

Seton Hall University

eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2021

The Cost of a Bundle of Wood: Video Games and In-App Purchases

Amory R. Blank

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Blank, Amory R., "The Cost of a Bundle of Wood: Video Games and In-App Purchases" (2021). *Law School Student Scholarship*. 1050.

https://scholarship.shu.edu/student_scholarship/1050

The Cost of a Bundle of Wood: Video Games and In-App Purchases

Amory R. Blank

Part I: Introduction

Video games play a large part in modern society and culture: they are now a dominant art form and have a notable presence in the economy.¹ *Pong*, developed in 1958, is considered the first video game.² This simple tennis simulation game triggered a wave of technological development, and by the 1980s there were over a dozen different in-home game systems on the market.³ The introduction of video games and home consoles marked a significant change for the entertainment industry. Color television was not yet widely adopted—even in American homes—and the remote control was still considered a luxury.⁴ Video game systems, which allowed a person to *talk to* and *play with* the television was an entirely new, and very popular, concept.⁵ Today, video games have been described as “the new normal,” with television and movies becoming “things of the past.”⁶ In fact, the video game industry today can match, and even surpass, the film industry in global

¹ S. Gregory BOYD, Brian Pyne & Sean F. Kane, VIDEO GAME LAW 1 (2019).

² Alan Chodos, *This Month in Physics History: October 1958: Physicist Invents First Video Game*, AMERICAN PHYSICAL SOCIETY APS NEWS (Oct. 2008) <https://www.aps.org/publications/apsnews/200810/physicshistory.cfm> (last visited Oct. 1, 2019).

³ BOYD, *supra* note 1, at 211.

⁴ BOYD, *supra* note 1, at 2.

⁵ BOYD, *supra* note 1, at 2.

⁶ Daniel Raphael, *The Impact of Video Games on This Generation*, HUFF POST, (NOV. 7, 2013), https://www.huffpost.com/entry/the-impact-of-video-games_b_4227617 (last accessed Nov. 8, 2019).

revenue.⁷ In a day of sales the game *Call of Duty: Black Ops 2* exceeded *The Avengers* movie box office record by over \$300 million.⁸

The content of video games has matured drastically over the decades, as has their form.⁹ Whereas consoles were originally bought with games already installed, modern games can be freely downloaded from the internet and consumers no longer need to physically enter a store to purchase a game.¹⁰ One of the most common gaming systems today is portable smartphones, which allow for most games to be downloaded instantly and often for free.¹¹ To adapt to this new business model, the industry developed new monetization methods. In-app purchases, particularly common in mobile games, became a popular way to earn money off of otherwise free games.¹² For years, consumers accepted these in-app purchases silently, until the metaphorical bubble burst with the release of the console game, *Star Wars: Battlefront 2*, and its use of loot boxes.¹³

A loot box is an opportunity a player to win potentially rare and valuable game items.¹⁴ These opportunities can come in multiple forms: for example, it can be a virtual box or other container with mystery items inside, or it can be a game of chance such as a random prize wheel. What item

⁷ In 2019, the global game market is predicted to reach \$152.1 billion. *Newzoo Global Games Market Report 2019: Light Version*, NEWZOO <https://newzoo.com/insights/trend-reports/newzoo-global-games-market-report-2019-light-version/> (last accessed Nov. 8, 2019). In comparison, 2018 box office revenue reached \$41 billion. *Global Box Office Revenue Hits Record \$41B in 2018, Fueled by Diverse U.S. Audiences* <https://www.hollywoodreporter.com/news/global-box-office-revenue-hits-record-41b-2018-fueled-by-diverse-us-audiences-1196010> (last accessed Nov. 8, 2019), and the film industry as a whole is predicted to reach \$103 billion in 2019. *Global Movie Production & Distribution Industry – Market Research Report*, IBIS WORLD, Sept. 2019, <https://www.ibisworld.com/global/market-research-reports/global-movie-production-distribution-industry/> (last accessed Nov. 8, 2019).

⁸ RON GARD & ELIZABETH TOWNSEND GARD, VIDEO GAMES AND THE LAW 3 (2017).

⁹ E.g. *c.f.* BOYD, *supra* note 1, at 19 (2019).

¹⁰ Symposium, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, FED. TRADE COMM'N, segment 1, 6 (2019).

¹¹ *Id.*

¹² William Lim, *Blood in the Water: A History of Microtransactions in the Video Game Industry*, MEDIUM (Aug. 15, 2018), <https://medium.com/@williamlim3/blood-in-the-water-a-history-of-microtransactions-in-the-video-game-industry-e5bf9e3de4da> (last visited Nov. 11, 2019).

¹³ In addition to its purchase price, the game included several integral characters and items that could only be accessed through hundreds of hours of tedious gameplay, or by paying an extra fee. *Id.*

¹⁴ GAMING COMMISSION, BELGIAN FPS JUSTICE, 5 (2018).

the player receives is based entirely upon luck.¹⁵ Loot boxes can be earned through game play, however, more often they are purchased through microtransactions which are in-game purchases made with real money.¹⁶ Because they are entirely chance-based, regulators worry that loot boxes are a gateway that exposes children to gambling at an early age.¹⁷ However, as lawmakers focus on loot boxes as an underage gambling concern, many fail to recognize the concerns posed by microtransactions as a whole. Loot boxes are one type of microtransaction, and microtransactions come in many forms and in games of many different types. They are not inherently bad and are often used as a *bona fide* method to fund games while still increasing accessibility through a lower sticker price. However, there are many ways that they can be poorly integrated into gameplay and used in predatory ways. Predatory microtransactions work with the mechanics of the game itself to deceive players and induce purchases. This is also called commercialization of a game—the microtransactions become “so pervasive or manipulative that they might disrupt gameplay.”¹⁸

The law has not adapted to the new technologies at the same rate as the video game industry—there is a legal disconnect between these new monetization methods and industry accountability. This Comment will analyze how microtransactions can become predatory and how players can be deceived as to the nature of those purchases. Part II of this Comment will briefly explain players’ use of in-app purchases, the revenue generated, and the different types of microtransactions. Part III will show the ways in which psychological methods can be used to induce purchases and how players can be misled as to the nature and value of these purchases. It will highlight the addictive nature of video games, and how developers can use this characteristic to integrate predatory

¹⁵ Anthony J. Dreyer et al., *Is my Loot Box Legal?*, VIDEO GAMING/E-GAMING LAW UPDATE (SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP.), August/September, at 1.

¹⁶ Symposium, *supra* note 10.

¹⁷ Symposium, *supra* note 10.

¹⁸ Symposium, *supra* note 10 at segment 2, 36.

microtransactions. It will also establish why loot boxes are of particular concern to regulators in light of these addictive tendencies. Finally, Part III will show that most gambling statutes are unable to effectively regulate loot boxes, despite their similarities, because most virtual items are not recognized by the law as having value. It will proceed to show, however, that the use and effect of microtransactions creates an illusion for consumers that virtual items do have value. Finally, Part IV will establish that industry standards and regulatory oversight are necessary to protect consumers. The law must adapt to recognize virtual items, not just loot boxes but in all contexts. This part will briefly examine the approaches taken by other countries to address different types of microtransactions. It will conclude with recommendations for potential regulatory and industry standards that can be implemented in the United States to protect consumers and the video game industry.

Part II: Background

A. Guild Members: Who Uses Microtransactions

Estimates place money spent on in-game virtual items in the billions of dollars globally each year.¹⁹ As a starting point, it is important to recognize that not only children play video games or engage in microtransactions. Roughly three-quarters of children between ages five and fifteen play online video games.²⁰ However, all told, one-half of Americans today play videogames—both children and adults.²¹ Most of the gaming population is composed of adults and the average gamer

¹⁹ BOYD, *supra* note 1, at 165.

²⁰ *Immersive and Addictive Technologies: Hearing Before Parliament Digital, Culture, Media and Sport Committee*, Parliament 2017, 1 (2019) (Statement of Dr. Joe Twist OBE, Chief Executive Officer, Ukie).

²¹ Symposium, *supra* note 10.

is thirty-three years old.²² Approximately less than a quarter of the gaming population is under the age of eighteen.²³

Concern amongst regulators centers upon children because they are particularly vulnerable to predatory monetization techniques.²⁴ They are more likely to make rash, illogical decisions in the heat of the moment—or in the middle of exciting gameplay.²⁵ Additionally, children do not always understand the value of money: they may have difficulty distinguishing between real and fake money and they may not understand the compounding nature of multiple \$0.99 transactions.²⁶ However, adults also engage in microtransactions and can also fall into the trap of spending more than they intend or realize. In a survey of adult players, 90% reported that they had opened a loot box, more than half of which were paid for.²⁷ One adult reported going \$15,800 into debt.²⁸ Another spent over £200 in the game *Runescape*—in one day—and accumulated a total debt of £50,000 from playing the game.²⁹

B. The Marketplace: Microtransaction Revenue and Types

The video game industry continues to grow exponentially: in the coming years industry revenue is expected to increase anywhere between 7% and 10% annually.³⁰ Microtransactions make up a significant portion of this revenue.³¹ Microtransactions became popular with the

²² Symposium, *supra* note 10.

²³ Symposium, *supra* note 10.

²⁴ Symposium, *supra* note 10.

²⁵ *Immersive and Addictive Technologies*, *supra* note [2019](#).

²⁶ Symposium, *supra* note 10.

²⁷ Erik Rolfsen, *Loot Boxes Look a lot Like Gambling, UBC Study Finds*, UBC NEWS (May 1, 2019), <https://news.ubc.ca/2019/05/01/lure-of-the-loot-box-looks-a-lot-like-gambling/> (last visited Nov. 2, 2019).

²⁸ Kyle Langvardt, *Article: Regulating Habit Forming-Technology*, 88 FORDHAM L. REV. 129, 146 (2019).

²⁹ *Immersive and Addictive Technologies* *supra* note [2019](#).

³⁰ BOYD, *supra* note 1, at 137; Julia Beyers, *Are Microtransactions Safe in iGaming?*, PENTEST MAG. (June 25, 2019), <https://pentestmag.com/are-microtransactions-safe-in-igaming/> (last visited Oct. 29, 2019).

³¹ In 2018 in Europe 43% of video game revenue came from microtransactions. *Immersive and Addictive Technologies* *supra* note [2019](#).

introduction of smartphones and the popularity of the iPhone App Store and Android Google Play Store. On mobile phones, small games can be downloaded quickly and directly.³² These games are relatively cheap, often only \$0.99 to \$4.99 and others, called “freemium” or “free-to-play” games, have no purchase cost at all.³³ Mobile games are very popular, both amongst traditional gamers and those who never previously played video games.³⁴ These mobile games make up most of the game market today; a 2017 report had global revenue from mobile games alone at \$34.8 billion.³⁵ Even games that are free to download can generate an enormous amount of revenue.³⁶ For example, within two weeks of the release of the free mobile game *Pokémon:Go* Nintendo’s value increased twenty-three billion dollars.³⁷

Some of these free games are funded by advertisements: they may provide game rewards for players who choose to watch additional ads, or a paid ad-free version for those who do not want any advertisements.³⁸ Others are condensed versions of the game to which players can gain additional levels, or even full access, for a fee.³⁹ And many are only free to download and include microtransactions that, although optional, can range from having a minimal impact on gameplay to a significant effect on a player’s success and overall game experience.⁴⁰

Microtransactions also exist in paid-for games and in console games and they make up a large portion of revenue in these games as well.⁴¹ In 2017, computer game sales were predicted to

³² BOYD, *supra* note 1, at 19.

³³ Symposium, *supra* note 10.

³⁴ Symposium, *supra* note 10.

³⁵ Andrew V. Moshirnia, *Article: Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 83 (2018).

³⁶ *Id.*, see also Langvardt, *supra* note [2827](#), at 138.

³⁷ GARD, *supra* note 8, at 1-2.

³⁸ Symposium, *supra* note 10.

³⁹ Symposium, *supra* note 10.

⁴⁰ Symposium, *supra* note 10.

⁴¹ *E.g.*, Symposium, *supra* note 10.

generate \$8 billion dollars.⁴² Microtransactions in these computer games were estimated at \$22 billion.⁴³ Microtransactions are highly profitable and a “key monetization method” for any game.⁴⁴ they allow the industry to continue to provide free games, and keep the price of paid games low.⁴⁵ Loot boxes are a particularly lucrative type of microtransaction: of the entire microtransactions market, loot boxes alone are set to generate \$50 billion by 2022.⁴⁶

The label “micro” in the term microtransaction is somewhat of a misnomer. Although many microtransactions, particularly those in mobile games, are only a few dollars and can be as low as \$0.99, some can reach as high as \$99.99.⁴⁷ Microtransactions have many forms, and often overlap, but they can be separated into four categories: loot boxes, explained above, time restrictions, virtual items, and game currency.⁴⁸ A time restriction is when a player must wait a specified amount of time prior to proceeding with an aspect of the game—alternatively, the player can make a microtransaction to bypass the wait.⁴⁹ Other time restrictions might limit how long a player can use a specific feature or virtual item.⁵⁰ Virtual items themselves range in their abilities: some give players a notable advantage, such as a stronger weapon for battle, or *MapleStory*’s pets which

⁴² Samuel Horti, *Revenue from PC Free-to-Play Microtransactions has Doubled Since 2012*, PCGAMER (Nov. 26, 2017) <https://www.pcgamer.com/revenue-from-pc-free-to-play-microtransactions-has-doubled-since-2012/> (last visited 11.6.19).

⁴³ *Id.*

⁴⁴ Beyers, *supra* note [3029](#).

⁴⁵ Beyers, *supra* note [3029](#).

⁴⁶ Steven Blickensderfer & Nicholas A. Brown, *U.S. Regulation of Loot Boxes Heats Up with Announcement of New Legislation*, THE NAT’L LAW REV. (May 9, 2019), <https://www.natlawreview.com/>.

⁴⁷ Symposium, *supra* note 10.

⁴⁸ Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO U. WORLDWIDE PSYCHOL., Feb. 25, 2016, <https://www.tuw.edu/psychology/psychology-behind-microtransactions/> (last visited Sept. 20, 2019); Kaylyn Hohn, *The Controversy with ‘Loot Boxes’: How Children Become Addicted to Microtransactions*, GAMERVV (Dec. 4, 2018), <https://gamervv.com/2018/12/04/the-controversy-with-loot-boxes-how-children-become-addicted-to-microtransactions/> (last visited Oct. 27, 2019).

⁴⁹ *E.g.*, Symposium, *supra* note 10.

⁵⁰ *E.g.*, Symposium, *supra* note 10.

accomplish tiresome but necessary tasks for the player.⁵¹ Other items serve no purpose and are purely aesthetic. For example, a special dance move for a character in the game *Fortnite*, or “skins” which change the appearance of weapons in *Counter-Strike Global-Offensive*.⁵² And sometime these items, useful or aesthetic, can only be obtained by purchasing and opening loot boxes—the item cannot be purchased directly. Most of these in-game purchases are made using a special game currency.⁵³ The player purchases the in-game currency with real money, then uses that game currency to buy the other virtual items, time boosters, and loot boxes.⁵⁴ The currency usually has no value outside the game and cannot be transferred back into real-world money.⁵⁵

Although some microtransactions are more important to gameplay than others, as a general rule most microtransactions are not strictly necessary for a player to do well in the game.⁵⁶ Usually an item that is absolutely necessary to play the game can also be obtained for free, through normal gameplay, although it may be very difficult.⁵⁷ Similarly, time restrictions will pass, although the player who does not make a microtransaction may need to wait anywhere from a couple minutes to a couple days before continuing gameplay.⁵⁸ In this way, a player is not required to make microtransaction in order to succeed, however microtransactions can significantly impact a player’s experience in a game.⁵⁹ Some players support microtransactions, stating that they

⁵¹ The pets collect the loot of defeated enemies automatically, so that the player does not have to repeatedly click or swipe to do it manually, saving players a significant amount of time. Some have stated, however, that pets are essentially necessary in the higher levels of the game. Calum Marsh, *The End of Ownership* PAC. STANDARD (SEP. 9, 2018), <https://psmag.com/magazine/the-end-of-ownership> (last visited Nov. 10, 2019).

⁵² John T. Holden, *Article: Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41, 89 (2018).

⁵³ GAMING COMMISSION *supra* note 14 at 89.

⁵⁴ Symposium, *supra* note 10.

⁵⁵ Symposium, *supra* note 10.

⁵⁶ See BOYD *supra* note 1, at 167.

⁵⁷ Symposium, *supra* note 10.

⁵⁸ Symposium, *supra* note 10.

⁵⁹ *E.g.*, Symposium, *supra* note 10.

⁵⁹ *E.g.*, Symposium, *supra* note 10. Games can also employ price discrimination techniques. Lawmakers have been cautioned that game developers could “[use] knowledge of a person’s in-game experience to encourage spending, without the player’s prior knowledge.” *E.g.* Parliament 2017, *supra* note 20 at 105.

distinguish serious players from those who will simply pay their way to the end.⁶⁰ Other players however, including some serious long term players, have become frustrated with the increasing prevalence of microtransactions in video games and how they are used.⁶¹

Part III: Analysis

Strictly necessary or not, some microtransactions are incorporated into the game in ways that make them *appear* necessary and as if, when purchased with real money, they have real value. The law affords these items no legal value, however, and it provides no protection for consumers from deceptive microtransactions. Best practices standards and regulatory oversight is necessary if video game developers are to continue using microtransactions to fund games.

Video games contain many features that are similar to addictive activities. Developers can use microtransactions in ways that take advantage of these similarities and other aspects of human psychology.⁶² Microtransactions can be integrated into gameplay, and encouraged through the design of the game, in ways that give players the impression that in order to do well in the game, they must make microtransactions.⁶³ Loot boxes and other microtransactions are often a key means of progression in free games, leading to “situations where individuals feel compelled to buy loot boxes in order to do better within the game.”⁶⁴ When virtual video game items become purchasable, particularly in virtual world games which mimic many real world features, players

⁶⁰ Symposium, *supra* note 10.

⁶¹ E.g., Kishan Mistry, *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, 542 (2018)

⁶² Duverge, *supra* note 47.

⁶³ The game can match new players against those who have more skills and purchases, or purchased a special item that the player is interested in. It can then also reward a player who makes a purchase with a more favorable match. Players are especially frustrated with “pay-to-win” games where it felt as if microtransactions were “needed for every aspect of the game.” Moshirnia, *supra* note 3534, at 90; *see also* Parliament 2017, *supra*, note 20 at 104-05 (“game companies use data to shape the in-game experience includ[ing] online multiplayer ‘matchmaking.’”).

⁶⁴ Michael J. MacPhee, *A New Form of Addiction: A Practical Regulatory Approach Towards Randomized Reward Systems in Video Games to Protect Consumers from Gambling-Like Practices*, 59 WASHBURN L.J. 137, 158 (2018).

begin to assign real value to those items and believe that they are purchasing something with real transferable value. When a game begins to take advantage of addictive features, to deceive players as to the necessity and role of microtransactions, or to encourage players to assign real value to virtual items, the microtransactions risk becoming predatory. This is why industry standards and regulation is necessary to give legal recognition to virtual items and monitor how microtransactions are used in video games within acceptable industry standards.

A. Magic Spells: Video Games and Addiction

Consumers today spend an abundance of hours on video games.⁶⁵ In May, 2019, the World Health Organization listed for the first time “gaming disorder” as a behavioral addiction in its International Classification of Diseases.⁶⁶ Characterizations of the disorder include an increase in the priority that a player gives to playing the game, an impaired control over gaming, and continuation or escalation of gameplay despite negative consequences.⁶⁷ These indicators and consequences all closely mirror those of traditional addictions.⁶⁸ Many lawmakers and others have voiced their concerns regarding these similarities.⁶⁹ Senator Hawley of Missouri stated that “video

⁶⁵ *Immersive and Addictive Technologies* *supra* note 2049 (“Among young people, 12-to-15-year-olds spend an estimated 13 hours 48 minutes per week playing video games”).

⁶⁶ 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, 195 (2019); Anya Kamenetz, *Is ‘Gaming Disorder’ an Illness? WHO Says Yes, Adding it to its List of Diseases*, NPR (May 28, 2019), <https://www.npr.org/2019/05/28/727585904/is-gaming-disorder-an-illness-the-who-says-yes-adding-it-to-its-list-of-diseases>; *see also*, Symposium, *supra* note 10 (noting that the United States has not made a similar classification, but it has listed internet gaming disorder a condition for future study).

⁶⁷ *Immersive and Addictive Technologies* *supra* note 2049.

⁶⁸ Edwin Hong, *Article: Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 61, 64 (2019).

⁶⁹ Hawaii State Legislator Chris Lee described them as being “explicitly designed to prey upon and exploit human psychology.” Chris Lee (ChrisLee808), REDDIT, https://www.reddit.com/r/gaming/comments/7elin7/the_state_of_hawaii_announces_action_to_address/dq62w5m/ (last visited Nov 8, 2019).

games prey on user addiction . . . extracting profits from fostering compulsive habits.”⁷⁰ For example, the game *Fortnite*, which as of 2018 had over 250 million players,⁷¹ was described as “created to addict” and was compared to heroin and cocaine.⁷² In June, 2019, a class action was filed in federal court in the Northern District of California by parents of underage players asserting that games like *Fortnite* “are highly addictive, designed deliberately so, and tend to compel children playing them to make purchases.”⁷³ Another was filed in Canada in October, 2019, stating that the game was created to be “the most addictive game possible.”⁷⁴

Although legal complaints may exaggerate, there are many similarities between video games and casinos. Both environments are filled with constant noise and activity.⁷⁵ Furthermore, the game, just like a casino, can give players constant encouragement to continue playing by providing new opportunities whenever it seems like the player may take a break.⁷⁶ It is also very easy for both the gambler and the gamer to lose track of time: casinos block out natural light, while video games aim to keep the player focused on the screen where there is no indication of the real time.⁷⁷ Furthermore, the use of virtual currency to make purchases within the game, particularly to purchase loot boxes, is similar to the use of casino chips for betting. Both the casino chips and the virtual currency remove the real cost of the bet, or of the microtransaction.

⁷⁰ Tony Romm & Craig Timberg, *Video Game ‘Loot Boxes’ Would be Outlawed in Many Games Under Forthcoming Federal Bill*, THE WASH. POST (May 8, 2019) <https://www.washingtonpost.com/technology/>.

⁷¹ Anna Nicoulaoui, *Fame and ‘Fortnite’ – Inside the Global Gaming Phenomenon*, FIN TIMES, (Aug. 2, 2019), <https://www.ft.com/content/> (noting that this would make it the fifth largest country in the world).

⁷² Edward C. Baig, *Epic Games Sued for Not Warning Parents ‘Fortnite’ is allegedly as Addictive as Cocaine*, USA TODAY, (Oct. 7, 2019) <https://www.usatoday.com/story/tech/talkingtech/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *E.g. cf* Thandi Fletcher, *Casino Lights and Sounds Encourage Risky Decision-Making*, UBC NEWS SCIENCE HEALTH & TECHNOLOGY, Oct. 29, 2018 <https://news.ubc.ca/>.

⁷⁶ *Cf.* Langvardt, *supra* note 28.

⁷⁷ *Cf.* Kamenetz, *supra* note 63.

The video game industry denies that video game addiction is real or a health concern, referring to the American Psychiatric Association which has not found video games to be addicting.⁷⁸ Furthermore, industry leaders insist that addiction is a result of individual characteristics, and that the industry cannot be held responsible for players who develop an overreliance on gaming.⁷⁹ One Electronic Arts representative, before the British House of Commons, noted that video game publishers owe no legal duty of care to consumers.⁸⁰ Whether or not there is a legal duty of care, however, the industry has strong incentives to encourage player devotion to games.⁸¹ Although the majority of gamers never make a microtransactions—some data shows that less than 6% of those who play a free game ever make a purchase—game publishers are like any other product developer and want to attract as many customers, or players, as possible.⁸² Those players who do use microtransactions, the heavy spenders, are called the “whales.”⁸³ However, even non-whales may engage in some microtransactions, which may still comprise some significant amount of revenue.⁸⁴ It is therefore important to developers that they attract as many overall players as possible, even those players who do not initially seem to be whales.⁸⁵ If a game can attract a player, and keep that player invested in the game, then the player is more likely to become emotionally invested in the game.⁸⁶ Players who are invested emotionally in a game are more

⁷⁸ Emily Chang, *Fortnite Addiction is Forcing Kids into Video-Game Rehab*, BLOOMBERG TECHNOLOGY (Mar. 30, 2018) <https://www.bloomberg.com/news/videos/2018-11-30/fortnite-addiction-is-forcing-kids-into-video-game-rehab-video>

⁷⁹ Langvardt *supra* note 28, at 146

⁸⁰ Matthew Gault, *EA Says Loot Boxes are Just ‘Surprise Mechanics,’* VICE, (June 20, 2019) <https://www.vice.com/>.

⁸¹ Langvardt *supra* note 28, at 147

⁸² Duverge, *supra* note [4845](#).

⁸³ Approximately 1.9% of gamers make up 90% of the revenue from microtransactions. Langvardt, *supra* note 28 at 140.

⁸⁴ Symposium, *supra* note 10.

⁸⁵ *Cf.* Langvardt, *supra* note 28, at 141.

⁸⁶ Torulf Jernström, *Let’s go Whaling: A Guide to Monetisation Through In-App Purchases* POCKETGAMER.BIZ (Sept. 2, 2016, 10:00 AM), <https://www.pocketgamer.biz/comment-and-opinion/63871/monetisation-lets-go-whaling/> (last visited Oct. 13, 2019).

likely to spend money in that game, and some research suggests that heavy spenders will actually take the longest to start spending.⁸⁷ “Hook, Habit, and Hobby” is the term in the gaming industry for generating long-term, devoted players who are more likely to spend money and become the “whales.”⁸⁸ The industry does have an incentive to generate devotion, even addiction, amongst video game players: the more overall players devoted to a game, the more potential whales the game can create.

Video games want to attract and keep as many players as possible. And there are many ways that the game can take advantage of its unique features to increase its addictiveness. Modern games are malleable: the game developer can constantly add to and update the game with new features or special events.⁸⁹ This encourages players to play the game more often and to stay with a particular game for longer, because there is always new and interesting material.⁹⁰ Furthermore, mobile games in particular have constant access to their players and can send regular notifications and solicitations for the player to login and play. A player may receive an item or game currency as an incentive for logging in regularly.⁹¹ This repeated call for players to login, and reward when they do so, increases addictive behavior with respect to the game.⁹²

B. Beasts: Predatory Monetization

As microtransactions have become more commonplace in games of all types, their use and integration into gameplay has become increasingly exploitative and predatory. Games count on

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Langvardt *supra* note 28, at 167.

⁹⁰ Langvardt *supra* note 28, at 167.

⁹¹ Langvardt *supra* note 28, at 167.

⁹² Langvardt *supra* note 28, at 167.

the devotion of their players, and more devoted players means more microtransactions. Not all games and microtransactions are predatory, but they can become so when the game abuses player psychology and marketing techniques.⁹³ Indications of predatory monetization occur when the game begins to exploit player devotion, disguising the microtransactions or withholding overall cost “until players are already financially and psychologically committed.”⁹⁴ There are many ways in which this can occur such as, “limited disclosure of the product; intrusive and unavoidable solicitations; and systems that manipulate reward outcomes to reinforce purchasing behaviors over skillful or strategic play. . . . [including] exploit[ing] inequalities in information between purchaser and provider.”⁹⁵ Through these predatory methods, the game can then deceive players into believing that the microtransactions are more necessary than they truly are.

Video games are a unique product because they are very closely integrated with technology and the internet, creating a dynamic product that can be easily changed at the developer’s will.⁹⁶ The manipulability of video games and the disparity of information between game creator and player creates an environment ripe for predatory microtransactions. For example, some games provide players with an initial cache of the game currency and items, similar to a trial phase of a new product.⁹⁷ This allows the player to become accustomed to the game without having to make an initial payment.⁹⁸ Unlike a traditional product however, the game can change the environment and dynamics surrounding the purchase.⁹⁹ New goals and challenges require significantly more game currency or items, and microtransactions are advertised as the best method to obtain these

⁹³ Langvardt, *supra* note 28, at 141.

⁹⁴ Daniel L. King & Paul H. Delfabbro, *Predatory Monetization Schemes in Video Games (e.g. ‘Loot Boxes’) and Internet Gaming Disorder*, 113, 11 SOC’Y FOR THE STUDY OF ADDICTION 1967, 1968

⁹⁵ *Id.*

⁹⁶ Symposium, *supra* note 10.

⁹⁷ Langvardt *supra* note 28, at 139.

⁹⁸ Langvardt *supra* note 28, at 139.

⁹⁹ Langvardt *supra* note 28, at 139.

resources.¹⁰⁰ It may take hours or days of rigorous gameplay, called grinding, to earn necessary items otherwise.¹⁰¹ Some believe that developers purposely design poor systems so that players will simply become frustrated with tedious and unenjoyable grinding and will simply pay to advance.¹⁰² One player spent \$500 to skip content that he did not find enjoyable and that would have taken hundreds of hours to play through otherwise.¹⁰³ Game publishers want to create an experience that wears players down enough to spend money, but not does not frustrate them so much that that they give up on the game altogether.¹⁰⁴ Instead of encouraging progress based upon the skill of the player, the game encourages progress through the microtransactions.

Another traditional marketing tool is the use of sales and special discounts on larger purchases. Games, however, can ensure that players only see the more expensive items first.¹⁰⁵ When the player is later shown the cheaper option, he or she is more likely to make a purchase because it appears to be a bargain in comparison.¹⁰⁶ The game can also track the funds a player has available and offer different prices for different players.¹⁰⁷ Similarly, a game can see from a player's habits when he or she is more likely to make a microtransaction, or what the player is more likely to purchase.¹⁰⁸ The game can then present that type of microtransaction to that player more often than it presents others.¹⁰⁹ Games accumulate a significant amount of data about their players, and there are many ways in which this data can be used to make microtransactions predatory.

¹⁰⁰ Langvardt *supra* note 28, at 139.

¹⁰¹ After the release of *Star Wars: Battlefront 2* the gaming community discovered that earning all necessary items through gameplay rather than purchasing them would require 4,528 hours of play, the equivalent of two-and-a-half years of a full-time job. Lim, *supra* note 16.

¹⁰² Prateek Agarwal, *Economics of Microtransactions in Video Games* INTELLIGENT ECONOMIST (Apr. 10, 2019) <https://www.intelligenteconomist.com/economics-of-microtransactions/> (last visited Oct. 7, 2019).

¹⁰³ *Immersive and Addictive Technologies supra* note 19.

¹⁰⁴ Prateek, *supra* note 99; *see also* Langvardt *supra* note 28, at 140

¹⁰⁵ Jernström, *supra* note 83.

¹⁰⁶ Jernström, *supra* note 83.

¹⁰⁷ King, *supra* note 91, at 1968.

¹⁰⁸ *Cf.* King, *supra* note 91, at 1968.

¹⁰⁹ *Cf.* King, *supra* note 91, at 1968.

A player may also be offered an item at specific, emotionally charged moments in the game, such as when a character is about to die or on the last turn of a puzzle.¹¹⁰ This last minute offer, when the item is most needed, increases the chance that the player will purchase in the moment when he or she is caught up in the game.¹¹¹ The game can even pit less-skilled players, who have not purchased an item, against those who have—suggesting to the player that the item is necessary for success.¹¹² A player who does buy the item may then be given an easier match, which reinforces that the purchase was worthwhile and even necessary.¹¹³ A patent was filed for this type of player matching system in 2017 by the game publisher, Activision.¹¹⁴ Although it is unclear how actively the technology is being employed, and not all games necessarily use player data in these ways.¹¹⁵ However, the field is ripe with opportunities for games to manipulate and use this information to create predatory microtransactions.

Games can also make use of player's own lack of knowledge to make microtransactions predatory. Influencers and other social-media personalities serve as the video game version of celebrity product promoters. These promoters are popular gamers who play the game on platforms such as YouTube and Twitch, modeling gameplay and features for other gamers. Some influencers are asked by game producers to engage in microtransactions while modeling the game, and may be reimbursed if they do. Publishers may also ask them to open specific loot boxes and will give

¹¹⁰ Jernström, *supra* note 83.

¹¹¹ Jernström, *supra* note 83.

¹¹² Symposium, *supra* note 10; *see also* Moshirnia *supra* note 34 at 89-91.

¹¹³ Andrew V. Moshirnia, *Article: Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 90 (2018).

¹¹⁴ Heather Alexandra, *Activision Patents Matchmaking That Encourages Players to Buy Microtransactions*, KOTAKU (Oct. 17, 2017), <https://kotaku.com>. (A spokesperson of Activision stated that the patent was only “exploratory” work done by an “R&D team working independently from [the] game studios,” and that the technology had not been used in any games.). *But see*, Parliament 2017, *supra*, note 20 at 104-05.

¹¹⁵ *Id.* (A spokesperson of Activision stated that the patent was only “exploratory” work done by an “R&D team working independently from [the] game studios,” and that the technology had not been used in any games.). *But see*, Parliament 2017, *supra*, note 20 at 104-05.

the influencer better odds than the average player.¹¹⁶ Viewers, who see the influencer receive valuable prizes from the loot box, may be led to believe that their own odds of winning similar prizes are higher than they truly are.

The social aspect of video games can also be exploited to introduce predatory microtransactions.¹¹⁷ For example, the game may inform players when one of them gets a rare item and others will want it as well. If the item was won in a loot box, the other players may believe that they have a good chance of winning it themselves. Adolescents in particular want to show off and can be more easily encouraged to make purely aesthetic microtransactions when they see other players with new items.¹¹⁸ Additionally, players who participate in guilds, groups of players working together, may feel compelled to buy items because they do not want to disappoint their friends and fellow members.¹¹⁹

The use of virtual currencies as a medium for other microtransactions disguises from players how much they spend, which further increases a player's vulnerability to predatory microtransactions. Developers assert that in-game currencies make the game more realistic and authentic for the player.¹²⁰ Some games do use a currency that is historically or geographically relevant to the game, but many more use generic currencies such as gold or crystals, and others have arbitrary 'currencies' like "a boatload of doughnuts, [or] a can of stars."¹²¹ Regardless of the form the currency takes, the effect is that the true cost of the purchase is removed from the microtransaction and players are more likely to forget that they are spending real money, especially

¹¹⁶ Symposium, *supra* note 10.

¹¹⁷ Symposium, *supra* note 10.

¹¹⁸ Jernström, *supra* note 83.

¹¹⁹ *Immersive and Addictive Technologies* *supra* note 19

¹²⁰ Symposium, *supra* note 10.

¹²¹ See *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 55569 (W.D. Wash. Apr. 26, 2016); CHANG, *supra* note 73, at 217-20; BOYD, *supra* note 1, at 175.

in the heat of the moment.¹²² The value of the fake currency is further confused by the fact that it is usually bought in odd amounts, and there is rarely a uniform correspondence between the amount of virtual currency received and real money used to purchase it.¹²³ Players often lose track of the total amount of money spent within the game.¹²⁴ Game systems also often store players' credit card information, further facilitating quick and thoughtless purchases and making it harder for players to keep track of the total amount of money spent.¹²⁵ Games do not always provide mechanisms to help even diligent players keep track of transactions – players may not know the total until they check their bank statement.¹²⁶

Games are designed to pull players in and captivate them so as to create a devoted customer base. However, these techniques can border on addictive and some games take advantage of these addictive tendencies.¹²⁷ This is when games and microtransactions risk becoming predatory. The design of the game may emphasize progression through these microtransactions rather than through skill.¹²⁸ Using the information learned from players, the system can also target interactions that are most likely to generate microtransactions from a given player.¹²⁹ These are all examples of predatory monetization schemes and they exist in both console and mobile games. In order to protect players from these deceptive microtransactions, some regulatory oversight is necessary.

C. Boss Level: Loot Boxes

¹²² Duverge, *supra* note 13; GAMING COMMISSION *supra* note 14 at n. 32.

¹²³ Compl. at 73, R.A. v. Epic Games Inc., Case 2:19-cv-1488 (C.D. Cal. Feb. 28, 2019).

¹²⁴ Duverge, *supra* note 13; Touro; GAMING COMMISSION *supra* note 14 at fn. 32.

¹²⁵ MacPhee, *supra* note 6463, at 140.

¹²⁶ Compl. at 18, Johnny Doe v. Epic Games Inc., Case 4:19cv3629 (N.D. Cal. June 21, 2019).

¹²⁷ *See generally*, Langvardt, *supra* note 31.

¹²⁸ Langvardt *supra* note 28, at 140 (calling them “design practices that draw the user into compulsive behavior.”).

¹²⁹ King, *supra* note 91, at 1968.

Loot boxes are particularly concerning because they contain many of the same features as gambling games. This increases the addictive parallels of video games and casinos, and makes the loot boxes particularly exploitable. Players enjoy loot boxes because of the unknown reward, but it is this very randomness that encourages multiple attempts and purchases.¹³⁰ Researchers have repeatedly linked loot boxes to problem gambling and show a connection between those who purchase loot boxes and those who develop gambling problems.¹³¹ This is true of both children and adults.¹³²

The process of opening a loot box is meant to be thrilling and exciting, with flashing lights and exploding animations, just like pulling the lever on a slot machine. This heightens the tension to make the experience more exciting, and research suggests that these ostentatious displays encourage the risky decision-making that is the hallmark of problem gambling.¹³³ It also encourages repeated attempts, or repeated loot box purchases. The pomp and circumstance combined with the uncertainty of the reward triggers an increase in dopamine production, the same hormone response that occurs when gambling.¹³⁴ Gamers who play with loot boxes experience the same emotional ups and downs as gamblers: an initial rush when the bet is made, or the box is being opened, followed by feelings of regret, shame and depression when the reward falls short.¹³⁵ This prompts a desire to keep trying, time after time, because a good reward must be just around the corner.¹³⁶ Some loot boxes show “near-miss” animations with the image slowing down and

¹³⁰ Langvardt, *supra* note 28, at 144

¹³¹ Symposium, *supra* note 10.

¹³² Symposium, *supra* note 10.

¹³³ Thandi Fletcher, *Casino Lights and Sounds Encourage Risky Decision-Making*, UBC NEWS SCIENCE HEALTH & TECHNOLOGY, Oct. 29, 2018 <https://news.ubc.ca/>.

¹³⁴ Prateek, *supra* note 9; 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, 193 (2019).

¹³⁵ Moshirnia, *supra* note 110 at 88.

¹³⁶ Moshirnia, *supra* note 110 at 87.

almost stopping on a particularly valuable item—similar to a slot machine—and the player feels that because they were so close that a good reward must be coming.¹³⁷

The video game industry does not want loot boxes classified as gambling because then those games that follow the (voluntary) rating standards would have to put a mature label on these games.¹³⁸ This would drastically reduce the customer base of many games.¹³⁹ Video game developers and publishers defend loot boxes on the basis that they are not gambling mechanisms but rather “surprise mechanics” like baseball trading cards and that “people enjoy surprises . . . [i]t’s been a part of toys for years.”¹⁴⁰ There are notable differences, however. Although collectors may binge on trading card packs, the purchasing process is very different from placing a bet or buying a loot box. Trading cards take more time and thought because, traditionally, one must go and physically purchase trading card packs, in person.¹⁴¹ Often, they go with the intention of only purchasing a set amount, which will be opened at a later time when they return home. There is significantly more friction involved in the process of buying trading card packs whereas with loot boxes, like with casino gambling, “[t]he entire setup. . . the entire visual of it, the entire sensory load of it, is rapid and is immediate.”¹⁴² To purchase a loot box a player does not have to spend the time to intentionally and purposefully go somewhere. It can all be done instantaneously from home and, if the player is disappointed, more can be instantly purchased.¹⁴³ Players are known to

¹³⁷ Moshirnia, *supra* note 110 at 87.

¹³⁸ Castillo, *supra* note 129, at 198.

¹³⁹ Castillo, *supra* note 129, at 198.

¹⁴⁰ Matthew Gault, *EA Says Loot Boxes are Just ‘Surprise Mechanics’*, VICE (June 20, 2019), <https://www.vice.com/>

¹⁴¹ Symposium, *supra* note 10.

¹⁴² Jason M. Bailey, [A Video Game ‘Loot Box’ Offers Coveted Rewards, but is it Gambling?](https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html), N.Y. Times, Apr. 24, 2018, <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html> (quoting State Senator Kevin Ranker).

¹⁴³ Symposium, *supra* note 10.

purchase and open multiple loot boxes in a short period of time—just like problem gamblers will pull a slot-machine lever time after time—all in the hope of receiving a specific reward.¹⁴⁴

Loot boxes are already concerning due to their similarities to gambling. However, they can also be made increasingly dangerous through the same predatory techniques as other microtransactions. For example, unlike traditional gambling games, the odds of receiving certain prizes from loot boxes can be changed at any time by developers.¹⁴⁵ A player always knows the odds of a game of roulette, the rules and mechanics of poker and blackjack never change. This is not true of loot boxes, however. Loot boxes introduce into video games, which are traditionally skill based, an element of chance that can change the entire dynamic of the game.

D. The Worth of a Bundle of Wood: The Value of Virtual Items

Gambling statutes vary from state to state, but the same general elements appear in most: consideration from the player, a potential prize, and an outcome controlled by chance.¹⁴⁶ Initially, regulators' concerns regarding microtransactions were focused solely upon loot boxes and their similarities to gambling. In most cases with loot boxes at issue, state gambling laws have been poorly equipped to handle the virtual nature of the games and items. Chance is interpreted differently from state to state, with some requiring that chance have more of a role than other states require.¹⁴⁷ However, regardless of the amount of chance necessary for a given state's gambling regulations to apply, it is clear that loot box outcomes are based upon chance: players do not have control over whether or what they will win in a loot box.¹⁴⁸ The prize and risk elements pose more

¹⁴⁴ Symposium, *supra* note 10.

¹⁴⁵ *E.g.*, Symposium, *supra* note 10.

¹⁴⁶ 38 Am. Jur. 2d Gambling §2

¹⁴⁷ MacPhee, *supra* note 6463, at 160.

¹⁴⁸ Castillo, *supra* note 129, at 187

difficult questions, however.¹⁴⁹ Both require an element of value: the consideration must be something of value risked by the player, and the potential prize must have value.¹⁵⁰ It is unclear under most laws and case precedent whether the virtual coins bet, and the virtual items won, have value as defined by these statutes.

This question of value and virtual items, however, is not limited to the virtual items in loot boxes. It is an important question for all virtual items and microtransactions. The threshold question is whether virtual items and virtual currency can amount to things of value. One argument is that they do not, because they often cannot be exchanged for real-world money.¹⁵¹ However, there are many other arguments for why virtual items may have value. Given the function of these items and the ways in which microtransactions are encouraged by developers, many players believe that virtual items do have some real value.¹⁵²

Some have argued that traditional theories of property support real value within game items and currency. Gamers often devote a significant amount of time and energy to obtaining game wealth and to developing characters.¹⁵³ The time and effort spent by players to building up game assets matches a Lockean property theory: a person who invests labor into something increases its value and thereby has a property interest in it.¹⁵⁴ A personhood theory may similarly suggest that game assets have value due to the “strong identificatory relationships” that players can form with the virtual items they create and with the avatars they develop to represent themselves.¹⁵⁵

¹⁴⁹ Castillo, *supra* note 129, at 189

¹⁵⁰ 38 Am. Jur. 2d Gambling §2

¹⁵¹ MacPhee, *supra* note 6463, at 160.

¹⁵² Marsh, *supra* note 50 (Noting that it “seems reasonable that you, the person who has exchanged money for the [virtual] sword, should have *some* legal claim to it.”).

¹⁵³ Alfred Fritzsche V, *Trespass to (Virtual) Chattels: Assessing Online Gamers’ Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity*, 8 U.C. DAVIS BUS. L.J. 235 at 16 (2007).

¹⁵⁴ *Id* at 17-19.

¹⁵⁵ *Id* at 22.

Property theories and the value of virtual items was first tested in 2002, by a company named BlackSnow Interactive. The company hired workers to enter another company's virtual game world and earn game currency and items there.¹⁵⁶ These assets were then sold to other players in exchange for real money.¹⁵⁷ The game's Terms of Service prohibited these sales, and BlackSnow's accounts were terminated. In response, BlackSnow sued, claiming a property interest in the accounts' assets, despite the Terms of Service.¹⁵⁸ BlackSnow argued a Lockean theory,¹⁵⁹ claiming that the sale of the virtual items was actually a sale of the time invested into those items, time that belonged to the players.¹⁶⁰ Essentially, BlackSnow said that the time investment was work that added to the value of those accounts and virtual items, thereby giving BlackSnow a property interest in them. Unfortunately, this legal question was never answered, as the case was dropped when unrelated charges were brought against BlackSnow by the Federal Trade Commission.¹⁶¹

A similar question was raised in 2016, after a player in the game *FIFA Soccer* was charged under federal law for conspiracy to defraud the game developer by fraudulently obtaining the game's virtual currency, *FIFA Coins*.¹⁶² A jury trial resulted in a conviction, but the defendant moved for a new trial, alleging in part that, based upon the game's own Terms of Service, the coins

¹⁵⁶ Julian Dibbell, *Black Snow Interactive and the World's First Virtual Sweat Shop*, JULIAN DIBBELL (DOT COM) (Jan. 2003), <http://www.juliandibbell.com/texts/blacksnow.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ They likely could not have argued a personhood theory because the players were simply minimum wage workers out of Tijuana and, therefore, presumably had little personal attachment to the accounts that they used or to the virtual assets of those accounts.

¹⁶⁰ JACK BALKIN & BETH SIMONE NOVECK *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 138 (NYU Press 2006) (quoting BlackSnow Interactive's representative) ("What it comes down to is, does a ... player have rights to his time, or does Mythic own that player's time? It is unfair of Mythic to stop those who wish to sell their items, currency or even their own accounts, which were created with their own time.").

¹⁶¹ BlackSnow essentially skipped town when the FTC discovered that it had put non-existent computers up for auction on eBay. Fritzsche, *supra* note 145, at 14.

¹⁶² Holden, *supra* note 50 at 71.

were not currency and had no monetary value. Unfortunately, the defendant passed away before the court could rule on his motion and the question of the value of game assets remained unanswered once again.¹⁶³

The question continues to haunt the courts, especially as loot boxes and other microtransactions have become increasingly commonplace. Several cases have addressed the question of loot box value and of the value of virtual currency in online gambling games. Although these cases have been brought under statutes in a number of different states, the crux of the decisions rests upon the question of value; specifically, whether the virtual items used as bets and winnings have a value sufficient to classify them as consideration and prize as defined by the relevant gambling law.

*Kater v. Churchill Downs, Inc*¹⁶⁴ was the first such case and it involved a casino video game wherein players bet and won virtual chips. When a participant ran out of chips, he or she could either wait for the chips to replenish over time or purchase more with real money.¹⁶⁵ A player sued the developer under Washington gambling statutes that prohibit all online or virtual gambling.¹⁶⁶ To answer if the game met the statute's definition of gambling, the court had to first determine if the chips that were used as prizes, had value.¹⁶⁷ The district court initially found that, because the chips could not be traded with other players and could not be redeemed for real money, they had no value.¹⁶⁸ Plaintiff's alternative claim, that the chips had value because they extended gameplay, was similarly rejected. The court held that because "there is never a possibility of

¹⁶³ Holden, *supra* note 50 at 71.

¹⁶⁴ 886 F.3d 784, 787 (9th Cir. 2018)

¹⁶⁵ *Kater v. Churchill Downs, Inc.*, 2015 U.S. Dist. Lexis 175049, at 2 (W.D. Wash. Nov 19, 2015), *rev'd*, 886 F.3d 784, 787 (9th Cir. 2018).

¹⁶⁶ Wash. Rev. Code § 9.46.240

¹⁶⁷ Washington defines gambling as: "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome." Wash. Rev. Code § 9.46.0237

¹⁶⁸ *Kater*, 2015 U.S. Dist. Lexis 175049, at 7.

receiving real cash or merchandise” from extended gameplay that the prize — increased game time given by the chips — has no real value.¹⁶⁹ However, the appellate court reversed this, holding that the extension of game time *can* be a prize of value, even if there is no ultimate option to win money.¹⁷⁰ Therefore, the appellate court held that the chips could have value as a prize.

Kater focused on the prize element of the gambling statute.¹⁷¹ Two subsequent cases, also brought under the Washington statute and both in 2018, addressed the consideration element and whether virtual gambling chips are valuable consideration.¹⁷² The games were similar to the casino-style game at issue in *Kater*, but the court in *Kater* did not address the question of consideration.¹⁷³ On a motion to dismiss, the defendant game developers in these later cases tried to distinguish by establishing that the chips had no value as consideration because players continued to receive free chips over time.¹⁷⁴ The court found that the chips met the definition of valuable consideration because players would have to pay—with real money—for more chips if they wanted to immediately continue playing after depleting their virtual chips.¹⁷⁵ The existence of alternative free options and waiting to receive more chips did not make them any less a thing of value.¹⁷⁶ Under Washington law, virtual games using virtual currency constitute gambling because the currency has value as both a prize and as consideration.

The question of value of virtual items is not limited to casino games, nor to Washington statutes. Other states have also addressed the value of virtual items and currency, with varying

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 787 (9th Cir. 2018).

¹⁷¹ *See generally, id.*

¹⁷² *Wilson v. PTT, LLC*, 351 F. Supp. 3d 1325, 1330 (W.D. Wash. 2018); *Fife v. Sci. Games Corp.*, 2018 U.S. Dist. LEXIS 212908 at 2 (W.D. Wash. Dec. 18, 2018).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Wilson* 351 F. Supp. 3d at 1338; *Fife* 2018 U.S. Dist. LEXIS 212908 at 11-12.

¹⁷⁶ *Id.*

outcomes. For example, in the popular game *Candy Crush* players have a limited number of lives which, once used, replenish over time.¹⁷⁷ Players who do not want to wait for the lives to regenerate can purchase more, or they can use “donated lives,” which are received in exchange for marketing the game to Facebook friends.¹⁷⁸ A class action suit arose under Illinois law after the donated lives of several players were deleted.¹⁷⁹ Denying the defendant’s motion to dismiss, the court held that it was plausible that the lives were items of value.¹⁸⁰ Even though the plaintiff received the lives for free, they were alternatively purchasable through microtransactions and, therefore, potentially had value.¹⁸¹ That the lives at issue had been donated instead of purchased was inconsequential.¹⁸² The parties later settled and the case was never tried on the merits. However, the case was brought in federal court, which required the plaintiff to establish the potentiality of value under the higher plausibility standard.¹⁸³ This outcome suggests that game developers, by making an item purchasable through microtransactions, give virtual items legal value.¹⁸⁴

This possibility is also present in a case that involved loot boxes and the gambling statutes of California, Michigan, and Illinois. In the game, players use real money to purchase virtual gems, which in turn are used to purchase loot boxes containing “Heroes” and “Talents” of varying rarity.¹⁸⁵ The court found that the prize element was not met because the Heroes and Talents could

¹⁷⁷ *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 993 (N.D. Ill. 2017).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (the court further noted that the defendant placed value on the marketing that the plaintiff did of the game because instead of giving money as consideration for the lives, the plaintiff marketed it to other players).

¹⁸² *Id.* at 997.

¹⁸³ *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 997 (N.D. Ill. 2017).

¹⁸⁴ *Id.*

¹⁸⁵ *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 876 (N.D. Ill. 2016).

not be exchanged or redeemed for real money.¹⁸⁶ The rewards could not be monetized and they could not provide players with additional game time, therefore they are valueless prizes.¹⁸⁷ However, the court noted that there was a possibility that the consideration element was met.¹⁸⁸ This is because the virtual gems, used to purchase the loot boxes, were themselves bought with real money.¹⁸⁹ These virtual items, purchased through microtransactions, retained the value of that purchase.¹⁹⁰

Different courts have interpreted whether a prize does or does not have value differently. However, this case law on virtual items and on value suggests that even if a virtual item does not have value *as a prize* per that state's statutory definition of prize, virtual items still have some intrinsic value. They are, after all purchased, even if game currency is used as the medium, with real currency at some point. In summary, game items are given value when they are made purchasable through microtransactions. Furthermore, anything that flows from that microtransaction also has value: loot boxes and other virtual items are no less valuable because they are obtained in exchange for game currency rather than purchased directly through microtransactions.¹⁹¹ Finally, even if there is a way to obtain a game item for free, if purchasing it is also an option then there may be value.¹⁹² On the other hand, under some statutes, even if the virtual items or currency have value in this sense, they may not be viewed them as a prize unless they provides more game time, or can be transferred into something else. Under some

¹⁸⁶ *Id* at 880, 882, 884 (“like California, Illinois does not provide for liability where games of chance offer rewards with no value . . . Heroes and Talents cannot be monetized.”).

¹⁸⁷ *Id* at 882 (noting that the California statute, like Washington includes in its definition of value extended game time. It is unclear if the other state statutes did as well).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id* at 876.

¹⁹¹ *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 876 (N.D. Ill. 2016) (“simply adding a step whereby players must purchase digital currency and use that currency to participate does not nullify the pecuniary loss”).

¹⁹² *E.g. Wilson* 351 F. Supp. 3d at 1338; *Liston*, 254 F. Supp. 3d at 997.

gambling regulations virtual prizes that simply add to gameplay are valueless, regardless of how they are earned or paid for. The lack of uniformity and case law between states makes it difficult to predict how a virtual item might be viewed in the future. However, it is clear that many traditional gambling statutes are not equipped to address loot boxes and virtual items: items won in a loot box do not always constitute a prize, even when they have value and the other legal elements of a gamble exist.

There is a growing recognition that virtual items may have value both legally and socially, even if that value is not one that meets the requirements for gambling regulation.¹⁹³ Items are given value when the game makes them purchasable with real money. On the other hand though, most games include Terms of Service (“ToS”) and End User License Agreements (“EULA”) that explicitly disclaim any real-world value of virtual items and currency.¹⁹⁴ Games also, in these terms, retain the right to delete any game items or currency at any time.¹⁹⁵ Some advocates argue that these ToS agreements are contracts of adhesion and therefore that courts may have grounds to find them void if the terms are unconscionable, or if “high pressure tactics” are used.¹⁹⁶ There is potential that disclaimer of value is unconscionable when a game actively suggests that its items have value and uses predatory monetization methods to further encourage microtransactions.¹⁹⁷ However, even if that is true, it is unlikely that courts would find these ToS void.¹⁹⁸ Players have

¹⁹³ London & Country Mortgages performed an analysis of the cost of virtual properties in a number of video games, even calculating how much the properties would cost if converted into various real-world currencies. *An In-Depth Analysis of the Video Game Housing Market*, LONDON & COUNTRY (last visited Jan. 24, 2020).

¹⁹⁴ BOYD, *supra* note 1, at 168. *But see* Fritzsche, *supra* note 162, at 15 (examples of games that do grant players property interest in game assets); Byron M. Huang, *Walking the Thirteenth Floor: The Taxation of Economies*, 17 YALE J.L. & TECH 224 (2015) (examples of games wherein federal income tax upon virtual assets may be appropriate).

¹⁹⁵ BOYD, *supra* note 1.

¹⁹⁶ Saunders, *supra* note 163, at 209.

¹⁹⁷ Saunders, *supra* note 163, at 209.

¹⁹⁸ Saunders, *supra* note 163, at 210

the choice to go to games with more favorable terms—in fact consumers are not required to play video games at all. It is purely a leisure activity.

Courts have even bolstered the validity of ToS agreements that limit the value of virtual items. *Dupee v. Playtika Santa Monica*¹⁹⁹ involved an online casino game and an allegation by the plaintiff that the game constituted unlawful gambling game under Ohio law.²⁰⁰ The game used virtual coins that could be purchased with real money, but never redeemed.²⁰¹ The case was dismissed on procedural grounds, however, the court recognized that the ToS might have the power to limit the value of the items within the game.²⁰² In *Phillips v. Double Down Interactive LLC*,²⁰³ the court again recognized the power of ToS to limit the real world value of virtual items. This case was also dismissed on other grounds, but it was noted that the terms of the game prohibited selling game accounts, and thereby the chips within them, for real money.²⁰⁴

However, despite ToS and EULA restrictions upon value, through the predatory use of microtransactions, developers implicitly encourage players to assign value to these virtual items. This is done first by introducing the microtransactions into the game model, and furthered by reinforcing their purchase with predatory techniques, especially those that suggest the microtransactions are integral to game success. There are many other ways, however, that developers can continue to reinforce the misconception amongst players that the items purchased have value. For example, leading up to the release of Bethesda's *Fallout 76*, players could pre-

¹⁹⁹ 2016 U.S. Dist. LEXIS 25026 (Mar. 1, 2016).

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.* at 3-4.

²⁰² Holden, *supra* note 50, at 86 (“[A]n additional district court observ[ed] that the terms of service appear to have the power to limit the value of virtual coins.”).

²⁰³ *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016).

²⁰⁴ *Id.* at 735.

order several physical items reminiscent of the game.²⁰⁵ One item, a duffel bag, was delayed in production and overbudgeted—the bag received did not, according to players, match the advertised description.²⁰⁶ To appease the community, the game publisher gave players in-game currency instead of a return and refund option.²⁰⁷ The game essentially equated a refund using real currency, with a refund using game currency. This is indicative of how the industry wants players to view game currency as something with a value that is interchangeable with real world value. If players view the items that they purchase within the game as having value, then they are more likely to engage in microtransactions.

There have also been several claims that the existence of secondary markets should lend credence to the fact that game accounts and assets have value, despite ToS and EULAs.²⁰⁸ These black markets seem to give virtual items marketable value, despite the game terms, because they allow players to sell and trade the items and currency for money.²⁰⁹ It was the existence of these secondary markets on which BlackSnow built its business model and at one time eBay had a section devoted to these sales.²¹⁰ Players have made up to hundreds of thousands of dollars through such sales.²¹¹

Some games provide these secondary markets themselves, while others prohibit the activity and state in their ToS that accounts can be terminated if it is discovered that that a player sold an account or its assets.²¹² Even in games that restrict the activity however, secondary “black

²⁰⁵ Internet Historian, *The Fall of 76* YOUTUBE (May 4, 2019), <https://www.youtube.com/watch?v=kjyeCdd-dl8&fbclid=IwAR1i8WcB7tp7ge76e3cb8SA6GCd5DHyniXGcFdIJsV1nCfiuVtONPDmIY90>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Fritzsche, *supra* note 145.

²⁰⁹ MacPhee, *supra* note 6463, at 161; *see also* Parliament 2017, *supra* note 20, at 90 (“It is also widely acknowledged that the virtual contents of loot boxes can be ‘cashed out’ for real-world monetary value.”).

²¹⁰ Saunders, *supra* note 163, at 229

²¹¹ F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 Calif. L. Rev. 1, 39 (2004).

²¹² BOYD, *supra* note 1, at 167.

markets” remain commonplace.²¹³ Some gamers believe that moderators do not enforce ToS and EULA restrictions upon real-world sales evenly amongst players, knowingly allowing certain players to make use of the black markets without consequences.²¹⁴ Others suggest that players are implicitly encouraged, by the game set-up and by the integration of microtransactions, to engage in these secondary market sales despite ToS and EULA restrictions.²¹⁵ Regardless, developers are aware that these markets exist and do not always act to have them shut down, or players who make use of them punished.²¹⁶ This is indicative of another way in which predatory monetization in video games can take advantage of players and their misconceptions as to the value of the virtual assets they obtain. A game can passively allow such a market to exist, allowing and implicitly encouraging players to assign a real value to the virtual items and currency. The developer itself, however, remains protected through the disclaimer in its ToS and EULA.

Sanctioned or not, the existence of secondary markets also makes it difficult for inexperienced gamers to differentiate between games that allow resale and those that do not. The microtransactions look the same in both types of games—the difference does not emerge until down the line when one player can resell items and another cannot. Most players do not recognize the different restrictions that the game terms may impose upon them. When developers introduce microtransactions, and emphasize them so strongly, they only add to this confusion.²¹⁷ Microtransactions suggest to players that their game currency and items do, in fact, have real world value. Players give value to these items and there is a significant market for them.²¹⁸ A market

²¹³ Fritzsche, *supra* note 145.

²¹⁴ Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI & TECH. L. 173, 182 (2005); *see also*, Parliament 2017, *supra* note 20, at 91 (“We are concerned that there are large video game companies who are failing to proactively enforce their own platform’s terms of use to prevent in-game items being readily exchanged for cash.”) (referencing a report from the Gambling Commission of the UK).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Fritzsche, *supra* note 145, at 45; SHU article page 16

that allows consumers to buy items creates the presumption amongst consumers that there will be a market to sell those items as well. Games capitalize on this misconception: through microtransactions the game encourages players to believe there is value in their items. The game can then integrate predatory monetization techniques to heighten the likelihood that players will engage in more microtransactions of all types, not just loot boxes.

The class actions started by parents of *Fortnite* players demonstrates this dichotomy and the frustrations of players. Allegations in the complaints include claims of psychological manipulation of players and unfair trade practices under California consumer protection laws.²¹⁹ One complaint alleges that developers “perfected a predatory scheme” and that this scheme “entices players to start playing [the] game, with the goal of luring those players to make in-game microtransactions” including loot box purchases.²²⁰ Another complaint includes similar allegations of psychological manipulations to encourage purchases and states that the game “is known for its addictive tendencies.”²²¹ These accusations have been repeated throughout the gaming community, and by other public figures.²²² The complaints themselves further highlight the nature of game currency and loot boxes, and that players who make microtransactions have no way to see how much has been spent in total, or opportunity to reverse the purchase.²²³

Loot boxes alone are not the problem, however. Rather it is this addictive nature which allows developers to begin using predatory monetization schemes in the integration of all microtransactions. Players that fall prey to such schemes believe that they are purchasing items with value that may be redeemable or transferable later, only to find out that it is worthless. The

²¹⁹ *E.g.*, Compl. at 1-2, R.A. v. Epic Games Inc., Case 2:19-cv-1488 (C.D. Cal. Feb. 28, 2019).

²²⁰ *Id.*

²²¹ Compl. at 11, Johnny Doe v. Epic Games Inc., Case 4:19cv3629 (N.D. Cal. June 21, 2019).

²²² *E.g.* Lee *supra* note 68; *see also* Anna Nicolaou, *Fame and ‘Fortnite’ – Inside the Global Gaming Phenomenon*, FIN. TIMES (Aug. 2, 2019), <https://www.ft.com/content/f2103e72-b38f-11e9-bec9-fdcab53d6959> (last visited Nov. 8, 2019) (noting that Prince Harry described the video game *Fortnite* as “created to addict.”).

²²³ *See generally id.*

lack of legal recognition and value for virtual items has “created a drastic disconnect between what people are actually receiving in exchange for their money and time online, and what they think they’re getting.”²²⁴ Many games are designed to encourage players to spend inordinate amounts of money on valueless virtual items.

Part IV. Conclusion and Regulatory Proposals

Even prior to the boom of microtransactions, economists studied the implications of games that are built around virtual worlds.²²⁵ The vast markets and economies of those games act similarly to real-world markets, with the same fluctuations depending on the estimated worth and availability of in game goods and currency.²²⁶ Legal theorists postulated, as games increasingly commodified their worlds with these real-world market mechanisms, that real-world law would become increasingly relevant to game activity.²²⁷ Microtransactions are a slightly different form of commodification, however, the theory that in-game markets could have real-world implications still seems to apply. As Professor Balkin noted, “[o]nce virtual worlds contain items of value easily convertible into real-world property, states will become increasingly interested in regulating what goes on in them.”²²⁸

It is clear that most current gambling legislation cannot be applied to loot boxes. However, the purpose of gambling legislation is to protect consumers. It forces the industry to take precautions and to actively watch for and try to address signs of problem gambling amongst

²²⁴ Marsh, *supra* note 20.

²²⁵ Saunders, *supra* note 163, at 192

²²⁶ Saunders, *supra* note 163, at 192

²²⁷ Jankowich, *supra* note 220, at 179 (developers may “have invited suits and regulation and other manifestations of real-world law by emphasizing commerce within virtual worlds”).

²²⁸ See generally Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds* 90 VA. L. REV. 2043, 2060 (2004).

consumers. Leaders in the gambling industry also head movements to encourage responsible gambling.²²⁹ Loot boxes, in fact all microtransactions, pose the same dangers as gambling. Players can become addicted to games, especially to loot boxes, and engage in uncontrolled spending. Despite the similar dangers, many video game industry leaders are reluctant to accept that they may have a responsibility to players whose spending falls outside of normal habits.²³⁰ In order to protect the integrity of the industry and its consumers, gold standards should be put in place with a regulatory body responsible for monitoring deceptive and unsafe microtransaction integration into video games.

Some changes are being made. Platforms such as the iPhone App-store, the Android Google Play store, and Amazon now require “in-game purchases” labels for games that include microtransactions.²³¹ The industry has also promised to begin publishing the statistical likelihood of different loot box outcomes.²³² These are two important steps. But they are not sufficient. Parents of players, and adult players themselves, do not always understand the different types of microtransactions or their dangers. Furthermore, the industry still has the ability to change at any point the odds of a player receiving different items in a loot box. As discussed in previous sections, games can also use technology to target or match players in ways that encourage microtransactions by those players. Given the predatory ways in which microtransactions can be used, the industry cannot be left to self-regulate any longer.

²²⁹ See e.g., Press Release, GVC Holdings, GVC Goldings Launches First US Foundation for Responsible Gambling, Corporate Compliance and Integrity (Oct. 8, 2019) (<https://www.prnewswire.com/news-releases/gvc-holdings-launches-first-us-foundation-for-responsible-gambling-corporate-compliance-and-integrity-300934069.html>).

²³⁰ Parliament 2017, *supra* note 20, at 66.

²³¹ Symposium, *supra* note 10.

²³² Symposium, *supra* note 10.

Some countries across the world have already enacted regulation, although for the most part they have only addressed loot boxes. For example, some countries have declared loot boxes to be a violation of gambling laws, even revoking in some cases previous statements that loot boxes do not classify as gambling, and have banned them from all games marketed to children under the age of eighteen.²³³ Others simply require disclosure of loot box probabilities.²³⁴ China, has considered also limiting the number of loot boxes that can be opened by a player each day.²³⁵ Australia, on the other hand, merely recommends that games with loot boxes have warning labels.²³⁶

The most interesting development comes from the United Kingdom who initially found that loot boxes did not qualify as gambling.²³⁷ However, in September 2019, a new parliamentary report was released concerning potential harms that can result from technologies like videogames. This report is particularly notable because it is not limited to loot boxes and gambling, but rather considers gaming disorder as a whole and potential concerns that it may introduce.²³⁸ It is possible now that the UK will re-evaluate its stance towards loot boxes and to other microtransactions altogether.

²³³ Tom Gercken, *Video Game Loot Boxes Declared Illegal Under Belgium Gambling Laws*, BBC NEWS (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306>.

Andy Chalk, *Netherlands Gaming Authority Cracks Down on Loot Boxes in Some Games*, PCGAMER (Apr. 19, 2018), <https://www.pcgamer.com/netherlands-gaming-authority-cracks-down-on-loot-boxes-in-some-games/>.

²³⁴ T.J. Hafer, *The Legal Status of Loot Boxes Around the World, and What's Next in the Debate*, PCGAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next/>.

²³⁵ Inside Gaming Daily, *EA Slammed for "Lack of Honesty and Transparency,"* YOUTUBE (Sept. 13, 2019), <https://www.youtube.com/watch?v=kUIVWBOLAf0&fbclid=IwAR1tFMT-Iw7SM8dX6TOg96dhniLZL7Joact4olaXWdKYRXXRGImf5olCA2gA>; Sean Farlow, *China is Looking to Limit Loot Boxes and Have Exact Drop Rates*, GAZETTE REVIEW (Aug. 16, 2019), <https://gazettereview.com/2019/08/china-looking-limit-loot-boxes-exact-drop-rates/>.

²³⁶ Hafer, *Supra* note 219.

²³⁷ Zoe Kleinman, *Fifa Packs and Loot Boxes 'Not Gambling' in UK*, BBC NEWS (July 22, 2019), <https://www.bbc.com/news/technology-49074003>.

²³⁸ DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, PARLIAMENT (2019).

The United States should follow the UK and take a leading position by addressing microtransactions as a whole, rather than loot boxes alone. Microtransactions are not all bad. When implemented properly they allow for game prices to stay low or non-existent, which increases accessibility to games across demographics. However, they can also be implemented in dangerous ways. Self-regulation alone by the industry will not suffice, however, industry leaders cannot be ignored either. Video game developers should work with government regulators to establish a system of gold standards and oversight that allows microtransactions to remain in games in safe ways.

On the governmental level, several state legislatures have had bills proposed, but none have yet passed.²³⁹ Some of these proposals were limited to loot boxes, while others addressed microtransactions as a whole.²⁴⁰ There have also been federal proposals. In May, 2019, Republican Senator Josh Hawley introduced a bi-partisan bill that would not only prohibit loot boxes from games played by minors, it would also bar games geared towards adolescents from offering any type of microtransaction that provide in-game advantages.²⁴¹ The bill is not expected to succeed, but federal oversight is the best way to proceed. Video games are a fluid industry much of which takes place online, with players in different states interacting. Federal regulation will help to ensure uniformity. This will benefit the industry as well, providing clear guidelines that apply throughout the country.

²³⁹ VIDEO GAMING/E-GAMING LAW UPDATE (SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP.), August/September, at 1.

<https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>

²⁴⁰ <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/>; Andrew V. Moshirnia, *Article: Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 99-101 (2018); Michael Brestovansky, *'Loot Box Bill Fails to Advance'*, HAW. TRIB. HERALD (Mar. 24, 2018), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/>.
2017 Legis. Bill Hist. CA A.B. 2194.
2019 Legis. Bill Hist. NY S.B. 1416.

²⁴¹ Tony Romm & Craig Timberg, *Video Game 'Loot Boxes' Would be Outlawed in Many Games Under Forthcoming Federal Bill*, THE WASH. POST (May 8, 2019).

Any bill that is passed should create a standard for how virtual items and value is to be addressed legally. It should also provide a clear grant of authority to the Federal Trade Commission (FTC), whose role it is to monitor businesses and bring action against unfair and deceitful practices. The FTC can keep track of predatory monetization techniques and address them. The FTC already monitors the Child Online Privacy Protection Act (COPPA) and can set similar guidelines for acceptable microtransaction practices. These guidelines should include COPPA-like regulations that require controls and standards for games and microtransactions that are marketed to underage players. COPPA requires that a website collecting personal data bar access to any visitor under the age of thirteen until parental permission is granted.²⁴² A similar standard can be set for microtransactions: any player under a certain age must provide parental consent during game set up. Without consent, no microtransactions can be marketed to the player. Oversight should also include monitoring how games are collecting user data and ensuring that the data is not being used to engage in targeted or predatory microtransactions. Finally, regulators should consider a ban on loot boxes in games that are marketed to underage players, with a mature label for these games.

There are also further steps that the industry can take. Parental controls should be uniform across all platforms and games. These controls should allow parents who do permit microtransactions to set a limit on spending. Developers should also consider implementing check-ins requiring further parental consent on a regular basis, such as monthly, to continue microtransactions. With the internet and credit cards it is much easier for children to spend more money and to do so more quickly than it was previously. Therefore it is important to provide tools

²⁴² 15 U.S.C.S. § 6502.

for parents to keep track of a child's purchases in the same way that they could restrict a cash allowance or prohibit a visit to a store.

Another route that developers can consider is alternative versions of a game. One game version can have microtransactions, while the other—marketed at a higher price—does not require microtransactions. Alternatively, one game could be subscription-based. Full disclosure as to the differences between the games and their costs will allow a player to make an informed decision as to which version is best suited for them and their gaming habits.

Finally, if games are to continue collecting user data, they should do so responsibly. This includes using this data to watch out for unusual spending habits, such as those monitored for in gambling, that suggest addictive behavior by a player. When a player seems to be engaging in concerning microtransactions – such as spending a large amount of money on loot boxes in a short period of time – the game can provide a check in with the player, or even a time-out. Games can also consider limits on how many loot boxes or other virtual items can be purchased at a given time, or phase of the game.

Industry gold standards, in conjunction with regulatory oversight, will increase consumer protection and consumer trust in video games and their integrity. Consumers will not be deceived, through predatory microtransactions, into purchasing unnecessary items that are in reality valueless. With regulators and industry leaders working together to determine appropriate models a fair solution can be reached that does not cripple the video game industry. It will allow the industry to continue to innovate with new technological advancements, as it has done for over sixty years, while consumers will remain protected.