

CHIPS, GOLD, AND ISK: INDIVIDUAL PROPERTY RIGHTS IN FANTASY PERSONAS AND VIRTUAL CURRENCIES

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TABLE OF CONTENTS

I.	Introduction.....	166
II.	Background.....	167
	A. The Value—Or Lack Thereof—in Video Games.....	169
	1. World of Warcraft.....	169
	2. Diablo III.....	170
	3. Entropia Universe.....	170
	B. Kater v. Churchill Downs.....	171
	1. The Case.....	171
	2. Washington’s Gambling Law.....	172
	3. The Outcome.....	172
	C. Mason v. Machine Zone.....	173
	D. Phillips v. Double Down Interactive LLC.....	175
III.	Analysis.....	176
	A. Comparing Kater, Mason, and Phillips.....	176
	B. Public Concern About Gambling and Video Games.....	177
	C. Comparison of Virtual Markets and Currencies Across WoW, Diablo III, and Entropia Universe.....	178
	1. Closed Virtual Currencies.....	178
	2. Virtual Currencies with Currency Flow in One Direction.....	178
	3. Convertible Virtual Currencies.....	179
	D. Unjust Enrichment and Unconscionability.....	180
	E. Liquidated Damages.....	182
IV.	Recommendation.....	183
	A. The Adjudicatory Solution.....	183
	B. The Legislative Solution.....	184
	C. The Non-legal Solution.....	185
V.	Conclusion.....	186

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I. INTRODUCTION

On September 29, 2019, during the last weekend of Hearthstone's¹ Grandmasters'² regular season,³ one shout shook the gaming world: "Liberate Hong Kong, revolution of our age!"⁴ The shout, in Chinese, came from Hong Kong-based player Chung Ng Wai ("Blitzchung") during an interview after he had just won a match in the tournament.⁵ Coming at a time when Hong Kong was experiencing mass protests demanding protection for "the semi-autonomous city from mainland China's attempts to control it,"⁶ Blizzard came down hard on Blitzchung, stripping him of his 2019 prize money and suspending him for a year from the game.⁷ Blizzard justified its suspension of Blitzchung, claiming he "had run afoul of a rule barring players from any act that 'brings you into public disrepute, offends a portion or group of the public, or otherwise damages' the company's image."⁸

Considering that some players have spent over \$10,000 on the game over their years of playing,⁹ being banned could mean a severe economic loss to these avid players—thus, begging the question: What happens to players' investment in the game if Blizzard decides the player did something to get banned?

In addition to Hearthstone, Blizzard also owns other intellectual properties such as World of Warcraft ("WoW"), StarCraft, and Overwatch.¹⁰ Each game is a potential money sink for players who want new items, player avatar skins, or in-game currency.¹¹ WoW is particularly worrisome because Blizzard Entertainment allows WoW players to use in-game gold to cover the cost of a WoW subscription, using their trademarked WoW Tokens.¹² The players are

1. Hearthstone is a digital card game created by Activision Blizzard, a gaming company. Zack Beauchamp, *One of America's Biggest Gaming Companies is Acting as China's Censor*, VOX (Oct. 8, 2019, 12:10 PM), <https://www.vox.com/2019/10/8/20904433/blizzard-hong-kong-hearthstone-blitzchung>.

2. *Hearthstone Grandmasters*, GAMEPEDIA, https://hearthstone.gamepedia.com/Hearthstone_Grandmasters (last visited Apr. 26, 2021) ("Hearthstone Grandmasters is the premier level of tournament play in Hearthstone, consisting of two eight-week seasons where 48 of the world's top Hearthstone players compete...").

3. This is the highest level of competition in the game. Beauchamp, *supra* note 1.

4. Tom Matthiesen, *Hong Kong Player Blitzchung Calls for Liberation of His Country in Post-game Interview*, INVEN GLOBAL (Oct. 6, 2019), <https://www.invenglobal.com/articles/9242/hong-kong-player-blitzchung-calls-for-liberation-of-his-country-in-post-game-interview>.

5. *Id.*

6. Dani Lee Collins, *The Real Reason #BoycottBlizzard is Trending on Twitter*, SVG (Oct. 8, 2019, 3:19 PM), <https://www.svg.com/169272/the-real-reason-boycottblizzard-is-trending-on-twitter>.

7. Beauchamp, *supra* note 1.

8. Daniel Victor, *Blizzard Sets Off Backlash for Penalizing Hearthstone Gamer in Hong Kong*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/world/asia/blizzard-hearthstone-hong-kong.html>.

9. Camden Jones, *Blizzard's Blitzchung Ban Leads to WoW and Hearthstone Players Quitting in Solidarity*, GAME REVOLUTION (Oct. 8, 2019), <https://www.gamerevolution.com/news/605425-blizzard-hong-kong-blitzchung-world-of-warcraft-hearthstone-players-quit>.

10. *List of Blizzard Entertainment Games*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Blizzard_Entertainment_games (last visited Apr. 26, 2021).

11. For example, Overwatch loot boxes, the gambling like system used to obtain in-game cosmetic items, cost the player two dollars for two boxes. Ben Barrett, *Here are the Prices for Overwatch's Microtransaction Loot Boxes*, PCGAMESN (May 24, 2016), <https://www.pcgamesn.com/overwatch/overwatch-price-microtransactions-cost>.

12. *Introducing the WoW Token*, BLIZZARD ENT. (Mar. 2, 2015), <https://worldofwarcraft.com/en-gb/news/18141101> [hereinafter *WoW Token*].

“able to purchase a WoW token through the in-game shop for real money, and then sell it on the Auction House for gold,” at whatever the current market price is.¹³

WoW’s method of allowing players to use in-game currency to pay for real-world subscriptions is nothing new to gaming. The massive multiplayer online game, EVE Online, has a similar system, allowing its players to use in-game currency, ISK, to pay for a subscription to the game.¹⁴ Some of EVE’s players, like some WoW players, amass considerable real-world wealth in their video game personas.¹⁵ Although against the game’s terms,¹⁶ EVE players can “farm” ISK in-game and then sell it to other gamers for real money.¹⁷ This raises the issue of real-world economic loss if a player is banned according to the Terms & Conditions of their particular virtual world.

This Note concerns online video game personas’ in-game items and currency, and the Terms & Conditions promulgated by their parent companies. This Note will argue that players have a property interest in video game currency, capable of being transacted for real-world value, and enforcement of the games’ Terms may violate state gambling laws or the equitable doctrines of unjust enrichment and unconscionability.

Part II of this Note explores the legal backdrop of case law on the value of in-game currencies, the video game worlds that might give rise to property rights issues, and online gambling laws’ relation to in-game currency. Part III discusses how courts might handle gambling laws and equitable doctrines as applied to video game currency and online personas. Part IV advocates for legislators to recognize property rights in digital currency, despite Terms & Conditions, by altering laws that apply to arbitration clauses and by giving the courts more power to exact equitable remedies when evaluating contract cases. It also gives companies a summary of how not to design a game in order to avoid legal liability as it relates to player property interests. Lastly, the section discusses what players can do to solve the problem.

II. BACKGROUND

In 2018, consumers globally spent \$93 billion on virtual goods in video games and other virtual media.¹⁸ This large amount of money was spent on

13. *Id.*

14. *Buy 100 Plex*, EVE, <https://buyeveisk.com/pilots-services/buy-100-plex> (last visited Apr. 26, 2021) (“PLEX is an in-game item that can be used to pay for your subscription without using more traditional payment methods. By using PLEX, you can pay for your game time simply by playing the game.”).

15. *See How Much is Eve Online Currency ISK to USD?*, PLAYERAUCTIONS, <https://www.playerauctions.com/market-price-tracker/eve/> (last visited Apr. 26, 2021) (“There are also individuals who trade ISK to real money in order to make a profit. Currently, there are 600 trillion ISK on the active accounts in EVE Online, which in ISK to real life money value translates to around 18 million USD.”).

16. *Policies*, EVE CMTY., <https://community.eveonline.com/support/policies/terms-of-service-en/> (last visited Apr. 26, 2021).

17. *Sell EVE Echoes ISK*, PLAYERAUCTIONS, <https://www.playerauctions.com/sell-eve-echoes-isk/> (last visited Apr. 26, 2021).

18. *Harper’s Index*, HARPER’S MAG. (Oct. 2019), <https://harpers.org/archive/2019/10/harpers-index-october-2019>.

“add-ons for online games, digital gifts and other items that exist only as data.”¹⁹ For example, in 2010 a virtual resort was sold for \$635,000 and a virtual space station for \$330,000.²⁰

Despite the recent growth in the market, paying real money for virtual goods in a video game is nothing new.²¹ Twenty-two years ago, Iron Realms Entertainment became one of the first game companies to profit from the sale of virtual goods when it began auctioning items in its text-based Role Playing Games (“RPGs”).²² The company eventually moved on from selling players items directly for real currency, instead opting for a model of selling people in-game currency that could later be redeemed for items from an in-game store.²³

“Today, virtual currencies in digital worlds are commonplace. It’s normal to purchase tools, skins, [and] even meme-tastic dances in games”²⁴ For example, WoW—arguably the most successful Massively Multiplayer Online (“MMO”) game of all time²⁵—gives players the in-game currency “gold” to spend on a multitude of in-game items.²⁶ Another Blizzard title, Diablo III, also uses gold as a currency, but has handled its currency much differently than WoW’s and perhaps more dangerously from a liability standpoint.²⁷

Virtual currency, as used in this Note, refers to the in-game currency of the video game being discussed. The term is often used to discuss cryptocurrencies,²⁸ but video game currencies fit the broad definition as well.²⁹ For the purposes of this Note, virtual currencies will be divided into three types: 1) closed virtual currencies, 2) virtual currencies with money flow in one direction, and 3) convertible virtual currencies.

Closed virtual currencies are created to operate in closed-loop environments, limiting the holder to purchasing virtual goods only within the virtual environment.³⁰ These currencies are often seen in the form of points, like frequent flyer miles.³¹ Virtual currencies with money flow in one direction are

19. *Sales of Virtual Goods Boom in US*, BBC (Oct. 22, 2009, 10:32 AM), <http://news.bbc.co.uk/2/hi/technology/8320184.stm>.

20. Oliver Herzfeld, *What is the Legal Status of Virtual Goods?*, FORBES (Dec. 4, 2012, 1:09 PM), <https://www.forbes.com/sites/oliverherzfeld/2012/12/04/what-is-the-legal-status-of-virtual-goods/#557f06c7108a>.

21. *See id.* (reporting that the sale of virtual goods would double yearly from 2008–2010).

22. Beau Hindman, *The World of Text MMOs/MUDs – An Interview with Matt Mihaly, CEO of Iron Realms Entertainment*, PLAY NO EVIL (Sep. 8, 2006), <https://web.archive.org/web/20081002232838/http://www.playnoevil.com/serendipity/index.php?%2Farchives%2F765-The-World-of-text-MMOs-MUDs-An-Interview-with-Matt-Mihaly%2C-CEO-of-Iron-Realms-Entertainment.html>.

23. *Id.*

24. *How Video Games Helped Pave the Way for Cryptocurrency*, SINGULARDTV (Aug. 2, 2018), <https://medium.com/singulardtv/how-video-games-helped-pave-the-way-for-cryptocurrency-f930521eef55>.

25. *Id.* (“[A]t its peak it had upwards of ten million users in the game.”).

26. *Id.*

27. @adoragoh, *Diablo III’s Failed Auction House: Why True Ownership Won’t Save Your Game*, MEDIUM (June 27, 2018), <https://blog.hoard.exchange/diablo-iiis-failed-auction-house-why-true-ownership-won-t-save-your-game-c6d692b9de1> [hereinafter Goh].

28. Christina Majaski, *Closed Virtual Currency Definition*, INVESTOPEDIA (May 6, 2019), <https://www.investopedia.com/terms/c/closed-virtual-currency.asp>.

29. *See id.* (“Virtual currency is a type of digital money that is used to purchase real-world goods or services online but has no legal tender status in some countries.”).

30. *Id.*

31. *Id.*

a subtype of closed virtual currency, the difference being that people can purchase additional currency with real money.³² Refillable restaurant gift cards are an excellent example of these currencies. Convertible virtual currencies, or open virtual currencies, allow for real money to be exchanged for the virtual currency and vice versa.³³ Bitcoin best exemplifies these currencies. Because these currencies have a readily determinable value in real money, they are treated as property for tax purposes.³⁴

A. *The Value—Or Lack Thereof—in Video games*

1. *World of Warcraft*

World of Warcraft (“WoW”) is a Massively Multiplayer Online Role-Playing Game (“MMORPG”) created by Blizzard Entertainment.³⁵ The game is set in the Warcraft fantasy universe where a player can create an avatar, explore the virtual world, fight creatures, and gather virtual items and gold.³⁶

For a player’s avatar to be competitive with other players’ avatars, the gameplay requires that players obtain certain items during their adventures.³⁷ These items can be purchased with in-game gold, which can be earned through various means in-game. Each method, however, requires hours of a player’s time.³⁸ Alternatively, although a violation of the game’s Terms and Conditions,³⁹ a player can purchase gold from other players using real money, converting what could have been hours of boring time spent “grinding” into an easy transaction for the price of a large pizza.⁴⁰

Blizzard heavily restricts this kind of player behavior. According to Blizzard’s Terms & Conditions, a player may not transfer their account to another person.⁴¹ Furthermore, gathering in-game currencies or resources for sale outside of the platform is prohibited.⁴²

To help solve the problem caused by prohibited gold transfers, Blizzard introduced the WoW token.⁴³ The token can be purchased for twenty dollars directly from Blizzard and either redeemed for a month of subscription time or

32. *Id.*

33. *Id.*

34. *Id.*

35. *New Player’s Guide*, WORLD OF WARCRAFT, <https://worldofwarcraft.com/en-us/game/new-players-guide> (last visited Apr. 26, 2020) [hereinafter *New Player’s Guide*].

36. *Id.*

37. *See id.* (discussing player items).

38. Daniel Friedman, *World of Warcraft’s Inflation Problem Could Finally be Hitting Regular Players*, POLYGON (Aug. 22, 2018, 11:00 AM), <https://www.polygon.com/2018/8/22/17759824/world-of-warcraft-azereth-economy-gold>.

39. *Terms of Use for Blizzard’s Websites*, BLIZZARD (June 19, 2018), <https://www.blizzard.com/en-us/legal/511dbf9e-2b2d-4047-8243-4c5c65e0ebf1/terms-of-use-for-blizzards-websites>. [hereinafter *Blizzard Terms of Use*].

40. Friedman, *supra* note 38.

41. *Blizzard End User Licensing Agreement*, BLIZZARD (June 1, 2018), <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement>.

42. *Id.*

43. Friedman, *supra* note 38.

fifteen dollars of Battle.net balance.⁴⁴ These tokens legitimize the sale of gold by giving players the ability to trade the tokens in the in-game market for gold.⁴⁵ However, both Blizzard Balance and WoW tokens do not constitute a property interest under Blizzard's Terms of Use and can be terminated without compensation at Blizzard's sole discretion.⁴⁶

2. *Diablo III*

Another popular game in the Blizzard video game family is the Diablo series. In Diablo, gameplay boils down to a fairly simple gameplay loop:

1. Kill enemies
2. Earn loot drops (items a player can find on a fallen enemy's corpse)
3. Find the weapons and armor that you need in these drops
4. Repeat.⁴⁷

With such a loot-heavy game like Diablo, Blizzard tried to create a system where players could find loot in-game and sell it on a player auction house for real money or for in-game currency.⁴⁸ Although Blizzard closed the auction house down in 2014,⁴⁹ the system is an excellent example of a company attempting to incorporate real value into virtual property. In order to use the trading system, players had to connect a PayPal account to the auction house so that they could receive money if someone purchased their virtual goods.⁵⁰ Blizzard did not allow people to convert their in-game currency or items directly into real-world money, but it did effectively give real world value to players' virtual goods.⁵¹ Blizzard would "tax" every transaction as well, making sure the company profited off of each sale.⁵² When the market first opened, some rarer and more powerful items were listed for \$250.⁵³

3. *Entropia Universe*

Unlike both Diablo and WoW, through the use of a "PED Card," Entropia players may transfer funds in and out of the game.⁵⁴ Whenever a player transfers money, MindArk, the game's parent company, charges a fee and in this way makes money from the exchange, just as a credit card company does when a

44. Battle.net balances are credits that can be spent on game extras in the Blizzard library. *Id.*

45. *Id.*

46. *New Player's Guide*, *supra* note 35.

47. Goh, *supra* note 27.

48. *Id.*

49. Lylirra, *Diablo III Auction House Comes to a Close*, DIABLO (Mar. 18, 2014), <https://us.diablo3.com/en/blog/13354139/diablo-iii-auction-house-comes-to-a-close-3-18-2014>.

50. Will Usher, *Blizzard Will Take 15% Cut of Diablo 3 Real-Money Auctions*, CINEMA BLEND (May 1, 2012), <https://www.cinemablend.com/games/Blizzard-Take-15-Cut-Diablo-3-Real-Money-Auctions-42056.html>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Entropia Universe Account Terms of Use (ToU)*, ENTROPIA UNIVERSE, (May 5, 2018) <https://account.entropiauniverse.com/messages/legal/terms-of-use> [hereinafter *Entropia Terms of Use*].

consumer uses their card at a store or ATM.⁵⁵ This open market is unusual in MMOs, but its benefit is to allow players to have some sort of ownership over the items they purchase or grind for in-game. If the in-game money has an exchange rate, then any purchased items must also have real-world value.

Further distinguishing MindArk from the likes of WoW or Diablo is the company's generous Terms of Use Agreement. MindArk grants Entropia players the right to receive the value of their in-game items, as they would be worth in the Trade Terminal (in-game market), in the event that their account is terminated.⁵⁶ After the termination, the player may withdraw their virtual items' aggregate value from their PED Card as real-world currency.⁵⁷ This protection allows for gamers who have spent thousands of dollars on a game to truly feel ownership of their character and resolves any legal liability on the company's behalf for loss of in-game currency.

Additionally, MindArk's Terms and Conditions contain a clause recognizing that their liability to the player, if acknowledged, is limited to the amount of money transferred into the account six months prior to an incident.⁵⁸ Perhaps this is simply a case of savvy lawyering, preparing the company for all eventualities, but the implication of this language is that MindArk recognizes that there may be some property right in the players' in-game currency.

However, despite these perks for Entropia players, the Terms of Use, as in WoW and Diablo, still reserve a right for the game developer to ban players' accounts.⁵⁹ This could potentially destroy players' hard-earned money. If MindArk bans a player's account, then the account will eventually be terminated. However, if terminated in this way, then the account holder may not be able to retrieve their money from their account.⁶⁰ Moreover, the "protections" Entropia's Terms of Use provide players is largely illusory, as MindArk reserves the right not only to ban accounts, but also to alter the terms of the end-user agreement at any time.⁶¹

B. *Kater v. Churchill Downs*

1. *The Case*

In 2013 Cheryl Kater, a Washington citizen, began playing Big Fish Casino, eventually spending and then losing over \$1,000 worth of virtual chips.⁶² Two years later, she initiated a class action lawsuit under Washington's

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* See also Blizzard Entertainment, *Blizzard End User License Agreement*, BLIZZARD ENT. (Oct. 9, 2020), <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> (demonstrating the user agreement for both WoW and Diablo).

60. *Entropia Terms of Use*, *supra* note 54.

61. *Id.*

62. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 786 (9th Cir. 2018).

Recovery of Money Lost at Gambling Act (RMLGA), Washington’s Consumer Protection Act, and a theory of unjust enrichment.⁶³

The federal district court dismissed her claim on the grounds that the online game could not qualify as illegal gambling.⁶⁴ The virtual chips were not a “thing of value,” as was necessary for the tort under RMLGA.⁶⁵ Big Fish Casino’s Terms of Use explicitly stated that the chips “have no monetary value and cannot be exchanged ‘for cash or any other tangible value.’”⁶⁶ But Big Fish Casino did contain a means for transferring chips between users, allowing players to sell their chips on a secondary market using the game’s internal mechanism.⁶⁷

The game functioned as a virtual casino where players could play various electronic games after downloading a free phone app, complete with a set of free chips that were necessary to play the games.⁶⁸ A player could win more chips and continue playing for free, but once they ran out, the player would need to pay money for additional chips to continue playing the game.⁶⁹

2. *Washington’s Gambling Law*

Washington’s gambling law defines gambling as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.”⁷⁰ The RMLGA gives:

All persons losing money or anything of value at or on any illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.⁷¹

3. *The Outcome*

On appeal, the Ninth Circuit reversed the lower court’s decision, holding that the Big Fish Casino chips were a “thing of value,” as they granted the player “the privilege of playing the game.”⁷² Big Fish Casino was thus an illegal gambling game under Washington law.⁷³ The Ninth Circuit viewed the fact that the game could not be played without either a purchase of new chips or by winning more of the virtual currency to be determinative because of the wording

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 787.

68. *Id.* at 785.

69. *Id.* at 785–86.

70. WASH. REV. CODE § 9.46.0237 (2019).

71. WASH. REV. CODE § 4.24.070 (2019).

72. *Kater*, 886 F.3d at 787.

73. *Id.*

of Washington’s gambling law.⁷⁴ Supporting its reasoning, the court likened the case to *Bullseye Distributing LLC v. State Gambling Commission*, in which the “Washington Court of Appeals held that an electronic vending machine designed to emulate a video slot machine was a gambling device.”⁷⁵ In that case, the Washington court reasoned that a voucher obtained by purchase, promotion, or in-game win, that allowed the player to extend their play-time was a “thing of value” under Washington law.⁷⁶

The defense argued that it was significant that the chips could be earned through gameplay, because the extended gameplay therefore cost the player nothing.⁷⁷ Unfortunately, the court did not discuss this issue as it was not alleged in the complaint.⁷⁸

Notably, the court concluded that virtual chips were “things of value,” despite the game’s terms of use stating otherwise.⁷⁹ Although on the surface this appears to render the game’s terms of use ineffective at shielding the company from liability, the Court rejected Kater’s second argument that because the chips could be sold on the “black market” they were “things of value.”⁸⁰ Since the sale of chips on a secondary market violated the terms of use, the court determined that the chips did not constitute a “thing of value” through this prohibited use.⁸¹

Ultimately, the court rejected other federal courts’ reasoning that “free to play” games were not illegal gambling, as their decisions involved “the analysis of different state statutes, state definitions, and games.”⁸² The court instead hinged its decision on the Washington’s gambling laws’ broad language in finding that Kater could recover her chips’ value lost to Big Fish Casino.⁸³ *Kater* leaves the question of whether in-game currencies in other states might also be considered “things of value” for the purposes of antigambling statutes uncertain.

C. *Mason v. Machine Zone*

Before the *Kater* decision, the Fourth Circuit decided very differently on a similar issue applying Maryland law.⁸⁴ Mia Mason filed a class action lawsuit against Machine Zone, Inc., asserting a claim that its mobile video game, *Game of War: Fire Age*,⁸⁵ contained an in-game unlawful gaming device and that she

74. *Id.*; WASH. REV. CODE, §9.46.0285 (2019). (“[A]ny money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.”).

75. *Kater*, 886 F.3d at 787.

76. *Id.* at 786.

77. *Id.* at 787.

78. *Id.*

79. *Id.* at 787–88.

80. *Id.* at 788 n.2.

81. *Id.*

82. *Id.* at 788.

83. *Id.*

84. *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017).

85. *Id.* at 317 (“Game of War is a game of strategy in which players build virtual towns and armies, and ‘battle’ each other in ‘real time in a virtual world. Players train their virtual armies, build their ‘empires,’ and

and similarly situated individuals lost money playing it.⁸⁶ The facet of the game at issue was a virtual casino, the Game of War casino.⁸⁷ Players could pay virtual chips for a chance to win various virtual prizes, such as gold (in-game currency), resources needed to advance their position in the game, and additional virtual chips.⁸⁸ These virtual chips could only be acquired through the in-game casino or by purchasing them with virtual gold that itself could be purchased with real money; there was no direct way to purchase chips with real money.⁸⁹

Her complaint rested on the theory that she had lost money when she gambled in the casino because the prizes she won were worth less than the money she spent to obtain them.⁹⁰ Furthermore, she argued her prize's value could be shown by the amount she would be able to make on the secondary market outside the video game.⁹¹

The Fourth Circuit disagreed with Mason's argument.⁹² Under Maryland law "a 'gaming device' is defined 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.'"⁹³ The court concluded that nothing of consideration or value was actually gambled in the in-game casino.⁹⁴

First, the court reasoned that a claim cognizable under the statute implied there had to be a "winner" of the money.⁹⁵ However, this was not the case, as Mason had spent her money on gold, regardless of her intention to convert it to virtual chips.⁹⁶ Second, Mason stood only to win more gold or chips, neither of which were able to be converted to real money through a legitimate process.⁹⁷ The fact that Mason could sell her account on the secondary market did not persuade the court, as the gold or chips were only part of a player's account and were not the sole value in trading an account on the market.⁹⁸ As it were, there was no way to directly sell the gold or chips, and thus, they had no real value.⁹⁹

join in alliances with other players, in an attempt to 'conquer' the virtual world. While no payment is required to play Game of War, individuals engaged in playing the game can purchase virtual 'gold,' at prices ranging from \$4.99 for 1,200 pieces of virtual gold, to \$99.99 for 20,000 pieces of virtual gold. Players can use the virtual gold they have accumulated 'to improve their virtual towns' and to progress more quickly in the game.").

86. *Id.* at 316–17.

87. *Id.*

88. *Id.* at 317.

89. *Id.*

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

91. *Id.*

92. *Id.*

93. *Id.* (citing Md. Code Ann., Crim. Law § 12-101(d)(1)(ii), (d)(2)).

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

95. *Id.*

96. *Id.*

97. *Id.* at 320.

98. *Id.*

99. *Mach. Zone, Inc.*, 851 F.3d at 320 n.3 ("Additionally . . . any attempt to sell virtual items on a secondary market is a violation of Machine Zone's terms of service, which prohibit people who play Game of War from redeeming 'Virtual Currency and Virtual Goods . . . for 'real world' money, goods or other items of monetary value from . . . any other person.").

D. Phillips v. Double Down Interactive LLC

In the Northern District Court of Illinois, Margo Phillips brought suit against Double Down Interactive LLC.¹⁰⁰ In her suit, Phillips alleged that Double Down Casino,¹⁰¹ a virtual casino owned by the company, was an unlawful gambling device under Illinois state law, and sought to recover the money she spent in the online casino.¹⁰²

To play the game, players must possess virtual chips that they then wager on the various games in order to win more chips.¹⁰³ Players received free chips every day, but had to pay for more chips if they wanted to continue playing without delay.¹⁰⁴ There was no in-game way to exchange chips, and the only way to “cash out” was to sell the whole account on the secondary market, which the game’s terms of use prohibited.¹⁰⁵

Under the Illinois Loss Recovery Act, “Any person who by gambling . . . lose[s] to any other person, any sum of money or thing of value, amounting to . . . \$50 or more . . . may sue for and recover the money or other thing of value[] so lost.”¹⁰⁶ Gambling was defined as “knowingly play[ing] a game of chance or skill for money or other thing of value.”¹⁰⁷ The court concluded “that a plaintiff may only recover what he or she ‘lost’ from the person who ‘won’ it, and that what was lost (and correspondingly won) must be money or some other thing of value.”¹⁰⁸

Unlike *Kater* and *Mason*, and despite mentioning in dicta the “surface appeal” of virtual chips being things of value, the court here declined to analyze the issue, instead focusing on winners and losers under Illinois law.¹⁰⁹ According to the court, for a claim to proceed under Illinois law, the company would have to be a winner, that is, a person or entity that directly participated in the games and had a direct stake in the games’ outcomes.¹¹⁰ The court’s reasoning consisted largely of the fact that Double Down had already received Phillips’s money when she purchased the virtual chips.¹¹¹ Because the company already had her money and did not stand to lose any money in her continued gambling, the court held that Double Down was not a winner, for the purposes of the law.¹¹² Furthermore, Phillips was not a loser either because she paid for

100. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 734 (N.D. Ill. 2016).

101. *See id.* (noting Double Down Casino is accessible either through Facebook, its Website, or through a downloadable application on a mobile device. The game is marketed as a full casino experience, including slot machines, roulette, poker, and blackjack. “All of Double Down’s casino games are games of chance, as each game’s outcome is determined solely by Double Down’s computerized algorithms.”).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 720 ILCS 5/28–8(a) (2013).

107. 720 ILCS 5/28–1(a)(1) (2019).

108. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 737 (N.D. Ill. 2016).

109. *Id.* at 739.

110. *Id.* at 740.

111. *Id.*

112. *Id.*

the chips to play the game.¹¹³ She did play the game; thus, Phillips could not recover her lost money.¹¹⁴

III. ANALYSIS

First, this section will compare and contrast the previously discussed cases, searching for a general rule that video game producers might consider when contemplating adding in-game currency systems that interact with real-world tender. Second, it will explore the complications of loot boxes in video games and prospective regulation. Third, this section will discuss the rule as it can be applied to games with closed virtual currency, virtual currency with money flow in one direction, and convertible virtual currency. Fourth, this section will analyze the contract law doctrines of unjust enrichment and unconscionability.

A. Comparing *Kater*, *Mason*, and *Phillips*

These cases each present ways to understand whether the courts will attribute value to video game currencies beyond just gambling games. Obviously, the choice of law being applied to the game may mean the difference between an actionable tort and one that is not, but surprisingly, the Ninth Circuit, Fourth Circuit, and Illinois District Court all share very similar analyses of the game currencies.¹¹⁵

Kater focuses mainly on what the virtual currency can be used to procure and the inherent value, if any, of the currency.¹¹⁶ The virtual chips in that case were seen as a thing of value because they gave the player the ability to continue playing the game.¹¹⁷

Mason is distinguishable from *Kater*. Although the Fourth Circuit addresses the value of virtual chips like the court did in *Kater*, the chips were only necessary to play an in-game minigame and not necessary to the overall experience of playing Game of War.¹¹⁸ In *Kater*, the chips were the limiting factor for how long someone could play the game; in contrast, the chips in *Mason* were viewed as the defendants in *Kater* argued: they were not needed to extend gameplay, but merely to enhance it.¹¹⁹

Phillips can also be distinguished from *Kater* as the court decided not to touch the issue of whether the virtual chips were worth money, but rather, only

113. *Id.*

114. *Id.* at 737.

115. Compare *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 (9th Cir. 2018) (holding virtual currency can be used to procure any inherent value of the currency), with *Phillips*, 173 F. Supp. 3d at 731 (N.D. Ill. 2016) (addressing the quirk in Illinois gambling law of requiring winners and losers), and with *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017) (holding that chips are only necessary to play an in-game minigame).

116. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018).

117. *Id.* at 787.

118. Compare *Mach. Zone, Inc.*, 851 F.3d at 316 (holding that the chips were not needed to extend game play), with *Kater*, 886 F.3d at 784 (holding that the chips were the limiting factors for how long someone can play the game).

119. *Kater*, 886 F.3d at 787.

to address the quirk in Illinois gambling law of requiring winners and losers.¹²⁰ Even so, under Illinois law, *Kater* would have likely turned out differently.

Taking these three cases together, a rule emerges for what may expose a gaming company to liability, even if they are not intending to gamble, at least within Illinois, Washington, and Maryland: (1) The company stands to lose something if a player “wins,” (2) the gaming currency either allows the player to continue playing the game or is able to be transferred for real money, and the loss to the company must not be merely prospective.¹²¹

While the end user licensing agreements (“EULA”) gamers agree to as a condition for them to play their favorite video games generally provide protection from liability for denying players value in their virtual currency,¹²² after the decision in *Kater* the protection has somewhat diminished.¹²³ As of now, depending on the state law, frustrated gamers may be able to sue under gambling statutes to recover money they’ve spent to obtain in-game currency.

B. Public Concern About Gambling and Video Games

Financially invested players are not the only people who have an interest in the intersection of gambling laws and video games. Over the past few years, concern over what constitutes gambling in video games has increased.¹²⁴ Many people argue that loot boxes in video games are encouraging children to gamble and thus are creating new addictions.¹²⁵ This perspective led Belgium to deem “loot boxes”¹²⁶ a form of gambling and encouraged at least one U.S. senator to propose legislation to ending the practice of allowing players to spend money on loot boxes.¹²⁷

The video game involved in *Phillips v. Double Down Interactive LLC* is one of these games that contain a loot box system.¹²⁸ Despite not awarding damages, the court did recognize the game as a gambling device, giving teeth to proponents of antigambling laws.¹²⁹

120. Compare *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 740 (N.D. Ill. 2016) (addressing the quirk in Illinois gambling law of requiring winners and losers), with *Kater*, 886 F.3d at 784 (holding that the chips were the limiting factors for how long someone can play the game).

121. *Id.*

122. See, e.g., *Zenimax Media Terms of Service*, ZENIMAX, (last visited Apr. 26, 2021) (stating that the virtual currency in game has no real value).

123. See *Kater*, 886 F.3d at 787 (holding that a player could recover money under a Washington antigambling statute).

124. See Jolyon Jenkins, *Are Some Video Games Making Children Gamble?*, BBC, <https://www.bbc.co.uk/programmes/articles/4S4XjtK4sg2CtBycM83yhV5/are-some-video-games-making-children-gamble> (last visited Apr. 26, 2021) (reporting that Belgium deemed loot boxes in game as a form of gambling).

125. *Id.*

126. *Id.* (“Loot boxes are a feature of video games in which you can pay to open random packs or crates of virtual items, hoping to uncover something rare and desirable.”).

127. Tony Romm & Craig Timberg, *Video Game ‘Loot Boxes’ Would be Outlawed in Many Games Under Forthcoming Federal Bill*, WASH. POST (May 8, 2019, 11:00 AM), <https://www.washingtonpost.com/technology/2019/05/08/video-game-loot-boxes-would-be-outlawed-many-games-under-forthcoming-federal-bill/>.

128. See *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 737 (N.D. Ill. 2016) (holding that the game was a gambling game within the meaning of the Illinois Loss Recovery Act).

129. *Id.* at 737.

As this perspective on loot boxes becomes more widely held, the issue of video game currency will likely also be elevated. Cases like *Kater* and *Phillips* will become more common. Whether the courts recognize certain video games as falling under the umbrella of gambling statutes may not matter much longer, as it appears a legislative solution may be on its way.¹³⁰

C. *Comparison of Virtual Markets and Currencies Across WoW, Diablo III, and Entropia Universe*

1. *Closed Virtual Currencies*

These types of virtual currencies present the fewest issues for video game publishers, as they are only accessible through in-game means and are not able to be legitimately¹³¹ converted to real-world assets.¹³² Despite the complainant's claim in *Kater* hinging on the value of virtual chips that she did not purchase, the chips were purchasable even if she had not, therefore giving them some value indirectly.¹³³ Based on the court's reasoning, it is very unlikely that a game without the requirement that a player obtain some purchasable in-game item to play would be considered a thing of value, even under Washington state law.¹³⁴

2. *Virtual Currencies with Currency Flow in One Direction*

WoW's system of virtual currency presents less issues than that of Diablo or Entropia Universe as its currency only flows in one direction. Players pay for tokens and then sell them in-game, thus funneling their currency in only one direction: Blizzard's coffers.¹³⁵ While there is no direct opportunity to convert the currency to real money, the currency does allow for players to purchase more subscription time.¹³⁶ This makes WoW's in-game currency valuable. Games such as WoW will not face liability in places like Illinois but could face liability in Maryland or Washington.

A suit under Illinois-style gambling laws against Blizzard for a player's losses in WoW would be unsuccessful, as there are no winners or losers and the player stakes nothing of value on the game's outcome.¹³⁷

130. Romm & Timberg, *supra* note 127.

131. Clint Pumphrey, *How Gold Farming Works*, HOWSTUFFWORKS, <https://electronics.howstuffworks.com/gold-farming.htm> (last visited Apr. 26, 2021) (noting that some games have a player base willing to pay real-world money for in-game currency but lack a process to purchase the currency, so these players seek out people willing to sell their currency on a secondary market; these secondary markets usually violate the Terms & Conditions of the game, making it a grey area).

132. Christina Majaski, *Closed Virtual Currency Definition*, INVESTOPEDIA (May 6, 2019), <https://www.investopedia.com/terms/c/closed-virtual-currency.asp>.

133. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018).

134. *See id.* at 787 ("Thus, if a user runs out of virtual chips and wants to continue playing Big Fish Casino, she must buy more chips to have 'the privilege of playing the game.' . . . [I]kewise, if a user wins chips, the user wins the privilege of playing Big Fish Casino without charge. In sum, these virtual chips extend the privilege of playing Big Fish Casino.")

135. *WoW Token*, *supra* note 12.

136. *Id.*

137. 720 ILCS 5/28.

Under Washington law, the results are more interesting. For the purposes of the gambling statute, like the chips in *Kater*, the WoW tokens and gold would likely be considered a “thing of value.”¹³⁸ The tokens can be exchanged for more playtime and in-game gold can buy tokens through the WoW player marketplace.¹³⁹ Therefore, a loss of either gold or tokens would be a loss of more playtime for the player.¹⁴⁰

Under Maryland law, for the gambling statute to apply, the person needs to lose money on playing the game.¹⁴¹ The gold in WoW is not likely to satisfy this requirement just like the mobile game at issue in *Machine Zone* since the gold is not directly able to be converted to a real currency.¹⁴² On the other hand, WoW tokens would be much more likely to satisfy the statute’s requirement, as they are directly redeemable for more subscription time or Blizzard points.¹⁴³ Still, the shared requirement between these three laws requiring the valuable thing be lost in a game of chance is difficult to satisfy in the context of WoW.

3. *Convertible Virtual Currencies*

The real trouble for video game companies is in convertible virtual currencies, which are currencies that can be redeemed for real world money. The readiness of conversion makes it very likely that any court would find these currencies to be a thing of value.

Diablo has convertible currency but, smartly, its currency is not directly redeemable for real world money through the company.¹⁴⁴ Rather, the game facilitates players’ ability to sell items for either in-game gold or for real money.¹⁴⁵ This might insulate Blizzard from the issues that gambling laws present, but it also makes in-game items and accounts valuable, perhaps opening it up to liability if an account is banned or terminated. Bitcoin operates similarly. The company facilitates trading Bitcoins, but they cannot be exchanged directly for money, but rather sold to other people seeking Bitcoin.¹⁴⁶

Entropia Universe’s currency exchange is surely favorable to players, but from a liability standpoint opens the company up to a multitude of gambling laws.¹⁴⁷ Since players can directly exchange their gold for real money,¹⁴⁸ the gold and their profiles are valuable. Furthermore, there are winners and losers in this game. Whenever a player defeats an enemy, there is a small chance they will drop valuable goods that can then be sold on the in-game market for

138. See *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018) (finding virtual casino chips to be things of value because they could be used to continue to play the game).

139. *WoW Token*, *supra* note 12.

140. Friedman, *supra* note 38.

141. *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 319 (4th Cir. 2017).

142. *WoW Token*, *supra* note 12.

143. *Id.*; Mason, 851 F.3d at 319.

144. Goh, *supra* note 27.

145. *Id.*

146. *How Does Bitcoin Work?*, BITCOIN, <https://bitcoin.org/en/how-it-works> (last visited Apr. 26, 2021).

147. See *Entropia Terms of Use*, *supra* note 54 (allowing players to receive money from their account if terminated).

148. *Id.*

money.¹⁴⁹ In effect, this amounts to a slot machine-like system where every time a player spends money on arrows or health items, they are gambling that they will get a return on their investment.¹⁵⁰ Because of the currency exchange, if a player gets valuable enough items, they may be able to transfer their in-game winnings to real money and thus cause the company to lose money, thus making the player a winner and the company a loser.

Games like this may be subject to gambling laws in Maryland, Washington, and Illinois, if not others, because of this system.

D. *Unjust Enrichment and Unconscionability*

Besides gambling laws, equitable doctrines in contract law such as unjust enrichment and unconscionability may present some hope to gamers. However, this hope is likely misguided if the goal is to retrieve the value of virtual items or currency from a video game.

In *Mason v. Machine Zone*, the plaintiff included in their complaint a claim for unjust enrichment, but the district court denied the claim.¹⁵¹ Unjust enrichment is a common law general principle underlying other legal doctrines and remedies.¹⁵² In California, the United States' tech capital, unjust enrichment may be a cognizable claim in its own right.¹⁵³ However, in states like Illinois the claim does not exist as its own cause of action.¹⁵⁴ The doctrine hinges on whether a party received a benefit where it would be unjust to retain the benefit at the expense of another party.¹⁵⁵

Assuming that unjust enrichment is a cognizable claim in its own right, one issue with the doctrine and video game currency is that a gamer's expectation when earning or purchasing in-game items is generally for their gaming experience to be improved. In games where there are cosmetic items that are inalienable, e.g., *Overwatch*,¹⁵⁶ a plaintiff would be hard pressed to convince a court that they believed they were owed something more than character costumes for their money. The court in *Mason* held that to force a gaming company to return funds that a player paid for "gold" would be unjust because the player had benefitted from the augmented gaming experience that the currency offered.¹⁵⁷ Assuming that people buy games to play them and gaming

149. *Id.*

150. There may be some question as to whether this is truly gambling as a player may be able to game the system by being more skilled, but video game systems like this allow for no more gamesmanship than blackjack. Ultimately, the slot machine like system is based on random number generation, just like pulling from a recently shuffled deck of cards. See *Random Number Generator*, FANBYTE (last modified Dec. 10, 2008), https://wow.allakhazam.com/wiki/Random_Number_Generator ("A Random Number Generator, or RNG, is a computer algorithm that produces a pseudo-random number.")

151. *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 467 (4th Cir. 2017).

152. *Id.*

153. *Id.*

154. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 743–44 (N.D. Ill. 2016).

155. *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 467 (4th Cir. 2017).

156. Barrett, *supra* note 11.

157. *Mach. Zone, Inc.*, 140 F. Supp. 3d at 467.

companies do not lead people to believe the games are investments,¹⁵⁸ it is unlikely that unjust enrichment would be helpful to the spurned gamer.

Unconscionability, however, might present a solution to gamers' problems. "The basic test for unconscionability is 'whether, in light of the general background and the needs of a particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.'"¹⁵⁹ To this test are substantive and procedural elements.¹⁶⁰ Each has to be present for a claim to succeed.¹⁶¹

Video games present issues for both procedural and substantive unconscionability, specifically the procedural prong.¹⁶² As for the procedural prong, players have a choice of which game they will play, and even though the company has superior bargaining power, video games are not essential and for the most part can be returned with ease, thusly lowering the probability that a court would find facts supporting this prong.¹⁶³ Substantive unconscionability, on the other hand, may be easier to meet. This prong focuses on the actual terms of the agreement rather than its formation.¹⁶⁴ Typically involving contract terms so one-sided as to "shock the conscience" or that impose oppressive terms.¹⁶⁵

In *Davidson & Associates, Inc. v. Internet Gateway, Inc.*, the Eastern District of Missouri held that the EULA for Blizzard's Battle.net stipulating that consumers could not duplicate or distribute the program was not unconscionable.¹⁶⁶ This is a troubling result for gamers in some sense, but the courts have yet to address whether the term that allows companies to ban players from their accounts for any reason is unconscionable.

Substantively, a term that allows a company to ban a player for exercising speech¹⁶⁷ after the player potentially paid thousands of dollars for in-game items¹⁶⁸ is certainly enough to shock this writer's conscience. Oppression, when applying the substantive prong of unconscionability, occurs when the terms dramatically favor the stronger party.¹⁶⁹ Terms like those of Blizzard's EULA¹⁷⁰ favor Blizzard. The company can ban someone at their discretion, as evidenced by banning the Hong Kong-based Hearthstone player Blitzchung.¹⁷¹

Imagine a scenario (and it has likely already occurred) where a player had dedicated years to a game, spending thousands of dollars to procure items and currency, confident that they could get some of their money back by selling these

158. See *Blizzard Terms of Use*, *supra* note 39 (providing in the end use agreement that all virtual goods are owned by Blizzard).

159. *Davidson & Associates, Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004).

160. *Id.*

161. *Id.*

162. See *id.* at 1180. (finding no procedural or substantive unconscionability in a video game license agreement).

163. *Id.*

164. *Id.*

165. *Davidson*, 334 F. Supp at 1180.

166. *Id.*

167. *Victor*, *supra* note 8.

168. *Herzfeld*, *supra* note 20.

169. *Pardee Constr. Co. v. Superior Ct.*, 100 Cal. App. 4th 1081, 1091 (2002).

170. *Blizzard Terms of Use*, *supra* note 39.

171. *Victor*, *supra* note 8.

items for real money on the in-game market. Imagine further that the player, acting in good faith, incurred the ire of their favorite video game's producer and was consequently banned from the game. Because of the game's EULA—uncannily similar to Blizzard's own agreement—the player not only loses their favorite hobby but also their account's entire value, thousands of dollars and years of work gone.

A scenario like this is not too far from reality where professional players can be banned with little to no explanation.¹⁷² The question is, what would a court do with a situation such as this?

The element of surprise in a contract contributes to the procedural unconscionability of an agreement.¹⁷³ In the scenario above, a player would surely be surprised to find that actions unrelated to a company could result in the loss of their account and its value. And because EULAs can be changed with a moment's notice and are often full of difficult to understand language,¹⁷⁴ a player would likely be even more surprised by such an outcome. As for the substantive prong, courts tend to look at policy concerns to determine if the prong is met.¹⁷⁵ Here, it is hard to see what benefit the player derives from a term allowing them to be banned arbitrarily. Moreover, these terms present no risk to the company, instead leaving all the risk squarely in the players' laps.

These terms mean the more a player invests in the game, the more control a game company has over the player and in the case of some players this control might mean them forfeiting their free speech to protect the money and time they have committed to a game. Thusly, at least in some situations, it is possible that courts might find certain terms unconscionable, recognizing some property interest in video game currencies.

Unfortunately for gamers, making things more complicated are the arbitration clauses tucked into game EULAs. These clauses are likely why the caselaw is so sparse regarding video game EULAs. If the civil case never goes to court, then there is no way a judge can apply these common law doctrines. Epic, a gaming company, recently won a case against a gamer claiming the arbitration clause was unconscionable and thus did not reach the merits of the plaintiff's claim.¹⁷⁶ So long as arbitration clauses are enforced, gamers are not likely to even discuss unconscionability or unjust enrichment in front of a judge, let alone succeed on their claims.

E. Liquidated Damages

Another potential source of liability is contract rules regarding liquidated damages clauses. These clauses are considered unenforceable penalties if they

172. *Id.*

173. *Kinney v. United HealthCare Services, Inc.*, 70 Cal. App. 4th 1322, 1330 (1999).

174. *Id.* at 1332.

175. *In re Checking Acct. Overdraft Litig.*, 694 F. Supp. 2d 1302, 1320 (S.D. Fla. 2010); *see also Davidson & Associates, Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164, 1180 (8th Cir. 2005) (covering the policy concerns of the subjective prong test).

176. *Heidbreder v. Epic Games, Inc.*, No. 5:19-CV-348-BO, 2020 WL 548408 at *4 (E.D.N.C. 2020).

are unreasonable or disproportionate as compared with the number of actual damages that would be sustained.¹⁷⁷

However, even after accepting that there is some measurable value in a player's account, Blizzard's EULA, for example, does not contain a liquidated damages provision.¹⁷⁸ Rather, the only reference to a player's digital items is in the termination clause.¹⁷⁹ Although the clause's title is not decisive to its purpose,¹⁸⁰ the termination clause's content does not indicate it was meant to compensate for a breach.¹⁸¹ Instead, it is merely an aspect of the agreement meant to dispose of a player's claim to their items in the event of termination. Because it does not compensate for a breach, it is neither liquidated damages nor a penalty and thusly does not expose the company to liability though that avenue.¹⁸²

IV. RECOMMENDATION

A. *The Adjudicatory Solution*

When it comes down to virtual items and currency, consumers should be happy to hear that there is a chink in video game producers' armor in the form of state gambling regulations. At least for the use of these statutes, some courts have indicated or outright shown a willingness to impart value onto virtual currency that, according to many games' terms and conditions, should hold no value.¹⁸³ Additionally, unconscionability may provide a different avenue for judicial recognition of player property rights, at least in dramatic circumstances. Arbitration clauses certainly frustrate the use of the courts, though. Moreover, even if the consumer can get in front of a judge, unless some obscure gambling law applies and the game has just the right mechanic, then there is no legal recourse for the disgruntled player.

In the EU, a French court recently altered the way that software use licenses were interpreted, recognizing players' right to transfer digital software as if it were a physical good.¹⁸⁴ But such a declaration has not been made by the US courts and even if it were, there is no telling how this would apply to the trade of goods within the virtual world.

177. 25A C.J.S. *Damages* § 198 (2021); § 65:3. Distinction between penalties and liquidated damages, 24 Williston on Contracts § 65:3 (4th ed. 2020).

178. *Blizzard Terms of Use*, *supra* note 39.

179. *Id.*

180. 25A C.J.S. *Damages* § 203.

181. *Blizzard Terms of Use*, *supra* note 39.

182. *See Mobil Oil Corp. v. Tennessee Val. Auth.*, 387 F. Supp. 498, 512 (N.D. Ala. 1974) ("The phrase 'liquidated damages' means a sum stipulated and agreed upon by the parties, at the time of entering into a contract, as being payable as compensation for injuries in the event of a breach A penalty is an agreement to pay a stipulated sum on breach of contract, irrespective of the damage sustained") (quoting 22 AM. JUR. 2D *Damages*, §§ 212-213 (1965)).

183. *Blizzard Terms of Use*, *supra* note 39.

184. Paul Wozniak, *French Judge: Resale of Steam Games is Legal Under EU Law*, GAMEPRESSURE (Sept. 19, 2019, 8:57 PM), <https://www.gamepressure.com/newsroom/french-judge-resale-of-steam-games-is-legal-under-eu-law/z21197>.

For the most part, any solution by the courts would be a band-aid to the real problem, since the qualifications for property recognition require a lot of legal creativity on the plaintiff's part. Regardless of what the courts might rule, companies can easily circumvent any court pronouncement.

To do this, companies should steer clear of microtransactions that result in either more playtime or real-world wealth.¹⁸⁵ Currency exchanges, player cash markets, and even extended game time may give value to virtual currencies and personas under gambling statutes.¹⁸⁶ Unjust enrichment is also unlikely to be a problem for companies if they give the player playtime and do not advertise their game as anything but entertainment.¹⁸⁷ Lastly, worries of unconscionability may be assuaged if the terms are made more fair for players, allowing them to recover some value for their in-game purchases or by reducing the amount of discretion that companies have in banning players.¹⁸⁸

If a company wants to continue to have microtransactions, it should make sure to keep its monetary schemes unidirectional.¹⁸⁹ First, it should allow players only to spend their money on in-game items that do not provide potential added time playing the game and cannot be traded for real-world money. Second, it should make sure that the gameplay does not operate under a lottery-like system such as Entropia's.¹⁹⁰ By taking these steps, the company can reduce the chance that the game's content has any value beyond entertainment.

B. The Legislative Solution

An adjudicatory solution is likely not possible considering the state of property and contract law in the United States. Arbitration clauses written into game EULAs prevent players from ever reaching the courts.¹⁹¹ And if the case cannot be heard then even if a law is passed like that of the EU,¹⁹² or like that of California allowing for judges to void parts of a contract for unconscionability,¹⁹³ the legislature must first pass laws altering arbitration

185. See *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018) (holding that the game casino affected gameplay). See also *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 743 (N.D. Ill. 2016) (stating that in-game currencies "have a monetary value").

186. See generally *Kater*, 886 F.3d at 787 (holding that the game dealt with items of value); *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 319 (4th Cir. 2017) (holding that enhanced gaming experience provided value to the in-game currency); *Phillips*, 173 F. Supp. 3d 731, 741 (N.D. Ill. 2016) (stating that the player bought more time to play).

187. See *Mach. Zone*, 851 F.3d at 317 (affirming that the company did not get unjustly enriched due to the game); *Phillips*, 173 F. Supp. 3d at 744 (stating that the company allowed players to continue playing the games with purchased currency).

188. See *Davidson & Associates, Inc. v. Jung*, 422 F.3d 630, 632 (8th Cir. 2005) (holding that the terms of the usage agreement were fair).

189. See *Layer 1, 2, 3 and Beyond: The Search For The Cheapest and Fastest Microtransactions*, MYSTERIUM NETWORK, <https://mysterium.network/blog/layer-2-the-search-for-the-cheapest-and-fastest-microtransactions/> (last visited Apr. 26, 2021) (explaining how unidirectional payment models as best fit for microtransactions).

190. *Entropia Terms of Use*, *supra* note 54.

191. See generally *Heidbreder v. Epic Games, Inc.*, 438 F.Supp.3d 591, 598 (E.D.N.C. 2020) (holding that a player will have to arbitrate claims when there is an arbitration clause present).

192. *Wozniak*, *supra* note 184.

193. *When Is a Contract Unconscionable in California?*, WAGENSELLER L. FIRM, <https://wagensellerlaw.com/when-is-a-contract-unconscionable-in-california/> (last visited Apr. 26, 2021).

agreements before the recognition of players' property interests will matter at all.

Alternatively, the legislature could pass laws preventing the problem in the first place, such as banning gambling-like mechanics in video games. In fact, a bill was introduced in Minnesota prohibiting the sale of games with gambling like mechanics in the wake of EA's *Star Wars Battlefront II*'s loot box debacle.¹⁹⁴ This approach has also garnered public support as people fear that gaming companies are intentionally targeting children with their loot box mechanics.¹⁹⁵ Seeing the similarities between loot boxes and gambling, Belgium has taken a step yet unknown to the United States, declaring loot boxes illegal according to the Belgium Gaming Commission.¹⁹⁶ A grim warning to U.S. companies wanting microtransactions in their games: if the courts or the legislature decide to alter their positions on loot boxes, then the profitable mechanic may vanish for good.

Ultimately, the best legal solution to the issue of property in video games is to reform the law surrounding arbitration agreements and grant courts the ability to void contracts for unconscionability. This strategy avoids banning microtransactions while enabling the courts to protect players. These changes would help to create gamer-friendly contracts, in the form of less frivolous bans of players and the restoration of a player's virtual value if a player was banned.

C. *The Non-legal Solution*

The most successful way to solve the problem may not involve the law. Vocal consumers banding together to stand up to predatory business practices of the gaming world's largest companies has been successful before and may prove in time to be successful again. Money talks and consumers vote with their wallets. And non-gamers still contribute to video game marketing through consumption of streaming content on platforms like Twitch, making a loss of their support potentially deleterious to a company's profits.¹⁹⁷

The launch failure and then redemption of EA's *Star Wars Battlefront II* (2018) is an excellent example of how problems can be fixed with vocal consumer disapproval.¹⁹⁸ After an abysmal launch due to controversy surrounding its loot box mechanic, EA responded to consumer backlash by fixing many of the problems that plagued the game.¹⁹⁹ The company added free

194. Jason Bailey, *A Video Game 'Loot Box' Offers Coveted Rewards, but Is It Gambling?*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>.

195. 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>.

196. Tom Gerken, *Video Game Loot Boxes Declared Illegal Under Belgium Gambling Laws*, BBC (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306>.

197. Samson Amore, *Twitch Streams 1.1 Billion Hours of Content in March, Hitting Record High*, THE WRAP (Apr. 3, 2020, 11:47 AM), <https://www.thewrap.com/twitch-game-streaming-1-1-billion-hours-of-content-march-hitting-record-high/>.

198. Camden Jones, *EA's Star Wars: Battlefront 2 Is Officially Great Now*, SCREEN RANT (Feb. 28, 2020), <https://screenrant.com/star-wars-battlefront-2-ea-good-now-2020/>.

199. *Id.*

content, removed loot box systems, and altered the progression systems of in-game characters so that they were no longer tied to any random mechanic necessitating microtransactions.²⁰⁰ Today, the game is now heralded as a success, leading to an overall decline in the use of gambling tactics in the triple-A gaming industry.²⁰¹

Gamers should take note of the lesson learned from EA's kerfuffle: strong consumer advocacy can be a powerful tool where the legal system does not tread.

V. CONCLUSION

Despite what Blizzard and other companies' Terms & Conditions of video game accounts might say, players' accounts can hold real world value, and thus players deserve restitution when their accounts are banned or deleted frivolously. Video game companies should be careful when adding currencies to their games that have some real-world value, even if it is only in the form of additional playing time, as this might open companies up to legal liability.

Furthermore, state legislatures or Congress should respond to the rapidly developing world of videogaming by clarifying the property rights of gamers in virtual property by changing arbitration rules and by universally granting the courts the ability to void contract terms for unconscionability. As of now, without legislative intervention, the courts lack the tools to provide a good remedy for players. Therefore, gamers should make their voices heard, thus taking the problem into their own hands.

Virtual property has value, and it is time that governments and companies act like it.

200. *Id.*

201. *Id.*