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Dominick Tarantino

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# LET'S STOP PLAYING GAMES: WHY BETTER CONGRESSIONAL INTERACTION IS REQUIRED TO PROTECT YOUNG GAMERS

## ABSTRACT

*This Note addresses the predatory nature of video game microtransactions, the serious risks they pose, and why an improved plan of legislative intervention is necessary to protect young, vulnerable video game consumers. With loot box microtransactions driving a flourishing industry that has reached unprecedented levels of success, adequate consumer protection cannot properly be achieved through self-regulation. Senator Josh Hawley's Protecting Children from Abusive Games Act is a step in the right direction, but its broad language will result in unintended consequences that can cripple the entire industry. Revising the bill's language will protect the intended young consumer and allow for other forms of microtransactions that do not harm consumers.*

## INTRODUCTION

The video game industry is in the midst of a controversy unlike any it has seen before.<sup>1</sup> Since the inception of world-renowned classics like Atari's *Pong* in 1972 or the Nintendo Entertainment System in 1985, the culture surrounding the industry has shifted dramatically.<sup>2</sup> The days of minimalist budgets to create impactful games are long gone.<sup>3</sup> Now, industry titans dedicate capital that exceeds half a billion dollars to commercialize their games and make them critically acclaimed darlings.<sup>4</sup> With the video game industry's revenue surpassing the likes of cinema, music, and sports, developers are now entertaining creative ideas to maximize profits and get their share of this competitive industry's pie.<sup>5</sup>

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1. Kevin Anderton, *The Ongoing Controversy of Microtransactions in Gaming*, FORBES (Mar. 7, 2018), <https://www.forbes.com/sites/kevinanderton/2018/03/07/the-on-going-controversy-of-microtransactions-in-gaming-infographic/#14dca9291d9c>.

2. Jeff Tyson, *The History of Video Games*, HOW STUFF WORKS (Oct. 16, 2000), <https://electronics.howstuffworks.com/video-game2.htm>.

3. *Why Video Games Are So Expensive to Develop*, ECONOMIST (Sept. 25, 2014), <https://www.economist.com/the-economist-explains/2014/09/24/why-video-games-are-so-expensive-to-develop>; See also Taylor Danielle, *GTA V: How Much Did It Cost to Make*, TWINFINITE (Dec. 18, 2017), <https://twinfinite.net/2017/12/gta-v-cost-make-how-much/> (Grand Theft Auto V, one of the most expensive video games ever made at the time, cost approximately \$265 million to develop and market).

4. *Why Video Games Are So Expensive to Develop*, *supra* note 3.

5. Wallace Witkowski, *Videogames are a bigger industry than movies and North American sports combined, thanks to the pandemic*, MARKETWATCH (Jan. 2, 2021), [https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combined-thanks-to-the-pandemic-11608654990#:~:text=Global%20videogame%20revenue%20is%20expected,North%20American%20sports%20industries%20combined.](https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combined-thanks-to-the-pandemic-11608654990#:~:text=Global%20videogame%20revenue%20is%20expected,North%20American%20sports%20industries%20combined.;); See also Devin Coldewey, *Free to Play Games Rule the Entertainment World with \$88 Billion in Revenue*, TECH CRUNCH (Jan. 18, 2019),

Enter microtransactions and loot-box systems: an industry defining monetization mechanic that has left developers with deep pockets, parents perplexed, and gamers paying significantly more money for games than they initially intended.<sup>6</sup> Microtransactions first infiltrated the video game industry through the “freemium”<sup>7</sup> model, which has dominated the mobile games market with games such as *Candy Crush Saga* and *Clash of Clans*.<sup>8</sup> The theory behind the “freemium” model is that it provides monetary incentives for developers to keep improving their free games while players will keep returning and making in-app purchases.<sup>9</sup> Sean Plott, a video game designer and former professional E-sports player, proclaimed in 2015 that it was possible for traditional console games to utilize the “freemium” model for multiplayer games to bring in substantial revenues from microtransactions.<sup>10</sup>

Fast-forward to 2018 and the theory that Sean Plott proffered has become the new reality. *Fortnite*, a free-to-play (F2P) game and cultural phenomenon, signaled an alarming indicator of the robustness of the microtransaction model when it generated revenues of \$2.4 billion in 2018.<sup>11</sup> As game developers see the profitability of the microtransaction model first-hand, it appears that this will be the future of the industry moving forward.<sup>12</sup> Yet, while game developers have seen a significant increase in revenue from microtransactions, it has not been without controversy.<sup>13</sup>

Video game consumers and politicians alike have objected to the use of microtransactions by claiming that these transactions employ predatory

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<https://techcrunch.com/2019/01/18/free-to-play-games-rule-the-entertainment-world-with-88-billion-in-revenue>.

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

7. The popular television show *South Park* was nominated for a Primetime Emmy Award for their episode called “Freemium Isn’t Free.” The episode “links addiction to freemium games to other addictions, including alcoholism and gaming addiction, and their possible genetic predisposition.” *Freemium Isn’t Free*, SOUTH PARK ZONE, (last visited Feb. 28, 2021), <https://southparkzone.blogspot.com/2015/12/freemium-isn-free.html>.

8. Harrison Jacobs, *Gaming Guru Explains Why ‘Freemium’ Is Actually the Best Business Model for Multiplayer Video Games*, BUS. INSIDER (Mar. 19, 2015), <https://www.businessinsider.com/sean-plott-explains-why-he-thinks-freemium-games-are-the-best-business-model-for-both-players-and-developers-2015-3>; See also Daniel Nations, *What Are Freemium Games*, LIFEWIRE (Sept. 16, 2019), <https://www.lifewire.com/what-is-freemium-1994347> (Discussing the positive aspects of F2P gaming, such as placing an emphasis on longevity for gamers by premium content constantly being added).

9. Jacobs, *supra* note 8.

10. *Id.*

11. Brittany Vincent, *Digital Games Saw 12% Growth to \$113.4 Billion in 2018*, VARIETY (Jan. 16, 2019), <https://variety.com/2019/gaming/news/superdata-2018-year-in-review-results-1203109940/>.

12. Ethan Levy, *Why Microtransactions Aren’t Going Away Any Time Soon*, KOTAKU (Dec. 23, 2014), <https://kotaku.com/why-microtransactions-arent-going-away-any-time-soon-1674260827>.

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

tactics and target especially vulnerable young video game consumers.<sup>14</sup> A viral video of Jack Black as a guest on *The Tonight Show Starring Jimmy Fallon* opened the public's eye to the potential pitfalls of microtransactions. During the interview, Jack Black spoke about how his eight-year-old son racked up approximately \$3,000 worth of in-app purchases in a F2P game.<sup>15</sup>

A primary reason for the success of microtransactions, specifically the loot box subset, is the psychological science behind it.<sup>16</sup> The loot box mechanic draws criticism because of its striking resemblance to casino-style gambling's non-guaranteed outcomes; it takes advantage of the body's dopamine system, which enjoys unpredictable rewards.<sup>17</sup> The opening of a loot box is akin to pulling a lever at a slot machine in a Las Vegas casino, especially when developers use bright colors and audio cues to elevate the excitement.<sup>18</sup> Due to developers' efforts to make loot boxes as addictive as possible in attempts to maximize revenue, young gamers have spent millions of dollars to get video game cosmetics<sup>19</sup> and advantages.<sup>20</sup>

With the predatory nature of microtransactions coming to the forefront, countries around the globe took action. For instance, Belgium's Gaming Commission declared that video game loot boxes were in violation of its gambling legislation.<sup>21</sup> This declaration caused huge video game publishers—such as Electronic Arts (EA) and Activision Blizzard—to potentially be subject to criminal sanctions if they continued providing loot box mechanics in Belgium.<sup>22</sup> When Belgium took this giant leap forward in the war against microtransactions, the U.S. Legislature took notice.<sup>23</sup> In May of 2019, U.S. Senator Josh Hawley introduced the Protecting Children From

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14. *Id.*

15. Mark Brown, *Jack Black's Son Spent \$3,000 on a Free to Play Game*, POCKET GAMER (May 6, 2015), <https://www.pocketgamer.com/articles/065202/jack-blacks-son-spent-3-000-on-a-free-to-play-game/>.

16. Agarwal, *supra* note 6.

17. *Id.*

18. *Id.*

19. Video game cosmetics and advantages are a topic of discussion that is later addressed in this Note. As a quick overview, video game cosmetics are an “in-game file that modifies the appearance of a character or item,” while advantages are purchased upgrades that make a player's character stronger in-game; *How on earth is trading virtual items in video games a \$50 billion industry?*, WAX IO (Dec. 11, 2017), <https://medium.com/wax-io/how-on-earth-is-trading-virtual-items-in-video-games-a-50-billion-industry-5972c211d621>.

20. Agarwal, *supra* note 6.

21. Tom Gerken, *Video Game Loot Boxes Declared Illegal under Belgium Gambling Laws*, BBC NEWS (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306>; *See also* James Vincent, *EA Will Stop Selling FIFA's In-game Currency in Belgium Because of a Ban on Loot Boxes*, VERGE (Jan. 30, 2019), <https://www.theverge.com/2019/1/30/18203399/ea-fifa-fut-pack-points-banned-belgium-loot-box> (explaining the impact from Belgium's ruling on loot boxes has forced industry giants such as Electronic Arts to stop selling loot boxes in the country).

22. Gerken, *supra* note 21.

23. Jason Schreier, *U.S. Senator Introduces Bill To Ban Loot Boxes And Pay-To-Win Microtransactions*, KOTAKU (May 8, 2019), <https://kotaku.com/u-s-senator-introduces-bill-to-ban-loot-boxes-and-pay-1834612226>.

Abusive Games Act (Loot Box Bill) that would ban loot boxes and pay-to-win<sup>24</sup> microtransactions in games “played by minors.”<sup>25</sup> The Loot Box Bill has yet to be voted on, but it was the first act by Congress to regulate a rising video game industry that had been abusing the psychological vulnerability of young children.<sup>26</sup> Employing legislation to adequately protect consumers is held up by two pillars: (i) an industry that is flourishing due to the robustness of the microtransaction model cannot be expected to satisfactorily regulate itself, and (ii) loot box microtransactions are strikingly similar to casino-style gambling, meaning that young consumers should be entirely barred from engaging in the practice, just as they would not be allowed to pull the lever at a slot machine in Las Vegas.

Part I of this Note introduces the history of microtransactions, the predatory nature of the mechanic due to the psychological science surrounding it, and the immense spikes in revenue driving its widespread adaptation. Part II will address global and local responses to the microtransaction epidemic with a particular focus on Belgium’s response to show how it has impacted video game culture. Part III addresses the jurisprudential landscape concerning video games and how previous rulings have failed to protect consumers. Part IV focuses on Senator Hawley’s Loot Box Bill’s genuine intentions to protect young consumers. However, its current assembly is overly broad and pointlessly outlaws harmless conduct. Finally, Part V proposes improved language to the Loot Box Bill that would properly protect young consumers and allow conduct that does not harm them.

## I. MICROTRANSACTIONS: WHAT THEY ARE AND HOW THEY STARTED

The microtransactions fiasco has generated great controversy in the video game industry but can hardly be considered clear cut. The term ‘microtransaction’ encapsulates a multitude of different payment mechanics but can simply be boiled down to “anything [the gamer] pays extra for in a video game outside of the initial purchase.”<sup>27</sup> The name derives from the idea that a “microtransaction purchase is small in price and function, typically no more than \$10.”<sup>28</sup> However, lower-priced microtransactions do not compose

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24. Pay-to-win microtransactions are discussed in greater depth during a later portion of this Note. The basic idea is that pay-to-win games offer gamers the option to purchase in-game abilities that “give [them] a leg up on the competition” by making their in-game character more powerful. Natalya Pomerty, *Effort Alone Isn’t Enough for Victory with the Pay-to-Win System*, STUDY BREAKS (Jan. 30, 2018), <https://studybreaks.com/culture/pay-to-win/>.

25. Schreier, *supra* note 23.

26. *Id.*

27. Eddie Makuch, *Microtransactions, Explained: Here’s What You Need To Know*, GAMESPOT (Nov. 20, 2018), <https://www.gamespot.com/articles/microtransactions-explained-heres-what-you-need-to/1100-6456995/>.

28. *Id.*

the entire revenue stream, as extremely popular franchises such as EA's *FIFA* allows gamers to purchase *Ultimate Team* points for up to \$99.99.<sup>29</sup>

In classifying different categories of microtransactions, Touro University analyzed various tactics that games employ to generate revenue via microtransactions.<sup>30</sup> Through this study, they recognized four distinct microtransaction categories, detailed below.<sup>31</sup>

#### A. IN-GAME CURRENCIES

The most popular type of microtransaction is in-game currency, which involves virtual in-game money purchased with legal tender.<sup>32</sup> By purchasing in-game currency, the gamer has the ability to acquire a wide variety of options, ranging from extra lives in a game like *Candy Crush* to a new character skin that changes the player's appearance in *Fortnite*.<sup>33</sup> In-game currency allows developers to “[hide the] true value of what players may purchase” and make larger quantities of in-game currency seem like the “better deal.”<sup>34</sup>

Riot's *League of Legends*, an extremely popular F2P game that derives all of its revenue entirely from microtransactions, allows players to purchase virtual currency called Riot Points.<sup>35</sup> Riot Points allow gamers to buy skins, which are “different aesthetic choices for the in-game character,” or unlock entirely different playable characters.<sup>36</sup> All of these items can be unlocked without the use of real money, but microtransactions often offer a shortcut to

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29. FIFA 18: Ultimate Team FIFA Points 12000 – Xbox One [Digital Code], AMAZON, <https://www.amazon.com/FIFA-18-Ultimate-Points-Digital/dp/B075JZWH1X?th=1> (last visited Feb. 3, 2021); See also Dustin Bailey, *Ultimate Team Made Up 28% of EA Revenue Last Year*, PCGAMESN (July 22, 2019), <https://www.pcgamesn.com/fifa-ultimate-team-revenue> (providing insight into how much EA relies on microtransactions in their popular *FIFA* franchise for revenue).

30. Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO UNIV. (Feb. 25, 2016), <https://www.tuw.edu/psychology/psychology-behind-microtransactions/>.

31. *Id.*

32. *Id.*

33. See Blake Montgomery, *Here's Who Drops The Most Cash On Candy Crush And Clash Of Clans*, BUZZFEED (Feb. 14, 2017), <https://www.buzzfeednews.com/article/blakemontgomery/heres-who-drops-the-most-cash-on-candy-crush-and-clash-of-cl>; See also, Asmir Pekmic, *Epic Games unveils new way to get cosmetic items in 'Fortnite Battle Royale'*, BLASTINGNEWS (Oct. 26, 2019), <https://us.blastingnews.com/gaming/2019/10/epic-games-unveils-new-way-to-get-cosmetic-items-in-fortnite-battle-royale-003006487.html>.

34. Duverge, *supra* note 30.

35. Mike Colagrossi, *How Microtransactions Impact the Economics of Gaming*, INVESTOPEDIA (Oct. 17, 2018), <https://www.investopedia.com/articles/investing/022216/how-microtransactions-are-evolving-economics-gaming.asp>.

36. *Id.*

players by saving them dozens of hours of video game “grinding”<sup>37</sup> and allowing them to buy the items they want.<sup>38</sup>

Due to the microtransaction model, Riot’s *League of Legends* was the most profitable F2P game in 2017 with over \$2.1 billion in revenues.<sup>39</sup> To the surprise of many analysts in the industry, revenues for the game declined to \$1.4 billion in 2018, a far cry from the \$2.1 billion earned in the previous year.<sup>40</sup> Although this was a shocking decline in revenue for one of the titans of the industry, many industry evaluators credit this to new competitors<sup>41</sup> entering the F2P landscape.<sup>42</sup> Even with this decline in revenue for Riot’s *League of Legends*, the fact that a F2P game can generate well over a billion dollars is a good indicator of the robustness of the in-game currency model.

## B. RANDOM CHANCE PURCHASES

Speak with any casual gamer and they would most likely refer to random chance purchase mechanics as “loot boxes,” a term that now dominates the industry lexicon. When a game utilizes the loot box mechanic, it “presents players with a mystery bag of goodies that could potentially be worth much more than the price of admission.”<sup>43</sup> Loot boxes have proven to be extremely profitable for developers, but they prey on psychological vulnerabilities and offer “deals” that make loot box openings appear to be discounted.<sup>44</sup> Ben Thompson, Art Director for Activision Blizzard and the enormously popular F2P game *Hearthstone*, believes that loot boxes capture that “moment of excitement [where] anything’s possible,” and that “successful games build on anticipation and release.”<sup>45</sup> This formula has been a goldmine for

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37. Grinding is a videogame term that refers to the “playing time spent doing repetitive tasks within a game to unlock a particular game item”, and mostly involves “killing the same set of opponents over and over in order to gain experience points.” Gamers usually do not find the process of grinding enjoyable, but consider it a necessary evil. *Grinding*, TECHOPEDIA, <https://www.techopedia.com/definition/27527/grinding> (last visited Feb. 3, 2021).

38. Colagrossi, *supra* note 35.

39. Tanner Dedmon, *League of Legends Tops Free-to-Play Revenue Charts in 2017*, COMICBOOK (Jan. 30, 2018), <https://comicbook.com/gaming/2018/01/30/league-of-legends-top-free-to-play-revenue-charts-in-2017/>.

40. Alissa McAloon, *Analyst: PUBG Out-Earned Every Other Premium PC and Console Game in 2018*, GAMASUTRA (Jan. 17, 2019), [https://www.gamasutra.com/view/news/334636/Analyst\\_PUBG\\_outearned\\_every\\_other\\_premium\\_PC\\_and\\_console\\_game\\_in\\_2018.php](https://www.gamasutra.com/view/news/334636/Analyst_PUBG_outearned_every_other_premium_PC_and_console_game_in_2018.php).

41. After seeing the success of free to play games, many developers wanted to enter the space. These include massive games such as *Fortnite*, *Apex Legends*, *Call of Duty: Warzone*, and more.

42. *The Decline of League of Legends – Is the World’s Biggest Esport Reaching Its Demise?*, GINX ESPORTS TV (Aug. 21, 2018) <https://www.ginx.tv/en/league-of-legends/the-decline-of-league-of-legends-is-the-world-s-biggest-esport-reaching-its-demise>.

43. Duverge, *supra* note 30.

44. *Id.*

45. Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PCGAMER (Sept. 28, 2017), <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/>.

*Hearthstone* as the game took in an estimated \$165 million in worldwide revenue in 2018.<sup>46</sup>

Loot boxes are consistently compared with traditional gambling due primarily to the idea of a “win state.”<sup>47</sup> This idea revolves around the notion that a gamer purchases a loot box intending to obtain a particular cosmetic or upgrade, even though the chances of obtaining it are completely random.<sup>48</sup> This form of gambling activates the brain’s pleasure circuits and rapidly releases dopamine, which acts as a minor high for the gamer.<sup>49</sup> Common sense dictates that after repeated failures of opening loot boxes without obtaining the prized item, a gamer would cease to spend money and continue playing the game. However, video game developers are shrewd enough to recognize the five cognitive fallacies a person experiences that will lead them right back to gambling.<sup>50</sup> These consist of (i) chasing; (ii) the gambler’s fallacy; (iii) self-correcting and fair; (iv) cheating the system; and (v) the entrapment effect.<sup>51</sup>

Chasing losses occurs when an individual continues gambling “with the hope of recovering what [they have] already lost,” leading to increases in total losses.<sup>52</sup> When a gambler chases losses, the gambling process is no longer enjoyable and justifying it revolves around rationalizing the losses.<sup>53</sup> The most recognizable on the aforementioned list is the gambler’s fallacy, which is the “misconception that something that has not happened for a long time has become ‘overdue.’”<sup>54</sup> This means a loot box purchaser essentially believes they are closer to their desired cosmetic than they actually are due to the recent run of bad luck they have experienced, which ultimately harms gamers.<sup>55</sup>

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46. Oliver Yeh, *Hearthstone’s Mobile Players Spent \$165 Million Last Year, Up 5% After a 2017 Slump*, SENSORTOWER (Jan. 30, 2019), <https://sensortower.com/blog/hearthstone-mobile-revenue-2018>; See also Natalie Clayton, *Hearthstone Hits 100 Million Users as Mobile Revenue Reportedly Passed \$660m*, POCKET GAMER (Nov. 6, 2018), <https://www.pocketgamer.biz/news/69406/hearthstone-has-hit-100-million-users/>.

47. Dr. Natalie Coyle, *The Psychology of Loot Boxes and Microtransactions*, PLATINUMPARAGON (June 6, 2018), <http://platinumparagon.info/the-psychology-of-loot-boxes-and-microtransactions/>.

48. *Id.*

49. David J. Linden, Ph.D., *Video Games Can Activate the Brain’s Pleasure Circuits*, PSYCH.TODAY (Oct. 25, 2011), <https://www.psychologytoday.com/us/blog/the-compass-pleasure/201110/video-games-can-activate-the-brains-pleasure-circuits-0>; See also Chirlien Pang, *Understanding Gamer Psychology: Why Do People Play Games*, SEKG (Jan. 31, 2017), <https://www.sekg.net/gamer-psychology-people-play-games/>.

50. Coyle, *supra* note 47.

51. *Id.*

52. *How to Avoid Chasing Losses?*, SMART GAMBLING EDGE (Dec. 03, 2018), <https://www.smartgamblingedge.com/2018/12/how-to-avoid-chasing-losses.html>.

53. *Id.*

54. Nick Valentine, *The Gambler’s Fallacy – Explained*, THE CALCULATOR SITE (June 23, 2019), <https://www.thecalculatorsite.com/articles/finance/the-gamblers-fallacy.php>.

55. Coyle, *supra* note 47.

The next fallacy revolves around gambling being a self-correcting and fair game. Daniel Kahneman, an Israel-American psychologist and economist,<sup>56</sup> wrote in *Thinking, Fast and Slow* that “chance is commonly viewed as a self-correcting process in which a deviation in one direction induces a deviation in the opposite direction to restore the equilibrium.”<sup>57</sup> However, these subpar loot box items are not “corrected,” which may lead a gamer to believe that the next deviation will be a “correcting” box and have a big reward due to the gamer’s run of subpar loot boxes.<sup>58</sup> The cheating the system fallacy is similar to gambling being considered a self-correcting and fair game. Here, gamers may become “delusional” while opening loot boxes and feel they have figured out the “trick” to get what they want from the random chance.<sup>59</sup>

The final fallacy, known as the entrapment effect, occurs when a gambler is “motivated to maintain a course of action having already invested so much [money] to date.”<sup>60</sup> This effect results in gamers feeling obligated to continue purchasing loot boxes because of the potential loss of ability to spend their virtual currency.<sup>61</sup>

### C. IN-GAME ITEMS: PAY TO WIN MODEL

The next type of microtransaction concerns purchasing in-game items that allows a gamer to directly purchase new characters, upgrades, or cosmetics that reflect that gamer’s personality.<sup>62</sup> Numerous video game publishers have recently employed the tactic of making specific in-game items unlockable without paying money while making the required playing time to unlock them realistically unfeasible.<sup>63</sup>

No game has received more backlash for employing this tactic than EA’s *Star Wars: Battlefront II*, which allowed gamers to receive powerful in-game items for “free” with the only cost being “dozens if not hundreds of hours” of the gamer’s time.<sup>64</sup> This left an extremely sour taste in the mouths of

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56. Daniel Kahneman, *Daniel Kahneman Biographical*, NOBEL PRIZE (2002), <https://www.nobelprize.org/prizes/economic-sciences/2002/kahneman/biographical/>.

57. *Mental Model: Misconceptions of Chance*, FARNAM ST., <https://fs.blog/2015/08/misconceptions-of-chance/> (last visited Feb. 3, 2021).

58. Coyle, *supra* note 47.

59. *Id.*

60. Debra Rickwood, et al., THE PSYCHOLOGY OF GAMBLING 16 (last visited Apr. 2, 2021), <https://www.psychology.org.au/publications/inpsych/2010/december/gambling/>.

61. *Id.*

62. Patricia E. Vance, *What Parents Need to Know About Loot Boxes (and Other In-Game Purchases)*, ESRB (July 24, 2019), <https://www.esrb.org/blog/what-parents-need-to-know-about-loot-boxes-and-other-in-game-purchases/>.

63. Ethan Gach, *Unlocking Heroes in Star Wars Battlefront II Could Take A Long Time*, KOTAKU (Nov. 12, 2017), <https://kotaku.com/players-are-trying-to-calculate-how-long-it-takes-to-un-1820373111>.

64. Gene Park, *How a Star Wars Video Game Faced Charges that it was Promoting Gambling*, WASH. POST (Nov. 18, 2017), <https://www.washingtonpost.com/news/comic-riffs/wp/2017/11/18/how-a-star-wars-video-game-faced-charges-that-it-was-promoting-gambling/>.

millions of gamers and industry personalities alike.<sup>65</sup> EA even earned itself a notorious spot in the Guinness World Record for being the most downvoted comment in Reddit history following a post by an EA Community Team member responding to the backlash.<sup>66</sup> Many individuals refer to the *Star Wars: Battlefront II* controversy as a prime example of the “pay-to-win” system, meaning that those “who have the money available can instantly buy their way to an advantage over others.”<sup>67</sup> To prove that *Star Wars: Battlefront II* employs a pay-to-win system, YouTuber XfactorGaming purchased \$90 worth of microtransactions in order to unlock different abilities and upgrade weapons for multiplayer, resulting in him “dominating the competition.”<sup>68</sup>

Yet, the *Star Wars: Battlefront II* controversy has done little to dispel the robustness of the in-game microtransaction model.<sup>69</sup> Epic Games’ world-renowned F2P Battle Royale<sup>70</sup> game *Fortnite* generated over \$2.4 billion in revenue in 2018, with all revenue coming from in-game cosmetic purchases that give players no competitive advantage.<sup>71</sup> *Fortnite* prides itself on offering an “assortment of purchasable skins ... intended to offer visual distinction and nothing more,”<sup>72</sup> which lends credence to the idea that strictly cosmetic in-game items can be extremely profitable.

In 2015, Activision Blizzard filed Patent #9789406, which outlined an online matchmaking system designed to “drive microtransactions in

65. Aaron Mamiit, *EA Sets Dubious World Record for Battlefront II Reddit Comment*, DIGIT. TRENDS (Sept. 8, 2019), <https://www.digitaltrends.com/gaming/ea-star-wars-battlefront-ii-loot-boxes-most-downvoted-reddit-comment/>.

66. *Id.*

67. Justin McKinney, *The Rise of Pay to Win in Video Games*, ODYSSEY (Dec. 13, 2017), <https://www.theodysseyonline.com/the-rise-of-pay-to-win-in-video-games>.

68. Kellen Beck, *YouTuber Spends \$90 in ‘Star Wars: Battlefront 2’ and Proves that it’s still Basically Pay-to-Win*, MASHABLE (Nov. 9, 2017), <https://mashable.com/2017/11/09/star-wars-battlefront-2-pay-win/>.

69. *Games and interactive media earnings rose 12% to \$139.9B in 2020*, SUPERDATA (Jan. 6, 2020), <https://www.superdataresearch.com/blog/2020-year-in-review>.

70. Battle Royale games have recently become extremely popular, as the primary hook is to drop a significant number of players in a large-scale free-for-all deathmatch, with the ultimate goal of being the last player alive. Gamers are only afforded one life and lose when they die in-game. See Alessandro Fillari, *Battle Royale Games Explained: Fortnite, PUBG, And What Could Be The Next Big Hit*, GAMESPOT (Apr. 21, 2019), <https://www.gamespot.com/articles/battle-royale-games-explained-fortnite-pubg-and-wh/1100-6459225/>.

71. Patrick Shanley, *‘Fortnite’ Earned \$2.4 Billion in 2018*, HOLLYWOOD REP. (Jan. 16, 2019), <https://www.hollywoodreporter.com/heat-vision/fortnite-earned-24-billion-2018-1176660>; See also Steven Wong, *PUBG Mobile made over \$1 billion in revenue*, GAMING ST. (Sept. 23, 2019), <https://gamingstreet.com/pubg-mobile-made-over-1-billion-in-revenue/> (*PlayerUnknown’s Battlegrounds* is an extremely popular F2P game that is one of *Fortnite*’s biggest competitors and has seen significant financial success through in-game cosmetic purchases).

72. Alex Avard, *Can Fortnite Battle Royale’s Cosmetics Provide Competitive Advantages? The Answer Isn’t So Simple*, GAMES RADAR (May 3, 2018), <https://www.gamesradar.com/can-fortnite-battle-royales-cosmetics-provide-competitive-advantages-the-answer-isnt-so-simple/>.

multiplayer video games” and “influence game-related purchases.”<sup>73</sup> The patent describes a number of matchmaking algorithms that a “game could use to encourage players to purchase additional in-game items.”<sup>74</sup> This is just further proof that publishers are privy to the revenue associated with in-game purchases and that they are actively constructing algorithms to influence purchase rates in online games.<sup>75</sup>

#### D. EXPIRATION

The final version of microtransaction discussed is expiration, and it has primarily taken hold in the mobile gaming-sphere, with popular games such as *Candy Crush* utilizing this tactic for revenue.<sup>76</sup> With expiration microtransactions, a game will have components (usually playable lives) that “wear out or can only be used a certain number of times in a given period of time.”<sup>77</sup> A gamer of *Candy Crush* can play only a select amount of times for free daily, with the gamer either having to wait 30 minutes to re-play or pay \$0.99 for a new life.<sup>78</sup> Expiration as a microtransaction model has had significant financial success, with total *Candy Crush* players spending an average of \$4.2 million *per day* on expiration microtransactions in 2018.<sup>79</sup> Ultimately, if a player feels their experience is “being cut short,” they will be more likely to purchase an in-game item to allow their gaming experience to continue without interruption.<sup>80</sup>

In sum, the microtransaction revenue model has been a huge boom for the industry by generating profits that video game publishers could not previously fathom.<sup>81</sup> Take-Two Interactive (a publishing titan known for popular games such as *Grand Theft Auto*, *Red Dead Redemption*, and *NBA*

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73. Kyle Orland, *Activision's patented method to drive microtransactions with matchmaking*, ARS TECHNICA (Oct. 18, 2017), <https://arstechnica.com/gaming/2017/10/activisions-patented-method-to-drive-microtransactions-with-matchmaking/>.

74. *Id.*

75. *See id.*

76. Alexis Kleinman, *Use This Candy Crush Cheat to Get Unlimited Lives*, HUFFPOST (Aug. 6, 2013), [https://www.huffpost.com/entry/candy-crush-cheat\\_n\\_3712493](https://www.huffpost.com/entry/candy-crush-cheat_n_3712493).

77. Duverge, *supra* note 30.

78. Kleinman, *supra* note 76; *See also* Boston Blake, *15 Games That Were Ruined by Microtransactions*, SCREEN RANT (Dec. 25, 2017), <https://screenrant.com/games-ruined-microtransactions/>; Casey Johnson, *Clash of Clans Proves That Our Impatience is Worth Billions*, NEW YORKER (June 24, 2016), <https://www.newyorker.com/business/currency/clash-of-clans-proves-that-our-impatience-is-worth-billions> (explaining that games such as *The Hunter* and *Clash of Clans* preys on the impatience of gamers by only allowing a specific amount of plays per day, allowing the gamer to continue playing only if they spend money).

79. Mike Minotti, *Sensor Tower: Candy Crush Players Spend an Average of \$4.2 Million a Day in 2018*, VENTURE BEAT (Jan. 9, 2019), <https://venturebeat.com/2019/01/09/sensor-tower-candy-crush-players-spent-an-average-of-4-2-million-a-day-in-2018/>.

80. Duverge, *supra* note 30.

81. Keith Noonan, *Can Video Game Companies Count on Microtransactions to Drive Growth?*, MOTELY FOOL (Mar. 30, 2018), <https://www.fool.com/investing/2018/03/30/can-video-game-companies-count-on-microtransaction.aspx>.

2k) received \$338 million in microtransaction revenue during the first fiscal quarter of 2019.<sup>82</sup> That \$338 million composed 62% of all of Take-Two's first quarter revenue.<sup>83</sup> Similarly, Activision Blizzard generated roughly \$4 billion in revenue from microtransactions in 2017, representing 57% of their revenue for that year.<sup>84</sup> Supercell, the creator of the *Clash of Clans* franchise, generated revenues of \$1.6 billion in 2018, which is monumental considering it is a "free" game.<sup>85</sup> *Fortnite* generated revenues of \$2.4 billion in 2018, which is "the most annual revenue of any game in history."<sup>86</sup> These staggering numbers suggest that microtransactions are a permanent revenue source for publishers who should not be trusted to self-regulate due to the massive potential for abusive behavior.

## II. WORLDWIDE AND LOCAL RESPONSES TO MICROTRANSACTIONS

### A. GLOBAL RESPONSE

The response to microtransactions from gamers and numerous governmental bodies has been less than stellar. Although many gamers clearly enjoy the benefits that come from microtransactions (proven by the large revenue numbers they generate), much of the gaming community and the public-at-large have expressed concerns.<sup>87</sup> A legitimate criticism that many gamers have expressed is that microtransactions make a "game feel incomplete by default," because it "forces people to constantly shell out money just to play the full game" they thought they already purchased.<sup>88</sup> Many gamers find it frustrating to purchase a newly released game for \$60 only to find out that, in order to compete in that gaming space, more money must be spent on in-game microtransactions.<sup>89</sup>

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82. Jeff Grubb, *Microtransactions, DLC Make Up 62% of Take-Two's First Quarter Revenues*, VENTURE BEAT (Aug. 2, 2018), <https://venturebeat.com/2018/08/02/microtransactions-dlc-make-up-62-of-take-twos-first-quarter-revenues/>.

83. *Id.*

84. Noonan, *supra* note 81.

85. Dean Takahashi, *Supercell Revenues Take a Big Dip in 2018 – to \$1.6 Billion and Profits to \$635 Million*, VENTURE BEAT (Feb. 12, 2019), <https://venturebeat.com/2019/02/12/supercell-revenues-take-a-big-dip-in-2018-to-1-6-billion-and-profits-of-635-million/>.

86. Tom Hoggins, *Fortnite Earned Record \$2.4 Billion in 2018, the 'Most Annual Revenue of Any Game in History'*, TELEGRAPH (Jan. 17, 2019), <https://www.telegraph.co.uk/gaming/news/fortnite-earned-annual-revenue-game-history-2018/>.

87. Dave Smith, *I Miss the Days When I Only Had to Pay Once for a Video Game*, BUS. INSIDER (Apr. 22, 2015), <https://www.businessinsider.com/microtransactions-are-ruining-video-games-2015-4>.

88. *Id.* (As a gamer myself, I can provide credence to this by saying I have bought multiple \$60 games, only to feel compelled to purchase microtransactions in order to feel like I am getting the 'complete' game).

89. Christopher Darling, *Are All Microtransactions Bad?*, CULTURE GAMING (Feb. 18, 2018), <https://cultureofgaming.com/are-all-microtransactions-bad/>.

The biggest public outcry has come from the implementation of loot boxes as a result of their predatory and psychological nature.<sup>90</sup> The issue has become such a hot-topic that Andrew Yang, New York City mayoral candidate, weighed in on the controversy when he stated that Congress should “be able to empower players to express their economic preferences up front” by requiring game developers to be more transparent with the odds of receiving specific items in a loot box.<sup>91</sup> Additionally, he talked about his belief that video game addiction is a genuine and underreported problem that requires the creation of an assistance program.<sup>92</sup>

Recently, the Federal Trade Commission (FTC) held a public workshop “to examine consumer protection issues related to video game ‘loot boxes’,” which provides support for the idea that the public, and more specifically the government, has taken notice of the issue.<sup>93</sup> One of the primary justifications for the workshop was that “concerns have been raised about techniques used to market loot boxes” and that these tactics may lead to minors becoming addicted to in-game purchases.<sup>94</sup> The workshop was open to the public, but also was comprised of a variety of stakeholders such as industry representatives, academics, consumer advocates, and governmental officials.<sup>95</sup>

Belgium threw a gigantic wrench into the battle between the public and leaders of the video game industry by declaring video game loot boxes illegal.<sup>96</sup> On April 25, 2018, Belgium’s former Minister of Justice, Koen Geens, posted a press release discussing Belgium’s Gaming Commission’s investigation into “loot boxes” in video games.<sup>97</sup> The Gaming Commission investigated four video games: *Star Wars: Battlefront II*, *Overwatch*, *FIFA 18*, and *Counter Strike: Global Offensive*.<sup>98</sup> Aside from *Star Wars: Battlefront II*, Belgium’s Gaming Commission found these games’ loot box mechanics

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90. Paul Lilly, *FTC to Investigate Predatory Loot Box Practices Sweeping Gaming Industry*, HOT HARDWARE (Nov. 28, 2018), <https://hothardware.com/news/ftc-investigate-predatory-loot-box-practices-gaming-industry>.

91. Gene Park, *Andrew Yang Weighs in on Loot Boxes, Hong Kong and Video Game Addiction*, WASH. POST (Oct. 23, 2019), <https://www.washingtonpost.com/video-games/2019/10/23/andrew-yang-weighs-loot-boxes-hong-kong-video-game-addiction/>.

92. *Id.*

93. Press Release, Fed. Trade Comm’n, *FTC to Hold Workshop on Consumer Issues Related to Loot Boxes* (Apr. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-hold-august-workshop-consumer-issues-related-loot-boxes>.

94. *Id.*

95. *Id.*

96. Ethan Gach, *Belgium Says Loot Boxes in Games Like Overwatch are Illegal*, KOTAKU (Apr. 25, 2018), <https://kotaku.com/belgium-says-loot-boxes-in-games-like-overwatch-are-ill-1825533879>.

97. Press Release, Koen Geens, *Loot Boxes in Three Video Games in Violation of Gambling Legislation* (Apr. 25, 2018), <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving> (This Press Release was translated from Dutch to English for the purposes of this Note).

98. *Id.*

to be a “game of chance,” thus subjecting it to Belgian Gaming Law.<sup>99</sup> The Gaming Commission defines a “game of chance” as a game with a “a game element” where “a *bet* can lead to a *win* or a *loss* and *chance* has a role in the gameplay.”<sup>100</sup>

The press release discusses how minors utilizing the loot box mechanic is “disturbing” and that if there is a lack of proper intervention, games of chance in video games will cause “great damage to people, family and society.”<sup>101</sup> Peter Naessens, the Director of the Gaming Commission, stated that “paying [for] lottery tickets are not an innocent part of video games” and that loot boxes seduce and mislead gamers—a harsh statement directed at the industry’s largest publishers.<sup>102</sup> With *Overwatch*, *FIFA*, and *Counter Strike: Global Offensive* being susceptible to Belgian Gaming Law, game developers are now subject to prison sentences and fines of up to €800,000 (\$974,605).<sup>103</sup>

Video game publishers were understandably upset with Belgium’s position on loot boxes. EA took a public stand against the ruling and even threatened to take the issue to court.<sup>104</sup> It asserted that loot boxes were not a form of gambling and that its games were “developed and implemented ethically and lawfully around the world.”<sup>105</sup> However, EA released a statement shortly thereafter in early 2019 stating that “after further discussions with the Belgian authorities, we have decided to stop offering FIFA Points for sale in Belgium.”<sup>106</sup> Other publishers like Activision Blizzard, Valve, and Take-Two also admitted defeat and removed microtransactions from their games released in Belgium.<sup>107</sup>

Due to the publicity that resulted from Belgium’s position on microtransactions, other countries took notice. Neil McArthur, Chief Executive of the Gambling Commission in the United Kingdom (UK), told Parliament that loot boxes are not considered gambling under current UK

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99. *Id.*

100. *Id.* (emphasis added).

101. *Id.*

102. *Id.*

103. Gach, *supra* note 96.

104. Paul Tassi, *EA Surrenders in Belgian FIFA Ultimate Team Loot Box Fight, Raising Potential Red Flags*, FORBES (Jan. 29, 2019), <https://www.forbes.com/sites/insertcoin/2019/01/29/ea-surrenders-in-belgian-fifa-ultimate-team-loot-box-fight-raising-potential-red-flags/#1f4b1a243675>.

105. *Id.*

106. *An Update on FIFA Points in Belgium*, ELEC. ARTS (Dec. 2018), <https://www.ea.com/en-ca/news/fifa-points-belgium>.

107. Hunter Miche, *EA Belgium Microtransactions Will Stop as EA Kneels to Belgian Authorities*, SEGMENTNEXT (Jan. 30, 2019), <https://segmentnext.com/2019/01/30/ea-belgium-microtransactions-will-stop-ea-kneels-belgian-authorities/>; *See also*, Brandon Russell, *Mario Kart Tour Not Available in Belgium Due to Loot Boxes*, IMORE (Sept. 27, 2019), <https://www.imore.com/mario-kart-tour-not-available-belgium-due-loot-boxes> (discussing how Mario Kart Tour, an extremely popular F2P Mobile Game, has been banned in Belgium due to most of the games revenue coming from loot box mechanics).

law.<sup>108</sup> To be subject to the Gambling Commission’s jurisdiction, a “prize has to be either money or have monetary value,” and loot boxes have no official way to monetize what is *inside* them.<sup>109</sup> However, McArthur expressed “significant concerns” about loot boxes and their popularity with minor children, saying that gambling laws in the UK need to adapt in order to reflect reality.<sup>110</sup>

McArthur’s analysis found wider support in the UK as Claire Murdoch, the Director of the UK’s National Health Service, said that loot boxes were “setting kids up for addiction by teaching them to gamble.”<sup>111</sup> This prompted the Department for Digital, Culture, Media, and Sport (DCMS) to launch an investigation in June 2020 seeking to obtain evidence on “consumable in-game devices found in popular video-game titles.”<sup>112</sup> Observers expect DCMS to reclassify loot boxes as gambling, although the investigation has yet to conclude.<sup>113</sup>

China was one of the first countries to acknowledge the pitfalls of loot boxes—likely because of how big the gaming culture is throughout the country.<sup>114</sup> In 2016, China’s Ministry of Culture released a new set of rules governing online games in the country.<sup>115</sup> A component of these new rules requires video games that feature random loot boxes “to reveal the odds of players receiving items.”<sup>116</sup> The success of this new ruling was quite high as multiple Chinese developers began revealing the drop rate for specific items in loot boxes which provided gamers with more transparency.<sup>117</sup>

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108. Owen S. Good, *UK Regulator: Loot Boxes Fall Outside of Current Gambling Law*, POLYGON (July 25, 2019), <https://www.polygon.com/2019/7/25/8930207/loot-boxes-gambling-regulation-banned-uk-law-controversy>.

109. Zoe Kleinman, *FIFA Packs and Loot Boxes ‘Not Gambling’ in UK*, BBC NEWS (July 22, 2019), <https://www.bbc.com/news/technology-49074003> (The primary reason that loot boxes fall outside of the United Kingdom’s gambling jurisdiction as the contents inside the loot boxes have no monetary value due to them not being able to be sold to third-parties. However, Gambling Commission Director Brad Enright does talk about the fear of underground markets for loot box items and how this could be an issue in the future).

110. Good, *supra* note 108.

111. Philip Conneller, *UK Lawmakers ‘Call for Evidence’ Suggests Loot-Box Clampdown Coming*, CASINO (June 8, 2020), <https://www.casino.org/news/uk-lawmakers-call-for-evidence-suggests-loot-box-clampdown-coming/>.

112. *Id.*

113. *Id.*

114. Chaim Gartenberg, *China’s New Law Forces Dota, League of Legends, and Other Games to Reveal Odds of Scoring Good Loot*, VERGE (May 2, 2017), <https://www.theverge.com/2017/5/2/15517962/china-new-law-dota-league-of-legends-odds-loot-box-random>; *see also*, Dean Takahasi, *Niko Partners: China Will Surpass 768 Million Gamers and \$42 Billion in Game Revenue by 2022*, VENTURE BEAT (May 7, 2018), <https://venturebeat.com/2018/05/07/niko-partners-china-will-surpass-1-billion-gamers-and-42-billion-in-game-revenue-by-2022/>.

115. Gartenberg, *supra* note 114.

116. *Id.*

117. *Id.*

## B. LOCAL RESPONSE

In the United States, Washington State Senator Kevin Ranker has been an outspoken proponent of stronger regulation for loot boxes, stating that “it is unacceptable to be targeting our children with predatory gambling masked in a game with dancing bunnies or something.”<sup>118</sup> Senator Ranker proposed a Washington State bill that would legally reclassify loot boxes as a form of gambling and would have the Washington State Gambling Commission conduct an analysis into whether minors should have such immediate access to loot box-centric games.<sup>119</sup>

In another attempt to regulate loot boxes on the state level, Hawaii state legislators introduced House Bill 2686 and Senate Bill 3024.<sup>120</sup> These bills “seek to prohibit the sale of any games that include loot boxes that can be purchased with real money to anyone under 21 years of age.”<sup>121</sup> Other proposed Hawaii state bills (such as House Bill 2727 and Senate Bill 3025) would require game publishers to “prominently label games that have randomized purchase systems and disclose the probability rates of specific loot box rewards.”<sup>122</sup> State Representative Chris Lee justifies the adoption of these regulations by arguing that the video game industry is beginning to “exploit people, especially children, to maximize profit.”<sup>123</sup> Unfortunately, all of these bills either died after failing to meet legislative deadlines or were amended to completely remove all loot box language.<sup>124</sup>

## III. UNITED STATES JURISPRUDENCE ON MICROTRANSACTIONS

With video games being a relatively new phenomenon, US jurisprudence has been far from conclusive when addressing the predatory nature of microtransactions. A handful of cases show that laws have not yet adapted to the new video game landscape.

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118. Cal Jeffrey, *Washington state to determine if loot boxes are gambling*, TECHSPOT (Jan. 25, 2018), <https://www.techspot.com/news/72943-washington-state-determine-if-loot-boxes-gambling.html>.

119. *Id.*

120. Rob LeFebvre, *Hawaii legislators want to put age restrictions on loot boxes*, ENGADGET (Feb. 13, 2018), <https://www.engadget.com/2018/02/13/hawaii-legislators-age-restrictions-loot-crates/?ncid=txtlnkusaolp00000603>.

121. *Id.*

122. *Id.*

123. *Id.*

124. Michael Brestovansky, *'Loot box' bills fail to advance*, HAW. TRIB. HERALD (Mar. 24, 2018), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/>. (Senate Bill 30215 was a companion to House Bill 2727, and completely removed all loot box language in an amended version of the bill).

**A. MASON V. MACHINE ZONE, INC.**

The Fourth Circuit heard arguments in March of 2017 for *Mason v. Machine Zone, Inc.*, the most impactful video game microtransaction case opined thus far.<sup>125</sup> Mason filed a class action complaint against Machine Zone, Inc., the developer of the extremely popular mobile game, *Game of War: Fire Age*.<sup>126</sup> Mason claimed that she and thousands of other users “lost money participating in an unlawful ‘gaming device,’” which should permit recovery under Maryland’s gambling loss recovery statute.<sup>127</sup> This “gaming device” consisted of allowing players to spin a virtual wheel within *Game of War* to win virtual prizes<sup>128</sup> that can be used within the game.<sup>129</sup> Mason sought recovery of the financial losses she incurred as a result of spinning the virtual wheel.<sup>130</sup>

In *Game of War*, players can purchase virtual “gold” from \$4.99 for 1,200 pieces of virtual gold to \$99.99 for 20,000 pieces.<sup>131</sup> A player can utilize virtual gold to obtain virtual “chips” that can be used at the *Game of War* virtual casino.<sup>132</sup> *Game of War* developers created an “animated light [that] rotates around the wheel,” making the gambling process visually stimulating.<sup>133</sup> Players who spin the virtual wheel have no control over the outcome of the spin, meaning that “no skill on the part of the player influences” the virtual prize they receive.<sup>134</sup> Between early 2014 and January 2015, “Mason paid over \$100 to participate in the virtual casino”<sup>135</sup> and claimed that she lost money because she received “prizes that were worth less than the amount of money she spent to spin the wheel.”<sup>136</sup>

Under Maryland’s Loss Recovery Statute, “[a] person who loses money at a [prohibited] gaming device ... may recover the money as if it were a common debt.”<sup>137</sup> Maryland law defines “gaming device” as “a game or device at which money or any other thing or consideration of value is bet, wagered or gambled,” and includes a “wheel of fortune.”<sup>138</sup>

The Fourth Circuit acknowledged that the virtual casino in *Game of War* is a prohibited gaming device, but concluded that Mason did not “lose

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125. See *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017).

126. *Id.* at 316–17.

127. *Id.*

128. These virtual prizes may consist of cosmetics for characters, upgrades, and in-game currency that can be used to purchase specific upgrades that the player deems appropriate.

129. *Mach. Zone, Inc.*, 851 F.3d at 316–17.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Mach. Zone, Inc.*, 851 F.3d at 318.

135. *Id.*

136. *Id.*

137. *Id.* at 319.; See also Md. Code Ann., Crim. Law § 12-110(a) (West 2013).

138. Md. Code Ann., Crim. Law § 12-101(d)(1)(ii), (d)(2) (West 2013).

money” when participating in the virtual casino.<sup>139</sup> The Fourth Circuit reasoned that for an individual to lose money under the Loss Recovery Statute, a winner of money must invariably be involved.<sup>140</sup> However, the money that Machine Zone received from Mason had nothing to do with the outcome of the virtual wheel, as they “retained the money that Mason paid to obtain *virtual gold* regardless of the outcome of Mason’s spin of the virtual wheel.”<sup>141</sup> The court found that when Mason spun the virtual wheel there was “no money at stake” because her potential rewards were either virtual gold or other virtual resources, which are neither real money nor redeemable for money.<sup>142</sup> In short, “Mason could not have lost or won money as a result of her participation in that virtual activity.”<sup>143</sup>

The Fourth Circuit’s decision does not appear to reflect the current realities of the virtual world and is a huge blow to consumer protection when it comes to microtransaction and loot box mechanics. There can be no dispute that “Machine Zone benefits monetarily from the availability of in-game gambling.”<sup>144</sup> The Fourth Circuit read Maryland’s statute too narrowly because while virtual chips are not redeemable for money, they are used for other critical aspects of the game.<sup>145</sup> Additionally, players with significant virtual gold deposits for a game such as *Game of War* sell their accounts on a secondary market, which proves that virtual gold indeed has monetary value.<sup>146</sup> Overall, this case shed light on gambling statutes’ inability to regulate loot boxes and other microtransactions, proving the need for stronger governmental intervention.

## B. MCLEOD V. VALVE CORPORATION

In *McLeod v. Valve Corporation*, plaintiffs sued Valve Corporation (Valve), developer of the extremely popular game *Counter-Strike: Global Offensive (CS:GO)*, alleging that Valve allowed “an illegal online gambling market” to operate through its “Steam platform<sup>147</sup>.”<sup>148</sup> In the complaint, plaintiffs argued that *CS:GO* weapon skins (Skins) are equivalent to casino

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139. *Mach. Zone, Inc.*, 851 F.3d at 319.

140. *Id.*

141. *Id.* (emphasis added).

142. *Id.*

143. *Id.*

144. Venkat Balasubramani, *Appeals Court Affirms Rejection of Gambling Claims Against Machine Zone*, TECH. & MKTG. L. BLOG (Mar. 18, 2017), <https://blog.ericgoldman.org/archives/2017/03/appeals-court-affirms-rejection-of-gambling-claims-against-machine-zone.htm>.

145. *Id.*

146. *Id.*

147. Steam is Valve’s greatest revenue producer, operating as “an online platform” where users can purchase games online and play them from around the world with only their profile. Players of *CS:GO* have the opportunity to purchase virtual weapons with different ‘textures’ through Steam, with prices fluctuating depending on the rarity of the weapon skin purchased.

148. *McLeod v. Valve Corp.*, No. C16-1227-JCC, 2016 WL 5792695, at \*1 (W.D. Wash. Oct. 04, 2016).

chips with “monetary value outside the game itself” because of the ability to “turn Skins directly into cash through ... third-party gambling sites.”<sup>149</sup> At the time of the complaint, third-party gambling websites were extremely popular with “tens of thousands of people [betting virtual] items from *CS:GO* on these [websites].”<sup>150</sup> Therefore, the virtual goods that are won and lost in-game have actual real-world value on Steam.<sup>151</sup> Valve receives 15% on the sale of each Skin sold through its Steam marketplace, resulting in an incentive to market these third-party gambling websites as more gamers will purchase Skins.<sup>152</sup> Plaintiffs claimed that “Valve is aware that rigged third-party sites are taking money from Valve’s teenage customers” and that popular YouTube channels “actively [promote] Lotto<sup>153</sup> as a gambling service,” which helps generate excitement about gambling Skins.<sup>154</sup>

Plaintiffs brought their claim under the Racketeer Influenced and Corruption Organizations Act (RICO), which combats organized crime by allowing penalties for racketeering activities, including illegal gambling.<sup>155</sup> The elements of a civil RICO claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiff’s business or property.<sup>156</sup> To prove injury under a RICO claim, “plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest.”<sup>157</sup> Ultimately, the Ninth Circuit would reject the plaintiffs’ RICO claim, saying that “gambling losses are not sufficient injury to business or property for RICO standing.”<sup>158</sup>

Although *McLeod v. Valve* was dismissed, it caught the attention of the Washington State Gambling Commission.<sup>159</sup> On October 5, 2016, the Washington State Gambling Commission announced it had contacted Valve

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149. *Id.*

150. *Id.*

151. Evan Lahti, *CS:GO’s controversial skin gambling, explained*, PCGAMER (July 06, 2016), <https://www.pcgamer.com/csgo-skin-gambling/>.

152. *Valve Corp.*, 2016 WL 5792695 at \*1.

153. *CSGO* Lotto was a “skin gambling” website, where players would connect their Steam accounts and “use the weapon skins they owned to enter into [gaming contests],” meaning that if they lost the virtual game, they would lose their skin. These skins, although completely virtual in nature, would end up having monetary value as they could be exchanged on Valve’s Steam Marketplace for real cash. See Charlie Hall, *CSGO Lotto’s lawyer says it was never a gambling site, and here’s why*, POLYGON (Dec. 18, 2017), <https://www.polygon.com/2017/12/18/16782124/csgo-lotto-lawsuit-gambling-terms-of-use-tmartn>; see also Steve Dent, *YouTubers avoid fine over Valve ‘CS:GO’ gambling scan*, ENGADGET (Sept. 08, 2017), <https://www.engadget.com/2017/09/08/youtube-csgo-lotto-fcc-no-fine/>.

154. *Valve Corp.*, 2016 WL 5792695 at \*1.

155. *Racketeer Influenced and Corrupt Organizations Act (RICO)*, NOLO (last visited Feb. 13, 2021), <https://www.nolo.com/legal-encyclopedia/content/rico-act.html>.

156. *Valve Corp.*, 2016 WL 5792695 at \*2.

157. *Id.*

158. *Id.*

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

to “immediately stop allowing the transfer of *Counter-Strike: Global Offensive* virtual weapons for gambling activities” through Steam.<sup>160</sup> Valve’s legal counsel Liam Lavery fired back that “Valve is not engaged in gambling or the promotion of gambling,” and that the company does not “facilitate gambling.”<sup>161</sup> However, Valve eventually admitted defeat following public backlash and sent cease and desist notices to third-party gambling websites asserting that “utilizing Steam to facilitate [third-party gambling] services does not comply with its user agreements.”<sup>162</sup>

### C. UPCOMING LITIGATION

At the end of 2020, a class-action lawsuit was filed against EA in the United States District Court for the Northern District of California alleging that EA’s games “are programmed to adjust the difficulty of games based upon individual gamers’ skills level.”<sup>163</sup> Because of this, the gamers argue that they are forced to “purchase more ‘loot boxes’” in order to compete in that gaming space.<sup>164</sup> A big point of emphasis will be whether the District of California enforces EA’s arbitration agreement, which all gamers must accept when playing games published by EA.<sup>165</sup> If arbitration is not enforced, a precedent will be set that allows gamers to potentially file class actions against other businesses offering games of chance.<sup>166</sup> This lawsuit is currently in its infancy but may have far-reaching consequences.

### IV. CONGRESS ATTEMPTS TO PROTECT CHILDREN WITH ABUSIVE GAMES ACT

With the deficiency of legal jurisprudence on the subject and legislation lacking the relevance required to connect itself with video games, more must be done to protect young consumers. On May 23, 2019, Senator Hawley formally introduced the Loot Box Bill to ban the sale of loot boxes to children.<sup>167</sup> The Loot Box Bill seeks to “regulate certain pay-to-win

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160. *Id.*

161. *Id.*; See also Mark Jansen, *\$5 Billion Spent on CS:GO Skin Gambling in 2016*, TECHRAPTOR (Jan. 25, 2017), <https://techraptor.net/gaming/news/5-billion-spent-on-cs-go-skin-gambling-in-2016> (discussing how Valve has a lot of money at stake when it comes to *CS:GO* skin gambling).

162. Jacob Wolf, *Valve prohibits online gambling through Steam for Counter-Strike and Dota 2*, ESPN (July 13, 2016), [https://www.espn.com/esports/story/\\_/id/17058219/valve-prohibits-online-gambling-steam-counter-strike-dota-2](https://www.espn.com/esports/story/_/id/17058219/valve-prohibits-online-gambling-steam-counter-strike-dota-2).

163. Andrew J. Silver, *An Imperfect Storm Has Sports Betting Operators Watching The EA Class-Action Lawsuit*, FORBES, (Dec. 10, 2020), <https://www.forbes.com/sites/andrewjsilver/2020/12/10/an-imperfect-storm-has-sports-betting-operators-watching-the-ea-class-action/?sh=4e9d4561fa22>.

164. *Id.*

165. *Id.*

166. *Id.*

167. Makena Kelly, *Bill to ban the sale of loot boxes to children presses forward with bipartisan support*, VERGE (May 23, 2019), <https://www.theverge.com/2019/5/23/18636535/loot-boxes-josh-hawley-markey-blumenthal-privacy-video-games>.

microtransactions and sales of loot boxes in interactive digital entertainment products, and for other purposes.”<sup>168</sup> Section 1(a)(1)(a) of the bill would hinder a game developer’s ability to market microtransactions to minors by making it “unlawful for a game publisher to publish a *minor-oriented game* that includes pay-to-win microtransactions or loot boxes.”<sup>169</sup> Senator Hawley may have genuine intentions with the Loot Box Bill, but the language of the bill shows a true lack of video game sophistication.<sup>170</sup> Section 2(5) of the bill defines “minor-oriented game” to mean “an interactive digital entertainment product for which the target audience is individuals under the age of 18.”<sup>171</sup> Section 2(5) outlines a wide range of considerations that can be analyzed to find whether a game constitutes a minor-oriented game. The FTC can look into: Section 2(5)(A) the subject matter of the product; (B) the visual content of the product; (C) the music or audio content of the product; or (D) other evidence demonstrating that the product is targeted at individuals under the age of eighteen.<sup>172</sup>

By stating “subject matter” can be used to decide whether a game is minor-oriented, Section 2(5)(A) may cause problems because subject matter is too broad and subjective.<sup>173</sup> To the masses, video games “generally appeal to kids,” meaning that subject matter is invariably minor-oriented and thus implying that almost every game should be subject to the Loot Box Bill’s conditions.<sup>174</sup> An additional issue derives from Section 1(b)(1)(b), which states “it is unlawful for a game publisher to publish an interactive digital entertainment product that is not a minor-oriented game if the publisher has *constructive knowledge* that *any* of its users are under the age of 18.”<sup>175</sup> The Loot Box Bill does not define constructive knowledge, making it difficult to discern whether a game publisher falls under the jurisdiction of the bill or not.<sup>176</sup> Generally, a lawyer evaluating the Loot Box Bill would most likely conclude from Section 1(b)(1)(b) that “if a publisher or distributor *should have known* that a *single user* of a game was under eighteen years old, and that game contained loot boxes or prohibited micro-transactions, they would be liable for penalties.”<sup>177</sup> This might cause microtransactions to be outlawed

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168. *Protecting Children From Abusive Games Act*, LYN19247, 116<sup>th</sup> Cong. § 1 (2019).

169. *Id.* (emphasis added).

170. See Brandon Huffman, *FAQ on a bill (S1629) proposing The Protecting Children from Abusive Games Act*, GAMASUTRA (May 31, 2019), [https://www.gamasutra.com/blogs/BrandonHuffman/20190531/343658/FAQ\\_on\\_a\\_bill\\_S1629\\_proposing\\_The\\_Protecting\\_Children\\_from\\_Abusive\\_Games\\_Act.php](https://www.gamasutra.com/blogs/BrandonHuffman/20190531/343658/FAQ_on_a_bill_S1629_proposing_The_Protecting_Children_from_Abusive_Games_Act.php).

171. *Protecting Children From Abusive Games Act*, *supra* note 168.

172. *Id.* The examples provided are not completely inclusive, as the Loot Box Bill provides a multitude of other ways to prove that a game is oriented towards minors.

173. See Huffman, *supra* note 170.

174. See *id.*

175. *Protecting Children From Abusive Games Act*, *supra* note 168.

176. Huffman, *supra* note 170.

177. *Id.*

on a scale much wider than gamers would appreciate due to the fact that nearly every video game is played by gamers under the age of eighteen.<sup>178</sup>

An even deeper dive into the definitions of Section 2(5) sheds light on the potential problems that could be associated with the Loot Box Bill.<sup>179</sup> The Entertainment Software Rating Board (ESRB) is responsible for providing the public with ratings on specific games, and in-turn these ratings assist parents with knowing whether their child is mature enough for a specific game.<sup>180</sup>

The three most common ratings are:

- a) *Everyone* – “Content is generally suitable for all ages. May contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.”
- b) *Teen* – “Content is generally suitable for ages 13 and up. May contain violence, suggestive themes, crude humor, minimal blood, simulated gambling and/or infrequent use of strong language.”
- c) *Mature* – “Content is generally suitable for ages 17 and up. May contain intense violence, blood and gore, sexual content and/or strong language.”<sup>181</sup>

Under the Loot Box Bill’s definition of minor-oriented games, games that have received a *Mature* rating would be under the Bill’s jurisdiction.<sup>182</sup> This may be a significant issue because such *Mature*-rated games, often played by adults, will now be deemed minor-oriented under the Loot Box Bill.<sup>183</sup> This means that there would be very few (if any) scenarios where a video game could be seen as not minor-oriented, which could potentially eradicate the entire microtransaction model.<sup>184</sup> Adult gamers “should have the right to make in-game purchases or gamble with loot boxes if they so please,” and the broad reach of Section 2(5) may make that reality unattainable.<sup>185</sup>

Section 2(7)(A) defines “pay-to-win microtransactions” as “an add-on transaction to an interactive digital entertainment product that eases a user’s

178. *See id.*

179. Jason Schreier, *U.S. Senator Says His Anti-Loot Box Bill Has The Video Game Industry Worried*, KOTAKU (May 21, 2019), <https://kotaku.com/u-s-senator-says-his-anti-loot-box-bill-has-the-video-1834905639>.

180. Charlie Hall, *A brief history of the ESRB rating system*, POLYGON (Mar. 3, 2018), <https://www.polygon.com/2018/3/3/17068788/esrb-ratings-changes-history-loot-boxes>.

181. All definitions come from ESRB, *Ratings Guide*, ESRB, <https://www.esrb.org/ratings-guide/> (last visited Feb. 3, 2021).

182. Olivia Richman, *Congress’ infamous “loot box bill” will hurt the industry*, UPCOMER (June 4, 2019), <https://upcomer.com/lol/story/1419025/loot-box-bill>.

183. *See id.*; *See also* Steven Chung, *Senate Bill Could Mean Game Over For Microtransactions And Loot Boxes*, ABOVE L. (May 29, 2019), <https://abovethelaw.com/2019/05/senate-bill-could-mean-game-over-for-microtransactions-and-loot-boxes/?rf=1>.

184. Richman, *supra* note 182.

185. *Id.*

progression through content otherwise available within the game without the purchase of such transaction.”<sup>186</sup> This section is especially crucial if the Loot Box Bill is to gain widespread support from the gaming community, as having a broad definition of pay-to-win microtransaction may open the floodgates to games being liable for microtransactions that are not considered predatory in the industry.<sup>187</sup> Wedbush Securities analyst Michael Pachter sheds light on the pitfalls of a broad definition of pay-to-win microtransactions, saying that Senator Hawley calls *Candy Crush*, “whose average player is a 48-year-old housewife, as being a game that targets minors with its \$150 bundles.”<sup>188</sup>

Under the Loot Box Bill’s frequently asked questions webpage, a primary question is whether it will ban all downloadable content.<sup>189</sup> The answer provided is a resounding “no,” however, this question drastically misses the mark. The question that should be asked is “[does] this bill ban more games than is needed to accomplish the goal of protecting kids from predatory monetization practices?”<sup>190</sup> As shown by the broad scope of Section (1)(b)(1)(b) and Section 2(5), the answer should be “yes,” because games that are primarily played by mature audiences will be subject to the jurisdiction of the Loot Box Bill due to its “very broad definitions of minor-oriented and pay-to-win and constructive knowledge standard.”<sup>191</sup> In sum, the Loot Box Bill might have genuine intentions, but its broad scope could have severe inadvertent consequences on the video game industry, and changes are necessary to properly regulate the games that gamers want.

## V. PROPOSED SOLUTION TO RECTIFY LANGUAGE ISSUES IN LOOT BOX BILL

In order for the Loot Box Bill to gain widespread support from both the gaming community and Congress, Senator Hawley and his co-authors would best be served by working hand-in-hand with industry leaders in order to fully understand the complexities of the video game marketplace.<sup>192</sup> Stanley Pierre-Louis, CEO of the Entertainment Software Association (ESA), has said that the Loot Box Bill is “flawed and riddled with inaccuracies” and

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186. Protecting Children From Abusive Games Act, *supra* note 168.

187. Giancarlo Caldes, ‘Zero’ chance it passes: Game analysts break down senator’s anti-loot box bill, VENTUREBEAT (May 13, 2019), <https://venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill/>.

188. *Id.*

189. Huffman. *supra* note 170.

190. *Id.*

191. *Id.*

192. See CJ Andriessen, *Senator Hawley’s anti-loot box bill is taking a scorched earth approach to invasive microtransactions*, DESTRUCTOID (May 24, 2019), <https://www.destructoid.com/senator-hawley-s-anti-loot-box-bill-is-taking-a-scorched-earth-approach-to-invasive-microtransactions-554673.phtml>.

would “ultimately prove harmful to the player experience.”<sup>193</sup> These flaws and inaccuracies most likely stem from the fact that Senator Hawley is admittedly not a gamer,<sup>194</sup> leading to the presumption that he does not completely grasp how the industry operates. The ESA has offered its support to the bill’s co-sponsors in helping them fully understand the microtransaction industry and why the Loot Box Bill would be far too broad in its scope.<sup>195</sup>

The Loot Box Bill must completely overhaul their system of evaluating minor-oriented games. Abstract categories such as the subject matter of the game or its visual contents are entirely too broad and could theoretically encapsulate any video game. The guidelines for determining minor-oriented games must become more rigid, making it easier for game developers to fully know whether their game is subject to the jurisdiction of the Loot Box Bill. Another benefit from adding more rigid guidelines is that only microtransactions the industry finds predatory will be banned; there is little to no issue with adults purchasing microtransactions to change their playable character’s appearance or adding more content to prolong the story of a specific game.

To improve the rigidity of the Loot Box Bill’s language, the bill’s cosponsors should rework Section 1(b)(1)(b). Games that receive a *Mature* rating are intended to be played by individuals aged 17+, meaning that Section 1(b)(1)(b)’s language of targeting games played by anyone under eighteen would capture the entire video game market. The bill’s cosponsors should use the ESRB’s rating system as a guide. Instead of saying that games played by anyone under the age of eighteen years old would fall under the Loot Box Bill’s jurisdiction, Section 1(b)(1)(b)’s language should reflect that games with an *Everyone* or *Teen* rating will be subject to the Loot Box Bill and closely scrutinized. This will allow games played primarily by adults to offer forms of microtransactions, while also making clear to developers when they must comply with the Loot Box Bill.

However, making this change would not go far enough to regulate mobile games because certain mobile games, like *Candy Crush* and *Clash of Clans*, do not receive ratings by the ESRB.<sup>196</sup> As such, the Loot Box Bill should have an updated section that deals entirely with mobile games and their microtransactions. This section should include specific guidelines that help evaluate whether a mobile game utilizes predatory microtransactions mechanics that specifically target the vulnerability of young kids. Potential

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193. Steve Watts, *US Senate Loot Box Bill “Riddled With Inaccuracies,” Says ESA*, GAMESPOT (June 6, 2019), <https://www.gamespot.com/articles/us-senate-loot-box-bill-riddled-with-inaccuracies-/1100-6467222/>.

194. See Schreier, *supra* note 179.

195. Watts, *supra* note 193.

196. *Candy Crush Saga*, LEARNING WORKS FOR KIDS, <https://learningworksforkids.com/playbooks/candy-crush-saga/> (last visited Feb. 28, 2021)

guidelines might include looking into data for mobile games such as the average age of players, the average amount spent on microtransactions, and how much time spent per gaming session. Additionally, Congress must be cognizant that mobile games can greatly differ from one another, and that no clear objective standard is plausible. Receiving advice from industry experts, and respecting their views on microtransactions on specific games, would go a long way in properly classifying predatory games that target young consumers. With mobile games not receiving ESRB ratings the guidelines must be more fluid compared to other sections, but what is currently written under the Loot Box Bill is entirely too broad.

### CONCLUSION

The rise in microtransactions has fully entrenched itself as a standard in the video game community. With young children specifically prone to the pitfalls associated with microtransactions, especially loot box purchases, a problem has arisen where young gamers spend excessive amounts of money on in-game purchases. Many countries have taken notice. Belgium took a significant step by completely outlawing all forms of loot box microtransactions. In the United States, there have been multiple attempts to solve the loot box crisis through legal jurisprudence. However, due to the lack of well-formed law in the subject area, consumers have been left vulnerable. Senator Hawley introduced “The Protecting Children from Abusive Games Act” in order to protect young gamers from the hazards linked with microtransactions. Although the bill has genuine intentions, its broad scope could result in catastrophe for the video game industry. For the Loot Box Bill to truly protect gamers from the microtransactions most deemed predatory, a re-drafting of the bill is required to limit its scope and not completely eradicate the microtransaction model.

*Dominick Tarantino\**

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