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NOTE

GETTING AWAY WITH GAMBLING: HOW LOOT BOXES SIDESTEP AMERICAN GAMBLING LAWS

Shelby Cariaga

I. INTRODUCTION

The idea to sell additional content for video games originated in the early 1980s.¹ Halfway through the subsequent decade, expansion packs for games became increasingly viable products for companies as these products' appeal to gamers increased.² Decades later, the global video game industry is estimated to have grossed over one hundred billion dollars.³ In contribution to that lofty figure, in recent years, video game companies "have been marketing desirable in-game extra content utilizing randomly generating loot boxes. Players are presented with the opportunity to spend real money in exchange for an in-game loot box that randomly generates desirable in-game items."⁴

To recoup the cost of developing a game, developers traditionally relied on "subscription-based profits models or conventional retail sales of their games."⁵ Today, many developers integrate microtransactions in an effort to "harness market share and maintain profits by allowing gamers to purchase virtual goods and property with real-world currency."⁶ The law's implications for microtransactions and loot boxes, which are integral to modern video games' monetization systems, are still largely unsettled. The primary legal issue loot boxes face is whether they should be classified as gambling and therefore be regulated or outright banned. This issue is strongly influenced not only by whether players can cash out the virtual goods they receive from loot boxes but also by the virtual property scheme for virtual goods in games that American law may ultimately adopt.

¹ Sok Min Yun, Note, *A Comparative Overview of Esports Against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating, and Gambling*, 37 CARDOZO ARTS & ENT. L.J. 513, 538 (2019).

² *Id.*

³ David J. Castillo, Note, *Unpacking the Loot Box: How Gaming's Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165, 166–67 (2019).

⁴ Yun, *supra* note 1, at 539 (footnote omitted).

⁵ Kenneth W. Eng, Note, *Content Creators, Virtual Goods: Who Owns Virtual Property?*, 34 CARDOZO ARTS & ENT. L.J. 249, 251 (2016).

⁶ *Id.* (footnote omitted).

II. BACKGROUND

A. *Microtransactions in Video Games*

Microtransactions can be defined as “the sale of virtual goods or services in exchange for real-world currency.”⁷ In games, they operate to grant players a license to use those virtual goods in the game.⁸ Virtual goods for sale for use within a game are intangible goods that may take many forms.⁹ These “nonphysical objects . . . enhance the gamer’s playing experience or ability to make progress in the game,”¹⁰ and their lifespan may vary: “some take the form of one-time use (consumable power-ups) while others confer a more permanent effect and last indefinitely in the game.”¹¹

B. *Loot Boxes: Microtransactions’ Controversial Child*

The microtransaction business model “has proven extremely successful from an economic standpoint; the most recent statistics cite a revenue of \$22 billion on the PC [platform] alone. With such large prospective revenue, many large publishers are choosing to prioritize games that offer chances for monetization options.”¹² Loot boxes are an example of implementation of the microtransaction business model in video games.¹³ They are “virtual boxes that are purchased using either in-game currency or real currency.”¹⁴ Thus, despite the resentment many consumers hold for loot boxes, their profit margin is definitive and incontestable.

Currently, loot boxes are not regulated as gambling within the United States because of the general perception that “game systems that use them are essentially cash-in systems with no payout.”¹⁵ This perception is not guaranteed to remain unchanged.¹⁶ Usually in exchange for real currency, gamers can purchase an in-game box that, when opened, may give the player

⁷ *Id.* at 252–53.

⁸ *Id.* at 255, 262.

⁹ Chrissie Scelsi, *Taking Virtual Candy from an Actual Baby: Virtual Goods, Microtransactions, and User-Generated Content*, in *LEGAL GUIDE TO VIDEO GAME DEVELOPMENT* 143, 144 (Ross Dannenberg ed., 2d ed. 2016).

¹⁰ Eng, *supra* note 5, at 253 (quoting *Technology Spotlight—Recognizing Revenue from Sales in a Virtual World*, DELOITTE (May 9, 2013), <https://www.iasplus.com/en/publications/us/industry-spotlight/tech/tech-spotlight-issue-4>).

¹¹ *Id.* at 253–54.

¹² Castillo, *supra* note 3, at 168 (footnotes omitted).

¹³ *Id.* at 169.

¹⁴ *Id.*

¹⁵ S. GREGORY BOYD, BRIAN PYNE & SEAN F. KANE, *VIDEO GAME LAW: EVERYTHING YOU NEED TO KNOW ABOUT LEGAL AND BUSINESS ISSUES IN THE GAME INDUSTRY* 188 (2019).

¹⁶ *Id.* at 193.

one of “a variety of items, including, but not limited to, in-game currency, weapons, armor, or visual enhancements.”¹⁷ The in-game currency is often used to purchase even more loot boxes the player may open.¹⁸

Beyond the initial design and implementation costs, the items within a loot box do not cost the game developer any additional money.¹⁹ However, in some games, those items may be resold by players within a secondary market for real-world money, sometimes to the tune of thousands of dollars.²⁰ The item the player receives from opening a loot box is chosen at random, at least presumably.²¹ This incentivizes players to continue playing—or more often paying—to obtain more loot boxes in order to receive better or more desirable items.²² Even so, the implementation of loot boxes is now commonplace in popular games from well-established game developers.²³

There is very little love lost between many gamers and loot boxes. One famous game company, Electronic Arts (EA), experienced severe backlash due to loot box implementation in a 2017 game, *Star Wars Battlefront II*.²⁴ One social media comment that EA made, in defense of the game’s loot box system, holds a Guinness World Record as the most downvoted comment on Reddit of all time.²⁵ Many gamers were frustrated because they had already paid a premium price to play the game but would still have to pay additional money to unlock certain popular characters such as Darth Vader.²⁶ EA commented that the intent behind making players unlock characters was to give players “a sense of pride and accomplishment.”²⁷ Reddit users

¹⁷ Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 61 (2019).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Castillo, *supra* note 3, at 169.

²² *Id.*

²³ *Id.*

²⁴ Paige Leskin, *EA’s Comment on a Reddit Thread About ‘Star Wars: Battlefront 2’ Set a Guinness World Record for the Most Downvoted Comment of All Time*, BUS. INSIDER (Sept. 9, 2019, 1:39 PM), <https://www.businessinsider.com/reddit-world-record-downvotes-ea-star-wars-battlefront-2-2019-9>. See generally *Top Sites in United States*, ALEXA, <https://www.alexa.com/topsites/countries/US> (last visited Sept. 30, 2020) (showing that in the United States, Reddit.com is ranked seventh for the most internet traffic); *The Top 500 Sites on the Web*, ALEXA, <https://www.alexa.com/topsites> (last visited Sept. 30, 2020) (showing that across the globe, Reddit.com is ranked seventeenth for the most internet traffic).

²⁵ Leskin, *supra* note 24.

²⁶ *Id.*

²⁷ *Id.*

downvoted the comment more than half a million times, and after this fiasco, EA changed the game's monetization system.²⁸

Star Wars Battlefront II remains infamous as the game that brought the issue of perceived corporate greed through microtransactions and loot boxes to the attention of consumers and regulators.²⁹ EA's \$80 game required the purchase of loot boxes, in addition to the base price, in order to access what consumers thought should be part of the base game.³⁰ The Belgian Gaming Commission recoiled from *Battlefront*'s example and called for loot boxes to be banned in Belgium and Europe, as it held that the loot box system condoned gambling for children.³¹ The massive social media backlash may have resulted in EA pulling loot boxes from the game, but the infamy of *Star Wars Battlefront II* and loot boxes lives on.³²

C. *Loot Box Monetization and Its Far-Reaching Consequences*

Much of the disdain for this type of microtransaction is due to the randomness inherent in loot boxes.³³ Many games do not have a secondary market where players can obtain items from loot boxes which other players unboxed. In those games, in order to get a desired, specific item in the loot box system, players have to buy an indeterminable number of loot boxes or keys to open boxes until they acquire the item they want.³⁴ Some games have loot box items such as player character cosmetics or weapon skins that are inconsequential to competitive gameplay.³⁵ In other games, items received from a loot box may give a player an advantage over others, which many deem to be uncompetitive or unfair.³⁶

Further, people have expressed concern over the similarities between loot boxes and gambling.³⁷ Consumers are "drawn to purchase multiple loot boxes in order to obtain the items they desire, because the loot boxes contain random items and may contain duplicate items."³⁸ This strategy resembles lotteries and other gambling: it entices players to continue coming back to the loot box system until they can get what they want.³⁹ Some assert that

²⁸ *Id.*

²⁹ BOYD ET AL., *supra* note 15, at 188.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 188–89.

³³ Yun, *supra* note 1, at 540.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Yun, *supra* note 1, at 540.

players will end up with a gambling addiction and are particularly concerned about the risk to children, as games are popular with both the young and the old.⁴⁰

The question of loot boxes as gambling centers on “whether it pays out real money.”⁴¹ Thus, the optimal way for a game developer “to avoid legal issues related to the sale of virtual goods via microtransactions is to remove the ability for users to cash out their virtual goods or currency. Doing so eliminates concerns about everything from securities regulation, money laundering, and banking regulation to gambling.”⁴² This is especially important in light of the legal uncertainty surrounding the rights an individual has in virtual goods because of the slow pace of legislation and “the inability to account for technology [that has] left the United States in a poor position to address the monetization of video entertainment, specifically retail video games.”⁴³

The impermanent and intangible nature of virtual goods received from loot boxes may present issues with the goods’ legal classification in the context of issues like virtual property and online gambling. This is particularly relevant in light of the contractual scheme found in games’ terms of services; these contracts only grant players licenses to virtual goods and do not give players true ownership over virtual goods.⁴⁴ Some would assert this contractual scheme may be insufficient to protect the rights of individuals and question if there are “inherent ownership rights in virtual goods and property acquired by exchanging real world currency.”⁴⁵ Virtual goods are intangible, but they “can be purchased or sold using real currency or in-game currency.”⁴⁶ This exchange can happen through a variety of mediums.

In the interest of facilitating the exchange of virtual goods, game developers, as well as third parties, create virtual marketplaces for the sale or trading of virtual goods.⁴⁷ Some examples include the Steam Marketplace and *World of Warcraft*’s auction house.⁴⁸ The ability of individuals to exchange virtual goods for real currency seems to indicate that virtual goods “possess real value.”⁴⁹ Despite that, the legal issue of “the ownership status of virtual

⁴⁰ Hong, *supra* note 17, at 65.

⁴¹ Scelsi, *supra* note 9, at 151.

⁴² *Id.* at 152.

⁴³ Castillo, *supra* note 3, at 166.

⁴⁴ Eng, *supra* note 5, at 255, 262.

⁴⁵ *Id.* at 251–52.

⁴⁶ *Id.* at 254.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 255.

goods and services remains ambiguous and unsettled under the current contractual regime.”⁵⁰

In the present legal landscape, video game developers “rely on contract law principles to regulate and control the transfer and ownership rights of virtual property in their virtual worlds.”⁵¹ Video games, like other software programs in general, require their users to agree to certain terms before using the program, whether the software is the game itself or the marketplace used to exchange goods between players (such as the Steam Marketplace). Video game developers use end user license agreements (EULAs) and terms of service agreements (ToS) to provide their legal protection.⁵² These agreements “represent contractual agreements between the end-user and the developer that describe the respective rights and remedies that the end-user and developer possess.”⁵³ However, one major issue is whether these agreements, particularly when applied to ownership of virtual goods, are unconscionable.⁵⁴

III. LOOT BOXES AND GAMBLING

A. *Gambling*

Are loot boxes gambling? Who decides the definition of gambling and where it is illegal? These are important questions for video game developers who want to include elements of gambling in their games. The gambling industry is heavily regulated, and video game developers should take great care to avoid creating illegal gambling businesses in their games if they want to avoid criminal and civil liability for an offense.⁵⁵ In the United States, each state defines gambling through its own legislature, and federal statutes on gambling generally focus on the illegality of the operation of “a game that affects interstate commerce and violates gambling laws in the state where the game or its players are located.”⁵⁶

In general, “federal statutes focused on gambling do not contain their own definitions for illegal games of chance” since the states have their own definitions that federal law will rely on, depending on the case.⁵⁷ There are games that have elements reminiscent of gambling but are not in violation of

⁵⁰ Eng, *supra* note 5, at 255.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ BOYD ET AL., *supra* note 15, at 207.

⁵⁶ *Id.* at 201; 18 U.S.C. § 1955; 18 U.S.C. § 1084.

⁵⁷ BOYD ET AL., *supra* note 15, at 201.

existing gambling laws.⁵⁸ To understand whether the law will definitively consider a video game to contain illegal gambling requires comprehension of “the elements that comprise a game of chance under state laws and whether the activity contemplated by [a] game will be considered gambling based on the presence or absence of those elements.”⁵⁹

The definition of gambling is not identical in every state, but in most states an illegal game of chance has at least three specific elements.⁶⁰ An activity is an illegal game of chance if there is “consideration, chance, and a prize.”⁶¹ To analogize with a slot machine—a casino gambling game that has similarities with loot boxes—the money wagered to be allowed to play the slots is the consideration, the possibility the symbols will all match is the chance, and the winnings the player receives if the symbols match is the prize.⁶² A loot box operates similarly when money or time is used as consideration and the randomness of the reward acts as the chance.⁶³ The legal distinction between an illegal game of chance and loot boxes is found in the element of prize: a player is guaranteed to receive an item as a reward, and loot box systems are generally “cash-in systems with no payout.”⁶⁴ If an item is of “limited value” or “no value,” then it is not a true legal prize.⁶⁵

With gambling reduced to its simple elements, it begins to sound like many online video games are in violation of criminal laws against gambling; however, as of 2019, “there have been no official investigations or prosecutions in the United States, at either the federal or state levels, alleging that . . . video games that are not merely digital recreations of casino games constitute illegal gambling.”⁶⁶ Even so, it would be a simple matter to apply the three elements of consideration, chance, and prize to some online games, even if they are “conceptually far removed from ‘casino-style’ gambling . . . [as] the line between gambling and gaming may be thinner than it appears.”⁶⁷

If these elements are in games, then why are game developers not being prosecuted for producing games that have monetization methods that rely on randomness in a way so similar to gambling? In some cases, it may be due

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 202.

⁶¹ *Id.*

⁶² *Id.* at 188, 202, 206.

⁶³ BOYD ET AL., *supra* note 15, at 206.

⁶⁴ *Id.* at 188.

⁶⁵ *Id.*; *see id.* at 205.

⁶⁶ BOYD ET AL., *supra* note 15, at 203.

⁶⁷ *Id.* (footnote omitted).

to the canny implementation by developers that reduces the presence of one or two of the elements of gambling in the game,⁶⁸ while in the case of loot boxes, there are other concrete reasons that prevent gambling regulations from applying.

Regarding the element of chance, if a game requires consideration and may result in a prize, states apply different standards to determine the amount of chance that a game may have before the state would consider it to be illegal gambling.⁶⁹ Most states rely on “the ‘dominant factor’ test, under which an activity will not qualify as illegal gambling if chance is not the dominant factor in determining the outcome of the activity.”⁷⁰ For example, skill instead of chance could be “the dominant factor if the activity provides information and the possibility for players to exercise skill, the players are aware of and have the skill required to participate, and the players’ skill sufficiently determines the outcome of the activity.”⁷¹ Notably, loot boxes are characterized by their inherent reliance on chance, and chance would likely be considered the dominant factor if most states’ tests were applied against loot boxes as they generally are implemented in popular games today.

Eliminating or “minimizing the prize element” is the simplest and most effective way to reduce a game’s likelihood of being classified as an illegal game of chance.⁷² This is because a game developer can retain the aspect of the prize for the player but restrict it to manifestation within the game and not create a prize in the legal sense as it relates to gambling law.⁷³ To do so, a video game developer can ensure that any benefit, such as a virtual item, that the player receives from the gambling-like activity has no value outside the game in actual real-world currency.⁷⁴

A simple application of this method is found where a player receives an in-game item from a loot box, even as a result of consideration and chance, but the player is unable to transfer or redeem that item in any manner that would result in the player receiving real-world currency (a closed economic system).⁷⁵ This is found in games in which players have no ability to trade or sell items. If a video game developer builds mechanisms in a game for a player to exchange that “in-game item for real-world” currency, this may indicate that the in-game item has real-world value.⁷⁶ Thus, that item might be

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² BOYD ET AL., *supra* note 15, at 205.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

considered a prize if the item is attained by the player through a chance mechanic such as a loot box.⁷⁷ However, there is a middle ground that gives players more freedom in exchanging their items which does not result in game developers inadvertently violating American gambling statutes.

As described above, one option that video game developers have is to use a “closed economic system” that does not give players an opportunity to cash out their in-game items in return for real currency or other items with real value such as game merchandise.⁷⁸ However, another option is to ensure that there is no overlap between specific in-game items that a player can receive through a game of chance and specific in-game items that can be exchanged or purchased.⁷⁹

Finally, a key step that developers can take is to ensure that players are not sidestepping the intended exchange mechanisms and exchanging in-game items received through chance, such as a loot box’s proceeds, for real-world money with other players.⁸⁰ A developer should put clauses in a game’s terms of service that prohibit players from taking part in any of these transactions outside of the intended closed economy of the game that involve real-world currency.⁸¹ This would not prohibit players from exchanging items with each other using systems that are not strictly within the game itself, such as the Steam Marketplace, but it would prohibit using commercial third-parties to facilitate the exchanges involving monetary transactions. This would require assiduous policing of the gray markets developed by unofficial and unsanctioned third parties; otherwise, a court could hold that the game’s items have real-world value.⁸² Beyond the elements of prize and chance, there is one final element of gambling that video game developers should be aware of.

The element of consideration is impossible to eliminate, at least in context of loot boxes used as a monetization method, even though it may be reduced.⁸³ Consideration is so difficult to eliminate because of the very broad definition it takes on in context of gambling.⁸⁴ It may generally be thought of as simply money, but the history of the law shows that money is not the only thing a player may give up in their bargained-for exchange.⁸⁵ In the context of video games, consideration can come in many forms: the upfront price of

⁷⁷ *Id.*

⁷⁸ BOYD ET AL., *supra* note 15, at 205.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 206.

⁸⁴ BOYD ET AL., *supra* note 15, at 206.

⁸⁵ *Id.*

a game or subscription to the game; the cost of in-game items or activities via microtransactions; and the player's own investment in the game through the time, attention, and effort the player expends on the game.⁸⁶ However, a game that is objectively free in a monetary sense "is much less likely to fulfill the consideration requirement of an illegal game of chance than a game that requires an upfront purchase or regular subscription fee."⁸⁷

B. *Federal Gambling Laws*

As discussed above, while federal statutes rely on states' statutes for the definition of gambling, the federal government is still involved in the regulation of gambling. Among the federal regulations, some federal acts may have an impact on loot boxes and the video game developers who choose to implement them.⁸⁸ The 1970 Illegal Gambling Business Act "was intended to combat the use of unlawful gambling operations to fund organized crime . . . [but] no connection to organized crime is required for an activity to be categorized as an illegal gambling operation under the Act."⁸⁹

To qualify as an "illegal gambling business" under IGBA, the operation of a game or activity must only (1) violate a law concerning gambling in the state where it is operated, (2) involve five or more persons (not including bettors), and (3) remain in operation for more than 30 days OR take in at least \$2000 in any single day. IGBA violations are punishable by up to five years in prison, confiscation of all monies or other property used in the gambling operation, and fines equal to the greater of \$500,000 or twice the gain or loss associated with the gambling operation.⁹⁰

This Act could impact those who operate games with gambling elements in ways they might not realize, as "gambling laws in some states dictate that gambling activity is operated where its players reside, instead of where its operator is located."⁹¹ This means one could be subject to a federal cause of action stemming from a violation of gambling laws of a state that the game operator is not located in simply because the game has players in that state.⁹²

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 207.

⁸⁹ *Id.*

⁹⁰ BOYD ET AL., *supra* note 15, at 207.

⁹¹ *Id.*

⁹² *Id.*

The Travel Act provides for the same penalties as the IGBA, and it too relies on states' regulations and definitions for gambling.⁹³ This Act focuses on "whether tools of interstate or foreign commerce were used in the operation of an unlawful activity or the distribution of its proceeds" and "explicitly prohibits as unlawful the use of interstate commerce in connection with business enterprises involving gambling."⁹⁴ Other federal regulations such as the Wire Act and the Unlawful Internet Gambling Enforcement Act (UIGEA) could have an impact on game developers if their game contains gambling.⁹⁵

In the past, the Department of Justice interpreted the Wire Act as a prohibition on any person within the United States from using a telecommunication system, including the internet, to gamble.⁹⁶ As of 2011, the Department of Justice considers the Wire Act to only concern interstate sports betting and not all gambling in general.⁹⁷ The purpose of the UIGEA is to thwart foreign internet gambling operations by "prohibiting U.S.-based payment processors and financial institutions from administering transactions generated by internet gambling websites serving U.S. customers."⁹⁸

In general, these federal regulations are heavily reliant on "whether an activity qualifies as an illegal game of chance in the state in which it is played."⁹⁹ This means state laws are largely the determining factor in deciding whether a game of chance played within a state's borders will violate state or federal gambling laws.¹⁰⁰ Most states have a complete bar on operation of games of chance over the internet, but three states allow private companies to be involved in real money online gambling: Delaware, Nevada, and New Jersey.¹⁰¹

Users in Delaware can play "a variety of traditional casino gambling games" if they can verify they are within the state of Delaware through geolocation.¹⁰² Nevada legalized online gambling in 2001 and has issued licenses to companies to administer internet poker within Nevada's borders.¹⁰³ However, the Nevada Gaming Commission puts limitations and

⁹³ *Id.* at 207-08.

⁹⁴ *Id.*

⁹⁵ *Id.* at 208.

⁹⁶ BOYD ET AL., *supra* note 15, at 208.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 210.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² BOYD ET AL., *supra* note 15, at 211.

¹⁰³ *Id.* at 210.

requirements on companies who are licensed to run online gambling operations in Nevada.¹⁰⁴ Among these are obligations to prevent underage users from gambling and to establish the location of online players.¹⁰⁵ New Jersey's online gambling is largely limited to Atlantic City, but since 2013, players of legal age from anywhere in New Jersey can legally gamble online if the casino operating the website is in Atlantic City.¹⁰⁶

The tests to determine whether an activity qualifies as a game of chance could change at any time within a state, so it is important for game developers to be aware of how closely their game toes the line in the eyes of the law between innocent diversion and illegal gambling.¹⁰⁷ On the other hand, states may follow the example of Delaware, Nevada, and New Jersey and legalize online gambling, even if only in a small way.¹⁰⁸ Further, "regulators in at least eight other states are considering legislation that will allow them to participate in this industry."¹⁰⁹ This could lead to sanctioned interstate gambling operations "by officially acknowledging that the activity is legal in the separate states where the bettor and casino are located."¹¹⁰ The three states discussed above have already passed legislation which would allow them to enter into these types of agreements so long as they do not conflict with federal law.¹¹¹

C. *Loot Boxes*

In 2002 and later in 2018, the United States Court of Appeals for the Ninth Circuit decided two cases that illuminate how courts may deal with the issue of loot boxes as gambling.¹¹² The 2002 case, *Chaset v. Fleer/Skybox Int'l*, consolidated eight disparate cases of plaintiff-purchasers of trading-card packages that had random inclusion of limited-edition cards, which the plaintiffs alleged constituted unlawful gambling.¹¹³ The court dismissed the case because the plaintiffs did not suffer an injury when they did not receive a specific card that they wanted from the trading card packs since they did still receive value through receiving cards; this is true even if the cards were

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 210–11.

¹⁰⁷ *Id.* at 211.

¹⁰⁸ BOYD ET AL., *supra* note 15, at 211.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 212.

¹¹¹ *Id.*

¹¹² See *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018); *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083 (9th Cir. 2002).

¹¹³ *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1085–86 (9th Cir. 2002).

not the ones they personally valued and had wanted to attain.¹¹⁴ Trading cards packs are quite similar to loot boxes: within a trading card package, consumers know they will receive a random assortment of items from a fixed pool of possible items. Loot boxes operate similarly, since purchasers are guaranteed to receive an item within a certain pool of options, but they do not know what the specific item will be.

Chaset shows a court's categorization of a randomly received item as the reception of an item of value, even if that specific item is not the one the consumer desired. However, within a closed economic system, an item received from a loot box would not be considered to have real-world value since the player cannot cash out the item in exchange for real currency. Again, this begs the question whether games without closed economic systems open themselves up to gambling issues and increases the importance that game developers assiduously police the gray markets developed by unofficial third parties.

In the 2018 case, *Kater v. Churchill Downs Inc.*, the Ninth Circuit held that the defendant's virtual chips in its gambling app were goods of actual value.¹¹⁵ Thus, the court declared that the defendant's casino game was illegal gambling.¹¹⁶ In *Kater*, the defendant operated a smartphone application (commonly known as an "app"), Big Fish Casino, that functioned as a virtual casino where players had access to casino games such as blackjack and poker.¹¹⁷ The user received some free chips at the outset and could win chips, but like a brick-and-mortar casino, a player had to pay real-world money to purchase additional chips.¹¹⁸ The price of the chips ranged from \$1.99 to almost \$250.¹¹⁹

Big Fish Casino's Terms of Use claimed that the virtual chips had no monetary value and could not be exchanged for anything of tangible value, but the app did have a mechanism that allowed for transfer of chips between users.¹²⁰ The trading mechanism enabled a black market outside the game to facilitate exchanges of the chips and real-world money between an app user and a purchaser.¹²¹ The plaintiff claimed that Big Fish Casino was facilitating the black market exchange by allowing users to trade chips and even profiting from such transfers by charging a fee for every trade.¹²² Under the state of

¹¹⁴ *Id.* at 1087.

¹¹⁵ *Kater*, 886 F.3d at 785.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 786.

¹²⁰ *Id.*

¹²¹ *Kater*, 886 F.3d at 786.

¹²² *Id.*

Washington's definition of a "thing of value," the plaintiff argued that the virtual chips are a "form of credit . . . involving extension of . . . entertainment or a privilege of playing [Big Fish Casino] without charge."¹²³

This case could result in concern over the legality of loot boxes, particularly in the state of Washington. The chips in Big Fish Casino can easily be analogized with virtual items received from a loot box. However, this is only the case if there is a way to exchange those virtual items for real-world currency. Additionally, a video game developer can ensure that they assiduously police any unofficial markets that facilitate exchange of their virtual goods.

D. *Legislative and International Response*

1. American Response

Loot boxes have not been ignored outside of American courts. The Hawaii state legislature, spearheaded by Representative Chris Lee, looked at the issue in 2018.¹²⁴ The legislature considered "two sets of bills that would regulate games containing randomized in-game item purchases—commonly known as loot boxes—much like casino games, barring minors from purchase and requiring odds disclosures and public warnings."¹²⁵ Hawaii's House Bill 2686 would have prohibited retailers (including online retailers) from distributing games that include a system to purchase randomized rewards to anyone under 21 years old.¹²⁶ However, these bills were mostly dead on arrival, and none of them were enacted due to failing to meet legislative deadlines.¹²⁷

Hawaii is not the only state that has addressed loot boxes. In 2016, the Washington State Gambling Commission, the body that regulates gambling in the state of Washington per their gambling laws, warned video game company Valve, which is headquartered in Washington, about the transfer of virtual goods through its online retail outlet, Steam.¹²⁸ In response, Valve's

¹²³ *Id.* at 787.

¹²⁴ Kyle Orland, *No Video Game Loot Boxes for Buyers Under 21, Say Proposed Hawaii Bills*, ARS TECHNICA (Feb. 13, 2018, 11:09 AM), <https://arstechnica.com/gaming/2018/02/no-video-game-loot-boxes-for-buyers-under-21-says-proposed-hawaii-bills/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Michael Brestovansky, *'Loot Box' Bills Fail to Advance*, HAW. TRIB.-HERALD (Mar. 24, 2018, 12:05 AM), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/>.

¹²⁸ Colin Campbell, *Washington Gambling Commission Demands End to Valve CS:GO Skin Gambling*, POLYGON (Oct. 5, 2016, 2:14 PM), <https://www.polygon.com/2016/10/5/13176244/washington-gambling-commission-demands-end-to-valve-cs-go-skin>.

lawyer strongly asserted that the company was not violating any gambling laws.¹²⁹ Valve's lawyer claimed that the company does not facilitate gambling and all its operations are lawful under Washington law.¹³⁰ However, he conceded that third-parties are able to take advantage of their system to further gambling transactions.¹³¹ In 2018, the state of Washington was included in a "group of regulators from 15 European regulation bodies" that signed a declaration over their concern about the risks of gambling in video games.¹³² The concern centered on skin betting, loot boxes, social casino gambling, and the gambling risk to children.¹³³

2. International Response

While the United States on a state or federal level may not have made significant strides in the hindrance of loot boxes, a few countries have decided to do so.¹³⁴ Belgium, "one of the first European countries to publicly turn its attention to loot boxes following the controversy surrounding *Star Wars Battlefront II*," decided that the system of loot boxes as implemented in at least three games qualified as a game of chance.¹³⁵ As a result, the publishers could be subject to "fines and prison sentences under the country's gaming legislation."¹³⁶ The three games were *Overwatch*, *FIFA 18*, and *Counter Strike: Global Offensive*.¹³⁷ Belgium defined game of chance as when "there is a game element [where] a bet can lead to profit or loss and chance has a role in the game."¹³⁸

Similarly, the Netherlands described the loot box systems in *FIFA 18*, *Dota 2*, *PlayerUnknown's Battlegrounds*, and *Rocket League* as being illegal

¹²⁹ Colin Campbell, *Valve Fires Back at Washington State Gambling Commission over CS:GO Betting*, POLYGON (Oct. 18, 2016, 12:32 PM), <https://www.polygon.com/2016/10/18/13318326/valve-fires-back-at-washington-state-gambling-commission-over-cs-go-betting>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Kyle Orland, *15 Countries and One US State Team up to Fight Gambling in Video Games*, ARS TECHNICA (Sept. 17, 2018, 12:07 PM), <https://arstechnica.com/gaming/2018/09/multinational-regulators-join-together-to-fight-gambling-in-video-games/>.

¹³³ *Id.*

¹³⁴ Kyle Orland, *Video Game Loot Boxes Are Now Considered Criminal Gambling in Belgium*, ARS TECHNICA (Apr. 25, 2018, 11:58 AM), <https://arstechnica.com/gaming/2018/04/video-game-loot-boxes-are-now-considered-criminal-gambling-in-belgium/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

gambling activities.¹³⁹ The Netherlands Gaming authority made this determination and required the four publishers to make changes to their games.¹⁴⁰ However, other organizations, such as the US Entertainment Software Rating Board (ESRB), were not in agreement that loot boxes are gambling.¹⁴¹ This was at least in part because “players always receive in-game goods when a loot box is opened.”¹⁴²

In 2018, ESRB President, Patricia Vance, argued that, while there is an element of surprise in loot boxes, the fact that loot boxes are not required to for a player to complete a game and one cannot cash out the reward from a loot box both “cut against the gambling descriptor.”¹⁴³ However, she did not consider that items from loot boxes “can often be resold for store credit via the Steam Marketplace and through outside third-party services.”¹⁴⁴ Further, she said the ESRB has not “[found] any evidence that children specifically have been impacted by loot boxes or leading them to some sort of tendency towards gambling.”¹⁴⁵ Beyond the response of governmental and regulatory bodies, very successful video game developers have also unilaterally responded to loot box criticism due to community pushback.

E. *Video Game Publishers and Developers’ Response*

The *Call of Duty* series, a franchise that has surpassed over 300 million units sold collectively,¹⁴⁶ long relied on a loot box system.¹⁴⁷ That has changed with the newest iteration in the series *Call of Duty: Modern Warfare* (2019).¹⁴⁸ Loot boxes were a mainstay of the franchise since 2014, but when *Call of*

¹³⁹ *Id.*

¹⁴⁰ Kyle Orland, *Four Publishers Must Change In-Game Loot Boxes to Avoid Dutch Gambling Laws*, ARS TECHNICA (Apr. 20, 2018, 11:34 AM), <https://arstechnica.com/gaming/2018/04/dutch-government-rules-some-loot-boxes-count-as-illegal-gambling/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Kyle Orland, *ESRB Defends “Fun” Loot Boxes as it Starts Labeling All “In-Game Purchases” [Updated]*, ARS TECHNICA (Feb. 27, 2018, 11:01 AM), <https://arstechnica.com/gaming/2018/02/esrb-defends-fun-loot-boxes-as-it-starts-labeling-all-in-game-purchases/>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Phillip Tinner, *Only 2 Franchises Now Have Sold More Than Call of Duty*, SCREENRANT (May 5, 2019), <https://screenrant.com/call-duty-pokemon-mario-franchises-sold/>.

¹⁴⁷ Kyle Orland, *So Long, Supply Drops: Call of Duty Gets Rid of Randomized Loot Boxes*, ARS TECHNICA (Oct. 17, 2019, 4:58 PM), <https://arstechnica.com/gaming/2019/10/so-long-supply-drops-call-of-duty-gets-rid-of-randomized-loot-boxes/>.

¹⁴⁸ *Id.*

Duty: Black Ops 4 introduced a loot box system a few months after the game launched—and after numerous people had already purchased the game—many fans were very upset.¹⁴⁹ The choice to include microtransactions in the game may have been a financial success for Activision, the publisher, at the time,¹⁵⁰ but the community backlash was enough to encourage Activision to revise its approach to the series and allow players to “unlock all ‘weapons and functional attachments’ only through gameplay.”¹⁵¹ This is because many video game players opined that loot boxes foster undesirable monetization methods for selling cosmetics or simply the entrenchment of pay-to-win mechanics.¹⁵²

Other popular games such as *Rocket League*, *Fortnite*, and *Middle-Earth: Shadow of War* have also removed loot boxes of the video game developers’ own volition due to community backlash.¹⁵³ Further, major corporations Apple, Google, Sony, Microsoft, and Nintendo require the companies that release games on their services to disclose the chances of getting a given specific item from a loot box that a player has to purchase.¹⁵⁴ While companies have gotten involved in the conversation over loot boxes, their legal characterization in the United States is far from settled.

One aspect to the unsettled legal issue of loot boxes is “the lack of any sort of framework through which the United States could enforce standards upon loot boxes should they constitute gambling, as well as an unwillingness to do so in the first place.”¹⁵⁵ Further, especially in a closed economic system, the “only possible value to be gained from the games are the items contained in the loot boxes.”¹⁵⁶ There is not a legal injury attributable to the “disappointment that comes from not gaining a particular item.”¹⁵⁷ Thus, within a closed economic system, the prize element of a game of chance is not satisfied.¹⁵⁸

Not everyone agrees that a prize requires a way to cash it out¹⁵⁹ but not requiring there to be a cashing out or a prize in a more substantial sense

¹⁴⁹ *Id.*

¹⁵⁰ Wesley Yin-Poole, *Activision Trumpets Call of Duty: Black Ops 4 Microtransactions as the COD Community Declares Them the Worst Ever*, EUROGAMER (Aug. 9, 2019), <https://www.eurogamer.net/articles/2019-08-09-activision-trumpets-call-of-duty-black-ops-4-microtransactions-as-the-cod-community-declares-them-the-worst-ever>.

¹⁵¹ Orland, *supra* note 147.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Castillo, *supra* note 3, at 183.

¹⁵⁶ *Id.* at 191.

¹⁵⁷ *Id.* at 191–92.

¹⁵⁸ *Id.* at 192.

¹⁵⁹ Hong, *supra* note 17, at 66–67.

would lead to absurd results. It is not unreasonable to be concerned about protecting children against the addictive qualities of gambling.¹⁶⁰ Yet if legislatures decide to become involved they would need to weigh both the policies behind the general illegality of gambling and whether the importance of gambling being regulated is weighted on the side of monetary regulation, moral regulation, or both.

Within an open economic system where trade and exchange are facilitated by official mechanisms of the game (and not by methods such as players selling their accounts, which would violate a game's terms of service¹⁶¹) and under the Ninth Circuit's analysis in *Kater v. Churchill Downs Inc.*,¹⁶² a prize is indeed possible. Despite the perception that the common law would not declare loot boxes to be gambling due to "its slow-moving, technologically-inadequate nature,"¹⁶³ the more likely reason that loot boxes would not be considered gambling under U.S. law, even in an open economic system, is that exchanges that result in an illegal cash out would go against a game's terms of service (ToS) and end user license agreement (EULA). These agreements that a player signs are part of the contractual scheme that developers use to control the rights a player has to the virtual goods and what he or she can do with those items.¹⁶⁴ While this does lead to questions of virtual property ownership rights, as it stands, the contractual scheme reigns largely supreme.¹⁶⁵

In light of the perpetuation of video game developers' control over virtual property through the contractual scheme of ToS and EULAs, and American law not taking a strong stance against loot boxes, some would argue that the video game industry should regulate itself in light of the benefits other entertainment industries have through self-regulation: namely, less governmental intervention.¹⁶⁶ There is already the infrastructure in place for this to perpetuate as "the video game industry is composed of organizations that . . . protect First Amendment rights of game developers and ensure compliance with legal, judicial, and industry standards."¹⁶⁷ However, the effectiveness of such a scheme would likely rely on whether it is "empowered

¹⁶⁰ *Id.* at 82.

¹⁶¹ Castillo, *supra* note 3, at 190.

¹⁶² *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 787–88 (9th Cir. 2018).

¹⁶³ Castillo, *supra* note 3, at 193.

¹⁶⁴ Eng, *supra* note 5, at 255.

¹⁶⁵ *Id.*

¹⁶⁶ Kishan Mistry, Note, *P(L)aying to Win: Loot Boxes, Microtransaction Monetization, and a Proposal for Self-Regulation in the Video Game Industry*, 71 RUTGERS U.L. REV. 537, 568 (2018).

¹⁶⁷ *Id.* at 569.

to adopt guidelines that apply universally to developers, publishers, and consumers of games on all platforms.”¹⁶⁸

In any case, a complete lack of government attention to the issue is not a reasonable expectation due to the close similarity between loot boxes and gambling, which both state and federal governments have a strong hand in regulating. As demonstrated by the situation where the video game company Valve was confronted by the Washington State Gambling Commission, self-regulation does have great merit.¹⁶⁹ Valve has a contractual scheme that controls what players are allowed to do with the virtual goods they obtain within games, and the infringement of the ToS and EULA by third-party websites is what results in the illegal gambling, but the illegal gambling is not sanctioned by Valve itself.¹⁷⁰ Governmental intervention, in this case, was unnecessary because of Valve’s policy of sending cease and desist letters to gambling websites; therefore, the situation did not require the government to get involved.¹⁷¹

IV. COUNTER-STRIKE: GLOBAL OFFENSIVE

A. CS:GO’s Loot Boxes and the Steam Marketplace

Counter-Strike: Global Offensive (CS:GO) is the latest video game in the PC first-person shooter *Counter-Strike* series, which pioneered in 1999.¹⁷² Valve originally released CS:GO in 2012, and throughout the game’s lifetime there has been a high prevalence of gambling associated with the game which is facilitated through third-party sites that are not associated with the CS:GO game developer, Valve.¹⁷³ Despite CS:GO releasing early in the last decade, the game remains very popular today with an all-time peak of 1,305,714 concurrent players playing at one time (April 2020) and, in June 2020, an average of 671,647.5 players and a peak of 1,009,467 concurrent players.¹⁷⁴

As a highly popular game with a long history of controversy associated with gambling, CS:GO is the best example of an online game to discuss the application of gambling laws on loot boxes and how a game developer has

¹⁶⁸ *Id.* at 576.

¹⁶⁹ Campbell, *supra* note 129.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *About CS:GO*, VALVE, <https://blog.counter-strike.net/index.php/about/> (last visited Sept. 6, 2020).

¹⁷³ Taylor Stanton Hardenstein, Comment, “Skins” in the Game: *Counter-Strike*, Esports, and the Shady World of Online Gambling, 7 UNLV GAMING L.J. 117, 117 (2017).

¹⁷⁴ *Counter-Strike: Global Offensive*, STEAMCHARTS, <https://steamcharts.com/app/730> (last visited Sept. 6, 2020).

responded to the risk of gambling violations.¹⁷⁵ With the growth of weapon skin trading and concern over skin gambling, “Valve has made changes to stem the tide of skin-related shenanigans, [but] the kerfuffle over loot boxes themselves—the original source of those skins—has expanded to the entire industry.”¹⁷⁶ While CS:GO may be embroiled in a world of esports and skin gambling facilitated by third-party sites—an activity which is illegal or likely to be—the question still remains whether the loot box system of the game itself is also infringing upon gambling laws.¹⁷⁷

CS:GO has a very active economy for virtual items.¹⁷⁸ In general, the wagering of these virtual items that is connected with CS:GO “has received very little attention from the legal community.”¹⁷⁹ The game contains skins for the weapons that the player uses in the game and are purely for cosmetic purposes.¹⁸⁰ Skins are valuable and popular in CS:GO because they change the appearance—generally the pattern and color—of an item.¹⁸¹ They give players a sense of individuality and control, but they do not change any actual gameplay besides the appearance of weapons, and thus do not give a tactical advantage.¹⁸² Additionally, even though players obtain the items for their personal use, the skins remain the sole intellectual property of Valve, the game developer.¹⁸³ Despite their innocuous purpose, it is true that “entire marketplaces have developed” around the cosmetic items in Valve games.¹⁸⁴

To obtain a skin in the first place, there exists a variety of methods including receiving skins just for playing or purchasing a skin from another player, but skins can also be obtained through CS:GO’s version of a loot box.¹⁸⁵ Valve, who owns CS:GO, is also the owner of Steam (the video game platform that CS:GO and many other games are played and sold on) and the

¹⁷⁵ Charlie Hall, *Now You Can Peek Inside Loot Boxes Before You Open Them in CS:GO, But Only in France*, POLYGON (Oct. 1, 2019, 12:40 PM), <https://www.polygon.com/2019/10/1/20893490/cs-go-loot-box-x-ray-scanner-france>.

¹⁷⁶ *Id.*

¹⁷⁷ John Vrooman Haskell, Note, *More than Just Skin(s) in the Game: How One Digital Video Game Item Is Being Used for Unregulated Gambling Purposes Online*, 18 J. HIGH TECH. L. 125, 127 (2017).

¹⁷⁸ Hardenstein, *supra* note 173, at 121.

¹⁷⁹ *Id.* at 117–18.

¹⁸⁰ Haskell, *supra* note 177, at 126.

¹⁸¹ *Id.* at 139.

¹⁸² *Id.* at 140.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 126.

¹⁸⁵ *Id.* at 140–41.

Steam Marketplace.¹⁸⁶ Through the Steam Marketplace and trading directly to other Steam users, a player can buy, sell, and trade skins, CS:GO's in-game items.¹⁸⁷ Unlike a closed economic system, this more open economic system that involves the ability to exchange and purchase in-game items through Steam seems to leave CS:GO open to the possibility of being termed a game of chance due to the presence of the element of a prize.¹⁸⁸

B. *The Contractual Scheme*

To play CS:GO, an individual must agree to multiple standard-form contracts, including the Steam Subscriber Agreement.¹⁸⁹ The Subscriber Agreement outlines the legal implications of these exchanges on the Steam Marketplace as being the exchange of only license rights to virtual items and calls the virtual items “subscriptions.”¹⁹⁰ The Subscriber Agreement specifically requires Steam users to agree “that Subscriptions traded, sold or purchased in any Subscription Marketplace are license rights, that you have no ownership interest in such Subscriptions, and that Valve does not recognize any transfers of Subscriptions (including transfers by operation of law) that are made outside of Steam.”¹⁹¹ This Subscriber Agreement thus not only outlines the contractual scheme where players do not actually own their virtual items outright, but it forbids the exchange of items outside of Steam. Further, the Subscriber Agreement limits players' rights regarding the Steam Wallet funds that players use to pay for items within the Steam ecosystem—funds that are supplied by a player either putting money into the Steam Wallet or by receiving money from selling a virtual item such as skin.¹⁹²

Steam Wallet funds do not constitute a personal property right, have no value outside Steam and can only be used to purchase Subscriptions and related content via Steam (including but not limited to games and other applications offered through the Steam Store, or in a Steam Subscription Marketplace) and Hardware. Steam Wallet funds have no cash value and are not exchangeable for cash.¹⁹³

¹⁸⁶ Hardenstein, *supra* note 173, at 121.

¹⁸⁷ *Id.*

¹⁸⁸ BOYD ET AL., *supra* note 15, at 205.

¹⁸⁹ Eng, *supra* note 5, at 258.

¹⁹⁰ Valve, *Steam Subscriber Agreement*, STEAM, https://store.steampowered.com/subscriber_agreement (last visited Sept. 6, 2020).

¹⁹¹ *Id.*

¹⁹² *Id.*; see Hardenstein, *supra* note 173, at 121–22.

¹⁹³ Valve, *supra* note 190.

Valve further indemnifies itself through the Subscriber Agreement by limiting its liability for any loss of a player's account or individual subscriptions.¹⁹⁴ These are all methods through which Valve limits its risk of violating gambling laws.

Even though CS:GO's system is not a closed economic system, through the contractual scheme of user agreements, Valve ensures that, so far as those contracts are enforceable, anything a player does outside of Steam using the virtual items is not sanctioned by Valve. This all functions to avoid satisfying the legal element of a prize in a game of chance. One Valve attorney alluded to the issue of individuals circumventing the sanctioned methods of exchanging the virtual goods, but he claimed that Valve itself was not facilitating gambling, only third-parties were.¹⁹⁵ Valve only allows for Steam Marketplace sales to be completed using the Steam Wallet and "funds cannot be withdrawn or transferred to another Steam account or to a bank/3rd party account."¹⁹⁶

Valve further does not allow trading between players for items outside of the trade itself or with assets that are not virtual items the player can exchange through Steam.¹⁹⁷ This means that Valve does not allow players to use any form of currency to facilitate the trade, including actual money through PayPal or gift cards.¹⁹⁸ Naturally, it is possible for players to circumvent these rules by coordinating with another player, but that would be unwise as it is a violation of the Steam Subscriber Agreement, and the player also has a high risk of being scammed by the other person he or she is trading with.

C. *Minimizing the Elements of Gambling*

Beyond these contractual measures Valve has taken which affect whether CS:GO would be considered to include a game of chance through its loot box system, Valve has also combated the third-party websites that facilitate gambling outside of the actual game of CS:GO by using the items of that game

¹⁹⁴ *Id.*

¹⁹⁵ Campbell, *supra* note 129.

¹⁹⁶ *Community Market FAQ*, STEAM SUPPORT, https://support.steampowered.com/kb_article.php?ref=6088-UDXM-7214 (last visited Sept. 25, 2020).

¹⁹⁷ *Steam Trading*, STEAM SUPPORT, https://support.steampowered.com/kb_article.php?ref=6748-ETSG-5417 (last visited Sept. 25, 2020).

¹⁹⁸ *Id.*

including skins and keys.¹⁹⁹ One example occurred in 2016 when Valve issued violation notices to twenty-three gambling websites.²⁰⁰ These cease and desist measures are likely important for a video game company to help ensure that, in its self-regulation, it does not run afoul of gambling statutes by inadvertently sanctioning gambling even if the gambling is not done through the game itself. Valve could no longer afford to ignore the huge influence those gambling websites were having, despite the fact that Valve itself did not sanction their efforts. In 2015, “approximately \$2.3 billion in CS:GO skins” were used to place bets on esports matches.²⁰¹ It is no surprise then that Valve sent letters to the skin gambling websites telling them that they were in violation of Steam’s Subscriber Agreement.²⁰² Before Valve decided to act against these websites, “it had been estimated by Eilers & Krejick Gaming (“E&J”) and Narus that the skin gambling market size was projected to be worth approximately \$7.4 billion in 2016 alone.”²⁰³ While the ostensibly illegal conduct of those websites is another issue entirely, such large figures even somewhat tangentially connected with the loot boxes of CS:GO cannot go unnoticed by the public at large.

Beyond the methods that Valve has already employed, a video game developer could also rely on a method to reduce the element of chance by reducing the dominant factor of chance in the loot box system.²⁰⁴ Some solutions could be creating a skill-based mini-game that, if the player is successful in winning or getting a certain score, the degree of chance is greatly reduced in the outcome of the loot box. Even if a video game company successfully designs a loot box system in a way that does not satisfy the legal definition of a game of chance, it can still run the risk of becoming embroiled in such a controversy if it does not work to ensure that third parties do not use its game or virtual items from its game for gambling purposes. This is especially why Valve must be concerned about being sued for its connection to such gambling websites.²⁰⁵

¹⁹⁹ Allegra Frank, *Valve Gives 23 Gambling Sites 10 Days to Shut Down or Face Deletion*, POLYGON (July 20, 2016, 3:30 PM), <https://www.polygon.com/2016/7/20/12240606/valve-cease-and-desist-letter-csgo-betting-sites>.

²⁰⁰ *Id.*

²⁰¹ Haskell, *supra* note 177, at 143.

²⁰² *Id.* at 144.

²⁰³ *Id.*

²⁰⁴ BOYD ET AL., *supra* note 15, at 203.

²⁰⁵ See e.g., *McLeod v. Valve Corp.*, No. C16-1227-JCC, 2016 U.S. Dist. LEXIS 137836 (W.D. Wash. Oct. 4, 2016) (showing the risk Valve runs of being sued if it does not get third party websites shut down, even though the case was ultimately dismissed anyway).

In 2018, Valve disabled loot box opening for players living in Belgium and the Netherlands specifically due to those nations' laws about gambling.²⁰⁶ Both Netherlands and Belgium ruled that some games were in violation of their laws.²⁰⁷ Valve predictably disagreed with the two nations' decision but did not want to face the economic consequences for failing to comply with the decisions.²⁰⁸ Players in those countries can still obtain those items by buying them from other places in the Steam Marketplace, but they cannot obtain the virtual items through a loot box opening.²⁰⁹

In light of the advocacy from a select few nations who are interested in the loot box as a gambling issue, Valve has also taken measures to avoid CS:GO running afoul of France's lawmakers.²¹⁰ This instance also highlights one issue that occurs when lawmakers become involved in regulating the inner workings of video games. In 2019, CS:GO was updated with a change to the loot box system, but the change applies only to users that reside in the nation of France.²¹¹ In what "appear[ed] to be a hedge against the threat of government regulation of loot boxes in that country," Valve added an "X-ray Scanner" for French CS:GO players to be able to preview the content of every loot box they will open before they open it.²¹² However, if the player does not wish to pay to obtain the previewed item, he or she can choose to never open another loot box on that CS:GO account until he or she chooses to pay to open that loot box and obtain the undesired item.²¹³ Even if that player chooses to make another account, he or she has to pay the one-time price for a scanner again—which is conveniently the same price as the amount to open a loot box—and therefore, there is no exploit of the scanner system.²¹⁴

This move by Valve to anticipate any attempt by French lawmakers deciding to disallow players from participating in the CS:GO loot box system essentially works to subvert the concept of gambling so that players are never

²⁰⁶ Andy Chalk, *CS:GO Players in Belgium and the Netherlands Can No Longer Open Loot Cases*, PC GAMER (July 12, 2018), <https://www.pcgamer.com/csgo-players-in-belgium-and-the-netherlands-can-no-longer-open-loot-cases/>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Hall, *supra* note 175.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *Release Notes for 9/30/2019*, VALVE (Sept. 30, 2019), <https://blog.counter-strike.net/index.php/2019/09/25667/>; BananaGaming, *CS:GO's X-Ray Scanner update for France explained!*, YOUTUBE (Sept. 30, 2019), <https://www.youtube.com/watch?v=QXmgUIYIG7o>.

paying for an unknown item. This takes CS:GO's French loot box system out of the realm of the element of chance by using a simple but clever gimmick. Even if the elements of prize and consideration remain, technically this system is no longer gambling but merely a microtransaction, however odd it may seem. Whether the simplicity of this solution illuminates the ultimate irrelevancy of regulating gambling at a loot box level or shows that such regulation should be pursued in order to force video game developers to make such changes to their loot boxes in order to prevent psychological gambling addictions is another issue entirely. However, this solution indicates that video game developers are capable of reacting to the demand of public institutions without requiring the involvement of the heavy hand of legislation.

Another step CS:GO's developers took as a stopgap measure against violating gambling laws was preventing players from being able to trade the keys that are purchased to be used to open CS:GO loot boxes.²¹⁵ Valve stated that this change was done to "to curb 'worldwide fraud networks' that [were] using CS:GO keys to 'liquidate their gains.'"²¹⁶ A year earlier in 2018, "Valve made adjustments to trading, implementing a seven-day trade cooldown that put a hold on any transactions as a way to stop third-party services that 'use automated Steam accounts to mimic players and make sure of Steam's trading functionality' for fraud purposes."²¹⁷ All of these measures including the limitations of the Steam Subscriber Agreement, the trade holds, the inability to trade keys, the cease and desists against gambling sites, and the scanner in France all work together to reduce the likelihood that CS:GO qualifies as a game of chance or that its developer, Valve, is in violation of gambling laws.

V. CONCLUSION

It may be the case that it is problematic that video game developers can so closely toe the line between gaming and gambling by using real currency. Further, individuals will likely always be able and inclined to circumvent video game developers' intended mechanisms and rules to prevent their game from being used for or involved with illegal gambling. Video game developers need to be very careful that they do not flaunt the laws of gambling by making it too simple for players to sidestep intended corraling of the

²¹⁵ Nicole Carpenter, *Valve Bans CS:GO Key Trading to Stop 'Worldwide Fraud Networks'*, POLYGON (Oct. 29, 2019, 10:07 AM), <https://www.polygon.com/2019/10/29/20937992/csgo-counter-strike-valve-key-trading-banned-fraud-network>.

²¹⁶ *Id.*

²¹⁷ *Id.*

money involved with loot box proceeds into a more closed economic system. It is undeniable that loot boxes are in the spirit of gambling even if they do not meet the legal definition of gambling under American law. Without assiduous policing of the way players use virtual goods obtained through loot boxes, it could lead to government involvement that reaches even into what goes on inside a game universe. This is particularly the case considering the rapid pace of virtualization of our world and the huge prevalence of online gaming. In fairness, this may become a necessary outcome in the future, particularly considering the rights individuals may deserve to have in their virtual property and the vast amount of money that may be invested in it. For example, in 2005, Jon Jacobs invested \$100,000 in virtual property in a video game in hopes of having a large return in his investment.²¹⁸ In 2010, he sold the virtual property for \$635,000.²¹⁹ The law must be wary with this issue especially considering the fact that a game could shut down indefinitely at any time. Thus, the property scheme for virtual property that American law ultimately adopts is an important issue.

With the popularity of loot boxes and microtransactions, a more open economic system than one that is fully closed is desirable for the consumers. Being able to exchange the goods of one game for another or sell those virtual goods within an economy such as the Steam Marketplace gives consumers options and choices that would otherwise be unavailable to them. Beyond the considerations of the elements of gambling, allowing a more economic system and not regulating against it is a pro-consumer stance.

However, even if loot boxes are not considered gambling under American law, some additional regulatory oversight beyond video game developers themselves may be desirable for the day-to-day regulation of cases. For example, “[a] self-regulatory organization . . . could meaningfully implement . . . an industry-wide set of guidelines.”²²⁰ This is especially important in light of “deceptive or exploitive monetization,” which even if it is not illegal under gambling laws, should not be allowed to run fully unchecked.²²¹ For any guidelines to be effective, such a “self-regulatory organization” would need the power to both adopt and enforce guidelines that apply to video game companies universally.²²² This separate organization

²¹⁸ Oliver Chiang, *Meet the Man Who Just Made a Half Million from the Sale of Virtual Property*, FORBES (Nov. 13, 2010, 7:20 PM), <https://www.forbes.com/sites/oliverchiang/2010/11/13/meet-the-man-who-just-made-a-cool-half-million-from-the-sale-of-virtual-property/#268586a321cd>.

²¹⁹ *Id.*

²²⁰ Mistry, *supra* note 166, at 577.

²²¹ *Id.*

²²² *Id.* at 576.

would “investigate deceptive monetization techniques, publish guidelines, and enforce compliance.”²²³ This sort of effort is likely going to be required as video games become increasingly integrated into the lives of individuals in both a monetary and life-commitment sense. Further, self-regulation reduces the need for the government to become involved in regulating the video game industry.²²⁴ It would ideally reduce the burden on public resources and complications for video game developers and consumers that would result from government intervention in every case of loot box infringement of American gambling law.

With the vast amount of public engagement with and funds invested in games, issues involving video games cannot be ignored by American lawmakers and legislators. Though these issues should not be ignored, it does not necessitate that every perceived issue should be regulated. Loot boxes can so easily be perceived as a gambling game within a different type of game. However, loot boxes generally do not satisfy the elements of gambling, and regulation of loot boxes would likely lead to undesirable consequences such that video game companies are much better served by self-regulating the economies of their games or facing the consequences when things get out of hand.

Undoubtedly, if a game simulates the mechanics of a casino and has a game of chance that unabashedly gives players a prize with real-world value through a cash out of the prize, requires valuable consideration from the player, and involves pure chance as the dominant factor in determining whether there is a prize or what the prize is, such a game is likely in violation of gambling laws. Gambling is still generally illegal throughout the United States, and video game developers who wish to include loot boxes in their games and sell those games in America must constrain the mechanics of their game to not become a game of chance that satisfies the three elements of prize, consideration, and chance. The virtualization of our world is here, and the law may not always tarry so far behind.

²²³ *Id.* at 575.

²²⁴ *Id.* at 568.