

Are You Rolling the Dice With Roll Playing Games?

*Some video games may actually be
an unlawful form of gaming*

By Ron Segev, Eric Stein and David McHugh



Subscription-based, massively multiplayer online role-playing games (MMORPGs) have made successful game developers and publishers massive amounts of money.

According to Superdata Research, *World of Warcraft*, the king of MMORPGs, brought in over one billion dollars in revenue in 2013 for developer Blizzard Entertainment.¹ The exceedingly popular free-to-play game *League of Legends* earned revenue of \$946 million over the first nine months of 2014 for developer and publisher Riot Games.²

Traditionally, video game developers and publishers have kept their spheres of operation outside the world of real-money online gaming. While that separation has been decreasing, we have seen that our non-gambling video game clients are still electing to stay away from real-money online gaming. These clients explain their decision as being based on two assumptions:

1. MMORPGs and FTP (Free to Play) games offer a different entertainment experience, one not necessarily based on gambling mechanics.
2. MMORPGs and FTP games are not exposed to the risk and regulation affecting the iGaming world.

What if these assumptions are not correct?

A game by any other name...

Sometimes what appears to be an innocuous video game may actually turn out to be something else. Without a developer even knowing it, their game could contain gambling elements, and, depending on the jurisdiction, that could be enough to land them in hot water.

It's not always easy to know when you've crossed the line into unlawful online gaming.

With some minor jurisdiction-dependent adjustments, the common law test used to determine if your video game is just that, a video game, or a form of gambling and (i.e. a presumptively illegal game) is made of up three elements: consideration, chance, and prize³:

1. Is there consideration? Did someone pay to play the game?
2. Is there an element of chance? Is there a systemic element of chance in the game, such as the roll of dice or the dealing of cards, which outweighs any element of skill in the game?
3. Is there a prize or reward? Does the game offer the player an opportunity to win a prize that has a real world value?



Applying this common law test, one can see how an online casino is clearly a form of gambling: the player places a bet (consideration), pushes a button to execute a random spin of the reels hoping to land on a winning series of images (chance), and if lucky wins cash (prize).

Consideration, chance, and a prize. That's all it takes for a "game" to become a "gamble," and therefore possibly unlawful. Importantly, with respect to the element of chance, the authorities are in general agreement that if such element is present and predominates the determination of a winner, the fact that players may exercise varying terms of skill is immaterial.⁴

When the common law definition of gambling arises in the video-game context

Many MMORPGs use a subscription model, which means players pay a monthly or annual fee for access to the game. Typically, the player will also have to pay a one-time fee to purchase a licence to install and play the game on their PC or console. Both of these payments can be viewed as consideration.

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¹ <http://www.gamesindustry.biz/articles/2014-07-18-the-old-republic-earned-usd165-million-last-year-report>, citing report by SuperData Research, Inc. (www.superdataresearch.com).

² <http://venturebeat.com/2014/10/23/the-10-highest-grossing-online-pc-games-in-2014-hearthstone-dota-2-cant-compete-with-league-of-legends/>.

³ See *Johnson v. Phinney*, 218 F.2d 303, 306 (5th Cir. 1955). See also *Morrow v. State of Alaska*, 511 P.2d 127 (Alaska, 1973) (... "courts generally adopt a definition including three essential elements: consideration, chance, and prize.")

⁴ Id. See also *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593 (1954); *State v. Wiley*, 232 Iowa 443, 3 N.W.2d 620 (1942); *State v. Coats*, 158 Or. 122, 74 P.2d 1102 (1938); *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941); *State ex rel. Green v. One 5¢ Fifth Inning Base Ball Machine*, 241 Ala. 455, 3 So.2d 27 (1941); *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937); *State v. Langford*, Tex.Civ.App., 144 S.W.2d 448 (1940); *In re Allen*, 27 Cal.Rptr. 168 at 169, 59 Cal.2d 5 at 6 (Cal., 1962)

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MMORPGs also provide players with prizes in the form of virtual-items or loot. In fact, collecting these virtual items is one of the main reasons players play MMORPGs. But are virtual, or in-game, items a prize for the purposes of determining if a video game is in fact an illegal gambling-game?

As far as we know, no court has decided whether a virtual-item is a prize, but the reality is that virtual-items can be worth a lot of money. For example, the World of Warcraft virtual-item “Reins of the swift spectral tiger” currently sells for \$431.12 USD on the website sse-games.com.⁵ World of Warcraft’s terms of use prohibit the sale of “in-game items or currency for ‘real’ money”⁶ but such efforts have been to no avail. Grey-markets abound for virtual-items and entire businesses are dedicated to obtaining virtual-items and then selling them for a handsome profit.

The question to ask then is whether a court could find that the real world value of virtual-items – and the fact they are sold in secondary markets evidencing such value – makes them prizes. While at least one court found the existence of a secondary market did not elevate a virtual item to satisfy the element of “prize”, most U.S. case law appears to presume the element of prize has been met by a cursory review.

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Statutory law, however, is a different matter, where element of “prize” has been consistently defined as “something of value”, meaning any “money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.”⁷ Under this definition, we can clearly see how a MMORPG virtual item, which might be “exchangeable for money” would be seen as a “prize.” Also, it is immaterial whether the ultimate prize is worth more than the consideration paid for the chance to win it⁸. In essence, the prize must be “some advantage or inequality in amount or value”⁹ received by some of the players of the game.

Of course, not all MMORPGs have their virtual-items sold on grey or black markets, but for those that do, their virtual-items have a real world monetary value, technically fitting the definition of “something of value.” As a result, virtual-items gained in a MMORPG that can be sold for real money can be considered a “prize”, satisfying that element of the common law test used to determine when a video game could be deemed a gamble. While no cases directly on point have been found, even though an MMORPG may have terms and conditions prohibiting the sale or trading of virtual items, it does not appear that a MMORPG operator has a legal obligation to pursue efforts to stop such actions. Though not a

direct corollary, it is worth noting that an action filed against Craigslist regarding its responsibility for allegedly illegal content was dismissed.¹⁰ So the onus may not necessarily lie with a developer or publisher to police and attempt to shut down third party virtual-goods markets. However there is almost no judicial review on this exact point and gaming professionals would be remiss not to keep an eye on this area.

The final question is whether the subject MMORPG contains an element of chance, and, if so, whether it outweighs the element of a player’s skill in determining the outcome of the game.¹¹ If this part of the common law test is met – and the other two elements of consideration and prize are present – the game is in fact a gamble.

Some subscription based MMORPGs use a dice rolling system for the “dropping” and allocation of virtual-items. The process works like this - Suppose you have a character in an MMORPG and you plan to defeat a monster. You plan to defeat this monster because doing so could cause it to drop a valuable and rare virtual-item that you wish to acquire. However, there is no guarantee that the monster will drop the virtual-item you desire. Rather, there is only a probability that the monster will drop the desired virtual-item. Unfortunately, there is a much greater probability that the monster will drop a less rare and less valuable virtual-item instead. As a result, even if you defeat the monster, there is only a *chance* that you will obtain the rare and valuable virtual-item. To make matters worse, defeating this monster alone will be quite difficult, if not impossible. You’ll need the help of other players, all also vying to obtain that rare and valuable item. So, you gather a team of other players, together you defeat the monster, and lo and behold the monster dropped the desired virtual-item. But who gets it?

Every player wants the virtual-item, and every player contributed to the monster’s defeat, but it only dropped one virtual-item and it can’t be shared. To deal with this problem, some MMORPGs roll a dice for each player who contributed to the monster’s defeat. Whoever gets the highest roll



is awarded the virtual-item. This dice roll for the virtual-item, and whether the monster drops the virtual item in the first place, unquestionably constitutes chance.

In the U.S., the legal status of subscription based MMORPGs that use dice-rolling for the allocation and dropping of virtual items – and also have grey or black markets for those virtual-items – is less clear. Does the chance element in the video game outweigh the skill of the player or players? This answer will vary based on the design of the game and the trier-of-fact assessing it. But the answer is important, as it may determine the legality of the video game.

Subscription based MMORPGs are illegal forms of gambling? Possibly.

As far as we can tell, no game developer has ever been convicted for developing and operating a subscription based MMORPG. Whether this means such video games are actually legal, or simply that subscription based MMORPGs are low on the radar of law enforcement, is not clear.

To mitigate the risk a video game is found to constitute gambling, one of the three common law gambling definition elements must be eliminated from the game's overall scheme. Specifically, this means removing items or scenarios, which can be viewed as either consideration, chance, or the prize. For example, a developer may be wise to develop free-to-play games as they (in theory) have no consideration. The problem is, if a game is truly free it can be hard to monetize, which is why most free-to-play games are actually "freemium" games. Freemium games are free to play, but players often have to purchase upgrades for their characters to remain competitive or to defeat more challenging characters and other obstacles.

Beware the in-game purchase option

The in-game purchase option could be problematic. When a player purchases a more powerful weapon with real money, and that weapon

increases their odds of overcoming an obstacle to obtain a valuable virtual-item the element of consideration is now present in what was a "free" game.

There is a solution to the problem faced by freemium games. A game can actually still have consideration and award virtual items without the game being a gambling game. To do so, the developer needs to ensure the virtual item does not become a "prize." Remember, a virtual item is probably a prize if it becomes "something of value." Generally, a game's virtual-item can only have real world value if there is a market at which it can be traded or sold. If it is impossible for players to sell or purchase virtual items from other players, then the virtual-item would likely not be deemed something of value, no longer meeting the definitions of a prize. Therefore, to prevent a virtual item from becoming a prize, developers need to find effective measures to prevent players from selling them. If this can be accomplished the game will not be awarding any "prizes," and would not be a gambling game.

Developers have used various strategies to achieve this result. Some games have a character's inventory reset following the completion of a gameplay session. This means that the character retains none of the virtual items that it picked up during the gameplay session. Since the character retains none of the virtual items, there is nothing to sell, meaning that the virtual items have no real world value and therefore are not prizes. Another strategy used is locking items to a player. When a player defeats an enemy and obtains a new virtual item, that item becomes locked to the particular player who earned it, and cannot be traded to or used by other players. Here, since the virtual item cannot be traded – or sold – it has no real world value and again is probably not a prize. This strategy may be attractive for the players, as they get to develop their character over many gameplay sessions, and simultaneously keeps the developer on the right side of the common law gambling definition's prize element.

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³ <https://www.sse-games.com/wow-items>

⁴ S.S World of Warcraft Terms of Use <http://us.blizzard.com/en-us/company/legal/wow_tou.html>

⁵ NJ Rev Stat § 2C:37-1(d) (2014); *See also* Ala. Code § 13A-12-20(11) (2014).

⁶ *See* Charles Pickett, "Contests and the Lottery Laws" (1932) 45 Harvard Law Review 1196 at 1207, cited in *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, J. Royce Fitchner, Drake Law Review, Vol. 60, 2011.

⁹ *See* Carl Co. v. Lennon, 148 N.Y.S. 375, 376 (Sup. Ct. 1914).

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We should restate our earlier view that, currently, it is unlikely that a publisher or developer would be required to police and attempt to shut down third-party virtual-goods markets; therefore it is currently unlikely that video game companies would be found responsible for activities on those markets.

The rest of the world

Of course, offering your games online means offering them to the world, so developers and publishers must also be sensitive to jurisdictions outside the U.S.

In Canada for example, “prize” has been defined as being money or money’s worth.¹² Money’s-worth can be property that has monetary value. For example, in the United Kingdom case *Secretan v Hart*, money’s worth is defined as:

“a way of expressing the price or consideration given for property where property is acquired in return for something other than money, such as services or other property, where the price or consideration which the acquirer gives for the property has got to be turned into money before it can be expressed in terms of money.”¹³

In Canada and the UK, any chance at all is enough to make the game a gamble if the other two elements are also present. So, in Canada and the UK, subscription based MMORPGs that use dice-rolling for the allocation and dropping of virtual items and that also have grey or black markets for those virtual items may actually be gambling-games. All three elements of a gamble are present: the subscription is consideration, the dice rolling for allocation of virtual-items is chance, and the monetary value attached to the virtual-item by virtue of grey or black markets may make the virtual-item a prize.

Jurisdictional adjustment is neces-



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sary when evaluating the element of chance in a game when offering your games to other jurisdictions. Compared with the U.S., Canada and the UK take a

simpler, albeit more restrictive approach to the chance element. In both these jurisdictions, no weighing of chance and skill is necessary. Instead, the courts and law enforcement need only ask if there is *any* element of systemic chance in the game, however small. If there is, the game will be a game of chance.

The Supreme Court of Canada made this clear when it held that “Parliament intended to

avoid the uncertainties involved in determining what is the dominant element and deliberately chose to include in the definition of ‘game’ all mixed games [of skill and chance] as well as games of [pure] chance.”¹⁴ In the UK, the *Gambling Act 2005* defines games of chance (i.e., illegal gambling-games) as including “a game that involves both an element of chance and an element of skill” and also “a game that involves an element of chance that can be eliminated by superlative skill.”¹⁵

A subscription based MMORPG publisher should have a closer look at the games from a legal perspective. Some design choices with regard to pricing models and game mechanics – and how law enforcement or the courts in jurisdictions around the world might view them – should be evaluated prior to taking the games live. Failing to properly evaluate the subscription-based MMORPG games for potential iGaming legal issues could be the biggest gamble of all. ♣

¹⁰ See *Thomas Dart, Sheriff of Cook County v. Craigslist Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

¹¹ See *In re Allen*, 27 Cal.Rptr. 168 at 169, 59 Cal.2d 5 at 6 (Cal., 1962) (“The term ‘game of chance’ has an accepted meaning established by numerous adjudications. Although different language is used in some of the cases in defining the term, the definitions are substantially the same. It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.” (Emphasis supplied).

¹² *R. v. Dwyer*, 1999 at para 1, 121 O.A.C. 298 (Ont. CA).

¹³ *Secretan v Hart*, [1969] 3 All ER 1196 at 1199.

¹⁴ *Ross, Banks and Dyson v R.*, [1968] SCR 786 at 792.

¹⁵ ss. 6(2)(a)(i)-(ii), UK *Gambling Act 2005*, c 19.