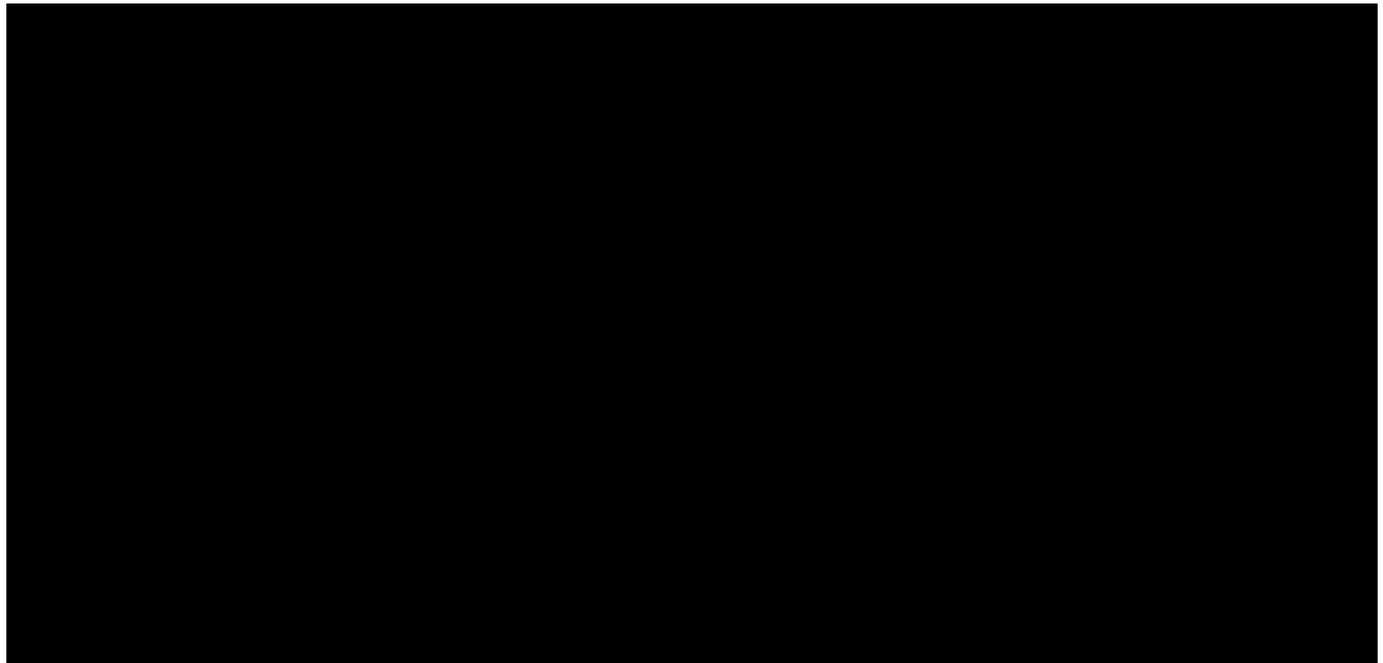


S1:E11 - Not All Fun and Games: Employment Issues in the Esports and Gaming Industry

ESPORTS AND ELECTRONIC GAMING | MEDIA, ENTERTAINMENT, MUSIC & SPORTS | TECHNOLOGY & TELECOMMUNICATIONS | LABOR & EMPLOYMENT | JULY 1, 2019



Steven Blickensderfer



Employment-related issues abound in esports and the video game industry. Join Steve and Nick in the last episode of season one of the LAN Party Lawyers podcast as they discuss some of the most pressing issues facing the industry — from the problem of "crunch," to esports player contracts. They are joined by entertainment lawyer Steve Sidman, who offers valuable insights based on more than two decades of experience representing creative talent and industry players.

Transcript:

Nick: Hello and welcome to the last regularly scheduled episode of season one of the LAN Party Lawyers podcast—the podcast for anyone interested in the e-gaming and esports industry. My name, of course, is Nick Brown, and I'm joined by my intrepid co-host...

Steve B: Steve Blickensderfer.

Nick: ...and through debate, discussion, and interviews, we tackle issues at the intersection of video games, law, and business. And as you've heard us say a number of times this season, please remember nothing we say here is legal advice.

Today, we're going to be talking about employment-related issues in the video game industry and with esports. We are very excited we are going to be joined by Steve Sidman. He's of counsel in Carlton Fields' Atlanta office. He has represented creative talent for more than two decades, including, for example, celebrity chefs, platinum-selling recording artists, TV producers and on-screen talent, and athletes. Suffice it to say, he's got a lot of great insight into the entertainment and sports industry, and in various issues related to branding that video game companies, esports teams, players, and content producers can relate to. So as usual, Steve, before we get to the interview, let's lay the groundwork for our listeners.

Steve B: Let's do it.

Nick: Today we're going to be talking about employment-related issues, which abound in the video game and esports space,

as Steve knows very well.

Steve B: What do you mean by employment, Nick?

Nick: Sure, so for this podcast we're actually going to be using the term employment in an extremely broad sense so that we can capture all sorts of issues that arise whenever people play games professionally, even some issues that aren't traditionally considered to neatly fit within the umbrella of employment law. And keep in mind as we go through this, this is a tremendously developing area of the law. We saved it for last because things can change place by place or day by day, and as you'll hear us discuss there are a lot of open questions in this area. So, without further ado, Steve, why don't you get us started? Tell us a little bit about employment issues with video game development.

Steve B: One of the things we thought about when we were thinking of thinking of this episode is what's unique to the video game industry as it relates to, as you mentioned, employment-related legal issues. And one that stands out to me is the issue of "crunch" that happens in the video game development process cycle. And crunch...

Nick: Infamous.

Steve B: ...yeah, crunch for those that aren't already aware is the time right before, usually, right before a game launches where there will be an immense amount of hours that need to be put into putting the finishing touches on a game. Just ask anyone who worked on a game that was being demo'd or video that was being played at E3, they probably got no sleep in the last couple weeks leading up to this event, and will get no sleep leading up to the launch of the event. And this is an issue that is prevalent in the video game industry, so much so that Nintendo just this week announced they would be delaying the launch to a game called Animal Crossing to avoid the issue of crunch.

Kotaku, a publication in the gaming space, has issued a number of articles on this. There's a great book out there called *Blood, Sweat, and Pixels* that talks about the issue of crunch in a number of games, which has led to burnout by employees and it can affect morale, and it could lead to issues, legal ramifications and consequences.

Nick: That's right. For many years in the gaming industry, the crunch has kind of been accepted as just how business is done. You have deadlines and it's really hard to manage game development, and so as you're approaching your final deadline to push the game out, you've already announced the release date, and there's just a ludicrous amount of work left to do. And so for years it's been more or less expected that there would be crunch time, but you've seen as esports and gaming get to be more of a household issue and more under the microscope in terms of the media, we've seen recently more discussions and more concerns about how does that violate employment rules or codes? Are you allowed to require your employees to work 80-, 90-hour weeks or more when they're not ordinarily doing that type of work or is that acceptable because that's how the industry has developed?

Steve B: Right.

Nick: So it's interesting. We're going to see that issue continue to develop, and we think it'll get more focus, especially in the near future.

Steve B: Right. Other issues related to video game development that touch on the employment legal issues are not necessarily unique to the gaming space, but I think that they are just now seeing the light of day where they otherwise were not. And those involve gender discrimination issues, sexual discrimination issues, and there is a push, ongoing as we speak for greater diversity in the workplace. There are some leading game developers that had hired, not too long ago, diversity officers, and people who are now in positions of authority at these bigger companies to implement policies for diversity and, you know, anti-gender discrimination, sexual discrimination issues. So, neat stuff there to the extent that now we're seeing a light being shown on these problems.

Nick: Particularly with "Gamergate" having occurred a couple years ago and, right or wrong, that discussion got a lot of buzz and a lot of media attention, which I think has drawn kind of a spotlight on some of the gender and sex issues involved in this previously historically male dominated industry that is now a lot more diverse.

Steve B: Another related issue in the video game development space—and I feel like we're, you know, there's a lot of issues here—but there were recently riots..., or not riots, there were walkouts at Riot...

Nick: At Riot.

Steve B: ... at Riot, which is the League of Legends developer. Employees were protesting the use of arbitration agreements in employment contracts, which is common. And arbitration for those who don't know is an alternate dispute resolution mechanism, which basically says you cannot bring a claim in court, you have to go to an arbitrator to resolve your claim. Usually they're coupled with like a class action waiver. Class action is bringing a bunch of like situated plaintiffs together to bring a lawsuit. Those agreements would then also include a waiver where you cannot couple your claims with others, you'd have to proceed alone. And so usually the idea behind this is it's a more inexpensive way to resolve a dispute and it helps unclog the courts, and the parties still have legal protection if the arbitration isn't sound. But, there are arguments on the other side. Nick, could you give us a few?

Nick: Yeah, sure. You know, the law is very clear that arbitration is favored for the reasons that Steve just stated, but there's also a perception that it favors the big guys over the little guys. And so a lot of times the employers end up favoring arbitration. For example, according to Bloomberg, studies, you know, suggest that employees are less likely to win arbitration

when in an arbitration than in court, and sometimes the arbitration, like Steve said, is coupled with other waivers, and so they've given up their rights to participate in other court proceedings to try to get remedies for perceived violation of their rights.

Another issue that's related with this is that these contracts are often presented on a take it or leave it basis, which is called in the law a contract of adhesion. And so that can present some issues for the party with less bargaining power.

Steve B: Right. So, we're going through these quickly. There's a lot, there's a number of issues we can touch upon, but we're going to shift gears from the video game development side into the esports side. So one of the issues currently going on in the esports space is the question of unions. Should unions exist? There are no current player unions, and unions typically you find them in other industries like football. They're to protect the players. It gives the players a collective voice. But as I said, esport athletes don't have any unions. The closest you have are the North American League Championship Series Players Association (NALCSPA) and the Counter-Strike Professional Players Association (CSPPA) in Europe. So they are more geographically tied to areas and specific games that, at least with League of Legends, is a franchise model, CS:GO is not. But, they exist for, again, what a union would otherwise operate in, which is protecting or giving a collective voice for players.

Nick: Yeah, and that raises really interesting questions, right? One of which is should there be unions in this area? You know, on the one hand when a publisher pulls an esports support for a game, like happened with Heroes Of The Storm last year, esports teams that had been formed, they were dropped, and players were let go. And if there had been a union in place, maybe there would've been protections to help them. On the other hand, you know, employers argue generally that they lose leverage that they need to run their business if unions are made, and if unions are, you know, achieved by their employer base. One of the issues is that they need kind of a critical mass of people to join the union in order for it to have its own power. So sometimes even forming a union doesn't get that far if not enough people join into it. But it's a hot topic we think we're going to see a lot more activity on that issue in the next couple years.

Steve B: So in the employment space when it comes to particular games, I'm thinking the League of Legends, the Overwatch League (OWL), CS:GO, you have the publisher that issues a set of rules and policies that they put in place that everybody who plays this game on the competitive level are going to agree to these certain set of rules. The teams agree to it. They agree to it with their players, in principle.

Nick: These are rules, Steve, that are outside of the game, right? Not just you can't pick this character or like that.

Steve B: Right. No, yeah, we're talking about, we're agreeing when you compete on the competitive level in this franchise league or, you know, CS:GO's not, but in these leagues you're going to agree to these terms, you're going to have these terms in place with your contracts.

Nick: Like licensing rights, streaming rights.

Steve B: Right. When Overwatch League wants to present their matches through ESPN, they want to make sure that those media rights are protected, that there's agreements and, you know, policies in place to set expectations for everyone involved so there's no questions later. And in 2018, the Overwatch rulebook was leaked, which gave us a little sneak peek into some of the terms that were in place, at least at that time. I don't know if it's been, it's likely been updated since then. But, if those rules are still in place today, Nick, I mean they're pretty aggressive. It said that Activision-Blizzard owned the right to license and use the pro players' likenesses, backstories, their streams, of Activision-Blizzard games.

Nick: Some of that sounds kind of like what you hear with pro athletes, right?

Steve B: Right, but how about this. Because in esports you have houses where, an infrastructure, where teams ask players to come to houses and train. The league, at least under these under these rulebooks, said that they had the right to install cameras in team houses and practice spaces to create like a reality TV show with cameras everywhere.

Nick: Would you watch that show, Steve?

Steve B: I don't, maybe, if I, maybe. I don't know. That might be interesting.

Nick: I hope the cameras aren't everywhere.

Steve B: So another thing that these policies have that, you know, really stood out to us is waivers. Have a ton of waivers as you would expect in an employment-related contract. Again, this is not technically an employment contract but, you know, class action waivers, arbitration waivers, and some other ones.

Nick: In particular, California passed a law called the Private Attorney General Act (PAGA) that essentially authorizes employees that are subject to labor code violations to actually bring suits and act as private attorneys general to recover civil penalties from their employers for those violations.

Steve B: A lot of words Nick, what does that mean?

Nick: Basically, you don't have to wait for the state to come in and enforce employment code violations. This law would allow individuals that feel that there have been violations to act as their own AGs and enforce them themselves. Interestingly, we've seen a number of these waivers of the Private Attorney General Act provision, but the California Supreme Court actually held that the waivers are against public policy. However, it still appears that the class action waivers and arbitration agreements

remain enforceable despite the PAGA issue.

Steve B: I'll just take a side note here. A lot of these contracts or policies that are put in place, they may include provisions that may not necessarily be legal or enforceable, and sometimes the contracts will also include provisions to say we can sever or take out the unenforceable parts and still enforce it. So, you know, this is a cutting edge area of contracts in esports, contracts in the video gaming space when it comes to employing players. So, we're going to find some of these, these terms are going to be challenged and in fact we just recently saw that.

Nick: Right.

Steve B: In an instance involving Tfue and FaZe. So why don't you give us the background on that, Nick?

Nick: Yeah, that's a perfect example. You know, anyone who was reading the internet that I was reading in May of 2019 had to stumble over this Tfue versus FaZe Clan lawsuit where Tfue the talent, a famous streamer, esports competitor, Fortnite player, among other games, he brought a lawsuit against his clan, his team FaZe Clan, F-A-Z-E, and he alleged that they were operating as a de facto talent agency, which is unlicensed under the law, and charged it an unconscionable commission from him, basically taking 80% of everything that he had earned.

Steve B: Well to be technically accurate, [it is for the] brands that were brought to Tfue from the esports team [where] they were asking for the 80/20 split. In these contracts you will see different categories of splits because the way in which revenue is brought and built by the team and the player, they vary, and that's what makes these agreements so challenging is that you have merchandising. Is it the merchandise that the player is selling on their own? In some instances you have superstars where they could sell their own picture on a t-shirt and make money that way. There's the team's merchandise, there are brand deals that are brought to the player by the team, there are brand deals brought by the player themselves and that need to be looked at by the team and, you know, passed on.

So there's lots of different ways in which there are revenue generators in these contracts and they're not across the board like an 80/20 split, just to clarify that one point. But this complaint by Tfue, it brings, it shines a light on an area that's often not talked about, and that is this negotiation and this contract between esports teams and players or marketing teams, marketing companies and players, is in this instance, this is an esports team and the complaint was alleging that this team was operating as a talent agency. And to be a talent agency, you need to be licensed in California. So they were arguing...

Nick: Which is really interesting because there's a separate regulatory scheme for athletes than there is for artists, and Tfue and his legal team made the strategic decision that they wanted to bring this case under the regulatory scheme for artists rather than athletes. And so it's interesting, they obviously made a decision that they could get a better outcome by proceeding as an artist, which, it's fascinating to me because these issues have not been resolved in the law yet. To our knowledge, there's been no lawsuit that's addressed the issue before this one of whether or not these eSports players are truly athletes or whether they're artists, or some blend in-between. We've, of course, been listening to this debate for a while now, but this case is dragging that out of our, you know, Discord chats and into the public arena, and there's been a whole bunch of buzz on this and so I don't think we're the only ones that find it fascinating.

Steve B: There's already been tremendous fallout from this.... Tfue has stated he wanted to create his own team, which, you know, I guess regardless of the intent for filing the lawsuit, it still has some important ramifications and some would say good ramifications for the industry. The thought is that all teams at this point have been reexamining their contracts and kicking the tires to see whether or not they could make their provisions more reasonable and less susceptible to challenge in court. Some other players, we've actually, ever since then we've seen a couple players move teams and they've had no problems in terms of the teams saying alright, you're good to go, I'll let you out of the contract. And I think Nickmercs left 100 Thieves, as an example.

Nick: Yeah, all good issues.

Steve B: Yeah, I think at this point we've covered the global landscape. You can see there's so much to talk about. We can go for hours. But let's bring in Steve Sidman to discuss some of these issues. As we mentioned before, Steve is of counsel in our Atlanta office, has a lot to say on these matters, so Steve, welcome to the show.

Steve S: Hi guys, pleasure to be here.

Nick: Thank you so much for taking the time. We're really excited to have you here. As Steve said, there's a whole lot we need to cover and you know a lot of the answers. So, let's get to it. Let's start off, you know, with a softball. What's your favorite game or what's a good game you've enjoyed or played recently?

Steve S: Oh, you said recently. Because, you know, I mean I'm turning 50 this year guys, and so, you know, my frame of reference dates back to, you know, Pong, Pitfall. Now, I would have to say that probably some, one of the iterations of Call of Duty. I'm a big World War II fan and a big first person shooter fan to the extent that I'm a fan of any such games and, you know, I learned more about the European theater of war by playing Medal of Honor and the Battle for Stalingrad by playing Call of Duty than virtually any history book ever taught me.

Steve B: If you ever wanted to see the structure of the Notre Dame Cathedral, you could go to Assassin's Creed. It's interesting that you could learn a lot from video games, especially good ones that take the time to get the history accurate.

Nick: Yeah, I learned a lot of new curse words from Call of Duty, so that was mine.

Steve B: So Steve, if I could take the next question, I was going to ask you to, let's just jump straight into this Tfue lawsuit.

Steve S: Sure.

Steve B: What's your take on what this kind of agreement looks like to you and what are some of the challenges for where we are as an industry when you have a player who, you know, has tremendous influence and following but is also a competitive esports player?

Steve S: In reviewing the Tfue deal, one of the first things that I took some small amount of solace in, was the fact that a lot of it is recognizable to me as kind of having been, if not outright lifted, but having the basis in the personal services agreements that you see all day every day for creative talent in more traditional media segments, recorded music industry, TV, and film, and those sorts of things. I don't want to be too dismissive of all of this. I think it's cute, though, that it's being characterized as athletes per se, because it seems to me that they are more, they are more entertainers than athletes. And, that having been said, none of the terms and conditions of the gamer agreement that I reviewed were at all unrecognizable. And a lot of the things that you see in this deal and in agreements for creative talent in other segments of the media industry also exist in traditional kind of, you know, black and white deals between sports teams and their athletes.

Nick: So these are kind of familiar clauses and issues in maybe a new context?

Steve S: Very much so, Nick. I mean, there are, they are familiar, but as you guys have rightly recognized, it is still very much the Wild West out there in the esports world. And so there really aren't templates or traditions or industry standards that, for instance, a talent representative could point to as a point of leverage, or for that matter that a publisher could point to as a point of leverage. We're really at the point in this kind of massive stage of the industry as a truly global industry where I think there's a real opportunity to impose some order and predictability.

Steve B: And I think one of the positive silver linings to this lawsuit was the fact that it would shine some light on this often, you know, not discussed area where you're negotiating a gamer contract that includes a confidentiality provision and no one talks about it. One side has a lot more information than the other, and the other side frankly doesn't care. And so one of the things, hopefully, that this does is it has the effect of creating an awareness and a desire to want to know more by the player to understand what their contract says because, you know, we're talking about video game contracts. We're talking about, you know, kids 18, that all they want to do is play video games professionally. They have a contract and all they care about is signing it so that they can get started.

Steve S: Sure.

Steve B: And so the last thing they're thinking about is let me call a lawyer who has, is disinterested third party who is looking out for my best interests, knows what to look for to help me get a better deal to the extent I can. Or...

Nick: Doesn't sound very disinterested.

Steve B: Well, disinterested I guess in terms of the, I don't know, the relationship...

Steve S: In absence of a conflict of interests.

Steve B: There you go. Thank you Steve for clarifying that. But at the end of the day there hopefully will be an uprising of interest and a genuine call for, I guess, professionals to be involved in this negotiation process, so that provisions that were once commonplace in agreements such as this will fall by the wayside and no longer be common industry terms.

Steve S: Sure, and I think that from our perspective, from a lawyer's perspective, there is a real opportunity for both, for representatives of both constituencies to make these agreements not only "more fair" but also to enable all of the participants in the, you know, kind of the esports economy, to kind of grow a bigger pie. You know, there is now I think, and this lawsuit brings this to ahead in a lot of ways, it does, Steve as you've said, shine a light on a lot of the shortcomings of the contractual relationships between the two parties. By the same token, any personal services agreement, any contract, I think can and should be looked at as a historical document, you know, and all of these provisions exist in one form or another because they didn't exist in a prior deal and someone made the decision it was a good idea to stick it in there.

Steve B: Right.

Steve S: You know, in this particular instance clearly, you know, the gamer, the athlete has amassed or feels that he has amassed a certain amount of leverage, a certain amount of critical mass that strategically it made sense for him to bring this lawsuit. You know, it's interesting because one of the major claims of the complaint is that the, a team is acting as a de facto, you know, talent agency and an unlicensed one at that. But both California and New York have legislation in place that requires the state licensing of talent agencies as really just kind of glorified employment agencies, albeit ones with particular industry bent.

Nick: That raises a fascinating question that we've been kind of dancing around, which is, you know, this whole episode's about employment-related issues but are these esports competitors or pro streamers or team members, are they even employees? Do they constitute independent contractors? Are they agents? What, are they something else? What are your thoughts on that?

Steve S: Sure. Well I think it's interesting because, you know, as you guys well know the conclusion or the characterization of a service provider as an employee or an independent contractor requires a legal conclusion. And, I mean, the IRS and the

Internal Revenue Code sets forth I think pretty clear guidelines as to from a tax perspective what, who is an employee versus who is an independent contractor, and the tax implications of that. The Copyright Act and its, you know, and all of the case law that flows from the litigation about copyrights talks about independent contractors versus employees and the context of what constitutes a work for hire. So, I don't know. I mean, this particular agreement, Tfuе's agreement, states that they're independent contractors. And yet if you get into the issues of that make up the analysis as to who's an independent contractor and who's an employee, there are I think strong arguments in both directions. I mean, on the one hand, there is a certain amount of leeway that's accorded the athlete or the gamer as far as what he or she can do and what sorts of freedoms they have, and by the same token there's also a lot of control that is imposed on them by the team.

Steve B: So one of the things that I was thinking about as I was going through that particular issue about, if you're an independent contractor, what does that mean? If you're an employee, what does that, what effect does that have? These contracts are all about, you know, who in a lot of ways who owns the IP, who has the rights to monetize the player's likeness and things like that. Does the distinction independent contractor employee have an effect on one's ability to say no, no, no, that's my video I recorded at home of me playing this game. I should be able to put it on my own stream and make this money separately from this contract.

Steve S: That's a great question, Steve. The answer is that those issues are very much a part of the consideration in terms of how you allocate who owns what. You know, under the Copyright Act, there are, in the law, the case law that flows from it, there are two ways that things become works for hire for a contracting party or for a commissioning party. One way is that there is an employer-employee relationship that is found to have been established and there's a very famous Supreme Court case, *Community for Creative Non-Violence (CCNV) v. Reid*, [490 U.S. 730 (1989)], that pretty much lays out the test for how you find someone to be an employee. And a lot of that has to do with the amount of control that the punitive employer has over the employee, what they get to dictate in terms of expenses and what have you, and a lot of that exists in this agreement.

By the same token, you know, if there is an independent contractor relationship that is found to have been established. The only way that you can get to work for hire status for the content that's being created is if there's an agreement that states that the results and proceeds of the services that are being provided is a work for hire for the commissioning party. So, those are things that all have to be taken into consideration at the outset of the relationship and in terms of preparing the underlying agreement.

Nick: That makes a lot of sense. So the next question I want to ask you, Steve, is something you and I have chatted about a little bit offline, but I'd like our listeners to get the benefit of your thoughts on this.

Steve S: Sure.

Nick: You know, one of the things that I think is just so fascinating about the Tfuе / FaZe Clan lawsuit and the reason we've been doing interviews on it and talking about it offline all the time, is that it reminds me so much of kind of the arc that we've seen in other related entertainment industries where, for example, recording, music, or the entertainment industry, movies and TV shows, or even maybe professional athletes, it seems like before something gets popular all the power is kind of in the hands of the people running the events and it's not really an even balance of power, but then as the industries mature and as they get a little more name recognition and the talent kind of takes off, then you see this kind of adjustment in the life in the arc of this industry.

Steve S: Sure.

Nick: Have you, I mean what do you think about that? Does it remind you of some of these other industries to see this type of thing occurring now in eSports, or am I off base?

Steve S: Absolutely. No, no, no, I think you're right on the money. I think that, as I touched on earlier, it's both a function of just kind of the passage of time and the role of history. But it's also a function of the relative leverage of the parties. You know, at the outset when you've got these, you know, the publishers who have these massive investments in time and technology and capital expenditure in producing these games and marketing these games and distributing these games via various means, you know, of course they're going to be able to kind of set the terms because it's all very, because they're the ones that ultimately have the power of the checkbook.

Nick: Right.

Steve S: But it takes guys like Tfuе and all the other gamers that you know by name to have the, not only the courage, but also the financial wherewithal and the business acumen to put their collective feet down and even their individual feet down and obtain improvements in these agreements. I think we're now just starting to see some of the first public examples of that. But yeah. You know, these things, it takes times and it takes a maturing and mature industry before you start seeing deals that I think are fundamentally and objectively more fair to the creative talent but that also, you know, have the flexibility to recognize the enormous amount of risk that the publishers are undertaking.

Steve B: It's truly an exciting time to be alive.

Steve S: It is indeed.

Steve B: I think it's equally difficult and challenging, not only because it's an industry that's growing and it's at its beginning

stages, but it's an industry that finds itself straddling sports and entertainment, right? So esports is like the entertainment of sports, you can't talk about one without the other when you're talking about esports. And so maybe as a follow up to that, do you see the law, well because we all know that the law moves...

Nick: Steve's got his crystal ball out right now.

Steve B: ...moves at a glacial pace, right? Bring your ball out. The law moves at a glacial pace and is slow to catch up with the realities of life. And right here we have life moving very quickly. And, do you see the law being changed, maybe new laws coming out to reflect the realities of esports, or are we going to continue to try to fit the square in the round peg in terms of is Tfuue an athlete under this agreement, is he a talent, is he neither, is he both? I mean, how do you get to both and get a resolution without changing some of the rules, updating the law?

Steve S: Steve that's a great question, and my general sense of it is that, as you I think correctly observed, the market and the business aspect of this is going to impose order for good or for ill a hell of a lot faster than the legislatures are going to, whether it's at a state level or at a federal level. You know, you're absolutely right, the pace of regulation to the extent that regulation ever comes to the fore is at best glacial, right?

Steve B: Mm-hmm.

Steve S: So what's going to happen is in the meantime someone is just going to take a position and things will change because the market will either accept it as a good idea or accept it as something that should potentially be considered an industry standard, and other things will fall by the wayside. I think a good analog to that is the way that recorded music industry reacted in response to the massive revolutionary shifts in the revenue stream when analog recordings became digital recordings and when physical digital recordings in the form of CDs and DVDs shifted online to iTunes, and then from iTunes and permanent digital downloads, to a streaming model. What happened was that the record companies that had been traditionally relying on dollars and cents revenue from the sale of a physical thing and of an actual manufactured good realized that ... we have no idea what's going on in this whole streaming world and we don't know whether or not we're ever going to be able to monetize this because it is so rife with infringement and piracy that we better do something about it.

And what that begat was something that's known in the music industry as the "360 degree deal" [or "360 deal"], where record companies started participating in revenue streams that traditionally were completely off-limits to them: touring revenues, physical merchandise sales, revenues from TV and film deals that the recording artists were involved in that traditionally weren't the subject matter of any deal that any recording artist would sign, you know, book publishing revenues and product endorsements. All of these things, you know, and that all happened, in the grand course of history it all happened really in an instant.

Steve B: Mm-hmm.

Nick: Just to clarify, that would be kind of extending the relationship that existed towards the recording and the production of a CD or a DVD or like record or whatever, to kind of the full panoply of involvement that a recording artist would do. Take that, where they get infrastructure and they get, the benefit of what the like you said, the big check recording company has to offer, but then they have to give some of that back and that would extend then from just the recording and the selling in the music part, to the all the other ancillary aspects of being a rock star.

Steve S: Correct, correct. And the record companies justified it. They didn't say "hey look, we're losing money, we need to do this land grab, we're going to take this from you too."

Nick: Right.

Steve S: Although that was really, that was the way that, that was the way the artist community heard it. Record companies basically said "hey listen, you know, you guys don't exist in any meaningful level of recognition without us. We're the ones that made you. And so to the extent that you have the ability to do a paid appearance on television or you have a tour, it's only because we funded your recording." My sense is that the publisher, the game publishers and the software companies and everyone that's involved in the corporate infrastructure of this industry that we're discussing here are going to take the same position, and quite frankly they're already doing it as evidenced by this Tfuue deal.

Steve B: Yeah.

Steve S: You know? They're saying look, you have no fame. You would be sitting in your mom's basement in, you know, Central Florida, but for us. We blew you up instantaneously and globally.

Nick: Central Florida's kind of nice Steve, just saying.

Steve S: This is not a knock on Central Florida, it was a knock on the guy's mom's basement.

Nick: Probably less nice.

Steve S: I'm just saying.

Steve B: I think this is a good transition into takeaways. What can we take away and, from the Tfuue [case] we've kind of laced into our discussion with you, but I'll go ahead and start. And I can think of no better time than right now. If you're in the industry, if you're a team or you're formulating a team, now's the best time to be looking at these contracts and evaluating its terms and not just accepting terms because they were used yesterday, but to look at them with a critical eye, with the

assistance of counsel to evaluate, you know, you want to have a reasonable provision and not be defending against a lawsuit and saying why it's reasonable and doesn't violate the law. So, that would be my first takeaway. Nick, do you have any?

Nick: Well I mean, you know, you want to consider, like Steve said, a lot of these contracts involve very familiar provisions that may exist in similar forms irrespective of the industry. Certain clauses that will be around for esports stuff might also apply in similar fashion to recording artists or professional athletes just like we were talking about. But also consider whether it's necessary to actually get in a clause and be specific about elements that are unique to the game industry. One example we talked about earlier today is "crunch." Maybe it makes sense to have a provision in your contract that says these other rules that apply generally don't apply during the crunch period or they apply in a different way. And then at least that way you'll have thought about it and you'll have something that you can hang your hat on if it ever comes to a disagreement to say no, look, we have agreed this and this is how we decided that the rights would work under that scenario.

Steve B: We'll call that the "crunch provision." I like it.

Steve S: Sure.

Steve B: What about Steve? You have any takeaways?

Steve S: Yeah and guys thanks again for having me on. This has been a lot of fun. My takeaway from all of this, and I view these things from the perspective of a deal lawyer, alright? My view of all of this is "chaos is a ladder."

Steve B: Nice.

Nick: Alright Little Finger, good work.

Steve S: And what I mean by that is that, we said it earlier, just to, you mix a few more hundred metaphors in this. This is the Wild West right now. And now is the time for all of the various stakeholders in this industry to be courageous and to be creative and to maybe even, you know, try to find points of commonality where, notwithstanding the vast amounts of revenue that are out there on the table rather than engaging in a land grab and trying to get much as we can, try to come with and craft deals that are kind of holistically more reasonable and more mutually beneficial or just mutually beneficial, you know, in things that are dependable and are industry-leading in terms of what can and perhaps should be done in the relationship between creative talent and the publisher distributor manufacturer types.

So I see this as an enormous opportunity for both the gamers and the publishers and everyone in-between, the team ownership, related brands. You know, this is a really cool time to be in this space for everyone concerned so, you know, let's not screw this up. Let's do it right.

Steve B: Right, and if you're a player, above all, this is a good example of why it's important to review the contract. First you got to read it. Alright? You can't be saying later you signed something you didn't read. You also should be looking at this with a lawyer and you shouldn't accept a position, you know, sign this, don't get the lawyers involved. You absolutely need to be represented and you need someone to look out for your best interests.

Steve S: And that is, that's part of what I was referring to as the need. It's a good idea to be a little bit courageous in these sorts of things. By the same token, you know, from the publisher's perspective or from the team ownership's perspective, I think it's beholden on them in their representation to make sure that these agreements are buttoned up and make sure that things aren't left to the vagaries and the interpretation of of a judge or a jury that doesn't know the industry.

Steve B: Right. Because you want to, these contracts, they're setting forth expectations in advance of when things go wrong, and so you want to be able to do that to the best you can. And I don't know if we'll ever see form contracts but, a little insider baseball, I just recently returned from an Esports Bar Association meeting where we were talking at length about what provisions are fair, just generally about the state of employment contracts in the industry or, you know, team contracts, and just the overall consensus was the need for cooperation on both sides to make sure that these have some fair terms in them. Because it helps all involved.

Steve S: Yeah absolutely, absolutely. You know, it's funny because, you know, one of the things that I think really needs to be addressed is the kind of fluid nature of the revenue streams with respect to the specific services that are being rendered right now. You know, it's like the ancillary stuff, the merch, the live [streaming], the touring, the live appearances—that sort of stuff. Kind of is what it is and those commercial channels have existed for decades. But the compensation structure with respect to the event itself or the game itself, you know, I think there needs to be some predictability imposed on how that is treated rather than just this kind of, you know, some sort of gross revenue pool becomes modified gross receipts becomes net receipts, you know? There are ways of doing it within the specifics of a particular game's universe that I think would be really cool.

Steve B: Yep.

Steve S: It's going to take some creative drafting but I don't think it's impossible.

Nick: Right. And in addition to providing certainty and, you know, expectations that can be relied upon and maybe something to hold onto if there ever gets to be a dispute, if you're entering into, if you're as a team and you're offering contracts that are fair, truly fair, then you're probably going to, even if you may slide a little bit on the revenue or the split in that particular contract, you may get a reputation for being a very fair, good place to work, good place to go and find teammates and get that infrastructure. And it may end up ultimately bringing in more revenue than had you squeezed a little bit more out of each

individual contract. Ultimately, you have to figure out what's right for your situation, but obviously an attorney that understands the industry and these pressure points would be able to help you navigate some of those decisions and what's right for you.

Steve S: Unquestionably.

Steve B: Well, that's all the time we have for today. I want to give a special thank you to Steve Sidman for your time for coming on the podcast and sharing in our meanderings on this issue. We really appreciate it.

Nick: Many, many thanks.

Steve S: Absolutely my pleasure guys. Thanks very much for inviting me to be along and for allowing me to muse pedantically.

Steve B: Do you have any handles or any way that folks can reach out to you on social media?

Steve S: Oh yeah. My Twitter handle is "@sidmanlaw" where you can dive into my lefty rantings, and I think on Facebook I'm "Steve Sidman" and on LinkedIn I'm also "Steve Sidman."

Nick: I noticed a theme.

Steve B: Well this actually wraps up our season one of the podcast. I cannot believe we've reached the end of the road for season one. Season two will be coming out at some point later in the future.

Nick: Very specific.

Steve B: Very, yeah, I try to be very, very specific. In-between, we're going to be recording at Guardian Con live in Orlando later this summer. So, if you're going to be at that event please come by and say hi. Be sure to check out any one of our episodes from season one. They're all still relevant and pressing issues today, and you can connect with us on Instagram [search "LANPartyLawyers"] or on our webpage "www.LANPartyLawyers.com." So Nick, any pearls of wisdom before we sign off?

Nick: I think I have shared all of my wisdom. But until next season Steve, game on.

Steve B: Game on.

©2020 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.