

Gaming... Means Something Different to the Government

Marc Whipple – CVGLS 2016

And by *government* I mean:

- 1) State and Local Police
- 2) The Department of Justice
- 3) Gaming Regulators
- 4) The IRS
- 5) Many, many more

Presenter: Marc Whipple

- IP Attorney and former General Counsel of Meyer/Glass Interactive and Incredible Technologies
- Licensed to practice in IL and before the USPTO
- Findings of Suitability in multiple states
- Blogs at LegallInspiration.com
- Knows what he's talking about but this is not legal advice
- No, seriously, this is not legal advice, get a lawyer!
- Wow that was quick

Seriously. This is not legal advice. Hire an experienced gaming lawyer if you're going to get anywhere *near* this stuff. I couldn't explain all the potential pitfalls to you if I had ten times as much time.

All The Gold in California...

Computer Gaming: Do I really need to define this?

Regulated Gaming: What most people would call (legal) gambling.

- 1) There are still lots of great new ideas in Computer Gaming.
- 2) There are not lots of great new ideas in Regulated Gaming.
- 3) You need to understand when you are going from a Type 1 Idea to a Type 2 Idea!

... is in a bank in the middle of Beverly Hills, in somebody else's name.

(Apologies to the Gatlin Brothers.)

When Is A Game Gambling?

Gambling traditionally has three elements:

- 1) Consideration
- 2) Chance
- 3) Prize

Great Reference: <http://www.gambling-law-us.com/>

Some jurisdictions have statutorily defined gambling differently, including removing the “chance” requirement in some circumstances. You must get legal advice specific to your circumstances!

Note that I am giving you that link so you will see how complicated this is and get an attorney, not so you will try to practice law.

What Is Consideration?

Consideration is:

- 1) Money
- 2) Anything you could buy with money
- 3) Anything you could sell for money
- 4) Anything you would rather have than a poke in the eye with a stick

In other words, *anything someone might potentially value!*

The consideration has to be for the chance to win the prize. If you buy a game and it costs the same whether you can win a prize or not, that would *usually* not qualify. But it’s not a good area to make assumptions. None of this is.

What Is Chance?

Chance is:

Any event not under the (complete/substantial) control of the player.

Is it a game? It has chance. The question is, how important is it to the outcome? Examples:

Chess: The player might touch a piece by accident. Importance: **Low**.

Poker Tournament: Over the course of many hands players of higher skill will tend to have better outcomes. Importance: **Medium**.

Hand of Poker: Cards dealt largely control the outcome assuming competent players. Importance: **High**.

Slot Machine: Outcome is totally random. Importance: **Very High**.

In a contest of skill, it’s not chance because you can’t control the other player’s outcome. But you yourself must be able to materially affect the outcome of the underlying events.

What Is (a) Prize?

A Prize is:

- 1) Money
- 2) Anything you could buy with money
- 3) Anything you could sell for money
- 4) Anything you would rather have than a poke in the eye with a stick

In other words, if it could be Consideration, it could be a Prize.

Major Historical Exceptions:

- 1) Prestige (Achievements!)
 - 2) Free plays of the game
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To reiterate: it does not have to be money to be a prize. It does not have to be something you can trade for money directly. For instance, a rare account-bound item could be a prize, even if you can't transfer it.

Free replays, if they cannot be turned into cash, are a historical exception which dates back to the days of flipperless pinball machines! If the machine has a reset switch which will clear free plays, that turns it back into a gambling device.

But My Game Is Skill-Based!

1) No, it probably isn't.

There are three levels of chance: Complete, substantial, and any-chance. Different jurisdictions use different definitions. People often believe that if skill largely determines the outcome, a game must be skill-based. *This is not the case.*

Simple First-Approximation Test: Could a low-skill player get lucky and beat a high-skill player? *Then your game is not a game of skill.*

2) So what?

Many jurisdictions have laws which greatly reduce *or even eliminate* the requirement that chance be a factor in the outcome of the game. A FanKings-style argument that picking players is a skill-based activity is *irrelevant* in those jurisdictions.

It does not count as "skill" to be able to successfully select the winners of a skill-based game or other event which you are not participating in/cannot control. If this were the case gambling would be logically impossible!

Strategies for Staying Out Of Trouble – 1

SUPER EASY FOOLPROOF CANNOT FAIL STRATEGY THE FIRST:

Don't incorporate gambling into your game. Either don't charge people, or don't give them prizes.

• Pros:

1. Super easy, foolproof, cannot fail.

• Cons:

1. Maybe not entirely foolproof.
Watch your marketing people: they *love* to have contests with prizes.
If you are claiming skill-based prize play, consult a gaming attorney.
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By the way, promotional sweepstakes are not gambling *if* they are set up properly, but a) that requires a lawyer, and b) sweepstakes are subject to their own regulations in some jurisdictions. Calling it a sweepstakes is not a Get-out-of-gambling-free card.

Strategies for Staying Out Of Trouble – 2

RELATIVELY STRAIGHTFORWARD STRATEGY THE SECOND:

Make sure your game awards prizes *ONLY* for skill-based play. (AKA the Golden Tee Golf Strategy.)

- Pros:
 1. Allows you to award prizes, which is a huge player draw.
 2. Provides employment for deserving attorneys.
 - Cons:
 1. Requires constant monitoring of laws affecting such games.
 2. Requires (yes I said *requires*) getting legal opinions for all jurisdictions in which you want to offer prizes. *EVERY GAME IS DIFFERENT, EVERY JURISDICTION IS DIFFERENT.*
 3. Requires you to either offer non-prize play in non-prize jurisdictions, or not offer the game in such jurisdictions, including some form of exclusion control.
 4. Always carries the risk that a LEO or regulator will disagree with your conclusion.
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There are some jurisdictions where “gambling devices” are defined separately from “gambling.” It is literally possible to turn your user’s tablet or PC into a gambling device – potentially an *unlawful* gambling device – if you do the wrong thing.

Strategies for Staying Out Of Trouble – 3

COMPLEX AND PERILOUS STRATEGY THE THIRD:

Get a Gaming License! (AKA The Reluctant FanKings Strategy.)

- Pros:
 1. Once you are licensed and your game is approved you can proceed (in that jurisdiction) with great confidence.
 2. Provides employment for deserving gaming attorneys.
 - Cons:
 1. Expensive, time-consuming, and uncertain, both for you and your game.
 2. Limits the jurisdiction(s) you may operate in in multiple ways.
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A gaming license typically costs anywhere from five hundred to fifty thousand dollars and requires *extensive* suitability investigation of the owners and key employees of the licensed entity. It is not a minor undertaking. Each individual game must also be certified by a gaming laboratory.

Oh, By The Way...

- 1) Regulated Gaming is dominated by a few very large companies with very large legal departments.
- 2) They have literally *thousands* of patents and registered trademarks.
- 3) If you start competing with them, they will start competing with you.
- 4) So think hard about entering their space, or you will discover the joys of a really well-written Cease and Desist letter!

It is *nothing personal*. Really. It's just how it works. They have gobs of money and you likely don't. Even if you win... you'll probably lose. Pick your battles, spend wisely.

It is uncommon, but not unheard of, for regulated gaming companies to pursue actions against “regular” computer game companies, especially smaller ones. It does happen, and it’s much more likely to happen if you enter into a space they consider “theirs.”

Thank You!

For More Information:

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While I do take clients in individual cases, I'm more likely to give you a referral. But either way, please never hesitate to contact me!