

# Esports and the Law

Presented by Skadden

## Is My Loot Box Legal?

By Anthony J. Dreyer and David Lamb, of Skadden, Arps, Slate, Meagher & Flom LLP

The Year 2019 saw an appreciable increase in scrutiny directed toward the use of “loot boxes”—in-game rewards (often randomized) that players can purchase while playing a video game. Both domestically and internationally, legislatures, regulatory agencies, and private groups took up the issue of what, if any, legal concerns loot boxes present. However, while discussions concerning loot boxes were certainly more prominent in 2019, they are just the latest in a long line of legislative and administrative reactions to this growing trend in video games. Although, to date, most attempts to ban or regulate loot boxes have been unsuccessful, the increasing government (and

private) scrutiny of this practice deserves the attention of anyone with a connection to the video game industry.

### The Rise of the Loot Box

The term “loot box” generally refers to any mechanism allowing players to obtain a set of unknown, virtual items for use in a game. A loot box could be a booster pack in a collectible card game, a weapons crate in a first-person shooter, or a llama-shaped piñata in a battle royale game. In most, though not all, instances of loot boxes, the available items have varying degrees of rarity, with more desirable items appearing less frequently.

Loot boxes and other micro-transaction mechanics have grown increasingly popular in the last several years, paralleling both

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## Senior Attorney at Activision Blizzard Shares Insights about Esports Industry

By Alex Beyrent, GWU 2L

Robert Forbes didn’t just fall into his position as Senior Legal Director of esports Leagues at Activision Blizzard.

He gained valuable experience at various points across the sports law landscape, ensuring that the company behind the creation of iconic franchises such as Call of Duty, Overwatch, and World of Warcraft, would get a well-rounded sports lawyer who could help the company build out its leadership position within the esports industry.

Forbes’ professional experience began shortly after graduating from the University of Virginia School of Law. First, he joined a law firm known for its work in the professional sports industry, Proskauer. From there, he went on to work as V.P. of Legal and Government Affairs for the Washington Redskins.

When the opportunity came up at Activision Blizzard, he was a little skeptical. His experience with video games up to that point had been fairly casual, largely limited to playing a lot of Tony Hawk’s Pro Skater in college, but he was open to

expanding his horizons.

And it has paid off. At Activision Blizzard, Forbes would have the unique opportunity to get in on the ground floor and help shape a brand-new professional sports league, one that he realized had real staying power. Since accepting the position, he has helped negotiate the sales of 20 Overwatch League teams and 12 Call of Duty League teams. These leagues have grown into worldwide spectacles. Their competitions are attended by thousands

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## Esports and the Law

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## Hackney Publications Welcomes Skadden as Sponsor of *Esports and the Law*, a Timely and Complimentary Newsletter Reporting on a Fast-Growing Industry

**H**ackney Publications, the nation's leading publisher of sports law periodicals, has announced that Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) will be the sponsor of *Esports and the Law*, a quarterly electronic newsletter, which will be complimentary to industry participants.

*Esports and the Law*, which can be subscribed to at <https://esportsandthelaw.com/>, will provide game publishers, leagues, teams, facilities and others with insights and analysis about recent legal developments in the industry.

Aside from sponsoring the newsletter, Skadden will also provide bylined articles from its attorneys, who have accumulated significant experience in the esports space. Additional original content will be provided by Hackney Publications and *Esports and the Law's* Editor in Chief, **Ellen M. Zavian**, a Professorial Lecturer in Law at the George Washington University Law School and nationally recognized esports industry expert.

Skadden partners **Karen Hoffman Lent** and **Anthony J. Dreyer**, who are co-leads of the firm's sports practice, along with sports and antitrust partner **Matthew M. Martino**, will provide editorial guidance and analysis. Other members of the firm will also contribute articles from time to time.

"One of our missions will be to provide prudent strategies designed to minimize risk and maximize growth," said Lent. "This newsletter is a natural extension for the attorneys in our sports practice, who through their representation of some of

the industries' biggest participants are constantly considering new and effective strategies, which can be shared with readers of *Esports and the Law*."

Similarly, Professor Zavian, who has decades of experience in the sports industry, has embraced the publication as a grand opportunity.

"*Esports and the Law* fits perfectly into my sports law class, where we are teaching students about being observant about how the law impacts new industries. This is why many of my students, with my guidance, will contribute well-researched articles," Professor Zavian said. "There are so many areas in the esports industry that are not being properly addressed from a legal prospective. We look forward to changing that."

Meanwhile, Hackney said he has been looking for the right partners to cover the legal side of the esports industry.

"Skadden has familiarity with Hackney Publications because of its decade-long subscription to *Sports Litigation Alert*," he said. "Similarly, we have had a long relationship with Professor Zavian, including publishing her bylined articles from time to time."

Hackney added that there are no limits on how influential *Esports and the Law* can be.

"We are prepared to cover the legal side of the industry like no other publication," he said. "These are exciting times in esports. We expect that our newsletter will deliver legal analysis and recommendations that can't be found anywhere else. ●

## Unique Gift Foreshadows Karen Hoffman Lent's Sports Law Career at Skadden

By Lauryn Robinson, *GW Law 2L*

**W**hen Karen Hoffman Lent received a Coleco Vision system from her parents in the fifth grade, little did she know this unique gift foreshadowed her career the esports practice at Skadden, Arps, Slate, Meagher & Flom, LLP.

Her love for sports grew with time. At Johns Hopkins University, Lent was a three-year starter on the women's basketball team while majoring in chemical engineering. After her summer associate experience at Skadden, Lent joined the firm to tackle sports law matters with tenacity. Today, Lent utilizes her love of athletics to create a dynamic career in sports and antitrust litigation.

Lent has represented a breadth of professional teams and leagues including the National Basketball Association (NBA), National Collegiate Athletic Association (NCAA), National Hockey League (NHL), the National Football League (NFL) and Major League Baseball (MLB).

In 2016, Lent was named a Power Player in sports law by *Sports Business Journal*, appeared in *Lawdragon 500 Leading Lawyers in America* and highlighted in *The Best Lawyers in America*. Now, Lent is the Sports and Entertainment Trailblazer according to *The National Law Journal* and named the 2019 Sports MVP by *Law 360*.

As one of the only female antitrust partners at the New York Skadden office, Lent is a leader for women in sports. She believes being one of few women doesn't change anything but makes her "work harder to have credibility in a historically male-dominated industry." Her accomplishments and mentorship galvanize fellow female associates to thrive in their respective industries.

Lent's accomplishments and influence

in the sports law community is exactly why we sought her out for this exclusive interview.

### ***What market conditions led to the creation of esports as a practice area?***

"As esports grow, we anticipate the companies involved will face many of the same issues on which we have expertise based on our representation of the traditional leagues, including with respect to antitrust, intellectual property, labor, organizational structure and internal governance. For example, agreements between leagues and teams and specified player rights will likely increase as esports continue to grow.

The esports sector has evolved from a niche market to mainstream entertainment, generating professional leagues and over the past year more than a billion dollars in revenue from, among other factors, sponsorships, media rights and advertising, for over 400 million viewers. In fact, some esports competitions are attracting more viewership than traditional sports tournaments. We're seeing large and established internet media companies planting a stake in the space. Broadcast and new media rights and merchandizing opportunities, as well as new U.S. markets for gambling, raise questions to resolve regarding data rights. Ancillary, streaming service popularity will require clarity about copyright issues and potentially the value of game-related items functioning as currency."

### ***In what ways does antitrust law intersect with esports?***

"Antitrust laws govern the conduct of virtually any industry. In the sports world, teams in a league need to agree on a host of issues ranging from the rules of the game to the location of events and how to deal with players. As esports teams develop and



**Karen Hoffman Lent**

organize into leagues, they will require antitrust advice on these types of issues and, hopefully, can avoid the antitrust litigation that traditional leagues faced as they grew in size and popularity."

### ***What kind of clients in the esports industry should consider enlisting Skadden as counsel?***

"Skadden's hallmark across disciplines is our ability to handle the most challenging issues our clients face, including many first-of-their-kind matters. Our sports practice is no different. Because Skadden has historically represented sports leagues on a wide range of challenges, we are best suited to advise esports leagues and their teams. Our experience gives us solid foundation to understand the legal issues faced by esports leagues and teams, while the creativity of our group will allow us to apply that knowledge in a way that addresses the differences between esports and traditional leagues."

### ***What has been the most surprising part about your practice?***

"When I went to law school, I never dreamed that I could bring my passion for sports into my legal career, but Skadden's practice has allowed me to do that from day one." ●

## Is My Loot Box Legal?

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the growth of the free-to-play segment of the video game market, as well as rising development costs across the industry.

### Are Loot Boxes Legal?

Today, with some few exceptions, most forms of loot boxes remain legal and unregulated worldwide. However, proponents of loot box regulation argue that the chance and rarity mechanics make loot boxes akin to gambling, and constitute predatory practices focused toward minors.

While this comparison may seem overblown to some (particularly those with small children who are familiar with the rampant use of “surprise mechanics” in toys), a careful examination of the relevant statutes and analogous cases demonstrates the potential risk posed by loot box systems. For example, the federal statutes governing online gambling, as well as each state’s individual gambling laws, generally require three elements for a particular activity to constitute an illegal “wager”: (1) risking something of value, (2) on the occurrence of a chance event, (3) for a potential valuable prize. Arguably, each of these elements may be satisfied by certain loot box systems.

In fact, courts have already held that in the context of mobile games, virtual currency may constitute something of value, and thus may satisfy the first element. Further, because many loot box systems involve some aspect of chance, the second element is likely satisfied as well.

With respect to the final element, the Ninth Circuit recently held that in the context of a casino games mobile app, the chips that a player could win constituted an item of value under California’s anti-gambling statute, because the chips allowed the player to continue playing the game. Thus, while most courts that have considered the issue in the context of mobile games have found that “prizes” awarded in video games *do not* constitute a thing of value, there is at least

some support for the claim that a virtual good, even if useable only in the game itself, may satisfy the “valuable prize” prong of the gambling analysis.

Given this potential, video game developers and distributors should be aware of the various avenues by which the legality of particular loot box systems may be challenged. For example, state Attorneys General may bring criminal or civil actions, or aggrieved consumers may bring challenges directly under most state’s anti-gambling laws.

Additionally, even if loot boxes are presumptively legal and do not constitute gambling, consumers may bring lawsuits based on consumer protection or false advertising laws if they believe that the loot boxes are marketed in an arguably misleading way. In this connection, consumer groups have recently begun questioning whether the odds of receiving certain desirable prizes are manipulated to incentivized continued play. These sensitivities are particularly heightened where the loot boxes at issue may be targeted toward minors.

### Recent Attempts at Regulation

In light of these concerns, many government officials, both in the U.S. and abroad, have taken steps directed at regulating loot boxes. For example, state legislatures in at least four states have introduced bills aimed at regulating loot box sales, and the Protecting Children from Abusive Games Act, which seeks to prohibit loot boxes in any game played by minors, was introduced in the U.S. Senate this year.

Additionally, this summer the U.S. Federal Trade Commission held a public workshop to examine consumer protection issues related to loot boxes. The primary focus was on the information asymmetry present in loot box mechanics, and whether such mechanics are unfair practices requiring FTC regulation.

Internationally, at least a dozen countries have considered the legality of loot boxes, and three—Belgium, the Netherlands, and China—have outlawed loot boxes to some extent. In fact, the gambling commissions of Belgium and the Netherlands found that most forms of loot boxes constituted gambling under the same wager, chance, and valuable prize structure discussed above.

Most recently, both the United Kingdom and Sweden have taken steps suggesting that loot boxes soon may be regulated or banned in those countries as well. For example, the Digital, Culture, Media and Sport Committee of the U.K. House of Commons released a statement that loot boxes purchased with real-world money that do not reveal their contents in advance constitute games of chance, and should accordingly be regulated under the United Kingdom’s Gambling Act. The Committee also recommended that loot boxes containing an element of chance should not be sold to children.

Similarly, the Swedish Consumer Agency submitted a report to Sweden’s Gaming Market Commission highlighting the similarities between loot boxes and real-money gambling, and suggesting loot box regulation.

### Best Practices

Given the uncertainties present in the current landscape, video game companies should examine their loot box practices closely, and keep in mind the following strategies to minimize legal risk:

- Take steps to avoid creating a wager, chance, or win/loss structure required for a finding of gambling. For example:
- Make the currency used to purchase loot boxes also acquirable from in-game actions, not simply available for direct purchase;

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## Humvee Manufacturer Rolls Out IP Suit Against Activision

By Kevin Wenzel, *GW Law 2L*

**A**M General, LLC, the company behind the Humvee military truck, has sued video game maker Activision Blizzard, Inc., over the use of Humvees in their “Call of Duty” video game series and associated tie-in products of the game franchise. In their initial complaint filed on November 11, 2017 in the Southern District of New York, AM General accused Activision of trademark infringement, trade dress infringement, false advertising, false designation of origin and dilution stemming from Activision’s use of AM General’s Humvee vehicles in its popular “Call of Duty” video game franchise.

In their complaint, AM General claims that Activision’s success has come at the expense of AM General, and consumers that are deceived into believing that AM general has granted a license to the game maker for the use of their intellectual property, and that they are involved in the creation of the popular video games. AM General also asserts that Activision has gone beyond including their intellectual property in seven

of Activision’s video games in the franchise, also alleging that Activision has included Humvees in strategy guides to the games and licensed “Call of Duty” toys such as “Mega Bloks” toy Humvees. AM general mentions that other video games have secured a license from them to include their Humvee vehicles in expressive works, and in Activision not doing so but continuing to use Humvees in spite of not having a license it would imply to consumers that AM General has approved the use of their intellectual property within Call of Duty games.

Activision responded by filing a motion for summary judgment on the case, calling AM General’s lawsuit an attack on the First Amendment, and that “to allow AMG to pursue its claim would run directly contrary to the First Amendment and give AMG a stranglehold on virtually any expressive depiction of 21<sup>st</sup>-century U.S. military history”. Activision contends that their Call of Duty video games are subject to First Amendment protections afforded to expressive works, and that “the limited

depictions of Humvees in the games (less than ten minutes out of more than 35 hours of gameplay) are artistically relevant to these games.”

“Call of Duty” is one of the most commercially successful video game franchises in the world, selling more than 300 million copies globally. Activision has just recently released its latest title in the series, “Call of Duty: Modern Warfare” on October 25<sup>th</sup>, 2019.

The case pits Activision’s First Amendment rights of free expression directly against AM General’s trademark rights with regards to expressive entertainment works. Previously, in the case of *Rogers v. Grimaldi*, the Second Circuit held that the “balance [between trademark rights and the First Amendment will normally not support application of the [Lanham] Act unless [1] the title has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” Much of Activision’s argument hinges on their assertion that their work falls within the protections afforded by the case, and that AM General cannot satisfy the *Rogers v. Grimaldi* test to prevail on their claim.

AM General’s case draws several parallels to a lawsuit filed by Bell Helicopter against Electronic Arts, Inc. in 2012 regarding the use of Bell’s Cobra Helicopter in Electronic Art’s first-person shooter title ‘Battlefield 3’. Although the case was settled without a ruling, it is worth noting that Electronic Arts took a similar stance to that of Activision’s in that expressive works, in this case video games, are afforded First Amendment protections that allowed the company to feature realistic depictions of Bell’s military vehicles in their game. ●

Case: AM General LLC v. Activision Blizzard, Inc., No. 1:17-cv-08644-GBD-JLC (S.D.N.Y. filed Nov. 11, 2017)

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- Remove chance by showing players in advance what they will get in a loot box (a strategy Fortnite has recently employed);
- Allow players to use duplicate items to progress in the game in some other way, so loot boxes always provide players with some value; and
- Prevent players from exchanging items received in loot boxes, and enforce pre-existing prohibitions on sales of items and/or accounts, to minimize perception that in-game items can be converted to real-world currency.
- Consider substantial parental controls on loot box purchases made by minors;
- Ensure that loot boxes are promoted transparently, with minimal “fine print” terms or fees that consumers plausibly could contend are “hidden” or obscured; and
- Continue working with law makers and regulators through self-regulatory bodies like the ESRB to foster an environment of self-regulation. For example, in the first panel of the FTC loot box workshop, it was announced that Nintendo, Sony, and Microsoft will mandate loot box odds disclosures for new games available on their respective platforms, and update existing games with loot box functionality by the end of 2020. ●

## Color Switch Employs Kitchen Sink Strategy To Show Forum Selection Clause Is Unenforceable, to No Avail

By Eduardo A. Carlo, GW Law 3L

On its face, the issue here is a simple one: is the forum selection clause enforceable? In its attempt to show that it is not, Color Switch LLC (“Color Switch”) has seemingly used every possible argument conceivable. Unpersuaded, the court denied each argument.

Color Switch is a tech company that developed a mobile application game called Color Switch (“the game”). In hopes of making the game a big hit, Color Switch entered into agreements with EyeBoxGames FZE (“EyeBoxGames”) to publish and market the game. EyeBoxGames is a publishing company incorporated in the United Arab Emirates (“UAE”), founded by Marc Lejeune, the founder of Fortafy Games DMCC (“Fortafy”), the defendant in this case.

The first agreement entered into (“the original agreement”) stated that EyeBoxGames is the publisher of the game and Color Switch the developers. Additionally, it included the forum selection clause at issue, stating that “the [original] Agreement and any non-contractual obligations arising out of or in connection with the Agreement shall be governed by and construed in accordance with UNITED ARAB EMIRATES law. Any dispute arising in connection with the Agreement shall be submitted to the exclusive jurisdiction of the Court of Dubai.” The original agreement was updated twice, both times including a provision stating that *provisions from the original agreement that were not modified by the amended agreement remain in effect*. In none of those updates was the forum selection clause updated, however, the third agreement did change the parties in the relationship by replacing EyeBoxGames with Fortafy.

Color Switch ended its publishing agreement with Fortafy and requested Fortafy

return all the intellectual property associated with the game. Specifically, Color Switch asked that Fortafy transfer the latest version of the game to Color Switch or its developer account. Fortafy refused to do so, Color Switch sued *in the US*, making copyright and declaratory relief claims, Fortafy filed a motion to dismiss based on enforcement of the agreement’s forum selection clause, and that’s how we end up with the current litigation.

A motion to dismiss based on enforcement of a forum selection clause is governed by Federal Rule of Civil Procedure 12(b) (3). This is a two-step inquiry, with each step having multiple grounds that may be challenged. Step 1 asks whether the forum selection clause is valid. SCOTUS precedent has held that forum selection clauses are presumptively valid and should be honored “absent some compelling and countervailing reason.” There are three ways to show such a countervailing reason: (1) if the inclusion of the provision in the agreement was the product of fraud or overreaching; (2) if the party wishing to repudiate the clause (in this case, Color Switch) would effectively be deprived of its day in court if the clause were enforced; and (3) if enforcement would contravene a strong public policy concern of the forum in *which the suit is brought*. Step 2 requires the court to balance public interest factors to determine whether dismissal of the action in favor of the other forum would promote justice. Factors a court can consider here are “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; and (3) the interest in having the trial of a diversity case in a forum that is at home with the law.”

Before even discussing the merits of Fortafy’s motion to dismiss, the court must find that Color Switch’s claims are within

the scope of the forum selection clause. Keeping true to its kitchen-sink strategy, Color Switch makes three arguments for why its claims *do not* fall under the scope of the forum selection clause, however, the court resoundingly rejects them, finding that Color Switch’s claims are inextricably linked to its publishing agreement.

Having established that Color Switch’s claims fall within the scope of the forum selection clause, the court must next determine whether the clause itself was valid. Color Switch alleges (1) fraud, coercion, and overreaching on behalf of Fortafy; (2) that it would be deprived of its day in court if the provision were enforced; and (3) that the US has a strong public interest in enforcing its own laws in this case. Again, the court dismisses all three arguments, finding that Color Switch provided no evidence pointing to fraud, coercion, or overreaching on behalf of Fortafy; additionally, it finds that Color Switch has not shown that UAE law would be “so deficient that [Color Switch] would be deprived of any reasonable recourse,” thus, failing to show that enforcing the clause would effectively deny its day in court; and, finally, the court finds that copyright laws do not serve the consumers; rather, they are designed to protect copyright owners. As such, the key interests in this dispute lie with the parties, not the American public. Having found none of the reason that could make a forum selection clause unenforceable, the court concludes that the forum selection clause is valid.

The court’s final step before granting Fortafy’s motion to dismiss is weighing the public interest factors. Despite Color Switch’s attempts to suggest otherwise, the court finds that there are no administrative difficulties in the Court of Dubai flowing from congestion. Additionally, it notes that

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## Nintendo Denied Opportunity to Exclude Additional Wii Products in GET's Infringement Claim

By Stephen Sharbaugh, GW Law 2L

A patent infringement lawsuit against Nintendo Co. (“Nintendo”) continues to proceed in the U.S. District Court for the Western District of Washington after Nintendo was denied its motion to exclude Genuine Enabling Technology’s (“GET”) belated contentions of additional Nintendo devices infringing its patent. The court’s ruling demonstrates that companies subjected to infringement claims should be wary of the products listed in the initial complaint as a party seemingly has an opportunity to add additional products to its complaint prior to the required preliminary infringement contention (“PICs”) deadline. Additionally, a party claiming infringement seemingly is not required to provide every factual assertion of infringement in its PICs to be deemed reasonably sufficient.

Beginning on February 8, 2017, GET filed a patent infringement suit in Delaware federal court. Nintendo opposed pursuing litigation in Delaware and requested a transfer to federal court in the state of Washington, where Nintendo of America is headquartered. GET argued that Nintendo was registered to do business in Delaware, and thus, could not request a change in venue. Albeit, nearly two years later, on March 11, 2019, the case was transferred to Washington federal court.

The patent at issue, which was assigned to GET, is described as “claiming methods and systems for user input devices and console systems, such as those found in video game products.” In other words, its patent covers a method of data encoding and synchronization commonly found in video game products, likewise to Nintendo. Prior to the venue transfer, Nintendo filed petitions for inter partes review (“IPR”), which determines patentability, in the U.S. Patent and Trademark Office. To Nintendo’s disappointment, the PTO found that it lacked sufficient evidence to prove GET’s claims reasonably lacked patentability.

In GET’s initial complaint against Nintendo, it specifically cited products such as, the Wii Console, the Wii Remote, and the Wii Remote Plus. It was not until, May 20, 2019, when GET served its first discovery request, that four additional Nintendo products were inquired: the Wii U Gamepad; the Nunchuk; the Joy-Con; and the Switch Pro Controller. These products were officially added to GET’s PICs as “accused products” on May 28, 2019. Nintendo contended that the addition of these products to the suit was highly unfair and prejudicial to its case, and thus filed its motion to strike those products from GET’s complaint. In arguments, Nintendo asserted that compared to the scope of the initial complaint, these additional products had drastically enlarged

the scope of the proceeding, but the court found that unconvincing as both parties had agreed to move up the PIC deadline after the first discovery request by GET. Nintendo’s effort to expediate the proceeding backfired as the court noted that it was “partly a prejudice of its own making.” Though the court noted Nintendo’s ability to amend the schedule, in good faith, if it needed more time due to GET’s belated contentions. Furthermore, Nintendo argued that GET impermissibly used a different argumentation in the IPR proceeding as compared to its complaint at its own benefit, arguing a narrower scope in the IPR and an enlarged scope in this case. But the court remarked that only the *meaning* of the infringement claim is determinative, not the scope of the “accused products.”

Upon determining that the PICs were in accordance with the local patent rules, the court examined the sufficiency of the PICs themselves. The part of the PIC, in question, was whether GET sufficiently claimed where each element of each asserted claim was found within each accused device, via a chart. Specifically, GET had included the specific components and, where possible, identified their model number and name in its PICs, but did not necessarily flesh out all of the preliminary assertions of infringement. GET’s PICs were determined to be sufficient in giving Nintendo reasonable notice of what was believed to be the infringing material in the Nintendo products. Ultimately, companies in patent infringement suits can benefit from being overly prepared, prior to the PIC deadline, to litigate products not in the initial complaint, especially when new information may appear during discovery. ●

## Color Switch Employs Kitchen Sink Strategy

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the Eastern District of California, where Color Switch has brought its claims, has one of the heaviest and most back-logged caseloads in the country. Finally, the court gives value to the fact that Color Switch was well aware of the implications of the forum selection provision when it entered into the agreement.

The court concludes by granting Fortafy’s motion to dismiss, without giving Color Switch any leave to amend, officially closing the matter (unless Color Switch chooses to appeal). ●

Case: Color Switch LLC v. Fortify Games DMCC, 377 F. Supp. 3d 1075 (E.D. Cal. 2019).

Case: Genuine Enabling Tech. LLC v. Nintendo Co., 2019 U.S. Dist. LEXIS 135707 (W.D. Wash. August 12, 2019)

## News Briefs

## Researchers Say Elite-level Video Gaming Requires New Protocols in Sports Medicine

Across the U.S., the esports athlete is a rising class of competitor in both collegiate and professional arenas. According to researchers in *The Journal of the American Osteopathic Association*, the field of sports medicine needs to catch up in order to address these players' particular needs.

Well beyond casual gamers, eSport athletes practice three to 10 hours per day, perfecting their strategies and reflexes in their chosen game. While average novice players make approximately 50 action moves per minute, collegiate and pro athletes make 500-600 action moves per minute—or about 10 moves per second.

“Given esports are played while sitting, you’d think it would be literally impossible to get injured,” says Hallie Zwibel, DO, director of sports medicine at New York Institute of Technology College of Osteopathic Medicine, who also oversees NYIT’s Center for Esports Medicine, and is co-author on this study. “The truth is they suffer over-use injuries like any other athlete but also significant health concerns from the sedentary nature of the sport.”

## Not Just Video Games

Dr. Zwibel says his past research found 56% of esports athletes experience eye fatigue, 42% report neck and back pain, 36% wrist pain, and 32% hand pain. However, only 2% of those reporting an ailment sought medical treatment. He adds that 40% of those surveyed get no physical activity in a given day.

Study authors note multiple health issues including blurred vision from excessive screen time, neck and back pain from poor posture, carpal tunnel syndrome from repetitive motion, metabolic dysregulation from prolonged sitting and high consumption of caffeine and sugar, and depression and anxiety resulting from internet gaming disorder.

“We’re really just now realizing how physically and mentally demanding esports can be,” says Dr. Zwibel. “Like any other college- or pro-level athlete, they need trainers, physical therapists and physicians to help them optimize their performance and maintain long-term health.”

Dr. Zwibel considers professional League of Legends player Hai Lam, who retired at 26 due to chronic wrist pain, an example of the toll esports can take on an athlete’s body. He hopes that tailored training regimens and appropriate medical care can help the next generation of esports athletes avoid similar outcomes.

Currently, by his estimates, there are 80 U.S. colleges with varsity esports teams, with 22 offering scholarships. Colleges, universities and even high schools are adding more teams each year. At the professional level, the global esports industry earned more than \$1

billion in 2019, with an audience of nearly 500 million.

“It’s safe to say esports is no longer in its nascent stages,” says Dr. Zwibel. “It’s world-class competition and serious business. It’s time we in sports medicine give these athletes the supports we know they need.”

## David Petr Joins American Esports as Advisory Board Member

American Esports has announced that David Petr has joined the organization as an advisory board member with “a focus on promoting American Esports opportunities to communities across the United States.”

Petr is the former President and CEO of the Montgomery County Economic Development Corporation (Maryland).

“David is a valuable addition as president of our advisory board given his strength in economic development. His entrepreneurial talents and strategic understanding of development will benefit American Esports as we expand our regional district model and build urban entertainment centers around the Metropolitan DC area and across the country.” stated Dani Canubas, CEO & Founder.

Founded in 2017, American Esports stated in a press release that it “empowers casual players with the venues, coaching and tournament play, and connects them to a community where they can learn, grow and compete. The company builds regional esports hubs and develops academic esports programs and gaming centers in high schools and colleges; provides turnkey gaming products and services; and establishes leagues for amateur players competing for institutions, corporations and the military.”



David Petr

## Study questions Video Games' Effects on Violent Behavior

A new study finds that there is not enough information to support the claim that violent video games lead to acts of violence.

The Contemporary Economic Policy study examined data from the National Longitudinal Study of Adolescent to Adult Health (Add Health), a nationally representative sample of adolescents in grades 7-12 in the United States between April and December 1995. Over 15,000 participants were followed into young adulthood with four waves of in-home interviews, with the last interview conducted in 2008, when participants were 24-32 years old.

“While the data show that fighting later in life is related to playing video games as an adolescent, most of this is because,

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relative to females, males both play games more often and fight more often. Estimates that better establish causality find no effect, or a small negative effect,” said author Michael Ward, PhD, of The University of Texas at Arlington. “This is my fourth analysis using a fourth methodology and a fourth dataset on actual outcomes that finds no violent effects from video games.”

Dr. Ward noted that it is important that studies examine real world outcomes and that they account for competing reasons why negative outcomes might be related to video game playing. “Video game development is among the fastest evolving forms of human expression ever devised. It is hard for us to imagine the experiences that games developed over just the next few decades will provide,” he said. “It would be a shame to unintentionally, and needlessly, stifle this explosion of creativity with content-based policy interventions.”

### Escapism: A Powerful Predictor of Internet Gaming Disorder Among Video Gamers

A new study in *Comprehensive Psychiatry*, published by Elsevier, is the first to compare professional electronic sport (eSport) players with recreational video game players and explores the similarities and differences between what motivates each group. While the two groups are psychosocially different, they found that both eSport and recreational gamers run the risk of developing internet gaming disorder when their intense immersion in the activity is tied to escapism.

“Previous research has linked escapism to psychiatric distress and gaming disorder in recreational gamers. While eSport gamers have many positive motivators like skill development, our study found that excessive immersion by some individuals can indicate mental health issues,” explained investigator Zsolt Demetrovics, PhD, Institute of Psychology, ELTE Eötvös Loránd University, Budapest, Hungary.

Internet gaming disorder (IGD) is described by leading classification manuals (DSM-5 and ICD-11) as severe behavior patterns that significantly impair personal, family, social, educational, and occupational functioning. Although the condition affects only a minority of gamers, it is associated with depression, anxiety, and social anxiety. Gaming motivations have also been found to predict gaming disorder, especially the incidence of escapism when gamers play video games to avoid real life problems.

The present study demonstrated a number of novel findings which can help move the field forward and suggests a number of practical and policy implications.

The investigators surveyed close to 4,300 recreational and eSport gamers to gather data about game time, gaming motiva-

tions, presence and severity of gaming disorder, and psychiatric symptoms. Additionally, the mediating effect of gaming motivations among eSport and recreational gamers between psychiatric distress and problematic gaming was examined.

Their findings revealed that eSport gamers spent significantly more time playing video games both on weekdays and weekends than recreational gamers. eSport gamers scored higher on social, competition, and skill development gaming motivations than recreational gamers. In both groups, escapism appeared to be the common predictor of gaming disorder. In the eSport group, escapism was the only motivation that had mediating effect, while in the recreational group, competition, fantasy, and coping also showed weak or even negative association with gaming disorder.

The way in which both eSport gamers and recreational gamers escape from reality into virtual worlds may be the result of different mechanisms and psychological backgrounds. In some players mental health status (stress level, psychosocial well-being, self-esteem) can modify the effect of escapism in the development of gaming disorder.

“Escapism can cause negative outcomes and interfere with an eSport gamer’s career just like any sportsman’s career could end with a physical injury or trauma,” noted Professor Demetrovics. “Future studies should focus on exploring escapism’s mechanism in different subgroups of gamers in relation to problematic gaming to help the development of prevention, intervention, and treatment programs. Recognizing their risks can lead to increased support methods, such as mental training, optimal self-esteem, and adaptive coping strategies for competitive situations.”

Further, the results suggest that some eSport players might be addicted to gaming like professional poker players being addicted to gambling or professional athletes being addicted to exercise.

The results of this study have implications for esports governing bodies. The investigators contend that there is arguably a duty of care for professional eSport bodies to ensure that the individuals who engage in the sport, and subsequently develop problems, get help, support, and treatment if they need it. “While esports bodies like the Electronic Sports League have developed rigorous guidelines around the use of performance enhancing drugs, based on our findings they should also develop a code of conduct that includes guidance and diagnostic checklists concerning problematic gaming and gaming disorder,” advised Professor Demetrovics.

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## Court Finds Balance of Equities, Public Interest Tests Favor Software Company

By Eric Smiley, GWU 2L

Cheating in sports has been around for centuries and it is no surprise that esports has its own level of cheaters, called ‘cheats’. Esports has a history of cheating, but the forms of cheating are quite different than cheating methods in traditional sports (i.e. Black Sox Scandal, MLB). Esports cheats come in the form of codes, that are made available to users/gamers in order to provide an unfair playing ground when playing online (i.e.: hacks, glitches). Not surprisingly, several software development companies have filed lawsuits to obtain damages and put an end to such cheating.

Many companies have created software that can detect any form of cheating. Recently, for instance, the developer of the game *Fortnite*, Epic Games, sued *Fortnite cheaters* and popular YouTube personality, Brandon Lucas (aka Golden Modz) and his frequent partner Colton Conter (Excentric), for using and selling *Fortnite* cheats.

A second cheat suit was filed in the summer of 2018 by software company Niantic, publisher of popular games such as *Pokémon Go*, “*Ingress*,” and the awaited “*Harry Potter: Wizards Unite*.” They sued an association of cheaters known as Global++, specifically alleging that Global++’s apps interfered with Niantic’s business affairs, breached their user agreement, and violated their intellectual property rights. What differentiates Niantic from Epic games is the fact that Niantic publishes location-based reality games that are played from a user’s mobile device and involves multiple players (meaning that users play in a shared online environment vs. *Fortnite*’s solo playing games).

While most of Global++ members have remained anonymous, some

members have been named in the suit, including reported leader Ryan Hunt and YouTube promoter Alen Hundur. The group uses the same names of the games, only adding the suffix “++” to the titles of their Cheating Programs. These Cheating Programs enable users to perform unauthorized actions while playing Niantic’s games, which ultimately provides users an unfair advantage over other players.

Niantic’s claim specifically alleged that Global++’s apps interfered with Niantic’s business affairs, breached their user agreement, and violated their intellectual property rights. Niantic believes Global++ has sold hundreds of thousands of subscriptions for its products and made millions of dollars. As a remedy, Niantic sought to shut down Global++’s hacked versions immediately, as the continued use by Niantic gamers would be detrimental to the gaming experience and cause financial harm to Niantic. Upon notice of the filing, Global ++ notably shut down its website and associated servers.

In September 2019, the United States District Court of the Northern District of California heard both parties’ preliminary injunction arguments after Global++ filed a motion to dismiss. Global++ argued that Niantic will not prevail on the merits of its claims surrounding the Copyright Act because Global++ has not created any derivative work under 17 U.S.C. § 106(2). In response, the Court noted that Global++’s failure to address the other two counts in the complaint, notably the allegations that Global reproduced unauthorized copies under § 106(1) and distributed unauthorized copies under § 106(3), is a concession to violating §§ 106(1) and 106(3). A preliminary injunction

was thus given.

Niantic also provided enough support to show that Global++ violated the unauthorized access provision of the Computer Fraud and Abuse Act (CFAA). For such a claim, Niantic successfully established that Defendants: “(1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that [they] (3) thereby obtained information (4) from any protected computer . . . , and that (5) there was loss to one or more persons during any one-year period aggregating at least \$5,000 in value.”

Further, under California law, Niantic alleged that Global++ breached their contractual duties under Niantic terms of service. Niantic successfully showed that (1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; defendant’s breach; and (4) damages to plaintiff as a result of the breach.”

Additionally, Niantic claimed that it suffered irreparable harm as a result of Global++’s actions. To show this, Niantic needed to show that preliminary relief is necessary to prevent irreparable harm. The Court agreed with Niantic.

The Court ultimately sided with Niantic and stated that both the balance of equities and public interest tests favor Niantic. In conclusion, Global++’s motion to dismiss Niantic’s lawsuit was denied and Niantic’s motion for preliminary injunction was successfully granted. ●

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Case: Niantic, Inc. v. Global++, No. 3:19-cv-03425-JST (N.D. Cal. filed June 14, 2019)

## Senior Attorney at Activision Blizzard Shares Insights about Esports

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of fans, broadcasted on major television networks, and sponsored by blue-chip companies like Coca-Cola and Anheuser Busch.

Forbes' success was a big reason why he was selected for the following interview in *Esports and the Law*.

### *When did you first begin to develop a passion for video games?*

“So my background is in professional sports actually. When I was in law school, I was really focused on a career in sports law and prior to law school I worked for a year at the NFL Players Association as a paralegal. And then even prior to that, in undergrad, I was very focused on a career in sports media. I wrote for the student newspaper and did internships at broadcast outlets and did a radio program, so I was very focused on being in sports in some capacity from a very early age. I went to law school at UVA and did the sports entertainment law journal and was the editor in chief there, so I was always very focused on it. Coming out of law school, I went to Proskauer in New York, which is a really broad-based sports practice group that sort of hits all aspects of the sports industry and the legal practice, from transactional to litigation. I was in the litigation group, principally doing antitrust work, but also working on a number of matters for various major sports leagues . . . So, the bottom line is that I worked in New York for three years and I was working in Los Angeles for a few years.

And then from there, I went to the Washington Redskins and was [there] for about five years. I was V.P. of Legal and Government Affairs there, handling all of the business-side legal work . . . It's pretty broad-based practice when you're in-house at a pro sports team, but after five years there, I was open to expanding my horizons a little bit and thinking about what

might be next for me and the opportunity came up with Activision Blizzard. It was a really unique opportunity. Different video game publishers are approaching esports in different ways, but Activision Blizzard is approaching the opportunity really as a standalone business, so whereas some publishers take more of a hands-off approach and license their rights out to third parties to operate tournaments or even more substantial leagues on their behalf, Activision Blizzard is the polar opposite. We're looking at this like applying the framework of traditional professional sports in the U.S. to esports.

And I was actually a little skeptical when I first heard about the opportunity, but I was open-minded. I'm not a big gamer at all. I played a lot of Tony Hawk's Pro Skater in college, which is helpful because it's an Activision title, but nothing serious . . . But then, as I looked into it, it really became clear to me that it was this tremendous opportunity to get in and help shape the structure of a professional sports league from inception. And when you're working in pro sports, there really are not that many opportunities to launch a league . . . So for me, I was looking at it like 'this is a really cool opportunity to launch a league, be there from inception, and really put my mark on it.' And so that's what attracted me to the opportunity, not so much a passion for games.”

### *What are your primary responsibilities as Senior Legal Director of Esports Leagues at Activision Blizzard?*

“A pretty wide range of things fall into my jurisdiction. At Activision Blizzard, we have a very large legal team, so the way our company staffs its legal team is almost like a full-fledged law firm within the company. We have attorneys that focus on the games themselves and all the issues [related to] the games and then, separate from that,

we have subject matter experts . . . We approach staffing the league in a similar fashion to how we staff our games. I was brought in as the sports industry subject matter expert, so I deal with issues that are specific to the league as a sports league. So first, the sale of our team. Activision Blizzard owns the league itself and the teams are independently owned and operated. We have contracts with each of the owners of the teams that govern their participation in the league. Right now, in the Overwatch League, we have twenty teams which are owned independently, and, in the Call of Duty League, we'll have twelve. So we've actually sold thirty-two teams over the last three years and negotiating those deals has been a huge part of my time.

And then from there, the contracts include a lot of details, but they're not comprehensive relative to the operation of the league. We put a lot of detail in the contracts, but you can't draft a contract which is totally comprehensive and covers every potential issue as the league evolves. And so, from the sale of the team, we then have to actually drill down on what the league governance will look like—what specific rights teams have relative to the league for commercialization and what the process is for various things (like if a team wants to go raise funds, or if they want to take out debt, or if [they] want to sell a sponsorship in a category which is reserved for the league). There's a whole host of league governance issues . . . And we're at such a nascent stage of the league that there are all these novel issues that pop up that you didn't anticipate. Our ownership groups are very entrepreneurial, and they're looking to establish their brands and build their businesses in their local markets, so they have a lot of great ideas and sometimes those ideas were not anticipated, so we need to constantly work

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## Senior Attorney at Activision Blizzard Shares Insights about Esports

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through those things. That takes up a large amount of my time.”

### *What do you find most challenging about your position?*

“I think the hardest thing is that we are moving at an incredible pace. We’re very thoughtful and we try to get everything right, but the pace of work is so tremendous and it’s something that is not unique to us. The pace of business in sports and entertainment is tremendously fast, so I was expecting it coming in, but the pace of work in a start-up sports or entertainment project is like four times what it would be once it’s a mature property. I have a lot of projects that I want to accomplish because I think they’ll help us, but coming into the office and having to deal with three new fires that I wasn’t expecting to have to deal with that particular day is really what I think has been the biggest challenge. It’s not a bad thing. It’s what keeps the job very interesting. But I come in and have my day planned out and I think ‘okay, here are the 3 things I’m going to get done today because my calendar’s free and I can just block out the time to focus

on these things’ and then before I even get to the office I have an email about some emergency issue that needs to be dealt with that ends up taking the entire day, so I’d say pace is probably the biggest thing.”

### *During your time at Activision Blizzard, what have been some of your favorite projects to work on?*

“The team sales have been really fun because, particularly on the Overwatch League side, it’s a truly international league, which is really unique. We have four teams that are in China, one in South Korea, one in the U.K., one in France, two in Canada, and the rest in the U.S. So I guess that’s something that’s been both a challenge and also something that’s been fun. I had no experience coming in with working in China, so just going to China to work on the team sales and negotiate with potential buyers was sort of an eye-opening experience for me personally, because the culture is so dramatically different from the U. S. It’s night and day and you really don’t appreciate it until you’re there. And once you’re there, you can feel it and you’re like a total fish out of water, so that that

part has been fun. Learning the styles of doing business in different cultures has been both fun and challenging.

And then I would say the other piece of it is the accomplishments that we’ve been able to achieve collectively as a team . . . Two years ago, when I started, the core team working on the Overwatch League was no more than a handful of people. I remember sitting in conference rooms as the product team was coming up with what the structure of the competition would look like and I was just a fly on the wall soaking it all in and trying to help where I could. But progressing from there to, two years later, sitting in a sold out Wells Fargo Arena listening to 12,000 screaming fans while our finals are being broadcast live on ABC on Sunday afternoon, we have blue chip sponsors like Coca Cola and Anheuser Busch activating in the arena, and we’re being covered by major publications like The Washington Post—getting from that starting point to there in two years was just—you step back and say ‘oh my gosh, I can’t believe that we pulled this off.’ That to me is the most satisfying part of it all.” ●

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### Torque Esports Enters into Definitive Purchase Agreement for Controlling Stake in Ferrari-Partnered Allinsports

Torque Esports Corp. (“Torque”) has signed a definitive share purchase agreement to acquire a 51% interest in the market-leading motorsport simulator manufacturer, Allinsports.

Allinsports has been a technical partner to Ferrari Driver Academy since its conception in 2009, training future racing stars and supplying bespoke Ferrari simulators to an exclusive clientele. Professional full-size and esports simulators are manufactured at Allinsports Italian manufacturing and development base in Marranello, Italy – located only 2.3 miles from the Ferrari factory.

“With this investment, Torque Esports will benefit from strong

repeatable revenues from simulator sales and the development of new products as the racing esports market expands rapidly,” said Torque Esports President and CEO, Darren Cox . “Allinsports has developed racing simulators for the biggest teams in the world and we have already started integrating Allinsports simulators with our other properties.”

Allinsports not only manufacture high-end racing simulator systems used by leading race teams across the globe, but also produce the eRacer esports simulator rigs that will be used in Torque Esports’s upcoming “World’s Fastest Gamer” competition. Torque Esports will also be integrating Allinsports simulators into the world’s first dedicated esports racing arena. The state-of-the-facility is being built by Torque in Miami and is scheduled to open in 2020.