

Video Gaming: Is My Loot Box Legal?

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The rise of the video game industry in recent years has led to growing scrutiny of certain practices by government officials. Most recently, on August 7, 2019, the Federal Trade Commission (FTC) held a public workshop to examine consumer protection issues related to “loot boxes” — in-game rewards, often randomized, that players can purchase while playing a video game. The FTC’s consideration of potential regulation of loot boxes is the latest in a long line of legislative and administrative reactions to this growing trend in video games. While most attempts to ban or regulate loot boxes have to date been unsuccessful, anyone with a connection to the video game industry should pay close attention to these developments.

The Rise of the Loot Box

The loot box mechanism allows players to obtain a set of unknown, virtual items for use in a game. Examples of loot boxes include a booster pack in a collectible card game, a weapons crate in a first-person shooter game or a llama-shaped piñata containing new avatar outfits in a Battle Royale game. In most, though not all, instances, the available loot box items have varying degrees of rarity, with more desirable items appearing less frequently.

Loot boxes and other microtransaction mechanics have grown increasingly popular in the last several years, paralleling both the growth of the free-to-play market as well as rising development costs across the video game industry.

Are Loot Boxes Legal?

Today, with a few exceptions, most forms of loot boxes remain legal and unregulated worldwide. However, proponents of loot box regulation argue that the chance and rarity mechanics make loot boxes akin to gambling and constitute predatory practices toward minors.

While this comparison may seem overblown to some, a careful examination of the relevant statutes and analogous cases demonstrates the potential risk loot box systems pose. For example, the federal statutes governing online gambling, as well as each state’s individual gambling laws, generally require three elements for a particular activity to constitute an illegal “wager”: (1) risking something of value (2) on the occurrence of a chance event (3) for a potentially valuable prize. Arguably, each of these elements may be satisfied by certain loot box systems.

In fact, courts have already held that in the context of mobile games, virtual currency may constitute something of value and thus may satisfy the first element. Additionally, given that many loot box systems involve some aspect of chance, that element is likely satisfied as well.

With respect to the final element, the U.S. Court of Appeals for the Ninth Circuit recently held that in the context of a casino games mobile app, the chips that a player could win were items of value because they allowed the player to continue playing the game. Thus, while most courts that have considered the issue in the context of mobile games have found that “prizes” awarded in video games do not constitute things of value because players cannot sell them, at least some support exists for the claim that a virtual good, even if usable only in the game itself, may satisfy the “valuable prize” prong of the gambling analysis.

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Given this potential, video game developers and distributors should be aware of the various avenues by which the legality of particular loot box systems may be challenged. For example, state attorneys general may bring criminal or civil actions, or aggrieved consumers may bring challenges directly under most states' anti-gambling laws. Additionally, even if loot boxes are presumptively legal and do not constitute gambling, consumers may bring lawsuits based on consumer protection or false advertising laws if they believe that the loot boxes are promoted in an arguably misleading way. Indeed, a putative class action lawsuit was filed in February 2019 against Epic Games alleging that loot boxes in Fortnite were falsely and unfairly advertised. These sensitivities are particularly heightened where the loot boxes at issue may be marketed toward minors.

Attempts at Regulation

In light of these concerns, many government officials, both in the U.S. and abroad, have taken steps directed at regulating loot boxes. For example, state legislatures in at least four states have introduced bills aimed at regulating loot box sales, and the Protecting Children From Abusive Games Act, which seeks to prohibit loot boxes in any game played by minors, was introduced in the U.S. Senate this year.

Internationally, the issue of loot boxes has been considered by at least a dozen countries, three of which — Belgium, the Netherlands and China — have outlawed loot boxes to some extent in the last couple of years. In fact, the gambling commissions of Belgium and the Netherlands found that most forms of loot boxes constituted gambling under the same wager, chance and valuable prize structure established in the U.S. and discussed above.

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Strategy Guide

Given the uncertainties in the current landscape, video game companies should examine their loot box practices closely and keep in mind the following strategies to minimize legal risk:

- Take steps to avoid creating a wager, chance or win/loss structure required for a finding of gambling. For example:
 - Make the currency used to purchase loot boxes also acquirable from in-game action, not simply available for direct purchase.
 - Remove chance by showing players in advance what they will get in a loot box (a strategy the popular Fortnite game recently employed).
 - Allow players to use duplicate items to progress in the game in some other way, so loot boxes always provide players with some value.
 - Prevent players from exchanging items received in loot boxes and enforce pre-existing prohibitions on sales of items and/or accounts, to minimize the perception that certain items are more valuable.
- Consider substantial parental controls on loot box purchases made by minors.
- Ensure that loot boxes are promoted transparently, with minimal “fine print” terms or fees that consumers plausibly could contend are hidden or obscured.
- Continue working with lawmakers and regulators through self-regulatory bodies like the Entertainment Software Rating Board to foster an environment of self-regulation.