
TAKING A GAMBLE: ANALYZING HOW THE REGULATION OF
LOOT BOXES IN VIDEO GAMES MAY CHANGE A BILLION
DOLLAR INDUSTRY

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With recent advancements in technology and a consistent increase in online dependence, the video game industry has hit record highs in profit and popularity. Due to this increased popularity, video game producers have begun to dramatically supplement their revenue through microtransactions. Microtransactions are in-game purchases that allow players to acquire downloadable content regularly released throughout the lifetime of a game. Loot box systems are a popular form of microtransaction that allow players to receive a random in-game item. Such systems, however, are becoming increasingly controversial as parents, players, and legislators have begun to liken their use of flashy lights, positive sound effects, and inherent random results to an illegal form of gambling. In response to these concerns, and a growing body of research finding potential connections between the use of loot box systems and problematic gambling behaviors, countries around the world have proposed or enacted laws to restrict their implementation. This Note examines various regulatory tools in an attempt to determine the appropriate course of action for legislators and industry leaders when regulating loot box systems. This Note argues that loot boxes should not be deemed an illegal form of gambling, but rather should be regulated to promote transactional transparency through the restriction of content offered in loot boxes and the prohibition of systems being accessed by young players. Such regulations will better protect both consumers making in-game purchases and the financial interests of producers.

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I. INTRODUCTION

Fortnite is a video game that has taken the world by storm. The game is free to play and has become a cultural phenomenon since its release in 2017.¹ Despite costing nothing for users to play, Epic Games, the producer of Fortnite, amassed more than \$3 billion in profit and 125 million players across all platforms during 2018.² The game is popular for computer and console players, and the mobile application has allowed users to play the game on the go. The mobile version of Fortnite garnered more than \$300 million in revenue in the Apple iOS app store in just 200 days.³ Fortnite's financial success has come almost exclusively from in-game purchases, also known as microtransactions, which are now becoming a staple for video game publishers.⁴ Microtransactions are in-game purchases

1. See, e.g., Gene Park, *Fortnite Was the Biggest Cultural Phenomenon of 2018*, WASH. POST (Dec. 27, 2018, 7:00 AM), <https://www.washingtonpost.com/technology/2018/12/27/fortnite-was-biggest-pop-culture-phenomenon/>; Bijan Stephen, *Fortnite Was 2018's Most Important Social Network*, VERGE (Dec. 21, 2018, 2:37 PM), <https://www.theverge.com/2018/12/21/18152012/fortnite-was-2018s-most-important-social-network>; Hayley Tsukayama, *Everything You Need to Know About Fortnite and Why It's so Popular*, WASH. POST (Apr. 3, 2018, 6:00 AM), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/03/everything-you-need-to-know-about-fortnite-and-why-its-so-popular>.

2. Erik Kain, *'Fortnite' Creator Epic Games Reportedly Earned \$3 Billion In Profits in 2018*, FORBES (Dec. 27, 2018, 11:56 AM), <https://www.forbes.com/sites/erikkain/2018/12/27/fortnite-developer-reportedly-earned-3-billion-in-profits-in-2018>; Jon Russell, *Epic Games, The Creator of Fortnite, Banked a \$3 Billion Profit in 2018*, TECHCRUNCH (Dec. 27, 2018, 9:44 AM), <https://techcrunch.com/2018/12/27/epic-fortnite-3-billion-profit/>.

3. Randy Nelson, *Fortnite Revenue on iOS Hits \$300 Million in 200 Days*, SENSOR TOWER (Oct. 5, 2018), <https://sensortower.com/blog/fortnite-revenue-300-million>.

4. See Kain, *supra* note 2.

made in addition to the base price of the game.⁵ The purchases are made by players in the virtual game using physical currency.⁶ In return, players receive additional content that can be used in the virtual world.⁷ Video game publishers rely on microtransactions for incremental revenues derived from a title.⁸ There are a number of microtransaction formats in which physical currency can be exchanged for additional content: (1) virtual currency systems; (2) permanent in-game content; (3) temporary in-game content; and (4) loot box systems.⁹

One common form of microtransaction is in-game virtual currencies, which utilize a system of fake money unique to the game itself.¹⁰ Users can earn virtual currency for free by playing the game or by purchasing set amounts using physical currency.¹¹ In-game currency can then be used to purchase additional content in the game.¹² In this way, publishers are able to create virtual economies within their games.¹³ Publishers derive prices for the virtual currency by balancing the time it would take for players to normally achieve a set value of the currency for free by playing the game and then setting a price to allow them to purchase the value instantly.¹⁴ While a number of factors contribute to pricing virtual currency in any given game, prices tend to be fairly uniform, particularly among mobile applications.¹⁵ Despite virtual currency typically being offered for prices as low as 99¢, publishers garner their highest profits from a small group of players who

5. See Kevin Anderton, *The Ongoing Controversy of Microtransactions in Gaming [Infographic]*, FORBES (Mar. 7, 2018, 9:45 AM), <https://www.forbes.com/sites/kevinanderton/2018/03/07/the-on-going-controversy-of-microtransactions-in-gaming-infographic>.

6. Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO UNIV. WORLDWIDE (Feb. 25, 2016), <http://www.tuwo.edu/psychology/psychology-behind-microtransactions/>.

7. *Id.*

8. Four types of microtransactions are in-game currencies, random chance purchases, in-game items, and expiring items. Prateek Agarwal, *Economics of Microtransactions in Video Games*, INTELLIGENT ECONOMIST, <https://www.intelligenteconomist.com/economics-of-microtransactions/> (last updated Apr. 10, 2019).

9. *Id.*

10. Duverge, *supra* note 6.

11. *See id.*

12. *Id.*

13. Kevin Ford, *Free-to-Play Monetization: A Lesson on Virtual Currency*, NATIVEX (Jan. 10, 2013), <https://www.nativex.com/blog/free-to-play-monetization-a-lesson-on-virtual-currency/> (describing different strategies mobile application companies can implement in order to bolster the virtual currency economies in their games).

14. Hong Guo, Lin Hao, Tridas Mukhopadhyay & Daewon Sun, *Selling Virtual Currency in Digital Games: Implications on Gameplay and Social Welfare*, 30 INFO. SYS. RES. 430, 431 (2019).

15. *See* Ford, *supra* note 13. Numerous studies and reports have investigated the various considerations undertaken by publishers when pricing virtual currency and downloadable content. These considerations are largely outside the scope of this Note but may provide insight into the intricacies of the industry. *See generally*, e.g., Ismail Civelek, Yipeng Liu & Sean R. Marston, *Design of Free-to-Play Mobile Games for the Competitive Marketplace*, 22 INT'L J. ELECTRONIC COM. 258, 258–288 (2018); Ismail Civelek et al., *Pricing of Virtual Goods and Designing Game Challenge Level for Free-to-Play Mobile Games in the Presence of Copycat Competitors*, PROC. 51 HAW. INT'L CONF. ON SYS. SCI., 2018, at 1350, 1350–1355 (2018).

purchase more expensive packages.¹⁶ In other words, while not everyone purchases additional content, those that do tend to spend heavily.¹⁷

A second form of microtransaction used by publishers is to offer specific in-game items for sale via physical currency.¹⁸ Additional items gained through this method typically offer advantages to players compared to items one receives by purchasing the base game.¹⁹ A third form of microtransaction used by publishers is to sell expiring items that possess a set number of uses or which become available for further use after a certain date.²⁰ Upon expiration, players may purchase additional time or repurchase the item.²¹

In addition to the aforementioned formats, loot box systems have become a popular method of microtransaction used by producers to facilitate in-game purchases.²² Loot box systems are virtual containers that carry in-game items purchased through microtransactions.²³ Loot box systems award items based on chance, much like a slot machine at a casino.²⁴ Consumers pay a set price and then receive a random in-game item—of varying quality—in return.²⁵ Loot box systems utilize bright lights, flashy animations, and attractive sound effects to create an exciting atmosphere for the purchasing player.²⁶ Loot boxes are definitively different from other forms of microtransactions because of their inherent random result.²⁷ Players do not know the item they will receive when purchasing a loot box.²⁸

Loot boxes have recently received heavy criticisms both domestically and abroad by governments, gambling commissions, and consumers who feel the system takes advantage of players. Many of these dissenters relate their use of

16. In a report by Swrve, an analytics and application marketing firm, only 0.15% of players were found to be responsible for 50% of in-game purchases revenue per month. The average amount spent on microtransactions by individual players was \$5.94, with purchases between \$1 and \$5 only making up 27% of total monthly revenues. *Swrve Finds 0.15% of Mobile Gamers Contribute 50% of All In-Game Revenue*, SWRVE (Feb. 25, 2014), <https://www.swrve.com/company/press/swrve-finds-015-of-mobile-gamers-contribute-50-of-all-in-game-revenue>.

17. For various reports on the prevalence of virtual currency spending in video games, see, for example, Ethan Gach, *Meet the 19-Year-Old Who Spent Over \$17,000 on Microtransactions*, KOTAKU (Nov. 30, 2017, 10:00 AM), <https://www.kotaku.com.au/2017/11/meet-the-19-year-old-who-spent-over-17000-on-microtransactions/>; Andrew Rombach, *Video Gamers, Finance, and Paid Downloadable Content*, LENDEDU (Nov. 20, 2017), <https://lendedu.com/blog/video-games-and-finance/>; Paul Tassi, *Study Says 69% of 'Fortnite' Players Spend Money on the Game, \$85 Spent on Average*, FORBES (June 26, 2018, 8:34 AM), <https://www.forbes.com/sites/insertcoin/2018/06/26/study-says-69-of-fortnite-players-spend-money-on-the-game-85-spent-on-average>, for various reports on the prevalence of virtual currency spending in video games..

18. Duverge, *supra* note 6.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big New Problem, Explained*, TOM'S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

24. Jason M. Bailey, *A Video Game 'Loot Box' Offers Coveted Rewards, but is it Gambling?*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>.

25. Freedman, *supra* note 23.

26. Agarwal, *supra* note 8.

27. See Duverge, *supra* note 6.

28. Agarwal, *supra* note 8.

flashing lights, entertaining animations, and positive sounds to predatory tricks utilized by casinos in attracting players to gamble.²⁹ While gambling is illegal for minors, there are currently no age restrictions on loot boxes in the United States.³⁰ Foreign legislation has outlawed or restricted the use of loot box systems³¹ and some states are attempting to curb their use as well.³² Outlawing or overregulating loot boxes would have drastic effects on the video game industry for both producers and consumers.³³

This Note examines the use of loot boxes in the video game industry and the effects future regulation regarding these systems will have on consumers and producers. Part II reviews the use of microtransactions and loot box systems by video game publishers, and how their recent spike in popularity has created both a billion-dollar industry and potential issues in a legal grey area. Part III analyzes current legislation regarding online gambling, as well as recent domestic and foreign legislation aimed at regulating the use of loot boxes. Part III also analyzes expected consequences and legal ramifications if the current unregulated system is left unchanged. Part IV recommends a balanced solution that does not consider loot box systems a form of online gambling, but rather proposes regulations that better protect consumers when making in-game purchases.

II. BACKGROUND

This Part will first examine the history of microtransactions in the video game industry and the growing reliance publishers have on them as sources of revenue. This Part will then discuss the Entertainment Software Rating Board (“ESRB”), the governing and regulatory body of the video game industry,³⁴ and their stance on loot boxes as a form of internet gambling. Finally, this Part will analyze recent social research exploring the relationship between loot box systems and gambling, which are now being utilized by lawmakers and gambling commissions to formulate rules and regulations that will be discussed in later sections of this Note.

29. Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019, 8:00 AM), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play>; Rob Zaeny, *Not Content with Just Loot Boxes, ‘NBA 2K20’ Has Actual Casino Games*, VICE (Aug. 28, 2019, 12:07 PM), https://www.vice.com/en_us/article/gyzq89/not-content-with-just-loot-boxes-nba-2k20-has-actual-casino-games.

30. See Steven Blickensderfer & Nicholas A. Brown, *U.S. Regulation of Loot Boxes Heats Up with Announcement of New Legislation*, NAT’L L. REV. (May 9, 2019), <https://www.natlawreview.com/article/us-regulation-loot-boxes-heats-announcement-new-legislation>.

31. See, e.g., Tom Gerken, *Video Game Loot Boxes Declared Illegal Under Belgium Gambling Laws*, BBC (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306>.

32. See Press Release, Entertainment Software Rating Board, ESRB to Begin Assigning “In-Game Purchases” Label to Physical Video Games (Feb. 27, 2018), <https://esrbstorage.blob.core.windows.net/esrbcontent/about/news/downloads/igp-press-release-final-22718.pdf>; Kris Holt, *US and European Gambling Regulators May Crack Down on Loot Boxes*, ENGADGET (Sept. 17, 2018), <https://www.engadget.com/2018/09/17/loot-boxes-illegal-gambling-regulators-europe-us/>.

33. See Christina Gough, *Gaming Monetization—Statistics & Facts*, STATISTA (Mar. 7, 2019), <https://www.statista.com/topics/3436/gaming-monetization/> (indicating the market value of microtransactions for consoles in 2017 was \$2.94 billion).

34. *About ESRB*, ESRB, <http://www.esrb.org/about/> (last visited Jan. 24, 2020).

A. *The Use of Microtransactions and Loot Boxes in Video Games*

With recent advancements in technology and a consistent increase in online dependency, the video game industry has hit record highs in profit and popularity.³⁵ Microtransactions have proven to be an effective source of revenue for video game producers, as consumer spending for in-game purchases totaled \$22 billion in 2015.³⁶ The amount consumers spend on microtransactions is expected to continue to grow with a projected total spending amount of \$32 billion in 2020.³⁷

As an example, Electronic Arts (“EA”), a North American AAA publisher, utilizes microtransaction systems in several of their games. Two EA games, Madden and FIFA, incorporate loot box systems. In the Ultimate Team mode of both games, consumers create a fantasy team of current and historic athletes to compete in various multiplayer tournaments and challenges.³⁸ Consumers may unlock players by completing challenges in the game but may also purchase players through peer-to-peer auctions or loot box systems.³⁹ In-game purchases through the Ultimate Team game modes in Madden and FIFA brought in earnings of more than \$2 billion during 2017.⁴⁰ EA’s earnings from full-game downloads was only one-third of this total during the same year.⁴¹

During the Twentieth Century, video game producers were able to turn profits by selling complete games on the day of release. No further content was released for the game or available for purchase after its release date.⁴² Since the turn of the Twenty-First Century, however, the video game market has changed, causing publishers to shift their focus toward free-to-play games, also known as “freemium” games.⁴³ Freemium games, as the name implies, are free to play but also offer additional premium content through microtransactions.⁴⁴ Freemium game business models gained popularity through the success of popular mobile

35. Kellie Ell, *Video Game Industry is Booming with Continued Revenue*, CNBC (July 18, 2018, 6:15 PM), <https://www.cnbc.com/2018/07/18/video-game-industry-is-booming-with-continued-revenue.html>. A recent study of the 463 most-played video games on the popular platform, Steam, found over 70% of the sample games used loot box systems. Over 85% of the sample games offered cosmetic items through microtransactions. See David Zendle, Rachel Meyer & Nick Ballou, *The Changing Face of Desktop Video Game Monetisation: An Exploration of Trends in Loot Boxes, Pay to Win, and Cosmetic Microtransactions in the Most-Played Steam Games of 2010-2019*, PSYARXIV PREPRINTS (Nov. 1, 2019), <https://psyarxiv.com/u35kt>.

36. Gough, *supra* note 33.

37. *Id.*

38. *FIFA 20 Ultimate Team*, ELECTRONIC ARTS, INC., <https://www.ea.com/games/fifa/fifa-20/ultimate-team/features> (last visited Jan. 20, 2020); *Win With Your Ultimate Team*, ELECTRONIC ARTS, INC., <https://www.ea.com/games/madden-nfl/madden-nfl-20/ultimate-team> (last visited Jan. 24, 2020).

39. *FIFA 20 Ultimate Team*, *supra* note 38; *Win with Your Ultimate Team*, *supra* note 38.

40. Press Release, Electronic Arts, Inc., Electronic Arts Reports Q4 FY18 and Full Year FY18 Financial Results (May 18, 2018), https://s22.q4cdn.com/894350492/files/doc_financials/2018/q4/Q4_FY18_Earnings_Release_-_Final.pdf.

41. *Id.*

42. Nenad Tomić, *Effects of Micro Transactions on Video Games Industry*, 14 MEGATREND REV. 239, 240 (2017).

43. *Id.* at 244–45.

44. *Id.* at 240.

applications but are now being adopted by major video game publishers for console and PC games.⁴⁵

Several factors have shifted the market toward freemium games and created an increased publisher reliance on microtransactions.⁴⁶ First, the increased use of cell phones and immense popularity in mobile games led to developers utilizing microtransactions and a freemium business model. Developers found microtransactions through a cell phone are quick, simple, and an effective way to increase revenue on a game that is cheaper than the traditional console video game.⁴⁷ Second, the wide use of the internet by consumers has allowed for more online multiplayer opportunities between consumers.⁴⁸ The internet also provides the infrastructure to sell and purchase games online and creates an effective and efficient payment channel.⁴⁹

Third, the advent of multiplayer games has shifted customer preference in microtransactions.⁵⁰ Publishers have recognized players are willing to spend more money on multiplayer games than single player games.⁵¹ Fourth, as market preferences for multiplayer games have continued to strengthen, publishers have found success in selling additional content that further distinguishes players from one another. Microtransactions have been the primary mode of purchase for these items.⁵²

Fifth, at the turn of the Twenty-First Century, publishers began to realize the positive effects of a freemium system, in which they could gain higher profits by initially selling the game for a lower price and then offer additional content throughout the game's life cycle. The freemium system allows publishers to garner higher revenue per user and creates a more constant connection with the user compared to the typical one-time purchase model.⁵³

Today, video game companies have shifted their business models to a system known in the industry as Games as a Service ("GaaS").⁵⁴ GaaS represents a revenue model that allows games to remain monetized after they are released.⁵⁵ In this sense, games become less like products and more like services from which the customer can expect additional content to be regularly released.⁵⁶ Several

45. Harrison Jacobs, *Gaming Guru Explains Why 'Freemium' is Actually the Best Business Model for Multiplayer Video Games*, BUS. INSIDER (Mar. 19, 2015, 12:08 PM), <https://www.businessinsider.com/sean-plott-explains-why-he-thinks-freemium-games-are-the-best-business-model-for-both-players-and-developers-2015-3> ("The 'freemium' model has proven itself to be incredibly profitable.")

46. Tomić, *supra* note 42, at 243.

47. *Id.* at 242–45.

48. *Id.* at 243–44.

49. *Id.*

50. *Id.* at 244.

51. *Id.*

52. *Id.*

53. *Id.* at 244–45.

54. Jason Schreier, *Top Video Game Companies Won't Stop Talking About 'Games as a Service'*, KOTAKU (May 30, 2017, 3:40 PM), <https://kotaku.com/top-video-game-companies-wont-stop-talking-about-games-1795663927>.

55. *Id.*

56. Haydn Taylor, *Games as a Service has "Tripled the Industry's Value,"* GAMESINDUSTRY.BIZ (Oct. 10, 2017), <https://www.gamesindustry.biz/articles/2017-10-10-games-as-a-service-has-tripled-the-industrys-value>.

GaaS models exist, such as game subscription services, weekly reward releases, and the addition of new content through microtransactions.⁵⁷

The GaaS model, which creates a consistent and steady revenue stream for publishers, was essentially born out of necessity.⁵⁸ Increasing competition in a saturated marketplace, combined with a rise in production costs, has forced publishers to continually release new updates to ensure consumers are engaged in their products.⁵⁹ A recent Frost and Sullivan market forecast report identified the GaaS model's increased adoption by publishers to be a "high impact" factor in the continued decline of the traditional approach to releasing video games.⁶⁰ In a world with nearly unlimited options for consumers, publishers must consistently produce content to maintain market relevance.⁶¹ EA and Ubisoft, two of the world's largest video game publishers, have adopted a GaaS model in recent years.⁶²

B. *The ESRB and Recent Controversy*

The ESRB is a self-governing body that assigns ratings to video games and mobile applications.⁶³ As the self-regulating body for the video game industry, the ESRB ensures guidelines and safety precautions are in place and being followed by publishers.⁶⁴ In response to recent loot box controversies, the ESRB introduced an "in-game purchases" label to all video games that offer microtransactions and downloadable content.⁶⁵ This label does not specifically address, nor signify, the use of loot boxes.⁶⁶ Additionally, in October 2017, the ESRB made a formal statement refusing to classify loot box systems as a form of gambling.⁶⁷

57. Cass Marshall, *Games as a Service Need to Find Out How to Keep Players Engaged*, POLYGON (Dec. 24, 2018, 10:00 AM), <https://www.polygon.com/2018/12/24/18137327/games-as-a-service-2018-gaming-retrospective>.

58. Schreier, *supra* note 54.

59. See Symposium, *Digital Distribution and Games as a Service*, 16 SMU SCI. & TECH. L. REV. 25, 43 (2013) ("It is no longer good enough to release a game and never make changes or add to the game. The market demands that developers continue to add new features and new content frequently after they release a game."); Schreier, *supra* note 54.

60. *Global Video Game Systems Market, Forecast to 2024*, FROST & SULLIVAN (Dec. 4, 2018), <https://cds.frost.com/p/50839#!ppt/c?id=9AC1-00-3B-00-00&hq=Games%20as%20a%20Service>.

61. *Digital Distribution and Games as a Service*, *supra* note 59, at 42 ("Developers understand that they need to monetize their games to continue to get their players to come back. The result is that games are now being delivered as a service. This means that customers either buy a game or download a game that is free to play, and then have the option of purchasing new content that is continuously added to that game.")

62. Aernout van de Velde, *New PlayStation Boss Says Fans Shouldn't "Worry" About GaaS Model; Company's Vision "Totally Different,"* WCCFTECH (Jan. 10, 2018), <https://wccftech.com/playstation-boss-games-gaas-vision/>.

63. *About ESRB*, *supra* note 34.

64. *Id.*

65. Paul Tassi, *The ESRB is Being Willfully Obtuse About Loot Boxes, and will Never Be any Help*, FORBES (Feb. 28, 2018, 9:25 AM), <https://www.forbes.com/sites/insertcoin/2018/02/28/the-esrb-is-being-willfully-obtuse-about-loot-boxes-and-will-never-be-any-help>.

66. *Id.*

67. Jason Schreier, *ESRB Says it Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017, 12:46 PM), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

While there's an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don't want). We think of it as a similar principle to collectible card games: Sometimes you'll open a pack and get a brand new holographic card you've had your eye on for a while. But other times you'll end up with a pack of cards you already have.⁶⁸

The rationale behind the ESRB's decision was the fact that loot boxes, unlike typical forms of gambling, guarantee consumers receive some sort of in-game content in return for their purchase.⁶⁹ Yet, many consumers⁷⁰ and government officials⁷¹ have expressed disdain with how the ESRB has handled the increased prevalence of loot box systems.

Loot boxes have gained considerable attention in the video game industry in recent years after a widely publicized controversy in late 2017.⁷² *Star Wars Battlefront II*, a game based on the popular movie franchise and produced by EA, one of the largest video game publishers in the industry, received strong negative feedback from customers after the release of the game in November 2017.⁷³ The creators of *Star Wars Battlefront II* encouraged customer spending through microtransactions to unlock additional in-game content that would have otherwise taken approximately 4,500 hours of gameplay to unlock.⁷⁴

Customers found the tactic to be predatory and unfair for players who spent anywhere from hundreds to thousands of dollars in order to purchase these characters, which provided in-game competitive advantages.⁷⁵ The controversy had considerable negative effects on EA. After the incident, EA's stock price dropped

68. *Id.*

69. *Id.*

70. See, e.g., Erik Kain, *The ESRB is Wrong About Loot Boxes and Gambling*, FORBES (Oct. 12, 2017, 7:00 AM), <https://www.forbes.com/sites/erikkain/2017/10/12/the-esrb-is-wrong-about-loot-boxes-and-gambling/#44c66d242a64>.

71. Paul Tassi, *US Senator Confronts the ESRB over Loot Box Classification and Addiction*, FORBES (Feb. 15, 2018, 9:59 AM), <https://www.forbes.com/sites/insertcoin/2018/02/15/us-senator-confronts-the-esrb-over-loot-box-classification-and-addiction/#1f4183e25a97>. See also Brian Fung, *U.S. Consumer Watchdog to Investigate Video Game 'Loot Boxes.'* CHI. TRIB. (Nov. 29, 2018, 12:45 PM), <https://www.chicagotribune.com/business/ct-biz-ftc-loot-boxes-video-games-investigation-20181129-story.html> (reporting the Federal Trade Commission will launch a probe into the effects of loot boxes on children and their overall relation to gambling).

72. See Ben Gilbert, *'We Got it Wrong': EA Exec Apologizes for 'Star Wars' Loot Box Fiasco, Promises to 'Be Better.'* BUS. INSIDER (Apr. 17, 2018, 9:11 AM), <https://www.businessinsider.com/star-wars-battlefront-2-ea-apologizes-for-loot-box-fiasco-2018-4>.

73. *Id.*; see also Ben Gilbert, *The Latest Major 'Star Wars' Game Finally Dropped Its Most Controversial Aspect—But It May Be Too Late*, BUS. INSIDER (Mar. 16, 2018, 9:40 AM), <https://www.businessinsider.com/star-wars-battlefront-2-drops-loot-boxes-2018-3>; Tae Kim, *EA Vows to Never Offer Paid 'Loot Boxes' in its Controversial 'Star Wars Battlefront II' Game*, CNBC (Mar. 16, 2018, 1:46 PM), <https://www.cnbc.com/2018/03/16/ea-vows-to-never-offer-paid-loot-boxes-in-its-controversial-star-wars-battlefront-ii-game.html>.

74. While the accuracy of these claims have yet to be verified, it is a substantial amount of gameplay nonetheless. See Allegra Frank, *Star Wars Battlefront 2 Content Might Take Years to Unlock, But EA Won't Say*, POLYGON (Nov. 15, 2017, 3:05 PM), <https://www.polygon.com/2017/11/15/16656478/star-wars-battlefront-2-content-unlock-time-cost>.

75. See GameSpot Staff, *Star Wars Battlefront 2's Loot Box Controversy Explained*, GAME SPOT (Nov. 22, 2017, 12:37 PM), <https://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155/>.

8.5%, resulting in a \$3.1 billion depreciation of shareholder value.⁷⁶ In response to player outrage, EA has now altered its company policies on the use of microtransactions in games.⁷⁷

C. *Recent Studies on Microtransactions and Problem Gambling*

Based upon the recent controversies surrounding loot box systems and the growing popularity of video games in general, social research is becoming more prevalent in the areas of microtransactions and problem gambling. While studies and publications are certain to continue, researchers around the world have begun to investigate the possible connections between loot boxes and problem gambling.⁷⁸ Early results indicate a possible connection between the two, particularly among children under the age of eighteen, who make up 28% of total players in the United States alone.⁷⁹

The Australian Environment and Communications Reference Committee recently completed and presented a study to the Australian Senate discussing the psychological relationship between loot boxes and gambling.⁸⁰ The study found problem gambling and the use of loot boxes to share a strong causal connection.⁸¹ The study was conducted through an online survey using the Problem Gambling Severity Index.⁸² The researchers collected data on how often individuals participated in problematic gambling activities as well as the frequency with which they purchased loot boxes and other microtransactions.⁸³

A total of 1,174 responses were collected and analyzed from gamers located in the United States.⁸⁴ Participants' spending on loot boxes over the month prior to the study ranged from \$0 to \$2,300.⁸⁵ The study found a statistically significant effect of problem gambling on loot box spending as non-problem and low-risk gamblers reported spending significantly less on loot boxes compared to

76. Tae Kim, Opinion, *EA's Day of Reckoning is Here After 'Star Wars' Game Uproar, \$3 Billion in Stock Value Wiped Out*, CNBC, <https://www.cnbc.com/2017/11/28/eas-day-of-reckoning-is-here-after-star-wars-game-uproar.html> (last updated Nov. 29, 2017, 11:18 AM). EA's stock prices have been in a state of inconsistency since the loot box controversy with periods of steady growth and more recently, a steady freefall. See *Electronic Arts Inc. Stock Chart*, NASDAQ, <https://www.nasdaq.com/symbol/ea/stock-chart?intraday=off&timeframe=2y&splits=off&earnings=off&movingaverage=None&lowerstudy=volume&comparison=off&index=&drilldown=off> (last visited Jan. 24, 2020).

77. Gilbert, *supra* note 72.

78. See *infra* notes 80–107 and accompanying text.

79. *2018 Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS'N 1, 6 (Apr. 2018), http://www.theesa.com/wp-content/uploads/2018/05/EF2018_FINAL.pdf.

80. Patrick Lum, *Video Game Loot Boxes Addictive and a Form of 'Simulated Gambling'*, *Senate Inquiry Told*, GUARDIAN (Aug. 16, 2018, 2:00 PM), <https://www.theguardian.com/games/2018/aug/17/video-game-loot-boxes-addictive-and-a-form-of-simulated-gambling-senate-inquiry-told>; Shaun Prescott, *Loot Boxes are "Psychologically Akin to Gambling," According to Australian Study*, PC GAMER (Sept. 18, 2018), <https://www.pcgamer.com/loot-boxes-are-psychologically-akin-to-gambling-according-to-australian-study/>.

81. See David Zendle & Paul Cairns, *Loot Box Spending Video Games is Linked to Problem Gambling Severity*, 14 PLoS ONE 1, 10–11 (Mar. 7, 2019), <https://doi.org/10.1371/journal.pone.0213194>.

82. *Id.* at 8–9.

83. *Id.*

84. *Id.* at 10.

85. *Id.* at 10–11.

moderate-risk and problem gamblers.⁸⁶ This statistically significant difference was not found for other forms of microtransactions in video games; however, researchers noted more research is necessary to fully understand the relationships between these factors.⁸⁷ According to researchers, the relationship discovered between problem gamblers and loot box spending is “comparable in strength to the relationship between problem gambling and known risk factors in the gambling literature . . . [such as] current alcohol dependence.”⁸⁸

The conclusion of the study called for additional parental advisories placed on boxes of games utilizing loot box systems, as well as possibly restricting the access of such games to players of legal gambling age.⁸⁹ Based on the significant relationship discovered, the final recommendation from the study was to consider loot box systems a form of gambling and restrict them accordingly, whether they met the legal definition or not.⁹⁰

In a paper published in *Nature Human Behaviour*, two New Zealand researchers found loot boxes to be psychologically akin to gambling.⁹¹ The paper analyzed twenty-two video games released in 2016–2017 that utilized loot box systems.⁹² Of particular importance in this study was the accessibility and frequency with which minors were exposed to and utilized loot box systems.⁹³ The paper compared the twenty-two identified video games against five characteristics common to most gambling activities: (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) nonparticipation can avoid incurring losses; and (5) items received provide a competitive advantage over other players.⁹⁴

Results of the study indicated ten of the twenty-two games met all five of the gambling criteria.⁹⁵ The researchers acknowledged legal definitions of gambling often require winners to be able to “cash-out” their winnings for real-world money, which they considered to be a narrow definition.⁹⁶ Even with this added component, results indicated one in five of the games constituted a form of gambling.⁹⁷ The researchers recommended games that do not allow players to “cash-out” their winnings be restricted to those of legal gambling age, while games that

86. *Id.* at 11, 17–20.

87. *Id.* at 20.

88. *Id.* at 19.

89. *Id.* at 23–24.

90. *Id.* at 24. The Zendle and Cairns study was based on the findings of a previous study completed by the same authors, which found very similar results illustrating the negative effects of problem gambling and loot box systems. For the results of the authors’ previous study, see generally David Zendle & Paul Cairns, *Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-Scale Survey*, 13 PLOS ONE 1, 15 (Nov. 21, 2018), <https://doi.org/10.1371/journal.pone.0206767>.

91. Aaron Drummond & James D. Sauer, Comment, *Video Game Loot Boxes are Psychologically Akin to Gambling*, 2 NATURE HUM. BEHAV. 530, 532 (2018).

92. *Id.* at 530–31.

93. *Id.* at 530.

94. *Id.* at 531.

95. *Id.* at 532.

96. *Id.*

97. *Id.*

do allow players to “cash-out” be subject to the regulations enforced on other forms of gambling.⁹⁸

Psychologists have hypothesized loot boxes’ addictive and predatory characteristics arise through a principle called variable rate reinforcement.⁹⁹ Variable rate reinforcement schedules are generally formed by players using slot machines and other gambling mechanics.¹⁰⁰ But, loot box systems and traditional modes of gambling possess similarities when it comes to the formation of variable rate reinforcement schedules in players.¹⁰¹ Both types of systems reward players and cause them to play for longer periods of time.¹⁰² The use of bright lights and positive sound effects by both systems cause players to develop physiological arousal from positive outcomes but can also lead to negative effects arising from excessive play.¹⁰³

According to Dr. Luke Clark of the Gambling Research Center at the University of British Columbia, “[t]he player [utilizing a loot box system] is basically working for reward by making a series of responses, but the rewards are delivered unpredictably.”¹⁰⁴ The excretion of dopamine in the brain caused by the highs and lows of these gambling-like activities can be both physiologically arousing and relaxing, which allows for the system to become a distraction from the physical world and can lead to their excessive use by players.¹⁰⁵ In essence, a variable positive outcome, such as receiving a rare item in a loot box, will allow the player to overcome the frequent less desirable outcomes in order to continue making purchases.¹⁰⁶ As a result, the player would likely continue to purchase more loot boxes which could lead to disastrous health effects, such as the development of an addiction or reliance on the system.¹⁰⁷

While social research into the connections between loot box systems and problem gambling—as well as the underlying physiological processes operating when players use such systems—are relatively new, early results indicate a connection might exist.¹⁰⁸ If such results continue to be reported, the regulations and legislation to be discussed in the next Part of this Note will likely receive further traction and support from lawmakers and consumers alike.

98. *Id.*

99. Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PC GAMER (Sept. 28, 2017), <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/>.

100. John Haw, *Random-Ratio Schedules of Reinforcement: The Role of Early Wins and Unreinforced Trials*, J. GAMBLING ISSUES, July 2008, at 56, 57.

101. Jessica McBride & Jeffrey Derevensky, *Gambling and Video Game Playing Among Youth*, J. GAMBLING ISSUES, Dec. 2016, at 156, 157.

102. *Id.* at 159–61.

103. *Id.* at 157–58; *see also* Bailey, *supra* note 24.

104. Wiltshire, *supra* note 99.

105. McBride & Derevensky, *supra* note 101, at 159–60; *see also* Wiltshire, *supra* note 99.

106. Wiltshire, *supra* note 99.

107. *See* McBride & Derevensky, *supra* note 101, at 160–61.

108. *See supra* notes 80–107 and accompanying text.

III. ANALYSIS

This Part of the Note will analyze current Federal and State internet gambling laws and how microtransaction systems, such as loot boxes, do not currently fall under the scope of these regulations. Next, this Part will examine newly proposed legislation at the state and federal level as well as proposed and enacted legislation internationally. Further analyzing such bills and regulations will provide a clearer picture of the current concerns surrounding loot box systems and how they are currently being studied and addressed.

A Federal and State Laws

1. Federal Laws

Federal legislation addressing the regulation of interstate gambling began in 1961 with the enactment of the Federal Wire Act.¹⁰⁹ The Act outlaws the making of bets or wagers in interstate commerce by way of wire communication in exchange for money or credit.¹¹⁰ Importantly, the Federal Wire Act does not outlaw interstate betting between states in which such wagers are legal.¹¹¹

Unsurprisingly, the Federal Wire Act does not have a significant impact on online gambling in modern society.¹¹² In order to provide further protections after the advent of the internet and growing popularity of online casinos and betting sites, the federal government enacted further legislation to regulate online gambling.¹¹³ The Unlawful Internet Gambling Enforcement Act (“UIGEA”) of 2006 was the first major federal law related to internet betting.¹¹⁴ The UIGEA works cohesively with state laws to ensure intrastate gambling transactions are not barred, as long as they are legal under corresponding state laws.¹¹⁵ The UIGEA did reinforce state laws, however, by making it unlawful to send or receive interstate gambling transactions that violate federal or state law.¹¹⁶

The application of loot box systems to the UIGEA is unclear. The UIGEA defines a bet or wager as:

[T]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.¹¹⁷

109. See Laura A. D’Angelo & Kerry O. Irwin, *States Prepare to Bet the House on Online Gaming*, A.B.A. BUS. L. TODAY (Apr. 2012), <https://apps.americanbar.org/buslaw/blt/content/2012/04/article-02-dangelo-irwin.pdf>.

110. Federal Interstate Wire Act, 18 U.S.C. § 1084(d) (2018). But, § 1084(b) of the Act does allow for an exception when information is transmitted across state lines for the purpose of sports reporting and journalism.

111. *Id.* § 1084(b).

112. D’Angelo & Irwin, *supra* note 109, at 2.

113. See generally Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361 (2018).

114. See *id.*

115. *Id.* § 5362(10).

116. *Id.*

117. *Id.* § 5362(1)(A).

The UIGEA continues on to include the “purchase of a chance or opportunity to win a lottery or other prize (which opportunity is predominantly subject to chance).”¹¹⁸ From this perspective, loot box mechanisms, characterized by their inherent nature of chance, certainly constitute the type of bet or wager the UIGEA seeks to regulate. Customers use currency to purchase a loot box with the understanding that they will receive something of value, such as a virtual item usable in the game, in the event a certain outcome arises.

While loot boxes may fit the statutory definition of a bet or wager under the UIGEA, the applicability of the UIGEA’s restrictions become less clear when viewed from the lens of legislative intent. The UIGEA was originally drafted as a result of growing concerns regarding debt collection problems for “insured depository institutions and the consumer credit industry,” particularly for bets crossing state and national borders.¹¹⁹ In essence, the UIGEA did not seek to prevent the negative effects of online gambling on consumers, but rather to reinforce the effectiveness of debt collection over the internet where traditional law enforcement efforts were failing.¹²⁰

Further, the UIGEA places more requirements on financial institutions than websites and companies offering gambling services.¹²¹ The UIGEA requires payment systems and their participants “to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures” that meet certain requirements.¹²² From the perspective of legislative intent, the growing concerns surrounding loot box systems and their connection with the UIGEA and Federal Wire Act are not cohesive.

Upon this review, current federal legislation addressing online gambling likely does not control, nor address the growing concerns of loot box systems that regulation is now seeking to protect against. Federal legislation such as the Federal Wire Act and the UIGEA either enforce only intrastate sports gambling or require the gambling activity to first violate a separate statute.¹²³ Because of this, state legislators may be in a better position to counteract the negative aspects of such systems. A better understanding of the current legal landscape of state internet gambling laws will assist in this analysis.

118. *Id.* § 5362(1)(B).

119. Fern L. Kletter, Annotation, *Validity, Construction, and Application of Unlawful Internet Gambling Enforcement Act of 2006*, 31 *U.S.C.A. §§ 5361 et seq.*, 16 A.L.R. Fed. 3d Art. 6 (2016).

120. Alan Sutin & Tracie Chesterman, *Online Gambling*, in 4 *E-COMMERCE & INTERNET L.*, pt.4, ch. 30, at 30.01 (Ian C. Ballon ed., 2019).

121. See 15B AM. JUR. 2D *Computers and the Internet* §171 (2019); Kletter, *supra* note 119.

122. Unlawful Internet Gambling Enforcement Act § 5364(a).

123. Sutin & Chesterman, *supra* note 120.

2. State Laws

Internet gambling is primarily regulated through state legislation.¹²⁴ Each state, however, differs in what it regulates and permits.¹²⁵ State regulations of internet gambling are addressed in four primary ways: (1) laws against financial transactions and bet-making; (2) laws against making bets; (3) laws against taking bets; and (4) laws against the promotion and advertisement of internet gambling.¹²⁶ Laws against financial transactions and bet-making are outside the scope of this Note because of the complex interplay of federal and state laws in such circumstances.¹²⁷ This Subsection will primarily address laws against making bets and laws against taking bets, as they are the most common type of state regulation.¹²⁸

A sampling of state laws will be surveyed for purposes of this Note. The analysis of select states' legislation will provide context for the current proposed legislation in states such as Washington, Hawaii, and California. This analysis will also aid in providing context to the recommendations that will be discussed at the conclusion of this Note.

a. Illinois

Illinois has been one of the leaders among states in regulating internet gambling.¹²⁹ Illinois was the first state to develop an online lottery, from which only a handful of states have followed suit.¹³⁰ Despite being progressive in this realm, it is still illegal to operate an online gambling site within the state.¹³¹ Under Illinois law:

124. Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT., Fall 2006, at 34, 39.

125. See generally *id.* at 40–42 (explaining how two legal scholars view the varying state laws against internet gambling and the odds of prosecution under such laws).

126. Jennifer W. Chiang, *Don't Bet on It: How Complying with Federal Internet Gambling Law Is Not Enough*, 4 WASH. J.L. TECH & ARTS 1, 5 (2007) (providing a state-by-state overview of internet gambling legislation in the United States).

127. *Id.* Laws regarding financial transactions and bet-making are commonly handled at the federal level. The Unlawful Internet Gambling Enforcement Act is the most recent example of federal legislation regulating financial transaction systems in an attempt to curtail the prominence of online gambling. See Unlawful Internet Gambling Enforcement Act § 5363.

128. Chiang, *supra* note 126, at 5.

129. *Illinois Online Gambling Laws*, U.S. GAMBLING ONLINE, <http://www.unitedstatesgamblingonline.com/illinois/laws.html> (last visited Jan. 24, 2020); see also *2015 Internet Gambling Legislation*, NAT'L CONF. ST. LEGISLATURES (Aug. 21, 2015), <http://www.ncsl.org/research/financial-services-and-commerce/2015-internet-gambling-legislation.aspx>.

130. Olivia Berlin & Jackson Brainerd, *Keeping State Lottery Revenue Alive*, 25 NAT'L CONF. ST. LEGISLATURES, Sept. 2017, <http://www.ncsl.org/LinkClick.aspx?fileticket=IDDYjEBkCG0%3d&tabid=31709&portalid=1>. For more information on Illinois' online lottery system, see *How to Play*, ILL. LOTTERY, <http://www.illinoislottery.com/learnmore> (last visited Jan. 24, 2020). The only states currently utilizing an online lottery are Georgia, Illinois, Kentucky, Michigan, New Hampshire, and Pennsylvania. See *Which States Offer Online Lottery Sales for Mega Millions Tickets?*, ONLINE POKER REP. (Oct. 23, 2018, 7:33 AM), <https://www.onlinepokerreport.com/32756/online-lottery-mega-millions-tickets/>.

131. 720 ILL. COMP. STAT. 5/28-1(a)(12) (2016).

[A] person commits gambling when he or she knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet.¹³²

Illinois law does create an exception to this rule in which “[g]ames of skill or chance where money or other things of value can be won but no payment or purchase is required to participate” are not considered an illegal form of internet gambling.¹³³ In this sense, players may legally purchase loot boxes with virtual currency earned through in-game achievements. Under the Act, loot box systems found to be forms of internet gambling may still operate if they receive a proper license under the Video Gaming Act.¹³⁴ Illinois has attempted to pass legislation allowing for the regulation of state-based online gambling sites in recent years, but efforts have been largely unsuccessful.¹³⁵

Interestingly, Illinois law outlaws operating online gambling websites outside of licensed sports wagering operators, but does not outlaw consumers participating in such activities through off-shore gambling websites.¹³⁶ Because of this, it is likely players could utilize loot box systems, even if they were found to be forms of gambling, as long as the companies were not based in Illinois. Even if the company were to be based in Illinois, loot box systems would be legal under the exception if players earned them for free through in-game play, rather than by purchasing them with physical currency.¹³⁷

b. New York

While New York’s state laws do not explicitly include a statute for internet gambling, the general gambling statute includes “any contest” as a broad umbrella.¹³⁸ The state legislature deemed it unnecessary to distinguish between specific forms of gambling, but rather simplified the law to determine guilt by asking two questions: (1) whether the activity constitutes gambling?; and (2) whether the defendant was acting as a promotional character or player?¹³⁹ If both ques-

132. *Id.*

133. *Id.* § 5/28-1(b)(13).

134. *Id.* § 5/28-1(b)(12).

135. Steve Ruddock, *New York, Illinois Among Prime Candidates for Online Gambling Legislation in 2019*, ONLINE POKER REP. (Dec. 3, 2018, 10:05 AM), <https://www.onlinepokerreport.com/33621/five-candidates-online-gambling-2019/>. On June 28, 2019, the governor of Illinois signed a bill into effect that greatly expanded gambling operations in the state. Although the majority of these changes apply only to physical gambling operations, the bill does legalize daily sports betting through online wagering operators that receive a license to offer services within the state. 820 ILL. COMP. STAT. 130/25-45(a) (2018).

136. See 720 ILL. COMP. STAT. 5/28-1(a) (2016); see also 820 ILL. COMP. STAT. 130/25-45(a)(2018).

137. 720 ILL. COMP. STAT. § 5/28-1(b)(13) (2016).

138. N.Y. PENAL LAW § 225.00(1) (McKinney 2015).

139. N.Y. ST. COMM’N ON REV. PENAL L. & CRIM. CODE, STAFF COMMENTS ON THE PROPOSED PENAL L. 1964, at 382 (1964).

tions are answered in the affirmative, then a gambling offense has been committed.¹⁴⁰ Gambling as a whole, rather by way of the internet or physical establishments, is heavily regulated in New York.¹⁴¹ Under the New York Penal Code: “A person engages in gambling when he stakes or risks something of value upon the outcome of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”¹⁴²

New York’s definition of “contest of chance” is broad, even including games with elements of player skill.¹⁴³ The Code’s definition states, “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”¹⁴⁴ In other words, a game may be considered gambling if one phase of the game is based on skill while other phases are based on chance.¹⁴⁵ Similar to Illinois, gambling is only illegal when the defendant was involved in a role other than as a player.¹⁴⁶

c. California

California has a heavily regulated gambling industry with numerous types of “gaming” deemed illegal. Under the California Penal Code:

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fantan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor¹⁴⁷

Other forms of gambling, such as making bets on horse races, are considered legal in California, but heavily regulated.¹⁴⁸ Casinos located on Native American land are also legal but regulated.¹⁴⁹ Aside from dice and card games and sports betting, California law also states:

140. *Id.*

141. *See generally, Gaming Regulatory and Statutory Requirements New York*, AM. GAMING ASS’N: GET TO KNOW GAMING, https://www.americangaming.org/wp-content/uploads/2019/07/AGAGamingRegulatory-FactSheet_NewYork-1.pdf (last visited Jan. 24, 2020) (“The New York State Gaming Commission oversees [Video Lottery Terminal] operations at racetracks and commercial gaming at casino gaming facilities. The lottery is only responsible for promotional activities related to VLTs.”).

142. N.Y. PENAL LAW §225.00(2) (McKinney 2015).

143. *Id.* § 225.00(1).

144. *Id.*

145. KAREN MORRIS & NICOLE L. BLACK, CRIMINAL LAW IN NEW YORK § 31:4 (4th ed. 2018), Westlaw (database updated Dec. 2018).

146. *Id.* (“Gambling is illegal only when a person advances gambling activity or profits from such activity while acting ‘other than as a player.’”).

147. CAL. PENAL CODE § 330 (West 2019).

148. CAL. BUS. & PROF. CODE §19401 (West 2019).

149. CAL. GOV’T CODE § 98004 (West 2019).

State law prohibits commercially operated lotteries, banked or percentage games, and gambling machines, and . . . [t]o the extent that state law categorically prohibits certain forms of gambling and prohibits gaming devices, nothing herein shall be construed, in any manner, to reflect a legislative intent to relax those prohibitions.¹⁵⁰

Despite the fact that no California statute specifically outlaws participation in *online* gambling, it is clear that the legislature does not intend for this to mean online gambling is permitted.¹⁵¹ Rather, the legislature seems to indicate that illegal forms of gambling in a physical location are also illegal on the internet.¹⁵² As will be discussed in a later section of this Note, California legislators are beginning to identify the potential dangers that arise through loot box systems and proposing legislation to counteract these effects. While current gambling legislation in California does not explicitly outlaw loot box systems, such systems may soon, at the very least, be subject to regulation.

d. Hawaii

Similar to other states, the Hawaii penal code defines a “contest of chance” as “any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”¹⁵³ This definition is identical to the definition utilized by New York in its penal code. In fact, according to the statutory comments, Hawaii adopted its comprehensive gambling legislation in part from statutes proposed in Michigan and enacted in New York.¹⁵⁴ Under the Hawaii penal code:

A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.¹⁵⁵

The Code defines “something of value” as “any money or property, any token, object, or article exchangeable for money or property.”¹⁵⁶ This language differs

150. BUS. & PROF. § 19801(a).

151. The only mention of the internet in California gaming legislation prohibits the operation and sale of raffle tickets over the Internet. PENAL § 320.5(f)(2) (“A raffle may not be operated or conducted in any manner over the Internet, nor may raffle tickets be sold, traded, or redeemed over the Internet.”). For a complete report on the relevant sections of California gambling statutes, see generally CAL. DEP’T OF JUST. BUREAU OF GAMBLING CONTROL, CAL. GAMBLING CONTROL COMM’N, CAL. GAMBLING LAW, REGS, & RESOURCE INFO. (2018), http://www.cgcc.ca.gov/documents/enabling/2018/CA_Gambling_Law_Regulations_Resource_Information_2018_Edition.pdf.

152. See BUS. & PROF. § 19801(a).

153. HAW. REV. STAT. § 712-1220 (2018).

154. See editor’s comments to HAW. REV. STAT. ANN. § 712-1223 (West 2019). For an in-depth analysis of the Hawaii gambling statute, see generally Christine Daleiden, *When Raffles, Sweepstakes, Games of Chance and Skill Constitute Illegal Gambling in Hawaii*, 19 HAW. B.J. 6 (2015).

155. § 712-1220.

156. *Id.*

from other states and brings up an important distinction video game publishers may raise if a loot box legal issue were to arise under the statute.

As previously discussed, one difficulty that exists between connecting loot boxes to gambling statutes is the fact that items players receive are typically not exchangeable.¹⁵⁷ Once the loot box transaction is complete, there is not a “cashing-out” process in which players may exchange items for physical currency.¹⁵⁸ The argument is still hazy and likely fruitless, however, as video game publishers can and do place a price on items when they charge customers for their purchases.¹⁵⁹ Additionally, Hawaii has very strict gambling laws, including criminal liability for those “advancing gambling activity,” which is satisfied when an individual “engages in conduct that materially aids any form of gambling activity.”¹⁶⁰ Theoretically, video game publishers may then be violating Hawaii law by simply offering or advertising loot box systems.¹⁶¹ Therefore, the ultimate success of such an argument is unclear. But such a distinction highlights the theme that the applicability of loot box systems to state gambling legislation is very much a gray area.

e. Washington

Washington is unique compared to the previously surveyed states because the state’s criminal code explicitly outlaws online gambling.¹⁶² The state outlaws online gambling from any site or provider based in the state; however, websites and companies incorporated offshore or elsewhere in the United States are legal.¹⁶³ Under the state code: “Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, the internet, a telecommunications system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony”¹⁶⁴

In the official notes of the statute, the legislature states, “It is the policy of this state to prohibit all forms and means of gambling, except where carefully and specifically authorized and regulated.”¹⁶⁵ The legislature continues on to note that the progression in popularity of the internet was not contemplated when the gambling act was enacted, nor when the lottery commission was created;

157. See *supra* Section II.C.

158. For a more in-depth analysis of the cashing-out process and how digital content can possess a real-world monetary value, see Evan Lahti, *CS:GO’s Controversial Skin Gambling, Explained*, PC GAMER (July 6, 2016), <https://www.pcgamer.com/csgo-skin-gambling/>.

159. See generally Gough, *supra* note 33.

160. § 712-1220 (“A person advances gambling activity if he plays or participates in any form of gambling activity.”).

161. This theory would likely hold true if offering or advertising the sale of loot boxes was deemed to be “conduct that materially aids any form of gambling activity.” See *id.*

162. See WASH. REV. CODE § 9.46.240 (2018).

163. See *id.*; see also *id.* § 9.46.070.

164. § 9.46.240.

165. *Id.*

therefore it is appropriate for the legislative body to “reaffirm the policy prohibiting gambling that exploits such new technologies.”¹⁶⁶ The Washington Gambling Commission requires three elements for an activity to constitute gambling: (1) prize; (2) chance; and (3) consideration.¹⁶⁷

Washington’s gambling system is heavily regulated.¹⁶⁸ Washington, like Hawaii and California, has become one of the early leaders in proposed legislation addressing loot boxes and their relation to gambling.¹⁶⁹ These proposals will be discussed in more detail in Section III.B of this Note. With new bill proposals in mind, however, certain aspects of the current various state laws are important to highlight.

B. *New Legislation is Changing Things*

1. *Proposed State Bills*

Several states have recently proposed legislation relating to the regulation of loot box systems in video games and also begun conducting further studies to measure the negative effects such systems may have on younger players.¹⁷⁰ While none of these bills have yet to be enacted, they aim to protect against the fears of many loot box critics.¹⁷¹ This Section will analyze the proposed laws and examine how they might affect the video game landscape if enacted.

Hawaii has become one of the leading states in the movement to restrict or illegalize loot box systems through a series of proposed state laws to enforce stricter consumer protections. In January 2018, Hawaii proposed House Bill 2686.¹⁷² The crux of the bill was to prohibit the sale of video games utilizing loot box systems to anyone under twenty-one years of age.¹⁷³ The bill was spearheaded by Hawaii State Representatives Chris Lee and Sean Quinlan, who garnered significant publicity for their outspoken criticisms of loot box systems and

166. *Id.*

167. *Illegal Activities*, WASH. ST. GAMBLING COMMISSION, <https://www.wsgc.wa.gov/regulation-enforcement/illegal-activities> (last visited Jan. 24, 2020) (defining consideration as a wager or anything of value). Recall, a lack of consideration was the ESRB’s justification for not considering loot boxes to be a form of gambling. *See* Schreier, *supra* note 67.

168. For an overview of the various regulations and rules enforced by the Washington State Gambling Commission, see *Regulation & Enforcement*, WASH. STATE GAMBLING COMM’N, <https://www.wsgc.wa.gov/regulation-enforcement> (last visited Jan. 24, 2020).

169. *See* David Lumb, *State Senator Wants to Regulate Loot Boxes in Washington*, ENGADGET (Jan. 25, 2018), <https://www.engadget.com/2018/01/25/washington-state-senator-regulate-loot-boxes/>.

170. *See infra* notes 172–96 and accompanying text.

171. *See infra* notes 172–96 and accompanying text.

172. H.R. 2686, 29 Leg., Reg. Sess. (Haw. 2018).

173. *Id.*

the negative effects such games have on children.¹⁷⁴ In March 2018, Hawaii proposed House Bill 2727.¹⁷⁵ This bill sought to establish disclosure requirements for video game publishers related to loot box systems.¹⁷⁶

Washington has continued this trend with the proposal of Washington Senate Bill 6266.¹⁷⁷ The proposed bill ordered the Washington state gambling commission to consider a series of questions: (1) whether loot box systems are a form of gambling under current state law?; (2) whether children under the age of 18 years old should be allowed to access loot box systems?; and (3) how the lack of transparency related to disclosure in loot box systems should be regulated moving forward?¹⁷⁸ As evidenced by similar studies conducted in foreign countries that have led to loot box regulation, the results of such an inquiry would likely have a profound impact on future state law in Washington related to online gambling and the use of loot boxes. The bill ultimately did not pass, however.¹⁷⁹

Washington has been the most aggressive state to push for loot box regulation. In September 2018, the state signed a joint declaration with fifteen European countries regarding the growing concerns with loot boxes and the blurring of social gambling and video games.¹⁸⁰ The joint declaration expressed the differing national frameworks and circumstances of each regulatory body, but also discussed the “common principles” they shared.¹⁸¹ The regulatory bodies vowed to work closely together in the future to open a dialogue on the issue in hopes of raising consumer and parental awareness about the relationship between loot boxes and gambling.¹⁸²

Similar to Washington, the Indiana Senate proposed a bill in April 2018 that would have required the Indiana Gaming Commission to study loot boxes with the hopes of enacting future rules, regulations, and taxes on the video game industry based on the results.¹⁸³ The bill requested the Indiana Gaming Commission to determine whether loot boxes are a predatory practice that meet the qual-

174. Owen S. Good, *Hawaii Lawmakers Introduce Loot Crate Regulation Bills*, POLYGON (Feb. 13, 2018, 11:15 AM), <https://www.polygon.com/2018/2/13/17007830/hawaii-loot-crate-laws-ea-star-wars-battlefront-2>; Tae Kim, *State Legislators Call EA's Game a 'Star Wars-Themed Online Casino' Preying on Kids, Vow Action*, CNBC (Nov. 22, 2017, 8:57 AM), <https://www.cnbc.com/2017/11/22/state-legislators-call-eas-game-a-star-wars-themed-online-casino-preying-on-kids-vow-action.html>.

175. H.R. 2727, 29 Leg., Reg. Sess. (Haw. 2018).

176. *Id.*

177. S.B. 6266, 65 Leg., Reg. Sess. (Wash. 2018).

178. *Id.*

179. *SB 6266-2017-2018*, WASH. ST. LEGISLATURE, <https://app.leg.wa.gov/billsummary?BillNumber=6266&Year=2018#documentSection> (last visited Jan. 24, 2020).

180. See Chloe Anagnos, *Government Actually Has No Business Regulating Loot Boxes*, FOUND. FOR ECON. EDUC. (Jan. 24, 2019), <https://fee.org/articles/government-actually-has-no-business-regulating-loot-boxes/>.

181. U.K. GAMBLING COMMISSION, DECLARATION OF GAMBLING REGULATORS ON THEIR CONCERNS RELATED TO THE BLURRING OF LINES BETWEEN GAMBLING AND GAMING (Sept. 17, 2018), <https://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>. The declaration was signed by regulatory leaders from Latvia, Czech Republic, Isle of Man, France, Spain, Malta, Jersey, Gibraltar, Ireland, Portugal, Norway, Netherlands, United Kingdom, Poland, Austria, and Washington State.

182. *Id.*

183. See Anagnos, *supra* note 180.

ifications of gambling under Indiana state law, and whether they should be regulated within the state.¹⁸⁴ The bill referred to the study as a look into “predatory gambling in video games.”¹⁸⁵ Ultimately, the bill was not passed and a study was never commissioned.¹⁸⁶

Following the ESRB’s decision to implement in-game purchase warnings on the packaging of video games,¹⁸⁷ the California legislature proposed a bill that would have required video game manufacturers offering microtransactions to provide a clear disclosure on the physical box the video game is sold in.¹⁸⁸ Violation of the law would have subject publishers to a civil penalty up to \$1,000 per violation.¹⁸⁹ The bill never passed committee and was deemed inactive in November 2019.¹⁹⁰

In April 2018, a bill was proposed in the Minnesota legislature to prohibit the sale of video games that utilize loot box systems.¹⁹¹ The bill aims to prohibit the sale of video games containing loot box systems to players under the age of eighteen and would require an additional warning disclosure for players above the age of eighteen.¹⁹² The bill reads, “No retailer may sell to a person under 18 years of age a video game containing a system that permits the in-game purchase of (1) a randomized reward or rewards, or (2) a virtual item that can be redeemed to directly or indirectly received a randomized reward or rewards.”¹⁹³

Additionally, the bill would prohibit video game publishers from updating the game to include such systems, unless they verify “using commercially reasonable technology” that the player is eighteen years of age or older.¹⁹⁴ On top of these prohibitions, the bill would also require a warning on the physical packaging that discloses the game contains “gambling-like mechanism[s]” that may lead to gaming disorders, negative health effects and the possibility of “significant financial risk.”¹⁹⁵ The bill is currently still moving through the legislative process at the time of drafting this Note.¹⁹⁶

2. Proposed Federal Legislation

While state legislators are beginning to study and address growing concerns with loot box systems, federal regulatory bodies and legislators are also taking notice. In late November 2018, the Federal Trade Commission (“FTC”) announced it would begin to investigate loot box systems after Maggie Hassan, a

184. S.B. 333, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

185. *Id.*

186. *Senate Bill 333*, IND. GEN. ASSEMBLY, <http://iga.in.gov/legislative/2018/bills/senate/333> (last visited Jan. 24, 2020).

187. Tassi, *supra* note 65.

188. Assemb. B. 2194, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

189. *Id.*

190. *Id.*

191. H.F. 4460, 2018 Leg., 90th Sess. (Minn. 2018).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

senator from New Hampshire, requested the probe.¹⁹⁷ Senator Hassan, much like Chris Lee and Sean Quinlan of Hawaii, took issue with the system's close link to gambling and the negative effects such purchases may have on children.¹⁹⁸ In response to the FTC's announcement, the Entertainment Software Association ("ESA"), the official trade association for video game publishers, stated loot boxes are an optional purchase that enhance a player's experience.¹⁹⁹ The ESA also doubled down on earlier statements made by the ESRB that loot box systems are not an illegal form of gambling.²⁰⁰

Because of continued pressure from Senator Hassan and Congress, the FTC hosted a public workshop on August 7, 2019, to discuss "non-law enforcement option[s]" for regulating loot boxes and to gather information on the systems from public stakeholders, lawmakers, and consumers.²⁰¹ Perhaps the biggest news arising out of the FTC workshop was the commitments made by Sony, Microsoft, and Nintendo, three of the largest video game publishers in the industry, to begin publicly disclosing loot box odds in all of their games by the end of 2020.²⁰² Despite this, the law-enforcement options available to the FTC remain unclear, as the Commission explicitly stated non-public law enforcement methods would not be publicly discussed.²⁰³ Even if the FTC's law-enforcement investigation remains secretive, a public workshop is the first indication of concrete action taken by the federal government with regard to loot box regulation.²⁰⁴

This is not the first time the FTC has investigated the video game industry at the request of Congress. The FTC has previously completed reports on the effects of marketing violent video games to children and the effectiveness of ESRB warning labels.²⁰⁵ Based on the FTC's report on the effectiveness of ESRB warning labels, the ESRB revised its policies to provide further warning

197. Fung, *supra* note 71.

198. *Id.*

199. *Id.*

200. *Id.* For more information on the Entertainment Software Association, see *About ESA*, ENTMT'S SOFTWARE ASS'N, <http://www.theesa.com/about-esa/> (last visited Jan. 24, 2020).

201. Brian Crecente, *FTC Plans Public Workshop on Loot Boxes, Won't Comment on Legal Investigation (Exclusive)*, VARIETY (Feb. 22, 2019, 9:07 AM), <https://variety.com/2019/gaming/news/ftc-plans-public-workshop-on-loot-boxes-wont-comment-on-legal-investigation-exclusive-1203146123/>; Lesley Fair, *FTC Workshop Looks into Loot Boxes*, FED. TRADE COMM'N (Apr. 8, 2019, 11:14 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/ftc-workshop-looks-loot-boxes>. The official event took place on August 7, 2019 in Washington, D.C. See *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, FED. TRADE COMMISSION (Aug. 7, 2019, 10:00 AM), <https://www.ftc.gov/news-events/events-calendar/inside-game-unlocking-consumer-issues-surrounding-loot-boxes>.

202. Brendan Sinclair, *What Did the FTC Hear in its Loot Box Workshop?*, GAMESINDUSTRY.BIZ (Aug. 7, 2019), <https://www.gamesindustry.biz/articles/2019-08-07-what-did-the-ftc-hear-in-its-loot-box-workshop>.

203. Kyle Orland, *FTC Plans to Examine Loot Boxes With Public Workshop Later This Year*, ARS TECHNICA (Feb. 22, 2019, 2:18 PM), <https://arstechnica.com/gaming/2019/02/ftc-plans-to-examine-loot-boxes-with-public-workshop-later-this-year/>.

204. *Id.*

205. See generally FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2009), <https://www.ftc.gov/sites/default/files/documents/reports/marketing-violent-entertainment-children-sixth-follow-review-industry-practices-motion-picture-music/p994511violententertainment.pdf>.

label explanations on its website.²⁰⁶ Such action by the ESRB indicates FTC reports have the possibility of leading to further action either through industry self-regulation or governmental procedures.

On May 8, 2019, Senator Josh Hawley of Missouri announced a bill entitled *The Protecting Children from Abusive Games Act*.²⁰⁷ If passed, the bill will ban loot box systems and similar “pay-to-win” microtransactions in games targeted toward players aged eighteen and under.²⁰⁸ According to Senator Hawley, games that target minors will be determined through subject matter, visual content, and other similar indicators.²⁰⁹ Games with large audiences that knowingly offer the opportunity for minors to engage in microtransactions would also be subject to new consumer protections.²¹⁰ In the words of Senator Hawley, “game developers shouldn’t be allowed to monetize addiction.”²¹¹

The bill would prohibit applicable games from utilizing loot box systems and pay-to-win mechanics.²¹² The bill considers pay-to-win mechanics to be those artificially affecting game difficulty in order to induce players to purchase microtransactions, as well as offering items that provide competitive advantages to players.²¹³ Such protections would be enforced by the FTC “as an unfair trade practice.”²¹⁴ State Attorney Generals would also possess the ability to raise suit on behalf of their state’s residents against violating developers and publishers.²¹⁵ In response to the bill’s announcement, the ESA maintained its previous pro-loot box stance with the following statement:

Numerous countries, including Ireland, Germany, Sweden, Denmark, Australia, New Zealand, and the United Kingdom, determined that loot boxes do not constitute gambling. We look forward to sharing with the senator the tools and information the industry already provides that keeps the control of in-game spending in parents’ hands. Parents already have the ability to limit or prohibit in-game purchases with easy to use parental controls.²¹⁶

Although still at a very early stage in the legislative process, Senator Hawley’s bill has already received bipartisan support.²¹⁷ It is the first bill of its kind at the federal level, further building on the regulatory momentum established by

206. *Id.* at 30.

207. Jason Schreier, *U.S. Senator Introduces Bill to Ban Loot Boxes and Pay-to-Win Microtransactions*, KOTAKU (May 8, 2019, 12:00 PM), <https://kotaku.com/u-s-senator-introduces-bill-to-ban-loot-boxes-and-pay-1834612226>.

208. *Id.*

209. Press Release, Josh Hawley, Senator, U.S. Senate, *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children* (May 8, 2019), https://www.hawley.senate.gov/sites/default/files/2019-05/2019-05-08_Video-Game-Bill_One-Pager_0.pdf.

210. *Id.*

211. Schreier, *supra* note 207.

212. Press Release, Josh Hawley, *supra* note 209.

213. *Id.*

214. *Id.*

215. *Id.*

216. Schreier, *supra* note 207.

217. Owen S. Good, *Anti-Loot Box Bill Gathers Bipartisan Support in Senate*, POLYGON (May 23, 2019, 11:38 AM), <https://www.polygon.com/2019/5/23/18637155/loot-box-laws-us-senate-josh-hawley-ed-markey-richard-blumenthal>.

Senator Hassan's call for an FTC probe and various state lawmakers calling for more stringent consumer protections.²¹⁸ The bill has been referred to the Senate Committee on Commerce, Science, and Transportation, and if passed, would likely be landmark legislation for the industry.²¹⁹

3. *Foreign Regulation and Legislation*

While the United States is beginning the process of addressing the growing concerns with loot box systems, legislation on this front first began in Europe.²²⁰ Much like individual states in the United States, countries in Europe have varying viewpoints on loot box systems and their relationship with gambling.²²¹ No country in the world has perhaps been stricter in their viewpoints, and as a result, regulations, than Belgium.²²²

In 2018, the Belgian Gaming Commission determined loot box systems in the popular video games *Star Wars Battlefront II*, *FIFA 18*, *Overwatch*, and *Counter-Strike: Global Offensive* violated Belgian gambling legislation and were a particular threat to the vulnerable minds of young consumers.²²³ In an official statement, Belgium's Minister of Justice, Koen Geens, placed particular importance on the negative effects loot box systems have on mental health.²²⁴ In response to the *Star Wars Battlefront II* controversy, the Belgian Gaming Commission investigated the four games and made four key findings: (1) the games allowed for the use of real-world currency to purchase in-game coins with no safeguards or deposit limits; (2) there is a lack of clarity in regard to the random item generator used in loot box systems; (3) a player may think an item from a loot box possesses a competitive advantage, which is not always the case; and (4) a confusion between fiction and reality may arise when publishers have well-known celebrities promote the most expensive loot boxes.²²⁵

The Belgian criminal statute carries a fine of €800,000, approximately \$913,172, and a five-year prison sentence for publishers who do not remove their loot box systems.²²⁶ At least one major publisher, EA, is under criminal investigation by the Belgian government after refusing to comply with the gambling

218. *See id.*

219. Ian Boudreau, *US Loot Box Ban Bill Gains Bipartisan Support in the Senate*, PC GAMER (May 24, 2019), <https://www.pcgamer.com/us-loot-box-ban-bill-gains-bipartisan-support-in-the-senate/>.

220. *See infra* notes 222–42 and accompanying text.

221. *See infra* notes 222–67 and accompanying text.

222. *See* Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER, <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal> (last updated Apr. 27, 2018).

223. *Id.*

224. Gerken, *supra* note 31.

225. FEDERAL PUBLIC SERVICE JUSTICE: GAMING COMM'N, RESEARCH REPORT ON LOOT BOXES 5–8 (2018), https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksr-aapport-loot-boxen-Engels-publicatie.pdf.

226. Gerken, *supra* note 31.

law.²²⁷ By failing to ensure the game's random chance loot boxes are not accessible by minors, EA developers may be subject to fines and prison time.²²⁸ EA stated in April 2018 that its games were "developed and implemented ethically and lawfully around the world" and refused to agree its loot box systems were a form of gambling.²²⁹ While initially threatening to settle the disagreement in court, EA has since agreed to abide by the statute and removed the option for Belgian players to purchase virtual currency and loot boxes with physical currency.²³⁰

In a similar study, the Dutch Gaming Authority found four popular video games violated their Betting and Gaming Act.²³¹ The four video games were found to contain loot box systems that were detrimental to young players and often resembled popular casino games such as slot machines and roulette.²³² The Authority added that the unlicensed loot box systems were determined by chance and prizes were tradeable outside the confines of the game.²³³ The Authority required the four games to obtain a gambling license in order to continue to offer loot box systems to players.²³⁴

In April 2018, the Dutch Gaming Authority published a second study regarding loot boxes and their effects.²³⁵ The interest of the Authority's study was twofold: (1) to determine whether loot box systems were permitted under the Dutch Betting and Gaming Act; and (2) to determine whether opening loot boxes posed any risks of addiction.²³⁶ The study analyzed the ten most popular video games on the streaming service Twitch,²³⁷ which allows viewers to watch live broadcasts of people playing video games.²³⁸ Based on an evaluation tool used by the Authority to analyze the Dutch gaming market, the study found that on average, loot boxes possess a moderate to high risk potential of addiction.²³⁹ The highest risk potential loot boxes were found to use mechanical characteristics similar to slot machines, which were characterized by the possibility to win more

227. Matt Wales, *EA Reportedly Under Criminal Investigation in Belgium Due to FIFA's Loot Boxes*, EUROGAMER, <https://www.eurogamer.net/articles/2018-09-10-ea-reportedly-under-criminal-investigation-in-belgium-due-to-fifas-loot-boxes> (last updated Sept. 11, 2018).

228. *Id.*

229. *Id.*

230. Paul Tassi, *EA Surrenders in Belgian FIFA Ultimate Team Loot Box Fight, Raising Potential Red Flags*, FORBES (Jan. 29, 2019, 10:23 AM), <https://www.forbes.com/sites/insertcoin/2019/01/29/ea-surrenders-in-belgian-fifa-ultimate-team-loot-box-fight-raising-potential-red-flags/#20ff6bbb3675>.

231. Wesley Yin-Poole, *The Netherlands Declares Some Loot Boxes Are Gambling*, EUROGAMER (Apr. 19, 2018), <https://www.eurogamer.net/articles/2018-04-19-the-netherlands-declares-some-loot-boxes-are-gambling>.

232. NETH. GAMING AUTH., *STUDY INTO LOOT BOXES: A TREASURE OR A BURDEN? 2* (2018) [hereinafter *Netherlands Study*]; Yin-Poole, *supra* note 231.

233. *Netherlands Study*, *supra* note 232, at 2.

234. Yin-Poole, *supra* note 231.

235. *Loot Boxes & Netherlands Gaming Authority's Findings*, DUTCH GAMES ASS'N, <https://dutchgame-sassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings> (last visited Jan. 24, 2020).

236. *Netherlands Study*, *supra* note 232, at 2.

237. *Id.* at 3.

238. *About*, TWITCH, <https://twitch.tv/p/en/about/> (last visited Jan. 24, 2020).

239. *Netherlands Study*, *supra* note 232, at 4.

valuable items, the existence of little to no limits on the amount of times consumers may access the systems, and the use of flashy lights and sound effects.²⁴⁰

Additionally, the highest risk loot boxes were comparable to casino games like roulette or blackjack in terms of addiction potential.²⁴¹ While the Dutch Gaming Authority acknowledged no evidence existed of addicted players purchasing loot boxes on a regular basis, its primary concern was with younger players who could be more easily swayed to purchase these items and who are more prone to the risks of gambling addiction.²⁴²

Contrary to Belgian and Dutch authorities, the United Kingdom Gambling Commission has spoken out that loot boxes do not currently constitute gambling.²⁴³ Under the definition set forth in the Gambling Act by Parliament, loot boxes do not constitute gambling when the system does not possess a feature that allows players to “cash-out” virtual items for physical currency within the game.²⁴⁴ In a discussion paper published in August 2016, the United Kingdom Gambling Commission analyzed the relationship between loot box systems and the British Gambling Act of 2005.²⁴⁵ The Act defines gambling as “betting, gaming, or participating in a lottery.”²⁴⁶ Under the Act, other games involving chance or the exchange of money do not require regulation.²⁴⁷

The United Kingdom Gambling Commission acknowledged that while statutory definitions and new innovations are increasingly becoming a gray area, preventing the exposure of children and adolescents to gambling is a “particularly high priority.”²⁴⁸ The primary focus on microtransactions within the Commission’s 2016 discussion paper was the buying, selling, and trading of “skins.”²⁴⁹ The Commission defined “skin” as “in-game items that provide aesthetic upgrades to a player’s game play where those in-game items can also be traded as commodities on a marketplace within a platform operated by the game’s developer or distributor.”²⁵⁰ Items from loot boxes typically fall under

240. *Id.*

241. *Id.*

242. *Id.*

243. *Loot Boxes Within Video Games*, U.K. GAMBLING COMM’N (Nov. 24, 2017), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx>.

244. *Id.*; see also U.K. GAMBLING COMM’N, VIRTUAL CURRENCIES, ESPORTS AND SOCIAL CASINO GAMING—POSITION PAPER ¶¶ 3.17–18 (Mar. 2017), <https://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf> [hereinafter March 2017 Position Paper] (explaining the Commission’s position on the dangers presented to underage children with the onset of new features that allow gambling with in-game items).

245. See U.K. GAMBLING COMM’N, VIRTUAL CURRENCIES, ESPORTS AND SOCIAL CASINO GAMING—DISCUSSION PAPER (Aug. 2016), <https://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-gaming-discussion-paper.pdf> [hereinafter August 2016 Discussion Paper].

246. *Id.* ¶ 1.1.

247. See *id.*

248. *Id.* ¶¶ 1.4–5.

249. *Id.* ¶¶ 3.4–6.

250. *Id.* ¶ 3.5. The term “skin” was popularized in 2012 by the computer games Team Fortress 2 and Counter Strike: Global Offensive. *Where Did Skins Come From?*, INST. OF GAMES, <http://www.videogames.org.au/skin-betting/> (last visited Jan. 24, 2020). Much like loot boxes, the trading and betting of skins has gained considerable criticisms from players and legislators for its similarity to gambling as players can often “cash-out” skins for physical currency. See, e.g., Samit Sarkar, *How Do Counter-Strike: Global Offensive Skins Work?*, POLYGON

this category, particularly when players gain items that are more rare and possess a higher value in the marketplace.

The primary concern of the Commission was that digital items may possess a monetary value that can be converted into physical currency.²⁵¹ When players have the ability to trade these items within an in-game marketplace as a form of virtual currency, the Commission requires a gambling license.²⁵² In its conclusion, the Commission made a point to note that the Secretary of State may further specify regulations for purposes of the Act in regard to specific actions, such as in-game items.²⁵³ While this power has yet to be invoked, further technological advancements or developments by game publishers could feasibly lead to such action.²⁵⁴

In a follow-up position paper in March 2017, the Commission ultimately left legislative interpretation up to the courts.²⁵⁵ Noting a lack of applicable case law on the subject, however, the Commission provided a balance of legal framework interpretation and an analysis of where boundaries into gambling might be blurring.²⁵⁶ While observing that video game publishers did not intend for in-game items to be resold and traded, the Commission essentially reaffirmed its earlier stated position. When players exploit the system by selling and trading in-game item rewards, which translate to a real-world monetary value, this constitutes gambling for purposes of the Act and requires a license.²⁵⁷

The United Kingdom also houses the Pan European Game Information (“PEGI”) organization, which, much like the ESRB in the United States, provides age ratings for video games.²⁵⁸ In a statement, PEGI held essentially the same view as the ESRB in response to the loot box comparison to gambling.²⁵⁹ In response to continued calls for greater player protection, PEGI announced in August 2018 that video games will disclose, at the point of purchase, whether optional in-game content is available for purchase within the game.²⁶⁰ Much like

(July 11, 2016, 10:30 AM), <https://www.polygon.com/2016/7/11/12129136/counter-strike-global-offensive-cs-go-skins-explainer>; *Skin Betting: ‘Children as Young as 11 Introduced to Gambling’*, BBC (Dec. 12, 2017), <https://www.bbc.com/news/technology-42311533>.

251. August 2016 Discussion Paper, *supra* note 245, at ¶¶ 3.4–5.

252. *Id.* ¶ 3.6.

253. *Id.* ¶ 7.2.

254. *Id.*

255. March 2017 Position Paper, *supra* note 244, ¶ 1.4.

256. *Id.*

257. *Id.*

258. *Video Game Boxes to Warn Parents About Extra Purchases*, SKY NEWS (Aug. 30, 2018, 1:06 PM), <https://news.sky.com/story/video-games-boxes-to-warn-parents-about-extra-purchases-11485534>.

259. Alessio Palumbo, *PEGI on Loot Boxes: We Can’t Define What’s Gambling, Only a Gambling Commission Can*, WCCFTECH (Oct. 12, 2017), <https://wccftech.com/pegi-loot-boxes-cant-define-gambling/> (“In short, our approach is similar to that of ESRB (I think all ratings board do, USK in Germany as well). The main reason for this is that we cannot define what constitutes gambling. This is the responsibility of a national gambling commission.”); see also Andy Chalk, *European Game Rating Body Agrees With ESRB: Loot Boxes Aren’t Gambling*, PC GAMER (Oct. 13, 2017), <https://www.pcgamer.com/european-game-rating-body-agrees-with-esrb-loot-boxes-arent-gambling/>.

260. *Video Game Boxes to Warn Parents About Extra Purchases*, *supra* note 258.

the ESRB, PEGI accomplished this by placing a warning icon on the packaging.²⁶¹ The Managing Director of PEGI described the warning label as “an important first step.”²⁶²

In November 2018, the United Kingdom Gambling Commission published an audit report exploring the gambling behaviors of children between the ages of eleven and sixteen in England, Scotland, and Wales.²⁶³ The audit reported an estimated 55,000 children were problem gamblers with an additional 70,000 at risk.²⁶⁴ Additionally, based on the survey’s results, approximately 450,000 children were estimated to have spent their own money on gambling in the past week.²⁶⁵ The Gambling Commission reported two-thirds of children were exposed to gambling through advertisements on television.²⁶⁶ Importantly for the purposes of this Note, the audit reported that gambling had been exposed to children through loot boxes in video games.²⁶⁷

Most recently, in September 2019, Parliament’s Digital, Culture, Media, and Sport Committee released a report on immersive and addictive technologies that provided several recommendations of action that should be taken to regulate loot box systems.²⁶⁸ The Committee recommended that harm from loot boxes should be presumed, and absent research proving the contrary, games using loot box systems that contain an “element of chance” should not be available for purchase by children.²⁶⁹ Further, the Committee recommended that loot boxes that are both available for purchase with physical currency and purchaseable without first revealing their contents should be defined as “games of chance played for money’s worth.” The Committee concluded their discussion of loot boxes by encouraging Parliament to regulate the systems under the Gambling Act as a game of chance.²⁷⁰ Parliament is expected to respond to the report in early 2020.²⁷¹

261. *Id.*

262. *Id.*

263. See U.K. GAMBLING COMM’N, *YOUNG PEOPLE & GAMBLING 2018: A RESEARCH STUDY AMONG 11-16 YEAR OLDS IN GREAT BRITAIN* (2018), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Levels-of-participation-and-problem-gambling/Young-persons-survey.aspx> [hereinafter *YOUNG PEOPLE & GAMBLING*].

264. *Id.* at 8, 30 (“Using the DSM-IV-MR-J screen, a child who confirmed that they had undertaken four or more of the behaviours/actions (from the overall screen of nine components) is considered a problem gambler, a score of two or three is used to identify an at-risk gambler and a score of zero or one indicates a non-problem gambler.”).

265. *Id.* at 5, 10 (noting this figure was higher than the number of children estimated to have drunk alcohol, smoked cigarettes, or taken illegal drugs in the past week).

266. *Id.* at 7.

267. *Id.* at 4, 6.

268. See generally HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMM., *IMMERSIVE AND ADDICTIVE TECHNOLOGIES 1* (2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/1846.pdf>.

269. *Id.* at 29.

270. *Id.* at 34.

271. Joseph Bradley, Francis Brown & Chris Ewing, *Game Over For Loot Boxes?*, WHITE & CASE (Nov. 11, 2019), <https://www.whitecase.com/publications/alert/game-over-loot-boxes>.

Sweden is also taking proactive legal steps to potentially counteract the negative effects of loot boxes on youth.²⁷² The Swedish Consumer Agency began compiling a report of potential consumer protection options for video game players, particularly children and adolescents.²⁷³ Although the report has not been publicly released, the Swedish Consumer Agency claims it has discovered a link between loot boxes and problem gambling with the possibility that some mechanics may violate the Swedish Gaming Act.²⁷⁴ Sweden has yet to take official legal action against loot box systems, but the discussion among industry and government leaders alludes to the possibility that, at the least, consumer protection regulations may be on the horizon.²⁷⁵

Asian countries are also further along in the regulation and legislation of loot box systems than the United States.²⁷⁶ In December 2016, China's Ministry of Culture released a new set of regulations requiring video game publishers who utilize loot box systems to disclose the probability odds, also known as drop rates, that players will receive certain items.²⁷⁷ While the regulation better protects consumers hoping to win big, the drop rates disclosure requirement only applies to the Chinese version of a particular game.²⁷⁸

The United States and the United Kingdom are at similar points in their legislative processes. Both countries seem to acknowledge loot boxes have negative side effects, but legislative and regulatory uncertainty looms.²⁷⁹ The fact that internet gambling is primarily legislated at the state level in the United States adds a unique wrinkle that makes regulation and enforcement more difficult for the government. It also could foreseeably lead to issues for video game publishers attempting to follow the possibly varying rules and laws. All may not be lost, however, as foreign legislation, as well as proposed domestic legislation at the state and federal level, provides possible regulations that may better protect consumers while allowing publishers to continue to remain competitive in the marketplace.²⁸⁰

272. See Brendan Sinclair, *Sweden Investigating Loot Boxes*, GAMESINDUSTRY.BIZ (May 14, 2019), <https://www.gamesindustry.biz/articles/2019-05-14-sweden-investigating-loot-boxes>.

273. Joe Ewens, *Swedish Consumer Watchdog Warns of Loot Box Gambling*, GAMBLINGCOMPLIANCE (Oct. 29, 2019), http://wikilaw.eu/wp-content/uploads/2019/10/gamblingcompliance_-_swedish_consumer_watchdog_warns_of_loot_box_gambling_-_2019-10-29-1.pdf.

274. *Id.*

275. *Id.*

276. Fung, *supra* note 71.

277. Chaim Gartenberg, *China's New Law Forces Dota, League of Legends, and Other Games to Reveal Odds of Scoring Good Loot*, VERGE (May 2, 2017, 1:38 PM), <https://www.theverge.com/2017/5/2/15517962/china-new-law-dota-league-of-legends-odds-loot-box-random>.

278. *Id.*

279. Kelly, *supra* note 29.

280. See, e.g., Charlie Hall, *Anti-Loot Box Bill Could Radically Change How Video Games Are Sold*, POLYGON (May 23, 2019, 5:27 PM), <https://www.polygon.com/2019/5/23/18637556/anti-loot-box-bill-micro-transaction-ban-legal-analysis-esa>.

IV. RECOMMENDATION

Loot boxes should not be deemed an illegal form of gambling. Microtransactions have become an essential form of revenue for video game producers.²⁸¹ As the cost of producing high-quality games has continued to rise, producers have been forced to find additional low-cost ways to supplement their income aside from base game sales.²⁸² Additionally, microtransaction purchases provide a source of extra content for consumers that add further enjoyment and entertainment value.²⁸³ Destroying a system that is valuable for both parties and almost a necessity for producers to compete in the marketplace would negatively affect the video game industry as a whole.

From a legal perspective, the United States' gambling regulatory system simply has too many variables to properly ensure every state takes the necessary precautions. With every state possessing different gambling laws that are ambiguous at best when determining whether loot boxes are encompassed, it would likely be impossible for every state to pass the same legislation. If states do pass separate legislation, the implementation of new practices for publishers in each jurisdiction has the potential to be overly cumbersome, if not impossible.

This does not mean the current system is perfect. Rather, regulations must be set in place to better protect consumers while balancing the possible dangers associated with the exposure of young players to loot boxes. By invoking certain protections, the system will become more properly regulated, while ensuring safety for younger players, and continued opportunities for producers to earn additional revenue from microtransactions.

A. *Mandatory Disclosures*

First, greater consumer protections are necessary in loot box systems. One tool that will help ensure consumers are informed when utilizing such systems are mandatory disclosures of the drop rates of items in a particular loot box. Mandatory disclosures are a simple and affordable solution for producers that ensure consumers are aware of what they are purchasing. This approach would ensure the system remains fair and removes the veil that currently blinds players when purchasing loot boxes. The mandatory disclosure of drop rates would also aid in preventing future public relations nightmares for publishers, such as EA's experience with *Star Wars Battlefront II*.

While the ESRB and PEGI have made helpful first steps on this front by placing warning labels on games that offer in-game purchases as a whole, further measures need to be taken. China has been one of the leaders in implementing such a system.²⁸⁴ As evidenced by the previously discussed Chinese regulations, the disclosures would likely need to be made on an official website or in-game.²⁸⁵

281. Kain, *supra* note 2.

282. Schreier, *supra* note 54.

283. Duverge, *supra* note 6.

284. See Gartenberg, *supra* note 277.

285. *Id.*

Publishers may consider exploring the implementation of probability disclosures within the game's Terms of Service. For example, the following is the current Terms of Service used by Pokémon GO, one of the most popular mobile games currently on the market and a frequent offeror of microtransactions.²⁸⁶ The Terms of Service are accessible through the mobile application or on the publisher's official website.²⁸⁷ The applicable section on virtual items and microtransactions states:

The App permits the purchase of virtual currency ("**Virtual Money**") and use of that Virtual Money to purchase virtual items or services that we expressly make available for use in the App ("**Virtual Goods**"). The purchase of Virtual Money and Virtual Goods is limited to Account holders who are either (a) 18 years of age or older; or (b) under the age of 18 and have the consent of a Parent to make the purchase. Parents of children under the age of 18 can consult the iOS or Google Play settings for their App to restrict in-App purchases, but should also monitor their children's Accounts for unexpected activity, including the purchase of Virtual Money or Virtual Goods.²⁸⁸

Pokémon GO provides an example of a detailed and clear company policy when it comes to microtransactions, particularly in regard to children and parents sharing responsibilities for their purchases. The Terms of Service continues on:

Virtual Money is a category of Content, so the purchase of Virtual Money grants you only a limited, nontransferable, non-sublicensable, revocable license to use such Virtual Money to access and purchase Virtual Goods in conjunction with your personal, noncommercial use of the Services. You acknowledge that you do not acquire any ownership rights in or to the Virtual Money, Virtual Goods, or other Content; any balance of Virtual Goods or Virtual Money does not reflect any stored value. You agree that Virtual Money and Virtual Goods have no monetary value and do not constitute actual currency or property of any type. Virtual Money may be redeemed only for Virtual Goods and can never be sold, transferred, or exchanged for "real" money, "real" goods, or "real" services from us or anyone else. . . . If you are the Parent and you are accepting these Terms on behalf of your child, you accept and acknowledge that you child has your consent to exercise this right independently.²⁸⁹

This contract serves as a great guide for publishers who must now navigate the complex and crowded post-Star Wars Battlefield II video game market. The Pokémon GO Terms include proper warnings against potential liability, including, the value of virtual items, the ability, or prohibition thereof, to "cash-out" items for physical currency, and the ability for children to purchase items with

286. Paul Tassi, 'Pokémon GO' Has Made \$1.8 Billion as it Turns Two Years Old, FORBES (July 9, 2018, 9:38 AM), <https://www.forbes.com/sites/insertcoin/2018/07/09/pokemon-go-has-made-1-8-billion-as-it-turns-two-years-old/#57edab144655>.

287. See *Niantic Terms of Service*, NIANTIC, <https://nianticlabs.com/terms/en/> (last updated May 15, 2019).

288. Jocelyn Mackie, *Terms & Conditions for Games*, TERMSFEED (July 16, 2019), https://termsfeed.com/blog/terms-conditions-games/#In-App_Purchases.

289. *Id.*

implicit permission from their parents through acceptance of the Terms.²⁹⁰ But, the language of Pokémon GO's Terms of Service could be altered or amended to also preclude liability in the realm of drop rate probabilities for loot box items.

A provided link to a website listing the various drop rates of items may be more practical for disclosing the actual figures themselves, particularly for larger games that offer several different items and loot box systems.²⁹¹ Standard language, however, could also be added to a game's Terms of Service to outline its loot box policy and drop rate disclosure information. While a simple solution for publishers, this recommendation would be an effective shield against potential lawsuits and provide customers with the information necessary to make a more informed purchase. From a publisher's perspective, this also places the burden on consumers to be educated with the purchases they make using the information available to them.

B. *Loot Boxes Including Only Cosmetic Items*

Second, future loot box systems should only include cosmetic items. The goal of this protection is to balance the interests of lawmakers and producers while maintaining a profitable system of content. The inclusion of items that provide competitive advantages to players reinforces a system of gambling as direct outcomes in competition can be equated to the amount of money consumers invest. Encouraging players to invest money in items that influence game results can lead to predatory behavior by producers, particularly toward younger players. This is one of the primary concerns among lawmakers today.²⁹²

Many publishers have already altered their downloadable content strategies to only provide cosmetic items.²⁹³ On one hand, such changes certainly make loot boxes less appealing to customers who are willing to spend money on potential in-game advantages. Publishers may be hesitant to implement such changes if they have a chance of negatively impacting the company's bottom-line. As previously discussed, loot box systems and microtransactions were essentially born out of necessity to improve revenues in an increasingly competitive and congested market.²⁹⁴ That being said, a limitation applicable to all publishers would likely have a negligible effect, if any, on the financial success of microtransactions. Fortnite is arguably the most successful game to ever use the microtransaction model while only offering cosmetic items in loot boxes. Such success should serve as a projection to other publishers that offering only cosmetic items can still be a highly profitable system.²⁹⁵

290. *Niantic Terms of Service*, *supra* note 287.

291. Devin Connors, *Drop Rates in Rocket League Crates*, ROCKET LEAGUE (July 23, 2018), <https://www.rocketleague.com/news/drop-rates-in-rocket-league-crates/>.

292. Press Release, Josh Hawley, *supra* note 209.

293. Jason Schreier, *After the Loot Box Fury, the People Behind the Next Battlefield Are Being Very Cautious*, KOTAKU (Mar. 3, 2018, 2:00 PM), <https://www.kotaku.com.au/2018/03/after-the-loot-box-fury-the-people-behind-the-next-battlefieldare-being-very-cautious/>.

294. *See* discussion *supra* Section II.A.

295. *See supra* Part I.

C. *Loot Boxes for Players Aged Seventeen and Up*

Third, the ESRB should protect minors against the negative side effects that may accompany loot box systems. Much like the ESRB's age-driven protections against suggestive conduct such as language and violence, the ESRB should also implement protections against the use of physical money to purchase loot boxes by players under seventeen years old. This restriction will aid in mitigating future risks of vulnerable children developing negative associations with loot boxes, and will further ensure consumer protection against predatory behavior by publishers.

Despite social science research into the effects of loot boxes being relatively new, early results have indicated such purchases do indeed have some negative effects.²⁹⁶ In some respects, this change may not alter the current video game landscape in a major way. Several games that utilize loot box systems are already restricted for purchase by those aged seventeen years and older. On the other hand, publishers that produce mobile applications and sport simulation games, such as Madden and FIFA, which utilize loot box systems heavily,²⁹⁷ will likely see more negative impacts.

Even with the addition of ESRB warnings regarding loot box systems, these warnings would only be discretionary and serve as potential red flags to parents.²⁹⁸ As the ESA noted, the enforcement of such warnings would largely be a retail and parental problem, rather than a publisher or ESRB problem.²⁹⁹ Therefore, the ESRB should take authority in the matter, as the regulating body of the video game industry, to work with lawmakers and develop a more reliable enforcement mechanism.

The FTC is the most likely lawmaking authority to initiate any sort of rulemaking proceeding. While the FTC did recently begin the processes of an investigation into loot boxes at the request of Congress,³⁰⁰ a rulemaking proceeding would allow consumers, producers, public interest groups, and other interested parties to state their opinions.³⁰¹ As mentioned previously, the ESRB will be reluctant to call for any sort of market-wide prohibition on loot box systems, nor should such a prohibition be called for.³⁰² The overall negative effects for video game publishers would be extremely volatile under such a system. Yet, enacting basic consumer protections into law, such as mandatory drop rate disclosures, mandating only the release of cosmetic items through loot boxes, and instituting a minimum age requirement for purchasing games using loot box systems, are initial steps the ESRB should be willing to make. These initial requirements

296. See discussion *supra* Section II.C.

297. Press Release, Electronic Arts, Inc., *supra* note 40.

298. Ben Kuchera, *Loot Crate Warning Labels Won't Save Us*, POLYGON (Feb. 27, 2018, 12:12 PM), <https://www.polygon.com/2018/2/27/17058212/esrb-loot-crate-box-labels>.

299. *Id.*

300. See *supra* Subsection III.B.2.

301. Colin Campbell, *FTC Loot Box Investigation: What Happens Next?*, POLYGON (Nov. 29, 2018, 2:00 PM), <https://www.polygon.com/2018/11/29/18118164/ftc-loot-box-investigation-legal-analysis>.

302. Schreier, *supra* note 67.

would allow the industry to begin adapting to such changes slowly in order for continual future progress to be made against the growing risk of gambling problems in the video game industry. An official relationship between the ESRB and the FTC would also leave the door open for further regulations as technology continues to improve and the market evolves.

V. CONCLUSION

The video game industry is currently experiencing a golden age of growth and innovation.³⁰³ Such rapid growth, however, has also led to changes in how publishers provide content to players. As publishers continue to adopt a GaaS model, the use of microtransactions and, as a result, loot boxes, will likely continue to rise in popularity. Loot box systems certainly provide benefits to both consumers and producers, but such systems also bring potentially disastrous side effects for younger players.³⁰⁴

While foreign and domestic governments are beginning to acknowledge the potential legal liability and harmful effects loot boxes may possess, it is unclear how drastically these new regulations will hinder the industry. As social research and lawmakers continue to explore these systems and learn more about their effects, new regulations will likely be necessary to better protect consumers and producers.

Although protections need to be put in place to better protect both parties, loot boxes should not be considered a form of illegal internet gambling. Doing so would overburden the industry and negatively affect consumers and producers. Additionally, although social research has begun to find similarities between gambling and loot box systems, the legal connection is less clear. In the United States, internet gambling is largely a state issue with varying standards and rules. Requiring video game companies to enforce such rules across each jurisdiction would essentially place a ban on loot box systems as a whole.

Regulations are an inevitable necessity as the video game industry continues to move toward a free-to-play, microtransaction-centric market. But a regulatory system that seriously hinders producers will only have more negative effects on potential customers. A balanced system designed to protect youth while allowing producers to continue to release downloadable content for players will be the most effective.

303. See *supra* notes 36–37 and accompanying text.

304. See discussion *supra* Section II.C.

