

THE REGULATION OF SOCIAL GAMING

Social gaming is the hottest topic in the gambling industry, but how imminent is regulation and what are the key battlegrounds? **Bahar Alaeddini**, Solicitor in the gambling law team at Harris Hagan, offers her insight.

What is surprising to some is that social gaming is not new. What is new is the way in which it has evolved with its transition to the Internet and social networking sites attracting a new demographic. Social gaming has exploded in such a pervasive way – nothing short of a global social phenomenon – that the ‘is it gambling?’ debate has been sharply intensified by the industry’s rapid growth. It is reportedly the fastest growing digital industry in the world with estimated revenues of up to \$7 billion by 2015 according to Morgan Stanley. It is reckoned that there are already

willingness to spend £1.49 buying a game on the App store, instead of paying at least seven times that on a cinema ticket, is likely to keep the industry booming and players enticed. It may well be that this age of austerity has arrived at the right time for social gaming operators as consumers look for cheaper forms of entertainment.

Social gaming vs social gambling

Although we do not want to get bogged down in definitions, the complexities of this subject are such that it is important to understand precisely what we are talking

mobile, with social features. The freemium model operates on a free-to-download basis but offers premium features such as bonuses and virtual currency which can be purchased with real money. Social gambling games tend to operate on a similar commercial model but with traditional gambling games such as poker, casino and bingo. It is a reasonable assumption that had there not been a crossover between social gaming and gambling, the debate as to whether or not social gaming should be regulated may never have surfaced and it may never have crossed the radar of regulators in any jurisdiction.

The major changes that have taken place in social gaming are twofold. Firstly, it is available to download, either for free or for a small amount, 24/7 on app stores and on social networking sites. On Facebook alone there were one billion monthly active users in October 2012 and 584 million daily active users in September 2012. Morgan Stanley estimates that every month, 12 percent of the world’s population (800 million) plays one or more form of online social gaming with around 20 percent of them being social gamblers. Secondly, in order to monetise these games, operators charge either for use or for acquiring various elements to improve the gaming experience.

Social gaming largely exists outside of the scope of gambling. For example, in the UK, this is because it does not contain all of the elements of the definition of gaming under section 6 of the UK’s Gambling Act 2005 (‘the 2005 Act’); namely, “playing a game of chance for a prize.” In a nutshell, if no money is paid out to players and winnings have no monetary value, social games will not be liable to regulation under the 2005 Act because the virtual currency does not constitute ‘money’s worth’.

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three times as many people playing social gambling-style games as there are online gamblers. This is most probably because it is unregulated and therefore flourishes in jurisdictions where online gambling is prohibited or restricted such as in the USA and many parts of Asia.

Social gaming represents a new cultural shift. It is also challenging attitudes towards gambling as it strives to project itself as a genuine leisure activity. The emergence of new technologies, which are driving innovation, coupled with a player’s

about. Within the gambling industry, we tend to use the word ‘gaming’ to refer to gambling and, in particular, casino gambling. It is often thought to be a more attractive word than ‘gambling’. However, to most people outside the gambling world, and certainly most people under 30, gaming is not used in a gambling context, but to refer to the playing of games such as Words with Friends, FarmVille and SongPop (the most popular social game on Facebook in 2012). In short, social gaming is playing free or ‘freemium’ games, online or

This is predicated on the basis that any such in-game currency is not exchangeable for any goods or services and cannot be traded for anything other than additional play.

The reward for successful game play tends to come in the form of leaderboards, unlocking levels, virtual items or, most commonly, virtual currency. These are all used as tools in the game, often designed to enrich player engagement, in the same way as money or model buildings might be in Monopoly. The general position, which is made clear in a game's terms and conditions, is that virtual currency has no value in the real world. It cannot be cashed out or transferred and a player has no property rights in it. What is curious is how this can be reconciled with the criminal prosecution of Andrew Mitchell in 2011, imprisoned under the Computer Misuse Act 1998 and Proceeds of Crime Act 2002 for hacking into Zynga's servers and 'stealing' \$12 million worth of virtual currency equivalent to 400 billion virtual poker chips, of which he then sold about one-third of on the black market for £50,000. Interestingly, Mitchell was not prosecuted for theft, but for converting criminal property and securing unauthorised access to a computer with intent to commit an offence.

Inevitably, regulators will be assessing the strength of the 'no money's worth' argument to see if it stacks up against the ability to sell virtual currency on open and black markets. The Mitchell case, along with others such as Runescape in Holland and Linden Labs in the USA, highlight the growing willingness of courts across the globe to consider whether virtual goods as legal property may be capable of statutory protection. For now, at least, there is a distinct lack of clarity.

Social gambling

The major battleground for social gaming centres on the provision of casino-style games, such as DoubleDown and Yazino, played by an estimated 173 million players every month. It is generally accepted that free play casino-style games with no real prizes are not gambling and do not fall within the regulatory sphere. The mere fact

that one plays a game with a roulette wheel or a pack of cards does not mean it falls within section 6 of the 2005 Act. While matters are more complicated when these games are not free to play, paying to play a game with no real prizes does not, in most jurisdictions, constitute gambling. Any issue as to the price of play or the fairness of the game would not be a matter for gambling regulators, but rather for consumer protection legislation.

These games are particularly popular in the US, which according to Morgan Stanley accounts for approximately 40 percent of the social gambling market, where the restrictions on online gambling make it an exceptionally ripe market to develop brand awareness. In the fullness of time, those operators will be banking on

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converting an exceptionally high proportion of existing players to real money gambling. In December 2012, Zynga confirmed that it had applied for a preliminary finding of suitability from the Nevada Gaming Control Board. This marks not only a first step towards offering real money gambling games in Nevada, but also Zynga's opening gambit on the path to a regulated US market.

Regulation: to be or not to be?

The debate is in its infancy, but its core question must be “is regulation necessary?” and, if so, whether gambling regulation is the answer. Regrettably, there is no straightforward answer at present and, instead, there exists a plethora of complicating factors such as the conflict of laws, multi-jurisdictional licensing regimes and the unpredictability of the industry.

Another area of interest that is likely to engage regulators is the potential social impact of free-play gambling-style games.

Some commentators, including the Remote Gambling Association, have talked of concerns around social gaming including:

1. A lack of transparency.
2. The potential for harm.
3. Misleading practices by making 'false promises' to customers, particularly the young and vulnerable, so that it appears easier to win on social gambling games compared to real money games by using favourable odds and higher return-to-player percentages.
4. The conversion of social gamers to real money gamblers.
5. Poor age verification – this is particularly relevant where such games are available on social networking platforms that do not operate stringent age verification procedures.

What does seem possible is that certain activity by online gambling licensees on their social gaming sites, or in relation to their social gaming products, including those that are free play, might impact upon their suitability to hold gambling licences. Such activity might include offering grossly different return-to-player percentages. It is yet to be seen how regulators will deal with this issue and whether they will offer any form of voluntary certification in relation to such matters as randomness and chances of winning.

The stark reality is that our understanding is incomplete due to the lack of available evidence and research. What does seem clear is that there is a lack of appetite for regulating non-gambling social games such as the Words with Friends and FarmVille variety. Regulators cannot step into the shoes of parents or carers and, in any event, those social games are subject to consumer protection legislation.

Self-regulation

While regulators are clearly keeping a close eye on the industry, it would seem premature for governments to introduce draft legislation without seeing how the industry develops, and without some research providing evidence that regulation may be necessary. What is clear during this period of self-discovery is that operators developing gambling-style social games are at risk of being regulated. There is a growing feeling that operators should take the initiative by looking to self-regulate. By putting appropriate testing and social responsibility measures in place commensurate with those adopted by its real-money relations, social gambling operators can improve their credibility rating amongst those looking in. It could perhaps be argued – and some no doubt will argue – that it would be

proportionate to regulate, but existing self-regulating mechanisms might also make the introduction of any statutory regulation less commercially damaging to operators.

In deciding that it was better to be proactive rather than reactive, the Social Gaming Association (SGA) has been formed with the goal to provide a platform and unified voice from the industry. The emergence of the SGA is an encouraging sign that operators are taking their responsibilities more seriously as they look to answer their critics and pro-actively educate policy makers about social gaming.

Catalyst

This debate is likely to be the catalyst that shapes the industry's future. At the very least, the games that look and feel

like gambling will continue to keep the regulators interested. A significant risk is that any regulatory regime is likely to take a number of years to develop and will need to be flexible in respect of technological advances. It will be incredibly difficult for even the most forward-thinking regulators to keep abreast with the speed at which new game concepts are developing. It is important that legislators do not rush in. For the time being, it seems likely that the debate will continue.



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