

2022 UC DAVIS LAW REVIEW PRACTICE PACKET

This practice packet consists of seven footnotes. This is an abbreviated version of the cite-checking portion of the Write-On and is provided if you would like additional practice. The Executive Editors (“EEs”) will be available to answer any questions about this exercise via email. The EEs are Benjamin Baek (bdbaek@ucdavis.edu), Taryn McLaughlin (tamclaughlin@ucdavis.edu), and Nicolas Warren (nswarren@ucdavis.edu).

You will NOT need to make any change to the “above-the-line” text, only the footnotes. **There are three steps to completing this assignment:**

1. Review and edit each citation according to the *Bluebook* and *Goldbook*. For any citation that you believe is missing required information, try to correct the error using information located in another citation or in the appended sources. For example, if you determine that a pincite (page number) is missing or incorrect, change it to the correct page number. If, however, you cannot correct an error based on the information provided, **do not look at outside sources**, and instead simply indicate that the information is missing based on these instructions:
 - ⇒ Indicate the information that should be added by using greater-than and less-than symbols (<>) and capital letters. For example, to indicate that a citation needs:
 - Pincite: type “<PIN>” in the appropriate place
 - Year: type “<(YEAR)>” in the appropriate place
 - Parenthetical: type “<(PAREN)>” in the appropriate place
2. Correct each citation for any “cite-checking” errors based on the appended source materials. For example, if the name of the case or an author is incorrect or misspelled, or if the pincite is wrong, please edit them based on the appended sources.
3. Highlight **each citation** based on the changes you make. Every citation must be highlighted in one of the following colors. A single footnote may contain one or more highlight colors:
 - ⇒ Not all footnotes contain Bluebook/Goldbook and cite-checking errors. If you find that the source contains **no such errors**, you must highlight the entire citation in **GREEN**.
 - ⇒ If you discover a source requires **any Bluebook/Goldbook edits and/or cite-checking corrections**, you must highlight the entire citation **YELLOW**. Errors may include (but are not limited to): incorrect quotations, improper PIN citations (i.e., wrong page number), wrong publication year, misspelled author names, etc.
 - ⇒ Finally, all the relevant sources will be provided. If for some reason you are **unable to find a source or if the source clearly does not support the ATL assertion**, you must make any necessary Bluebooking and cite-checking changes possible and highlight the citation in **PINK**.

Below is an example documenting how changes should be made:

Incorrect Citation: *Green v. Tanaka*, 123 US 125, 131; *See e.g., Hunt*, *supra* note 14, at 789

Corrected Citation: **Yellow v. Tanaka**, 123 U.S. 125, 131 <(YEAR)>; **see, e.g., Hunt**, *supra* note 14, at 789 <(PAREN)>.

A. *Loot Boxes as Gambling*

Gambling is tightly regulated in the state of California.¹ Under California law, the mechanisms of loot boxes closely resemble traditional gambling.² The California Penal Code prohibits the unauthorized operation of lotteries.³ A lottery is a scheme of a “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.”⁴ Litigation against video game publishers are often thwarted or stalled by arbitration clauses and end-user license agreements (“EULA”).⁵

B. *California is Well Positioned to Regulate Loot Boxes*

Critics would say self-regulation is working as Microsoft, Nintendo, and Sony will soon begin requiring disclosure of loot box odds in all video games used on their platforms.⁶ However, this may be a reactionary measure in response to the banning of loot boxes in several European nations.⁷

Practice Packet Note:

- **Do not cite-check the first two footnotes**, i.e. assume they contain no cite-checking errors. Please only *Bluebook*/*Goldbook* the first two footnotes and remember to indicate where information is missing.
- Assume cross-references to the author’s own text or footnotes sufficiently support the above-the-line text.
- *Bluebook* **and** cite-check the remaining footnotes. You will find all necessary source documents appended to the end of this document.

¹ *see* Bureau of Gambling Control, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, <https://oag.ca.gov/gambling> (last visited November 12, 2020).

² *See FTC Public Workshop on Loot Boxes – So What Now?*, FENWICK (Jan. 23, 2020), <https://www.fenwick.com/insights/publications/ftc-public-workshop-on-loot-boxes-so-what-now> [<https://perma.cc/A9PZ-S79C>] (noting research linking loot boxes to problem gambling and the potential effects on minors); *see also* Aaron Drummond and James D. Sauer, *video game loot boxes are psychologically akin to gambling*, NAT. OF HUMAN BEHAVIOR Vol. 2, 530-532 (2018), <https://pubmed.ncbi.nlm.nih.gov/31209310/>

³ CALIFORNIA PENAL CODE, Section 319 (2012).

⁴ *See* CALIFORNIA PENAL CODE, Section 319 (2012).

⁵ *See R.A. by and through Altes v. Epic Games, Inc.*, 2020 WL 865420 at 2 (E.D.N.C. 2020).

⁶ Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, THE VERGE (Feb. 19, 2019), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play> (“The industry began to regulate, but the new rules are fairly weak compared to what some critics are asking”).

⁷ *but see* Nicole Carpenter, *Major Video Game Companies Commit to Disclosing Loot Box Probability*, VICE (Aug. 7, 2019, 11:37 AM), <https://www.vice.com/en/article/ne8wwg/nintendo-microsoft-and-sony-commit-to-disclosing-loot-box-probability>; *see* Ana Diaz, *EA Calls Its Loot Boxes ‘Surprise Mechanics,’ Says They’re Used Ethically*, POLYGON (Jun. 21, 2019, 9:10 AM EDT), <https://www.polygon.com/2019/6/21/18691760/ea-vp-loot-boxes-surprise-mechanics-ethical-enjoyable> (“A senior executive at Electronic Arts told the United Kingdom’s Parliament that the company prefers to call loot boxes ‘surprise mechanics,’ and argued that their use in EA games is ‘quite ethical and quite fun [and] enjoyable to people’”); *infra* Part III.A.

*** PRACTICE PACKET SOURCES ***
UC Davis Law Review, 2022

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Bureau of Gambling Control

(Last visited Nov. 12, 2020)

State of California Department of Justice

Office of the Attorney General

<https://oag.ca.gov/gambling>

Mission Statement: To ensure the integrity of gambling in California

Vision: Recognized as the leading authority in gambling regulation and enforcement in the world.

Values: We value integrity, commitment, teamwork, excellence, and professionalism.

To ensure the integrity of gambling in California is to ensure that gambling is conducted honestly, competitively and free from criminal and corruptive elements. The Bureau of Gambling Control (Bureau) carries out this mission by working cooperatively with the California Gambling Control Commission (Commission) to develop and implement a means of regulating the gambling industry in California. The primary functions of this regulation include the following:

- Conduct comprehensive investigations into the qualifications of individuals and business entities who apply to the Commission for state gambling licenses or findings of suitability,
- Conduct ongoing compliance inspections of gambling operations and establishments throughout the state,
- Review and approve the rules of games and gaming activities in all California cardrooms prior to them being offered for play.
- Register non-profit organizations and suppliers of gambling equipment and/or services to conduct charity fundraising events using controlled games.

The Bureau is also committed to reducing problems that result from pathological gambling. To this end, the Bureau is actively working with partners in the gambling and problem gambling research and treatment industries to administer the statewide Self-Exclusion Program. This pro-active program allows individuals to confidentially add their name to a roster of patrons to be excluded from gambling establishments within California.

History and Background

Prior to 1998, California's gambling industry was essentially unregulated. In 1984, the Legislature enacted the "Gaming Registration Act," which required the Attorney General's office to provide uniform, minimum regulation of California card rooms. However, the scope of the Attorney General's authority was extremely limited and funding was inadequate. Recognizing the need for broader oversight of California's gambling industry, the Legislature enacted the "Gambling Control Act" (Chapter 867, statutes of 1997).

In March 2000, the voters of California passed Proposition 1A which amended the California Constitution to permit Class III (casino-style) gaming on Indian land, provided that such activities are authorized by a tribal ordinance and conducted in conformity with a gaming compact entered into between the Tribe and the State. The Tribe and the State share a joint interest in ensuring that tribal gaming activities are free from criminal and other undesirable elements. While the Tribe maintains the primary responsibility for on-site regulation of gaming operations, the State is ultimately responsible for ensuring compliance with all aspects of the compact.

The [Gambling Control Act](#) (Business and Professions Code section 19800 et seq.) created a comprehensive scheme for statewide regulation of legal gambling under a bifurcated system of administration involving the Division of Gambling Control within the Attorney General's Office and the five-member California Gambling Control Commission appointed by the governor. The commission is authorized to establish minimum regulatory standards for the gambling industry, and ensure that state gambling licenses are not issued to or held by unsuitable or unqualified individuals.

Early in 2007, the Attorney General redefined the Division as a Bureau. The Bureau was positioned within the Department of Justice's Division of Law Enforcement. Senate Bill 82, which was chaptered August 24, 2007, made changes to statute relating to the Division of Gambling Control, thus allowing the change to "Bureau of Gambling Control".

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FTC Public Workshop on Loot Boxes – So What Now?

January 23, 2020

Fenwick

<https://www.fenwick.com/insights/publications/ftc-public-workshop-on-loot-boxes-so-what-now>

Publications

With consumers, gamers and lawmakers expressing concerns about whether loot boxes are predatory or contribute to gambling-like behavior, game developers can take steps to minimize the possibility of their games inviting controversy.

The following digest captures highlights from the U.S. Federal Trade Commission’s public workshop, “[Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes](#).” We outline what might be coming next for the industry and include six practical tips for developers who use loot box mechanics.

BACKGROUND

The August 7, 2019, FTC workshop brought together a variety of contributors, including consumer advocates, industry representatives, academics and government officials.

The day was divided into [three panels](#)¹ comprised of panelist [presentations](#) and discussions covering the marketing and use of loot boxes and other microtransactions, and the potential behavioral impact of these virtual rewards on consumers. Transcripts and video recordings of the workshop are available on the workshop’s [home page](#).

THE “WHO, WHAT AND WOW” OF LOOT BOXES

The workshop opened by addressing the fundamentals of loot boxes as a type of microtransaction and the genesis of such purchase options within video games.² Presenters answered the question, “What is a loot box?” exploring the definition and the variety of ways the mechanic can be structured. Jeff Haynes, senior editor of video games and websites at Common Sense Media, divided the mechanic into three categories: (1) the “*cosmetic loot box*” and (2) the “*mode specific loot box*” (each reflecting optional content which does not give the player an edge in gameplay), compared to (3) the “*pay-to-loot*” variety of loot box in which the payment of money by the player is essentially required to be successful with the game play.³ Haynes recognized the “pay-to-loot” variety as causing the most problems because these mechanics frequently involve “slot machine-style mechanics where paying extra possibly gives the players more chances to earn high rewards.”⁴ Haynes also acknowledged that these several types of loot boxes are not mutually exclusive, and that any or all of the varieties could appear in a game at any one time.

The amount of time spent defining loot boxes and the nuanced discussion about the mechanic’s various configurations foreshadows the possible challenge for regulators should any oversight or rulemaking come out of the FTC’s investigation process—it may be difficult to avoid affecting benign loot box mechanisms in an attempt to address other structures viewed as problematic.

ESA ANNOUNCES VIDEO GAME INDUSTRY COMMITMENT

During the workshop Michael Warnecke, chief counsel of tech policy at the Entertainment Software Association (ESA), announced commitments from Microsoft, Nintendo and Sony to require new games developed for their platforms containing paid loot boxes to disclose the odds of obtaining each of the randomized virtual goods included in the loot box. The policy targeted for implementation in 2020 will also apply updates to existing games that add loot box features.⁵ In addition to these commitments, many of the ESA's game publisher members made a similar pledge to disclose the odds for their game titles, irrespective of the platform (a complete list of the participating entities can be found on the [ESA website](#)).⁶ Warnecke noted that along with [Apple](#) and [Google](#), which also require disclosure of loot box odds by app developers on their mobile platforms, the commitment by the ESA's members reflects a comprehensive approach by the industry to allow consumers to make educated choices with respect to paid loot box purchases.

PANELISTS EXPRESS CONCERNS

In addition to educating those who may have been unfamiliar with loot boxes, the workshop provided a platform for presenters to express their concerns about loot boxes as gambling, and the potential impact the mechanics may have on young players. Dr. David Zendle, a York St. John University researcher, did not mince words with respect to the effects displayed by his study, stating: “[S]pending money on loot boxes is linked to problem gambling. The more money people spend on loot boxes, the more severe the problem gambling is.”⁷ According to Zendle, his [research](#) and that of other research labs have replicated this effect.

Acknowledging that it is unclear what sort of causal relationship may exist between loot boxes and problem gambling, Zendle said the existence of any link is cause for concern and is “not something to be trivialized.”⁸ Zendle reported that the same link between problem gambling and loot box spending also exists in adolescents, and the link was “much, much stronger than in adults.”⁹ Zendle made a plea to the industry to work together with him and other researchers. He reasoned that access to the “terabytes of data on user interaction and user spending” held by game companies is what researchers need to get to the bottom of what is creating the problematic correlation displayed by the research.¹⁰

Panelists also discussed concerns about what the speakers referred to as “dark patterns” used with games to get consumers to engage in gameplay and encourage the purchase of loot boxes. Anna Laitin, director of financial policy at Consumer Reports, highlighted pay-to-win, appointment dynamics (i.e., dynamics that build the habit of playing) and the need to engage in excessive “grinding” (i.e., repetitive play) as in-game tactics that may result in players spending much more than they otherwise intend to spend during gameplay.¹¹ Presenters also identified the potential for game companies to use their existing knowledge of a player's individualized habits or game play tendencies to maximize the likelihood that a player may buy a loot box. John Breyault, vice president of public policy, telecommunications and fraud at National Consumers League, expressed concern for monetization schemes becoming predatory and the unknowns regarding the impact these schemes could have on younger players.¹²

LOOT BOX DISCLOSURES

In addition to noting the availability of parental controls, panelists focused on the current form of game disclosures made available by the industry aimed at helping consumers, and specifically parents, make educated decisions about how much time or money their kids spend on games. According to Patricia Vance of the Entertainment Software Rating Board (ESRB), 75% of parents polled reported that the “in-game purchase” notice labels are “either extremely important or very important in helping them decide which games are appropriate for their kids to play.”¹³ As the self-regulatory organization that assigns age and content ratings to video games and apps, the ESRB started assigning the “in-app purchases” notice to games in 2018.¹⁴ Vance acknowledged that the in-app purchase notice on games is broad, covering all types of in-game spending. According to ESRB’s research, a general disclosure about whether a game features in-app purchases reflects parents’ concerns about all in-game spending, and not just loot boxes.¹⁵

For some panelists, however, the broad “in-app purchase” notice appeared to be insufficient, pointing to the industry research as indicative of the industry failing to provide clear information to consumers about loot boxes. Ariel Fox Johnson, senior counsel at Common Sense Media, noted that if the industry is hearing less from parents specifically about loot boxes, this may be because parents are uninformed, stating: “[Parents] are in the dark. They barely understand in-app purchases in general, let alone specific mechanisms like loot boxes.” One reason for parents being so in the dark, Fox Johnson suggested was due to ineffective notices¹⁶ and the need for clear labeling of advertising and other commercial content. As part of the discussion, panelists (Haynes and Breyault) offered options to provide more information to consumers beyond the in-app purchase label. These included exploring modifications to disclosures that would indicate a player’s average spend on the game after purchase,¹⁷ and providing access to active webpages available to parents pre-purchase, containing detail regarding the content accessible via the in-app purchase.¹⁸

WHAT’S NEXT?

As of October 11, 2019, the public comment period for the workshop is now closed, with 123 comments [received](#).¹⁹ It is unclear what the FTC will do next. In the near term, the future of loot boxes is now likely to depend largely on the new odds disclosure policy proposed by Microsoft, Nintendo and Sony, and the effect this policy will have on the games industry as a whole. Starting in 2020, we can expect some developers to disclose their odds pursuant to this policy, while other developers may increasingly move away from providing loot boxes and pivot towards other business models such as paid subscription services, which are becoming more popular. We still don’t know whether the console and mobile platform owners will aggressively police their new policy, or what the real-world consequences will be for non-compliant games. Developers who use a dynamic drop rate/odds system may struggle to comply with the new disclosure rules; these developers may need to leverage technology to make their systems more transparent.

It is important to remember that loot box mechanics in video games are not new: much of the regulatory interest in regulating loot boxes was a direct result of player backlash

against companies whose practices were perceived to be unfair. In light of the themes covered during the workshop and the concerns expressed by participants, below are some practical recommendations for developers who use loot boxes or are considering implementing the mechanics in their games. Following these tips may help ensure players are satisfied, and thus help the developer stay out of future regulators' crosshairs.

- **Monitor gaming trends** and listen to player feedback when a game or mechanic is criticized as “unfair” or “pay-to-win.”
- **Avoid any of the “dark patterns”** described in the FTC workshop, such as punishing players for missed play sessions, or manipulating loot box odds or contents to be more or less desirable based on an individual player’s inferred spending propensity.
- Consider ways to make loot box mechanics more **transparent and player-friendly**, for instance by disabling duplicate items, or instituting a “buy-back” style program where players can trade in virtual items they don’t want for other, rarer items.
- Limit the number of items that can be **exclusively** obtained through randomized mechanics.
- Take extra caution in games that may be appealing to an **underage audience**.
- Consider **other revenue models**, such as subscription programs, which are becoming increasingly popular with gamers.

Please reach out to Tracy Randall, Joe Newman, Jennifer Stanley or another member of the Games Industry Group at Fenwick for help managing your risk in this constantly evolving space.

1 The first panel, “*Treasure or Trifle? A Macro Look at Microtransactions*,” focused on the role of loot boxes and similar mechanics in the video game ecosystem and the impact of those monetization models on end users; the second panel, “*Head in the Game – What Drives Loot Box Spending*,” examined the social, psychological and economic motivations associated with loot box spending; and the final panel—“*A Level Playing Field – What’s Fair Game?*”—was aimed at identifying and exploring current initiatives for disclosing in-game microtransactions and other mechanisms that may enhance consumer protection.

2 Jeff Haynes of Common Sense Media stated: “*Now, unlike most video game genres, the current concept of loot boxes, as they’re thought of today, is still somewhat relatively new, having really developed over the past 15 years or so... But it was the inclusion of online access in games, as well as regularly updated content that helped drive the expansion of loot boxes from this niche feature to where they currently are today.*” [Segment 1 of the FTC Workshop transcript](#); p. 10.

3 *Id.* at p. 11.

4 *Id.*

[5 https://www.theesa.com/perspectives/video-game-industry-commitments-to-further-inform-consumer-purchases/](https://www.theesa.com/perspectives/video-game-industry-commitments-to-further-inform-consumer-purchases/)

6 Id.

7 [Segment 2 of the FTC Workshop transcript](#); p.1.

8 Id. at p. 2.

9 Id. at p. 3.

[10](#) Id. at p. 5.

[11](#) Id. at p. 28.

[12](#) Segment 1 of the FTC Workshop transcript; p. 21

[13](#) Segment 2 of the FTC Workshop transcript; p. 23.

[14](#) Id at p. 25.

[15](#) Id at p. 26.

[16](#) Id. at p. 35.

[17](#) Segment 1 of the FTC Workshop transcript; p.33.

[18/a](#) Id. at p. 34.

[19 https://www.regulations.gov/docket?D=FTC-2019-0021](https://www.regulations.gov/docket?D=FTC-2019-0021)

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Video game loot boxes are psychologically akin to gambling

Video games are increasingly exposing young players to randomized in-game reward mechanisms, purchasable for real money — so-called loot boxes. Do loot boxes constitute a form of gambling?

Aaron Drummond and James D. Sauer
 Nature Human Behaviour
 2018 Aug; Volume 2 (No. 8): 530-532.
<https://pubmed.ncbi.nlm.nih.gov/31209310/>

Playing video games is a common pastime in industrialized nations, with 65% of US homes including at least one gamer¹. To increase the longevity and profitability of their products, video game developers are, with increasing frequency, incorporating purchasable randomized rewards — commonly referred to as ‘loot boxes’ — in their games². Consumers and, more recently, policymakers are becoming increasingly concerned that these randomized reward mechanisms may constitute a form of unregulated gambling targeting minors^{3,4}. Here, we examine the structural and psychological features of loot boxes to evaluate similarities to gambling. Whether (and which) loot boxes may be deemed illegal is a matter determined by the laws of individual countries.

‘Loot box’ is a catch-all term for a digital container of randomized rewards. Essentially, a loot box contains one or more random rewards that alter the game in some way. Rewards may allow players to personalize aspects of the in-game aesthetic (for example, alter their avatar’s appearance) or improve their in-game performance (for example, via powerful weapons). Possessing rare game rewards is therefore highly desirable⁴. Of particular interest is the increasing trend to allow players to purchase loot boxes using realworld currency.

One factor that might initially motivate players to purchase loot boxes is that loot box rewards can provide considerable competitive advantage in multiplayer games (that is, an increasingly common game type). Thus, players may purchase loot boxes to gain an advantage or simply remain competitive. In either case, some players are engaging in this practice and those who do not may be at a considerable disadvantage. Here, we focus on the concern that the mechanisms underlying players’ engagement with loot boxes are similar, if not identical, to gambling^{3,4}, and many of these players are minors¹. Research investigating the exposure of adolescents to simulated gambling suggests that risks such as peer pressure and a dilution of monetary value through the exchange of real currency for virtual currency might facilitate migration to monetary forms of gambling⁵.

Moreover, adolescents tend to have poorer impulse control than adults, potentially increasing their vulnerability to gambling mechanics and behaviours learned from these mechanisms^{6,7}.

On face value, loot boxes present a number of striking similarities to real-world gambling. Players often purchase loot boxes for money and receive rewards of varying value based on chance. Thus, over multiple purchases, players will receive a high-value item on average every X number of times they open a box (where X represents a number of openings determined by a predefined algorithm). For example, a game with a 10% chance of a high-value item in a loot box, may result in success, on average, once for every ten boxes purchased. Critically, however, due to the random nature of rewards, the exact number of boxes that require purchase to obtain a valuable item varies. This kind of reward structure is termed a variable ratio reinforcement schedule, and underpins many forms of gambling^{7,8}. Variable ratio reinforcement results in people quickly acquiring behaviours and repeating these behaviours frequently in the hopes of receiving a reward^{7,8}. Research has long shown that behaviours acquired with variable ratio reinforcement are extremely persistent⁸. Given these features are similar to those underlying traditional forms of gambling^{7,8}, the Belgium Gaming Commission and Australian and US regulators are investigating whether loot boxes constitute a form of gambling³. However, at present, there is no consensus on whether such simulated forms of gambling constitute illegal gambling operations^{4,5}. Whether loot boxes are a form of gambling has important ethical and regulatory implications. If loot boxes are akin to gambling (the legal age for which is 18 or older in most US states, and in many countries), this would raise serious concerns about their appropriateness for games available to younger audiences. Our analysis of the characteristics of loot boxes in 22 games rated by the Entertainment Software Ratings Board (ESRB) as appropriate for audiences 17 years old or younger reveals that loot boxes have important structural and psychological similarities with gambling.

Gambling

To determine whether loot boxes constitute gambling, we must first define gambling. Griffiths⁹ specifies five characteristics common to most gambling activities, and that distinguish gambling from other risktaking behaviour:

- (1) The exchange of money or valuable goods.
- (2) An unknown future event determines the exchange.
- (3) Chance at least partly determines the outcome
- (4) Non-participation can avoid incurring losses.
- (5) “Winners gain at the sole expense of losers” (p. 1 in ref. ⁶).

A sixth characteristic that is important to consider is whether the winnings can be converted in some way into real-world money — that is, ‘cashed out’. The ability to cash out winnings is often considered a criterion for gambling by regulatory bodies^{4,5}. Although not all games with loot boxes contain this functionality, some games include the ability to cash out via thirdparty websites (that is, not run by a game company), others via the platform on which the game is distributed.

Loot boxes

To frame this Comment, we sourced a list of games containing loot boxes over the past 15 years from the video game review site Giant Bomb (<https://www.giantbomb.com/loot-boxes/3015-9059/games/>). We focused on games released in the past 2 years (2016–2017) due to the recent controversy over the issue, and because there were as many games released with loot boxes in 2016–2017 as there were before this time, which confirms the rapid growth of this practice over the past 2 years.

For each game, we determined the relevant characteristics of the loot-box system by watching online videos of players opening the loot boxes. Table 1 shows how the loot-box systems for each game aligned with Griffith’s criteria for gambling^{4,9}. The first criterion required the box to be purchasable for real-world currency. The second criterion required that the box was only received after payment. The third criterion required that the box’s contents were randomly determined. The fourth criterion was satisfied in cases where losses could be averted by choosing not to buy a box. The fifth criterion was more complex. The definitional difficulty arises because no player who purchases a loot box receives their money back directly. Instead, they receive items of various utility, desirability or rarity, which may have some value to the player, or, in cases where virtual items can be traded or sold, can be later converted to real-world money. We took a relatively conservative approach to this criterion and assumed that winners only profit at the expense of losers if the obtained reward provides winners with a direct competitive advantage over losers (that is, some rewards increase the chances of the recipient winning future games). This is displayed in the ‘Competitive advantage’ column. We also collected information about whether it was possible to sell the items received from loot boxes, thus ‘cashing out’ one’s winnings.

Ten (45.45%) of the twenty-two games meet all five of Griffiths’ criteria for gambling⁹ (eleven would actually meet the criteria assuming Forza Motorsport 7

introduces purchasable loot boxes as Turn 10 Studios have indicated). For four of these ten games, players could also cash out winnings, albeit via websites unaffiliated with the company that published the game (that is, independent websites exploiting features within these games that allow players to trade with each other, to buy and sell in-game rewards for real-world money). However, we note that, for these four games, the publisher’s terms of use appear to explicitly prohibit the trading or re-sale of virtual currencies. A fifth game — PlayerUnknown’s Battlegrounds — met only four of the five criteria for gambling, but allowed players to cash out (by selling items for varying prices) on the distributor’s (Steam) marketplace. We found no text in the publisher’s terms of use explicitly prohibiting trading or re-selling virtual items. At the time of writing, many items were purchasable in this game’s marketplace for less than the cost of opening a loot box. Thus, through a chance outcome, players could lose money by obtaining items worth less than the cost of opening a loot box and cashing the item out via the game’s distribution platform (see Steam marketplace <https://steamcommunity.com/market/search?appid=578080>). Thus, although players do not gain an in-game competitive advantage, winners gain at the expense of losers due to the real financial gains or losses incurred in these market transactions. Six of the ten games that met all of Griffiths’ criteria, as well as all of the games that allow players to cash out for real money, were rated appropriate for audiences 13 years old or younger.

Some legal definitions of gambling require that the aforementioned ability to cash out their winnings for money is present⁴. However, we argue that this is a narrow definition of gambling because it fails 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. Nonetheless, even according to this strict interpretation of gambling, at least one in five (23%) of the games with loot boxes we sampled constituted a form of gambling.

In sum, in the way they encourage and sustain user engagement, loot-box systems share important structural and psychological similarities with gambling. Of those games containing loot boxes, 100% allow for (if not actively encourage) underage players to engage with these systems. The literature on those at risk of developing problematic gambling behaviours suggests that the video-gaming population might be a ripe breeding ground for such issues. Males are both more likely to develop pathological gambling behaviours (cf. females)¹⁰ and overrepresented in the video-gaming population¹¹. People exposed to gambling when young are also most at risk of developing problematic gambling behaviours¹⁰.

Recommendations

Given the identified structural similarities between loot boxes and gambling, and the known potential for these mechanisms to produce maladaptive behavioural

consequences^{7–9}, we propose the following. Games that allow players to sell their virtual items (that is, cash-out their winnings) provide the clearest example of gambling in video games. Although game developers may not be legally responsible for thirdparty websites that facilitate players cashing out virtual items, allowing players to trade virtual items creates clear opportunities for players to convert those items to real currency via these independent sites. These games appear to meet both the psychological and legal definitions of gambling. Thus, for games with these mechanisms, we suggest that the ESRB, other ratings agencies and gambling regulatory bodies consider restricting access to people of legal gambling age. Games that allow players to cash-out items via the distribution platform of the game (that is, games that meet legal criteria for gambling, and where the publisher controls the cash-out mechanism), may warrant regulatory oversight as bona fide gambling operations.

We noted two other categories of games. (1) Games that meet the psychological definitions of gambling according to Griffiths' criteria^{4,9}, but do not include the ability to cash out winnings. We recommend that the ESRB and other ratings agencies review these games and increase

their recommended minimum age. (2) Games that do not meet all psychological criteria for gambling, but still involve the exchange of money for randomized rewards. Despite not meeting legal and/or psychological definitions of gambling, these games include mechanisms for initiating and maintaining player engagement that tap into basic psychological principles associated with gambling behaviour (for example, variable ratio reinforcement schedules). Further research must determine whether games in these two categories result in adverse short (for example, overspending) or long-term (for example, addiction) consequences, as the appropriate regulatory intervention should depend on the prevalence and severity of such consequences. Finally, we suggest the ESRB and other ratings agencies adopt additional parental advisory information detailing loot-box mechanics in video games to help consumers and parents make informed decisions.

References

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State of California

PENAL CODE

Year: 2021

Section 319. A lottery is 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. (Enacted 1872.)

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2020 WL 865420

Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina,
Western Division.

R.A., a minor, BY AND THROUGH his Guardian,
Steve ALTES, on behalf of himself and all others
similarly situated, Plaintiff,

v.

EPIC GAMES, INC., Defendant.

No. 5:19-cv-325-BO

Signed 02/20/2020

Attorneys and Law Firms

Alexander Lee Simon, [Daniel L. Warsaw](#), Pearson, Simon and Warsaw, LLP, Sherman Oaks, CA, [Jeffrey Douglas Kalief](#), [Sophia Goren Gold](#), Kalief PLLC, Washington, DC, [Daniel K. Bryson](#), Patrick M. Wallace, Whitfield, Bryson & Mason, LLP, Raleigh, NC, [Joseph C. Bourne](#), [Melissa S. Weiner](#), Pro Hac Vice, Pearson, Simon and Warsaw, LLP, Minneapolis, MN, for Plaintiff.

[James B. Saylor](#), Pro Hac Vice, Kelley Drye and Warren LLP, [Jeffrey S. Jacobson](#), Faegre Drinker Biddle & Reath LLP, New York, NY, [Robert C. Van Arnam](#), [Wes J. Camden](#), Williams Mullen, Raleigh, NC, [Ryan Matthew Salzman](#), Drinker Biddle and Reath LLP, [Tahir Lynn Boykins](#), Kelley Drye and Warren LLP, Los Angeles, CA, for Defendant.

ORDER

TERRENCE W. BOYLE, CHIEF UNITED STATES
DISTRICT JUDGE

*1 This matter is before the Court on defendant’s motion to dismiss for failure to state a claim. For the reasons discussed below, the motion [DE 55] is GRANTED.

BACKGROUND

Defendant Epic Games is the developer of the popular

videogame *Fortnite*. The company’s principal place of business is Cary, North Carolina. Plaintiff is a minor and a California resident who played a specific version of the videogame called *Fortnite: Save the World*.

Players of *Fortnite: Save the World* can make in-game purchases of various products offered through the game. One specific product offered is called the “loot box.” Each loot box contains a randomized assortment of items that can improve a player’s chances at advancing in the videogame. Players do not know which specific items are inside a given loot box ahead of time, and so ultimately, players run a risk that they will be dissatisfied a box’s contents.

The allegations in plaintiff’s complaint relate to his purchase of loot boxes. Though plaintiff’s complaint does not provide detail about his specific purchases or what was represented to him, the crux of his factual allegations is that defendant misrepresented the probability that the loot boxes he purchased contained certain items. But for defendant’s misrepresentations, plaintiff maintains he would not have purchased the loot boxes.

Plaintiff sued in the Central District of California, alleging violations of various state consumer protection statutes.

Defendant moved to compel arbitration to enforce an arbitration clause contained in a 2019 End User License Agreement (“EULA”) agreed to by plaintiff in March 2019 as part of the terms of service. Defendant also moved, alternatively, to transfer the case to this district based on forum selection clauses in both the 2019 EULA and a 2017 EULA that plaintiff agreed to when he first downloaded the game.

Seeking to avoid arbitration and venue transfer, plaintiff purported to disaffirm both EULAs, citing his minor status. The California court gave effect to plaintiff’s disaffirmance of the 2019 EULA. The court then transferred the case here on a traditional [28 U.S.C. § 1404\(a\)](#) analysis without deciding whether plaintiff had effectively disaffirmed the 2017 EULA.

Plaintiff maintains his disaffirmance of the 2017 EULA. Defendant accepted this disaffirmance and has offered to refund any money paid by plaintiff. Defendant moves to dismiss the case on various grounds, including that plaintiff’s disaffirmance ends the case.

DISCUSSION

When venue is transferred pursuant to § 1404(a), the transferee court must apply the laws of the state of the transferor court. See *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). This includes the transferor court’s choice of law principles. *Id.* The district court in California, using California choice of law principles, determined that California law governed the issue of plaintiff’s disaffirmance. *R.A. v. Epic Games, Inc.*, 2019 WL 6792801, at *5 (C.D. Cal. July 30, 2019). Accordingly, this Court will apply the same.

*2 A minor may disaffirm a contract by any act “disclosing an unequivocal intent to repudiate its binding force and effect.” *Spencer v. Collins*, 156 Cal. 298, 303 (1909). A minor seeking to disaffirm “must disaffirm the entire contract, not just the irksome portions.” *Holland v. Universal Underwriters Ins. Co.*, 270 Cal. App. 2d 417, 421 (1969). Disaffirmance has the effect of rescission and renders the contract a “nullity [.]” *Scollan v. Gov’t Emp. Ins. Co.*, 222 Cal. App. 2d 181, 183 (1963). Because disaffirmation arises in equity, “the trial court is vested with a broad discretion to see that equity is done.” *Le Baron v. Berryessa Cattle Co.*, 78 Cal. App. 536, 548 (1926).

Here, plaintiff unambiguously maintains his position that he disaffirms the 2017 EULA. The Court recognizes this disaffirmance and finds that plaintiff has effectively disaffirmed the 2017 EULA.

The 2017 EULA established the terms of service that governed the parties’ relationship, including “purchases [plaintiff made] through the Software.” See Farnsworth Decl., Ex. A. As part of his disaffirmance of the underlying EULA, plaintiff necessarily also disaffirms—and voids—

the in-game purchases, which only existed because of the 2017 EULA.

By voiding the in-game purchases, plaintiff erases the entire basis for his claims. Plaintiff cannot void the transactions with defendant and receive his refund while simultaneously maintaining causes of action that arise solely from those transactions. Because plaintiff’s disaffirmance wipes out the entire basis for his claims, his amended complaint must be dismissed.

CONCLUSION

For the reasons discussed above, defendant’s motion to dismiss for failure to state a claim [DE 55] is GRANTED. Plaintiff’s amended complaint is DISMISSED. Defendant must refund plaintiff’s purchases.

Defendant’s prior motion to dismiss [DE 52] and consent motions left over from the previous court [DE 24, 30] are DENIED AS MOOT.

The Clerk is DIRECTED to close the case.

SO ORDERED, this 20 day of February, 2020.

All Citations

Slip Copy, 2020 WL 865420

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HOW LOOT BOXES HOOKED GAMERS AND LEFT REGULATORS SPINNING

By Makena Kelly

Feb 19, 2019, 8:00am EST

The Verge

<https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play>

A month ago, a woman known online as CadenceLikesVGs realized she had a gambling problem. She wasn't playing blackjack or pulling slot machine levers; she was opening video game loot boxes.

"I can't do this anymore. It is a problem," [Cadence, who wished to remain anonymous, wrote in a Reddit post last month](#). "But I can't spend money on PoE, because I know that it's a slippery slope that won't stop until I spent everything."

"Because my brain is fucked up."

Path of Exile (PoE) is a free-to-play role-playing game that sells loot boxes. It's developed and published by the New Zealand-based studio Grinding Gear Games, and it was acquired by the Chinese tech company Tencent last May. Despite the acquisition, most players see the devs as a scrappy indie outfit. It's a stereotypical RPG, borrowing enough from the *Diablo* series for some players to consider it to be the game's spiritual successor.

"THE HOUSE ALWAYS WINS."

The game operates in seasons, with new items that let users customize their character's gear arriving in the in-game shop every three months or so. Each loot box costs around \$3 USD to open, but it's rare to pull the item you want on your first, second, or even third purchase.

After the season ends, many of the items in the mystery boxes are placed in the shop so that people can purchase them directly, but those direct transactions are expensive, too. A whole set of armor could cost a player hundreds of dollars to obtain.

"People tend to jump on the lootboxes thinking they'll get a deal, but that's not how gambling works," Cadence said. "The house always wins."

Cadence told *The Verge* that out of all of the gear sets she was able to complete, the least amount of money she spent was around \$140. The most was \$400, and she didn't receive every available in-game item that season. It was at that point that she decided she'd had enough.

So she emailed the devs asking for help. “Would it be possible to disable my ability to buy Mystery Boxes entirely? I have serious impulse [problems],” Cadence wrote. Quickly, the devs responded, and after a brief email exchange, they disabled her ability to buy the mystery boxes and refused to re-enable it until August 2019, a date she specified herself. It’s similar to the voluntary exclusion policies imposed by many casino control boards, but it’s a new phenomenon in video games.

ONE USER SPENT OVER \$10,000 ON LOOT BOXES OVER SEVERAL YEARS

Grinding Gear Games, the studio behind *Path of Exiles*, did not respond to repeated requests for comment.

“I am somewhat ashamed to admit, but my attempts at reaching out were an attempt at having my cake, and eating it, too. I wanted to support the game that I love, without supporting their horrible business practices,” Cadence said, referring to the loot boxes. “But honestly, if they were going to say no to my request, I’d have uninstalled the game and quit and never looked back.”

The problem is much bigger than Cadence. Forums are filled with similar stories featuring as much as hundreds to thousands of dollars lost to poor impulse control. Some players have suffered from gambling addictions in the past, and now that disease has manifested itself in randomized online purchases. One Reddit user, who goes by Kenggold online, [admitted to spending over \\$10,000](#) on loot boxes in a variety of games over the past few years.

[Game studios would be banned from selling loot boxes to minors under new bill](#)

Last year, discussions around regulating loot boxes seemed to be coming to a head. Lawmakers in states and at the federal level were proposing bills, seeking research, and prompting regulatory bodies to investigate the practice. But just as discussions were heating up, the government shut down and the agency in charge of the investigation had to hold off as its employees were furloughed. Now, the government has been reopened for over a month, but after nearly a year of inquiry and unsuccessful bills, regulation talks have stalled.

Some countries in the European Union have already begun to act. Last September, the [Gambling Regulators European Forum](#) (GREF) put out a statement that was signed by regulators from 15 different EU countries that were concerned about the practice. Last May, the Belgian Gaming Commission decided that loot boxes fell under the jurisdiction of its gambling law, and studios like Blizzard, Valve, and EA all [pulled loot boxes from their games](#) in those countries. As the concern spread across Europe, it started to catch fire in the US, but that momentum has stalled, and the video game industry’s lobbying efforts over this \$30 billion industry seem to have curbed any tangible progress to regulate the sale of loot boxes.

Congress' most outspoken advocate for loot box regulation has been Sen. Maggie Hassan (D-NH). Last year Hassan received a note from a constituent who voiced concern over the video game industry's marketing of in-game transactions. In November, at a Commerce Committee hearing with Federal Trade Commission officials, Hassan requested that the body open up an investigation into loot boxes.

"It's time for the FTC to investigate these mechanisms to ensure that children are being adequately protected," Hassan said last November. "And to educate parents about potential addiction and other negative impacts of these games." FTC chairman Joe Simons agreed that the practice should be investigated.

"WE NEED TO REALLY LOOK AT THE WAY THESE LOOT BOXES ARE BEING DESIGNED AND MARKETED."

In an interview with *The Verge*, Hassan wouldn't speak specifically on how she would like to see the multibillion-dollar industry regulated, but she affirmed that consumers, especially children, should be protected. "My particular emphasis right now is that we need to make sure, especially for young gamers, that there are consumer protections in place to provide transparency and awareness. And we need to really look at the way these loot boxes are being designed and marketed to ensure that they are not predatory," Hassan said.

While the government was shut down, the FTC didn't have enough funds to support its investigations and was forced to put them on pause. This included any it may have opened into loot boxes. After the agency reopened last month, Hassan sent a letter asking for an update, "I understand that you have begun to take initial steps to begin an investigation," she said. "With that appreciation in mind, I am requesting an update."

There's still no word on when the FTC investigation will conclude, whether the agency will publish a public report on its findings, or if officials are looking into declaring some kind of rule to govern the video game industry and loot boxes. The FTC declined to comment.

"LOOT BOXES ARE A SHINING EXAMPLE OF WHY WE NEED TO UPDATE OUR GAMBLING LAW."

If the FTC investigation were to determine that loot boxes are an unfair or deceptive practice, the body could potentially declare a new rule that would affect the entire gaming industry. But it's been several decades since the body imposed that kind of broad regulation, and many of the agency's enforcement powers have been significantly weakened since then. Every FTC investigation moves slowly, and the agency has been tasked with more than it currently has enough resources to handle throughout the past few years.

If legislation and regulatory rulemaking pose too large of a challenge, the courts could be forced to determine whether loot boxes fall underneath current gambling regulations. The legal gambling age varies across the country (between 18 and 21), and when it comes to regulating loot boxes, most of the concern lies on whether children should be able to pay for them.

According to Keith Whyte, the executive director of the National Council on Problem Gambling, current US gambling laws originated in the 17th century. And although many of the mechanics used in loot boxes may already be regulated, it may be more efficient to bring gambling laws into the 21st century. “It needs massive updating in this age of new technology and loot boxes are a shining example of why we need to update our gambling law and regulations,” Whyte said.

However, California state assemblymember Jay Obernolte, a video game studio owner and advocate for loot boxes, believes that most of this outrage could be solved if platform holders like Apple and Google included more parental control settings for microtransactions. “I wish that they had better parental controls on these online microtransactions. To me that fits into a broader question into whether we should have more parental involvement in these purchase decisions,” he said. “I think the answer to this is yes.”

A VOLUNTARY FEATURE

Loot boxes have been around in some form since the early 2000s, gradually evolving into a system of never-ending in-app purchases. The model was popularized by Japanese gacha mobile games in the early 2010s. In these games, there are normally a variety of characters that the player can receive and play as in the game by “pulling” or “spinning” the gacha, which oftentimes resembles a slot machine or a roulette wheel.

As Western studios caught on, the model changed into something less explicitly casino-like. A loot box became a randomized item drop, a virtual crate that players pay real-life money to open. These crates can contain a variety of in-game items. Some change the appearance of their characters, like outfits or weapon skins, and, in some cases, they can help someone make faster progress in a game.

“THEY ARE NOT GAMBLING ... THE GAMER MAKES THE DECISION.”

Initially, the practice was confined to free-to-play games, which needed the loot box money to fund development. But in recent years, larger studios like Blizzard and Electronic Arts (EA) have begun to attach similar mechanics to popular titles like *Overwatch* and *Battlefront* that cost anywhere from \$30 to \$60 on their own.

The backlash against loot boxes reached its peak when EA released its highly anticipated title *Star Wars Battlefront II* in November 2017. Even while in beta testing, players were upset with how the game used loot boxes. Not only did the boxes drop unnecessary

character skins and accessories, but users were required to spend real-world money in order to make any significant progress in the game. Players used “Star Cards” to level up their basic stats, and without them, they were basically out of luck when it came to winning online matches. At the time, you could purchase the boxes with in-game currency, but EA made it difficult for players to acquire it. Even though the game cost \$60, purchasing loot boxes with real-world money was the only real option if players wanted to stay ahead of their online competition.

The outrage lasted for months. “This loot crate system is exactly something that you would find in a free-to-play game that you would pay zero dollars for,” popular YouTuber and video game commentator Angry Joe said in a video. “The shit that you get from the crate is awful. It’s boring. It’s shitty.”

“WE SHOULDN’T ALLOW STAR WARS TO INFLUENCE YOUR KIDS TO GAMBLE.”

Following the outrage, Hawaii state lawmakers made one of the most prominent change attempts, introducing four bills that would set rules for the gaming industry when it came to loot boxes and microtransactions. One pair would have prohibited anyone under the age of 21 to purchase the crate with real money. The other two would have required video game publishers to publicly disclose the probability rates of receiving rewards. Both sets ultimately failed.

“As someone who has been an avid gamer my entire life, it’s been really frustrating to see the business model for the industry begin to transition from creating and selling great products to creating products that exploit gamers,” said Hawaii state representative Chris Lee, who helped launch this discussion in the legislature.

But soon after the bills were introduced, the industry began to publicly argue that loot box mechanics didn’t resemble gambling at all. Lee was taken aback by the argument. “I grew up playing games my whole life,” he said last year. “I’ve watched firsthand the evolution of the industry from one that seeks to create new things to one that’s begun to exploit people, especially children, to maximize profit.”

It was around this time that the Entertainment Software Association (ESA) began to argue that loot boxes were a “voluntary” feature. “They are not gambling,” the [ESA said in response around the same time](#) that the Hawaii legislators began to eye loot boxes. “Depending on the game design, some loot boxes are earned and others can be purchased. In some games, they have elements that help a player progress through the video game. In others, they are optional features and are not required to progress or succeed in the game. In both cases, the gamer makes the decision.”

But the Hawaii legislators didn’t buy the industry’s arguments. “We didn’t allow Joe Camel to encourage our kids to smoke cigarettes, and we shouldn’t allow Star Wars to influence your kids to gamble,” Rep. Sean Quinlan, a sponsor of the Hawaii legislation, responded at a press conference.

ARE LOOT BOXES GAMBLING?

The heart of the issue is whether loot boxes should be considered as gambling or a kind of mini-game. Anti-gambling activists argue that loot boxes imitate similar mechanics that you find in casinos, like slot machines and lotteries. At the same time, the gaming industry argues that the virtual and voluntary nature of these transactions means they shouldn't fall under gambling laws.

“Loot boxes do not constitute gambling because players always receive something of value that enhances their experience,” Stanley Pierre-Louis, acting president and CEO of the ESA told *The Verge*. “A player can play through an entire video game successfully without buying a single loot box. In many cases, a loot box simply allows a user to collect a cosmetic in-game item. Loot boxes often enhance the experience for those who choose to use them, and are just another part of the many unique experiences that video games offer.”

But if the courts were forced to determine, through something like a class action lawsuit, whether loot boxes fell underneath current gambling law, critics think judges would be hard-pressed to find a reason as to why they shouldn't be covered.

“IT WOULD BE PROFOUNDLY THREATENING TO THEIR BUSINESS MODEL WERE THEY TO FALL UNDER ANY TYPE OF GAMBLING REGULATION OR OVERSIGHT.”

Ryan Morrison, who [is known as the Video Game Attorney online](#), argued that loot boxes already meet the definition of gambling in every state in the nation. “You're putting something of value in, your money, and you're buying something that has odds to it that you are unaware of, that's chance, and you're getting something that you value or don't value,” Morrison said. “Those are the three factors in all 50 states and I would argue that most loot boxes are already defined as gambling, and if push came to shove and a government body wanted to go after them or if someone wanted to bring this to court.”

If critics were to pursue litigation, a recent Justice Department opinion could pose an even more serious threat. In January, the DOJ reevaluated a 2011 opinion of the Wire Act, saying that all online gambling was now unlawful. As of right now, it's unclear whether the mechanics in loot boxes are similar enough to those in gambling for them to be governed under current US gambling law. Still, if some government body were to determine that they do fall under current regulation, the industry may be forced to make sudden, sweeping changes. If somebody — whether that be the FTC, Congress, or the courts — were to formally consider loot boxes as gambling, the gaming industry could suddenly be out billions in annual revenue, which could spell disaster for the industry's current business model.

The new opinion still allows carveouts for some online gambling, but it functions primarily to allow for states like New Jersey to craft their own laws to allow online gambling within state borders. Geofenced intrastate online gambling can be legal, but since video game studios operate globally, studios could be forced to only sell loot boxes in states that

already allow online casinos. “It would be profoundly threatening to their business model were they to fall under any type of gambling regulation or oversight,” Whyte said. “Because in the regulated gambling space, you cannot do most of the things that they’re doing. Online, it has to be restricted to people in a particular state.”

The industry has begun to self-regulate, but the new rules are fairly weak compared to what some critics are asking. As a response to the outrage that followed *Battlefront II*, the Entertainment Software Rating Board (ESRB), which was established by the ESA, announced that it would begin to disclose games with microtransactions with a new label. “You may have noticed that we’ve been a little quiet on the topic of in-game purchases and loot boxes,” the ESRB said [in a statement last February](#). “But we’ve been listening.” However, this new label doesn’t just signify that loot boxes are included in the game, but extra downloadable content (DLC) is represented by the exact same label. DLC is the same for everyone, and it isn’t at the subject of chance like loot boxes.

Some studios have adopted more transparent practices on their own, like those at Riot Games, which publishes one of the most streamed games on Twitch, *League of Legends (LoL)*. In *LoL*, [users know how likely it is that they’ll receive a certain kind of item](#) from loot box drops. Still, there are no laws in the US or rules mandated by the video game industry that ensure that all studios disclose drop rates.

It’s unlikely that studios will be required to disclose probability rates or be prohibited from charging minors for loot boxes anytime soon. “A self-regulatory framework already exists,” Pierre-Louis said. “The ESRB has a long history of informing players, parents, and caregivers about content in video games.”

But until some solution is offered, people like Cadence will continue to be sucked into free-to-play games, convincing themselves that one more box will drop the item they’re looking for.

“When your brain works like mine, you can’t stop,” Cadence said. “There is always the little voice of the back of your head that goes ‘Yeah no man, you should’ve quit like 30 boxes ago,’ but even when you’re telling yourself to stop, you’re still clicking buy, and you’re still opening boxes.”

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Major Video Game Companies Commit to Disclosing Loot Box Probability

Companies such as Nintendo, Sony, and Microsoft are committing to reforming practices around paid lootboxes, the Entertainment Software Association says.

By Nicole Carpenter
August 7, 2019, 11:37am

Vice
<https://www.vice.com/en/article/ne8wwg/nintendo-microsoft-and-sony-commit-to-disclosing-loot-box-probability>

Console makers Sony, Microsoft, and Nintendo will soon require video game developers to disclose the probability of receiving randomized items in paid loot boxes for games on their platforms, the Entertainment Software Association (ESA) announced at the Federal Trade Commission's loot box workshop on Wednesday

Michael Warnecke, ESA's senior policy counsel said that the new rules "would require the disclosure of the relative rarity or probabilities of obtaining randomized virtual items in games that are available on their platforms," [GamesIndustry.biz](#) reported. The policy will apply to new games and game updates that add loot box features, Warnecke explained. ESA has not clarified what these policies will look like in-action. VICE Games has reached out to Microsoft, Sony, and Nintendo for more information about their upcoming policies.

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In a [blog post](#) published this morning, the ESA noted that while the "precise timing" of the rollout is still in the works, the companies "are targeting 2020 for the implementation of the policy." ESA also said that some "publisher members" of the association that already disclose this information, and plenty more have agreed to do the same before late 2020.

For instance, developer Blizzard Entertainment [released its loot box drop rates for *Overwatch* to comply with Chinese gaming regulations](#). Respawn Entertainment's *Apex Legends* also [lists the odds players can expect](#) when buying loot boxes, and this year Epic Games' *Fortnite* [made its loot boxes transparent](#) so players can see what they're buying.

"At Nintendo, ensuring that our customers can make informed choices when they play our games is very important," Nintendo spokespeople said. "As part of our ongoing efforts in this area, Nintendo will require disclosure of drop rates in Nintendo Switch games that offer randomized virtual items for purchase, such as loot boxes. This requirement will

apply to all new games and includes updates to current games that add loot boxes through in-game purchases.”

The list of ESA members includes major video game studios and publishers such as Activision Blizzard, Bandai Namco Entertainment, Bethesda, Bungie, Electronic Arts, Microsoft, Nintendo, Sony Interactive Entertainment, Take-Two Interactive, Ubisoft, Warner Bros. Interactive Entertainment, and Wizards of the Coast.

"Sony Interactive Entertainment aims to ensure PlayStation users have access to information and tools, such as parental wallet controls, that will help them make informed decisions about in-game purchasing," Sony spokespeople said. "We support industry efforts to disclose the probability of obtaining randomized virtual items, known as loot boxes, and are committed to providing consumers with this information for all games we produce and publish."

The debate over loot boxes has been raging in earnest since 2017, when publisher Electronic Arts faced criticism for its microtransaction structure for *Star Wars: Battlefront II*. Governments have already begun enforcing policies against the practice, arguing that loot boxes exploit children and have addictive properties akin to gambling.

In the Netherlands, four games were found in violation of the Dutch Gaming Act in 2018. In May 2019, United States senator Josh Hawley of Missouri introduced legislation that would ban "the exploitation of children through 'pay-to-win' and 'loot box' monetization practices by the video game industry," according to his announcement.

Apple did implemented a policy in 2017 that shared drop rates with users, and Google followed suit in late May. Now, it sounds like most mainstream video games will do the same.

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EA calls its loot boxes ‘surprise mechanics,’ says they’re used ethically

‘People like surprises,’ executive tells UK Parliament

By [Ana Diaz](#)

Jun 21, 2019, 9:10am EDT

Polygon

<https://www.polygon.com/2019/6/21/18691760/ea-vp-loot-boxes-surprise-mechanics-ethical-enjoyable>

A senior executive at Electronic Arts told the United Kingdom’s Parliament that the company prefers to call loot boxes “surprise mechanics,” and argued that their use in EA games is “quite ethical and quite fun [and] enjoyable to people.”

[Appearing before a House of Commons committee on Wednesday](#), Kerry Hopkins, vice president of legal and government affairs at EA, responded to a member of Parliament who had asked if the publisher had any “ethical qualms” about loot boxes. Their use in 2017’s *Star Wars Battlefront 2* kicked off a huge controversy that drew scrutiny from several governments, including those in the United States and Europe. Loot boxes, in the form of Ultimate Team packs, are also a major source of revenue for EA’s FIFA franchise. Hopkins compared loot boxes to other products: Kinder Eggs, a chocolate treat with a toy in its center, and Hatchimals, a blind box-style toy hidden inside an egg. “People like surprises,” she said. But the comparison to Kinder Eggs was quite ironic, given that the chocolate eggs [were banned](#) in the U.S. until recently, over concerns the prizes were a choking hazard.

“We do think the way we’ve implemented these kinds of mechanics is quite ethical and quite fun,” she said. “They aren’t gambling and we disagree that there’s evidence that shows they lead to gambling.”

The British Parliament is investigating loot boxes over concern that they constitute gambling, and the potential harm that could cause to children, citing [anecdotal evidence](#) and [research](#) that call loot boxes addictive.

Loot boxes, microtransactions, and pay-to-win mechanisms have come under mainstream scrutiny over the past year. A [bill to regulate them](#) died in Hawaii’s legislature, but a Republican senator recently [introduced a bill](#), with bipartisan support, that would prohibit loot boxes in games marketed to or played by children. Loot boxes have been likened to gambling, a comparison that Electronic Arts and the Entertainment Software Association dispute.

In 2017, New Zealand regulators [reached the same conclusion](#). However, in 2018, countries like Belgium and the Netherlands found that the loot boxes in games like *Counter-Strike: Global Offensive*, *Dota 2*, and *Overwatch* were a form of gambling; developers Blizzard and

Valve modified their games to comply with regional regulations. Other nations, such as South Korea, China, and [Japan](#) have started regulating loot boxes, too.

EA's statements may raise eyebrows, but they're unsurprising given the company's history on this issue. EA pushed back hard on [the Belgian Gaming Commission](#) when it ruled that loot boxes constituted unregulated gambling, but still decided to stop selling FIFA Points, a microtransaction in its FIFA soccer series, in that country.

Parliamentary members on the committee have not announced any plans to regulate loot-boxes in the U.K. as of now.

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End.

A. Loot Boxes as Gambling

Gambling is tightly regulated in the state of California.¹ Under California law, the mechanisms of loot boxes closely resemble traditional gambling.² The California Penal Code prohibits the unauthorized operation of lotteries.³ A lottery is a scheme of a “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.”⁴ Litigation against video game publishers are often thwarted or stalled by arbitration clauses and end-user license agreements (“EULA”).⁵

B. California is Well Positioned to Regulate Loot Boxes

Critics would say self-regulation is working as Microsoft, Nintendo, and Sony will soon begin requiring disclosure of loot box odds in all video games used on their platforms.⁶ However, this may be a reactionary measure in response to the banning of loot boxes in several European nations.⁷

Practice Packet Note:

The first two footnotes were only Bluebooking/Goldbooking exercises. For the Cite-Checking on the Write-On, you would need to make an effort to find the required pincites in a Cite-Checking packet.

¹ See *Bureau of Gambling Control*, STATE OF CAL. DEP’T OF JUST., OFF. OF THE ATT’Y GEN., <https://oag.ca.gov/gambling> (last visited Nov. 12, 2020) <[perma.cc]>.

² See *FTC Public Workshop on Loot Boxes – So What Now?*, FENWICK (Jan. 23, 2020), <https://www.fenwick.com/insights/publications/ftc-public-workshop-on-loot-boxes-so-what-now> [https://perma.cc/A9PZ-S79C] (noting research linking loot boxes to problem gambling and the potential effects on minors); see also Aaron Drummond & James D. Sauer, *Video Game Loot Boxes Are Psychologically Akin to Gambling*, 2 NATURE HUM. BEHAV. 530, 530-32 (2018), <https://pubmed.ncbi.nlm.nih.gov/31209310/> <[perma.cc]>.

³ CAL. PENAL CODE § 319 (2021).

⁴ *Id.*

⁵ See R.A. *ex rel. Altes v. Epic Games, Inc.*, 2020 WL 865420 at *2 (E.D.N.C. 2020).

⁶ Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019, 8:00 AM EST), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play> <[perma.cc]> (“The industry has begun to self-regulate, but the new rules are fairly weak compared to what some critics are asking.”).

⁷ See Nicole Carpenter, *Major Video Game Companies Commit to Disclosing Loot Box Probability*, VICE (Aug. 7, 2019, 11:37 AM), <https://www.vice.com/en/article/ne8wwg/nintendo-microsoft-and-sony-commit-to-disclosing-loot-box-probability> <[perma.cc]>; Ana Diaz, *EA Calls Its Loot Boxes ‘Surprise Mechanics,’ Says They’re Used Ethically*, POLYGON (June 21, 2019, 9:10 AM EDT), <https://www.polygon.com/2019/6/21/18691760/ea-vp-loot-boxes-surprise-mechanics-ethical-enjoyable> <[perma.cc]> (“A senior executive at Electronic Arts told the United Kingdom’s Parliament that the company prefers to call loot boxes ‘surprise mechanics,’ and argued that their use in EA games is ‘quite ethical and quite fun [and] enjoyable to people.’”); *infra* Part III.A.