

The Latest in Cyberlaw

E-SPORTS: LEGAL ISSUES

Anne F. Downey

In my last column, I discussed the increasingly popular field of e-sports. In essence, e-sports are competitive video games, with players participating in tournaments to win prizes. This month we will examine some of the legal issues related to e-sports.



One still-evolving area pertains to intellectual property. Some pieces of the puzzle are known. We know that the publisher of an e-sports game - for example, Riot Games, publisher of the popular League of Legends game - owns the copyright in the game itself (because the publisher employed the individuals who created the game or it otherwise acquired the rights). In addition, we know that, under copyright law, the owner of a copyright in a creative work also owns the copyright in any derivative works, i.e., a work based on or derived from an already existing work.

E-sports game publishers grant licenses for the use and streaming of the game. Thus, leagues, teams and players must operate within the boundaries set by the license agreements. While the publisher has broad rights, players have rights in their names and identities, i.e., a right of publicity.

In 2015, a dispute arose that illustrates some of the complexities. The story revolves around a Korean professional player, Lee “Faker” Sang-Hyeok, a 23-year old phenomenon widely acknowledged as the greatest League of Legends player in the world. Faker granted exclusive rights to Azubu (a game streaming service) to stream his game play, including his running commentary. However, because Twitch (a competitor streaming service) is much more popular, a spectator decided to stream Faker’s game play on Twitch, and proceeded to do so without permission. This angered Faker, his team, Riot Games, and Azubu. Azubu sent a Digital Millennium Copyright Act takedown notice to Twitch to remove the spectator’s stream of Faker’s game play. However, the stream on Twitch was not a copy of the stream on Azubu, but rather an independently created live stream generated by the spectator utilizing “spectator mode”.

The dispute ended up being settled, but it illustrates the competing interests of the various parties involved in e-sports, including the game publisher, the player, the player’s team, the player’s exclusive streaming service, a spectator, and the spectator’s streaming service. (In 2017, Faker left Azubu and switched to Twitch, where the live stream of his game play immediately broke a record in terms of audience size.)

The rights of e-sports players continue to evolve in other respects too. There is a lot of debate surrounding the respective rights of teams versus players. Teams typically want broad control over sponsorships, which are a key part of the e-sports revenue stream. From the player standpoint, there is a push to form an overarching player union and set minimum standards for player contracts.

In May 2019, one e-sports player, Turner “Tfue” Tenney, commenced a lawsuit in Los Angeles Superior Court against his team, FaZe Clan, alleging that the Gamer Agreement he signed with the team in April 2018 was “grossly oppressive, onerous, and one-sided.” Tenney alleged that the Gamer Agreement limits his ability to practice his profession in violation of Section 16600 of the California Business and Professions Code (which voids any contract that restrains a person from engaging in a profession, trade or business). He also alleged that FaZe Clan acted as an unlicensed talent agency in violation of the California Talent Agency Act (part of the California Labor Law). He further asserted that FaZe Clan failed to pay him his share of sponsorship earnings and deducted up to 80% of earnings as a “finder’s fee.” Tenney, a 21-year old residing in California and Florida who is renowned for his skill in playing the Fortnite game, asked the court to declare the Gamer Agreement void and to award him money damages. (Separately, also in May 2019, Tenney petitioned the California Labor Commissioner seeking a determination that FaZe Clan violated the Talent Agency Act and that the Gamer Agreement is void.)

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As to FaZe Clan, it believes the team has the right to control sponsorships and prevent a player from signing up his or her own separate sponsorships. On August 1, 2019, FaZe Clan commenced a countersuit against Tenney in the U.S. District Court for the Southern District of New York, alleging that the player breached the Gamer Agreement by failing to share a percentage of his more than \$20 million in gaming, endorsement and sponsorship revenues. The team alleged that "Tenney is taking the valuable information he learned from Faze Clan, which he is obligated to keep secret, and using it to create a rival to Faze Clan or otherwise support rival gamers and gaming organizations." FaZe Clan requested money damages and an injunction to stop Tenney from disparaging FaZe Clan, interfering with its business dealings, and disclosing trade secrets. (The Gamer Agreement includes a choice of law provision specifying that New York law controls and a venue provision requiring any litigation to be brought in New York City.) We shall see how things go in the heated dispute between Tenney and FaZe Clan.

Another player-related issue pertains to immigration visas. In May 2013, the US Citizenship and Immigration Services (USCIS) granted Danny "Shiphtur" Le, a League of Legends player from Canada, a P-1A visa to enter the US as an "athlete." Mr. Le's previous attempt to cross the border under a regular B-1 business visa was unsuccessful because Le indicated that he would be earning a player salary in the US. While a B-1 visa holder can receive prize money, he or she cannot receive a salary.

Le hired an immigration attorney, who argued that the P-1A visa category is available to internationally recognized e-sports players because e-sports is an organized sport, just like Major League Baseball or the National Hockey League.

Following Mr. Le's victory, the USCIS has granted P-1A visas to numerous e-sports players. The P-1A visa category allows internationally recognized athletes, professional athletes and certain amateur athletes to come to the US to participate in athletic competitions. The e-sports player may prove P-1A eligibility by proving a degree of skill and recognition substantially above that ordinarily encountered, with renown in more than one country. Another way to prove P-1A eligibility is to prove employment by a team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year. While numerous e-sports players have been able to obtain a P-1A visa, not all applications are successful, and each petition is decided on a case-by-case basis. If a P-1A visa cannot be obtained, a player may be able to enter the U.S. under another visa category.

As I stated in my last column, whether you roll your eyes or not, I think e-sports are here to stay for the foreseeable future. Indeed, e-sports have become a big business with global operations. Next month we will look at a few other legal issues related to e-sports.

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