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Gamble-to-Win: Regulating Video Game Loot Boxes Under the FTC's Unfair and Deceptive Practices Doctrines

COLE SHARDELOW*

INTRODUCTION

Teenager Jonathan Peniket is an avid player of the soccer video game series *FIFA*, and he fondly remembers playing the series' games since the release of *FIFA 2005*.¹ In 2009, *FIFA* offered a new game mode called Ultimate Team, in which users could spend real money to purchase trading cards of their favorite soccer players and use those players within the game.² To acquire new soccer players, *FIFA* users could not purchase specific trading cards outright; instead, users purchased packs containing random cards with soccer players of varying quality.³ As Peniket began purchasing card packs, he repeatedly failed to receive his favorite players.⁴ The impulse to see if he could get lucky and receive a quality player combined with stress from school created a compulsive need to buy more packs.⁵ By the time his purchasing spree ended, Peniket had spent almost £3,000—his entire college savings.⁶ The randomized trading card feature *FIFA* used is known as a loot box, and it is one of many games that offers such a feature.⁷

*© J.D. Candidate 2024, University of Maryland Francis King Carey School of Law. I would like to thank Professor Alexi Pfeffer-Gillett and the editors of the *Journal of Business & Technology Law* for their valuable ideas and feedback. I would especially like to thank my parents, Scott and Diane Shardelow, and Lucy Nielsen for their endless love and encouragement.

1. Felicity Hannah & Jane Andrews, *Loot Boxes: I Blew my University Savings Gaming on FIFA*, BBC (July 9, 2020), <https://www.bbc.com/news/business-53337020>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* ("I was throwing £80 into the game four or five times a night."). Peniket's anxious encounters with video game loot boxes are far from unique. See, e.g., Ellen McGrody, *For Many Players, Lootboxes Are a Crisis That's Already Here*, VICE (Jan. 30, 2018, 2:08 PM), <https://www.vice.com/en/article/kznmwa/for-many-players-lootboxes-are-a-crisis-thats-already-here> (recounting testimony of players experiencing addiction, shame, depression, and suicidal thoughts because of excessive loot box purchases).

6. Hannah & Andrews, *supra* note 1.

7. See, e.g., David Zendle et al., *The Prevalence of Loot Boxes in Mobile and Desktop Games*, 115 ADDICTION 1768, 1770 (2020) (finding 59% of the top grossing mobile games on iPhone contained loot boxes).

Gamble-to-Win

Loot boxes are in-game rewards that are earned through either playing a game or spending real money.⁸ A loot box's defining feature is its randomized rewards, in which the player has a certain probability of receiving each type of reward within the loot box.⁹ For example, a loot box may present a high probability of rewarding a bland outfit for a user's in-game character but only offer a small chance of rewarding an eye-catching, unique outfit.¹⁰

Loot boxes provide a significant and continuously growing source of revenue for the video game industry. Players spent an estimated \$15 billion on loot boxes in 2020, and these purchases are expected to generate \$20 billion by 2025.¹¹ In 2023, loot boxes are predicted to be one of the central forces driving an estimated 30% increase in the value of the gaming industry.¹²

While loot boxes are a financial boon for the video game industry, mounting evidence suggests they are a financial and mental burden for users.¹³ Studies have found a correlation between loot box usage and gambling behaviors.¹⁴ Researchers from the universities of Plymouth and Wolverhampton found just 5% of loot box purchasers produced 50% of loot box revenues.¹⁵ One major cause of addictive loot box behaviors is in how loot boxes are designed. For instance, many loot boxes obfuscate their actual cost by requiring multiple virtual currency exchanges or by hiding the probability of receiving rare items.¹⁶ These tactics were used to drive loot box purchases in *Diablo Immortal*, in which an estimated \$100,000 is required to fully upgrade an in-game character.¹⁷

8. Isobel Hamilton, *There's a Debate Raging in Video Games Over Whether Loot Boxes Should be Classified as Gambling*, BUSINESS INSIDER (July 5, 2020, 5:22 AM), <https://www.businessinsider.com/classifying-video-game-loot-boxes-as-gambling-2020-7>.

9. *Id.*

10. *Id.*

11. Matt Gardner, *The Gaming Industry's Loot Box Problem is About to Get Worse*, FORBES (Mar. 11, 2021, 5:00 AM), <https://www.forbes.com/sites/mattgardner1/2021/03/11/the-gaming-industrys-loot-box-problem-is-going-to-get-worse/?sh=5b60c8fc4425>.

12. *Id.*

13. See *infra* text accompanying notes 14–17.

14. E.g., Kengo Yokomitsu et al., *Characteristics of Gamers who Purchase Loot Box: A Systematic Literature Review*, 8 CURRENT ADDICTION REPS. 481, 481 (2021); Stuart Gordon Spicer et al., *Loot Boxes and Problem Gambling: Investigating the "Gateway Hypothesis"*, ADDICTIVE BEHAVS., August 2022, at 1, 1 (finding loot box purchases lead to future gambling and vice versa).

15. JAMES CLOSE & JOANNE LLOYD, LIFTING THE LID ON LOOT-BOXES: CHANCE-BASED PURCHASES IN VIDEO GAMES AND THE CONVERGENCE OF GAMING AND GAMBLING 3 (2021).

16. *Id.* at 2.

17. Paul Tassi, *'Diablo Immortal' Player Spends \$100K to Max His Character, Now Too Powerful to Matchmake*, FORBES (Aug. 7, 2022, 11:52 AM), <https://www.forbes.com/sites/paultassi/2022/08/07/diablo-immortal-player-spends-100k-to-max-his-character-now-too-powerful-to-matchmake/?sh=b52ea6b58df5>.

COLE SHARDELOW

The United States is sorely lacking loot box regulations.¹⁸ Consumers have neither federal nor state statutory protections against loot boxes,¹⁹ but not for a lack of trying. State loot box regulations have failed to garner sufficient support to pass in state legislatures,²⁰ while a federal bill introduced in 2019 and referred to committee has seen no action since then.²¹

Although legislative remedies in the United States are languishing, video game companies could face one final boss in their quest to keep loot boxes deregulated: the Federal Trade Commission (“FTC”).²² The FTC has broad authority to regulate “unfair or deceptive acts or practices in or affecting commerce.”²³ This regulatory power gives the FTC the ability to proscribe a practice as either unfair, deceptive, or both.²⁴ The possibility of the FTC regulating loot boxes as unfair or deceptive is not hypothetical, as the FTC has already used this authority to regulate in-game purchases.²⁵ Further, the FTC itself showed an interest in monitoring loot box practices when it hosted a workshop discussing loot boxes with industry representatives and advocacy groups.²⁶ Finally, a more recent investigatory request sent on behalf of sixteen advocacy groups may press the FTC to move from workshop discussions to regulatory action.²⁷

18. See Daniel Cermak, Note, *Micro-Transactions, Massive Headaches: International Regulation of Video Game Loot Boxes*, 28 MICH. ST. INT’L L. REV. 273, 303 (2020) (dubbing the United States’ loot box landscape “The Wild, Wild West of Loot Boxes”).

19. See *id.* (“Neither the United States Federal government nor its individual states have passed official legislation declaring loot boxes as gambling.”); Jason Egielski, Note, *Don’t Hate the Player, Hate the Game: Video Game Loot Boxes, Gambling, and a Call for Administrative Regulation*, 50 HOFSTRA L. REV. 175, 186 (2021) (discussing criticism that loot boxes are “unregulated gambling”).

20. See, e.g., Egielski, *supra* note 19, at 185 n.125 (listing state loot box bills in Hawaii and Washington that failed to pass).

21. S. 1629, 116th Cong. (2019).

22. See *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, FTC, <https://www.ftc.gov/news-events/events/2019/08/inside-game-unlocking-consumer-issues-surrounding-loot-boxes> (last visited Oct. 19, 2022) (illustrating the FTC’s interest in loot box oversight by hosting a loot box workshop on Aug. 7, 2019).

23. 15 U.S.C. § 45(a)(1).

24. See generally Thomas Leary, Former Comm’r, FTC, *Unfairness and the Internet* (Apr. 13, 2000) [hereinafter *Unfairness and the Internet*] (describing application of unfair practices doctrine to the internet), <https://www.ftc.gov/news-events/news/speeches/unfairness-internet>; letter entitled “FTC Policy Statement on Deception” from James Miller, Chairman, FTC, to the Hon. John Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983) [hereinafter *Statement on Deception*] (outlining the FTC’s deceptive practices doctrine), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception>.

25. See *FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1160, 1166 (W.D. Wash. 2014) (denying Amazon’s motion to dismiss, in part, because substantial injury to adult consumers may be caused by apps that induce children to make in-game purchases).

26. See *supra* note 22.

27. See letter from Haley Hinkle, Policy Counsel, Fairplay, and Katharina Kopp, Deputy Director and Director of Policy, Center for Digital Democracy, to the commissioners of the FTC, at 4, 7 (June 2, 2022) [hereinafter

Gamble-to-Win

Considering the potential dangers loot boxes pose to children and the FTC's broad ability to deter unfair and deceptive practices, the FTC can and should regulate video game loot boxes. Thus, Section I discusses the origins of in-game purchases, known as microtransactions, and their transformation into loot boxes.²⁸ Section II analyzes loot box design and its effects on consumers.²⁹ Finally, Section III describes the FTC's ability to regulate unfair and deceptive practices and argues that video game loot boxes are unfair and deceptive practices under the FTC Act.³⁰

I. FROM PIXELS TO PURCHASES: THE DEVELOPMENT OF MICROTRANSACTIONS AND LOOT BOXES

In its initial decades, the video game industry sold games as one complete piece of content.³¹ It was not until the 2000s that video game companies began adding content accessible through subsequent in-game purchases,³² known as microtransactions.³³ The prefix "micro" in microtransaction denotes the amount of content the transaction provides, as it is often a small fraction of the entire game's content.³⁴ Microtransactions can generally be broken into four types: cosmetic microtransactions, content microtransactions, pay-to-win microtransactions, and loot boxes.

A. Cosmetic Microtransactions

Cosmetic microtransactions are purchases that provide an aesthetic benefit to a player within a game.³⁵ Cosmetic microtransactions offer no gameplay advantage to players and are only used to personalize a player's experience.³⁶ For instance, Microsoft's first foray into microtransactions was through the video game *The Elder*

Investigation Request] (requesting the FTC investigate Electronic Arts for committing unfair and deceptive practices in the way it designed loot boxes within *FIFA: Ultimate Team*), <https://fairplayforkids.org/wp-content/uploads/2022/06/LootboxLetter.pdf>.

28. See *infra* Section I.

29. See *infra* Section II.

30. See *infra* Section III.

31. David Zendle et al., *The Changing Face of Desktop Video Game Monetisation: An Exploration of Exposure to Loot Boxes, Pay to Win, and Cosmetic Microtransactions in the Most-Played Steam Games of 2010-2019*, PLoS ONE, May 7, 2020, at 1, 1.

32. See Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, US GAMER (Oct. 11, 2017), <https://www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes> (recounting the first "large-scale" microtransaction in 2006).

33. Nenad Zoran Tomić, *Economic Model of Microtransactions in Video Games*, 1 J. ECON. SCI. RSCH. 17, 18 (2019).

34. See *id.* (explaining microtransactions are determined "primarily by purpose, not by the amount" paid).

35. Zendle et al., *supra* note 31, at 2.

36. See, e.g., *id.* (describing how *Fortnite* players can purchase unique movements for their characters so they can express ideas).

COLE SHARDELOW

Scrolls IV: Oblivion in 2006.³⁷ As part of the game, players could purchase unique golden, silver, and other horse armor for their horse companions; the pack of horse armor cost \$2.50 for those who played *Oblivion* on the Xbox 360 video game console and \$1.99 for those who played on computers.³⁸ The game *Fortnite* offers a more troubling example.³⁹ Unlike *Oblivion*, *Fortnite* tempts players with the promise of free gameplay.⁴⁰ Once in the game, players are showered with a plethora of microtransactions, including cosmetic microtransactions such as character animations, loading screen art, and character outfits such as Spider-Man, Batman, and Darth Vader.⁴¹

B. Content Microtransactions

Content microtransactions add substantive features to a game without giving players an advantage that would create imbalances.⁴² Some types of additional features include “new missions in action games, new nations and new scenario packages in strategic games, [and] new vehicles or tracks in racing games.”⁴³ These microtransactions originated in the 1980s as expansion packs for games such as *Xanadu: Dragon Slayer II*.⁴⁴ The original game has players fighting enemies in a maze-like fantasy setting, and the expansion pack added new maps, enemies, and an entirely new feature allowing players to trade items.⁴⁵ Since then, game developers have attempted to monetize their games in every way possible through content microtransactions—to the point where a game’s entire premise is changed to entice more purchasers.⁴⁶ For example, the base game of *Red Dead Redemption* is a classic Wild West environment; its *Undead Nightmare* expansion pack, however, turns the game into a zombie survival scenario.⁴⁷

37. Williams, *supra* note 32.

38. *Id.* (capturing a photo of the golden and silver horse armor in *Oblivion*).

39. Joseph Yaden, *5 Years Ago, Epic Games Made the Most Influential Shooter of All Time*, INVERSE (July 25, 2022), <https://www.inverse.com/gaming/fortnite-5th-anniversary>.

40. Williams, *supra* note 32; Yaden, *supra* note 39.

41. Yaden, *supra* note 39.

42. Tomić, *supra* note 33, at 18.

43. *Id.*

44. See *Xanadu: Scenario 2*, MOBY GAMES, <https://www.mobygames.com/game/xanadu-scenario-ii> (last visited Oct. 23, 2022) (describing the expansion pack to the video game *Xanadu: Dragon Slayer II*).

45. *Id.*

46. See, e.g., Kristine Steimer, *Red Dead Redemption: Undead Nightmare Review*, IGN (Aug. 16, 2021, 3:32 PM), <https://www.ign.com/articles/2010/10/27/red-dead-redemption-undead-nightmare-review> (describing how an expansion to *Red Dead Redemption* alters it from a Wild West to a zombie survival game).

47. *Id.*

Gamble-to-Win

C. Pay-to-Win Microtransactions

A pay-to-win microtransaction derives its name from the in-game advantage it grants players who purchase it.⁴⁸ Pay-to-win microtransactions can grant one of two types of advantages: a timing advantage or an exclusivity advantage.⁴⁹ A timing advantage quickens a player's ability to level up or progress through a game.⁵⁰ Players are often incentivized to purchase timing advantages because developers shrewdly design their games to require impracticable amounts of time or effort to progress.⁵¹ The developers of the game *Star Wars Battlefront 2* incentivized timing advantages by offering a more expensive version of the game that provided immediate weapon bonuses to a player's soldiers, whereas those bonuses would take normal players hours to acquire.⁵² On the other hand, exclusivity advantages grant purchasing players features that non-purchasing players do not have the ability to acquire.⁵³ *Metal Gear Survive* used this microtransaction by requiring players to pay \$9.99 to receive a second save slot—a feature that allows a player to have an extra character.⁵⁴ Without this feature, non-purchasing players who would like to try a new character are forced to delete their one allotted save and thus lose their progress in the game.⁵⁵

D. Loot Boxes

Loot boxes are the culmination of the previous microtransactions into a gambling-like package. A loot box randomly grants a player one or more of a set of possible

48. Tomić, *supra* note 33, at 19.

49. See Zendle et al., *supra* note 31, at 2 (providing examples of pay-to-win microtransactions that allow players to level up more quickly or that grant new, advantageous abilities).

50. *E.g., id.* (describing a timing advantage in *Assassin's Creed: Odyssey* in which players purchase a "boost" to level up more quickly).

51. See FORBRUKERRÅDET, INSERT COIN: HOW THE GAMING INDUSTRY EXPLOITS CONSUMERS USING LOOT BOXES 20–21 (2022) (warning of games that add "'busywork' for which players are encouraged to pay real money to skip").

52. 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/?sh=5260d4464a63>.

53. *E.g.,* Zendle et al., *supra* note 31, at 2 (explaining a microtransaction that gives players the ability to sneak up on other players).

54. Erik Kain, *Konami is Charging Real Money for 'Metal Gear Survive' Save Slots*, FORBES (Feb. 23, 2018, 11:36 AM), <https://www.forbes.com/sites/erikkain/2018/02/23/shameless-konami-charges-money-for-metal-gear-survive-save-slots/?sh=4365e50d22eb>.

55. See *id.* (warning the only way to gain an additional save slot without purchase is by "deleting your first save").

COLE SHARDELOW

rewards.⁵⁶ A loot box often contains either cosmetic rewards⁵⁷ or play-to-win advantages.⁵⁸ Loot boxes owe much of their origins to Japan, where gachapon features—named after vending machines that give out random toys⁵⁹—emerged from games like *MapleStory* in 2004.⁶⁰ Using an in-game replica of a gachapon machine, *MapleStory* players would exchange a ticket for a random item.⁶¹ The gachapon format grew rapidly in mobile games in the 2010s.⁶² Though these mobile games were simple, their ability to “fool[] your brain” into persistently playing generated revenues of \$1 billion.⁶³

The first games specifically featuring loot boxes developed along a parallel timeline to gachapon games and originated in China with the 2006 game *ZT Online*.⁶⁴ *ZT Online* established loot boxes’ now common gimmicks—a virtual treasure chest displaying all potential rewards “on a circle reminiscent of Wheel of Fortune” and opened by a key the player must acquire⁶⁵—and its success exacerbated the growth of games with both free-to-play and loot box features.⁶⁶ As a result, the 2010 game *Team Fortress 2* carried over the visual design of discrete, boxed rewards to the Western video game industry by giving players the option of either purchasing keys or repeatedly playing the game to unlock loot boxes.⁶⁷

An additional type of loot box—packs of randomized trading cards—emerged in Western sports games through the soccer game *UEFA Champions League 2006-*

56. See *supra* text accompanying notes 8–10.

57. E.g., Tyler Colp, *Overwatch Loot Box Hoarders Say Goodbye*, PC GAMER (Sep. 14, 2022), <https://www.pcgamer.com/overwatch-loot-box-hoarders-say-goodbye/> (describing the “assortment of skins and other cosmetic items” that came from loot boxes in the game *Overwatch*).

58. E.g., Investigation Request, *supra* note 27, at 1–2 (explaining how “more powerful” soccer players in *FIFA: Ultimate Team* are acquired by purchasing loot boxes).

59. DARIUS GAMBINO, FROM GACHAPON TO VIDEO GAME DLC: A BRIEF HISTORY OF LOOT BOXES, GAMBLING AND THE LAW 2 (2022).

60. Johnny Vito, *The Evolution of Loot Boxes, Crates, and UT Cards*, PLAYSTATION UNIVERSE (Sep. 9, 2021), <https://www.psu.com/news/the-evolution-of-loot-boxes-crates-and-ut-cards/>.

61. *Id.*

62. See, e.g., Steven Wright, *The Evolution of Loot Boxes*, PC GAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes/> (discussing the success of a gachapon mobile game under the subheading “Mobile mutations”).

63. *Id.* (pointing out how the design of the game *Puzzles & Dragons* persuaded players to continue purchasing gachapons).

64. See *id.* (discussing loot box origins in *ZT Online*).

65. *Id.*

66. See GAMBINO, *supra* note 59, at 2 (explaining how *ZT Online* “legitimized loot boxes as a revenue stream” and encouraged the growth of free to play games after its release).

67. Wright, *supra* note 62.

Gamble-to-Win

2007.⁶⁸ Video game developer Electronic Arts (“EA”) would use this model in basketball,⁶⁹ football, and even sci-fi action and horror games.⁷⁰

Eventually, with the release of *Star Wars: Battlefront II*, developers pushed the loot box format to a point so predatory that it received intense pushback from both players and the broader public.⁷¹ *Battlefront II* is a multiplayer shooter game where players improve their weapons and abilities by obtaining star cards.⁷² Star cards could either be obtained by successfully progressing through the game or by purchasing them through loot boxes.⁷³ Although players could technically acquire star cards by playing the game, doing so was practically impossible; unlocking every star card required an estimated 4,528 hours, or over six months of playtime.⁷⁴ This system all but ensured players who did not purchase loot boxes would have no ability to compete against loot box purchasers who could easily obtain star cards.⁷⁵ The fierce backlash to the unbalanced star card system by players, regulators,⁷⁶ and *Star Wars*’ owner Disney eventually persuaded the developer of *Battlefront II* to remove the ability to purchase star cards.⁷⁷

II. LOOT BOX DESIGN AND ITS ADDICTIVE EFFECTS ON PLAYERS

A loot box’s presentation is the main cause of addictive player purchases. As explained below, loot boxes are carefully designed to tempt players into making as many purchases as possible. These designs have devastating effects on players’ financial and social health.

68. *Id.*

69. See GAMBINO, *supra* note 59, at 3 (discussing *NBA 2K13*’s use of trading cards within a game mode called MyTeam).

70. See Wright, *supra* note 62 (stating EA adds trading cards “to nearly every sports game they make,” including *Madden*; EA also added card packs to sci-fi action game *Mass Effect 3* and sci-fi horror game *Dead Space 3*).

71. See GAMBINO, *supra* note 59, at 7 (finding *Star Wars: Battlefront II* “received the most press in the argument over loot boxes”).

72. *Id.*

73. *Id.*

74. Matt Davidson, *Someone’s Estimated How Long it Takes to Unlock Everything in Star Wars: Battlefront 2 (Too Long)*, IGN (Nov. 15, 2017, 9:53 AM), <https://www.ign.com/articles/2017/11/15/someones-estimated-how-long-it-takes-to-unlock-everything-in-star-wars-battlefront-2-too-long>.

75. See GAMBINO, *supra* note 59, at 7 (warning that the unbalanced star card system “would have otherwise resulted in many players simply investing in loot boxes, and dominating the game”).

76. See Wright, *supra* note 62 (discussing player pushback against star cards and how regulators began to consider classifying them as gambling).

77. See GAMBINO, *supra* note 59, at 7 (describing how “loot boxes were limited to cosmetic items only” after star card backlash).

COLE SHARDELOW

A. *The Alluring Design Features of Loot Boxes*

Loot boxes contain two design features that incentivize players to repeatedly purchase them: the unclear probability of receiving a rare item, and the presentation and functionality of loot boxes.⁷⁸ Typically, their presentation comes in the form of confusing design practices called dark patterns.⁷⁹

1. *Probability Disclosures*

Players are unable to determine the likelihood of receiving a quality reward from a loot box because of the confusing ways in which probabilities are disclosed.⁸⁰ Initially, the probability of receiving some items in a loot box is astronomically small, with some rewards having only a 0.0008% chance of being won.⁸¹ Loot boxes also use unintuitive probabilities.⁸² First, loot boxes do not have visual cues indicating the probability of success that, for instance, dice have.⁸³ Further, the probability of receiving a loot box reward at any one time constantly changes based on the amount of times a player has purchased a loot box⁸⁴ or on behavioral data collected by the game.⁸⁵ Finally, the large amount of potential rewards in a loot box—1000 items for some games⁸⁶—further obscures the probability of receiving a reward and requires players to purchase a larger number of loot boxes to receive the particular reward they want.

78. See FORBRUKERRÅDET, *supra* note 51, at 13–22 (discussing the exploitative probabilities, presentations, and functions that lead consumers to purchase loot boxes).

79. Rebekah Valentine, *Consumer Advocates to ESRB, FTC: Loot Box Odds Disclosure is Not Enough*, GAMES INDUSTRY (Aug. 7, 2019), <https://www.gamesindustry.biz/consumer-advocates-to-esrb-ftc-loot-box-odds-disclosure-is-not-enough>.

80. See *id.* (finding probability disclosures futile because they fail to encapsulate the complexity of loot boxes); see generally Leon Y. Xiao et al., *Probability Disclosures are not Enough: Reducing Loot Box Reward Complexity as a Part of Ethical Video Game Design*, J. GAMBLING ISSUES, May 13, 2022, at 1 (describing the obtuse nature of probabilities in loot boxes).

81. Leon Y. Xiao et al., *What are the Odds? Lower Compliance with Western Loot Box Probability Disclosure Industry Self-Regulation than Chinese Legal Regulation 3* (Sep. 30, 2021) (unpublished manuscript).

82. Xiao et al., *supra* note 80, at 3.

83. See *id.* (explaining how loot boxes have no visual probability cue like a roulette wheel does and that games such as *Golden HoYeah* alter the probability of rolling certain numbers on a die).

84. See *id.* at 4 (noting how some games use a “pity-timer” that increases the chance of winning a rare loot box reward if the player has repeatedly purchased a loot box without success).

85. See FORBRUKERRÅDET, *supra* note 51, at 16–17 (describing how consumer data points, such as “likelihood to spend money,” lead to adjustments to the probability of loot box rewards).

86. Nick Ballou et al., *The Hidden Intricacy of Loot Box Design: A Granular Description of Random Reward Mechanisms in Games 7* (Nov. 22, 2020) (unpublished manuscript) (on file with the Digital Games Research Association) (categorizing some video games as having thousands of rewards in one “pool” of a loot box).

Gamble-to-Win

Some video game developers provide loot box probability disclosures in accordance with a nation's or industry association's requirements,⁸⁷ but such requirements often fail to adequately address the unclear nature of loot box probabilities. For example, China's probability disclosure requirement has failed to ensure 4.4% of the top-selling Chinese video games provide disclosures.⁸⁸ Industry self-regulation fares even more poorly, with only 64% of the top 100 grossing iPhone games with loot boxes in the UK disclosing their probabilities.⁸⁹ Further, even if a developer discloses probabilities about their games, many of those disclosures exist only on the game's website.⁹⁰ Finally, because of the constantly fluctuating and obtuse nature of loot box probabilities,⁹¹ a typical player would be unlikely to understand the actual probability even if a disclosure was given.⁹²

2. *Dark Patterns*

Alongside confusing probabilities, loot boxes use a particularly alluring and misleading technique called dark patterns. Dark patterns are "design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm."⁹³ A simple example of a dark pattern occurs when a website is designed to sneak items into an online shopping cart without the consent of the user.⁹⁴ Dark patterns exist within a variety of online contexts, including in apps, websites, and games.⁹⁵ To successfully deceive users into acting against their interests, dark patterns often prey on users' cognitive biases.⁹⁶ Many attempts have been made to broadly categorize dark patterns.⁹⁷ Relevant types of dark patterns

87. See Leon Y. Xiao et al., *Gaming the System: Suboptimal Compliance with Loot Box Probability Disclosure Regulations in China*, BEHAV. PUB. POL'Y, May 18, 2021, at 1, 4 [hereinafter *Gaming the System*] (stating China's probability disclosure requirement); cf. Leon Y. Xiao, *ESRB's and PEGI's Self-Regulatory 'Includes Random Items' Labels Fail to Ensure Consumer Protection*, 19 INT'L J. MENTAL HEALTH AND ADDICTION 2358, 2358 (2020) (discussing loot box disclosure requirement for North American and European video game industry regulators ESRB and PEGI).

88. *Gaming the System*, supra note 87, at 12.

89. Xiao et al., supra note 81, at 17–18.

90. See *Gaming the System*, supra note 87, at 12 (finding 38.5% of disclosures of top grossing Chinese mobile games existed on the game's website only).

91. See supra notes 83–86 and accompanying text.

92. See Xiao et al., supra note 80, at 4 ("When decision-making environments are complex, consumers are likely to . . . fail to correctly account for all relevant data.").

93. FED. TRADE COMM'N, BRINGING DARK PATTERNS TO LIGHT 2 (2022).

94. *Id.* at 1.

95. See *id.* at 3 (discussing sources of dark patterns "including ecommerce, cookie consent banners, children's apps, subscription sales, and more").

96. See Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 44 (2021) (finding dark patterns employ "framing effects, the sunk cost fallacy, and anchoring").

97. See generally Arunesh Mathur et al., *What Makes a Dark Pattern . . . Dark?: Design Attributes, Normative Considerations, and Measurement Methods*, CHI CONF. ON HUM. FACTORS COMPUTING SYS., May 2021, at

COLE SHARDELOW

include intermediate currency, confirmshaming, and urgency dark patterns.⁹⁸ Intermediate currency dark patterns obscure the actual cost of an item by hiding it behind one or more virtual currencies; games such as *Clash of Clans* use this method by presenting multiple tiers of in-game currency and requiring certain items be purchased with particular currencies.⁹⁹ Video games might also employ confirmshaming, which occurs when a choice is framed to make one option seem irrational or wrong.¹⁰⁰ Finally, urgency dark patterns coerce users into making purchases through limited time offers or countdown timers.¹⁰¹ *FIFA 22* uses both a limited time offer and countdown timer by featuring “lightning round” loot box sales, in which a limited quantity of rare soccer player packs are available for purchase worldwide and players are reminded of the sale by a visual tracker that counts down the quantity of packs available.¹⁰²

Loot boxes also capitalize on dark patterns specific to video games.¹⁰³ Two relevant types of video game dark patterns are temporal and monetary dark patterns, each of which has its own subtypes.¹⁰⁴ A video game feature is deemed a temporal dark pattern based on the answers to the following questions: “Can the player develop a sense of the time commitment necessary to successfully play the game? Are the player’s expectations of the time commitment significantly at odds with the actual time required? How likely are players to feel they ‘wasted their time?’”¹⁰⁵ A feature can be found a monetary dark pattern by similarly asking the following questions:

*How likely is the player to regret having spent money to play the game?
How likely is the player to “lose track” of how much money he spends
while playing the game? Is the player aware of what she is getting in
return for their money when she spends it? . . . Is the player aware of how*

1; Colin M. Gray et al., *The Dark (Patterns) Side of UX Design*, CHI CONF. ON HUM. FACTORS COMPUTING SYS., Apr. 2018, at 1; Harry Brignull, *Types of Deceptive Design*, DECEPTIVE DESIGN, <https://www.deceptive.design/types> (last visited Oct. 26, 2022).

98. See Luguri & Strahilevitz, *supra* note 96, at 53 (listing types of dark patterns).

99. See Valentine, *supra* note 79 (“[G]ames such as Clash of Clans obfuscate the amount that certain things cost by distancing the final items . . . from the real money being spent”).

100. Luguri & Strahilevitz, *supra* note 96, at 53 (defining confirmshaming as a “[c]hoice framed in a way that makes it seem dishonorable, stupid”); cf. FORBRUKERRÅDET, *supra* note 51, at 14 (describing how loot boxes attempt to create a fear of missing out among players).

101. Luguri & Strahilevitz, *supra* note 96, at 53 (explaining countdown timer and limited offer dark patterns).

102. FORBRUKERRÅDET, *supra* note 51, at 26.

103. See José P. Zagal et al., *Dark Patterns in the Design of Games*, 2013 SOC’Y FOR ADVANCEMENT SCI. DIGIT. GAMES 39, 41–44 (describing types of video game dark patterns).

104. See *id.* at 41–43 (discussing temporal and monetary dark patterns).

105. *Id.* at 41.

Gamble-to-Win

*much money he will have to spend in order to achieve his goals in the game?*¹⁰⁶

Grinding is one type of temporal dark pattern used in loot boxes.¹⁰⁷ A grinding dark pattern is aptly named for video game designs that force players to perform “repetitive and tedious tasks.”¹⁰⁸ Grinding acts as a dark pattern by coercing players into gaming for unnecessary amounts of time for the purpose of progressing in the game or receiving a reward.¹⁰⁹ It is used to frustrate players to the point where they would consider purchasing a loot box to more quickly progress in the game.¹¹⁰ At the extreme end of grinding, *FIFA 22* requires users wishing to receive a single soccer player loot box containing the best players to either purchase the loot box or play the game for 35 hours.¹¹¹

Pay-to-win microtransactions are also a type of monetary dark pattern.¹¹² Pay-to-win game designs coerce purchases that players would not have made otherwise by exploiting a player’s social or competitive nature.¹¹³ For example, *Raid: Shadow Legends* uses a global messaging system that constantly notifies players every time another player receives a high quality character from a loot box.¹¹⁴ Thus, players feel compelled to purchase loot boxes in the hopes that they, too, will receive a similarly high quality character.¹¹⁵ This dark pattern, like many others, plays off of cognitive biases that manipulate players into following social trends.¹¹⁶

B. The Effects of Loot Boxes on Players

Loot boxes make players financially irresponsible to the point where they begin to harm themselves and those closest to them. In particular, loot boxes impact the behavioral, mental, and financial wellbeing of players.¹¹⁷ These effects are felt most

106. *Id.* at 42.

107. *Id.* at 41–42.

108. *Id.* at 41.

109. *Id.* at 41–42.

110. FORBRUKERRÅDET, *supra* note 51, at 21.

111. *Id.* at 34 (describing the amount of coins and playtime required for a Jumbo Rare Gold Player Pack).

112. Zagal et al., *supra* note 103, at 43 (“Monetized Rivalries is a pattern . . . colloquially known as ‘Pay to Win.’”).

113. *See id.* at 43 (describing how pay-to-win dark patterns encourage spending by pressuring players “to achieve . . . a high placement on a leaderboard”).

114. FORBRUKERRÅDET, *supra* note 51, at 43.

115. *Id.* at 44.

116. *See id.* (describing a cognitive bias known as the bandwagon effect); *Bandwagon Effect*, APA DICTIONARY OF PSYCHOLOGY, <https://dictionary.apa.org/bandwagon-effect> (last visited Oct. 29, 2022) (“Bandwagon effect: the tendency for people in social . . . situations to . . . do or believe things because many other people appear to be doing or believing the same.”).

117. *See infra* notes 121–137 and accompanying text.

COLE SHARDELOW

intensely by younger players who are “among the most avid consumers of . . . video games.”¹¹⁸ Estimates have found more than half of adolescent players engaged with loot boxes and nearly one in five adolescent players purchased a loot box within a 12 month span.¹¹⁹ Other estimates have found 25-40% of adolescent players have purchased at least one loot box.¹²⁰

First, loot boxes have been repeatedly shown to produce addictive and gambling behaviors.¹²¹ In fact, the more an individual engages with loot boxes, the more they exhibit gambling symptoms.¹²² At the same time, excessive loot box purchases may create a positive feedback loop with gambling in which loot box purchases lead to gambling and vice versa.¹²³ The practical effect of loot box gambling is illustrated by estimates that 5% of loot box purchasers make up half of all loot box revenues.¹²⁴ This problem is particularly concentrated in adolescents, who are twice as likely to engage in loot box gambling compared to adults.¹²⁵

Second, loot box purchases adversely affect players’ mental health because they lead to a form of excessive gaming known as “problem video gaming.”¹²⁶ Problem video gaming is a psychological addiction to video games and is “characterized by symptoms similar to those of substance use and gambling disorder.”¹²⁷ The problem gaming produced by loot box purchases correlates with risks such as social isolation, family conflict, and the potential to drop out of school.¹²⁸ Further, problem gaming is linked to suicidal thoughts and “likely . . . suicide attempts.”¹²⁹ Many players have admitted to facing these traumatic experiences.¹³⁰

118. Daniel L. King & Marc N. Potenza, *Not Playing Around: Gaming Disorder in the International Classification of Diseases (ICD-11)*, 64 J. ADOLESCENT HEALTH 5, 5 (2019).

119. Soren Kristiansen & Majbritt C. Severin, *Loot Box Engagement and Problem Gambling Among Adolescent Gamers: Findings from a National Survey*, ADDICTIVE BEHAVS., April 2020, at 1, 3.

120. CLOSE & LLOYD, *supra* note 15, at 15.

121. *See, e.g., id.* at 2 (“[R]elationships between loot box engagement and problem gambling have been robustly verified in around a dozen studies.”).

122. *Id.* at 15.

123. Spicer et al., *supra* note 14, at 1 (19.87% of study participants reported loot boxes led to future gambling and vice versa).

124. CLOSE & LLOYD, *supra* note 15, at 3.

125. David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, ROYAL SOC’Y OPEN SCI., June 2019, at 1, 17.

126. Wen Li et al., *The Relationship of Loot Box Purchases to Problem Video Gaming and Problem Gambling*, 97 ADDICTIVE BEHAVS. 27, 32 (2019).

127. *Id.* at 28.

128. *See* King & Potenza, *supra* note 118, at 5 (describing effects of excessive gaming over 12 months).

129. Eilin K. Erevik et al., *Problem Gaming and Suicidality: A Systematic Literature Review*, ADDICTIVE BEHAVS. REPS., June 2022, at 1, 1.

130. *See supra* note 5.

Gamble-to-Win

Finally, players lose control of their spending habits as a result of loot boxes' addictive qualities.¹³¹ A UK report found 25% of younger players spent at least £100 for every video game they play.¹³² Around one third of players failed to track their loot box spending habits, and a similar percentage “did not feel in control of their spending on loot boxes.”¹³³ Those closest to a player, knowingly or not, often perpetuate the player's spending spiral, as the following illustrates:

*One in six (15%) had taken money from their parents without permission to buy a loot box; and one in ten (9%) had borrowed money they couldn't repay, while one in ten (11%) had either used their parent's credit or debit card, or borrowed money from friends or family to do so[.]*¹³⁴

While many loot box purchasers spend around \$20 per month on loot boxes,¹³⁵ some purchasers spend hundreds of dollars per month.¹³⁶ These individuals do not spend large amounts of money because they are wealthy or have disposable income; most do so because of a gambling problem.¹³⁷ Thus, loot boxes have contributed to widespread, addictive spending habits among players, with some players spending extreme amounts of money as a result.

III. THE FINAL BOSS: THE FTC AND ITS UNFAIR AND DECEPTIVE PRACTICES DOCTRINES

The FTC offers the best way to protect players from the effects of loot boxes. The FTC should curtail problematic loot box practices because of its prominent position in protecting consumers and its unique approach to enforcement, and because FTC jurisprudence indicates loot boxes are unfairly and deceptively designed.

A. The FTC's Role in Policing Loot Boxes

The FTC should regulate loot boxes through its enforcement powers. The FTC is a federal agency tasked with “protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement,

131. See generally GAMBLING HEALTH ALLIANCE, WHAT IS THE FINANCIAL IMPACT OF LOOT BOXES ON CHILDREN AND YOUNG PEOPLE? (2020) (describing financial impact of loot boxes on adolescents).

132. *Id.* at 2.

133. *Id.*

134. *Id.*

135. See CLOSE & LLOYD, *supra* note 15, at 24 (“[M]ost loot box purchasers spend modest amounts.”).

136. *Cf. id.* at 26 (categorizing excessive loot box spenders as those paying “hundreds of pounds per month”).

137. See James Close et al., *Secondary Analysis of Loot Box Data: Are High-Spending “Whales” Wealthy Gamers or Problem Gamblers?*, ADDICTIVE BEHAV., June 2021, at 1, 3 (finding no correlation between loot box purchasing and annual income while also finding one third of excessive spenders are problem gamblers).

COLE SHARDELOW

advocacy, research, and education.”¹³⁸ The FTC engages in advocacy, research, and education in several ways. The FTC both contributes to and learns from consumer research by holding workshops—one of which was a workshop on the efficacy of loot boxes.¹³⁹ Blogs posted on the FTC’s website¹⁴⁰ and guidelines posted in the federal register¹⁴¹ both educate about and advocate for practices the FTC has deemed anticompetitive; thus, the blogs and guidelines indicate acceptable conduct to businesses. Similarly, the FTC publishes policy statements outlining its views on anticompetitive conduct in broad commercial areas.¹⁴² In terms of enforcement, the FTC has the authority to conduct investigations, impose rules, and litigate.¹⁴³ Most of the FTC’s rulemaking authority comes from its ability to establish practices as per se unfair or deceptive if the practice occurs “commonly.”¹⁴⁴ The FTC can broadly bring enforcement actions against “[u]nfair methods of competition in or affecting commerce” and “unfair or deceptive acts or practices in or affecting commerce.”¹⁴⁵ The FTC’s unfair or deceptive acts or practices powers are referred to as its “Section 5” powers.¹⁴⁶

The FTC should police loot boxes through its Section 5 powers for several reasons. First, the FTC has broad authority to determine whether a practice is unfair or deceptive; it is not confined to making such determinations based on historical or industry understandings of what is unfair or deceptive.¹⁴⁷ Second, through multiple enforcement actions, the FTC can create a body of quasi-common-law that provides guidelines for proper loot box design.¹⁴⁸ Settlements between the FTC and

138. *Mission*, FTC, <https://www.ftc.gov/about-ftc/mission> (last visited Oct. 29, 2022).

139. *See supra* note 22.

140. *See Business Guidance*, FTC, <https://www.ftc.gov/business-guidance> (last visited Oct. 29, 2022) (providing links to business blogs discussing FTC actions and guidance on unfair and deceptive practices).

141. *See, e.g.*, 16 C.F.R. §§ 255.0–255.5 (2021) (providing guidance on advertising endorsements and testimonials).

142. *Legal Library: Policy Statements*, FTC, <https://www.ftc.gov/legal-library/browse/policy-statements> (last visited Oct. 29, 2022).

143. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FTC, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (last visited Oct. 29, 2022).

144. *Id.*

145. 15 U.S.C. § 45(a)(1).

146. *See A Brief Overview*, *supra* note 143 (defining Section 5 and describing unfair practices and deceptive practices).

147. *See FTC v. Standard Educ. Soc’y*, 86 F.2d 692, 696 (2d Cir. 1936) (Hand, J.) (“The Commission has a wide latitude in such matters . . . its powers are not confined to such practices as would be unlawful before it acted; . . . its duty . . . is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.”), *rev’d in part and remanded on other grounds*, 302 U.S. 112 (1937).

148. *Cf. Daniel J. Solove & Woodrow Hartzog, The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014) (describing the FTC’s quasi-common-law in relation to privacy law).

Gamble-to-Win

businesses make up the bulk of the FTC's enforcement actions,¹⁴⁹ and these settlements often delineate the boundaries of acceptable behavior.¹⁵⁰ Over time, the FTC “develops [a] body of law in a stable way” through settlements such that “[p]racticitioners look to FTC settlements as though they have precedential weight.”¹⁵¹ The FTC has already implemented this quasi-common-law system in the field of privacy law,¹⁵² and it could do the same for loot boxes. Finally, using enforcement actions is preferable to the rulemaking process because FTC rulemaking is cumbersome to the point of being ineffective,¹⁵³ whereas enforcement actions can best adapt to changing loot box circumstances.

The FTC may only bring a Section 5 enforcement action if it has “reason to believe” that a business is engaging in unfair or deceptive practices and if it is in the public interest.¹⁵⁴ Loot boxes employ unfair and deceptive practices and enforcement against them is in the public's best interest.¹⁵⁵

B. The FTC Should Bring Unfair and Deceptive Practices Claims Against Loot Box Developers

The FTC should bring unfair and deceptive practices claims against video game developers of loot boxes because of the behavioral, mental, and financial injuries loot boxes produce¹⁵⁶ and because of their misleading features.¹⁵⁷

1. Loot Boxes are Unfair

Loot boxes are unfair because they financially drain players through addictive features that do not sufficiently benefit players or the video game industry. An act or practice is unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition;” the FTC may also consider “established public policies” when making its decision.¹⁵⁸ Thus, the elements needed to establish unfairness include substantial consumer injury, an

149. *Id.* at 610.

150. *See id.* at 620–21 (settlements “signal the basic rules that [the FTC] wants companies to follow”).

151. *Id.* at 620.

152. *See generally id.*

153. *See id.* at 620 n.176 (describing rulemaking requirements, including an “industry-wide investigation, . . . staff reports . . . propos[ing] a rule, and engag[ing] in a series of public hearings”). This process is so tedious that “the FTC has not engaged in [such] rulemaking in 32 years.” *Id.*

154. *FTC v. Raladam Co.*, 283 U.S. 643, 654 (1931).

155. *See discussion infra* Section III.B.i.

156. *See discussion infra* Section III.B.i.

157. *See discussion infra* Section III.B.ii.

158. 15 U.S.C. § 45(n).

COLE SHARDELOW

inability to reasonably avoid the harm, weighing benefits to consumers or competition, and established public policies.¹⁵⁹

First, substantial consumer injury is an objective test of whether consumers are likely to be substantially injured by the defendant's practices.¹⁶⁰ Typical consumer injuries are economic, health, or safety harms.¹⁶¹ Emotional harms are typically not serious enough to qualify as a substantial injury, though courts have found exceptions to this rule.¹⁶² An injury can be substantial if it produces small harm to a large number of consumers or concentrates significant harm on a small number of consumers.¹⁶³

Second, a consumer cannot reasonably avoid the harm presented by an unfair practice if the seller "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making."¹⁶⁴ Consumers are presumed to have the ability to freely decide between goods or services in the marketplace and to avoid harmful decisions.¹⁶⁵ However, practices that remove the ability of consumers to comparison shop and thus are not reasonably avoidable include those that "withhold or fail to generate critical price or performance data" or that "exercise undue influence over highly susceptible classes of purchasers."¹⁶⁶ The FTC has explicitly identified younger consumers as those that could be highly susceptible to unfair practices.¹⁶⁷

159. *Id.*

160. Public statement entitled "The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection" from J. Howard Beales, Former Director of the Bureau of Consumer Protection, FTC (May 30, 2003) [hereinafter Unfairness Authority], <https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection>.

161. *Id.*

162. Letter entitled "FTC Policy Statement on Unfairness" from Michael Pertschuk et al., Chairman, FTC, to the Hon. Wendell H. Ford et al., Chairman, Committee on Commerce, Science, and Transportation (Dec. 17, 1980) [hereinafter Statement on Unfairness], <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>; *but see* FTC v. Accusearch, Inc., No. 06-CV-105-D, 2007 WL 4356786, at *18 (D. Wyo. Sept. 28, 2007) (finding emotional harms caused by stalkers acquiring victims' phone records created substantial injury because injuries were neither trivial nor speculative), *aff'd*, 570 F.3d 1187 (10th Cir. 2009).

163. Unfairness Authority, *supra* note 160; FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010).

164. Statement on Unfairness, *supra* note 162; *see* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 976 (D.C. Cir. 1985) (finding reasonable avoidance requirement follows "Commission's general reliance on free and informed consumer choice as the best regulator of the market").

165. *See* Statement on Unfairness, *supra* note 162 ("[W]e expect the marketplace to be self-correcting . . . We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.").

166. *Id.*

167. *See* public statement entitled "The ABCs at the FTC: Marketing and Advertising to Children" from Roscoe B. Starek, III, Former Commissioner, FTC (July 25, 1997) ("Children tend to imitate other children and they often lack the ability to foresee and avoid dangers."), <https://www.ftc.gov/news-events/news/speeches/abcs-ftc-marketing-advertising-children>.

Gamble-to-Win

Third, to determine the countervailing benefits of the practice to consumers or competition, courts consider both the current benefit of the practice and the burden that would be imposed by a remedy.¹⁶⁸ Examples of burdens that might be considered include “increased paperwork, increased regulatory burdens on the flow of information, [and] reduced incentives to innovation and capital formation.”¹⁶⁹

Finally, public policy considerations must ground a claim of substantial injury.¹⁷⁰ “An act or practice that causes substantial injury but lacks . . . grounding [in statutes, judicial decisions, or the Constitution] is not unfair within Section 5(a)’s meaning.”¹⁷¹

Loot boxes are unfair because they encourage harmful gambling behaviors that cannot be reasonably avoided or outweighed by commercial benefits. First, loot boxes create substantial consumer injury by creating unhealthy spending habits, excessive spending, depression, higher school dropout rates, and thoughts of suicide in adolescents and adults alike.¹⁷² Although courts presume emotional harms are insufficient to be considered a substantial injury, the depression and suicidal thoughts faced by loot box addicted consumers may be enough to overcome the presumption.¹⁷³ Regardless, the excessive, gambling-like spending exhibited by some players¹⁷⁴ satisfies a substantial injury because it concentrates significant financial harm on a small number of consumers.

Loot boxes cannot be reasonably avoided because they often “withhold . . . critical . . . performance data”¹⁷⁵—the probability of receiving a particular reward.¹⁷⁶ Because loot boxes are purchased by significant numbers of adolescents, reasonable avoidance will be viewed from the perspective of an adolescent.¹⁷⁷ A consumer cannot comparison shop between video game loot boxes because the consumer has little to no idea how likely she is to receive a reward. Adolescents are also unable to reasonably avoid loot boxes because they “exercise undue

168. Unfairness Authority, *supra* note 160.

169. Statement on Unfairness, *supra* note 162; *see* FTC v. Neovi, Inc., 604 F.3d 1150, 1158–59 (9th Cir. 2010) (finding email check service had no benefits to consumers or competition because competitors offered the same service in a more secure, convenient, and cheap manner).

170. LabMD, Inc. v. FTC, 894 F.3d 1221, 1229 (11th Cir. 2018).

171. *Id.*

172. *See* discussion *supra* Section II.B.

173. *See supra* note 162.

174. *See supra* notes 131–37 and accompanying text.

175. Statement on Unfairness, *supra* note 162.

176. *See* discussion *supra* Section II.A.i.

177. *See supra* note 167 and accompanying text.

COLE SHARDELOW

influence¹⁷⁸ over children, who are easily goaded by dark patterns into purchasing them.¹⁷⁹

The countervailing benefits consumers receive under current loot box practices may include lower prices on video game purchases, while the benefits for video game developers include large profits¹⁸⁰ and the ability to self-regulate.¹⁸¹ If loot boxes were regulated, harms could include an increased cost in video games, less money for developers to produce high quality games,¹⁸² and a chilling effect on innovative microtransactions that some consumers may enjoy or benefit from. Thus, the countervailing considerations provide some support for leaving the loot box industry alone.

Several public policy considerations,¹⁸³ however, provide a foundation from which to find loot boxes unfair. First, courts have found claims of unfairness are grounded in the common law tort of negligence;¹⁸⁴ thus, the FTC can argue video game developers negligently fail to design loot boxes that are understandable to a reasonable consumer. Second, the FTC has a statutory mandate to protect children online through the Children's Online Privacy Protection Act.¹⁸⁵ Finally, caselaw shows courts have an interest in protecting children and parents from unwanted video game charges,¹⁸⁶ and such charges could come from loot boxes. Thus, the common law, statutes, and caselaw suggest a public policy foundation in protecting children from unwanted online purchases resulting from negligent user interfaces, and this foundation likely outweighs any burdens businesses or consumers would face by the regulation of loot boxes. Therefore, the FTC would likely be able to find loot boxes unfair.

178. Statement on Unfairness, *supra* note 162.

179. See *supra* text accompanying notes 118–20.

180. See *supra* text accompanying notes 11–12.

181. See FED. TRADE COMM'N, VIDEO GAME LOOT BOX WORKSHOP 6 (2020) (describing workshop panelists expressing support for the adaptability and flexibility of self-regulation compared to potentially “poorly crafted” government regulation).

182. See Renee Gittins, Executive Director, International Game Developers Association, Remarks at the FTC's Video Game Loot Box Workshop 71:8–72:23 (describing how loot boxes cover game development costs, stagnating game prices, and larger numbers of employees, and how regulation would cause small developers to “suffer” from implementation costs), https://www.ftc.gov/system/files/documents/public_events/1511966/loot_boxes_workshop_transcript.pdf.

183. See *supra* text accompanying notes 170–71.

184. See *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1231 (11th Cir. 2018) (finding company's practices unfair because they were grounded in a “negligent failure to design and maintain a reasonable data-security program”).

185. 15 U.S.C. §§ 6501–06.

186. See *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 10654030, at *1, *9–10 (W.D. Wash. July 22, 2016) (finding children and parents could not reasonably avoid in-app purchases—including purchases on mobile games—when the apps were listed as free, and the in-app purchases disclosure was listed at the bottom of the page in a dense paragraph).

Gamble-to-Win

2. *Loot Boxes are Deceptive*

Loot boxes are deceptive because the way in which they disclose probabilities and use dark patterns is materially misleading. An act or practice is deceptive if it is misleading to a reasonable consumer and is material to the consumer's decision in a transaction.¹⁸⁷ Thus, a deceptive practice claim contains three elements: a misleading act or practice, the reasonable consumer standard, and materiality.¹⁸⁸

First, a misleading act or practice is established where "a representation, omission or practice . . . is likely to mislead the consumer."¹⁸⁹ Courts find a practice is misleading based on the overall "net impression" the practice creates, even if "the solicitation also contains truthful disclosures."¹⁹⁰ Additionally, a claim need only show a practice is likely to mislead; a showing of actual deception is not required.¹⁹¹

Second, the potentially misleading practice in question is viewed from the perspective of a reasonable consumer under the circumstances.¹⁹² The element is satisfied if the consumer's interpretation of the practice as misleading is reasonable.¹⁹³ "When representations or sales practices are targeted to a specific audience, such as children . . . the Commission determines the effect of the practice on a reasonable member of that group."¹⁹⁴

Third, the misleading practice must be material such that it "is one which is likely to affect a consumer's choice of or conduct regarding a product."¹⁹⁵ A misleading practice is likely to affect a consumer's choice if it significantly involves the health of the consumer or the safety or cost of the product.¹⁹⁶

The FTC has recently found practices that use dark patterns are deceptive.¹⁹⁷ It has broadly categorized dark patterns into, in part, practices that induce false beliefs, hide material information, or lead to unauthorized charges.¹⁹⁸ The agency

187. Statement on Deception, *supra* note 24, at 1.

188. *Id.*

189. *Id.*

190. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

191. *See Trans World Accts., Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979) (Section 5 requires only a "tendency" to deceive).

192. Statement on Deception, *supra* note 24, at 2.

193. *Id.*

194. *Id.* at 3; *see also* *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

195. Statement on Deception, *supra* note 24, at 5.

196. *Id.*

197. *See generally* FED. TRADE COMM'N, *supra* note 93 (discussing the FTC's stance and recent actions on dark patterns).

198. *Id.* at 4, 7, 10.

COLE SHARDELOW

has also explicitly identified intermediate currency, confirmshaming, urgency, and grinding as notable dark patterns.¹⁹⁹

Loot boxes present several deceptive practices. Because many loot box purchasers are adolescents and younger children,²⁰⁰ the practices will be viewed from the perspective of a reasonable adolescent video game player.

First, the misleading representations presented by loot boxes include probability disclosures—or a lack thereof—and dark patterns.²⁰¹ A video game that offers no disclosure as to the probability of receiving its loot boxes would be likely to mislead adolescent consumers because, after factoring in the dark patterns that attempt to induce players to purchase loot boxes,²⁰² the consumer would receive the inaccurate impression that the likelihood of receiving a valuable reward is fairly high. A video game that does offer a disclosure may still be misleading because loot boxes often have fluctuating probabilities.²⁰³ Thus, providing a static probability would mislead the consumer into believing her probability of receiving a reward never changes. Further, even if a probability disclosure displays a fluctuating probability, consumers may never see the disclosure because many developers attempt to hide loot box probabilities by only presenting them on their website.²⁰⁴

Second, a loot box's misleading representations are material. Each of the misleading practices related to probability disclosure is material because, as with any game of chance, the likelihood of winning a valuable reward has a significant impact on a consumer's decision to purchase a loot box. Additionally, misleading loot box practices are material because they involve the health of the consumer.²⁰⁵ These practices involve the health of the consumer because they are likely to induce an adolescent into unhealthy gambling behaviors.²⁰⁶ Thus, the FTC may be able to succeed on a deceptive practices claim because loot box probability disclosures are likely to materially mislead consumers.

CONCLUSION

Video game loot boxes exist as a seemingly harmless and ever-changing source of entertainment. However, loot boxes' rapid ascendance as the prime source of profit for video game developers, their confusing and alluring design, and their detrimental effects on adult and adolescent players should compel the FTC to

199. See *id.* at 21–25 (identifying intermediate currency, confirmshaming, urgency, and grinding as dark patterns in the FTC's "Compilation of Digital Dark Patterns").

200. See *supra* text accompanying notes 118–20.

201. See discussion *supra* Sections II.A.i., II.A.ii.

202. See *supra* notes 99–102, 109–16 and accompanying text.

203. See *supra* notes 84–85 and accompanying text.

204. See *supra* note 90 and accompanying text.

205. See *supra* text accompanying note 196.

206. See discussion *supra* Section II.B.

Gamble-to-Win

consider loot boxes unfair and deceptive practices. The FTC's adaptable Section 5 authority is the ideal method to protect countless players, and it may be the wake-up call the video game industry needs to say game over to loot boxes.