

proprietary virtual currencies created by game designers.

Virtual currencies and their use within social networks, proprietary virtual worlds and social gaming environments have existed for more than a decade. In fact, these virtual environments have created a myriad of ways that their virtual currencies can be purchased, mined, earned, stolen, insured, refined and even won. Creators of online virtual worlds such as SecondLife have progressed to the point where they have monetized their virtual currencies via vibrant secondary exchanges that allow proprietary virtual currencies to be converted into fungible “real life” money.⁵ In each of the recent three cases, it is the “gambling” of these virtual currencies within these online environments which became the subject of potential class actions seeking recovery under various state statutes.

In *Mason v. Machine Zone*, the plaintiff sought recovery under Maryland and California loss recovery and consumer protection statutes for losses of “virtual gold” that she purchased and then gambled in the popular multi-player online game titled *Game of War: Fire Age*. The virtual world in which the plaintiff played allowed “gold” to be earned for free or purchased with real currency. The “gold” had numerous uses inside the game, but it could also be wagered at the “casino” inside the virtual world. The pleadings alleged that the “gold” could also be bought and sold via a secondary market which would convert the same into “real world” currency; however, these secondary markets and exchanges were expressly prohibited via the game’s terms and conditions to which all players agreed prior to their participation in the game.⁶

The federal judge rejected attempts by the plaintiff to analogize the gaming environment to a slot machine or other games of chance instead finding that the overall virtual world was essentially a game of skill and that the casino activity was “more akin to purchasing cinema or amusement park tickets” where “consumers of such services pay for the pleasure of entertainment per se, not for the prospect of economic gain.” Of particular note was that while the Plaintiff could “spend her ‘gold’ as she pleased” subject to the game’s terms and conditions, the judge found that

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Act. In that case decided in November, the Plaintiff alleged that the virtual casino games constituted gambling under Washington State law. Unlike the *Mason* case, there was no virtual world with alternative currency that had alternative uses within that realm. Instead, the virtual casino offered players the ability to receive free daily deposits of chips which could be used to play a sundry of casino games. These game chips could also be purchased with real-world money in the event a player does not want to wait until the next day’s deposit of free credits and could be transferred to another player for a fee charged by the

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she could not “cash out of the game” and dismissed the action stating that: “Even in the Internet age, there is a crucial distinction between that which is pretend and that which is real and true. ... The laws of California and Maryland do not trifle with play money...”. The Terms of Service seemed to be a critical aspect leading to dismissal of the claims against the game designer.

Similarly in *Kater v. Churchill Downs, Inc.*, the Terms of Use⁷ were an important reason that the Big Fish virtual casino was able to evade claims under the Washington Recovery of Money Lost at Gambling



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¹ *Soto v. Sky Union, LLC.*, United States District Court, N.D. Illinois, Eastern Division. January 29, 2016, 2016 WL 362379.

² For the purposes of this article, the term “virtual currency” will refer to fictitious proprietary representations of “currency” created by game designers for use within social gaming environments which by the terms and conditions of the game have no value in the real world and cannot be monetized into “real world” fungible currency via a “currency exchange” sanctioned by the game creators.

³ *Soto, supra*; *Kater v. Churchill Downs Incorporated*, United States District Court, W.D. Washington, November 19, 2015, 2015 WL 9839755; *Mason v. Machine Zone, Inc.*, United States District Court, D. Maryland, October 20, 2015, 2015 WL 6335771.

⁴ The *Mason* case was appealed to the Fourth Circuit Federal Court of Appeals on November 23, 2015.

⁵ <https://community.secondlife.com/t5/English-Knowledge-Base/Buying-and-selling-Linden-dollars/tap/700107>, last visited March 18, 2016.

⁶ Defendant’s Terms of Service provided that “Virtual Currency and Virtual Goods may never be redeemed for ‘real world’ money, goods or other items of monetary value from [Defendant] or any other person”; that players receive a nontransferable “revocable license to use the Virtual Goods and Virtual Currency” solely for personal entertainment purposes; and that, aside from the foregoing license, players have “no right, title, or interest in or to any such Virtual Goods or Virtual Currency.”

⁷ In *Kater*, the Terms of Use clearly stated that users “have no property interest in any virtual item... Virtual items may not be transferred or resold for commercial gain in any manner... Virtual items may not be purchased or sold from any individual or other company via cash, barter or any other transaction. Virtual items have no monetary value, and cannot be used to purchase or use products or services other than within the applicable Big Fish Offering. Virtual items cannot be refunded or exchanged for cash or any other tangible value.”



Each of these cases provides some clarity and guidance for game designers on how “free play” and “pay-to-play” can coexist without running afoul of some state laws prohibiting gambling. These lines however are still somewhat blurred when they involve regulated gaming companies, particularly those that are licensed in Nevada.



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game operator. Like the *Mason* plaintiff, the existence of a secondary market for these casino credits was raised as evidence of a “real world” payout evidencing the alleged illegal gambling. In addition, the fact that the chips awarded from successful games of chance extended game play or time inside of the gaming environment was evidence of a “thing of value” being awarded via the game.

In dismissing these claims, the court found that the extension of game play is only valuable if the game is not free to play. In addition, the court determined that “any user exchanging Big Fish Casino chips for cash on a secondary market is expressly violating the game’s Terms of Use, which users are required to agree to before they can access the game. Allowing Plaintiff and those similarly situated to sue Defendant for damages based on their own breach of contract would be contrary to basic principles of law and equity.”

The final and most recent case in the trilogy involves a social game known as *Castle Clash* which is more of a hybrid between the two prior cases. In *Soto v. Sky Union*, the court considered a virtual gaming environment in which success inside the gaming world had a lot to do with the skills and talents attributed to the virtual characters obtained by a player. These characters as well as their skills and talents could be earned over time spent in the virtual world or could be won via a host of chance-based algorithms inherent to the game.⁸ The plaintiffs sought recovery of gaming losses under Michigan, Illinois and California consumer protection and loss recovery laws as a result of the inherent chance within the game in its determination of which players received the more powerful Heroes and Talents for their virtual characters which increased their game success and ultimately their time in the gaming environment. The lack of a secondary market on which Heroes, Talents and Gems could be exchanged was noted by the court while it also found that unlike a casino there is no “house” to “cash out” the players. The court used similar logic as the prior decisions finding that “Heroes and Talents cannot be monetized. They merely improve, to greater and lesser extents depending on their strengths and skills, the gameplay experience for *Castle Clash* players. And under Illinois law, ‘the possibility of winning a greater or lesser amount of amusement’ is not gambling.”

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game designers on how “free play” and “pay-to-play” can coexist without running afoul of some state laws prohibiting gambling. These lines however are still somewhat blurred when they involve regulated gaming companies, particularly those that are licensed in Nevada. The Nevada Attorney General took a more conservative view when asked to opine as to the legality of an online gaming environment designed by WagerWorks for casino conglomerate, MGM.⁹ The gaming environment which provided players with daily allotments of free game credits which had no value within or outside of the game but instead awarded players casino marketing points¹⁰ based on the amount of time the player spent within the online gaming environment was found to be outside of regulation by the Nevada statutes. The opinion did clarify that other proposed game options similar to those in the above trilogy could

be subject to regulation by the State’s gaming control board if the virtual credits could be lost by the player or were convertible to some type of other reward or prize within the gaming environment regardless of “whether or not the instrumentality may be redeemed for cash.”¹¹

This area of the law no doubt will continue to unfold presenting challenges to regulated gambling companies and unregulated social gaming concerns. These cases make a strong point that game designers should be very clear in the Terms of Use for their games as the Terms of Use relates to player’s rights to the virtual currencies and assets. In addition, they should also be diligent in monitoring of the use of their virtual currencies and be mindful of other cases which have extended property rights in these assets to their players.¹² Finally, consideration should be given to proactive protection of intellectual property rights associated with the game by unauthorized secondary markets dealing in virtual assets and currencies.¹³ Diligence in the prosecution of such unauthorized uses will prevent arguments that the game designer has tacitly accepted the monetization of the virtual currency making it more akin to convertible “scrip money”¹⁴ which could lead to gambling law prosecutions and consumer redress. These steps will no doubt help insulate the games from future challenges, but as the lines between gambling and gaming continue to blur via their convergence on the Internet one should expect additional court decisions to help clarify the murky boundaries between the legal and the suspect. ♣

⁸ The game allowed for Heroes, Talents and Gems to be purchased with “shards” randomly assigned by the game and earned via daily trips to the game’s dungeon. A player was entitled to a single trip per day or could purchase additional trips with real money. In addition, shards and gems could be won via games of chance within the game which could be used to purchase Heroes and Talents which could improve a player’s success within the game.

⁹ See Nevada AGO 2000-38.

¹⁰ These casino marketing points could be used for show tickets, hotel rooms, food, merchandise, airline miles, prize privileges and even cash.

¹¹ See Nev. Rev. Stat. Sec. 463.01862 definition of “representation of value”.

¹² See *Evans v. Linden Research*, N.D. California, 2014 WL 1724891 (settlement of a class action lawsuit for misappropriation of virtual currency and virtual assets)

¹³ See *Zynga Game Network Inc. v. Williams*, United States District Court, N.D. California, May 20, 2010, 2010 WL 2077191 default judgment entered via *Zynga Game Network Inc. v. Williams*, United States District Court, N.D. California, June 28, 2011, 2011 WL 2560240, 100 U.S.P.Q.2d 1550 (Enforcement action for unauthorized use of service mark MAFIA WARS by the creator of an unauthorized secondary market dealing in virtual goods and currency related to the online game).

¹⁴ See *Charnes v. Central City Opera House Ass’n*, 773 P.2d 546 (Colo. 1989) for an explanation of “scrip money”. *Accord Monte Carlo Parties, Ltd. v. Webb*, 322 S.E.2d 246 (Ga. 1984)