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## The Legal Liabilities of Twitch, Amazon's Livestreaming Subsidiary

Jean Fang

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# THE LEGAL LIABILITIES OF TWITCH, AMAZON’S LIVESTREAMING SUBSIDIARY

Jean Fang

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## I. INTRODUCTION

Amazon's Twitch is the leader of the video game streaming market, controlling 76% of this market in the Americas and Europe.<sup>1</sup> The video gaming market is rapidly expanding, exceeding its entertainment counterparts, including music and film, by wide margins in profits; experts valued the global gaming market at \$229.39 billion in 2022 and expect it to grow to \$401.32 billion by 2027.<sup>2</sup> Amazon paid \$1 billion to acquire Twitch in 2014 in a business move to capture the views of the gaming audience; on Twitch, popular streamers broadcast themselves playing video games to thousands of devoted fans.<sup>3</sup> Based on recent controversies that have made the news, Twitch's updated streamer contracts as of 2022 and its nature as a livestreaming platform cause complications with its Terms of Service, revenue split, and protection of both streamers and viewers, resulting in legal ramifications.<sup>4</sup> This paper seeks to identify streamers' key complaints about their updated contracts and compare their offers from other streaming sites to understand what prompts streamer migration from a content creator standpoint.<sup>5</sup> Additionally, this article explores how Twitch can modify its streaming contracts through changes in payment terms, safety regulations, and website usage arrangement to better appeal to both content creators and their audiences.<sup>6</sup> Through examination of the Twitch streamer contract and Terms of Service agreement, this paper will recognize potential weaknesses in the protection of streamers' rights and profits that can lead to future lawsuits or legal trouble if not addressed.<sup>7</sup>

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<sup>1</sup> 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>.

<sup>2</sup> *See id.*; *Global Gaming Market Report 2023: Increasing Proliferation of Mobile Phones is Expected to Propel Growth*, YAHOO!FINANCE (May 2, 2023), <https://finance.yahoo.com/news/global-gaming-market-report-2023-163000929.html>.

<sup>3</sup> *See Khan, supra* note 1.

<sup>4</sup> *See infra* Parts III and IV.

<sup>5</sup> *See infra* Section III.A.i and Part V.

<sup>6</sup> *See infra* Parts III and IV.

<sup>7</sup> *See infra* Part III.

## II. WHAT IS TWITCH?

The developers of Twitch, a popular streaming website, initially intended to create a space for gamers to communicate with their audiences by broadcasting their gameplay live, but Twitch has since then branched into other categories.<sup>8</sup> Yale-graduate Justin Kan founded Twitch in 2005, originally calling it Justin.tv, to host livestreams of video games.<sup>9</sup> On Twitch's public "About" page, the website markets itself as a space for people to intermingle with each other in large numbers through interactive entertainment and chatting.<sup>10</sup> In 2014, Amazon offered to pay over \$1 billion to acquire Twitch, which the New York Times labels a "website for watching video games."<sup>11</sup>



Figure 1: Twitch's Logo and icon

Thousands of gamers broadcast or stream themselves playing games live on Twitch, and many of these gaming streamers have built up a large and loyal audience base who watch continuously for hours.<sup>12</sup> According to Twitch, viewer retention is high as these followers watch streams on Twitch for almost two hours a day.<sup>13</sup> By 2014, Twitch's peak viewership had already rivaled or surpassed that of some prime-time cable networks' average viewership, including HLN, CNN, E!, MSNBC, TruTV, and MTV.<sup>14</sup> Amazon pointed out in its press release when purchasing Twitch that by July 2014, Twitch had "more than 55 million unique visitors and over 15 billion minutes of content produced by more than 1 million broadcasters," garnering the website "more peak broadband

<sup>8</sup> See *About*, TWITCH, <https://www.twitch.tv/p/en/about/> (last visited Oct. 13, 2023).

<sup>9</sup> Hannah Baker, *Takedowns and Terminations: Twitch's Transgression and Streamers' Struggles*, 71 CASE W. L. REV. 1375, 1378–79 (2021).

<sup>10</sup> See *Twitch About*, TWITCH, *supra* note 8.

<sup>11</sup> Gregor Aisch & Tom Giratikanon, *Charting the Rise of Twitch*, N.Y. TIMES (Aug. 27, 2014), <https://www.nytimes.com/interactive/2014/08/26/technology/charting-the-rise-of-twitch.html?searchResultPosition=10>. *But see infra* note 25 (indicating that Amazon ended up paying Twitch \$970 million).

<sup>12</sup> Aisch & Giratikanon, *supra* note 11.

<sup>13</sup> Aisch & Giratikanon, *supra* note 11.

<sup>14</sup> Aisch & Giratikanon, *supra* note 11.

traffic than giants like Facebook and Hulu.”<sup>15</sup> The front and foremost category of interest on Twitch is “Games,” but other categories that have grown and developed since Twitch’s creation, including “Music, Talk Shows, Sports, Travel and Outdoors, Just Chatting, Food & Drink, [and] Special Events.”<sup>16</sup> Additionally, Twitch is popular with game developers and companies that stream footage of competitive gaming tournaments pitting professional players against each other, such as Riot Games’ streams of competitive League of Legends, which attract hundreds of thousands of viewers.<sup>17</sup>

### A. Twitch’s Value from a Business Perspective

From the perspective of Amazon and other big businesses, Twitch is clearly an expensive, yet worthwhile investment—but what are the website’s key compelling characteristics?<sup>18</sup> The answer is money, and a lot of watching eyeballs—when discussing the business of entertainment, most consumers typically think of film and music, but games make more money than both those areas.<sup>19</sup> The video game industry currently generates much more revenue than the box office; the global box office 2019 peak of revenue was \$39 billion, while video games that year earned \$180 billion in revenue.<sup>20</sup> Consequently, Amazon and other

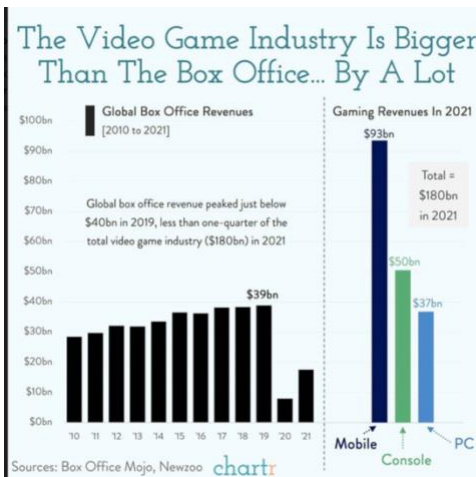


Figure 2: Graphic comparing Box Office profits to Video Game profits

<sup>15</sup> German Lopez, *Why Amazon Spent \$970 Million to Buy Twitch*, VOX (Aug. 26, 2014, 9:30 AM), <https://www.vox.com/2014/8/26/6067085/amazon-twitch-tv-video-games-live-streaming-league-of-legends-dota-2>.

<sup>16</sup> *Twitch About*, TWITCH, *supra* note 8.

<sup>17</sup> Aisch & Giratikanon, *supra* note 11.

<sup>18</sup> Lopez, *supra* note 15.

<sup>19</sup> Ryan Morrison, Presentation for Pepperdine Video Game Law Society (VGLS) (Oct. 20, 2022) (notes on file with author); *see* Khan, *supra* note 1.

<sup>20</sup> Victoria Schwartz, Lecture for Pepperdine Entertainment Law Class “Structure of the Entertainment Industry: Theater, Literary Publishing, and

big companies have greatly increased their investment in the gaming entertainment field, which is evidenced by how Amazon “created an in-house gaming studio in 2012.”<sup>21</sup> The currently most viewed game title on Twitch, League of Legends, has generated over \$1.4 billion every year from 2015 to 2020, despite being a free-to-play game, by selling cosmetic skins and effects to players.<sup>22</sup> As legal representative for hugely popular streamers, games, and gaming-related sites, such as “Discord, XQC, and Among Us,” Morrison stunned listeners after informing them that his biggest client made \$3.5 million—in a week—playing video games on stream.<sup>23</sup> The global gaming market was valued at \$229.39 billion in 2022 and projected to grow further to \$401.32 billion by 2027, thus, big tech companies are vying in for a piece of the profit.<sup>24</sup>

There’s a reason why Google, YouTube, and Amazon were all in a race to purchase Twitch in 2014, with Amazon finally emerging as the victor.<sup>25</sup> Amazon CEO Jeff Bezos clarified his reasoning for the purchase: “Broadcasting and watching gameplay is a global phenomenon and Twitch has built a platform that brings together tens of millions of people who watch billions of minutes of games each month.”<sup>26</sup> Amazon is keen to add gaming to its lengthy list of products and has grown to become the second largest digital game distributor after the Steam Store; with the purchase of Twitch, Amazon hopes to capture the wallets of even more of

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Interactive Digital Media” (Jan. 23, 2023) (notes on file with author); *see* Khan, *supra* note 1.

<sup>21</sup> Lopez, *supra* note 15.

<sup>22</sup> Ralston Dacanay, *How Much Money Did League of Legends Make in 2021?*, DBLTAP (Dec. 30, 2021), <https://www.dbltap.com/posts/how-much-money-did-league-of-legends-make-in-2021-01fr6hfexgdt>.

<sup>23</sup> *Video Game Law Society Hosts Ryan Morrison*, PEPP. SURF REP. (Sept. 29, 2022), <https://law.pepperdine.edu/surf-report/posts/video-game-law-society-hosts-ryan-morrison.htm>. Ryan Morrison, “The Video Game Attorney” and Founding Partner at Morrison Rothman, an Esports, Video Games, and Digital Entertainment Law Firm, Presentation at a Lunch Hosted by Pepperdine Caruso School of Law’s Video Game Law Society (Oct. 20, 2022).

<sup>24</sup> PR Newswire, *Global Gaming Market Report 2023: Increasing Proliferation is Expected to Prepare Growth*, YAHOO! FINANCE (May 2, 2023), <https://finance.yahoo.com/news/global-gaming-market-report-2023163000929.html>.

<sup>25</sup> Chris Welch, *Amazon, Not Google, Is Buying Twitch for \$970 Million*, THE VERGE (Aug. 25, 2014, 10:57 AM), <https://www.theverge.com/2014/8/25/6066295/amazon-reportedly-buying-twitch-for-over-1-billion>.

<sup>26</sup> *Id.*

the gaming market.<sup>27</sup> Amazon definitely gained new consumer's views—just recently, the League of Legends International Worlds 2022 Grand Final broke Twitch's record for most concurrent viewers at a time with 3.1 million live viewers.<sup>28</sup> To put into perspective how big the Esports (competitive video gaming) scene can be, in 2018, the League of Legend's World Final Championship held in South Korea had nearly “100 million unique viewers” tune into the live viewing worldwide, while the Super Bowl barely had over 98 million viewers.<sup>29</sup> During the COVID

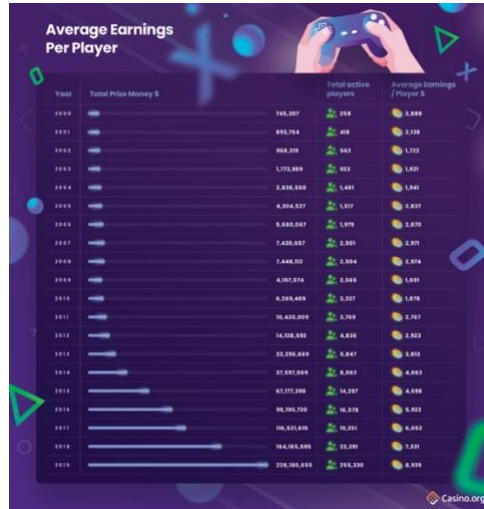


Figure 3: A graph showing trends in number of Esports players and money earned by Esports players

the Super Bowl barely had over 98 million viewers.<sup>29</sup> During the COVID pandemic, the total hours viewers spent on Twitch increased “from 9 billion in 2019 to 24 billion in 2021.”<sup>30</sup> For professional Esports gamers, salaries start at six-figures, and prizes for championships are hefty.<sup>31</sup> For example, Kyle Giersdorf won \$3 million at the 2019 Fortnite World Cup

<sup>27</sup> Ben Popper, *Why It Makes Sense for Amazon to Buy Twitch*, THE VERGE (Aug. 25, 2014, 12:03 PM), <https://www.theverge.com/2014/8/25/6066509/why-it-makes-sense-for-amazon-to-buy-twitch>.

<sup>28</sup> Esports Charts Team, *Worlds 2022 grand final sets new Twitch record for League of Legends*, STREAM CHARTS (Nov. 6, 2022), <https://streamcharts.com/news/lol-twitch-record-during-worlds>.

<sup>29</sup> Annie Pei, *This Esports Giant Draws in More Viewers Than the Super Bowl, and It's Expected to Get Even Bigger*, CNBC NEWS (Apr. 14, 2019, 12:19 PM), <https://www.cnbc.com/2019/04/14/league-of-legends-gets-more-viewers-than-super-bowlwhats-coming-next.html>.

<sup>30</sup> Will Bedingfield, *Success on Twitch No Longer Comes on Twitch*, WIRED (Oct. 3, 2022, 2:34 PM), <https://www.wired.com/story/twitch-streamers-leaving-tiktok-youtube/>.

<sup>31</sup> Billy Studholme, *The esports salary market is headed toward a correction*, DIGIDAY, (Jan. 6, 2023), <https://digiday.com/marketing/the-esports-salary-market-is-headed-toward-a-correction/>.

for his first place finish.<sup>32</sup> Where there is big money and fame, there is business opportunity.

### B. *Twitch’s Multi-Tier Contracts with Streamers*

On Twitch, anyone can make an account to stream content, with Twitch defining a content creator as anyone who creates content on its platform.<sup>33</sup> As a Twitch creator’s audience grows, Twitch provides ways for streamers to monetize their channels, increasing monetary incentives over time.<sup>34</sup> Viewers who discover creator channels can digitally follow creators and be alerted when creators go online.<sup>35</sup> Streamers can progress from an ordinary creator with no official label into an “Affiliate”, and then into a “Partner.”<sup>36</sup> Requirements to obtain these statuses are laid out in figure 4 below.<sup>37</sup> Unlike lower-level streamers, Partners and Affiliates receive revenue from running ads on their channels.<sup>38</sup> Once an Affiliate, the streamer may choose to enable ads that play before or during the stream, costing approximately \$0.25–\$1.50 per 1,000 views.<sup>39</sup> Additionally, when a streamer reaches Affiliate status, viewers can subscribe to their channel for a set price every month.<sup>40</sup> Loyal followers may choose to subscribe to the channels of creators they enjoy for additional perks, such as access to the streamer’s personalized sticker emojis in chats.<sup>41</sup> These followers can choose to “subscribe” to content creators they enjoy by “paying either \$4.99, \$9.99, or \$24.99 per month to unlock exclusive emotes, view the channel’s streams without any interruptions from advertisements, and even gain exclusive access to ‘subscribers only’ chats”,<sup>42</sup> with each price option elevating the viewer’s

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<sup>32</sup> Mike Snider, *Teens Rule at \$30 Million Fortnite World Cup, Game Gets a Season 10 Teaser*, USA TODAY, (July 28, 2019, 7:53 pm), <https://www.usatoday.com/story/tech/gaming/2019/07/28/fortnite-world-cup-teens-win-millions-video-game-competition/1853236001/>.

<sup>33</sup> *Twitch 101*, TWITCH CREATOR CAMP, <https://www.twitch.tv/creatorcamp/en/paths/getting-started-on-twitch/twitch-101/> (last visited Sept. 27, 2023).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See infra* Figure 4.

<sup>38</sup> *Twitch 101*, *supra* note 33.

<sup>39</sup> Eric (last name omitted), *Twitch vs. YouTube – Complete Comparison*, STREAMERSPLAYBOOK, <https://streamersplaybook.com/twitch-vs-youtube/> (last updated Aug. 15, 2022).

<sup>40</sup> *Twitch 101*, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> Baker, *supra* note 9, at 1380.



status title to a higher “tier.”<sup>43</sup> Partner status is the highest level for a creator; to become a Partner, the streamer must first meet several requirements, and then submit a Partner application form through the streamer’s own dashboard.<sup>44</sup> Figure 4 below from the Twitch Creator Camp page shows the required qualifications to become a Twitch Affiliate and Partner:<sup>45</sup>

Requirements	Affiliate	Partner*
Time streamed (last 30 days)	8 Hours	25 Hours
Unique days streamed (last 30 days)	7 Days	12 Days
Average viewers per stream	3 Viewers	75+ Viewers
Followers reached	50+ Followers	-

Figure 4: The qualifications to become a partner or an affiliate on Twitch

For those who are less internet-savvy, Twitch streamers may appear as nobodies, but their paychecks and their reach say otherwise.<sup>46</sup> Fortnite streamer Tyler “Ninja” Blevins made history after streaming a survival game with the musician Drake in front of over 600,000 live viewers, breaking the former record of 388,000 concurrent viewers set by Dr. Disrespect.<sup>47</sup> Popular gaming influencers or professional gamers may

<sup>43</sup> *Id.*

<sup>44</sup> *Twitch 101*, *supra* note 33.

<sup>45</sup> *Id.*

<sup>46</sup> See Lisa Respers France, *Drake and Ninja’s ‘Fortnite’ battle sets a new Twitch record*, CNN Entertainment (Mar. 15, 2018, 2:17 PM), <https://www.cnn.com/2018/03/15/entertainment/drake-ninja-fortnite-twitch-battle/index.html>; see also Max Miceli & Alex Tsiaoussidis, *Full List of All Twitch Payouts (Twitch Leaks)*, Dot Esports (July 13, 2022, 9:00 pm), <https://dotesports.com/streaming/news/full-list-of-all-twitch-payouts-twitch-leaks>; Shubham, *All Twitch Payout Leak – Streamers List*, Gamer Tweak, <https://gamertweak.com/streamers-payout-leak-twitch/> (last updated June 20, 2023).

<sup>47</sup> Lisa Respers France, *Drake and Ninja’s ‘Fortnite’ Battle Sets a New Twitch Record*, CNN ENTERTAINMENT (Mar. 15, 2018, 2:17 PM),

even choose to trademark their chosen in-game name or “gamer-tag” and their personal logo designs.<sup>48</sup> Tyler “Ninja” Blevins applied for trademark protection on his “Ninja” name and logo design, as did other streamers such as DrLupo.<sup>49</sup>

The revenue of the Top 100 streamers on Twitch from August 2019 to October 2021 was leaked online, and this payment amount, shown in the leaked data chart figure below, still excludes “YouTube revenue, donations, merchandise, sponsorships”, and other alternative forms of revenue available from amassing a following on Twitch (although the accuracy of this leaked information cannot be verified).<sup>50</sup>

1	CriticalRole	\$9,626,712.16	shroud	\$2,040,503.15	RayNarvaezJr	\$1,335,520.12	Riot	\$1,052,571.76
2	xQcOW	\$8,454,427.17	AdmiralBahroo	\$1,985,892.39	Symfuhny	\$1,334,485.63	KYR_SP33DY	\$1,052,545.35
3	summit1g	\$5,847,541.17	Pestily	\$1,961,086.96	dakotaz	\$1,324,198.49	Giadd	\$1,045,687.54
4	Tlue	\$5,295,582.44	Sykkuno	\$1,916,327.43	ZanoXVII	\$1,310,925.80	juansguarizo	\$1,034,709.27
5	NICKMERC5	\$5,096,642.12	ESL_CSGO	\$1,903,580.27	SypherPK	\$1,295,112.63	Bugha	\$1,034,227.61
6	ludwig	\$3,290,777.55	LVNDMARK	\$1,902,807.22	Trymacs	\$1,288,207.23	NickEh30	\$1,027,976.40
7	TimTheTatman	\$3,290,133.32	DrLupo	\$1,894,615.81	TheGrefg	\$1,286,765.09	Tubbo	\$1,000,504.31
8	Altoar	\$3,053,839.94	AdinRoss	\$1,854,656.42	Papaplatte	\$1,286,004.35	Pikabooiirf	\$994,116.76
9	auronplay	\$3,053,341.54	Clix	\$1,843,917.31	JohnPitterTV	\$1,215,717.01	RatedEpicz	\$987,866.88
10	LIRIK	\$2,984,653.70	TeePee	\$1,786,534.47	RATIRL	\$1,214,440.08	Swagg	\$984,854.80
11	__unknown__	\$2,863,780.63	Rubius	\$1,764,965.15	RocketLeague	\$1,204,908.70	CDNThe3rd	\$976,750.53
12	Gaules	\$2,844,965.18	PaymoneyWubby	\$1,756,456.29	NoWay4u_Sir	\$1,188,728.95	Tumblr	\$960,316.77
13	HasanAbi	\$2,810,480.11	alanzoka	\$1,731,716.65	GamesDoneQuick	\$1,185,456.44	Aydan	\$953,042.02
14	Asmongold	\$2,551,618.73	Trainwreckstv	\$1,572,912.37	GernaderJake	\$1,176,353.74	ops1x	\$947,355.14
15	loltyler1	\$2,490,584.90	pokimane	\$1,528,303.11	fps_shaka	\$1,173,280.30	scump	\$946,332.99
16	RanbooLive	\$2,401,021.84	tommyinnit	\$1,513,217.70	EslandTV	\$1,170,700.02	BarbarousKing	\$933,633.48
17	MontanaBlack88	\$2,391,369.58	Maximilian_DOOD	\$1,499,562.93	buddha	\$1,158,170.55	julien	\$918,684.35
20	KnowNothingTV	\$0.00	GRONKH	\$1,481,291.05	Locklear	\$1,155,665.61	mango	\$916,857.66
18	ibai	\$2,314,485.53	sodapoppin	\$1,461,302.14	stylisnnoob4	\$1,147,599.76	Kitboga	\$915,795.53
19	Castro_1021	\$2,311,021.81	ZeratoR	\$1,440,221.40	ANGRYPUG	\$1,146,888.15	chocoTaco	\$913,022.39
20	MOONMOON	\$2,236,043.55	BobbyPoffGaming	\$1,415,247.01	Sintica	\$1,075,977.17	alexelcapo	\$911,427.22
21	TheRealKrossi	\$2,157,258.23	Ninja	\$1,378,791.48	Fresh	\$1,073,254.63	Anomaly	\$906,794.96
22	moistcr1tkal	\$2,098,742.63	Philza	\$1,364,215.61	Quackity	\$1,065,157.18	Jerm985	\$906,602.00
23	Mizkif	\$2,086,548.21	Amouranth	\$1,363,346.32	RonnieRadke	\$1,063,989.05	The8BitDrummer	\$895,020.23
24	CohhCarnage	\$2,061,059.29	BruceGreene	\$1,360,850.67	Riot	\$1,052,571.76	TSM_ImperialHal	\$886,999.17
			Odalblock	\$1,354,805.74				

Figure 5: A leaked chart detailing how much Twitch paid top streamers from Aug. 2019 to October 2021.

<https://www.cnn.com/2018/03/15/entertainment/drake-ninja-fortnite-twitch-battle/index.html>.

<sup>48</sup> Justin M. Jacobson, *Protect Your Gamer-Tag: Professional Gamers, Streamers, and Content Creators*, L. OFF. OF JUSTIN M. JACOBSON, <https://jmjesq.com/trademark-law-professional-gamers-streamers-creators/> (last visited Oct. 13, 2023).

<sup>49</sup> *Id.*

<sup>50</sup> Max Miceli & Alex Tsiaoussidis, *Full List of All Twitch Payouts (Twitch Leaks)*, DOT ESPORTS (July 13, 2022, 9:00 pm), <https://dotesports.com/streaming/news/full-list-of-all-twitch-payouts-twitch-leaks>; Shubham, *All Twitch Payout Leak – Streamers List*, GAMER TWEAK, <https://gamertweak.com/streamers-payout-leak-twitch/> (last updated June 20, 2023).

### III. CONFLICTS BETWEEN TWITCH AND ITS STREAMERS ARISING FROM CONTRACTUAL WEAKNESSES

Recently, in 2022, Twitch came under fire for its new streaming contracts because of excessive ads driving away viewers and an arguably unfair percentage share of income between the site and its creators.<sup>51</sup> Several notable streamers in the platform have since migrated to other social media platforms that have realized the promise of game livestreaming.<sup>52</sup>

#### A. *A Dive into Twitch's Affiliate Contract*

When you finally achieve the requirements to become a Twitch Affiliate and start making money from streaming, you are greeted by the Twitch Monetized Streamer Agreement, a contract that you must sign to participate.<sup>53</sup> This contract starts by stating the streamer must be eligible to participate, such as being at least thirteen years of age, although as this paper later discusses, some younger streamers ignore this.<sup>54</sup> Then, Twitch makes clear that your livestreams while streaming on this platform exclusively belong to it:

Solely for any live audio-visual work you choose to provide to us as User Content (your "Live Twitch Content"), starting from beginning of the Initial Broadcast of any such Live Twitch Content, and continuing for a period of twenty-four (24) hours following the end of the Initial Broadcast of such Live Twitch Content (the "Exclusivity Period"), such Live Twitch Content is exclusive to Twitch (even as to you). During the Exclusivity Period of any Live Twitch Content, you will not, nor permit or authorize any third party to, broadcast, stream, distribute, exhibit and otherwise make available such Live Twitch Content in any manner.

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<sup>51</sup> Michael Gwilliam, *Asmongold & Valkyrae Blame Ads for "Killing Twitch" as Platform Denies 70/30 Sub Split*, DEXERTO (Sept. 21, 2022), <https://www.dexerto.com/entertainment/asmongold-valkyrae-blame-ads-for-killing-twitch-as-platform-denies-70-30-sub-split-1938342/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Twitch Monetized Streamer Agreement*, TWITCH, <https://www.twitch.tv/p/en/legal/affiliate-agreement/> (July 14, 2023).

<sup>54</sup> *Id.* (under Section 1.1 General Eligibility).

Notwithstanding the foregoing, you have the right to make any Live Twitch Content available, during the Exclusivity Period, solely via the Twitch Services. After the Exclusivity Period of any Live Twitch Content, the license to such Live Twitch Content will become non-exclusive and you will have the right to broadcast, stream, distribute, exhibit and otherwise make available such Live Twitch Content in any manner and format desired by you. The “Initial Broadcast” means the initial broadcasting, streaming, distribution, or other exhibition of Live Twitch Content via the internet, whether such Live Twitch Content is broadcast on a real-time, live basis as the subject event is occurring or such Live Twitch Content has been prerecorded and is being initially broadcast for the first time via any manner or method of streaming.<sup>55</sup>

This part of the contract means that creators are not allowed to stream to multiple livestreaming platforms, but creators may still upload videos recording their livestreams, known as VODs, to other sites after twenty-four hours.<sup>56</sup> The agreement then elaborates that if the streamer violates this agreement, Twitch reserves the right to withhold payment, which occurs through “bits and cheering, qualifying purchases, channel subscription services, special programs,” and “advertisements.”<sup>57</sup> Reading deeper into the fine print, Twitch holds great power over the creator’s pay, such as withholding revenue share for Bits based on Twitch’s “sole discretion.”<sup>58</sup> Through all this, Twitch never clearly lists out a salary; no financial compensation is promised for streaming a certain number of hours, so everything the streamer makes is earned from the views or payment of supportive viewers.<sup>59</sup> Twitch pays program fees on a monthly basis, but if the streamer made “less than \$100 (the “Payment Threshold”),” then Twitch “may instead accrue such payment obligation until such time as its overall obligation to you is at least the Payment

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<sup>55</sup> *Id.* (under Section 2.2 Live Content Exclusivity).

<sup>56</sup> *Id.* (further clarification of significant aspects of Section 2.2).

<sup>57</sup> *Id.* (under Section 2.4 Violations and Section 3 Program Fees). Bits and cheering send money to the streamer, and subscriptions to streamers cost \$5 but can be upgraded to higher tiers. Twitch takes a portion of the money gifted by viewers via bits, cheering, and subscriptions. Qualifying purchases often involve streamers promoting companies through advertising.

<sup>58</sup> *Id.* (looking into Section 3 Program Revenue, this further elaborates on how affiliates are paid).

<sup>59</sup> *Id.* (salary payment and any form of guaranteed payment for streaming are omitted under Section 3 Program Fees).

Threshold.”<sup>60</sup> Additionally, Twitch may terminate the affiliate agreement if the streamer performs no activity or earns less than \$100 in program fees in twelve consecutive months.<sup>61</sup> Toward the end of the agreement, Twitch lays out its terms for the termination in Section 6.<sup>62</sup> Future creators should take note that termination of this contract with Twitch is unilateral:

[E]ither you or we may terminate this Agreement at any time, with or without cause, by giving the other party . . . written notice of termination.

. . . .

. . . [N]o termination of this Agreement will relieve either party for any liability for any breach of, or liability accruing under, this Agreement prior to termination.<sup>63</sup>

After sections on modifications, indemnification, disclaimers, and limitation of liability—in which capitalized words emphasize the section on disclaimers and liabilities—Twitch finally defines its relationship with the Affiliate in section 14 under “Relationship of Parties”:

You and we are, and will remain at all times, independent contractors, and nothing in this Agreement will be construed to create an agency, employment, fiduciary, representative or any other relationship between you and us. You will not represent yourself to be an employee, representative, or agent of us. You understand and agree that you do not have authority to bind us in any manner . . . [or] enter[] into any agreement or incur[] any liability on behalf of us.<sup>64</sup>

Further in the depth of the Affiliate Agreement contract, the next sections detail that the laws of the United States govern Twitch, then list how to arbitrate disputes or claims, and then name further assurances, waiver, and severability—ways in which Twitch has insulated itself from

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<sup>60</sup> *Id.* (under Section 4.1 Payment Terms).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (under Section 6 Term and Termination).

<sup>63</sup> *Id.* Twitch’s ability to unilaterally terminate its streamers without giving cause has led to a lawsuit with streamer Dr. Disrespect. Brent Koepp, *Why Was Dr Disrespect Banned on Twitch? Everything You Need to Know*, DEXERTO (Jul. 12, 2023), <https://www.dexerto.com/entertainment/why-was-dr-disrespect-banned-on-twitch-everything-you-need-to-know-1385549/>.

<sup>64</sup> TWITCH, *supra* note 53.

legal liability and has controlled the forum and applicable law for any disputes about its contract.<sup>65</sup>

On June 26, 2020, Twitch banned the streamer, Dr. Disrespect, who had over four million subscribers, thus unilaterally terminating an exclusive streamer's multimillion-dollar contract with barely any notice or chance to appeal.<sup>66</sup> Hannah Baker criticizes this pattern of behavior in *Takedowns and Terminations: Twitch's Transgression and Streamers' Struggles*:

Twitch handing down bans and suspensions without explanation is not out of character; 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.<sup>67</sup>

#### I. Controversial Contract Update: Excessive Ads and New Revenue Split

In September 2022, Twitch denied a long-requested 70/30 sub split for all content creators (where creators receive 70% of the profits viewers give them, and Twitch takes 30%); instead, beginning in June 2023, popular streamers that previously had the improved 70/30 revenue split “will only receive \$100,000 of sub-revenue [money from subscriptions], with anything after this at the regular 50/50 split.”<sup>68</sup> This change does not affect 90% of Twitch's streamers, who are on standard contracts; it only impacts the largest streamers, who previously had a preferential 70/30 split.<sup>69</sup> Although rival websites, such as YouTube, are

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<sup>65</sup> See *id.* (Under Section 11 Governing Law, Jurisdiction, and Venue; Section 12 Arbitration; and Section 13 Miscellaneous.)

<sup>66</sup> Baker, *supra* note 9, at 1375–78.

<sup>67</sup> *Id.* at 1378.

<sup>68</sup> Calum Patterson, *Twitch Denies Requests for 70/30 Sub Split Due to “High Cost” of Running Site*, DEXERTO (Sept. 21, 2022), <https://www.dexerto.com/entertainment/twitch-denies-requests-for-70-30-sub-split-due-to-high-cost-of-running-site-1937440/> [hereinafter Patterson (2022a)]. Normally, Twitch and creators split profits from viewers 50/50, but very popular streamers had premium contracts, allocating revenue 70% to the creator and 30% to Twitch, to incentivize popular creators to remain on the platform. *Id.*

<sup>69</sup> *Id.*

competing for Twitch's creator and audience base, Twitch fails to incentivize its large streamers to stay.<sup>70</sup> In a blog letter from Twitch president, Dan Clancy, Clancy states that the baseline revenue share of most streamers' contracts is 50/50, but a few popular streamers have premium agreements.<sup>71</sup> However, Twitch was neither transparent on the agreements' differences nor consistent in offering these premium contracts for larger streamers.<sup>72</sup> Clancy claims that Twitch implemented changes because it was unethical for streaming contracts to vary revenue shares merely based on the size of the streamer's audience base.<sup>73</sup> Over 22,000 streamers on UserVoice, Twitch's improvement suggestion platform, requested that Twitch move all streamers to a 70/30 revenue split and that Twitch provide faster payment.<sup>74</sup> However, Twitch decided to be more "fair" by paying its largest streamers less instead of increasing the pay of all streamers.<sup>75</sup> Twitch argued that paying all streamers 70/30 is impossible because "using the published rates from Amazon Web Services' Interactive Video Service (IVS)—which is essentially Twitch video—live video costs for a 100 CCU streamer who streams 200 hours a month are more than \$1,000 per month."<sup>76</sup> Several streamers argue against this, claiming Twitch is being greedy; for example, popular streamer, FaZe Ronaldo, publicized a graph on his Twitter page to 1.2 million followers comparing how much money creators keep on different platforms<sup>77</sup>:

Twitch notes:

[P]roducts like Prime Subs, Community Gifting, Hype Train, and the Ads Incentive Program, to name a few, have driven an increase of 27% more streamer revenue per viewer hour every year over the last five years . . . [and

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<sup>70</sup> *See id.*

<sup>71</sup> Dan Clancy, *A Letter from Twitch President Dan Clancy on Subscription Revenue Shares*, TWITCH (Sept. 21, 2022), [https://blog.twitch.tv/en/2022/09/21/a-letter-from-twitch-president-dan-clancy-on-subscription-revenue-shares/?utm\\_referrer=https://t.co/zP6xcCtJAQ](https://blog.twitch.tv/en/2022/09/21/a-letter-from-twitch-president-dan-clancy-on-subscription-revenue-shares/?utm_referrer=https://t.co/zP6xcCtJAQ).

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See, e.g.*, FaZe Ronaldo (@StableRonaldo), TWITTER (Oct. 1, 2022, 2:18 PM), <https://twitter.com/stableronaldo/status/1576320582970658816?s=46&t=m9S2GK9kJlboxv88P-k9o2A>.

that] the same viewer hour now earns [the streamer] three times more money than it did five years ago . . . .”<sup>78</sup>

Twitch claims that Prime Subs, which entails giving Amazon prime members one free subscription to a specific streamer on Twitch every month, increases the revenue share to around 65% for most streamers (Twitch does not profit from Prime subs). Clancy asserts in his blog that Twitch’s investment into these alternative monetization options provides streamers with more money than a twenty percent subscription revenue share would. Additionally, since larger streamers were already used to a certain level of income, Twitch adjusted 2022 contracts so these streamers “retain their 70/30 revenue share split for the first \$100K earned

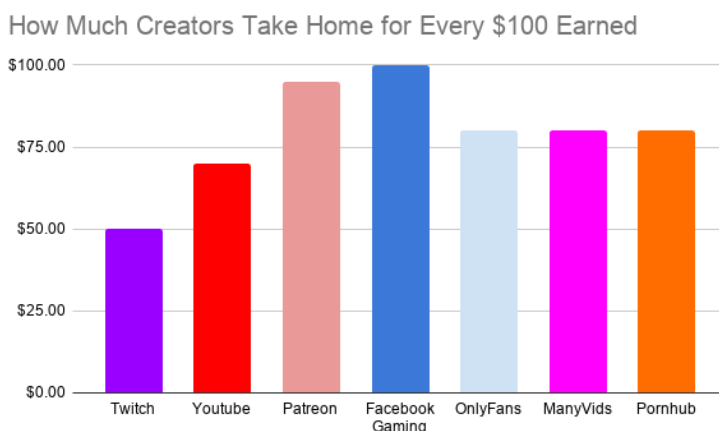


Figure 6: Graph showing Twitch's revenue split compared to that of other sites, as taken from FaZe Ronaldo's tweet.

<sup>78</sup> Patterson (2022a), *supra* note 68. Prime subs involve viewer subscriptions that give money to creators. *Id.* Community gifting allows viewers to gift subscriptions to other viewers. Albert Petrosyan, *New Twitch 'Community Gifting' Feature Allows Users to Gift Up to 100 Subs at Once*, DEXERTO (Aug. 9, 2018), <https://www.dexerto.com/general/twitch-introduces-new-community-gifting-feature-that-allows-users-to-gift-up-to-100-channel-subs-at-once-137035/>. Hype train is when limited time programs incentivize viewers to subscribe and gift subscriptions. Mika Robinson, *What Are Twitch Hype Trains?*, STREAMLABS (Nov. 23, 2022), <https://streamlabs.com/content-hub/post/what-are-twitch-hype-trains>. The Ads Incentives program enables Twitch creators to run ads to earn ad revenue. Calum Patterson, *Twitch Streamers Reveal Big Pay Bump from New "Ad Incentive" Offers*, DEXERTO (Aug. 29, 2022), <https://www.dexerto.com/entertainment/twitch-streamers-reveal-big-pay-bump-from-new-ad-incentive-offers-1917317/> [hereinafter Patterson (2022b)].



through subscription revenue,” and then additional “revenue above \$100K will be split at the standard 50/50 share split” to make their transition smoother. For some streamers, especially more popular ones, Twitch claims some have received improved offers for running ads in September 2022, showing more pay for ads per hour. For data on this point, Gothalion, a Destiny streamer with approximately 1 million followers, received “over \$20,000 for streaming 133 hours, with 3 minutes of ads per hour.” Additionally, Twitch Partner “Duck,” a smaller but decently successful streamer with under 20,000 followers, corroborated Twitch that the new ad incentive pays creators more—but at what cost?

Streamers disliked Twitch’s new contracts for including increased financial benefits for streamers who ran more ads because these ads were so lengthy that the viewers were being driven away.<sup>79</sup> Twitch proposed an alternative way for large streamers to earn revenue at the level they previously had through Twitch’s controversial new Ads Incentive Program.<sup>80</sup> This ad incentives program improves streamers’ pay if they run a certain amount of ads and stream a certain amount of hours and offers streamers increased revenue split from ads if they run more of them.<sup>81</sup> However, some streamers argued that the additional money they receive does not offset the harm to their channel from additional ads because viewers are annoyed, causing the viewers to tune off from the stream.<sup>82</sup> In a viral clip from his livestream, the popular streamer HasanAbi commented on how his fellow streamer Ludwig laughed at him after he told Ludwig what the revenue split in his Twitch contract was since HasanAbi decided to run fewer ads to retain viewers.<sup>83</sup> HasanAbi commented: “There are certain things you can’t discuss about your contract . . . but Ludwig who saw my contract laughed about it numerous times . . . I don’t have a 50/50 ad split.”<sup>84</sup> HasanAbi is one of Twitch’s most well-known streamers, with 2.3 million followers, who does live political commentary and sometimes gaming streams.<sup>85</sup> HasanAbi is right; social media reactions demonstrate that viewers have noticed the increase

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<sup>79</sup> *Id.*

<sup>80</sup> Clancy, *supra* note 71.

<sup>81</sup> Patterson (2022a), *supra* note 68.

<sup>82</sup> *Id.*

<sup>83</sup> @Dexerto, TWITTER, (Sept. 22, 2022, 4:38 PM),

<https://twitter.com/dexerto/status/1573094504231477249?s=46&t=bqdLAaNFbBKWXojZrT7HVg>.

<sup>84</sup> *Id.*

<sup>85</sup> @HasanAbi, TWITCH, <https://www.twitch.tv/hasanabi> (last visited Sept. 25, 2023).

in ads, with users angrily commenting on social media about how they leave a channel if they get six back-to-back ads in streams.<sup>86</sup>

Since the ads are automatic and run without streamer control, the viewer's experience may be spoiled by an ad during a crucial moment.<sup>87</sup> Popular streamer Asmongold is a World of Warcraft streamer with 3.3 million followers on Twitch.<sup>88</sup> After hearing of Twitch's new ad plans, he tweeted out this statement:

Let's cut the bullsh[\*]t – excessive ads are killing Twitch. You go to a stream and it says 1/6 ads played, you go to another tab then come back and the video player has crashed. Like [on Twitter] if you've ever clicked off a stream because of too many ads.<sup>89</sup>

100 Thieves co-owner and popular streamer Valkyrae, who recently switched platforms from Twitch to YouTube, also accused Twitch of being too greedy after the news of the ad plans. She compared Twitch to its competitor YouTube, tweeting:

Strange being at a YouTube event [right now] directly speaking to executives while Twitch greeds [sic] for profit. Killing your viewerbase [sic] [with] more ads [and] hurting the backbone of your company, the creators[.] We want to see success from both platforms since competition is good[,] but Twitch is throwin[g].<sup>90</sup>

Despite all these protests, creators on Twitch may be hard-pressed to legally ensure that Twitch pays them a certain threshold amount.<sup>91</sup>

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<sup>86</sup> Patterson (2022b), *supra* note 68.

<sup>87</sup> *Id.*

<sup>88</sup> @Asmongold, TWITCH, <https://www.twitch.tv/asmongold> (last visited Sept. 25, 2023).

<sup>89</sup> Zack (@Asmongold), TWITTER, (Sept. 21, 2022, 11:50 pm), <https://twitter.com/Asmongold/status/1572659623718436865?lang=en> (displaying the grammar and wording of this quote exactly as it was in the original tweet to capture tone and colloquial nature and edited to censure profane language).

<sup>90</sup> *Id.* As a former Twitch streamer who switched to YouTube Live, Valkyrae also benefits from persuading other streamers to migrate to the platform that she supports. (The tweet is worded like the original, and edits to the tweet for clarity have been marked with brackets).

<sup>91</sup> Baker, *supra* note 9, at 1378.

## 2. Prior Existing Contractual Issues

Even prior to Twitch's recent contract update, Twitch's Terms of Service and streamer contracts had come under fire, with some streamers feeling that their legal rights were not adequately protected.<sup>92</sup> Many streamers have voiced complaints about Twitch's frustrating behavior that is excused by its Terms of Service and Affiliate Contract.<sup>93</sup> For example, streamers have recently become annoyed by Twitch's increasingly strict enforcement of the Digital Millennium Copyright Act (DMCA).<sup>94</sup> The DCMA protects "copyrighted material online and stop[s] the infringement of digital or digital recreations of copyrighted works," and many Twitch and YouTube creators come in conflict with it for playing music in their background.<sup>95</sup> Several streamers have complained that, "Twitch has removed several of their videos for copyright infringement with neither a notification of what content violated a copyright nor an opportunity to cure the infringement."<sup>96</sup> However, no legal action has been taken against Twitch for this because such behavior by Twitch is clearly laid out as legal contractual obligations to prevent depictions by streamers of copyrighted material.<sup>97</sup> On Twitch, third parties may file complaints about usage of copyrighted material and request that Twitch mute the content and notify the streamer of a strike (warning for when streamer uses copyrighted material, which Twitch needs to block out in video records).<sup>98</sup> Unfortunately, this system allows the reporting party to report innocent streamers and abuse the system's design by "flagging false positives."<sup>99</sup> Although streamers are frustrated, Twitch's Terms of Service often protect the platform from bearing responsibility when streamers are harmed.<sup>100</sup> Protecting the rights of streamers is difficult because:

Twitch streamers have complete control over the content they produce for their channels. These streamers create their content without direction or supervision from

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1386.

<sup>94</sup> *Id.*

<sup>95</sup> *The Digital Millennium Copyright Act (DMCA) and Streamers*, GREENROOM, (June 22, 2020), <https://www.greenroomlegal.com/legal-blog/the-digital-millennium-copyright-act-dmca-and-streamers>.

<sup>96</sup> Baker, *supra* note 9, at 1386.

<sup>97</sup> *Id.* at 1387.

<sup>98</sup> *The Digital Millennium Copyright Act (DMCA) and Streamers*, *supra* note 95.

<sup>99</sup> *Id.*

<sup>100</sup> Baker, *supra* note 9, at 1387.

Twitch. Twitch streamers have specialized skills in performance, content creation, and marketing that make their channels more successful than others . . . 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.<sup>101</sup>

Since profits are obtained entirely through views, Twitch has needed to file lawsuits against creators who falsely inflated their streaming numbers with bots to obtain greater revenue.<sup>102</sup> In *Twitch Interactive, Inc. v. Johnston*, the defendants provided software programs that affected Twitch channel viewership and utilized websites names such as [www.shoptwitch.com](http://www.shoptwitch.com) and the like.<sup>103</sup> The court granted Twitch’s motion for summary judgment as to defendant’s liability for “(1) trademark infringement in violation of 15 U.S.C. § 1114; (2) unfair competition in violation of 15 U.S.C. § 1125(a); (3) violation of the Anti-Cybersquatting Consumer Protection Act (‘ACPA’), 15 U.S.C. § 1125(d); and (4) breach of contract.”<sup>104</sup>

### 3. Recent Gambling Ban

On September 20, 2022, Twitch banned streams of selected gambling websites and referral links to gambling after months of public backlash and campaigns against rampant gambling streams.<sup>105</sup> Now Twitch’s community guidelines state, “We do not allow users to share links or affiliate codes to sites that contain slots, roulette, or dice games” in chat, with a banner, or verbally.<sup>106</sup> This includes referral codes to slots sites or verbal references to viewers, even without typing out the site

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<sup>101</sup> *Id.* at 1389.

<sup>102</sup> *See* *Twitch Interactive, Inc. v. Johnston*, No. 16-CV-03404-BLF, 2018 WL 1449525, at \*1 (N.D. Cal. Jan. 22, 2018).

<sup>103</sup> *Id.* at \*2–3.

<sup>104</sup> *Id.* at \*1.

<sup>105</sup> Michael Gwilliam, *Twitch bans gambling sites including Stake and more following streamer backlash*, DEXERTO, (Sept. 20, 2022, 3:15 PM), <https://www.dexerto.com/entertainment/twitch-bans-gambling-features-after-streamer-backlash-but-theres-a-catch-1937092/>.

<sup>106</sup> *Community Guidelines*, TWITCH, [https://safety.twitch.tv/s/article/Community-Guidelines?language=en\\_US](https://safety.twitch.tv/s/article/Community-Guidelines?language=en_US) (last visited Oct. 13, 2023).

name.<sup>107</sup> Twitch also prevents certain gambling sites from being streamed, including stake.com, rollbit.com, duelbits.com, and roobet.com, regardless of whether money is involved.<sup>108</sup> Twitch explicitly states that even free social versions of these sites are not allowed.<sup>109</sup> To determine if the site should be blocked, Twitch considered factors such as the inclusion of safety protections, age verification, waiting periods, money deposit limits, and whether the site is U.S. licensed or licensed in other countries with adequate protection.<sup>110</sup> Additionally, Twitch keeps an eye out for if the streamer promoting a site uses or encourages their viewers to use virtual private networks (VPNs) to dodge geoblocking.<sup>111</sup> “Geoblocking” involves “completely blocking or limiting access to internet content based on the physical location” of the user attempting to access that content.<sup>112</sup> Sites that Twitch allow as exceptions include broadcasting websites for sports betting, poker, and fantasy sports.<sup>113</sup>

Previously, popular streamers like xQc and Trainwreck made millions of dollars through sponsorships on slot websites.<sup>114</sup> Félix “xQc” Lengyel is a popular variety streamer with 11.9 million followers.<sup>115</sup> During an August 7, 2022 broadcast, xQc pulled up a figure showing he “has wagered \$685,075,984 with 656,376 bets, 63,057 wins, and 583,405 losses.”<sup>116</sup> However, these gambling streams became controversial, especially since so many Twitch viewers are children or easily influenced, thus popular streamers like Pokimane have advocated for Twitch to ban

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Josh, *GeoBlocking What You Need to Know (+ How to Beat It in 2023)*, ALL THINGS SECURED (Jan. 9, 2023), <https://www.allthingssecured.com/vpn/what-is-geo-blocking-geo-restricting/>.

<sup>113</sup> See Twitch Interactive, *supra* note 102.

<sup>114</sup> Terry Oh, *xQc Reveals Insane Nine-Figure Sum Wagered Through Twitch Gambling Streams*, DEXERTO (Aug. 07, 2022, 18:06), <https://www.dexerto.com/entertainment/xqc-reveals-nine-figure-sum-wagered-twitch-gambling-streams-1895815/>; See also *Trainwreckstv Reveals He Received \$360 Million For 16 Months of Gambling*, JAXON, <https://www.jaxon.gg/trainwreckstv-reveals-he-received-360-million-for-16-months-of-gambling/>.

<sup>115</sup> xQc, TWITCH, <https://www.twitch.tv/xqc> (last visited Oct. 13, 2023).

<sup>116</sup> Oh, *supra* note 114.

gambling.<sup>117</sup> An extreme example is how Twitch streamer “Sliker” scammed fans and other streamer for thousands of dollars to gamble with and never paid them back.<sup>118</sup>

These popular gambling streamers were very unhappy to lose their source of revenue, but the truth is that many forms of online gambling are illegal in the U.S., and Twitch needs to make sure their content follows legal guidelines.<sup>119</sup> The Wire Act, 18 U.S.C. § 1084 (2000), states operators of wagering businesses, including offshore Internet gambling businesses that electronically transmit information related to gambling via “wire communication facility,” may be fined or imprisoned.<sup>120</sup> According to the Department of Justice, under the Wire Act, all internet gambling is illegal in the United States.<sup>121</sup> Section 1084(b) clarifies an exception if the wiring act is legal in both the transmission’s source and destination locations.<sup>122</sup> The definition of “wire communication facility” appears to include online gaming sites, as it broadly applies to “the nation's entire telecommunications infrastructure.”<sup>123</sup> The Unlawful Internet Gambling Enforcement Act passed by Congress in 2006 “made it illegal for wagering businesses to knowingly accept payment in connection with unlawful Internet gambling” but did not make the act of gambling itself illegal.<sup>124</sup> Twitch earns money off their streamers, who previously were promoting certain illegal internet gambling sites.<sup>125</sup> Thus, Twitch allowing the promotion of online gambling sites was potentially a crime, and this ban was thus necessary and arguably not implemented in a timely manner, as plenty of public protest occurred before Twitch took any action.<sup>126</sup>

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<sup>117</sup> See Joshua Duckworth, *Pokimane Calls on Twitch to Ban Gambling Streams*, GAMERANT (Sept. 19, 2022), <https://gamerant.com/twitch-gambling-streams-pokimane/>.

<sup>118</sup> James Batchelor, *Twitch Streamer Sliker Admits to \$200,000 Gambling Scam*, GAMESINDUSTRY (Sept. 20, 2022), <https://www.gamesindustry.biz/twitch-streamer-sliker-admits-to-200000-gambling-scam>.

<sup>119</sup> 18 U.S.C. § 1955 (2014) (prohibiting illegal gambling businesses).

<sup>120</sup> 18 U.S.C. § 1084 (2000).

<sup>121</sup> *Gambling*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/gambling> (last visited Oct. 13, 2023).

<sup>122</sup> *Id.*

<sup>123</sup> Oh, *supra* note 114.

<sup>124</sup> *Gambling*, *supra* note 121; 31 U.S.C. §§ 5361–5367 (2006).

<sup>125</sup> Cecilia D'Anastasio, *Twitch Streamers Rake in Millions With a Shady Crypto Gambling Boom*, WIRED (Jul. 13, 2021, 06:36 PM), <https://www.wired.com/story/twitch-streamers-crypto-gambling-boom/>.

<sup>126</sup> Gwilliam, *supra* note 105.

## IV. FAILURE TO PROTECT STREAMERS

As a social media platform with contracts between its uploaders, Twitch is responsible for protecting streamers, but recent events indicate they have sometimes failed to do so.<sup>127</sup> Twitch states “[h]arassment or threats have absolutely no place on Twitch, and we use every lever at our disposal to both minimize the risk of harm and respond to harm caused to our community,” but so far Twitch’s protections of streamers have been ineffective.<sup>128</sup> Twitch has an introduction page for new creators on technical considerations like lighting and recording systems or building their audience, but nothing about the dangers of fame or personal security.<sup>129</sup>

A. *The Parasocial Viewer*

Twitch streamers have been stalked at their front door or at fan conventions, targeted with violence, or “swatted,” which is “a sometimes deadly stunt in which someone calls the local police to report a fake crime at a streamer’s home, hoping the raid will be caught live on camera.”<sup>130</sup> Fans on Twitch are observed to demonstrate “parasocial” behavior; viewers have a “parasocial relationship” with streamers—a form of communication that is “one-sided, with fans investing time, energy, and emotions in stars who were unaware of their existence.”<sup>131</sup> Leigh Honeywell, chief executive of Tall Poppy, a cybersecurity company that counsels Twitch, advises, “Micro-celebrities who are famous among a niche group, such as a Twitch audience, do not tend to realize how accessible their personal information is until the harassment starts.”<sup>132</sup> Often, the perpetrators “dox” streamers for this information—doxing is a form of cybercrime in which someone hacks another to release another’s personal or private information, such as one’s home address.<sup>133</sup>

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<sup>127</sup> See *infra* Sections D.

<sup>128</sup> Kellen Browning and Kashmir Hill, *How Streaming Stars Pay the Price of Online Fame*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/2022/07/29/technology/twitch-stalking.html?searchResultPosition=5>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Rob Lever, *What Is Doxxing?*, U.S. NEWS, (Dec. 16, 2021, 12:00 PM), <https://www.usnews.com/360-reviews/privacy/what-is-doxxing>. Doxxing is a

Information obtained by illegally hacking into a creator's computer violates the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. 1030, which defends "computers connected to the Internet . . . from trespassing, threats, damage espionage, and from being corruptly used as instruments of fraud."<sup>134</sup> Additionally, California prosecutes cyber-harassment under Penal Code 653.2, which includes doxing, and a conviction may lead to fines of up to \$1,000 or jail time of up to a year.<sup>135</sup>

Kaitlyn Siragusa, also known online as Amouranth for her seductive Twitch streams, had a stalker from Estonia who sent her unsettling messages for months and eventually showed up at her house, even going so far as knocking on her front door.<sup>136</sup> This was only one example of what Amouranth experienced in terms of harassment and stalking.<sup>137</sup> Amouranth was famed for pushing the boundaries of Twitch's regulations on sexually explicit content—from sexy video game cosplays where she dons the costumes of scantily clad game characters, exercising on livestream while bantering with her chat, or starring in hot tub streams in a bikini—she's quite a controversial figure in the community.<sup>138</sup> Amouranth has been swatted so often that local law enforcement agencies know to check her stream when they get calls reporting her address.<sup>139</sup> Amouranth had experienced so many threatening encounters since she joined Twitch in 2016, and she eventually had to take matters into her own hands since Twitch did not adequately protect her.<sup>140</sup> Furthermore, if Amouranth, who is one of the top 100 income earners on this platform, cannot get assistance here from Twitch, then less widely known streamers may receive even less help.<sup>141</sup> In order to help herself, Amouranth bought guns, security cameras, and a guard dog named Bear.<sup>142</sup> She explained: "[i]n livestreams, [these fans] see into your home, into your bedroom, and it feels very personal with them . . . . I think that is what contributes to a

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hacker term that came from "dropping dox" and can be illegal if the information is obtained through unscrupulous means, such as hacking. *Id.*

<sup>134</sup> *Cybercrime: An Overview of the Federal Computer Fraud and Abuse Statute and Related Federal Criminal Laws*, (Oct. 15, 2014), EVERYCRSREPORT, <https://www.everycrsreport.com/reports/97-1025.html>.

<sup>135</sup> Cal. Penal Code § 653.2 (West 2010).

<sup>136</sup> Browning & Hill, *supra* note 128.

<sup>137</sup> *Id.*

<sup>138</sup> *See id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> Christopher Castellaw, *Amouranth Is Only Female Twitch Streamer in the Top 100 List*, GAMERANT (Nov. 21, 2022), <https://gamerant.com/top-100-twitch-streamers-amouranth/>.

<sup>142</sup> Browning & Hill, *supra* note 128.



lot of the stalking: [t]hey feel like they know you.”<sup>143</sup> Additionally, there is already substantial sexism against female streamers trying to break into the gaming industry, and Amouranth’s more open sensual displays places an even bigger target on her back that leads to some of the public to suggest that her acts invites such harassment.<sup>144</sup> A potential way for Twitch to combat this is to warn viewers entering a sexually suggestive stream with a pop-up window or some other form of deterrence warning against harassment.

Another female streamer, BrookeAB, found that some of her followers were possessive to the extent of doxing her and sending her death threats, and although Twitch banned the worst offenders, there was little else the site could do.<sup>145</sup> Since harassment is rampant on this livestreaming platform, Twitch should support creators by providing them legal assistance and implementing psychological studies to counteract the creation of parasocial connections.<sup>146</sup>

Despite the fact that women account for almost half of the gaming population, they are not proportionately represented in the competitive gaming world or the 100 highest-paid Twitch streamers.<sup>147</sup> The gaming streaming scene can be very hostile, as seen in the case of Nadia, currently the most popular female streamer of the first-person shooting game *Call of Duty: Warzone*.<sup>148</sup> Nadia streamed from a “clean PC” provided by YouTube due to relentless accusations that she was cheating in the game with “aimbots,” cheats using software that help the player aim their gun, and “wallhacks,” cheats that lets players see what should be invisible

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<sup>143</sup> *Id.*

<sup>144</sup> *See id.*; *see also* Liv McMahon, *What It’s Really Like to Be a Female Twitch Streamer – and Why It’s Far from Game over for Misogyny in the Gaming Industry*, SCOTSMAN (Aug. 11, 2021), <https://www.scotsman.com/news/people/what-its-really-like-to-be-a-female-twitch-streamer-3337578>.

<sup>145</sup> Browning & Hill, *supra* note 128.

<sup>146</sup> *See id.* Note that Twitch has been criticized for having particularly parasocial viewers compared to other social media platforms, likely because the streamers stream in live time and chat directly with their viewers via an interactive chat. *See id.*

<sup>147</sup> Castellaw, *supra* note 141.

<sup>148</sup> Brad Norton, *Shroud Addresses Nadia’s Warzone Cheating Accusations with Simple Rebuttal: “Who Cares?”*, DEXERTO, <https://www.dexerto.com/call-of-duty/shroud-addresses-nadias-warzone-cheating-accusations-with-simple-rebuttal-who-cares-1950041/> (Oct. 4, 2022, 9:53 PM).

opponents through walls.<sup>149</sup> TikTok videos accusing Nadia of cheating have garnered millions of views and thousands of likes, despite her playing well in front of 50,000 viewers while livestreaming on TikTok.<sup>150</sup> Ultimately, Nadia would never undergo this targeted harassment and public doubt of her skills if she was not a female streamer trying to break into a game with a strong male community base.<sup>151</sup> Sexual harassment of female streamers take a form even in indirect ways—in a recent controversy, several major female streamers discovered their likeness was used in artificial intelligence generated pornography.<sup>152</sup> Female streamers such as Pokimane, Sweet Anita, and QTCinderella learned the disturbing truth that their faces were edited on other people’s bodies in pornographies.<sup>153</sup> These terrible acts were achieved through “deepfakes,” which is a technique that produces highly realistic-looking but fake, “digitally manipulated video or image[s]” through new artificial intelligence tools.<sup>154</sup>

State laws such as California’s Penal Code Section 646.9 criminalize stalking, which entails following or harassing another person, and causing them to fear for their wellbeing.<sup>155</sup> Additionally, in 1996, Congress passed 18 U.S.C. Section 2216A as part of the Violence Against Women Act (VAWA), making stalking and harassment a federal felony “on military or U.S. territorial lands.”<sup>156</sup> “Under federal law, swatting is generally punished as a felony,” and the punishment ranges from five years to life in prison, depending on the severity of injuries that result.<sup>157</sup>

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<sup>149</sup> Emanuel Maiberg, *Everyone Thinks Nadia Is Cheating at “Warzone” Because She’s Good at the Game*, VICE (Oct. 4, 2022, 1:28 PM), <https://www.vice.com/en/article/7k8e59/everyone-thinks-nadia-is-cheating-at-warzone-because-shes-good-at-the-game>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; Natalia Vasilyeva, *Female Gamers: Here to Play, Here to Stay*, DRUM, (Mar. 31, 2021), <https://www.thedrum.com/opinion/2021/03/31/female-gamers-here-play-here-stay>.

<sup>152</sup> Bianca Britton, *They Appeared in Deepfake Porn Videos Without Their Consent. Few Laws Protect Them*, NBC NEWS, (Feb. 14, 2023, 12:48 PM), <https://www.nbcnews.com/tech/internet/deepfake-twitch-porn-atrioc-qtcinderella-maya-higa-pokimane-rcna69372>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Cal. Penal Code § 646.9 (West 2009).

<sup>156</sup> 18 U.S.C. § 2261A; *Interstate Stalking*, U.S. ATT’Y’S OFF. N. DIST. OF GA., (Dec. 23, 2021), <https://www.justice.gov/usao-ndga/victim-witness-assistance/interstate-stalking>.

<sup>157</sup> Kelly Martin, *The Crime of Swatting: Laws and Penalties*, NOLO, <https://www.nolo.com/legal-encyclopedia/the-crime-of-swatting-laws-and-penalties.html> (last visited Sept. 23, 2023).

If a victim dies from swatting, the perpetrator could face life in prison.<sup>158</sup> Deepfake pornography is a relatively new problem that has developed as artificial intelligence has advanced; while laws are in development to address this form of sexual harassment, there are still few legal remedies.<sup>159</sup>

### B. *The Child Predator*

On an interactive site like Twitch, child predators are always a matter of concern.<sup>160</sup> On Twitch, anyone over the age of thirteen may stream, but creators under the age of eighteen are supposed to have the supervision of a parent or guardian before they go live.<sup>161</sup> However, any user uploading onto their personal Twitch account may find the website does little to nothing to enforce this guardian requirement other than requiring a parent to read over and sign Twitch's Terms and Services.<sup>162</sup> Twitch states that "[c]hildren under 13 may not use Twitch," but making an anonymous account is remarkably easy and Twitch merely relies on a reporting system to enforce this rule.<sup>163</sup> Although Twitch does not allow children under thirteen on its site, many children still tune in or create accounts, exposing them to child predators.<sup>164</sup> Factors contributing to this is that creating a Twitch account is very easy to do, and once these children are on Twitch, they are naturally attracted to games that tailor to a younger audience, like Fortnite and Minecraft.<sup>165</sup> In fact, according to Bloomberg, at least 1,976 Twitch users found and followed underage streamers; many of these accounts followed more than 1,000 children.<sup>166</sup> Hundreds of these "predator accounts" followed more than 1,000 children's accounts,

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<sup>158</sup> 18 U.S.C. § 1038 (2022).

<sup>159</sup> Katherine Singh, *There's Not Much We Can Legally Do About Deepfake Porn – yet*, REFINERY29, <https://www.refinery29.com/en-us/2023/02/11283094/deepfake-porn-laws-atriloc> (Feb. 9, 2023, 9:38 AM).

<sup>160</sup> Cecilia D'Anastasio, *Child Predators Use Twitch to Systematically Track Kids Livestreaming*, BLOOMBERG, (Oct. 19, 2022), <https://www.bloomberg.com/graphics/2022-twitch-problem-with-child-predators>.

<sup>161</sup> *Twitch 101*, *supra* note 33; *Guide for Parents and Educators*, TWITCH, [https://safety.twitch.tv/s/article/Guide-Parents-Educators?language=en\\_US](https://safety.twitch.tv/s/article/Guide-Parents-Educators?language=en_US) (last visited Oct. 13, 2023).

<sup>162</sup> *Id.*

<sup>163</sup> *Guide for Parents*, *supra* note 161.

<sup>164</sup> D'Anastasio, *supra* note 160.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

targeting over 279,016 accounts found belonging to children.<sup>167</sup> Since Twitch is interactive through the viewer’s chat, these predators may manipulate children into performing anything from “suggestive dances to explicit sexual acts.”<sup>168</sup>

Twitch has put some work into countering this problem, drastically increasing its law enforcement response team that collaborates with the National Center for Missing and Exploited Children (NCMEC) and the Tech Coalition.<sup>169</sup> Nonetheless, many predators still slip through; in July 2022, one Twitch predator requested indecent acts in the livestreams of four different children creators, and one of these streams attracted 290 live viewers before Twitch shut down the broadcast after 30 minutes.<sup>170</sup>

Child pornography is not protected by the First Amendment, and 18 U.S.C. § 2251 makes the sexual exploitation of children illegal.<sup>171</sup>

Section 2256 of Title 18, United States Code, defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age). Visual depictions include photographs, videos, digital or computer-generated images indistinguishable from an actual minor, and images created, adapted, or modified, but appear to depict an identifiable, actual minor. Undeveloped film, undeveloped videotape, and electronically stored data that can be converted into a visual image of child pornography are also deemed illegal visual depictions under federal law.<sup>172</sup>

This code adds that “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in... sexually explicit

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; see also *Who We Are*, TECH COAL.,

<https://www.technologycoalition.org/about#:~:text=The%20Tech%20Coalition%20is%20an,sexual%20exploitation%20and%20abuse%20online> (last visited Oct. 13, 2023) (“the Tech Coalition is an alliance of global tech companies who are working together to combat child sexual exploitation and abuse online.”)

<sup>170</sup> D’Anastasio, *supra* note 160.

<sup>171</sup> 18 U.S.C § 2251 (2008); see also *Amdt 1.7.5.12 Child Pornography*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-1/child-pornography> (last visited Oct. 13, 2023).

<sup>172</sup> 18 U.S.C §2251 (2008).

conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished...<sup>173</sup> In other words, what these predators did should be illegal, despite the acts commission over streaming.<sup>174</sup>

Under *New York v. Ferber*, the U.S. Supreme Court recognized that visual sexual depictions of children in films or still photographs are not a form of expression protected under the First Amendment.<sup>175</sup> Streaming is still a form of video, and streamers have the option to, and often do, keep up videos of their livestreams for viewers to rewatch, thus this is comparable to film. According to some legal commentators, “you could be convicted of possessing or promoting child pornography if authorities believe you viewed sexual depictions of children through a streaming service.”<sup>176</sup> There is no question that these predators’ actions are both illegal and unethical, but Twitch should take responsibility for preventing children from creating streaming accounts. Making these children so accessible to predators indicates a flaw in their system.<sup>177</sup> In *United States v. Williams*, the Supreme Court ruled that knowingly advertising, promoting, presenting, distributing, or soliciting child pornography or material that is believed to be child pornography is prohibited, even if said child porn does not exist.<sup>178</sup> Thus, since Twitch knew that predators elicit child pornography on their website, they could potentially be held liable as a distributor under *United States v. Williams*; unless Twitch actively goes out of its way to prevent further child porn solicitation from predators.<sup>179</sup> Twitch outlines its policy against child pornography in its community guidelines:

Twitch prohibits any content or activity that endangers youth. This includes content that features or promotes child sexual abuse material (CSAM), and the sexual

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<sup>173</sup> *Id.*

<sup>174</sup> *Can You Be Convicted of Child Pornography for Streaming?*, THE L. OFFS. OF NED BARNETT, (Nov. 14, 2016), <https://www.nedbarnett.com/can-convicted-child-pornography-streaming/>.

<sup>175</sup> *New York v. Ferber*, 458 U.S. 747 (1982); *see also Amdt 1.7.5.12 Child Pornography*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-1/child-pornography> (last visited Oct. 13, 2023).

<sup>176</sup> NED BARNETT, *supra* note 174.

<sup>177</sup> CORNELL, *supra* note 175.

<sup>178</sup> *Id.*; *see also United States v. Williams*, 553 U.S. 285, 294–299 (2008).

<sup>179</sup> *See id.*

exploitation, sexual misconduct or grooming of youth (which is defined by this policy as minors under 18). We report all illegal content or activity to the National Center for Missing and Exploited Children, which works with global law enforcement agencies around the world, and the consequence for engaging in such activity or with such content is immediate and indefinite suspension.<sup>180</sup>

However, Twitch can clearly do more to increase security measures if such predatory accounts are still on the site, and children are bypassing their age restriction.<sup>181</sup> The EARN IT Act of 2022 “establishe[s] the National Commission on Online Child Sexual Exploitation Prevention,” a commission in charge of developing best practice for “interactive computer service[s]” such as Facebook, Twitter, and Twitch to “prevent, reduce, and respond to the online sexual exploitation of children.”<sup>182</sup> This includes limiting liability protections for such computer service providers in the case of child exploitation on their sites.<sup>183</sup> Thus, Twitch would find themselves in greater legal liability with their current pattern of child predators.<sup>184</sup> Additionally, these service providers must report any “facts or circumstances sufficient to identify and locate each minor and each involved individual” in the case of a child being sexually exploited to the National Center for Missing and Exploited Children (“NCMEC”), which Twitch already states it does.<sup>185</sup>

While reporting to the NCMEC sounds well-intentioned on the surface, legal experts such as Riana Pfefferkorn warn that this act may make child exploiters even more difficult to convict.<sup>186</sup> One problem with this bill is that it discourages providers to use encryption to provide its users more security since they need to track who is communicating with

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<sup>180</sup> Community Guidelines: Introduction to Safety on Twitch, TWITCH, [https://safety.twitch.tv/s/article/Community-Guidelines?language=en\\_US](https://safety.twitch.tv/s/article/Community-Guidelines?language=en_US).

<sup>181</sup> See D’Anastasio, *supra* note 160.

<sup>182</sup> EARN IT Act, S.3538, 117<sup>th</sup> Cong. §§ 2(2)–3(b) (2021) (revises the federal framework governing the prevention of online sexual exploitation of children).

<sup>183</sup> *Id.* at § 5(7)(8).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at § 7(a)(1)(A)(i); see D’Anastasio, *supra* note 160.

<sup>186</sup> Riana Pfefferkorn, *The Earn It Act Is Back, and It’s More Dangerous Than Ever*, STAN. L. SCH. CTR. FOR INTERNET AND SOC’Y (Feb. 4, 2022, 1:23 pm), <https://cyberlaw.stanford.edu/blog/2022/02/earn-it-act-back-and-it’s-more-dangerous-ever> (criticizing weaknesses of the EARN IT Act by CIS, the Center for Internet and Society at Stanford Law School, “a leader in the study of law and policy around the Internet and other emerging technologies”. This article criticizes the weak points of the EARN IT Act).

child users.<sup>187</sup> Critics of the bill argue that EARN IT also impairs the First Amendment by causing tech companies to censor innocent speech and turning online private service providers into government surveillance companies; therefore, going against the principle of net neutrality.<sup>188</sup> Pfefferkorn compared the enactment of EARN IT to the enactment of the Stop Enabling Sex Traffickers Act (SESTA) and the Fight Online Sex Trafficking Act (FOSTA), which served as models for EARN IT, noting that increased vigilance by these service providers caused predators to switch to the dark web and off-sites.<sup>189</sup> While this last point is noteworthy for the valiant cause of eradicating all child pornography, Twitch, as a private business, is likely more focused on its own users.<sup>190</sup> On the introduction of the EARN IT Act, U.S. Senator Josh Hawley of Missouri commented:

First Big Tech said it needed special immunity from human trafficking laws. Now it says it needs immunity from laws against child pornography. Enough. It's time to stop putting the financial interests of Big Tech above protecting kids from predators. The EARN IT Act is another way to bring today's internet law into the 21st century.<sup>191</sup>

Net neutrality, on the other hand, is “the idea that Internet service providers (ISPs) should treat all data that travels over their networks fairly, without improper discrimination in favor of particular apps, sites or services.”<sup>192</sup> Notwithstanding, critics argue that overt surveillance on Twitch's users encroaches on users' First Amendment rights.<sup>193</sup> Net

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<sup>187</sup> *Id.* (Twitch has to track criminal users by finding their identities through third parties, as it does in *Twitch v. Doe*).

<sup>188</sup> *Id.*

<sup>189</sup> *Graham, Blumenthal, Hawley, Feinstein Introduce EARN IT Act to Encourage Tech Industry to Take Online Child Sexual Exploitation Seriously*, U.S. S. COMM. ON THE JUDICIARY (Mar. 5, 2020), <https://www.judiciary.senate.gov/press/rep/releases/graham-blumenthal-hawley-feinstein-introduce-earn-it-act-to-encourage-tech-industry-to-take-online-child-sexual-exploitation-seriously>.

<sup>190</sup> Alexander Lee, *How Twitch lost its grip on, and way with, the streaming community*, DIGIDAY (Apr. 3, 2023), <https://digiday.com/marketing/how-twitch-lost-its-grip-on-and-way-with-the-streaming-community/>.

<sup>191</sup> See Graham, Blumenthal, Hawley, *supra* note 189.

<sup>192</sup> *Net Neutrality*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/net-neutrality> (last visited Sept. 27, 2023).

<sup>193</sup> *Id.*

neutrality laws are therefore controversial; the Obama administration enacted them in 2015, only for these laws to be repealed by the Trump administration in 2018.<sup>194</sup>

### C. *Hate Raids And Targeting Of Minority Groups*

In 2020, Twitch expanded its definition of sexual harassment and hateful conduct to take more action against violators; these new guidelines included bans for repeated (spam) comments, inappropriate comments on someone's appearance, and sending links to pornographic material.<sup>195</sup> In an update post, Twitch acknowledged that "many people on Twitch—particularly women, members of the LGBTQIA+ community, Black, Indigenous, and people of color—unfortunately continue to experience a disproportionate amount of harassment and abuse online."<sup>196</sup> Thus, these new policies that took effect on January 22, 2021 focus on three different areas: "Harassment, Hateful Conduct, and Sexual Harassment."<sup>197</sup> The hashtag #TwitchDoBet circulated in August of 2021 because "hate raids," a form of harassment where an online user sends a horde of "automated bot accounts [that] spam their chats with racist and discriminatory epithets," targeted Black and L.G.B.T.Q. streamers.<sup>198</sup> The #TwitchDoBetter campaign, led by streamer RekItRaven, requested that Twitch provide better tools against hate raids.<sup>199</sup>

On September 1, 2021, content creators boycotted Twitch for a full day under #ADayOffTwitch to persuade Twitch to do better against

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<sup>194</sup> Will Kenton, *What is Net Neutrality? Policies and Controversy*, INVESTOPEDIA (Aug. 18, 2022), <https://www.investopedia.com/terms/n/net-neutrality.asp>.

<sup>195</sup> Kellen Browning, *Twitch Cracks Down on Hate Speech and Harassment*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/technology/twitch-harassment-policy.html>.

<sup>196</sup> *Introducing Our New Hateful Conduct & Harassment Policy*, TWITCH (Dec. 9, 2020), <https://blog.twitch.tv/en/2020/12/09/introducing-our-new-hateful-conduct-harassment-policy/>.

<sup>197</sup> *Id.* (Twitch clarified that even supposedly positive comments on the streamer's attractiveness may be prohibited if the streamer indicated such comments were unwanted. The website held a live discussion titled "Creator Camp" on the key policy changes that creators were welcome to join to).

<sup>198</sup> Browning, *supra* note 195.

<sup>199</sup> Kimberlee Speakman, *Twitch Sues Users Who it Alleges Conducted 'Hate Raids'*, FORBES (Sept. 10, 2021, 3:19 PM), <https://www.forbes.com/sites/kimberleespeakman/2021/09/10/twitch-sues-users-who-it-alleges-conducted-hate-raids/?sh=7ac253e77822>.



abuse and hate speech.<sup>200</sup> In response, Twitch promised to implement account verification and ban evasion detection to fight against repeat harassers.<sup>201</sup> Additionally, Twitch continuously adds banned words onto their filters to block hateful words.<sup>202</sup> To their credit, Twitch is not the only social media platform struggling with hate speech; Facebook took down a reported 9.6 million hate speech posts in the first quarter of 2020, and Instagram is testing account lockdown features to mute hateful comments.<sup>203</sup> However, Twitch comments differ from those on other social media platforms because users post them live, in real-time, directly to a creator you can interact with.<sup>204</sup>

I am currently a moderator for several Twitch channels, including the channel of popular League of Legends professional player Doublelift, who currently has over 1.7 million followers.<sup>205</sup> My responsibilities as a moderator mainly involve monitoring his live chat but also include helping gather content for him to stream on Twitch and post on his YouTube channel, which currently has 692,000 subscribers.<sup>206</sup> As a moderator, the most common comments I delete are racist ones and cruel comments relating to the murder of his mother by his brother.<sup>207</sup> The chat section of livestreams offers a wonderful opportunity to interact with viewers, but many online trolls take advantage of it to harass and abuse streamers.<sup>208</sup>

Twitch sued two viewers in a federal lawsuit in 2021 for conducting “hate raids” against minority streamers.<sup>209</sup> Merely a week after #ADayOffTwitch gained traction and creators boycotted Twitch to protest

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See *supra* Sections B(I), C.

<sup>205</sup> See Doublelift, TWITCH, <https://www.twitch.tv/search?term=doublelift> (last visited Sept. 27, 2023).

<sup>206</sup> See Doublelift, YOUTUBE, <https://www.youtube.com/c/doublelift> (last visited Sept. 27, 2023).

<sup>207</sup> See Jennifer Smith, *Son, 30, ‘murdered his mother and stabbed his father as they tried to console him over his recent break up’*, DAILYMAIL (Apr. 2, 2018, 8:23 PM), <https://www.dailymail.co.uk/news/article-5567091/Son-30-murders-mother-stabs-father.html>.

<sup>208</sup> See generally Browning, *supra* note 195.

<sup>209</sup> Emily Walsh, *Twitch hits back at its ‘hate raid’ trolls with a federal lawsuit*, BUS. INSIDER (Sept. 11, 2021, 1:58 PM), <https://www.businessinsider.com/twitch-hits-back-at-hate-raid-trolls-with-a-lawsuit-2021-9>; see also *Twitch Interactive v. CruzzControl et al* (2021).

hate speech, viewers continued to attack LGBTQ+ and Black streamers with hateful comments.<sup>210</sup> This lawsuit took place in the U.S. District Court for the Northern District of California, against viewers “CruzzControl” from the Netherlands and “CreatineOverdose” from Austria.<sup>211</sup> In another case, *Twitch Interactive, Inc. v. Doe*, Twitch brought claims against “numerous Doe defendants who allegedly coordinated to post racist, misogynistic, and violent content on its online video platform” and sought discovery from companies such as Twitter and Google to find out the true identities of these perpetrators.<sup>212</sup> Specifically, Twitch filed that on June 14, 2019, Twitch chats for the game Artifact were flooded with videos of “the March 2019 Christchurch mosque attack, pornography, copyrighted movies and televisions shows, and racist and misogynistic videos” through the use of bots.<sup>213</sup> Twitch sought the identities of these perpetrators through Discord, Google, and other social accounts the perpetrators used to create their Twitch accounts.<sup>214</sup>

#### D. Harmful Activity Leaked on Streams

Harmful activities targeted at streamers have been broadcasted live on their channels.<sup>215</sup> Amouranth has recently been involved in other controversies, including her abusive significant other forcing her to stream on Twitch and make money off OnlyFans.<sup>216</sup> Following her breakdown during a livestream, Amouranth showed texts from her significant other threatening to kill her dogs if she failed to do as he said.<sup>217</sup> Additionally, xQc’s ex-girlfriend, another streamer called AdepttheBest, did not take to their break-up well and purposely harassed him at times she knew he was

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<sup>210</sup> Kimberlee Speakman, *Twitch Sues Users Who It Alleges Conducted “Hate Raids”*, FORBES (Sept. 10, 2021, 3:19 PM), <https://www.forbes.com/sites/kimberleespeakman/2021/09/10/twitch-sues-users-who-it-alleges-conducted-hate-raids/?sh=7ac253e77822>.

<sup>211</sup> *Id.*

<sup>212</sup> *Twitch Interactive, Inc. v. Doe*, No. 19-cv-03418-WHO, 2019 U.S. Dist. LEXIS 132842, at \*1 (N.D. Cal. Aug. 7, 2019).

<sup>213</sup> *Id.* at \*2.

<sup>214</sup> *Id.*

<sup>215</sup> Browning & Hill, *supra* note 128.

<sup>216</sup> Mara Leighton, *Twitch star Amouranth tells fans she’s free now after accusing her husband of emotional abuse – ‘I was a ‘Truman Show’ for too long’*, BUS. INSIDER (Oct. 18, 2022, 11:25 AM), <https://www.insider.com/twitch-onlyfans-amouranth-free-after-accusing-husband-of-abuse-2022-10>.

<sup>217</sup> Nicole Clark, *Twitch star Amouranth says husband forces her to stream, controls her finances*, POLYGON (Oct. 17, 2022, 5:44 PM), <https://www.polygon.com/23409728/amouranth-twitch-streamer-husband-abuse-domestic-violence>.

live by watching his stream.<sup>218</sup> During xQc's livestream on January 7, 2023, Adept banged on xQc's front door demanding to be let in, yelling she had a court order, and even typing for him to "open up his door" in his stream chat in front of thousands of viewers.<sup>219</sup>

Viewers also often harm streamers by doxing them, which means they try to find their home address or IP address, and then deliberately report them to the security department with fake crimes, causing FBI or armed police raids on-stream to harass the streamer (referred to as "swatting").<sup>220</sup> In 2017, Andrew Finch was swatted over a Call of Duty game, leading to his death, and Tyler Barriss, who made the call, was sentenced to twenty years in prison.<sup>221</sup> Because streamers make content in real-time, perpetrators know that calling security while the streamer is actively broadcasting in their house will cause a live confrontation visible on the stream.<sup>222</sup>

Twitch claims it plans to livestream an educational session for streamers on real-world risks, but it has not released one yet.<sup>223</sup> Mr. Verrilli, the Twitch head of product, asserts that Twitch has recently increased safety efforts by including a new feature of obscuring personal contact information on the settings page so streamers don't accidentally expose addresses or phone numbers.<sup>224</sup> Twitch's vice president of global trust and safety, Angela Hession, insists that Twitch informs streamers how to protect themselves on and off Twitch by providing a safety center to help prevent stalking, doxing, and swatting.<sup>225</sup> Hession informs that Twitch tries to be a safe platform for streamers but is legally limited from helping

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<sup>218</sup> Joe Craven, *xQc and Adept clash on stream following 'manipulation' accusations and break up*, DEXERTO (Sept. 17, 2022, 11:44 AM), <https://www.dexerto.com/entertainment/xqc-and-adept-clash-on-stream-following-manipulation-accusations-and-break-up%EF%BF%BC-1934085/>.

<sup>219</sup> Shawn Wilken, *Adept Shows up at xQc's House and Tells Him He is Violating a 'Court Law'*, GAMERANT (Jan. 8, 2023), <https://gamerant.com/adept-xqc-house-visit-court-law-violation-warning-video/>.

<sup>220</sup> Nathan Grayson, *Twitch streamers traumatized after four 'swattings' in a week*, THE WASH. POST (Aug. 15, 2022, 1:34 PM), <https://www.washingtonpost.com/video-games/2022/08/15/keffals-adin-ross-ishowspeed-swatting-twitch-youtube/>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Browning & Hill, *supra* note 128.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

in certain ways.<sup>226</sup> For example, Twitch cannot give out personal information on a reported harasser's account unless law enforcement requests.<sup>227</sup> Nonetheless, Twitch's team working with law enforcement increased four times in size in the past two years.<sup>228</sup>

## V. RECENT TWITCH COMPETITORS

Twitch dominates the video game livestreaming market as the “platform that’s become almost synonymous with livestreaming.” and “control[led] 91.1% of market share for hours streamed” as of 2020.<sup>229</sup> Twitch recently updated its rules on exclusivity to boost streamers so that partnered streamers can broadcast on other platforms too, with some limitations.<sup>230</sup> However, if Twitch feels secure, that feeling is ill-placed.<sup>231</sup> Other companies appeared to notice Twitch’s soaring popularity and followed suit in pursuing livestreaming.<sup>232</sup> For example, YouTube announced “YouTube Live” in April 2011, Facebook launched Facebook Live in Spring 2016, and Twitter bought out the livestreaming mobile app Periscope and renamed it “Twitter Live” as a feature in March 2021.<sup>233</sup> These companies not only took on livestreaming, but also targeted the gaming audience, evidenced by Google’s 2015 launch of “YouTube Gaming” for live video game content,<sup>234</sup> as well as Microsoft’s August 2016 acquisition of the video game livestreaming platform “Beam” (later renamed “Mixer”).<sup>235</sup> Additionally, in a controversial move, Mixer poached some of Twitch’s most popular streamers, Tyler “Ninja” Blevins and Michael “Shroud” Grzesiek, with exclusive contracts.<sup>236</sup> In April 2020, Facebook launched Facebook Gaming, an app for live gaming content.<sup>237</sup> However, not all of these competitors fared well in this high-

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Nicole Bleu, *47 Latest Live Streaming Statistics For 2023: The Definitive List*, BLOGGINGWIZARD (Jan. 1, 2023), <https://bloggingwizard.com/live-streaming-statistics/>.

<sup>230</sup> Calum Patterson, *Twitch now allows partners to stream on rival platforms but there’s a catch*, DEXERTO (Aug. 23, 2022, 12:31 PM), <https://www.dexerto.com/entertainment/twitch-now-allows-partners-to-stream-on-rival-platforms-but-theres-a-catch-1911859/>.

<sup>231</sup> *Id.*

<sup>232</sup> Baker, *supra* note 9, at 1380–81.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1381.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1382.

demand market.<sup>238</sup> Despite all the money Mixer had invested to sign exclusive streamers due to low active viewership, Microsoft moved its existing partners to Facebook Gaming and shut down Mixer in the summer of 2020.<sup>239</sup> Twitch still dominates over competitors, as in 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%.”<sup>240</sup> As more and more large creators voice complaints and migrate away from the platform, Twitch needs to find new ways to maintain this lead.<sup>241</sup>

Another factor that adds to Twitch’s instability is that Twitch costs Amazon a substantial amount of money to run.<sup>242</sup> To offset these costs, Twitch removed features such as “hosting” which allowed streamers to “embed another channel’s live broadcast on their own page”—moves like these disappoint loyal users.<sup>243</sup> Shawn Gilguly, a Twitch partner who built his own following by posting on TikTok, noted that building a following on Twitch alone through pure effort is impossible.<sup>244</sup>

#### A. *Kick.Com*

A recent Twitch rival that emerged is the notorious streaming website Kick.com, promoted by the streamer Trainwreck.<sup>245</sup> This website appears to be an answer to Twitch’s gambling ban, as Trainwreck’s biggest former source of income was gambling prior to the ban, and the founders are involved in the “cryptocurrency gambling sites Stake and EasyGo.”<sup>246</sup> Trainwreck initially promoted the website as a creator-friendly alternative to Twitch that provides creators with a greater percentage share of revenue by paying an “hourly wage to streamer[s] whether they’re big or small,”<sup>247</sup> but internet sleuths quickly revealed that he had his own reasons for promoting the site—namely, his gambling

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Bedingfield, *supra* note 30.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Rory Young, *Trainwreck Details Kick Creator Program*, GAMERANT, (Jan. 27, 2023), <https://gamerant.com/trainwreck-kick-creator-program/>.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

would not be prohibited.<sup>248</sup> Nonetheless, Trainwreck argues that many streamers on Twitch receive no support and will lose nothing by migrating to Kick.<sup>249</sup>

### B. YouTube And Facebook Streaming

Rival websites, including YouTube, are currently competing for Twitch's creator and audience base.<sup>250</sup> Several popular streamers have migrated to these other sites, such as the aforementioned Valkyrae who migrated to YouTube.<sup>251</sup> In a speaker presentation hosted at Pepperdine by the Video Game Law Society, Ryan Morrison stated, "Twitch has been the mainstay since [I] came onto the scene...but Twitch has shown clearly that they no longer are . . . Amazon is putting a push in."<sup>252</sup> YouTube has an appeal to creators over Twitch because viewers are more open to watching pre-recorded videos or live videos, while on Twitch most viewers only tune in when a streamer is live.<sup>253</sup>

## VI. CONCLUSION

Twitch has been losing a large amount of streamers to rival streaming websites due to lack of financial incentives.<sup>254</sup> Additionally, the protections the site provides streamers are lacking, as streamers constantly find themselves the target of various forms of harassment.<sup>255</sup> Twitch has encountered many public controversies this past year in 2022 and ought to further consider its contracts and regulations to avoid legal ramifications and harm to its creators.<sup>256</sup> Currently, most streamers must and do individually litigate against Twitch when legal problems arise.<sup>257</sup> For example, Dr. Disrespect pursued legal action on the termination of his channel, and even though both parties washed their hands clean of the matter by settling, the big-time streamer has no intention of coming back

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<sup>248</sup> Calum Patterson, *Trainwreck confirms ties between Kick.com and crypto gambling site Stake*, DEXERTO, (Dec. 7, 2022), <https://www.dexerto.com/entertainment/trainwrecks-kick-streaming-platform-appears-to-be-a-stake-com-project-2003847/>.

<sup>249</sup> Bedingfield, *supra* note 30.

<sup>250</sup> Patterson (2022a), *supra* note 68.

<sup>251</sup> RAE (@Valkyrae), *supra* note 90.

<sup>252</sup> Presentation by Ryan Morrison for Pepperdine Video Game Law Society (VGLS), *supra* note 19.

<sup>253</sup> *See* Bedingfield, *supra* note 30.

<sup>254</sup> *See supra* Sections B(I), C(II), C(IV).

<sup>255</sup> *See supra* Section D.

<sup>256</sup> *See generally supra* Sections B–D.

<sup>257</sup> Baker, *supra* note 9, at 1385–86.

to the platform.<sup>258</sup> Individual litigation has benefits, such as individual compensation for the streamer, but it is time consuming.<sup>259</sup> If enough streamers sue due to a certain policy, Twitch is further incentivized to change those policies to avoid future conflict, preserve its public image, and avoid the costs of persistent litigation.<sup>260</sup>

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<sup>258</sup> Ryan Dinsdale, *Dr. Disrespect Won't Return to Twitch After 'Resolving' Lawsuit*, IGN, (Mar. 11, 2022, 4:21 AM), <https://www.ign.com/articles/dr-disrespect-wont-return-to-twitch-after-resolving-lawsuit>.

<sup>259</sup> Baker, *supra* note 9, at 1386.

<sup>260</sup> *Id.*