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Takedowns and Terminations: Twitch's Transgressions and Streamers' Struggles

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TAKEDOWNS AND TERMINATIONS:
TWITCH’S TRANSGRESSIONS AND
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INTRODUCTION

On Friday, June 26, 2020 at 2:01 PM CT, Twitch banned popular streamer Guy Beahm, better known as “Dr. Disrespect.”¹ ESports journalist Rod “Slasher” Breslau reported on twitter around 4:22 PM that the ban was permanent in nature² and not related to recent Digital Millennium Copyright Act (“DMCA”)³ takedowns.⁴ At the time of the

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1. Scott Duwe & Dexter Tan Guan Hao, *Dr Disrespect has been Banned on Twitch*, DOT ESPORTS (June 26, 2020, 2:06 PM), <https://dotesports.com/streaming/news/dr-disrespect-has-been-banned-on-twitch> [<https://perma.cc/MU4K-8LMW>].
 2. Rod Breslau (@Slasher), TWITTER (June 26, 2020, 4:22 PM), <https://twitter.com/Slasher/status/1276611805629026310> [<https://perma.cc/R5B9-75KB>].
 3. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998). For a brief explanation, see *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/dmca/> [<https://perma.cc/VYH5-4P7K>] (last visited Mar. 1, 2021).
 4. Rod Breslau (@Slasher), TWITTER (June 26, 2020, 4:28 PM), <https://twitter.com/Slasher/status/1276613302483812352> [<https://perma.cc/89VN-JFSY>]; see also Bijan Stephen, *Twitch Streamers are Getting Blindsided by Years-old Copyright Notices*, VERGE (June 8, 2020, 3:45 PM),

ban, Dr. Disrespect's channel had over four million subscribers.⁵ In an incredibly unusual move, Twitch actually refunded Dr. Disrespect's subscribers for their subscriptions to his channel.⁶ Shannon Liao, a video games journalist for CNN, posted the following tweet at 4:45 PM: "Twitch's statement on @drdisrespect ban: 'As is our process, we take appropriate action when we have evidence that a streamer has acted in violation of our Community Guidelines or Terms of Service. These apply to all streamers regardless of status or prominence in the community.'" ⁷ The timing of Dr. Disrespect's ban also closely corresponded with a flurry of bans as a result of sexual assault allegations of other streamers on Twitch.⁸

While Dr. Disrespect had previously experienced a temporary ban for streaming inside an occupied men's restroom at the Electronic Entertainment Expo in 2019, Twitch's swift and decisive action in permanently banning Dr. Disrespect's account in combination with its silence on its reason for doing so led to mass confusion.⁹ This sparked wild speculation across the internet about exactly why Dr. Disrespect was banned. For example, reddit users flooded the subreddit r/LivestreamFail with theories behind Dr. Disrespect's ban ranging

<https://www.theverge.com/21284287/twitch-dmca-copyright-takedowns-clips-controversy-broken-system> [<https://perma.cc/PCK5-ZL7V>] (explaining how Twitch has recently started to send takedown notices to streamers in accordance with the DMCA).

5. Palmer Haasch, *Dr Disrespect, a Popular Streamer who Recently Signed a Multiyear Twitch Deal, has Reportedly been Banned from the Platform*, INSIDER (June 26, 2020, 6:02 PM), <https://www.insider.com/dr-disrespect-banned-from-twitch-report-permanent-2020-6> [<https://perma.cc/L2KF-M5XQ>].
6. Preston Byers, *Twitch Refunds Dr Disrespect Subscribers After Channel Ban*, DOT ESPORTS (June 26, 2020, 9:16 PM), <https://dotesports.com/streaming/news/twitch-refunds-dr-disrespect-subscribers-after-channel-ban> [<https://perma.cc/KC6A-JGCU>].
7. Shannon Liao (@Shannon_Liao), TWITTER (June 26, 2020, 4:45 PM), https://twitter.com/Shannon_Liao/status/1276617617730568195 [<https://perma.cc/5GYK-TBPB>].
8. Rachel Kaser, *Sexual Predators on Twitch: We All Knew*, NEXT WEB (June 23, 2020, 7:39 PM), <https://thenextweb.com/gaming/2020/06/23/sexual-predators-on-twitch-we-all-knew/> [<https://perma.cc/9N2U-GJR9>].
9. Nathan Grayson, *Dr Disrespect Streams Inside an E3 Bathroom, Gets Banned from Twitch*, KOTAKU (June 11, 2019, 8:00 PM), <https://kotaku.com/dr-disrespect-streams-inside-an-e3-bathroom-gets-banned-1835428982> [<https://perma.cc/3697-XPFC>]; see also James Nunns, *What is E3?*, TECH MONITOR (Aug. 16, 2016), <https://www.cbronline.com/what-is/what-is-e3-4978576/> [<https://perma.cc/UXW8-3NGY>].

from accusations of mishandling charity funds¹⁰ to contract fraud¹¹ to sexual assault.¹² Others theorized that Dr. Disrespect's ban was an orchestrated conspiracy to form a new streaming platform with two other famous eSports streamers, Ninja and Shroud.¹³

If Dr. Disrespect were any regular Twitch streamer, these circumstances might seem frustrating and mysterious, but ultimately just another news story that would fade into obscurity; however, Dr. Disrespect is unique. Dr. Disrespect is represented by CAA (Creative Artists Agency), a major talent agency based in Los Angeles, California.¹⁴ In early March 2020, just roughly three and a half months before the perma-ban, Twitch signed a "major multiyear" exclusive contract extension with Dr. Disrespect.¹⁵ Financial details of the transaction were never publicly disclosed, but journalists estimated that the value of the contract exceeded \$10 million.¹⁶ While the parties never

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10. u/Deku_911, Comment to u/VisualEnigma, *Doc Banned*, REDDIT (June 26, 2020, 3:03 PM), https://www.reddit.com/r/LivestreamFail/comments/hgdq5i/doc_banned/fw3tcfh/?context=8&depth=9 [<https://perma.cc/F6AH-9L24>].
 11. u/darknecross, Comment to u/checkit880, *Doc is Perma Banned*, REDDIT (June 26, 2020, 4:22 PM), https://www.reddit.com/r/LivestreamFail/comments/hgf8ke/doc_is_perma_banned/fw3y936/ [<https://perma.cc/HVV6-ZS4Q>].
 12. u/sudosusifu, Comment to u/checkit880, *Doc is Perma Banned*, REDDIT (June 26, 2020, 4:22 PM), https://www.reddit.com/r/LivestreamFail/comments/hgf8ke/doc_is_perma_banned/fw3zhss/?context=3 [<https://perma.cc/ZNG2-JN59>].
 13. Paul Tassi, *What is Brime, The Latest Streaming Conspiracy Involving Ninja, Shroud, and Doc?*, FORBES: GAMES (June 28, 2020, 8:10 AM), <https://www.forbes.com/sites/paultassi/2020/06/28/what-is-brime-the-latest-streaming-conspiracy-involving-ninja-shroud-and-doc/?sh=5c0ab38a2028#125880320288> [<https://perma.cc/3NUY-83N2>].
 14. Natalie Jarvey, *CAA Signs Twitch Streamer DrDisrespect (Exclusive)*, HOLLYWOOD REP. (Jan. 10, 2019, 3:38 PM), <https://www.hollywoodreporter.com/news/twitch-streamer-drdisrespect-signs-caa-1175330> [<https://perma.cc/7PWP-N9AS>]. See generally *Video Games*, CAA, <https://www.caa.com/entertainmenttalent/video-games> [<https://perma.cc/8N7J-RPGN>] (last visited Mar. 1, 2021) (explaining the services offered by CAA).
 15. Patrick Shanley, *Streamer Dr Disrespect Signs Multiyear Deal to Stay on Twitch*, HOLLYWOOD REP. (Mar. 12, 2020, 9:51 AM), <https://www.hollywoodreporter.com/news/dr-disrespect-signs-multi-year-deal-stay-twitch-1283878> [<https://perma.cc/8M62-LU9M>].
 16. Paul Tassi, *Dr Disrespect's Twitch Ban Didn't Start as a Publicity Stunt, But It's Turning Into One*, FORBES: GAMES (July 18, 2020, 8:59 AM), <https://www.forbes.com/sites/paultassi/2020/07/18/dr-disrespects-twitch-ban-didnt-start-as-a-publicity-stunt-but-its-turning-into-one/?sh=2110fb8e8992> [<https://perma.cc/43BA-357G>].

made many of the details of the agreement available to the public, the central purpose of the agreement was to prevent Dr. Disrespect from streaming with any other platform besides Twitch.¹⁷

This means that without any meaningful form of notice or opportunity to appeal, Twitch unilaterally terminated a multimillion-dollar exclusive contract. One could assume this was simply a power flex on Twitch's part, feeling emboldened by the recent failure of the "Mixer" platform.¹⁸ Twitch handing down bans and suspensions without explanation is not out of character;¹⁹ Twitch likely feels confident that content creators don't have any other viable options for platforms and will therefore put up with whatever decisions Twitch makes. This creates an incredibly toxic environment for content creators on Twitch who are subject to the inconsistent whims of a company that knows the creators have few other options for broadcasting their content.

Content creators are feeling increasing levels of frustration as Twitch continues to feel emboldened to behave badly; however, with the amount of power Twitch holds—both financially and with its control of the market—streamers feel helpless in their quest to seek equal treatment from a platform that knows that streamers have nowhere else to go.

In this comment, I will explore possible solutions for content creators to affect change in Twitch's policies and treatment of its streamers. First, I will review the background necessary to understand the streaming atmosphere. I will discuss the history of video sharing and live streaming, review the current state of the video game streaming industry, and explore Twitch's relationships and agreements with its users. I will then discuss three possible solutions to affect change in Twitch's policies. The first solution is litigation of individual issues as they arise in hopes that Twitch will change their policies accordingly. The second solution is organization, in which streamers can come together and provide legal representation and education to participating members. The third solution proposes a legislative solution by which streamers ask lawmakers to enact laws that regulate the behavior of online streaming platforms. In attempting all three of these potential

17. See Matt Perez, *Top Streamer Dr Disrespect Signs Multiyear Exclusivity Deal with Twitch*, FORBES (Mar. 12, 2020, 1:40 PM), <https://www.forbes.com/sites/mattperez/2020/03/12/top-streamer-dr-disrespect-signs-multi-year-exclusivity-deal-with-twitch/?sh=6d7d52eb66df> [https://perma.cc/XB9U-AMTX].

18. See *infra* notes 39–40, 42–43 and accompanying text.

19. See, e.g., Julia Alexander, *Popular CS:GO Streamer Sues Twitch After Almost 600 Days of Being Banned: Dating Back to July 2016*, VERGE (Feb. 19, 2018, 5:12 PM), <https://www.polygon.com/2018/2/19/17029530/phantomlord-twitch-banned-lawsuit-counter-strike-go> [https://perma.cc/3ZGX-TPSV] (describing how a Twitch partner was banned without notice or explanation, similar to how Dr. Disrespect was banned).

solutions, streamers will afford themselves the greatest chance at effectively changing Twitch's behavior towards its content creators.

I. BACKGROUND

A. *History of Video Sharing and Live Streaming*

The first major video sharing platform, YouTube, was created in 2005 by three former employees of PayPal, Jawed Karim, Steve Chen, and Chad Hurley.²⁰ The trio saw a need for one location where people could share videos to the entirety of the internet. In April of 2005, Karim posted the first YouTube video, titled "Me at the Zoo."²¹ In October of 2006, at only a year and a half old, Google acquired YouTube for \$1.65 billion after the launch of its own Google Videos failed.²² Since its inception, YouTube has begun sharing advertisement revenue with its content creators, spurring the massive expansion of higher quality content.²³ YouTube remains one of the most successful websites in history as the second most visited website in the world.²⁴ Content creators' ability to earn money has grown as YouTube has continued to expand, with the number of channels earning six figures per year growing 40% annually.²⁵

Around the time of YouTube's inception, Twitch entered the scene allowing users to live stream content to audiences across the internet. Twitch, originally named "Justin.tv," was founded in 2005 by Justin Kan while he was studying physics and psychology at Yale.²⁶ Kan originally used the website to broadcast his own life; however, in 2007

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20. A. Exford, *The History of YouTube*, ENGADGET (Nov. 10, 2016), <https://www.engadget.com/2016-11-10-the-history-of-youtube.html> [https://perma.cc/2TEQ-4ERW].
 21. Jawed Karim, *Me at the Zoo*, YOUTUBE (Apr. 23, 2005), https://www.youtube.com/watch?v=jNQXAC9IVRw&ab_channel=jawed [https://perma.cc/KM73-9KBZ]; Exford, *supra* note 20.
 22. Victor Luckerson, *A Decade Ago, Google Bought YouTube—and It Was the Best Tech Deal Ever*, RINGER (Oct. 10, 2016, 8:30 AM), <https://www.theringer.com/2016/10/10/16042354/google-youtube-acquisition-10-years-tech-deals-69fdbc1c8a06> [https://perma.cc/47N3-7VRL].
 23. *Id.*
 24. *YouTube by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE AGENCY, <https://www.omnicoreagency.com/youtube-statistics/> [https://perma.cc/QUJ4-V8Y3] (last updated Jan. 6, 2021).
 25. *Id.*
 26. James Cook, *Twitch Founder: We Turned A "Terrible Idea" Into A Billion-Dollar Company*, BUS. INSIDER (Oct. 20, 2014, 9:14 AM), <https://www.businessinsider.com/the-story-of-video-game-streaming-site-twitch-2014-10> [https://perma.cc/2GNG-BQ3L].

the website began allowing users to post their own live streams.²⁷ Kan was specifically interested in his website hosting live streams of video games, even hiring a “specialist video game streamer” who helped grow the video game channels on the website.²⁸ In August of 2014, Amazon acquired Twitch for \$1 billion.²⁹

Since the website transformed from “Justin.tv” to Twitch, myriad features have been added to create an optimal streaming experience. Users can stream content on their own channels as well as watch streams on other channels.³⁰ During these streams, users can interact with both the content creator and with other viewers through the chat function, use custom emotes unique to the content creator’s channel, and donate money to the content creator.³¹ Users can pay to subscribe to their favorite content creators, paying either \$4.99, \$9.99, or \$24.99 per month to unlock exclusive emotes, view the channels’ streams without any interruptions from advertisements, and even gain exclusive access to “subscribers only” chats.³²

With Twitch’s popularity soaring, YouTube announced its live streaming service as “YouTube Live” in April of 2011.³³ Others followed suit, including a mobile app called “Periscope,” which allowed users to live stream to audience with the touch of one button from their mobile device.³⁴ Users broadcasting through Periscope could interact with their

27. *Id.*

28. *Id.*

29. *Id.*; see also Imad Khan, *Why Twitch is Still the King of Live Game Streaming*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/business/tech-video-game-streaming-twitch.html> [<https://perma.cc/46G6-RLG5>]; Mansoor Iqbal, *Twitch Revenue and Usage Statistics*, BUS. OF APPS (Oct. 30, 2020), <https://www.businessofapps.com/data/twitch-statistics/> [<https://perma.cc/JF9P-3Q9V>].

30. *About*, TWITCH, <https://www.twitch.tv/p/en/about/> [<https://perma.cc/JM5H-ZCRA>] (last visited May 24, 2021).

31. Joseph Yaden, *What is Twitch?*, DIGIT. TRENDS (Nov. 27, 2020), <https://www.digitaltrends.com/gaming/what-is-twitch/> [<https://perma.cc/FAR6-F8QS>].

32. Chaim Gartenberg, *Twitch’s New Subscription Model Will Let Fans Pay Streamers Significantly More Money*, VERGE (Apr. 19, 2017, 1:32 PM), <https://www.theverge.com/2017/4/19/15359244/twitch-new-subscription-model-tiers-more-money-streamers> [<https://perma.cc/W2YU-YJRP>]; Brad Stephenson, *Twitch Subscriptions: How They Work*, LIFEWIRE, <https://www.lifewire.com/twitch-subscriptions-4147319> [<https://perma.cc/6P4K-B6HC>] (last updated Sept. 11, 2020).

33. Joshua Siegel & Christopher Hamilton, *YouTube is going LIVE*, YOUTUBE OFF. BLOG (Apr. 8, 2011), <https://blog.youtube/news-and-events/youtube-is-going-live> [<https://perma.cc/CBK6-SXE4>].

34. Steve Olenski, *What Is Periscope and How Can You Use It for Business Video Streaming?*, FORBES (Dec. 5, 2015, 9:00 AM), <https://www.forbes.com>

viewers in real time as viewers could send likes and send messages through the chat function.³⁵ Periscope was acquired by Twitter in February 2015; however, Twitter announced in December of 2020 that it would shut down Periscope by March of 2021, instead featuring live broadcasting through its integrated “Twitter Live” feature.³⁶ In April of 2016, Facebook launched Facebook Live, which allowed any Facebook user to live stream videos to their Facebook profiles.³⁷

In addition to expanding the presence of live streaming across the internet, companies have also created spaces specifically for live video game streaming content. In 2015, Google launched “YouTube Gaming,” a YouTube app and website focused entirely on both live and on-demand gaming video content.³⁸ In August of 2016, Microsoft decided to enter the live streaming arena and acquired a video game live streaming platform called “Beam,” renaming it “Mixer.”³⁹ In a bid to compete with Twitch, Mixer secured exclusive streaming contracts with streaming giants Tyler “Ninja” Blevins and Michael “Shroud” Grzesiek.⁴⁰ Also looking to throw its hat into the live streaming ring,

[com/sites/steveolenski/2015/12/05/what-is-periscope-and-how-can-you-use-it-for-business-video-streaming/?sh=2a755d70457b](https://perma.cc/Y3GG-XWHT) [https://perma.cc/Y3GG-XWHT].

35. *Id.*
36. Chaim Gartenberg, *Twitter is Shutting Down Its Periscope Apps*, VERGE (Dec. 15, 2020, 3:13 PM), <https://www.theverge.com/2020/12/15/22176842/twitter-periscope-shut-down-live-video-streaming-apps-2021> [https://perma.cc/942N-7AFJ].
37. *Introducing New Ways to Create, Share and Discover Live Video on Facebook*, FACEBOOK (April 6, 2016), <https://about.fb.com/news/2016/04/introducing-new-ways-to-create-share-and-discover-live-video-on-facebook/> [https://perma.cc/B5RS-S3CE].
38. Ross Miller, *Google is Launching a “YouTube Built for Gamers” to Take On Twitch*, VERGE (June 12, 2015, 2:00 PM), <https://www.theverge.com/2015/6/12/8772097/youtube-gaming-twitch> [https://perma.cc/HN3A-LGZX].
39. Chad Gibson, *Microsoft Acquires Beam Interactive Livestreaming Service*, OFF. MICROSOFT BLOG (Aug. 11, 2016), <https://blogs.microsoft.com/blog/2016/08/11/microsoft-acquires-beam-interactive-livestreaming-service/> [https://perma.cc/3V43-54KE]; Tom Warren, *Microsoft Renames Beam to Mixer, Adds New Game Streaming Features*, VERGE (May 25, 2017, 9:24 AM), <https://www.theverge.com/2017/5/25/15690306/microsoft-mixer-game-streaming-service-features> [https://perma.cc/VHC8-Z3CF].
40. See Ben Gilbert, *Ninja Reportedly Got Paid Between \$20 Million and \$30 Million by Microsoft to Leave Amazon’s Twitch Streaming Service*, BUS. INSIDER (Jan. 27, 2020, 2:57 PM), <https://www.businessinsider.com/how-much-did-ninja-make-for-leaving-twitch-2020-1> [https://perma.cc/F24U-75P3]; see also Brendan Sinclair, *Mixer Signs Exclusive Deal with Shroud*, GAMES INDUS. (Oct. 24, 2019), <https://www.gamesindustry.biz/articles/>

Facebook launched Facebook Gaming, an app for live and on-demand gaming video content, in April 2020.⁴¹ In the summer of 2020, Microsoft decided to move its existing partners to Facebook Gaming and shut down the Mixer platform.⁴² Microsoft's head of gaming, Phil Spencer, cited comparatively low monthly active viewers as the driver for Microsoft's decision to shut down the platform.⁴³ As of 2019, Twitch controlled about 73% of the video game streaming market share, while YouTube Gaming controlled about 21%, Facebook Gaming controlled about 3%, and Mixer controlled about 3%.⁴⁴

B. Current State of the Video Game Streaming Industry

A DFC Intelligence report released in mid-2020 found that 3.1 billion people play video games globally.⁴⁵ As of 2019, 944 million people worldwide watched video game streamers online.⁴⁶ This is up from 850 million in 2018 and 666 million in 2017.⁴⁷ It has become crystal clear that video game streaming will continue to grow and expand as an industry. In 2017, the gaming video content market had a global revenue of over \$4.5 billion.⁴⁸ Gamers between the ages of 18 and 25 spend over 1.6 times as many hours per week watching video game

2019-10-24-mixer-signs-exclusive-deal-with-shroud [https://perma.cc/X5MD-BDGY].

41. Seth Schiesel, *Facebook to Introduce an App for Gaming*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/19/technology/facebook-app-gaming.html> [https://perma.cc/8KJR-TA5B].
42. Tom Warren, *Microsoft is Shutting Down Mixer and Partnering with Facebook Gaming*, VERGE (June 22, 2020, 2:30 PM), <https://www.theverge.com/2020/6/22/21299032/microsoft-mixer-closing-facebook-gaming-partnership-xcloud-features> [https://perma.cc/CG8Y-82WE].
43. *Id.*
44. *Top Facebook Gaming Stats Every Brand Should Know in 2021*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/facebook-gaming-stats/> [https://perma.cc/7AV7-2PFK] (last updated Dec. 30, 2020).
45. Adam Bankhurst, *Three Billion People Worldwide Now Play Video Games, New Report Shows*, IGN (Aug. 15, 2020, 7:20 PM), <https://www.ign.com/articles/three-billion-people-worldwide-now-play-video-games-new-report-shows> [https://perma.cc/T4AL-NNUU].
46. Christina Gough, *Gaming Video Content Viewers Worldwide 2016–2019*, STATISTA (Nov. 18, 2020), <https://www.statista.com/statistics/516754/gaming-video-content-viewer-number-global/> [https://perma.cc/GT5P-C3XJ].
47. *Id.*
48. Nate Nead, *eSports & Gaming Video Content (GVC)—Industry Overview*, INV. BANK, <https://investmentbank.com/esports-gaming-video-content/> [https://perma.cc/U3SV-QCYH] (last visited May 24, 2021).

streamers on online streaming services than watching traditional sports on television.⁴⁹

As streaming becomes more lucrative for content creators, these creators will continue to produce higher quality content which will attract more viewers and ultimately more advertising revenue for the platforms on which they share their content. “Expert streamers” with sizable followings earn on average \$3,000 to \$5,000 per month streaming about 40 hours per week,⁵⁰ and top tier streamers are easily earning millions annually.⁵¹

C. *Twitch-User Contractual Relationships*

Twitch has three tiers of relationships with streamers with varying benefits and obligations.⁵² The first tier is just the basic relationship that Twitch has with any person uploading content to Twitch, regardless of follower count, viewership, or engagement.⁵³ Any content creator in this tier (i.e., anyone who uploads content to the Twitch platform) agrees to the Terms of Service when creating their account.⁵⁴ At this tier, the content creator is not required to sign any formal agreements.

The second tier is called the “affiliate” tier.⁵⁵ A content creator can reach affiliate status on metrics alone, meaning that once a channel reaches certain statistical goals, Twitch will automatically offer the content creator an upgrade to the “affiliate status.”⁵⁶ To reach “affiliate status,” the content creator’s channel must, over a thirty day period, gain at least fifty followers, broadcast for at least 500 minutes, broadcast on at least seven unique days, and maintain an average viewer

49. *Market Research: The State of Online Gaming—2020*, LIMELIGHT NETWORKS 13 (2020), https://img03.en25.com/Web/LLNW/%7Bd6493b33-3811-4b20-a410-64c25141adb4%7D_SOOG_MR_2020.pdf [<https://perma.cc/H6LU-WEMY>].

50. *Twitch Affiliate Partner Program*, BUS. OF APPS, <https://www.businessofapps.com/affiliate/twitch/> [<https://perma.cc/7VQK-U65V>] (last visited May 24, 2021).

51. Nead, *supra* note 48.

52. *Twitch Affiliate vs Partner: What’s The Difference?*, STREAMSENTIALS, <https://streamsentials.com/twitch-affiliate-vs-partner/> [<https://perma.cc/57XC-5JES>] (last visited May 24, 2021).

53. *See Twitch 101*, TWITCH, <https://www.twitch.tv/creatorcamp/en/learn-the-basics/twitch-101/> [<https://perma.cc/65CA-J9JQ>] (last visited Apr. 7, 2021) (explaining the other tier requirements for followers, viewership and engagement).

54. *See Terms of Service*, TWITCH, <https://www.twitch.tv/p/legal/terms-of-service/> [<https://perma.cc/N8GH-TEQ6>] (last updated Jan. 1, 2021).

55. *Twitch Affiliate vs Partner: What’s The Difference?*, *supra* note 52.

56. *Id.*

count of three viewers over the time streamed.⁵⁷ As an “affiliate,” the content creator gains the ability to have their followers “subscribe” for \$4.99, \$9.99, or \$24.99 per month, of which the affiliate can keep half.⁵⁸ Each of these subscription levels allow for different perks, including emotes and a badge icon.⁵⁹ Additionally, “affiliate” status allows for the content creator to make money off of advertisement revenue on their streams and off of “bits,” an electronic currency within Twitch that viewers can give to the streamers they enjoy.⁶⁰

The third tier is called the “partner” tier.⁶¹ A content creator can only reach partner status through an invitation from Twitch.⁶² The content creator can submit an application for consideration for “Partner” status, and Twitch will review the content creator’s channel holistically.⁶³ Twitch will consider not only data metrics similar to those considered for the “affiliate” status, but also the quality of the content produced, the amount of engagement with the viewers in the chat, and the uniqueness of the channel.⁶⁴ As a “partner,” the content creator signs a partner agreement with Twitch.⁶⁵ These agreements are negotiable and therefore are specific to each content creator.⁶⁶ One common element of these agreements, however, is a limitation on the content creator’s ability to multi-stream live content to other websites.⁶⁷

57. *Id.*

58. *Twitch Affiliate Partner Program*, *supra* note 50.

59. Chris, *How to Subscribe on Twitch in 2021*, STREAM SCHEME, <https://www.streamscheme.com/complete-guide-to-twitch-subscriptions/> [https://perma.cc/4ZS7-E7ZF] (last updated May 12, 2021).

60. *Twitch Affiliate vs Partner: What’s The Difference?*, *supra* note 52.

61. *Id.*

62. *Partner Application*, TWITCH, <https://www.twitch.tv/partner/signup> [https://perma.cc/3VUH-BRSC] (last visited May 24, 2021).

63. *See Twitch Affiliate vs Partner: What’s The Difference?*, *supra* note 52; *Partner Application*, *supra* note 62.

64. *Twitch Affiliate vs Partner: What’s The Difference?*, *supra* note 52.

65. *Id.*

66. *See How to Increase Your Sub Split with Twitch*, CREATOR HYPE (Sept. 8, 2020), <https://creatorhype.com/twitch-signing-streamers-increase-sub-split/> [https://perma.cc/VP9Y-TRA9] (suggesting that the agreements are negotiable in some limited ways).

67. *Id.*

II. POTENTIAL SOLUTIONS

A. *Litigation*

The first option for affecting change within Twitch's policy is for streamers to individually litigate against Twitch when grievances arise. Currently, this seems to be the most popular option for streamers. Dr. Disrespect has alluded to pursuing legal action against Twitch for the termination of his channel.⁶⁸ Additionally, James "Phantomlord" Varga is currently suing Twitch in San Francisco county.⁶⁹

Varga streamed *Counter-Strike: Global Offensive* (CS:GO)⁷⁰ on Twitch from 2012 to 2016.⁷¹ In 2016, Twitch banned Varga's account without any notice and without providing any reason for the ban.⁷² Five months later, in January of 2017, Twitch told Varga that he was banned for reports alleging his involvement in a cheating scandal with a gambling website for CS:GO cosmetic items.⁷³ Varga chose to sue Twitch, filing a complaint in the California Superior Court on February 14, 2018.⁷⁴ The complaint detailed a lengthy history of confusing direction from Twitch, leaving Varga unclear about how to conduct his channel.⁷⁵ In his complaint, Varga alleged breach of contract,⁷⁶ breach of implied covenant of good faith and fair dealing,⁷⁷ intentional misrep-

68. See Jasmine Henry, *Dr Disrespect Threatens Twitch Lawsuit—and That's a Can of Worms*, CCN, <https://www.ccn.com/dr-disrespect-threatens-twitch-lawsuit-and-thats-a-can-of-worms/> [<https://perma.cc/546U-RRLS>] (last updated Sept. 23, 2020, 2:04 PM); Phillip Martinez, *Dr. Disrespect Won't Return to Twitch, Considering Legal Action After Ban*, NEWSWEEK (July 16, 2020, 1:30 PM), <https://www.newsweek.com/dr-disrespect-twitch-ban-update-reason-interview-guy-beahm-1518360> [<https://perma.cc/4EZE-Y6UW>].

69. Alexander, *supra* note 19.

70. See *About CS:GO*, COUNTER-STRIKE, <https://blog.counter-strike.net/index.php/about/> [<https://perma.cc/5JTS-JWAM>] (last visited May 24, 2021).

71. Alexander, *supra* note 19.

72. *Id.*

73. *Id.*

74. Complaint, *Varga v. Twitch Interactive, Inc.*, No. 18-564337 (Cal. Super. Ct. Feb. 14, 2018).

75. *Id.* ¶ 37–42; see also *id.* at Ex. A.

76. *Id.* ¶ 57–61.

77. *Id.* ¶ 62–67.

resentation,⁷⁸ negligent misrepresentation,⁷⁹ and unlawful business practices in violation of California's Business & Professions Code.⁸⁰

Varga's Partner Agreement with Twitch limited potential damages in a lawsuit to fifty thousand dollars; however, the California judge decided to allow damages in excess of the fifty-thousand-dollar limit.⁸¹ The court reasoned that imposing the fifty-thousand-dollar-limit would significantly hinder Varga's ability to retain representation.⁸² Additionally, the court pointed out that it appeared obvious that Varga did not even read the contract and therefore did not understand the limitation on damages he agreed to.⁸³ The court denied Twitch's motion for summary judgment and set the trial for March of 2021.⁸⁴

Litigating each of Twitch's individual transgressions has its benefits. For example, the individual streamer suing Twitch can receive compensation should the court find in their favor. Additionally, if enough streamers sue Twitch when the company takes advantage of and harms them, the lawsuits might pressure Twitch to change its policies. Twitch might become motivated to change its policies not only to improve their public image, but to avoid the potentially hefty cost of constant litigation.

That being said, individual streamers suing Twitch for each transgression poses several challenges to effectively inducing widespread change to Twitch's policies. First, much of Twitch's frustrating behavior falls within its terms of service. For example, streamers have recently become frustrated with Twitch's overwhelmingly strict enforcement of the DMCA.⁸⁵ Streamers have claimed that Twitch has removed several of their videos for copyright infringement with neither

78. *Id.* ¶ 68–81.

79. *Id.* ¶ 82–92.

80. *Id.* ¶ 93–97.

81. Charlie Hall, *Judge: Streamer who Didn't Read Contract Can Sue Twitch for over \$50K*, POLYGON (Oct. 1, 2019, 5:00 PM), <https://www.polygon.com/2019/10/1/20893922/phantoml0rd-twitch-contract-lawsuit-unconscionable> [<https://perma.cc/383G-VHG2>].

82. *Id.*

83. *Id.*

84. *Judge Rules Trial Against Twitch for Phantoml0rd Breach of Contract Can Proceed, Dismisses Motion for Summary Judgment Entirely*, QUINLAN LAW FIRM (Oct. 7, 2020), <https://quinlanfirm.com/2020/10/judge-rules-trial-against-twitch-for-phantoml0rd-breach-of-contract-can-proceed-dismisses-motion-for-summary-judgment-entirely/> [<https://perma.cc/RHT8-A2KB>].

85. See Nicole Carpenter, *Twitch Streamers were Issued Tons of DMCA Takedown Notices Today*, POLYGON (Oct. 20, 2020, 6:05 PM), <https://www.polygon.com/2020/10/20/21525587/twitch-dmca-takedown-notice-content> [<https://perma.cc/Y68K-ERG3>].

any notification of what content violated a copyright nor an opportunity to cure the infringement.⁸⁶ While Twitch's behavior in this instance is frustrating, the company's actions have generally fallen within its terms of service and up to this point have not been subject to legal action.⁸⁷

Second, litigation can become prohibitively expensive. As a subsidiary of Amazon, Twitch has the resources to continue dealing with litigation as it arises; yet the overwhelming majority of streamers do not generate enough income from streaming to adequately afford representation.⁸⁸ In fact, it seems to be unusual when a streamer *does* have representation. When eSports media reported on Twitch's termination of Dr. Disrespect, journalists went out of their way to point out how unusual it was that Dr. Disrespect was represented by a talent agency that provided him with sophisticated counsel.⁸⁹ Even a top-ten streamer like Phantoml0rd entered into a Partner Agreement with Twitch without representation.⁹⁰ If streamers do not have access to representation, their options for finding success in legal challenges against Twitch are drastically reduced.

Third, individual lawsuits are unlikely to affect widespread change in Twitch's policy. As a subsidiary of Amazon, Twitch has substantial resources to fight legal challenges.⁹¹ Even if streamers are successful against Twitch in litigation, the damages awarded would likely only be a drop in the bucket compared to Amazon's revenue.⁹² If the cost of

86. *Id.*

87. *Id.*

88. *See Twitch Affiliate Partner Program, supra* note 50 and accompanying text. "Expert streamers" broadcasting for forty hours per week earn an average yearly salary of between \$36,000–\$60,000. Most streamers do not broadcast this often.

89. *See, e.g., Shanley supra* note 15; Geoff Weiss, *CAA Signs Twitch Streamer Dr DisRespect as It Builds Out Gaming Roster*, TUBEFILTER (Jan. 11, 2019), <https://www.tubefilter.com/2019/01/11/caa-signs-dr-disrespect/> [<https://perma.cc/ER3Z-VM8N>]; *see also* Noah Smith, *Dr Disrespect Is Speaking Again*, WASH. POST (Jul. 16, 2020, 8:00 AM), <https://www.washingtonpost.com/video-games/2020/07/16/dr-disrespect-is-speaking-again/> [<https://perma.cc/M7CZ-XUA9>] (noting that Beahm (Dr. Disrespect) was represented by legal counsel).

90. Hall, *supra* note 81.

91. *See* Paul R. La Monica, *Amazon Is Now the Most Valuable Company on the Planet*, CNN: BUS. (Jan. 8, 2019, 11:27 AM), <https://www.cnn.com/2019/01/08/investing/amazon-most-valuable-company-microsoft-google-apple/index.html> [<https://perma.cc/G4RQ-W9VX>].

92. Emil Protalinski, *Amazon Reports \$96.1 Billion in Q3 2020 Revenue: AWS Up 29%, Subscriptions Up 33%, and "Other" Up 51%*, VENTUREBEAT (Oct. 29, 2020, 1:07 PM), <https://venturebeat.com/2020/10/29/amazon-earnings-q3-2020/> [<https://perma.cc/V6FQ-4GM5>].

litigation does not cause a strain on Twitch's bottom line, it seems unlikely the company will be motivated to change their policies in any significant way.

B. Organization

Another option for streamers to attempt to induce changes in Twitch's behavior is to organize. One way that workers organize to affect change in their workplaces is through the creation of labor unions. In 1935, with the passage of the National Labor Relations Act, Congress carved out an antitrust exemption for workers to collectively bargain with their employers for better wages and working conditions.⁹³ Given the recent struggle of streamers against Twitch and its inconsistent application of its policies, many in the industry have suggested streamers unionize and collectively bargain for better contracts and better treatment from streaming platforms.⁹⁴ In fact, Dr. Disrespect called for streamers to unionize just months before Twitch terminated his channel.⁹⁵

Unfortunately for streamers across all platforms, Union protections do not extend to "independent contractors."⁹⁶ The National Labor Relations Board, in *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, established the use of the common law agency test to determine independent-contractor status.⁹⁷ This test requires the analysis of a litany of factors to determine a worker's status as an independent contractor, including: "[t]he extent of control which, by the agreement, the master may exercise over the details of the work;" whether "the work is usually done under the direction of the employer or by a specialist without supervision;" "[t]he skill required in the particular occupation;" and "[w]hether the employer or the workman

93. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449.

94. See, e.g., Cecilia D'Anastasio, *It's Time for YouTubers and Twitch Streamers to Organize*, KOTAKU (Apr. 12, 2017, 2:00 PM), <https://kotaku.com/its-time-for-youtubers-and-twitch-streamers-to-organize-1794261637> [<https://perma.cc/Y5K2-T8TA>] (pitching an argument for content creators to unionize); Cecilia D'Anastasio, *Is It Game Streaming's Turn for a Labor Revolution?*, WIRED (July 8, 2020, 5:04 PM), <https://www.wired.com/story/mixer-livestreaming-labor-rights/> [<https://perma.cc/A3UY-2ZWX>] (illustrating job uncertainty in streaming careers).

95. David Purcell, *Dr Disrespect Explains Why Streamers Should Unionize—“Show a Little Respect”*, DEXERTO (Aug. 14, 2019, 10:11 PM), <https://www.dexerto.com/entertainment/dr-disrespect-explains-why-twitch-streamers-need-to-unionize-twitch-mixer-913473/> [<https://perma.cc/EGK2-Q3VP>].

96. 29 U.S.C. § 152(3) (2018).

97. 367 N.L.R.B. No. 75 (Jan. 25, 2019).

supplies the instrumentalities, tools, and the place of work for the person doing the work.”⁹⁸

Twitch streamers have complete control over the content they produce for their channels. These streamers create their content without direction or supervision from Twitch. Twitch streamers have specialized skills in performance, content creation, and marketing that make their channels more successful than others. While Twitch provides the mode of distribution for the content, streamers use their own equipment and space to create their channel’s content. Twitch streamers essentially run their channels as separate businesses through which they generate their own income based on the success or failure of their own content. The National Labor Relations Board would almost certainly classify streamers as independent contractors. Because of this classification, streamers are likely not eligible for the protections afforded to labor unions under U.S. law.

While they might be barred from forming a labor union, streamers could still organize and form a streamers association. While the ability of a streamers association to collectively bargain are likely currently limited by antitrust law,⁹⁹ a streamers association could still provide myriad benefits to its members. For example, the streamers association could offer access to legal representation for paying members. Additionally, the streamers association could offer education to its members about contract negotiation and other important skills to protecting streamers’ livelihoods.

Having an organization where streamers could pool their resources to increase access to representation and education would be incredibly helpful to the streaming community; however, forming such an organization would not be without its challenges. The chief challenge would likely be participation. Without adequate participation, the streamers association would not have the money to maintain legal representation for its members, nor the resources to provide meaningful education. The streaming community is incredibly atomized. Most live-streaming content creation happens within individual channels, making it difficult to form the same sense of comradery and shared struggle that binds workers in other industries. Individual streamers will likely not find it necessary or desirable to seek community through a trade association. Additionally, the requirement of membership dues might turn away streamers with lower earnings.

98. *Id.* at 1–2. For more on the common law agency test, see RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

99. See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 979–84 (2016).

YouTube content creator Hank Green attempted to create an organization like this for internet content creators.¹⁰⁰ In 2016, Green established the Internet Creators Guild.¹⁰¹ With an annual membership fee of \$60, the organization sought to help creators build their channels, understand their contracts with various platforms, sponsors, and agencies, and educate platforms about best practices for working with content creators.¹⁰² However, just three years later, the organization announced its plans to cease operations.¹⁰³ The organization cited low membership and participation as one of the chief reasons for its closure.¹⁰⁴ While this first attempt at an organization for internet content creators failed, hope is not lost that streamers could eventually band together for mutual support. As streamers continue to become more and more frustrated with the uncertainty of Twitch's platform, they may more clearly see the necessity of such an organization.

C. Legislation

Another options for streamers to affect change in Twitch's policy is to advocate for legislation that would regulate Twitch's behavior. There is currently no legislation in place that addresses the issues that streamers face at the hands of their streaming platforms. Enacting legislation would be incredibly effective in changing Twitch's behavior because the decisionmaking would not rest in Twitch's hands; instead, Twitch would be required to comply with the law. Additionally, legislation of this ilk would benefit streamers because the laws would apply across all streaming platforms. This means that even as the streaming market changes, streamers could be assured that they are protected regardless of where they choose to broadcast.

While legislation seems like the most beneficial option available to streamers, it likely comes with the most significant obstacles. First, streamers would have to convince legislators to not only put legislation forward but pass it. Recent efforts to pass legislation related to live-streaming platforms has proven that Congress is disconnected and simply does not understand the current internet landscape. For example, Congresswoman Alexandria Ocasio-Cortez attempted to pass

100. Hank Green, *Introducing the Internet Creators Guild*, MEDIUM (June 15, 2016), <https://medium.com/internet-creators-guild/introducing-the-internet-creators-guild-e0db6867e0c3> [<https://perma.cc/MJM3-7GCK>].

101. *Id.*

102. *Id.*

103. Julia Alexander, *YouTubers' First Organizing Attempt, the Internet Creators Guild, Is Shutting Down*, VERGE (July 11, 2019, 1:07 PM), <https://www.theverge.com/2019/7/11/20688929/internet-creators-guild-shutting-down-hank-green-youtube-copyright-claims-monetization> [<https://perma.cc/D5Y4-LXPP>].

104. *Id.*

a bill in the House of Representatives that would prevent the United States military from using Twitch and other video streaming platforms to advertise to and recruit children.¹⁰⁵ Additionally, the bill would have prevented the military from using taxpayer money to maintain Twitch video gaming channels.¹⁰⁶ The bill ultimately failed in the House.¹⁰⁷ In a tweet, Congresswoman Ocasio-Cortez expressed her frustration with her colleagues' ignorance, saying "[i]magine trying to explain to your colleagues who are members of Congress what Twitch is."¹⁰⁸ If members of Congress are struggling to understand the nature of Twitch as a platform, it will be challenging for streamers to convince legislators to pass laws regulating the behaviors of these platforms.

Second, streamers would likely face significant opposition from the streaming platforms. These streaming platforms have incredible amounts of resources with which they can lobby legislators to oppose this legislation. Even if streamers organized and concentrated their own lobbying efforts, the resources available to the streaming platforms would likely far exceed those of the streamers lobby. While a well-funded lobby does not necessarily guarantee instantaneous victory, such a lobby would significantly increase the streamers' burden.

CONCLUSION

Twitch's control of the video game streaming industry continues to grow. In Q3 of 2020, Twitch controlled 91% of video game live streams.¹⁰⁹ In addition to its impressive statistics, Twitch was likely emboldened by Microsoft's failure in Mixer.¹¹⁰ If a tech-giant like Microsoft could not compete with Twitch, who can? Now more than ever, it is imperative that streamers work together to induce change in Twitch's behavior. Any one of the proposed solutions would be a positive step towards change. Litigating streamer grievances with

105. Kim Lyons, *After Impassioned Speech, AOC's Ban on US Military Recruiting via Twitch Fails House Vote*, VERGE (July 30, 2020, 7:19 PM), <https://www.theverge.com/2020/7/30/21348451/military-recruiting-twitch-ban-block-amendment-ocasio-cortez> [https://perma.cc/2F67-ECFF].

106. *Id.*

107. *Id.*

108. Alexandria Ocasio-Cortez (@AOC), TWITTER (July 30, 2020), <https://twitter.com/AOC/status/1288971591968333826?s=20> [https://perma.cc/7D2X-PN8A].

109. Jordan Novet, *Amazon's Twitch Dominates Game Streaming Market After Microsoft Mixer Shutdown*, CNBC (Oct. 7, 2020, 12:56 PM), <https://www.cnbc.com/2020/10/07/amazon-twitch-dominates-game-streaming-after-microsoft-mixer-shutdown.html> [https://perma.cc/YBH2-5BKV].

110. *See supra* notes 39–40, 42–43 and accompanying text.

Twitch is incredibly effective in helping streamers on an individual level. With more and more lawsuits, Twitch could potentially experience pressure to make changes within its organization. On the collective level, creating an organization would be an effective strategy for elevating the industry. By equipping a greater proportion of streamers with representation and education, content creators will become more capable of protecting and advocating for themselves in the face of Twitch's misbehavior. Finally, legislating will make the most effective, lasting change to Twitch's behavior. But without a coordinated, well-funded effort, lawmaking remains challenging and slow. Combining all three of these approaches would allow streamers the greatest chance at affecting significant, long-lasting change in Twitch's policies for the better.

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