

# Esports and the Law

Presented by Skadden

## Court Grants Injunction for Nintendo Against Gaming Pirate

By Ellen M. Zavian, Esquire, with  
Lauryn Robinson, GW Law, 2L

If it is too good to be true, then it probably is... illegal. This is exactly what gaming company Team-Executer, Sergio Moreno, found out the hard way. In 2018, his company, *Offer-Up*, enabled hundreds of users to play their favorite Nintendo games for free or at a reduced cost.

In March of 2017, Nintendo of America (“Nintendo”) released the *Nintendo Switch*, a multifunctional video game system designed to be used at home or on-the-go. Users can purchase games online or insert an authorized game cartridge (“Nintendo Switch Game Card”) into the Nintendo Switch device. Either way, the Switch costs at least \$300 and the cartridges start at \$50. A hefty price for any gamer!

So it is no wonder why gamers flocked to *Offer-Up* for a free version of the Nintendo games. Since the pirated games attracted hundreds of users, it was on Nintendo’s radar screen. In response, Nintendo filed suit against Moreno for copyright and trademark infringement on Dec. 11, 2018 in the United States District Court, Central District of California, Southern Division.

Nintendo claims Moreno committed various counts of copyright and trademark infringement. By alleging that “defendants modifications are (a) designed or produced for the primary purpose of circumventing technological measures that control access to works protected by Nintendo’s copyrights or that protect Nintendo’s copyrights as a copyright owner; (b) have

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## Anthony Dreyer’s Long Love Affair With Sports and Video Games Leads to Successful Legal Practice in Esports

By Jason Re, GW Law 1L

To really know Anthony Dreyer, one cannot merely look at his current title, Partner at Skadden, Arps, Slate, Meagher & Flom, LLP, or even the bio on the firm’s website. Rather, one must go back, way back, to when Dreyer took over a paper route in order to pay for video games. His youth was filled with passionate participation in games such as NES, Sega Genesis (original PlayStation), and that passion continues today

with each generation of X Box, and the current game, Switch.

That love for sport and video games comes through in his work, as he has become one of the esports industry’s leading attorneys. But that is hardly Dreyer’s only area of legal expertise. He also has extensive experience counseling clients on a wide range of sports matters, from the PGA TOUR, to ticket sales policy involving Madison Square Garden (MSG Network, NY Knicks, NY Rangers), and a class action involving the

NCAA, NBA, NHL, NFL and MLB in a suit brought to prevent New Jersey’s authorization and licensing of gambling at athletic events. These and many other matters have led him to be recognized by the *Chambers USA: America’s Leading Lawyers for Business* in the Nationwide Sports Law category and to be named by the *SportsBusiness Journal* as a sports law power player.

**Question:** *What did you study during*

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## Esports and the Law <sup>ES</sup>EL

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## Heavy Metal Trademark Infringement

By Laura Saini, *GW Law 2L*

The infamous metal band Iron Maiden sued 3D Realms Entertainment APs for trademark infringement, trademark dilution and unfair competition for using the Iron Maiden trademark in its video game. 3D Realms is a video game publisher, most well-known for publishing games like Duke Nakem, Max Payne, Commander Keen, Wolfenstein 3D, Bombshell and Ion Fury. 3D Realms made a video game called Ion Maiden, using a similar steel cut font that Iron Maiden mark is known for, allegedly adopting a character named Shelly Harrison, an attempt to copy Steve Harris, the Iron Maiden founder and primary songwriter. Ion Maiden also uses the yellow bomb emoji in its video games and merchandise, which looks similar to the character Eddie in the Iron Maiden video games. The lawsuit also claimed that Ion Maiden was similar to an Iron Maiden game released in 2016, *Legacy of the Beast*, a fantasy role-playing video game where players go through obstacles to search for Eddie's soul with the band's music as the background.

3D Realms claimed on Twitter that the claims were frivolous because several of the claims like the skull emoji and the Shelly, Harrison character were in 3D Realms previous video game, *Bombshell*. However, in July 2019 3D Realms changed the title of the game from Ion Maiden to Ion Fury to "avoid legal issues with a certain popular heavy metal band," according to the 3D Realms Website. Iron Maiden Holdings Limited voluntarily dismissed the suit on October 2019.

This isn't the first time a video game publisher was accused of trademark infringement. In 2014, a class action case brought by Ed O'Bannon and Sam Keller settled against Electronic Arts and Collegiate Licensing Company and the NCAA



for using their likeness in an NCAA video game without compensation. The video game allowed users to utilize the athlete's avatars while playing, and even the names of the athletes could be uploaded on the internet by users. The transformative use defense did not prevail in court because the video game depicted the student athletes almost identically and portrayed them playing basketball, the very activity that led them to become famous.

Currently a big trademark infringement action is underway by Pinkerton Detectives Agency against the extremely popular game, *Red Dead Redemption*. The game is an interactive Wild West adventure, famous for its attention to detail, its realism, and its historical accuracy. *Red Dead 2* refers to Pinkerton detectives who help find culprits; the detectives are dressed in the same apparel typical to Pinkerton detectives and the detectives also wear badges with the name Pinkerton visible. This is based on reality, where the US government hired Pinkerton detectives to catch criminals in the early part of the 20<sup>th</sup> century. The developers of *Red Dead*, Take-Two Interactive Software and Rockstar Games, filed for a declaratory judgement arguing that they only invoked as much necessary to evoke historical facts, and part of the appeal of the game is to have historically accurate, immersive experience. ●

## Passionate Gamer and Government Affairs Professional Tackles the Growth of eSport in Congress

By *Stephen Sharbaugh*, GW Law 2L

**K**evin O'Hanlon has always been a gamer and has had a deep personal familiarity with games such as Counter-strike and Dota. These gems of his childhood stood the test of time and have now become a real opportunity, in the form of esports.

O'Hanlon started in politics interning for Hillary Clinton for President in 2008. This initial experience in politics led him to work for Congressman Heath Shuler (D-NC-11) where he served in a variety of roles, culminating as the congressman's senior advisor. Since leaving the Hill, O'Hanlon has lobbied for a broad variety of high tech and other industries including AT&T, Verizon, LifeLock and the Entertainment Software Association (ESA). He ultimately joined ESA in 2015 where he served as Senior Director, Federal Government Affairs. In this capacity, O'Hanlon led ESA's initiatives on emerging technology, games for education, and esports.

With O'Hanlon's unique background in esports, he was able to illustrate a deeper insight into how esports has evolved, specifically in the eyes of legislators, in this exclusive interview.

### *How has your previous experience working in Congress assisted you in advocating for the video game industry?*

O'Hanlon noted that his many years on the Hill helped him better understand their process and helped him better communicate with staff and Congressional representatives. But O'Hanlon mentioned that ever since he left, the demographics of Congress have changed drastically. O'Hanlon continued that Congress currently has one of its youngest generations in its history and to him that has become a "double-edged sword." On the one hand, some of the younger generation of



**Kevin O'Hanlon**

Congressional representatives are more open to the growing potential of esports, some of them growing up playing many of the same games he did. But, that familiarity also has brought passionate viewpoints on numerous issues putting esports "in a really unique place."

### *How do you think legislation can aid the development of the esports?*

O'Hanlon remarked that he believes esports is the "great equalizer." He sees numerous opportunities for states and the federal governments to step into this unknown territory and welcome the growth of a beneficial product. O'Hanlon cited that many women and minorities have begun to become involved in esports and that the nature of video games invites all to participate. Specifically, he stated that "you do not need the traditional physical skills present in other sports, you can simply pick up a controller and play." O'Hanlon sees opportunities for more states to institutionalize competitive leagues, citing that some states have already enacted legislation. For instance, O'Hanlon believes that "states are starting to realize that a lot of money changes hands in a lot places, raising tax implications and

jurisdictional questions."

### *How do you anticipate emerging technologies (VR, AR, and MR) impacting esports?*

O'Hanlon spoke highly of these technologies and the massive opportunities they present. For VR (virtual reality), "calling it interesting technology is a vast understatement." "AR [augmented reality] is more practicable and MR [mixed reality] has the most potential in being able to compete and play with multiple people in the same area at the same time." But O'Hanlon also noted that there may be problems with adoption. He cited issues with gaining 5G broadband access, which will be essential for implementation. Overall, O'Hanlon sees these emerging technologies as a "very interesting extension" of esports.

### *What has been one of your most memorable experiences with legislators and esports?*

O'Hanlon discussed that in July 2019 he helped orchestrate the first esports tournament on Capitol Hill between members of the House of Representatives, a group called The Future Forum. They played Rocket League, a soccer-like game in which players control small, rocket-propelled cars, that was streamed live on Twitch. Six members participated, including Rep. Stephanie Murphy (D-FL-7) and Rep. Hakeem Jeffries (D-NY-8). O'Hanlon remarked that "by getting them exposed to the games, it exposed them to the positive outcomes of esports."

Now as an experienced government affair professional with nearly 10 years of Congressional and lobbying experience, O'Hanlon has now taken a position with Samsung as the Director of Government Relations. ●

## Dreyer's Love for Sports, Video Games Leads to Esports Practice

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*undergrad at Rutgers? Did this help/impact your choice of practice area?*

**Answer:** I have a B.A. in Economics, with a minor in English. Candidly, the main reason was because I couldn't decide if I wanted to pursue an MBA or a JD, and I tried to defer that decision as long as humanly possible. So, I hedged and studied business and finance, but within a liberal arts curriculum. On reflection, I wouldn't have changed a thing. The Econ degree has helped me have a better understanding of the economic drivers—and hence, sources of legal friction and disputes—in the sports and video game industries. It has also been a huge help as I work with damage experts and economists on some of my more complex litigation matters.

**Q:** *What are some ways that intellectual property law and contract law intersect with eSports?*

**A:** There are really countless ways in which eSports and IP intersect. A videogame is one of the richest sources of intellectual property there is. From potentially copyrightable source code, to the expression of a creative idea that is the game itself, the possible inclusion of trademarks and other source-identifying intellectual property, and the use of the name and image of voice actors and avatars—a videogame incorporates all of these rights and more. Then you add issues such as fair use, like copyright owner's rights when publicly performed, and a whole host of emerging issues that courts, games, and videogame companies have just begun to consider.

**Q:** *Do you see any parallels between sports law and esports law? Did your work with pro sports leagues and athletes prepare you for practicing in the esports legal arena?*

**A:** One of the areas that has always interested me is league governance. It



“The Econ degree has helped me have a better understanding of the economic drivers—and hence, sources of legal friction and disputes—in the sports and video game industries.”

—Anthony Dreyer

may be that I'm a geeky lawyer at heart, but I find the rules around how a league operates to be fascinating. It's one of the first areas I cover in the Sports Law course that I teach, and it serves as a foundation for how a league functions. It also informs how other legal disciplines such as the antitrust and labor laws apply to the league's operations. Esports leagues present many of the same potential issues. How is an esports league structured? Who owns the league and its intellectual property? Who makes decisions about scheduling and player issues? Although the current esports league model typically centers around the game developer (which owns the game and its IP), I think that model will continue to be questioned and revisited

as more and more investors and other entities seek to enter the space.

**Q:** *Does the sport global footprint impact who represents sport organizations?*

**A:** With esports growth on all continents, it has been critical to work at a firm with global experts around the world. It is not enough to solely focus on the U.S. intellectual property laws. The global presence mandates expertise in all areas of the law, including licensing, real estate and leasing (for venues), ticketing, general commercial work, financing, sponsorship, naming rights issues, player disputes and issues, and gambling/doping/integrity matters, among countless others. ●

## Ruling Means Gamer Could Alter Internet Workers' Rights

By *Lauryn Robinson, GW Law 2L*

**T**urner “Tfue” Tenney is known around the world as one of the best esports players in the industry. With his pending lawsuit against FaZe Clan (“FaZe”), a premier esports organization, Tenney may earn a new title: the esports player who transformed workers’ rights for all influencers.

In 2018, Tenney signed a Gamer Agreement (“Agreement”) with FaZe. The Agreement entitled FaZe up to 80 percent of the revenue paid to Tenney by third parties. Any income generated by Tenney during the Agreement was payable to FaZe and distributed to Tenney on a monthly income basis. However, Tenney claims FaZe materially breached the agreement when it failed to distribute the funds.

On May 20, 2019, Tenney filed suit against FaZe in the Superior Court for the Central District of California. Tenney alleges the Agreement violated the California Business and Professional Code §16600 (“Section 16600”) because of its illegal yet

conspicuous anti-competition provisions. The Agreement’s Terms and Conditions titled “Exclusivity and Matching Right” (“Section 5”) stated FaZe shall have the exclusive approval over any and all third-party requests for Tenney’s services. In the Complaint, Tenney argues Section 5’s contractual language violates Section 16600 because it illegally places restraints on trade. Tenney further asserts the Agreement violates the California Talent Agency Act because of its continuous and systematic attempts to procure employment for Tenney without a license. The California Talent Agency Act states businesses and individuals can only act as an agent with a license obtained through California’s Labor Commissioner. Entities who operate without a license may have commissions returned to the client or void all negotiated contracts.

FaZe fired back with a countersuit in the New York Federal Court in August 2019. Among other claims, the company alleges (1) breach of contract, (2) misappropriation of trade secrets, (3) commercial disparage-

ments and (4) unjust enrichment. In the filings, FaZe attributes Tenney’s success to teachings on business, social media and gaming practices Tenney learned during his tenure with FaZe. FaZe also believes without their efforts, Tenney would not have over 10 million followers as one of the most popular streamers on Twitch.

In the weeks following Tenney’s lawsuit, concerns arose about the current FaZe roster. Gaming partner and roommate Dennis “Cloakzy” Lepore entered into an agreement with terms that favored his “future departure” from FaZe. Although Lepore publicly stated his decision was independent of the lawsuit, his actions led to speculation within the esports community that the Tenney suit played a role. Specifically, once Lepore read Tenney’s public filings, which revealed the terms and conditions of his employment agreement, Lepore now had information to better suit him for future negotiations. This is exactly why FaZe asserted that Tenney has blatantly violated the Agreement’s Confidentiality Clause. FaZe knew the release of such confidential information could potentially interfere with other current talent.

Tenney’s complaint echoes those of professional athletes who fought for players’ rights such as Tom Chambers (NBA), Freeman McNeal (NFL), Curt Flood (MLB) and soccer’s Jean-Marc Bosma. While many of these pioneers in traditional sports opened up free agency for their respective sports, some, like Flood, suffered from their stance. Where Tenney will sit in the history books is yet to be seen. But, one thing is for sure, his bold steps have moved esports into the footsteps of traditional sports, good and bad. ●

## Wrapping Up the Blizzard Controversy

By *Morgan Frazier GW Law 2L and contributing author, Wesley Guzman GW Law 3L*

**B**lizzard Entertainment has faced major criticism and fallout from the esports community after punishing Ng Wai Chung, a Hong Kong based esports competitor, who voiced support for Hong Kong’s protests during the Blizzard-sponsored Asia-Pacific *Hearthstone* Grandmasters competition on Oct. 5, 2019.

Two broadcasters were conducting a post-match interview with Chung, known by his screen name Blitzchung, in which he said, “liberate Hong Kong, revolution of our time.” This phrase has become the slogan for the pro-democracy protestors. Hong Kong has been in a state of civil conflict since early

June 2019. Millions of people have marched and protested to demand sovereignty from mainland China. The protests have gained international attention, with the focus of China’s communist government as a central issue.

One of China’s biggest companies, and the largest video game publisher in the world, owns a five percent stake in Blizzard’s parent company, Activision Blizzard.

Blizzard is a developer and publisher of some of the most popular video games worldwide including *World of Warcraft*, *Overwatch*, and *Starcraft*.

Blizzard responded to Chung’s comments by stripping him of his prize money and giving him a one-year ban from par-

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FaZe Clan, Inc. v. Tenney, case number 1:19-cv-07200, in the U.S. District Court for the Southern District of New York.

Tenney v. FaZe Clan, Inc. et al., case number: 19STCV17341, in the Superior Court of the State of California Los Angeles

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no commercially significant purpose or use other than to circumvent a technological measure that control access to a copyrighted work and (c) marketed by the Defendant with, knowing of its use to circumvent, therefore in violation of 17 U.S. §§102(a)(1), 1201(a)(2) and 1201(b).”

In sum, Nintendo alleged Moreno circumvented Nintendo’s copyrights by selling and distributing gaming cartridges loaded with pirated games. In practice, fraudulent cartridges sold online through sites such as *Offer-Up* would come with four to six Nintendo Switch games of the player’s choice. The online site would also include photos and detailed descriptions of the modification along with directions

for game console installation.

About two weeks following the filing of the Complaint (Dec. 20, 2019), Nintendo filed a motion for permanent injunction against Moreno.

It did not take long for the Court to rule in Nintendo’s favor (Dec. 30, 2019), ruling that Moreno and any other accomplice(s) engaged in copyright and trademark infringement and were prohibited from selling, distributing, and marketing any games bearing the Nintendo copyright. The Court further required Moreno to certify a written letter to Nintendo stating he no longer possessed any hardware or software owned by Nintendo. With compliance, Moreno would not have to pay any fines for his activity.

This is not the first time Nintendo sought to protect its intellectual property and won. In September of 2018, Nintendo obtained a court order from the United Kingdom High Court that required UK Internet Service Providers to block access to websites that allowed piracy on the Nintendo Switch.

As the gaming industry matures, and billions of dollars flow in, closing down these types of pirate operations will become a game of ‘whac-a-mole’. And while users would love to play unlimited games for free, they know that beloved characters like Mario and Donkey Kong need to protect their images too! ●

## Wrapping Up the Blizzard Controversy

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ticipating in *Hearthstone* competitions. Additionally, Blizzard deleted the interview and footage from the match on its official channels. They claimed he violated 2019 *Hearthstone* Grandmasters Official Competition Rules section 6.1, which forbids any act that “brings you into the public disrepute, offends a portion or group of the public, or otherwise damages Blizzard image.”

According to Blizzard spokesman Dustin Blackwell, “our official broadcast needs to be about the game and the competition, and to be a place where all are welcome.” He further stated that “if we allow the introduction of personal views about sensitive issues into the channel, it ceases to be what it’s meant for esports.”

Blizzard President J. Allen Brack also responded to the criticism and issued a statement saying that its relationship with China was “not a factor” in its decision to ban Chung. He also reduced Chung’s sentence to six months, a decision many critics viewed as

too harsh and bowing to censorship pressure.

Social media reacted in outrage at news of Chung’s ban. Gamers posted images and videos of themselves uninstalling or cancelling subscriptions to Blizzard games. Activision Blizzard received a letter from a bipartisan group of U.S. lawmakers accusing Blizzard of censoring Chung in order to protect its business interests in China. A few days later, three American University students were banned for six months for holding up a sign that read “Free Hong Kong, boycott Blizz” during a Blizzard-sponsored broadcast of a *Hearthstone* tournament.

Blizzard banned the students after they “knowingly broke the rules.” Blizzard said: “We strongly encourage everyone in our community to share their viewpoints in the many places available to express themselves. However, our official broadcast needs to be about the game and the competition, and to be a place where all are welcome.”

Casey Chambers, one of the American University students that was banned, said

he and his friends had been supportive of the Hong Kong protests in the past, and that they “just happened to have an amazing opportunity to protest an American company bowing down to China, within the context of the Hong Kong protests.” He said that while his team wasn’t looking to get banned, “it’s good to see equal treatment” between US esports players and those in Hong Kong.”

Nearly a month after Chung’s suspension, protesters lined up outside BlizzCon, Blizzard’s annual fan convention in California, to express their support for the protests in Hong Kong and to rally against Blizzard’s punishment. Brack addressed the situation during the opening of BlizzCon, but he did not acknowledge the accusations that Blizzard was censoring Chung in order to satisfy Chinese interests. Brack said that he would “accept accountability” for the situation, and that Blizzard was committed to doing better in the future and that the company would continue trying to connect people around the world through video games. ●

# Professional Athletes & Video Games: An Analysis of the Transformative Use Test

By Tyler S. Woods, Sandra Day  
O'Connor College of Law.

In *Brown v. Entm't Merchants Ass'n*, the Supreme Court confirmed that video games—like books, plays, and movies—are works of art that enjoy First Amendment protection. 564 U.S. 786, 790 (2011). But this protection is not without limit. Although video games enjoy the freedom of expression, this expression cannot unjustly infringe upon an individual's right of publicity. Accordingly, when a plaintiff alleges a video game violates their right of publicity, courts will conduct a balancing test to determine whether the individual's right of publicity outweighs the artistic value of the speech. This balancing analysis, adopted by most jurisdictions, is known as the transformative use test.

## The Transformative Use Test as an Affirmative Defense

As a general rule, to succeed on a right of publicity claim, a plaintiff must prove: (1) the defendant used the plaintiff's identity; (2) the defendant appropriated plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

In *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, the California Supreme Court annunciated the transformative use test as an affirmative defense to a right of publicity claim. 21 P.3d 797 (Cal. 2001). The test inquires “whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.” *Id.* at 809. In other words, to qualify for legal protection, “an artist depicting a celebrity must contribute something more than a merely trivial variation, but

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**Video game developers have faced several right of publicity claims by former athletes and asserted the transformative use test as an affirmative defense.**

create something recognizably his own.” *Id.* at 810–11.

## The Transformative Use Test Applied

Video game developers have faced several right of publicity claims by former athletes and asserted the transformative use test as an affirmative defense. Provided are two such cases: the first case being the most well-known, the second case being the most recent.

In *Keller v. Elec. Arts, Inc.*, Samuel

Keller, the former starting quarterback for Arizona State University, sued Electronic Arts (“EA”) for using his image and likeness in EA's video game series, NCAA Football, without consent. No. C 09-1967 CW, 2010 WL 530108, at \*5 (N.D. Cal. Feb. 8, 2010). The college football video game featured virtual players that physically resembled real college football players, listed the same jersey numbers as real college football players, and even included player biographies that displayed the same hometowns as real college football players. *Id.* at \*1. EA asserted transformative use as a defense to the right of publicity claim because the video game was an artistic expression that neither listed real player names nor depicted real college football exhibitions. *Id.* at \*3–4. However, the court held EA's use was not sufficiently transformative, and thus Keller prevailed on his right of publicity claim. *Id.* at \*4. The court reasoned the use was not

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transformative because the virtual player and Keller shared many characteristics, including the same height, weight, jersey number, and hometown. Furthermore, the court reasoned the virtual player depicted Keller in the same form: they were both starting quarterbacks for the same football team. *See also Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding that EA's NCAA Football use of former Rutgers' quarterback Ryan Hart's virtual image was also not sufficiently transformative).

In *Hamilton v. Speight*, a former professional football player and wrestler, Lenwood Hamilton, sued several video game developers for using his image and likeness in creating the virtual character Augustus Cole for the Gears of War video game series. No. 2:17-CV-00169-AB, 2019 WL 4697485, at \*1 (E.D. Pa. Sept. 26, 2019). Gears of War is a third-person shooter tracking a fictional military squad at war on a foreign planet against a race of exotic reptilian humanoids. *Id.* at \*2. The Cole video game character is a member of the fictional military squad, and Cole's physical characteristics and voice are similar to Hamilton's. *Id.* In Gears of War 3, the player can change the Cole character's outfit to either resemble Hamilton's professional wrestling costume or a football player. *Id.* at \*3. Nonetheless, the court held that the transformative use test was satisfied, and thus Hamilton's right of publicity claim was dismissed. *Id.* at \*9. The court first reasoned the use was transformative because Cole's name, background, and violent persona are distinct from Hamilton's. *Id.* at \*6. Second, the court reasoned the use was transformative because the context in which the Cole character appeared was dissimilar from Hamilton's, for unlike Hamilton who wrestled and played football, Cole engaged in "fantastical violence against cartoonish reptilian humanoids on a fictional planet in a fictional war." *Id.* at \*7.

### Alternative Tests

There are at least two alternatives to the transformative use test: (1) the predominant use test; and (2) the *Roger's* test.

First, the predominate use test "weighs whether the predominate use of the identity is for commercial exploitation or whether the predominate use is to make an expressive comment." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). In *Doe*,

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**The transformative use test is utilized by a majority of jurisdictions and focuses on the artist's unique expression as it relates to their work of art.**

the court held that the comic book series, *Spawn*, violated professional hockey player Tony Twist's right of publicity by naming the comic book villain after Twist. *Id.* The court applied the predominant use test and reasoned that using the hockey player's name and likeness was "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity." *Id.*

Advocates of the predominate use test argue the transformative test unjustly operates to "preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation." *Id.* However, advocates of the transformative use test argue the predominate use test "is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics." *Hart*, 717 F.3d at 154.

Second, the *Roger's* test, which originated from trademark law, considers whether celebrities' names are used in the

title of a work absent connection to the work or consent from the celebrity. *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989). In *Rogers*, the court held that even though the title was inspired by the famous couple, Ginger Rogers and Fred Astaire, the use of "Ginger and Fred" as a movie title did not violate Rogers' right of publicity. *Id.* The court reasoned that under the *Roger's* test, the title "Ginger and Fred" is "clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product." *Id.*

Advocates of the *Roger's* test argue the test is fair because it intuitively bars "minimally relevant use of a celebrity's name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content." *Id.* at 1005. However, proponents of the transformative use test argue the *Roger's* test is inadequate because the *Roger's* test was designed for trademark cases and the right of publicity is broader and more complex than trademark rights; accordingly, right of publicity cases require a more nuanced test like the transformative use test. *Hart*, 717 F.3d at 158.

### Conclusion

The transformative use test is utilized by a majority of jurisdictions and focuses on the artist's unique expression as it relates to their work of art. As applied to athletes and video games, the more a video game removes the athlete from the setting they professionally compete or competed in, the more likely the video game developer will succeed in defending against a right of publicity claim. While there are alternatives to the transformative use test, the transformative use test is likely the most objective and nuanced test observed by courts today. ●



## News Briefs

**Harrisburg Launches Esports B.S. Degree**

After establishing a successful esports varsity program in 2018 and winning the Collegiate Overwatch National Championship in early 2019, Harrisburg University of Science and Technology introduced an Esports Bachelor of Science degree program this spring.

The program was designed to provide students with the skills needed to become a media content creator, event manager, specialized coach, organizational/team manager, esports marketing manager, esports analyst, and other professions. “The program is not a training ground for players,” according to the university. “It’s a path to turning a passion into an exciting career in the rapidly expanding esports industry.”

Philadelphia’s Nerd Street Gamers, an esports event production and facilities management group, will serve as a program partner and advisor. By producing skilled esports professionals, HU’s new program will only strengthen the esports industry, says John Fazio, CEO at Nerd Street Gamers.

“With the announcement of an esports undergraduate program, Harrisburg University continues to raise the bar for collegiate esports across every aspect of the industry, including player development, event programming, and most importantly, education,” Fazio said. “Building the infrastructure for esports goes beyond finding talented players, it requires a foundation that increases accessibility for more individuals to participate in gaming and educational training programs that develop talent in early stages.”

**NHL Teams Join Forces With North America Scholastic Esports Federation**

Four NHL hockey teams have joined forces with the North America Scholastic Esports Federation (NASEF) to stage the 2020 Chel Invitational, an event which offers hockey fans and esports players a chance to compete for scholarships and team prizes. The participating teams are the Anaheim Ducks, LA Kings, Vegas Golden Knights and Florida Panthers.

Each team will host a qualifying regional esports competition for youth and adults. Winners of those local events will receive a trip to Southern California to compete on-stage in a live finals event at DreamHack Anaheim. Scholarships, grants, and team prizes totaling more than \$50,000 will be awarded.

“Scoring a goal or blocking a shot is always exciting, whether it happens in the chill of a rink or in a competitive on-screen battle. We’re thrilled at the increased number of fans playing NHL online,” said Mark Deppe, commissioner, NASEF. “The youth focus is fantastic – this is a great way to connect with fans of all ages, encouraging their love of hockey and showing them how they can have related career paths on and off the ice.”

NASEF leverages massive youth interest in esports by teaching

students about career options that exist in esports, professional sports, and other industries. In the Chel Invitational, high schoolers can win scholarships for their own college education and grants for their high schools. Additional scholarships will be given to students who win analytic and creative “Beyond the Game” competitions with a hockey theme.

The 2020 Chel Invitational will use EA Sports NHL 20 for concurrent Swiss-style brackets divided by region and platform (Xbox, Playstation). Each of the participating NHL teams will manage its local event for participants age 18 and up. Live Finals will be held at DreamHack Anaheim on February 22.

**Verizon and Dignitas Partner to Launch Nation’s First 5G Esports Training Facility**

Verizon and Dignitas have entered into a strategic partnership with a goal of “developing emerging technologies and their positive applications towards esports.”

As a core focus, the companies will launch the nation’s first 5G esports training facility, the Verizon 5G Gaming Center. Located in Verizon’s 5G Lab in Los Angeles, the 5,500-square-foot training facility will serve as Dignitas’ west coast headquarters and home to its League of Legends teams. Dignitas’ 2019 World Championship-qualifying team will train exclusively at this facility and compete in the League Championship Series.

By working together at the Verizon 5G Lab, Verizon and Dignitas “will identify and develop ways that Verizon’s 5G Ultra-Wideband network can enhance player performance, improve recovery, and enable players to connect with fans in new innovative ways.”

**Professorial Lecturer in Sports Law Zavian Talks About Esports at National Conference**

Professorial Lecturer in Sports Law Ellen Zavian, who teaches at GW Law School, was the keynote speaker at “ED Games Expo Showcase: Esports & Education,” which was held in early January at the Wilson Center in Washington D.C.

Zavian, who is the editor-in-chief of *Esports and the Law*, has become one of the nation’s leading experts about the developing practice known as esports law. The entire conference can be viewed at the following link. However, skip forward ten minutes to catch her talk: <https://www.wilsoncenter.org/event/ed-games-expo-showcase-esports-education>

Zavian began her career in sports when she was a student at the University of Maryland where she worked in the university’s intramural sports and recreation department while working at the Maryland Race Tracks in the promotional department on weekends. While earning her law degree, she interned at the Na-

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tional Football League Players Association (NFLPA). Soon after graduation, Zavian became the first female attorney/agent in the NFL. She has represented the US Women's Soccer and Softball gold medalists and extreme athletes, collectively, and held the title of Commissioner for the Central Atlantic Collegiate Conference.

Zavian has served on many sports-related committees, including the DC Bar's Arts, Entertainment, Media, and Sports Section, and co-created the Association of Corporate Counsel's Sports & Entertainment Committee. She teaches sports law, negotiations, leadership, and entrepreneurship at the George Washington University School of Business and GW Law School, while serving her clients in the sports industry, conducting arbitrations, and leading corporate workshops.

### Oakland University First D-1 School to Add Varsity Esports Team in Michigan

Oakland University (OU) has become the first Division I university in the state of Michigan to formally announce the addition of a varsity esports team to its athletics program. The team will begin competition in the fall of 2020. The University also announced a unique partnership with Team Renegades, a professional esports team based at GameTime in Auburn Hills.

"Oakland University strives to be entrepreneurial and open to new approaches to teaching, the student experience, and learning, including novel areas of exploration," said OU President Ora Hirsch Pescovitz. "The popularity, learning potential and student engagement possibilities of esports places Oakland in the forefront of translating what can only be described as a phenomenon into a relevant educational context, including strengthening the relationship among emerging media and academic disciplines."

Steve Waterfield, OU's Director of Athletics, added that the school is "very fortunate to have the support and mentorship of Team Renegades. Based at GameTime, the partnership with a professional esports team will provide support and expertise as the University launches its esports initiatives. Plus, the fact that GameTime is so close to our university is an added benefit.

"I expect the varsity team to collaborate with campus partners, and believe that esports has potential to impact student recruitment to the entire University. Esports requires the same teamwork and skill found in other sports and provides participants with opportunities to develop leadership skills."

Oakland's D-I varsity esports teams will initially compete in three games: League of Legends, Rocket League and Super Smash Bros., with the initial varsity team likely being comprised of up to 12 athletes, open to male and female gamers.

Jonas Jerebko, professional basketball player and owner of Team Renegades, said he hopes OU's launch into esports will help spread the excitement and camaraderie of gaming throughout the region.

"Esports is growing at such an impressive pace and I'm thrilled to see Oakland become a part of this innovative and cutting-edge field," said Jerebko, whose basketball career included six seasons with the Detroit Pistons. "Many people, including myself, already know Oakland for its competitiveness with its current sports. This is a prime opportunity to push the boundaries and bring that energy and enthusiasm to new audiences with a new sport."

More information and media announcements will be forthcoming at [www.oakland.edu/esports/](http://www.oakland.edu/esports/)

### UCI Esports Receives \$50,000 Gift from Top Video Game Streamer Pokimane

Popular gaming personality Pokimane has donated \$50,000 to the University of California, Irvine for student scholarships in its esports program. An initial \$25,000 gift this year will be combined with the remaining \$25,000 in 2021 to create an endowment that will fund tuition and fees for gamers selected by UCI Esports.

Imane Anys, better known as Pokimane, is a prominent Twitch video game streamer and YouTuber. Currently a resident of Los Angeles, the 23-year-old Moroccan Canadian got her start streaming herself playing "League of Legends" and "Fortnite." UCI's esports teams regularly compete in "League of Legends" and were the national champions in 2018.

"I am so pleased to be able to give back to the gaming world, which has given me so much," Pokimane said. "I love being able to share my experience of how I got to where I am today in hopes that it will help others who are on their way. I'm also especially happy to be supporting UCI's esports program because their students are focusing on gaming in addition to pursuing their college degrees – which, I can say from experience, isn't easy!"

This is the first endowment in the history of UCI's 4-year-old esports program, and it allows the merit-based Pokimane Scholarship to be awarded in perpetuity to deserving students. Beginning in 2022, about \$2,500 will be given annually to a single undergraduate. There is no limit to how many times a student can earn the scholarship during his or her time at UCI.

"We couldn't be more excited about this generous gift from Pokimane," said Mark Deppe, director of UCI Esports. "The gaming community contributes so much passion and energy to the world of esports, and we are thrilled to recognize and reward some of the outstanding leaders. I am incredibly thankful for Poki's generosity, and I hope this will inspire other successful gamers and streamers in the future."

# Lawsuit Raises the Question, Is Fortnite Too Addictive?

By Kenneth Whittaker, *GW Law 3L*

**F**ortnite is a free-to-play third person shooter that has taken the gaming community by storm. Over a quarter billion gamers play Fortnite and the game has given rise to numerous gaming celebrities. But the game’s publisher has been criticized for making the game too “addictive”.

On October 3, a Montreal law firm filed a class action lawsuit against the game’s publisher claiming that Fortnite is allegedly as “addicting as cocaine.”

The firm, Calex Legal, has proposed a class action suit on behalf of two Quebec parents and alleges that Fortnite was designed and marketed specifically towards children with the help of psychologists, statisticians, and others in order to make “the most addictive game possible”. They claim that the game triggers dopamine, a pleasure hormone that could potentially be as harmful as cocaine. Additionally, the suit alleges that the developers of Fortnite use “the same tactics as slot machines, or variable reward programs” and that they have used these tactics to manipulate the minds of children. Calex notes that children are especially susceptible to this manipulation because “their self-control system in the brain is not developed enough.”

Calex Legal is supporting its legal argument with a Quebec Superior Court ruling from 2015. There, the court ruled that tobacco companies failed to inform the public of the dangers of smoking and that they had the duty to issue warnings of those dangers. Quebec law now states that all addictive properties of a product must be disclosed to consumers. Calex Legal argues



that Epic has a similar duty to inform the public of the addictive nature of Fortnite.

The lawsuit states that, “The addiction to the game Fortnite has real consequences on the lives of players, many of whom have developed problems such that they

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**The lawsuit states that, “The addiction to the game Fortnite has real consequences on the lives of players, many of whom have developed problems such that they do not eat, do not shower and no longer socialize.”**

do not eat, do not shower and no longer socialize.” The lawsuit also acknowledges

that multiple rehabilitation centers have opened up in Canada and all over the world specifically dedicated to treat people addicted to Fortnite.

Calex has also turned to the World Health Organization to try and strengthen their claim.

In September 2018, the WHO added “Gaming Disorder” to its International Classification of Diseases stating that “For gaming disorder to be diagnosed, the behavior pattern must be of sufficient severity to result in significant impairment in personal, family, social, educational, occupational or other important areas of functioning and would normally have been evident for at least 12 months.”

According to the lawsuit, the two children of the parents filing the suit, a 10-year old and a 15-year old, have played approximately 1,800 and 7,000 matches of Fortnite respectively, and they have spent almost CA\$1,000 on in-game purchases.

The parents are seeking a refund of the children’s in game purchases, in addition to restitution for damages and a fine imposed on Epic.

Since the filing in October, over 300 parents have contacted Calex legal team, hoping to join the suit. ●

**Skadden Arps Honored as Firm of the Year**  
 Skadden, Arps, Slate, Meagher & Flom LLP was named a 2019 Law360 Firm of the Year for receiving Practice Group of the Year awards in six categories — Benefits, Energy, Mergers & Acquisitions, Securities, Sports & Betting, and Tax — tying for second-most practices recognized.