

SOCIAL CASINO GAMING: LEGAL (R)EVOLUTION

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HASTINGS

- Legal backdrop - traditional elements of gambling
- New statutory developments
- Recent litigation
- What is the right policy?



Generally, there are **two business models** employed in the social games industry:

- Up-front cost for the game or application
 - Buy the application like Angry Birds
- Free game or application with in-game purchases available to enhance the entertainment experience



Farmville allows users to buy more land or tractors

“Freemium” model

SOCIAL CASINO GAMES

- Over the past 6+ years, there has been an emergence of casino-style social games such as slots, poker, blackjack and roulette.
- Both regulated gambling and non-gambling gaming companies
- 2015 est. revenue \$3.4 billion (Statista)
- Nearly three-quarters of players are women (SuperData Research); over 90 percent of players never pay
- Top 10 market entrants account for over 80% of market (Statista)



SOCIAL CASINO GAMES

- Convergence versus Diversification
 - Marketing tool or standalone revenue source?

Hollywood Casino – Play Free Slots

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By Penn Interactive Ventures, LLC

Open iTunes to buy and download apps.



[View in iTunes](#)

+ This app is designed for both iPhone and iPad

Free

Category: [Games](#)
 Updated: Jun 01, 2016
 Version: 3.40.672
 Size: 146 MB
 Languages: English, Danish, Finnish, French, German, Greek, Italian, Portuguese, Russian, Simplified Chinese, Spanish, Swedish
 Seller: Penn Interactive Ventures, LLC
 © Penn Interactive Ventures, LLC
 You must be at least 17 years old to download this app.
 Infrequent/Mild Alcohol,

Description

Put Hollywood Casino in your pocket! This application is FREE, fun, and allows you instant access to Hollywood Casino's free slots on your mobile devices!

[Hollywood Casino – Play Free Slots Support](#) >

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What's New in Version 3.40.672

You want more games? You got more games! This update includes HOT NEW GAMES launching in May & June, including:

[...More](#)

Screenshots

iPhone | iPad



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HASTINGS

The screenshot shows the Slotomania website interface. At the top, there are navigation links: CLASSIC SLOTS, HOW TO PLAY, PLAYTIKA REWARDS, Slotomania (logo), PROMOTIONS, FREE SLOTS GAMES, and SIGN IN. The main content area features a central promotional banner for 'PLAY SLOTOMANIA' with the text 'THE #1 FREE SLOT MACHINE GAME!' and 'Come play with us!'. Below this are two buttons: 'Play Using Facebook' and 'Sign in & Play', separated by 'Or'. A link for 'New player? Register now >>' is also present. The background is a vibrant casino-themed illustration with various characters and slot machine elements.

CLASSIC SLOTS HOW TO PLAY PLAYTIKA REWARDS **Slotomania** PROMOTIONS FREE SLOTS GAMES SIGN IN

PLAY SLOTOMANIA
THE #1 FREE SLOT MACHINE GAME!
— Come play with us! —

Play Using Facebook

Or

Sign in & Play

New player? [Register now >>](#)

Fan Page | Event | Affiliates | Term of Service | Privacy Policy | Shop | Site Map | Support

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FEDERAL LAWS

- “Unlawful internet gambling” means a “bet or wager [that] is unlawful **under any applicable Federal or State law** in the State or Tribal lands **in which the bet or wager is initiated, received, or otherwise made.**”
 - UIGEA; 31 U.S.C. § 5362(10)(A).
 - The intermediate routing of electronic data are not considered in that determination.
- Wire Act prohibits using a wire communication facility (such as the telephone or internet) to transmit “bets or wagers on any sporting event or contest.” 18 U.S.C. § 1084.
- PASPA – sports
- Other statutes rely on underlying violation of Wire Act or state laws.

STATE LAWS

- ▶ Gambling generally requires 3 elements:
 - ▶ **Consideration:** The payment of something is required to play the game
 - ▶ **Chance:** The outcome of the game turns on chance, not skill
 - ▶ **Prize:** Money, money's worth or something of real-world/tangible value is awarded based on game play
 - ▶ Virtual rewards?
 - ▶ Additional Play?
 - ▶ Tied to outcome of game or purchase?



- “Clearly occasional and ancillary to the primary business of that person”
 - Michigan, Tennessee, New Mexico, Alabama
- Limits on mail-in AMOE
 - Kansas, Connecticut
- Limits on utility of any AMOE in some states
- Additional play as prize?

- Internet sweepstakes cafés allow patrons to purchase internet time, or sometimes prepaid telephone minutes or other office services. Patrons receive sweepstakes entries along with their purchase.
- Many cafés allow patrons to play simulated gambling games as a way of revealing whether they have any winning sweepstakes entries.
- Patrons usually can obtain a limited number of free sweepstakes entries on a daily basis.
 - This feature is intended to avoid most state gambling proscriptions by removing the element of consideration.
- Cafés may be prosecuted under ordinary gambling prohibitions and convicted as mere subterfuges for unlawful gambling activity.
 - Patrons' primary motivation in purchasing internet time is to play the sweepstakes, rather than to use the internet time or other available services.
- Estimated that internet sweepstakes cafés earn over \$10 billion annually.

- Those cases addressing the issue generally have found the cafés to be subterfuges for gambling
- Example: *State v. Vento*, 286 P.3d 627 (N.M., 2012)
 - Majority of customers paid to play the games, the vast majority of the internet time sold went unused (99.75%)
 - Patrons used sweepstakes winnings to purchase additional internet time, even though they still had time remaining in their accounts.
 - Finding: Lottery
- Example: *Lucky Bob's Internet Café, LLC v. California Dep't of Justice*, 2013 WL 1849270 (S.D. Cal. May 1, 2013)
 - 100 entries to the Sweepstakes for every \$1 of purchased internet time
 - Prizes ranging from 10 cents to \$3,000
 - 94% prize payout rate
 - Total of \$1,225,055 was spent for 204,176 hours of internet time, and 97.375% of the total purchased internet time was unused
 - Finding: Slot machine

- Similar laws (albeit using different statutory formulations) have been passed in California, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Mississippi, New York, North Carolina, Ohio and Pennsylvania.
- Some laws clearly limit to placement in a business establishment (e.g., Ohio); others do not
- Florida
 - any machine or device or system or network of devices . . . that, **upon activation**, which may be achieved by, but is not limited to, the insertion of any . . . account number, code, or other . . . information, . . . is **directly or indirectly** caused to operate . . . if the user, **whether by application of skill or by reason of any element of chance or any other outcome unpredictable by the user**, may . . . **receive any . . . thing of value.**”
- Massachusetts
 - devices used to conduct sweepstakes through an entertaining display, where “sweepstakes” is defined to include games that award prizes based upon chance, “**with or without payment of any consideration**”; “Entertaining display” can include actual or simulated game play.

- Some statutes are written so broadly – to avoid attempted circumvention – that they capture far more activities than internet sweepstakes cafés.
- Potentially capture even free-to-play games like social casinos, depending on their prize structure.
- In other words, they seem to eliminate the consideration requirement (similar to UK).
- Moreover, some states find that **mere additional play** may constitute a prize for gambling purposes.

- In 2015, one plaintiffs' firm brought at least 6 lawsuits against various social casinos and other games, including:
 - Game of War (2), Big Fish Casino, DoubleDown Casino, Castle Clash and Slotomania.
- All games operated on a freemium model.
- Plaintiffs brought claims asserting:
 - Right to recover gambling losses under state qui tam laws providing for gambling loss recovery, fashioned after Statute of Anne
 - Unfair competition or deceptive trade practices for offering allegedly unlawful gambling games
 - Unjust enrichment
- All suits were decided in favor of defendants, save one still-pending action. Two dismissals are on appeal.

RECENT SOCIAL CASINO LITIGATION

Game	Case	Case No.	Court	Latest Decision	Appeal Info.
Game of War	Mason v. Machine Zone, Inc.	1:15-cv-01107-JKB	D. Md.	Dismissed, 2015 WL 6335771 (D. Md. Oct. 20, 2016)	Pending appeal before 4th Cir.
Big Fish Casino	Kater v. Churchill Downs Inc.	2:15-cv-00612-MJP	W.D. Wash.	Dismissed, 2015 WL 9839755 (W.D. Wash. Nov. 19, 2015)	Pending appeal before 9th Cir.
Double Down Casino	Phillips v. Double Down Interactive, LLC	1:15-cv-04301	N.D. Ill.	Dismissed, 2016 WL 1169522 (N.D. Ill. Mar. 25, 2016)	Not appealed
Game of War	Ristic v. Machine Zone	1:15-cv-08996	N.D. Ill.	Motion to dismiss is pending	
Castle Clash	Soto v. Sky Union, LLC	1:15-cv-04768	N.D. Ill.	Dismissed, 2016 WL 362379 (N.D. Ill. Jan. 29, 2016)	Not appealed
Slotomania	Dupee v. Playtika Santa Monica	1:15-cv-01021-CAB	N.D. Ohio	Dismissed, 2016 WL 795857 (N.D. Ohio Mar. 1, 2016)	Not appealed

- Plaintiffs' "losses" were suffered with virtual currency, to which they had a nontransferable, revocable right for entertainment purposes. Their actual economic "losses," if any, were suffered at the moment that the virtual currency was purchased, prior to any purported gambling activity.
- Virtual currency purchases were made with no hope of economic gain because virtual currency cannot be cashed out.
- Plaintiffs are not "losers" because they received the benefit of their bargain when they purchased virtual currency. They gained the entertainment value associated with the purchase, akin to buying movie tickets.
- Social casino operators are not "winners" because they never risk their own money in the games. The virtual currency purchases occur prior to any game play, and they can never "lose" the money paid for virtual currency.

- Purported secondary market for virtual currency did not convert it into “something of value” for gambling purposes, since plaintiffs pleaded existence of secondary market for accounts, not currency, which itself violated Terms and required a third-party bargain to assess value.
- Additional point: “traditional” cases finding additional play to be prize all involved games where payment to play was required – not the case here (which might support even games that award \$ prizes)
- Purely software-based games could not constitute slot machines defined with reference to a “machine, apparatus, or device.”

“This case ends up being more about the need to draw clear and distinct lines between real and virtual worlds, particularly when it comes to the serious business of going to court and litigating real claims and interests. Even in the Internet age, there is a crucial distinction between that which is pretend and that which is real and true.”

Mason v. Machine Zone, Inc., __ F. Supp.3d __ (2015), 2015 WL 6335771 (D.Md.)

- Non-redeemability
 - The Service may include an opportunity to purchase virtual, in-game currency (“Coins”) that may require you to pay a fee using real money to obtain the Coins. Coins can never be redeemed for real money, goods, or any other item of monetary value from ACME or any other party. You understand that you have no right or title in the virtual in-game items, spins or Coins.
- Non-transferability
 - Your purchase of Coins is final and is not refundable, transferable or exchangeable, except in ACME’s sole discretion. You may not purchase, sell, or exchange Coins outside the Service. Doing so is a violation of the Terms and may result in termination of your Service account and legal action taken against you.
- Revocability
 - ACME may refuse access to the Service or may terminate your account without notice for any reason, including, but not limited to

OTHER REGULATORY FRAMEWORKS?

- **The United Kingdom Gambling Commission** in Jan. 2015 concluded a two-year review of the social games sector
- Factors behind finding:
 - Extensive existing consumer regulation
 - The moderate time and money spent playing by the vast majority of players
 - No increase in young people participating in social gaming or real money gambling despite revenue growth in both industries
 - The absence of evidence that social games are a cause of RMG participation in young people, or otherwise.
- *“We are clear there is no compelling reason at the moment to impose additional gambling regulation on the social gaming sector given that it is already subject to extensive consumer protection legislation.”*

“Explaining our Approach to Social Gaming” (UK Gambling Commission 2015)

- Belgium (with monetary payouts); Japan (*gacha* – advertising disclosures and AML restrictions)

- Social gaming IS regulated
 - Consumer protection laws
- Should social gaming be regulated **as gambling**?
 - Is it a “gateway” to real-money gaming?
 - Do virtual prizes have value?
 - What is the behavior we are trying to prevent (or what is the interest we are trying to protect)?
- When a regulated gaming company offers a social product, should that trigger marketing or other restrictions?
- Examples from other industries
 - “Non-alcoholic beer”?
 - Some discussion of regulation even of non-alcoholic beer sales, but at present laws only cover “low-alcohol”



- Are there constitutional considerations (e.g., commercial speech)?
 - Supreme Court in 1976 considered law banning sale of low-alcohol (referred to as “non-intoxicating”) beer to minors
 - Rational basis
 - Fairness issue
 - In the context of discrimination (gender or tribal-focused restrictions on sales) or economic protectionism (wine shipments), laws have failed rational basis (or heightened scrutiny) analysis
 - Is there a rational basis to distinguish between regulated companies and social gaming companies offering the same type of game?
 - How to determine which games merit regulation?

- Factors to consider
 - Should who offers the game matter?
 - Should name of the game matter?
 - Brand equity – which is leveraging which and does that matter?
 - Okay to earn credits to real-money regulated play?
 - Free-play internet gaming as a model?
 - No links to pay sites
 - Should profitability of social gaming matter?
 - Viable model in its own right, not simply (or primarily) a gateway to regulated gambling
 - Here, answers could differ even within industry



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