

“IT'S COMPLICATED”: ANALYZING THE POTENTIAL FOR ESPORTS PLAYERS’ UNIONS

Timothy Heggem*

INTRODUCTION

Professional video game competition (more commonly known as “esports”) has always lived in the shadow of its bigger, older, more ball-obsessed sibling: traditional professional sports (or, as I like to call it, “analog sports”)—football, baseball, basketball, and the like. Pundits and fans understandably compare esports to analog sports, and draw inspiration for the former from the latter. Analog sports professionals generally hire talent agents, wear jerseys, and—coming to the focus of this article—unionize. According to many in the industry, esports professionals should do the same.

The exponential growth of esports in the late 2000s and early 2010s has been accompanied by both prescriptive and descriptive discussions of players’ unions. Many say that players should unionize to protect their interests, especially since many of them are young and inexperienced when it comes to matters of contract negotiation and work conditions. Indeed, the average age for players of most esports titles is between 24 and 27 years of age.¹ Others, again seeing a tight analogy between esports and

* Timothy Heggem has represented many esports teams and organizations over the last two years. An attorney at Theodora Oringer PC, Mr. Heggem and his colleagues assist the firm's esports clients in various areas, including employment practices counseling, business litigation, covenants not to compete, unfair business practices, and contract law.

¹ Colin Campbell, *How eSports Fans Spend Their Time, and Their Money*, POLYGON (Nov. 5, 2015, 4:00 PM), <http://www.polygon.com/2015/11/5/9676764/how-eSports-fans-spend-their-time-and-their-money>.

analog sports, simply take the position that esports players' unions are inevitable.²

A discussion of players' unions is particularly relevant now in the wake of very public and very polarizing collective actions by team owners and players. *Exempli gratia*, I refer to the recent kerfuffle between the Professional Esports Association ("PEA"), a league formed by seven prominent esports teams, and twenty-five of their professional *Counter-Strike: Global Offensive* players. On December 21, 2016, esports veteran Scott "SirScoots" Smith published an open letter addressed to the PEA on behalf of these players.³ The PEA responded soon thereafter.⁴ As a result of these developments, we now hear once again a chorus of pundits, commentators, and even casual fans calling for players to "organize."

It is not my place or expertise to opine on the advisability of unions generally, let alone in the complicated, unsettled area of esports. I leave that to policymakers, economists, and ultimately the players themselves. But as a lawyer working at a law firm with labor and employment expertise, which has counseled many esports organizations and players over the last couple of years, I can offer some insights regarding the mechanics of unionizing and (more importantly) how unionizing might work in the esports context. In particular, I will discuss some complications that could arise for a players' union specifically in the esports context.

² Dustin Steiner, *NRG Andy Miller: Legal Gambling and Player Unions Are Inevitable Parts of Esports Growth*, PVP LIVE (Mar. 1 2017, 11:54 PM), <https://pvplive.net/c/nrg-andy-miller-legal-gambling-and-player-unions>.

³ Scott Smith, *An Open Letter to the Professional eSports Association, its Member Teams, and the Counter-Strike Community*, MEDIUM (Dec. 21, 2016), <https://medium.com/@sirscoots/an-open-letter-to-the-professional-esports-association-its-member-teams-and-the-counter-strike-db2fb8b55f75#.p0ra022pq>.

⁴ Steven Cropley, *PEA Responds to Players Rights Movement with Open Letter of Their Own*, WWG (Dec. 23, 2016), <http://wwg.com/esports/2016/12/23/pea-responds-to-players-rights-movement-with-letter-to-sirscoots>.

A BRIEF PRIMER ON UNIONS

In any discussion, it's important to start by defining your terms. So, what is a union? Unions fall under Section 501(c)(5) of the Internal Revenue Code, which exempts labor, agricultural, and horticultural organizations from taxation.⁵ According to the Internal Revenue Service,

General usage defines a labor organization as:

- An association of workers
- Who have combined to protect or promote the interests of the members
- By bargaining collectively with their employers
- To secure better working conditions, wages, and similar benefits.

The term embraces *labor unions*, councils, and committees.⁶

As this definition implies, labor unions are a subset of labor organizations. The IRS explains, “‘Labor union’ is a somewhat narrower term than ‘labor organization.’ Labor unions are labor organizations, but not all labor organizations are labor unions. IRC 501(c)(5) labor organizations do not need to be recognized labor unions.”⁷

For a discussion of labor unions specifically, we must turn to the National Labor Relations Act (“NLRA”).⁸ The NLRA governs the rights of employees to organize and to bargain

⁵ John Francis Reilly et al., *IRC 501(c)(5) Organizations, Exempt Organizations-Technical Instruction Program for FY 2003 J-4* (July 30, 2012), <https://www.irs.gov/pub/irs-tege/eotopicj03.pdf>.

⁶ *Id.* (emphasis added).

⁷ *Id.*

⁸ 29 U.S.C. §§ 151–169 (2012)..

collectively with their employers through chosen representatives, and it is the NLRA that permits and limits the formation of labor unions.

Creating a labor union (as opposed to joining a pre-existing one) is difficult and almost always requires the assistance of outside specialists, such as union organizers. The process, simplified for the sake of brevity, generally proceeds as follows:

The employees constituting the group that seeks union representation will attempt to organize informally through private discussions. This initial step can be a significant hurdle. It may be the case that only a small fraction of the employees want to unionize. And even if all of the employees want to unionize, they may not share common concerns.

If a sufficient number of employees are interested in forming a union, they will then establish an organizing committee. The members of this committee will act as representatives for the employees who want to create the union.

The employees will then need to hold an election. This process starts by employees signing authorization cards. At least thirty percent of the employees must sign the cards, and there are various requirements that the prospective union must satisfy in order for the signed cards to be considered valid.

The employees then use the signed authorization cards to petition the National Labor Relations Board (“NLRB”) for approval of a union election. The NLRB will then evaluate the petition.

The NLRB will only conduct a union election if the group of employees constitutes an appropriate bargaining unit, meaning that the employees have a clear and identifiable community of interests. In determining the appropriateness of a bargaining unit, the NLRB will examine whether the employees have similar demands, hold similar positions, are non-management employees, and work in a close geographical area.

If over fifty percent of the employees in the group petition for union formation, the employer(s) can choose

to recognize the union in what is known as “card check,” thereby waiving the secret ballot process. And, under the proposed Employee Free Choice Act (“EFCA”),⁹ voluntary recognition by the employer would not be necessary—the union would form automatically. Alternatively, the NLRB can schedule a secret ballot election after the employees submit their authorization cards. The result of a secret ballot election is determined by simple majority vote.

If the union wins the election, the employer must recognize and collectively bargain with the union.

Collective bargaining is the process by which an employer is required by law to bargain in good faith with a union over all “terms and conditions of employment.”¹⁰ The NLRA makes it an unfair labor practice for the employer to attempt to bypass the union and negotiate directly with employees.¹¹ The collective bargaining process yields a collective bargaining agreement (or “CBA”) – a negotiated agreement between a labor union and an employer that specifies various employment terms, such as wages, hours, working conditions, benefits, vacation, and paid leave. After a labor union and an employer execute a CBA, the employer cannot change anything detailed in the CBA without the union’s approval. Moreover, the employer cannot make any unilateral changes to any “term or condition” of employment without violating the NLRA, with such violation

⁹ See H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

¹⁰ See 29 U.S.C. § 158(a)(5), (d) (2010).

¹¹ See *N.L.R.B. v. Baltimore News Am. Div., Hearst Corp.*, 590 F.2d 554, 556 (4th Cir. 1979); *N.L.R.B. v. Arkema, Inc.*, 710 F.3d 308, 320 (5th Cir. 2013); *Wayne v. Pac. Bell*, 238 F.3d 1048, 1055 (9th Cir. 2001).

subject to an NLRB remedial order.¹² The CBA lasts for a specific period. During this period, the union observes the employer to make sure the employer abides by the CBA. If the union believes an employer has breached the CBA, the union can file a grievance with the NLRB, which may result in further litigation.

Just as important as defining a “union,” we should also define what a “union” is not. Here we come upon one of several common misconceptions on this topic. The terms “players’ union” and “players’ association” are often used interchangeably, but they are different. Associations fall under Section 501(c)(6) of the Internal Revenue Code, which exempts organizations such as business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues.¹³ According to the Internal Revenue Service,

To meet the requirements of IRC 501(c)(6) and Reg. 1.501(c)(6)-1, an organization must possess the following characteristics:

1. It must be an association of persons having some common business interest and its purpose must be to promote this common business interest;
2. It must be a membership organization and have a meaningful extent of membership support;
3. It must not be organized for profit;

¹² See *First Nat’l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 674–75 (1981); *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 198 (1991).

¹³ John Francis Reilly et al., *IRC 501(c)(6) Organizations, Exempt Organizations-Technical Instruction Program for FY 2003 K-4* (July 30, 2012), <https://www.irs.gov/pub/irs-tege/eotopick03.pdf>. See 26 C.F.R. § 1.501(c)(6)-1 (2001).

4. No part of its net earnings may inure to the benefit of any private shareholder or individual;
5. Its activities must be directed to the improvement of business conditions of one or more lines of business . . . as distinguished from the performance of particular services for individual persons;
6. Its primary activity does not consist of performing particular services for individual persons; and
7. Its purpose must not be to engage in a regular business of a kind ordinarily carried on for profit, even if the business is operated on a cooperative basis or produces only sufficient income to be self-sustaining.¹⁴

In essence, an association furthers the business interests of its members through promotion and advocacy. As you can see from the list of characteristics above, an association does not possess the core feature of a union—namely, collective bargaining. This is not a trivial difference. A players' association, as effective as it might be, cannot legally require team owners to come to the bargaining table.¹⁵

COMPLICATIONS OF FORMING AN ESPORTS PLAYERS' UNION

As mentioned at the outset of this article, it is all too easy to compare esports to analog sports. "Esports players should

¹⁴ *Id.*

¹⁵ Compare Reilly 501(c)(5), *supra* notes 5–6 (collective bargaining is an essential feature of labor unions) with Reilly 501(c)(6), *supra* note 13 (labor associations do not have a collective bargaining feature).

form a union, just like professional athletes.” But it is important to remember that there are some significant differences between esports and analog sports that could at least complicate the formation of esports players’ unions.

THE BARGAINING UNIT WRINKLE

As briefly mentioned above, a critical step in the creation of a union is the formation—and the NLRB’s recognition—of an appropriate bargaining unit. According to the NLRB, “[a] unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining.”¹⁶ This is a matter largely left to the broad discretion of the NLRB.¹⁷ Given this discretion, various kinds of bargaining units can form. There can even be multi-employer bargaining units in what is called “centralized bargaining” if multiple employers are grouped together in voluntary associations.¹⁸

This raises several interesting questions in the esports context. The nature of competition and compensation varies significantly across esports titles. Given these differences, could all players form a single union that spans multiple esports titles? Such a union would be large (and probably powerful), but the NLRB might not find the requisite community of interest for such a diverse group to constitute an appropriate bargaining unit. And even if players’ unions form around individual esports titles, there are still complications. Unlike analog sports, most of the major esports organizations field multiple teams for different esports titles. They each have a *League of Legends* team, a *Counter-Strike: Global Offensive* team, an *Overwatch* team, etc. If players’ unions existed for each of those titles, existing esports organizations would need to enter into multiple CBAs—an

¹⁶ *Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, NAT’L LAB. REL. BOARD (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf>.

¹⁷ *Id.*

¹⁸ *See id.*

expensive, perhaps even cost-prohibitive, proposition. And if the players' unions get too small—for instance, Team SoloMid's five *League of Legends* players form a union—they may not have the enough power to do any good.

THE INDEPENDENT CONTRACTOR WRINKLE

Many esports players, if not most of them, are hired as independent contractors, and this could impact the ability of esports players to form a players' union. In 1947, Congress amended the NLRA to exclude independent contractors.¹⁹ Although independent contractors can join a union, a bargaining unit consisting mostly of independent contractors does not enjoy the same privileges and protections as a bargaining unit consisting mostly of employees. For instance, such a union would lose its tax-exempt status.²⁰ Moreover, even if a minority of the union members are independent contractors, an employer is not required to bargain with a union regarding contract terms for independent contractors. Nor would independent contractors who strike have any protection against employer reprisals under the NLRA.

THE GAME DEVELOPER WRINKLE

In the analog sports context, there are basically two sides to the transaction: team owners (which compose leagues) and players. As such, it is feasible for owners and players to bargain collectively and produce CBAs that specify the terms and conditions of players' employment.

At first blush, the esports context seems analogous. There are team owners, and there are players that they employ.

¹⁹ 29 U.S.C. § 152(3) (1947).

²⁰ Reilly 501(c)(6), *supra* note 13 (“Where most of an organization’s members are entrepreneurs or independent contractors, the organization does not meet the requirements of IRC 501(c)(5). Rev. Rul. 78-288, 1978-2 C.B. 179.”).

But the esports context includes a powerful and increasingly influential third party: the game developers and publishers.

In the analog sports context, the manufacturers of the gaming apparatus (e.g., footballs and baseballs) have no say in how the gaming apparatus is used, much less in the employment terms and conditions of professional athletes. Team owners and players purchase this analog gaming apparatus and “own” it in the traditional sense. As such, the manufacturers of analog gaming apparatuses have no seat at the collective bargaining table.

The esports manufacturers context is markedly different. Team owners and players do not “own” the esports titles they play professionally. They play esports titles subject to software licenses governed by U.S. contract and copyright law, including Section 109(d) of the Copyright Act of 1976.²¹ Software licenses merely constitute permission to use the software in ways that would otherwise constitute copyright infringement. This difference between analog sports and esports, although seemingly small, is—you will forgive the expression—a game-changer.

Game developers of esports titles have the power to restrict who plays their games and how their games are played. Accordingly, game developers have almost unfettered power to dictate terms to teams/owners. This, in turn, effectively gives game developers the power to specify all sorts of employment terms and conditions for professional esports players. Riot Games, the developer of *League of Legends* (one of the most popular and most played esports titles on the planet²²), is probably first among game developers in this regard. It specifies all sorts of player contract requirements for organizations that compete in the North American Challenger Series and the League Championship Series, such as term duration, minimum

²¹ 17 U.S.C. § 109(d) (2008).

²² *New Twitch Rankings: Top Games by esports and Total Viewing Hours*, NEWZOO (Jul. 14, 2016), <https://newzoo.com/insights/articles/new-twitch-rankings-top-games-esports-total-viewing-hours>.

player compensation, and grounds for contract termination.²³ And this appears to be an increasing trend among game developers. During the 2016 BlizzCon, Blizzard Entertainment announced that it would launch an official league for *Overwatch*, Blizzard's most recent esports title.²⁴ The *Overwatch* League is set to launch in the third quarter of 2017,²⁵ but Blizzard has already indicated that each player in the *Overwatch* League will have a contract specifying compensation and benefits.²⁶ It is not entirely clear what this means, and we do not yet know the details of how the *Overwatch* League will function. But there is certainly the possibility that Blizzard Entertainment, like Riot Games, will heavily influence the employment terms and conditions of professional *Overwatch* players.

Of course, game developer influence over employment terms and conditions does not preclude the existence of players' unions. For instance, a game developer could require minimum player compensation, and a players' union could collectively bargain for compensation above that minimum. But it is also possible to imagine game developers occupying space

²³ Whalen Rozelle, *Proposed Changes to Player-Team Contracts for 2016*, LEAGUE OF LEGENDS ESPORTS (Nov. 18, 2015), http://www.lolesports.com/en_US/articles/proposed-changes-player-team-contracts-2016.

²⁴ Dan Szyborski, *Blizzard to Create Professional Overwatch League*, ESPN (Nov. 4, 2016), http://www.espn.com/esports/story/_/id/17968297/blizzard-announces-professional-overwatch-league.

²⁵ Philip Kollar, *Overwatch League is Blizzard's Ambitious New eSports Org, Includes City-Based Teams*, POLYGON (Nov. 4, 2016), <http://www.polygon.com/2016/11/4/13511762/overwatch-league-is-blizzards-ambitious-new-eSports-org-includes-city>.

²⁶ Tim Mulkerin, *Blizzard's New Professional 'Overwatch' League Comes with Minimum Salaries and Benefits*, MIC: TECH (Nov. 4, 2016), <https://mic.com/articles/158637/blizzard-professional-overwatch-league-comes-with-minimum-salaries-and-benefits-esports#.W1nscyYn7>.

traditionally occupied by players' unions. For instance, game developers sometimes fine, suspend, or even ban players for misbehavior.²⁷ Arguably, this would displace the penalty, termination, and dispute resolution procedures typically specified by a traditional players' union.²⁸ And, because the game developers do not employ professional esports players in any capacity, esports players could not collectively bargain with game developers as a labor union. Thus, potential conflicts between game developers and esports players' unions are foreseeable, and one can only speculate about how they would be resolved.

CONCLUSION

Even in the face of seemingly simple questions, lawyers often find themselves in the uncomfortable position of having to reply, "It's complicated." In that same vein, questions about the formation of esports players' unions defy easy answers. Forming a labor union is complicated and expensive. Forming an esports players' union would be even more so, especially given the ever-changing state of the esports industry. Can esports players form unions under existing laws? If so, how? Much as I hate to say it, the answer is: it's complicated.

²⁷ See *List of Competitive Rulings*, ESPORTSPEDIA (May 24, 2016), http://lol.esportspedia.com/wiki/List_of_Competitive_Rulings.

²⁸ *Collective Bargaining Agreement*, NFL (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.