

11. Regulating In-Game Monetization: Implications of Regulation on Games Production

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Abstract

A widening gap exists between the understanding of regulation 'on the books' and how regulation is exercised in practice. Utilizing the concept of regulatory space, I examine the on-going regulation of 'loot box' monetization within the video game industry. Over the period of 2014 to 2018, several legislative attempts to regulate loot boxes have occurred internationally. While each of these pieces of regulation, whether successful or not, is framed within specific nation-states, the shifting landscape of regulation surrounding monetization impacts production and consumption of games worldwide. I argue for a de-centred approach to examine regulation of loot boxes to incorporate the global interconnections of various actors, including corporations, nation state governments, consumers, and independent regulatory bodies.

Keywords: regulation, monetization, loot box, game industry, regulatory space

Introduction

Law and regulation are often presented as an all-encompassing set of principles applied evenly across society (Darian-Smith 2013). This perspective applies to how individuals generally think of regulation within industries, such as the video game industry and its long history of regulating sexual and violent content in games. However, individuals, and by extension institutions, are not passive recipients of regulation, but instead influence and shape law and regulation around them (Darian-Smith 2013). Much of the current

literature surrounding the intersection of law and society is centred around the state, but as society becomes increasingly globalized, new dynamic analyses are necessary for the processes of regulation, production, and consumption in industries that are fast-moving, and platform dependent, such as the video game industry. The video game industry is emblematic of many of the other entrepreneurial technologically inclined industries that continue to grow through the platformization of cultural production (Nieborg and Poell 2018). Examining how regulation processes occur, and impact this particular industry and its surrounding cultures and communities, helps to better understand regulation as a more generalizable process. One such case where regulation and the video game industry intersect is on the issue of monetization.

Recent shifts in monetization, or how developers generate revenue from its users, have resulted in new social crises surrounding the regulation of these industries (Dyer-Withford and de Peuter 2009; Nieborg 2011; 2016). As certain forms of monetization are deemed to be exploitative (such as the use of user data in generating advertising revenue or through the use of gambling-based mechanics), the study of monetization represents a new area of inquiry in games production studies and how they can be examined to understand production and consumption more contemporarily (Albarrán-Torres and Goggin 2014; King, Delfabbro, and Griffiths 2010), including how processes of critique impact industry practices (Perks 2019).

These gambling-like modes of monetization, commonly referred to as 'loot boxes,' have been a focus within critical games journalism, and in recent years have been a target of regulation by state and non-state actors. Attempts at regulation vary in success and failure, dependent on the relative power and position of those involved. For instance, China introduced targeted regulation towards gambling-based mechanics in games, while countries like Singapore previously attempted but ultimately could not pass legislation resulting in meaningful impact in developer practices. This paper provides a historical tracing of the loot box regulation controversy focused at its arguably most critical moment within the United States. Ideally, this will be indicative of the challenges associated with regulating emerging methods of monetization and the potential implications regulation has for production and consumption practices within the video game industry.

The regulation of loot boxes is an ongoing process and continues to develop to this day. However, the period between 2017 and 2019 saw increased international attention towards loot box regulation in games. I would argue that examining past cases of legislation is effective in determining the role of state and non-state actors for future regulation. This paper outlines theories

of regulatory space to help better understand the processes of regulation in the video game industry. I offer a contextualization of the current state of loot box regulation in the United States as it has developed between 2017 and 2019 using regulatory space as a theoretical lens. I draw upon journalistic writing published between this period on periodicals such as games-focused news sites *Polygon*, *PCGamer*, and *Kotaku* as well as more traditional news sites such as *CBC News*, *The Wall Street Journal*, and *CNBC*. This framework and case study illustrate how the complexity and pluralistic nature of modern regulatory structures occurs over time. I particularly focus on the relative power of discrete actors in the industry and how future attempts at regulation can work towards handling emerging methods of monetization, and potentially other developing forms of commodification. Finally, I discuss how the use of regulatory space ultimately requires a rethinking of regulation and how regulatory actors and those within these impacted industries approach it altogether. This paper concludes with a discussion for game studies scholarship to pay more attention to the role and process of regulation and law in games production.

Regulatory Space in Game Production

Capitalism is increasingly reliant on a complex interdependent relationship with regulation (Levi-Faur 2017). As corporations, such as video game studios, aim to accumulate as much capital as possible, they operate within systems of regulation and control that work not in public interest but to mediate these processes of capital accumulation (Ibid.). Regulation is widely considered a state process (Levi-Faur, 2014; Majone, 1997). However, the concept of regulatory space expands upon this conception and highlights the many different actors and processes of regulation that may impact games production. This approach builds upon Natasha Tusikov's (2016) work, which examines the interdependent processes of state and corporate actors, expanding the understanding of how regulation and actions by corporations shape the access and services available to individuals online.

Colin Scott (2001) argues that regulation should be considered a complex system of interdependent actors working with disparate resources. These resources can include knowledge, power, capital, or organizational capacity. This understanding of regulation pushes back against traditional thoughts on regulation, which, as previously mentioned, typically think of regulation as one centralized regulator, such as the state. In the video game industry, this means that to more accurately analyse regulation of games production

other actors need to be considered, such as game studios, lobbyist organizations (such as the Entertainment Software Association), self-regulatory organizations (such as the Entertainment Software Rating Board), more traditional governmental bodies, and consumers. In addition, it is key to avoid reducing these actors to a rigid hierarchical relationship, but rather to think of them as independently acting regulators within a larger space of regulation (Ibid.).

Reform of regulation by any actors can be understood as a renegotiation of the regulatory space. As the resources possessed are dispersed amongst many different actors, regulation reform is to be understood as a renegotiation of these resources between stakeholders (Ibid.). Traditional ideas of what regulation reform might look like typically are state-centred, such as government interventions. However, using regulatory space it is possible to consider how other stakeholders can become involved, such as games critics, consumer groups, smaller independent studios, and other actors in the industry. While there is often extensive government involvement in regulation reform, the concept of regulatory space proposes that the renegotiations based on the interdependence and bargaining of other actors are just as critically important for analysis (Ibid.). With all of these moving parts, it is important to think about how regulation may have far-reaching implications that are applied disproportionately to different actors – such as how regulations may impact independent game studios versus larger, massive video game companies such as Electronic Arts or Ubisoft.

The metaphor of regulatory space offers a more holistic approach to understanding regulation in the video game industry while also providing a more critical framework for mapping the power of different actors. Power in regulation is often considered to be determinative, and held solely by one actor, however Scott (2001) argues that there are alternative, informal forms of power and authority, which have to be acknowledged. In the video game industry, this could include the power of developers to organize and self-regulate, of consumers to utilize their purchasing power to influence development practices, or the work of third-party lobbyist groups to influence government legislation. As different forms of wealth, organization, or knowledge are dispersed across these many actors, their interdependence grows regardless of whether the power is formal or informal. For instance, certain controversies within the video game industry have resulted in different forms of self- and industry regulation due to the consistent coverage and power of critical games journalists (Perks 2019).

The work of regulation, then, as argued by Scott (2001), is standard setting and interpretation within industries. Regulations that are too specific are

often difficult to reinterpret or renegotiate, however, those that are too general often require more effort to define what does or does not fall under their regulation. This act of interpreting regulation is often done 'live' and amongst the regulators and communities that they impact (Scott 2001). Cycles of interpretation, adjustment, and discussion are more common rather than outright enforcement of regulations, making the process of regulation better defined as an act of constant re-shaping. The metaphor of regulatory space offers a more holistic understanding of the many ways renegotiation of regulation takes place, arguing for a potentially more collaborative understanding of governance in industries. It challenges the capacities of law and regulation, imbuing them with reflexivity and responsiveness, which is more accurate of what is observed in contemporary, fast moving industries like video game production.

Regulation within all industries is complex and the video game industry is no different. I argue that the video game industry is an ideal site to utilize the metaphor of regulatory space to examine the implications of regulation on games production. In addition, developers themselves are increasingly trying to collectively organize for unionization under the grassroots organization, such as the Game Workers Unite, which represents a potential new form of self-regulation in this industry (Weststar and Legault 2019). Overall, the video game industry offers an opportunity to unpack processes of regulation as they occur in real time, across different issues, and in conversation with the many different stakeholders. This live interpretation, renegotiation, and regulation between actors will be explored in the following section where I trace the period between 2017 and 2019 concerning the attempted and ongoing regulation of loot boxes in the United States.

Loot Boxes and Star Wars

Freemium monetization is the increasingly common standard within the video game industry. One form of freemium monetization is the use of loot boxes. Loot boxes can usually be purchased in-game with real world currency and opened for a chance to win select items from a larger pool of variable rarity and desirability (Koeder and Tanaka 2017). The emergence of loot box microtransactions draws similarities to traditional forms of chance-based gambling, such as slot machines (Heimo et al. 2016; Nielsen and Grabarczyk 2018; Spiker 2017; Zagal, Björk, and Lewis 2013). Loot boxes are examined within this analysis due to their prominence as a mode of monetization throughout the video game industry and the recent regulation controversies

surrounding them (Abarbanel 2018; Almaguer 2019; Schwidessen and Karius 2018). Linked to traditional gambling, loot boxes represent complicated hurdles for government regulation with a few successful legislative actions occurring internationally (De Kervenoael, Palmer, and Hallsworth 2013; Sithigh 2014). Just as more general regulation varies internationally, it is important to remember that gambling regulation does so as well, making loot boxes a difficult object to regulate globally.

This analysis is primarily drawn from journalistic writing that was published during the period of November 2017 to early 2019. I selected articles from games publications, scholarly games writing, mainstream writing on the topic of loot boxes, and critical games writing on loot boxes. This includes more traditional journalism, such as *The Wall Street Journal*, to more games industry focused writing, such as that found on *Polygon*. As I have argued elsewhere, journalistic writing impacts practices within the video game industry (Perks 2019). Calls for regulation typically originate from media, if there is no outcry regulation does not take place, once action is taken in the response of regulation the media then assesses it. For those articles that reference specific actions by third-parties, such as the Electronic Software Ratings Board (ESRB) and Entertainment Software Association (ESA), these documents were examined. However, I draw mainly on writing that covers these organizations' actions as I believe it is the response surrounding them that is most important to this article. Utilizing these pieces of writing, my analysis mainly serves to create a linear narrative capturing the different actors, their responses, and their negotiations in these moments of regulation. I do so in order to make apparent the many different moving pieces involved in regulation within an industry and how it can impact production, consumption, and labour.

These controversies became a key moment in the video game industry following the introduction of loot boxes into a critically acclaimed series and IP. Prior to the launch of *Battlefront II* on 17 November 2017, developed by Electronic Arts as an action-shooter video game based on the Star Wars film franchise, there was an immediate backlash to the introduction of loot boxes into the game (see Alexandra 2017; Frank 2017; Ore 2017). A large amount of content within the game (characters, cosmetics, upgrades, etc.) was locked behind a 'soft' paywall. Though these items could be unlocked through repeated play, players were upset that those willing to pay or 'gamble' their money, could unlock them quicker and arguably have an advantage over other players in the online competitive modes. This marked a controversial synthesis of microtransactions (Švelch 2017), typically found in freemium games developed by smaller studios (Nieborg 2016), with the production

value and size of a AAA multibillion-dollar game studio (Nieborg 2011). Players found themselves in a situation where publishers expected them to pay a high initial cost in addition to chance-based microtransactions to efficiently access all game content.

These criticisms quickly filled video game journalist sites, official and unofficial forums, and social media platforms. In response, developers of *Battlefront II* cut the prices of the loot boxes and ultimately disabled microtransactions altogether prior to the official launch of the game (Frank 2017). This controversy continued for many months (see Alexandra 2017; Ore 2017), and, at the time of writing in mid-2019, continues to unfold in the form of legislation, public statements by large studios, and tongue-in-cheek jabs by competitors. In the United States alone, several different lawmakers responded with attempted legislation for loot boxes. In addition, third-party organizations made efforts to educate and self-regulate the industry. All of this amidst a complicated relationship between developers, who arguably still work to make profit on their games, and their consumers, who felt a right to equitable and 'fair' monetization of the games they purchased. This section details a timeline of regulatory events from the start of the *Battlefront II* loot box incident in 2017 to the time of this manuscript's writing in 2019.

Before 2017, legislation already ruled that gambling within games using virtual currency was legal, so long as there were no ties to real world currency or value. However, this ignores the fact that loot boxes and other in-game purchases are originally bought with real world currency, even if they do not have any real-world value to be converted to after. It also overlooks the effects of problematic gambling, which can see individuals significantly impacted monetarily through repeated or excessive purchase of these loot boxes with responsibility for these actions placed solely on the individual (Alexius 2017). At the time of writing this chapter, loot boxes remain minimally regulated in the United States. Currently, most gambling laws specify that something of value must be received for an act to be considered gambling. While the ESRB has a seldom used rating of Adults Only (AO) when 'real gambling' is contained in a game, retailers rarely stock games with this rating and therefore developers and publishers do not often market them. While the items received from many loot boxes may not have a real-world exchange value, this current system nonetheless disregards that these items can hold other value (rarity, desirability, aesthetic value, etc.).

Following the initial discovery that *Battlefront II* would rely heavily on loot boxes during early access to the game, there was an initial negative outcry from consumers as early as October 2017. This included forms of boycotting and harassment campaigns on the studio's social media. While this may

initially not appear as a form of regulation, it is important to remember that regulatory space is made up of many actors, which can include consumers, and that actors possess varying forms of power. In this case, the initial response from consumers represented a form of consumer or purchasing power, which when exerted on Electronic Arts, resulted in the initial cutting of loot box prices and their subsequent removal from the game. However, rumours circled that it was pressure from Disney, the holding company of the *Star Wars* franchise, which resulted in the last-minute removal of all microtransactions (Needleman and Fritz 2017). In addition, this level of outcry from the gaming community was followed with an intense cycle of reporting on the loot box issue by video game journalist sites. These articles focused mostly on the role of the ESRB and the ESA in regulating developers and monetization more generally. It should be noted that the ESA and ESRB were both established by major video game companies themselves as a lobbyist organization and self-regulatory organization respectively.

The initial response from the ESRB and ESA was that loot boxes were not gambling, of which they stressed the voluntary and optional nature of their purchase and use (Schreier 2017). This was followed by several other developers who agreed that their use of loot boxes should not be considered gambling, and thus not regulated (Kerr 2018). Internationally, this echoed other statements by Electronic Arts officials who stated that loot boxes were, 'actually quite ethical and quite fun, quite enjoyable to people' in a United Kingdom parliamentary hearing (Bailey 2019). This framing by the ESRB, ESA, and large studios placed the onus on consumers to regulate themselves. Considering the regulatory space they were working in, they arguably enforced a massive amount of organizational capacity in an effort to control the image of loot boxes and how they would be considered by the public. Furthermore, they sought to avoid any direct regulation that would impede upon their business or require an alteration to current practices.

Consumers and journalists, however, were not satisfied with this initial response from all parties and continued to then pressure lawmakers to act. Hawaii state lawmakers first spoke out saying they would look into the issue of loot boxes and would attempt to introduce legislation as early as possible (Plunkett 2017). However, they noted that it would be beneficial if the industry chose to regulate itself. States would prefer industries regulate themselves, as it is often difficult to enforce legislation that is either too specific or too general. The work of balancing between the two is both time and resource consuming for states. Instead, the government attempted to put the onus on developers, but noted it would still act if necessary. During

this time, various small and independent developers came out against loot boxes, noting that they would not be implemented in their games. At the Electronic Entertainment Expo (E3), the premier trade-event for the video game industry, certain developers publicly took a jab at studios that monetize using loot boxes (Farokhmanesh 2018). Meanwhile, the iOS application store, where iPhone owners can download and purchase games for their phone, introduced regulation for developers according to which they must disclose the odds of loot boxes sold over the platform (Kuchera 2017).

Each of these cases represents different actors working within the regulatory space around the issue of loot boxes. Each actor possesses different forms and levels of power in these renegotiations. In addition, while the state may have been the focus of much of the initial reporting around loot box regulation, we can see how the actions of developers, consumers, and journalists are all equally important to understanding how regulation unfolds within an industry, and how it may unfold for other issues in games and similar future issues in other industries. While the initial bills introduced by Hawaii state lawmakers would eventually fail (Brestovansky 2018), the overall conversation continued to take place throughout 2018.

In January 2018, Washington lawmakers introduced legislation ordering the Washington State Gambling Commission to investigate loot boxes to determine if they should be considered gambling or if they would require specific forms of regulation (Mitchell 2018). Next month in February, another lawmaker in the United States brought up the issue of loot boxes to the Federal Trade Commission (FTC). The FTC eventually urged the ESRB to review how they approached loot boxes, specifically the ‘completeness’ of their review and regulation process as a pretense for future regulation that may come from the state (Crecente 2018). Following this, the ESRB agreed to now label games that included in-game monetization, such as loot boxes, and rolled out an educational campaign targeting parents on how to handle loot boxes and other in-game purchases (Schreier 2018). However, ESRB still asserted that loot boxes were not gambling and did not need to be regulated as such.

Several other states also attempted to regulate loot boxes. In April 2018, Minnesota lawmakers introduced a bill to prohibit the sale of games with loot boxes to those under 18. In May 2019, a Missouri senator introduced a bill that would ban loot boxes and pay-to-win microtransactions. The International Game Developers Association (IGDA), a non-profit association meant to support game developers, urged the industry to self-regulate to avoid state regulations. The IGDA proposed several areas for the industry to target, including not marketing loot boxes to children, to disclose the

odds of loot boxes, and to educate parents (Santangelo 2018). Outside of state involvement, OpenCritic, a review aggregation website for video games meant to aid consumers, started to include information on loot box content in games (Gach 2019). Most recently, in August 2019, the ESA stated that several large studios including Microsoft, Nintendo, and Sony would begin developing requirements for loot boxes to disclose odds in game, and that other publishers and studios within the ESA would also follow suit (Hall 2019).

Discussion

The initial lack of regulation surrounding loot boxes combined with their profitability arguably made them attractive for developers. However, as David Levi-Faur (2017) would argue, the newly introduced regulation of loot boxes also acts as an incentive towards other forms of monetization, ones that may be more ethical. In the case of *Battlefront II*, Electronic Arts shifted their monetization towards directly purchasable virtual items over loot boxes, which could arguably be considered to be more ethical. When regulated, these processes become institutionalized and attractive for other economic actors. Regulation can be a method of defining, creating, and regulating new behaviours and is perhaps crucial as modern monetization continues to develop (Levi-Faur 2017). However, regulatory capitalism fails to account for the plurality of actors and interactions of regulation in practice. The metaphor of regulatory space offers the necessary framework to track these renegotiations around industry practices and to better understand the actors and resources that are engaged.

Regulatory capitalism posits that regulation is to be expected, especially as certain forms of capital accumulation are proven to be profitable, and this was truly the case with loot box monetization. As pointed out earlier, freemium monetization is increasingly utilized in the video game industry resulting in high profit margins for studios (Nieborg 2016). However, as showcased in the case study above, this process is messy and requires specific attention to all parties involved, including consumers, journalists, third-party organizations, and lawmakers. Regulatory space offers a clearer understanding that can trace these actors and pays close attention to modes of power that are engaged in renegotiations. The introduction of these theories, and potentially others from the discipline of law and society, is critical at a time when the video game industry is increasingly called to regulate its practices, communities, and products.

Regulation arguably acts as a mediator between these relationships and negotiations (Scott 2001). In addition, it goes further to 'constitute and mediate' these processes of capitalism (Levi-Faur 2017, 289). While it appears that more traditional forms of regulation may be slow-moving or unsuccessful in the United States, there are clear cases highlighted where other forms of regulation or use of power is more successful. For example, while several bills have failed, power exerted from consumers, journalists and lawmakers pressuring the ESRB to re-evaluate their ratings and policies has led to acknowledgement of in-game monetization on labelling and the creation of an educational campaign for parents. In addition, this same pressure led to the FTC working alongside the ESA, which represents large multi-billion-dollar companies like Nintendo and Sony, leading to announcements by these and other studios that they would begin disclosing the odds of loot boxes in their games.

While the focus of this chapter was limited to the United States, it is important to consider the globalized nature of the conversation surrounding loot boxes. Regulatory space is a metaphor that can be stretched not simply to new areas like game studies, but also internationally. China has successfully been able to regulate loot boxes, and did so before the initial outcry resulting from *Battlefront II* (McAloon 2016). However, developers there have worked around the limitations, though certain policies like the disclosure of odds are still arguably successful (Ziebart 2017). In addition, there have been past attempts to regulate loot boxes in countries like Singapore, all of which could be examined more closely using a law and society lens (Wee 2014). As argued previously, bringing together more traditional theories utilized in game studies, such as platform capitalism and economic platform studies of monetization, combined with more underutilized theories from the discipline of law and society provides new insights into how this industry functions and will proceed. Moreover, how future shifts in the industry's monetization or other industries may begin to be traced.

Conclusion

For now, loot boxes appear to be a turning point for the video game industry. As legislative processes continue to unfold internationally and self-regulatory groups shift blame, resorting to tactics of avoidance, it is key to trace and understand the actors involved in these processes. The role of state and non-state actors is dependent on their power within these spaces and directly shapes how they can negotiate. Effective regulation of loot boxes, and other

forms of commodification, is then not centrally located, nor dependent on any single actors. This lends itself to the notion that alternative forms of regulation should be considered outside of traditional legislation by state actors. In addition, other forms of regulation may be more successful, and arguably have been when examining how video game companies continue to respond to pressure, resulting in transformation within industries.

In the case of *Battlefront II*, it was not any direct state regulation that resulted in meaningful change to their monetization. Instead, it was a combination of rumoured pressures internally to avoid any damage to the *Star Wars* franchise too close to the release of their next blockbuster hit and crisis management on the part of Electronic Arts to avoid losses. In the end, Electronic Arts did report losses and placed the blame mainly on the loot box issue itself (Sarkar 2018). In addition, they would later note that loot boxes would still be present in future games. This crisis itself still led to changes within the wider industry, as some developers noted that they would not be including loot boxes in their games to avoid any ethical or PR issues (Cleaver 2017; Messner 2017). Whether or not Electronic Arts decides to keep loot boxes, their original implementation of them, the regulatory response, and the resulting negotiations between different actors changed how the industry and developers view loot boxes.

While the United States has yet to successfully introduce any meaningful regulation, other countries have been more successful. This further complicates the practices of developers as they increasingly must contend with differences between states. In the case of Belgium, which successfully introduced legislation to ban loot boxes, companies have been pushing back against the regulation (BBC News 2019). As this paper argues, regulation and the renegotiations that surround it do matter for issues of production and consumption of games. Game studies scholars interested in the intersections of the industry, the games developers produce, and the conditions under which they work should pay close attention to how they play out. As the industry begins to grapple with unionization (see Weststar & Legault, 2019) and as the issue of monetization continues, studies that focus on regulation and trace its relative failures, successes, and impacts throughout the industry will prove to only expand on the scope of game studies more broadly. In the case of Electronic Arts, they appear to be trying to re-frame the definition of loot boxes in hopes of sliding past regulations. Meanwhile, actions are being taken by other developers and third-party organizations to either confront or avoid this controversy altogether. Ultimately, regulation undeniably shifts and changes developer practices and it is important to understand that there is no single actor working through these negotiations throughout these spaces, but rather, many players on the board.

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