The converging worlds of social gaming and gambling

The gaming and gambling industries, traditionally separate entities, are moving closer and closer together, which increases debate as to whether gambling-like games should fall under gambling regulation. Jas Purewal, an interactive entertainment Solicitor at Osborne Clarke, discusses how one important consequence - little considered by the games industry - holds the potential for games to be defined and regulated by gambling laws.

Setting the scene
The games industry is in rude health, driven in large part by the boom in social and mobile games in recent years. This has in turn been driven partly by innovation in the games business model: for example, more and more games are 'free to play', where there is no upfront charge at all (unlike e.g. traditional boxed console games) and the games publisher instead looks to profit through 'monetising' the player by selling virtual goods, virtual currency and in-game experiences like additional content.

Another new way in which games businesses are looking to turn a profit is through chance-based game mechanics tied to these new business models. This is relatively novel in the games industry, coming as it does from a traditionally skill-based background, such as for example Activision-Blizzard’s billion dollar Call of Duty series of games. The most basic examples are chance games imported wholesale into social or mobile products, such Zynga Poker. Additionally, we’re seeing chance-based game mechanics being imported into more identifiably ‘gamelike’ games. A number of high profile social and mobile games involve, for example, an offer to players to use virtual currency to participate in a competition for virtual goods. Another involves virtual currency being used to bet on an outcome. Yet another involves a paid in-game lottery. These mechanics, so far at least, are attracting player interest and proving profitable.

However, from a legal perspective the obvious question is whether such games might be regulated under gambling law?

Games and gambling law
In general terms, there is a reasonable argument that the kind of chance-based game mechanics outlined above probably do fall under existing gambling legislation under the right circumstances. Let’s take as an example the ‘gaming’ category of regulated gambling under the UK’s Gambling Act 2005 (‘Gambling Act’) (for completeness: there are other categories of regulated gambling, but for present purposes we ignore them). ‘Gaming’ means ‘playing a game of chance for a prize’. A ‘game of chance’ can mean a pure game of chance, a game of both chance and skill and a game of chance which can be eliminated by superlative skill.

‘Playing a game of chance for a prize’ means a player playing it can ‘acquire a chance of winning a prize...whether or not he risks losing anything at the game’. A ‘prize’ means ’money or money’s worth’.

Essentially, all this means that many if not most games involving a game of chance (or even a combined skill/chance game) could be regulated, for three reasons. The first reason is that a game can be regulated if it has the requisite degree of chance - it doesn’t need to be 100% chance-based to qualify. The second is that any argument that games don’t involve any real risk or stake is immaterial under the Gambling Act, because playing a game of chance ignores ‘whether or not [you] risk anything at the game’. Thirdly, games businesses rely on an argument that any in-game prize does not constitute ‘money or money’s worth’ (or its local equivalents under other countries’ law - such as the concept of ‘gain’ in France) and therefore the game cannot constitute gambling. Or, put another way, games cannot be regulated because there is no ‘cash out’. For reasons we’ll now turn to discuss, this is increasingly a key determiner as to whether or not a
game may in principle fall under gambling law.

**Virtual orthodoxy?**

To date, games businesses have argued that there is no ‘cash out’ (and therefore no prize of money or money’s worth) by pointing out firstly that there is typically no way for a player to extract money from an in-game win and, secondly, that any in-game win has no real world value itself anyway because such prizes are simply lines of code that have no independent existence and cannot be capable of either ownership or value. Or, at least, that’s the orthodox position - which in reality is coming under attack.

The first line of attack is that actually it is possible for a player to extract money from an in-game win, depending on the game’s technical restrictions. For example, if a game permits trading (authorised or not) between players, then ways can be found to transfer in-game assets between players in return for real money (at one time, for instance, eBay was a popular auction house for virtual items). The second line of attack is that arguably in-game wins do have real world value if users pay real money for them given the chance - even if that is against the game’s T&Cs (which it usually is).

To what extent has this been tested legally so far? Perhaps surprisingly to non-followers of the nascent law of virtual goods and currency, there is a growing body of case law on the subject. Cases in South Korea, China, the USA, Holland and the UK have (to differing degrees) supported the proposition that virtual goods and currency can be legal property capable of being alienated for value.

For example, in 2010 a UK national was successfully prosecuted for misappropriating virtual poker chips from the Zynga Poker game and selling them for real profit. The judge found that the fact that the virtual chips were capable of being provided to a third party in return for money in the real world meant that they were more than just lines of code and were deserving of legal protection. That said, the legal position regarding virtual goods and currency is still far from clear; indeed, there are countervailing movements: a number of Asian countries including Vietnam, South Korea and China have adopted legislation seeking to diminish, or abolish entirely, the legal status and use of virtual goods. In summary, there are growing arguments that virtual goods and currency may have sufficient ‘value’ for gambling law purposes.

**What this means for games and gambling**

The arguments traditionally put forward to explain why a game does not fall under gambling regulation will not always provide a complete shield. National gambling laws do not all necessarily require a real world stake to be put up; they can apply to games which are a mix of skill and chance; and if virtual goods and currency have real world value then they can in principle constitute a prize for gambling law purposes.

What can games businesses wishing to reduce the risk of falling within gambling regulation do?

First, they need to consider whether changes to the underlying game mechanics can fully prevent virtual goods/currency trading. Second, they need to work with lawyers to identify key territories likely to pose particular risks for them and, again, to consider whether any changes to the game can reduce or avoid those risks.

Third, they should take proactive steps to prohibit the actual trading of virtual goods and currency by their players. Lastly, they need to ensure their T&Cs prohibit gambling and adequately cover the treatment of virtual goods and currency.

Unfortunately, there is at present little focus on these matters in the games industry, even as games come increasingly into gambling regulators’ sights. For example, in Japan the Consumer Affairs Agency has recently announced it intends to regulate a paid lottery mechanic for virtual goods known as ‘gacha’, while in the UK the Gambling Commission has reportedly commented on social games as being on the ‘perimeter’ of gambling regulation and thus being monitored by them. As a result, the time may be coming to an end when a games business feels able to ignore gambling regulation until the last possible moment.

At that stage, the games industry may realise that it has been sleepwalking towards at least some degree of gambling regulation, following which it may wake up and want to do something about it. At that point, expect a debate about the more fundamental question of whether games should be subject to gambling law, or whether their nature qua games means they should be treated separately. We continue to live in interesting times in the worlds of games and gambling.

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2. R v Ashley Mitchell (unreported).
3. [http://www.yomiuri.co.jp/dy/national/T120605002878.htm](http://www.yomiuri.co.jp/dy/national/T120605002878.htm)