A Comparative Overview of eSports Against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating, and Gambling[[1]](#footnote-1)♦

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Introduction

In the modern age of technology, there is a type of sport that has rapidly risen to the forefront of both the entertainment and legal worlds: eSports.[[2]](#footnote-2) Until recently, the eSports market has been minor and insignificant.[[3]](#footnote-3) A variety of factors have contributed to the rapid rise of the eSports market, including the continued enthusiasm of the millennial generation for electronic entertainment systems.[[4]](#footnote-4) Today, the eSports market has become a multi-million dollar industry, as more governments and corporate entities acknowledge eSports as a legitimate market.[[5]](#footnote-5) Despite the rapid growth in the eSports market, the growth itself is not all positive. Similar to the challenges faced by the traditional sports markets such as football, soccer, and baseball, the eSports industry faces somewhat distinct challenges that are inherently tied to the growth of an industry.[[6]](#footnote-6)

This Note analyzes a few of the similarities and differences between the eSports industry and the traditional sports industry, utilizing the specific context of monetary exploitation, cheating, and gambling. One of the critical issues apparent from a comparison between the eSports industry and the traditional sports industry—through the lens of monetary exploitation, cheating, and gambling—is the lack of a centralized and established eSports governance structure in the United States.[[7]](#footnote-7) The dominant trend towards regulation has been through eSports organizations such as Twitch, ELEAGUE, Electronic Sports League (ESL), World eSports Association (WESA), and eSports Integrity Coalition (ESIC).[[8]](#footnote-8)

On an international level, different countries have addressed the lack of eSports governance and regulation in different ways.[[9]](#footnote-9) In the United States, while the government has applied the pertinent laws and regulations to industries such as the traditional sports industry, the unique characteristics of eSports, such as in-game gambling, have often left the eSports industry in a “legal gray area.”[[10]](#footnote-10) For this reason, this Note proposes a preemptive—rather than reactionary—adoption of governance in the United States by utilizing the similarities between eSports and traditional sports as a jumping-off point. Ultimately, this Note advocates for (1) the adoption of a governance system similar to the one adopted by France, wherein a reform known as the Digital Republic Bill recognizes eSports as a distinct entity and provides for industry-specific governance and regulations;[[11]](#footnote-11) (2) an adoption of legislation providing definitions and guidelines relevant to the very basic core of eSports; and (3) recommendations for states to adopt and select applicable regulations present in various European nations to develop legislations for eSports-specific issues.

Part I discusses the background surrounding eSports as a competitive sport and market and introduces the controversy surrounding the resistance in recognizing eSports as a sport. Part II focuses on the types of eSports currently active in the modern market and reveals the varietal scope eSports provides to the industry. Part III provides a comparative analysis between traditional sports and eSports within the legal realm of monetary exploitation, cheating, and gambling. Starting with monetary exploitation, Part III.A contrasts the unique characteristics of eSports with those of traditional sports in the realm of criminal fraud, identity theft, and in-game fraudulent exploitations; Part III.B compares the similarities and differences between the cheating occurring in both traditional sports and in eSports; Part III.C addresses the legal complications gambling poses in eSports versus traditional sports; and Part III.D attributes the gambling implications of eSports to the legal issues regarding loot boxes. A loot box is a consumable virtual box purchased with monetary currency that redeems randomized virtual items in video games. Part IV discusses the cultural differences between traditional sports and eSports and analyzes the shortcomings in the current eSports market. Finally, Part V analyzes the French government’s approach to eSports and its proposed Digital Republic Bill. Part V concludes with a proposal advocating for the United States to adopt a similar approach to France’s Digital Republic Bill in regulating the eSports industry, as well as legislation providing definitions and guidelines relevant to the very basic core of eSports. The proposal also recommends that states adopt and select applicable regulations present in various European nations as guidelines to approach eSports’ specific issues.

I. Background and the Resistance to eSports

eSports, in its modern state, consists of a series of competitive video game matches between individual competitors, or teams of competitors, in front of an audience.[[12]](#footnote-12) At times, the audience themselves participate in eSports. Some play with friends; some challenge themselves, and others root for their favorite eSports team. All of these participants are immersing themselves in the growing eSports community.[[13]](#footnote-13) In fact, today, “more people . . . watch major eSports competitions than . . . the NBA finals or [the] World Series.”[[14]](#footnote-14)

While the popularity of eSports continues to rise, growing controversy around the video game competitions’ use of the term sports in their name has quickly developed—namely, there has been an increasing debate over whether competitive video gaming should be considered a sport.[[15]](#footnote-15) The average person, when thinking about sports, generally associates the term with traditional athletic activities—i.e., baseball, football, soccer, basketball, etc.—and not sitting in front of a computer playing video games.[[16]](#footnote-16)

The term “sport” is defined as “an athletic activity requiring skill or physical prowess” that is “often of a competitive nature”—e.g., “racing, baseball, tennis, golf, bowling, wrestling, boxing, hunting, fishing, etc.”[[17]](#footnote-17) Beyond the traditional activities associated with the term “sport,” activities ranging from aerobics and cricket to indoor games like chess and darts, are also defined as sports.[[18]](#footnote-18) Although eSports is often left absent from the list of activities typically considered sports, competitive video gaming nevertheless falls within the term’s definition, and therefore should be recognized as a sport.[[19]](#footnote-19)

Competitive video gaming, while possessing distinct attributes that are unique from any other traditionally recognized sport, is too frequently overlooked—namely, eSports, rather than receiving proper recognition as an independent class of sports, is often misidentified as a “non-sport” activity.[[20]](#footnote-20) To many societies, eSports is simply the recreational enjoyment of an interactive, visual game.[[21]](#footnote-21) However, eSports is much more than children sitting in front of a computer and playing video games.[[22]](#footnote-22) Studies have shown that eSports meets all the requirements of the traditional definition of a sport.[[23]](#footnote-23) Felix Falk, the Managing Director of Bundesverband Interaktive Unterhaltungssoftware, an association representing German producers and publishers of interactive entertainment software, compares eSports players to regular athletes by stating, “[i]t is not only the motor activity, but it is also the social, cognitive activity that is involved in eSports.”[[24]](#footnote-24)

According to Falk, “[t]he motor activity is comparable with that of motor sports or chess, in which the motor activity is often not visible . . . eSport[s] athletes achieve something truly remarkable; with hundreds of clicks per minute they achieve things that are entirely comparable to athletes in other sports.”[[25]](#footnote-25) Furthermore, scientists at the German Sports University in Cologne have found that eSports athletes are exposed to similar physical strains as that of “normal” athletes.[[26]](#footnote-26)

Supporting Mr. Falk’s statement, Professor Ingo Froböse at the German Sports University states that eSports athletes achieve up to four hundred mouse and keyboard movements per minute.[[27]](#footnote-27) Professor Froböse claims that the coordination of both hands’ movements with various parts of the brain at the same time places a level of strain that scientists have never observed in any other sport.[[28]](#footnote-28) These astounding levels of strain allow eSports athletes to achieve a pulse rate of 160 to 180 beats per minute, which is equivalent to one’s pulse rate during a very fast marathon run.[[29]](#footnote-29)

From another perspective, traditional sports and eSports can be categorized under the broad scope of entertainment.[[30]](#footnote-30) The gaming world, contained under the overarching umbrella of entertainment, encompasses both physical sports such as traditional sporting activities like football and basketball, as well as mental sports such as chess and eSports.[[31]](#footnote-31) When considering eSports and chess analogously, it is easy to view eSports as a legitimate sport. Both activities lack the motor functions people associate with traditional sports. Further, both require the level of competitiveness, mental fitness, player ranking system, and behavioral code seen in traditional sports.[[32]](#footnote-32)

In the context of whether an activity is or is not a sport, chess and eSports differ only in the recognition given by the governments and the established leagues. While over a hundred countries have recognized chess as a sport,[[33]](#footnote-33) a few countries are yet to be swayed on labeling eSports as a sport.[[34]](#footnote-34)

Beyond the consideration of physical and technical skillset, eSports has had some historical presence as a potential sport for a few decades. The first video game competition was on October 19, 1972, at Stanford University.[[35]](#footnote-35) In 1981, Atari conducted a world championship event in Expo Center, Chicago for Asteroids, an arcade space shooter video game.[[36]](#footnote-36) While the Atari events were deemed a failure back in 1981[[37]](#footnote-37) and had not even been coined “eSports” yet, eSports has since come a long way.[[38]](#footnote-38) Ten years ago, only a small population knew about the term eSports.[[39]](#footnote-39) According to Newzoo, the eSports global audience has grown from 204 million to 292 million viewers between the years 2014 and 2016.[[40]](#footnote-40) Not only does Newzoo project that the eSports’ global audience will exceed 427 million by the end of 2019, but leading gamer Olof Kajbjer predicts that eSports viewership will be as high as that of the National Hockey League (NHL) in ten years.[[41]](#footnote-41)

This growth has been in part because of the profitability in the viewer market. With the launch of Twitch in 2011, a live streaming service for video gaming players to share with the masses, tournaments have had a reliable and efficient way of distributing the competition to the fan viewers.[[42]](#footnote-42) Live streaming video games has attracted hundreds of thousands of viewers daily, allowing for the growth in the eSports market.[[43]](#footnote-43) Twitch has become the streaming video service platform for nearly every major tournament, being integrated directly into the (i) software of new releases from video game publishers like Blizzard Entertainment and (ii) hardware of the Xbox One and PlayStation 4 systems.[[44]](#footnote-44)

While Twitch has been a major part of the growth in the eSports market, the overall advances in technology have also played a role in its growth over the past decade.[[45]](#footnote-45) According to the American Community Survey conducted by the United States Census Bureau in 2016, approximately 85.1% of American homes have some sort of a computer.[[46]](#footnote-46) Moreover, the broadband revolution (i.e., the widespread availability of high-speed Internet access) has reached an all-time high, allowing for faster Internet connectivity.[[47]](#footnote-47) In conjunction with the widespread availability of the computer and faster Internet connections in households, platforms like Twitch have given tournament promoters the perfect outlet to cheaply and easily push live streams to millions of viewers with minimal network delays.[[48]](#footnote-48)

II. Types of eSports

There is a wide range of traditional competitive sports in modern society.[[49]](#footnote-49) Americans generally favor sports such as baseball, football, and basketball,[[50]](#footnote-50) while sports like cricket and field hockey have been popular in Europe, Africa, Asia, and Australia.[[51]](#footnote-51) However, the most popular sport in most regions of the world is soccer, with an estimated fanbase of 3.5 billion people.[[52]](#footnote-52)

Nevertheless, the categories within eSports are also vast and expansive.[[53]](#footnote-53) While traditional sports are limited by the rigidity of athletic concepts, eSports has no such limits.[[54]](#footnote-54) The only requirements for a video game to become a viable competitive eSport are a mass following, a competitive nature, and a game developer creating the video game.[[55]](#footnote-55) In the year 2008 alone, 986 titles were created on Wikipedia that corresponded with video game releases.[[56]](#footnote-56) In March of 2016, on average, a new game was released for the PlayStation 4 every other day.[[57]](#footnote-57) Despite the extraordinary number of potential eSports video games released each year, only a small number of video games are entered into an eSports league.[[58]](#footnote-58) A few examples of the major video games within an eSports league include *DOTA 2*, *League of Legends*, *Counter-Strike: Global Offensive*, *Halo 5: Guardians*, *Heroes of the Storm*, *Overwatch*, *Call of Duty: Black Ops 3*, and *Hearthstone: Heroes of Warcraft*.[[59]](#footnote-59)

Similar to the wide range of traditional sports, there are a variety of eSports genres, with accompanying video games deemed competitive in the current eSports scene.[[60]](#footnote-60) While the list of video game genres is extensive, there are a few genres that are more popular and conducive to the competitive eSports framework. One distinctive eSports genre is the first-person shooter (FPS) genre.[[61]](#footnote-61) In 1997, the first FPS tournament—Red Annihilation—was held in the World Congress Center, in Atlanta, Georgia, for the FPS video game *Quake*.[[62]](#footnote-62)

Later that year, the Cyberathlete Professional League, one of the first major gaming leagues, held its first tournament offering fifteen thousand dollars in prize money.[[63]](#footnote-63) FPS games saw a tremendous rise in popularity with the flourishing of eSports after the turn of the millennium.[[64]](#footnote-64) In the year 2002, Major League Gaming was launched and is now regarded as the largest and most successful eSports league.[[65]](#footnote-65) Major League Gaming was also the first tournament to be televised in North America in 2006, with the video game *Halo 2* being shown on the USA Network.[[66]](#footnote-66) The science fiction FPS franchise *Halo* is a pillar of the FPS world, enticing players and spectators alike with its intense, fast-paced gameplay.[[67]](#footnote-67)

A second distinctive video game genre to enter the eSports scene is the real-time-strategy genre.[[68]](#footnote-68) While FPS games focused on players’ reflexes and instantaneous reactions, real-time-strategy games focused more on careful thinking and planning.[[69]](#footnote-69) For example, the game *Starcraft* offered “limitless strategic potential, flourishing and becoming one of the main driving forces of the eSports world, though it [did] not reach its peak in popularity until after the year 2000.”[[70]](#footnote-70) Although *Starcraft*’s popularity did not amount to television broadcasting in the United States, *Starcraft* matches were broadcasted on Korean television as part of a professional sports league within eighteen months of the game’s launch.[[71]](#footnote-71) The successor of Blizzard Entertainment’s *Starcraft*, *Starcraft II*, was launched in 2010 and continues to be the most prominent real-time-strategy game in eSports.[[72]](#footnote-72)

A third distinctive eSports genre is the multiplayer online battle arena[[73]](#footnote-73) (MOBA) genre. The key characteristics of the genre are (1) a top-down perspective and (2) a real-time-strategy game, where each player picks a hero character to form a team.[[74]](#footnote-74) Most of the popular MOBA games have a tower defense format with “creeps” and role-playing game elements.[[75]](#footnote-75) The first rendition of what would turn into the modern MOBA was the *Aeon of Strife* modification of Blizzard Entertainment’s *StarCraft* in 1998.[[76]](#footnote-76) Afterwards, a growing fanbase arose from the creation of the *Defense of the Ancients* modification of Blizzard Entertainment’s *Warcraft III: Reign of Chaos*.[[77]](#footnote-77) These modifications were made possible by Blizzard Entertainment’s map-editor, allowing for custom game development utilizing the real-time-strategy platform.[[78]](#footnote-78) Following the popularity of the *Defense of the Ancients* modification, video game mapmakers Meian and Ragnor consolidated all the modification versions of *DOTA* into one “All-Stars” map.[[79]](#footnote-79) Afterwards, video game modification creator Steve Freak, otherwise known as Guinsoo, streamlined “All-Stars,” and the resulting *DOTA Allstars* became a tremendous success.[[80]](#footnote-80)

The most recognized MOBA eSports are *DOTA 2* and *League of Legends*.[[81]](#footnote-81) Last year, fans and viewers watched 44.9 million hours of *DOTA 2* and 81.2 million hours of *League of Legends*.[[82]](#footnote-82) *DOTA 2* also had 16.8 million eSports hours, while *League of* *Legends* had 10.7 million eSports hours.[[83]](#footnote-83) Today, MOBAs have become enormously popular, as games such as *League of Legends* reach millions of viewers worldwide and have tournaments with prize pools of over five million dollars.[[84]](#footnote-84)

A final distinctive eSports genre is the fighting game genre.[[85]](#footnote-85) This genre consists of one-on-one video game matches[[86]](#footnote-86) where the players control a wide array of characters against one another, using attacks triggered through rapid sequences of button, mouse, or joystick movements.[[87]](#footnote-87) Fighting games frequently feature unarmed fighting, using highly exaggerated martial arts moves and extreme power.[[88]](#footnote-88) The match between the players consists of several rounds per fight in most competitive tournaments. Competitive fighting games require players to master techniques such as combos, which are a series of attacks the player’s character can string together, blocking and counter-attacking the opponent.[[89]](#footnote-89)

On the monetary side, in the 2017 Capcom Cup, the winner was set to receive a first-place prize of at least $120,000, with additional money through sales of special in-game downloadable content.[[90]](#footnote-90) E-Sports Earnings has listed several fighting game players’ earnings, ranging from $1000 to $449,342.20.[[91]](#footnote-91) While the fighting game genre does not have as large a viewership as other eSports genres,[[92]](#footnote-92) the fighting game genre is an eSports community ever growing with popularity.[[93]](#footnote-93)

III. Monetary Exploitation, Cheating, and Gambling

Similar to the world of traditional sports, the growing popularity and profitability has led to an increase in in-game monetary exploitation, cheating during matches and tournaments, and betting on the outcomes of eSports matches and tournaments.[[94]](#footnote-94) While both traditional sports and eSports experience similar transgressions such as cheating in and betting on tournaments, there are a few distinct differences between traditional sports and eSports in the realm of monetary exploitation, cheating, and gambling.

A. Monetary Exploitation in eSports

In-game transactions are one of the key distinctions between the eSports market and the traditional sports market. The majority of online multi-player video games have an in-game economy.[[95]](#footnote-95) Further, many of the online multi-player video games have a system allowing for a monetary conversion to a digital, in-game conversion.[[96]](#footnote-96) For example, video games under Valve’s Steam, a “pioneering game platform that distributes and manages thousands of games directly to [a] community of more than [sixty five] million players around the world,”[[97]](#footnote-97) have access to a community market where players can purchase and trade in-game items.[[98]](#footnote-98) Video games such as *DOTA 2*, *Player-Unknown Battlegrounds*, and *Counter-Strike: Global Offensive* have “skin” systems where players can obtain unique, visual graphics within the game, and trade, sell, or purchase them at the Steam Community Market.[[99]](#footnote-99)

While Steam allows players to purchase and sell their skins on the Steam Community Market for Steam Wallet Funds, third-party websites not affiliated with Steam have allowed access for players to purchase in-game items for real-world currency.[[100]](#footnote-100) Allowing the latter conduct by third-party websites poses several unique problems absent in traditional sports.[[101]](#footnote-101) First, there is a level of exploitation and fraud associated with utilizing third-party websites.[[102]](#footnote-102) Individuals seeking to exploit unwary players hide malware and other information-stealing Trojans known as “keyloggers” within third-party websites.[[103]](#footnote-103) In 2013, scammers began utilizing the gaming Trojan “Trojan.grolker” to steal both gaming and online banking credentials from compromised machines.[[104]](#footnote-104)

The in-game scams and fraudulent exploitation fall within the realm of criminal fraud and identity theft laws.[[105]](#footnote-105) Schemes to commit identity theft or fraud violate the identification fraud statutes, credit card fraud statutes, computer fraud statutes, and financial institution fraud statutes.[[106]](#footnote-106) The United Nations Office on Drugs and Crime issued a report reviewing cybercriminals’ methods for money laundering, concluding that online gaming is a key avenue for money laundering.[[107]](#footnote-107) The rise in virtual economies in online video games and gaming sites is a reason for this overlap between the online video game market and cybercriminals.[[108]](#footnote-108) In 2015, the United Kingdom’s National Crime Agency (NCA) was criticized for implying that teens who express interest in computer science as well as gaming could become cybercriminals in the future.[[109]](#footnote-109) While this theory is relatively new and contested, the idea that criminals start their careers with gaming is not unfounded.[[110]](#footnote-110) Online gaming platforms have massive user populations, hosting vast quantities of unsecure data and money. Further, “stealing bitcoins, identities[,] or even game levels from another gamer, for example, is far easier than taking money from a bank.”[[111]](#footnote-111) Accordingly, “cybercriminals essentially see online games as a way of making money—either by stealing and selling data, or convincing the user to hand over their bank details.”[[112]](#footnote-112)

Second, a more obscure market is the in-game competitive boosting market.[[113]](#footnote-113) There are numerous third-party websites that offer services for “boosting” in-game competitive rankings.[[114]](#footnote-114) The services entail either players who are paid in real-world currency playing on the payer’s account to raise an in-game competitive ladder, or the payer playing with a player paid in real-world currency to raise an in-game competitive ladder.[[115]](#footnote-115) The action of another player playing on the payer’s account violates many online video games’ terms of service.[[116]](#footnote-116) In addition, while a player who is playing with other players to raise an in-game competitive ladder does not violate the terms of use of many online video game publishers, the act of paying other players with real-world currency to play with them does violate the terms of use.[[117]](#footnote-117) Not only is the competitive integrity of an online video game tarnished,[[118]](#footnote-118) but also the payers are placing themselves at risk of other potential cybercrimes.[[119]](#footnote-119) By providing third-party websites with their online video game account information, payers are at risk of identity theft and the subsequent credit card frauds.[[120]](#footnote-120)

Not only are there potential risks associated with third-party websites, but also the Steam marketplace itself has numerous “scammers” within the its community.[[121]](#footnote-121) Despite the potential risks, players continue to seek third-party websites due to the ease in trading, purchasing, and selling in-game items.[[122]](#footnote-122) Much like the risks associated with providing account information to third-party competitive video game boosting websites, cybercrime is prevalent in these third-party Steam markets.[[123]](#footnote-123)

B. Cheating in eSports Competitions

Both the world of traditional sports and the world of eSports face complications with cheating. Cheating in traditional sports arises when athletes enhance their abilities with performance-enhancing drugs.[[124]](#footnote-124) The types of performance-enhancing drugs, otherwise known as “doping,” include blood boosters, diuretics, lean mass builders, masking drugs, painkillers, sedatives, and stimulants.[[125]](#footnote-125) The pay-off for using performance-enhancing drugs is incredibly high.[[126]](#footnote-126) A top athlete is rewarded in hundreds of millions of dollars, as well as paid incredible amounts by manufacturers for product endorsement.[[127]](#footnote-127) At times, being the top athlete in any sport is worth “[ten] to [hundred] times as much as being second.”[[128]](#footnote-128) Therefore, in a competition level where the majority of athletes are genetically blessed or practice for hours on end, top athletes have a strong incentive to seek any advantage available.[[129]](#footnote-129)

Similar to cheating in traditional sports, cheating during matches and tournaments has been rampant in competitive eSports.[[130]](#footnote-130) [E]Sports athletes are using performance-enhancing drugs such as Adderall to achieve “‘laser-like focus,’ faster reaction time and alertness, and the ability to predict what other players would do.”[[131]](#footnote-131) The Adderall abuse became significantly controversial following the abuse of the drug by players competing in the eSports tournament ESL One Katowice.[[132]](#footnote-132) Consequently, the Electronic Sports League has coordinated with the World Anti-Doping Agency to compile a list of prohibited drugs in eSports.[[133]](#footnote-133) The list of drugs banned from gaming competitions goes beyond the most applicable drugs like Adderall.[[134]](#footnote-134) By coordinating with the World Anti-Doping Agency, the Electronic Sports League has included the long list of prohibited drugs to the eSports world,[[135]](#footnote-135) including cocaine and steroids.[[136]](#footnote-136)

The eSports athlete’s incentive to use performance-enhancing drugs such as Adderall is similar to that of a traditional athlete. Much like the monetary incentive for traditional athletes,[[137]](#footnote-137) eSports athletes face massive prize pools and sponsor benefits for performing well in eSports tournaments.[[138]](#footnote-138) Furthermore, the monetary incentive for eSports athletes is amplified by the shorter time frame for which an eSports athlete is in his or her prime. While the average age of eSports athletes differs between the competitive video game platforms, the average age of competitors for many of the popular competitive eSports, as of September 2017, was in the low twenties.[[139]](#footnote-139) Comparatively, the average age of Major League Baseball (MLB) players is twenty-nine years old, the average age of National Hockey League (NHL) players is twenty-seven years old, and the average age of National Basketball Association (NBA) and National Football League (NFL) players is twenty-six years old.[[140]](#footnote-140) While, overall, the average age gap in numbers does not appear largely different, eSports players are significantly younger than their counterparts in other major sports.[[141]](#footnote-141) The reason behind this difference in age between eSports players and traditional athletes is scientific: the brain’s ability to react to stimuli peaks at the age of twenty-four.[[142]](#footnote-142) This peak is crucial, because the majority of eSports competitions hinge on the players’ reflexes.[[143]](#footnote-143) While a traditional athlete’s reflexes are important, the physical component within traditional sports allows for athletes to compete for longer periods of time.[[144]](#footnote-144) Accordingly, eSports athletes resort to cheating and using performance-enhancing drugs because of the shorter time-frame to fulfill the same monetary incentives offered in traditional sports. Much like how traditional athletes may resort to the use of performance-enhancing drugs to prolong their careers,[[145]](#footnote-145) eSports athletes may resort to the use of performance-enhancing drugs that allow them to stay competitive beyond the relatively short career length.

Beyond performance-enhancing drugs, a second form of cheating in eSports is the use of bugs and glitches, third-party programs, and modified gaming peripherals.[[146]](#footnote-146) The most prominent example of the use of bugs and glitches was during a Counter-Strike: Global Offensive tournament in 2014 between the two competitive eSports teams: Fnatic and Team LDLC.[[147]](#footnote-147) During the match, team Fnatic performed a three-man boost, the act of a player crouching his character to allow for another player to jump on top of the crouched player, allowing for player Olofmeister to view large portions of the map.[[148]](#footnote-148) ESPN author Kien Lam describes this exploit as analogous to basketball, where random, full-court, three-pointers rain from the rafters, and the opposing team cannot see the ball or determine where it is shot from.[[149]](#footnote-149) To make matters worse, rumors were abound that team Fnatic had known about this boost prior to the Dreamhack tournament, and yet kept it a secret.[[150]](#footnote-150) Ultimately, the Dreamhack tournament organization ruled that the exploitation of the boost was not intended to be a part of the video game map and therefore was illegal.[[151]](#footnote-151) Team Fnatic forfeited the match due to pressure from the eSports organization, sponsors, and fans.[[152]](#footnote-152)

While the exploitation of a bug within the game itself is deemed a form of cheating by organizations such as Dreamhack, many consider cheating to be in the realm of third-party software and modified gaming peripherals, the most prominent examples of which has been within the FPS category of eSports. Two common forms of third-party software cheating are aim-assist, otherwise known as aimbot or auto-aim, and wall-hacking.[[153]](#footnote-153) The cheat of aim-assist consists of a third-party software identifying where an opposing player is and targeting the opposing player without the help of the user.[[154]](#footnote-154) Essentially, the aim-assist allows for the user to aim faster and more precisely than a human being’s reflex. In the realm of first-person shooters, aim-assist ensures players a higher chance of winning by eliminating the human error in having to aim within the video game. The cheat of wall-hacking consists of a third-party software allowing players to see opposing players through the in-game walls.[[155]](#footnote-155) This cheat grants users a greater strategic and situational advantage in FPS games, because the user will know where the opposing players are and where they are going within the in-game map. Interestingly, also, the third-party software of aim-assist is in itself a viable wall-hack, as the user will lock onto opposing players through walls, indicating the direction the opposing players are located.

The use of these third-party software cheats has been most commonly observed in the Counter-Strike: Global Offensive tournaments.[[156]](#footnote-156) Prior to the Dreamhack Winter 2014 tournament, one of Counter-Strike: Global Offensive’s major tournaments, two professional eSports players Hovik “KQLY” Tovmassian and Gordon “Sf” Giry were banned by the Valve Anti-Cheat System (“VAC”).[[157]](#footnote-157) Further, Joel “EmiliOooo” Mako was banned during a live competitive match between Ukrainian team HellRaisers and Swedish team Property.[[158]](#footnote-158) Viewers and competing players alike were stunned when the console message appeared informing the players within the FragBite Masters tournament that Mako had been VAC banned.[[159]](#footnote-159)

This form of cheating is comparative to rare instances in traditional sports where athletes obtain an unfair advantage from their equipment. One of the most infamous incidents is the “Dis-Onischenko” incident from the 1976 Olympics in Montreal.[[160]](#footnote-160) Olympic Fencing “bouts” are competitions between two masked opponents using one of three kinds of weapons: the epée, the foil, or the sabre.[[161]](#footnote-161) In order to obtain points, the competitors’ swords and the scoring areas of the body are connected by a body cord and are electronically sensitive.[[162]](#footnote-162) The electronically sensitive connections allow for strikes to emanate an audible tone and illuminate a light indicating the contact.[[163]](#footnote-163) During the 1976 Olympics, Soviet fencer Boris Onischenko attempted to exploit the Olympics fencing system by re-wiring his epée’s electronic sensing technology, tricking the system into registering strikes when none actually occurred.[[164]](#footnote-164) Similar to pressing the aimbot key in eSports, “[a]ll [Onischenko] had to do was make it look like he may have struck his opponent, flick a switch hidden in the handle of his weapon, and voilà—a touch!”[[165]](#footnote-165)

C. Gambling in eSports

Finally, gambling is a major occurrence in eSports as is within traditional sports. In traditional sports, one of the controlling federal gambling laws has been the Professional and Amateur Sports Protection Act of 1992 (PASPA).[[166]](#footnote-166) PASPA banned states, outside those given exemptions, from regulating and taxing sports betting.[[167]](#footnote-167) Historically, PASPA had essentially limited sports betting to the state of Nevada.[[168]](#footnote-168) However, the United States Supreme Court held in *Murphy v. National Collegiate Athletic Association* that PASPA was a legislative overreach by the federal government, claiming “Congress had ‘commandeered’ state regulatory power by prohibiting states from legislating the issue.”[[169]](#footnote-169) As a result of the Supreme Court’s decision in *Murphy*, the Supreme Court has outlawed PASPA’s prior prohibition on states from sponsoring sports gambling, and allows the states to establish their own sports-betting laws.[[170]](#footnote-170)

The Supreme Court’s decision in *Murphy* was supported by many in the traditional sports industry who viewed the federal gambling laws as “obsolete” in the new age of technology.[[171]](#footnote-171) Prior to the Supreme Court’s decision in *Murphy*, U.S. Representative Frank Pallone, Jr. from New Jersey stated, “[t]he laws need a wholesale review to see how they can actually work together and create a fairer playing field for all types of gambling, both online and offline, including sports betting and daily fantasy sports.”[[172]](#footnote-172) One of the key concerns is that the laws and regulations ensure an environment of integrity, accountability, and strong consumer protections.[[173]](#footnote-173) This concern arises from Americans finding ways to bet on sports.[[174]](#footnote-174) Despite past prohibitions by legislations such as the PASPA, the American Gaming Association estimated $149 billion was bet illegally on sports in the U.S. in 2015.[[175]](#footnote-175) In stark contrast, on the regulated side, the American Gaming Association estimated $4.3 billion was bet in 2015 at Nevada’s regulated sportsbooks.[[176]](#footnote-176)

Offline eSports betting and gambling is constrained to the same legality as any other form of betting in traditional sports like football, basketball, and baseball.[[177]](#footnote-177) The intersection in the online and gambling worlds is where sports betting in traditional sports and eSports overlap. According to John McManus, executive vice president and general counsel for MGM Resorts International, “[online]’s where people are going to want to place bets. That’s where it makes sense to place bets and to be done safely.”[[178]](#footnote-178) Research from GamblingCompliance projects that a fully mature and widespread online sports betting market in the United States would be the largest market in the world.[[179]](#footnote-179)

Before the Supreme Court’s decision in *Murphy*, the United States government had effectively banned online betting on a federal level.[[180]](#footnote-180) While traditional sports betting had been largely prohibited in the online sphere pre-*Murphy*, eSports did not face the same prohibitions due to a technological loophole that had allowed for questionable betting and gambling.[[181]](#footnote-181)

The eSports online betting and gambling loophole was previously mentioned in Part III.A, involving the sale of virtual items or cosmetic skins utilizing third-party websites rather than Valve’s Steam marketplace.[[182]](#footnote-182) Third-party websites allow for players to not only sell and purchase cosmetic skins for online video games, but also bet and gamble in-game virtual items.[[183]](#footnote-183) Some websites allow users to bet and win in-game cosmetic items while playing online poker.[[184]](#footnote-184) Other websites have similar functions to sports betting in traditional sports where users can bet in-game virtual items on the outcome of the matches.[[185]](#footnote-185) An example of an online in-game virtual item betting venue is CS:GO Lounge, a third-party website unaffiliated with Valve, a popular betting site for Counter Strike: Global Offensive in-game virtual items.[[186]](#footnote-186)

Before the Supreme Court’s decision in *Murphy*, the illegality of online betting and gambling websites like CS:GO Lounge was clear. Publishers such as Valve issued cease and desist orders to over twenty different gambling sites, stating that the third-party websites using Valve’s Steam accounts were in breach of the terms and conditions of Steam’s subscriber agreements, prohibiting accounts from commercial use.[[187]](#footnote-187) As a result of the pressure and the legal implications of unregulated gambling, CS:GO Lounge, a once popular third-party betting website, ceased its betting feature in the summer of 2016.[[188]](#footnote-188) In a post-*Murphy* and PASPA world, the Supreme Court has left the decision to establish sports betting laws to the states.[[189]](#footnote-189) As a result, the task of addressing and regulating eSports betting and gambling is left to the states.

There are not many legal precedents on virtual item betting and gambling.[[190]](#footnote-190) One case involving virtual item gambling is *Mason v. Machine Zone*. In *Mason*, plaintiff Mia Mason alleged that Machine Zone, Inc., the producer of the popular *Game of War: Fire Age* mobile video game violated California Penal Code §330(b) regarding gaming.[[191]](#footnote-191) *Game of War: Fire Age* is a mobile game that allows players to build a pixilated empire, construct cities, build armies, and raid neighbors.[[192]](#footnote-192) A feature within this game is a virtual wheel that players can spin for virtual prizes in a virtual casino.[[193]](#footnote-193) Players can purchase “gold” to obtain “chips” to gamble in the game’s casino.[[194]](#footnote-194) The plaintiff purchased a hundred dollars’ worth of casino gold for which she brought suit under Maryland Code, Criminal Law §12-110: Maryland’s Loss Recovery Statute to recover the money she lost at prohibited gaming.[[195]](#footnote-195) According to the plaintiff, Machine Zone had rigged the odds of the virtual wheel.[[196]](#footnote-196) The Fourth Circuit Court of Appeals dismissed the suit, agreeing with the district court’s ruling against the plaintiff, asserting that she had not actually lost money as required by Maryland’s Loss Recovery Statute.[[197]](#footnote-197) Furthermore, the Fourth Circuit reasoned that the Maryland Statute’s reference to money could not be read to encompass virtual game goods like gold or wood.[[198]](#footnote-198) According to the Fourth Circuit, because the game does not offer payouts of real-world money, “Mason paid money to obtain virtual gold, which she later used to accrue virtual chips. . . . [W]hen Mason participated in the virtual casino, she used only virtual chips, which are not redeemable for money. Thus, when Mason ‘spun’ the virtual wheel, there was no money at stake.”[[199]](#footnote-199)

Despite the dissimilar in-game structure between *Counter-Strike: Global Offensive*’s skin gambling and *Game of War: Fire Age*’s virtual wheel, the importance of the Fourth Circuit’s holding in *Mason* is that the court did not give much weight to the secondary markets that exist for selling *Game of War* accounts for real-world money.[[200]](#footnote-200) According to Bryce Blum, founder of ESG Law, there is a likelihood that skin gambling will be considered gambling by law, because the secondary markets are prominent and permitted to exist and skins have a widely known value.[[201]](#footnote-201) Further, according to Jeff Ifrah, founding partner of Ifrah Law and a gaming law expert, virtual items in the form of skins or other digital items of value would fall under gambling, because virtual items, much like traditional gambling cases involving cash or chips, are “things of value.”[[202]](#footnote-202) Both Blum and Ifrah conclude that while betting does not necessarily need to be banned in all forms, it needs more regulations and protections for participants.[[203]](#footnote-203) The viewpoint on online eSports gambling by both Blum and Ifrah parallels that of the pre-*Murphy* era and, arguably, the current motivations for offline gambling state regulations in traditional sports (i.e., the need to protect the participants).

D. Loot Boxes in the World of eSports

One of the more recent questions posed in the eSports online sphere is whether in-game “loot boxes,” virtual “lucky-dip boxes that cost real money and yield random virtual rewards,” are considered gambling.[[204]](#footnote-204) This concept of loot boxes, and its similar nature to traditional gambling, is unique to the world of eSports. Much like the problems associated with eSports skin gambling, courts are beginning to adapt and rule on loot boxes utilizing the regulations of traditional sports gambling.[[205]](#footnote-205) Despite the recent legal implications, loot boxes are not a new concept in the world of online video games.[[206]](#footnote-206) A loot box, from a business and economic perspective, is simply another avenue for video game developers and publishers to obtain wealth and income after the sale of a video game. This is in line with the expansion pack business approach. Expansion packs suggest an expansion of a pre-existing video game or purchasable extra content for that video game.[[207]](#footnote-207) In the past, video games did not have Internet connections or weekly updates, as they do today.[[208]](#footnote-208) Consoles such as Super Nintendo, Sega Genesis, Nintendo 64, and the PlayStation provided games and content that were unchangeable once purchased.[[209]](#footnote-209) However, the concept of purchasing additional content for video games can be traced back to the early 1980s. For example, in 1982, Epyx, Inc. released the *Upper Reaches of Apshai* expansion for their dungeon adventure game *Dunjonquest*.[[210]](#footnote-210) By the mid-1990s, expansion packs became more viable for companies and appealing to gamers.[[211]](#footnote-211) Companies such as Blizzard Entertainment brought expansion packs to popularity in 1996 with the expansion pack *Warcraft 2: Beyond the Dark Portal*.[[212]](#footnote-212) Today, Blizzard Entertainment is well known for providing expansion packs to its popular MMO video game *World of Warcraft*.[[213]](#footnote-213) Valve is another video game company known for its numerous content additions and modifications to its games, starting with its video game *Half-Life* in 1998.[[214]](#footnote-214) Most notably, the *Counter-Strike* expansion, although technically a modification, has given rise to many in-game expansions labeled as “operations.”[[215]](#footnote-215)

In modern terminology, the in-game expansions for *Counter-Strike* are more akin to downloadable content, otherwise known as DLCs.[[216]](#footnote-216) The current growth trend of DLCs parallel that of high speed Internet.[[217]](#footnote-217) Further, with the ease of access and user interface from video game platforms such as Xbox Live, PlayStation Network, Blizzard Entertainment’s battle.net, Valve’s Steam, and Electronic Arts (otherwise known as EA Origin), video game producers and publishers can increase their digital distribution.[[218]](#footnote-218) Accordingly, “with the increasing accessibility on both PC and consoles, it [is now] much easier to simply open a menu in-game and [pay a few dollars to purchase downloadable content], a [sort of] impulse buying that was largely unseen before Steam, Xbox Live[,] and other services of [similar] nature.”[[219]](#footnote-219)

Lately, video game publishers have been marketing desirable in-game extra content utilizing randomly generating loot boxes.[[220]](#footnote-220) Players are presented with the opportunity to spend real money in exchange for an in-game loot box that randomly generates desirable in-game items.[[221]](#footnote-221) Video games such as Blizzard Entertainment’s *Overwatch* allow players to directly purchase these loot boxes under an in-game menu.[[222]](#footnote-222) Other games such as *Counter-Strike: Global Offensive* require players to purchase a key for real money in order to open the loot box for the randomly generated in-game item.[[223]](#footnote-223)

Many players dislike the digital loot box because of the cost associated with the randomness.[[224]](#footnote-224) Players dislike the fact that they must “[b]uy an unknown number of keys or crates until [they] get lucky and find something [they] wanted or needed.”[[225]](#footnote-225) Worse is the video game developer’s shift from loot boxes containing items strictly cosmetic in nature to items that are game changing.[[226]](#footnote-226) As a result, loot boxes have essentially become “pay-to-win” random generators, as the game changing items obtained from loot boxes give players a winning advantage in the video game.[[227]](#footnote-227) This, in turn, becomes a question of whether the use of loot boxes constitutes gambling. The strategy of traditional sports betting and gambling is present: “[t]he best way to keep someone playing a game is to give [her] a powerful reward or major upgrade on an irregular time schedule.”[[228]](#footnote-228) Lotteries and gambling exploit this strategy in order to entice players to continue playing.[[229]](#footnote-229) Video game developers have also applied this strategy to loot boxes. Video game consumers and players are drawn to purchase multiple loot boxes in order to obtain the items they desire, because the loot boxes contain random items and may contain duplicate items.

This concern over whether loot boxes function as gambling instruments has come to the forefront following EA’s *Star Wars: Battlefront II* video game.[[230]](#footnote-230) Players were furious over the notion that they had to purchase a sixty- to eighty-dollar video game and compete against those who had purchased additional advantageous in-game items.[[231]](#footnote-231) Unlike those loot boxes that offer purely cosmetic items, the loot boxes in *Star Wars: Battlefront II* provided “players anything from a strong power-up or rare item, to an essentially worthless item, like a dance emote for a character.”[[232]](#footnote-232) This aspect of paying to play without knowing what the player will get from a loot box has not only created an unfair imbalance in the multiplayer matches that are now encouraging a pay-to-win structure, but also has made the players furious at the notion of having to spend real money on essentially a random lottery.[[233]](#footnote-233) As a result of the uproar over the *Star Wars:* *Battlefront II* loot box system, the Belgian Gaming Commission has ruled that because players paid money and received a random reward, the loot box system could fall under the purview of gambling regulations.[[234]](#footnote-234)

In the United States, Hawaii State Representative Chris Lee has publicly announced his efforts to pass legislation regulating video game loot boxes.[[235]](#footnote-235) Describing the sale of video games with loot boxes as “predatory practices in online gaming,” Representative Lee specifically condemned EA’s *Star Wars:* *Battlefront II* as a “Star Wars-themed online casino.”[[236]](#footnote-236) Further, Representative Lee cited medical experts and psychologists who study gambling to show the addictive gambling mechanisms that game makers are exploiting with the sale of loot boxes.[[237]](#footnote-237) Representative Lee seeks similar regulation of loot boxes as those of casino gambling, with in-game purchases of randomized loot boxes restricted to players who are twenty-one years of age or older, the age Representative Lee feels consumers are less psychologically vulnerable to the addictive nature of gambling.[[238]](#footnote-238)

Following the backlash against video game loot boxes in Hawaii, the efforts to pass regulations for and impose restrictions on in-game loot boxes have garnered the attention of several state legislators, including those from Connecticut, North Carolina, Georgia, and Minnesota.[[239]](#footnote-239) In the state of Washington, three democratic senators introduced a bill that requires the Washington State Gambling Commission to examine loot boxes and determine whether the mechanisms are considered gambling under Washington laws.[[240]](#footnote-240) The Washington bill, much like Hawaii Representative Lee, focused on the question of whether children, who may be more vulnerable to gambling addiction, should be allowed to access games with options to purchase randomized loot boxes.[[241]](#footnote-241) The bill further addressed the question of transparency surrounding randomized loot boxes in video games following Apple’s update of its App Store payment section in December 2017, which required all games and applications utilizing random-item systems, such as loot boxes, to “disclose the odds of receiving each type of item to customers prior to [their] purchase.”[[242]](#footnote-242) Considering the relatively young age range of players in both professional eSports[[243]](#footnote-243) and casual eSports,[[244]](#footnote-244) the fears of Hawaii Representative Lee and the Washington State democratic senators are reasonable.

IV. The Cultural Phenomenon and the Future of eSports

There are clear legal issues arising from the unique characteristics of eSports. The question remains, when compared to the challenges faced by traditional sports, how do the unique challenges the eSports industry faces impact the future of eSports?

There is little economic resistance to the growth in the eSports industry. It is clear from the large tournaments and prize pools associated with it that the eSports market is profitable.[[245]](#footnote-245) Its popularity is present and ever-growing, as both its profitability and cultural backing are recognized by investors. Facebook, although allegedly not interested in paying for live sports video content, is looking into pushing and promoting eSports against the established Twitch streaming service.[[246]](#footnote-246) In May 2017, Facebook had contracted with eSports contest organizer ESL to obtain the contractual rights to live stream over 5,500 hours of eSports events and 1,500 hours of exclusive content on its social network.[[247]](#footnote-247) In addition, the NBA announced in 2016 that it was teaming up with Take-Two Interactive Software, the creators of the *NBA 2K* basketball video game, to create a new eSports league.[[248]](#footnote-248) The inaugural season of the *NBA 2K* League began on May 1, 2018, with the Knicks Gaming winning the championship in August of last year.[[249]](#footnote-249)

The cultural integration of interactive video games into society is another major contributor to the future of the eSports industry. People born into a particular culture generally immerse themselves in its values and behaviors and consider its built principles the norm.[[250]](#footnote-250) Traditional sports have been heavily integrated into the educational structure of most countries.[[251]](#footnote-251) In the United States, most elementary schools, middle schools, high schools, and colleges have clubs and sports teams revolving around traditional sports.[[252]](#footnote-252) While traditional sports dominate the educational structure in the United States, eSports clubs have begun to emerge and establish themselves, most notably in the collegiate clubs and tournaments.[[253]](#footnote-253) Contributing to the emergence of eSports in the education structure is the fact that the millennial generation has grown up participating in and watching eSports as its cultural norm.[[254]](#footnote-254) According to Jens Hilgers, the eSports community “needed an audience for which eSports was natural, not alien[:] [a]n audience of millennials that would grow up with computer games and accept eSports as a part of [its] culture.”[[255]](#footnote-255) Even though ethnocentrism, the judging of another culture solely by the values and standards of one’s own culture, has been a hurdle for eSports to fully integrate into the U.S. culture, the younger millennial generation’s familiarity with computer games has facilitated the push for a change in the mainstream attitude towards cultures like eSports.[[256]](#footnote-256)

One of the hindrances to the growth in eSports appears to be the lag in laws and regulations that prohibit exploitation, cheating, and gambling in eSports. With respect to traditional sports, most governments have recognized the economic and social function that they serve.[[257]](#footnote-257) Despite the conflicts between sports organizations’ rules and regulations and governmental laws,[[258]](#footnote-258) athletes have rights and obligations deriving from both avenues,[[259]](#footnote-259) which provide for a governing body that legitimizes traditional sports and remedies problems such as corruption, doping, and match-fixing.[[260]](#footnote-260)

Traditional sports and eSports are different in some respects, due to certain unique attributes of eSports. As such, while the laws and regulations applied to traditional sports can similarly apply to eSports in some respects, in others, we need new laws.

For example, consider the methods of monetary exploitation and online gambling issues surrounding eSports.[[261]](#footnote-261) Unfortunately, the laws surrounding traditional sports in these respects are incompatible with the unique characteristics of eSports. While courts have readily applied existing criminal fraud and identity theft laws to address in-game and online-gaming fraudulent exploitations,[[262]](#footnote-262) it is unclear how they would address the in-game competitive boosting market, which is unavailable in traditional sports.[[263]](#footnote-263)

It is the unique online nature of certain eSports events that allows for players to profit from in-game competitive boosting.[[264]](#footnote-264) While this behavior is clearly against the integrity of competitive sporting events, the only violation occurring is with respect to the video game publisher’s terms of service.[[265]](#footnote-265) Although a monetary fraud has been committed against all the competitors participating in the event, it is yet judicially undecided what damages one must pay for such monetary fraud. One reason is that courts have not yet determined the value of virtual in-game prize pools. This is evident in the difficulty of acknowledging virtual items as having monetary value in *Mason*.[[266]](#footnote-266) Without such legal clarification and understanding, the growth in the eSports industry has become hindered, as the laws and regulations lag behind.

The lag in the laws and regulations behind the rapid growth in the eSports industry is further exemplified by the question regarding loot boxes as a gambling tool. Loot boxes have been around in the physical world since the early 1990s in the form of collectable trading cards.[[267]](#footnote-267) The leap to the online world occurred in 2006 when Chinese free-to-play *MMO ZT Online* pioneered virtual treasure boxes, containing in-game items worth more than the boxes themselves.[[268]](#footnote-268) Similar to the virtual wheel in *Game of War: Fire Age*’s casino,[[269]](#footnote-269) *MMO ZT Online* featured a circle reminiscent of the one in *Wheel of Fortune*, showing players all the loot they could obtain from a loot box.[[270]](#footnote-270) Despite the decade-long history of loot boxes within the online eSports industry, it was only recently with *Star Wars: Battlefront II* that the legal world started addressing the possibility of loot boxes falling under the realm of gambling.[[271]](#footnote-271) Although EA relented to the public outcry against its randomized loot box system within *Star Wars: Battlefront II*, the popularity and profitability of loot boxes in online eSports likely means they will continue to be prevalent in future video games.[[272]](#footnote-272)

When comparing and contrasting between eSports and traditional sports in the realm of monetary exploitation, cheating, and gambling, it appears as though the legal approaches taken are highly inefficient where the unique characteristics of eSports diverge from traditional sports.[[273]](#footnote-273) This inefficiency is visible in *Mason*, where the court did not define the notion of virtual value, a concept inherently integrated in almost all commercial eSports,[[274]](#footnote-274) but rather relied on the traditional notions of monetary value in their analysis.

The court’s reasoning in *Mason* is not to suggest that the current laws and regulations have been entirely inefficient. In fact, they have been proficient in governing areas where eSports and traditional sports overlap. As previously analyzed, the existing criminal fraud and identity theft laws are effective in identifying and regulating monetary exploitations in eSports. In addition, the existing laws and regulations readily apply to both eSports and traditional sports in regards to cheating.[[275]](#footnote-275) Furthermore, monetary incentives exist for both traditional sports athletes and eSports athletes,[[276]](#footnote-276) and both traditional sports and eSports industries have recognized the implications of using performance-enhancing drugs.[[277]](#footnote-277)

Beyond the use of performance-enhancing drugs, eSports has also seen the rise of bugs and glitches, third-party programs, and modified gaming peripherals as additional forms of cheating.[[278]](#footnote-278) These forms, which change the integral competitive aspect of the game itself, are unique to the characteristics of eSports. The world of traditional sports has rarely seen athletes using modified equipment.[[279]](#footnote-279) Regardless, both traditional sports and eSports organizations have created regulations prohibiting the use of modified equipment and performance-enhancing drugs, as well as disqualifying and banning athletes from participating in their respective sports if caught cheating.

V. Proposal: Looking to Foreign Laws as a Model

Ultimately, the issue arises when the courts and legislatures utilize inapplicable laws to the unique characteristics of eSports, not when the courts apply existing laws to comparable practices in eSports and traditional sports. While state initiatives to characterize loot boxes as a form of gambling in Hawaii, Washington, Connecticut, North Carolina, Georgia, and Minnesota are a tremendous first step,[[280]](#footnote-280) they only target a small portion of potential issues in eSports.[[281]](#footnote-281) For example, they will not cover areas such as in-game skin exploitation. This Note proposes that the United States requires a broader, more encompassing set of legislation in order to cover the wide scope of transgressions occurring within the eSports industry. An example and a possible guideline for the set of regulations much needed in the United States is France’s Digital Republic Bill.[[282]](#footnote-282)

The underlying support behind the French Digital Republic Bill is the enormity of France’s eSports market.[[283]](#footnote-283) As a result, the French Digital Republic Bill pursues clarity and regulations covering all digital technologies in modern-day France.[[284]](#footnote-284) The French Digital Republic Bill lists three broad objections: (1) wider data and knowledge dissemination, (2) equal rights for Internet users, and (3) fraternity through an inclusive digital society. However, the bill also provides two decrees, which create a regulatory framework specific to eSports competitions and eSports labor contracts.[[285]](#footnote-285)

Adopted on May 9, 2017, “[t]he First Decree aims at framing the rules applicable for the organization of official eSports competitions.”[[286]](#footnote-286) Previously, the issue faced by eSports organizations in France was that traditional French gambling laws forbade eSports organization of any game or competition.[[287]](#footnote-287) Now, the First Decree provides a clear legal framework for the organization of eSports competitions.

The Second Decree details the conditions for accreditation by eSports organizations to hire eSports players.[[288]](#footnote-288) Currently, the Digital Republic Bill provides for the creation of an eSports contract in France, but the creation is “expressly reserved to accredited companies or associations.”[[289]](#footnote-289) However, the Second Decree provides further that in order for professional teams and leagues to hire an eSports player, they need to be accredited by the French Minister responsible for the digital industry.[[290]](#footnote-290) The requirements set forth by the Second Decree’s accreditation process include training, mental and physical supervision of players, and “[a] description of the means used to minimize risks posed by the profession.”[[291]](#footnote-291)

They United States needs a similar set of guidelines as proposed by France’s Digital Republic Bill to govern the eSports industry. By adopting and creating legislation similar to the First Decree, the United States will be able govern and ensure integrity in eSports events and competitions. Furthermore, by adopting and creating legislation similar to the Second Decree, the United States will be able clearly regulate eSports player contracts.

This Note also proposes legislation that establishes the definitions and guidelines relevant to the very basic core of eSports. The legislation must clearly define the terms and statuses of the eSports players, the eSports technological terminology, and the terminology commonly used in modern eSports. For example, the legislation must detail the definition of transgressions in the context of monetary exploitation (e.g., offensive conduct utilizing in-game items of value), cheating (e.g., the use of in-game assistance or advantageous peripherals), and gambling (e.g., the use of randomized loot boxes). Without such legislative guidelines, courts will continue to rule either with uncertainty, ignorance, or avoidance of specific concepts unique to eSports, such as the notion of value in a virtual item.[[292]](#footnote-292) Furthermore, without legislative guidelines specific to eSports and in the contexts of monetary exploitation, cheating, and gambling, courts will continue to react to the new innovations set by eSports, potentially utilizing inapplicable laws created for traditional sports and gambling. An eSports-specific guideline with set definitions will assist legislatures and courts in making informed laws and rulings on eSports-specific issues. Although the defined terminology and usages may likely shift, as the world of eSports is constantly evolving with advances in technology, the initial eSports specific guidelines will provide a basis for future amendments.

As a final consideration, this Note proposes the states adopt select, applicable regulations present in European nations as guidelines for issues specific to eSports. Take, for example, the gaming legislations in Spain and Italy. In Spain, the Spanish Gaming Act regulates gaming, including forms of sports gambling and betting.[[293]](#footnote-293) This act provides that online games played at the national level require a federal license or authorization, and games (including online games) played within a specific region require the relevant license of that region.[[294]](#footnote-294) The Spanish Gaming Act provides no specific regulations for mobile gambling and interactive gambling.[[295]](#footnote-295) As for social gaming, the act distinguishes games of pure skill from those of chance.[[296]](#footnote-296) Essentially, this act places games of pure skill outside the realm of gambling but regulates gambling in games with three components: chance, pay-to-play, and the existence of a prize.[[297]](#footnote-297)

In Italy, the Civil Code Provisions and the national gaming authority Agenzia delle Dogane e dei Monopoli (ADM) are the controlling bodies of legislation for gaming, and in turn sports gambling and betting.[[298]](#footnote-298) Similar to the Spanish Gaming Act, Italy’s Civil Code Provisions and the ADM distinguish and divide games into categories of luck, chance, and skill.[[299]](#footnote-299) Italian laws forbid games of luck, but games of skill are fully legal and regulated.[[300]](#footnote-300) Much like the Spanish Gaming Act, the Italian laws provide no specific regulations for mobile gambling and interactive gambling, and simply apply existing rules for remote gambling facilities.[[301]](#footnote-301) Furthermore, Italian laws do not provide specific regulations for social gaming, daily fantasy sports, and electronic sports,[[302]](#footnote-302) unless real money is involved in the prize mechanism.[[303]](#footnote-303)

The Unites States could utilize Spain’s and Italy’s gaming legislations as guidelines to regulate eSports. For example, the United States could pass federal legislation dividing eSports into two groups: social gaming or mobile gambling and interactive gambling. By dividing eSports into specific categories, the United States can implement category-specific legislation akin to that of Spain and Italy’s gaming legislations. Furthermore, the United States could pass federal legislation regulating sports and eSports gambling, while incorporating the Spanish Gaming Act’s structure for licensing with specific regions with that of the United States’ individual states. By utilizing a region, or a state in the instance of the United States, the United States can maintain state sovereignty while imposing broader regulatory guidelines. Additionally, the United States could provide effective guidelines for regulating eSports-specific gambling issues by adopting clear definitions, such as those under Italian laws, for online betting. Using a similar approach to the Italian laws by distinguishing games of skill from games of luck and chance, the United States could provide a framework within eSports-specific structures to resolve the luck and chance factors. As addressed in Section III.D, loot boxes, which are inherently random, can be treated as “games of luck.”[[304]](#footnote-304) In contrast, placing bets on eSports competitions requires bettors to assess the probabilities of competitors winning and would therefore be considered a “game of skill.” By adopting a clear and concise guideline akin to Spain’s and Italy’s, the United States may be better equipped to address and regulate emerging issues in eSports.

In addition to Spain and Italy, other European countries have also developed policies and regulations to address eSports.[[305]](#footnote-305) For example, the Netherlands and Sweden have established state-approved eSports associations.[[306]](#footnote-306) In the United States, post-*Murphy*, state governments could greatly benefit from utilizing the same practices.

Conclusion

The lack of a governing regulatory body in eSports has implications beyond the monetary exploitation, cheating, and gambling issues addressed in this Note. The proposal for legislation akin to France’s Digital Republic Bill and legislation providing the definitional basis for eSports, in addition to recommendation for states to adopt select, applicable regulations from European nations, is merely the first step. The eSports industry faces uncertainty in other key areas, including labor regulations for the players, advertising, sponsorships, merchandising, live-streaming events, financing, and intellectual property law (e.g., determining ownership of and control over the exploitation of a published video game).[[307]](#footnote-307) In addition, many existing eSports organizations require guidelines for common questions such as whether eSports qualify for government grants, tax reliefs, unique taxes, and charities.[[308]](#footnote-308) Currently, the eSports industry lacks the substantial body of self-regulation, statute, case law, and regulatory action, which is available in the traditional sports industry.[[309]](#footnote-309) In order to reach the same prominence established in traditional sports, the laws and regulations governing eSports need to provide the same level of clarity, structure, and legitimacy that is provided in those governing traditional sports.[[310]](#footnote-310)

Sok Min Yun[[311]](#footnote-311)\*

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259. *Id.* [↑](#footnote-ref-259)
260. *Id.* [↑](#footnote-ref-260)
261. *See* *supra* Part III.A & C. [↑](#footnote-ref-261)
262. *See Identity Theft*, *supra* note 104. [↑](#footnote-ref-262)
263. For example, in traditional sports, Athlete *A* cannot simply mask and superimpose himself as Athlete *B* in a professional sporting event while maintaining the identity of Athlete *B*. On the contrary, an eSports athlete can simply log onto player *A*’s video game account and “boost” the video game account’s competitive ranking. [↑](#footnote-ref-263)
264. *See* Hartung, *supra* note . [↑](#footnote-ref-264)
265. *See* *Why Online Gaming Is the New Frontier for Cybercrime*, *supra* note 106. [↑](#footnote-ref-265)
266. *See* Sullivan, *supra* note . [↑](#footnote-ref-266)
267. Steven T. Wright, *The Evolution of Loot Boxes*, PC Gamer (Dec. 8, 2017), http://www.pcgamer.com/the-evolution-of-loot-boxes/. [↑](#footnote-ref-267)
268. *Id.* [↑](#footnote-ref-268)
269. *See* Sullivan, *supra* note . [↑](#footnote-ref-269)
270. *See* Wright, *supra* note . [↑](#footnote-ref-270)
271. *See id.* [↑](#footnote-ref-271)
272. *See id.*  [↑](#footnote-ref-272)
273. *See* Lahti, *supra* note . [↑](#footnote-ref-273)
274. *See id.* [↑](#footnote-ref-274)
275. *See* *supra* Part III.B. [↑](#footnote-ref-275)
276. *See* Hartung, *supra* note ; *see also* Matt Kamen, *Pro-Gamer Admits to Doping in eSports*, Wired (July 16, 2015), http://www.wired.co.uk/article/esports-doping-admission. [↑](#footnote-ref-276)
277. Eugen Dimant & Christian Deutscher, *The Economics of Corruption in Sports: The Special Case of Doping*, Harv. U. Edmond J. Safra Ctr. for Ethics (Mar. 18, 2015), https://ethics.harvard.edu/blog/economics-corruption-sports-special-case-doping; *see also* Ed McCambridge, *Anti-doping Efforts Still in Their Infancy in eSports*, DW.com (July 21, 2017), http://www.dw.com/en/anti-doping-efforts-still-in-their-infancy-in-esports/a-39783790. [↑](#footnote-ref-277)
278. *See Cheating in eSports: Is it Possible to Cheat on Pro Level?*, *supra* note 129. [↑](#footnote-ref-278)
279. *See* Wood, *supra* note . [↑](#footnote-ref-279)
280. *See* Orland, *supra* note . [↑](#footnote-ref-280)
281. *See* Alvarez, *supra* note 4. [↑](#footnote-ref-281)
282. *See* The Digital Republic Bill, *supra* note . [↑](#footnote-ref-282)
283. *See* Znaty, *supra* note . [↑](#footnote-ref-283)
284. *See* The Digital Republic Bill, *supra* note . [↑](#footnote-ref-284)
285. *See id.*; *see also* Znaty, *supra* note . [↑](#footnote-ref-285)
286. *See* Znaty, *supra* note . [↑](#footnote-ref-286)
287. *See id.* [↑](#footnote-ref-287)
288. *See id.* [↑](#footnote-ref-288)
289. *See id.* [↑](#footnote-ref-289)
290. *See id.* [↑](#footnote-ref-290)
291. *See id.* [↑](#footnote-ref-291)
292. *See* Lahti, *supra* note . [↑](#footnote-ref-292)
293. *See* Santiago Asensi Gisbert & Alla Serebrianskaia, *Gaming in Spain: Overview*, Thomson Reuters Prac. L., https://uk.practicallaw.thomsonreuters.com/9-635-1228?transitionType =Default&contextData=(sc.Default) (last updated Feb. 1, 2018). [↑](#footnote-ref-293)
294. *Id.* [↑](#footnote-ref-294)
295. *Id.* [↑](#footnote-ref-295)
296. *Id.* [↑](#footnote-ref-296)
297. *Id.* [↑](#footnote-ref-297)
298. *See The Most Common Gambling Restrictions in European Countries*, Leader Newspaper (Feb. 14, 2018), http://www.theleader.info/2018/02/14/common-gambling-restrictions-european-countries/#; *see also* Quirino Mancini et al., *Gaming in Italy: Overview*, Thomson Reuters Prac. L., https://uk.practicallaw.thomsonreuters.com/4-636-9099?transition Type=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (last updated Mar. 1, 2018). [↑](#footnote-ref-298)
299. *Id.* [↑](#footnote-ref-299)
300. *See* Quirino Mancini et al., *supra* note . [↑](#footnote-ref-300)
301. *See id.* [↑](#footnote-ref-301)
302. *See id.* [↑](#footnote-ref-302)
303. *See id.* [↑](#footnote-ref-303)
304. *See* *supra* Part III.D. [↑](#footnote-ref-304)
305. Mathias Bogusch, *eSports Coming to the Fore for Policymakers in Europe*, White & Case LLP (Oct. 4, 2017), https://www.whitecase.com/publications/article/esports-coming-fore-policymakers-europe. [↑](#footnote-ref-305)
306. Alexander Schlicht & Viktoria Winstel, *Participation in eSports tournaments Without a Visa*, Video.Games.Law (July 16, 2018), http://gameslaw.org/participation-in-esports-tournaments-without-a-visa-is-that-possible/. [↑](#footnote-ref-306)
307. *See* Purewal & Davies, *supra* note . [↑](#footnote-ref-307)
308. *See id.* [↑](#footnote-ref-308)
309. *See id.* [↑](#footnote-ref-309)
310. *See* Mrkonjic, *supra* note . [↑](#footnote-ref-310)
311. \* Acquisitions Editor, *Cardozo Arts & Entertainment Law Journal* Vol. 37, Benjamin N. Cardozo School of Law (2019); B.A., Economics, Fordham University (2014). I would like to thank Julia Spivak, Sahara Farzaneh, and the members of AELJ Vol. 36 and Vol. 37 for all the support in the publication process. I would also like to thank my friends, Raymond Xu and Joe Violone, for assistance in the editing process, and Kenneth Sugarman and Rick Perkal for the wonderful opportunity Finally, to my parents, Kil Chung Yun and Maeng Soon Yun, my brother Sok-San Yun, and my dog Jindo, thank you for being there with me through all the good times and bad. [↑](#footnote-ref-311)