

# WHAT'S IN A GAME? A TEST UNDER WHICH WE MAY CALL A "VGT" A GAMBLING GAME IS NOT SO SWEET: WHY COURTS SHOULD NOT APPLY THE MATERIAL ELEMENT TEST TO VGTS

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I have fond childhood memories of going to the arcade and playing the various games – pinball, racing games, the quarter-pusher, and, of course, the crane game. The crane game, also referred to as the claw game or the “digger,” was one of my favorites and it is the most mainstream; it appeared in arcades, restaurants, bowling alleys, movie theaters, and many other places. For some, the crane game was an elusive machine holding coveted stuffed animals or candy. For me, it was a skill game that I could play to win stuffed animals. At first, I was not very good at the game and it frustrated me; but, after a while, I learned some of the tricks for winning: pick your prize before you start the game, choose only from those stuffed animals at the top because the buried ones are inaccessible (unless you play a few times and move the ones on the top around), check the location of the crane/claw from all angles, and make sure the crane has stopped moving before you release it or before the time runs out so that it does not drop on the animal sideways.

Every now and then, I play the crane game for nostalgia, and when children come up to the game, I pass along some of my tips. In my own experience, the crane game was skill-based; after I picked up some technique and got better at the game, I could win a stuffed animal in at least one of three tries. Of course, the crane game and its components have changed since my childhood. The game now operates with a random number generator, which affects the odds of winning. Some courts have held that the chance involved in the crane game is material to the game. Even before the addition of the random number generator, some courts have found that the crane game constitutes illegal gambling.<sup>1</sup> Many states list the crane game as an exempted device such that it is not an illegal gambling machine. However, the fact that a legal test for what constitutes gambling could find nostalgic childhood games, like the crane game, to be gambling demonstrates that there may be a serious problem with the evaluation of what gambling is.

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<sup>1</sup> See *e.g.*, *Int'l Mutoscope Reel Co. v. Valentine*, 286 N.Y.S. 806, 807-08 (N.Y. App. Div. 1936).

There are three main tests for evaluating what constitutes gambling: (1) the predominance test, which is used in the majority of jurisdictions,<sup>2</sup> (2) the material element test, which is used in at least seven jurisdictions,<sup>3</sup> and (3) the gambling instinct test.<sup>4</sup> A game is gambling under these tests if the game involves consideration, chance, and prize or reward.<sup>5</sup> However, the chance element is evaluated differently under each test. Specifically, under the predominance test, a game is gambling if the chance or luck in the game “predominates” over the skill involved.<sup>6</sup> In this context, scholars state that “predominates” refers to a 51% benchmark such that if chance plays a 51% or greater role in the game, chance predominates over skill.<sup>7</sup> In contrast, under the gambling instinct test, one looks at the activity in question while attempting to ascertain whether it appeals to the “gambling instinct.”<sup>8</sup> The gambling instinct test is problematic given its subjective nature.

This paper will focus on the material element test. While more structural than the gambling instinct test, the material element test is subtly subjective and problematic. Under the material element test, a game is gambling when chance is considered a “material element” in a game.<sup>9</sup> This test is subjective because the meaning of “material” is not uniformly defined and applied.<sup>10</sup> The subjectivity of the material element test is best understood by examining what results may stem from its application. This paper will apply the material element test to pay-to-play video game console tournaments (“VGTs”) and will show that under a broad reading of the material element test, a judge could possibly deem VGTs gambling games.

Because the material element test allows for too much discretion and subjectivity, this paper suggests that the predominance test is the best available test because it is more objective and reliable. First, this paper will illustrate the wide range of discretion involved in the material element test by examining games, which have been found to constitute gambling, and games that could be considered gambling based upon this test. Second, this paper will explain the working structure of VGTs by using the game NHL 2012 for PlayStation 3 (“PS3”) as an example. Third, this paper will call into question the utility of the material element test based upon the possibility of a court finding VGTs to be gambling, especially as compared to the predominance test. Fourth, this paper will demonstrate that the predominance test is superior to the material element test, particularly because the predominance test solidifies the distinction between traditional gambling games and VGTs. Fifth, this paper will conclude

<sup>2</sup> Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 390 (2009).

<sup>3</sup> The seven jurisdictions include: Alabama, Alaska, Hawaii, Missouri, New Jersey, New York, Oklahoma, and Oregon. *Id.* at 392 n.64.

<sup>4</sup> *Id.* at 393-94.

<sup>5</sup> *See e.g.*, *Commonwealth v. Dent*, 992 A.2d 190, 191 (Pa. 2010).

<sup>6</sup> *Id.* at 193.

<sup>7</sup> Cabot et al., *supra* note 2 at 391-92.

<sup>8</sup> *Id.* at 393-94.

<sup>9</sup> *Id.* at 392.

<sup>10</sup> *See id.* at 403.

that the predominance test, due to its predictability and reliability, is better suited for VGTs than is the material element test.

### I. THE MATERIAL ELEMENT TEST

Under the material element test, gambling occurs when chance is considered a “material element” in a game.<sup>11</sup> This test is overtly subjective because the meaning of “material” is not uniformly defined, assuming it is defined at all.<sup>12</sup> Moreover, even with an absolute meaning of “material,” a judge or jury may differ as to what makes chance material in a given game depending upon their own predilections, the evidence presented, the expert opinions, and the facts and circumstances of the case.<sup>13</sup>

Under the material element test, a judge or jury will look at three parts to determine whether a game is a gambling game: (1) consideration, (2) chance, as a material element of the game, and (3) prize or reward.<sup>14</sup> Under part (1), the consideration must be a detriment or promise, and is most often money.<sup>15</sup> Under part (3), the prize or reward must be something of “value.”<sup>16</sup> Some courts differ as to what is valuable, and this is a fact-dependent determination because whether something has value depends on the circumstances;<sup>17</sup> however, courts consistently agree that the prize must be of more than nominal value.<sup>18</sup>

Part (2) of the material element test causes the most controversy because courts have not defined what “material” means in this context.<sup>19</sup> Some courts have held that chance does not need to dominate to be material.<sup>20</sup> Thus, “although skill may primarily influence the outcome of a game, a state may prohibit wagering on the game if chance has more than a mere incidental effect on the game.”<sup>21</sup> This means that chance can be a material element whenever it plays any role in the outcome of the game, not necessarily a material or significant role in the ordinary sense of these words.<sup>22</sup> Additionally, this test does not truly evaluate the skill involved in the game; a game could be a gambling game even if skill was the larger factor in the game, simply because chance had more

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<sup>11</sup> *Id.* at 392.

<sup>12</sup> *Id.* at 403.

<sup>13</sup> *See id.* at 403-04.

<sup>14</sup> *Dalton v. Pataki*, 11 A.D.3d 62, 90 (N.Y. App. Div. 2004) (discussing the material element definition of gambling as defined in N.Y. Penal Law § 225.00 (McKinney 2011)).

<sup>15</sup> *See People v. Dubinsky*, 31 N.Y.S.2d 234, 239 (N.Y. Sp. Sess. 1941) (holding that consideration need not be money); *see also Veterans of Foreign Wars Post 6477 v. Mo. Gaming Comm’n*, 260 S.W.3d 388, 391 (Mo. Ct. App. 2008) (holding that consideration must be valuable).

<sup>16</sup> *State v. One “Jack and Jill” Pinball Mach.*, 224 S.W.2d 854, 860 (Mo. Ct. App. 1949).

<sup>17</sup> *State v. Prevo*, 44 Haw. 665, 678 (Haw. 1961) (holding that free games are valuable prizes).

<sup>18</sup> *Veterans of Foreign Wars Post 6477*, 260 S.W.3d at 391; *James v. State*, 113 P. 226, 228 (Okla. Crim. App. 1910).

<sup>19</sup> *Cabot et al.*, *supra* note 2 at 403.

<sup>20</sup> *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984).

<sup>21</sup> *Cabot et al.*, *supra* note 2, at 392-93.

<sup>22</sup> *See id.*

than an incidental role on the outcome of the game.<sup>23</sup> The next section will examine the material element test's application to games that have been deemed gambling.

## II. GAMBLING GAMES UNDER THE MATERIAL ELEMENT TEST

The subjective and discretionary nature of the material element test is most evident from the results achieved when applying it to common games. In fact, games such as the crane game and pinball could be gambling games under the material element test absent a statutory exemption.<sup>24</sup> The following section will examine poker and trading cards to further illustrate the application of the material element test.

### 1. *Poker Under the Material Element Test*

The first and third elements of the material element test, and the other tests, are hardly ever contested in poker.<sup>25</sup> In a cash game, the consideration (element one) is money exchanged for chips equivalent to the value of the money offered.<sup>26</sup> In a poker tournament, the consideration is a fixed amount of money exchanged for a predetermined amount of chips given to all players who buy into the tournament.<sup>27</sup> As to element three, the prize awarded in a cash game is the monetary value of the chips that the player wins and cashes in for money.<sup>28</sup> The prize in a tournament is usually a predetermined amount of money based upon the player's performance – first place finishes pay the most, but most tournaments award money to several lower slots in the tournament as well.<sup>29</sup> Additionally, the prize in a tournament could be a gratuitous seat in a larger tournament, which is equivalent to the value of the required buy-in for the larger tournament. Thus, the consideration and prize elements are usually met in standard poker cash games or tournaments.<sup>30</sup>

On the other hand, the second element of any gambling test, the role of chance and/or skill, is usually contested.<sup>31</sup> Courts have found that poker is a gambling game in most material element jurisdictions because chance plays a material role in the game, regardless of whether the skill of the player affects the outcome of the game.<sup>32</sup> The role of the “draw of the cards” in poker leads

<sup>23</sup> *See id.*

<sup>24</sup> *Int'l Mutoscope Reel Co. v. Valentine*, 286 N.Y.S. 806, 807-08 (N.Y. App. Div. 1936); *White v. State*, 51 So.2d 550, 554 (Ala. Ct. App. 1951).

<sup>25</sup> *See e.g.* *Commonwealth v. Dent*, 992 A.2d 190, 191-92 (Pa. 2010) (stating that the “controlling question . . . was whether the element of chance predominates over skill. . .”).

<sup>26</sup> *See id.* at 193 (explaining that anteing money is consideration in poker).

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See e.g. id.* at 191-92.

<sup>31</sup> *See e.g. id.* To combat this issue, many legislatures have enacted statutes identifying specific games as gambling. For example, in Nev. Rev. Stat. § 463.0152 poker is deemed a gambling game. NEV. REV. STAT. § 463.0152 (2013).

<sup>32</sup> *U.S. v. Gotti*, 459 F.3d 296, 342 (2d Cir. 2006); *State v. Faught*, 124 S.W. 62, 62 (Mo. Ct. App. 1910); *see also* *People v. Turner*, 629 N.Y.S.2d 661 (N.Y. Crim. Ct. 1995) (stating that “[t]he skill of the player may increase the odds in the player's favor, but cannot determine the outcome [of a poker game] regardless of the degree of skill employed”).

courts to this conclusion.<sup>33</sup> As a Pennsylvania court explained, “[n]o amount of skill can change a deuce into an ace.”<sup>34</sup> In other words, a player’s skill may increase the odds of winning, but his skill cannot alter the chance involved from the draw cards.<sup>35</sup> Thus, most material element courts hold that skill cannot negate chance; thus, chance is a material element of poker.<sup>36</sup>

Poker aficionados vehemently object to poker being a chance game. There are two very persuasive arguments in their favor.<sup>37</sup> First, a skilled player can read his opponent’s tells/body language,<sup>38</sup> employs strategic bluffing, and plays pursuant to odds.<sup>39</sup> Second, some courts mistake the skill/chance balance analysis by examining the skill/chance of a single hand rather than throughout an entire tournament.<sup>40</sup> It is true that an unskilled player could beat a skilled player in one hand based upon the cards dealt; however, it is much less likely that an unskilled player would beat a skilled player over the course of a tournament.<sup>41</sup> Regardless of the plausibility of these arguments, it seems that they typically fail under the material element test because the draw cards have more than a mere incidental effect on the game.<sup>42</sup>

These arguments could be more persuasive under the predominance test, which permits chance to play a role in a game as long as skill predominates, or has at least a 51% role in the game.<sup>43</sup> A New York district court was so persuaded in *U.S. v. DiCristina*, holding that “poker [ ] is not predominantly a game of chance.”<sup>44</sup> The Second Circuit Court of Appeals reversed the decision and avoided the skill/chance analysis, stating that such analysis is irrelevant to whether the defendant was engaged in an illegal gambling business under IGBA.<sup>45</sup> The Court reiterated that New York follows the material element test, not the predominance test.<sup>46</sup> Nevertheless, the Court did not specifically

<sup>33</sup> See *Turner*, 629 N.Y.S.2d at 662.

<sup>34</sup> *Dent*, 992 A.2d at 196 (citing *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 630-31 (N.C. Ct. App. 2007)).

<sup>35</sup> See *Plato’s Cave Corp. v. State Liquor Auth.*, 496 N.Y.S.2d 436, 438 (N.Y. App. Div. 1985).

<sup>36</sup> See *Gotti*, 459 F.3d at 342; *Faught*, 124 S.W. at 62; *Turner*, 629 N.Y.S.2d at 661.

<sup>37</sup> See e.g. Michael A. Tselnik, Note, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1646 (2007) (explaining why poker is a skill game).

<sup>38</sup> An example of a “tell” is a quick smirk that a player tries to conceal after looking at his cards. Most players can conceal cues as obvious as that; however, skilled players can often decipher subtle reactions that other players have subconsciously, such as tapping one’s cards after viewing a good hand.

<sup>39</sup> George Remenik, *Mrs. Tschetschot’s Busted Hand, Poker, and Taxes: The Inconsistent Application of Tax Laws on a Game of Skill*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 485, 491-92 (2010).

<sup>40</sup> See Cabot et al., *supra* note 2 at 408-09.

<sup>41</sup> Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 465 (2005); see also Tselnik, *supra* note 37 at 1646.

<sup>42</sup> See Cabot et al., *supra* note 2, at 392-93; see *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. 2010).

<sup>43</sup> Cabot & Hannum, *supra* note 41 at 458.

<sup>44</sup> *U.S. v. DiCristina*, 886 F.Supp.2d 164, 234 (E.D.N.Y. 2012).

<sup>45</sup> *U.S. v. DiCristina*, 726 F.3d 92, 99 n.8 (2d Cir. 2013).

<sup>46</sup> *Id.* at n.5 (citing *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995)).

reverse the district court's holding that poker is a skill game, so it is potentially persuasive analysis in other jurisdictions.<sup>47</sup> However, courts are unlikely to rush to adopt the analysis in *DiCristina* because it was a departure from existing law; poker has classically been considered a gambling game and legislatures often have a strong desire to regulate it, if not eradicate it.<sup>48</sup>

## 2. *Trading Cards Under the Material Element Test*

American courts are reluctant to hold that trading cards constitute gambling despite plausible arguments that the elements of gambling exist.<sup>49</sup> Specifically, courts have consistently held plaintiffs do not have standing to sue trading card manufacturers and companies for illegal gambling under the Racketeer Influenced and Corrupt Organizations Act ("RICO Act").<sup>50</sup> In *Price et al. v. Pinnacle Brands, Inc.*, Price and others brought a class action suit, alleging unlawful gambling through "chase cards" (rare trading cards), against the card manufacturer, Pinnacle.<sup>51</sup> The district court dismissed the plaintiffs' complaint.<sup>52</sup> On appeal, the Fifth Circuit Court of Appeals examined the RICO Act and found that plaintiffs did not have standing to sue Pinnacle because they relied upon conclusory allegations rather than general facts to allege injury.<sup>53</sup> Particularly, the court found that the plaintiffs received precisely what they paid for and the fact that they did not receive a "chase"<sup>54</sup> card was insufficient to claim an injury because "[i]njury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing."<sup>55</sup> The court then discussed that plaintiffs had failed to demonstrate causation because they failed to show that the compensable injury was caused by the defendant's alleged RICO violation – gambling.<sup>56</sup> Thus, the court of appeals affirmed the district court's dismissal of the plaintiffs' complaint for lack of standing.<sup>57</sup>

In *Price*, the court set out the elements of gambling as the plaintiffs alleged. The court stated that the elements as applied to trading cards were as follows: "(1) consideration ("persons must purchase card packages in order to try to win a valuable chase card"); (2) chance ("valuable chase cards are randomly inserted in the packages"); and (3) a prize ("chase cards have, and are perceived by class members to have, value, and obtaining a chase card in a

<sup>47</sup> *Id.* at n.8

<sup>48</sup> Cabot & Hannum, *supra* note 41, at 455-56.

<sup>49</sup> Perhaps, as I suspect, because society tends to determine what constitutes gambling based upon preconceived notions of gambling, what is "morally wrong," and what ought to be regulated by the government.

<sup>50</sup> See *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606-07 (5th Cir. 1998); see also *Fuller v. Harrah's Entertainment, Inc.*, No. 04-2108, 2004 U.S. Dist. Lexis 22097 at \*3 (E.D. La. Nov. 1, 2004) (explaining that under *Price* and its progeny, "plaintiffs who purchase packs of trading cards in hopes of winning a more valuable insert card do not have RICO standing to charge illegal gambling because plaintiffs' failure to receive an insert card is not an injury cognizable under RICO").

<sup>51</sup> *Price*, 138 F.3d at 604-05.

<sup>52</sup> *Id.* at 605.

<sup>53</sup> *Id.* at 606.

<sup>54</sup> See *infra* p. 44 for a description of chase cards.

<sup>55</sup> *Price*, 138 F.3d at 607.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 608.

package is winning a prize”).<sup>58</sup> Despite some courts' reluctance to find trading cards to be gambling, some legislatures and attorney generals have nevertheless concluded that trading cards are gambling when marketed with a focus on the chase cards.<sup>59</sup>

Aside from societal factors and the standing issue, a material element jurisdiction could find chance plays a material role in trading cards. As explained in element three, the valuable cards or “chase cards” are those which are rare, hard to find, and usually, worth more money on the resale market.<sup>60</sup> It is precisely because of the rarity of these chase cards that chance plays a material role in trading cards. Because chase cards are randomly inserted into trading card packs and are made in limited quantities, card collectors must purchase many packs to increase the odds (or chance) that they will be fortunate enough to find a pack with a coveted chase card.<sup>61</sup> Skill plays little to no role in obtaining a chase card. Thus, the analysis rests on whether the chase card constitutes a prize.

### III. WHAT ARE VIDEO GAME CONSOLE TOURNAMENTS (VGTs)?

There are several types of VGTs. The selected game may be a first-person shooter game or a sports game, like NHL 2012. Moreover, VGTs may be played locally or online. Local play is when one or more gamers play on a single console or when one or more consoles are linked directly to each other, creating a local network. Online play is when one or more consoles are connected through the Internet. This paper will focus on online sports VGTs, specifically EA Sports' NHL 2012 (NHL12) for PlayStation 3 (PS3).

#### 1. Video Game Tournaments

Tournaments are found in two varieties; those that allow wagering, and those that do not.<sup>62</sup> Because there are many variations of websites that create or connect players to VGTs, this paper will focus specifically on the NHL12 tournaments found on EASportsArena.com (“EASportsArena”), which is a VGT website advertised directly in NHL12.<sup>63</sup> A gamer may compete in a VGT match or tournament on EASportsArena. Once a gamer chooses the game he wants to play, he is redirected to VirginGaming.com where he must register and agree to the terms and conditions of the website.<sup>64</sup> EASportsArena offers a

<sup>58</sup> *Id.* at 604-05.

<sup>59</sup> *See e.g.* CAL. PENAL CODE § 319.3 (Deering 2014).

<sup>60</sup> *See Price*, 138 F.3d at 604-05.

<sup>61</sup> *See, e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 963 (10th Cir. 1996) (discussing how trading card manufacturers increase the value and desirability of card packs through chase cards).

<sup>62</sup> *See* GAMEBATTLES: THE WORLD LEADER IN ONLINE VIDEO GAME COMPETITION, <http://gamebattles.majorleaguegaming.com/> (last visited Feb. 17, 2014); *see also* Tournaments, VIRGIN GAMING, <http://www.virgingaming.com/tournaments.html> (last visited Mar. 5, 2014).

<sup>63</sup> *See* NHL 12, (Electronic Arts 2011); *see also* EA SPORTS ARENA, <http://www.easports.com/arena> (last visited Feb. 17, 2014).

<sup>64</sup> EA SPORTS ARENA, *supra* note 63. For simplicity's sake, even though the actual website connecting gamers to VGTs is virgingaming.com and not EASportsArena.com because of

variety of free or pay-to-enter tournaments and games for NHL12 gamers to compete in, including: head-to-head matches, multiplayer bracket tournaments, leaderboard matches, invite-only tournaments, and series tournaments.<sup>65</sup>

The most common tournaments and games are head-to-head matches and multiplayer tournaments.<sup>66</sup> Head-to-head matches are as they sound: A gamer plays another gamer in a single match one-on-one.<sup>67</sup> EASportsArena connects gamers by allowing them to enter into a game lobby and search for another gamer, post a challenge to a specific EASportsArena gamer, post an “open” challenge which any member within the specified parameters<sup>68</sup> can accept, or accept a specific challenge or open challenge from another member.<sup>69</sup> Head-to-head matches may be played for free or for an entry fee with the winner taking 88% of the pot and the website taking a rake of 12%.<sup>70</sup> Multiplayer tournaments are a form of bracket tournament, which follow the basic elimination format of professional sports brackets.<sup>71</sup> A gamer is connected to another gamer and the winner moves to the next round while the loser is eliminated from the tournament; this pattern continues until only one player remains.<sup>72</sup> Generally, gamers pay a fee to enter the initial round, with the latter rounds being free, and prizes are awarded after each round with increasing value every round.<sup>73</sup> The last remaining player wins a pre-determined amount, which is the pot less the prizes awarded in earlier rounds and the rake.<sup>74</sup>

Leaderboard tournaments and invite-only tournaments are special tournaments based upon gamers’ performances in head-to-head matches and multiplayer tournaments.<sup>75</sup> In leaderboard tournaments, there is a qualifying period during which members play in head-to-head matches and multiplayer tournaments.<sup>76</sup> Winning these matches and tournaments earn members tokens. At the end of the qualifying period, the leading gamers with the most tokens are entered into a special online tournament to compete for prizes.<sup>77</sup> Gamers pay entry fees for most of the qualifying head-to-head matches and multiplayer tournaments, but gamers need not always pay to enter the online leaderboard

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the automatic webpage redirection, I will continue to refer to it as “EASportsArena.” I will also discuss a few of the terms and conditions and the potential implications for virgingaming.com below in section IV-3.

<sup>65</sup> See generally *FAQ & HELP*, VIRGIN GAMING, [http://virgingaming.com/faq/?f=HME\\_6F\\_001](http://virgingaming.com/faq/?f=HME_6F_001) (last visited Feb. 17, 2014).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> Parameters can be set by the gamer creating the open challenge and they include things like skill rating, reputation, and other match details. *Id.*

<sup>69</sup> See *id.*

<sup>70</sup> The pot is the combination of the entry fees and the rake is the so-called “management fee” that the website retains from all cash tournaments or matches. *Terms and Conditions for Virgin Gaming*, VIRGIN GAMING, [http://virgingaming.com/terms-and-conditions/?f=HME\\_6N\\_001](http://virgingaming.com/terms-and-conditions/?f=HME_6N_001) (last visited Feb. 17 2014).

<sup>71</sup> See *FAQ & HELP*, VIRGIN GAMING, *supra* note 65.

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

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

<sup>74</sup> See *id.*

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

<sup>76</sup> See *id.*

<sup>77</sup> *Id.*

tournaments.<sup>78</sup> Invite-only tournaments are only open to gamers who meet certain reputation and skill qualifications as determined by EASportsArena.<sup>79</sup> Gamers may build their reputation and skill by playing in or winning head-to-head matches and multiplayer tournaments while complying with the website's terms and conditions, and receiving good ratings from other members.<sup>80</sup> Similar to leaderboard tournaments, gamers need not pay to enter invite-only tournaments, but they pay to play at least some of the head-to-head matches and multiplayer tournaments which are required to obtain invitations to play in invite-only tournaments.<sup>81</sup>

Series tournaments are a new tournament style for playing VGTs that are quite different from the traditional bracket-style tournament.<sup>82</sup> First, series tournaments can be entered or played at any time, rather than at pre-determined times as in bracket tournaments.<sup>83</sup> Second, gamers may stop playing the tournament after each round and return to it at a later, convenient time or they may play through all rounds at once, rather than playing only at pre-set times.<sup>84</sup> Third, gamers need not enter into the first round – they may enter into the tournament a few or several rounds into the tournament, allowing them to bypass some rounds.<sup>85</sup> However, if the gamer chooses to enter into a later round, he is still required to pay for his entry fee, and it is often higher for the later rounds in series tournaments.<sup>86</sup> Thus, in series tournaments, gamers are required to pay to enter and the round they choose to begin with determines their required entry fee.<sup>87</sup>

## 2. *NHL 2012 for PS3 Gameplay Essentials*

NHL12 for PS3 can either be played locally or online through the PlayStation Network (“PSN”).<sup>88</sup> If a gamer plays locally, he or she either plays against the computer or against a friend who has a controller sitting next to him or her.<sup>89</sup> If a gamer plays online, he or she will either play against the computer or against another online player after being connected via PS3's online servers (also known as “PlayStation Network” or “PSN”). Amidst NHL12's many features and playing formats, the most popular are “team play” and “HUT play.”<sup>90</sup>

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<sup>78</sup> *See id.*

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

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

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

<sup>83</sup> *Id.*

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

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See NHL 12, supra* note 63.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* “HUT play” is much like playing a video game with your fantasy sports team. This is described further *infra* p. 38.

a. *Team Play and HUT Play*

Team play involves simply choosing an existing NHL team along with its current players, coaching staff, rating, etc.<sup>91</sup> Additionally, there are roster updates, at least a few times, during the actual NHL season where programmers adjust the team for trades, injuries, and update the players' ratings.<sup>92</sup> An example of how team play works would be as follows: A gamer starts a game of NHL12 where he chooses the Minnesota Wild as his team. The gamer's gaming skill combines with the team, coaching, and player skill ratings to form an overall skill rating.

In contrast, a gamer could choose "HUT play" (Hockey Ultimate Team play) which involves creating and maintaining one's own hockey team, an experience that is akin to being the real-life owner of a professional hockey franchise.<sup>93</sup> It is also comparable to creating one's own fantasy sports team. A gamer would create a team and play HUT by collecting players, coaches, training cards, and contract cards.<sup>94</sup> More specifically, he begins HUT play with a virtual pack of trading cards featuring various players, coaches, and training programs. The gamer has the option, in order to obtain better players or training programs, to purchase additional virtual packs either with points called "pucks," with real money, or in an auction-type format<sup>95</sup> which allows trading or purchasing other gamers' cards for pucks.<sup>96</sup> The cards, their meaning and value, and their implications are in more detail below. After the gamer creates his team, he can maintain (or increase or decrease) the player's and team's skill level through training cards and contract cards.

The main difference between team play and HUT play is that HUT play requires training, contracts, and other maintenance in order to maintain, increase, or decrease a team's skill rating; whereas in team play, the team's skill rating will mirror that of the actual NHL team's rating with only incremental increases in skill after playing a certain number of games<sup>97</sup>

In both HUT and team play, the so-called physics engine and computer algorithms have essential roles in the realistic nature of the game and the elements of chance.<sup>98</sup> For example, the physics engine creates realistic hits based on the players' real-life height and weight along with the force and speed of the hit in the game.<sup>99</sup> In NHL12, much like in the actual NHL, gamers encounter

<sup>91</sup> *See id.* A team's "rating" is projected based on statistics of the team from prior years. *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> The auction format is similar to eBay; gamers set a price in "pucks," bidders can "buy now" to purchase the card (if the "buy now" option is available), bid in the auction, or offer a trade consisting of pucks and/or other cards. *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*; *see also* Caley Roark, NHL 12 Reviewer: HUT, Be a Legend and Winter Classic, OPERATION SPORTS, September 10, 2011, Impressions, <http://www.operationsports.com/features/1331/nhl-12-reviewer-hut-be-a-legend-and-winter-classic-impressions/>.

<sup>98</sup> *See NHL 12*, *supra* note 63; *see also* Andrei Dumitrescu, NHL 12 Gets New Be A Pro Mode, Full Contact Physics Engine, SOFTPEDIA, (May 25, 2011, 22:01), <http://news.softpedia.com/news/NHL-12-Gets-new-Be-a-Pro-Mode-Full-Contact-Physics-Engine-202263.shtml>.

<sup>99</sup> *See id.*

player injuries, fluke goals,<sup>100</sup> unexplained missed shots, broken sticks, penalties (good and bad ones), and so forth.<sup>101</sup> Additionally, pursuant to the roster updates throughout the season, gamers may also face actual player injuries and alterations to their players' ratings for these factors occurring in real life.<sup>102</sup> Thus, gamers are playing based upon the chance of these factors arising in the NHL and in their game.<sup>103</sup>

During a game, a gamer may toggle between any player on his team, but at any given time, the gamer only controls one of his team's players.<sup>104</sup> A programmed algorithm controls all of the remaining players.<sup>105</sup> The gamer will choose a play (a wheel breakout, for example) and the computer algorithm will then control the players as if they were NHL players, based upon the chosen play.<sup>106</sup> However, there are always occasions where the computer's algorithm results in a failed pass, a poorly taken shot, or a player out of position that, arguably, would almost never happen in real-life.<sup>107</sup> The next section explains how these algorithmic factors are quite different in NHL2012 as compared to in the real-life NHL.

*b. Trading Cards in HUT*

Though there are several types of cards available, this section will focus on three main categories: player cards, contract cards, and training cards.<sup>108</sup> There is a player card for each player in the NHL. The ranking found on the player's card is determined using the player's previous years' performance, the projected performance for future years, and filtered through a totality of the circumstances analysis by examining statistics, age, speed, agility, and other similar factors.<sup>109</sup> Contract cards are used in conjunction with a player card to establish a new player contract or to extend a current player's contract.<sup>110</sup> Training cards come in several different forms. As a category, they are used to maintain, adjust, or upgrade players.<sup>111</sup> These cards include:

- Player training cards (for forwards and defensemen) add +3, +4, +5, +7, or +9 to a player's ranking in the categories of: skate, shot, defense, handling, checking, or a +2, +3, or +5 "all;"
- Goalie training cards add +3, +4, +5, +7, or +9 to a goalie's ranking of: rebound control, quickness, high saves, low saves, position, or a +2, +3, or +5 "all;"
- Position cards allow the gamer to alter a player's position (for example, in real-life, Mikko Koivo is a center in the NHL, but with a position card, a gamer could play Koivo as a left or right wing); and

<sup>100</sup> Fluke goals are goals that normally would not have gone in the net or that a goalie normally would have saved.

<sup>101</sup> See *NHL 12*, *supra* note 63.

<sup>102</sup> See *id.*

<sup>103</sup> It is almost as if gamers face two times the chance of what an NHL team or NHL team owner would face throughout a season.

<sup>104</sup> See *NHL 12*, *supra* note 63.

<sup>105</sup> MARK J.P. WOLF, *THE MEDIUM OF THE VIDEO GAME* 1978 (2001).

<sup>106</sup> See *generally id.*

<sup>107</sup> See *generally id.*

<sup>108</sup> See *NHL 12*, *supra* note 63.

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

- Healing cards “heal” player injuries (for example, there are +1, +2, +4 games for any injury which heal players for 1, 2 or 4 games; there are also cards specific to injuries such as torso, leg, or arm injuries).<sup>112</sup>

Additionally, NHL12 has included “players of the week” cards and “legend” cards.<sup>113</sup> Approximately five players are chosen as the players of the week based upon their performance, and their cards are available for purchase with upgraded ratings.<sup>114</sup> Legend cards are those of legendary hockey players such as Wayne Gretsky and Gordie Howe, of course, these players also have upgraded, or legendary, ratings; these cards are also available for purchase or trade.<sup>115</sup> The nuances and the importance of various player cards will be discussed in more detail below, in section IV-2.<sup>116</sup>

#### IV. COULD VGTs BE CONSIDERED GAMBLING?

Examining VGTs under the material element test has brought us to the question of this paper which is best answered by considering the two main types of VGT gameplay separately. In both types of VGTs, the necessary requirement for the material element test is whether chance plays a material factor in the outcome of the VGT. Under NHL12’s team play, a court could find VGTs gambling based upon the computer algorithms and the physics engine which compounds the element of chance<sup>117</sup> when paired with the roster updates.<sup>118</sup> Under HUT play, much of the analysis remains the same; although, HUT play includes the use of virtual trading cards, which distinguishes HUT from standard play. A court likely would find that the virtual trading card feature of HUT play does not constitute gambling based upon the lack of valuable prize. If courts find VGTs to be gambling under either NHL12 team play or HUT play, the websites administering VGTs may be held accountable for their involvement in the gambling activity.<sup>119</sup>

##### 1. NHL12 Team Play

Whether playing NHL12 team play online for money is gambling under the material element test depends upon whether there is consideration, a prize is awarded, and if chance is a material element in the game.<sup>120</sup> As for consideration, one could argue that the mere time it takes to play the game is a detriment

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *infra* part IV-2.

<sup>117</sup> The computer algorithms provide for gamers to encounter player injuries or fluke goals, which events are completely separate from the real-life NHL. However, the roster updates may remove a gamer’s player from the line-up if the player is injured in the real-life NHL. Accordingly, the gamer must deal with game-created injuries and real-life NHL player injuries. Therefore, gamers have a compounded element of chance. See NHL 12, *supra* note 63; Wolf, *supra* note 106.

<sup>118</sup> See NHL 12, *supra* note 63.

<sup>119</sup> See *infra* part IV-3.

<sup>120</sup> See *Dalton v. Pataki*, 11 A.D.3d 62, 90 (N.Y. App. Div. 2004) (discussing the three elements necessary to constitute gambling under New York law); see also, *e.g.*, N.Y. Penal Law § 225.00 (McKinney 2011).

and thus, constitutes consideration. Some courts may accept this because under traditional contract principles, consideration may be an exchange of promises or it may be something as small as a peppercorn.<sup>121</sup> If this were accepted, even the free tournaments could be considered gambling. However, it is more likely that courts would be persuaded that consideration must be valuable, i.e. the money paid by the gamer to enter the match or VGT.<sup>122</sup> Because money and other prizes are given to the winning gamer, it is almost certain that VGTs could satisfy the prize element. Second, all courts would likely find that a prize is involved because money or other prizes are awarded to the winning gamer.<sup>123</sup> However, determining whether chance is a material element in the game will depend upon the court's thorough examination of the game, statistical evidence, expert witnesses, and perhaps comparisons to similar games.<sup>124</sup>

In order for a court to find that chance is a material element in VGTs, or specifically, NHL12 team play VGTs, the court would need to examine: (1) the computer algorithms that control the players when the gamer is controlling only one of the players at any given time, and (2) the injuries and other similar factors within the game which are compounded when coupled with the roster updates that account for real player injuries.<sup>125</sup> These are the most questionable aspects of the game because they involve the most chance or luck, especially if the court finds that these aspects have at least more than a "mere incidental effect" on the game.<sup>126</sup> It might not be difficult to persuade a court in a material element jurisdiction to make such a finding because it is clear that these aspects do have some effect on the game.<sup>127</sup>

First, it is unlikely that a court would find that computer algorithms uncontrolled by a gamer are "skill;" rather, a court would likely find that they are elements of chance in the game. One could argue that because all gamers encounter the computer algorithms and thus, the same element of chance, the chance is equally distributed among the gamers.<sup>128</sup> Further, even if the algorithms negatively affect one gamer at one point, throughout the course of a tournament or gameplay, the algorithms should affect the other gamers to the same degree.<sup>129</sup> This is a very plausible argument.

However, courts may not be persuaded because the goal of the chance/skill element of the test is not to evaluate the chance as it affects each gamer but how much chance is involved in the game as a whole.<sup>130</sup> For example,

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<sup>121</sup> *Judwin Properties, Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 435 & n.3 (5th Cir. 1992).

<sup>122</sup> *See Veterans of Foreign Wars Post 6477 v. Mo. Gaming Comm'n*, 260 S.W.3d 388, 390-91 (Mo. Ct. App. 2008) (holding that consideration must be valuable).

<sup>123</sup> *See id.* at 391 (stating that gambling only occurs when "successful play is rewarded by something of value," and defining what "something of value" is); *see also James v. State*, 113 P. 226, 228-29 (Okla. Crim. App. 1910).

<sup>124</sup> *See Cabot et al.*, *supra* note 2, at 401-02.

<sup>125</sup> *See NHL 12*, *supra* note 63.

<sup>126</sup> *See id.*; *see also Cabot et al.*, *supra* note 2, at 392-93.

<sup>127</sup> *See NHL 12*, *supra* note 63.

<sup>128</sup> *See id.*

<sup>129</sup> A parallel argument is often made in the context of poker. *See Tselnik*, *supra* note 37, at 1646-48 (discussing how a professional poker player's skill outweighs the game's element of chance in the long run).

<sup>130</sup> *See Cabot et al.*, *supra* note 2, at 409-10.

poker has consistently been found to be a gambling game regardless of the skill involved (*e.g.*, bluffing, reading opponents, calculating and playing the odds, etc.) because of the chance involved for *all* players – the luck of the cards and the chance of what cards will be drawn.<sup>131</sup> Courts could apply this same logic to VGTs; computer algorithms constitute chance that materially affects the outcome of the game much like the draw of cards in poker. Accordingly, although all players encounter the same chance, the element of chance is not removed from the game.<sup>132</sup>

Second, player injuries, penalties, fluke goals, missed shots or passes, and other similar aspects in NHL12 are additional chance factors that contribute to the outcome of the game.<sup>133</sup> As described above, the physics engine in NHL12 adds realism to the game by mimicking real-life events, such as player injuries, which can require gamers to play without the injured players throughout the game and sometimes for more than one game.<sup>134</sup> Additionally, in concert with the computer algorithms, gamers may experience bad penalties, fluke goals, unexplainable missed shots or passes, etc.<sup>135</sup> The latter aspects are very realistic because these are elements of real-life NHL play.

However, while injuries are also an ordinary aspect of hockey, there is an additional element of chance in NHL12 that does not exist in the real-life NHL. In NHL12, injuries can affect gamers in two ways: a gamer's player may be injured in the course of gameplay, causing a gamer to change his roster or play short a player for one or more games in a tournament depending upon the injury;<sup>136</sup> or, a gamer's player may be placed on the injured reserve pursuant to the PSN roster updates that reflect the injury of an actual NHL player.<sup>137</sup> As a result, gamers encounter essentially double the chance that their players will suffer injuries and they will be forced to deal with more injuries than a coach/owner of an NHL team would.<sup>138</sup>

A court would likely find that the aspects of the game, such as bad penalties and fluke goals, are essential aspects of hockey such that they are not truly elements of chance; but, it could find that the increased injuries are strong factors of chance in the game. In addition, a court could find that computer algorithms are elements of chance. Together, the injuries and computer algorithms are chance elements that contribute to the outcome of the game and a court could plausibly find that such chance is a material element of the game because, although it may not be dominant, it is more than a mere incidental aspect of the game.

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<sup>131</sup> *See id.*

<sup>132</sup> *See NHL 12, supra* note 63.

<sup>133</sup> *See id.*

<sup>134</sup> *See id.; see also* Dumitrescu, *supra* note 98.

<sup>135</sup> *See NHL 12, supra* note 63; *see generally* WOLF, *supra* note 105.

<sup>136</sup> Gamers may also use a healing card, if they have one, to heal their player's injuries. *See NHL 12, supra* note 63.

<sup>137</sup> *See id.*

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

## 2. *NHL12 HUT Play and Trading Cards*

There is overlap among the essential playing features between team play and HUT play; however, HUT play has a distinct element that should be examined separately under the material element test – the virtual trading card feature.<sup>139</sup> As explained in section II-2, courts have been reluctant to find trading cards to be gambling under the RICO act, but some states' Attorneys General and legislatures have issued opinions or created statutes listing trading cards as gambling.<sup>140</sup> As discussed below, the virtual trading cards in HUT play meet the elements of gambling under the material element test; thus, courts employing the material element test could find NHL12's virtual trading card feature to be gambling.

### *a. Differences and Similarities Between Virtual and Traditional Trading Cards*

Before examining virtual trading cards in terms of the material element test, the principal differences and similarities between virtual trading cards and typical trading cards will be explained (aside from the obvious virtual/physical distinction). First, there are alternative methods of obtaining virtual trading cards in HUT play aside from paying money; whereas, the only way to obtain ordinary trading card packs is to purchase them.<sup>141</sup> Virtual trading cards may be purchased with “pucks” (a virtual currency in NHL12 earned during gameplay) or obtained from another gamer via PSN's auction site in exchange for pucks or other trading cards or a combination of both.<sup>142</sup> Second, traditional trading cards have a resale market;<sup>143</sup> however, virtual trading cards do not have the same type of resale market. Gamers can trade or sell their virtual trading cards on the auction site of PSN, but they can only obtain pucks or other cards from gamers, they cannot receive real money.<sup>144</sup> Third, traditional trading cards tend to consist of only players and/or teams;<sup>145</sup> virtual trading cards on NHL12 include player or team cards, but there are also upgrade cards such as training cards, healing cards, and position cards.<sup>146</sup> Lastly, virtual player cards, unlike traditional NHL trading cards, may be improved with other upgrade virtual cards and may be used for gameplay.<sup>147</sup>

Despite the differences between virtual and traditional trading cards, the two types are remarkably similar when comparing the player and team cards. First, both types of cards feature a player or team and the corresponding statis-

<sup>139</sup> *See id.*

<sup>140</sup> *See, e.g.,* CAL. PENAL CODE § 319.3 (West 2013).

<sup>141</sup> *Compare NHL 12, supra* note 63, *with* TOPPS, [www.topps.com](http://www.topps.com) (last visited Feb. 17, 2014) (Topps is the leading manufacturer of sports trading cards, which are available for sale through their website or at retail stores around the United States).

<sup>142</sup> *See NHL 12, supra* note 63.

<sup>143</sup> *See, e.g.,* BECKETT PRICE GUIDE, [www.beckett.com/price-guides](http://www.beckett.com/price-guides) (last visited Feb. 17, 2014) (the Beckett price guide gives trading card collectors a guide for selling their trading cards on the resale market).

<sup>144</sup> *See NHL 12, supra* note 63.

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

tics.<sup>148</sup> Second, both types come in card “packs” and may be purchased for money.<sup>149</sup> Third, in each type, packs may contain rare and valuable chase cards whose potential existence encourages collectors and gamers to purchase more packs.<sup>150</sup> Lastly, both types foster a secondary market in which collectors buy/trade cards from other collectors and gamers buy/trade cards from other gamers.<sup>151</sup>

*b. Virtual and Traditional Trading Cards Under the Material Element Test*

When based solely upon the similarities between virtual and traditional trading cards, it seems that each element of the material element test is met. First, there is consideration whenever a gamer purchases a pack of virtual cards.<sup>152</sup> Second, chance plays a material element in whether or not the gamer will obtain a rare chase card in a pack.<sup>153</sup> Chase cards are rare and hard to obtain. Accordingly, they are extremely valuable to gamers and their “resale” value on the secondary market is quite high.<sup>154</sup> The chase cards in virtual trading card packs include legend cards, player of the week cards, certain rare player cards (such as Sidney Crosby and Alexander Ovechkin), and rare upgrade cards (such as the +2, 3, or 5 “all” training cards.)<sup>155</sup> Third, a prize is awarded to the gamer who finds the chase cards.<sup>156</sup> The prize may take the form of the card itself, the use of the card in gameplay (which is very helpful because rare cards increase the success and value of the team), or the trade value on the PSN auction market.<sup>157</sup>

The first two elements are unlikely to be contested here because it seems evident that consideration is paid when a gamer purchases the virtual trading card packs and no skill can change whether he will obtain a chase card. However, the third element could be debated because the prize is not the traditional sort. With regular trading cards, the prize from obtaining a chase card could be the mere possession of it, but it is typically the monetary value of the card that constitutes the prize because a prize must be more than just nominally valuable.<sup>158</sup> With these virtual trading cards, gamers cannot trade their acquired chase cards for money – they can only obtain pucks, other cards, or a better team in exchange for chase cards.<sup>159</sup>

One argument is that gamers are compensated with real money if they win a VGT, and the winning is attributed to the use of chase cards to improve their

<sup>148</sup> Compare TOPPS, *supra* note 140, with NHL 12, *supra* note 63.

<sup>149</sup> Compare TOPPS, *supra* note 140, with NHL 12, *supra* note 63.

<sup>150</sup> Compare TOPPS, *supra* note 140, with NHL 12, *supra* note 63.

<sup>151</sup> Compare, e.g., BECKETT PRICE GUIDE, *supra* note 143, with NHL 12, *supra* note 63.

<sup>152</sup> See NHL 12, *supra* note 63; Price v. Pinnacle Brands, Inc., 138 F.3d 602, 604-05 (5th Cir. 1998) (listing how chase cards allegedly meet the elements of illegal gambling).

<sup>153</sup> See NHL 12, *supra* note 63.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*; see Price *et al.*, 138 F.3d at 604-05.

<sup>157</sup> See NHL 12, *supra* note 63.

<sup>158</sup> See Veterans of Foreign Wars Post 6477 v. Missouri Gaming Comm’n, 260 S.W.3d 388, 391 (Mo. Ct. App. 2008); see also James v. State, 113 P. 226, 228 (Okla. Crim. App. 1910).

<sup>159</sup> See NHL 12, *supra* note 63.

team. However, this argument will likely fail because it seems that such a link is too attenuated. Another argument is that the prize is pucks which are equivalent to money because those pucks may be used, in lieu of real money, to purchase other packs of cards. This is the most plausible argument that gamers earn a prize when obtaining virtual chase cards, but it is a difficult argument to make – it would depend upon a persuasive demonstration of statistics surrounding the cost of packs in real money compared to their cost in pucks and the use of pucks in NHL12 as a whole. Therefore, virtual trading cards, when viewed as most similar to traditional trading cards as their features allow, could be considered gambling only if the prize element is met by a court finding that pucks are equivalent to money.

*c. Virtual Trading Cards Under the Material Element Test*

Virtual trading cards in HUT play are relatively safe under the material element test (and likely the predominance test) because their additional features make it less likely that a court would find the elements of consideration and prize are met. As explained in subsection IV-2.b, the rare cards are like chase cards because they are valuable to gamers and induce them to purchase more packs. Thus, a court would likely find that chance is a material element in the quest for chase cards in virtual trading card packs.<sup>160</sup> However, a court will likely also find that there is no consideration or prize.

A court could plausibly find there is no prize from the virtual trading card feature of HUT play as explained in the subsection IV-2.b. It may also find that there is no consideration involved, particularly if the gamer purchases virtual card packs with pucks or trades cards or pucks with other gamers. The court's finding would depend upon two things: first, if the court follows the "any detriment" or "peppercorn" theory of consideration in gaming law,<sup>161</sup> it could find that the amount of time taken to play games and earn pucks is sufficient consideration; second, if the court equates pucks to a monetary value based on their use in the game, the effort required to obtain them, and their ability to purchase the same items instead of using cash, it could find that pucks are sufficient consideration. If a court does not take either of those two approaches, it likely will find that there is no consideration. The court may also find no consideration even if, in a particular gamer's case, the gamer only purchased packs with money and not pucks, simply because there was an alternate form of purchase available.<sup>162</sup> If the court does not take either of the two discussed approaches to consideration, it will likely find there is no consideration, and probably no prize. Thus, virtual trading cards in HUT play would not constitute gambling under the material element test.

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<sup>160</sup> See *Price et al.*, 138 F.3d at 604-05 (discussing that the chance element of a gambling test may be met by the existence of chase cards).

<sup>161</sup> See *e.g.* *People v. Dubinsky*, 31 N.Y.S.2d 234, 239 (N.Y. Sp. Sess. 1941) (holding that consideration need not be money).

<sup>162</sup> Most courts hold that there is no consideration if the game sponsor offers an alternate form of entry or purchase that is as simple as the paid entry. See *Bullseye Distributing, LLC v. State Gambling Comm'n*, 110 P.3d 1162, 1165 (Wash. App. Ct. 2005).

### 3. *What about VGT Websites?*

If VGTs are found to be gambling under the material element test, the court will look at evidence against the websites operating the VGTs. The websites which host the VGTs could be implicated for their involvement in gambling under the Unlawful Internet Gambling Enforcement Act (UIGEA, codified at 31 U.S.C. § 5363), the Illegal Gambling Business Act (IGBA, codified at 18 U.S.C. § 1955), and the Federal Wire Act (FWA, codified at 18 U.S.C. § 1084), like the major poker websites.<sup>163</sup> Parts of EASportsArena's operation are at least suspicious, if not troublesome. First, when logging into EASportsArena, you are redirected to VirginGaming.<sup>164</sup> Second, the website is operated entirely out of Canada, as other poker sites have done to avoid U.S. jurisdiction.<sup>165</sup> Third, the website requires gamers to be 18 years old to engage in VGTs,<sup>166</sup> perhaps because 18 is the legal age to gamble in some Canadian provinces (it is 19 in the others).<sup>167</sup> Fourth, VirginGaming takes a "management fee" out of the entry fees.<sup>168</sup> This so-called management fee could be found to be a rake if the fee is not actually going towards operational costs, but is garnering a profit for EASportsArena. Fifth, the website has a hyperlink for "responsible gaming" that lists the symptoms of problem gambling<sup>169</sup> and provides several hyperlinks to help centers for problem gamblers, such as Gamblers Anonymous, which are generally only present on gambling websites or in casinos.<sup>170</sup> More information about the operation of EASportsArena would be required to make a true assessment as to its liability, but the simple facts above could prove quite troublesome if VGTs were found to be gambling under the material element test.

## V. THE SOLUTION – THE PREDOMINANCE TEST (REFINED)

Under the predominance test, a judge will consider the same forms of evidence as under the other tests, but he or she will require the presence of three elements to find a game to be gambling. These three elements are: (1) consideration, (2) chance predominates over skill, and (3) prize.<sup>171</sup> As mentioned, elements (1) and (3) have been contested, but are less frequently battled

<sup>163</sup> For information about the indictment of the major poker websites, see Verified Complaint, *United States v. PokerStars et al.*, 2011 WL 1449657 (S.D.N.Y. April 14, 2011) (No. 11 CIV 2564).

<sup>164</sup> See EA SPORTS ARENA, *supra* note 63.

<sup>165</sup> *Terms and Conditions for Virgin Gaming*, VIRGIN GAMING, *supra* note 70; see Mike Brunner, *Poker Site Cheating Plot a High-stakes Whodunit*, NBCNEWS.COM (Sept. 18, 2008 9:09:13 AM), [http://www.nbcnews.com/id/26563848/ns/us\\_news-crime\\_and\\_courts/t/poker-site-cheating-plot-high-stakes-whodunit/](http://www.nbcnews.com/id/26563848/ns/us_news-crime_and_courts/t/poker-site-cheating-plot-high-stakes-whodunit/) (discussing a cheating scandal against the Canadian poker site, UltimateBet.com).

<sup>166</sup> *FAQ & HELP*, VIRGIN GAMING, <http://virgingaming.com/faq/> (last visited Feb. 18, 2014).

<sup>167</sup> *Gambling in Canada*, WORLD GAMBLING REVIEW, <http://onlinecasinosuite.com/gambling/canada/> (last visited Feb. 18, 2014).

<sup>168</sup> *Terms and Conditions for Virgin Gaming*, VIRGIN GAMING, *supra* note 70.

<sup>169</sup> *Id.*

<sup>170</sup> *Responsible Gaming*, VIRGIN GAMING, [http://virgingaming.com/responsible-gaming/?f=HME\\_6L\\_001](http://virgingaming.com/responsible-gaming/?f=HME_6L_001) (last visited Feb. 18, 2014).

<sup>171</sup> See *e.g.* *Commonwealth v. Dent*, 992 A.2d 190, 191 (Pa. 2010).

over in court because they are presumably well-settled through contract principles.<sup>172</sup> However, element (2) is often the subject for debate in court cases because the standard is not uniformly applied.<sup>173</sup> Commentators suggest that courts measure, “chance predominates over skill,” in that chance must account for over 50% of the outcome of the game for it to be a gambling game.<sup>174</sup> If skill accounts for 50% or more of the outcome of the game, it is not a gambling game.<sup>175</sup>

Using the predominance test to assess VGTs elucidates the problematic nature of the material element test and the necessity for the predominance test. The analysis in section IV is relevant to this examination. Although the factors previously discussed, including the computer algorithms and other chance elements such as injuries, could be found to be “material elements” of chance in the game, it is highly unlikely that chance would be found to predominate over skill. VGTs, particularly NHL12 VGTs, require a great deal of skill to play and win. Even though the chance elements play a role in the outcome of the game, they do not predominate over skill or play more than a 50% role in the game; rather, skill predominates over those chance elements. All players encounter those chance elements and the skilled players account for those aspects, making them statistically more likely to win than unskilled players in spite of the chance elements. Because of this outcome and the role of skill in NHL12 and similar VGTs, chance does not predominate over skill, and thus, VGTs are games of skill and VGTs are not gambling. However, some jurisdictions have specific laws prohibiting particular games, so a few states may need to be voided from participation.

Additionally, the predominance approach to gambling may be problematic because not all games are capable of producing accurate statistics, such that this 50% or more approach is viable. Even if they were, many courts say nothing about “predominates” meaning over 50% in gambling cases, which makes one wonder if they actually apply this percentage standard.<sup>176</sup> Moreover, several of these courts do not discuss the games’ statistics as evidence.<sup>177</sup> Thus, while this paper suggests that jurisdictions currently using the material element test should adopt the predominance test, these jurisdictions could further refine the predominance test if adopted.

The predominance test is the best method for determining what constitutes gambling because it generally does not lead to ridiculous or varying results depending upon the court, unlike the material element test. However, to ensure the best results, the predominance test ought to be refined and applied uniformly. Refining the test includes ensuring a uniform application of the “50% plus” benchmark and a necessary examination of statistics. Thus, all predominance test courts should apply the 50% plus benchmark, and when viable statistics are available, courts should consistently consider and assess them as part of

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<sup>172</sup> See *supra* part I.

<sup>173</sup> See *supra* part I.

<sup>174</sup> Cabot et al., *supra* note 2, at 402.

<sup>175</sup> *Id.*

<sup>176</sup> See e.g. *Commonwealth v. Dent*, 992 A.2d 190 (Pa. 2010) (failing to discuss a percentage benchmark for when chance “predominates” over skill).

<sup>177</sup> See e.g. *id.*

the chance/skill analysis. Additionally, regulators and courts should consider permitting a re-evaluation of a gambling game every few years when raised in the courts rather than flatly applying the precedent of a game being deemed gambling from years prior. This will ensure that, given the frequent alterations of games and changes in understanding, games will not continue to be deemed gambling despite a change or new information that would lead to an opposite conclusion. With these changes to the predominance test, its application will be more uniform and it will provide the most consistent and accurate results in determining what constitutes gambling.

## VI. CONCLUSION

I sense the collective gasp of gamers and the entire video game industry as they reach this section of my paper. Am I really claiming that the beloved features of immensely popular video games are gambling in some jurisdictions? Under the material element test, and depending on the court, they *could* be. However, that does not mean they *should* be classified as gambling. The court's discretion to deem what constitutes a game in which chance is a material element is vast and, in practice, tends to favor the government. It seems that this discretion is intentional to permit the legislature and courts to deem which games are gambling (and thus subject to regulation) when it so chooses. Perhaps it is a tactic to encourage government regulation or perhaps it constitutes a social choice based on gambling being "morally repugnant" where the courts and legislature err on the side of caution and deem activities gambling more often than not. But I suggest they grant the "non-morally repugnant" ones a statutory exemption, such as fantasy sports and the crane game,<sup>178</sup> or avoid addressing them by invoking judicial doctrines, such as the standing issue raised in trading card RICO cases.<sup>179</sup>

In any case, while a court *could* find these VGTs and trading card features to be gambling under the material element test, I do not believe they ought to be considered gambling. Rather, this potential result demonstrates that the material element test is too discretionary and vague; nearly any activity involving money and chance could become gambling depending on the court's interpretation of the chance involved. I do not purport to have the foolproof solution to the subjectivity involved in determining what constitutes gambling, but I do suggest that the material element jurisdictions adopt the majority approach, the predominance test, because the material element test permits too much discretion which could result in over- or under-inclusiveness based solely upon the success of the testimony and various studies offered to the court or legislature at any given time.

Further, refining the predominance test, to ensure it is uniformly applied with the "50% plus" benchmark and allowing a re-examination of particular games at least every few years to account for changes in the knowledge of the game or changes in the game itself would increase the success and predictability of the test while decreasing the chance that games would be mistakenly

<sup>178</sup> 31 U.S.C. § 5362(1)(E)(ix) (2012); ALA. CODE § 13A-12-76(c) (2013).

<sup>179</sup> Price et al. v. Pinnacle Brands, Inc., 138 F.3d 602, 606 (5th Cir. 1998).

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classified as gambling games. Thus, the material element test ought to be replaced with the predominance test to avoid unpredictability, varying results across jurisdictions, and potentially ridiculous results where skill games, such as VGTs, could be deemed gambling solely because chance plays *a* role in the outcome of the game.

