LOOT BOXES: GAMBLING OR GAMING?

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I. INTRODUCTION

Video game developers have implemented a new way for players to obtain in-game items that may give Las Vegas goers some serious déjà vu. The seediness of this new revenue system may be hard to detect on the surface of many video games, but replace slot machines with loot boxes and the similarities become clearer. Due to the legal and psychological similarities between loot boxes and illegal lotteries (or gambling), reason dictates regulation of these in-game purchases, especially as they relate to minors. This paper discusses (I) what a loot box is and why academics and game players alike are so concerned with them, (II) the legal and psychological similarities between loot boxes and gambling, (III) current regulatory efforts in the United States and around the globe, and (IV) suggested regulation to thwart the negative impacts of loot boxes, especially with respect to minors.

A. What is a loot box?

Many popular videogames now feature loot boxes (or equivalents) including Overwatch, Middle-earth: Shadow of War, Star Wars Battlefront 2, FIFA Ultimate Team, Mass Effect: Adromeda, Fortress 2, injustice 2, Lawbreakers, Forza Motorsport 7, and For

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1 See Vic Hood, Are loot boxes gambling? EUROGAMER (Oct. 12, 2017), http://www.eurogamer.net/articles/2017-10-11-are-loot-boxes-gambling (last visited May 1, 2019).
Honor. But what is a loot box? In videogame parlance, “loot” is an in-game reward, which is often found within crates, treasure chests, and special containers. A “loot box” is a bundle of additional content that, once opened, can be used in game-play. In other words, the loot box is the crate, treasure chest, or special container from which a player is able to obtain loot. “The virtual items that can be ‘won’ [from a loot box] can comprise basic customization (i.e. cosmetic) options for a player’s in-game character . . . to in-game assets that can help players progress more effectively in the game (e.g. gameplay improvement items such as weapons [and] armor).” The items a player may “win” from a loot box also vary in rarity: common, rare, epic and legendary. In purchasing a loot box, players hope they will win epic or legendary items and such players are often encouraged to spend more money to do so because the chances of winning such items are minimal.

Most loot boxes can be accumulated in one of two ways: (1) for free by playing the game, or (2) by an in-game purchase directly from the game’s publisher. Loot box purchases take place within videogames when players use real money to buy virtual in-game items such as crates, cases, and chests (collectively “loot boxes”). For example, “[i]n Overwatch, a vibrant team-based shooter [videogame] by Blizzard, [loot boxes] are sold

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2 Mark D. Griffiths, *Is the buying of loot boxes in videogames a form of gambling or gaming?*, INTERNATIONAL GAMING RESEARCH UNIT, PSYCHOLOGY DEPARTMENT 1, 2, https://core.ac.uk/download/pdf/146458704.pdf.  
3 SCOTT MULTIMEDIA, § 24.11 VIDEO GAME REGULATION, Westlaw 9334766 (database updated May 2018).  
4 Griffiths, *Is the buying of loot boxes in videogames a form of gambling or gaming?*, INTERNATIONAL GAMING RESEARCH UNIT, PSYCHOLOGY DEPARTMENT at 2.  
in packages from two for $2 to fifty for $40.”7 These in-game purchases are known as “microtransactions” which “occur when one exchanges money for digital assets.”8 These microtransactions are not as straightforward as one may expect, however. Instead of purchasing exactly what a “player needs at any given time, loot box content is random. Even where loot box content is subject to a set of known parameters, the exact contents of any given loot box is unknown to the purchaser at the time of purchase.”9 In short, players who buy loot boxes participate in an in-game reward system that can be purchased repeatedly with real money to obtain a random selection of virtual items that may (or may not) be of value to a player.10

**B. Why so much attention from players and academics?**

Loot boxes are not a new feature in videogames, but the widespread availability of loot boxes in modern videogames has led to questions over whether they should be regulated as a form of gambling. This common revenue system amongst the videogame industry “is seen as inherently troublesome because the specific ‘loot’ available is rarely enumerated, and it’s a gamble whether a purchase even gives a player what he or she wants.”11 Loot boxes overlap legally and psychologically with many traditional forms of gambling and

7 Bailey, supra note 5.
9 MULTIMEDIA, supra note 3.
this overlap, mixed with the addictive nature of video games, showcases the potential harm such in-game purchases can inflict on players.\textsuperscript{12} Gambling in the United States is regulated under federal and state laws that, for the most part, work in unison to protect the interests of the public.\textsuperscript{13} Federal laws omit an exact definition of gambling, but numerous state laws define its various implementations, typically emphasizing the elements of “consideration,” “chance,” and “value” (or “prize”).\textsuperscript{14} It is clear that loot boxes implement the first two elements of consideration and chance—a player pays real-world money (i.e. consideration) for the chance to win rare loot. Courts that have looked at the issue, however, fail to see the virtual rewards won from loot boxes as having the required “value” to satisfy the last element of gambling.\textsuperscript{15} This does not mean loot boxes do not constitute gambling; it simply means the states’ definitions of gambling fail “to recognize the value created for players from the combination of scarcity of, and competitive advantage provided by, in-game items in the gaming environment.”\textsuperscript{16}

\textsuperscript{15} See 28.16[6] Avoiding Classification as an Illegal Lottery, 3 E-Commerce and Internet Law, Westlaw (database updated Jan. 2019) (“See Mason v. Mach. Zone, Inc., 851 F.3d 315 (4th Cir. 2017); Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731 (N.D. Ill. 2016); Soto v. Sky Union, LLC, 159 F. Supp. 3d 871 (N.D. Ill. 2016). But see Kater v. Churchill Downs, Inc., 886 F.3d 784 (9th Cir. 2018) (finding real-world value present for an online casino game where the court assumed, for purposes of a motion to dismiss, that (a) the chips awarded in the game were needed to continue playing the game, (b) the chips were not available by any means other than purchase after an initial free allocation, and (c) the acquisition of the chips via the game allowed continued play of the game which otherwise would have cost the player money, which could bring the chips within Wash. Rev. Code § 9.46.0285, which defines a “thing of value” as “any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge”) (emphasis added”).
Loot boxes may have difficulty satisfying legal criteria for gambling, but authors from the scientific journal *Nature* found that nearly half the loot boxes they reviewed met psychological criteria for gambling.\(^\text{17}\) Research on loot boxes and related gambling problems are still ongoing, but published reports show considerable cause for concern.\(^\text{18}\) Video game developers have designed loot boxes to “encourage repeated player spending using . . . limited disclosure of the product . . . and systems that manipulate reward outcomes to reinforce purchasing behaviors . . .”\(^\text{19}\) Randomizing the rewards a player may obtain, and the low probability of obtaining a desired item incentivizes players to purchase an indeterminate amount of loot boxes before eventually receiving the desired prize.\(^\text{20}\) This is much like a gambler putting an indeterminate amount of coins in a slot machine hoping to win the jackpot. Developers also add music and graphic cues which heighten tension and create a ritual that entices repeat purchases.\(^\text{21}\) Audio and visual cues are important because they “provide game players with the opportunity to engage in superstition, ascribing meaning to random deviations in opening animations or combination [i.e. loot boxes].”\(^\text{22}\) The evidence is not only theoretical as loot box

\(^{17}\) *Id.*

\(^{18}\) *See* Zendle, David, et al. *Paying for Loot Boxes Is Linked to Problem Gambling, Regardless of Specific Features Like Cash-out and Pay-to-win: A Preregistered Investigation* (Oct. 12, 2018), https://psyarxiv.com/6e74k/ (concluding that paying for loot boxes is linked to problem gambling); David Zendle & Peter Cairns, *Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-scale Survey* (Aug. 2018), https://psyarxiv.com/6e74k/ (finding evidence for a link between the amount that gamers spent on loot boxes and the severity of their gambling problems).

\(^{19}\) Supra note 10 at 1.

\(^{20}\) *Id.*

\(^{21}\) Andrew Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 Minn. J.L. Sci. & Tech. 77, 88 (2018) (providing examples of these animations that may be viewed on YouTube. See, e.g., ScrewKiller, 7 Top Loot Box Game Opening Animation, YOUTUBE (Nov. 26, 2017), https://www.youtube.com/watch?v=P2D_v9a_GgM).

purchasers have reported an initial rush when opening a loot box, followed by a wave of regret, much like pathological gamblers placing a wager.\textsuperscript{23} Even more concerning are reports of self-described loot box addicts who have considered suicide as a result of spending thousands of dollars pursuing desired items.\textsuperscript{24} The disparities between gambling law and loot boxes combined with the revelations of current psychological research have led academics, players, and legislators wanting regulation in the video game industry.

II. WHY SHOULD LEGISLATORS CARE?

A. Federal Gambling Laws

There are two federal gambling laws which affect online or internet gambling. The first is the Interstate Wire Wager Act of 1961 (known as The Wire Act), which bans interstate online sports wagering or betting.\textsuperscript{25} The Wire Act was previously held to ban all interstate online gambling until 2011 when the Justice Department concluded that “interstate transmissions of wire communication that do not relate to a ‘sporting event or contest’ . . . fall outside of the reach of the Wire Act.”\textsuperscript{26} Therefore, The Wire Act cannot

\begin{itemize}
  \item \textsuperscript{23} Moshirnia, supra note 21 at 88; Ellen McGrody, \textit{For Many Players, Lootboxes Are a Crisis That’s Already Here}, \textit{VICE WAYPOINT} (Jan. 30, 2018, 1:08 PM), https://waypoint.vice.com/en_us/article/kznmwa/for-many-players-lootboxesare-a-crisis-thats-already-here (recounting stories from addicts, noting that opening multiple loot boxes “had a feeling of a continuous rush . . . like opening a bunch of Christmas presents” and that “the rush of pulling [items from a loot box] is addicting” but that this rush was replaced by shame. Another player said, “I realized what I had done, checked my bank account and wanted to throw up”).
  \item \textsuperscript{24} Ellen McGrody, \textit{For Many Players, Lootboxes Are a Crisis That’s Already Here}, \textit{VICE WAYPOINT} (Jan. 30, 2018, 1:08 PM), https://waypoint.vice.com/en_us/article/kznmwa/for-many-players-lootboxesare-a-crisis-thats-already-here (telling stories of addicts, including individuals who considered suicide: “I ended up calling a suicide hotline that night. I felt distraught, pathetic, that I had just blown so much money on nothing but virtual jewels. I felt like I deserved to die for letting it get so bad and for wasting this much money”).
  \item \textsuperscript{25} 18 U.S.C.A. § 1084.
  \item \textsuperscript{26} \textit{Whether Proposals by Illinois and New York to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate The Wire Act}, 35 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 1, 13 (September 20, 2011).
\end{itemize}
apply to loot boxes as loot boxes do not relate to a sporting event or contest. The second federal gambling law, the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), holds more hope in relation to regulating loot boxes. The UIGEA was created specifically to combat online gambling. Accordingly, the UIGEA has a broader scope than The Wire Act, making it illegal to accept payments for any internet gambling not specifically authorized or made legal. In other words, the UIGEA works in tandem with state laws by not itself making gambling illegal, but making the receiving of money for gambling illegal if the online gambling is prohibited under any state or federal law.

Under the UIGEA, “unlawful gambling occurs when a person ‘[p]laces, receive[s], or otherwise knowingly transmit[s] a bet or wager by any means’ that involves some use of the internet, and the bet or wager is unlawful under state or federal law.” A bet or wager is defined as “an agreement or understanding that [a] person . . . will receive something of value in the event of a certain outcome.” A person places a bet or wager, which includes the “purchase of a chance or opportunity to win a lottery or other prize,” when such person stakes or risks “something of value upon the outcome of . . . a game subject to chance.” Not surprisingly, several state laws operate under a similar definition of unlawful gambling (i.e. risking something of value for the chance to win a prize).

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27 O'Day, supra note 8 (citing 31 U.S.C.A. § 5362 (2017) “New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders”).
29 O'Day, supra note 8 (citing 31 U.S.C.A. § 5362(10)(A)).
33 See Mo. Rev. Stat. §572.010 (2008) stating that “[a] person engages in ‘gambling’ when he or she stakes or risks something valuable upon the outcome of a contest of chance or a future contingent event not
Therefore, should states find loot boxes gambling under their respective state laws, loot boxes can easily be regulated both federally and state-wide.

**B. Loot Boxes qualify as gambling under many state laws**

States have the power to regulate gambling unless it affects the stream of commerce. 34 In fact, under its police power, a state’s authority to regulate gambling is nearly unchecked, 35 and as a result, various states developed gambling laws. 36 Today, “gambling is legal in some form in forty-eight states; only Utah and Hawaii ban it in its entirety.” 37

Under the aforementioned federal law (the UIGEA), and various state laws, loot boxes qualify as gambling. The character and use of loot boxes in videogames mimic the character and use of slot machines used in casinos. As such, loot boxes satisfy the requirements of gambling under various state laws necessitating regulation in order to curb the negative impacts on players, especially minors. While the specific requirements vary from state to state, numerous state statutes’ definitions of gambling and gambling instruments typically emphasize three elements: (1) consideration; (2) chance; and (3) under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome”; see also CAL. PENAL CODE § 319 defining a lottery as “any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.”

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34 See e.g. Champion v. Ames, 188 U.S. 321 (1903) (recognizing in no uncertain terms that the power to regulate lotteries directly falls within the police power reserved to the states, while Congress can regulate only the trafficking of lottery tickets in interstate commerce); United States v. Edge Broadcasting Co. 509 U.S. 418, 426 (1993) (stating that gambling fails to implicate a right that is constitutionally protected. The court added that gambling is a vice activity that states have a right to ban).


value (or prize).\textsuperscript{38}

1. Consideration

Loot boxes easily satisfy the “consideration” element of gambling through the payment of real-world money. While the exact qualifications of consideration vary based on jurisdiction, the majority’s view of consideration includes the payment of money or anything of value (i.e. risk of loss) for the chance to gain.\textsuperscript{39} Some loot boxes can be obtained for free by “leveling up” in a game, meaning a player’s character in-game experiences some sort of progression that usually entails unlocking new abilities or skills. In this sense, loot boxes are not gambling because there has been no payment of money, only skill used to obtain the loot box. The problematic loot boxes, however, are the ones available for purchase for the purpose of giving players an extra chance at obtaining a certain desired item, such as a highly desirable “skin.” For example, Blizzard Entertainment, Inc. allows players to purchase loot boxes in the game by (1) selecting “Loot Box” from the main menu, (2) clicking “Shop,” (3) choosing the number of loot boxes they would like to purchase, (4) selecting a payment method from the dropdown menu, and (5) clicking “Pay Now.”\textsuperscript{40} The process is easy, as this is the way most online purchases are made. Most online purchasers, however, are aware of what they will be

\textsuperscript{38} See \textit{e.g.,} MO. REV. STAT. §572.010 (2008) (stating that “[a] person engages in ‘gambling’ when he or she stakes or risks something valuable upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome”); CAL. PENAL CODE § 319 (West 2018); WASH. REV. CODE ANN. § 9.46.0237; NEV. REV. STAT. § 463.0152; KAN. STAT. ANN. § 21-4302(4); MO. ANN. STAT. § 572.010(3); N.Y. PENAL LAW § 225.00 (McKinney 1934).

\textsuperscript{39} Castillo, \textit{supra} note 12 at 185; \textit{see also} Yellow-Stone Kit v. State, 88 Ala. 196 (1889) (holding that the transaction did not constitute illegal gambling because no money was paid, directly or indirectly, for the chance of receiving a prize).

\textsuperscript{40} \textit{Purchasing Loot Boxes, BLIZZARD ENTERTAINMENT, INC.}, https://eu.battle.net/support/en/article/73354 (last visited May 12, 2019).
receiving in return for their purchase; loot box purchasers are not. Blizzard’s process is a direct example of players risking the loss of real-world money for the chance to gain an in-game item via the loot box clearly satisfying the “consideration” element of a gambling.

2. Chance

Loot boxes also satisfy the “chance” element of gambling as the specific “loot” available in a loot box “is rarely enumerated, and it’s a gamble whether a purchase even gives a player what he or she wants.”41 The Entertainment Software Rating Board, the self-regulated organization that assigns age and content ratings for video games and apps,42 has attempted to refute this classification of chance by stating that “it does not view loot [boxes] as a form of gambling because the system guarantees participants will receive in-game content.”43 While this statement is technically true—loot boxes consistently provide players with something in return for opening a box—players are not buying loot boxes to receive just any in-game content. Players purchase loot boxes in the hopes that they will receive a specific rare or legendary item as shown by numerous consumers having voiced their complaints online to Epic regarding the loot they received from Llamas (loot boxes in the video game “Fortnite Save the World”).44 One player complaint

41 Lanxon, supra note 11.
44 I guess I’ve hit the paywall?, REDDIT.COM, https://www.reddit.com/r/FORTnITE/comments/6r06mz/i_guess_ive_hit_the_paywall/ (last visited April 27, 2019) stating “I feel like I can’t progress anymore unless I drop more money into this game . . . so far I’ve spent $233 on llamas [and have no received] a single legendary/mythic [item] and my llamas [have] turned gold 6 times and no legendary [items]. I thought it was guaranteed?”; see also Buying Llamas is
stated, “[i]t feels like I am gambling to get good gear . . . [the llama system] makes you spend a ton of money for llamas that you’ve no good way of telling if you’re going to get something good.” Another player asked why his loot boxes “absolutely suck” after opening twelve loot boxes in one day and only receiving two legendary items. Clearly, players are purchasing loot boxes in search of certain specific items deemed to have value in the game and, therefore, to the player. By guaranteeing in-game content (even if the content received is not wanted or the reason for the purchase) with the purchase of a loot box, the video game industry is operating within a loophole in gambling regulation. The fact that players consistently receive in-game content reduces the “chance” component because there is a one-hundred percent chance a player will receive something as a result of the purchase.

In order to overcome this legal bump in the road, courts today should look to Internet Community and Entertainment Corp. v. Washington State Gambling Commission, in which the Supreme Court of Washington held that accepting a bet may simply include charging users a fee for the opportunity to place a bet, bringing the defendant’s business (Betcha) under the scope of “professional gambling” as defined by Washington’s gambling act. The issue in this case was whether Betcha was in violation of state gambling laws even though the defendant did not obligate bettors on his website to pay

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45 Id. at 695.
47 169 Wash. 2d 687 (2010).
48 Id. at 695.
their losses (i.e. there was no loss in exchange for the consideration).\(^49\) Similarly, the ESRB is arguing that loot boxes are not gambling because purchasers always receive something from the loot box (i.e. there is no loss in exchange for the purchase of the loot box). The arguments are parallel claiming that each respective business is not gambling because chance is not a factor to due consumers being able to avoid the loss of their initial purchase (whether by opting not to pay the loss as with defendant’s business, or by the ESRB providing undesirable guaranteed loot in each box). In holding that simply charging users a fee for the opportunity to place a bet was enough to violate state law, the Court chose to address the issue head-on by looking at the initial payment, instead of the end results of such payment.\(^50\) Working off this holding, loot boxes violate state law by charging players a fee for the opportunity to place a bet—the purchase of the loot box is both the fee and the bet itself, all wrapped into one shiny virtual box.

A second argument against the ESRB’s view that loot boxes do not involve chance can be made using an older, but factually similar case, *People v. Genelle*.\(^51\) The court in *People v. Genelle* held “that a penny gum ball machine which occasionally dispensed trinkets in addition to gum balls constituted a ‘gaming device’ under state gambling laws.”\(^52\) The issue in this case was whether trinkets that were “interspersed with the gum balls and came out at unpredictable intervals with the gum ball, but not with each gum ball, red[er]ed the machine a gaming device as distinguished from a vending

\(^{49}\) *Id.* at 690-691.
\(^{50}\) *Id.* at 695.
\(^{52}\) *Id.* at 858.
Like the gum ball machine, loot boxes always provide a purchaser with an item (i.e. a gum ball), but also provide the purchaser with the opportunity to get a legendary or rare item (i.e. a trinket). If the loot boxes were solely a means of distributing in-game content of equal value in the game, it would be merely a vending machine, and a legal means of effecting a sale. However, this is not the case as players are engaged in a game in which they purchase a loot box and, in opening the box, hope that it will release a legendary item in addition to the “gum ball.” “Who will win? No one can foretell. The result of the game is unpredictable.” As demonstrated by People v. Genelle, the “chance” factor is clearly present with respect to loot boxes despite guaranteed in-game content.

3. Prize

At first glance, loot boxes certainly satisfy the last element, receiving a prize, to qualify as gambling. A reasonable person cannot deny that a player may receive a highly sought after item as the result of opening a loot box, otherwise why buy the loot box in the first place? This element, however, presents a legal hiccup as the prizes in loot boxes are purely virtual or digital items within digital games and promotions (i.e. the player “has to pay [real] money for the chance to win the virtual item”). This technicality has forced courts and regulators “to consider whether purely virtual items have ever sufficient real-world value to be deemed prizes for purposes of anti-lottery laws.” While only a
handful of U.S. courts have considered the issue, the current majority view is that “no ‘prize’ is present for gambling purposes where (a) the virtual rewards cannot be redeemed, transferred or exchanged for any items of real-world value, and (b) there is no secondary market for these rewards (at least not a market that the game sponsor endorses, approves, or otherwise knowingly tolerates).  

Courts should interpret “prize,” “something of value,” “property,” or the like, as used in state gambling statutes to include virtual and tangible assets alike. For example, Missouri’s Statute defines ‘lottery’ as an “unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance.” The statute defines “something of value” as any money or property . . . or article exchangeable for money or property, any form of credit or promise directly or indirectly contemplating transfer of money or property . . .”

“Property,” as used in the statute, would include “digital assets,” meaning “any intangible, electronic record that has value, which one owns, licenses, or controls.” A

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57 Id. (See Mason v. Mach. Zone, Inc., 851 F.3d 315 (4th Cir. 2017); Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731 (N.D. Ill. 2016); Soto v. Sky Union, LLC, 159 F. Supp. 3d 871 (N.D. Ill. 2016). But see Kater v. Churchill Downs, Inc., 886 F.3d 784 (9th Cir. 2018) (finding real-world value present for an online casino game where the court assumed, for purposes of a motion to dismiss, that (a) the chips awarded in the game were needed to continue playing the game, (b) the chips were not available by any means other than purchase after an initial free allocation, and (c) the acquisition of the chips via the game allowed continued play of the game which otherwise would have cost the player money, which could bring the chips within WASH. REV. CODE § 9.46.0285, which defines a “thing of value” as “any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge”) (emphasis added)).
59 Id.
loot box is a combination of in-game digital assets owned by the video game developers. When a player purchases a loot box, and with it the in-game items inside, the player is purchasing (and therefore owning or licensing) such digital assets. The question now is “do these digital assets have value?” and the answer is “yes.” One argument is that digital assets do not hold value because they lack tangible properties.\(^1\) While this is true, it should not be the deciding factor of value. Courts should look to economists’ interpretations of value, such as the “scarcity principle.” “Constraining the opportunity to own or experience an object signals product scarcity.”\(^2\) People tend to desire scarce products due to the limitations placed on obtaining them and such limitations also “influence the perceived value and desirability of those objects.”\(^3\) If the persistent purchasing of loot boxes in search of specific legendary items is not enough to convince a court of the value placed on such digital items, one should look at the secondary markets on which these digital items are sold. Typically, game developers have provisions in their End User License Agreements that prohibit users from selling their digital assets on third-party platforms.\(^4\) This, however, does not stop players from selling rare and valuable digital goods on secondary markets for real money. “‘Skins’ for guns in ‘Counter Strike’ – essentially a paint job that does not affect the gun’s in-game effectiveness – are

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\(^2\) Shipra Gupta, Ph.D., *The Psychological Effects of Perceived Scarcity on Consumers’ Buying Behavior*, 41 DISSERTATIONS, THESSES, AND STUDENT RESEARCH FROM THE COLLEGE OF BUSINESS, University of Nebraska (June 2013).

\(^3\) Id. at 1.

\(^4\) See Blizzard End User License Agreement, BLIZZARD.COM (last updated June 21, 2018), https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b45004a02ea/blizzard-end-user-license-agreement.
currently up for sale for hundreds and thousands of dollars.”

Such secondary markets bring loot box digital assets within the purview of state gambling laws.

Furthermore, courts should reject the contention that loot box rewards are not “something of value” since, as stated above, the value of such digital items is determined by demand. As such, player opinions of the value should be considered. For example, Denis Kharlamov, who has spent about $900 on loot boxes, stated, “[w]hen you are opening those loot boxes, there is definitely a feeling of euphoria when you get something you perceive as valuable.” Players give each item value regardless of how the law defines it, so the laws should adapt in the same way humans have. To players, the legendary items are a treasure to be purchased and found within a loot box. That makes loot boxes a gambling device, “for if the player does not get a trinket [i.e. legendary item], he may try and try again.”

C. Psychological similarities between loot boxes and gambling

The legal similarities between loot boxes and gambling are an avenue academics are pursuing, but the core of the concern surrounding loot boxes are the psychological similarities. The psychological stimulation and accompanied negative impacts associated with gambling are present when a player engages in the loot box phenomenon. This has led to concerns within the academic community that the similarities between loot boxes

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66 Bailey, *supra* note 5.

67 See *supra* note 51 at 857.
and gambling may lead to problem gambling amongst gamers, minors in particular. When players open a loot box, they may get something they desperately wanted, or they may get items they consider abysmal. Video game psychologist and author Jamie Madigan says, “[t]his randomness taps into some of the very fundamental ways our brains work when trying to predict whether or not a good thing will happen.” She added that humans are “particularly excited by unexpected pleasures like a patch of wild berries, or an epic skin for our character.” Keith Whyte, the executive director of the National Council on Problem Gambling, would seem to agree considering his statement that “[i]ntermittent variable reinforcement is the means of delivering rewards that is most exciting to the human brain.” In short, the randomized and unpredictable nature of loot boxes stimulates the human brain in much the same ways as gambling. Mr. Whyte added that such intermittent reinforcement triggering brain stimulation “is the fundamental basis to slot machines [and] the fundamental basis to loot boxes. There is no distinction.”

Unsurprisingly, the Entertainment Software Rating Board (ESRB) disagrees, comparing loot boxes to a pack of sports cards or games like Magic: The Gathering (an online strategy collectible card game) as opposed to gambling, since unsuccessful lawsuits made similar legal claims against such games.

Based on appearances alone, the ESRB has a valid for claiming loot boxes resemble trading cards more than gambling. Similar to a card pack, loot boxes require players to

68 Hood, supra note 1.
69 Id.
70 Bailey, supra note 5.
71 Id.
72 Id.
spend real money to buy a pack of guaranteed items, but the items inside are not revealed until the player opens the loot box (or pack of cards). However, that is where the similarities end. Buyers of card packs “can sell cards back for a market price or even trade cards in for something that they can then use for personal play.”73 Video games do not offer the same options with regard to loot boxes, most of the time restricting the resell and trade-in options. Additionally, buying the entire card pack is not the only option for a player wanting a specific card. Magic the Gathering, for example, allows players to buy cards individually from retail online or local stores.74 Were loot boxes the same as trading cards, the video game developers would offer alternative ways of obtaining highly desirable in-game items. Instead, such developers force players to purchase the opportunity to obtain valuable in-game items, making loot boxes all the more similar to lotteries and gambling. The simple fact is, Magic the Gathering (and similar collectible trading card games) allow “players a number of ways to go about building [card] decks,” while loot boxes do not.75 This is the key difference between loot boxes and trading cards. Another difference between trading cards and loot boxes, pointed out by State Senator Kevin Ranker, is that the “entire setup of digital gaming, the entire visual of it, the entire sensory load of it, is rapid and is immediate.”76 Mr. Whyte says that such audiovisual cues are incredibly important, “noting that casinos have preserved the sound of crashing coins even though slot machine winnings now come on slips of paper.”77 Similarly, when “an elite soccer player is opened in the game FIFA 18, fireworks explode

75 Rutledge, How Loot Boxes Don’t Resemble Trading Cards, HARDCORE GAMER (Oct. 15, 2017).
76 Bailey, supra note 5.
77 Id.
and confetti falls.”78 The same, or even similar, audiovisual cues are absent when a player opens a pack of cards.

If the video game industry does not take social responsibility for their loot distribution systems, it may lead to problem gambling amongst gamers, adults and youths alike. Problem gambling “is often thought to be caused by individuals being conditioned by the arousing features of gambling to the point that their need for the excitement of gambling becomes harmful both to themselves and to others.”79 In order to determine if loot boxes had similar characteristics of gambling necessary for such conditioning, an Australian study analyzed 22 games featuring loot boxes and found that “in the way [the games] encourage and sustain user engagement, loot-box systems share important structural and psychological similarities with gambling.”80 By allowing these systems to stand, we are leaving the gaming population vulnerable to negative social, psychological, and economic harm. The Belgian Gaming Commission is strongly aligned with this thought processes as the Commission’s Research Report on Loot Boxes stated:

. . . there is no single systematic protection of consumers, minors or gambling addicts from gambling. More and more people, including young people, are confronted with gambling without realizing it. Because they experience wins and losses in connection with monetary wagers, they are, as it were, raised to consider gambling to be normal and are less capable of

78 Id.
79 DAVID ZENDLE, ET AL. PAYING FOR LOOT BOXES IS LINKED TO PROBLEM GAMBLING, REGARDLESS OF SPECIFIC FEATURES LIKE CASH-OUT AND PAY-TO-WIN: A PREREGISTERED INVESTIGATION (Oct. 12, 2018), https://psyarxiv.com/6e74k/ (concluding that paying for loot boxes is linked to problem gambling).
resisting the dangers of gambling. The disguised character of games of chance is extra problematic in the case of children. If there is no adequate intervention, then games of chance in video games will increasingly cause harm to players, families and society.\textsuperscript{81}

Research provides empirical evidence of a relationship between loot boxes and problem gambling.\textsuperscript{82} As such, the regulation of loot boxes is clearly appropriate and desperately needed.

\textbf{III. CURRENT REGULATORY EFFORTS}

\textit{A. Regulation within the Gaming Industry}

The gaming industry has implemented little to no protective measures regarding the vast exposure of loot boxes to the public, despite the parallels between gambling and loot boxes. The Entertainment Software Association (ESA), the trade association representing United States video game companies, has strongly denied any link between gambling and loot boxes and has even defended the implementation of the revenue system in video games.\textsuperscript{83} In 1994, the ESA established a self-regulatory body for the industry known as the Entertainment Software Rating Board (ESRB).\textsuperscript{84} As of this paper, the ESRB has made a single placating effort at notifying consumers of the potential financial risks associated with certain video games by labeling games that sell loot boxes with an “In-

\textsuperscript{82} Zendle, \textit{supra} note 79.
\textsuperscript{83} Tom Hoggins, \textit{Video game loot boxes to be investigated by US after being blamed for rise in young gamblers}, The Telegraph (Nov. 28, 2018, 3:34 PM), https://www.telegraph.co.uk/gaming/news/loot-boxes-investigated-us-blamed-rise-young-gamblers/.
\textsuperscript{84} \textit{Supra} note 42.
Game Purchases” label. While this is a step in the right direction, this particular step is currently too broad to effect the type of precautionary features that should be associated with games offering loot boxes. The “In-Game Purchases” label is a catch-all phrase that will be applied to games that sell anything in-app. This move “is a clear punt for the ESRB, which has been repeatedly pressured not just by fans and games journalists about the issues of addicting, gambling-based loot boxes, but also more recently by legislators . . .” The issue with the label being so all-encompassing is that “nearly every game on the market contains ‘in-game purchases’ . . . so this will be a sticker slapped on pretty much all titles, barring perhaps some indies.” The industry’s self-regulatory bodies need to address the issue at hand instead of slapping a band-aid on it. Either the ESA should implement new loot box structures to reduce the addictive characteristics, or the ESRB should rate games offering loot boxes as M for “Mature” or AO for “Adults Only,” as casinos have, to at least prevent minors from being exposed.

B. Regulation inside the United States

While many states have attempted to bring loot boxes within their state gambling laws’ scope, courts are having difficulty assigning the rewards from loot boxes as “something of value” as mentioned above. Therefore, legislators in several states have proposed

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87 Id.
laws to address the video game industry’s loot boxes. For example, Hawaii proposed three bills, the first two of which would have prohibited the sale of video games containing a system of purchasing a randomized rewards to consumers under 21 years of age. The third took a different approach, establishing certain disclosure requirements for publishers of video games that contain a system of purchasing randomized rewards. Similarly, California’s proposed bill would have required the manufacturers of video games to “provide a clear disclosure that the video game includes the opportunity to engage in a microtransaction on the physical box the video game is sold on.” All such bills have died in committee, however. In light of taking a few losses in the legislative arena, private regulation may be a temporary fix until the law is able to catch up with today’s technological advances. Apple, Inc. is at the forefront of such regulation in the U.S. addressing loot boxes in its App Store Review Guidelines. Apple now requires apps offering loot boxes, or other mechanisms that provide randomized virtual items for purchase, to disclose the odds of receiving each type of item prior to purchase. States must continue the fight against loot boxes through revised bills and litigation. Until the precedent has been set, however, private companies should take note from Apple to in order to protect adults and minors from the harms of gambling and gambling addiction.

95 Id.
C. Regulation around the world

For many of the aforementioned reasons, “the use of loot boxes has been deemed to constitute a form of illegal gambling in a handful of non-US jurisdictions, particularly where loot boxes are aimed at an audience of minors who may be particularly susceptible to game mechanisms that appeal to the human instinct for gambling, regardless whether the ‘prizes’ have any real-world value.”96 As of this note, countries around the world have chosen one of three regulatory avenues to curb the negative effects of loot boxes: (1) banning loot boxes entirely97, (2) regulating loot boxes as a form of gambling98, or (3) requiring developers to disclose the probabilities of receiving any given reward.99 In 2018, the Belgian Gaming Commission and the Netherlands Gaming Authority both ruled that some loot boxes are “in violation of national gambling legislation.”100 Correspondingly, games of chance are banned in Belgium other than exceptions provided for by the country’s Gaming and Betting Act.101

97 BELGIUM GAMING COMMISSION, supra note 81.
101 BELGIUM GAMING COMMISSION, supra note 81.
Research Report on Loot Boxes, if the video games are not altered in compliance with the Belgian’s Gaming and Betting Act, the game operators “risk a prison sentence of up to five years and fines of up to EUR 800,000 for a first violation.” 102 Additionally, Belgium’s Minister of Justice, Koen Geens, was “keen to focus on how children are confronted with loot boxes, calling the mix of gaming and gambling ‘dangerous for mental health.’” 103 As such, the penalty can be doubled when persons younger than 18 (i.e. minors) are involved. 104 There were no laws passed specifically banning loot boxes, Belgium and the Netherlands simply determined that certain loot boxes were in violation of existing gambling laws. While Electronic Arts continues to “push forward” with loot boxes, 105 Blizzard has chosen to remove paid loot boxes from the games “Overwatch” and “Heroes of the Storm” in Belgium in order to maintain compliance with Belgium’s laws. 106 Blizzard’s compliance is proof that if gaming companies will comply with regulations if the legal authorities are persistent in their contentions that loot boxes are illegal gambling. Electronic Arts’ refusal to comply is based on its belief that loot boxes do not qualify as gambling under the country’s laws. If states were able to pass specific loot box legislation requiring probability disclosures and age limit requirements, companies such as Electronic Arts would have no leg to stand on.

102 Id.
104 BELGIUM GAMING COMMISSION, supra note 81.
Other countries, such as China and South Korea, require game manufacturers selling loot boxes to disclose the probabilities of receiving any given reward.\textsuperscript{107} In 2017, China passed an additional, harsher law “that outlawed virtual ‘lottery tickets,’” leading Blizzard to remove the ability to buy Overwatch loot boxes with real money in that region . . .”\textsuperscript{108} Australia, on the other hand, has opted to conduct research into the psychological similarities between loot boxes and gambling, while restricting their sales of video games containing loot boxes to people over the legal gambling age of 18.\textsuperscript{109} Lastly, and far more trusting than other countries, the UK has chosen to let industry self-regulation handle the issue.\textsuperscript{110}

V. SUGGESTED REGULATION

Increasing the transparency of loot boxes offers the most efficient and least industry invasive way of addressing the loot box issue. Currently, the monitoring of the video game industry and the lack of effective regulations for games of chance within video games is in “stark contrast to the regulated gambling sector for adults.”\textsuperscript{111} The United States can bridge this regulatory gap by requiring (1) disclosure of the granular odds of receiving any given item from loot boxes (or, alternatively, the offer of desired loot items for purchase separately), \textit{and} (2) the ESRB to rate loot box games as “Adults Only.”


\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} BELGIUM GAMING COMMISSION, \textit{supra} note 81 at 17.
Much like the regulations in China and South Korea, video game developers should be required to disclose the probability of receiving each “loot” item in a loot box. This would increase consumer awareness in each purchase and bring credibility to the ESA and ESRB’s claims that loot boxes are more like collectible cards than gambling.112 “Increasing consumer information has been the regulatory drumbeat for nearly fifty years across a variety of products related to a wide field of practices.”113 Disclosing odds would be efficient and in line with this drumbeat. Developers would be able to comply almost immediately as they have already had to create the algorithms necessary for such a system in China. The speediness of this approach is the best option for reducing the negative effects of loot boxes and introducing the benefits, which include “better reasoned purchases [and] avoidance of ‘unfair’ loot box games,”114 quickly. An alternative to disclosing the odds of each loot box is to require video game developers to offer legendary items for purchase separately from the randomized loot boxes, as trading cards do, to reduce the incentive to pay real world money for the opportunity to win one. Again, since the ESRB claims loot boxes are the same as trading cards, this should not be an issue for the industry. This requirement would ensure that players are not using loot

112 See Chaset v. Fleer/Skybox Int’l, LP, 300 F.3d 1083, 1086 (9th Cir. 2002) (noting that tangible card manufacturers routinely report the odds of rare finds within their card decks).
113 Moshirnia, supra note 21 at 109; see, e.g., Be an Informed Consumer, NAT’L CTR. FOR COMPLEMENTARY AND INTEGRATIVE HEALTH, https://nccih.nih.gov/health/decisions (urging individuals to be informed consumers); John F. Kennedy, 35th President of the U.S., Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962) (recognizing the right to be informed); The Lisbon Treaty art. 169, Dec. 13, 2007, 51 O.J. C 115 (“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.”).
114 Moshirnia, supra note 21 at 110.
boxes as a gambling machine by trying and trying again when the player does not get the specific item he or she was looking for.

The federal government should require the ESRB to rate games offering randomized rewards for purchase as “AO” to at least ensure that minors are not hooked on gambling at such a young age. The gaming industry’s self-regulation does not adequately protect players and the lack of proper regulation and control in modern video games that offer loot boxes is “particularly problematic with regard to minors and gambling addicts, who can take part in games of chance without any protection.” A simple “In-Game Purchases” label is not nearly enough to warn parents, minors or gambling addicts of the dangers that now lie within a majority of the most popular games. The “ESRB was formed to prevent federal review of violent content in video games.” Current “Adults Only” rated games are described as “content suitable only for adults ages 18 and up. May include prolonged scenes of intense violence, graphic sexual content and/or gambling with real currency.” The ESRB can stick to their assertions that loot boxes are not gambling by expanding this category to include games with loot box mechanics. In this way, the ESA and legislators can meet in the middle by not requiring loot boxes to be labeled gambling, but protecting the public from its harms nonetheless. The combination of the granular odds disclosure and ESRB ratings accomplishes consumer protection goals and avoids a gambling-focused ban which could “open the floodgates for

115 BELGIUM GAMING COMMISSION, supra note 81 at 17.
116 Moshirnia, supra note 21 at 108.
overregulation of video game content.”\textsuperscript{118} The goal is not to control how video game developers entertain consumers and make a profit, it is simply to protect the public when such developers will not look past the revenue stream to see the harm.

\textsuperscript{118} Moshirnia, \textit{supra} note 21 at 111.