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# The High Cost of Free-To-Play Games: Consumer protection in the New Digital Playground

Erik Allison

*Southern Methodist University*, [eallison@mail.smu.edu](mailto:eallison@mail.smu.edu)

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# THE HIGH COST OF FREE-TO-PLAY GAMES: CONSUMER PROTECTION IN THE NEW DIGITAL PLAYGROUND

*Erik Allison\**

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\* J.D. Candidate, SMU Dedman School of Law, May 2018; B.A. University of Oklahoma, August 2015. I would like to thank my girlfriend, Rebecca Buedden, for her support during this project. I would also like to thank my parents and my sisters for always telling me why I am wrong.

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## I. INTRODUCTION

WHILE mobile games such as *Candy Crush Saga* and *Clash of Clans* cost nothing to download, these games frequently prompt players to use real money to purchase the games' digital currency, in-game lives, or new levels of the game not available to free users.<sup>1</sup> These free-to-play games with in-app purchases are also known as "freemium" games, because they provide a free game but charge money

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1. See Ramin Shokrizade, *The Top F2P Monetization Tricks*, GAMASUTRA (June 26, 2013, 8:16 AM), [http://www.gamasutra.com/blogs/RaminShokrizade/20130626/194933/The\\_Top\\_F2P\\_Monetization\\_Tricks.php](http://www.gamasutra.com/blogs/RaminShokrizade/20130626/194933/The_Top_F2P_Monetization_Tricks.php) [<https://perma.cc/XE25-XUF9>].

for premium content.<sup>2</sup> The game developers behind free-to-play gaming have developed this concept around the idea that gamers do not want to risk an initial investment on a game that might not hold their interest, but are more willing to try a free game in which they may choose to invest more time and, possibly, money.<sup>3</sup> Thus, game developers have created games that are initially appealing, allowing rewarding early play, but eventually become less and less rewarding.<sup>4</sup> As the game becomes less rewarding, it persistently solicits the player to purchase items that enhance or speed up the gameplay to make it more rewarding.<sup>5</sup> For example, when the player is out of resources, lives, or levels, the game might direct the user directly to the in-game store, which may be animated in the same way as the gameplay.<sup>6</sup> The free-to-play game industry has found these methods extremely effective in eliciting purchases from adult players,<sup>7</sup> but more concerning is their effect on the behaviors of children under the age of thirteen. While there is certainly some question about the ethics of these methods when used against adult players, the use of these methods in games marketed to children passes the line from unethical to illegal.

The Federal Trade Commission Act was designed to protect consumers against unfair trade practices and to change with the times as new types of malicious practices arise.<sup>8</sup> Furthermore, state law protections have mirrored federal protections in order to provide consumers with private causes of action.<sup>9</sup> In federal enforcement actions, the Federal Trade Commission (FTC) has diligently pursued new sources of unfair practices, such as unauthorized purchases, in the industry of free-to-play gaming and in-app purchases (IAPs).<sup>10</sup> But these procedures are meant to deal with unfair practices on a case-by-case basis, not for sweeping regula-

2. *The Psychology of Freemium*, PSYCHGUIDES.COM, <http://www.psychguides.com/interact/the-psychology-of-freemium/> [<https://perma.cc/3ENB-2JLM>] (last visited Apr. 17, 2017).

3. Pascal Luban, *The Design of Free-To-Play Games: Part 1*, GAMASUTRA (Nov. 22, 2011), [http://www.gamasutra.com/view/feature/134920/the\\_design\\_of\\_freetoplay\\_games\\_.php?page=1](http://www.gamasutra.com/view/feature/134920/the_design_of_freetoplay_games_.php?page=1) [<https://perma.cc/PW75-BULZ>].

4. *See id.*

5. *See id.*

6. *See The OFT's Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 11, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

7. *See* Mike Rose, *Chasing the Whale: Examining the Ethics of Free-to-Play Games*, GAMASUTRA (July 9, 2013), [http://www.gamasutra.com/view/feature/195806/chasing\\_the\\_whale\\_examining\\_the\\_.php](http://www.gamasutra.com/view/feature/195806/chasing_the_whale_examining_the_.php) [<https://perma.cc/C9G9-9BRR>].

8. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

9. *See* 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); CONN. GEN. STAT. ANN. § 42-110b (West 2017); FLA. STAT. ANN. § 501.201 (West 2017); HAW. REV. STAT. § 480-2 (West 2017); LA. REV. STAT. ANN. § 51:1401 (2017); ME. REV. STAT. ANN. tit. 5, §§ 206-214 (2017); MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 2017); NEB. REV. STAT. ANN. §§ 69-1601 (West 2017); N.C. GEN. STAT. ANN. § 75-1.1 (West 2017); S.C. CODE ANN. § 39-5-10 (2016); VT. STAT. ANN. tit. 9, §§ 2451-2462 (West 2017); WASH. REV. CODE ANN. § 19.86.101 (West 2017); W. VA. CODE ANN. § 46A-6-101 (West 2017).

10. *See FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016); Complaint at 6, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014).

tions. Instead, the rule-making power of the FTC was specifically designed to implement these types of industry-wide regulations.<sup>11</sup>

The exploitative practices involved in free-to-play games demand comprehensive action. It is time for the FTC to introduce regulation of free-to-play games marketed to children, requiring disclosures of relevant costs before download, clear divides between gameplay and purchases, and limitations on the type of free-to-play models allowed in games marketed to children. To allow freely informed decisions by parents and children as well as a direction for innovation in the gaming industry, the FTC should follow the lead of the United Kingdom's consumer protection legislation and administrative guidelines in crafting new regulations.

This paper will continue in Part II by introducing and discussing some of the common free-to-play models. Both the neophyte and the initiated gamer may be unfamiliar with some of the fine points of how free-to-play games operate, and an understanding of the business model, user interface, and common game mechanisms of free-to-play games is a requisite for the remainder of this paper. Additionally, Part II will provide some scientific research into the coercive effects of free-to-play games. Then, Part III will discuss both the historical development and current state of consumer protection law as it relates to free-to-play games marketed to children. Also, Part III will show that there is a myriad of possible avenues by which individual consumers or the FTC can take action against the free-to-play game developers who violate consumer protection laws. Then, Part IV will discuss the pros and cons of using state law claims or FTC enforcement actions to eliminate unfair and deceptive practices from free-to-play games targeted at children. Part V will present an alternative solution to the analysis: the FTC should exercise its rule-making power to directly regulate free-to-play games marketed to children. Finally, Part VI will conclude with some closing remarks regarding the best course of action to be taken in the industry.

## II. UNDERSTANDING THE FREE-TO-PLAY GAME

For readers who have not played a free-to-play game before, it might be helpful to understand how a typical free-to-play game operates. In the mobile game sensation, *Clash of Clans*, the player's continuous objective is to build a fortress, replete with troops and resources, which the player can defend against raids by other online players.<sup>12</sup> The player can also raid other players' fortresses in return, which yields resources for a victorious raid.<sup>13</sup> Raids can be carried out whenever a player has built up enough resources (the game uses virtual gold as a currency) to develop

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11. 15 U.S.C.A. § 57a(a) (Westlaw through Pub. L. No. 114-327).

12. See Mike Foster, *The Waiting Game: Hands-on with Clash of Clans*, ENGADGET (Jan. 22, 2014), <http://www.engadget.com/2014/01/22/the-waiting-game-hands-on-with-clash-of-clans/> [https://perma.cc/6DVP-J45V].

13. See *id.*

the necessary troops.<sup>14</sup> In order for a player to build, for example, a mine to capture the gold necessary to build and upgrade walls, troops, and structures, the player must spend gold in order to build it.<sup>15</sup> Furthermore, the player must subsequently wait a period of time for the mine's completion, and then wait again while it produces gold.<sup>16</sup> During the early stages of the game, immediately after download, the player is given a certain amount of gold to start and some free structures.<sup>17</sup> Additionally, in the earlier stages of the game, the buildings take a short time to complete, usually seconds or minutes.<sup>18</sup> By this process, the player sees immediate results and receives immediate satisfaction.<sup>19</sup> However, as the game progresses, the wait times for production increase exponentially.<sup>20</sup> Wait times to upgrade a single structure may take up to forty-five days to complete.<sup>21</sup> Additionally, only a certain number of structures can be worked on at a time, unless the player purchases another builder, which costs an unusually high amount of gold.<sup>22</sup>

The repetitive gameplay of *Clash of Clans* would seem to encourage players to play in short bursts; players can play for fifteen to thirty minutes, and then come back the next day to check on progress and play more.<sup>23</sup> However, the moment when no more action can be taken due to wait times or lack of resources, the game offers the player another option: spend between ninety-nine cents and ninety-nine dollars for decreased wait times or lump sums of resources.<sup>24</sup>

According to Gamasutra author Pascal Luban, there is at least one reason why free-to-play games are designed to encourage consistent but brief gameplay: “[t]o create frustration in the player, and to stimulate him to purchase the items that would let him continue playing the game.”<sup>25</sup> These are the in-app purchases (IAPs) about which this paper is concerned. The game is designed to reel in the player at the beginning with quick, consistent bursts of dopamine from gratifying activities, and then begin withholding gratification unless the player makes IAPs.<sup>26</sup>

Most players simply wait or walk away from the game when progress is frustrated by a lack of resources or a long wait.<sup>27</sup> Only a small percentage of the players, around 1.9% for some free-to-play games, actually engage

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See* Foster, *supra* note 12.

19. *See* Luban, *supra* note 3.

20. *See* Foster, *supra* note 12.

21. *See id.*

22. *See id.*

23. *See* Luban, *supra* note 3.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See Swrve Monetization Report 2016*, Swrve, 9 (2016), <https://www.swrve.com/images/uploads/whitepapers/swrve-monetization-report-2016.pdf> [<https://perma.cc/JYH4-5GKF>].

in IAPs in a given month.<sup>28</sup> Problematically, according to a Swrve study, about 48% of free-to-play game revenue comes from only 0.19% of gamers.<sup>29</sup> This 0.19% of players is the category of players the free-to-play gaming industry calls “whales.”<sup>30</sup> Like a slot machine, the game is designed to psychologically and biochemically elicit the desired response in the player: just one more quarter—but in this case, the machine will also accept one hundred dollars at a time.<sup>31</sup> This is all made even more concerning by the fact that free-to-play games are not played at an age restricted casino. Rather, they reside on phones and tablets that are constantly at the fingertips of users.

Finally, free-to-play gaming is big, big business—and growing rapidly.<sup>32</sup> According to one industry consultant, the big surge in free-to-play games does not represent a new type of game, but rather “a deep revolution that is affecting most aspects and actors of the game industry.”<sup>33</sup> To give a sense of just *how* big this revolution has become, consider the following statistics: In 2017, mobile games accounted for a 25.04% share of active apps in the Apple App Store.<sup>34</sup> “In 2013 alone, in-app purchases’ share of the Apple App Store’s total revenue from the top 200 apps grew from 77% to 92%.”<sup>35</sup> “In the US alone, 180.4 million consumers will play games on their mobile phones in 2016, representing 56% of the population and a whopping 70% of all mobile phone users.”<sup>36</sup> As such, any effort to regulate free-to-play gaming will likely come under intense scrutiny.

### III. THE DEVELOPMENT AND CURRENT STATE OF CONSUMER PROTECTION LAW IN THE UNITED STATES

Consumer protection in the United States has been legislated at the federal level by the Federal Trade Commission (FTC), as well as on the state level by various state-enacted consumer protection statutes.<sup>37</sup> Sec-

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28. *Id.* at 2.

29. *Id.* at 9.

30. *See* Rose, *supra* note 7.

31. *See* John Doe, *When Does Social Gaming Become Gambling?*, FLUSHDRAW (May 25, 2015), <http://www.flushdraw.net/news/when-does-social-gaming-become-gambling/> [https://perma.cc/DBH2-KTTT].

32. *See* *Most Popular Apple App Store Categories in December 2016, by Share of Available Apps*, STATISTA.COM, <https://www.statista.com/statistics/270291/popular-categories-in-the-app-store/> [https://perma.cc/YW24-B3FE] (last visited Apr. 15, 2017).

33. Luban, *supra* note 3.

34. *See* Statista, *supra* note 32.

35. *See* PsychGuides, *supra* note 2.

36. *How the Free-to-Play Model Captured the Mobile Gaming Market, Why It's Proven Problematic, and How to Fix It*, BUSINESS INSIDER, (Apr. 26, 2016, 2:00 PM), <http://www.businessinsider.com/the-mobile-gaming-report-market-size-the-free-to-play-model-and-new-opportunities-to-market-and-monetize> [https://perma.cc/F4BQ-BHGX].

37. *See* 15 U.S.C.A. § 45 (West, current through 114-327); 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); CONN. GEN. STAT. ANN. § 42-110b (West 2017); FLA. STAT. ANN. § 501.201 (West 2017); HAW. REV. STAT. § 480-2 (West 2017); LA. REV. STAT. ANN. § 51:1401 (2017); ME. REV. STAT. ANN. tit. 5, §§ 206–214 (2017); MASS. GEN. LAWS ANN.

tion 5 of the Federal Trade Commission Act (FTC Act) was enacted in 1914, prohibiting “unfair methods of competition.”<sup>38</sup> However, in 1938 the statute was amended to prohibit also “unfair or deceptive acts or practices.”<sup>39</sup> It was always the intent of the legislature for the FTC Act to prohibit all unfair or deceptive practices, but as the House Report states: “It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.”<sup>40</sup>

#### A. THE SUCCESS OF PREVIOUS FTC ATTEMPTS TO PROMULGATE RULES PROTECTING CHILDREN HAS BEEN MIXED

In 1980, Congress amended the FTC’s rule-making authority following an FTC attempt to regulate advertising to children.<sup>41</sup> The amendment removed the FTC’s authority to promulgate rules concerning advertising to children under an “unfairness” theory.<sup>42</sup> The proposed “Kidvid” rule that led to this congressional response attempted to accomplish three sweeping reforms: (1) an outright ban on all television advertising to viewerships comprised of a high proportion of extremely young children; (2) a ban on advertising of unhealthy foods to older viewerships; and (3) a requirement that advertisements of unhealthy foods to older children contain nutritional warnings, paid for by the advertisers.<sup>43</sup> The ensuing congressional action was a response to sharp criticism—even among reputedly liberal-minded news outlets—that the FTC’s proposed rule overreached FTC authority.<sup>44</sup> According to a 2014 FTC discussion of the issue, the proposed rule was ill-advised, especially when considering that children comprised at least 30% of the viewership of only one television program during the time when the rule was proposed—Captain Kangaroo.<sup>45</sup>

In addition to the notoriously disastrous Kidvid proposal, the FTC has succeeded in two efforts to regulate in the area of consumer protection of

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ch. 93A, §§ 1–11 (West 2017); NEB. REV. STAT. ANN. §§ 69–1601 (West 2017); N.C. GEN. STAT. ANN. § 75-1.1 (West 2017); S.C. CODE ANN. § 39-5-10 (2016); VT. STAT. ANN. tit. 9, §§ 2451–2462 (West 2017); WASH. REV. CODE ANN. § 19.86.101 (West 2017); W. VA. CODE ANN. § 46A-6-101 (West 2017); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

38. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

39. Wheeler-Lea Act, ch. 49, § 5, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (West, current through P.L. 114-327)); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

40. H.R. REP. NO. 63-1142, at 19 (1914); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

41. See 15 U.S.C. § 57(h) (West, current through P.L. 114-327); see also Carol J. Jennings & Mary Koelbel Engle, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present* (based on J. Howard Beales, Remarks at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection: Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation (Mar. 2, 2004)), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf).

42. See 15 U.S.C.A. § 57(h) (West, current through P.L. 114-327).

43. See Jennings & Engle, *supra* note 41, at 6.

44. See *id.* at 7–8.

45. See *id.* at 9–10.



children.<sup>46</sup> First, under the Telephone Disclosure and Dispute Resolution Act, the FTC promulgated the “900 Number Rule” in 1992, which “bans the advertising of 900 number services to children under the age of 12 and requires ads directed to older children, ages 12 to 17, to disclose clearly that they must have a parent’s permission to call.”<sup>47</sup> Second, under the Children’s Online Privacy and Protection Act, the FTC promulgated a rule “governing the online collection of personal information from children under the age of 13.”<sup>48</sup>

#### B. STATE CONSUMER PROTECTION LAWS HAVE EMERGED TO PROVIDE A PRIVATE CAUSE OF ACTION

Because the FTC Act did not include a private cause of action, states later enacted “little FTC” statutes allowing private causes of action for damages either for unfair competition or unfair trade practices.<sup>49</sup> However, due to fears that private actions such as these could be used by plaintiffs to harass defendants with frivolous suits, some state acts were amended to require “that the plaintiff consumer have suffered a loss as a result of his purchase.”<sup>50</sup> Specifically, the Maine consumer protection statute was amended to require that a plaintiff have “suffer[ed] any loss of money or property, real or personal.”<sup>51</sup>

#### C. CALIFORNIA STATE LAW RECOGNIZES A CAUSE OF ACTION FOR UNAUTHORIZED IN-APP-PURCHASES MADE BY CHILDREN

As IAPs began to dominate the gaming market, class action lawsuits and FTC enforcement actions began to roll in. In 2011, Apple faced a class action lawsuit, *In re Apple In-App Purchase Litigation*, wherein parents sought reimbursement under California consumer protection law for unauthorized IAPs made by children due to Apple’s deceptive and unfair trade practices.<sup>52</sup> Prior to the lawsuit, the Apple app store required the entry of the account holder’s password in order to authorize IAPs.<sup>53</sup> However, after the password had been entered once, Apple allowed the user to make subsequent purchases without password authorization for a

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46. *See id.* at 5.

47. *Id.*

48. *Id.*

49. *See* 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); CONN. GEN. STAT. ANN. § 42-110b (West 2017); FLA. STAT. ANN. § 501.201 (West 2017); HAW. REV. STAT. § 480-2 (West 2017); LA. REV. STAT. ANN. § 51:1401 (2017); ME. REV. STAT. ANN. tit. 5, §§ 206–214 (2017); MASS. GEN. LAWS ANN. ch. 93A, §§ 1–11 (West 2017); NEB. REV. STAT. ANN. §§ 69–1601 (West 2017); N.C. GEN. STAT. ANN. § 75-1.1 (West 2017); S.C. CODE ANN. § 39-5-10 (2016); VT. STAT. ANN. tit. 9, §§ 2451–2462 (West 2017); WASH. REV. CODE ANN. § 19.86.101 (West 2017); W. VA. CODE ANN. § 46A-6-101 (West 2017); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

50. *See* *Bartner v. Carter*, 405 A.2d 194, 202 (Me. 1979); *see also* ME. REV. STAT. ANN. tit. 5, § 213 (2017).

51. ME. REV. STAT. ANN. tit. 5, § 213 (2017).

52. *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1032 (N.D. Cal. 2012).

53. *Id.* at 1033.

fifteen-minute interval.<sup>54</sup> Parents claimed that they were unaware that subsequent purchases, which totaled between \$99.99 and \$338.72 at a time, could be made during the fifteen-minute interval without password authorization.<sup>55</sup> Furthermore, parents contended Apple violated the Consumer Legal Remedies Act of California (CLRA) by marketing apps as “free or costing a nominal fee with the intent to induce minors to purchase in-app game currency.”<sup>56</sup> Additionally, parents argued that Apple “breached its duty to disclose material facts about the game currency embedded in these gaming apps.”<sup>57</sup> While Apple moved to dismiss the action for failure to state a claim, the district court upheld the parents’ cause of action under the CLRA.<sup>58</sup>

In addition to the CLRA claim, the parents claimed that Apple violated the California Unfair Competition Law (UCL), alleging that “Apple engaged in unlawful, unfair, fraudulent and/or deceptive business acts and practices in violation of the UCL by advertising, marketing, and promoting apps as free or at a nominal cost with the intent to lure minors to purchase game currency.”<sup>59</sup> Again, the court denied Apple’s motion to dismiss the parents’ cause of action under the UCL.<sup>60</sup> Following the district court’s denial of Apple’s motion to dismiss, Apple settled the class action suit, allowing the settlement class members to apply for and receive refunds for unauthorized purchases.<sup>61</sup>

#### D. THE FTC REQUIRES THAT ALL IN-APP-PURCHASES ARE AUTHORIZED BY PASSWORD APPROVAL

*In re Apple* roused an FTC enforcement action regarding Apple’s IAP procedures. The FTC concluded that Apple’s IAP billing practices violated the FTC Act, but Apple reached a settlement with the FTC and a consent agreement and order was issued on March 25, 2014.<sup>62</sup> The FTC ordered refunds of at least 32.5 million dollars and required more detailed disclosures upon authorization of IAPs.<sup>63</sup> These requirements were as follows:

A. If consent is sought for a specific In-App Charge: (1) the In-App Activity associated with the charge (as provided to Apple by the App’s developer); (2) the specific amount of the charge; and (3) the account that will be billed for the charge; or

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54. *Id.*

55. *Id.* at 1033–34.

56. *Id.* at 1038.

57. *Id.*

58. *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1038–39.

59. *Id.* at 1040.

60. *Id.* at 1041.

61. *See* Unopposed Motion for Preliminary Approval of Class Action Settlement; Certification of Settlement Class; and Approval of Form and Content of Proposed Notice, at 5–6, *In re Apple In-App Purchase Litig.*, (No. 11-CV-1758), 2013 WL 673488 (N.D. Cal. Feb. 22, 2013).

62. Decision and Order at 1, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014).

63. *Id.* at 3–4.

B. If consent is sought for potential future In-App Charges: (1) the scope of the charges for which consent is sought, including the duration and Apps to which consent applies; (2) the account that will be billed for the charge; and (3) method(s) through which the Account Holder can revoke or otherwise modify the scope of consent on the device, including an immediate means to access the method(s).<sup>64</sup>

The FTC order focused entirely on pre-purchase disclosures and the password authorization of already-initiated IAPs and did not discuss disclosures at the point of downloading the app or at the point of advertising the app.<sup>65</sup> Apart from requiring refunds, the sole intent of the order is to ensure that children cannot make IAPs without parental consent.<sup>66</sup> The order accomplishes its goal by ensuring that every individual IAP requires password approval.<sup>67</sup>

E. FAILURE TO OBTAIN PASSWORD APPROVAL FOR IN-APP-PURCHASES MADE BY CHILDREN CONSTITUTES A VIOLATION OF THE FTC ACT

In August 2012, the FTC began investigating Amazon for its IAP billing and advertising practices, and it subsequently brought an enforcement action for violation of the FTC Act.<sup>68</sup> In April 2016, the district court granted the FTC's motion for summary judgment.<sup>69</sup> The district court agreed that Amazon's "billing of parents and other account holders for in-app purchases incurred by children 'without having obtained the account holders' express informed consent' [was] unlawful under Section 5 of the FTC Act, 15 U.S.C. § 45(n)."<sup>70</sup> The IAPs at issue in this case happened around the same time as those in *In re Apple* (and before the FTC order), and Amazon's IAP notifications and password requirements were even less stringent than Apple's.<sup>71</sup> Before Amazon was notified of the FTC investigation, Amazon did not require a password for "charges below \$20 or charges that, in combination, exceeded \$20."<sup>72</sup>

Specifically at issue in *FTC v. Amazon.com* was whether Amazon engaged in "unfair practices" under the three-part test of the FTC Act, which requires (1) causation, or likely causation, of substantial harm to consumers, (2) that the injury was not reasonably avoidable to consumers, and (3) that the injury was not outweighed by any countervailing benefits to consumers.<sup>73</sup> First, the court found that the FTC evidence

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64. *Id.* at 3.

65. *See id.*

66. *See id.* at 3–4.

67. *See id.* at 3.

68. *See* *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016).

69. *Id.*

70. *Id.*

71. *See id.*; *see also* Complaint at 1, *Apple, Inc.*, No. C-4444 (F.T.C. Mar. 25, 2014).

72. *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

73. *Id.*

satisfied the “substantial injury” element of the unfair practices test.<sup>74</sup> “An act or practice may cause substantial injury either by doing ‘small harm to a large number of people, or if it raises a significant risk of concrete harm.’”<sup>75</sup> Furthermore, the fact that consumers have knowledge of the actual harm is not material.<sup>76</sup> Rather, “[i]njury can be shown where consumers are ‘injured by a practice for which they did not bargain.’”<sup>77</sup> Here, the court not only found that the purchases themselves constituted substantial injury but also it found that any time spent seeking refunds added to the injury.<sup>78</sup> The FTC Act does not require that injury be monetary.<sup>79</sup>

Second, the court found that consumers could not reasonably avoid the injury.<sup>80</sup> “An injury is reasonably avoidable under Section 5 of the FTC Act if the consumer could have made a ‘free and informed choice’ to avoid it.”<sup>81</sup> Here, neither the disclosures regarding Amazon’s lax password authorization policy, nor the disclosures in the app store regarding the existence of IAPs in the apps persuaded the court that parents had “reason to anticipate the impending harm and the means to avoid it.”<sup>82</sup>

Finally, the court found that there were no countervailing benefits to the consumer or to competition offered by Amazon’s IAP practices.<sup>83</sup> Here, the court rejected Amazon’s argument that: “(1) ‘consumers prefer a seamless, efficient mobile experience,’ essentially, that failing to require a password was a benefit, and (2) that the general interest in innovation constitutes a benefit to consumers.”<sup>84</sup>

#### F. 15 U.S.C. 57A(A) AUTHORIZES THE FTC TO PROMULGATE RULES TO DEFINE UNFAIR OR DECEPTIVE ACTS OR PRACTICES

The FTC Act grants to the FTC authority to promulgate “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of section 45(a)(1) of the FTC Act.<sup>85</sup> While the FTC cannot introduce rules related to children’s advertising based on an “unfairness” theory, its ability remains unaffected to propose rules based on a theory that the advertising acts or practices are “deceptive.”<sup>86</sup> The FTC Act sets forth requirements for an informal hearing procedure by which notice is given to interested parties, who may give testimony or cross-examine any persons giving tes-

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

79. *Id.* (citing *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1158 (S.D. Cal. 2008)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

85. 15 U.S.C.A. § 57a(a)(1)(b) (Westlaw through Pub. L. No. 114-327).

86. *See id.* § 57a(h); *see also* Jennings & Engle, *supra* note 41, at 1, 8.

timony with regard to the proposed rule.<sup>87</sup> Furthermore, after a rule is promulgated, any interested party may petition for judicial review of the rule.<sup>88</sup> Finally, if the reviewing court finds that “the Commission’s action is not supported by substantial evidence,” it may hold the rule unlawful and set it aside.<sup>89</sup>

G. THE UNITED KINGDOM CONSUMER PROTECTION LAWS ARE  
SUPPLEMENTED WITH DETAILED ADMINISTRATIVE  
GUIDELINES CONCERNING FREE-TO-PLAY GAMES

The United Kingdom (the UK) passed the Consumer Protection from Unfair Trading Regulations Act (CPRs) in 2008.<sup>90</sup> The statute was designed to protect consumers from unfair, aggressive, or misleading commercial practices by merchants.<sup>91</sup> As opposed to the U.S. FTC Act, the CPRs go beyond simply prohibiting “unfair or deceptive acts or practices,” which must be defined on a case-by-case basis or through FTC rulemaking.<sup>92</sup> Rather, the legislation behind the CPRs gives examples of the type of behaviors that are prohibited as unfair, misleading, or aggressive.<sup>93</sup> For example, according to the CPRs, a trade practice is unfair if it “materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.”<sup>94</sup> Under the CPRs, a commercial practice contains a misleading omission if it “fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”<sup>95</sup> Finally, under the CPRs, a trade practice is aggressive if “it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence.”<sup>96</sup>

To supplement the CPRs in the industry of free-to-play gaming, the UK Office of Fair Trading Principles (OFTP) released administrative guidelines designed to give specific recommendations on how to create a conforming free-to-play game.<sup>97</sup> To that end, the principles give examples

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87. 15 U.S.C.A. § 57a(c) (Westlaw through Pub. L. No. 114-327).

88. *Id.* § 57a(e)(1)(A).

89. *Id.* § 57a(e)(3)(A).

90. The Consumer Protection from Unfair Trading Regulations, 2008, S.I. 2008/1277 (U.K.).

91. *See id.*

92. Compare 15 U.S.C.A. § 45(a)(1) (Westlaw through Pub. L. No. 114-327) (prohibiting unfair or deceptive acts or practices), with The Consumer Protection from Unfair Trading Regulations, 2008, S.I. 2008/1277, art. 2, ¶¶ 3–7 (U.K.) (setting out circumstances when a commercial practice is unfair).

93. *See* The Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008/1277, art. 2, ¶¶ 3-7 (U.K.).

94. *See id.* at ¶ 3.

95. *See id.* at ¶ 6.

96. *See id.* at ¶ 7.

97. *See generally* *The OFT’s Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 3–20, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

of game mechanisms and advertising practices that are compliant and non-compliant with the CPRs.<sup>98</sup> According to the OFTP guidelines, the CPRs prohibits:

a lack of transparent, accurate and clear up-front information relating, for example, to costs, and other information material to a consumer's decision about whether to play, download or sign up to a game[;] misleading commercial practices, including failing to differentiate clearly between commercial messages and gameplay[;] exploiting children's inexperience, vulnerability and credulity, including by aggressive commercial practices[;] including direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them[;] payments taken from account holders without their knowledge, express authorization [sic] or informed consent.<sup>99</sup>

#### IV. FREE-TO-PLAY GAMES TARGETED AT CHILDREN MAY VIOLATE STATE CONSUMER PROTECTION LAWS AND THE FTC ACT

Under existing laws, free-to-play games targeted toward children may run afoul of consumer protection laws. Even when marketing companies comply with the *In re Apple* order and *FTC v. Amazon.com* case as far as IAP authorization, there still may exist deceptive practices that violate the unfair practices prohibitions of the FTC Act and state consumer protection laws.<sup>100</sup>

As stated, both class action suits under state law and FTC enforcement have been effective in forcing app developers and sellers to reinforce protections against unauthorized spending.<sup>101</sup> However, these actions do not account for the possibility that some IAP practices might lead to coerced consent rather than informed consent.<sup>102</sup>

##### A. FREE-TO-PLAY GAMES TARGETED AT CHILDREN MAY VIOLATE STATE CONSUMER PROTECTION LAWS, BUT CONSUMER PROTECTION LAWS ARE NOT ADEQUATE TO REMEDY THE PROBLEM

There is certainly an argument that any unfair or deceptive practices inherent in free-to-play games should be dealt with at the state level via

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98. *See id.* at 3–18.

99. *Id.* at 2.

100. *See, e.g.*, 15 U.S.C.A. § 45 (Westlaw through Pub. L. No. 114-327); 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016); Complaint at 1, *Apple, Inc.*, No. C-4444 (F.T.C. Mar. 25, 2014); *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1040 (N.D. Cal. 2012).

101. *See FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600; Decision and Order at 2–6, *Apple, Inc.*, No. C-4444 (F.T.C. Mar. 25, 2014); *In re Apple*, 855 F. Supp. 2d at 1040–41.

102. *See The OFT's Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 2–5, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

state consumer protection laws, which allow for private causes of action.<sup>103</sup> By this method, parents can form class action lawsuits, as was the case in *In re Apple*, in order to effect change and enjoin malicious practices or seek damages.<sup>104</sup> For the purposes of this paper, I will discuss the possibility of prosecuting such a claim under California law, which was applied in *In re Apple*.<sup>105</sup>

### 1. California Consumer Legal Remedies Act

First, while it is possible that parents might find success by pursuing CLRA claims against unscrupulous game developers and sellers, this would not be the most efficient and effective way to regulate the industry because the CLRA is a private cause of action that requires plaintiffs to feel sufficiently harmed by practices they see as proscribed in order to be motivated to join class actions or file suit individually.<sup>106</sup> In order to successfully prove that IAPs in children's games violate the CLRA, parents must prove that these marketing practices qualify as one of the prohibited "unfair methods of competition [or] unfair or deceptive acts or practices."<sup>107</sup> The most likely way to prove this is by alleging that IAPs in children's games are "likely to mislead a reasonable consumer."<sup>108</sup> Furthermore, omissions are only actionable under the CLRA when there is a duty to disclose or when the defendant has made contrary representations.<sup>109</sup>

There are four circumstances under which a duty to disclose arises under California law: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from plaintiff; or (4) when the defendant makes partial representations but also suppresses some material facts."<sup>110</sup> Finally, an omitted fact is material if its disclosure would have caused the plaintiff to behave differently.<sup>111</sup>

In several material respects, the marketing of apps with IAPs make partial representations and conceal or omit facts, the disclosure of which might lead a reasonable parent to refrain from allowing his or her child to play a free-to-play game or from authorizing purchases initiated by the child.<sup>112</sup> In the case of Apple, oftentimes the only obvious disclosure present when downloading an app is the small print warning: "offers in-app

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103. See, e.g., 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); CAL. CIV. CODE § 1770 (West 2017).

104. See Cal. Civ. Code § 1780.

105. See *In re Apple*, 855 F. Supp. 2d at 1033.

106. See CAL. CIV. CODE § 1780.

107. *Id.* at § 1770(a).

108. *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1038 (N.D. Cal. 2012).

109. *Id.* at 1039.

110. *Id.*

111. See *id.*

112. See *id.*

purchases.”<sup>113</sup> However, parents are not made aware as to whether the game contains “hard gates” or “soft gates,” as one industry consultant Ramin Shokrizade describes.<sup>114</sup>

The warning, “offers in-app purchases,” would likely be misleading even when speaking of a game with soft gates—points in a game at which it is incredibly difficult or takes a great amount of time to advance without making IAPs.<sup>115</sup> However, such a disclosure is certainly deceptive in a game with hard gates—points in a game at which it is *impossible* to advance without making IAPs.<sup>116</sup> To say that such a game “offers” IAPs is both a partial representation and an intentional omission of the fact that the game will at some point require payment for continued play.<sup>117</sup> Certainly, the decision of a parent who never intends to authorize IAPs on whether to allow their child to play a game might hinge directly on whether the game will eventually require payment. As such, such an omission is likely material under California law.<sup>118</sup>

## 2. California Unfair Competition Law

The parents could be similarly successful in proving a cause of action under California’s UCL.<sup>119</sup> Under the UCL, a cause of action can be proved solely on the basis of: “(1) unlawful business acts or practices, (2) unfair business acts or practices, (3) fraudulent business acts or practices; [or] unfair, deceptive or misleading advertising.”<sup>120</sup> A plaintiff need only sufficiently prove one of the three prongs of the UCL (unfair, unlawful, and fraudulent) in order for the alleged actions to be actionable under the UCL.<sup>121</sup> Furthermore, the parents need not prove fraud in order to recover under the “unlawful” or “unfair” prongs of the UCL.<sup>122</sup> Thus, the parents could simply prove the fraudulent prong in order to recover. To prove the fraudulent prong under the UCL, the parents must prove that they (1) relied upon misrepresentations of the free-to-play game, (2) that the misrepresentations made by the game were material, (3) that the misrepresentations affected their decision to authorize purchases or download the game, and (4) that the misrepresentations made by the game were “likely to deceive members of the public.”<sup>123</sup>

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113. See Zac Hall, *App Store Changes ‘Free’ Button to ‘Get’, Likely Due to In-App Purchase Controversies*, 9TO5MAC (Nov. 19, 2014, 9:47 AM), <https://9to5mac.com/2014/11/19/app-store-changes-free-button-to-get-likely-due-to-in-app-purchase-controversies/> [<https://perma.cc/9BUZ-QYY5>].

114. See Shokrizade, *supra* note 1.

115. See *id.*

116. See *id.*

117. See *id.*

118. See *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1039 (N.D. Cal. 2012).

119. See 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); see also *In re Apple*, 855 F. Supp. 2d at 1040.

120. See *In re Apple*, 855 F. Supp. 2d at 1040.

121. See *id.*

122. See *id.*

123. See *id.* at 1041.



In proving this defense, a parent could argue that a free-to-play game misled them “by giving the false impression that payments [were] required” in order for their child to continue playing, when it was actually possible to advance without making IAPs.<sup>124</sup> For example, a game might prompt a user: “USE A SEED to finish growing the plant now.”<sup>125</sup> But the game does not explain that the seed will grow automatically if the user waits for a set amount of time.<sup>126</sup>

### 3. *Problems with the State Law Remedies*

While parents could likely prove that the marketing of IAPs in children’s games constitutes a prohibited practice under the CLRA or the UCL, parents affected by these practices may be unaware of the harm. Since many apps offering IAPs intentionally mask the necessity for payment at the aforementioned hard and soft progress gates, parents are led to conceptualize an IAP they authorize as a one-time fee for premium content for their child.<sup>127</sup> In reality, these gates, and the IAPs they encourage, trigger a change in the type of gameplay.<sup>128</sup> For example, in the mobile game, *Candy Crush Saga*, the player may eventually hit a hard gate when they come to “the river,” which requires IAPs to cross.<sup>129</sup> However, once the player pays to cross, the game difficulty is radically increased to the point where the player expends in game “lives” faster than they are regenerated (lives regenerate slowly over time, but can be purchased via IAPs).<sup>130</sup>

Thus, the parent is baited to believe that the initial purchase at the river would entitle their child to continue the previously experienced gameplay, but instead the game is switched.<sup>131</sup> Game developers and sellers understand that if a player or parent will authorize the initial IAP at the first gate, they are more likely to make subsequent IAPs, and they adjust the game accordingly.<sup>132</sup> Once the parent realizes that the game has begun to require an unacceptable amount of IAPs, the parent might simply withhold authorization. However, the problem is that the game has already succeeded in baiting the parent to authorize several small purchases.<sup>133</sup> And a parent who has spent only ten dollars (as opposed to the large sums of money charged to parents in *In re Apple*)<sup>134</sup> is unlikely

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124. See *The OFT’s Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 2–5, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

125. See *id.*

126. See *id.*

127. See Shokrizade, *supra* note 1.

128. *Id.*

129. *Id.*

130. See *id.*

131. See *id.*

132. See *id.*

133. See Shokrizade, *supra* note 1.

134. See *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1039 (N.D. Cal. 2012).

to view his or her loss as meriting a lawsuit or worth the time to seek a refund.

Therein lies the success of these deceptive practices, and the inadequacy of the state law remedy in solving the problem: the game developers and sellers have spread out the damage by tricking a large number of parents to spend only a small amount. According to the Swrve, a mobile marketing and analytics firm, 48.4% of profits come from only the top 10% of payers, meaning that 51.6% of profits come from the 90% of payers who make fewer IAPs.<sup>135</sup> While parents can seek refunds for unauthorized IAPs according to the FTC,<sup>136</sup> this does nothing to promote a practice of informed consent.<sup>137</sup>

#### B. FREE-TO-PLAY GAMES TARGETED AT CHILDREN MAY VIOLATE THE FTC ACT

The FTC has shown in *FTC v. Amazon.com* and in its order against Apple that it is willing to enforce the FTC Act in cases of unfair practices regarding IAPs.<sup>138</sup> However, as discussed, the enforcement action proposed herein would far surpass the FTC's previous involvement in this issue.<sup>139</sup> Whereas the FTC's previous action was to order Apple and Amazon to reinforce safeguards against unauthorized purchases, this action would require that the FTC condemn practices that lead to authorized purchases.<sup>140</sup> Even so, it is possible that the FTC could simply enforce the current statutory scheme to mitigate the damage caused by IAPs in children's apps. However, such an enforcement action would approach the limits of what the current version of the FTC Act was designed to accomplish, and it would not address the underlying harm in exposing children to IAPs.

In determining whether IAPs in children's apps are unfair under the FTC Act, the FTC must consider whether IAPs in children's apps (1) cause or are likely to cause substantial injury to parents and children (2) which is not reasonably avoidable by the parents and children themselves and (3) not outweighed by countervailing benefits to consumers or to competition.<sup>141</sup> In making its decision, the FTC may consider "established public policies," but public policy cannot form the "primary basis"

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135. See Swrve Monetization Report, *supra* note 27, at 8.

136. See Decision and Order at 4, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014).

137. See *The OFT's Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 2–5, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/of1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/of1519.pdf) [<https://perma.cc/J6X5-GRVR>].

138. See Decision and Order at 1, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014); see also *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016).

139. See Decision and Order at 1, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014); see also *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

140. See Decision and Order at 3–4, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014); see also *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

141. See 15 U.S.C.A. § 45(n) (Westlaw through Pub. L. No. 114-327).

of its decision.<sup>142</sup>

### 1. *Substantial Injury Prong*

In proving the substantial injury element of the unfairness test, the FTC need not show that IAPs in children's apps cause large-scale harm to individual parents and children.<sup>143</sup> Rather, they need only show that the practice causes "small harm to a large number of people."<sup>144</sup> Furthermore, the substantial injury element does not require that the individual parents and children actually be aware of the harm caused.<sup>145</sup> Thus, the FTC enforcement option does not suffer from the same problems as the state law option. Namely, FTC enforcement does not hinge on parents feeling sufficiently wronged so as to file suit.

### 2. *Not Reasonably Avoidable Prong*

To prove that the injury caused by IAPs in children's apps is not reasonably avoidable, the FTC must show that parents could not have made a "free and informed choice" to avoid it.<sup>146</sup> Following the *FTC v. Amazon* decision and the FTC order against Apple, there are certainly mechanisms in place for parents to avoid unauthorized charges by their children.<sup>147</sup> Such mechanisms include parental controls and password locks.<sup>148</sup> However, unavoidable risks are still prevalent. Because advertising and gameplay may not show signs of hard gates until after IAPs are made, parents may not be able to avoid such games before authorizing purchases.<sup>149</sup> Obviously, parents could simply avoid any game with in-app purchases, but this would unfairly punish free-to-play games that offer a one-time payment to unlock the full game.<sup>150</sup> Moreover, free-to-play games represent a larger and larger portion of available mobile games, and they are increasingly difficult to avoid.<sup>151</sup>

### 3. *Cost-Benefit Analysis*

To prove that the benefits of unregulated IAPs in children's apps do not outweigh their potential to do harm to consumers, the FTC need only

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142. *See id.*

143. *See FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*; *see also* Decision and Order at 2, 4–5, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014).

148. *See FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) at 79,600.

149. *See* Shokrizade, *supra* note 1.

150. *See* Karan Bhasin, *Freemium vs. Premium: Observations on the Mobile Market's Pricing Model*, IGN.COM (Feb. 10, 2016), <http://in.ign.com/mobile/87402/feature/free-to-play-vs-premium-observations-on-the-mobile-markets-pricing> [<https://perma.cc/4JTW-U5GQ>].

151. *See How the Free-to-Play Model Captured the Mobile Gaming Market, Why It's Proven Problematic, and How to Fix It*, BUSINESS INSIDER, (Apr. 26, 2016, 2:00 PM), <http://www.businessinsider.com/the-mobile-gaming-report-market-size-the-free-to-play-model-and-new-opportunities-to-market-and-monetize> [<https://perma.cc/G8QP-U7VK>].

show that the app “produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition.”<sup>152</sup> Here, game designers claim that free-to-play games are “expanding the number of people who play games, . . . stimulating the industry after a slow-down, and [allowing] the opportunity to create new gaming experiences for players.”<sup>153</sup> Furthermore, since the games are usually simple in design, the game developers can release various rough initial products and then tweak the more successful games based on data and player feedback.<sup>154</sup>

In this way, the free-to-play model has allowed developers to worry less about investing large sums of money into games that prove unsuccessful.<sup>155</sup> There is absolutely no denying the commercial success of the free-to-play model. As stated, its development has led to a record number of overall games produced, and free-to-play games dominate the mobile gaming market.<sup>156</sup> So, the present case is not as clear-cut as the one against allowing purchases to be made without a password. On the contrary, if the FTC moved to eliminate IAPs entirely from apps targeted at children, parents and children alike would suffer as game developers would struggle to monetize their games. It is likely that the only free games targeted at children would either be rife with advertisements or would themselves be advertisements for some toy. This situation is undesirable for all involved. However, the FTC does not need to go so far as to eliminate IAPs from free-to-play games entirely.

Instead, the FTC should argue that games with particularly exploitative types of IAPs should be age restricted, or at least not targeted at children. Furthermore, less exploitative types of IAPs in children’s games should be scrutinized more closely. For example, in-game stores should be clearly separated from gameplay (i.e., not animated in the same fashion as the game, and not prompted to open by any actions within the game).<sup>157</sup> This limited enforcement focuses on the negatives, while still allowing free-to-play game developers to monetize their games. In such a situation, the only benefit taken away is that derived from deception. With this type of enforcement, the benefits of the alleged unfair practices clearly do not outweigh the costs.

#### 4. *The Problems with an FTC Enforcement Action*

While the FTC enforcement action does not suffer from the problems inherent to state law causes of action, there remain questions as to

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152. See *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016).

153. See Luban, *supra* note 3.

154. *Id.*

155. See *id.*

156. See *How the Free-to-Play Model Captured the Mobile Gaming Market*, *supra* note 151.

157. See *The OFT’s Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 10, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

whether it is the most efficient and effective solution to the problems at hand. For example, the FTC actions against Apple and Amazon focused primarily on fixing a specific deceptive practice—the failure to require password authorization of IAPs.<sup>158</sup> As such, the action was reactive to a specific trade practice that can be remedied by a specific order. But the deceptive practices within free-to-play games targeted at children operate on a much larger scale. There is no quick fix to this problem. This is an industry revolution. Responding to this phenomenon with an FTC action against one company that specifically denotes how the apps they sell should be developed and marketed is an inefficient and premature action in this case.<sup>159</sup>

#### V. THE FTC SHOULD UTILIZE ITS RULE-MAKING POWER TO DIRECTLY REGULATE THE FREE-TO-PLAY GAMING INDUSTRY

Due to the coercive mechanisms inherent in many free-to-play games currently on the market, the FTC should introduce thoughtful regulation of the free-to-play gaming industry, requiring disclosure of game models before downloads, separation between gameplay and purchases, and limitation on the type of free-to-play models allowed in games marketed to children. By following the lead of the United Kingdom's consumer protection legislation and guidance, the FTC would provide clarity for children and adults and clear boundaries for the industry.

In order to accomplish meaningful regulation, the FTC should use its rule-making authority granted by the FTC Act to introduce industry wide regulation of free-to-play game development and marketing based on the theory that the regulated practices are deceptive under the FTC Act.<sup>160</sup> In order to accomplish this sweeping reform, the FTC should look to industry leaders and consultants as well as to the UK OFT's set of guidelines regarding the free-to-play gaming industry's obligations under UK consumer protection law.<sup>161</sup> As demonstrated in this paper, many of the practices employed by the free-to-play game industry meet the statutory criteria of deceptive practices under the CLRA, the elements of which are substantially the same as those under the FTC Act.<sup>162</sup> This portion of the paper will discuss how the FTC can incorporate the UK standards into a new set of proposed rules. Furthermore, while the FTC's previous foray into regulating advertising directed at children failed, the rules proposed herein are readily distinguishable from the previously proposed

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158. See Decision and Order at 1, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014); see also *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016).

159. See Decision and Order at 1, Apple, Inc., No. C-4444 (F.T.C. Mar. 25, 2014).

160. 15 U.S.C.A. § 57a(a) (Westlaw through Pub. L. No. 114-327).

161. See *The OFT's Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 3–20, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

162. *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 168 (2d Cir. 2016).

rules.<sup>163</sup>

A. THE FTC SHOULD REQUIRE DISCLOSURE OF RELEVANT COST INFORMATION PRE-DOWNLOAD

First, the FTC should require a prominently displayed breakdown of costs available before the download of any free-to-play game marketed toward children.<sup>164</sup> These costs should include (1) the initial cost of downloading the game, (2) any unavoidable costs required for continued gameplay, and (3) the cost of any optional IAPs.<sup>165</sup> While the FTC orders against Apple and Amazon are steps in the direction of “informed consent,”<sup>166</sup> adequate standards must be formed not only to protect parents against unauthorized purchases but also to inform parents about the type of solicitation to which their child will be exposed during their gaming experience. Furthermore, it is important for parents to understand what *type* of IAPs are offered before allowing their child to play the game *and* before authorizing such purchases.

Following the FTC actions, Apple’s app store now features a “get” download button for free-to-play games rather than the “free” button previously used.<sup>167</sup> Additionally, below the bright blue “get” button, the disclaimer—“in-app purchases”—is featured in smaller black print.<sup>168</sup> To simply disclose that a game includes in-app purchases does not scratch the surface of informed consent of parents upon downloading the app or authorizing purchases.<sup>169</sup>

B. THE FTC SHOULD REQUIRE THAT IN-APP-PURCHASE COMPONENTS BE SUFFICIENTLY SEPARATE FROM GAMEPLAY

Second, the FTC should require any in-game store be sufficiently separated from the gaming interface.<sup>170</sup> Additionally, achievements that require IAPs should be sufficiently distinguishable from those that require only gameplay.<sup>171</sup> Upon seeing that a game may contain in-app purchases, a parent who does not want his or her child to be tempted by in-app purchases may think it sufficient to withhold the password and instruct his or her child to not enter the shop. However, when there “is an indistinguishable transition between gameplay and the shop when the

163. See Jennings & Engle, *supra* note 41, at 6–8.

164. See *The OFT’s Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 3, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

165. See *id.*

166. See *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016).

167. See Hall, *supra* note 113.

168. See *id.*

169. See *The OFT’s Principles for Online and App-Based Games*, OFFICE OF FAIR TRADING, 2, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf) [<https://perma.cc/J6X5-GRVR>].

170. See *id.* at 10.

171. See *id.*

[player] has insufficient in-game currency to carry out an action in the game,”<sup>172</sup> parents are deprived of their ability to make initial decisions to stay away from IAPs. While a parent should be able to tell their child “no,” it is a deceptive practice on the part of the game for a game to entice children into making all the steps for a purchase except the authorization.

Additionally, a game should make clear whether an objective is possible by simply playing the game or only through in-app purchases. The OFTP offers as example:

‘Find the pieces of silver on the Treasure Hunt to become a Super Pirate!’ The consumer completes the Treasure Hunt, finds the pieces of silver but cannot become a Super Pirate without upgrading his/her account, which requires a payment. On completion of the Treasure Hunt, the game states: ‘Become a Super Pirate – upgrade your account now!’<sup>173</sup>

In such a situation, the game developer could avoid deception merely by advertising the game while making clear that “Super Pirate” status is a premium feature.<sup>174</sup>

### C. THE FTC SHOULD REQUIRE THAT GAMES MAKE CLEAR THE EXISTENCE OF A FREE ALTERNATIVE TO IN-APP-PURCHASES

Third, the FTC should require the game “not mislead consumers by giving the false impression that payments are required or are an integral part of the way the game is played if that is not the case.”<sup>175</sup> Children can be misled into believing that they must purchase in-game currency in order to continue in the game—rather than waiting—if the option to wait is not shown prominently.<sup>176</sup> Furthermore, if it is not made clear at the point of purchase that in-game currency regenerates over time, parents may be misled into making a purchase that they would not otherwise make. This business model is essentially attempting to bypass the parent’s supervision and understanding by speaking directly to the child. When the child says that he must pay to continue, the game has abused the child’s lack of capacity in order to deceive the parent. Or, alternatively, the game has given the child an opportunity to intentionally deceive the parent. This is especially true when parents are less technologically literate than their children. Either possibility could be avoided by prominently displaying the free option.

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172. *Id.* at 11.

173. *Id.* at 10.

174. *Id.*

175. *See id.* at 12.

176. *See id.*

D. THE PROPOSED RULES HEREIN ARE CLEARLY DISTINGUISHABLE  
FROM PREVIOUSLY UNSUCCESSFUL REGULATIONS ON  
ADVERTISING TO CHILDREN

Although Congress and the public responded with hostility to the FTC's proposal to regulate advertising to children on television, the rules proposed herein are materially distinguishable from that attempt.<sup>177</sup> First, while the Kidvid proposal attempted to ban all advertising to children under a certain age,<sup>178</sup> the proposal described herein would only require a change in the way free-to-play games are developed to ensure that neither children nor parents are coerced by deceptive marketing. In fact, the proposed regulation is even less restrictive than the successfully enacted 900 Number Rule, which imposed an absolute ban on advertising 900 number services to children under age twelve.<sup>179</sup>

Also, the regulation proposed herein does not have any direct collateral effect on advertising free-to-play games to children above the age of thirteen. The Kidvid proposal would have required that any program with a sufficient proportion of underage viewers be advertisement-free.<sup>180</sup> This means that advertisers would be restricted from advertising on programs that also included a substantial proportion of viewers above the age targeted by the regulation.<sup>181</sup> In the present case, the regulation would simply require that free-to-play games that do not comply be age restricted to those over the age of thirteen. Thus, the regulation only directly affects its targeted age group.

Additionally, the Kidvid proposal failed in part because it attempted to regulate children's exposure to advertisements when parents were in an equal or better position to do so.<sup>182</sup> However, the regulation proposed herein is not attempting to take the place of the parent, but rather, it is attempting to empower parents to be able to make freely informed decisions about the types of IAPs to which their children are exposed. Children's exposure to television advertisements is both predictable and avoidable. With the exception of product placement within programming, television advertisements and television programs are easily distinguishable. However, the methods by which free-to-play games present IAPs are constantly being innovated.<sup>183</sup> Furthermore, the interactive nature of free-to-play games and IAPs is fundamentally different from advertisements transmitted over television.

Moreover, the Kidvid proposal ban on advertising during children's programs would cut out the funding for children's programming.<sup>184</sup> However, the proposal herein would not cut out all forms of IAPs in children's

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177. See Jennings & Engle, *supra* note 41, at 6.

178. See *id.*

179. See *id.* at 5.

180. See *id.* at 6.

181. See *id.* at 6-9.

182. *Id.* at 8-9.

183. See Shokrizade, *supra* note 1.

184. See Jennings & Engle, *supra* note 41, at 9-10 & n. 43.



games; it would merely regulate the procedures by which IAPs are presented and the types of IAPs allowed in children's games.

Considering these distinguishing factors, the regulation proposed herein does not come close to the type of overreach in the Kidvid proposal. Rather, the Kidvid regulation actually serves as a wake-up call to those who are unconcerned about the deceptive practices found in free-to-play games: The FTC used to be concerned with the intrusion of television advertisements in our children's lives, but consider how much more intrusive advertisers have become.

E. THE PROPOSAL PROCEDURE UNDER THE FTC ACT WOULD  
ALLOW INDUSTRY AND GOVERNMENT TO COLLABORATE IN  
PRODUCING RULES TO MAKE FREE-TO-PLAY  
GAMES SAFER FOR CHILDREN

As a final reason to prefer FTC regulation, it would allow members of the government, the public, and the mobile gaming industry to speak openly about the future of the free-to-play gaming model.<sup>185</sup> Although the Kidvids proposal was disastrous for the FTC for other reasons, the hearing on the proposed rule-making generated substantial public discussion.<sup>186</sup> In fact, over 60,000 pages of longhand comments were received from "consumer organizations; individuals in academic, scientific, technical and government positions; broadcasters; product manufacturers; advertising agencies and associations; and individual consumers."<sup>187</sup> If nothing else, the public discussion would put the exploitative tactics of much of the free-to-play gaming industry, rather than one particular company, in the public spotlight. And the negative publicity might elicit more industry self-regulation.

VI. CONCLUSION

The remaining problems regarding IAPs in free-to-play games are certainly novel in some respects. But there are clear frameworks in place by which they can be addressed. Furthermore, while the individual harm may seem insubstantial, the aggregate harm posed to consumers is substantial. The mobile game will continue to grow, regardless of any legal action taken by the FTC or individual consumers. But without action from individual consumers or the FTC, that growth will be irresponsible. While it may seem like a novel argument to contend that the free-to-play games are coercive and harmful *even when* purchases are authorized, consumer protection law in the United States was always intended to adapt to new types of unfair or deceptive practices.<sup>188</sup> Over time, state law protections have flourished in order to provide consumers with private

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185. See 15 U.S.C.A. § 57a(c) (Westlaw through Pub. L. No. 114-327).

186. See Jennings & Engle, *supra* note 41, at 7.

187. See *id.*

188. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); 36 AM. JUR. 3d *Proof of Facts* § 1 (2017).

causes of action.<sup>189</sup> On the federal level, the FTC has diligently pursued sources of unfair practices, such as unauthorized purchases, in the industry of free-to-play gaming and IAPs.<sup>190</sup> However, these procedures are not broad enough in scope to provide the comprehensive regulation that the free-to-play gaming industry needs. Instead, the rule making power of the FTC was specifically designed to implement these types of industry-wide regulations.<sup>191</sup>

With the exploitative nature of in-app purchases growing unchecked, it is time for the FTC to introduce regulation of free-to-play games marketed to children, requiring disclosures of relevant costs before download, clear divides between gameplay and purchases, and limitations on the type of free-to-play models allowed in games marketed to children. To allow freely informed decisions by parents and children as well as a direction for innovation in the gaming industry, the FTC should follow the lead of the United Kingdom's consumer protection legislation and administrative guidelines in crafting new regulations.

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189. 15 CAL. BUS. & PROF. CODE § 17200 (West 2017); CONN. GEN. STAT. ANN. § 42-110b (West 2017); FLA. STAT. ANN. § 501.201 (West 2017); HAW. REV. STAT. § 480-2 (West 2017); LA. REV. STAT. ANN. § 51:1401 (2017); ME. REV. STAT. ANN. tit. 5, §§ 206–214 (2017); MASS. GEN. LAWS ANN. ch. 93A, §§ 1–11 (West 2017); NEB. REV. STAT. ANN. §§ 69–1601 (West 2017); N.C. GEN. STAT. ANN. § 75-1.1 (West 2017); S.C. CODE ANN. § 39-5-10 (2016); VT. STAT. ANN. tit. 9, §§ 2451–2462 (West 2017); WASH. REV. CODE ANN. § 19.86.101 (West 2017); W. VA. CODE ANN. § 46A-6-101 (West 2017).

190. See *FTC v. Amazon.com*, [2016-1 Trade Cases] Trade Reg. Rep. (CCH) ¶ 79,600 (Apr. 26, 2016); see also Complaint at 6, *Apple, Inc.*, No. C-4444 (F.T.C. Mar. 25, 2014).

191. 15 U.S.C.A. § 57a(a) (Westlaw through Pub. L. No. 114-327).