

**P(L)AYING TO WIN: LOOT BOXES, MICROTRANSACTION  
MONETIZATION, AND A PROPOSAL FOR SELF-REGULATION  
IN THE VIDEO GAME INDUSTRY**

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ABSTRACT

*As the video game industry continues to grow, game developers have implemented monetization mechanics that generate recurring revenue streams. A recent and popular model is the microtransaction, a system that allows players to purchase in-game assets and additional gaming content with real world currency to enhance or complement the base game. While this model has enjoyed success within the mobile and free-to-play gaming market, its widespread use in the console video game market—particularly through loot box mechanics—has been controversial, primarily because it imposes seemingly limitless additional costs to players, who have already paid for the base game, and has effects similar to casino-style gambling. This note discusses the issues with the microtransactions model generally, and the loot box mechanic specifically, as a means of generating recurring revenue streams. Specifically, it assesses the countervailing concerns of both consumers and game developers and proposes a solution for self-regulation within the industry as an alternative to government regulation or judicial action.*

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## I. INTRODUCTION

The video game industry has seen a dramatic transformation since the launch of the first console systems in the 1970's.<sup>1</sup> Video games today, unlike their counterparts in previous decades, have increasingly become more expensive and technically complex to develop.<sup>2</sup> To name a few characteristics that contribute to the increase in cost and complexities, the current generation of games often contain increasingly expansive, visually profound, and graphically detailed environments; engaging narratives; original musical scores; professionally voiced dialogues by experienced actors; and numerous in-game activities and missions that occupy players for dozens, if not hundreds, of hours.<sup>3</sup> The video game industry as a whole has become an entertainment powerhouse “cover[ing] multiple sectors and generat[ing] more revenue than the movie and music industry.”<sup>4</sup>

As the industry continues to grow, more and more game developers have proposed recurring revenue models that provide steady income streams from their games.<sup>5</sup> In a May 2017 presentation, Yosuke Matsuda, President of Square Enix, the game publisher widely known for the Final Fantasy and Kingdom Hearts franchises, declared that the

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1. Trevir Nath, *Investing in Video Games: This Industry Pulls in More Revenue Than Movies, Music*, NASDAQ (June 13, 2016, 11:11 AM), <http://www.nasdaq.com/article/investing-in-video-games-this-industry-pulls-in-more-revenue-than-movies-music-cm634585>.

2. See Jason Schreier, *Why Video Games Cost So Much to Make*, KOTAKU (Sept. 18, 2017, 11:30 AM), <https://kotaku.com/why-video-games-cost-so-much-to-make-1818508211>; JASON SCHREIER, BLOOD, SWEAT, AND PIXELS: THE TRIUMPHANT, TURBULENT STORIES BEHIND HOW VIDEO GAMES ARE MADE xiii–xx (2017).

3. See generally SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at xiii–xx; MARK J.P. WOLF, THE VIDEO GAME EXPLOSION: A HISTORY FROM PONG TO PLAYSTATION® AND BEYOND (Mark J.P. Wolf ed., 2008) [hereinafter VIDEO GAME EXPLOSION]; Carl Therrien, *Graphics in Video Games*, in VIDEO GAME EXPLOSION 239–50 (Mark J.P. Wolf ed., 2008); Feichin Ted Tschang, *The Video Game Development Process*, in VIDEO GAME EXPLOSION 231–38 (Mark J.P. Wolf ed., 2008); see also DUSTIN HANSEN, GAME ON! VIDEO GAME HISTORY FROM PONG AND PAC-MAN TO MARIO, MINECRAFT AND MORE 197–203 (2016).

4. Nath, *supra* note 1. In 2015, the “total revenue in the U.S. eclipsed \$23.5 billion.” *Id.*

5. See Jason Schreier, *Top Video Game Companies Won't Stop Talking About 'Games as a Service'*, KOTAKU (May 30, 2017, 3:40 PM), <https://kotaku.com/top-video-game-companies-wont-stop-talking-about-games-1795663927>. As Schreier observes: “There was once a time when video game developers would make a game, release it, and then move onto the next big thing. That time has long since passed. . . . Developers are looking at ways to make money off games for as long as possible, through downloadable content, cosmetic microtransactions, and good-old fashioned loot boxes.” *Id.*

“Games as a Service’ model” will be “the mainstream model for gaming in the future.”<sup>6</sup> Thus, thinking ahead, Matsuda stated, “[i]n developing future titles, we will approach game design with a mind to generate recurring revenue streams.”<sup>7</sup> To generate recurring revenue streams, some game developers and publishers have begun to use microtransactions, a system that allows players to purchase virtual currencies, digital assets, and additional gaming content after purchasing the base game.<sup>8</sup> While game developers view the microtransactions model as the future of the industry, consumers and game commentators have expressed concern that the business model deters players as a result of the virtually limitless added costs.<sup>9</sup>

Despite the decades-long commercial growth of the video game industry, legal scholarship on issues within the industry has been

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6. Alessio Palumbo, *Square Enix: Games as Service Will Be the Mainstream Model, Future Titles Will Be Developed with That in Mind*, WCCFTECH (May 26, 2017), <https://wccftech.com/games-as-service-mainstream-model/>. See Square Enix Holdings, *Outline of Financial Results Briefing by Square Enix Holdings Held on May 11, 2017*, at 9 (May 11, 2017), <http://www.hd.square-enix.com/eng/news/pdf/17q2outline.pdf>.

7. See Palumbo, *supra* note 6; Square Enix Holdings, *supra* note 6. Game commentators on various sites have quoted this line from the Square Enix presentation to report on Square Enix’s future game development plans. See, e.g., Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’ supra* note 5. Significantly, Schreier quotes two officers from two other major game publishers making remarks similar to those made by Matsuda of Square Enix. *Id.* For instance, Yves Guillemot of Ubisoft has stated, “[w]e are transforming our games from standalone offline products into service-based platforms where we can continually interact with and entertain our players.” *Id.* Similarly, Andrew Wilson of EA has opined, “[g]ames as a service are reshaping our industry, and EA is positioned to lead.” *Id.*

8. Oxford defines microtransaction as “[a] very small financial transaction conducted online.” *Microtransaction*, OXFORDDICTIONARIES.COM, <https://en.oxforddictionaries.com/definition/microtransaction> (last visited Feb. 19, 2019). It illustrates this definition with the example: “the game derives all of its revenue from microtransactions.” *Id.* See also *Steamworks Documentation: Microtransactions (In-Game Purchases)*, STEAMWORKS, <https://partner.steamgames.com/doc/features/microtransactions> (last visited Feb. 19, 2018) (providing guidelines and best practices to game developers seeking to publish games that include microtransactions on Steam).

9. Compare Eddie Makuch, *Microtransactions Will Be in Every Game, Says EA Exec*, GAMESPOT (June 22, 2012, 11:11 AM), <https://www.gamespot.com/articles/microtransactions-will-be-in-every-game-says-ea-exec/1100-6383445/> (describing an EA executive’s prediction that the microtransactions model will be incorporated into every game and likening the model to retail shopping) with Trevor Ruben, *Why Microtransaction and Loot Boxes Are Destroying Games*, ROLLING STONE (Oct. 13, 2017, 9:43 AM), <https://variety.com/2017/gaming/news/loot-boxes-destroying-games-1203048432/> (arguing that “[m]icrotransactions hurt the entire industry” through the purchase of in-game currencies that can only be used to purchase in-game items).

scant.<sup>10</sup> But in recent years, this has begun to change, as legislators, courts, lawyers, and law students have critically examined recent developments in the industry.<sup>11</sup> As an effort to shed light on the widely used but controversial monetization models in current generation games, this note analyzes the legal challenges and policy concerns surrounding game developers' use of microtransactions, generally, and loot boxes, specifically, to monetize new games.

Specifically, this note weighs players' concerns about the potential risk of consumer protection and the need for regulation against game developers' freedom to create and contract. To simultaneously protect the countervailing interests of consumers and game developers, this note proposes that microtransactions should be regulated, but through self-regulation by a regulatory body within the industry, and not through congressional or judicial action. The purpose of such an internal regulatory scheme is threefold: (i) it would allow game developers to continue producing ambitious, creative, and high-quality games that generate the cash flows they expect, but require full disclosure on anticipated monetization mechanics; (ii) it would ameliorate growing concerns among consumers about limitless additional costs by providing fair notice about the monetization features; and (iii) it would minimize needless litigation in courts and avoid a potentially drastic statutory overhaul of the game industry's practices by Congress.

This note proceeds in five parts. Part I introduces the issues this note addresses. Part II provides a background on the microtransactions monetization model, loot boxes, add-ons, and key events that triggered (and continue to fuel) the microtransactions controversy. Part III analyzes these issues by balancing the competing interests of consumers and game developers, and discussing relevant case law and governmental regulatory efforts that could be problematic for consumers, game developers, and the industry at large. Part IV proposes an internal regulatory scheme that could better serve the competing interests of

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10. See generally, e.g., Mark J.P. Wolf, *Introduction*, in VIDEO GAME EXPLOSION xiii, xiii–xiv (Mark J.P. Wolf ed., 2008).

11. See, e.g., *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 992–94 (N.D. Ill. 2017) (case involving a popular free-to-play mobile game); *Senate Commerce, Science and Transportation Committee Hearing on Federal Trade Commission Nominations* (Feb. 14, 2018) [hereinafter *Hearing on FTC Nominations*] (transcript of senate committee hearing in which nominees to the FTC discussed proposal to regulate loot boxes); Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 185 & n.1 (2004) (law review article by a professor of telecommunications); Erik Allison, Comment, *The High Cost of Free-to-Play Games: Consumer Protection in the New Digital Playground*, 70 SMU L. REV. 449, 450–52 & n.1 (2017) (law review comment by a law student).

consumers and game developers than litigation or governmental regulation. Finally, Part V concludes the note with a summary of the issues and applicability of the solutions proposed herein.

## II. BACKGROUND

The microtransactions “controversy” is a present, ongoing phenomenon with no ready solution.<sup>12</sup> As of this writing, however, consumers and industry professionals have been increasingly vocal with criticism about microtransactions in games, and game publishers have acknowledged the shortcomings with these monetization schemes.<sup>13</sup> More importantly, legislators, courts, and regulatory agencies have recently taken notice of this issue and are taking steps to address it through regulation.<sup>14</sup>

In light of these ongoing activities, this section provides a broad but necessary context for understanding the problems with the microtransactions monetization model as well as the solutions that regulation aims to accomplish. As a point of departure, this section discusses relevant events that gave rise to the microtransactions “controversy” and continue to fuel it today. As a note of caution, because the microtransactions controversy is ever-evolving, the discussion below can only highlight *some* noteworthy issues and does not provide a comprehensive or exhaustive overview of all issues.

First, this section begins with a discussion about the concept of “pay-to-win,”<sup>15</sup> a term that describes the systems game publishers use to entice players to purchase gaming content and other digital products, as opposed to encouraging players to practice and develop the skills required to succeed in games.<sup>16</sup> The discussion elaborates on controversial news reports involving major game publishers—primarily, Activision Blizzard (“Activision”) and Electronic Arts (“EA”)—that have been accused of implementing monetization schemes that abuse the “pay-to-win” mechanic.<sup>17</sup> Second, it examines the implementation of so-called loot boxes, a popular type of microtransaction used in many large-budget,

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12. *E.g.*, Ruben, *supra* note 9.

13. *See* discussion *infra* Sections II.A–B.

14. *See* discussion *infra* Sections III.C, Part IV.

15. *E.g.*, Heather Alexandra, *Star Wars Battlefront II Lets You Pay Real Money for Multiplayer Advantages*, KOTAKU (Nov. 10, 2017, 11:40 AM), <https://kotaku.com/star-wars-battlefront-ii-lets-you-pay-real-money-for-mu-1820333246>.

16. *See id.*; *see also* Dave Thier, *You Can Still Pay-To-Win in ‘Star Wars Battlefront 2,’* FORBES (Nov. 18, 2017, 3:45 PM), <https://www.forbes.com/sites/davidthier/2017/11/18/you-can-still-pay-to-win-in-star-wars-battlefront-2/#6ac745ae4a63>.

17. *See infra* notes 26, 31, 142–43.

“AAA” games, which consumers and critics have reviled as forms of unregulated gambling. Third, it traces the development of the microtransactions model in free-to-play and mobile games through in-app or in-game purchases and notes some of the litigation in which these mechanics were at issue. Finally, it discusses add-on content—including downloadable content (“DLC”), expansion packs, and season passes—that game developers more traditionally used in PC and console games to generate recurring revenue streams, but which have not been examined in the context of microtransactions.<sup>18</sup>

#### A. *Pay-to-Win Mechanics*

Recently, consumers, game commentators, and other professionals within the video game industry have criticized the “pay-to-win” microtransactions systems that are prevalent in many new games.<sup>19</sup>

Specifically, as game journalists and other commentators have noted, microtransactions sully the gaming experience because they incentivize players, especially newcomers, to purchase in-game items instead of earning those same items by progressing through the game.<sup>20</sup> As such, this system discourages players from actually playing the game and developing their skills, as they can easily obtain valuable in-game items by simply purchasing them.<sup>21</sup> Another concern that consumers and commentators have raised is the potential for game developers, seeking to maximize profits from recurring revenue streams, to abuse microtransactions monetization schemes by increasingly sectioning off content behind pay walls.<sup>22</sup> A closer look at how game developers have used (and propose to use) these microtransactions systems reveals some of the causes of frustration for consumers and commentators.

An appropriate point of departure is EA’s *Star Wars: Battlefront II*, which consumers and commentators have widely criticized for its use of

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18. See, e.g., SQUARE ENIX HOLDINGS CO., LTD., 2017 ANNUAL REPORT 3–4, 19 (2017) [hereinafter SQUARE ENIX 2017 ANNUAL REPORT]; Suzanne Jackiw, *Title Defense: Creating Consistency in Video Game Title Trademark Law*, 96 J. PAT. & TRADEMARK OFF. SOC’Y 1, 7 (2014); *DLC*, TECHTERMS.COM, <http://www.techterms.com/definition/dlc> (last accessed Feb. 19, 2019).

19. E.g., Thier, *supra* note 16; Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’ supra* note 5.

20. E.g., Alexandra, *supra* note 15; Thier, *supra* note 16.

21. E.g., Alexandra, *supra* note 15; Thier, *supra* note 16.

22. E.g., Alexandra, *supra* note 15; Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’ supra* note 5; Thier, *supra* note 16.

microtransactions since its release in November 2017.<sup>23</sup> Specifically, critics took issue with the pay-to-win mechanics of the game, which allow players to purchase upgrades and combat bonuses that otherwise would only be available by progressing through the game.<sup>24</sup> As Dave Thier, a contributor to *Forbes*, explains:

If you want to spend some money to get an edge on your opponents, look no further than the \$79.99 Elite Trooper Deluxe Edition, which comes in at a \$20 premium over the standard edition. It comes with a suite of epic cards for all of your troopers, offering you powerful combat bonuses right out of the box that might take hours to grind for normally.<sup>25</sup>

Indeed, as Heather Alexandra, a contributor to Kotaku, observes: “[Y]ou can quite literally pay money for statistical advantages in *Star Wars Battlefront II*.”<sup>26</sup>

Likewise, Activision has faced criticism over its use of microtransactions in two of its popular franchises, *Destiny* and *Overwatch*.<sup>27</sup> As Richard Scott-Jones, a contributor to *PC Games*, explains, the *Destiny* series introduced loot boxes in October 2015.<sup>28</sup> In *Destiny*, players can purchase the in-game currency, Silver, in specified increments as follows: “500 cost[s] \$4.99, 1,000 (+100 bonus) cost[s] \$9.99, and 2,000 (+300 bonus) cost[s] \$19.99” making 100 Silver worth

23. *E.g.*, Alexandra, *supra* note 15 (“After widespread negative responses to the game’s beta and accusations that the game would be ‘pay-to-win,’ the developers removed the most powerful tier of cards from [loot] crates.”).

24. *See* Alexandra, *supra* note 15. Alexandra explains that the game enables players to purchase loot boxes containing valuable items, bonuses, and upgrades through two types of in-game currencies: credits and crystals. *Id.* Players obtain credits by playing matches within the game. Alternatively, players can purchase crystals with real world currency. *Id.* “Let’s say someone spends \$99.99 for a ton of crystals and opens all of their crates. By the end of that process, they will likely have acquired a few rare cards that grant noticeable bonuses and give them a competitive edge at launch.” *Id.* Thus, the problem, as Alexandra notes, is that this system incentivizes players to purchase crystals in order to obtain valuable items they could otherwise receive by playing matches in the game. *See id.*

25. Thier, *supra* note 16.

26. Alexandra, *supra* note 15.

27. *See* Erik Kain, ‘Overwatch’ Micro-Transactions Are Just Fine, and Way Better than Paid DLC, FORBES (June 10, 2016, 2:20 PM), <https://www.forbes.com/sites/erikkain/2016/06/10/overwatch-micro-transactions-are-just-fine-and-way-better-than-paid-dlc/#70ba94b524c8>; Richard Scott-Jones, *Here’s How Destiny’s Microtransactions Went from Emotes to Gameplay-Affecting Loot Boxes*, PC GAMES (Jan. 15, 2018), <https://www.pcgamesn.com/destiny-2/destiny-2-eververse-microtransactions-bright-engrams>.

28. Scott-Jones, *supra* note 27.

approximately \$1.00.<sup>29</sup> Initially, players purchased loot boxes to obtain “cosmetic rewards” that did not affect gameplay.<sup>30</sup> But, as Scott-Jones explains, in April 2016, game developer, Bungie, updated the game, and for “the first time Destiny put a toe across the sacred line of affecting gameplay through microtransactions” in introducing armor into the loot box system that “alters [players’] in-game power.”<sup>31</sup>

More significantly, Activision has been the subject of criticism for patenting a microtransactions-driving monetization system.<sup>32</sup> On October 17, 2017, the United States Patent and Trademark Office (“USPTO”) approved Patent No. 9,789,406, filed in 2015 and titled “System and method for driving microtransactions in multiplayer video games.”<sup>33</sup> This system would allow Activision to create a system that matches junior players with more experienced, “marquee” players in a multiplayer online game session to (1) “encourage the junior player to make game-related purchases of items possessed/used by the marquee player”; and (2) “emulate the marquee player by obtaining weapons or other items used by the marquee player.”<sup>34</sup> In addition, Activision filed another microtransactions patent application in 2015, titled “System and Method of Identifying Portions of Video Game Streams for Driving Microtransactions.”<sup>35</sup> If granted, this patent would allow players, “e-sportscasters,” and other users to record, distribute, annotate, broadcast, and comment on gameplay.<sup>36</sup> In addition, and more significantly, the patent would also “facilitate . . . micro-transactions relevant to video game playback” that would enable players to identify and purchase the digital items used in the game playbacks.<sup>37</sup>

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29. *Id.*

30. *Id.*

31. *Id.*

32. See Sys. & Method for Driving Microtransactions in Multiplayer Video Games, U.S. Patent No. 9,789,406 (issued Oct. 17, 2017) [hereinafter 406 Patent]; Kyle Orland, *Activision’s Patented Method to Drive Microtransactions with Matchmaking*, ARS TECHNICA (Oct. 18, 2017, 5:45 PM), <https://arstechnica.com/gaming/2017/10/activisions-patented-method-to-drive-microtransactions-with-matchmaking/>.

33. 406 Patent, *supra* note 32.

34. *Id.* at 1.

35. Sys. & Method of Identifying Portions of Video Game Streams for Driving Microtransactions, U.S. Patent No. 14/919,430 (filed Oct. 21, 2015).

36. *Id.*

37. *Id.* at 2.

### B. *The Loot Box Crisis and Gambling*

Recently, in the gaming industry, the loot box crisis has become a major topic of controversy.<sup>38</sup> Players who purchase in-game loot boxes receive digital mystery containers that have randomized items for exclusive use in the game.<sup>39</sup> As Joel Hruska, a reporter for *Extreme Tech*, explains, “In some games, the boxes are random rewards you unlock with keys you bought with real dollars.

Sometimes the boxes are free, but the keys to open them cost money.”<sup>40</sup> The loot box feature has become common in numerous multiplayer online games and AAA titles, such as *Overwatch*, *Call of Duty: WWII*, and *Star Wars: Battlefront II*.<sup>41</sup> Game publishers recognize their value in generating recurring revenue streams.<sup>42</sup> For instance, Activision, the publisher of games like *Overwatch*, reported over \$1 billion in revenues from the sale of loot boxes.<sup>43</sup>

Players who have played games featuring microtransactions have described them as addictive.<sup>44</sup> Alex Avard, a reporter for *Games Radar*, described the psychological gratification of opening loot boxes as a “sensory experience that’s specifically designed to entice your attention

38. E.g. Alex Avard, *Video Games Have a Loot Box Fetish, and It’s Starting to Harm the Way We Play*, GAMES RADAR (Oct. 10, 2017), <https://www.gamesradar.com/loot-boxes-shadow-of-war/>; Joel Hruska, *Most Gamers Hate Buying Loot Boxes, So Why Are Games Using Them?* EXTREME TECH (Oct. 13, 2017, 1:02 PM), <https://www.extremetech.com/gaming/257387-gamers-hate-buying-loot-boxes-games-using>; Steven T. Wright, *The Evolution of Loot Boxes*, PC GAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes/>.

39. Players and especially game commentators have criticized the loot box model. See Hruska, *supra* note 38 (“Loot boxes take the idea of ‘pay-to-win’ and add a noxious random generator . . . . Loot boxes randomize their payouts and, in many cases, will happily award you a duplicate item you already have. We’ve gone from a model of ‘Pay \$X for Y Item’ to ‘Buy an unknown number of keys or crates until you get lucky and find something you wanted or needed.’”).

40. *Id.*

41. Stefanie Fogel, *‘Battlefront II’ Gets Han Solo Season*, VARIETY (May 9, 2018, 9:31 AM), <https://variety.com/2018/gaming/news/star-wars-battlefront-ii-han-solo-season-1202804499/>; Hruska, *supra* note 38; Luke Plunkett, *Battlefront & Overwatch’s Loot Boxes Under Investigation in Belgium*, KOTAKU (Nov. 15, 2017, 5:40 PM), <https://kotaku.com/battlefront-overwatches-loot-boxes-under-investigation-1820486239>; Wright, *supra* note 38.

42. See Hruska, *supra* note 38.

43. See Wright, *supra* note 38.

44. Will Bindloss, *Yes, Loot Boxes and Card Packs Reek of Gambling*, VENTURE BEAT (Nov. 14, 2017, 4:30 PM), <https://venturebeat.com/2017/11/14/yes-loot-boxes-and-card-packs-reek-of-gambling/>. See also Eric Schinzer, *Loot Crates are Not Considered Gambling, Though It’s Pretty Close* (Oct. 15, 2017), <http://cogconnected.com/2017/10/loot-crates-not-considered-gambling/>.

and whet your appetite.”<sup>45</sup> But the danger in the loot box mechanic, as Avard notes, is its addictive potential: “You’re no longer merely converting real-world cash for in-game cash, but betting on an addictive lotto of luck and potential.”<sup>46</sup> Hruska considers the loot box a “cynical exploitation of a well-known psychological fact: The best way to keep someone playing a game is to give them a powerful reward or major upgrade on an irregular time schedule.”<sup>47</sup> As Hruska further notes, “[l]otteries and gambling both exploit this strategy, and we’re seeing games start doing it as well.”<sup>48</sup> Accordingly, some game reporters and commentators are convinced that loot boxes have the same psychological effects as playing the lottery or gambling in a casino.<sup>49</sup> Meanwhile, game publishers have capitalized on the sensory experience of opening loot boxes.<sup>50</sup> As Avard observes, “Activision seems to believe that opening loot boxes is such a euphoric experience for its customers, that Call of Duty: WWII will actually reward players for watching others open their own loot boxes.”<sup>51</sup>

Indeed, game publishers like Activision and EA have reaped the benefits of using the loot box feature in their games.<sup>52</sup> In its most recent press release, describing fourth quarter earnings of 2017, Activision reported net revenues of \$4.9 billion from “[s]ubscription, licensing, and other revenues.”<sup>53</sup>

In a footnote to this line item, the report explains, “Subscription, licensing, and other revenues represent revenues from *World of Warcraft* subscriptions, licensing royalties from our products and franchises, value-added services, downloadable content, **microtransactions**, and

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45. Avard, *supra* note 38. For an analogous discussion of regulation proposed within the fantasy sports context, see Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. OF SPORTS & ENT. L. 277, 288–90 (2016) (describing addictive aspects of fantasy sports betting).

46. Avard, *supra* note 38.

47. Hruska, *supra* note 38.

48. *Id.*

49. See Avard, *supra* note 38; Hruska *supra* note 38.

50. See Avard, *supra* note 38.

51. *Id.*

52. See Hruska, *supra* note 38; Rob Thubron, *Over Half of Activision Blizzard’s \$7.16 Billion Yearly Revenue Came from Microtransactions*, TECHSPOT (Feb. 12, 2018, 6:12 AM), <https://www.techspot.com/news/73230-over-half-activision-blizzard-716-billion-yearly-revenue.html>.

53. *Activision Blizzard Announces Fourth-Quarter and 2017 Financial Results*, ACTIVISION (Feb. 8, 2018), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-announces-fourth-quarter-and-2017-financial>.

other miscellaneous revenues.”<sup>54</sup> Likewise, in its most recent Form 10-Q filing, EA reported total net revenues of \$1.16 billion in the last quarter of 2017.<sup>55</sup> In its “[s]ervice and other revenue” disclosure, EA stated, “[o]ur service revenue includes revenue recognized from time-based subscriptions, games, content or updates . . . includ[ing] entitlements to content that are accessed through hosting services (e.g., **microtransactions** for Internet-based, social network and free-to-download mobile games). . . .”<sup>56</sup>

### C. Free-to-Play Games and In-App Purchases

In the free-to-play and mobile game markets, game publishers and developers frequently use microtransactions in the form of in-app purchases to monetize their games.<sup>57</sup>

Since July 2008, when the Apple App Store first launched,<sup>58</sup> gaming apps used microtransactions to enable players to purchase additional in-game items, currency, and “lives.”<sup>59</sup> Developers of mobile and free-to-play games use the microtransaction model to attract numerous players, who can theoretically play the base game for free, but have the option to purchase “extra” gaming content through in-app purchases should they desire to experience additional aspects of a game.<sup>60</sup> The use of microtransactions has even caused developers of massively multiplayer online role-playing games (“MMORPG”) to replace their subscription-based monetization methods with microtransactions that allow players to purchase in-game currency and assets instead of paying monthly subscription fees.<sup>61</sup>

In the past decade since free-to-play and mobile games first appeared on platforms such as the Apple App Store, microtransactions have

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54. *Id.* (emphasis added).

55. Electronic Arts Inc., Quarterly Report (Form 10-Q) at 32 (Feb. 6, 2018).

56. *Id.* at 33 (emphasis added).

57. See Allison, *supra* note 11, at 450–54.

58. See Christina Bonnington, *5 Years On, the App Store Has Forever Changed the Face of Software*, WIRED (July 10, 2013, 6:30 AM), <https://www.wired.com/2013/07/five-years-of-the-app-store/> (discussing when the Apple App Store launched and “debuted with 500 third-party apps, including top grossing titles like . . . Sega’s *Super Monkey Ball* . . .”).

59. See *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 993 (N.D. Ill. 2017); *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1033–34 (N.D. Cal. 2012) [hereinafter *In re Apple*]; Allison, *supra* note 11, at 452–53.

60. See, e.g., Chelsea King, Note, *Forcing Players to Walk the Plank: Why End User License Agreements Improperly Control Players’ Rights Regarding Microtransactions in Video Games*, 58 WM. & MARY L. REV. 1365, 1367 (2017); Yen-Shyang Tseng, Note, *Governing Virtual Worlds: Interaction 2.0*, 35 WASH. U. J. L. & POL’Y 547, 554 (2011).

61. Tseng, *supra* note 60, at 554–55 & n.43.

become the subject of litigation and criticism.<sup>62</sup> As early as 2012, federal courts began hearing cases in which plaintiffs alleged claims of consumer fraud, unfair competition, and breach of contract against retailers and developers of mobile games.<sup>63</sup> Notably, in the case *In re Apple In-App Purchase Litigation*, plaintiffs sued Apple in the Northern District of California after downloading purportedly free games for their minor children through the Apple App Store and later incurring charges “ranging from \$99.99 to \$388.72 at a time” due to in-app purchases of which they were unaware.<sup>64</sup> In a 2015 case, *Mason v. Machine Zone, Inc.*, a plaintiff sued the developer of a mobile game named *Game of War: Fire Age* in the District of Maryland when she lost “more than \$100” betting in a casino-style activity in the free-to-play game.<sup>65</sup> Most recently, in 2017, in *Liston v. King.com, Ltd.*, a plaintiff sued King, the developer of the popular puzzle game *Candy Crush Saga* (“Candy Crush”), when he lost his “in-game ‘lives’” after King “remove[d]” the “Donated Lives,” and did not inform players beforehand.<sup>66</sup>

In addition to courts, lawyers and law students have examined some of the legal issues raised by free-to-play and mobile games.<sup>67</sup> As one student has observed, consumers have limited rights to content purchased in microtransactions where consumers only gain a “license” to content that is subject to terms of End User License Agreements (“EULA”).<sup>68</sup> Others have critically examined the utility of the EULA in effectively creating rules in “virtual worlds.”<sup>69</sup> Another student has critiqued the “exploitative practices” of free-to-play game developers and has argued in favor of FTC regulation of games that are marketed to children.<sup>70</sup>

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62. *E.g.*, *Liston*, 254 F. Supp. 3d at 989; *In re Apple*, 855 F. Supp. 2d at 1030; Allison, *supra* note 11, at 456–57.

63. *See, e.g.*, *In re Apple*, 855 F. Supp. 2d at 1033–34.

64. *Id.*

65. *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d. 457, 459–60 (D. Md. 2015).

66. 254 F. Supp. 3d at 993–94.

67. *See* Allison, *supra* note 11, at 450–52; King, *supra* note 60, at 1365; Tseng, *supra* note 60, at 547–48.

68. King, *supra* note 60, at 1366–72, 1391–92 (analyzing the microtransaction model in *League of Legends*).

69. *See* Castronova, *supra* note 11, at 185, 196–97, 200–05; Tseng, *supra* note 60, at 548–49.

70. Allison, *supra* note 11, at 452, 468–70.

*D. Downloadable Content, Expansion Packs, and Season Passes*

More commonly than in-game purchases, console games feature digital products called DLC, expansion packs, and season passes.<sup>71</sup> DLC and expansion packs are digital files containing additional gaming content—including, for example, new areas or maps for players to explore; new weapons, armor, items, or characters; or new interactions, functions, or interfaces—that a player can download and patch to a previously purchased base game at an additional cost.<sup>72</sup> Season passes are digital licenses that players can purchase, typically at any point after a base game is released, which enable players to download most (if not all) DLC or expansion packs that a game developer plans to release in the future.<sup>73</sup> For ease of reference, this note occasionally groups these three products together under the name “DLC” or “add-ons.”

One of the most successful franchises, developed by Maxis and published by EA, that uses expansion packs is *The Sims*.<sup>74</sup>

The first installment in the franchise, titled *The Sims*, released on February 5 2000 for the PC and later released for the Sony Playstation 2 console.<sup>75</sup> The original game allowed players to create characters called Sims, build houses for their Sims using a variety of design tools, furnish houses with interactive items of furniture and other household objects, and control their Sims’ lives through daily activities, including finding a job, cooking meals, interacting with other Sims within and outside of the household, paying bills, and developing skills.<sup>76</sup> Over the next three years, EA released seven expansion packs—including *The Sims: Hot Date* and *The Sims: Makin’ Magic*—which added new content and mechanics

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71. See generally Andrew W. Eichner, *Game Over, Insert Coin to Continue: Entering a New Era of Video Game Intellectual Property Enforcement*, 53 IDEA 101 (2013).

72. See Jackiw, *supra* note 18, at 7 (“[S]ome games offer Holiday DLC, which changes the playable character into a stereotypical winter holiday character like Santa Clause or a snowman. Developers also offer DLC without connection to any external event, for instance adding new species to a game featuring animals.”); see also *DLC*, TECHTERMS.COM (Sept. 6, 2012), <https://techterms.com/definition/dlc>; *DLC Season Pass*, GIANT BOMB, <https://www.giantbomb.com/dlc-season-pass/3015-7186/> (last updated Sept. 4, 2018, 6:10 AM).

73. See generally *DLC Season Pass*, *supra* note 72.

74. See HANSEN, *supra* note 3, at 196–203 (describing how the game’s creator, Will Wright, was inspired to create the franchise); Mark J.P. Wolf, *Best-Selling Video Games, in VIDEO GAME EXPLOSION 275, 275* (Mark J.P. Wolf ed., 2008) (noting that *The Sims* sold 6.3 million units, making it the best-selling PC game in 2002).

75. *The Sims*, EA, <https://www.ea.com/games/the-sims/the-sims> (last visited Feb. 20, 2019).

76. See generally *DLC*, TECHTERMS.COM (Sept. 6, 2012), <https://techterms.com/definition/dlc>; Andrew Park, *The Sims Review*, GAMESPOT (Feb. 11, 2000, 12:00 AM), <https://www.gamespot.com/reviews/the-sims-review/1900-2533406/>.

to the base game, including new areas for players to explore, additional lots on which players could build homes, and new abilities that allowed players' characters to learn magic.<sup>77</sup>

Since the franchise's launch in 2000, EA published three additional installments—*The Sims 2* in 2004,<sup>78</sup> *The Sims 3* in 2009,<sup>79</sup> and *The Sims 4* in 2014.<sup>80</sup>

With each installment, EA released a number of add-ons that players could install at an additional cost.<sup>81</sup> For instance, with the *Sims 4*, players could purchase among three categories of add-ons, including the so-called: (1) "Expansion Pack"; (2) "Game Pack"; and (3) "Stuff Pack."<sup>82</sup> Original retail prices for these add-ons range from \$10 each for stuff packs to \$40 each for expansion packs.<sup>83</sup>

For console games, publishers typically release DLC within a few weeks or months after releasing the base game.<sup>84</sup> As a point of reference, Bethesda Softworks ("Bethesda") released its fifth installment in its popular *Elder Scrolls* franchise, *Elder Scrolls V: Skyrim* ("Skyrim"), on November 11, 2011, with an original retail price of \$60 for PC, Xbox 360, and Playstation 3.<sup>85</sup> Within one year of releasing the base game,

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77. See HANSEN, *supra* note 3, at 201; Andrew Park, *The Sims: Makin' Magic Review*, GAMESPOT (Oct. 28, 2003, 12:29 PM), <https://www.gamespot.com/reviews/the-sims-makin-magic-review/1900-6077463/>.

78. *The Sims 2*, EA, <https://www.ea.com/games/the-sims/the-sims-2> (last visited Feb. 20, 2019).

79. *The Sims 3*, EA, <https://www.ea.com/games/the-sims/the-sims-3> (last visited Feb. 20, 2019).

80. Chris Pereira, *The Sims 4 Review Roundup*, GAMESPOT (Sept. 10, 2014, 1:17 PM), <https://www.gamespot.com/articles/the-sims-4-review-roundup/1100-6422243/>; *The Sims 4*, EA, <https://www.ea.com/games/the-sims/the-sims-4/pc> (last visited Feb. 20, 2019).

81. *The Sims 4: Expand Your Game*, EA, <https://www.ea.com/games/the-sims/the-sims-4/pc/about-packs> (last visited Feb. 20, 2019).

82. *Id.* According to EA's online store website, expansion packs are "[l]arge packs that expand your game and take your Sims on new adventures"; game packs are "[m]edium-sized packs that add new experiences to play in new thematic ways"; and stuff packs are "[s]maller packs that add more to your Sims' lives with fun objects and fashion." *Id.*

83. *The Sims 4 Downloadable Content: The Sims 4 Expansion Packs*, EA <https://www.ea.com/games/the-sims/the-sims-4/pc/store-promo/expansion-packs> (last visited Feb. 20, 2019); *The Sims 4 Downloadable Content: The Sims 4 Game Packs*, <https://www.ea.com/games/the-sims/the-sims-4/pc/store-promo/game-packs> (last visited Feb. 20, 2019); *The Sims 4 Downloadable Content: The Sims 4 Stuff Packs*, EA, <https://www.ea.com/games/the-sims/the-sims-4/pc/store-promo/stuff-packs> (last visited Feb. 20, 2019).

84. *DLC Season Pass*, *supra* note 72.

85. See David M. Ewalt, *Elder Scrolls V: Skyrim is One of the Best RPGs Ever*, FORBES (Nov. 14, 2011, 9:45 AM), <https://www.forbes.com/sites/davidewalt/2011/11/14/elder-scrolls-v-skyrim-review/#39f862602238>; Michael Rougeau, *25 Video Game Deals to Wake Up Early*

Bethesda released DLC in the form of *Dawnguard* on June 26, 2012, *Hearthfire* on September 4, 2012, and *Dragonborn* on December 4, 2012.<sup>86</sup> At release, the original price for *Dawnguard* and *Dragonborn* was \$20 each, and *Hearthfire* was \$5.<sup>87</sup> In June 2013, Bethesda repackaged the base game with all DLC and released *Elder Scrolls V: Skyrim Legendary Edition* for a total price of \$60.<sup>88</sup>

Three years later, Bethesda released *Elder Scrolls V: Skyrim Special Edition* (“Skyrim Special Edition”) for PC and newer generation consoles, Microsoft’s Xbox One and Sony’s Playstation 4.<sup>89</sup> *Skyrim Special Edition* included the base game and all DLC as well as “remastered art and effects, volumetric god rays, dynamic depth of field, screen-space reflections, and more.”<sup>90</sup> In November 2017, six years after releasing the original *Skyrim*, Bethesda released *Skyrim Special Edition* for the Nintendo Switch and Playstation VR, making the game available for the first time on a handheld console<sup>91</sup> in virtual reality.<sup>92</sup> In 2014, *Time* reported that *Skyrim* had sold 20 million copies since its launch in 2011.<sup>93</sup> Shortly after the release of *Skyrim Special Edition*, that number rose to 30 million copies.<sup>94</sup> According to Statistic Brain Research Institute, a

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for on *Black Friday 2011*, COMPLEX (Nov. 21, 2011), <http://www.complex.com/pop-culture/2011/11/25-video-game-deals-to-wake-up-early-for-on-black-friday-2011/2>.

86. Luke Karmali, *Skyrim Dawnguard, Hearthfire and Dragonborn DLC Dated for PS3*, IGN (Feb. 4, 2013), <http://www.ign.com/articles/2013/02/04/skyrim-dawnguard-hearthfire-and-dragonborn-dlc-dated-for-ps3>; *The Elder Scrolls V: Skyrim*, GIANT BOMB, <https://www.giantbomb.com/the-elder-scrolls-v-skyrim/3030-33394/dlc/>.

87. Luke Karmali, *supra* note 86; *The Elder Scrolls V: Skyrim*, *supra* note 86.

88. Erik Kain, ‘*Skyrim: Legendary Edition*’ Launches June 4th, FORBES (Apr. 25, 2013, 12:33 PM), <https://www.forbes.com/sites/erikkain/2013/04/25/skyrim-legendary-edition-launches-june-4th/#4373e2453935>.

89. Gary Jones, *Skyrim Special Edition: Release Times and Remastered Creation Kit Launch Plans Revealed*, EXPRESS (Oct. 28, 2016, 1:17 AM), <https://www.express.co.uk/entertainment/gaming/726034/Skyrim-Special-Edition-release-date-Remastered-Bethesda-Creation-Kit-PS4-Mods-Xbox-One>.

90. *The Elder Scrolls V: Skyrim Special Edition*, STEAM, [http://store.steampowered.com/app/489830/The\\_Elder\\_Scrolls\\_V\\_Skyrim\\_Special\\_Edition/](http://store.steampowered.com/app/489830/The_Elder_Scrolls_V_Skyrim_Special_Edition/) (last visited Feb. 20, 2019).

91. Kevin Murnane, ‘*Skyrim*’ on the Switch is a Bit of a Surprise, FORBES (Nov. 18, 2017, 8:00 AM), <https://www.forbes.com/sites/kevinmurnane/2017/11/18/skyrim-on-the-switch-is-a-bit-of-a-surprise/#5cbab1fc1cab>.

92. Heather Alexandra, *Skyrim VR Actually Made Me Throw Up, yet I Want to Play More*, KOTAKU (Nov. 17, 2017, 5:20 PM), <https://kotaku.com/skyrim-vr-actually-made-me-throw-up-yet-i-want-to-play-1820559231>.

93. Matt Peckham, *At 20 Million Copies Sold, Skyrim is in the Top 20 Bestselling Games of All Time*, TIME (Jan. 27, 2014), <http://time.com/1875/at-20-million-copies-sold-skyrim-is-in-the-top-20-best-selling-games-of-all-time/>.

94. Chris Suellentrop, ‘*Skyrim*’ Creator on Why We’ll Have to Wait for Another ‘*Elder Scrolls*’, ROLLING STONE (Nov. 21, 2016, 9:29 PM),

statistics research group, the total revenues that Bethesda has made from the sale of *Skyrim* is estimated at \$1.3 billion.<sup>95</sup>

As the above examples illustrate, for almost two decades, game developers have successfully sold additional gaming content by packaging it in the form of add-ons. To be sure, add-ons and microtransactions provide two different ways through which game developers can generate additional revenues.<sup>96</sup> While consumers have more traditionally accepted add-ons, the same has not been true for microtransactions.<sup>97</sup>

### III. CONSUMERS V. DEVELOPERS: BALANCING COMPETING INTERESTS

As Part II has shown, game developers have increasingly begun to use microtransactions, such as loot boxes, to monetize games as a means of generating recurring revenue streams. Part III analyzes the use of such monetization models in light of consumer concerns, litigation, and governmental regulatory efforts. Foremost, this section attempts to balance the competing interests of consumers and game developers, taking as its premise that larger revenues are necessary for the growth of the video game industry and are not inherently harmful. First, this section critiques game publishers' exploitive use of loot boxes and other microtransactions mechanics and argues that game publishers need not resort to such deceptive monetization schemes to generate the recurring revenue streams they need to continue producing ambitious, high-quality games. Second, this section examines the pitfalls and inadequacies of litigation in protecting consumer interests. It discusses recent cases in which consumers sued retailers, developers, and publishers of console and mobile games alleging, among other things, consumer fraud, unfair competition, false advertising, and breach of contract claims, only to have their cases dismissed for failure to plead cognizable claims. Third, this section contends that game developers should be concerned—despite the case law in their favor—as legislators and regulators both domestically

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<https://www.rollingstone.com/culture/culture-features/skyrim-creator-on-why-well-have-to-wait-for-another-elder-scrolls-128377/>.

95. Nat Berma, *How Much is the Elder Scrolls Franchise Worth?* MONEYINC.COM, <http://moneyinc.com/skyrim-franchise/> (last visited Feb. 20, 2019).

96. See James Brightman, *Digital Game Sales to Reach \$7.8 Billion This Year*, GAMESINDUSTRY.BIZ (July 20, 2017), <https://www.gamesindustry.biz/articles/2017-07-20-digital-game-sales-to-reach-usd7-8-billion-this-year-superdata>.

97. See Schreier, *Top Video Game Companies Won't Stop Talking About 'Games as a Service'*, *supra* note 5. But see Erik Kain, *'Overwatch' Micro-Transactions Are Just Fine, and Way Better than Paid DLC*, *supra* note 27.

and abroad have taken notice of loot boxes and microtransactions. Acknowledging consumer concerns and likening the monetization schemes as forms of gambling, legislators have proposed regulations that could have devastating effects for both game developers and consumers.

A. *Developers Can Generate Recurring Revenue Streams Without Resorting to Loot Boxes and Microtransactions*

The video game industry has expanded to such a degree that the production of new titles—not unlike blockbuster films—are costly, time-consuming endeavors.<sup>98</sup> As Jason Schreier explains, every game developer faces numerous challenges throughout the development process, including issues with changing technologies, programming tools, testing, troubleshooting, and marketing.<sup>99</sup> For instance, a small-scale, five-person “indie studio” can expect to spend upwards of eighteen months and \$900,000 to produce a retro-inspired, 16-bit game.<sup>100</sup> Moreover, a large-scale publisher with a team of 400, seeking to create the next major AAA game, could easily spend three years and \$144 million.<sup>101</sup> In addition to the costs and time commitments, many games require high production qualities with engaging narratives, excellent graphics, and a variety of quests that keep players entertained for many hours of gameplay.<sup>102</sup> A case in point is CD Projekt Red’s *The Witcher III: Wild Hunt*.<sup>103</sup> With this third installment in *The Witcher* franchise, CD Projekt was determined to make “the best-looking game [consumers] could buy”<sup>104</sup> with an engaging narrative that “ma[de] the player feel like he or she was making consequential decisions that had an impact on how

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98. See SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at xiii–xx; Schreier, *Why Video Games Cost So Much to Make*, *supra* note 2.

99. SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at xvii–xx (explaining five main factors, including changing technologies and tools, which contribute to the high costs of producing games); Schreier, *Why Video Games Cost So Much to Make*, *supra* note 2 (explaining the factors, time, and relative costs that indie studios, mid-size developers, and large publishers face to produce games).

100. Schreier, *Why Video Games Cost So Much to Make*, *supra* note 2. In his book, Schreier interviews programmers, developers, and other professionals at both small-scale studios and large publishers and recounts specific challenges that they faced in producing their respective games. SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at xiii–xx. Specifically, in his chapter on Naughty Dog’s *Uncharted 4*, Schreier explains, “[t]o develop games like *Uncharted* and *The Last of Us*, Naughty Dog’s employees worked endless hours, staying at the office as late as 2:00 or 3:00 a.m. during extended, hellish periods of overtime that popped up before each major development milestone.” *Id.* at 31–32.

101. Schreier, *Why Video Games Cost So Much to Make*, *supra* note 2.

102. See SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at 31–61, 223–47.

103. *Id.* at 223–47.

104. *Id.* at 227.

the story would unfold”<sup>105</sup> and enough content to make players “take at least one hundred hours to finish.”<sup>106</sup> The game was a graphical and technical masterpiece, as Schreier explains:

[CD Projekt Red] had pulled off some incredible technical accomplishments . . . The foliage looked like it had come right out of a Polish forest. [The protagonist] Geralt’s ringmail was so elaborately detailed, you could identify each ring of metal. The leather looked sufficiently leathery.<sup>107</sup>

Given the high cost, time commitments, and production qualities of new games, developers want to maximize not only the profits they gain, but also the time consumers devote to playing their games.<sup>108</sup> Moreover, once the game releases, game developers encounter additional costs of providing technical support for online servers and constantly creating new content among other considerations.<sup>109</sup> Thus, some developers and publishers view new game releases as a *service*, as opposed to a single-use *product*, that can be enhanced over time with updates, DLC, and new content.<sup>110</sup> Square Enix describes the impetus behind the “games as service” concept in its 2017 Annual Report as follows:

“Games as a Service” is a concept that is often mentioned recently in HD game contexts. Gone are the days in which single-player games were of primary status and multiplayer games secondary. . . . The terms “multiplayer” and “Games as a Service” themselves have existed for some time, but they are now being used in reference to game designs that place a strong emphasis on longer-term user engagement. We will also endeavor to develop games designed not to be played once after launch but that customers can enjoy more and play longer. In doing so, we

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105. *Id.* at 225.

106. *Id.* at 229.

107. *Id.* at 236–37.

108. See Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’* *supra* note 5 (describing games as a service model).

109. See SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at 58; Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’* *supra* note 5.

110. See Schreier, *Top Video Game Companies Won’t Stop Talking About ‘Games as a Service,’* *supra* note 5; see also SQUARE ENIX 2017 ANNUAL REPORT, *supra* note 18, at 9–10.

will increase customer satisfaction and enhance the lifetime value of the games themselves.<sup>111</sup>

Notably, Square Enix has successfully implemented this model in the most recent installment of its *Final Fantasy* franchise, *Final Fantasy XV* by releasing both paid DLC and free updates.<sup>112</sup>

Compared with add-ons and DLC, microtransactions and loot boxes appear to operate under the same philosophy: to extend the shelf life of a game, to have players continue to play, and to generate recurring revenues. But the two models have striking differences in terms of what they offer consumers.

First, the pay-to-win mechanics of microtransactions tend to discourage gameplay, in contrast with add-ons.

Take, for example, Activision's microtransactions patents. As noted in Part II, Activision's approved patent, *System and method for driving microtransactions in multiplayer video games*, is a system that brings together lower-ranked players with higher-leveled, better-equipped players in the same online match to either play together or compete.<sup>113</sup> Indeed, some consumer concerns are well founded: A system that matches players of unequal rank with the principal purpose of enticing the lower-ranked players to purchase digital assets merits scrutiny. More likely than not, a lower-ranked player has a slim chance of winning a match or succeeding in a mission with players whose characters are at higher levels or possess superior in-game assets.<sup>114</sup> Thus, the microtransactions system encourages players to pay for better gear, or risk playing with players that have better equipment and items, invariably causing most to lose.

Second, the ratio of cost to content tends to be higher with microtransactions.<sup>115</sup> As noted in Part II, the mobile and free-to-play market popularized the use of microtransactions, which publishers and

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111. SQUARE ENIX 2017 ANNUAL REPORT, *supra* note 18, at 9.

112. SQUARE ENIX 2017 ANNUAL REPORT, *supra* note 18, at 3; Square Enix Holdings, *Outline of Financial Results Briefing by Square Enix Holdings Held on May 11, 2017*, (May 11, 2017), <http://www.hd.square-enix.com/eng/news/pdf/17q2outline.pdf>.; Hajime Tabata, *Announcing Free Updates for Final Fantasy XV*, SQUARE ENIX (Dec. 7, 2016), <https://na.square-enix.com/us/node/6935>.

113. 406 Patent, *supra* note 32.

114. *See id.*; Heather Alexandra, *Activision Patents Matchmaking That Encourages Players to Buy Microtransactions*, KOTAKU (Oct. 17, 2017), <https://kotaku.com/activision-patents-matchmaking-that-encourages-players-1819630937>; Orland, *supra* note 32.

115. *See* Michael Crider, *Microtransactions in AAA Games Are Here to Stay (But They're Still Terrible)*, HOW-TO GEEK (Aug. 10, 2017), <https://www.howtogeek.com/321101/microtransactions-in-aaa-games-are-here-to-stay-but-theyre-still-terrible/>.

developers quickly adapted for AAA titles for PC and consoles. Although microtransactions have been controversial in free-to-play games, as discussed below, the monetization schemes seemed better suited for games that do not require an up-front cost to download and play.<sup>116</sup> This is not the case for the majority of PC and console games. Typically, console video games carry an up-front \$60 price tag for the base game alone.<sup>117</sup> Consumers of such console games cannot experience the story and gameplay mechanics without paying this initial cost, unlike their mobile counterparts. Moreover, many AAA console games feature expansive stories, open worlds, and many hours of gameplay.<sup>118</sup> From the perspective of game developers, the content included in the base game may be more than enough to justify the \$60 price tag, but adding microtransactions imposes additional, sometimes unforeseen costs to consumers.

Additionally, with DLC, players can only experience the additional gaming content if players already have the base game.<sup>119</sup> But in contrast with microtransactions, where players typically purchase individualized items in an *à-la-carte* fashion, add-ons typically provide players a package of content—including new levels, maps, items, quests, and other mechanics—that significantly increase the number of gameplay hours.<sup>120</sup> Unlike add-ons, which are limited in number, microtransactions can impose limitless additional costs on consumers.

Third, consumers typically know what they are paying for when they purchase add-ons, in contrast with loot boxes, which contain randomized rewards. As Joel Hruska notes, “Loot boxes randomize their payouts and, in many cases, will happily award you a duplicate item you already have.”<sup>121</sup> Even in games, like Activision’s *Overwatch*, which allow players to obtain items by both playing matches and purchasing loot boxes, the randomness of the rewards, and the potential for duplicative items is still

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116. Pascal Luban, *The Design of Free-to-Play Games: Part 1*, GAMASUTRA (Nov. 22, 2011), [https://www.gamasutra.com/view/feature/134920/the\\_design\\_of\\_freetoplay\\_games\\_.php?page=1%20\[https://perma.cc/PW75-BULZ\]](https://www.gamasutra.com/view/feature/134920/the_design_of_freetoplay_games_.php?page=1%20[https://perma.cc/PW75-BULZ]). See generally Games, APPLE APP STORE, <https://itunes.apple.com/us/genre/ios-games/id6014?mt=8> (last visited Feb. 20, 2019); Games, GOOGLE PLAY, <https://play.google.com/store/apps/category/GAME> (last visited Feb. 20, 2019).

117. See Crider, *supra* note 115.

118. See SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, at xiii–xx.

119. See Jackiw, *supra* note 18, at 7.

120. See SCHREIER, BLOOD, SWEAT, AND PIXELS, *supra* note 2, xii–xx, 31–61, 223–47.

121. Hruska, *supra* note 38.

exploitive.<sup>122</sup> Significantly, as Michael Crider, a contributor to *How-To Geek*, explains:

Duplicates earn coins that can be spent towards specific pieces of cosmetic gear that players want, but the value of the coins is only a fraction of the value of the duplicate item . . . . So the core progression mechanic in *Overwatch*, even if it's technically possible to earn everything without paying, is inexorably and intentionally designed to frustrate players just enough to make them spend real money on loot boxes . . . . It doesn't help that the system is stuffed with literally thousands of low-value items . . . making it all harder to hit a rare skin or emote in the quasi-gambling randomized loot system.<sup>123</sup>

In brief, game developers have adopted various ways of monetizing games as part of their mission to generate recurring revenue streams and transform the present model to a games-as-service model. Before the rise of mobile and free-to-play games, game developers typically relied on DLC and other add-ons. But some developers have since turned to loot boxes and other types of microtransactions. As noted above, microtransactions and loot boxes exploit pay-to-win mechanics that ultimately discourage progression through gameplay and do not offer consumers the value for content that add-ons typically provide.

*B. Consumers Are Disadvantaged and Current Remedies Are Insufficient: Lessons from Mobile and Console Games' Litigation*

Consumers who have allegedly been harmed by particularly exploitive or deceptive monetization schemes, such as loot boxes, should be wary of pursuing claims against retailers, publishers, and developers in court. Indeed, a body of recent case law exists, involving in-app purchases in the mobile and free-to-play market.<sup>124</sup> Game journalists and other commentators have described mobile games as “addictive,” and recent case law has recognized this aspect of mobile games.<sup>125</sup> Moreover, commentators have also described the in-app purchase model as

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122. See Crider, *supra* note 115.

123. *Id.*

124. *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 993 (N.D. Ill. 2017); *Mason v. Mach. zone, Inc.*, 140 F. Supp. 3d 457, 459–60 (D. Md. 2015); *In re Apple In-App Purchase Litigation*, 855 F. Supp. 2d 1030, 1033 (N.D. Cal. 2012); see also Allison, *supra* note 11, at 450–51.

125. *E.g., Liston*, 254 F. Supp. 3d at 993; see also Allison, *supra* note 11, at 450–51.

exploitive.<sup>126</sup> For instance, commentators on the popular fortress-building mobile game, *Clash of Clans*, have observed that in the early stages of the game, players have sufficient gold, resources, and time to build structures, but as the game progresses, players encounter excessive wait times and insufficient gold and resources, causing players to inevitably make in-app purchases to advance.<sup>127</sup> While this model has enjoyed commercial success, it has been the subject of criticism and litigation.<sup>128</sup> Significantly, within the last six years, the District Court for the Northern District of California, has considered two cases in which consumers sued Google, Inc. and Apple—two major operators of digital applications stores, Google Play and the Apple App Store—bringing claims under California’s consumer protection statutes and contract laws.<sup>129</sup>

Similarly, cases in other jurisdictions have used California statutes and case law as a point of departure for consumer claims against developers of mobile and free-to-play games, challenging the microtransactions model used in the games.<sup>130</sup> For instance, in *Mason v. Machine Zone, Inc.*, the District Court for the District of Maryland considered whether the microtransactions feature in the free-to-play mobile game *Game of War* violated: (i) “a California statute criminalizing, *inter alia*, the manufacture, ownership, or possession of a ‘slot machine or device[.]’”; (ii) a California unfair competition law enjoining parties from engaging in “unlawful, unfair or fraudulent business act[s] or practice[s]”; (iii) a Maryland criminal statute providing loss-recovery for “a person who ‘loses money’ at a prohibited ‘gaming device’”; and (iv) common law unjust enrichment.<sup>131</sup> The microtransactions feature at issue allowed players to purchase virtual gold at a rate of “\$4.99 for 1200

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126. Allison, *supra* note 11, at 453 (“The game is designed to reel in the player at the beginning with quick, consistent bursts of dopamine from gratifying activities, and then begin withholding gratification unless the player makes [in-app purchases].”).

127. Allison, *supra* note 11, at 452-53; Mike Foster, *The waiting game: Hands-on with Clash of Clans*, ENDGAGET (Jan. 22, 2014), <https://www.engadget.com/2014/01/22/the-waiting-game-hands-on-with-clash-of-clans/>.

128. *Imber-Gluck v. Google, Inc.*, No. 5:14-CV-01070, 2014 WL 3600506, at \*1 (N.D. Cal. July 21, 2014); *In re Apple*, 855 F. Supp. 2d at 1033. *See also* Allison, *supra* note 11, at 456-57 (discussing *In re Apple* and arguing in favor of FTC regulation).

129. *Imber-Gluck*, 2014 WL 3600506, at \*1-2; *In re Apple*, 855 F. Supp. 2d at 1033-34.

130. *See Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 461-66 (D. Md. 2015). *But see Liston*, 254 F. Supp. 3d at 998 n.2 (N.D. Ill. 2017) (distinguishing *Mason* based on standing claims and the nature of the complaint).

131. *Mason*, 140 F. Supp. 3d at 459, 461, 464, 467-68 (first quoting CAL. PENAL CODE § 330b (West 2011), then quoting CAL. BUS. & PROF'L CODE § 17200 (West 1992), and then quoting MD. CODE. ANN., CRIM. LAW § 12-110 (West 2002)).

pieces to \$99.99 for 20,000 pieces” and then wager the virtual gold in a “Casino” game to win random, in-game loot.<sup>132</sup> The court dismissed all claims, finding, *inter alia*, that the microtransactions feature did not constitute unlawful gambling, as the free-to-play game was primarily one of skill and not chance, and the consumer “received the full economic benefit of her bargain” in purchasing the virtual gold to play the in-game Casino.<sup>133</sup>

Likewise, in *Liston v. King.com, Ltd*, a plaintiff sued King.com, Ltd (“King”), the developer of *Candy Crush Saga* (“Candy Crush”), alleging consumer fraud and contract claims, including: (i) violation of the Consumer Fraud and Abuse Act (“CFAA”); (ii) breach of implied contract; (iii) unjust enrichment; (iv) “violation of the consumer protection statutes of all 50 states and the District of Columbia”; and (v) “violation of Illinois’ Consumer Fraud and Deceptive Business Practices Act [(“ICFA”)].”<sup>134</sup> A mobile puzzle game, Candy Crush invites players to complete various puzzles with limited time or number of moves.<sup>135</sup> If players fail to complete the puzzles under specified conditions, they can replay the level, provided they have an appropriate number of in-game “lives.”<sup>136</sup> The District Court for the Northern District of Illinois identified three ways players can obtain additional lives after the five initial lives players obtain when starting the game: (1) waiting thirty minutes to obtain a maximum of five additional lives per wait period (the “Free Life Option”); (2) purchasing lives through microtransactions at a cost of \$0.99 for five lives (the “Purchase Option”); or (3) linking the Candy Crush account to their Facebook accounts and inviting their Facebook friends to download the game, which then allows players to receive additional lives (the “Donated Lives” or “Facebook Option”).<sup>137</sup>

Specifically, the plaintiff alleged that King “designed or changed Candy Crush in order to remove the Donated Lives” without providing adequate notice to players when he chose to acquire additional lives through the Facebook Option and found that they were no longer in his Candy Crush account.<sup>138</sup> While the court dismissed the federal and Illinois consumer fraud claims, it allowed the plaintiff to proceed on his

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132. *Id.* at 460.

133. *Id.* at 459, 464, 466, 469.

134. *Liston*, 254 F. Supp. 3d at 992, 994.

135. *Id.* at 993.

136. *Id.*

137. *Id.*

138. *Id.* at 993–94.

breach of implied contract, unjust enrichment, and state statutory consumer fraud claims.<sup>139</sup>

Significantly, in allowing the plaintiff's contract claims to proceed, the court rejected King's argument that the donated lives had no monetary value.<sup>140</sup> Instead, the court reasoned that "King's argument that an asset that is able to sell for 20 cents has no inherent value is untenable"<sup>141</sup> and that "the Donated Lives have a calculable value of \$.20 each, based on the ability to purchase five lives for \$.99," causing King's actual damages argument to fail.<sup>142</sup>

In many ways, these cases look grim for consumers seeking to make similar consumer fraud or unfair competition allegations regarding the use of microtransactions and loot boxes in AAA and multiplayer games. The most recent cases alleging false advertising and other consumer claims against console game developers have similarly ended with dismissals.<sup>143</sup>

Notably, in *Bassett v. Electronic Arts*, plaintiffs in a putative class action sued EA for "an alleged misrepresentation to consumers about the Internet capabilities of video games" that EA "manufactured, advertised, and sold."<sup>144</sup> Specifically, the plaintiffs contend that EA wrongfully deactivated the online features of two games after the plaintiffs had purchased at least eight products manufactured by EA.<sup>145</sup> Plaintiffs brought claims under various state statutes and common law contract principles, including: (i) "California's Consumers Legal Remedies Act"; (ii) "California's False Advertising Law"; (iii) "California's Unfair

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139. See *id.* at 1003–07. To be sure, the court only provisionally allowed the plaintiff's non-Illinois consumer fraud claim, absent a representative class of similarly situated plaintiffs. See *id.* at 1003, 1007. The court reasoned that a complaint need not assert all legal theories upon which a plaintiff may recover and "it remains to be seen whether Liston and the putative class will actually move forward on all, or any, of the non-Illinois causes of action." *Id.* at 1003. The court, thus, held that the sufficiency of this claim "will be dependent upon and tailored to the identification of a plaintiff or plaintiffs—whether Liston or others—who may permissibly assert causes of action premised on consumer fraud statutes other than that of Illinois." *Id.* at 1007.

140. *Id.* at 997, 1004–05.

141. *Id.* at 997.

142. *Id.* at 1005.

143. Compare *Bassett v. Elec. Arts, Inc.*, No. 13-CV-04208, 2015 WL 1298644, at \*1–2, \*11 (E.D.N.Y. Feb. 9, 2015) (dismissing a putative class action alleging, *inter alia*, false advertising and breach of contract claims against Electronic Arts for deactivating online features for two products), with *McMahon v. Take-Two Interactive Software, Inc.*, 640 F. App'x 669 (9th Cir. 2016) (reversing a district court decision to dismiss the plaintiffs' unfair competition and false advertising claims).

144. *Bassett*, 2015 WL 1298644, at \*1.

145. *Id.*

Competition Law”); (iv) “New York General Business Law Section 349”); (v) breach of express warranty; (vi) breach of implied warranty of merchantability; (vii) breach of implied warranty of fitness for particular purpose; and (viii) unjust enrichment.<sup>146</sup> The District Court for the Eastern District of New York, however, did not reach the merits of any of these claims.<sup>147</sup> Instead, the court analyzed the arbitration clause in the Terms of Service Agreement between the plaintiffs and EA and upheld its validity.<sup>148</sup> Furthermore, the court rejected the plaintiffs’ challenge to the arbitration provision, arguing that it was an illusory promise and unconscionable.<sup>149</sup> Specifically, with regard to the unconscionability challenge, the court explained: “California courts have consistently held that a term cannot be so unconscionable as to invalidate a contract when the contract at issue concerns a nonessential recreational activity.”<sup>150</sup>

“This is because unconscionability requires a deprivation of meaningful choice, and for nonessential activities, the consumer always has the option of forgoing the activity.”<sup>151</sup> Accordingly, because “[v]ideo games such as the ones manufactured by defendant are nonessential recreational activities,” the plaintiffs could not invalidate the arbitration clause.<sup>152</sup>

In contrast, the Ninth Circuit in *McMahon v. Take-Two Interactive Software* provided some hope to consumers when it reversed a district court’s decision holding that plaintiff’s allegations of misrepresentation were “not actionable” under “California’s unfair competition law (UCL) and false advertising law (FAL).”<sup>153</sup> Plaintiffs argued that Take-Two Interactive Software, Inc. (“Take Two”) and Rockstar Games, Inc. (“Rockstar”)—the developers of Grand Theft Auto V (“GTA V”)—misrepresented the availability of an online feature on the game’s packaging, causing the plaintiffs to purchase the game at a “premium price.”<sup>154</sup> The Ninth Circuit noted the plaintiff’s allegation “that they

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146. *Id.*

147. *Id.* at \*3–13. To be clear, the court only partially granted EA’s motion to compel arbitration, recommending “that this action be stayed pending arbitration pursuant to Section 3 of the [Federal Arbitration Act], and that defendant’s motion to transfer venue be denied without prejudice to renewal if there is to be further litigation after an arbitration award has been rendered.” *Id.* at \*13. Thus, future litigation in this case is subject to its outcome in the arbitral forum.

148. *Id.* at \*4–8.

149. *Id.* at \*8–11.

150. *Id.* at \*11.

151. *Id.* (citation omitted).

152. *Id.* at \*11.

153. 640 F. App’x 669, 671 (9th Cir. 2016) (citations omitted).

154. *Id.*

read all the disclosures and statements on GTA V's packaging, and that these representations led them to believe that GTA Online would be available to play immediately upon purchase of GTA V."<sup>155</sup> Indeed, the Ninth Circuit asserted that the district court failed to assess the plaintiffs' reliance on these statements and, thus, remanded the case for further proceedings.<sup>156</sup>

On remand, the District Court for the District of California considered the plaintiffs' Second Amended Complaint, bringing the following claims: (i) violation of California's UCL; (ii) violation of California's FAL; (iii) "breach of express warranty"; (iv) "breach of the warranty of merchantability"; and (v) "violation of the Song-Beverly Act."<sup>157</sup> The court acknowledged that GTA V's packaging stated that the game featured an online component, but also noted a statement "[i]n smaller font below this statement [clarifying] that the online features 'may not be available to all users, and may, upon 30 days' notice, be terminated, modified, or offered under different terms.'"<sup>158</sup> As such, the court found that the plaintiffs failed to plead actual and reasonable reliance on the alleged misrepresentations on GTA V's packaging, dismissing the action.<sup>159</sup>

To be sure, microtransactions are not at issue in *Bassett* or *McMahon*.<sup>160</sup> But inevitably, a legal challenge to the microtransactions model would have to overcome the jurisprudential hurdle of these cases. Cases like *Liston* demonstrate that consumers may have a glimmer of hope under contract theories.<sup>161</sup> But even if consumers could succeed in bringing a cognizable claim, courts are unlikely to fashion a universal remedy for all consumers harmed by exploitive microtransactions and loot boxes.<sup>162</sup>

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155. *Id.*

156. *Id.* at 671–72.

157. *McMahon v. Take-Two Interactive Software, Inc.*, No. 13-2032, 2017 WL 4708020, at \*1 (C.D. Cal., July 6, 2017).

158. *Id.*

159. *Id.* at \*3–6.

160. *McMahon*, 2017 WL 4708020, at \*1, \*6; *McMahon*, 640 F. App'x at 669, 672; *Bassett v. Elec. Arts, Inc.*, No. 13-CV-04208, 2015 WL 1298644, at \*1, \*11 (E.D.N.Y. Feb. 9, 2015).

161. *Liston v. King.com, Ltd.*, 254 F. Supp. 3d 989, 1004, 1007 (N.D. Ill. 2017).

162. *See generally McMahon*, 2017 WL 4708020; *Liston*, 254 F. Supp. 3d 989; *Bassett*, 2015 WL 1298644.

C. *Developers Should Be Concerned with Government Regulation of Loot Boxes*

For some time, consumers voiced concern about loot boxes and even protested their widespread use in new games.<sup>163</sup>

It seems these concerns have not fallen on deaf ears. The loot box feature has recently come under the scrutiny of legislators and regulators both domestically and abroad.<sup>164</sup> While legislators in some jurisdictions have proposed age restrictions and fair notice requirements, others have outright banned the sale of certain games that contain loot boxes.<sup>165</sup> A closer look at some of these proposals is revealing.

For instance, in the United Kingdom, an online petition likening the “loot box” microtransaction model to gambling secured enough signatures for Parliament to consider regulating digital games to conform to gambling laws.<sup>166</sup> On October 6, 2017, Daniel Zeichner, a member of the Labor party, posted a question for the Secretary of State for DCMS on the Parliament’s publications and records page, asking “what steps she plans to take to help protect vulnerable adults and children from illegal

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163. *E.g.*, Wright, *supra* note 38 (“With Battlefront 2, droves of players protested, and regulators began to grumble about the [sic] how the practice might meet the legal definition of gambling.”).

164. *E.g.*, Plunkett, *supra* note 41; *Rage Over Pay-To-Win ‘Star Wars’ Game Draws Attention from Lawmakers*, CTV NEWS (Nov. 30, 2017, 7:24 AM), <https://www.ctvnews.ca/entertainment/rage-over-pay-to-win-star-wars-game-draws-attention-from-lawmakers-1.3700633>; Katherine Cross, *How the Legal Battle Around Loot Boxes Will Change Video Games Forever*, THE VERGE (Dec. 19, 2017, 9:00 AM), <https://www.theverge.com/2017/12/19/16783136/loot-boxes-video-games-gambling-legal>; Blake Hester, *New Bills Look to Regulate the Buying and Selling of Games with Loot Boxes in Hawaii*, ROLLING STONE (Feb. 12, 2018), <https://www.rollingstone.com/glixel/news/new-bills-look-to-regulate-games-with-loot-boxes-in-hawaii-w516594>.

165. *E.g.*, Dustin Bailey, *The UK Government Have Responded to Questions About In-Game Gambling*, PCGAMESN (Oct. 17, 2017), <https://www.pcgamesn.com/uk-government-loot-box-regulations>; Max Wasserman, *Are Video-Game Loot Boxes a Form of Gambling That Targets Children? Washington Aims to Find out*, THE NEWS TRIBUNE (Jan. 23, 2018, 8:00 AM), <http://www.thenewstribune.com/news/politics-government/article196064729.html>; Saqib Shah, *Belgium Moves to Ban ‘Star Wars Battlefront 2’-Style Loot Boxes*, ENGADGET (Nov. 22, 2017), <https://www.engadget.com/2017/11/22/belgium-moves-to-ban-star-wars-battlefront-2-style-loot-boxes/?ncid=txtlnkusaolp00000603>.

166. *Closed Petition: Adapt Gambling Laws to Include Gambling in Video Games Which Targets Children*, PETITIONS: UK GOVERNMENT AND PARLIAMENT (Apr. 4, 2018), <https://petition.parliament.uk/petitions/201300> [hereinafter *Adapt Gambling Laws*]; Parliament, Parliamentary Business, Publications & Records, *Gambling: Video Games: Written Question – 106043*, Written Questions and Answers (Oct. 16, 2017), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-06/106043/> [hereinafter *Gambling: Video Games: Written Question*].

gambling, in-game gambling and loot boxes within computer games.”<sup>167</sup> The Department of Digital, Culture, Media and Sport (“DCMS”) responded to the written question: “The government recognise [sic] the risks that come from increasing convergence between gambling and video games. The Gambling Commission is keeping this matter under review and will continue to monitor developments in the market.”<sup>168</sup>

In response to the petition, one commentator observed: “The petition—while grammatically questionable—asks laws covering gambling to be adapted to include videogame-related gambling, citing China’s law requiring the public disclosure of loot box odds.”<sup>169</sup> Indeed, the Chinese Ministry of Culture recently adopted the regulations requiring game developers to publicly disclose on an official webpage: (i) information regarding the name, quantity, and other pertinent characteristics of virtual goods; and (ii) the probability of obtaining specific virtual goods.<sup>170</sup> The regulation, presently available only in Chinese, has been unofficially translated on numerous blogs and has garnered attention within the gaming community.<sup>171</sup> Likewise, in November 2017, Belgium’s Gaming Commission banned *Star Wars: Battlefront II* over concerns that its loot box feature would encourage

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167. *Gambling: Video Games: Written Question*, *supra* note 166.

168. *Id.* (Parliamentary Under-Secretary for the DCMS, Tracey Crouch, responded on October 16, 2017, repeating almost verbatim DCMS’s response to the online petition for regulating gambling in video games).

169. Bailey, *supra* note 165.

170. Felix Hilgert, *New Regulation for “Loot Boxes” in China – International Impact for All Online Games?*, VIDEO.GAMES.LAW (Feb. 2, 2017), <http://gameslaw.org/new-regulation-for-loot-boxes-in-china-international-impact-for-all-online-games/>.

Hilgert reproduces one unofficial translation of the proposed regulations:

2.6—Online game publishers shall promptly publicly announce information about the name, property, content, quantity, and draw/forged probability of all virtual items and services that can be drawn/forged on the official website or a dedicated draw probability webpage of the game. The information on draw probability shall be true and effective.

2.7—Online game publishers shall publicly announce the random draw results by customers on notable places of official website or in game, and keep record for government inquiry. The record must be kept for more than 90 days. When publishing the random draw results, some measures should be taken place to protect user privacy. *Id.*

171. *Id.* (“While this development has been met with a positive response especially from foreign gamers and speculations about its international impacts have already started, the actual consequences for the online game sector remain uncertain.”).

gambling among children.<sup>172</sup> The Gaming Commission, however, has not definitively decided that all loot boxes constitute gambling.<sup>173</sup>

In the wake of international regulatory responses to loot boxes, legislators in the United States have slowly begun to take action on the issue. Hawaii's State Legislature began investigating *Star Wars: Battlefront II*'s loot box feature in November 2017, around the same time as Belgium's Gaming Commission.<sup>174</sup> Representative Chris Lee stated in a press conference: "We are here today to ensure future protection to kids, youth and everyone when it comes to the spread of predatory practices in online ingredients and the significant financial consequences it can have on families and has been having on families of this nation. . . . This is a Star Wars themed online casino designed to lure kids into spending money."<sup>175</sup> In February 2018, legislators in Hawaii proposed bills that seek to regulate loot boxes in ways similar to those enacted in Belgium and China.<sup>176</sup> The first set of bills, House Bill 2686 and Senate Bill 3024, seek to restrict the sale of games that involve the purchase of loot boxes through real currency to individuals age twenty-one and over.<sup>177</sup>

The second set, House Bill 2727 and Senate Bill 3025, seeks to require game publishers to explicitly label games that include loot boxes and also publish the probability rates of receiving specific items or rewards players can obtain through the loot box feature.<sup>178</sup>

In January 2018, legislators in Washington State took notice of the loot box problem.<sup>179</sup> Senator Kevin Ranker (D-Washington) proposed a bill that would "reclassify loot boxes and other [microtransactions]

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172. Shah, *supra* note 165.

173. See James Gatto, *The Legality of Loot Boxes—Update*, SHEPPARD, MULLIN, RICHTER & HAMPTON LLP: LAW OF THE LEVEL BLOG (Nov. 30, 2017), <https://www.lawofthelevel.com/2017/11/articles/gaming/legality-loot-boxes-update/>.

174. Alex Perry, 'Star Wars Battlefront II' Problems: Hawaii Investigates Loot Boxes as Gambling, INT'L BUS. TIMES: TECH. (Nov. 22, 2017, 3:12 PM), <https://www.ibtimes.com/star-wars-battlefront-ii-problems-hawaii-investigates-loot-boxes-gambling-2618662>.

175. Joel Hruska, *Battlefront II Loot Crates Declared Gambling, Investigated in Hawaii*, EXTREMETECH (Nov. 27, 2017, 10:15 AM), <https://www.extremetech.com/gaming/259503-battlefront-ii-loot-crates-declared-gambling-belgium-attacked-hawaii>.

176. Cross, *supra* note 164; Hester, *supra* note 164; Wesley Yin-Poole, *The Video Game Industry's Loot Box Problem Isn't Going Away*, EUROGAMER (Feb. 15, 2018), <http://www.eurogamer.net/articles/2018-02-15-the-video-game-industrys-loot-box-problem-isnt-going-away>.

177. Rob LeFebvre, *Hawaii Legislators Want to Put Age Restrictions on Loot Crates*, ENGADGET (Feb. 13, 2018), <https://www.engadget.com/2018/02/13/hawaii-legislators-age-restrictions-loot-crates/?ncid=txtlnkusaolp00000603>.

178. *Id.*

179. Cal Jeffrey, *Washington State to Determine if Loot Boxes Are Gambling*, TECHSPOT (Jan. 25, 2018, 5:20 PM), <https://www.techspot.com/news/72943-washington-state-determine-if-loot-boxes-gambling.html>.

mechanics as a form of gambling.”<sup>180</sup> Echoing the concerns of many officials, Senator Ranker has commented, “It is unacceptable to be targeting our children with predatory gambling masked in a game with dancing bunnies or something.”<sup>181</sup>

Moreover, Senator Maggie Hassan (D-New Hampshire) has taken an active role in proposing regulations on microtransactions in general and loot boxes in particular.<sup>182</sup> During a nominations hearing, Senator Hassan broached the topic of microtransactions and loot boxes in her question to prospective nominees to the FTC:

[I]n the past, the FTC has looked at video games, issuing a report on the marketing of violent video games to children in 2009 and in 2013. It also studied the Entertainment Software Rating Board, or ESRB, finding it one of the most effective voluntary enforcement boards. That’s why I’m confident that the ESRB will take this issue seriously. So today I am sending a letter to the ESRB outlining my concerns with micro transactions, which may take the form of loot boxes. That’s what they’re called, and allow in-game purchases for surprise winnings. And in many cases these are being marketed to and used by children who are obviously particularly susceptible to being addicted to them.<sup>183</sup>

Thus, concerned about the dangers of loot boxes, including their addictive qualities and the vulnerability of children, she asked the prospective nominees, “[W]ould the FTC be willing to look at loot boxes as an issue independently?”<sup>184</sup>

True to her word, Senator Hassan urged the ESRB, a self-regulating, non-profit organization that publishes ratings and guidelines on the age-appropriateness and content in games, “to examine whether the design and marketing approach to loot boxes in games—especially those geared toward children—are being conducted in an ethical and transparent manner that adequately protects consumers from predatory practices.”<sup>185</sup>

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180. *Id.*

181. Wasserman, *supra* note 165.

182. Tae Kim, *Senator Calls for Further Protections from ‘Predatory’ Monetization Practices in Video Games*, CNBC (Feb. 22, 2018, 5:09 PM), <https://www.cnbc.com/2018/02/22/senator-hassan-calls-for-further-protections-from-predatory-monetization.html>; see also *Hearing on FTC Nominations*, *supra* note 11.

183. *Hearing on FTC Nominations*, *supra* note 11.

184. *Id.* All nominees responded affirmatively to Senator Hassan’s question. *Id.*

185. Kim, *supra* note 182.

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In her letter to Patricia Vance, ESRB's president, Senator Hassan expressed her concerns about microtransactions and loot boxes, stating:

The prevalence of in-game micro-transactions, often referred to as 'loot boxes,' raises several concerns surrounding the use of psychological principles and enticing mechanics that closely mirror those often found in casinos and games of chance. The potential harm is real. Recently the World Health Organization classified "gaming disorder" as a unique condition in its recent draft revision of the 11th International Classification of Diseases. While there is robust debate over whether loot boxes should be considered gambling, the fact that they are both expensive habits and use similar psychological principles suggest loot boxes should be treated with extra scrutiny. At minimum, the rating system should denote when loot boxes are utilized in physical copies of electronic games.<sup>186</sup>

Senator Hassan also expressed her faith in the ESRB's rating system, "which is of great value to parents across the country."<sup>187</sup> She stated further that the ESRB has an "important mission" to provide important information about "the suitability of games" to parents and "ensur[e] that the industry is following responsible marketing practices."<sup>188</sup> Finally, Senator Hassan made the following proposals to the ESRB: (i) review its ratings process with respect to loot boxes; (ii) evaluate "whether the design and marketing approach to loot boxes in games geared toward children is being conducted in an ethical and transparent way"; (iii) research and "publish data on how developers are using loot boxes, how widespread their use is, and how much money players spend on them"; and (iv) "develop best practices for developers, such as ethical design, tools for parents to disable these mechanisms, or making them less essential to core gameplay."<sup>189</sup>

Prior to Senator Hassan's recent initiative, the ESRB declined to recognize the loot box mechanic as gambling.<sup>190</sup> In October 2017, a

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186. Letter from Senator Maggie Hassan to the Entertainment Software Rating Board (Feb. 14, 2018) [hereinafter Letter], *reprinted in* Kim, *supra* note 182.

187. *Id.*

188. *Id.*

189. *Id.*

190. Erik Kain, *The ESRB is Wrong About Loot Boxes and Gambling*, FORBES (Oct. 12, 2017, 7:00 AM), <https://www.forbes.com/sites/erikkain/2017/10/12/the-esrb-is-wrong-about-loot-boxes-and-gambling/#1a3e08942a64>; Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017, 12:46 PM), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

spokesperson for the ESRB stated in an email to Kotaku: “ESRB does not consider loot boxes to be gambling. . . While there’s an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don’t want).”<sup>191</sup> But in response to Senator Hassan’s letter, the ESRB provided the following comment to CNBC:

We received Senator Hassan’s letter and appreciate her confidence in and support of the ESRB rating system. . . . As the [video game] industry evolves, so does our rating system, and we will continue to make enhancements to ensure parents continue to be well-informed. We will also continue to provide information about additional tools, including parental control guides, that help parents set spending and time limits and block potentially inappropriate games based on the ESRB-assigned age rating.<sup>192</sup>

A discussion of the ESRB’s self-regulatory role in the video game industry appears below.

#### IV. THE MERITS OF SELF-REGULATION IN THE VIDEO GAME INDUSTRY: A PROPOSAL

In light of the challenges that both consumers and game developers face, noted in Part III, Part IV maintains that self-regulation in the video game industry is the most appropriate solution. As this section discusses below, self-regulation has been a hallmark in other branches within the entertainment industry. To some degree, self-regulation has also kept the government from becoming unnecessarily involved in the business and affairs of the entertainment industry. More significantly, self-regulation has allowed creators—producers, filmmakers, musicians, artists, and game developers, to name a few—to continue making creative works and consumers to continue enjoying those works. In essence, self-regulation would allow professionals in the video game industry to more readily address and correct the problems with microtransactions, taking into account the competing interests of game developers and consumers, while keeping courts and legislators out of the industry’s affairs.

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191. Schreier, *ESRB Says It Doesn’t See ‘Loot Boxes’ as Gambling*, *supra* note 190 (emphasis omitted).

192. Kim, *supra* note 182.

The entertainment industry in the United States has a history of self-regulation as an alternative to government regulation.<sup>193</sup> For instance, the film and television industry includes a variety of trade and self-regulatory organizations that represent the creative, policy, and legal interests of filmmakers, producers, directors, actors, and talent agents.<sup>194</sup> Established in 1922, the Motion Picture Association of America (MPAA) sought to self-censor what it deemed “offensive material” in the film industry and “prevent government interference in filmmaking.”<sup>195</sup> The MPAA’s role as an advocate for the motion picture industry has expanded to developing anti-piracy measures both domestically and internationally.<sup>196</sup>

The MPAA continues its mission to “advanc[e] the business and art of filmmaking, protect[] the creative and artistic freedoms of storytellers, and bring[] entertainment and inspiration to audiences worldwide.”<sup>197</sup>

Similarly, in the music and recording industry, numerous trade organizations exist to represent the interests of musicians, composers, publishers, songwriters, and recording artists.<sup>198</sup> Among these organizations are the Recording Industry Association of America (RIAA), the National Music Publishers Association (NMPA), and the American Federation of Musicians (AFM).<sup>199</sup>

Likewise, the video game industry is composed of organizations that similarly protect First Amendment rights of game developers and ensure compliance with legal, judicial, and industry standards.<sup>200</sup> The first self-regulatory organizations in the video game industry emerged in the early 1990s, in response to controversies surrounding violence in video games and congressional hearings threatening to take legislative measures to regulate gaming content.<sup>201</sup> To avoid government regulation, industry

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193. See THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES §1:110 (2017); *Our History: Who We Are*, MOTION PICTURE ASS’N OF AMERICA, <https://www.mpa.org/who-we-are/#our-history> (last visited Feb. 20, 2019).

194. E.g., SELZ ET AL., *supra* note 193, §§ 1:111–126.

195. *Our History: Who We Are*, *supra* note 193.

196. See SELZ ET AL., *supra* note 193, § 1:124; *Our History: Who We Are*, *supra* note 193.

197. *Our History: Who We Are*, *supra* note 193.

198. SELZ ET AL., *supra* note 193, §§ 1:129–151.

199. *Id.* §§ 1:142, 1:134, 1:137. The RIAA, for instance, “[P]romotes the creative and financial vitality of major music companies.” *About RIAA*, RECORDING INDUS ASS’N OF AMERICA, <https://www.riaa.com/about-riaa/> (last visited Feb. 20, 2019). Its mission is to “protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.” *Id.*

200. See SELZ ET AL., *supra* note 193, § 1:166, 1:169–172.

201. See *id.* § 1:171; see also Garrett Mathew-James Mott, Note, *Game Over for Regulating Violent Video Games? The Effect of Brown v. Entertainment Merchants Ass’n on*

professionals created the Interactive Digital Software Association (IDSA), which was re-named the Entertainment Software Association (ESA) in 2003, to internally regulate the industry.<sup>202</sup>

The IDSA created the ESRB in 1994 to develop a standardized rating system for video game content, which would provide consumers—particularly parents purchasing games for children—fair notice and guidance on age-appropriateness, content, and interactive elements.<sup>203</sup>

Today, the ESA continues to service the business, financial, and legal aspects of the video game industry by providing “a global content protection program, business and consumer research, government relations and intellectual property protection efforts.”<sup>204</sup> Moreover, the ESA is dedicated to making sure the video game industry receives “the same First Amendment protections as books, music, movies and TV programs, and oppos[ing] efforts to regulate entertainment media based on its content.”<sup>205</sup> The ESA also publishes an annual report on video game usage, sales, and demographics data.<sup>206</sup>

The ESRB continues to review new game releases for appropriate content and ensures compliance with industry rules.<sup>207</sup> Additionally, the ESRB supervises and ensures compliance with online and mobile privacy as well as advertising practices.<sup>208</sup> Prior to the release of new games, the ESRB’s rating process requires game publishers to: first, submit a completed questionnaire “detailing the game’s pertinent content” including depictions and/or usage of “violence, sexual content, language, controlled substances, gambling, etc.” as well as “other relevant factors such as context, reward systems and degree of player control”; and

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*First Amendment Jurisprudence*, 45 LOY. L.A. L.REV. 633, 651-52 (2012); Alan Wilcox, *Regulations Violence in Video Games: Virtually Everything*, 31 J. Nat’l Ass’n Admin. L. 259–64 (2011).

202. Rob Fahey, *IDSA out, ESA in as Trade Body Changes Name*, GAMESINDUSTRY.BIZ (July 22, 2003), <https://www.gamesindustry.biz/articles/idsa-out-esa-in-as-trade-body-changes-name>.

203. SELZ ET AL., *supra* note 193, § 1:171. See *ESRB Ratings Guide*, ENTMT SOFTWARE RATING BOARD, [http://www.esrb.org/ratings/ratings\\_guide.aspx](http://www.esrb.org/ratings/ratings_guide.aspx) (last visited Feb. 20, 2019); see also Mott, *supra* note 201.

204. *Overview*, ENTMT SOFTWARE RATING, <http://www.theesa.com/about-esa/overview/> (last visited Feb. 20, 2019).

205. *Government Affairs*, ENTMT SOFTWARE RATING, <http://www.theesa.com/public-policy/government-affairs/> (last visited Feb. 20, 2019).

206. *Essential Facts About the Computer and Video Game Industry*, ENTMT SOFTWARE ASS’N, <http://www.theesa.com/about-esa/essential-facts-computer-video-game-industry/> (last visited Feb. 20, 2019).

207. *ESRB Ratings Guide*, *supra* note 203.

208. *Id.*

second, “a video that captures all pertinent content, including typical gameplay, missions, and cutscenes, along with the most extreme instances of content across all relevant categories.”<sup>209</sup>

The ESRB then evaluates the submissions and assigns a rating comprised of three elements: (i) a rating category that “suggest[s] age appropriateness” and ranges from everyone (“E”) to adults only (“AO”); (ii) content descriptors, such as “intense violence” or “sexual content,” that provide more information about areas of “interest or concern” about the game’s content; and (iii) interactive elements such as a game’s ability to share a user’s location or interact with others via the Internet.<sup>210</sup> As previously noted, the ESRB has declined to recognize loot boxes as a form of gambling, contrary to consumer concerns about this type of microtransaction.<sup>211</sup>

In short, the video game industry has a number of professional associations that can research legal and policy issues within the industry.<sup>212</sup> While these organizations have not historically investigated claims of consumer fraud or unfair competition, they have not encountered monetization methods such as loot boxes and microtransactions.<sup>213</sup> Because the members and leaders of these organizations are professionals within the industry, they have an interest in maintaining the integrity of the industry and their oversight and decisions are likely to have a meaningful industry-wide impact.<sup>214</sup> To understand the scope of a self-regulatory organization’s usefulness, current legislative proposals are worth considering.

Two sets of proposals in the Hawaii legislature provide a good model for a self-regulatory organization to consider in promulgating an industry-wide best practices guideline.<sup>215</sup> The companion bills HB2686 and SB3024 contemplate age restrictions on the sale of video games that contain microtransactions to individuals ages twenty-one and over.<sup>216</sup> The proposed statutes provide as follows:

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209. *ESRB Ratings Process*, ENTMT SOFTWARE RATING BOARD, [http://www.esrb.org/ratings/ratings\\_process.aspx](http://www.esrb.org/ratings/ratings_process.aspx) (last visited Feb. 20, 2019).

210. *ESRB Ratings Guide*, *supra* note 203.

211. *See id.*

212. SELZ ET AL., *supra* note 193, §§ 1:166, 1:169–172.

213. *See id.*

214. *See Education & Outreach*, ENTMT SOFTWARE RATING BOARD, <http://www.esrb.org/about/education.aspx> (last visited Feb. 20, 2019); *Frequently Asked Questions*, ENTMT SOFTWARE RATING BOARD, <http://www.esrb.org/ratings/faq.aspx> (last visited Feb. 20, 2019).

215. *See* H.R. 2686, 29th Leg., Reg. Sess. (Haw. 2018); H.R. 2727, 29th Leg., Reg. Sess. (Haw. 2018); S. 3024, 29th Leg., (Haw. 2018); S. 3025, 29th Leg., Reg. Sess. (Haw. 2018).

216. H.R. 2686, 29th Leg., Reg. Sess. (Haw. 2018); S. 3024, 29th Leg. (Haw. 2018).

§481B-\_\_\_ Video games; restrictions. (a) It shall be unlawful for any retailer to sell to any person under twenty-one years of age a video game that contains a system of further purchasing:

- (1) A randomized reward or rewards; or
- (2) A virtual item which can be redeemed to directly or indirectly receive a randomized reward or rewards.<sup>217</sup>

Moreover, the companion bills HB2727 and SB3025 set forth mandatory disclosures in microtransactions systems in two proposed sections.<sup>218</sup> In pertinent part, the proposed section 481B-A provides:

§ 481B-A Video games; probability rates; disclosure. (a) Video game publishers that distribute video games that contain a system of further purchasing:

- (1) A randomized reward or rewards; or
- (2) A consumable virtual item that can be redeemed and directly or indirectly converted to a randomized reward or rewards,

shall prominently disclose and publish to the consumer the probability rates of receiving each type of randomized reward or rewards at the time of purchase and at the time any mechanism to receive a randomized reward or rewards is activated so as to meaningfully inform the consumer's decision prior to the purchase or activation of any mechanism to receive a randomized reward or rewards.

(b) The department of commerce and consumer affairs, in consultation with the office of enterprise technology services, is authorized to audit the code of video games sold in this State and subject to this section to ensure that the probability rates for receiving each type of randomized reward or rewards are calculated correctly and working properly. The department may contract with a third party to provide additional assistance as needed. The department shall not publicly disclose proprietary

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217. Haw. H.B. 2686; Haw. S.B. 3024.

218. Haw. H.B. 2727; Haw. S.B. 3025.

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information beyond that which is necessary to fulfill the intent of this section.<sup>219</sup>

Further, proposed 481B-B provides:

§ 481B-B Video games; labelling; disclosure. (a) Each video game subject to section 481B-A shall:

(1) Bear a prominent, easily legible, bright red label on its packaging which reads: “Warning: contains in-game purchases and gambling-like mechanisms which may be harmful or addictive”; or

(2) If purchased digitally and downloaded through the Internet or an online application, prominently disclose to the consumer at the time of consumer purchase a bright red label that is easily legible and which reads: “Warning: contains in-game purchases and gambling-like mechanisms which may be harmful or addictive”,

so as to meaningfully inform the consumer’s decision prior to purchase.

(b) No video game publisher shall at any time modify a game to contain or otherwise permit the inclusion of additional content for which the game was not appropriately labeled at the time of original sale.<sup>220</sup>

Considering the two sets of proposals above, two important consumer protection concerns are immediately apparent: (1) the protection of minors from “gambling-like” mechanisms; and (2) fair disclosure of probability rates for players to obtain certain in-game items.<sup>221</sup> Significantly, the fair disclosure bills also provide for a compliance mechanism, authorizing a government body to audit video game sales to ensure publishers comply with fair disclosure requirements.<sup>222</sup> Indeed, a self-regulatory organization would find these measures useful in drafting regulations and best-practices rules to protect consumers from deceptive microtransactions.

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219. Haw. H.B. 2727; Haw. S.B. 3025.

220. Haw. H.B. 2727; Haw. S.B. 3025.

221. See Haw. H.B. 2686; Haw. H.B. 2727; Haw. S.B. 3024; Haw. S.B. 3025.

222. See Haw. H.B. 2727; Haw. S.B. 3025.

But these proposals also fall short in important ways. First, the age restriction proposal may prohibit *retailers* from selling games with microtransactions to individuals under the age of twenty-one, but it does not prohibit or deter game *developers* and *publishers* from implementing such mechanics in the first place.<sup>223</sup> In only an indirect way, the age restriction proposal may deter game publishers from using microtransactions if the restriction prevents sales when the usual customer base for their games—namely, customers ages seventeen and older, corresponding to ESRB’s “Mature” rating category—cannot purchase the publisher’s games.<sup>224</sup> Second, the fair disclosure proposal is well-intentioned, but game publishers are likely to resist the inclusion of the warning label, finding it overly prohibitive.<sup>225</sup> Indeed, the warning label, as presently written in the proposed statutes, would equate the “dangers” associated with purchasing video games with microtransactions to the dangers associated with purchasing cigarettes.<sup>226</sup> As such, the proposed measure goes too far to regulate gaming, a largely recreational activity that need not be hazardous to the health, like gambling or alcohol consumption. Third, the fair disclosure proposal is also commendable in providing for a compliance mechanism, but compliance alone may not be a sufficient deterrent to game publishers who seek to abuse microtransactions.<sup>227</sup>

Considering these weaker areas of the Hawaii legislature’s proposals,<sup>228</sup> a self-regulatory organization should consider more effective ways to disincentivize deceptive uses of microtransactions from their inception. Moreover, the self-regulatory organization should also have the authority to censure publishers and developers, who violate industry guidelines.<sup>229</sup> In addition, as part of its best-practices rules, a self-regulatory organization could propose monetization methods that do not value payment over gameplay. For example, items that are “exclusively” available through microtransactions could be made available through in-game progression, giving players the option to acquire items they could otherwise only obtain by making an additional

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223. See Haw. H.B. 2686; Haw. S.B. 3024.

224. *ESRB Ratings Process*, *supra* note 209. See Haw. H.B. 2686; Haw. S.B. 3024.

225. See Schreier, *ESRB Says It Doesn’t See ‘Loot Boxes’ as Gambling*, *supra* note 190; H.B. 2727, 29th Leg., Reg. Sess. (Haw. 2018); S.B. 3025, 29th Leg., Reg. Sess. (Haw. 2018).

226. See Haw. H.B. 2727; Haw. S.B. 3025; Hester, *supra* note 164.

227. See Haw. H.B. 2727; Haw. S.B. 3025.

228. See Haw. H.B. 2727; Haw. S.B. 3025.

229. Cf. LEGAL ALMANAC SERIES, THE LAW OF OBSCENITY AND PORNOGRAPHY § 6:19 (2012) (explaining the ESRB’s power to compel compliance and fine game publishers that violate the ESRB’s advertising and labeling guidelines).

payment. Moreover, as Heather Alexandra has observed with the *Star Wars: Battlefront II* system, developers could limit the ways players use upgrades, bonuses, and other items relative to their level or status in the game.<sup>230</sup> For example, a level one player could be limited to equipping lower-level upgrades or bonuses that incentivize the player to progress through the game, develop skills, and level up before they meet the criteria to equip higher-level items.<sup>231</sup>

Considering Senator Hassan's proposal that the ESRB regulate loot boxes,<sup>232</sup> the proposal is well-founded and reflects consumer concerns with the monetization scheme. Senator Hassan is correct in noting that further research on monetization mechanics is necessary to guide regulatory efforts.<sup>233</sup> But the ESRB is not best-equipped to handle such a task.<sup>234</sup> The ESRB's function is to review gaming content for such features as age-appropriateness, violence, graphic language, and nudity.<sup>235</sup>

Through this review process, the ESRB can adequately identify descriptors and an age-appropriateness category that gives consumers fair notice about the game's content.<sup>236</sup> Moreover, the ESRB can sanction game publishers who violate its labeling and advertising guidelines through imposing fines and compelling compliance.<sup>237</sup> Thus, the ESRB plays an important role in protecting consumers, especially parents and children, from video game content that may not be suitable for younger audiences and players with sensitivities to graphic or violent material.<sup>238</sup> But the ESRB's task is not to investigate consumer claims or police the ways game publishers and retailers contract with consumers or monetize their games.<sup>239</sup>

Instead of expanding the ESRB's role, the industry should have a separate self-regulatory organization whose sole purpose is to investigate deceptive monetization techniques, publish guidelines, and enforce compliance. The ESRB, however, could be useful to this organization's mission in two ways. First, the ESRB could consider monetization mechanics as a factor that affects their evaluation of age-

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230. See Alexandra, *supra* note 15.

231. *Id.*

232. Letter, reproduced in Kim, *supra* note 182.

233. Letter, reproduced in Kim, *supra* note 182.

234. See *ESRB Ratings Guide*, *supra* note 203; see also *Education & Outreach*, *supra* note 214.

235. See *Essential Facts About the Computer and Video Game Industry*, *supra* note 206.

236. *ESRB Ratings Guide*, *supra* note 203.

237. Legal Almanac Series, *supra* note 229, at § 6.19.

238. See *ESRB Ratings Guide*, *supra* note 203.

239. See Kim, *supra* note 182; *ESRB Ratings Process*, *supra* note 209.

appropriateness.<sup>240</sup> Thus, a game that the ESRB would normally rate as “T for Teen,” could instead be rated “M for Mature,” if, given the total mix of content, the microtransactions features tip the balance toward the higher age-appropriateness category.<sup>241</sup> Second, and more practically, the ESRB could include a descriptor for microtransactions or loot boxes in their label that gives consumers fair notice of the monetization mechanic.<sup>242</sup>

Finally, a self-regulatory organization should be empowered to adopt guidelines that apply universally to developers, publishers, and consumers of games on all platforms. Recent efforts by retailers show that the market has already begun to correct itself by responding to consumer concerns.<sup>243</sup> For instance, Apple now requires game developers to disclose probabilities of obtaining specific rewards through loot boxes on free-to-play games available on its App Store.<sup>244</sup> Apple’s updated App Store Review Guidelines state: “[a]pps offering ‘loot boxes’ or other mechanisms that provide randomized virtual items for purchase must disclose the odds of receiving each type of item to customers prior to purchase.”<sup>245</sup> Similarly, Google’s developer policies prohibit developers from misleading consumers about “in-app services, goods, content, or functionality offered for purchase.”<sup>246</sup> It further cautions developers: “[i]f your product description on Google Play refers to in-app features that may require a specific or additional charge, your description must clearly notify users that payment is required to access those features.”<sup>247</sup> Moreover, to combat gambling in apps, Google has imposed restrictions that require the developer to “prevent under-age users from gambling in the app.”<sup>248</sup> Furthermore, the app “must be rated AO (Adults Only)” and “clearly display information about responsible gambling.”<sup>249</sup> However, the gambling restrictions are only effective in the United Kingdom,

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240. See *ESRB Ratings Process*, *supra* note 209.

241. See generally *id.*

242. See generally *id.*

243. See S. Gregory Boyd, *Apple Requires Loot Box Odds Disclosure*, MONDAQ (Feb. 23, 2018),

<http://www.mondaq.com/unitedstates/x/673030/Gaming/Apple+Requires+Loot+Box+Odds+Disclosure>.

244. *Id.*

245. APPLE, § 3.1.1: *In-App Purchase*, APP STORE REV. GUIDELINES, <https://developer.apple.com/app-store/review/guidelines/> (last visited Feb. 20, 2019).

246. GOOGLE PLAY, *Monetization and Ads: Payments*, DEVELOPER POL’Y CTR., <https://play.google.com/about/developer-content-policy-print/> (last visited Feb. 20, 2019).

247. *Id.*

248. *Id.* at *Gambling: Gambling Apps*.

249. *Id.*

Ireland, and France.<sup>250</sup> Finally, Steam provides a set of best practices for developers seeking to use microtransactions, encouraging developers to: (1) “[u]se your in-game economy to improve your product and make customers happier, not as a means to extract revenue from unhappy customers”; (2) “[b]uild systems wherein customer purchases make your game better for other customers”; and (3) “[a]llow your users to create value for one another.”<sup>251</sup>

These initiatives show that at least game retailers—primarily for mobile and free-to-play games—have taken steps to limit deceptive or exploitive monetization. These initiatives do not entirely solve the problem, but they are a step in the right direction. A self-regulatory organization, however, could meaningfully implement a uniform solution by adopting these policies into an industry-wide set of guidelines.

#### V. CONCLUSION

This note has discussed recent problems that have emerged in the video game industry as a result of game developers use of loot boxes and microtransactions monetization schemes. These problems, while causing widespread public outcry among consumers, have also prompted regulatory efforts from legislators both nationally and internationally. In an attempt to balance the competing interests of consumers—who are concerned with deceptive payment mechanics and limitless costs—and game developers—who require recurring revenue streams to continue to create new, ambitious, and high-quality games—this note has proposed self-regulation within the video game industry as the most appropriate solution. In essence, self-regulation would allow professionals within the video game industry to readily address these competing interests and correct the microtransactions problems without interference from the courts and legislators. Finally, to use a familiar adage, self-regulation would give the market an opportunity to correct itself, which would best serve both consumers and game developers in the long term.

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250. *Id.*

251. *Steamworks Documentation: Microtransactions (In-Game Purchases)*, *supra* note 8.