

Governance Challenges in the Global Games Industry

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The current governance challenges facing the global games industry are heavily dominated by online games. Whilst much academic and industry attention has been afforded to Virtual Worlds, the more pressing contemporary challenges may arise in casual games, especially when found on social networks. As authorities are faced with an increasing volume of disputes between participants and platform operators, the likelihood of external regulation increases, and the role that such regulation would have on the industry – both internationally and within specific regions – is unclear. Similarly, as we increasingly see developers push the bounds of what is reasonable and morally or legally acceptable, regulatory issues are likely to come to the forefront, and set a precedent for the future regulation of games, not only on these platforms, but more generally.²

TheNextWeb (Zainzinger, 2012) state that 53% of Facebook users play social games, and according to Facebook's IPO filing Zynga accounts for 12% of Facebook's revenue. It is also noted that the top five 'casino' games on Facebook – *Texas HoldEm Poker*, *Slotomania*, *DoubleDown Casino*, *Bingo Blitz* and *Best Casino* – draw over 11 million users daily, and that approximately 20% of gamers have paid for in-game benefits with Facebook Credits, citing Christopher Jenke, COO of *CrowdPark*, as stating, "It's about teasing out that human instinct that two four-year-olds already have when they bet each other 'I can run faster than you'. That human demeanor of challenging one another fits perfectly into the social network, where you're only a mouse click away from, for example, all your classmates".

The article suggests an increasing merger of social networks and gambling, with social games reaching 290 million players a month on *Facebook*, and the online gambling industry quoted at \$30.3billion, and the article notes that late 2011 saw gambling companies given permission to

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advertise on Facebook and suggests that “since December, Zuckerberg and the team are in talks with operators to open up the network for real money gambling in the UK and other countries”. An article in the January 2012 issue of *Forbes* magazine (Tassi, 2012) notes that *Zynga* “is thinking about getting into the real money gambling game online”, with *Zynga* already offering poker and bingo through their social media platforms, and subsequently *Zynga* have launched Poker and Casino offerings in the United Kingdom. However, it is not only the more formal gambling games which pose regulatory questions; indeed, these may be the simplest to classify.

Gambling with Zero Return

The Review of the Australian Interactive Gambling Act (Australian Government: Department of Broadband, Communications and the Digital economy, 2013) draws attention to developing areas such as social media as a potential site for future regulation. They draw particular attention to the potential that Facebook games which mimic gambling activity, such as *Slotomania* or *Zynga Poker*, may serve to normalize gambling amongst young players of the games. They also note the investment of traditional casino operators such as International Game Technology (ITG) – manufacturer of slot machines - and *Caesar’s Entertainment* - owner of over 50 casinos – in game developers. The report cites William Hill CEO Ralph Topping as claiming that

“...a child can buy chips to play an online slot which is almost as good as anything you find on William Hill Online... In fact, it might even pay out more than a slot you might find on an online gambling site, which could also encourage the vulnerable...But that’s OK because the chips aren’t real money. Or are they?”

The report states that these games are not currently “prohibited under the IGA as they do not satisfy the definition of a gambling service, due to the virtual currency not being redeemable for real money or anything else of value”. However, they identify that many of these games allow the purchase of virtual chips for real currency. These examples of straight gambling simulations, described as ‘gambling-like’ by the report, are however merely symptomatic of an increasing trend in social games towards the use of mechanics, such as the common energy counter, designed to slow the players progress and encourage them to spend real money to advance.

Kelly (2010) argues that “when you strip away the graphics of these [social] games, what you are left with is simply a button [...] You push it and then the game returns a value of either Win or Lose”. He notes that while “every game developer wants their game to be played, preferably addictively, because it’s so awesome”, mechanics frequently lead not to “addiction of engagement through awesomeness” but “the addiction of compulsiveness”, surmising that “the reality is that they’ve

actually sort-of kind-of half-intentionally built a virtual slot machine industry”, in which “energy is the same as coins”.

If such core elements of social game design are questioned, this gives cause to question the real-money options to circumvent them. With players able to purchase virtual currency and speed the completion of tasks, the money invested by the 20% purchasing in-game benefits (Zainzinger, 2012) may well be the result of compulsion. The decision by the Japanese Consumer Affairs agency to investigate the ‘Kompu Gacha’ mechanic, which I will detail subsequently, and the resultant verdict that such mechanics should be regulated through gambling legislation, demonstrates that politicians are beginning to look at the mechanics deployed in these environments. Indeed, Purewal (2012) argues, “there’s a reasonable argument that complete gacha would be regulated under gambling law under at least some (if not most) Western jurisdictions”.

In many ways, these games – straight gambling simulations and otherwise - are *much worse* than the traditional gambling activity which the IGA review considers. Schüll (2012), discussing the slot machine industry in Las Vegas, argues that it is not the money that is significant for players of slot machines, but a sense of escape; that players see the slot machines as placing them in a trancelike state referred to as the ‘machine zone’. If social games are able to replicate this, as Kelly (2010) argues, then these games are encouraging participants to deposit funds to continue playing. As Schüll discusses, the majority of slot gamblers do not want to win, but to stay in the zone. In slots, however, there is always a chance of winning while with contemporary social games; there is a guaranteed return of zero. Compared to Blackjack (99.8% return) or even the Pokies [slots] that are currently the focus of Australian regulatory attention (>87% return), this is clearly a terrible proposition for the player. I thus contend that limiting the scope of analysis to games with cash prizes on the outcome or cash at risk during the game seems to miss the wider picture; what gambling operator, given the choice, wouldn’t happily accept real money bets they would never have to pay out on?

Kompu Gacha

At its core, Gacha can be likened to trading cards – a player pays a fee (say \$1) to obtain a virtual item, or pack of items, which when opened could either be worthless or of value, with the valuable items appearing at a ratio far less than those that are worthless or of little value.

Kompu Gacha requires a player to purchase packs in the hope of completing the set, and the problem, judicially, has proven to be the bonus awarded for completing the set. For example, a social game may allow you to receive rewards for each baseball player you own, but if you were to

complete the team line-up then your rewards are subject to a 50% bonus or other in-game benefit. The Kompu Gacha business model is based on these rewards not being available through play, but rather in requiring the player to purchase packs in the hope of completing the set.

The precise reason for Japanese authorities targeting providers utilizing this mechanic, such as Gree and DeNA, is still the subject of some debate, although it appears that they are comparing these virtual items to lottery tickets, as opposed – for example - to *Magic: The Gathering*, in which you own the cards and can sell and trade them, or MMOs where there are both in-game methods of earning the elements to complete a set (e.g. a set of armor which awards a bonus when complete) and the ability to sell and trade.

In early 2012, the Japanese Consumer Affairs agency opened an investigation following consumer complaints over money spent on complete gacha. The *Yomiuri Shimbun* newspaper (2012) suggested that the investigation centre on the violation of gambling laws. As Purewal (2012) states, The Consumer Affairs Agency “invited companies involved in the activity to stop it, which several duly did”, although it appears that the Japanese authorities are pressing ahead with plans to regulate the industry regardless.

Purewal (2012) argues that this is “one of the first high profile examples of games and gambling law colliding”, and notes that “Games lawyers have known for some time that this [collision] would happen, as have those parts of the gambling industry who’re interested in games [...] and those parts of the games industry who’re interested in gambling”. He further considers complete gacha in the context of the UK Gambling Act, arguing that the definition of a game of chance is met:

Gaming’ means ‘playing a game of chance for a prize’. A person plays such a game if

- (i) ‘he plays a game of chance and thereby acquires a chance of winning a prize; and
- (ii) whether or not he risks losing anything at the game”)

Purewal also argues that it could equally meet the terms of a lottery:

(2) An arrangement is a simple lottery if:

- (a) persons are required to pay in order to participate in the arrangement,
- (b) in the course of the arrangement one or more prizes are allocated to one or more members of a class, and

(c) the prizes are allocated by a process which relies wholly on chance.

(3) An arrangement is a complex lottery if—

(a) persons are required to pay in order to participate in the arrangement,

(b) in the course of the arrangement one or more prizes are allocated to one or more members of a class,

(c) the prizes are allocated by a series of processes, and

(d) the first of those processes relies wholly on chance.

Purewal notes that “in [his] view, there are at least two avenues under which complete gacha could constitute gambling under UK law, in which case from a purely legal perspective anyone offering complete gacha would require authorisation from the Gambling Commission. Other EU countries and the US may take a similar approach and potentially reach a similar answer”. As demonstrated in the United States with the action taken by *Second Life* after the passing of the *Unlawful Internet Gambling Enforcement Act*, if the US were to reach such a conclusion (that it was gambling, and it was happening online) there would be no regulation shy of prohibition.

Further, Purewal notes that this may be an oversimplification, and that it would be incorrect to assume complete gacha would be ‘regulated in the West’, noting that you would need to have “servers based in the jurisdiction for a start” and that “requiring authorization isn’t the end of the world at all: it simply means you need to seek a license from the national gambling regulator, or seek a way to restructure your game so that it doesn’t fall under the legislation”. Again, though, in light of the UIGEA and the prohibition placed by that act on accepting or facilitating payments for gambling (including credit cards), it would seem that the United States would at least intend to prohibit such activity regardless of the jurisdiction in which it is located, were it to be available to US based customers.

Purewal also contends that even if such mechanics were not seen as gambling, they may be subject to regulation, noting that they may involve “addictive play”. While there is a large body of literature on games and addiction, the majority of which is beyond the scope of this conference paper, I would suggest that the argument (and standard of proof) changes somewhat once real money is involved. Similarly, the pursuit of profit likens such activity more to the literature on gambling addiction than gaming addiction.

Addictive Mechanics & Micro-Transactions

Not all forms of micro-transaction are as problematic as ‘Kompu gacha, though potential regulatory issues surrounding them still exist. Of social games, it would come as no surprise that some of the most problematic and more prominent targets for regulation are those that mirror gambling activity, however I would suggest that mainstream franchises are also likely to be the subject of attention.

In *The Simpsons: Tapped Out*, Homer states “Nonsense Lisa, you can’t lose in a social game” as he introduces scratch cards in a recent update. Indeed, every ticket is a winner, but in *Tapped Out*, you can lose, and you can lose a lot. A new player is quickly prompted to purchase donuts (used to speed progress or obtain premium buildings), with their benefits highlighted throughout the tutorial. At \$0.07 a donut, premium buildings can cost over \$70, and players wanting fast progress can quickly run up an expensive bill, in an experience described by an Australian Television reviewer as “another perfect example of manipulative game design” (‘Bajo’, 2012)

Kelly (2010) quotes Randy Breen, CEO of SGN as stating:

That’s [addiction] what a game like Mafia Wars [on Facebook] essentially creates. The interesting thing is that you’re still motivated by that simple triangle I described. Push button, get thing, go do another thing, get award, go on to the next thing. You see people that may never have played RPGs getting into the game mechanics. They may not understand what’s going on, but they get some fulfillment out of leveling.

He notes that this effectively describes an addiction and that “every game developer wants their game to be played, preferably addictively, because it’s so awesome”, and that “Addiction in that vein means interest, passion and true engagement. However what Randy is (unintentionally I think) relating in the above quote is not the addiction of engagement through awesomeness. Instead it is the addiction of compulsiveness [...] The reality is that they’ve actually sort-of kind-of half-intentionally built a virtual slot machine industry”. This description has clear parallels with the work of Schüll (2012), and indeed draws significant comparisons between the participants of slot machines and social games.

Kelly continues, describing Energy (seen in many social games) as an “exploitative game mechanic and [I] am wondering whether Facebook should ban it”, noting that “it preys on compulsive behaviors”. He offers a comparison between virtual worlds and gambling games, arguing “Blizzard does not set out to make a game that will simply trap users into engagement patterns when they make their next great game. Blizzard are trying to create loyal fans and customers and genuinely entertain them through being awesome, so that their addiction proves worthwhile” while “Slot

machine makers [...] are not trying to do that. They are simply trying to simply ensnare players. Energy and time-waiting mechanics do much the same thing”.

Just as play styles often blur the distinction between advantage play and cheating (Woodford, 2013), so we are seeing designers increasingly blur the distinction between gaming and gambling. While *Mafia Wars* does not provide a cash-out mechanism, the introduction of real world cash into a game of this type will mark a new frontier for social gaming, and one that is likely to increase the push for regulation. At the very least, players are unlikely to accept bugs as reason for losing profit, and there will be a need for a dispute resolution system in such spaces.

Some games already, as with *Eve Online*'s PLEX (Pilot License Extension) system, allow players to put cash into the environment in return for in-game progress. Thus Kelly's argument about the question of ethical design already has applicability. If we were to agree with his argument that such common elements of social game design are addictive, compulsive and unethical, questions must be asked regarding the real-money mechanics deployed in such games to circumvent them. If players have the opportunity to purchase energy, or to buy the resources to speed the manufacture of a workshop (in *The Hunger Games Adventures*), does that make such purchases compulsive and unethical; and if we support the argument that Facebook should intervene in permitting such mechanics, is there also an argument for an external regulator to intervene? Just as the Japanese Consumer Affairs Agency banned Complete Gacha, it seems possible that an Australian or British consumer authority might suggest that such mechanics are exploitative and should be prohibited, at least so far as they invite the spending of real money.

Purewal (2012b) documents these debates, questioning whether “the use and/or marketing of freemium games/in-app purchases/virtual goods is ‘evil’”, noting that “if a game (or other software) is designed in such a way that it encourages its users to pay money, potentially quite a lot of money, in return for little more than transitory enjoyment or other advantages, AND if the majority of those users are children, then parents are going to start getting angry, businesses are going to get sued, and politicians will start getting interested”.

Purewal cites articles from *GamesIndustry.biz* and *The Wall Street Journal* as evidence that “the first two [are] already happening [and] it's only a matter of time before the political interest starts up – which will rapidly lead to regulators in key territories (in particular the FTC in the USA and the European Commission in the EU) announcing investigations into it”, citing the Japanese attempt to regulate Gacha as the start of a trend. Purewal argues that “there is the potential for some form of industry wide self-regulation here based on more enlightened working practices as well a greater

willingness to name and shame the few bad apples that spoil the barrel”, while noting that “there’s precious little sign of any industry consensus or action that could lead to justified self-regulation. Until that begins to happen, there will be nothing to stop piecemeal enforced regulation in different countries”.

Though a real money poker or bingo game offered by Zynga would clearly be gambling, the meshing of a social game developer and gambling is likely to draw increased attention to their other games and the mechanics within, and, from there, it is only a short step to other online games, including virtual worlds. Given that the Japanese are already trying to regulate these specific mechanics and the games which contain them, it remains to be seen whether this will establish a precedent that other jurisdictions may follow. The kind of system called for by Purewal, particularly the “willingness to name and shame the few bad apples that spoil the barrel”, is in fact remarkably similar to the system that evolved in the offshore gambling industry (Woodford, 2013b)

While the formal acceptability of mechanics is likely an issue for governmental regulation, the community can certainly influence the number of participants utilizing any particular operator. One example of this is the offshore gambling website *Wizard of Odds*, operated by Michael Shackleford, Adjunct Professor of Casino Math at the University of Nevada, Las Vegas. Shackleford (2012), as with Sportsbook Review, maintains a blacklist of casino operators, publicly shaming those who, through testing, offer games that appear to subvert standard probability. Certain casino software has been known to be able to guarantee a particular win/loss percentage, doing so through generating non-random outcomes to games, effectively turning table games such as blackjack and roulette into de-facto slot machines, with set payouts. By making such information publicly available, Shackleford both informs players and, presumably, reduces the profitability of such operations.

From the above discussion it becomes apparent that there are likely to be a wide range of disputes emanating from these environments. There will be discussions over the ethics of particular mechanics, just as there has long been with gambling services, and we are also likely to see disputes between players and platform providers over terms of service, cheating, payment disputes and so forth. While Dibblell’s ‘Play Money’ (2006) demonstrated the range of participants who were profiting from virtual worlds, those profiteers may increasingly enter more mainstream online environments such as *Facebook*, and as they do the range of disputes those environments face will only increase.

Magic: The Gathering: Online

Magic: The Gathering, and its online variation, also appears to operate in something of a grey- area

between games and gambling. While having much in common with trading cards (Craddock, 2004), they can also be said to have more in common with the type of games considered here because they contain a significant gaming element. Craddock notes that the game has been referred to as “Magic: The Addiction” and “Those five colour crack cards” by enthusiasts and critics alike (p. 316), and that “[t]he game is played in an identical way online, from the game mechanics to purchasing virtual cards in packs. There are even secondary markets for the e-cards waiting in on-line auctions such as E-Bay and online shops that deal exclusively in Magic: The Gathering Online (M: TGO) cards” (p. 317).

Indeed, one only need conduct a cursory review of community forums and blogs for *Magic: The Gathering* to see similar behavior to that normally associated with gambling activities. One author, Jeremy (2010), who notes that he considers himself “very much a casual player”, notes that “paper Magic is largely a finite space according to the normal rules and restrictions of one’s free time, work and social obligations, and the sort of context of the playing environments in which you’re involved. I can’t just show up to the local card shop on Sunday night at 11pm and find 7 other people willing to draft. But if I log into MTGO, bam. Not just 8, but continuously filling queues of people drafting Swiss, 4-3-2-2, and 8-4s. The thing is, the only limit on how much and when you can play is the amount of dollars you’re willing to bet per pull”

So far, this sounds very much like any form of gambling you could imagine. However, Jeremy continues, arguing, “Magic isn’t slots. It isn’t even poker or blackjack. It requires skill, patience, attention, time, energy, awareness... all of those things”. The gambling industry has long struggled to obtain legal definitions of ‘chance’, particularly when considering games of mixed skill and luck such as poker. While both played in casinos, poker and blackjack are actually two very different games; blackjack has a fixed house edge that could be overcome with card counting or bonuses, while poker is a game played against others (rather than the house), and in which it has been proven that professional players can have a long term edge (see, for example, Turner & Fritz, 2001).

Finally, Jeremy notes that “When I can just log in at 9pm on a Tuesday night and draft, I start to lose a little bit of what makes Magic special [...] Everyone wants to win... its not specific to MTGO but there are other forces at work there. When you can keep pumping quarters into an arcade machine, you aren’t going to stop at the second to last level. I throw \$14 at a draft and 30 minutes to two hours later, I’m usually out [...] The thing is that playing online – despite the fact that skill is at work - always comes back to the same thing as slots: in the end, the main thing you control is how many dollars you’re willing to put into the machine. At FNM, there are one or several events and then

people get tired and leave. On MTGO, you can keep playing until your bank or PayPal account is empty”.

This description mirrors the mentality of many gamblers, yet *Magic: The Gathering Online*, despite not having a specific exception in US anti-gambling legislation (as does, for example, competitive fantasy sporting leagues), continues unabated. The question must be asked whether in time the legislation will catch up with *Magic: The Gathering* and other similar activities, or whether the lack of enforcement in these markets can be seen as a positive precursor for the online gaming industry and related environments.

Conclusion

Reynolds and de Zwart (2011) predict that “in the short term [we will see] Increased theft of virtual items; Increased third party sales of virtual items and related crimes e.g. credit card fraud; More players will seek legal remedies for publisher acts that they do not agree with; More judgments will be found in favor of players overturning EULA and copyright primacy; and, Policy makers and regulators will increasingly focus on the virtual items and currency – probably creating regulations that inadvertently harm at least one sector of the industry, thereby also harming citizens that enjoy participating in that sector” (p. 6) Certainly, this is something that the games industry should be cautious of, and the blurring of social games and gambling activities, of the kind currently proposed by Zynga, may prove to be problematic for the wider industry.

Equally, however, we should not forget the players. Schüll’s (2012) work on the type of addiction found in slot machine players, combined with the observed similarities between slot machines and contemporary social games, must give rise to caution. Social games are, by their vary nature, vastly more accessible than slot machines to the majority of Americans, and – by being online – are significantly more available than even ‘pokies’ in Australia, which can be found in high concentration. While these are games that can be played for free, and for fun, online, this is a harmless hobby and thus not a problem, however the increased entangling of real money with these mechanics must lead to moral, if not legal, questions about whether such designs are appropriate.

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