

GAM(BL)ING 2.0

The Problem of Old Laws in an Era of New Games

BY ANDREW KIM

“digital gaming”—a phrase that broadly covers games played on computers and mobile devices—has seen explosive growth over the past decade. What started off with a small but devoted group of gamers playing titles like *StarCraft* and *Diablo* has morphed into a seemingly ubiquitous form of entertainment that has entered the mainstream, as evidenced by the hordes of smartphone-wielding millennials searching for Pokémon in the augmented reality game *Pokémon GO*. Digital gaming owes its meteoric rise in large part to a particular subset of the industry—digital games that are played online.

One of the most popular forms of digital gaming is multiplayer gaming, which, in certain contexts, can include “social” or “social media” gaming. *League of Legends*, a third-person game played in a battle arena, is among the most popular multiplayer games—if not the most popular. In 2015, tens of thousands of *League of Legends* fans descended on a sold-out Madison Square Garden to watch the North American championship of the game, with 27 million viewers joining them via live stream on YouTube and Twitch. Another example is *Counter-Strike: Global Offensive (CS:GO)*, played every month by over half a million users who are riveted by a multiplayer first-person shooter that has been around, in one form or another, for over a decade. And on mobile phones, over three million users play *Game of War*, a multiplayer “social game” in which players build virtual empires and battle one another for dominance.

At first glance, it may seem as if these games offer little reward other than personal pride and virtual glory. And they come at a price—most, like *League of Legends* and *CS:GO*—are pay-to-play games (or, in the case of *Game of War*, a “freemium” game in which the game is free but in-game features are not). Indeed, these games have been a big business for developers—digital gaming sales hit \$61 billion in 2015.

But looking beneath the surface, it is clear these games have become a financial boon for players, too. Some of the ways in which a player can make money are unquestionably legal. Top players, for instance, can participate in tournaments hosted by game developers in which those players can win millions of dollars. And some of the ways are completely illegal, at least in the vast majority of states. Outside of the United States, for instance, third-party betting outlets allow interested parties to place wagers on the outcome of these multiplayer games. Although these outlets have attempted to make inroads into the United States, they largely remain banned for the time being as illegal gambling sites.

There is, however, a gray area. In the last couple of years, these

massively popular online games have found themselves under the scrutiny of criminal antigambling laws, albeit in a civil context. Through no fault of their own, developers have increasingly found themselves snared by laws intended to ban “traditional” forms of gambling. For instance, players have used in-game features, such as the ability to trade items with no inherent value, to create a secondary market of shadow gambling without the developer’s consent. And yet game developers have been left holding the bag, accused of running a gambling operation because antiquated laws intended for older forms of gambling do not adequately address the circumstances these developers are in.

To be clear, it is very unlikely that a developer of a multiplayer online game will ever be brought up on criminal charges. The “gray area” exists because eager plaintiffs’ attorneys have filed lawsuits against these developers, looking to take advantage of a murky legal landscape even though these developers never intended for their games to be outlets for gambling. But these lawsuits all rely on criminal gambling prohibitions to make their case, and it is not implausible to think that a zealous regulator could take the next step and shut down an immensely popular game on the theory that it is illegal gambling, for reasons beyond the developer’s control.

This article highlights two problems posed by gambling laws that trouble digital gaming developers. The first is a new take on a familiar problem—the issue of uniformity. Although most states use the same rudimentary formula with the same elements for determining whether a game can be considered “gambling,” they vary as to how much of each ingredient is necessary to violate the law. The second is a problem likely unforeseen when the gambling laws were first passed—the issue of secondary markets, i.e., how players place real-world value on otherwise worthless in-game items and use those items to place wagers on in-game events.

DIGITAL GAMES AND GAMBLING LAWS: THE NEED FOR UNIFORMITY

The task of regulating gambling is generally left to the states, not the federal government. While there are a host of federal laws that deal with gambling, such as the Wire Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act, these statutes are intended to work in tandem with existing state law prohibitions, with the goal of quashing interstate gambling.

Most state gambling laws were written decades, if not over a century, ago. The obsolescence of some of these laws can be seen on their face; many gambling laws have a rich history underneath the statutory text. California, for instance, prohibits the playing of faro, a seventeenth-century French card game not in vogue for some time. (CAL. PENAL CODE § 330; *see Ex Parte Milburn*, 34 U.S. (9 Pet.) 704 (1835) (denying habeas petition challenging bail on charges of keeping a faro bank).) Many state laws explicitly ban “policy” or “numbers” games, a form of street lottery popular in the mid-1900s and sometimes tied to organized crime.

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That is not to say, however, that state gambling laws are effectively defunct, too archaic to be enforced. Some forms of gambling have continued to flourish since the inception of the gambling laws currently in force. People still operate illegal and unlicensed slot machines (e.g., *State v. Greenetrack, Inc.*, 154 So. 3d 940 (Ala. 2014) (per curiam)), secret gambling parlors still exist (e.g., *United States v. Esposito*, 638 F. App'x 133 (3d Cir. 2016)), and bookies still take surreptitiously placed bets on the outcomes of sporting events (e.g., *United States v. Massimino*, 641 F. App'x 153 (3d Cir. 2016)).

To combat these forms of “traditional” gambling and other variants of the modern age (such as illegal web casinos), prosecutors and civil enforcers (such as private plaintiffs) rely on laws that fall into one of three categories: (1) a general gambling prohibition, (2) “ancillary” gambling prohibitions, and (3) laws prohibiting bookmaking and pool selling. These laws have been effective in regulating games that have been considered illegal since the time the laws prohibiting them were written, but they have also ensnared games that are not considered “gambling” in the mainstream.

The type of law most problematic for modern gaming also happens to be the most general: a prohibition on “gambling.” Most states have a statute that bans “gambling” as a general matter. “Gambling,” in turn, is usually defined as a person offering a thing of value (the “stake”), placed on the outcome of a contest, for the opportunity to win a thing of value (the “prize”). These laws also have a third (and in many cases, most important) element: chance. Chance is described as “something that happens unpredictably without any discernible human intention or direction and in dissociation from any observable pattern.” (*People v. Shira*, 133 Cal. Rptr. 94, 105 n.12 (Ct. App. 1976).)

In all but two states, the contest on which a wager is placed must be a contest of chance in order for gambling to occur. Louisiana and Arizona are the exceptions—in those states, any stake placed for the opportunity to win a prize, regardless of whether it is placed on the outcome of a contest of chance or one of pure skill, is considered to be gambling. The rest of the states require at least a scintilla of chance in order for a wager placed on a contest to be considered gambling. In the vast majority of states, such as California and Massachusetts, chance must predominate over skill in order for the game to be considered gambling. The second largest group of states, including New York, require a “material” element of chance in the game—although these states differ on what the word “material” means. And the ambiguity of the word “material” itself causes problems, because materiality is often difficult to quantify. (Anthony N. Cabot et al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 393 (2009).) Finally, in a small minority of states, such as Kentucky and Tennessee, any degree of chance is sufficient for determining whether there is gambling.

To illustrate, consider these games. Chess and trivia games are games of skill—chess requires strategic thinking, trivia requires sheer knowledge. The classic “one-armed bandit”—a slot machine—is an obvious game of chance; no amount of human manipulation can influence the outcome, which is determined by a random-number generator. These games are easy calls when it comes to the chance/skill question. But others are not. Consider, for example, card games, which many would automatically associate with gambling. Certain types of bridge are considered games of skill. Blackjack, a game for which some skill can be employed to mitigate the house edge (such as basic strategy or card counting), is a game of chance. And

as recent memory shows, poker falls somewhere in the middle—its proponents say it is a game of skill, its detractors (including regulators and prosecutors) consider it a game of chance.

Setting aside variations on the levels of chance required for a game, another complication is the kind of role that chance must play in order for a game to be considered one of chance. States generally require that chance be a systemic component of the game, i.e., part of the game’s design, in order for a game to constitute “gambling.” Even in states where “any” chance will do, random events (such as a freak accident) that befall the competitors of a lawful skill-based game do not somehow transform the game into a contest of chance, as the design of the game itself would not contemplate or foresee the randomness. (See, e.g., *Ky. Office of the Att’y Gen., Op. No. 80-409*, 1980 WL 103297, at *2 (June 17, 1980).)

In the abstract, these concepts may seem straightforward; in practice, particularly with “modern” digital gaming, the lines are difficult to draw. Take fantasy sports, for instance. These games—particularly their online variant—have been increasingly popular over the last few years. Proponents assert that the game is one of analytics—athletes are selected as part of fantasy sports teams, but those athletes merely serve as vehicles for statistics and variables, with the endgame being to “create a lineup that will produce extreme outcomes” and better than everyone else’s. (Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, *McKINSEY & CO.* (Sept. 2015), <http://tinyurl.com/zgagw6l>.) Detractors (including many state regulators) claim that the game is one of chance because “players exercise no control or influence over the actions of [fantasy sports] players” and because of random considerations such as injury, weather, and officiating. (Letter from Kevin K. Takata, Deputy Attorney Gen., Haw. Dep’t of the Attorney Gen., to the Honorable Rosalyn H. Baker, Senator, Sixth Dist. 6–7 (Jan. 27, 2016), *available at* <http://tinyurl.com/j6byxsm>.) The protracted confusion over whether fantasy sports are games of skill or games of chance has forced state legislatures to step in to clarify that they are not gambling contests.

The skill/chance issue, standing alone, is not an insurmountable obstacle for game developers—in-game chance elements can be added and removed. But what inhibits some digital game innovators—whose success depends on the ability to reach as many players as they can, across the country and around the world—is the uncertainty created by a patchwork of different laws. Because states vary on how much chance is required for a game to be considered “gambling” and what kind of role chance must play in order for “gambling” to occur, it is difficult for developers to create a game that would neatly accommodate every law. Consider, for instance, a hypothetical pay-to-win online trivia game. The game assigns a randomly selected category of questions every time a user plays the game—the user may or may not have a base of knowledge about that category. In most states—where chance must predominate in a contest before the game can be considered “gambling”—the game would be perfectly legal. But in states such as Kentucky and Tennessee—where “any chance” will do—that pay-to-play trivia game could raise concerns about compliance under an aggressive interpretation of the gambling laws of those states.

“Ancillary” gambling prohibitions are companion laws that typically outlaw the facilitation of gambling, rather than the act itself. These include laws forbidding the running of a gambling facility, or the manufacture, possession, and operation of a gambling device.

These laws typically cross-reference the general gambling prohibition to establish a violation of the law. Some states have ancillary gambling laws that are difficult to apply to digital games, mostly because they have considerably narrowed the scope of the offense. Massachusetts's gambling device statute, for instance, explicitly states a gambling device must be a slot machine. (See MASS. GEN. LAWS ch. 271, § 5A.) But states with broadly worded ancillary laws could use those laws to reach key components of a digital gaming operation. If, for example, a digital game is used for "gambling," the server used to host games could be considered a "gambling device, depending on how a state defines the term."

Pool selling and bookmaking prohibitions are less of a concern for the typical game developer. The two offenses are closely related, but they are not the same. Pool selling occurs when contestants pool together a pot of money (the prize pool); competitors then make wagers on the outcome of events, with winning wagers receiving prizes from the pool. Pari-mutuel horse racing is perhaps the most prominent example of a "pool." Bookmaking is a close cousin, the distinction being that "the betting is with the bookmakers [i.e., the house], while in pool selling, the betting is among the purchasers of the pool." (38 C.J.S. *Gaming* § 6.) These laws do not consider the skill/chance question. A stake on a contest is typically considered a bet that runs afoul of one of these two provisions, although several states have "purse, prize, and premium" laws that exempt entry fees paid for one's own participation in a contest of skill in which prizes can be won from operators who do not take part in the contest (or otherwise have a vested interest). So long as a game format does not allow a player to wager a thing of value on the outcome of a contest, there is no concern about running afoul of pool selling and bookmaking prohibitions. For most developers, this should not be an issue, especially as they attribute no value to in-game items.

The criminal prohibitions discussed above were crafted at a time when gambling was treated purely as a vice. The legal landscape for gambling has since dramatically transformed, going from outright prohibition to careful regulation and licensure, replete with a schedule of fees and taxes owed to the state fisc. To the extent that digital gaming operations raise gambling concerns, the criminal laws could conceivably be used by prosecutors and regulators to shut them down. But as the legislative response to the uncertainty about fantasy sports shows, it is far more likely that any tension with the criminal laws will be addressed by accommodation and regulation, not resort to outright prohibition.

THE PROBLEM OF SECONDARY MARKETS

One unexpected source of potential legal problems is a feature of many digital games—in-game items. Although a game developer may not attribute any real-world value to an in-game item (or even a game account), the players themselves may assign that real-world value, which in turn has created legal headaches for developers. Most digital games are not designed with a real-world prize in mind: players can collect in-game items, but those items have no inherent real-world value. So in ordinary circumstances, they come nowhere close to violating the gambling laws, such as a general gambling prohibition or a bookmaking statute, because there is no opportunity to win anything of value.

These games sometimes allow players to trade virtual in-game items using the game platform itself. This is where things get complicated from a gambling law perspective. Some players may

find a virtual quid pro quo arrangement satisfactory, trading one in-game item for another. But others may assign value to in-game items and may offer real money for certain items, especially those that are rare or otherwise prized in some way. So two players can come to an agreement to trade a virtual item for money, consummating the transaction by using a third-party vendor like PayPal or through BitCoin. These are not always small-dollar transactions—certain items on *CS:GO*, for instance, are regularly sold for hundreds of dollars. Even accounts themselves can become a desired good—players unwilling to spend the time to build up an in-game character or account can buy their way to success, purchasing accounts that have already achieved certain in-game accomplishments.

What results from this marketplace of in-game items and accounts is a thriving secondary market, where items and accounts are assigned real-world value by the players themselves, not the developer. And that market has spawned an unseemly outgrowth for those developers: gambling through the secondary market. At the most basic level of secondary market gambling, players can use in-game items or accounts to wager on themselves or others, e.g., Player 1 "wagers" an in-game item that he or she will beat Player 2 in an upcoming match (and vice versa), which the winning player can then sell on the secondary market. The next level of secondary market gambling is wagering on a match from which those placing wagers are totally detached—Players 1 and 2 wager in-game items on an upcoming team-based match involving two teams, with Player 1 asserting that Team A will win and Player 2 claiming that Team B will win. And the most extreme form of secondary market gambling is flat-out gambling—Player 1 transfers items to the in-game account of a third-party website, those items are assigned a monetary value, and then Player 1 plays casino-type games on the third-party website, "cashing out" winnings back in the form of in-game items.

These transactions raise the question of whether developers—who have no intention of fostering a gambling environment when they first release their games—could be liable for allowing gambling to occur through their games and on their systems. To be sure, no developer has been found civilly or criminally liable for violating the gambling laws of any state on a secondary market gambling theory, and it is highly unlikely that any will. But two recent civil actions provide food for thought as to how developers might find themselves unexpectedly on the hook for violating those prohibitions.

Mason v. Machine Zone, a suit involving the popular mobile game *Game of War*, presented one of the first examples of a game developer ensnared by a secondary market theory of gambling liability. *Game of War* is a strategy game in which players build virtual empires and attack one another in a quest for dominance. At the time, users accrued "gold," an in-game currency that could either be earned or purchased. Players could use the "gold" to purchase in-game items that would enhance their gaming experience. Or they could go to a virtual wheel, on which they would wager "gold" in exchange for the opportunity to win, with the spin of the wheel, some other in-game item. The player in *Mason* contended that the virtual wheel constituted gambling because a stake (purchased "gold") was placed on a contest of chance (the spinning wheel) for the possibility of winning a thing of value. The thing of value that could be won, the *Mason* player alleged, was a randomly selected in-game resource that would make the player's account more valuable—that account could then be sold on the secondary market. The *Mason* court found the link to the secondary market too attenuated to implicate the developer and

dismissed the case. (*Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015).) Similar claims were made in *Soto v. Sky Union, LLC*. (159 F. Supp. 3d 871 (N.D. Ill. 2016).) As of this writing, the U.S. Court of Appeals for the Fourth Circuit is considering the *Mason* case on appeal.

McLeod v. Valve Corp., a case involving *CS:GO*, provides another approach to a secondary market theory of gambling liability. *CS:GO* is a multiplayer first-person shooter in which teams compete against one another to eliminate the other in timed rounds. In playing the game, players can accumulate “skins,” cosmetic decorations added to virtual in-game weapons. These skins can be acquired either through randomly generated “drops” or by trading with other players through an in-game platform. That platform also allows players to sell or buy skins for real money. Through third-party sites, players can wager skins on *CS:GO* matches and even wager skins in online “traditional” casinos replete with games like poker and roulette. Valve, the game’s developer, has not explicitly blessed any of this third-party activity. Instead, it has sent cease-and-desist letters asking for the third-party activity to stop. Nevertheless, the player in *McLeod* alleged that Valve, by allowing these sites to operate for the time that they did, engaged in illegal gambling. The district court ultimately dismissed the case on grounds that the plaintiffs lacked standing to bring their claims under RICO, punting on the question of gambling (but assuming it arguendo). (*McLeod v. Valve Corp.*, No. 2:16-CV-01227-JCC, 2016 U.S. Dist. LEXIS 137836 (W.D. Wash. Oct. 4, 2016).) In light of what was virtually a non-decision on the gambling issue in *McLeod*, suits have continued to spring up. (See, e.g., *G.G. v. Valve Corp.*, No. 2:16-cv-01941-JCC (W.D. Wash.).)

The *Machine Zone* and *McLeod* cases illustrate a problem unanticipated by the gambling laws currently in force: those laws presume that the operators themselves are offering prizes of value—they do not address what happens when it is someone else who is assigning value to prizes that otherwise would be worthless. To be sure, the problem of worthless items being used as proxies for money or other items of real-world value is not a new one. Courts have long held, for instance, that pinball operators who allow players to accumulate free plays and “cash out” those free plays for set sums of money operate illegal “gambling devices.” (*State v. One Hundred & Fifty-Eight Gaming Devices*, 499 A.2d 940, 952 (Md. 1985) (collecting cases).) (Yes, pinball is sometimes considered a game of chance.) The newness of the problem stems from the third-party assignment of value. If two players make an in-game wager using in-game items and therefore “gamble,” is the developer who hosts the game facilitating gambling? That raises another complicated question—what happens when the developer knows that the gambling is happening, but does nothing to shut it down? Is acquiescence enough to hold developers liable? Principles of fairness and lenity say no, as it is not the developer itself that is assigning value to the prizes. But the answer to the question of liability is not clear-cut.

RECOMMENDATIONS

The lack of uniformity in the gambling laws of the 50 states and the problem of secondary market gambling are only two issues that could potentially arise from the intersection of digital gaming and gambling laws. Despite its ubiquity, digital gaming is still a relatively new phenomenon, and the law has yet to catch up. It will likely be years before states are familiar enough with the digital gaming environment to take any action and reform their laws, if they feel

compelled to do so at all.

That said, there are three steps states can take to alleviate the problems mentioned in this article. To address the lack of uniformity on the skill/chance question, states should approach the definition of gambling as a binary choice: chance should either predominate, or it should not matter at all. Although game developers would likely prefer it if all 50 states required that chance predominate in a game in order for it to be considered gambling (as that would give them, in theory, a perfect sense of uniformity), states should also retain the right to exercise some semblance of sovereign prerogative in determining how much gambling to allow in their borders. However, predicating gambling on “intermediate” levels of chance—e.g., a material degree of chance or “any” chance—casts needless ambiguity into the question of gambling. States using those tests should consider picking one side of the skill/chance question or the other, rather than straddling the fence.

As for the issue of secondary market gambling, states should consider adopting laws preemptively clearing developers of any liability under the gambling laws for such activity. Developers should be held liable only if they intentionally design their game so that players could covertly use it as a means of gambling. Another approach is to hold developers liable only for intentional design *or* if they know their game is being used for gambling and they take no steps to put a stop to such secondary market gambling. Under the second approach, developers should be given a safe harbor if they take affirmative steps to shut down the gambling, such as the cease-and-desist letters sent out by Valve in response to the allegations in *McLeod*. Two challenges to this approach, however, are determining when a developer should be deemed “on notice,” and burdening developers with the affirmative duty of expending resources to take advantage of the safe harbor.

Finally, and perhaps most importantly, states should stay ahead of the curve and keep abreast of the latest digital gaming trends. Education and cooperation with the digital gaming industry is the best way to address other challenges that may arise as digital games play a more prominent role in American society. Nevada, for instance, has taken the lead on implementing regulations for “eSports wagering”—placing wagers on the outcome of certain digital contests played by “professional” digital gamers. By addressing at least one aspect of digital gaming early on, the Silver State has already started to reap benefits—casinos have gone all-in on professional digital gaming, i.e., eSports, and expect to yield big dividends.

One area that could be the focus of future regulation is the issue of addiction. eSports wagering in particular has the potential to combine two potent and well-documented forms of addiction—video game addiction and problem gambling. (Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), http://www.espn.com/espn/feature/story/_id/18510975/how-counter-strike-turned-teenager-compulsive-gambler.)

Whether state governments will take steps to reform their gambling laws to address these challenges remains to be seen. But states that proactively clear the air and help promote some semblance of uniformity in the gambling laws may hear from digital game developers sentiments familiar to many gamers—“TY” instead of “TISNF” (“thank you” and “that is so not fair,” respectively, in digital gaming parlance). ■