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LOOT BOXES AND THE QUESTION OF GAMBLING

By Elijah Tredup



At the ever-increasing intersection of gambling and video games, one topic that has stoked impassioned discussion among consumers, video game publishers, lawmakers, and regulators are “loot boxes.” Loot boxes are a subcategory of the microtransaction monetization model used by video game developers—a microtransaction generally being categorized as an in-game purchase made after the initial purchase or download of the video game.¹

Loot boxes follow a fairly standard formula across different games. Players either earn the loot box through game play, or to save time and effort they can also purchase it with money.² The contents of the loot box are typically determined by some form of random number generator, and are revealed in a carefully choreographed display of animation, lights, camera work, and sounds intended to build anticipation for the player.³ Players will be awarded in-game items with varying degrees of rarity that can range from purely cosmetic (such as a new costume for their in-game avatar), to those that can enhance gameplay (such as stronger weapons).⁴

Having existed in video games for over a decade,⁵ loot boxes were mostly tolerated by the video game consumer, though pushback grew as they slowly went from being staples of free-to-play games to being implemented by major video game publishers in big budget titles using popular IPs.⁶ In fall 2017, the consumer market finally hit its tipping point, with Electronic Arts' impending release of *Star Wars Battlefront II* serving as the catalyst.⁷ As the game's release drew near, details such as the inclusion of gameplay enhancing items in loot boxes, as well as what

consumers felt like a disproportionate time to unlock features through regular gameplay, raised complaints that the game was too heavily trying to push loot box purchases in what amounted to a pay-to-win scheme.⁸ While initial consumer backlash was centered on perceived price gouging of customers, it also cast increased scrutiny on the loot box mechanic itself, its perceived similarities to gambling, and the inclusion of a potentially unregulated gambling product in games with large audiences of minors.⁹

With how relatively new the scrutiny of loot boxes as a gambling product is, it can be easy for many, especially those removed from the video game community, to attempt to categorically declare loot boxes as either gambling or not gambling. However, despite sharing a basic monetization model, the precise mechanics by which loot boxes operate may vary greatly between games, thus necessitating a case-by-case approach. Below are some examples of the considerations gaming attorneys must make when analyzing different implementation of loot boxes against different jurisdictions' legal standard of gaming. The examples are presented through the traditional consideration, chance, and prize elements.

Consideration

Attention must be paid to the precise mechanics through which loot boxes are purchased, and the legal standard a particular jurisdiction uses to determine whether such transaction would satisfy the element of consideration. Some games, such as *Dota 2* and *Overwatch* have implemented a

loot box purchase system as straightforward as directly paying real money for the loot box.¹⁰ Such a purchase would likely meet even the most narrowly construed consideration standard¹¹—the player is directly exchanging money with real-world value for the opportunity to open the loot box.

Games may also award loot boxes to players for achieving some kind of in-game feat or milestone, such as reaching a certain level of experience (for example, in addition to purchasing loot boxes, *Overwatch* will reward players with a loot box each time they “level up” their character).¹² Even though the player is not paying any real-world money, it is important to ask whether a particular jurisdiction might consider the devotion of time and effort sufficient to be consideration.¹³

Some iterations of loot boxes involve a purchasing mechanic that, rather than utilizing real world money, uses a type of digital, in-game currency.¹⁴ Further complicating this mechanic are games that have a “premium currency” component (in-game currency that can be purchased with real money). For example, loot boxes in *Heroes of the Storm* can be purchased with digital “gold” earned through playing the game—prior to a March 2019 update, however, they could also be purchased with digital “gems,” an in-game currency that could either be earned by play or purchased for real money.¹⁵ Such purchasing mechanics should raise multiple questions for gaming attorneys: Where does the relevant gaming jurisdiction stand on the consideration element being satisfied by *representations* of value? Is the element of consideration negated if spending money is just one of several options a consumer can use to obtain the loot box? Such questions are not without precedent: For instance, the 9th Circuit has interpreted Washington state gambling law to hold that virtual chips constituted a “thing of value” sufficient to support a wager because they “extend the privilege of playing Big Fish Casino mobile app.”¹⁶ Even where the virtual chips were not purchased but won through play, they still constituted a thing of value because “the user wins the privilege of playing Big Fish Casino without charge.”¹⁷

Chance

The methods by which loot boxes implement their chance mechanics may also vary from game to game, making an analysis of this element not as straightforward as it may seem.

A common element found across different loot boxes is a random number generator (RNG) that decides what items are awarded to the player.¹⁸ However, loot boxes always award the player with *something*, though the items often are very common or duplicates, and may have little to no value or use to the player.¹⁹ It is important to ask how a particular

gaming jurisdiction analyzes the chance element: Does it look primarily at the presence of systemic chance²⁰ to make this determination (in this case, the outcome is completely out of the control of the player and determined by a RNG)? Will the jurisdiction consider the fact that the RNG is programmed to always guarantee at least some kind of reward, however small?²¹

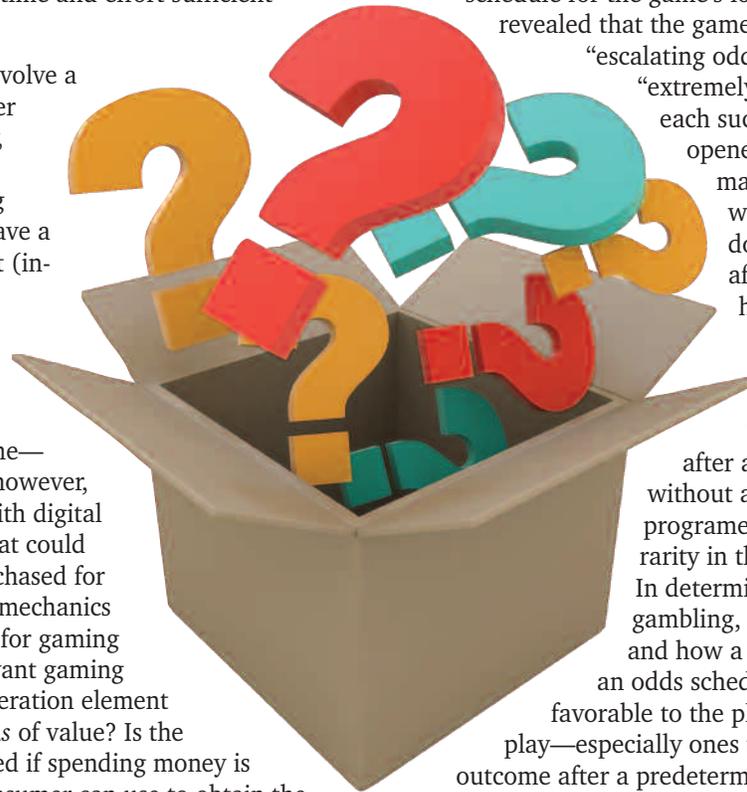
Further wrinkling such analysis is that, as developers have become more transparent with loot box odds, it is apparent that they operate in a way that gives some reality to longstanding gamblers’ fallacies.²² For example, in October 2018, Valve, the publisher behind *Dota 2*, disclosed the odds schedule for the game’s loot boxes.²³ The disclosure revealed that the game used what it termed

“escalating odds”—the odds of getting an “extremely rare item” increased with each successive loot box the player opened²⁴ (compare this to slot machines where, contrary to what many consumers believe, do not become “due” to pay out after successive losses).²⁵ Players have performed their own loot box analyses, with many claiming games operate on what has been dubbed a “pity timer”—the belief that after a certain number of loot boxes without any rare items, the game is programmed to guarantee an item of that rarity in the next loot box purchased.²⁶ In determining whether loot boxes are gambling, it will be important to know if and how a gaming jurisdiction factors in an odds schedule that becomes more favorable to the player with each successive play—especially ones that guarantee a certain outcome after a predetermined number of games—into its chance analysis.

Prize

The intangible, digital nature of loot box rewards, combined with various roundabout methods of valuation implemented by games publishers, further supports that loot boxes must be examined on a case-by-case basis.

Few, if any, loot boxes implement a prize scheme, such as a cash reward, that would indisputably meet just about any jurisdiction’s standard of prize. For the intangible, digital items of a loot box to satisfy the prize element, a jurisdiction would likely need a broad interpretation of what constitutes a prize. The inquiry gets more complicated with games that allow or facilitate the existence of a secondary market or trading platform for these in-game items. One example is Valve’s Steam Community Marketplace which serves as a platform to allow gamers to buy and sell in-game items from Valve’s various games with other users (with Valve taking a cut of each transaction), and offers tools such as the ability to track price history.²⁷ Whereas Valve does not allow the money earned to be withdrawn (instead it acts like a store credit



towards other purchases such as new video games), third party sites unaffiliated with Valve have stepped in with platforms that allow users to import their in-game items and sell them for actual cash withdrawable through means such as PayPal.²⁹



Another factor muddying the determination as to whether these digital items contain value is that some publishers may assign a dollar value to loot box items in a roundabout fashion. Such example is the game Apex Legends, where players can purchase loot boxes for 100 “Apex Coins” (the game’s premium in-game currency, purchasable at a rate of approximately \$1 = 100 coins).³⁰ Players can avoid the uncertainty of loot boxes by purchasing certain items à la carte: a weapon called The Demolisher was recently available for direct purchase for 1800 Apex Coins.³¹ One must ask if a particular gaming jurisdiction would consider this indirect appraisal of The Demolisher of ~\$18 by the publisher when evaluating whether such an item constitutes a prize of value. Given this, the fact that some jurisdictions have already opined that the ability to trade items outside of the game gives them value (see below), and that some markets are offered by third parties not affiliated with the publisher, the analysis of the prize element for loot boxes is anything but straightforward.

Action to Date

A wide variety of jurisdictions have looked at the loot box issue, with several declaring its stance on whether the activity constitutes gambling. The variety of stances taken have resulted in multiple instances of publishers altering³² or removing loot box mechanics,³³ or even pulling the entire game from the market.³⁴ Below is a summary of some of the stances taken regarding loot boxes.

United States - In the United States, several states, including **Hawaii, Washington, California, Minnesota, and Indiana**, have introduced some form of legislation in the past few years addressing loot boxes, though none have made it as far as becoming law.³⁵ Meanwhile, at the **Federal** level, the Federal Trade Commission has scheduled a public workshop on August 7, 2019 to examine issues related to loot boxes.³⁶ Additionally, a federal bill “regulat[ing] certain pay-to-win microtransactions and sales of loot boxes in interactive digital entertainment products” has been introduced.³⁷

Europe – In September 2018, 15 European gaming regulators (and one U.S. gaming regulator) signed on to a declaration of concern regarding “the risks being posed by the blurring of lines between gambling and other forms of digital entertainment such as video gaming,” including loot boxes.³⁸ Although the declaration expressed a shared mission between various jurisdictions, it ultimately iterated its stance that specific means of regulation will be left up to each signatory jurisdiction.³⁹

Belgium - In its Research Report on Loot Boxes released in April 2018, Belgium’s Gaming Commission applied the elements of Belgium’s gaming law to four games.⁴⁰ It determined that three of these (*Overwatch*, *FIFA 18* and *CS:GO*) constituted games of chance, subjecting them to possible criminal violations and fines.⁴¹ The highly detailed report took into consideration many of the loot box nuances described earlier in this article in applying its gaming law.⁴²

Netherlands - In April 2018, the Netherlands Gaming Authority released the results of its study of loot boxes, in which it determined four of the ten studied ran afoul of the Betting and Gaming Act.⁴³ The analysis primarily turned on whether the loot box prizes could be traded outside of the game, thus giving them a “market value.”⁴⁴ Video game publishers not in compliance by June 20, 2018 could be subject to fines and potentially prosecution.⁴⁵

United Kingdom – In November 2017, the U.K.’s Gambling Commission issued a statement articulating its stance on loot boxes. The statement, prepared by Executive Director Tim Miller, explained that per U.K. gambling law as set by Parliament, loot boxes that award in-game items confined within the game and unable to be cashed out are unlikely to require licensing as a gambling activity.⁴⁶

France - The French gaming regulatory body ARJEL addressed loot boxes in its 2017-18 yearly activity report.⁴⁷ According to one translation and analysis, ARJEL’s position is that a loot box could meet the definition of gambling if the awarded prize has real world monetary value.⁴⁸ Although this could be evidenced by being able to sell the prize outside of the game, the off-platform trading must be one authorized by the game’s publisher.⁴⁹ However, the analysis noted the lack of clarity in ARJEL’s position as to the extent a game publisher must be involved in facilitating this activity to meet this standard.⁵⁰

Sweden - In May 2019, the Swedish Consumer Agency was charged with reviewing loot boxes and to produce a report of its findings by October 2019.⁵¹

Ireland – Loot boxes have caught the attention of the Minister of State for the Department of Justice and Equality, as well as a member of Ireland’s parliament.⁵² These concerns have been raised against the backdrop of Ireland conducting an overhaul of its gambling laws.⁵³

Australia – In November 2018, a Committee inquiry and report prepared at the direction of the Australian Senate stated that whether or not lot boxes constituted gambling would have to be assessed on a case-by-case basis, but noted there was broad consensus among stakeholders that loot

boxes more likely fall under the definition of gambling where real-world money is exchanged.⁵⁴ It recommended that a comprehensive review of loot boxes be undertaken by the Australian government.⁵⁵ As part of its inquiry, the committee invited submissions on the topic, including from Australian states and territories. **Victoria** stated that a determination of whether a loot box falls within its legal definition of gambling would need to be made case-by-case, and because its powers to regulate such activity were limited, it called for the Australian Government to further address the issue.⁵⁶

Queensland noted how the different elements of a loot box could constitute gambling, but deferred to the results of the Australian Government's inquiry on which it would base its own determinations.⁵⁷ The government of **New South Wales** generally stated that the question of loot boxes violating NSW gambling laws turned on the ability to monetize virtual loot box rewards outside of the game they are featured in.⁵⁸

New Zealand - Trish Millward, Manager of Licensing Compliance for Regulatory Services at the Department of Internal Affairs articulated in a response to an email inquiry that the Department does not view loot boxes as meeting the legal definition of gambling.⁵⁹

Finland - In September 2018, one of Finland's leading newspapers reported that regulators in Finland had begun its own examination into the loot box question, and that Finland's Lotteries Administration articulated its stance on what kind of loot boxes would constitute gambling.⁶⁰ To constitute gambling, loot boxes must be purchasable with real money; the player does not know what prizes they will get; the prizes can be exchanged for real money with the game's publisher or a third party platform; and the publisher does not have a license.⁶¹

China - In December 2016, China's Ministry of Culture set out various online games regulations—effective May 2017—which included video game loot boxes.⁶² Included in these rules were the requirement to disclose loot box odds, and disclosure of loot box results on the game's official website.⁶³ Now falling under the National Administration of Press and Publication, additional rules regarding loot boxes continue to be discussed and put into action.⁶⁴

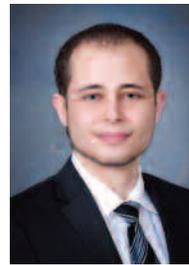
South Korea - In April 2018, three video game developers were fined approximately \$945,200 by South Korea's Fair-Trade Commission over deceptive loot box practices, including promoting misleading odds on the likelihood of winning loot box prizes.⁶⁵ A year later, South Korea's FTC announced it would review consumer regulations related to in-game purchase policies as a whole.⁶⁶

Japan - In May 2018, Japan's Consumer Affairs Agency ("Agency") announced its stance that "kompu gacha" systems violated Japanese law, and would be subject to enforcement.⁶⁷ Loot boxes in Japan are known as "gacha," with a variant of the system known as kompu gacha

("complete gacha")—kompu gacha awards a player with an in-game item for collecting all of the items in a particular set from the standard gacha loot boxes.⁶⁸ According to one analysis of the Agency's stance, the illegality of the kompu gacha system was determined pursuant to Japanese consumer protection law rather than its gaming laws.⁶⁹ Although the Agency's stance was specifically geared toward loot boxes of the kompu gacha type, the video games industry in Japan has made various attempts at self-regulation initiatives on the issue of loot boxes as a whole.⁷⁰



Finally, in addition to government jurisdictions taking stances, notable private actors have spoken on the issue. Some examples include the Entertainment Software Rating Board implementing "In-Game Purchases" labels on video games containing microtransactions (it maintains however that loot boxes are not gambling)⁷¹ and both Apple and Google requiring app developers to disclose loot box odds in games offered in their respective mobile app stores.⁷²



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- ⁷⁰ *Id.*
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- ⁷² Adi Robertson, *Google’s Play Store States Requiring Games with Loot Boxes to Disclose Their Odds*, THE VERGE (May 29, 2019, 4:49 PM), <https://tinyurl.com/yyzhamu7>.



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