-escalating/720812002/>.

³⁵ *The First Video Game?*, BROOKHAVEN NAT'L LAB., <https://www.bnl.gov/about/history/firstvideo.php> (last visited Jan. 4, 2021).

³⁶ *Id.*

³⁷ *Id.*

viewership habits have also helped to define the industry's trajectory within the world of streaming, advertising, social media, and broader online interactivity.³⁸ Twitch, an internet-based streaming service owned by Amazon, served as the first mainstream platform for esports, where viewers could livestream competitive gameplay from their favorite content creators.³⁹ Facebook Gaming and YouTube are other rising esports streaming platforms.⁴⁰

In 2019, one of the world's most famous and established gamers, Tyler Blevins, known as "Ninja," said that he would leave Twitch in order to stream with former-platform Mixer.⁴¹ Ninja cited contractual disputes with Twitch.⁴² Specifically, what was at issue in the dispute was the terms and conditions governing Ninja's branding rights.⁴³ Ninja's agent claimed that the decision to leave Twitch for Mixer had nothing to do with the direct salary.⁴⁴ Instead, the decision to depart revolved around Twitch's restrictions on how Ninja could expand his brand through then-existing licensing structures.⁴⁵ Ninja and his agent maintained the viewpoint that licensing freedom was strongly in Ninja's best interest long-term, more so than any salary or payment from one streaming platform.⁴⁶

Such disputes call into question competitive esports gamers' rights at-large within the esports industry. Esports intellectual property ("IP") rights are dominated by software publishers of the specific games; specifically they seek to protect patents and copyrights on novel and useful software designs and art or graphics within any particular popular video game.⁴⁷ The software publishers, who largely dominate the IP landscape for esports, also dominate the means of

³⁸ Benn Popper, *Field of Streams: How Twitch Made Video Games a Spectator Sport*, VERGE (Sept. 30, 2013), <https://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming>.

³⁹ Tiffany Hsu, *Twitch Users Watch Billions of Hours of Video, but the Site Wants to Go Beyond Fortnite*, N. Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/business/media/twitch-twitchcon-ads-redesign.html>.

⁴⁰ Julia Alexander, *What Is Mixer, Ninja's New Exclusive Streaming Home?*, VERGE (Aug. 1, 2019), <https://www.theverge.com/2019/8/1/20750432/mixer-ninja-microsoft-twitch-youtube-streaming-fortnite>.

⁴¹ Matt Kim, *Twitch's Restrictive Contract Drove Ninja to Mixer Deal: Ninja's Manager Cites Unfair Twitch Contract and Toxicity for Move to Mixer.*, IGN (Oct. 2, 2019), <https://www.ign.com/articles/2019/10/02/ninja-twitch-contract-reason-for-leaving-mixer>.

⁴² *Id.*

⁴³ Julia Alexander, *Ninja Left Twitch Because His Brand was Too Big for Gaming*, VERGE (Oct. 4, 2019), <https://www.theverge.com/2019/10/4/20898907/ninja-twitch-contract-mixer-streaming-microsoft-amazon>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Copyright In Esports: A Top-Heavy Power Structure, But Is It Legally Sound?*, *supra* note 14; *see also* Purewal & Davies, *supra* note 21 (discussing generally the intellectual property issues of esports).

competition and its dissemination.⁴⁸ Most publishers sell franchises of their respective games to investors for tens of millions of dollars, and license a prominent majority of professional gameplay to streaming companies.⁴⁹ If publishers do not already own the IP rights for a given video game, the next in line to buy would be major technology companies that have invested in or own streaming services and platforms, which provide for the recording and dissemination of a larger amount of gameplay for both signed and independent gamers.⁵⁰ Ultimately, these technology companies have to answer to the same software developers when acquiring franchise and end-user licenses to broadcast and record gameplay, as well as help grow the success of various competitive enterprises.⁵¹

Regarding the future of digital, as well as physical branding, which is feverishly on the rise within the esports industry, gamers will need to realize the potential of their unique personalities. According to a recent survey by Foley & Lardner and The Esports Observer, which featured more than 200 players and executives, IP rights and licensing matters were cited by 61% of respondents as the issue posing the most legal risk to the industry.⁵² Such personalities originate both in video-game play, such as gamer tags, and in other areas, such as their logos and unique presence on social media.⁵³ Even on traditional cable television, some esports gamers are marketing and broadcasting their marks. For example, the controversial esports personality “Dr. DisRespect” appeared in

⁴⁸ Leonard Langenscheidt, *How Intellectual Property Rights Are Hurting Esports Teams*, ESPORTS OBSERVER (Feb. 22, 2017), <https://esportsobserver.com/how-ip-rights-are-hurting-esports-teams/>.

⁴⁹ Adam Stern, *Is Franchising the Future for Esports?*, SPORTS BUS. J. (Nov. 15, 2019), <https://www.bizjournals.com/losangeles/news/2019/11/15/is-franchising-the-future-for-esports.html>.

⁵⁰ Dean Takahashi, *Quantum Tech: Esports Investing Hit \$1 Billion in 2019, Revenues Could Be \$4 Billion in 2022*, VENTUREBEAT (Jan. 23, 2020), <https://venturebeat.com/2020/01/23/quantum-tech-partners-esports-investments-hit-1-billion-in-2019-revenues-could-hit-4-billion-in-2022/2/>; see Adam Fitch, *Player Contract Illustrates Unfair and Unethical Conditions*, ESPORTS INSIDER (Dec. 17, 2019), <https://esportsinsider.com/2019/12/unfair-player-contract/>.

⁵¹ Aaron D. Lovaas, *Esports: A Whole Different Ball Game*, 26 NEV. LAW. 26, 27 (2018) (discussing how “the [game] publisher owns the entire environment” of intellectual property).

⁵² Milad Momeni, *The Legal Vacuum Within Esports*, THE FORUM (Nov. 19, 2019), <https://pipsself.blogs.pace.edu/2019/11/19/the-legal-vacuum-within-esports/>.

⁵³ See Sam Quirke, *What is a Microsoft Account? A Guide to Setting Up on Xbox*, TRUEACHIEVEMENTS (Dec. 25, 2019), <https://www.trueachievements.com/n39992/sign-up-microsoft-account-xbox-gamertag> (defining a gamertag as a “user name and identity in the Xbox ecosystem”); see also Matthew Hanson, *5 Ways to Build an Audience for Your Twitch Stream*, TOMS HARDWARE (Dec. 20, 2018), <https://www.tomshardware.com/reviews/build-audience-twitch-stream,5943.html> (explaining that to develop as a streamer you have to interact and react to audiences).

December 2019 on “Jimmy Kimmel Live” to market himself.⁵⁴ However, in addition to having the talent, competitive gamers must also become increasingly more brand savvy. Teams are not only looking to win, but they are also looking to generate buzz and attention.⁵⁵ In order to grasp and retain audience attention, mostly online, the competitive gamer must become a formidable force online through harnessing social media platforms.⁵⁶ Gamers frequently take to social media to publicly share clips and snippets of their gameplay, livestreams of their gameplay, photos, reactions to developments within the gaming world, or personal commentary on an array of topics that are related to competitive esports-world culture.⁵⁷ Competitive gamers have more or less become magnetized, whether that be triggered through cultural and social means, to the area of content creation amid gameplay on social media, or through streaming platforms.⁵⁸ And yet, through constrictive contracting, distributors of content can still deny competitive gamers many of the benefits earned from creative endeavors.⁵⁹ It is a power struggle illustrated within an industry that is dependent upon novel and unique content creation generated by the gamers themselves. Without gamer-generated content, the industry lacks the entertaining qualities that support incoming waves of advertising and sponsorship revenue.

Greater levels of trademark registration among competitive gamers would rocket gamers’ pursuits of leveraging their brands during contract negotiations with lucrative esports teams, leagues, and streaming providers. Gamers will need to take a more active stance than they do now in registering trademarks so to extend the lifespan of their professional careers and steer clear of unfair and unreasonable contracts. Although there has been some growing league support,

⁵⁴ Daniel Manso, *Dr. DisRespect Appears on Jimmy Kimmel Live*, GAME RANT (Dec. 14, 2019), <https://gamerant.com/dr-disrespect-jimmy-kimmel-live/>.

⁵⁵ Jeff Yabumoto, *Philadelphia Fusion Marketing Specialist Evan Frasca on Esports Brand Development*, NBC SPORTS (June 11, 2019), <https://www.nbcsports.com/philadelphia/fusion/philadelphia-fusion-marketing-specialist-evan-frasca-esports-brand-development-interview-part>.

⁵⁶ Andie Katschthaler, *ESports Marketing and Social Media Case Study*, WALLS.IO, <https://blog.walls.io/showcases/esports-and-social-media-walls/> (last visited Feb. 26, 2020).

⁵⁷ Hanson, *supra* note 53 (explaining that to develop as a streamer you have to interact and react to audience).

⁵⁸ Richard Yao, *Gaming as a Cultural Force*, IPG MEDIA LAB (Nov. 15, 2018), <https://medium.com/ipg-media-lab/gaming-as-a-cultural-force-dc456f8a41ab>.

⁵⁹ See Aabicus Lee, *The Dangers of Esports Contracts: Don’t Sign Before You Read This*, DAILY ESPORTS (Apr. 21, 2019), <https://www.dailyesports.gg/the-dangers-of-esports-contracts-dont-sign-before-you-read-this/> (showing that despite unfair contract terms, players will likely still sign in order to get a start in the market); see also Michael Long, *Playing the Game: An Insider’s Take On Esports Representation*, SPORTSPRO (July 21, 2017), <https://www.sportspromedia.com/analysis/playing-the-game-an-insiders-take-on-esports-representation> (quoting “go-to” New York esports attorney Ryan Morrison, who stated that “[Gamers] don’t argue for their contracts properly, they don’t ask for more in their contracts, they don’t ask for what they’re supposed to be given.”).

as gamers have claimed themselves, contracts often disproportionality benefit the game developers, tournament hosts, and leagues.⁶⁰ This article attempts to assist competitive gamers by reviewing and explaining the levels and types of value trademarks held in an already-crowded field of IP rights within the esports industry. This article instructs competitive gamers on how to seek trademark protections for their products and features so to acquire additional leverage in negotiating favorable contracts, as well as how to increase their marketable assets and value overall.

III. PRIOR LAW

A. Game Developers Dominate the Majority of all IP Rights in Esports, which Makes Esports a Top-Heavy Legal and Business Structure that has Disproportionately Benefitted from the Value of Competitive Gamers.

Game developers and software companies hold the majority of IP rights, especially the patents and copyrights for esports video games.⁶¹ The majority of the profit generated ends with developers.⁶² The control the developers hold influences how a competitive video game can be marketed, used in tournament play, and developed and expanded for leagues and teams.⁶³ “[Developers], ultimately, get to call the shots about how their games’ ecosystems will be designed because of the constraints of intellectual property . . . [a]nd those choices shape the terrain on which esports’ stakeholders attempt to solve their pipeline problems.”⁶⁴ Developers in the last decade began to sell team franchises for vast sums.⁶⁵ Some team franchises for *League of Legends* have sold for \$50 million and between \$60–80 million per team for the game *Overwatch*,

⁶⁰ See Lee, *supra* note 59 (shining light on the unfair terms and conditions that many teams and leagues present to young and talented competitors who they wish to sign).

⁶¹ See Tori Allen, *What’s In a Game: Collective Management Organizations and Video Game Copyright*, 8 UNLV GAMING L. J. 209, 210–11 (2018) (showing how a game company nearly shut down an esports competition due to intellectual property disagreements).

⁶² *Id.* at 212–13.

⁶³ *Id.* at 211.

⁶⁴ Will Partin, *The Esports Pipeline Problem*, POLYGON (July 11, 2019), <https://www.polygon.com/features/2019/7/11/18632716/esports-amateur-pro-players-teams-talent-process>.

⁶⁵ Miles Yim, *People Are Investing Millions Into League of Legends Franchises. Will the Bet Pay Off?*, WASH. POST. (Nov. 18, 2019), <https://www.washingtonpost.com/video-games/esports/2019/11/18/people-are-investing-millions-into-league-legends-franchises-will-bet-pay-off/>.

according to Forbes.⁶⁶

B. Contracts are the Prominent Legal Arteries Through which Gamers, Leagues, and Teams Create Meaningful Growth, Generate Financial Gain, and Determine the Commercial Rights of Involved Parties.

The law regulating interactions between esports gamers, teams, and streaming companies is comprised mostly of gamer agreements in which teams typically provide the gamer with a percentage commission on profits earned in tournaments, streaming, and advertising; while companies will pay gamers a base sum plus a percentage of streaming revenue.⁶⁷ In a standard gamer agreement, the gamer typically grants the team the right to condition all branding and advertising for the gamer.⁶⁸ The team assumes responsibility for all sponsorships, branding, and advertising for the gamer, and sometimes the team will opt to take a significant portion of the profits from advertising.⁶⁹ Many gamer agreements largely divert independent marketers and advertisers away from negotiating deals with the gamer directly, instead redirecting the advertiser to the team, league, or streaming company contractually bound to the gamer.⁷⁰ The gamer agreement essentially qualifies team or corporate management as the official gatekeeper for the use of images, video, gamertags, logo, or other identifying features of a contracted-with gamer.⁷¹ Because it is possible that a team or streaming company will assume so much of the responsibility for the gamer for all sponsorship, branding, and advertising deals, the effect of the gamer agreement's composition leaves the gamer with little personal autonomy over commercial use of his or her identifiable features.⁷² Whether that includes gamertags and logos under trademark law, or image, likeness, voice, and persona under the right of publicity, team and corporate management priorities can often take central command over the signed gamers.⁷³ The gamer agreements, at least

⁶⁶ Mike Ozanian et al., *The World's Most Valuable Esports Companies*, FORBES (Oct. 23, 2018), <https://www.forbes.com/sites/mikeozanian/2018/10/23/the-worlds-most-valuable-esports-companies-1/#56fac9066a6e>.

⁶⁷ See generally Lydia Mitrevski, *Esports Contracts: The Good, The Bad, and The Ugly*, ESPORTS INSIDER (May 30, 2017), <https://esportsinsider.com/2017/05/esports-contracts-good-bad-ugly/> (discussing issues with gamer contracts resulting from non-lawyers relying on publicly available contract templates found on the internet).

⁶⁸ Andrew Simmons, *Crown Me King Esports Single Sponsored Player Contract*, DOCRACY, <https://www.docracy.com/0vcqbsf49ch/crown-me-king-esports-single-sponsored-player-contract> (last visited Nov. 1, 2019).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See generally *id.* (providing an example of standard gamer contract).

⁷³ See generally Asmar Pekmic, *FaZe Releases Tjeu's Contract, Admits It's Horrible for Gamers*, BLASTING NEWS (May 25, 2019), <https://us.blastingnews.com/gaming/>

in this dimension, look mostly one-sided because they are. They primarily benefit team franchises and streaming platforms and leave gamers with small slices of winnings and advertising revenues with little control over how their creations and recognizable features are exploited.⁷⁴

C. Trademarks Help Gamers Secure Recognition and Verification of their Brands and Establish Favorable Licensing Structures with Franchises and Corporations.

According to the Trademark Act of 1946, better known as the Lanham Act, a trademark is defined as “a word, name, symbol, or device, or any combination thereof” that is “used by a person, or which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act.”⁷⁵

Trademarks are protected through interstate commerce, and do not need to be registered with a state, regional, or federal office for a trademark’s protection to be recognized by the court.⁷⁶ What qualifies as a trademark has over the years been interpreted liberally by the courts, covering a diverse array of works, some as simple as mere color schemes.⁷⁷ The purpose of trademark protection is to protect consumers and owners of trademarks, and to increase competition and transparency between parties about a trademarked work’s origin and quality.⁷⁸ The Lanham Act focuses on the word “distinctiveness” as an essential element for trademark registration.⁷⁹ Distinctiveness means that a person, when shown a trademark, could be able to identify the place or source from which such a service or good originates.⁸⁰ Distinctiveness is the elemental component of a trademark that helps the public differentiate the trademarked good or service from “confusingly similar” goods or services, which if registered get preference from the courts over non-registered or attempted-registered marks that are confusingly similar to the registered mark.⁸¹ Registration also requires goods or

2019/05/faze-releases-tfues-contract-admits-its-horrible-for-gamers-002919365.html
(discussing the horrible aspects of gamer contracts).

⁷⁴ *Id.*

⁷⁵ The Lanham Act, 15 U.S.C. § 1127 (2018).

⁷⁶ § 1127.

⁷⁷ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 173 (1995).

⁷⁸ *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 509 F.3d 380, 381 (7th Cir. 2007).

⁷⁹ § 1127; *see also Zatarain’s, Inc. v. Oak Grove Smoke House, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983) (explaining how while descriptive terms are normally not afforded trademark protection, a descriptive mark with a secondary meaning may be protected).

⁸⁰ § 1127.

⁸¹ *Landers, Frary & Clark v. Universal Cooler Corp.*, 85 F.2d 46, 48 (2d Cir. 1936) (“It has now become settled that a man has established his mark upon one kind of goods may

services to be used in commerce or for the true owner to intend to later inject the goods or services into the stream of commerce.⁸² Applications for current, commercial trademarks require an affidavit or declaration of such use.⁸³ When applying for a trademark with intent to use in commerce, the application does not require an affidavit, but rather a verified statement of bona fide intention.⁸⁴

Even though registration of the trademark is not required to have one's trademark lawfully recognized, there are multiple benefits that come with registration that save trademark registrants time and resources down the line.⁸⁵ According to the United States Patent and Trademark Office (USPTO), benefits of federal registration include:

(1) a legal form of notice to others who might be looking to use the mark or a similar mark; (2) a legal presumption that the registrant is the owner of the trademark, therefore making the requirement of the registrant having to show proof of use unnecessary; (3) a "legal presumption of legal right" for others looking to incorporate the federally registered service or good; (4) a legal permission to use the popularized circled "R" symbol to visually timestamp and mark the good or service as federally registered; (5) a right to bring any infringement action through federal court; and (6) a way of preserving the trademark globally throughout various countries where incorporation of the service or good could begin to flourish.⁸⁶

It is common for trademarks to be registered federally for famous athletes and entertainers.⁸⁷ It is also common for public figures to register a nickname, performance name, or stage name regularly associated with their profession.⁸⁸

In the US, athletes federally register trademarks for their names and nicknames that identify them, their products, and services to the world.⁸⁹ Examples include former NFL player Rob Gronkowski's "GRONK"⁹⁰ and controversial former Texas A&M Quarterback Johnny Manziel's "JOHNNY

prevent another from using it upon another kind, if that be not too foreign to the first.").

⁸² 15 U.S.C. § 1051 (1947).

⁸³ See 37 C.F.R. § 2.20 (2015); see also §§ 2.32(a)(5); see also §§ 2.34(a)(1)(i).

⁸⁴ See §§ 2.20(k)(1); see also §§ 2.32(a)(2), (5).

⁸⁵ Mark Trademan, *Trademark Basics*, USTPO, <https://www.uspto.gov/trademarks-getting-started/trademark-basics> (last visited Nov. 1, 2019).

⁸⁶ *Id.*

⁸⁷ Ahiza Garcia, *Pro Athletes and the Things They Trademark*, CNN (Aug. 20, 2016), <https://money.cnn.com/2016/08/16/news/usain-bolt-business-olympics/index.html>.

⁸⁸ L. Robert Batterman, *Trademark Protection for Nicknames: Will Johnny Be Good, or Will Name Games Go Up in Flames?*, NAT. L. R. (Mar. 9, 2015), <https://www.natlawreview.com/article/trademark-protection-nicknames-will-johnny-be-good-or-will-name-games-go-flames>.

⁸⁹ Garcia, *supra* note 87.

⁹⁰ GRONK, Registration No. 4406416.

FOOTBALL.”⁹¹ Examples of entertainers registering their musical performance, or stage name, for trademark protection, include Melissa Vivianne Jefferson’s “LIZZO”⁹² and Kanye West’s “YEEZY.”⁹³

Trademarks can be established on a state, federal, and international level.⁹⁴ The international level is authorized through the Madrid Protocol, a treaty system that aims to enforce trademark protections across the globe and is managed by the World Intellectual Property Organization’s International Bureau.⁹⁵ In the Madrid Protocol, registrants who believe their trademarked good or service will be used on an international level can attempt to register their trademarks in over 100 participating nation states.⁹⁶ But the protocol must first seek approval of recognition of the trademark within the various trademark legal regimes.⁹⁷

The plaintiff or registrant has the burden of proving the infringement in an infringement claim.⁹⁸ In order to prove infringement, the plaintiff is required to show that there is a protectable mark (which does not mean it has to be registered), maintain ownership of the mark, and show that a likelihood of confusion is caused by the defendant’s use of goods and services.⁹⁹

Trademarked goods and services are a quasi-form of property, which can be transferred and sold through an assignment process.¹⁰⁰ They also can be licensed through commercial transactions and settings.¹⁰¹ This endorsement of the licensing structure is stated in Section 5 of the Lanham Act:

⁹¹ JOHNNY FOOTBALL, Registration No. 5464752.

⁹² U.S. Patent Application No. 88498468 (published April 28, 2020) (Lizzo LLC, applicant).

⁹³ U.S. Patent Application No. 5125895 (published June 24, 2014) (Mascotte Holdings, Inc., applicant).

⁹⁴ Biana Borukhovich, *What Is the Difference Between a State and Federal Trademark?*, N.Y. L. J. (Mar. 15, 2019), <https://www.law.com/newyorklawjournal/2019/03/15/what-is-the-difference-between-a-state-and-federal-trademark/?slreturn=20210201133705>.

⁹⁵ *See Madrid – The International Trademark System*, WIPO, <https://www.wipo.int/madrid/en/> (last visited Oct. 29, 2020); NATION’S RESTAURANT NEWS, YOURS, MINE AND NOT NECESSARILY OURS. . . BRAND PROTECTION ABROAD CAN BE TRICKY, WHILE PRODUCT NAMES SPARK U.S. LEGAL RIFTS (Aug. 2, 2004) (analyzing the effect of the Madrid System, on another industry, the restaurant industry, globally).

⁹⁶ *Madrid Protocol*, U.S. PATENT AND TRADEMARK OFF., <https://www.uspto.gov/trademark/laws-regulations/madrid-protocol> (last visited Nov. 1, 2019).

⁹⁷ *Id.*

⁹⁸ *Am. Home Prods. Corp. v. Barr Labs., Inc.*, 834 F.2d 368, 371 (3d Cir. 1987).

⁹⁹ *Com. Nat’l Ins. Servs., Inc. v. Com. Ins. Agency, Inc.*, 214 F.2d 432, 437 (3d Cir. 2000).

¹⁰⁰ 1 ANNE GILSON LALONDE, *GILSON ON TRADEMARKS*, § 3.11 (Matthew Bender & Co. Inc. eds., 2020); *see Russell Rd. Food & Bev. v. Spencer*, 829 F.3d 1152, 1156 (9th Cir. 2016).

¹⁰¹ 15 U.S.C. § 1055 (1988).

If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be.¹⁰²

The licensing process occurs when the licensor, or trademark holder, permits specified modes of use of the respective good or service to the licensee, or the party seeking to exploit the mark.¹⁰³ Otherwise, a party's use without permission from the trademark registrant or holder could be considered an infringing use.¹⁰⁴ Typically, this license for use of a trademark comes in exchange of a legal consideration of value, which can be a monetary sum, such as a royalty or a performance. It could also be a promise to refrain from using the licensed trademark in specified ways.¹⁰⁵ Licensing trademarks became popular in the 1950s and 1960s with the rise of the franchise, the middle class, and consumer culture.¹⁰⁶ Today, the trademark license is widely respected as a private contractual agreement between parties, typically used by registrants or holders to preserve the identity and reputation of their brands in a profitable manner.¹⁰⁷

D. Corresponding to the Rise of the Internet Marketplace, Trademark Protection Has Been Granted to Internet Identifiers, such as Domain Names, which are Similar to Gamers' Gamertags.

Unique domain names can be registered as trademarks.¹⁰⁸ Legislation in the US supports protection of domain names.¹⁰⁹ In 1999, Congress passed the Anti-Cybersquatting Consumer Protection Act ("ACPA"), which amended the Lanham Act.¹¹⁰ The ACPA prohibits registering domain names for the purpose

¹⁰² § 1055

¹⁰³ Exxon Corp. v. Oxxford Clothes, 109 F.3d 1070, 1076 (5th Cir. 1997).

¹⁰⁴ *Id.*

¹⁰⁵ *Exhibit 10.25 Trademark License Agreement*, SEC, <https://www.sec.gov/Archives/edgar/data/1564902/000119312512515221/d448022dex1025.htm> (last visited Nov. 1, 2019).

¹⁰⁶ 2 ANNE GILSON LALONDE, *GILSON ON TRADEMARKS* § 6.03 (Matthew Bender & Co. Inc. eds., 2020).

¹⁰⁷ *Id.* at § 6.01.

¹⁰⁸ See James Evans, *Domain Names vs. Trademarks*, GOV'T TECH. (Nov. 30, 1996), <https://www.govtech.com/magazines/gt/Domain-Names-vs-Trademarks.html> (explaining the conflict between domain names and trademarks and the process of obtaining a trademarked domain).

¹⁰⁹ See *Protecting Trademarks in Domain Names*, INT'L TRADE ADMIN. (July 25, 2016), <https://www.stopfakes.gov/article?id=Protecting-Trademarks-in-Domain-Names-Rights-Protection-Mechanisms-RPMs-for-Small-Business> (explaining that the expansion and protection of domain names is important to American businesses in order for them to benefit from new opportunities in the digital economy).

¹¹⁰ The Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d) (2018).

of extorting them from persons, corporations, or organizations who have recognizable trademarks.¹¹¹ Before the ACPA, when a person, corporation, or organization with a recognizable trademark wanted to register a domain name that was identical or similar to their name, they faced the reality of that domain name being already held by domain-name speculators, or “cybersquatters.”¹¹² The cybersquatters then requested “creative extortion” payments in exchange for release and the right to use the domain name.¹¹³

The ACPA was codified within the Lanham Act for multiple reasons. One reason is trademarks and domain names serve many of the same functions, such as incorporating branding to identify goods or services to customers and establish marketplace recognition.¹¹⁴ Although there is conflicting scholarship on how domain names and trademarks interact within the traditional sphere of trademark regulation, domain names receive special protection under the ACPA for the purpose of protecting entrepreneurs and businesses from “creative extortion” and similar forces that attempt to exploit voids in URL registry.¹¹⁵ The similar characteristics between domain names and general usernames, or gamertags, that other gamers, streamers, search-engine users, and more, use to engage with online platforms is striking. Both identify the source of attributable content through an internet-connected platform, contain additional information about the creator of the content being delivered, and help to guarantee that the content is operated by a true and genuine source that can promote content quality; whether that quality assurance be certain postings on a website, game style and gameplay, or self-promotion across platforms on the internet.¹¹⁶

E. Right of Publicity is a Popular Legal Avenue for Traditional Athletes, Entertainers, and Artists Protecting their Brands from Unjust Enrichment and

¹¹¹ § 1125(d)(1).

¹¹² Tamara Kurtzman, *Continued Hijacking and Ransoming of the Domain Name System by Modern Day Corporate Privateers*, A.B.A. (June 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/06/cyber_center_kurtzman/.

¹¹³ RK Dewan & Co., *The Perils of Cybersquatting*, LEXOLOGY (June 19, 2014), <https://www.lexology.com/library/detail.aspx?g=a0185a55-3175-460d-8140-40e4968ab0bc>.

¹¹⁴ J.B. Maverick, *Trade Name vs. Trademark: What's the Difference?*, INVESTOPEDIA (Aug. 15, 2019), <https://www.investopedia.com/articles/personal-finance/120415/trade-name-vs-trademark-know-difference.asp>.

¹¹⁵ See Gayle Weiswasser, *Domain Names, the Internet, and Trademarks: Infringement in Cyberspace*, 13 SANTA CLARA HIGH TECH. L. J. 137, 170–72 (2004) (explaining the jurisdictional and use complexities behind treating domain names as trademarks).

¹¹⁶ *Username Definition*, TECHTERMS (Sept. 22, 2020), <https://techterms.com/definition/username> (explaining the characteristics of a username); *Domain Names*, WEBSITE.COM, <https://www.website.com/beginnerguides/domainnames/8/1/What-is-a-domain-name?.ws> (last visited Nov. 4, 2020) (explaining the characteristics of a domain name).

Misappropriation.

Persons have the right to control how and where others use their image and likeness through state laws that support a right of publicity.¹¹⁷ The Restatement (Third) of Unfair Competition defines the right of publicity as “one who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate.”¹¹⁸

The rule typically does not apply to the press or peoples’ discussions and conversations about another person because of strong First Amendment protections in the U.S.¹¹⁹ The state law’s purpose is to prevent unjust commercial enrichment of a person’s name, image, likeness, or unique voice, without their permission.¹²⁰ Courts have recognized the right of publicity as a unique tort of its kind, premised on the idea that persons have the right to control the use of their images to their control and consent.¹²¹ Many state statutes providing for a right of publicity are tailored to well-known persons holding celebrity or celebrity-like status.¹²²

Although the bulk of litigation over right of publicity in the esports world has predominately involved traditional athletes or entertainers suing videogame publishers for misappropriation of their likeness, litigation has yet to surface on the issue of professional gamers themselves engaging in litigation with teams and streaming companies over misappropriation or unjust enrichment over their likeness. As the sport undeniably grows, and recognition of celebrity gamers increases, such issues are bound to arise.¹²³ This note aims to inform gamers of

¹¹⁷ RICK KURNIT & EDWARD ROSENTHAL, 2020 GETTING THE DEAL THROUGH: RIGHT OF PUBLICITY UNITED STATES (2014).

¹¹⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 2006).

¹¹⁹ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (holding in the only Supreme Court right of publicity case that there are some limitations on the press pertaining to use of celebrities’ performances, such as that First Amendment protections would not shield the press for screening a celebrity’s full performance without their permission); 1 ANNE GILSON LALONDE, GILSON ON TRADEMARKS, § 2B.04 (Matthew Bender & Co. Inc. eds., 2020).

¹²⁰ GILSON ON TRADEMARKS, *supra* note 119.

¹²¹ *Zacchini*, 433 U.S. at 575.

¹²² 3 ANNE GILSON LALONDE, GILSON ON TRADEMARKS, § 12.06 (Matthew Bender & Co. Inc. eds., 2020).

¹²³ See Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes’ Name, Image, and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), <https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis> (discussing the NCAA’s concerns over misappropriating college athlete’s identities); see generally Michael McCann, *Breaking Down Lamar Jackson’s Lawsuit Against Amazon*, SPORTS ILLUSTRATED (Mar. 26, 2020), <https://www.si.com/nfl/2020/03/27/lamar-jackson-amazon-lawsuit-analysis> (analyzing star quarterback Lamar Jackson’s claim of violation of right of personality against Amazon).

how best to utilize trademarks and trademark-related legal frameworks, like the state-recognized right of publicity, to bolster their negotiating powers with powerful franchises and companies searching for talented gamers.¹²⁴ This way, gamers will have more of their valuable assets protected and recognized amid periods of heavy negotiating, contracting, and assignment of rights. Notwithstanding greater levels of protection that would come from wholesale unionization of celebrity or competitive gamers, assertion of the right to publicity earlier on in a gamer's career will undoubtedly become more of a serious consideration when gamers aim to develop strategies for long-term careers in the esports industry.

IV. SIGNIFICANCE

The reality of competitive gamers signing contracts with professional esports teams and streaming platforms without adequate legal representation to help navigate the process can be detrimental to their careers, especially when gamers are young in age and experience. Statistically speaking, video games are becoming more addicting than ever.¹²⁵ Furthermore, as kids spend more time at the helm of a controller and computer set, the urge to “go pro” in esports from an earlier age will likely normalize in the future, similar to how it has become commonplace for children to dream of going pro in baseball, football, basketball, and other traditional sports. Acting upon those dreams and intentions, children may spend countless hours playing and practicing beyond their experimental and formative years (most children stop playing recreational sports at the average age of eleven).¹²⁶ But, the rates for overall child participation in traditional sports

¹²⁴ See Michael J. Hoisington, *Celebrities Sue Over Unauthorized Use of Identity*, HIGGS L. (Aug. 2020), <https://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/> (defining the right of publicity as, “the right to control the commercial value of your name, likeness, voice, signature, or other personal identifying traits that are unique to you”); see also Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, A.B.A., https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/ (last visited Nov. 3, 2020) (summarizing the common elements of the right of publicity in the U.S.: “Most right of publicity statutes include the following major elements: (1) a definition of ‘personality’ that limits the types of characteristics protected by the right; (2) a definition of ‘infringing use’; (3) a definition of *who* is protected by the right; (4) a list of exceptions and exemptions from liability; (5) rules regarding descendibility; and (6) available damages.”).

¹²⁵ See Caitlin Gibson, *The Next Level*, WASH. POST (Dec. 7, 2016), <https://www.washingtonpost.com/sf/style/2016/12/07/video-games-are-more-addictive-than-ever-this-is-what-happens-when-kids-cant-turn-them-off/> (highlighting the negative psychological and sociological effects on childrens’ brains as their dependencies on videogames for purposes of stimulation rapidly increase).

¹²⁶ *Survey: Kids Quit Most Sports By Age 11*, ASPEN INST. (Aug. 1, 2019),

are falling.¹²⁷ What is increasing is competitive play for video games.¹²⁸ All signs point to the direction of more children tailoring their expectations to the opportunities derived from competitive video games, which now consume a significant portion of the average modern child's time.¹²⁹

Without sufficient legal guidance, and strategic preparation before initial phases of contract negotiation, when gamers do have the ability to “go pro,” teams are positioned to temporarily strip competitive gamers of their rights to use their personal identifiable images, likeness, personalities, gamertags, and logos.¹³⁰ This limitation can place competitive gamers in an anticompetitive position by being contractually prohibited from accepting direct offers from sponsors and advertisers, which could help boost competitive gamers' public and financial opportunities.¹³¹ Team ownership of the rights of publicity of competitive gamers, as well as their trademarks, can be detrimental to gamers themselves.¹³² It can restrain a competitive gamer from possible independent branding opportunities, which are currently not recognized as players continue to relinquish control of a majority of branding and marketing rights to the teams and streaming platforms that they often abruptly sign contracts with.¹³³ This can result in stunted independent growth for competitive gamers that can extend

<https://www.aspenprojectplay.org/national-youth-sport-survey/1> (referencing the “Don't Retire, Kid” program the Aspen Institute initiates to keep children engaged with sports at a young age).

¹²⁷ *Id.*

¹²⁸ See Lisa Rapaport, *Parents Think Teens Spend Too Much Time Playing Video Games*, REUTERS (Jan. 20, 2020), <https://www.reuters.com/article/us-health-teens-gaming/parents-think-teens-spend-too-much-time-playing-video-games-idUSKBN1ZJ25M> (analyzing the statistical data of teens and the amount of time spent on video games and other media platforms); see also Simon Hattenstone, *The Rise of eSports: Are Addiction and Corruption the Price of its Success?*, GUARDIAN (June 16, 2017), <https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports> (discussing the rise of eSports, including the pros and cons of the new sports platform).

¹²⁹ See Maggie Fox & Erika Edwards, *Teens Spend 'Astounding' Nine Hours a Day in Front of Screens: Researchers*, W. VA. EDUC. ASSOC., <https://www.wvea.org/content/teens-spend-astounding-nine-hours-day-front-screens-researchers> (last visited Apr. 17, 2020) (citing a report by Common Sense Media); see also Hattenstone, *supra* note 128.

¹³⁰ Simmons, *supra* note 68.

¹³¹ *Id.*

¹³² See Christina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L. J. 289, 357 (1998) (highlighting the fact that without a recognized right of publicity, the holder of such a right cannot fully “[protect] and [promote] the commercial value of one's identity, meaning personal attributes, but not limited to name, face, voice or signature.”).

¹³³ See generally Nicole Pike, *Esports Playbook for Brands in 2019*, NIELSON, <https://www.nielsen.com/wp-content/uploads/sites/3/2019/05/esports-playbook-for-brands-2019.pdf> (last visited Nov. 4, 2020) (making no mention in a branding report of the importance or significance of striking marketing and branding opportunities with competitive or celebrity players, instead focusing on teams, venues, streaming companies, and social media).

beyond the terms of the original agreement.¹³⁴

By not having a registered trademark, competitive gamers arrive at the negotiation table empty-handed, with little to no legal value to offer teams or leagues other than their gameplay. Today, premiere skill alone might be enough to get a team's attention, but it is not enough to protect competitive gamers from teams' unfair, long-term use and limitations on a competitive gamer's unique characteristics that will last with the player beyond a single term of a deal.¹³⁵ The long-term sustainability of a career trajectory is on the chopping block when teams, leagues or streaming platforms seek major releases of rights to use a gamer's image, gamertag, identifiable features, and the like. Limitations need to be set in place, and conditions need to be established by the gamer. The gamer should have some say in the process: in other words, for professional gamers, the contractual process should not be all or nothing.

Another hurdle for gamers is the threat of non-payment.¹³⁶ The esports industry has born witness to multiple instances of teams offering competitive gamers a paycheck or commission, only to receive nothing in the end and little chance of holding the team legally accountable for promised payments.¹³⁷ With no time-honored union organizations to represent gamers who are mistreated contractually by their employers or business partners, gamers are left out to dry in a business ecosystem that might not always have their best interests at heart. However, if a contract falls through and a gamer has already secured trademarks by use in commerce and registry—with the added boost of the mark being tied directly to a form of either a personality right, a gamertag, or domain name—gamers can find potential and sustainable monetary relief, independent of a team, league, or streaming platform that fails to make due payment. Such relief can arrive through an ongoing licensing system that can independently release rights, at his or her will, as well as a basic framework for independent and more equalized negotiations, for all future gameplay and streaming agreements.¹³⁸

Through proper harnessing of federal registration, competitive gamers can enter into negotiations with teams, leagues, and streaming platforms with more

¹³⁴ Lee, *supra* note 59 (exemplifying the type of career limiting eSport contractual restrictions).

¹³⁵ Ryan Dooley, *Player Branding in Esports*, LINKEDIN, <https://www.linkedin.com/pulse/player-branding-esports-ryan-dooley/> (last visited Feb. 27, 2021) (noting that brands bring in the most value in esports).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Tim Lince & Trevor Little, *Dybala Image Rights Issue Highlights Growing Importance of Intellectual Property to Sports Stars*, WORLD TRADE REV. (Aug. 8, 2019), <https://www.worldtrademarkreview.com/brand-management/dybala-image-rights-issue-highlights-growing-importance-intellectual-property>.

leverage than a gamer without trademarkable features.¹³⁹ Registration by unsigned competitive gamers, completed on a mass scale, could exact added pressure on entities during negotiations.¹⁴⁰ Robust registration could ultimately equip competitive gamers with new leverage as teams could not ignore the explicit legal rights of the gamer, resulting in teams engaging in more equitable licensing arrangements with gamers.¹⁴¹

A major benefit of trademark registration for gamers is the opportunity to bring action against a team, league, or platform in federal court for misappropriation of his or her licensed trademark or for an infringing use, such as not paying licensed royalties.¹⁴² If a gamer has valid reason to suspect that his or her trademark is exploited in a manner violative of an agreed-to or non-existent license, threat of litigation in federal court could exact added pressures on teams to settle the issue or avoid a breach of the license outright.

Trademark registration would give competitive gamers an added boost in the present “attention economy.”¹⁴³ This unique economic era has been characterized by the Nielson Norman Group as: “Digital products are competing for users’ limited attention. The modern economy increasingly revolves around the human attention span and how products capture that attention.”¹⁴⁴ Where much of a competitive gamer’s success depends on his or her notoriety or reputation online, registering a competitive gamer’s trademark(s) would give the gamer a newfound ability to make strategic decisions about how their registered marks are utilized through negotiations with third parties and in gamer agreements.¹⁴⁵ Such freedom of choice involved in a competitive gamer’s decision over where, when, and how his or her image appears in advertising campaigns both online or in-person can set the trajectory of the type of story, image, or philosophy a competitive gamer desires. But for now, gamers are often largely without this freedom due to the contracts that they are signing.¹⁴⁶

¹³⁹ See *A Guide to the eSports Licensing Landscape*, LICENSING INT’L (Oct. 2, 2019), <https://licensinginternational.org/news/a-guide-to-the-esports-licensing-landscape/> (“Individual streamers have the ability to translate better to retail than teams,” but typically players do not get licensing deals until after they have made a name in tournament play).

¹⁴⁰ See Lince & Little, *supra* note 138 (explaining that popular football club star was able to hold up an entire negotiation over image rights issue; the player had effectively tilted the negotiation into his favor by situating all future and current brand or marketing ventures into the forefront of the negotiation).

¹⁴¹ *A Guide to the eSports Licensing Landscape*, *supra* note 139.

¹⁴² Dooley, *supra* note 135 (highlighting difficulties faced by players in the legal realm).

¹⁴³ Dooley, *supra* note 135; see also Lexie Kane, *The Attention Economy*, NIELSON NORMAN GRP. (June 30, 2019), <https://www.nngroup.com/articles/attention-economy/>.

¹⁴⁴ Kane, *supra* note 143.

¹⁴⁵ Bridget Diakun, *Esports: An Untapped Market for Both Brands and Law Firms*, WORLD TRADEMARK REV. (June 8, 2019), <https://www.worldtrademarkreview.com/brand-management/esports-untapped-market-both-brands-and-law-firms>.

¹⁴⁶ See generally Dooley, *supra* note 135 (highlighting the importance of competitive

Without having at least some control over where a gamer's brand or image is exploited, competitive gamers risk displacing lines of communication with intended audiences and could suffer professionally as a result. Team, league, and streaming platforms' gamer agreements of the present, while often lucrative, are not always looking out for the best interest of gamers.

V. ANALYSIS

Competitive gamers' gamertags, logos, or other insignia are protectable under both federal and regional trademark law. Gamers' registration of such trademarked goods and services has been completed before, but as noted by legal practitioners in the entertainment field, often not consistently or early enough in the process of the gamer's career.¹⁴⁷ Gamertags, which have close ties to domain names, can be registered as trademarks.¹⁴⁸ Gamertags are a creative and direct way for competitive gamers to market merchandise and apparel that they choose to create and sell or plan to sell in good faith in the future.¹⁴⁹ Gamertags are also an easy way to consistently and accurately identify competitive gamers to public audiences through streaming, advertising, and interaction on social media platforms.¹⁵⁰ Most competitive gamers are not known by their real names in the world of esports livestreaming, advertising, and marketing at-large.¹⁵¹ Gamertags take precedence over their legal birthnames within the gaming community, similar to how a performer's stage or band name takes precedence over their birthname.¹⁵²

In 2002, a twelve-time esports world-champion gamer, Jonathan Wendel, better known as Fatal1ty, registered his gamertag "Fatal1ty" as a typed drawing mark.¹⁵³ This mark was to be used for goods, such as "video game apparatus, namely, video game hardware [video game software, and mouse pads]" and for his services of "promoting the video games and video game competitions of others through playing, demonstrating and endorsing video games of others and

gamer's control over their own brand).

¹⁴⁷ See, e.g., FATAL1TY, Registration No. 3149347 (exemplifying an instance of trademarked gamertag).

¹⁴⁸ Justin Jacobson, *What Makes Gamer-Tags and Team Names Such Valuable Trademarks?*, ESPORTS OBSERVER (Apr. 26, 2017), <https://esportsobserver.com/makes-gamer-tags-team-names-valuable-trademarks/>.

¹⁴⁹ *Id.*

¹⁵⁰ LoL Esports, *How a Pro Player Gets His Name*, YOUTUBE (July 2, 2013), <https://www.youtube.com/watch?v=WNpK76KUZkM>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See, e.g., FATAL1TY, *supra* note 147 (exemplifying an instance of the trademarked gamertag).

endorsing and appearing at video game tournaments of others.”¹⁵⁴ Eight years later, Fatal1ty updated his trademark for goods and services, such as “computer hardware and peripherals; headphones; power supplies.”¹⁵⁵ Although Fatal1ty no longer plays competitively and is considered retired, he has capitalized on his widespread notoriety within the gaming community as one of the top competitive gamers. He has succeeded in this endeavor by launching his own website for the sale and marketing of various gamer goods.¹⁵⁶ Various types of exclusive Fatal1ty gaming gear, including headsets, power connectors, filter caps, and software modifications, such as the “Key Master,” the “Fatal1ty Mouse Port,” and the “F-Stream,” can be purchased on Fatal1ty’s website and partner manufacturers’ websites.¹⁵⁷ Having a federally registered trademark for his gamertag, Fatal1ty is equipped to garner a stronger following and recognition past his competitive gaming prime. This has led to ample opportunities for rewarding partnerships with manufacturers and technology developers of gaming accessories. Fatal1ty’s commercial success has no doubt inspired an entire generation of up-and-coming competitive gamers, who wish to become professionals and create their own brands and markets for those brands.

Many teams’ gamer agreements limit the extent of individual sponsorships for competitive gamers. Sponsorship limits in agreements have the effect of creating artificial legal boundaries around how much money competitive gamers make and where the revenue comes from. It also limits a gamer’s ability to affiliate. The sponsorship limitations typically assign sole responsibility for the facilitation of sponsorship dealings to a single team, league, or streaming platform.¹⁵⁸

Despite the myriad benefits associated with registration, many gamers have chosen not to register trademarks for their gamertags and personal logos, which they use regularly in online streams, in selling products, and in promotion on internet communities and social media.¹⁵⁹ Today, competitive gamers have the ability to conduct research on the current trademark landscape by consulting reputable IP clinics throughout the U.S., which could assist in registering

¹⁵⁴ FATAL1TY, Registration No. 3990001.

¹⁵⁵ *Id.*

¹⁵⁶ Yohana Desta, *10 People Making Total Bank From Gaming*, MASHABLE (Oct. 8, 2014) <https://mashable.com/2014/10/08/gaming-for-money/>.

¹⁵⁷ *Gaming Armor*, ASROCK INC., <https://www.asrock.com/microsite/Fatal1ty/> (last updated Oct. 26, 2019).

¹⁵⁸ Noah Smith, *Debate: What Does a Fair Esports Contract Look Like? It’s Complicated.*, WASH. POST (June 18, 2019), <https://www.washingtonpost.com/sports/2019/06/18/debate-what-does-fair-esports-contract-look-like-its-complicated/>.

¹⁵⁹ See Tim Lince, *Leading E-sports Players Must Take Trademark Protection Seriously or Risk Losing Ownership of Their Gamertags*, WORLD TRADEMARK REV. (Oct. 3, 2019), <https://www.worldtrademarkreview.com/anti-counterfeiting/leading-e-sports-players-must-take-trademark-protection-seriously-or-risk>.

gamertags and logos with the USPTO.¹⁶⁰ When competitive gamers invest themselves into competitive gameplay for the purpose of building a career or part-time endeavor, trademark registration of gamertags, as well as any logos, would help to ensure future recognition and add credible legal and commercial value to a gamer's desired associations.¹⁶¹

As the life cycle of the popularity of a competitive video game becomes shorter, and teams enter and exit periods of boom and bust depending on the success of the given game, competitive gamers may move to new game environments.¹⁶² This volatility of game-hopping, which stems from endlessly shifting competitive game platforms, has been labeled as a pipeline problem within the esports industry.¹⁶³ This problem is brought on and exacerbated by the consolidated power that developers have over a majority stake of the intellectual property rights for video games.¹⁶⁴ Many competitive gamers carry over their gamertags with them to new teams, to new independent gameplay opportunities, or the latest social media platform in order to grow and maintain an engaged audience.¹⁶⁵ With such dispersion of engagement, gamers' trademarks should be registered federally because most esports tournaments and leagues are not limited to state boundary lines.¹⁶⁶ Esports is an international affair, drawing in consistent global participation.¹⁶⁷ According to The Catholic University of America's former esports team president Kyle Korona, although the largest presence of esports exists on the West Coast, the industry is

¹⁶⁰ See generally *Law School Clinic Certification Program*, USPTO, <https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1> (last visited Nov. 1, 2019) (explaining the Law School Clinic Certification Program, which allows law schools to practice intellectual property, patent, and trademark law for clients who request their services).

¹⁶¹ See Diakun, *supra* note 145 (signifying the importance of a strong brand for solidifying consumer recognition, which ultimately allows competitive gamers to attract more sponsorships).

¹⁶² Partin, *supra* note 64.

¹⁶³ See generally *id.* (defining the pipeline problem as the balance of learning a skill that is time consuming and expensive but that is necessary for an industry to survive and be profitable; and also describing the issue in context of gaming given its central focus on players needing to be the most skilled in order to be successful).

¹⁶⁴ *Id.*

¹⁶⁵ See generally Caleb Rainey, *Esports Nicknames and Their Purpose*, READYESPORTS, <https://readyesports.com/esports-nicknames-and-their-purpose/> (last visited April 17, 2020) (stating that gamertags are an important part of a competitive gamer's career because they will generally be used and known as their gamertag for their entire career).

¹⁶⁶ See, e.g., Shannon Liao, *Fortnite is Holding a World Cup This Weekend with \$30 Million in Prizes*, CNN (July 28, 2019), <https://www.cnn.com/2019/07/26/business/fortnite-world-cup-preview/index.html> (exemplifying the lack of state boundaries in the competitive eSports gaming industry given that most gaming tournaments are attended by players from all around the world).

¹⁶⁷ *Id.*

widespread.¹⁶⁸ Korona said that competitive gamers in the US are involved with tournaments and teams not only across different regions of the country, but also throughout the world.¹⁶⁹

For example, Korona referenced his friend Josef Bieda, known by his gamertag as “Joesiedon.” Joesiedon is a competitive gamer who played for the official esports team for the University of Maryland, Baltimore County.¹⁷⁰ Korona said Joesiedon has and continues to coach competitive teams in his ten-plus year career in esports, with some competitive teams located as far away as South America. Currently, Joesiedon works as a team manager for a creative startup based out of Rockville, Maryland, called the Game Gym that hosts training sessions for competitive and recreational gamers alike.¹⁷¹ Joesiedon’s international connections illustrate how widespread and interconnected the competitive gaming world today can be even on a local level. One’s own next-door neighbor may also be a coach for a South American competitive gaming squad. One’s own next-door neighbor could be a well-recognized competitive gamer on a team based in a foreign country. Local examples are demonstrative of how both gamers who do and do not acquire attention through the US market can often acquire some recognition worldwide and in seemingly unpredictable pockets of the globe. This reality has major implications for trademark registration.

A. The Likelihood of Consumer Confusion of Gamers’ Trademarkable Works Exist in Various Areas.

Consumer confusion about trademarks, such as gamertags and logos of competitive gamers, is likely to occur (1) during livestreamed gameplay, (2) on social media and in online advertising, and (3) in the marketing of gamer-branded merchandise and other goods. Such a likelihood of confusion has the potential to disrupt a gamer’s campaign of building his or her brand, establishing his or her fanbase, and negotiating gamer agreements with esports teams, leagues, and streaming platforms. Arguably still in its infancy, esports is

¹⁶⁸ See generally Eduardo Gonzalez, *Los Angeles Will be Home to Largest Public Esports Arena on West Coast This Summer*, L.A. TIMES (Feb. 12, 2020), <https://www.latimes.com/sports/story/2020-02-12/los-angeles-esports-arena-west-coast-summer> (reporting on the largest arena for eSports being built in the Los Angeles area because it is regarded as the cultural capital for online gaming and the arena will allow hundreds of teams from all around the world to participate in professional level gaming).

¹⁶⁹ Kevin Webb, *Eight Teams Paid More than \$30 Million Each to Join the Overwatch League*, BUS. INSIDER (Dec. 29, 2018), <https://www.businessinsider.com/overwatch-league-season-2-2018-9>.

¹⁷⁰ *Josef Bieda*, GAME GYM, <https://gamegym.com/player/christopher-herrera-2/> (last visited Nov. 1, 2019).

¹⁷¹ *About Us*, GAME GYM, <https://gamegym.com/about/> (last visited Dec. 30, 2020).

currently experiencing several trademark infringement disputes between various entities within the industry.¹⁷² In October 2019, a major trademark lawsuit was initiated by Riot Games, the developer and owner of the wildly popular competitive videogame *League of Legends*, against esports team Riot Squad.¹⁷³ Riot Games argues that the Riot Squad team used Riot Games' "RIOT brand name" in order to garner more attention by tricking internet users into thinking that Riot Squad had a relation to Riot Games.¹⁷⁴ Riot Games is already well-known within the gaming community.¹⁷⁵ Riot Games alleges that, under the federal Lanham Act, the Riot Squad team infringed its trademark, as well as committed false designation of origin by using the term "Riot" in its name.¹⁷⁶

1. *Livestreamed Gameplay*

Due to the esports landscape's wide-ranging choice of competitive games, competitive gamers typically choose to specialize in only one or two specific games at a given time.¹⁷⁷ Tyler "Ninja" Blevins, one of the more well-known independent esports gamers and personalities, began his competitive career playing Halo 3 in 2009.¹⁷⁸ Predominately known for his gameplay success and style in *Fortnite*, Ninja has competed in various competitive games throughout different periods of his decade-long career.¹⁷⁹ Unlike traditional sports, such as football in which no one owns the game, esports' prevalence of "game hopping" is a sign of the industry's interconnectedness with trends in coding and graphic design.

Unlike traditional sports, in which fundamentals of the sport are more or less set in stone, esports knows no bounds or limits. Accordingly, esports is not made up of one set of rules or fundamentals, but instead is comprised of a collection of different games with various objectives.¹⁸⁰ The boundaries of esports are ever

¹⁷² Ben Bayliss, *Riot Games Suing Esports Organization Riot Squad for Trademark Infringement*, DUALSHOCKERS (Oct. 21, 2019), <https://www.dualshockers.com/riot-games-vs-riot-squad-trademark-dispute/>.

¹⁷³ *Id.*; Complaint at 3, Riot Games, Inc. v. Riot Squad Esports LLC, No. 2:19-CV-08626 (C.D. Cal. 2019) [hereinafter Riot Games Compl.]

¹⁷⁴ Riot Games Compl. at 3.

¹⁷⁵ Bayliss, *supra* note 172.

¹⁷⁶ Riot Games Compl. at 2.

¹⁷⁷ See Partin, *supra* note 64 (explaining that within the esports industry the lifespan of games is tied to that of the players because, although a variety of games are available, players tend to stick to the same game throughout their career).

¹⁷⁸ Arash Markazi, *Tyler 'Ninja' Blevins, the Fortnite Guy, Wants to be Known as More Than That*, L.A. TIMES (May 29, 2019), <https://www.latimes.com/sports/la-sp-ninja-esports-fortnite-video-games-20190529-story.html>.

¹⁷⁹ *Id.*

¹⁸⁰ Christina Gough, *Leading eSports Games Worldwide 2019, by Tournament Prize*

shapeshifting, yet accessible, and subject to an inconsistency that typically is associated with fast fads and popular culture driven by the internet and continuous redevelopment of computer code.

Competitive gamers committed to establishing a reputation within the world of esports expect to effectively carry a traceable distinguishing feature of themselves to whatever game they figuratively “hop” to next. Without the guarantee of being able to carry a recognizable gamertag or logo from one game to the other, competitive gamers are subject to a degradation of their creative and identifiable works. A gamer’s inability to consistently transfer his or her protected distinguishing feature is plainly detrimental to the gamers because the time and cost of having to create a duplicate version of such features for each new game or online platform becomes unreasonable. It is unreasonable because having to create feature-like duplicates cuts against the trademark’s essential element of identifiability. Requiring gamers to create feature-like duplicates would also task gamers with having to re-create on a constant basis, likely at the detriment of time and cost to them.

Outside of official professional tournaments, when gamers participate in popular games such as *Fortnite* and *World of Warcraft* there is no way to easily verify, especially during gameplay, exactly who a gamer might be playing due to inconsistent naming schemes that allow multiple players to share the same username.¹⁸¹ Confusion can also result from in-game cheating. Many leagues do not forcibly mandate anti-cheat rules to ensure that a competitor playing a certain game is who they say they are.¹⁸² When players are caught cheating—usually in tournaments or any online competitive gameplay for recognition or reward—they are penalized, usually through aggressive fines or timely suspensions.¹⁸³ The need to address cheating is changing as more people gravitate to online communities during stay-at-home orders and mandated quarantines during the COVID-19 outbreak. Additional proprietary anti-cheat rules have to be enforced because traditional measures relying on physical presence cannot always be guaranteed.¹⁸⁴ For now, deception and confusion often proliferate during live

Pool, STATISTICA (Mar. 27, 2020), <https://www.statista.com/statistics/501853/leading-esports-games-worldwide-total-prize-pool/>; see generally, Matt Walden, *The 20 Most Lucrative Games You Can Play Professionally*, GAMESPOT (Mar. 11, 2019), <https://www.gamespot.com/gallery/the-20-most-lucrative-games-you-can-play-professio/2900-91/#1>.

¹⁸¹ Richard Lawler, *Xbox Live ID Numbers Let You Choose a Gamertag That’s Already Taken*, ENGADGET (June 11, 2019), <https://www.engadget.com/2019/06/11/xbox-live-duplicate-gamertags/>.

¹⁸² Graham Ashton, *Cheating in Esports – How Is It Done, and How Is It Dealt With?*, ESPORTS OBSERVER (May 27, 2019), <https://esportsobserver.com/cheating-in-esports/>.

¹⁸³ *Id.*

¹⁸⁴ Andrew Webster, *How the Biggest Gaming Leagues are Adapting to an Online-only World*, VERGE (March 27, 2020), <https://www.theverge.com/2020/3/27/21196237/esports-leagues-online-coronavirus-call-of-duty-overwatch-league-of-legends>.

gameplay.

The way a gamer conducts his or herself during gameplay can often stir controversy, sometimes leading to suspensions and terminations from use of the game altogether for behavior such as software cheats.¹⁸⁵ These impressions are important among the online gaming community, and they can contribute to a gamer's commercial and competitive traction within the industry. Impersonation is a problem that the esports industry has yet to come up with a systemized solution; most games or game systems currently internally handle such conflicts in which two or more identical gamertags conflict with each other.¹⁸⁶ The non-unified structure of the gaming world is partially to blame for the ongoing problem of gamertag or logo transferability and the imitation and degradation of such gamer-generated content. There is no official organized body that sets rules or regulations for procedures that all competitive gaming providers must maintain for the gamers themselves.

Although there are internal systems to process identical gamertags, the issue of a consistent handling of identical gamertags is unclear and convoluted. Similarly, there is no widespread framework for gamers' use of live cameras to stream gameplay and how logos or other insignia can be used as decoration, modification, or overlay in the live cam or "selfie-style shot" of the gamer. Due to game providers failing to fully verify gamers during live gameplay, livestream viewers or gamers actively involved in streaming their gameplay could likely be confused about who a gamer is.

Unspecific verification policies support substantial confusion for infringement as established in the monumental case of *Polaroid Corp. v. Polarad Electronics Corp.*¹⁸⁷ Courts regularly use the factors in *Polaroid* to determine whether the essential confusion element for infringement is met.¹⁸⁸ These factors include trademark strength, similarity between goods and services, consumer degree of care exercised, the intent of a defendant, and actual confusion.¹⁸⁹ In order to foster a favorable reputation within the competitive gaming world, the current confusion over gamertags in gameplay and for online

¹⁸⁵ Nathan Grayson, *Top Counter-Strike Players Caught In Big Cheating Scandal*, KOTAKU (Nov. 1, 2019), <https://kotaku.com/top-counter-strike-players-caught-in-big-cheating-scand-1662810816>.

¹⁸⁶ Xbox Support, *Gamertag Update FAQ*, MICROSOFT, <https://support.xbox.com/en-US/my-account/manage-gamertag-and-profile/gamertag-updates-faq> (last updated Oct. 26, 2019).

¹⁸⁷ See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (detailing the prior owner's chance of success in a trademark protection action based on many variables, all of which were debatable factors and thus heighten confusion).

¹⁸⁸ Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1582 (2006).

¹⁸⁹ *Polaroid Corp.*, 287 F.2d at 495.

streaming could be recognized as indicators of potential trademark infringement.

The abundance of look-alike gamertags of established gamers may be the product of a general fondness for anonymity within the esports world, which derives from an internet-driven culture and desire among gamers to protect their true identities.¹⁹⁰ Korona mentions the purveyance of the controversial “stream sniping” style of gameplay common in games such as *Fortnite* and *Apex*.¹⁹¹ Stream sniping involves streamers closely monitoring gameplay for entrance of more established gamers.¹⁹² If a streamer spots an established gamer by reference of their gamertag, they queue up to play in the same session of the game with the objective of ganging up on the gamer and using extraneous clues about the established gamer’s strategy with the end-goal of defeating them.¹⁹³ This controversial style of esports gameplay implies a pervasive failure of gamertag verification, which currently leaves ample room for speculation as to who is responsible for the nature of a user’s gameplay. For a competitive gamer who is actively trying to stand out and develop a streaming audience that will “hop along” with the gamer, inconsistent verification of gamertags indirectly depresses up-and-coming gamers’ potential for progress. Progress for competitive gamers is limited by esports games and operating systems failing to accurately attribute and verify the identities of gamers. Viewers being left to make educated guesses about gamer identities is unacceptable when active professional branding, reputations, and contracts are on the line for competitive gamers striving for success in the esports profession.

By registering trademarks, competitive gamers could be assured that they will be able to queue for a new game using the same gamertag and logo they wish to consistently use to identify themselves; similar to how one’s account can be certified on Twitter to ensure followers the person is who they say they are. If someone uses a look-alike gamertag or blatantly steals a competitive gamertag, then the gamer can address the issue by simply emailing the publisher of the video game or operating system, noting that the gamertag is a protected trademark.¹⁹⁴ By registering gamertags and logos, competitive gamers can worry

¹⁹⁰ Rainey, *supra* note 165.

¹⁹¹ Paul Tassi, *Ninja-Hunting Kid Puts A Face To ‘Fortnite’ Stream Sniping*, FORBES (Jan. 2, 2019), <https://www.forbes.com/sites/insertcoin/2019/01/02/ninja-hunting-kid-puts-a-face-to-fortnite-stream-sniping/#13341b415ccf>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Garrett Gomez, *How to Trademark Your Artist Name*, REPOST BY SOUNDCLOUD, <https://www.repostnetwork.com/resources/how-to-trademark-your-artist-name/> (last visited Sept. 13, 2020) (showing that the steps taken to legally trademark an artist’s name resemble those taken for trademarking a gamertag); see also Deborah A. Wilcox & Courtni E. Thorpe, *A Quick Fix for Online Trademark Infringement*, IP INSIGHT, <https://www.fedbar.org/wp-content/uploads/2012/07/ip-jul12-pdf-1.pdf> (last visited Nov. 3, 2020) (emphasizing trademark holders sending takedown notices to website for infringement of their

less about persons using confusingly similar or identical logos and gamertags for various purposes, which can often have negative repercussions for a player trying to establish a fan base in the online gaming community due to consumer confusion.¹⁹⁵ Registration would help to assure gamers that they are able to solely curate their reputation within an already highly competitive esports industry.¹⁹⁶ If a distinctive gamertag or logo is registered as a trademark and an infringement violation can be proven by the plaintiff, then any system or game could potentially be exposed to or at least threatened by legal action so that the would-be defendant can avoid the financial and time commitment of responding to possible enjoinder.¹⁹⁷

Robust trademark registration and enforcement could enjoin other gamers from using gamertags or logos that infringe upon the registered mark in a confusingly similar way.¹⁹⁸ No matter the reason motivating an infringing use, rigorous registration and enforcement of gamer trademarks would signal to videogame publishers, platforms, and possible infringers that the likelihood of legal action against the infringers of gamers' trademarks in gameplay and on social media is heightened. To help build and maintain an online audience, competitive gamers should register their marks and begin to monitor for infringement from the outset, once the gamer sets out to play competitively, whether that be independently or for a team or league. Competitive gamers should strive to begin their registration and enforcement (if necessary) before they sign a personal gamer agreement with any professional team, league or streaming company.

2. *Social Media, Online Advertising for Competitive Tournaments and Recreational Livestreaming*

In the current attention economy, many different sources compete for clicks,

trademarks).

¹⁹⁵ See *Musicians and Artists Profile*, USPTO, <https://www.uspto.gov/learning-and-resources/ip-policy/musicians-and-artists-profile> (last visited Sept. 13, 2020) (describing the steps of trademark registration for musician and artist profiles).

¹⁹⁶ Jacobson, *supra* note 148.

¹⁹⁷ Steve Brachmann, *Nintendo Files Copyright, Trademark Infringement Suit Against Operator of ROM Websites*, IP WATCHDOG, <https://www.ipwatchdog.com/2018/08/17/nintendo-files-copyright-trademark-infringement-suit-against-operator-rom-websites/id=100283/> (last visited Sept. 13, 2020).

¹⁹⁸ See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (stating that “[i]t is, of course, also undisputed that liability under § 43(a) requires proof of the likelihood of confusion); *Trademark Dispute: Can a Video Game Use Another Company's Trademark?*, DAVID LIZERBRAM & ASSOC.'S: KEEP IT LEGAL BLOG (Feb. 24, 2015), <https://lizerbramlaw.com/2015/02/24/trademark-dispute-can-video-game-use-another-companys-trademark/>.

eyeballs, and other digital interactions on the internet.¹⁹⁹ For competitive gamers who gain sustained notoriety or fame, their presence or involvement with a particular tournament, livestream, or ongoing gameplay drives curious onlookers, fans, want-to-be competitors, and advertisers to various online forums.²⁰⁰ Similar to how cable channels and streaming networks incorporate specific professional athletes to advertise live games and programming, online advertisers now use banner ads and more to direct potential streamers to tournament play involving a specific gamer or team.²⁰¹

Esports teams that use a competitive gamer's gamertag or logo for commercial purposes without fair and adequate compensation ultimately hurt the gamer by limiting their economic mobility and legal rights within the contractual agreement.²⁰² Federal registration of gamertags or logos would signal to advertisers, looking to utilize gamers' features, that permission must be granted by the competitive gamer before they can be exploited for advertising both in online and offline settings.

With respect to the issue of advertising and branding, a licensing structure between the competitive gamer and a team or streaming company would allow for the gamer to determine the conditions of how their trademarked features are used. Perhaps the team using a gamer's tag and logo has participated in commerce with an entity involved in public controversy, which the player and team had not agreed to. A licensing structure enforced by the gamer or their agent would equip the gamer with the right to refrain from being associated with disagreeable commercial exploits. In this sense, a gamer can decide not to be publicly associated through his or her team, streaming company, or league with certain sponsorships, companies, or marketing ploys. The initial license could set the parameters that a competitive gamer would have in advertising and marketing decisions during and after the term of the contract. A limited license is the first preventive measure that could be used by the competitive gamer to deter exploitation of their trademark.²⁰³ Secondly, the threat of enjoinder

¹⁹⁹ Sophie Perryer, *The Attention Economy Commodifies Human Engagement, but it's Difficult to Monetise*, NEW ECON. (June 26, 2019), <https://www.theneweconomy.com/strategy/the-attention-economy-commodifies-human-engagement-but-its-difficult-to-monetise>.

²⁰⁰ ABBY LONG, NICK DRABICKY, & HAYLEY RHODES, *THE EMERGENCE OF ESPORTS & THE ADVERTISING OPPORTUNITIES WITHIN THE ECOSYSTEM*, 13–14 (PMG 2018).

²⁰¹ Nat Ives, *Hulu Ad Campaign Spells Out That Its Influencers Get Paid*, WALL. ST. J. (Feb. 15, 2019), <https://www.wsj.com/articles/hulu-ad-campaign-spells-out-that-its-influencers-get-paid-11550228400>.

²⁰² Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 *FORD. L. REV.* 1909, 1935–36, 1985 (1997) (explaining that trademark remedies have expanded generously throughout time).

²⁰³ See, e.g., *Form of Trademark License Agreement*, SEC. AND EXCH. COMM'N, <https://www.sec.gov/Archives/edgar/data/1452016/000119312509163904/dex1012.htm> (last

would serve as an additional barrier against unpermitted use.²⁰⁴ Federal registration of a trademark for a gamer's features would also permit a gamer to enjoin companies using his or her trademark without permission throughout the country.²⁰⁵ Because an infringing company could be located virtually anywhere in the US, under a federal registration the trademark holder may be able to bring the suit through the federal court system.²⁰⁶

An organized licensing structure and the threat of enforcement are accessible legal tools that gamers can employ to alleviate unauthorized and unwanted use of a gamer's recognizable features on the internet. The ability to authorize where, what, and how a gamer's trademark is used will allow the gamer to effectively target their desired audience and grow their brand to their liking without heightened levels of interference by companies and teams. Ultimately, in the online commercial vein, the federal trademark is all about equipping gamers with a baseline legal structure to be able to make more choices, which through a minimum level of trademark engagement can lead to less overall unauthorized exploitation of a gamer's features in the long term.

3. *Branded Merchandise and Other Goods*

According to the NPD Group Retail, the market for gaming accessories is reaching its highest level since 2010, hitting \$2.3 billion in 2018.²⁰⁷ Naturally, gamers on various competitive levels are motivated to cash in on the growing accessory market, as well as the more traditional fan-merchandise market. Often using their gamertag or logo to brand adorning hardware, such as mice, mice pads, keyboards, headsets, chairs, controllers, and more, it has never been easier for gamers to market and sell personalized products.²⁰⁸ The market for esports jerseys and apparel, just like with traditional sports, is robust and active.²⁰⁹ The

visited Apr. 17, 2020) (providing an example of a license agreement).

²⁰⁴ *Id.*

²⁰⁵ *About Trademark Infringement*, USTPO (June 8, 2018), <https://www.uspto.gov/page/about-trademark-infringement>.

²⁰⁶ *Id.*

²⁰⁷ Mike Snider, *Video Game Accessories Let You Fine Tune the Feel, Sound and Seat of Your Game*, USA TODAY (Aug. 13, 2019), <https://www.usatoday.com/story/tech/gaming/2019/08/13/video-game-accessories-controllers-headsets-drinks-up-your-game/1410859001/>.

²⁰⁸ See GRAND VIEW RESEARCH, GAMING PERIPHERAL MKT. SIZE, SHARE & TRENDS ANALYSIS REPORT BY PROD. (HEADSETS, KEYBOARD, MICE, CONTROLLER), BY DEVICE, BY TYPE, BY DISTRIB. CHANNEL, BY REGION, AND SEGMENT FORECASTS 2020 – 2025, (May 2020), <https://www.grandviewresearch.com/industry-analysis/gaming-peripherals-market> (discussing many ways that gamers can customize accessories).

²⁰⁹ See Emily Engle, *Inside the Race to Monetize Esports Apparel*, HYPEBEAST (Sept. 26, 2019), <https://hypebeast.com/2019/9/esports-apparel-fashion-adidas-ninja-nike> (discussing

first esports league–apparel deal for gamer-and-team ware on record was completed at the end of 2018 between Fanatics and the *Overwatch* league, suggesting ample demand for esports-affiliated goods.²¹⁰

For independently affiliated gamers and also affiliated gamers who want to establish, market, and maintain personal branded goods separate from any singular team or game, a registered trademark for the gamertag or logo for various forms of merchandise and hardware could bolster the gamer’s overall economic outlook in several ways. First, a gamer would be able to begin to sell online merchandise and other apparel earlier in their career before a team or league actively pursues contractual rights. Having the marked merchandise registered and circulated in commerce may help to prevent imitators and fraudulent actors from using a gamer’s gamertag or logo in a lucrative manner while the gamer begins to capitalize on his or her product.²¹¹ The behavior of fraudulent characters on the internet can pose the threat of harmful confusion as to whether a particular trademarked good or service originated from, and ultimately is endorsed by, the gamer his or herself.²¹² After registration, if a gamer’s trademarked products begin to sell and business increases, the gamer will have the opportunity to establish and maintain their viable merchandising venture.²¹³ When a team, league, or streaming platform approaches the gamer, the gamer will have a more compelling case for negotiating a favorable licensing clause into the gamer agreement.

Second, federal registration for gamertags and logos would provide the gamer with the ability to negotiate agreements with teams and leagues from a position of greater leverage and strength.²¹⁴ FaZe Clan, Inc.’s gamer agreement with professional gamer Turney Tenney, also known as Tfeu, retained large profits from commercial exploitation of Tfeu’s gamertag, name, logos, image, and

similarities between the market for esports jersey and apparel, and traditional sports).

²¹⁰ See Junior Skepple, *Fanatics Lands First-ever Esports Merchandising Deal*, JACKSONVILLE BUS. J. (Dec. 4, 2018), <https://www.bizjournals.com/jacksonville/news/2018/12/04/fanatics-lands-first-ever-esports-merchandising.html> (discussing the market for *Overwatch* eSports-affiliated goods).

²¹¹ See U.S. DEP’T OF JUST., U.S. ATT’Y’S MANUAL: CRIM. RES. MANUAL § 1715 (discussing the government’s protections of the trademark against counterfeiting).

²¹² See Steve Brachmann, *Cubs, MLB Seek Ex Parte Seizure of Counterfeit Merchandise Sold Outside Wrigley Field*, IP WATCHDOG (Sept. 29, 2016), <https://www.ipwatchdog.com/2016/09/29/cubs-mlb-seizure-counterfeit-merchandise-wrigley-field/id=73271/> (discussing counterfeit merchandise); see Tom Joyce, *Fake NFL Jerseys Reveal the Evils of Chinese Counterfeit Goods*, WASH. EXAM’R (Sept. 3, 2019), <https://www.washingtonexaminer.com/opinion/fake-nfl-jerseys-reveal-the-evils-of-chinese-counterfeit-goods> (discussing counterfeit merchandise).

²¹³ See WORLD INTELL. PROP. ORG., THE ECONS.’ OF TRADEMARKS 83, 84 (2013) (discussing the conferral of market power to the owner of a registered trademark).

²¹⁴ See *A Guide to the eSports Licensing Landscape*, *supra* note 139 (discussing the stronger negotiating position that gamers can be in once they license their product).

likeness for the team.²¹⁵ In addition to teams often taking large percentages of profits, many esports contracts like the FaZe-Tfeu agreement can fail to provide competitive gamers with flexible opportunities to independently pursue commercial sponsorships.²¹⁶ That means that even though a competitive gamer could financially benefit from an independent sponsorship, pursuant to the agreement, the gamer would not be permitted to accept such a deal.

4. *Renegotiating the Contract Once Gamers Have More Leverage*

Instead of walking into a contract negotiation without proof of a federally registered trademark, a gamer could likely embolden his or her rights within the team, league, or platform by inserting a licensing agreement clause into the gamer agreement.²¹⁷ When a team, streaming platform, or league pursues a competitive gamer in the hopes of signing an agreement with them, they would first need to agree to a licensing scheme with the competitive gamer. By doing this, the team avoids possibly infringing the gamer's trademark.²¹⁸ If the competitive gamer and the entity cannot agree on a fair licensing structure for a registered mark, the gamer would then be presented with some options. First, he or she could seek alternative deals with other entities that would offer some consideration (like a fee) in exchange for the right to license the mark for commercial purposes.²¹⁹ The competitive gamer may also continue to negotiate with the current entity, while simultaneously keeping in mind of the less-than-ideal compromise that may be required to reach an agreement. Thirdly and finally, in a more radical fashion, the gamer could reject the original entity's offer completely and continue to play competitively on an independent level. Although this may temporarily deprive the gamer of live tournament play, and some team perks and benefits, the advantages of remaining independent in the short term include: continued development of an organic and tight-knit audience through social media, continued practice and exposure on the outskirts of the pro-circuit level, and continued commercial exploitation of one's own brand through independent sponsorships.²²⁰ All of these factors can contribute to a competitive gamer's evolving path toward successful pro-circuit-level

²¹⁵ Complaint at 3, 5 *Turner Tenney v. FaZe Clan, Inc.*, No. 19STCV17341 (Super. Ct. L.A. County C. D. 2019).

²¹⁶ Complaint at 2, 5, *Turner Tenney*, No. 19STCV17341.

²¹⁷ See *A Guide to the eSports Licensing Landscape*, *supra* note 139.

²¹⁸ *Protecting eSports Copyright and Trademark*, INTELL. PROP. CTR. (Feb. 21, 2019), <https://theipcenter.com/2019/02/protecting-esports-copyright-and-trademark/>.

²¹⁹ Jacobson, *supra* note 148.

²²⁰ *How to Become a Pro Gamer in 10 Steps*, INTEL CORP., <https://www.intel.com/content/www/us/en/gaming/resources/want-pro-gamer.html> (last visited Mar. 20, 2021).

gameplay.

A current issue with many contemporary gamer agreements is that many gamers are not actively registering federal trademarks before signing agreements with teams, leagues, or platforms, so the agreements themselves may not recognize that the gamer holds any such trademarks.²²¹ Entertainment expert and reporter Tim Lince recently said, “I don’t think the [gamers] have taken their own brand protection seriously enough.”²²² Trademark registration can help to rewrite the misconceived notion of corporate entities that competitive gamers only hold one recognizable value: their gameplay. Registered trademarks can provide gamers with more economic choices and opportunities for growth.²²³ They can position gamers to become less dependent on corporate management, which answers primarily to entity-oriented goals and can provide only fleeting affiliation. If a gamer has a federally registered trademark, and is competing independently, then the gamer will likely retain more autonomy and have the freedom to engage in flexible non-exclusive licenses with marketers and advertisers as he or she sees fit under an agreement.²²⁴ Such a licensing system could enable the gamer to rake in larger shares of advertisers’ efforts to generate profits through incorporation of the gamer’s trademarked features.²²⁵

After federal registration of a trademark, it is in a gamer’s best interest to insert a licensing clause into the terms of any gamer agreement offered by an entity. Details of such an agreement would include: whether the entity’s use of the trademark is exclusive or non-exclusive, the inclusion of royalty payouts, how the license will perform quality controls and warranties, a determination of the term for the right of use, distribution and marketing projections for the trademark, and a payment plan or lump sum rate for royalties.²²⁶ The more permissive of a use a gamer grants to the licensee in his or her agreement for their gamertag or logo, the more consideration a team or league should offer in return so that the contract accurately, and in good faith, reflects the legal value of the exchange.²²⁷ Consideration can be left open to the creativity of the contracting parties.²²⁸ It could be fulfilled in a licensee’s promise to fund

²²¹ Lince, *supra* note 159.

²²² *Id.*; see also Diakun, *supra* note 145.

²²³ USPTO, ECON. WORKING PAPER NO. 2018-02, AN ANATOMY OF U.S. FIRMS SEEKING TRADEMARK REGISTRATION (2018).

²²⁴ *A Guide to the eSports Licensing Landscape*, *supra* note 139.

²²⁵ See Lince, *supra* note 159.

²²⁶ See generally TIMOTHY J. KELLY, TRADEMARK LICENSING CONSIDERATION CHECKLIST, PUB. NO. 5923, PLI’S COURSE HANDBOOK ADVANCED LICENSING AGREEMENTS (Fitzpatrick, et al. eds., 2005) (explaining key areas to address when drafting a licensing agreement and formalizing it in writing).

²²⁷ *Id.*

²²⁸ Richard Stim, *Consideration: Every Contract Needs It: What is Consideration in a Contract and What If an Agreement Doesn’t Have It?*, NOLO, <https://www.nolo.com/legal->

portions of actions for infringement, as is seen in exclusive licensing agreements. A team or league's consideration would also need to adjust accordingly to the breadth of the license so to guarantee the parties' adherence to the agreement's terms and conditions. Such terms and conditions of the contract should be reasonable in order to avoid unconscionability, illegality especially in context of state talent-agent statutes and claims of unjust enrichment.²²⁹

Another reason why gamers should move forward with registration of federal trademarks relates to contractual and enforcement duties. If a trademark is accounted for in an agreement that was negotiated for an exchange of legal value between a gamer and a team, and it is then incorporated into the gamer agreement itself, the license would become a material element of the agreement that was negotiated for exchange of legal value.²³⁰ Gamers should add language into the license clause that a breach of the terms and conditions of the license terms, especially with regard to royalties and quality control, serves as a breach of the entire agreement. This should have the result of encouraging that the entity to carry out its implied duty of good faith as it relates to performance of the contract.²³¹

Federal registration of a trademark forwards the presumption that the trademark is valid, but it also signals to licensees that violation of a licensing agreement may be construed as a trademark infringement, subjecting the infringer to legal action in federal court.²³² Here, an example of the shift in the power dynamic between gamer and entity can be realized. With a licensing structure, the entity carries with it a duty to honor the terms and conditions of the license if they wish to avoid a material breach and avoid costly and timely litigation.²³³

encyclopedia/consideration-every-contract-needs-33361.html (last visited Sept. 12, 2020).

²²⁹ *Unconscionability*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/unconscionability> (last visited Sept. 12, 2020) (defining unconscionability as "a defense against the enforcement of a contract or portion of a contract." Unconscionability is found when a contract has both "unfair bargaining and unfair substantive terms."); *Unjust Enrichment*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/unconscionability> (last visited Sept. 12, 2020) (noting that unjust enrichment occurs when, "Party A confers a benefit upon Party B without Party A receiving proper restitution required by law.").

²³⁰ *See generally* Kelly, *supra* note 226 (explaining key areas to address when drafting a licensing agreement and that parties are "forced to live with what they reduced to writing.").

²³¹ *Id.* (noting that once the document is finalized it is generally too late to make amendments and the licensor's termination rights under the agreement).

²³² *About Trademark Infringement*, *supra* note 205.

²³³ *See id.* (explaining judicial ramifications if a licensing agreement is breached and if a trademark owner can prove infringement).

B. To Register and Enforce Trademarks, Gamers Could Utilize Pro Bono Legal Clinics and Seek on Low-Cost, Tech-Driven Monitoring Services.

One important factor to take into consideration is the time, cost, and energy of registering a federal trademark. To register a trademark, it could cost someone between \$200 and \$400, plus attorney's fees, which can cost anywhere between \$300 to \$3,000.²³⁴ Many competitive gamers are young in age and experience and may not have enough financial backing to support the laborious process and cost of registration. Also, with registration comes the duty of self-enforcement, one of the unique features that comprises trademark law doctrine.²³⁵ Trademark holders are required to use due diligence for enforcement of the registered trademark, which according to the USPTO, relates to the "unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services."²³⁶

Thankfully, many academic institutions have established legal clinics that provide registration for persons with goods or services that may qualify under a registered trademark.²³⁷ Online services provided by companies such as LegalZoom provide trademark infringement monitoring for around \$175 a year.²³⁸ If a gamer is serious about competing and wishes to develop, expand, and protect one's brand, he or she must be willing to invest in enforcement mechanisms in order to show infringers, interested teams, platforms, leagues, and consumers that the trademark holds legal force.

As esports gamers' gamertags and logos become more recognizable on the internet, the chance of a team, league or platform pursuing that gamer for his or her gaming talent increases. The esports world is rapidly changing, and its

²³⁴ Jacquelyn White, *How Much Does It Cost to Trademark a Name?*, STREET (Nov. 22, 2019), <https://www.thestreet.com/personal-finance/how-much-does-it-cost-to-trademark-a-name-15176740>.

²³⁵ *Self-enforcing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/self-enforcing> (last visited Sept. 12, 2020).

²³⁶ *About Trademark Infringement*, *supra* note 205.

²³⁷ Institutional law clinics that provide pro bono services for federally registered trademarks include: (1) Arizona State University Sandra Day O-Conner College of Law, (2) California Western School of Law, (3) Lincoln Law School of San Jose, (4) New York Law School, (5) Rutgers Law School, (6) South Texas College of Law Houston, (7) UIC John Marshall Law School, (8) UNH Franklin Pierce School of Law, (9) University of Akron School of Law, (10) University of Detroit Mercy School of Law, (11) University of Miami, (12) University of North Carolina at Chapel Hill School of Law, (13) University of San Francisco School of Law, (14) University of Tennessee College of Law, (15) Vanderbilt Law School. *Law School Clinic Certification Program* *supra* note 160; *About Trademark Infringement*, *supra* note 205.

²³⁸ *We'll Keep an Eye on Your Trademark so You Can Focus on Your Business*, LEGALZOOM, <https://www.legalzoom.com/business/intellectual-property/trademark-monitoring-overview.html> (last visited Nov. 1, 2019).

growth has recently and consistently trended upward. It is in the best interest of competitive gamers to register gamertags or logos that signal their identity and authenticity as soon as possible.

VI. CONCLUSION

Competitive gamers who are serious about launching a career in esports should take the time to build and incorporate a logo into gameplay and on social media and foster consistent use of a gamertag for purposes of gameplay, promotion, and streaming. An ambitious esports gamer's establishment of a consistent logo and gamertag can then be registered as federal trademarks for additional protection. It is important to remember that logos and gamertags are just a launching point. It is important to federally register these due to the non-traditional geographic borders of esports gameplay, much of it being conducted virtually, unlike with traditional sports.

Famous gamers such as Tfeu and Ninja should feel encouraged and comfortable to use right of publicity law to hold streaming companies, teams, leagues, and advertisers accountable for all unauthorized use of their images and likeness under appropriate state law. Additionally, if competitive esports gamers anticipate active involvement in international competitive tournaments and either international independent or team gameplay, gamers should submit applications through the USPTO for trademark protection under the Madrid Protocol. Having received approval from over one-hundred of the contracting countries involved in the Madrid Protocol, a standard level of trademark protection for a given work are then established for the trademark holder. Taking basic steps to register trademarks is one of the best strategies that will help competitive gamers protect their careers and expand safeguards for their brands in contract negotiations with esports entities.