

BARRISTERS TIPS

by Jamison Gilmore

Loot boxes are profitable, which is undeniable, as a 2021 study from Juniper Research demonstrates, projecting that loot boxes will increasingly generate annual revenue for companies, with a resulting revenue of approximately \$20.3 billion dollars in 2025.¹ However, various California-based actions have been filed alleging companies that profit from loot boxes are engaging in illegal gambling.

Generally, a loot box is a virtual consumable that produces a random virtual item in a video game. These virtual items include cosmetic items, such as weapon skins in EA Sports' Apex Legends, and performance-based items, like powerful cards in Blizzard Entertainment's Hearthstone. Common to each instance, a player purchases a virtual consumable with money, virtual currency, or through playing the game, which unlocks at least one in-game item when consumed.

A Game of Skill, Not Chance

A handful of decisions rendered in California may provide a road map for companies to protect against allegations of illegal gambling activity.

The degree to which loot boxes complement gameplay will provide a corresponding amount of protection from claims that loot boxes are "illegal slot machines" under Penal Code Section 330b. The case of *Mai v. Supercell Oy* is instructive.² In *Mai*, the plaintiff alleged Supercell Oy was unjustly enriched and violated both Business and Professions Code Section 17200 et seq. and Civil Code Section 1750 et seq. because loot boxes in two of Supercell Oy's mobile games constituted illegal slot machines.³ The court dismissed the complaint with leave to amend for three reasons, one of which was based on Supercell Oy's successful use of loot boxes to enhance the skill-based components of Supercell Oy's games. The court found Supercell Oy's games fell within the "games of skill" exception in Penal Code Section 330b, subdivision (d) because the "competitive multiplayer" nature of the games showed skill was necessary to win

and, thus, they were games of skill.⁴

Making loot boxes a complementary aspect to a game shows the game is one of skill, not chance. Courts generally do not look at individual aspects of a game in isolation to determine whether it is a skill-based or chance-based game.⁵ Accordingly, the more

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features that can be added to a game, including different game modes, should further demonstrate that a game is skill-based. This would have been a harder argument to make if the games were focused more on collection of in-game items than competitive gameplay.

Allowable Places for a Loot Box Prize

A developer's persistence in either 1) keeping loot box items relegated to the game offered or 2) prohibiting the sale of loot box items in terms of use will serve to protect against loot box litigation. A good case on this point is *Coffee v. Google, LLC*.⁶ Similar to the allegations in *Mai*, the plaintiffs in *Coffee* alleged Google was unjustly enriched and violated both Business and Professions Code Section 17200 et seq. and Civil Code Section 1750 et seq. because loot boxes in games sold on Google's Play Store amounted to illegal slot machines.⁷

The court in *Coffee* rejected the plaintiffs' claim that items retrieved from loot boxes sold in games on Google's Play Store were "things of value" pursuant to Penal Code Section 330b, subdivision (d). In doing

so, the court relied on a finding in *Mai* that a loot box item that can only be used within the game in which it is obtained and not cashed out for money or spent elsewhere is not a "thing of value."⁸ However, the court in *Coffee* went further in rejecting the plaintiffs argument that loot box prizes obtained on Google's Play Store could be traded in "legitimate digital markets or in 'grey' markets" because the sale or transfer of any in-app content, including loot box items, violated Google's terms of service.⁹

Selling loot boxes can be lucrative but also risky in that the seller may be hauled into court based on allegations of illegal gambling. Protecting against illegal gambling claims can take shape by: 1) ensuring that loot boxes are an ancillary component of the game, 2) ensuring that loot box items can only be used within the game, and 3) making the sale or transfer of loot box items a violation of terms of service. ■

¹ JUNIPER RESEARCH, IN-GAME GAMBLING & LOOT BOXES: MARKET FORECASTS, LEGISLATION & EVOLUTION 2021-2025, available at <https://www.juniperresearch.com/researchstore/content-digital-media/in-game-gambling-loot-boxes-research-report> (last accessed Nov. 23, 2022).

² *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 WL 4267487 (N.D. Cal. Sept. 20, 2021).

³ *Id.* at *1.

⁴ *Id.* at *4.

⁵ *Id.* at p. *4 (rejecting the plaintiff's argument that the loot box within the game constitutes illegal gambling because the entirety of the game is analyzed to determine whether it is a skill-based game.)

⁶ *Coffee v. Google, LLC*, No. 20-cv-03901-BLF, 2022 WL 94986 (N.D. Cal. Jan. 10, 2022).

⁷ *Id.* at *1-3.

⁸ *Id.* at *12 (citing *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 WL 4267487, at *4 (N.D. Cal. Sept. 20, 2021)).

⁹ *Coffee*, 2022 WL 94986 at *13.

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