

# Esports and the Law

News, case summaries, articles, and strategies concerning esports and the law

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## Attorneys Share Legal Perspective on eNascar iRacing NASCAR Pro Invitational Series Success

By Michael Folger, Skadden, Arps, Slate, Meagher & Flom LLP and affiliates

All sports leagues have been facing unprecedented challenges while dealing with the coronavirus pandemic. Some have acted proactively to maintain their connection with their fans, while others have not.

NASCAR has clearly been in the proactive camp, finding great success using esports to stay connected with fans through the eNASCAR iRacing Pro Invitational Series.

We sought out NASCAR’s legal team, General Counsel Tracey Lesetar-Smith and Assistant General Counsel Jason Weaver (Marketing and Esports) to get their per-

spective on what went in to successfully creating and operating the Pro Invitational Series.

**Question:** *Tracey, how did the idea come about? What were NASCAR’s goals for the Pro Invitational Series?*

**Answer:** When the threat of COVID-19 heightened and forced most businesses to shut down or work from home, including NASCAR and the suspension of physical races, several NASCAR Cup Series drivers started discussing the opportunity to race together on iRacing during the hiatus. This idea quickly evolved into the eNASCAR iRacing Pro Invitational Series. We formally postponed real-life racing across

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## CG Tech Loses Patent Fight Against Gaming Platforms

By Samantha Kaplan, NYU Law 3L

In *CG Tech. Dev., LLC v. FanDuel, Inc.*, the court affirmed the United States Patent Trial and Appeal Board’s (“PTAB”) decision finding appellant CG Tech’s ‘818 patent invalid. *CG Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942 (Fed. Cir. 2019).

This case was the final stop in the parties’ protracted litigation over the ‘818 patent. In 2016, CG Tech, a provider of gaming technology, sued seven online gambling companies, including the three appellees here, for infringing a number of CG Tech’s patents. *CG Tech. Dev., LLC v. FanDuel,*

*Inc.*, No. 216CV00801RCJVCF, 2017 WL 58572, at \*4 (D. Nev. Jan. 4, 2017). A Nevada Federal Judge dismissed all claims except for the alleged infringement of the ‘818 patent. *Id.* at \*7.

In March 2017, Fanduel, DraftKings, and BWin.Party Digital Entertainment petitioned for *inter partes* review of the ‘818 patent, an action that triggers a trial proceeding before the PTAB to determine the patentability of certain claims in a patent. *Inter partes* review allows parties to challenge claims they believe lack novelty or are obvious in light of prior patents or other existing works.

The petitioners alleged that a number of the ‘818 claims were obvious in light of two prior patents. The ‘818 patent “describes a video game system with personalized wireless controllers” that utilize a user’s personal data to customize the gaming experience. *CG Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942, 944. One piece of personal data included in the patent is a user’s age. The petitioners argued that the ‘818 patent was obvious in light of two prior patents, Walker and Kelly, that disclosed personalizing gaming based on a user’s age.

The main issue before the PTAB was the

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## Two Courts Grapple with Suits Over Fortnite's Emotes

By Andrew Quinn, *Georgetown Law 3L*

In the past few months, Epic Games, Inc., the creator of the massively popular video game Fortnite, sought dismissal of two separate suits against it for allegedly copying dance moves and incorporating them into “emotes.” Emotes are movements that players of Fortnite can command their avatars to perform and are sold as an in-game purchase in the Fortnite electronic storefront. In the more recent suit decided in May, *Brantley v. Epic Games, Inc.*, No. 8:19-CV-594-PWG, 2020 WL 2794016 (D. Md. May 29, 2020), two former University of Maryland basketball players, Jaylen Brantley and Jared Nickens, alleged that Epic Games intentionally copied the movements of a dance they popularized, the “Running Man,” and incorporated them as an emote. Brantley and Nickens claimed that the popularity of the Running Man exploded after a live performance by the two on the *Ellen DeGeneres Show*. Brantley and Nickens asserted causes of action under common law and the Lanham Act for invasion of the right of privacy/publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution, and false designation of origin. The U.S. District Court for the District of Maryland dismissed all eight claims.

The court first held that the common law privacy, unfair competition, and unjust enrichment claims were preempted by the Copyright Act because the “scope of copyright preemption is broader than that of copyright protection” and the Running Man was “within the ‘general subject matter’ of copyright under a choreographic work.” Further, the rights provided by the common law actions were equivalent to the rights protected by the Copyright Act, and therefore, the common law claims were preempted by the Copyright Act.

Next, the court found that Brantley and Nickens failed to adequately allege Lanham

Act unfair competition and false designation of origin claims because they simply reincorporated their copyright allegations, whereas the Lanham Act is designed to prevent customer confusion as to the source of goods, not originality or creativity. The court then quickly dismissed the trademark infringement and dilution claims under the Lanham Act and common law because while Brantley and Nickens argued their trademark was in the Running Man likeness, likenesses and images do not function as trademarks, and the plaintiffs did not allege how the dance was used to identify a unique good or service.

Finally, Brantley and Nickens alleged that Epic Games “creat[ed] the false impression that Plaintiffs endorsed Fortnite” as part of their unfair competition and trademark claims, which the court nevertheless analyzed as an additional, separate cause of action for false endorsement. The court cited *Dastar Corporation v. Twentieth Century Fox Film Corporation*, 539 U.S. 23 (2003) and found that because Plaintiffs’ false endorsement claims were based on the “conclusory allegation that Epic Games used their likeness” for the Running Man Emote, “these allegations would lead to the type of conflict between the Lanham Act and the copyright law that the Supreme Court sought to avoid in *Dastar*.”

This case followed a nearly identical case against Epic Games that was decided in March, *Pellegrino v. Epic Games, Inc.*, No. CV 19-1806, 2020 WL 1531867 (E.D. Pa. Mar. 31, 2020). There, Plaintiff Leo Pellegrino, a professional baritone and saxophone player, sued Epic Games for using Pellegrino’s “Signature Move” for the Fortnite emote “Phone It In.” Pellegrino claimed he performs his Signature Move in all of his live performances, which hundreds of thousands have viewed, and Epic Games copied the move after it was featured in a

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## Avoiding a \$10 Million Judgment: Texas District Court Rules Nintendo Did Not Infringe on iLife Patent

By Benjamin Gilman, Michigan Law 3L

In 2013, iLife Technologies Inc. (“iLife”) sued Nintendo of America, Inc. (“Nintendo”) claiming that Nintendo’s Wii gaming console infringed on iLife’s U.S. Patent No. 6,864,796 (“Claim 1”). Claim 1 is described as a system for evaluating body movement relative to an environment. The patent includes the use of a sensor and a processor to locate the dynamic and static accelerative phenomena of the body. Similarly, the Nintendo Wii uses motion sensor technology to make out its users’ body to perform different gaming functions. After a trial, the jury returned a verdict in favor of iLife for over \$10 million in damages. Nintendo appealed the verdict, arguing that (1) Claim 1 was patent-ineligible subject matter, (2) the patent was indefinite, and (3) the patent was invalid for lack of written description and enablement.

On Jan. 17, 2020, the Northern District of Texas vacated the jury verdict and ruled that Claim 1 was patent-ineligible subject matter under 35 U.S.C. §101. Since the court resolved the case under the first issue, it did not reach the second and third issues raised by Nintendo. In order to determine that Claim 1 was patent ineligible, the court analyzed the two factor test set up by the Supreme Court in *Alice Corp. Pty. Ltd. v. CLS Bank Intern.* The first factor is whether the character of the relevant claim is directed to patent-ineligible subject matter, such as laws of nature, natural phenomena, or abstract ideas. If the relevant claim is directed to a patent-ineligible subject matter, the second factor is whether, considering the elements of the claim, both individually and combined, the elements transform the nature of the claim. To satisfy the second factor, the patent holder must demonstrate that the elements or combination of elements are not merely well-understood, routine and conventional, but involve an inventive concept.

Applying the first factor, the court ruled that Claim 1 was directed to a patent-ineligible concept because Claim 1 described nothing beyond conventional motion sensor technology and conventional activities. The court also reasoned that the concepts in Claim 1 were all previously known to the industry. Because of this, the court found that the patent constituted an abstract idea of gathering, processing, and transmitting information.

iLife attempted to argue Claim 1 was not an abstract idea because it specified the type of information (dynamic and static accelerative phenomena), it used a mathematical algorithm to generate new information, and it was implemented on conventional computer components. The court rejected all three of these arguments, noting that none of the arguments made Claim 1 any less abstract. First, a patent must do something beyond specifying a particular type of information, such as changing the character of the information, to not be considered an abstract idea. Second, applying a mathematical algorithm was not sufficient because the new information generated by the algorithm was no less abstract than the information prior to using the tool. Third, implementing the idea on conventional computer components was not sufficient because it did not improve the functionality of the components, and the implementation method was well known to the industry at the time.

Moving to the second factor, the court held that Claim 1 was not an inventive concept because it did not add anything to the routine processes of data collection, analysis, and transmission. Claim 1 described the ordinary order of steps for data analysis, provided no new source or type of information, and did not explain how the data may be evaluated differently (for example a child versus an adult).

iLife argued that Claim 1 could be

considered inventive because the processor distinguished between normal and abnormal events as well as other characteristics. Again, the court was not persuaded by this argument. Under the second factor, the language in the claim must provide for the specifics about the inventiveness of the limitation or technology, and looking at the language in Claim 1, the patent failed to include any of the information or details argued by iLife. Because Claim 1 was determined to be an abstract idea and not involve an inventive concept sufficient to transform the abstract idea, the court ruled that Claim 1 was patent-ineligible. The court thus vacated the \$10 million jury verdict against Nintendo, as the company cannot infringe on an invalid patent.

The iLife decision demonstrates how gaming companies must remain vigilant about the potential patent infringement claims and some of the powerful defenses to those claims when looking to implement the newest technology into their games and consoles in order to avoid potentially significant adverse judgments. While there is still ambiguity about what constitutes patentable subject matter under the Alice test, Courts have shown an overwhelming willingness to grapple with the issue in the early stages of litigation when presented with a properly framed motion. For those seeking to assert their patents and forestall early motion practice, adding allegations to a complaint to demonstrate the inventiveness of the claimed concepts can help avoid early unpatentability determinations. For those accused of infringing patents that appear to cover unpatentable subject matter, framing the invention as one that simply uses computers to simplify things humans can or have done before, versus something that actually makes a computer function better, can be an effective approach to demonstrating unpatentability. ●

## Twitch v. John and Jane Does 1-100: Anonymity in Digital Era

By Jack Igoe, Michigan Law 3L

On May 25, 2019, a group of individuals launched a coordinated digital attack on Twitch Interactive Inc., Amazon's newly-acquired video game streaming giant. According to a legal complaint filed by Twitch, the hackers flooded Twitch's platform with prohibited content including "a video of the March 2019 Christchurch mosque attack, hard core pornography, copyrighted movies and television shows, and racist and misogynistic videos." Hackers evaded Twitch's protective measures by using automated computer programs to create new accounts – commonly referred to as bots. Eventually, Twitch temporarily suspended its streaming option for new users and required two-factor authentication for certain accounts.

On June 14, 2019, Twitch filed a lawsuit in the Northern District of California against several anonymous defendants alleging four causes of action: one federal trademark infringement claim and three California common law claims. *Twitch Interactive, Inc. v. John & Jane Does 1-100*, No. 19-3418 (N.D. Cal. June 14, 2019).

First, Twitch alleged that the defendants infringed on Twitch's trademarks by displaying Twitch's signature marks on websites and Twitter accounts used to coordinate the attack. Second, Twitch alleged that the defendants breached their contract with the streaming service by violating several of the terms and conditions that all users agree to follow, which prohibit users from posting prohibited content and creating fraudulent accounts, among other things. Third, Twitch alleged that the defendants intentionally exceeded the permissible use of the platform, thereby "trespassing" on Twitch's digital property. Finally, Twitch alleged that defendants committed fraud by agreeing to terms and conditions that they had no intention of following and by disguising their identities during the attack.

Despite the publicity of the attack, the identities of the alleged violators largely

remain a mystery. In today's digital era, deciphering a user's identity can be a time-consuming, sometimes futile process depending on the user's efforts to remain anonymous. As is clear from Twitch's case, this extra layer of anonymity adds several litigation considerations that simply do not exist otherwise, namely identifying the defendants before filing suit. In other words, you can't sue whom you can't see. Ever since Twitch filed its complaint, its primary goal has been uncovering the identity of the anonymous hackers. Immediately following the May 2019 attack, Twitch launched an internal investigation. The investigation isolated thousands of suspicious IP addresses by examining user activity during the attack. Although useful, IP addresses do not contain identities. Instead, each address provides general information such as the user's internet service provider.

With this information, Twitch applied for several third-party subpoenas. Over the course of several months, Twitch issued subpoenas to Verizon, Comcast, Optimum, Google, Microsoft, and Twitter, among others. These subpoenas sought records related to the several IP addresses uncovered by Twitch's internal investigation. Although the IP addresses themselves may not contain identifying information, the internet service providers' records associated with those same IP addresses do.

These third-party subpoenas allowed Twitch to identify several of the previously unknown parties. In its amended complaint filed on May 13, 2020, Twitch named Mason Apodaca as an individual defendant alongside the other still-anonymous defendants. Twitch uncovered Mr. Apodaca's identity by cross-referencing publicly available data and subpoena returns from Mr. Apodaca's internet service provider.

Twitch also identified – and settled with – four individuals between December 2019 and March 2020. Although unclear due to negotiated confidentiality agreements, these users' identities likely were uncovered in the

same manner that Twitch identified Mr. Apodaca. As of this writing, Twitch received an extension on its deadline to serve any possible defendants, giving it until Aug. 25, 2020, to do so.

Twitch's case highlights several concerns for digitally-based entertainment providers. Whereas most plaintiffs have no issue identifying their adversaries before going to court, the same is not true for digital entertainment providers like Twitch. This opaqueness makes it harder for businesses to decide whether to file suit, as uncovering the identity of anonymous users has the potential to significantly delay the proceeding and makes litigation more expensive and recovery less certain from the outset. In most cases, a plaintiff cannot recover a judgment against the defendant without first serving him or her with a complaint. Thus, when potential defendants remain anonymous, the plaintiff cannot recover *at all*, let alone assess the likelihood of meaningful recovery. Even in cases that do not result in a trial, the amount of legwork required to arrive at a settlement is still significantly heightened due to these same procedural limitations.

Given these heightened costs, businesses like Twitch may turn to other avenues of relief. Extra-judicial approaches such as permanently blocking user accounts or removing content may become more popular. However, as Twitch's case demonstrates, these extra-judicial forms of relief may be inadequate in the face of evolving forms of attack whereby a relatively small number of users can rely on highly-coordinated, automated attacks to evade protective measures.

In any event, the digital realm raises significant litigation considerations largely absent from other forms of in-person entertainment. Digital providers must undertake relatively unclear calculations before committing to a formal response. This will force businesses to be deliberate in their litigation decisions, perhaps saving their time and money for cases that have increased signaling significance, more certain recovery, or both. ●

## Decision in Esports Case Suggests Attendance, Not Sales, Can Trigger Tax Obligations

By Dana Stone, Penn Law 3L

With traditional sports leagues suspended, the esports and video game industry is having a moment. Notwithstanding the economic downturn, the video game industry has seen an increase in revenue during the pandemic as many fans embrace the fast-growing industry. In fact, in March, video game sales in North America were up 34 percent from those in March 2019. As video games go from household hobby to professional sports status, video game publishers will aim to capitalize on this surge in popularity through many channels, specifically trade shows and conventions. A recent case in Washington State highlights a consideration publishers should account for when deciding to attend conventions once large gatherings are permitted to resume.

Popular video game developer and publisher, Riot Games, Inc. (“Riot”) recently discovered the unforeseen sales tax risk presented by participating in a trade show or convention. In *Riot Games, Inc. v. Washington*, BTA Dkt. No. 15-118 (Feb. 11, 2020), the Washington State Board of Tax Appeals (“Board”) upheld the Department of Revenue’s determination that Riot’s participation in a trade convention in Seattle created a sufficient nexus with Washington to trigger payment of the state’s business and occupation (“B&O”) tax.

Washington imposes a B&O tax on “every person that has a substantial nexus” in the state. A substantial nexus can be established by a person with a physical presence in Washington, engaging in activities that are “significantly associated with the person’s [or representative’s] ability to establish or maintain a market for its products” in the state. Such activities include exhibiting at a trade show and performing activities aimed at establishing or maintaining customer relationships. Since 2016, Washington allowed a trade convention exception in which

businesses such as Riot can participate in one trade show per year without establishing a substantial nexus, as long as they do not make sales at the convention. There’s a catch—to qualify for the exception, the trade convention cannot be open or marketed to the general public. This means that marketing for the convention must be limited to specific members and invited guests.

Prior to November 2012, Riot (based in California) did not have any employees or physical place of business in Washington. Its only direct contact with the state was its attendance at an annual multi-day gaming convention in Seattle. In August and/or September of 2010, 2011 and 2012, Riot sent several employees to participate at the Penny Arcade Expo (“PAX”). Industry insiders and the general public gather each year at PAX to explore exhibitor booths, participate or watch gaming tournaments and try out new games. Open to the public, approximately 70,000 people attended PAX during the years in question. Riot attended PAX to promote League of Legends (Riot’s popular multiplayer online video game) and engage with the general community. During 2010 and 2011, Riot made no direct sales at the convention. Rather, at its booth, Riot handed out swag and representatives played games with visiting fans.

In an audit by the Washington Department of Revenue, the Department determined that Riot’s attendance at the conventions in 2010, 2011 and 2012 created a sufficient nexus with Washington to trigger the B&O tax. Riot disagreed with this determination for 2010 and 2011 because it did not make any sales at the convention in those years, and obtained a temporary revenue registration certificate in August 2012. Instead, it contends that it did not have a nexus with Washington until it hired an employee located in the state in November 2012, at which point it registered with the Department for tax reporting purposes on

a permanent basis.

In February of this year, the Board upheld the Department of Revenue’s nexus determination, finding that Riot’s activities at PAX were sufficient to allow Riot to maintain a market for its products in Washington. Although no sales were made at the convention in 2010 and 2011, Riot had gross sales to Washington customers of \$533,410 and \$1,573,083 in those years. The Board noted that Riot employees interacted with PAX participants by promoting League of Legends and engaging in gaming tournaments with public participants. The Board also held that Riot obtaining a temporary revenue certificate in 2012 did not bar the Department of Revenue from determining upon further information that an additional tax would be due. While the trade convention exception did not go into effect until July 2016 and thus was not applicable to the audit period, the Board noted PAX was marketed to the general public and would not fall under Washington’s trade convention exception.

A sales tax obligation arising from attendance or participation at a trade convention is not a new concept. Like Washington, many states provide more lenient rules regarding sales tax nexus in an attempt to encourage conventions and the economic benefits that result from such conventions. For example, in California, any out-of-state business whose sole activity in the state is engaging in a convention or trade show for less than 15 days and whose gross income from that activity is less than \$100,000 is not considered to have a nexus with the state for tax purposes. Riot’s case demonstrates the importance of investigating the state tax laws well in advance of attending a trade show in another state because each state has its own rules, and participation at a trade show in another state may put an organization at risk of tax obligations there. ●

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our top series on a Friday and announced the eNASCAR iRacing Pro Invitational Series the following Tuesday.

Since the start of the pandemic, there is no question that there's been a shortage of original content produced, and this impacted numerous businesses, including our media partners. NASCAR saw this as an opportunity to deliver something special for the greater racing community and industry stakeholders in the midst of so much uncertainty. Our partners at FOX Sports and iRacing spearheaded the project, but it truly became an industry-wide effort to offer fans a mental break from the crisis that consumed our country by providing some normalcy of sport to their lives.

Stakeholders could monetize and provide their respective partners value during these trying times, especially while NASCAR wasn't running races. It took a tremendous amount of collaboration and willingness to do something positive for the greater racing community and the industry responded.

**Q:** Tracey, what were the biggest challenges, including from a legal standpoint?

**A:** We were in the midst of so much uncertainty and that unpredictable environment created challenges we had to overcome in a very short period of time. The biggest challenge was due to the rapid development of a completely new esports series. We had to navigate complications acquiring and securing the necessary rights and licenses associated with the creation of the new league in a really short timeframe. I have the good fortune of overseeing an incredibly talented and dedicated team of lawyers and legal professionals here at NASCAR, and the ability of the group to pivot and solve these challenges on the fly cannot be overstated. Credit goes to Jason Weaver, my Assistant General Counsel of Marketing and Esports, and the team



Tracey Lasetar



Jason Weaver

members who were vital in getting this new league off the ground. He has always been complimentary of our working relationship with iRacing.

**Q:** Jason, can you provide us with your thoughts on this?

**A:** For more than a decade, iRacing and NASCAR have simulated stock car races featuring the top sim-racers in the world through the eNASCAR Coca-Cola iRacing Series. iRacing is so realistic and authentic to the racing experience that NASCAR drivers use the platform to practice. iRacing is a fantastic partner and worked alongside NASCAR throughout the whole process to help finalize all the logistical aspects of the series. NASCAR and everyone involved knew this project was important and that, if implemented correctly, it could be a resounding success.

**Q:** Tracey, have you had any dialogue with other sports entities – either inside or outside the world of motor sports – about the Pro Invitational series?

**A:** Between NASCAR's Legal and Gaming teams, we received inquiries from leagues, agencies and executives across other sports as a result of the success of the eNASCAR iRacing Pro Invitational Series. The series became one of the most visible moments in esports history in terms of linear broadcast, with six of the seven events ranking as the highest-rated esports TV programs of all time and 6.8 million unique

viewers across the series. Traditionally, esports has been confined to digital arenas and only more recently has it progressed to physical events. Delivering the eNASCAR iRacing Pro Invitational Series Sundays on FOX helped continue to legitimize esports as a real entertainment property, and other leagues noticed. Some states even offered it as a legal sports betting competition.

**Q:** Tracey, NASCAR also kicked off the second year of the eNASCAR Heat Pro League on April 22, which is a more traditional eSports league and has sanctioned one of the longest running eSports leagues in the eNASCAR Coca-Cola iRacing Series.

**A:** While the eNASCAR Coca-Cola iRacing Series dates back to the inception of NASCAR's relationship with iRacing in 2008 and features the world's most elite oval sim-racers, iRacing uniquely positions NASCAR, providing the ultimate crossover platform between esports and physical racing. In fact, many of the top drivers use iRacing to prepare for physical competition. It's a testament to our innovative business and competition units that NASCAR identified iRacing as an opportunity to lower the barrier of entry to racing. In 2018, NASCAR and iRacing developed the eNASCAR Ignite Series specifically to attract and identify young and diverse talent.

Through NASCAR's relationship with Motorsport Games—the developer and publisher of NASCAR Heat 5—we created our first mass-market, console-based esports competition, the eNASCAR Heat Pro League. The league introduces NASCAR-style racing to the massive esports audience on consoles and offers an entry point for new, casual gamers while engaging avid fans on a deeper level. With the portfolio of competition that NASCAR has in the esports space, NASCAR is redefining fan

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## Updates from the Southern District of New York in *FaZe Clan v. Tenney*

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opposite mandate from case law.

On their second motion for summary judgement, FaZe failed to prove that Tenney breached the Gamer Agreement by failing to share a source of revenue. Tenney had designed “skins,” or outfits worn by characters in a video game, for Epic Games and kept his revenue from this. The contract gave FaZe claim on “in-game merchandise,” but Tenney submitted persuasive evidence that FaZe Clan did not consider skins “in-game merchandise.”

Most damning was a YouTube video in which a FaZe representative stated that in-game merchandise “had nothing to do” with skins.

Ellen Zavian, Esq., a professorial lecturer of law at The George Washington University Law School (<https://www.law.gwu.edu/ellen-m-zavian>) and editor in chief of Esports and the Law, wrote about this case in the Summer 2020 edition of ESL, noting that “neither party will be walking away from this fight anytime

soon.”

Given the recent settlement between FaZe and Tenney, it would seem they did finally give up on the fight. However, the complex and bitter legal battle, which led them to this settlement demonstrates how uncharted the legal territory of esports employment and contract law is; there is no doubt that cases like *FaZe Clan Inc. v. Tenney* will only become more common as the world of esports — and the legal questions that accompany esports — grows. ●

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engagement while connecting the sport with new audiences.

**Q:** Jason, from a legal standpoint, what have been the challenges with launching and operating these eSports leagues? How are these leagues structured?

**A:** Each league is structured slightly differently, and those nuances have created various challenges along the way. The NASCAR industry itself is historically complex, so we’ve tried to model these leagues somewhat off of real world racing, tackling the unique legal challenges they may pose in order to support the structures and make the product work as it’s supposed to.

**Q:** Tracey, care to elaborate?

**A:** All of the leagues are created by a license from NASCAR to the operator/developer of the league. Navigating the rights landscape and acquiring the necessary licenses (e.g., drivers, tracks, teams, sponsors, OEMs, etc.) to create each league and maintain viability has been tricky. However, our entire industry has been fully supportive of these initiatives, which helped establish a foundation for each league and open up new revenue streams.

For the eNASCAR Coca-Cola iRacing Series, participants must first become

members/subscribers of iRacing. Once they are members, they must perform at a high enough level to achieve what is called a Class A license before qualifying through the NASCAR Pro Series, which runs November through January each year on iRacing. Once qualified for the series, competitors are drafted to teams, some of which are affiliated with top real-world NASCAR teams and drivers. The 2020 eNASCAR Coca-Cola iRacing Series features one of the richest payouts in esports racing competition, with a prize pool of more than \$300,000.

For the eNASCAR Heat Pro League, Motorsport Games and the Race Team Alliance (an alliance of numerous NASCAR Cup Series sanctioned race teams) formed a joint venture together to create the eNASCAR Heat Pro League, under license by NASCAR. The league issues franchises to the participating teams. Each year Motorsport Games runs qualifying races for those interested in competing on both Xbox and PlayStation platforms. The league hosts a draft whereby franchises draft a driver on each console to compete in the eNASCAR Heat Pro League. Drivers are independent contractors of each franchise and are under

contract for the season. The 2020 league featured 28 of the best players competing for a prize pool of more than \$200,000.

**Q:** Tracey, how do teams deal with issues like sponsorships, contracts, etc.?

**A:** As I’ve pointed out, the sport of stock car racing is a complex and unique ecosystem, and our esports efforts often mirror or echo that ecosystem in terms of where there are opportunities for industry stakeholders to bring in revenue. So, we are continuing to see those stakeholders find their own unique paths.

**Q:** Jason, your thoughts?

**A:** Drivers and teams vary on their individual approaches to esports sponsorships and contracts, however, that approach is often similar to real world racing in NASCAR. Drivers, teams and tracks maintain their ability to secure sponsorships, just like NASCAR maintains its ability to sell sponsorships for the league itself.

**Q:** Tracey, what might be something we can expect in the future?

**A:** As esports opportunities continue to develop in our industry, I wouldn’t be surprised to see new and diverse stakeholders enter the fray as a gateway to the on-track racing itself. ●



## Links Between Video Games, Gambling Deeper than Expected

A range of video game practices have potentially dangerous links to problem gambling, a study has revealed.

Building on previous research by the same author, which exposed a link between problem gambling and video game loot boxes, the new study suggests that a number of other practices in video games, such as token wagering, real-money gaming, and social casino spending, are also significantly linked to problem gambling.

The research provides evidence that players who engage in these practices are also more likely to suffer from disordered gaming — a condition where persistent and repeated engagement with video games causes an individual significant impairment or distress.

Author of the study, Dr David Zendle

from the Department of Computer Science at the University of York, said: “These findings suggest that the relationship between gaming and problem gambling is more complex than many people think.”

“When we go beyond loot boxes, we can see that there are multiple novel practices in gaming that incorporate elements of gambling. All of them are linked to problem gambling, and all seem prevalent. This may pose an important public health risk. Further research is urgently needed.”

For the study, a group of just under 1,100 participants were quota-sampled to represent the UK population in terms of age, gender, and ethnicity. They were then asked about their gaming and gambling habits.

The study revealed that a significant proportion (18.5%) of the participants had

engaged in some behavior that related to both gaming and gambling, such as playing a social casino game or spending money on a loot box.

Dr Zendle added: “There are currently loopholes that mean some gambling related elements of video games avoid regulation. For example social casinos are ‘video games’ that are basically a simulation of gambling; you can spend real money in them, and the only thing that stops them being regulated as proper gambling is that winnings cannot be converted into cash.

“We need to have regulations in place that address all of the similarities between gambling and video games. Loot boxes aren’t the only element of video games that overlaps with gambling; They’re just a tiny symptom of this broader convergence.” ●

## CG Tech Loses Patent Fight Against Gaming Platforms

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meaning of a specific phrase in the patent. The patent specified that the gaming system would, among other things, allow a wireless controller to transmit data on a user’s age to a video game system. The transmission of this personal information could allow the game to “authorize play based on age.” The court needed to determine what this phrase meant in order to evaluate the obviousness of the patent. The PTAB determined the “plain and ordinary meaning” of this phrase was “a control that either prohibits *or adjusts* operation of a video game based on the user’s age.” *CG Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942, 944 (emphasis added). Based on this construction of the phrase, the PTAB found that the challenged claims “would have been obvious based on [two prior patents,] Walker and Kelly.” *Fanduel, Inc. v. Cg Tech. Dev., LLC*, 2018 WL 5269266, at \*29.

CG Tech appealed the PTAB’s decision to the Federal Circuit, contending that the PTAB incorrectly construed the meaning of the phrase “authorize play based on age.” It

argued the PTAB defined this phrase too broadly by including the term “or adjusts” in its definition: “Adjusting a game impacts ‘how’ a particular game is played, [whereas] ‘[p]rohibiting’ [or not authorizing] a game impacts whether a player can play a particular game.” Brief for Appellee at \*5, *CG Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942 (Fed. Cir. 2019) (No. 19-1261). This misconstruction, the appellant argued, was not harmless error. While both the Walker and Kelly patents included embodiments that spoke to “adjusting” play based on age, appellant argued that neither mentioned “authorizing” play based on age. Therefore, if the PTAB had interpreted the phrase “authorize play based on age” correctly, it would not have concluded the patent was invalid.

While the Federal Circuit agreed with CG Tech that the PTAB had misconstrued the meaning of the phrase, the court held that the patent was nevertheless invalid because the Kelly patent did, in fact, “disclose[] prohibiting [gameplay] based on age.” *CG*

*Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942, 946. The court pointed to language from the Kelly patent that disclosed “players can . . . be required to meet certain conditions before participating in a credit game or tournament,” with one of those conditions being age. *Id.* at 945. The court also cited to language in the PTAB decision that supported this understanding, i.e., that “Kelly discloses using the age of the game player as a prerequisite to playing a particular game.” See *Fanduel, Inc. v. Cg Tech. Dev., LLC*, 2018 WL 5269266, at \*15. The court thus held that PTAB’s misconstruction of the phrase was “harmless error” due to the substantial evidence supporting its findings on the Kelly patent, and affirmed the PTAB’s ruling. *CG Tech. Dev., LLC v. FanDuel, Inc.*, 794 F. App’x 942, 945.

In a last ditch effort to salvage its patent, CG Tech filed a petition for rehearing en banc. The petition was denied on March 20, 2020, putting an end to the dispute and invalidating the ‘818 patent. ●

## Two Courts Grapple with Suits Over Fortnite's Emotes

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Google Pixel 2 commercial. Notably, the plaintiffs in *Brantley* plead nearly the same causes of action that Pellegrino asserted in his action: invasion of the right of privacy/publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution, false designation of origin, and false endorsement.

Despite the similarities between the cases, the court in *Pellegrino* dismissed the right of publicity and privacy claims on different grounds than those in *Brantley* and declined to dismiss the false endorsement claim. First, for the right of publicity and privacy claims, the court employed the Transformative Use Test to weigh Pellegrino's publicity and privacy rights against Epic Games' First Amendment protections afforded to expressive works, which include video games. The court concluded that because the avatars in Fortnite do not resemble Pellegrino or otherwise share his identity nor do what Pellegrino does in real life, Epic Games' use of Pellegrino's likeness was sufficiently transformative to provide it with First Amendment protection that was not outweighed by Pellegrino's interest in his likeness.

Second, for the false endorsement claim under the Lanham Act, the court noted that other courts have allowed a plaintiff's false endorsement claim "to proceed notwithstanding *Dastar* where a complaint alleges that the defendant used the plaintiff's identity or likeness to deceive the public into believing that the plaintiff endorsed the defendant's product." Here, Pellegrino alleged Epic Games used Pellegrino's Signature Move to generate significant income by creating the false impression that Pellegrino endorsed Fortnite. Specifically, Pellegrino argued that Epic Games had copied his Signature Move and named the emote "Phone It In" to allude to Pellegrino's appearance in the Google Pixel 2 commercial, that the reaction from many players of Fortnite was immediate recognition of Pellegrino's Signature Move, and this

created the false impression that Pellegrino endorsed Fortnite. The court found that these allegations "relate to Epic's use of Pellegrino's likeness and trademark to create the impression that Pellegrino endorses Fortnite and do not relate to the alleged confusion over the origin of the Signature Move" and, unlike the allegations in *Brantley*, Pellegrino's false endorsement claim "is distinct from his false designation of origin claim and thus, is not barred by *Dastar*."

The distinction between the opposite false endorsement holdings in *Brantley* and *Pellegrino* could be due to how Pellegrino plead the cause of action. Brantley and Nickens alleged their false endorsement claim not as a distinct theory of liability under the Lanham Act, but as part of their general trademark infringement claims based on the "conclusory allegation that Epic Games used their likeness." Conversely, Pellegrino separately alleged that: (1) Epic Games committed trademark infringement by using the Signature Move to create the false impression that Epic created it (false designation of origin), and (2) Epic Games used Pellegrino's Signature Move to generate income by creating the false impression that Pellegrino endorsed Fortnite (false endorsement). While the distinction may be slight, it allowed the court in *Pellegrino* to find that Pellegrino's false endorsement claim based on Epic Games' use of his likeness in "Phone It In" did not depend on the authorship or origin of Pellegrino's Signature Move.

What is more likely, however, is that

Brantley and Nickens failed to establish that the Emote Running Man was based specifically on their likeness, whereas Pellegrino successfully alleged that "Phone It In" was based on his Signature Move, and therefore, his likeness. Brantley and Nickens relied on their performance on the *Ellen DeGeneres Show* to allege that Epic Games used their likeness for the Running Man, but in the very same clip admitted they had not created the dance move. Indeed, the court in *Brantley* noted this inconsistency and repeatedly characterized Plaintiffs' allegation that Epic Games used their likeness in Running Man as "conclusory." Conversely, the court in *Pellegrino* accepted Pellegrino's allegations that the sale of the "Phone It In" on Fortnite's storefront followed his performance of the Signature Move in the Google Pixel 2 commercial, and therefore, "Phone It In" was distinctly based on Pellegrino's likeness.

In any event, both *Pellegrino* and *Brantley* illustrate the difficulties faced by plaintiffs seeking to sue Epic Games or other video game creators for allegedly incorporating their dance moves into emotes. With Player Unknown's Battlegrounds, Call of Duty: Warzone, and other popular videogames incorporating emotes as in-game purchases, one may expect more plaintiffs filing suits like those in *Pellegrino* and *Brantley*, but successfully recovering on these claims will certainly prove difficult based on the rationale set forth in the two cases. ●

### Huya Forms Committee to Consider Tencent Proposal

HUYA Inc., a leading game live streaming platform in China, has announced that its Board of Directors has formed a special committee consisting of two independent directors, Mr. Hongqiang Zhao and Mr. Tsang Wah Kwong, to consider the previously announced preliminary non-binding

proposal set out in an August 10, 2020 letter from Tencent Holdings Limited. Mr. Zhao chairs the special committee. The special committee has retained Citigroup Global Markets Inc. as its independent financial advisor and Skadden, Arps, Slate, Meagher & Flom LLP as its U.S. legal counsel.

## As Collegiate Esports Evolve, Women Are Being Left Out

**A** new study from North Carolina State University reports that the rapidly growing field of collegiate esports is effectively becoming a two-tiered system, with club-level programs that are often supportive of gender diversity being clearly distinct from well-funded varsity programs that are dominated by men.

“Five years ago, we thought collegiate esports might be an opportunity to create a welcoming, diverse competitive arena, which was a big deal given how male-dominated the professional esports scene was,” says Nick Taylor, co-author of the study and an associate professor of communication at NC State. “Rapid growth of collegiate esports over the past five years has led to it becoming more professional, with many universities having paid esports positions, recruiting players, and so on. We wanted to see how that professionalization has affected collegiate

esports and what that means for gender diversity. The findings did not give us reason to be optimistic.”

For this qualitative study, the researchers conducted in-depth interviews with 21 collegiate esports leaders from the U.S. and Canada. Eight of the study participants were involved in varsity-level esports, such as coaches or administrators, while the remaining 13 participants were presidents of collegiate esports clubs. Six of the participants identified as women; 15 identified as men.

“Essentially, we found that women are effectively pushed out of esports at many colleges when they start investing financial resources in esports programs,” says Bryce Stout, co-author of the study and a Ph.D. student at NC State. “We thought collegiate esports might help to address the disenfranchisement of women in esports and in gaming more generally; instead, it

seems to simply be an extension of that disenfranchisement.”

“Higher education has been spending increasing amounts of time, money and effort on professionalizing esports programs,” Taylor says. “With some key exceptions, these institutions are clearly not putting as much effort into encouraging diversity in these programs. That effectively cuts out women and minorities.

“Some leaders stress that they will welcome any player onto their team, as long as the player has a certain skill level,” Taylor says. “But this ignores the systemic problems that effectively drive most women out of gaming—such as harassment. There needs to be a focus on cultivating skill and developing players, rather than focusing exclusively on recruitment.” ●

## Activision Blizzard Taps Petitti to Lead Sports & Entertainment

**A**ctivision Blizzard, Inc. has announced the appointment of Major League Baseball’s Tony Petitti as President of Sports and Entertainment. In his new role, reporting to Activision Blizzard CEO Bobby Kotick, Petitti will oversee esports, consumer products, and film and television.

“Tony is one of the most highly regarded executives in sports and entertainment,” said Bobby Kotick, Chief Executive Officer of Activision Blizzard. “His success in media and as Deputy Commissioner

and Chief Operating Officer of Major League Baseball is the perfect blend of skills to help us realize our aspirations for esports and our related businesses. He is admired by owners, media executives, players and fans.”

Petitti most recently served as Deputy Commissioner, Business and Media of Major League Baseball and Chief Operating Officer, where he led marketing, broadcasting and media rights sales, the MLB Network, digital content, youth programming and special events. Prior

to that, Petitti was President of the MLB Network, which he helped launch from its inception in 2008.

Before joining MLB, Petitti, a 13-time Emmy-award winner, was executive vice-president and executive producer at CBS Sports where he was responsible for the network’s sports programming and production. He graduated from Haverford College before attending Harvard Law School. ●