

SPENDING MONEY ON A FREE GAME: FINDING THE KEY TO LOOT BOX CONSUMER PROTECTION ISSUES

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INTRODUCTION

Excessive video game use, coined a “gaming disorder” by the World Health Organization,¹ has long been tied to negative side effects and patterns of behavior. These include more easily treatable physical conditions² like joint pain or numbness, blisters or calluses, sleep disorders, and harder to treat psychological conditions³ such as decreased self-esteem, aggressive tendencies, and a sense of loneliness or anxiety which frequently progress into mental health diagnosis’ such as depression.

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1. *Addictive Behaviours: Gaming Disorder*, WORLD HEALTH ORG. (22 Oct. 2020), <https://www.who.int/news-room/questions-and-answers/item/addictive-behaviours-gaming-disorder> [<https://perma.cc/9HKN-DRU6>].

2. *Video Game Addiction: Signs, Effects and Treatment*, UNITYPOINT HEALTH, <https://www.unitypoint.org/livewell/article.aspx?id=ce341f2d-1bdc-49d1-9a4b-b524e782cbbe> [<https://perma.cc/BE44-YLX9>].

3. Juliane M. von der Heiden, et al., *The Association between Video Gaming and Psychological Functioning* *FRONTIERS IN PSYCHOLOGY* (July 26, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6676913/> [<https://perma.cc/9XA6-DHVC>].

Recently, however, a less obvious impact of video game use has become the subject of increased scrutiny—whether video game mechanisms known as “loot boxes” are encouraging a form of gambling. And, given the high level of video game use by minors—ninety percent⁴ of minors play video games and twenty percent⁵ of video gamers are minors—this gambling debate inevitably casts a light on consumer protection needs. The question begs, however: what are these allegedly “destructive” loot boxes and why are they a part of an ongoing legal debate?

This Essay seeks to provide readers with a holistic consideration of the consumer protection issues surrounding loot boxes. Section I discusses the role of loot boxes in the video game industry, how they became a hot topic, and a look into class action suits. Section II provides an analysis of how non-American countries approach the loot box and gambling debate. And, finally, Section III provides a brief set of solutions to this rapidly growing issue—showing that it could all be so simple.

I. LOOT BOXES AND THEIR EVOLUTION

Loot boxes, grab bags, or as Electronic Arts (EA) Sports ingeniously calls them “surprise mechanics,”⁶ are virtual containers accessible in many video games that contain items, or “loot”, that players use to enhance their gaming experience and progress in the game. Loot ranges in desirability to the player and includes customization options to a character’s outfit (also known as “skins”), equipment such as armor and weapons, and longevity bonuses, such as an extra life or game time to increase playing time. There’s a catch though, well two catches, that have brought rise to the issue of gambling in this space. First, loot boxes are randomized so players have no inkling as to what they are getting until their surprise reveals itself. And secondly, loot boxes must often be purchased. Loot boxes can be obtained by either purchasing in-game currency or by reaching certain milestones in the game.

Game manufacturers have long seen the success of their loot boxes. Players report their enjoyment of being able to express their personalities

4. Rachel Barclay, *Do Video Games Make Kids Saints or Psychopaths (and Why Is It So Hard to Find Out)?*, HEALTHLINE (Oct. 20, 2018), <https://www.healthline.com/health-news/video-games-saints-or-psychopaths-082814> [<https://perma.cc/7XEA-2MGK>].

5. J. Clement, *U.S. Average Age of Video Gamers 2021*, STATISTA (Aug. 20, 2021), <https://www.statista.com/statistics/189582/age-of-us-video-game-players/> [<https://perma.cc/QM M9-W9Y4>].

6. Erica Johnson & Kimberly Ivany, *Video Game Giant EA Steering Players into Loot-Box Option in Popular Soccer Game, Insider Says*, CBC NEWS (Apr. 26, 2021), <https://www.cbc.ca/news/gopublic/fifa21-loot-boxes-electronic-arts-1.5996912> [<https://perma.cc/4FFS-CNXXZ>].

through the persona of their avatars fitted with skins and other loot.⁷ Other players appreciate the functional value that loot brings, allowing them to get past exceedingly difficult stages in a game.⁸ As the demand for loot boxes increased, game manufacturers have released loot boxes in different designs and formats. “Traditional” loot boxes positioned the player to potentially receive duplicate loot, whereas new, or “unique” loot boxes guarantee the player a different item each time⁹.

The success manufacturers have seen with loot boxes, however, has not been limited to the happiness of their players. Loot box sales have proven to be quite the profitable business model. Research suggests that in 2020, \$15 billion in revenue was generated from the sale of loot boxes, with that number expected to rise five percent annually.¹⁰ This, amongst other factors, explains the industry’s expansion to unique loot boxes. After all, a player is going to stop spending money on traditional loot boxes once they receive duplicates or all items in any given loot set because there is no value to such a continued expenditure.

A. *The Rise of a Consumer Protection Problem*

Video game users did not just wake up one morning and uncover a causal link to their purchase of loot boxes to an emerging legal issue. Rather, and most often, the parents of minors who play such games were alarmed by the preferences of their children to play a virtual game rather than a real life one outside. Additionally, the change in habits and behaviors of their kids or the fact that their credit card statements were higher than anticipated would cause surprise. After investigation, parents would often connect these changes to their children’s excessive video game use and in-game elements such as loot boxes.

A commenter on a Federal Trade Commission blog post reported¹¹ spending over \$3,000 on in-game chance purchases in the once uber popular online game “Farmville”.¹² Until its end in 2020, Farmville

7. FED. TRADE COMM’N, *INSIDE THE GAME: INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES*, AT 22 (Aug. 7, 2019), https://www.ftc.gov/system/files/documents/public_events/1511966/loot_boxes_workshop_transcript.pdf [<https://perma.cc/F4PP-MD8G>].

8. *Id.* at 131.

9. *Id.* at 139.

10. *Juniper Research: Video Game Loot Boxes to Generate over \$20 Billion in Revenue by 2025, but Tightening Legislation Will Slow Growth*, BUS. WIRE (Mar. 9, 2021), <https://www.businesswire.com/news/home/20210308005767/en/Juniper-Research-Video-Game-Loot-Boxes-to-Generate-over-20-Billion-in-Revenue-by-2025-but-Tightening-Legislation-Will-Slow-Growth> [<https://perma.cc/T5EA-YTYJ>].

11. *Video Games, Loot Boxes, and Your Money*, CONSUMER INFO. (Sept. 30, 2019), <https://www.consumer.ftc.gov/blog/2019/09/video-games-loot-boxes-and-your-money> [<https://perma.cc/7L62-GX2K>].

12. *Id.*

described its in-game purchase options as “microtransactions” but they had the same effect as loot boxes. In fact, the practice of labeling such exchanges as microtransactions mainstreamed loot boxes in the video game industry.¹³

One Connecticut mom, Jessica, grappled tirelessly with Chase Bank and later with Apple after discovering over \$16,000 in charges to her account.¹⁴ Initially being told by Chase that she was likely an addition to the sea of fraud victims experiencing unauthorized charges from Apple, Jessica didn’t initially reach out to Apple. It was not until four months after her fraud claim that Chase confirmed the charges were hers and that she needed to contact Apple. Apple then shared that the charges were tied to spending on “Sonic Forces”, the preferred video game of Jessica’s son, George. Jessica, crushed by her new inability to pay her mortgage, analogized George’s in-game pack purchase of “Gold Ring” packs, each costing \$99.99, to “lines of cocaine”.

If these numbers seem high, research conducted by the United Kingdom’s Gambling Health Alliance (GHA) suggests the purchasing patterns of loot boxes by minors are more dangerous. It found that a handful of families had to refinance their homes to cover the debts created by their minors’ loot box purchases.¹⁵ While some will be quick to assign blame to parents for gross oversight of their children, GHA further found that fifteen percent of children stole money from their parents to buy loot boxes¹⁶ and nearly ten percent of children borrowed money that they knew they could not repay.¹⁷

B. Class Actions

The presence of loot box consumer protection claims in the courts have ebbed and flowed over the years, but they appear to be making a return. Claimants, many of whom are trying to bolster their bargaining power by seeking qualification as a class action group, rigorously argue that loot boxes are akin to gambling. Across state lines, the elements necessary to establish the existence of illegal gambling vary, but they can generally be deduced to the following: (1) the claimant putting something

13. Matthew Gault, “*Farmville’ Changed Online Gaming Forever, Now It’s Going Offline*,” VICE (Sept. 28, 2020), <https://www.vice.com/en/article/z3ea89/farmville-changed-online-gaming-forever-now-its-going-offline> [<https://perma.cc/B3RV-FE5N>].

14. Doree Lewak, *This 6-Year-Old Racked up \$16K on Mom’s Credit Card Playing Video Games*, N.Y. POST (Dec. 14, 2020), <https://nypost.com/2020/12/12/this-6-year-old-racked-up-over-16k-on-his-moms-credit-card/> [<https://perma.cc/W5SE-X87L>].

15. *Over 1 in 10 Young Gamers Get into Debt by Buying Loot Boxes*, RSPH (Dec. 23, 2020), <https://www.rsph.org.uk/about-us/news/over-1-in-10-young-gamers-get-into-debt-because-of-loot-boxes.html> [<https://perma.cc/ZU3D-AZKX>].

16. *Id.*

17. *Id.*

of value at risk (2) to potentially win a valuable prize (3) in a drawing method based on chance.

Like most legal debates, a determination of whether loot boxes constitute a form of gambling requires a further breakdown of the elements. “Something of value” typically refers to any form of money or property, including a token or other object that may be exchanged for money or other property.¹⁸ A “chance method” is a type of game that depends, in a material degree, on an element of random chance, notwithstanding the possibility that skill of a player may be a factor therein.¹⁹

As the law evolves, new cases show claimants are arguing that much like the draw of gambling in a casino, loot boxes are pushed onto them through psychological manipulation and deceptive marketing tactics. In strong opposition, game manufacturers stand by the position that the purchase of loot boxes is a personal choice guided by accurate representations and that players get exactly what they buy. To further analyze this novel legal issue, let’s take a peek inside the courtroom walls.²⁰

1. Unfair Competition

In *Coffee v. Google, LLC*, plaintiffs John Coffee and Mei-Ling Montanez claim they have standing under unfair competition laws because they suffered economically from Google’s facilitation of third-party apps who sell loot boxes.²¹ They brought this lawsuit after purchasing countless loot boxes through games they downloaded through the Google Play platform, such as “Final Fantasy” and “Dragon Ball Z”.²²

Plaintiffs’ point to their state’s Unfair Competition Law (UCL), which prohibits any “unlawful, unfair or fraudulent business act or practice.”²³ To recover under UCL, Coffee and Montanez must establish that they suffered from economic injury due to its dealings with Google.²⁴ They argue they meet the burden due to Google splitting up loot box

18. N.Y. PENAL L. § 225.00(6) (MCKINNEY 2018). While it is important to note that this is the state of New York’s legal definition of “something of value,” other state and federal law define this term similarly. Washington state has exactly the same language, but instead described the term “thing of value” (WASH. REV. CODE § 9.46.0285 (1987)). America’s proclaimed gambling capital, Atlantic City (New Jersey), adopted this language too, though it excluded those games which don’t require a charge from the player in exchange for a chance at an award (N.J. REV. STAT. § 2C:37-1(D) (2021)).

19. N.Y. PENAL L. § 225.00(1) (MCKINNEY 2018).

20. While the cases presented are from various jurisdictions, many of the claimants’ arguments are consistent therefore nuances across state laws should not be overthought.

21. *Coffee v. Google LLC*, 20-cv-03901-BLF, 3 (N.D. Cal. Jan. 10, 2022).

22. *Id.* at 4.

23. CAL. BUS. & PROF. CODE § 17200 (WEST 2021).

24. CAL. BUS. & PROF. CODE § 17204 (WEST 2021).

transactions into two parts. First, by requiring the purchase of virtual currency in Google Play, then by only allowing in-game purchases through the exchange of virtual currency. By framing the process this way, the plaintiffs argue that Google has set up a “predatory scheme” designed to deceive the buyer into gambling his or her money on random chance prizes, like a casino does with a slot machine, by removing the component of “real” money. Outside of this, plaintiffs argue that Google plays a key role in facilitating the second stage of loot purchases. It not only implements strict guidelines onto app developers that it works with for their product releases, but it provides them with app development tools.

Google, in turn, urges the court to assess its practices only under the first step to buying loot boxes. The exchange of real money for virtual money between Google and consumers has no role in the second step. Viewed this way, no plaintiff can claim economic injury because they knew they’d get “X” amount of virtual money for “X” amount of real currency provided. As for its involvement with app developers, Google claims immunity as the provider of an “interactive computer service”. In other words, Google merely provides a host site for developers to release their apps to consumers like Coffee and Montanez, and thus did not contribute to the alleged illegal conduct.

The District Court ultimately ruled in favor of Google, stating that the plaintiffs lacked sufficient grounds to maintain their UCL claim because they failed to prove they suffered from economic injury.²⁵ Quite the opposite, the plaintiffs received the exact amount of “lapis crystals” and “dragon stones” they paid for in their Play Store transactions.²⁶ Further, the plaintiffs are unable to impose liability on Google for the exchange of these virtual currencies with loot boxes as Google has immunity under the Communications Decency Act (CDA).²⁷ To receive cover under CDA immunity, a defendant must: (1) be a provider of an interactive computer service; (2) who plaintiff alleges is a publisher or speaker of the allegedly offending content; and (3) that a third party in fact served as the information content provider for.²⁸

An “interactive computer service” is defined as an information service that enables computer access by multiple users to a computer server.²⁹ Neither party contests that this prong is satisfied as Google hosts millions of third-party apps on its system, which is virtually accessible to consumers. As for the second element, a party acts as a publisher or

25. *Coffee v. Google LLC*, 20-cv-03901-BLF, 13 (N.D. Cal. Jan. 10, 2022).

26. *Id.*

27. 47 U.S.C. § 230(c)(1).

28. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009), as amended (Sept. 28, 2009).

29. 47 U.S.C. § 230(f)(2).

speaker if he or she engages in some decision making as to whether to post online content submitted by a third party. Plaintiffs initially argue that Google should screen all apps whose developers request inclusion in the Play Store, and later proceed to argue that they are not trying to label Google as a publisher of the apps, but instead that Google is “permitting and facilitating illegal gambling.”³⁰ Recognizing that plaintiffs’ entire lawsuit was premised on the content of Google’s app listings, the court found the second prong to be satisfied. Lastly, Coffee and Montanez failed to demonstrate that Google collaborated with the makers of Dragon Ball Z or Final Fantasy as a co-developer. A defendant fails to satisfy this final prong so long it does not “contribute materially to the alleged illegality of the conduct.”³¹ Plaintiffs’ contention that Google requires their app developers to sign a Developer Distribution Agreement and provides them with software development tools is moot—Google’s conduct is uniform across the board and did not create the content within the apps.

2. Consumer Legal Remedies Act

In *Mai v. Supercell Oy*, plaintiff Peter Mai brought a putative class action against game manufacturer Supercell Oy (Supercell). Mai argued that he had standing under the Consumer Legal Remedies Act (CLRA)³² because Supercell exploited human psychology to encourage loot box sales in its popular game “Clash Royale” by mimicking the features of casino machines. The CLRA allows a consumer to recover if they suffer from a loss or deprivation of money or property³³ due to any one of more than two dozen unlawful actions taken by the defendant.³⁴ These include misrepresenting goods, whether as to their source or quality, passing off goods as if it has sponsorship or approval from a third party it does not, and suggesting that a good confers rights or benefits that it does not have.³⁵

Mai alleged that Supercell deceived him into repeatedly purchasing gems, the in-game currency for Clash Royale, by giving loot boxes dramatic sound and visual effects. However, the court did not agree with Mai, instead stating that not only did Mai fail to connect Supercell’s conduct to an illegal act under the CLRA, but he didn’t suffer from economic harm. Mai received the exact number of gems he purchased.

30. Coffee v. Google, LLC, No. 20-CV-03901-BLF, 2022 WL 94986, at *5 (N.D. Cal. Jan. 10, 2022).

31. *Id.* at 7.

32. CAL. BUS. & PROF. CODE § 1770 (West 2001).

33. Mai v. Supercell Oy, No. 5:20-CV-05573-EJD, 2021 WL 4267487, at *3 (N.D. Cal. Sept. 20, 2021).

34. CAL. BUS. & PROF. CODE § 1770 (West 2001).

35. *Id.*

Further, the District Court found Mai's analogy comparing Clash Royale gems to casino gambling chips to be unsubstantiated because the former cannot be exchanged back for real money.³⁶

II. A LOOK AT OTHER COUNTRIES

As the popularity of video game loot boxes continues to rise, with an anticipated revenue growth from \$15 billion in 2020 to \$20 billion in 2025,³⁷ American lawmakers would be wise to look at how foreign jurisdictions approach loot box regulation. While many European nations are taking a consumer-focused direction, U.S. legislation and case law is reacting minimally at best to consumers' concerns that loot boxes present a grave gambling danger.

A. Netherlands

Take the Netherlands strict treatment of loot boxes, as supported by its Betting and Gaming Act (the Netherlands Act). The Netherlands Act permits a provider of a "game of chance" to offer and promote its game if it holds a license to do so. Otherwise, the provider is subject to harsh penalties.³⁸ A "game of chance" under the Netherlands Act is defined as "an opportunity to compete for prizes or premiums if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence," with a prize or premium characterized as anything with economic value.³⁹ For purposes of clarity, the Netherlands Act considers in-kind prizes to hold economic value within the game, which is quite the unique approach, especially compared to that of the United States.

As part of its effort to enforce the Netherlands Act, the Netherlands Gaming Authority (NGA) regularly conducts studies of loot boxes purchased in the country. A 2018 study revealed that four out of ten video games it examined were in violation of the Netherlands Act, including EA Sports.⁴⁰ EA Sports took issue with the allegation that its in-game "packs", which provide varying levels of virtual football players in its

36. *Mai v. Supercell Oy*, No. 5:20-CV-05573-EJD, 2021 WL 4267487, at *3 (N.D. Cal. Sept. 20, 2021).

37. J. Clement, *Global Video Game Loot Box Market Size 2025*, STATISTA (Sept. 7, 2021), <https://www.statista.com/statistics/829395/consumer-spending-loot-boxes-skins/> [<https://perma.cc/ZX5B-BMS5>].

38. Alan Littler et al., *The Gambling Law Review: Netherlands*, THE LAW REVIEWS (June 7, 2021), <https://thelawreviews.co.uk/title/the-gambling-law-review/netherlands> [<https://perma.cc/8JRD-4CFN>].

39. *Id.*

40. Andy Chalk, *Netherlands Gaming Authority Cracks down on Loot Boxes in Some Games*, PC GAMER (Apr. 19, 2018), <https://www.pcgamer.com/netherlands-gaming-authority-cracks-down-on-loot-boxes-in-some-games/> [<https://perma.cc/F2YT-VEFY>].

highly popular FIFA game, constituted “games of chance.”⁴¹ EA Sports argued the position that earning packs is possible only in “FUT Mode”, a game of skill, with the player’s abilities being the predominant factor in determining the outcome of a football match. Further, EA Sports contends that the players don’t intend to gamble and that opening packs is not what FUT Mode is about, but rather that winning the virtual football league is. Unsurprisingly, given the Netherlands’ pro-consumer stance, the Hague Court adopted the views of the NGA.

The Hague Court insisted that opening game packs should be analyzed by themselves, rather than as part of the overall game, and when done so, they fit within the “game of chance” category. After all, EA Sports players, by opening packs, have the opportunity to win prizes holding an economic value whereby they lack an influence, let alone a dominant one, as to which prize, if any, they will win. While the prizes may not be exchanged for real world money on the defendant’s game, they hold value within the game either by themselves or as trade value for FUT Coins on the EA Sports platform. EA Sports doesn’t contest this, even stating that the packs have “relevant game value . . . within FUT mode.”⁴²

Recognizing that EA Sports’ does not hold a license for its “game of chance”, the NGA, later supported by the Hague Court in an appeal by EA Sports, imposed fines of up to \$10 million euros (\$11.7 million U.S. dollars) onto EA Sports.⁴³ The NGA emphasized the importance of upholding the Netherlands Act for the protection of consumers, particularly those populations vulnerable to gambling like children. Either way, it is clear that the ruling will benefit children and adults alike, both of whom should be conscious of the type of games they are playing and how it might influence their spending behavior.

B. Belgium

In a move that other nations might characterize as extreme, Belgium outright banned and made illegal loot boxes in video games⁴⁴ based on guidance from the Belgium Gaming Commission (KSC).⁴⁵ KSC, as an early bird in the world of loot box issues, conducted a study of a handful

41. Elec. Arts Inc. v. D.G.A https://uitspraken-rechtspraak-nl.translate.googleusercontent.com/s/document?id=ECLI%3ANL%3ARBDHA%3A2020%3A10428&_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=en-US [https://perma.cc/U42G-JS5M].

42. *Id.*

43. Andy Chalk, *Electronic Arts Faces €10 Million Fine over FIFA Loot Boxes in the Netherlands*, PC GAMER (Oct. 29, 2020), <https://www.pcgamer.com/electronic-arts-faces-euro10-million-fine-over-fifa-loot-boxes-in-the-netherlands/> [https://perma.cc/PT4B-44T3].

44. Tom Gerken, *Video Game Loot Boxes Declared Illegal under Belgium Gambling Laws*, BBC NEWS (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306> [https://perma.cc/9UK9-R55V].

45. For clarification of the acronym’s source, the commission’s name is “De Kansspelcommissie” in Dutch.

of games widely used in the country to determine if loot boxes were in violation of the Belgium Gaming Act (Belgium Act).

Those games that were analyzed, such as *Overwatch*, *Star Wars Battlefront* (*Battlefront*), *FIFA*, and *Counter-Strike: Global Offensive* (*Counter-Strike*), came under the scrutiny of various lenses. KSC focused on: (1) strict age limits the Belgium Act imposes on game use based on its content; (2) the manner in which loot boxes can be accessed in the games, including illusions or techniques the developers use to encourage loot box use by players; and (3) the conditions necessary for a game of chance.⁴⁶ Some opponents of Belgium's consumer friendly approach may argue there is an imbalance in the factors above in that it is based too heavily on social impacts rather than the law.

KSC implements a number of techniques aimed at protecting players it deems vulnerable or susceptible to gambling and games of chance. First, there are minors up to 18 years old, who have a complete ban on game of chance participation. The second category allows those between 18 and 21 years old to engage in some forms of lotteries and betting, with the final category permitting those only 21 and older to enter and play games at casinos. By comparing these age limits to the age categories set for the analyzed games by the gaming industry itself, KSC concluded that this form of self-regulation neglected to take the Belgium Act's age limits into account and violated it.

The age categories decided upon by the gaming industry were: *Overwatch* - 12 years old, *Battlefront* - 16 years old, *FIFA* - all ages, and *Counter-Strike* - 18 years old. While the reference to the age categories does not provide specific intel into the loot box issue, KSC does find it to be a worthwhile factor in determining the game developers' approach to safeguarding its younger audiences from games of chance. For instance, KSC found it problematic that despite *Overwatch* being labeled for those 18 and up, the developer imposed an age limit of only 13 years old to provide payment and make financial transactions in the game.

Next, KSC analyzes the mechanisms in which loot boxes are obtained and noted the following in its report:⁴⁷ the game developers (1) exploited players based on their anticipated social behavior in games; (2) framed the games so as to make them appear to be based on skill; and (3) came up with their own financial exchange system.⁴⁸ Activision, the owner of

46. KANSSPEL COMMISSIE, ONDERZOEKSRAPPORT LOOT BOXEN (2018), <https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf> [https://perma.cc/CX3U-6BQD].

47. This list is not exhaustive due to the number of conclusions reached by KSC. For the sake of efficiency, a handful of points were selected for discussion.

48. KANSSPEL COMMISSIE, ONDERZOEKSRAPPORT LOOT BOXEN (2018), <https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf> [https://perma.cc/RDW8-2EPQ].

the Overwatch game franchise, got quite crafty with its selling technique by filing for a patented process of selling loot boxes. This two-step process involves having a player indicate his or her favorite loot box prize from a host of options, then putting the player up against a more experienced player already in possession of the favorite item. Activision, in turn, is increasing the likelihood that the player will buy a loot box to get that item.

KSC further found that the game developers further dug players into the loot box hole by implementing its own “coin” or “credit” system to buy loot boxes.⁴⁹ For Star Wars, this looks like “Galactic Credits”, an idealistic play on the currency used in the highly popular movie series. While for FIFA, it’s FUT Coins. The development of these exchange systems, KSC says, results in a dissociation in the player’s mind between money with real world value and in-game currency.⁵⁰ By thinking in “coin” or “credit”, rather than “euros”, the player is more likely to use up in-game currency purchased off the platform and find him or herself having to refill—again and again. Further, the developers impose a higher value on in-game currency than what it costs to purchase it with actual money, and thus makes the players believe they are getting a deal.⁵¹

As for the presence of chance, KSC played devil’s advocate for a moment prior to conceding that the games do indeed have this element. KSC pointed out that from the perspective of the game developers, there was little to no involvement of chance since the loot box items could be manipulated or customized based on player collected data.⁵² In other words, by analyzing player information such as gaming behavior like time spent playing, payment history, and their personal background, the developers could stage certain prizes based on the player buying the loot box. Nevertheless, to the player, the loot box prize outcome was based solely on a random generator, and thus there was a presence of chance for the players.

III. PROPOSED LEGISLATIVE APPROACH

Given that the international approach to loot boxes and consumer protection stands in stark contrast to that of the U.S. legislature and courts, what can America adopt from their methodologies? Perhaps the better question to ask is: should they?

Consumer advocates could argue for a variety of new legislative approaches towards loot box regulation. For starters, they might propose

49. *Id.*

50. *Id.*

51. *Id.*

52. Kansspel Commissie, Onderzoeksrapport Loot Boxen (2018), <https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf> [<https://perma.cc/CX3U-6BQD>].

labeling loot boxes as unlawful competition or practice under the Federal Trade Commission Act⁵³ because their disguised presence in video games is deceiving to the consumer. A less aggressive approach would look like restrictions on when video game developers may include loot boxes in their games or how they can be accessed. For instance, giving the option to earn loot boxes through game play. Or, like Senator Josh Hawley attempted to introduce in the Protecting Children From Abusive Games Act (Senate Bill 1629), prohibiting loot boxes in games advertised to those under 18 years old.⁵⁴ These attempts are not unheard of. In fact, a handful of states including Hawaii, California, and Washington, whose courts have repeatedly struck down loot box cases, have tried to introduce such legislation to regulate loot boxes. A focus on the psychological and financial impacts of loot box purchases can serve as the necessary traction to get this legislation off the ground. Often, avid players are not connecting loot box purchases with their financial implications, especially children. The social aspects of game play combined with marketing tactics employed by game developers can easily get players into a psychological hold.

Important too is the proper regulation of the gaming industry, which is arguably in a stronger position of power than the consumer. Perhaps host sites like Google Play shouldn't receive automatic immunity simply because they are not completely entangled with every third-party app it hosts, thus requiring them to maintain stronger oversight of the apps' contents. On the other hand, the gaming industry would argue that a restriction on its product selection would prohibit free trade and that the loot boxes should be allowed, provided that there is a demand for it. That the consumer does not need overt protection because their exchange of real money for virtual in-game currency is the product of "mutual consent to mutual advantage"⁵⁵—in other words, the deal is not forced, but is instead sought after.

There is clearly no cut and paste solution, but there can be middle ground and it should be implemented to protect the consumer. While parents should be required to maintain oversight of their children's activities, the gaming industry should not be allowed to prey on their developing minds. Some options include: (1) requiring game developers to provide sneak peeks into loot box contents; (2) removing or limiting exchange markets amongst players that increase the perceived value of loot box items; and (3) imposing greater parental control measures for minor users.

53. 15 U.S.C. §§ 41–58 (1950).

54. Protecting Children From Abusive Games Act, S.1629, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1629/text> [<https://perma.cc/D9EN-WB7>].

55. A quote from the Fountainhead, AYN RAND, *THE FOUNTAINHEAD* 605 (25th ed. 1971).

CONCLUSION

While it remains unclear what direction legislators will take in the world of consumer protection as it regards loot boxes, there is no doubt that the video game industry will only grow larger and so too will loot box features. Most often, consumers seek recovery under some combination of the following legal arguments: (1) unfair competition; (2) the Consumer Legal Remedies Act; or both. Regardless of the position taken, there remains little room to say that loot boxes pose no consumer protection issue whatsoever.

With this said, legislative analysis should be undertaken to better address this issue, with influence from all players involved (the game developers and consumers), international approaches (which have proved to be successful), and existing case law. It is then that a more tailored solution can be developed for America's unique video game market.