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Gotta Catch 'Em All! The Rise of eSports and the Evolution of its Regulations

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Gotta Catch ‘Em All! The Rise of eSports and the Evolution of its Regulations

*Elizabeth Chung**

I. INTRODUCTION

It will inevitably shock many to find out that the video gaming industry stands to be one of the most successful industries for upcoming generations. In fact, it is predicted that the global gaming market will hit nearly \$180 billion in revenues by 2021 (in 2012, the revenue market stood at a measly \$70.7 billion).¹ This increase in market size “reflect[s] the constant growth of platforms, such as smartphones.”² In 2018, mobile games brought in \$61.3 billion in revenue, accounting for over 50% of the total gaming market, and are expected to grow to \$106.4 billion, or to about 59% of the total revenue, by 2021.³ According to one study, “there are about 2.3 billion gamers across the globe,”⁴ and 91% of the global market is digital.⁵ This means that “\$125.3 billion worth of games flows through digitally connected channels as opposed to physical retail.”⁶

The transition from brick and mortar retail stores to online digital platforms can be seen across most industries. With this change, it is inevitable that questions will arise surrounding how legislation will have to evolve and adapt in order to properly accommodate the transition. Further, much like how it is difficult to regulate a virtual currency like Bitcoin, it will be difficult to regulate the virtual world in the early stages of its life. Unfortunately, with all of the good that the virtual universe could bring, it could also open Pandora’s Box,⁷ potentially including otherwise illegal activity. For instance, this virtual world could potentially serve as a vehicle for transactions that

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1. Dean Takahashi, *Newzoo: Games Market Expected to Hit \$180.1 Billion in Revenues in 2021*, VENTUREBEAT (Apr. 30, 2018), <https://venturebeat.com/2018/04/30/newzoo-global-games-expected-to-hit-180-1-billion-in-revenues-2021/>.
2. *Id.*
3. *Id.*; Bradly Shankar, *Mobile Games Brought in \$61.3 Billion in Revenue in 2018: Report*, MOBILESYRUP (Jan. 17, 2019), <https://mobilesyrup.com/2019/01/17/mobile-games-revenue-2018-report/>.
4. Takahashi, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Greek Myths & Greek Mythology*, <https://www.greekmyths-greekmythology.com/pandoras-box-myth/> (last visited Feb. 2, 2020).

cannot be tracked.⁸ If a videogame platform and transaction is to serve as an intermediary, will courts have to give immunity to companies like Microsoft as they do for internet service providers?⁹ If the government cannot fully track the dark web, what efforts will it have to make in the video gaming industry?¹⁰

This comment will explore the floodgates of future litigation that the virtual video gaming world will unavoidably open.¹¹ The virtual industry is growing exponentially and has integrated itself into nearly every aspect of the next generation's life.¹² For example, toddlers are more advanced with technology because of the convenience that iPads and smartphones provide to parents trying to calm and occupy their children, and children are learning how to do homework using technology in classrooms at a much younger age.¹³ Though this early instruction can be pivotal in a child's development, it also foreshadows the future of technology and how much the next generation will depend on it. The convenience could make everything in life more efficient, with no exception to potential illegal activity. This comment will explore these different legal issues and explain how courts have ruled in similar (but not identical) issues in the past. These issues will include: (1) the laws that will govern and regulate eSports and its players; (2) copyright infringement issues between game developers and those who record their gameplay for profit on platforms like YouTube and Twitch; and (3) gambling, wire fraud, and other illegal transactions that cannot be traced in this cyber world and how courts will deal with these.

II. VIDEO GAMERS ARE SOME OF THE MOST WATCHED PLAYERS IN THE COUNTRY

It was recently announced that video gaming platforms had a whopping six hundred sixty-six million viewers in 2017, which is more viewers than Hulu, HBO, ESPN, and Netflix *combined*.¹⁴ Video gaming platforms are dominated by viewing platforms such as YouTube and Twitch, with YouTube bringing in 517 million viewers (gaming video content only), and Twitch clocking in at 185 million viewers despite its fairly new introduction

8. See Takahashi, *supra* note 1.

9. See *id.*

10. See *id.*

11. See *id.*

12. *Effective Classroom Practice: Infants and Toddlers*, NAEYC, <https://www.naeyc.org/resources/topics/technology-and-media/infants-and-toddlers> (last visited Feb. 2, 2020).

13. *Id.*

14. Ana Valens, *Report Reveals Twitch Has More Viewers than HBO and Netflix*, GAMEPUR (Oct. 18, 2017), <https://www.gamepur.com/news/33863-twitch-audience-hbo-netflix.html>.

to the public (Twitch was introduced in 2011, approximately six years after the launch of YouTube).¹⁵

YouTube “is a video sharing service that allows users to watch videos posted by other users and upload videos of their own.”¹⁶ Started in 2005, YouTube was acquired by major tech conglomerate, Google, in 2006.¹⁷ “YouTubers,” or the people who upload content on the platform itself, make money from their videos by enabling videos to be monetized per view, ad sharing, and later turning fame into merchandise sales, appearances, and sponsorship deals.¹⁸ Users can opt to join “subscription versions” of YouTube where they can access streaming shows or avoid the ads, though this is only an option and the platform remains free to use as-is.¹⁹

Twitch, like YouTube, can be used either to watch content or as a subscription-based service where users “interact, explore [and] contribute” to the platform by “watching, chatting, subscribing and cheering with Bits, and more [to help their] favorite streamers get rewards [and] recognition.”²⁰ On April 19, 2017, Twitch announced it was going to create a new subscription tier, which includes “ad-free viewing, subscriber badges and twenty-six emoticons chat during subscriber-only mode,” starting at \$9.99.²¹ It was set to be launched on “partnered channels who choose to opt into the beta to start, with availability set to increase in the coming weeks.”²² Otherwise, subscriptions start at \$4.99/month for the most basic package and cap out at \$24.99.²³ The idea behind the different tiers is to “allow fans to support their favorite streamers on higher levels . . . [and also offer] increased opportunities for fans to give money to streamers solely to support them instead [of having to receive] things in return.”²⁴ The platform was recently acquired by

15. *Id.*; Eugene Kim, *Amazon Buys Twitch for \$970 Million in Cash*, BUS. INSIDER (Aug. 25, 2014), <https://www.businessinsider.com/amazon-buys-twitch-2014-8>; TechTerms, *YouTube*, <https://techterms.com/definition/youtube> (last visited Feb. 2, 2020).

16. *See* TechTerms, *supra* note 15.

17. *Id.*

18. *How to Earn Money on YouTube*, YOUTUBE, https://support.google.com/youtube/answer/72857?hl=en&ref_topic=9153826 (last visited Feb. 2, 2020).

19. *See, e.g., YouTube Premium*, YOUTUBE, <https://www.youtube.com/premium/> (last visited Feb. 2, 2020).

20. TWITCH, <https://www.twitch.tv/p/about/> (last visited Feb. 2, 2020).

21. Chaim Gartenberg, *Twitch’s New Subscription Model Will Let Fans Pay Streamers Significantly More Money*, THE VERGE (Apr. 19, 2017), <https://www.theverge.com/2017/4/19/15359244/twitch-new-subscription-model-tiers-more-money-streamers>.

22. *Id.*

23. *Id.*

24. *Id.*

Amazon.²⁵ Twitch users can now link their Amazon Prime accounts to receive free perks such as a specific skin.²⁶

Skins may be earned within a video game.²⁷ They change the look of portions of the game, such as changing the look of the gun you play with.²⁸ “Skins are purely cosmetic so they don’t change the gameplay or they don’t make you a better player,”²⁹ but some skins are rarer than others.³⁰ So players with a rarer skin get certain recognition, quite similar to branding on clothes.³¹

For those who are unfamiliar with the world of video gaming, as a brief explanation, gaming video content (GVC) is where a player will record himself or herself playing a specific game.³² The content can range from streaming a “speed-run” of a difficult level (where a player will run through a level as fast as possible to completion), competitive gameplays, charity plays, live-streams, the release of new items including maps or rare items you can collect from playing, new strategies, Easter eggs (“hidden video game features or surprises that are unlocked by using certain techniques to complete in-game tasks, entering specific button combinations or acquiring access to secret game or game file areas”),³³ and sometimes even identifying flaws within the games with the hope of gaining the attention of the game’s developers.³⁴

Major players in the industry, such as PewDiePie (sixty million subscribers on YouTube) and Ninja (22.8 million subscribers on YouTube), have become some of the hottest celebrities with net worths estimated to reach as much as \$10 million as of 2018.³⁵ A mere decade ago, little siblings

25. See Kim, *supra* note 15.

26. See Carl Christensen, *eSports Gaming Video Content (GVC) – Industry Overview*, INVESTMENT BANK, <https://investmentbank.com/esports-gaming-video-content/> (last visited Feb. 2, 2020).

27. *Skins & Skin Betting*, VG, <http://www.videogames.org.au/skin-betting/> (last visited Feb. 2, 2020).

28. See *id.*

29. *Id.*

30. See *id.*

31. *Id.*

32. See Valens, *supra* note 14.

33. *Easter Egg*, TECHOPEDIA, <https://www.techopedia.com/definition/3786/easter-egg> (last visited Feb. 7, 2020).

34. See Christensen, *supra* note 26.

35. Travis Clark, *The 11 Most Popular Gaming Youtube Stars Some of Whom Made Over \$10 Million Last Year*, BUS. INSIDER (Feb. 14, 2018), [https://www.businessinsider.com/most-popular-gaming-youtube-stars-ranked-2018-2;](https://www.businessinsider.com/most-popular-gaming-youtube-stars-ranked-2018-2; Ninja's YouTube Stats) *Ninja’s YouTube Stats*, SOCIALBLADE, <https://socialblade.com/youtube/user/ninjashyper> (last visited Feb. 7, 2020).

watched their older siblings play a game for hours at a time. But now, people are being paid thousands of dollars to play games while others, who may or may not be their siblings, watch them play for hours on end.

III. PLAYER REGULATION

A. Are Video Game Players “Athletes”?

There has been quite the debate on whether or not video gamers should be classified as “athletes,” though their income checks can prove to pay more than traditional pro-athletes that break a sweat for our entertainment. Although it seems to be merely a subjective issue—much like the age-old debate on whether or not cheerleaders are considered athletes—one reason the debate is such a hot topic is because only those who qualify as athletes can obtain what is called a P-1 visa. A P-1 visa is a category “designated for internationally recognized athletes and teams coming to the United States to participate in athletic competitions.”³⁶ Because there was no precedent on the matter, “[e]ach petition [has been] evaluated on its own merits . . . the fact that eSports competitors have been recognized as athletes and received P-1 visas in the past does not guarantee future approvals.”³⁷ Riot Games, a gaming developer and eSports tournament organization from Los Angeles, California, was one of the first entities to successfully secure a P-1 visa for one of its “athletes” to compete in a tournament in the United States back in 2013.³⁸ However, issues have arisen due to the mere fact that the term “athlete” is not defined within United States immigration regulations for these P-1 visas.³⁹

Recently, progress has been made through the United States Citizenship and Immigration Services (USCIS):

In a notable development in the field of eSports, USCIS has begun to approve P1 petitions for eligible professional video gamers who are internationally recognized, enabling them to come and stay in the United States for up to five years, and perform for payment or prize money in the United States.⁴⁰

This “essentially qualif[ied] the league as a professional sports league on par with the NBA [National Basketball Association], MLB [Major League

36. Courtney New, *Immigration in Esports: Do Gamers Count as Athletes?*, FORBES (May 18, 2017), <https://www.forbes.com/sites/allabouttherupees/2017/05/18/immigration-in-esports-do-gamers-count-as-athletes/#5c65e261468e>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *P1 Visa for eSport Professionals: Let the USCIS Game Begin!*, VISAPRO, <http://www.visapro.com/resources/article/p1-visa-for-esport/> (last visited Feb. 7, 2020).

Baseball] and NFL [National Football League].”⁴¹ The USCIS “now recognizes eSports or professional video gaming as an athletic sport and eSport professionals are ‘athletes’ making them eligible to seek P1 visa[s].”⁴²

The process to obtain this visa is identical to the process that most traditional, internationally recognized, professional athletes would obtain theirs:

(1) a United States employer must file and obtain an approved P1 petition from USCIS; (2) once the P1 petition is approved by USCIS the foreign national athlete must apply for a P1 visa at a United States consulate outside the United States; (3) Upon successfully obtaining the P1 visa stamp in his or her passport, the foreign national athlete may then enter and perform in the United States.⁴³

Despite this recognition, the vagueness surrounding the term “athlete” by the immigration regulation department and the lack of defining the term “internationally recognized,” makes each case unique.⁴⁴ The office has merely outlined certain guidelines for success.⁴⁵

According to VisaPro, when filing with the USCIS, a successful P-1 petition must contain the following items:

(a) [e]vidence of having legally contracted with a major United States sports league[;] (b) a written consultation from an appropriate labor organization[;] (c) [e]vidence demonstrating that the athlete meets at least two of the following criteria: (1) [s]ignificant participation in the United States major sports league in prior seasons[;] (2) [p]articipation in international competitions with a national team[;] (3) [s]ignificant participation in a prior United States college/university season in inter-collegiate competitions[;] (4) [w]ritten statement from a major United States sports league or official of the sport’s governing body demonstrating the alien’s or team’s international recognition[;] (5) [w]ritten statement from the sports media or a recognized expert[;] (6) [i]nternational ranking provided by internationally recognized sports’ organizations[;] and (7) [s]ignificant honors/awards in the sport[.]⁴⁶

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. *See id.*

46. *See P1 Visa for eSport Professionals: Let the USCIS Game Begin!*, *supra* note 40.

If the athlete can prove this, he or she will be granted access to come to the United States to play in these eSport tournaments.⁴⁷ If the athlete has a spouse and/or child, though they are allowed to file for a P-4 visa for the duration of the athlete's stay, he or she "may not engage in employment, but may attend school or college."⁴⁸

The intent of these visas is to allow athletes and entertainers to enter into the United States on a temporary visa in order to complete his or her competition, assignment, or other video gaming event.⁴⁹ Inevitably, it's not very easy to regulate all of the players coming in and out of the country and then monitor their entire duration in the country. So, what happens if they do not leave? That's hard to say—theoretically, if their stay exceeds a certain number of days (typically 180 days) from their visa expiration date, they would:

[f]ace removal proceedings to be deported from the United States. Additionally, if [they] overstay for more than one hundred and eighty days but less than one year then [they] would be inadmissible to the United States for three years beyond that time and if [they] overstayed for one year or greater [they] would be inadmissible for ten years.⁵⁰

With the current state of immigration, it is a very real possibility that athletes would take the risk to remain in the country should it better the lives of their families.

Though the USCIS has agreed to treat video gamers as athletes and allow them to file for P-1 visas, can we say that these gamers truly qualify for this category? Merriam-Webster defines an athlete as "a person who is trained or skilled in exercises, sports or games requiring physical strength, agility or stamina."⁵¹ If we were to hold a gamer to that particular definition, then yes, those who sit at their television screen or computer monitor using the joysticks to maneuver around a map without actually have to get out of their chair should be considered athletes.⁵² More specifically, a video gamer is "a person who is trained or skilled in . . . games."⁵³

47. *See id.*

48. *P-1A Internationally Recognized Athlete*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/p-1a-athlete> (last visited Feb. 7, 2020).

49. *Id.*

50. *Overstaying Your Visa*, LAWINFO, <https://resources.lawinfo.com/immigration/overstaying-your-visa.html> (last visited Feb. 7, 2020).

51. *Athlete*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/athlete> (last visited Feb. 7, 2020).

52. *See id.*

53. *Id.*

A recent study in South Korea, one of the largest gaming countries in the world, showed that some of the top gamers practiced their “sport” for nearly twelve to fourteen hours per day.⁵⁴ Others, like Team Liquid (a successful Korean eSports team), practice together for eight hours a day “scrimmaging against other pro and Challenger-level teams. In the hours before and after that team practice, they play on their own for nearly every waking minute.”⁵⁵ To put this in perspective, the National Collegiate Athletic Association has a “twenty-hour rule” that prohibits students from engaging in “sport related activities” for more than twenty hours a week.⁵⁶ Another study showed that the average Olympic athlete commits six hours a day towards training and competitions,⁵⁷ and the average professional athlete totals a bit over forty hours a week (eight hours a day).⁵⁸ With these statistics in mind, the training and skill portion of that definition is easily satisfied by video gamers, but the latter half of that definition leaves room for argument: “requires physical strength, agility, or stamina.”⁵⁹

In comparing video gamers to traditional “athletes,” it may be difficult to come to the conclusion that video gamers require “physical strength, agility or stamina,” but interviews with gamers would strongly beg to differ.⁶⁰ Gaming requires, as noted above, hours of practice which translates to “stamina.”⁶¹ If you are to read that statement to mean, “physical strength” and “stamina” as two separate terms, rather than “stamina” to mean “physical stamina,” then there may be a case to argue that video gamers actually require quite a bit of stamina.⁶² In fact, people could argue that an athlete’s mental stamina is far superior to their actual physical stamina.⁶³ If you are to take a liberal stance on the definition of what an “athlete” is according to the USCIS, then video gamers most definitely fit the category and as an “enter-

54. Harrison Jacobs, *Here’s the Insane Training Schedule of a 20-Something Professional Gamer*, BUS. INSIDER (May 11, 2015), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5>.

55. *Id.*

56. *Countable Athletically Related Activities*, NCAA, <https://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf> (last visited Feb. 7, 2020).

57. *Elite Athletes Spend 10,000 Hours Training For London 2012*, INSIDE THE GAMES (Nov. 18, 2010), <https://www.insidethegames.biz/articles/11108/elite-athletes-spend-10000-hours-training-for-london-2012>.

58. *Id.*

59. *Athlete*, *supra* note 51.

60. *See* Jacobs, *supra* note 54.

61. *See id.*

62. *See id.*

63. *See Elite Athletes Spend 10,000 Hours Training For London 2012*, *supra* note 57.

tainer” should be allowed to petition for a P-1 visa. After all, these players bring in more revenue according to recent studies stated above than traditional athletes.⁶⁴ It’s beneficial for the economy and, policy-wise, should be able to encourage economic growth.

B. How Will eSport Players be Regulated When it Comes to Cognitive Performance Enhancers?

If gamers are considered “athletes,” will they be regulated as such? A major concern for traditional athletes, whether they are professional athletes, Olympians, or even NCAA college players, is the use of performance enhancers, also known as “doping.” But how does one regulate doping in the world of gaming?

Esports leagues have performed random drug tests on their players to find substances such as Adderall (a prescription drug used to treat attention-deficit hyperactivity disorder) and similar prescription drugs when the player lacked a valid prescription for it.⁶⁵ These cases, though disappointing, are easier to solve. Taking a prescription drug without a valid prescription is illegal, regardless of what the purpose of taking it is.⁶⁶ Thus, if one were to find a video gamer with a prescription drug in his or her system without a valid prescription, it would likely force forfeiture for that round or require banning the player from the competition completely. However, how does one regulate this if the player truly does have a prescription for the drug? If he or she is born with or develops a mental or behavioral disorder, does he or she not have the privilege or opportunity to become a professional video gaming athlete? Not allowing them to play would most definitely cause a case for discrimination, but allowing them to play could be considered unfair gameplay if not monitored correctly.

In traditional sports, there are different tiers to accommodate different handicaps. For instance, the Paralympics are created for those who have lost physical abilities to compete in the sport they love.⁶⁷ Is attention deficit disorder that is treated with Adderall considered something that warrants a whole new league to be created to ensure fair gameplay? Video gaming is a mental stamina-based sport, which means the major muscle used when performing is the brain. The brain is altered by Adderall to be able to focus, much like performance-enhancing drugs used by traditional athletes to be-

64. See Christensen, *supra* note 26.

65. Kevin Loria, *Some Competitive Video Gamers are Abusing Drugs to get an Edge*, BUS. INSIDER (Jan. 15, 2016), <https://www.businessinsider.com/esports-doping-scandal-investigated-by-espns-otl-2016-1>.

66. Buddy T, *Using Drugs Without a Prescription is Illegal*, VERYWELLMIND (Nov. 4, 2018), <https://www.verywellmind.com/using-drugs-without-a-prescription-is-illegal-69457>.

67. *Who We Are*, INT’L PARALYMPIC COMMITTEE, <https://www.paralympic.org/ipc/who-we-are> (last visited Feb. 19, 2020).

come stronger, faster, and more energetic.⁶⁸ The NCAA goes so far as to regulate the amount of caffeine intake consumed by an athlete.⁶⁹ Where will courts draw the line for the sport of gaming? If we're going to give these "athletes" P-1 visas, which allows them to enter our country to compete, should we not regulate their performance as well?

If one is to compare this to the legal regulation surrounding the intake of Adderall with traditional sports, as long as the player has a valid prescription, he or she is allowed to take the drug without interfering with their participation in the game, at least in the NCAA.⁷⁰ However, traditional sports are considered to be more of a "physical" activity, thus focusing more on physical performance-enhancing drugs. Any type of physical enhancing drugs such as "anabolic-androgenic steroids to enhance athletic performance is prohibited by most sports organizations—and it's illegal."⁷¹ Again, this is an illegal substance, so it's easier to monitor, but what about something legal such as caffeine? Past precedent says that even high amounts of caffeine can lead to testing positive for a banned substance.⁷² The premise behind this is that it's a "central nervous system stimulate" that "benefits . . . both physical and mental performance."⁷³ According to the United States National Library of Medicine by the National Institutes of Health, performance-enhancing drugs "are not restricted to illegal drugs or prescription medications, such as anabolic steroids. They include dietary supplements and a variety of compounds that are available at grocery and health food stores and online."⁷⁴

Elite athletes competing at international and national levels are subject to standardized anti-doping guidelines under the auspices of WADA [World Anti-Doping Agency] and related national organizations. WADA is the international independent agency that publishes the World Anti-Doping Code, which is the document harmonizing anti-doping policies in all sports and all countries.⁷⁵

68. See *Adderall*, WEBMD, <https://www.webmd.com/drugs/2/drug-63163/adderall-oral/details> (last visited Feb. 19, 2020).

69. *Caffeine and Athletic Performance*, COLLEGIATE & PROF. SPORTS DIETITIANS ASS'N, http://www.sportsrd.org/wp-content/uploads/2018/11/Caffeine_and_Athletic_Performance_WEB.pdf (last visited Feb. 7, 2020).

70. *Id.*

71. *Performance-Enhancing Drugs: Know the Risks*, MAYOCLINIC, <https://www.mayoclinic.org/healthy-lifestyle/fitness/in-depth/performance-enhancing-drugs/art-20046134> (last visited Feb. 7, 2020).

72. *Caffeine and Athletic Performance*, *supra* note 69.

73. *Performance-Enhancing Drugs: Know the Risks*, *supra* note 71.

74. Claudia L. Reardon & Shane Creado, *Drug Abuse in Athletes*, 5 *SUBSTANCE ABUSE & REHABILITATION* 95 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4140700/>.

75. *Id.* at 100.

On the other hand, in the MLB, cortisone (a type of steroid) is used by baseball players throughout the season and is completely legal in the MLB if, and only if, it is prescribed by a physician and taken in the correct doses.⁷⁶ Similarly, cyclists have been using a drug called tramadol as a pain reliever which has remained legal under the “monitor[ed] drug list” used by WADA.⁷⁷ However, people are petitioning for the drug to be banned completely for its performance-enhancing side effects.⁷⁸ “Ian Mullins, an elite mountain bike racer, points out that tramadol is the go-to painkiller for many athletes, especially cyclists, despite its reputation of abuse.”⁷⁹ He further goes on to explain in his interview that,

[A]thletes feel perceptible pain relief by taking tramadol—a potent painkiller—before, during and after interest workouts or competitions—all without risking a positive test. Unlike other narcotics, such as oxycodone and morphine, athletes know they can use tramadol whenever the pain hits and still remain compliant with anti-doping rules.⁸⁰

If courts were to follow this precedent, then Adderall may very well be allowed for those players who have valid prescriptions. Perhaps only the amount of Adderall in the system will be monitored. Regardless, it will be difficult to monitor the levels of this drug in each athlete’s system since dosages are prescribed differently for each patient. What this could mean, then, is that Player 1, who normally takes five milligrams to accomplish what he or she needs from the drug, could potentially take ten milligrams to enhance their performance beyond what is needed. Conversely, Player 2 could require ten milligrams to accomplish what they need from the drug but be capped out at ten milligrams should the regulation be set at that level. Thus, Player 1 would theoretically be at an advantage over Player 2.

Electronic Sports League (ESL), which specializes in the game League of Legends and Counter-Strike events, created a list of banned substances, including Adderall without a proper prescription, following the admission of a player named Kory “Semphis” Friesen who “admitted in a 2015 interview posted on Landers CStrike YouTube channel, that he and his Cloud9 team-

76. See Dan Kolko, *Cortisone: The “Magic Shot” That Has Been Crucial to Nats’ Success*, MID-ATLANTIC SPORTS NETWORK (Oct. 5, 2012), <https://www.masnsports.com/nationals-pastime/2012/10/cortisone-the-magic-shot-that-has-been-crucial-to-nats-success.html>.

77. *Tramadol: Why Some Athletes and Anti-Doping Experts Want it Banned*, U.S. ANTI-DOPING AGENCY (Feb. 13, 2017), <https://www.usada.org/tramadol-why-some-athletes-and-anti-doping-experts-want-it-banned/>.

78. *Id.*

79. *Id.*

80. *Id.*

mates had taken Adderall before a tournament in Katowice, Poland.”⁸¹ However, ESL only monitors certain games, and “eSports leagues are [still] self-regulating.”⁸² Combined with how quickly the drug can leave one’s system, it would be difficult with the randomized drug testing that is currently in order to serve as an efficient level of monitoring for the doping issue involved in eSports.

Because Adderall and caffeine can both be classified as legal substances—though it can be a disadvantage for other players if their competitors have the assistance—if the courts are going to treat these players as athletes, then they should allow the use of the drug if its prescribed, or in the case of substances like caffeine, if it’s within the “legal” guidelines of the sports world. If we are to give these players enough of an “athlete” title that they can obtain a visa to compete in the United States, they should be regulated like all of the other sports, universally.

IV. INTELLECTUAL PROPERTY ISSUES TRIGGERED BY STREAMING

A. Does Recording and Uploading Gameplay Violate Copyright Law?

In traditional sporting leagues or organizations, “no one individual has the right to broadcast or stream professional sporting events that are copyrighted and licensed” without explicit permission from the sports team or league itself.⁸³ Television and media organizations will have to obtain licenses to have the rights to broadcast sporting events and will pay a large amount of money in order to do so.⁸⁴ In regards to eSports, however, there can be some issues arising from the current “gentlemen’s agreement” that is in place between the gaming developers, players, and streaming platforms.

The Copyright Act of 1976 states that copyright protection exists for “original work[s] of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or a device.”⁸⁵ In order for a copyright infringement suit to succeed, two elements must be met. The plaintiff must establish that: “(1) it owns a

81. See Ed McCambridge, *Anti-doping Efforts Still in their Infancy in eSports*, DEUTSCHE WELLE (July 21, 2017), <https://www.dw.com/en/anti-doping-efforts-still-in-their-infancy-in-esports/a-39783790>.

82. *Id.*

83. Nick Small, *Rights to Broadcast Live Sports: Advice & Tips*, DACAST (Oct. 1, 2018), <https://www.dacast.com/blog/rights-to-broadcast-live-sports-advice-tips/>.

84. *IP and Sports – Background Brief*, WORLD INTELLECTUAL PROP. ORG., https://www.wipo.int/pressroom/en/briefs/ip_sports.html (last visited Feb. 9, 2020).

85. 17 U.S.C. § 102 (2019).

valid copyright; and (2) the defendants copied constituent elements of the work that are original” and that “the allegedly infringing material bears a substantial similarity to copyrightable elements of plaintiff’s work.”⁸⁶ In the case of eSports, both of these elements are fulfilled, because recording oneself playing a video game and streaming it online is blatantly infringing the game developer’s copyright. It is comparable to recording a movie in the movie theatre prior to its release and uploading it onto YouTube for the public to see. As the uploader, you are taking someone else’s creative work, sharing it without permission, and potentially taking profit away from the copyright owner by spoiling the game for them.

Courts regularly reason that copyright infringement often times takes away potential profits from copyright owners.⁸⁷ In the world of video game streaming, though, that “blatant copyright infringement” could actually be a profit generator more than a deterrence. Video games are indeed,

[e]ligible for copyright protection as audiovisual works (as is the code underlying a game as a literary work) the authors or creators of video games possess the copyright in the audiovisual content of the games. This means creators can limit how a video game is exploited in online video, streaming gameplay, at in-person tournaments and otherwise. Any individual engaging in those actions without the appropriate permission from the creator is arguably committing copyright infringement.⁸⁸

Currently, for professional eSport players, this is regulated via contract and licensing agreements.⁸⁹ These licensing agreements “allow individuals to incorporate gameplay into video content as long as that content is available without charge, and as long as the use of the game is non-commercial.”⁹⁰ Unfortunately, video game streaming far exceeds the bounds of the tournament arena.

Video game streamers such as Tfue and Lachlan, two of the most famous in the industry, record their gameplay and upload to both YouTube and Twitch on a regular basis.⁹¹ Streamers produce a wide variety of content, ranging from variations of gameplay, introductions of new video games out

86. *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276, 282 (S.D.N.Y. 2001).

87. *Id.*

88. Richard P. Flaggert, *Copyright in eSports: A Top-Heavy Power Structure, But Is It Legally Sound?*, DLA PIPER (Sept. 27, 2018), <https://www.dlapiper.com/en/thailand/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

89. *Id.*

90. *Id.*

91. See *Tfue* FANDOM: WIKITUBIA, <https://youtube.fandom.com/wiki/Tfue> (last modified Sept. 23, 2019); see also *Lachlan*, FANDOM: WIKITUBIA, <https://youtube.fandom.com/wiki/Lachlan> (last modified Sept. 22, 2019).

in the market and initial runs and impressions of the release, instructions on obtaining various rare skins and weapons, and strategies for becoming better players in the games, all the way to simple streams, such as a player streaming himself playing an old classic while finding all of the available Easter eggs.⁹² As of now, YouTube is considered an intermediary, with the terms and conditions stating that they will reach out to the content uploader should a takedown notice be requested under the Digital Millennium Copyright Act (DMCA).⁹³

[A] three-way copyright dispute arose in 2015 in connection with a Twitch channel called “SpectateFaker,” which broadcast a publicly available spectator mode of the games of a popular player, Lee “faker” Sang-hyeok. Abuzu, another video game streaming service, had secured from Sang-hyeok the exclusive right to stream his games. When Abuzu discovered the SpectateFaker channel, it issued a DMCA takedown notice to Twitch on the grounds that Twitch was infringing on Abuzu’s IP rights.⁹⁴

This case became a three-way copyright infringement case, as the rights that were exclusively licensed to Abuzu by Sang-hyeok were “not actually his to grant, but were exclusively owned by the game publisher at issue, Riot Games.”⁹⁵ The underlying issue was whether or not the “player of a game may have an intellectual property interest in his/her gameplay, for instance, as a derivative work of the underlying game.”⁹⁶ The issue itself was never resolved, although Riot Games eventually filed its own DMCA complaint against the channel.⁹⁷

So, who owns the copyright in such cases? Technically speaking, the gaming developers should own the copyright. Even then, those who develop the game and actually work on the artistic portions of the work and the coding likely have signed an agreement with the publishing company that all of their original rights to their copyrighted works be transferred to the publishing company. Why, then, are video game publishers not sending out more takedown notices to these players once they discover the game being streamed on these platforms? At the National Asian Pacific American Bar Association Conference held in Chicago, Illinois in November 2018, a panel of general counsel members from major video game streaming industry lead-

92. See *PewDiePie*, <https://www.youtube.com/user/PewDiePie/playlists>, YOUTUBE (last visited Feb. 9, 2020).

93. *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> (last visited Feb. 9, 2020).

94. Flaggert, *supra* note 88.

95. *Id.*

96. *Id.*

97. *Id.*

ers sat down to discuss the surge in eSports.⁹⁸ In this panel, the issue of copyright infringement and potential intellectual property issues was brought up. One panel member described the relationships between the gaming platforms and the gaming publishers.⁹⁹ She stated that gaming publishers normally will grant a license for their games to be played at major tournaments, but the reality is that the more exposure a game has, the more likely others will want to play it.¹⁰⁰ Players who initially stream the game, especially if they are popular YouTubers or Twitch players, will garner more publicity for the game and potentially boost sales rather than retract from them.¹⁰¹

However, like a feature film, there can be multiple copyright owners involved in the development of a game. Unless explicitly stated, musicians can license out their songs without giving away any of their rights to video game developers to incorporate into the game.¹⁰² Because they retain their rights, they have the right to issue takedown notices as well if they feel as though their songs are being exploited by these gamers.¹⁰³

With some streams having more viewers than a theatrically released motion pictures, musicians have been asking why the latter should pay license fees and the former should not. In a perfect world, the streamers who are monetizing their visual content in combination with an artist's music would obtain a music synchronization or master license, which would allow the streamer to pair the music with the video game sequence.¹⁰⁴

98. *Player 1 vs. Player 2: Legal Face Offs in eSports*, NAT'L ASIAN PACIFIC AM. BAR ASS'N, https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2018_napaba_com/call_for_programs/cle_course_materials/505_cle_materials.pdf (last visited Feb. 9, 2020).

99. *See id.*

100. *See id.*

101. *See* Aaron Marsden, *The Ultimate Guide for Promoting Your Game with Twitch Influencers*, MEDIUM (June 5, 2018), <https://medium.com/powerspike/the-ultimate-guide-for-promoting-your-game-with-twitch-influencers-a17045c32611>; *see also* Chris Morrison, *Six Ways Indie Game Developers Find Success with Youtube and Twitch Influencers*, GAMASUTRA (June 14, 2018), https://www.gamasutra.com/blogs/ChrisMorrison/20180614/319967/Six_ways_indie_game_developers_find_success_with_YouTube_and_Twitch_influencers.php.

102. DAVID GREENSPAN, *MASTERING THE GAME: BUSINESS AND LEGAL ISSUES FOR VIDEO GAME DEVELOPERS* 133–35 (2013).

103. *See* Scott Alan Burroughs, *A Twitch in Time: Legal Issues Catch Up with Popular Game Broadcasting Platform*, ABOVE THE LAW (Sept. 5, 2018), <https://abovethelaw.com/2018/09/a-twitch-in-time-legal-issues-catch-up-with-popular-game-broadcasting-platform/>.

104. *Id.*

Regular YouTubers who vlog or upload different variations of content outside of video game streaming have always had to abide by the copyright laws implemented by Title 17.¹⁰⁵ YouTube's terms and conditions state that if the original copyright owner issues a takedown notice, the infringers will be notified and their videos removed.¹⁰⁶ Thus, to avoid losing money from having their videos taken down, most YouTubers will use "free to use" songs that do not pose the risk of being regulated or will remove the background music altogether.¹⁰⁷ Though these claims rarely go to litigation, it would be in the best interest of video game streamers to either mute the soundtrack of the video game when they stream and simply use the overlay of their conversations with the other players, or otherwise gain a license from the musicians to avoid being nailed with copyright infringement. This world may be a virtual one, but like regular sports that are broadcasted via licenses obtained by whatever national league owns the rights to the sport, it would be in the gamers' best interest to simply obtain a license or mute their gameplay.

V. KINGDOM FRAUD: THE KEY TO CRIMINAL ACTIVITY

A. Could Glitches Cause Illegal Advertising, Money Laundering, Wire Fraud, and Gambling?

The world of video gaming is just that: a new world with fictional characters, fictional money, and fictional worlds that are created by gaming developers to allow players to participate in these fantasy lands as they disguise themselves and put themselves in different characters' shoes, living in a world with very few rules and virtually (pun intended) no real-life consequences. With this "escape," it is understandable why health officials have started to research video gaming addictions and mental health issues associated with the obsessions surrounding some cult-following games, such as Fortnite.¹⁰⁸ Like any other addiction, the addiction associated with video gaming can also cause the players to have temporary lapses in judgment, which could lead to desperate attempts to either remain in a game, excel in the game, or purchase something within the game using illegal means.¹⁰⁹ This could and has involved activities such as wire fraud, money laundering, gambling, and breaking Federal Trade Commission (FTC) regulations when be-

105. 17 U.S.C. § 102(a)(6) (2019).

106. *See Term and Services*, *supra* note 93.

107. *Music, Copyright & YouTube: Fair Use, Public Domain & DMCA*, LONGZIJUN (Jan. 18, 2012), <https://longzijun.wordpress.com/2012/01/18/music-public-domain-and-copyright/#copyright-free>.

108. *See* Jerry Kennard, *Are Video Games Bad for Your Health?*, HEALTH CENTRAL (July 31, 2018), <https://www.healthcentral.com/slideshow/ways-video-games-are-bad-for-your-health>.

109. *See id.*

ing sponsored to keep the player's following intrigued and loyal.¹¹⁰ Whether or not there will ever be a completely efficient system put in place to monitor the cryptocurrencies and virtual schemes being hidden behind these video games is a question for the future, but for now, we can explore the issues that have already arisen from the introduction of digital downloads, online streaming, and online game-play associated with some of the top video games in the industry.

B. Can the FTC Regulate Potential Illegal Activity Disguised as Microtransactions?

In 2017, the FTC settled a case with video game streamers, Trevor "TmarTn" Martin and Thomas "Syndicate" Cassell who were charged with "deceptively endorsing the online gambling service CSGO Lotto while failing to disclose [that] they jointly owned the company and . . . paid other well-known influencers thousands of dollars to promote the site on YouTube, Twitch, Twitter, and Facebook without requiring them to disclose the payments in their social media posts."¹¹¹ The case settled, with the FTC ordering Martin and Cassell to "clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product of service."¹¹² With the enormous amount of social media influence in today's generation, it was only a matter of time before the FTC would crack-down on disclosure requirements. In previous cases, the FTC has required social media influencers to completely disclose that they were being paid to promote a product by making it clearly visible to the consumers that they were being compensated.¹¹³ The theory behind this was to ensure that consumers were not tricked by the endorsement by assuming that the influencer posted about the product out of sheer individual will over monetary gain.¹¹⁴ In the world of Instagram, Facebook, and Twitter posts, this new regulation

110. See John T. Holden & Sam C. Ehrlich, *A Legal Tool to Use Against eSports Gambling Fraud*, GAMBLING RES. EXCHANGE ONT., (2018), [https://www.greo.ca/Modules/EvidenceCentre/files/Holden%20and%20Ehrlich%20\(2017\)_Esports,%20skins%20betting,%20and%20wire%20fraud%20vulnerability_Final.pdf](https://www.greo.ca/Modules/EvidenceCentre/files/Holden%20and%20Ehrlich%20(2017)_Esports,%20skins%20betting,%20and%20wire%20fraud%20vulnerability_Final.pdf).

111. FED. TRADE COMM'N, *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers* (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

112. *Id.*

113. *Id.*

114. *See id.*

has been somewhat solved by influencers by following each caption up with hashtags such as “#ad” or “#paidadvertisements.”¹¹⁵

With the video game streaming industry being completely reliant on platforms such as YouTube and Twitch, it was only a matter of time before video gamers, like the ones mentioned above, were considered to be “influencers.” According to “Pixlee,” a social media influencer is a “user on social media who has established credibility in a specific industry. A social media influencer has access to a large audience and can persuade others by virtue of their authenticity and reach.”¹¹⁶ Thus, in the world of Fortnite, Minecraft, League of Legends, and other popular eSports, these top players are not only considered influencers but could arguably be considered mentors and coaches for those who study their strategy and mimic their gameplay.

The recent FTC regulation placed on gamers foreshadows the possibility of other illegal activity surrounding this largely unregulated industry. The digital era has proven to test precedent legislation since it plays in a completely different realm. For instance, copyright issues for machines have come up recently with major film studios, like the Walt Disney Company, in regard to a machine and its digital output.¹¹⁷ As mentioned above, the social media network has created an influx of new regulations set forth by the FTC to ensure consumer protection and to help consumers make informed decisions about their purchases.¹¹⁸ In this virtual world, however, the lack of uniform regulation could potentially open doors to illegal activity and crime.

For example, in the world of video gaming, there is something called a microtransaction. Previously, the video gaming industry was reliant on the physical sale of video games.¹¹⁹ The reliance on physical sales took a turn when downloadable content (DLC) became available and allowed the industry to add onto the initial sale of the game by allowing gamers to download new releases or additions to the game via an internet connection.¹²⁰ DLCs then bred the idea of a “microtransaction.”¹²¹

115. See Dave Davies, *2019/2020 Guide To FTC Influencer & Endorsement Guidelines*, BEANSTALK, <http://beanstalkim.com/learn/internet-law/ftc-disclosures/> (last updated Sept. 24, 2019).

116. *What is a Social Media Influencer?*, PIXLEE, <https://www.pixlee.com/definitions/definition-social-media-influencer> (last visited Feb. 9, 2020).

117. *Rearden LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 969 (N.D. Cal. 2018).

118. *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, *supra* note 111.

119. Mike Colagrossi, *How Microtransactions Impact the Economics of Gaming*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/022216/how-microtransactions-are-evolving-economics-gaming.asp> (last updated Oct. 17, 2018).

120. *Id.*

121. *Id.*

A microtransaction, according to Investopedia, is “a business model where users can purchase virtual items for small amounts of money. Microtransactions often appear in free-to-play games, meaning there is no cost to download the game, just a cost to buy the online virtual products.”¹²² Microtransactions have proven to be a very successful tool for gaming developers, though only 5–20% of the game communities take part in microtransactions and the amounts.¹²³ Though this may seem like an insignificant number, these microtransactions are usually add-ons that the gaming developer can monetize after a player has downloaded a free-to-download game.¹²⁴ Therefore, the only profit earned by these developers is with the microtransactions the players partake in when, say, a new map is released via DLC.¹²⁵ “The in-game currency can also be used to unlock different characters. These options can often be unlocked with extended gameplay, but the microtransactions offer an incentive to unlock them quickly.”¹²⁶ In eSports, this can be a huge revenue generator. Both League of Legends and Fortnite are “free-to-play” games that rely on microtransactions to generate revenue.¹²⁷ Though the majority of microtransactions are for these “free” games, it is important to note that they are not limited to them.¹²⁸ Counter-Strike, a game that can be downloaded for \$14.99, also has an extensive amount of microtransaction activity amongst its most loyal players.¹²⁹

“Microtransactions assist in integrating a real-world market into in-game economics.”¹³⁰ As Investopedia lays out, Fortnite is a prime example of a game that uses an “in-game currency that players can either earn through gameplay or purchase using real cash (or credit).”¹³¹ This currency is then used to purchase aesthetic skin additions or unlock other features within the game.¹³² If a player is especially impatient, he or she can purchase, using real currency, something called a “battle pass” to advance through the game more quickly.¹³³

The transactions are not limited to the virtual world. The intermingling of the video game world and reality opens the doors to transactions that can

122. *Id.*

123. *Id.*

124. *Id.*

125. See Colagrossi, *supra* note 119.

126. *Id.*

127. *Id.*

128. See *id.*

129. *Id.*

130. *Id.*

131. Colagrossi, *supra* note 119.

132. *Id.*

133. *Id.*

be made and cashed out in a player's actual bank account for a video game world transaction.¹³⁴ There is a community of professional players who play Counter-Strike who "make real money, receive items that are paid for with real currency and win cash prizes."¹³⁵ Though this may sound like a neat concept for gamers who wish to make money off of their gameplay, it also could also potentially open the door to wire fraud issues. Criminals have used something as indiscrete as Tide laundry detergent to launder money.¹³⁶ The idea of using a microtransaction to launder money does not seem to be a farfetched idea. There have not been many cases regarding money laundering and microtransactions, but there have been some case studies by cybersecurity experts who say that money laundering via video games is not impossible.¹³⁷ In fact, it's suggested that these transactions have already occurred in games such as World of Warcraft.¹³⁸ An example of a general scheme is for a hacker to steal an account and:

[B]uy World of Warcraft gold using their stolen money and either meet the seller in-game or receive in-game mail with the gold included. The hacker would then turn around and sell their newly bought sum of gold—either for cryptocurrency like bitcoin, or if they choose, using another method. At this point, the origins of their money would be nearly untraceable.¹³⁹

However, since nearly everything is recorded in the world of video gaming transactions, criminals make the most profit by creating their own platform and selling microtransactions directly to consumers (mimicking traditional money laundering schemes).¹⁴⁰ Expert Jean-Loup Richet, a cybersecurity officer with French telecommunications giant Orange S.A., predicts that this will be highly unlikely due to the sheer amount of willpower that will have to go into creating a gameplay like this.¹⁴¹ Regardless, it is possible, and because it is possible, there will have to be regulation put in place at some point.

134. *See id.*

135. *Id.*

136. *See* Jordan Weismann, *Why Are Criminals Stealing Tide Detergent and Using It for Money?*, THE ATLANTIC (Mar. 18, 2012), <https://www.theatlantic.com/business/archive/2012/03/why-are-criminals-stealing-tide-detergent-and-using-it-for-money/254631/>.

137. Steven Messner, *How Microtransactions and In-Game Currencies Can Be Used to Launder Money*, PCGAMER (Apr. 13, 2018), <https://www.pcgamer.com/how-microtransactions-and-in-game-currencies-can-be-used-to-launder-money/>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

C. Could Video Gaming Present New Means of Committing Wire Fraud and Money Laundering?

Wire fraud is essentially any “writings, signs, signals, pictures or sounds transmitted by wire, radio or television in interstate or foreign commerce. Federal prosecutors often charge persons with wire fraud in order to bring federal charges against them, typically when the crimes committed would only be subject to state laws.”¹⁴² The elements of wire fraud are:

[s]imilar to regular fraud, except that it takes place over phone lines or involves electronic communications. The legal definition of wire fraud has four elements: (1) the defendant created or participated in a scheme to defraud another out of money; (2) the defendant did so with intent to defraud; (3) it was reasonably foreseeable that the defendant would use wire communications; and (4) the defendant did in fact use interstate wire communications.¹⁴³

In the video gaming industry, everything is done over electronic lines that transmit writings, signs, signals, pictures, or sounds—in fact, all transactions are. More games are now being purchased and downloaded via online stores like “Microsoft Store” for Xbox or “PlayStation Store” for PlayStation than in brick and mortar stores such as GameStop.¹⁴⁴ Purchasing physical copies of games has become somewhat of a waste of time and space for many gamers.¹⁴⁵ If anything, many gamers would rather just buy more memory to store the games on their consoles.¹⁴⁶ This can be easily done by upgrading a console’s hard drive or secure digital (SD) card size to allow for additional game storage.¹⁴⁷ As long as users have an Internet connection and a valid credit card, they can purchase nearly all of their games without leaving their house.¹⁴⁸ With that in mind, it seems somewhat safe to predict that the entire gaming industry will eventually be handled via the internet and digital downloads in the foreseeable future.

Wire fraud in the video gaming industry seems to be a somewhat “no-brainer” for criminals who happen to be tech-savvy. In 2016, a twenty-seven

142. *Wire Fraud*, FIND LAW, <https://criminal.findlaw.com/criminal-charges/wire-fraud.html> (last visited Feb. 9, 2020).

143. *Id.*

144. Christopher Dring, *Why Do Gamers Still Buy Physical Games?*, GAMESINDUSTRY.BIZ (Sept. 14, 2018), <https://www.gamesindustry.biz/articles/2018-09-14-why-do-gamers-still-buy-physical-games>.

145. *See id.*

146. *See id.*

147. Ciara O’Brien, *How to . . . Upgrade Your Console’s Storage*, IRISH TIMES (Dec. 29, 2018), <https://www.irishtimes.com/business/technology/how-to-upgrade-your-console-s-storage-1.3744357>.

148. Dring, *supra* note 144.

year old by the name of Anthony Clark successfully committed wire fraud using EA Sports' FIFA Football.¹⁴⁹ What began as a “coding project” turned into the discovery and creation of a code to “generate FIFA coins—an in-game currency prized by millions of players” that were sold online.¹⁵⁰ This scheme was so successful that Clark made \$16 million in a matter of two years.¹⁵¹ Through tracking by the Internal Revenue Service and EA Sports employees, Clark was eventually brought down by the Federal Bureau of Investigation.¹⁵² However, with the lack of history with virtual digital currency cases in video games, it was new territory for the prosecution.¹⁵³ Cryptocurrency itself is already extremely difficult to track, and legislation is working on how to handle currencies such as bitcoin.

For the time being, since cryptocurrency is not consistently and universally regulated, if gamers were to use video games as a vehicle to commit wire fraud, there will inevitably be a small window of time, including the present, to do so with a high chance of not getting caught. How will the courts deal with these cases? If it's clearly fraud, but is done with cryptocurrency, does it still fall under wire fraud? If so, which jurisdiction will hear the crime if it's floating in a virtual world?

In 2018, the popular mobile game, “Clash of Clans” was involved in a money laundering scheme where “scammers on Facebook [would] openly trad[e] tools that automatically turn[ed] stolen credit card numbers into in-game currencies they [could] then sell for profit.”¹⁵⁴ Money laundering, according to Investopedia, “is the process of making large amounts of money generated by a criminal activity, such as drug trafficking or terrorist funding, appear to have come from a legitimate source. The money from the criminal activity is considered dirty, and the process “launders” it to make it look clean.”¹⁵⁵ The process in this case involved scammers using the stolen credit cards “to buy in-app currencies from mobile games such as Clash of Clans, Clan Royale and Marvel Contest of Champions, [and] then sell those curren-

149. Brian Day, *This Whittier Man Built a Video Game Currency Empire and Became a Millionaire – Then The FBI Raid Brought It Down*, ORANGE CTY. REG. (Oct. 29, 2017), <https://www.oeregister.com/2017/10/29/this-whittier-man-built-a-video-game-currency-empire-and-became-a-millionaire-then-an-fbi-raid-brought-it-down/>.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Matthew Gault, *Scammers are Using Clash of Clans to Launder Money from Stolen Credit Cards*, MOTHERBOARD (July 20, 2018), https://motherboard.vice.com/en_us/article/xwkyb3/scammers-are-using-clash-of-clans-to-launder-money-from-stolen-credit-cards.

155. James Chen, *Money Laundering*, INVESTOPEDIA (Mar. 8, 2019), <https://www.investopedia.com/terms/m/moneylaundering.asp>.

cies on the grey market for cash.”¹⁵⁶ The grey market, unlike the black market, can potentially be perfectly legal.¹⁵⁷ The grey market “refers to goods which have been manufactured by or with the consent of the brand owner, but are sold outside of the brand owner’s approved distribution channels—which can be perfectly legal.”¹⁵⁸ The key takeaway in this definition is that it “can” be perfectly legal. It “can” also, then, be illegal.

For instance, in the Clash of Clans case, the goods that were being sold in the grey market were goods purchased through stolen credit cards (37,606, to be exact) that were linked to Apple accounts.¹⁵⁹ The currencies were then “dumped” in the grey market.¹⁶⁰ The scarier part of this whole ordeal was that the criminals had automated the entire process.¹⁶¹ According to the website *Motherboard*, the “malicious actors took the process further, automatically changing credit cards until a valid one [was] found, automatically [purchasing] games and resources, automatically posting the games and resources for sale, working with a digital wallet for order processing, and managing multiple Apple devices to distribute the load.”¹⁶² Citing *Kromtech* even further, the “end result [was] an automated money laundering tool for credit card thieves.”¹⁶³

Even more recently, the rise of popularity of the game Fortnite triggered a similar money laundering scheme, except this time using the game’s currency called “V-Bucks.”¹⁶⁴ Criminals were buying V-bucks from the game’s official store using stolen credit cards and then selling them on the dark web via discounts and bulk purchases.¹⁶⁵ Many of the credit card numbers were obtained by luring inevitably younger players who find pages on social media networks alleging to be “V-bucks generators.”¹⁶⁶ The generators ask for the username and passwords of the player’s Fortnite account as well as their credit card information in order to generate the V-bucks.¹⁶⁷ Unknowingly,

156. Gault, *supra* note 154.

157. Will Kenton, *Grey Market*, INVESTOPEDIA (June 27, 2018), <https://www.investopedia.com/terms/g/greymarket.asp>.

158. *Id.*

159. Gault, *supra* note 154.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Tamara Evdokimova, *Criminals Are Using Fortnite to Launder Money*, SLATE (Jan. 24, 2019), <https://slate.com/technology/2019/01/fortnite-video-games-money-laundering-scams.html>.

165. *Id.*

166. *Id.*

167. *Id.*

then, the credit card information will be transferred and used to make the unauthorized purchases to sell on the dark web.¹⁶⁸

So how should this be regulated? At the most minimal level, “buying and selling accounts on Fortnite is against the game’s end-user license, which means that Epic Games can and will close accounts that have been purchased or sold, but they have to catch them first.”¹⁶⁹ On a more criminal and grander scale, “analysis of dark web-conversations regarding Fortnite related credit card fraud suggests that while some exploited cards are shut down, the use of virtual private network (VPN) servers and other deception mechanisms allows cybercriminals to continue in their nefarious endeavors, with little intervention on the part of Epic Games or law enforcement agencies.”¹⁷⁰ If companies and federal agencies cannot track the criminal activity fast enough, and if the use of VPNs and other servers make it nearly impossible to track down the criminals in time, will resources even be put into identifying the criminals when those same resources could be used to evaluate the dark web for national security crimes instead? In most states, “money laundering is almost charged as a felony offense, but in some states, misdemeanor charges are possible.”¹⁷¹ The penalties for money laundering can range from probation and fines to prison time that can range from one year to more than thirty-five years, depending on the complexity and severity of the crime.¹⁷²

Between the introduction of cryptocurrency and the lack of sufficient cryptocurrency regulation, as well as the ease involved in laundering money and creating virtual goods to sell from thin air, it will be interesting to see how the courts will regulate this new arena of crime. Drawing a parallel, current practices and regulations from typical wire fraud and money laundering may prove to be difficult if the currency being used is lost in a digital world that can be erased instantaneously. Weighing this against the pros that come with the development of cryptocurrency and the ease in which money can be securely transferred for “good” purposes, the courts will have to strike a compromise on how strict they will be in regulating this alternate world.

168. *Id.*

169. Brian Crecente, *Dark Web Creating Thriving Criminal Eco-System Around Game*, VARIETY (Jan. 15, 2019), <https://variety.com/2019/gaming/news/fortnite-money-laundering-1203108363/>.

170. *Id.*

171. Mark Theoharis, *Money Laundering*, CRIMINALDEFENSE LAW., <https://www.criminaldefenselawyer.com/crime-penalties/federal/money-laundering.htm> (last visited Feb. 9, 2020).

172. *Id.*

D. What Issues are Presented by Young Players Gambling in Video Games?

One U.S. team has fought against gambling in video games alongside fifteen other countries who have attempted to create regulations and challenge loot boxes, skin gambling, and more in video games.¹⁷³ The main area of concern with gambling in these games involves the targeting of younger players.¹⁷⁴ According to a declaration signed by fifteen European regulation bodies and the U.S. state of Washington about their “increasing concerns with the risks being posed by the blurring lines between gambling and other forms of digital entertainment such as video gaming,” there are “four specific areas of concern: (1) skin betting; (2) loot boxes; (3) social casino gambling; and (4) the use of gambling themed content within video games available to children.”¹⁷⁵ Recently, developments such as Fortnite (yes, the game responsible for the previous money laundering schemes mentioned above) put an end to random loot box purchases.¹⁷⁶ The FTC has announced plans to examine loot boxes in a workshop in 2019 to address the ongoing political concern surrounding the issue of children and their purchase of mystery loot boxes in video games.¹⁷⁷ These efforts have proven to the world that society is putting more and more social responsibilities on video game developers to protect their audience.

i. Skin Betting

Skin betting is when “third-party sites allow users to wager money or in-game items for a chance at earning better items.”¹⁷⁸ Technically, this is not illegal. The idea of skin betting came from a game called Counter-Strike, more specifically, CS:GO. The issue surrounding the “gambling” scheme was that many of the enterprises were not regulated and were not licensed

173. See Kyle Orland, *15 Countries and One US State Team Up to Fight Gambling in Video Games*, ARSTECHNICA (Sept. 17, 2018), <https://arstechnica.com/gaming/2018/09/multinational-regulators-join-together-to-fight-gambling-in-video-games/>.

174. *Id.*

175. *Id.*

176. Kyle Orland, *Fortnite Puts an End to Random Loot Box Purchases*, ARSTECHNICA (Jan. 28, 2019), <https://arstechnica.com/gaming/2019/01/fortnite-puts-an-end-to-random-loot-boxes-purchases/>.

177. Kyle Orland, *FTC Plans to Examine Loot Boxes with Public Workshop for Later This Year*, ARSTECHNICA (Feb. 22, 2019), <https://arstechnica.com/gaming/2019/02/ftc-plans-to-examine-loot-boxes-with-public-workshop-later-this-year/>.

178. Orland, *15 Countries and One US State Team Up to Fight Gambling in Video Games*, *supra* note 173.

gambling entities.¹⁷⁹ Early on, players used skins to gamble by placing their skins in a pot to be won (or lost) depending on a predicted outcome of a game.¹⁸⁰ Naturally, this led to some players rigging games and forcing certain outcomes to occur, upsetting all those who participated in the gambling process.¹⁸¹ It was not until those particular skins could be “cashed out” into one’s real debit card or bank account via third parties within the “Steam Community Market” that people truly started to become addicted.¹⁸² The Steam Community Market is intended to simply be a third party application that allows the buying and selling of items via something called a “Steam Wallet.”¹⁸³ The Steam Wallet can be used, for example, in an eSports betting arena such as CS:GO Lounge, where the only disclosures or warnings of the illegal aspects of gambling are found in the rarely viewed terms and conditions set out by the website.¹⁸⁴ The disclosure itself only states that “by placing a bet on CS:GO Lounge, you are confirming that you are in abidance with your country’s laws which allow you to participate in skin-betting.”¹⁸⁵ The site specifically says that it is the player’s responsibility to figure out if it’s legal where he or she lives.¹⁸⁶

The major problem associated with skin betting comes from the fact that these games cater to young children.¹⁸⁷ Because everything is done behind a television screen or computer monitor, it is difficult to monitor the real humans behind the virtual betters. The BBC released an article in November 2018 addressing this concern, stating that “children as young as 11 have problems with gambling, while almost half a million are betting regularly.”¹⁸⁸ Though regulations require a valid license in order to facilitate gambling, and most sites will warn users about age requirements, “just over one in ten 11 to 16-year-old children have participated in skins gambling before.”¹⁸⁹

Skin betting, though technically “legal,” promotes and encourages bad gambling habits in our youth. The idea of spending \$0.99 to obtain a skin or

179. Evan Lahti, *CS:GO’s Controversial Skin Gambling, Explained*, PCGAMER (July 6, 2016), <https://www.pcgamer.com/csgo-skin-gambling/>.

180. *Id.*

181. *Id.*

182. *See id.*

183. *Community Market*, STEAM, <https://steamcommunity.com/market/> (last visited Feb. 9, 2020).

184. Lahti, *supra* note 179.

185. *Id.*

186. *Id.*

187. *See Gambling and Gaming: Children as Young as 11 Betting Online*, BBC (Nov. 21, 2018), <https://www.bbc.co.uk/newsround/44736452>.

188. *Id.*

189. *Id.*

weapon that allows for the child to excel in a game or show off to his or her gaming friends inevitably encourages bad habits of spending money until they get what they want. The fact that the game is virtual and there are no “real world” repercussions that you may see at the time of the gamble could make it even more addicting. Courts should work to regulate this industry much like any other gambling arena. They must be able to verify the age of the player and to only allow for those old enough to bet to participate. If the government were to create physical arenas where players must be physically present in order to purchase and bet on skins, then players will have to do so. Regardless of how the government will crack down on this problem, it is critical that online gambling be less accessible for children.

ii. Loot Boxes

Loot boxes “allow players to pay—often with real money—for a chance to win a virtual item.”¹⁹⁰ Loot boxes “are an almost \$30 billion industry, according to tech consultancy firm Juniper Research, and a major source of income for video game companies but have also caused concern among anti-gambling advocacy groups and psychologists who say consumers can exhibit gambling-like behavior in buying loot boxes.”¹⁹¹

Loot boxes are found in nearly all popular video games.¹⁹² They are a form of microtransaction that involves the use of real currencies to purchase “boxes” containing different items such as characters, costumes, and weapons within a game.¹⁹³ The reason a loot box is being considered along the same lines as casino slot machines and other gambling or betting channels is because the player who purchases the loot box does not actually know what is in the box prior to the purchase.¹⁹⁴ It’s a mystery—a surprise that costs you the same amount regardless of whether or not you want the item in the end.¹⁹⁵ There are no returns or exchanges, and you are stuck with what you have randomly “purchased.”¹⁹⁶ With this type of system, it is predictable that many of these boxes will not contain the item the player is actually hoping for. This then leads to players spending more and more of their actual cold hard cash to continue to purchase these loot boxes in order to one day obtain the desired item. Again, this could potentially cause psychological issues for both adults and children alike. In fact,

190. *Id.*

191. Benjamin Pu, *What Are Loot Boxes? FTC will Investigate \$30B Video Game Industry*, NBCNEWS (Nov. 28, 2018), <https://www.nbcnews.com/tech/tech-news/loot-boxes-gambling-video-games-ftc-look-it-n941256>.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.*

[t]wo researchers conducted a survey of more than 7,000 gamers and found “important links between loot box spending and problem gambling” and that gamers who displayed gambling and addiction issues typically spent more money on video game loot boxes. The researchers warned that “buying loot boxes may therefore lead to problem gambling amongst gamers.”¹⁹⁷

Currently, the Children’s Online Privacy Protection Rule (COPPA), “imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age.”¹⁹⁸ It deals with websites that advertise to children (whether through bright animated characters on the website or through a product itself) and aims to protect children from online predators and from data privacy issues that children may not be fully equipped to handle.¹⁹⁹ Politicians and parents alike are now arguing against loot boxes, stating that they should be regulated in order to help prevent children from falling into the trap of gambling in video games.²⁰⁰ “Tackling unlicensed third-party websites offering illegal gambling linked to popular video games is a priority,” stated the U.K.’s Gambling Commission, who has “urged the games industry and technology platforms to help stamp out such sites.”²⁰¹

Unfortunately, the underlying debate is whether or not loot boxes can even be considered gambling under the current definition. Gambling is “the betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident or have an unexpected result by reason of the bettor’s miscalculation.”²⁰² Though loot boxes seem to fit perfectly under this description, it is still up for debate on whether or not they actually qualify as gambling. Researchers have drawn parallels to the process of purchasing loot boxes in video games and casino/online gambling, but the

197. Pu, *supra* note 191.

198. *Children’s Online Privacy Protection Rule (“COPPA”)*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule> (last visited Feb. 9, 2020).

199. *See Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM’N (Mar. 20, 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>.

200. *Gambling and Gaming: Children as Young as 11 Betting Online*, *supra* note 187.

201. Kris Holt, *US and European Gambling Regulators May Crack Down on Loot Boxes*, ENGADGET (Sept. 17, 2018), <https://www.engadget.com/2018/09/17/loot-boxes-illegal-gambling-regulators-europe-us/>.

202. Dan Glimne, *Gambling*, ENCYCLOPEDIA BRITANNICA (Feb. 20, 2019), <https://www.britannica.com/topic/gambling>.

government has yet to fully commit to labeling the process as a true “gambling” activity.²⁰³

Governments should absolutely categorize loot boxes as gambling, and video gaming companies should be held responsible and accountable for ensuring that children are not involved in illegal gambling schemes. Video game developers profit off of selling their product to a wide general audience. Often times, the most popular games are those played by children under the age of thirteen.²⁰⁴ Though it can be argued that they cannot monitor every single customer who purchases their game or is involved with their online gameplay, more regulation to ensure that they are not promoting or facilitating such illegal activities should be put in place. If one goes on to YouTube or Twitch right now, it is very likely that one will find a gamer who sounds right around the age of eight cursing into his or her microphone attached to their headset while flying into a game of Fortnite. It is also highly likely that these children will have access to these loot boxes and will want to take their chances on purchasing one of them in hopes of receiving some rare commodity in the game that they can show off to their gaming friends and/or complete strangers they meet in the randomized level.

Understandably, video gaming developers can argue that they should not be asked to create a new version of their game for states that allow gambling and states that do not. However, in the grand scheme of things, it’s two separate types of downloads that can be programmed from the backend to play back in certain regions. We have this technology already set up with certain videos and streaming services,²⁰⁵ so why not implement it into a video game download? The gaming industry’s argument that the purchasing of loot boxes should not be considered gambling is quite difficult to take in. As previously defined, loot boxes require players to take a chance on a mystery box and then hope that the outcome is what they want.²⁰⁶ If not, they lose their money and cannot get it back without selling what they received from the original loot box.²⁰⁷ Though they do get some sort of item, at the bare bones of it, it is still a gamble, and it is still being done by children.²⁰⁸ It is

203. *Gambling and Gaming: Children as Young as 11 Betting Online*, *supra* note 187.

204. See Orla Meehan, *A Profile of the Battle Royale Player and How They Compare to Other Gamers*, NEWZOO (May 22, 2018), <https://newzoo.com/insights/articles/a-profile-of-the-battle-royale-player-and-how-they-compare-to-other-gamers/>.

205. See Claire Reilly, *Netflix VPN Access Locked Down for Overseas Users*, CNET (Jan. 4, 2015), <https://www.cnet.com/news/netflix-vpn-access-lock-down-over-seas-users-geoblock/>.

206. See *Gambling and Gaming: Children as Young as 11 Betting Online*, *supra* note 187.

207. See *id.*

208. See *id.*

past court precedent in just about every situation to protect our children. This should be no different.

The most recent ruling by the United States Justice Department “expands a federal prohibition on internet gambling,” stating that the “U.S. Wire Act bars all internet gambling that involves interstate transactions, reversing its position from 2011 that only sports betting was prohibited under the law passed fifty years earlier.”²⁰⁹ What does this mean for video gaming? Unless video game developers can create some kind of tracking device that ensures that none of these microtransactions are happening over state lines, it will have to come up with a solution to stop promoting activities such as skin betting and loot boxes, or perhaps they should just remove it altogether.

VI. CONCLUSION

The world of eSports and the ever-growing video gaming industry is becoming more difficult to avoid as a major arena left unregulated. Games such as Fortnite and Counter-Strike have created tournaments sponsored by some of the largest companies in the world that require contracts, salaries, and prizes like any other entertainment event. With this, however, comes a new responsibility to the public. Because video games operate on a digital platform and work in a world filled with glitches, Easter eggs, and other items/events that are difficult to predict and ward against, it will be an uphill battle to properly regulate the industry.

Drawing parallels to other industries such as the world of sports, it’s difficult to fully incorporate the rules associated with those categories with video games since video games operate on a fully digital platform. Further, with the lack of sufficient regulation around cyberworld issues such as bitcoin and cryptocurrency, data privacy, and cybersecurity, until the foundation of these regulations is set, it will be difficult to do a deep dive into a specific niche industry such as eSports.

Previously, courts have used past precedent and holdings in order to rule on current issues at hand. Unfortunately, the world of eSports and virtual gambling within video games cannot rely fully on these previous decisions due to the different arenas in which the two categories play. Like this comment has explored in detail, the differences between something as simple as whether or not video game athletes should be considered athletes at all proves to be more difficult to unfold than anticipated. Even the idea of microtransactions is so new that the use of bitcoins or different cryptocurrencies makes it difficult for anyone to trace or manage the transactions to begin with. When dealing with a world where there are multiple ways to hide, mask, and delete content, it’s even more difficult to create laws to ensure a fair playing field for everyone. Furthermore, it’s difficult to catch the bad

209. Edward Pettersson, *U.S. Online Gambling Reversal Puts ‘Chill’ on Industry*, BLOOMBERG (Jan. 14, 2019), <https://www.bloomberg.com/news/articles/2019-01-15/u-s-now-says-all-online-gambling-illegal-not-just-sports-bets>.

guys when they're using this technology to become more sophisticated in conducting their crimes.

It is challenging for the government to simply take over all of the data that is being outputted by these programs. Companies are allowed to keep their own data and are expected not to share their data with third parties. There have been a plethora of cases concerning data sharing and the Fourth Amendment issues surrounding search and seizures of a private citizen's information. The endless amounts of litigation that has surrounded the issue of whether or not law enforcement is allowed to seize the private data and use it to help prosecute someone even though they were browsing the web in the privacy of their own home has been up for debate and still walks a very thin line. Video games are no different in that they transmit data between different consoles via the world wide web. What one does on in the privacy of their own home playing their own video game console is strictly for their own knowledge—for now.

It would be wise for the courts to rule in favor of treating eSport players like traditional athletes—otherwise, the courts will have to work on creating whole new legislation surrounding video gamers and the tournaments in which they participate . As far as preventing wire fraud and money laundering, until the government can get a handle on the dark web and regulate cryptocurrency efficiently, the world of microtransactions may continue to grow in the criminal world as experienced criminals use it as a vehicle to disguise their activity since most of the repercussions will come in the form of fines and small slaps on the wrists until regulations are put in place. Finally, it would be no surprise if the government sped up their attempts at regulation once they realize children are involved in all of these activities and that the digital platforms they have encouraged to help the economy have negatively affected the minds of our future generations.