INTRODUCTION

There seems to be a general understanding that the exponential growth in technological advancements has left the legal field lagging behind significantly.\(^1\) Harold F. Kelley, President of Datapoint Corporation in the 1980s, has appropriately summarized the recent phenomenon of interplay between legal issues and a society dominated by technology:

Technology holds the greatest opportunity to improve productivity and cost in American business. But it will also create legal questions and issues. . . . A new field of experts is called for. It will probably be a group, like the patent attorneys, who will be at the leading edge of understanding what computers and technology can and can’t do.\(^2\)

Information technology is the incorporation of computer technology, the Internet, as well as wireless and telecommunications technologies to store, retrieve, transmit and manipulate data.\(^3\) In recent decades, the increased accessibility to computers, smartphones, tablets, and related technologies has created an indispensable reliance on information technology.\(^4\) For instance, the estimated number of Internet users in the world as of 2015 has exceeded 3 billion.\(^5\) In 2014, the United States ranked second in terms of Internet usage,
with around 280 million users.\textsuperscript{6} Furthermore, with a population of around 322 million people, the number of Internet users in the United States has exceeded 85 percent of the population.\textsuperscript{7} Therefore, the “limitless capabilities” of information technology have become a “driving force” in the expansion of law.\textsuperscript{8}

The meteoric rise of information technology has also effectively influenced one of the biggest industries in the global market: gambling.\textsuperscript{9} The global casino and online gambling industry is now estimated to be worth around $285 billion and is expected to grow by around 5.3 percent annually over the next half decade.\textsuperscript{10} Many gaming companies have departed from utilizing basic and traditional forms of gambling and are “looking at things like virtual reality, surround sound, touch-screens, even things where the chair and the screen vibrate when you touch them so that you feel a sensation of movement.”\textsuperscript{11}

It is no surprise that the young generation shares the gaming industry’s interests towards visually appealing, mentally stimulating, and interactive, virtual gambling games.\textsuperscript{12} Almost 60 percent of Americans play video games, with “an average of two gamers in each game-playing [United States] household.”\textsuperscript{13} Within the video game industry, the growth of a recent phenomenon known as “eSports” has created a “major cultural and economic shift from old-world, physical forms of entertainment with limited availability to easily accessible virtual entertainment in the online space.”\textsuperscript{14} The eSports industry is composed “of leagues built around the live and online streaming of competitive matches between players of popular video games” such as League of Legends, Dota 2, Counter Strike: Global Offensive, StarCraft 2: Heart of the Swarm, and Hearthstone.\textsuperscript{15}

Furthermore, the rise of eSports may contribute significantly to the

\textsuperscript{6} See id.
\textsuperscript{7} Id.
\textsuperscript{8} SCOTT, supra note 1.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} See id.
industry of fantasy sports betting by avid gamers. Since 2014, the growth in the number of the active fantasy sports players in the USA and Canada alone has exploded to almost 42 million people.\textsuperscript{16} Although the United States federal government has yet to take a stance on the legality of fantasy sports, attempts to regulate fantasy sports under state laws have been difficult due to the ambiguous nature of existing gambling laws.\textsuperscript{17} Fantasy sports activities are conducted in a majority of the states, however, only a handful of states have clear statutory authorization allowing fantasy sports companies to do so.\textsuperscript{18} Therefore, in conjunction with all the recent trends, “eSports tells us that the likely winners in the online gambling market will be not only the obvious casino players, but also others that embrace full spectrum of entertainment and social media around it.”\textsuperscript{19}

This note examines the current legal state of fantasy sports betting under federal and state laws, and determines whether the same legal analysis applies to electronic sports. Part I provides a brief historical overview of sports betting and its development into present day application, including the creation and popularity of fantasy sports. Part II discusses the history of eSports and its growth into a major economic powerhouse. Part III examines the current legal state of sports betting under federal and state regulations. Part IV compares and contrasts eSports from the conventional understanding of what constitutes a “sport” pursuant to the Professional and Amateur Sports Protection Act. Part V analyzes the current legal state of fantasy sports betting under federal and state regulations. Finally, Part VI examines the current state of fantasy sports, or more specifically DFS, under state jurisdictions and applies the various legal analyses to consider the future prospect of fantasy eSports.


\textsuperscript{19} McGlade, supra note 14.
I. SPORTS BETTING

A. History of Sports Betting

Sports betting’s ancient roots have existed almost as long as spectator sports.20 For instance, ancient Romans would bet on “gladiatorial fights and chariot races.”21 In the United States, the rise of various sports in the early 20th Century saw a parallel popularity among sports bettors.22 Unfortunately, scandals and game fixing became a huge concern in sports wagering, as evidenced by the infamous scandal when the Chicago White Sox team was accused of purposely throwing the 1919 World Series game.23 Although many professional sports leagues and states have adopted regulations against gambling to restore and protect the “integrity of sports,” the federal government decided to prohibit interstate sports wagering through the Federal Wire Act of 1961 and sports wagering altogether in 1991 through the Professional and Amateur Sports Protection Act (“PASPA”).24 Nevada, however, was able to obtain an exemption from the ban on sports wagering.25 The widespread ban on sports wagering has become a major issue in the power struggle between the federal government and states wanting to benefit from the loss of potential tax source.26

B. Modern Day Sports Betting

In modern day United States, the sports industry is a “massive business,”27 with one study estimating sports as a $212 billion industry since the early 2000s.27 This figure is surpassed by the amount of money wagered on sporting

21 Games People Play, supra note 20; see also Moody, supra note 20.
22 Moody, supra note 20.
23 Games People Play, supra note 20.
25 Games People Play, supra note 20, at 208.
27 Anthony N. Cabot & Robert D. Faiss, Sports Gambling in the Cyberspace Era, 5
In Nevada, legal sports wagering can amount to around $2 billion annually, whereas illegal sports wagering in the United States may have reached up to $380 billion annually. With the rise of Internet-usage and online gambling, the figures concerning sports betting could be larger. Americans gambled almost $6 billion through illegal online wagering in 2006. Furthermore, by failing to legalize and regulate Internet gambling, the federal government may lose around $62 billion in taxes over the next decade.

C. Rise of Fantasy Sports

The rise in sports betting spawned a growth in fantasy sports, which “are contests where persons compete for cash or prizes based on a scoring system that takes into account the accumulated statistics of professional athletes chosen as part of a fantasy team.” Fantasy sports have become a form of “mainstream wagering” in the United States.

Although fantasy sports games are constantly changing with companies seeking new ways to engage participants, there are generally four potential ways to allocate players. The traditional method was to allocate players through an auction involving a bidding process among participants. A second way to allocate players is through a “modified auction,” where the “price of each player is determined before the competition begins, and multiple participants in a single league may select the same player.” The third way is through a “league draft,” where new players are allocated in a way similar to real, professional sports leagues. Lastly, participants can agree “to have players allocated . . . randomly by software provided by the league’s host site.”

One of the most important distinctions among modern fantasy sports...

---

28 Id.
29 Id.
33 Id.
35 Id.
36 Id.
37 Id. at 14.
38 Id.
leagues is the length of the fantasy seasons.\textsuperscript{39} Traditional fantasy sports competitions generally run from the first day of a professional sport’s regular season until the conclusion of the season.\textsuperscript{40} On the other hand, many up and coming fantasy sports competitions “last for less than one full professional sports season,” some of which are known as daily fantasy sports (“DFS”).\textsuperscript{41} DFS allow participants to pay an entry fee, select players, and potentially receive prize money daily.\textsuperscript{42}

II. THE BIRTH OF eSPORTS

Video games have become an integral part of the younger generation’s hobbies, and the video game industry is anticipated to grow up to $82 billion by 2017.\textsuperscript{43} Accompanying the video game industry is the massive growth in public gaming contests.\textsuperscript{44} In the 1980s, arcades first created tournaments and attracted local gamers to establish a sense of gaming community.\textsuperscript{45} In the 1990s, gaming contests at local-area network (“LAN”) parties and PC cafes shifted the popularity of gaming to PCs “as a new platform for gaming.”\textsuperscript{46} The 1990s saw the creation of “the first true eSports competitions.”\textsuperscript{47} The term eSports has been used to describe organized competitive gaming leagues.\textsuperscript{48}

The first eSport competitions involved a first person shooting game (“FPS”) called “Quake,” where “[t]he winner received a Ferrari previously owned by John Carmack, [the] lead developer for Quake.”\textsuperscript{49} Subsequently, the Cyberathlete Professional League, which was considered one of the first major gaming leagues, held a tournament offering $15,000 in prize money.\textsuperscript{50} During the early 1990s, eSports was primarily dominated by FPS games; however, the late 1990s saw an explosion in popularity of real time strategy games (“RTS”), such as StarCraft.\textsuperscript{51} While FPS games focused on “twitch skills” to aim and shoot enemies, RTS games utilized “careful thought and long term planning” to

\textsuperscript{39} Id. at 15.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 16; see Playing Daily Fantasy Sports for Dummies and Er… You!, DAILY FANTASY SPORTS 101, www. Dailyfantasysports101.com/basics/ (last visited May 1, 2016).
\textsuperscript{42} See Edelman, supra note 41.
\textsuperscript{44} Id.; see also Tyler F.M. Edwards, eSports: A Brief History, ADANAI (Apr. 30, 2013), http://adanai.com/esports/
\textsuperscript{45} Borowy, supra note 43; see Edwards, supra note 44.
\textsuperscript{46} See supra, note 45.
\textsuperscript{47} Edwards, supra note 44.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} See id.
\textsuperscript{51} Id.
defeat opponents. However, although RTS games like StarCraft have been compared to a game of chess, speed is still a critical factor because unlike chess, players do not take turns to make moves.

The turn of the millennium saw the rise and solidification of video game tournaments in the international realm of gaming culture. Towards the late 2000s, a new type of gaming category emerged known as Multiplayer Online Battle Arena (“MOBA”). “MOBAs have exploded in popularity and have effectively dominated eSports.” One example is “League of Legends” (“LoL”), which was released in 2009 by Riot Games.

A. Popular eSports Games and Competitions

Since the release of LoL, Riot has hosted multiple championship series with major professional leagues from around the world competing for the championship. The LoL World Championship is a tournament held once a year where international teams meet and compete. For instance, the 2014 world championship tournament was separated into three distinct phases: regionals, group stage selection, and the bracket stage. Under the regionals stage, five major regions across the globe each host their own regional competition with their own set of competition rules to determine which teams secure a spot in the world championship: North America (NA LCS); Europe (EU LCS); Korea (OGN); China (LPL); and South East Asia (GPL). For instance, in North America, the “LCS competition is divided into two splits, spring and summer,” with the summer split doubling as the World’s qualifier. “The tournament is a single-elimination bracket stage where each match is a best-of-five” resulting in the top three teams securing a spot in the World Championship.

After the regionals, the top sixteen teams from the five leagues are then seeded and placed into their respective positions in different groups based on their performance during the regionals and a “randomized placement system.”

52 Id.
54 See Edwards, supra note 44.
55 Id.
56 Id.; see About, supra note 53.
57 About, supra note 53.
58 See id.
59 See id.
61 Id.
62 Id.
63 Leah Jackson, Worlds 2014 Group Stage Selection Results, LEAGUE OF LEGENDS (Sept. 8, 2014), http://na.lolesports.com/articles/worlds-2014-group-
To ensure fairness for each region, no two teams from the same region are placed in the same group. For instance, out of the four groups during the 2014 Worlds, group B contained Team Solo Mid from North America, Star Horn Royal from China, Azubu Taipei Assassins from Taiwan, and SK Gaming from Europe. Finally, the top two teams from each of the four groups will advance into the bracket stage to compete for the number one spot and the accompanying prize pool.

DOTA 2, another MOBA style game, has a similar world championship series known as the “International,” where teams from around the world compete in elimination-style brackets. The International is similarly broken down into three distinct phases of elimination, each with its own set of rules and guidelines to determine which teams are directly invited to participate in the tournament or qualified through regionals.

B. Current Structure and State of eSports

The current structure of eSports is similar to that of American baseball leagues with some drastic differences. First off, the pay difference for professional players in eSports is nowhere near the “multi-million dollar revenue found in prominent physical sports;” however, professional players in the eSport leagues are able to make a comfortable living. Although many team owners often juggle the roles of “financier, talent scout, recruiter, and promoter all at once,” organizations such as the LCS from LOL have teams with much more sophisticated ownership, such as team owners, brand owners, and even sponsorships.

Although the fan base for eSports is still relatively minor in the United stage-selection-results.

See id. The reason behind this rule might be to ensure a steady stream of fan base from each region throughout the tournament. Similarly, some regions are generally considered more skilled than others, with one example being Korea, which is considered the most competitive in terms of player skills and strategic planning. See Rob Zacny, A Title for TSM, Reality Checks for Everyone Else, RED BULL (Mar. 16, 2015), http://www.redbull.com/us/en/esports/stories/1331711412230/a-title-for-tsm-reality-checks-for-everyone-else.

See Jackson, supra note 63.


See Tournament Rules, note 67.


Id.

States in comparison to the fan base for other leagues such as the NBA or NFL, its growing popularity has caught the attention of big corporations such as ESPN. In January of 2016, ESPN announced on its front page that it would be dedicating an entire new sports section for eSports. Similarly, Mark Cuban, an NBA team owner and billionaire, has invested in a startup platform, Unikrn, for the purpose of eSports betting. Unikrn touts itself as a website dedicated for “eSports wagering service[s],” and “provide[s] eSports fans and newcomers alike a safe and legal place to gather, game and bet on eSports.”

Furthermore, widespread availability of Internet access has accompanied the eSport popularity. Although high-profile eSport tournaments, such as the LoL World Championship, can occur in front of a live audience, the primary audience for eSport tournaments viewed the events through online streaming websites (e.g., Twitch.tv). For instance, during the International Dota 2 Championship, the amount of viewership online exceeded 20 million people, with 2 million peak concurrent viewers. However, more impressive is the LoL World Championship, where the fifteen-day tournament gained “288 million cumulative daily unique” viewers around the world online. During the final match between the last two teams, the peak concurrent viewers reached 11.2 million. To put things into perspective, the 2014 Super Bowl drew 111.5 million television viewers, with an estimated 2.3 million streaming the American football game online. Similarly, first-person shooter, Counter-Strike: Global Offensive, drew more than 1 million viewers in the Intel Extreme Masters eSports tournament during March of last year.

Besides the viewership count, the prize pools alone among international

76 Burk, supra note 69.
77 Id. at 1540–41.
80 Id.
eSports competitions further bolster the magnitude and size of the industry. The 2014 League of Legends World Championship prize pool was around $2 million, while Dota 2’s mostly crowd-funded prize pool almost reached a whopping $11 million.\(^3\) The winner of the Dota-2 tournament received a little over $5 million, while second place received almost $1.5 million, and third place took around $1 million.\(^4\) The fact that Dota 2’s prize pool was funded by consumers through a portion of the sales of a “digital compendium,” which is “an interactive digital booklet stuffed with fan activities,”\(^5\) demonstrates the impressive fan base behind eSports.

**C. eSports Bookmaking**

It should come as no surprise that accompanying the surge in eSports popularity is the rise in eSports bookmaking and wagering.\(^6\) For instance, “Pinnacle Sports,” which touts itself as “the leading online bookmaker,” has accepted its one-millionth eSports bet towards the end of 2014.\(^7\) Since recording its first eSports bet in February of 2010, the traders at the company did not foresee that the company would pass the “one-millionth-bet milestone” in just four years, surpassing wagering for “traditional mainstays like golf or rugby in terms of popularity with its bettors.”\(^8\)

Betting on eSports is very similar to traditional sports betting in that players want to bet on the team that they think will win.\(^9\) For Pinnacle Sports, a customer would simply select an event (i.e. a match between two teams during the NA LCS summer split) and decide the amount to place a bet at the available odds.\(^10\) “If the bet is successful . . . [the customer will] win money proportional to [the] bet.”\(^11\) Since most eSports games like LOL and DOTA 2 do not utilize an endgame score, but rather the completion of objectives to determine the winner (as opposed to traditional sports like basketball or football where the endgame score determines the winner), “match winner” or

---


\(^{84}\) Id.


\(^{87}\) Id.

\(^{88}\) Id.


\(^{90}\) Id.

\(^{91}\) Id.
“money line” betting is used instead of the “point spread.”

Furthermore, Pinnacle Sports utilizes decimal odds under the “match winner” style of betting to determine the payout and the probability of outcome. Therefore, the higher the decimal odds placed on a team, the lower the probability that the team will win, resulting in a higher payout.

For instance, on Pinnacle, in the EU LCS, SK Gaming was scheduled to play against the Unicorns of Love (again, another distinction between eSports and traditional sports: creative and flamboyant team names) on April 12, 2015. SK Gaming had a decimal odd of 1.510, while Unicorns of Love was 2.660. If a customer were to bet $100 on either team, a successful bet on SK Gaming would yield a win of around $151 while Unicorns of Love would be only be around $266. The disparate payout is attributed to past performances and current strengths of each team, and although the new Unicorns of Love has performed consistently well in season 5, SK Gaming has a proven track record that stems back several seasons. Another example is Team Solo Mid against Team Impulse in the NA LCS on April 12, 2015. Under the money line style of betting, Team Solo Mid’s decimal odd is placed at 1.740 while Team Impulse is 2.160. Again, if a customer were to bet $100 on either team, a successful bet on Team Solo Mid would yield a win of around $174, while Team Impulse would be around $216. Team Impulse has a higher payout because Team Solo Mid is currently considered the strongest team in the NA LCS, especially after they secured a victory at the IEM Katowice over top teams from other leagues; therefore, betting on Team Impulse would be a very risky move, hence the higher payout acts as an incentive to bet on them.

However, with the rise in eSports betting, a major concern for gamblers is...
whether online eSports bookmaking is legal within the United States. Furthermore, if eSports betting were considered illegal in the United States, would fantasy eSports betting provide an alternative venue for gamers to engage in some form of wagering scheme besides bookmaking? One of the first steps to take is to understand the current structure of relevant gambling laws in place and its applicability towards eSports.

III. LEGALITY OF SPORTS BETTING

A. The Federal Wire Act

Enacted in 1961, the Wire Act was part of the Federal Government’s effort to declare “war on organized crime.” The Wire Act’s purpose was to target bookmaking and assist the public policy of most states during the 1960s to combat all forms of gambling. The relevant parts of the statute state:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both. When the Wire Act was enacted, telegraph wire services were the primary targets used by illegal bookies to obtain horserace results, as well as the use of telephone services to target illegal sports books. However, modern application of the Wire Act pertains to remote wagering and has been central towards regulating Internet gambling.

The statute defines a “wire communication facility” as: “any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.” Therefore, the Wire Act applies to the Internet and wireless phones, which utilizes some forms of a “wire communications facility.” Furthermore, in 2011, the United States Department of Justice (“DOJ”) released a memorandum stating that the Wire Act does not extend to legal

104 Id.
106 Rose & Bolin, supra note 103.
107 Id. at 661, 670.
109 Rose & Bolin, supra note 103, at 661.
Spring 2016] FANTASY (E)SPORTS 405

gambling activities outside of “sporting events or contests.”110

B. The Professional and Amateur Sports Protection Act

In 1991, a bill was introduced in the Senate and became known as the Professional and Amateur Sports Protection Act (PASPA).111 Under PASPA, the relevant parts of the statutes state:

It shall be unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.112

The federal government decided to “restrict states from implementing or expanding gambling that was legal under state law” following the “proliferation of state lotteries,” which “led to competition among the states.”113 The Senate Judiciary Committee explained that the bill “serve[d] an important public purpose, to stop the spread of State-sponsored sports gambling.”114 Four states qualified for exemption from PASPA: sports lotteries conducted in Montana, Oregon and Delaware, and licensed sports pools in Nevada.115 At the moment, PASPA effectively prohibits further implementation of new sports betting schemes.116

C. The Unlawful Internet Gambling Enforcement Act

For a period from 1996 to 2006, Congress attempted and struggled to update and clarify the scope of the Wire Act.117 On September 30, 2006, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).118 The relevant provisions “provide that no person engaged in the business of betting or wagering may knowingly accept directly or indirectly

110 Id. at 672.
111 Id. at 665.
113 Rose & Bolin, supra note 103, at 663.
116 See id. at 169.
virtually any type of payment from a player in unlawful internet gambling (i.e. bets that are unlawful under other state or Federal laws).” Therefore, the UIGEA regulates betting indirectly by prohibiting certain financial transactions in relation to “unlawful internet gambling,” thereby attempting to make sources of payment methods for illegal gambling less accessible (e.g., credit cards). The UIGEA does not explicitly define unlawful gambling, however, and defers to other federal and state laws. Furthermore, the UIGEA is “riddled with loopholes” that may create openings for many forms of online gambling, such as “fantasy sports, skill games, and intrastate gambling.”

D. State Laws

As previously discussed, PASPA effectively prohibits states from “enacting, licensing, or operating any kind of wagering scheme on sporting events,” with the exception of states that had previously “operated some form of sports wagering scheme between 1976 and 1990.” Again, those states were Nevada, Oregon, Montana, and Delaware. Since the passage of PASPA, the Act has allowed Nevada to establish a monopoly on sports wagering. Thus, although the DOJ’s 2011 memorandum stated that the Wire Act does not extend to legal gambling activities outside of “sporting events or contests,” states that are not exempted by PASPA but desire to legalize sports wagering are still disallowed by PASPA.

IV. LEGALITY OF eSPORTS BETTING

A. Is eSport Considered a Sport?

With eSports being a relatively new phenomenon, the law community’s stance on the legality of eSports betting has also been rather obscure. Under the PASPA, 28 U.S.C. § 3701 defines both “amateur sports organization” and “professional sports organization” as “a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more . . . athletes participate, or a league or association of persons or governmental entities.” PASPA’s scope of authority would easily extend to eSports, due to the scope and nature of eSport tournaments, where professional

119 Mainstream Wagering, supra note 32, at 1197.
120 Rose & Bolin, supra note 103, at 668.
121 Id.
122 Id.
123 Galasso, Jr., supra note 115, at 163.
124 Id. at 175.
125 Id. at 167.
126 Id. at 169; Rose & Bolin, supra note 103, at 672.
gamers from around the world partake in leagues and tournaments.\textsuperscript{128}

\textbf{B. Similarities Between eSports and Conventional Sports}

Although eSports might be deemed a sport in a legal sense under the PASPA, would one consider eSports a true “sport” under the traditional and conventional understanding of what constitutes a sport? There is no bright line definition of a sport, and there is often a gray area between whether it is considered “merely a game,” or a “competition.”\textsuperscript{129} One proposed definition seems to incorporate important elements of what constitutes a sport: “an objective-based competition between two or more parties that requires a degree of physical and mental skill, where timing or urgency is required to complete the objective and reaction to the opponent’s objective attempts is important.”\textsuperscript{130} eSports tournaments seem to fit into this definition.\textsuperscript{131}

Even if eSports is considered a “sport,” should gamers be considered athletes? Most definitions of an “athlete” generally require the element of physical strength and agility.\textsuperscript{132} Although gamers are generally stereotyped as “unfit,” “uncoordinated,” and lacking “stamina,” the physical skill required does not depend on brute strength or strength training, but rather on refined motor skills.\textsuperscript{133} One study has shown that although gamers are relatively unfit, “they possess reactions skills ‘as finely tuned as fighter pilots.”\textsuperscript{134} For instance, real time strategy games such as Starcraft require professional players to register up to seven key inputs every second for up to 60 minute-long matches.\textsuperscript{135} Even the government appears to have implicitly recognized eSports

\textsuperscript{129} Id. at 7.
\textsuperscript{130} Id. at 8.
\textsuperscript{131} See supra Part II.
\textsuperscript{132} Compare \textbf{Athlete}, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/athlete (last visited Mar. 23, 2016) (“[A] person who is trained in or good at sports, games, or exercises that require physical skill and strength”), with \textbf{Athlete}, DICTIONARY.COM, http://dictionary.com/browse/athlete?s=t (last visited Mar. 23, 2016) (“[A] person trained or gifted in exercises or contests involving physical agility, stamina, or strength; a participant in a sport, exercise, or game requiring physical skill.”).
\textsuperscript{134} McTee, supra note 128, at 10 (quoting \textit{Leading Video Gamers Failed on Fitness}, EVENTS AT ESSEX (June 7, 2010), http://www.essex.ac.uk/events/event.aspx?e_id=1670).
gamers as professional athletes. Many foreign gamers have been granted P-1 Visas, which are given to aliens who “perform[] as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.” For instance, Danny Le, also known as “Shiphtur” in-game, received a visa to compete in the 2013 League of Legends World Championship.

Furthermore, although sports is traditionally understood as “an athletic endeavor which requires fitness and physical prowess” within the intercollegiate scene, eSports is beginning to change that perception among certain demographics of college students. For instance, ESPN, a sports and entertainment network, in conjunction with Blizzard Entertainment, televised the first live coverage of a collegiate eSports tournament. College students competed against each other for $450,000 worth of prizes towards tuition through Blizzard’s “free-to-play multiplayer online battle arena, Heroes of The Storm.”

As of 2015, “[t]wo universities have . . . expressed their beliefs that eSports are worth investing in and have granted varsity sport status to their League of Legends teams.” Robert Morris University in Illinois became the first school in the United States to incorporate eSports in its athletic program, and the University of Pikeville in Kentucky was the second. Both schools have expressed that besides physical strength and cardiovascular endurance, eSports athletes are no different from athletes under the traditional sense. Therefore, it seems that bookmakers will have a difficult time arguing for eSports to be an exception among the federal ban on sports wagering.

---

141 Id.
142 Schmidt, supra note 135.
144 Schmidt, supra note 135.
145 See supra Part III.A–B.
For gamblers who are not in Nevada but still wish to bet on eSports, there is another option: fantasy eSports wagering.\(^146\)

One of the major fantasy eSports betting websites is Vulcun.\(^147\) By February of 2015, Vulcun had quadrupled its prize pool from $250,000 to $1 million.\(^148\) However, just a month later, Vulcun quadrupled the prize pool once again to $4 million.\(^149\)

Vulcun’s website has changed since 2015, now offering only “traditional sports betting [and] other casino-style games played with free points, not with real money. No money can be won using these games.”\(^150\) However, prior to the changes, Vulcun used to state on their website, “eSports fantasy games follow exactly the same rules as those for traditional sports and are 100% legal under United States Federal Law. We take the legal status of our games very seriously and do our utmost to ensure compliance with existing state and federal laws.”\(^151\) Furthermore, Vulcun had acknowledged variance amongst state laws relating to fantasy sports and stated that they “do not offer paid entry games to residents” of states where they “believe the law is unclear or questionable.”\(^152\)

Under Vulcun, the old scheme was similar to that of a traditional fantasy sports league.\(^153\) The contest format required a player to act as a manager with a fixed fantasy budget, and each player utilized the allotted budget amount to build the best possible roster by selecting a certain amount of players.\(^154\) The amount of each player’s salary in a contest was determined by the following factors: season average points, the previous week’s points, and the player’s popularity.\(^155\) The salaries were adjusted automatically each week; therefore,

\(^{146}\) Certain states have unclear or questionable laws relating to the legality of fantasy sports, while others, such as Arizona and Louisiana, deem fantasy sports as illegal games of chance. See Mainstream Wagering, supra note 32, at 1206; see also The Fantasy Sports Industry, VULCUN, https://web.archive.org/web/20150319100417/https://vulcun.com/main/legal (last visited Mar. 15, 2016).

\(^{147}\) See Philippa Warr, Fantasy League of Legends and the $1m Prize Pool, ROCK PAPER SHOTGUN (Feb. 2, 2015, 8:00 PM), http://www.rockpapershotgun.com/2015/02/02/league-of-legends-fantasy-esports-1-million-prize-pool/.

\(^{148}\) Id.


\(^{151}\) The Fantasy Sports Industry, supra note 146.

\(^{152}\) Id.


\(^{154}\) Id.

\(^{155}\) Id.
one could not strategically select all the “superstars” and hope for the best. Furthermore, a contestant could only pick a maximum of three players from the same eSports team, which would prevent players from cherry picking the best teams where the players tend to fare better on average due to competitive team based performance. At the end of the contest, the player with the highest total team score, based on each selected player’s performance, would win a cash prize.

AlphaDraft is another example of a fantasy eSports betting website. Like Vulcun, where each contestant must utilize a fixed budget to select players based on their salaries, under AlphaDraft, participants in each contest are assigned a fixed salary cap of $50,000 that will be utilized to draft six players and a team roster. Similarly, the owners of AlphaDraft also explicitly acknowledged that their website is legal. The website stated that skill is the predominant factor, where “[m]anagers must take into account a myriad of statistics, facts and game theory in order to be competitive.” However, unlike Vulcun, AlphaDraft maintains the same DFS play-style with cash prizes.

Despite the recent changes in the fantasy eSports betting websites regarding their confidence in the legality of their games, most strategic betting websites would agree that there is more to eSports than just picking the highest scoring individuals and hoping for the best. League of Legends, which has created a fantasy league contest of its own, although not for prizes or rewards, has created an article explaining how to succeed in fantasy drafting by learning the concept of “value drafting.” Recommended factors to take into consideration includes “the relative value of players in each position,” the competition for the week, and the overall playing style of the player in conjunction with the team’s strategy (getting more kills in a game as a carry versus playing more of a support role allowing other teammates to succeed).

156 Id.
157 See id.
158 Id.
162 Id.
163 Id.
Besides learning how to budget and build a bankroll, weighing the odds, gaining knowledge of the teams/players, and gaining a general understanding of sports betting, one must also become a player. To do well in fantasy eSports betting, one should actually learn the game, understand the concept of meta-gaming for each season or patch update, realize what works and does not work, and apply that to the process of selecting players. Therefore, to do well in the long run under fantasy eSports betting, it is insufficient to simply look at a chart with the highest numbers and select players hoping to win by chance or luck.

With the rise in eSports popularity, two of the major fantasy sports betting websites now offer eSports betting: FanDuel and DraftKings. In September of 2015, DraftKings announced that it would expand to include professional gaming and would accept wagers on League of Legends. Similarly, following DraftKings’ announcement, FanDuel made it known that it would do the same and have since acquired AlphaDraft, which was a major DFS website dedicated to online gaming competitions. However, with fantasy wagering being a relatively new phenomenon, the issue becomes whether fantasy eSports wagering is legal under the current federal and state laws of the United States.

A. The Wire Act

Under the Wire Act, the existence of a “wager” is a necessary requisite element to establish a violation. Furthermore, United States District Judge Dennis M. Cavanaugh dismissed a case and held that the payment of an entry fee to participate in a league cannot constitute a wager or bet. Judge Cavanaugh explained that “[c]ourts throughout the country... have long recognized that it would be ‘patently absurd’ to hold that ‘the combination of an entry fee and a prize equals gambling,’” which, if true, would deem

---

169 See id.
“countless contests engaged in every day” as unlawful gambling.\textsuperscript{173} Therefore, “the Wire Act is probably inapplicable,” however, it would depend on the structure of the fantasy sports contest and whether it is determined to be a game of skill or chance.\textsuperscript{174}

\textbf{B. The Unlawful Internet Gambling Enforcement Act}

As previously discussed, UIGEA makes it illegal for any person “in the business of wagering to accept . . . transfers from U.S. financial institutions for the purpose of Internet gambling that is already unlawful under existing state or federal laws.”\textsuperscript{175} However, the Act creates a carve-out for “participation in any fantasy or simulation sports game . . . in which . . . no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization.”\textsuperscript{176} Furthermore, the following conditions must be satisfied:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants[;]

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting or other events[; and]

(III) No winning outcome is based

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.\textsuperscript{177}

Under UIGEA, the conditions listed are structured similar to the dominant factor test utilized by individual state laws to determine true skill gaming, which will be discussed in further detail below.\textsuperscript{178} Therefore, Congress seems to have created an exception to ensure that websites of fantasy sports operators are not automatically deemed illegal as long as certain conditions are met.

However, with the emergence of DFS, “it is possible that not all fantasy

\begin{footnotesize}
\begin{enumerate}
\item\textit{Id.} at *7 (citing and quoting State v. Am. Holiday Ass’n, 727 P.2d 807, 809, 812 (Ariz. 1986) (en banc)).
\item Mainstream Wagering, supra note 32, at 1217.
\item \textit{Id.}
\item Mainstream Wagering, supra note 32, at 1215–16 (2007); see also infra Part V.I.D.
\end{enumerate}
\end{footnotesize}
sports games fulfill [the] three-part test” of UIGEA. In daily and weekly fantasy games, ‘winning outcomes [may not] reflect the relative knowledge and skill of the participants’ because the limited duration of these games heightens the importance of luck in game results.” Similarly, “as a matter of public policy, Congress may not want to provide special protection to short-duration fantasy sports games because the shortened duration of these games may feed the desires of compulsive and addicted gamblers.”

C. The Professional Amateur Sports Protection Act (“PASPA”)

PASPA appears to be a direct obstruction towards the legality of fantasy sports contests. The relevant parts of PASPA state:

It shall be unlawful for . . . a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

However, three possible reasons have been offered as to why PASPA should not apply to fantasy contests. The first reason is that pursuant to PASPA, a person would be in violation of the Act only if the operation of sports wagering is specifically authorized by state law. Therefore, fantasy sports should be exempted from illegal gambling, because such games lack the element of chance and do not need to be authorized by state law in the first place. Secondly, fantasy contests may potentially be exempted pursuant to 28 USC § 3704, wherein PASPA “shall not apply to a lottery, sweepstakes or other betting . . . in operation in a State . . . to the extent that the scheme was conducted by that State or other governmental entity at any time . . . [from] January 1, 1976 to August 31, 1990.” Therefore, if a “governmental entity” can produce evidence proving that similar fantasy sports contests were conducted during the mentioned timeframe, then fantasy sports may qualify for exemption.

Third, fantasy sports contests “typically rely on . . . strategic skill component[s] . . . to exempt themselves from state gambling prohibitions which...”

---

179 Edelman, supra note 34, at 38.
180 Id. (quoting § 5362 (1)(E)(ix)(II)) (alteration in original).
181 Id.
182 Mainstream Wagering, supra note 32, at 1213 (quoting 28 U.S.C. § 3702 (1992)) (omissions in original); see also infra Part VI.D.
183 Mainstream Wagering, supra note 32, at 1213.
184 Id.
185 Id. at 1213–14.
186 Id. at 1214 (quoting 28 U.S.C. § 3704 (1992)) (omissions and alterations in original).
187 Id.
typically incorporate the three classic elements of prize, chance, and consideration.”

In other words, the ambiguity of PASPA seems to only prohibit sweepstakes expressly authorized by state law, but not fantasy contests that state law indirectly exempts due to predominantly skill-based elements “or an alternative method of free entry.” However, the issue of skill vs. chance between traditional fantasy sports and DFS still remains an issue to be resolved by the courts.

D. State Laws

Despite the recent developments in the federal jurisprudence and Congress addressing the legality of fantasy sports, most state gambling laws have not explicitly exempted fantasy sports. Therefore, it is imperative to analyze “state court interpretations of . . . state anti-gambling statutes in order to ascertain the legality of fantasy sports in a specific state.”

Within most states’ anti-gambling statutes, a contest is held to be an illegal lottery if it consists of the following three elements: “(1) the distribution of prizes, (2) according to chance, (3) for a consideration.” Considerations and prizes are common elements present in a standard fantasy league, in which participants usually pay an entry fee in exchange for the possibility of winning a prize if they win pursuant to the contest rules. Therefore, the legality of fantasy sports betting “turns on whether the leagues’ outcomes depend on the requisite level of chance.”

In determining whether a contest is “one of skill or chance,” most states utilize the “Dominant Factor Test,” or the “Predominance Test.” The Dominant Factor Test essentially “asks whether ‘player skill’ or ‘uncontrollable chance’ is the most likely [predominant] factor that will influence the outcome of a contest.” When applying the test, however, different courts have reached different outcomes over similar or identical games due to the issue “being a question of fact as opposed to a question of law.” Therefore, the issue of skill or chance “can be influenced by the quality of evidence presented; the experience and qualifications of counsel; and the . . .

---

188 Id.
189 Id.
190 Boswell, supra note 175, at 1263.
191 Id.
192 Id. (quoting Lucky Calendar Co. v. Cohen, 117 A.2d 487, 494 (N.J. Sup. Ct. 1955)).
193 Id.
194 Id.
195 See Mainstream Wagering, supra note 32, at 1204.
196 Id.
197 Id. at 1204–05.
perceptions by the triers of fact.”

A handful of states apply two other types of tests to determine the legality of a game: the “Material Element” test and the “Any Chance” test. Under the “Material Element” test, whether skill plays a significant or dominant role is irrelevant. “If chance plays a meaningful role,” then the game is considered gambling or an illegal lottery. The “Any Chance” test prohibits wagering on any contest containing characteristics of chance, regardless of how small or miniscule the element of chance is.

Although some degree of luck is involved in fantasy sports, which is beyond the control of the participant, the general consensus is that “properly constructed” fantasy sports competitions are sufficiently a game of skill and “able to pass legal scrutiny” under most applicable state laws. Those states which follow the “Any Chance” test include the following: Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Maine, Nebraska, New Hampshire, South Carolina, Tennessee, Vermont, Virginia, Texas, and Wisconsin. Furthermore, the following states, also known as the “Absolute Prohibition” States, would not allow fantasy sports betting altogether since gambling is explicitly prohibited: Arizona (defines gambling as whether it involves “a game or contest of chance or skill”) and Illinois (defines gambling as playing a “game of chance or skill for money”).

E. Policy Rationale Supporting Legality of Traditional Fantasy Sports

As previously mentioned, one of the major distinctions between fantasy sports and sports wagering is the application of skill and knowledge by fantasy league contestants under specified rules to create and manage a team of players to accumulate the most points. However, there are other policy reasons as to why fantasy sports should be legal.

First, the monetary incentives and prizes from fantasy sports are secondary to the games’ interactive and entertainment aspects, which include bragging rights. Most fantasy sports leagues formed among friends and families promote a “strong social value” by fostering a more “intimate” and “friendly”

198 See Mainstream Wagering, supra note 32, at 1205.
199 Id.
201 Id.
202 Id.
203 See Mainstream Wagering, supra note 32, at, at 1214, 1219.
204 See EHLING, supra note 200 (citations omitted).
205 Id.
206 See supra section V.
competition. Second, the structure and nature of fantasy competitions makes it very difficult for corruption to occur among real sports teams, since contestants, under a legal valid fantasy competition pursuant to UIGEA, are required to pick players from different teams. Third, fantasy sports create positive externalities by creating exposure for sports teams and strengthening the fan base, as well as generating more revenue for the sports industry.

The bottom line is that most fantasy sports contestants “play to manage their own dream teams, root for their players, enthusiastically watch and follow the sports in which their athletes play, and compete against family and friends.” However, it should again be noted that there are inherent differences between traditional sports betting and DFS. Due to the huge variety of DFS games, the social and legal treatment towards DFS should be different as well.

VI. FUTURE PROSPECT OF ONLINE FANTASY eSPORTS BETTING

Although the legality of fantasy sports is an evolving issue, current federal law seems to neither protect nor threaten the legality of such activities. However, state interpretations have differed regarding the level of skills involved in fantasy sports and DFS. Because fantasy eSports will very likely have the same legal treatment as fantasy sports, it will be beneficial to examine current state interpretations of fantasy sports. In particular, two district cases have collaterally addressed the issue, as well as two memos issued by the attorney generals for the states of Nevada and New York.

In the two district court cases from New Jersey and Illinois, both courts seem to suggest the legality of fantasy sports and DFS. Both plaintiffs brought a “qui tam” or “loss recovery” action against fantasy sports betting websites seeking “to recover losses incurred by the residents of each state who participated in the Defendants’ fantasy sports games.” Although the primary legal analysis concerned whether the Defendants were “winners” as a matter of law under the qui tam statutes, both courts collaterally addressed the issue of whether fantasy sports leagues constitute illegal gambling. Participants

208 See Boswell, supra note 175, at 1277.
210 Boswell, supra note 175, at 1275.
211 Id. at 1272.
212 See supra sections V.A–C.
213 See supra section V.D.
would pay a fee, which gives them access to a support structure needed to select and manage a fantasy team, and would draft a team and compete against other participants in a league. One of the courts held that up-front/non-refundable entry fees do not constitute bets or wagers because “(1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes.” More importantly, the court in Humphrey v. Viacom states:

The success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench. The team with the best performance—based upon the statistics of the players chosen by the participant—is declared the winner at the season’s end.

Thus, both courts seem to suggest that fantasy sports and DFS are legal. However, it is important to note that the claims were brought under a qui tam theory of recovery and may potentially prevent any definitive legal conclusions from the two cases.

On the other hand, Nevada Attorney General (“AG”) Adam Laxalt, and New York Attorney General Eric Schniederaman, have both taken a stance that DFS is illegal without proper licensure under the applicable state laws. Both AGs have made a distinction between traditional fantasy sports and DFS. Under traditional fantasy sports, participants “compete over the course of a long season” while playing for bragging rights or side wagers. Furthermore, the websites “that host traditional fantasy sports receive most of their revenue

---

218 Id. at *4; Langone, 2013 WL 5567587, at *2–3.
220 Id. at *4.
221 See id. at *5; Langone, 2013 WL 5567587, at *1.
from administrative fees and advertising, rather than profiting principally from gambling.

Unlike traditional fantasy sports, both AGs have found that DFS is essentially gambling in disguise. The Nevada AG concluded that “pay-to-play daily fantasy sports . . . constitute sports pools under NRS 463.0193 and gambling games under NRS 463.0152(1).” Furthermore, DFS “may also constitute illegal lotteries under NRS 462.105(1) depending on the legal question of whose skill is being assessed and the factual question of whether skill or chance is dominant.”

Similarly, AG Schneiderman concluded that “DraftKings’ operations constitute illegal gambling under New York law,” since participants of DFS “are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes.” The entry fees were akin to wagers placed to participate in a “contest of chance” since the outcome of the contests was dependent on “numerous elements of chance to a ‘material degree.’”

Following the different approaches in state interpretations of the legality of DFS, the future of fantasy eSports betting is uncertain. However, regardless of whether DFS constitutes friendly skill-based competitions or illegal gambling, the size, popularity, and profitability of the industry will likely guarantee that DFS websites are here to stay.

**CONCLUSION**

When examining the current state of fantasy sports in terms of the legality and recent economic growth, it is safe to assume that fantasy eSports will be able to resume under the United States jurisdiction and have the potential to mirror the massive growth in MOBA gamers, albeit subject to inevitable regulations. Under federal law, Fantasy eSports will receive the same legal treatment as fantasy sports, which is currently an absence of federal intervention. On the other hand, states vary in their interpretations of what constitutes an illegal lottery and gambling, although most states apply the Predominant Factor test and consider fantasy sports a predominantly skill-based game.

However, because the nature and structure of eSports makes it sufficiently

---

225 Id.
227 Id. at 16 (stating that “[i]f the skill being assessed is that of the actual players rather than that of the fantasy sports team owners, then daily fantasy sports constitute illegal lotteries” and furthermore, “[i]f the skill being assessed is that of the owners, then there is a factual question as to whether the skill in selecting lineup predominates over chance”).
228 New York Attorney General Letter, supra note 222.
229 Id.
similar to sports competitions to allow for fantasy betting, the similarity creates a double-edged sword by creating a new era of competitive “sports” while making online eSports bookmaking illegal under UIGEA and PASPA. Until current federal regulations, eSports fans will have to resort to fantasy league competitions. Furthermore, depending on the structures of the fantasy eSports competitions, traditional fantasy sports competitions will much more likely receive preferential treatment under the law as opposed to DFS leagues.

As many observers have noted, the potential loss of taxation from illegal sports wagering is already staggering compared to legal sports wagering, and with the tremendous growth in eSports as witnessed through recent years, the projection in further loss of potential tax revenue by the federal government and states will be inevitable. Regardless, the entry of eSports into the fantasy sports betting scene will be a giant step towards further strengthening the ever-expanding fan base and generate more revenue for game developers like Riot.