Insights: Alerts

Loot Box Update

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Written by

A flurry of news has recently hit the loot box industry. Not only has the FTC finally issued its staff report summarizing the issues addressed at its August 2019 workshop, but a variety of class action lawsuits against gaming companies that use loot boxes have also been filed, and are beginning to work their way through the courts.

Back in August 2019, long before we became familiar with the intricate details of novel coronaviruses, the Federal Trade Commission hosted a workshop examining the legal issues surrounding loot boxes. For the uninitiated, loot boxes are small video game transactions where game-players buy virtual stuff, using real world money or in-game currency, without knowing exactly what they are buying. The contents of each loot box are randomly assigned – while some may contain high value, rare items, others may contain only low-value, more common items. Loot box transactions are often key to the monetization and, thus, viability of many otherwise free-to-play video games.

Those familiar with gambling, sweepstakes, and lottery laws may recognize that loot boxes could run afoul of lottery or gambling laws, given that they appear to satisfy three key elements: prize (the things in the loot box that the buyer receives), chance (because the player does not know what they are buying, and the value of the thing received may vary), and consideration (payment with real world money or in-game currency). However, depending on the game and the structure of the loot box transaction, gaming companies may have varied defenses to a claim that loot box transactions are, in fact, illegal gambling programs or illegal lotteries.

Since its workshop, the FTC's staff has studied the submissions, testimony, and issues, and published a Staff Report. The report discusses and summarizes a number of issues, and highlights public concerns around loot boxes, emerging academic research, and industry self-regulatory initiatives. Among the public concerns raised was how loot boxes may encourage game-players to overspend, how marketing techniques may mask the real cost to players through confusing terms or inadequate disclosures, and how loot box monetization models may impact children.

The staff report also indicates that, since the workshop, the Entertainment Software Rating Board (ESRB) announced a new rating element to disclose when a game includes random in-app purchases, i.e., when game-players will not know in advance what virtual item they will receive upon purchase.

These issues are prominently highlighted in a recently filed proposed California class action against the Finnish videogame developer Supercell Oy, over the company's video games *Brawl Stars* and *Clash Royale*. According to the complaint, the plaintiff spent over $150 in loot box transactions, but those loot box transactions “have all the hallmarks of a Las Vegas-style slot machine,” and constitute illegal slot machine devices when played on a mobile phone or computer.

Legal conclusions about loot boxes remain challenging, and that is unlikely to change soon. Of course, this is to be expected; gambling and lotteries are regulated at the state level, through 50 different state constitutions, with differing legislative structures, and distinct case law precedent. Similar legal issues around fantasy sports games have followed a comparable timeline and trajectory, with the give and take of industry muscle, lobbying, legal challenges, judicial decisions, and legislation and regulation. Loot box transactions now constitute a multi-billion dollar marketplace, and account for a significant percentage of all video game revenue, according to the FTC's staff report. Loot boxes, and the legal challenges associated with them, are not going away any time soon.

If you have any questions or concerns about loot boxes, fantasy sports games, sweepstakes, or skill contests, please feel free to contact us.