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LAN Party Lawyers: All-In on Loot Boxes

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In this inaugural episode of LAN Party Lawyers, Steve and Nick discuss the increasingly popular phenomenon of including loot boxes in digital games. They also examine the growing concerns about loot boxes by regulators around the world and debate whether loot boxes should be considered a form of gambling.

Transcript:

Steve: Hello and welcome to the LAN Party Lawyers Podcast, where we tackle issues at the intersection of video games, law, and business. My name is Steve Blickensderfer.

Nick: And I'm Nick Brown.

Steve: And we are your hosts. We are lawyers by day at the law firm of Carlton Fields, where we represent gamers, content creators, and companies in the gaming space. We help with issues related to content creation,

eSports, gaming conventions and events, and intellectual property.

Nick: But, we're not just lawyers. We're also lifetime friends and gamers ourselves. We've gamed together for years...

Steve: Years.

Nick: ...on both competitive and cooperative content.

Steve: Mm-hmm.

Nick: Although, I'm pretty sure I usually prevail on the competitive stuff.

Steve: Not so much.

Nick: But between the two of us, we've probably played just about every type of game that there is. But some of our favorites include RTS games, RPGs, co-op campaigns and of course, good old shooters.

Steve: Yep. Good old shooters. Well, fun fact, Nick, I was co-leader of, you didn't call it eSports then but, the equivalent of an eSports team, back when Clan Wars was pretty popular.

Nick: So we have you to thank for eSports, is that what you're telling us, Steve?

Steve: I wish.

Nick: Well, we'll thank you anyways. We appreciate it. But before we really get going here, we have to do the lawyer thing really quick and remind you that anything we say here is not legal advice, and we're not your lawyers.

Steve: So this is Season One of the LAN Party Lawyers Podcast. We have a list of issues that we will be examining in Season One. And the first one up is loot boxes. So Nick, why don't you start us off and tell us what are loot boxes?

Nick: Sure. A loot box is essentially a digital mystery box or a package in a game that contains in-game mystery items or rewards that are often sold for either money or in-game currency.

Steve: Like card packs.

Nick: Right. Exactly. That's a really good example. So for example, there's a game called Hearthstone that's made by Blizzard. It's a collectible card game that you play online and they sell card packs that are essentially a digitalized version of the physical card packs like I used to buy with Magic: The Gathering when I was a kid.

Steve: One of my first experiences with loot boxes was after playing hours and hours of Rocket League and I get, it's a different style of loot boxes.

Nick: Yeah?

Steve: I get this box and I can't open it. And I had to pay money to buy a key. So that's another version.

Nick: Oh, that's very clever.

Steve: Yeah.

Nick: And so I'm guessing, in that loot box you got in Rocket League, that it was probably cosmetic items and not things that make you better or give you a competitive advantage in the game?

Steve: I think it was a lightning bolt and really cool decals for the car.

Nick: That does sound really cool.

Steve: Yeah, it was.

Nick: Another example kind of on the other side of the spectrum, would be the initial release of Star Wars Battlefront II, where they had loot boxes that were tied up with in-game progression and they would reward items that give a competitive edge to players like stat boosts or better guns. So that's the opposite side of something like Rocket League where you would get something that just makes you look cool or a cool antenna. The loot boxes are often found in free to play games like Hearthstone, but they're not always, just using the same examples, Rocket League is a low price game but it's a game you do pay for.

Steve: How much have you spent on Hearthstone?

Nick: You know, I don't really want to get into all that, it's not important how much I've spent.

Steve: Did you just plead the fifth? I think you just did.

Nick: I think that's probably a good answer. But, you know, the other example would be Star Wars Battlefront II that I just mentioned, that's a full price game and they also sell loot boxes for real money in the game so it really runs the whole spectrum. Now, some people, you know, want to know where loot boxes come from; on the one hand they add an element of excitement into the game but mainly, they generate money as a form of micro-transactions which are increasingly popping up in all sorts of games, even full priced ones.

Steve: So, you know, the discussions begs the question, what's the big deal with loot boxes? Well from a player's standpoint, loot boxes can turn games from a competition of skill and dedication into a contest of who can pay more money.

Nick: Pay-to-win.

Steve: Pay-to-play. So it could have that effect on games. Ordinarily, you need to put in the time and grind out hours to get the levels and experience so you can get the perks and stuff. But, if you've got loot boxes, you can just buy your way to better gear and climb the leaderboards that way. So a lot of people say that loot boxes ruin games and take the fun out of it. So there's also another legal aspect of why loot boxes are a big deal and increasingly we are seeing governments cracking down on loot boxes as a form of unauthorized gambling.

Nick: Like a slot machine.

Steve: Yeah, sort of, so, you know, you mentioned Star Wars Battlefront II, the regulations really start pouring in after that and people started looking at loot boxes. And there were studies done, some of them have linked gambling, well loot boxes as being addictive and particularly for kids and tying loot boxes to gambling. So Australian studies were done on this, some UK studies and as a result, some countries are actually banning loot boxes in games entirely.

Nick: Who's banning loot boxes?

Steve: Well, we see this in Belgium as one example. Other countries are regulating loot boxes as a form of gambling and that's found in the Netherlands. Others are requiring the developers to disclose the probabilities of receiving any given award, we see that in China and South Korea.

Nick: Oh, wow, that's really got to drop the sales numbers, right? If you actually saw how low your chance was of winning something good, would you still buy them?

Steve: Well, you know, maybe, maybe not. I think maybe not if you find out that getting, you know, a particular item is one in a million chance, you'd be a lot less likely to buy something. But I mean...

Nick: There's a chance.

Steve: ...there's a chance. Is it a trade secret if that information is not known to anyone else? Maybe, I don't know, that's a very good question I haven't thought of before. It's not nearly the same thing as like, you know, National Lampoon's Vegas Vacation where you can see the Dodge Viper and you're doing the quarter slots, so it's very different.

Nick: What are these countries doing about it?

Steve: Well, you know, there's some countries that are in the process of investigating, you have one end - you have Belgium who's just abandoned it entirely and then kind of in the middle, you have countries that are in the process of investigating and figuring out whether they should regulate. The UK appears to be leaning on the side of letting the industry regulate itself; France's regulatory body on gambling has determined as of recently of July, 2018, that loot boxes were not legally a form of gambling. And here in the US, congress recently asked the Federal Trade Commission, the FTC, to look into loot boxes. So we expect a lot more action in the US on the regulatory side of things in the near future.

Nick: And, you know, that kind of sounds familiar, right? We're already used to seeing ESRB labels on our games that point out the intended maturity level of the player. And so now, if they also have for in-game purchases, that may be not a big stretch from what we're used to.

Steve: We're already seeing Australia recommend games carry a label that sales be restricted to people who of the gambling age - over 18 but that's not been codified into law yet.

Nick: Alright, so, we figured out that a lot of different countries are looking to loot boxes and they are coming out with different results. Why is this controversy a big deal for the industry, Steve?

Steve: I got one number for you, Nick, 50 Billion Buckaroos. That's a lot of money.

Nick: That's a big number.

Steve: And that's the amount of money that's the loot box industry as estimated as early as 2022. So that's a lot of money; loot boxes have generated a lot of money for game companies, which is just a fact.

Nick: So that's a few years from now, but you know, they've already become so common that it's gotten to the point that when a game developer decides not to include loot boxes in a big game, sometimes that fact makes the news on its own.

Steve: That's right. And if it's considered gambling, let's say, the company will either need to comply with that gambling regulation or pull the game, pull the loot box functionality out of the game.

Nick: Has anybody done that?

Steve: Blizzard actually has had to do that in Belgium to comply with their laws over there, so.

Nick: But on the other hand, if it's not considered gambling...

Steve: Business as usual.

Nick: ...business as usual, move on forward.

Steve: That's right, that's right.

Nick: So this a pretty huge issue with game development, right? It used to be enough back in the day, just to make a really good game, right? Have good balance, have not a lot of bugs, maybe have a cool story. But now, developers have to think way beyond just designing a balanced game and making sure it works, they also have to determine whether and how to include this loot box functionality that is really popular but it comes tethered to a variety of legal and PR consequences. Let me give you an example, you may remember recently there was a game that came out called, it was a Lord of the Rings game called Shadow of War, it was a sequel. It was a really fun game, had this great nemesis system, it's an Orc killing simulator, essentially; but when the game, before it came out, it was first announced that there were going to be loot boxes, that fact took over all of the discussion of the game, all people were talking about was that it was going to have micro-transactions and loot boxes. And everybody was speculating, it was all just a cash grab, it was going to be shoehorned into the game in order to make money and it was not actually going to help and you were going to have to actually buy loot boxes or grind endlessly to see the end game. But later when the game came out, it turns out the loot boxes were not that important to the game. All the reviews came pouring in and everybody said, you know, you really don't need to buy the loot boxes to move forward, they're totally optional. And that was my experience as well, I got the game and I played it and I did not feel the need to buy a single loot box, I was able to get through the game, have a great time without spending more than the sticker price of the game. And I think ultimately, later on, as a PR move, they came back and removed the loot boxes later in the game as a...

Steve: Go figure.

Nick: ...yeah, as a post-release update...

Steve: Yeah.

Nick: ...I think to remove that whole line of argument and criticism. And, you know, it's unfortunate that the loot box issue overshadowed what was otherwise a really fun game.

Steve: Well that just goes to show you how much of a lightning rod loot boxes can be, even if they're done well, it can be a problem.

Nick: Right. But on the other hand, banning them might really cut off a lot of these free-to-play games that we see, right?

Steve: Right.

Nick: 'Cause free-to-play games, they rely on revenue that they get from people spending on micro-transactions, a lot of which are loot boxes.

Steve: Yeah.

Nick: And so prohibiting them might end up disrupting an otherwise working game ecosystem and then prevent people from launching even other games.

Steve: Alright, Nick, so we just went through why loot boxes are a big deal and now we're going to go to the 1v1 Showdown. Now this is the part of the podcast where me and you are going to go head-to-head, pro/con, are loot boxes gambling, are loot boxes not gambling? So I'm going to go first...

Nick: Of course.

Steve: ...and I'm going to tell you why loot boxes are not gambling. And this is the position that's typically taken by like the Entertainment Software Association.

Nick: Alright, Steve, convince me.

Steve: So, first, Mr. Brown, loot boxes have no real world value. I can't take a loot box and go to the bank and ask for, you know, an exchange.

Nick: Not with that attitude, you can't.

Steve: Not for real dough, no, loot boxes have no real world value, it's tied to digital value, which is different, now this is for loot boxes that not transferable, so there's no market for these things. So, you know, I'm going to put loot boxes that are transferable to the side for a minute, for ones that are not...

Nick: How convenient.

Steve: ...so take a Hearthstone pack, you can't trade that pack and get money out of it so that's the first reason. Second reason is that loot boxes always offer something of value for in the games, so digital value, I'm always going to get something in the game that is worth spending the money on. Whether it's like a, you know, a legendary I don't have before or a really cool skin for a car, it's not the same as putting a quarter into a slot machine and getting zilch as a result. At the end of the day, there's no such thing as an empty loot box. Next, loot boxes are entirely optional, Nick, you don't have to pay to use loot boxes in order to play the game, so, that's another reason. And next, randomized outcomes have been a core mechanic in games for decades, RPGs in particular. From Dungeons and Dragons, to XCOM, to Word of Warcraft, players are used to this randomized element to games and loot boxes just an extension to that. So, you know, I'll cite to France and the UK that found the connection to loot boxes and gambling to be dubious and I rest my case...

Nick: Dubious?

Steve: ...dubious, Nick...

Nick: Wow.

Steve: ...so why don't you convince me?

Nick: Alright, well, I think your arguments are dubious. The truth is, these are just digitalized slot machines, they're Skinner Boxes that take your money bit by bit. First of all, despite what my opponent says, loot boxes obviously have value.

Steve: No they don't.

Nick: First of all, people spend a lot of money on them, that's a pretty good indicator that they have a lot of value. And the rewards, they aren't the same, they usually have different rarities of what you can get, you can get an epic skin, you can get a common skin, you can get a voice over, so they obviously have some value because you can compare them and one is more valuable than another. And even whether awards are just cosmetic like a skin, they don't give any competitive edge, but people still take them really seriously, and certain items, they end up becoming more coveted than others. Particularly, where, as we know with digital games, developers can create their own scarcity by having limited time items like a Santa hat for your character or an anniversary skin or some throwback...

Steve: Unicorn, a unicorn mount, Nick.

Nick: ...listen, I got unicorn mounts in a lot of games, okay? They are worth something. Steve pointed that there aren't any "empty" loot boxes.

Steve: There aren't.

Nick: But what if you open a loot box that contains just copies of items you already have, and you can't trade them?

Steve: But you just said, it contains items, so it's not empty.

Nick: But there's no value to you there, which shows that a better roll would have been more valuable, which shows loot boxes inherently do have value. Now, contrast that, some loot boxes are in fact transferable or at least the items you can get from them are, and those do have real world value and I can prove that. For example, in Counter Strike: Global Offensive, there's a separate marketplace for buying and selling skins that you can get from randomized loot boxes. And that's not even going into the whole lottery system that exists where you bet on in-game items, that's obviously gambling. Think for example, the CS:GO gambling sites that exist—gambling sites, by the way—and even where the items are not transferable, we all know that people sometimes sell accounts that are accomplished or have particularly nice items and that probably will violate the game's Terms of Service but it does raise questions about whether any of these items, the fruits of the loot boxes are truly non-transferable, as my opponent claims. At the bottom, loot boxes create a feeling of a near-miss, like slot machines, they encourage one more go, another box, another card pack, another micro-transaction. And backing me up on this are the Dutch who ruled earlier this year that the existence of unofficial monetization platforms is in fact enough to qualify loot boxes as a form of gambling.

Steve: Holland is not your friend, Nick. Just throwing that out there.

Nick: I think they disagree with you.

Steve: So what can we take away from this discussion?

Nick: Well I think the simplest answer from a legal standpoint may be if you're making a game or publishing one, just forego loot boxes entirely, right? Although that's potentially giving up a bunch of potential revenue, it also can save you considerable money and headaches that you'd otherwise have to deal with to comply with laws, in all the different various jurisdictions as we just discussed, they're different by country. You also have to deal with the PR consequences of loot boxes like we talked about with Shadow of War and so you don't have your own Star Wars Battlefront II debacle.

Steve: Alright, well, I mean if you want to have loot boxes in your game, there are other ways you could go about it.

Nick: Oh, yeah?

Steve: You could, recently Fortnite announced visible loot boxes, where you could actually see the items that are inside a loot box, kind of takes away from that mystery...

Nick: Yeah, where's the fun in that?

Steve: ...fun in that, yeah but at the same time, that's one way that you can minimize the aspect of gambling to make loot boxes more accessible and avoid the regulations. And another thing you can do is, if you do decide to have loot boxes that are non-visible, you could, as much as it pains me to say, maybe put some restrictions on the transferability of those loot boxes. Whether in the Terms of Service or wherever that you could forbid the sale of in-game items or user accounts and that would be one way to do it as well.

Nick: 'Cause that would prevent people from selling them.

Steve: Right, it just eliminates the market entirely. Another one, another thing that everybody should be doing is staying on top of what's going on. The FTC has just started its investigation of this, as regulatory bodies around the world weigh in, we're going to be seeing a lot more activity for loot boxes. And again, it goes back to \$50 billion, it's a lot of money at stake.

Nick: And as always, the best idea is to work with an attorney who understands the legal and the industry trends at play.

Steve: Absolutely, so that's, unless you have anything else to add, Nick, I think that's all we have for the podcast today.

Nick: That's all I've got but be on the lookout for upcoming podcasts by us on other issues in the gaming sphere.

Steve: Yeah, we have a whole lineup, check out any other episodes from our Season One podcasts. And until next time, game on.

Nick: Game on.

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