

Social and Online Games Legal Round-Up

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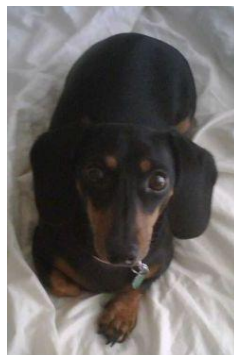


Disclaimer with Cute Animals

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The cute animals just make this slide more bearable.



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The Law is Always Changing. Plan Accordingly.

- Application of laws to the constantly evolving technology can be complex.
- New technology rarely plays by the rules set up for old technology.
- 2 Key Considerations:
 - Plan based on recent decisions and actions
 - Plan based on reasonable expectations for future legal developments
- Keep in mind: Laws change constantly, and you have to continue to adapt to them.

Ten Developments for 2010

There are more potential and pressing issues than I could discuss in a day long session, but the following ten topics have all been the starting points for conversations with clients, other attorneys, and attendees at conferences based on recent developments.



ACHIEVEMENT UNLOCKED
Finished the Presentation Introduction

www.technology-ninja.com

1. “What ever happened with that *Glider* thing?”

- Still on appeal. So, in short, nothing has changed *yet*.

Summary of *Glider*’s result:

- Grants a lot of power to software developers: EULA violations can be considered copyright infringement; Circumventing systems like Warden is a DMCA Violation
- Walks a fine line, though:
 - There’s a clear difference between Glider and a user creating a character in violation of naming policy (damages, profits by the infringer, etc.)
 - Seems unlikely courts will impose full penalties in all cases
 - This possibility has many groups on edge (i.e. PublicKnowledge.org)
- Lessons (unless this changes on appeal):
 - Specify in the EULA/TOS
 - Don’t be afraid to sue in big cases
 - Exercise some more restraint in the little ones



“...Or that *Worlds.com* thing?”

- Transferred to Northern District of California.
- Markman Hearing set for June 6, 2010
 - Unlikely anything significant will happen from the courts before then.
 - After that, however, we may see truth to the March 2009 headline: “Worlds.com CEO: We're 'Absolutely' Going To Sue Second Life And World Of Warcraft”¹



¹ <http://www.businessinsider.com/worldscom-ceo-were-absolutely-going-to-sue-second-life-and-world-of-warcraft-2009-3>

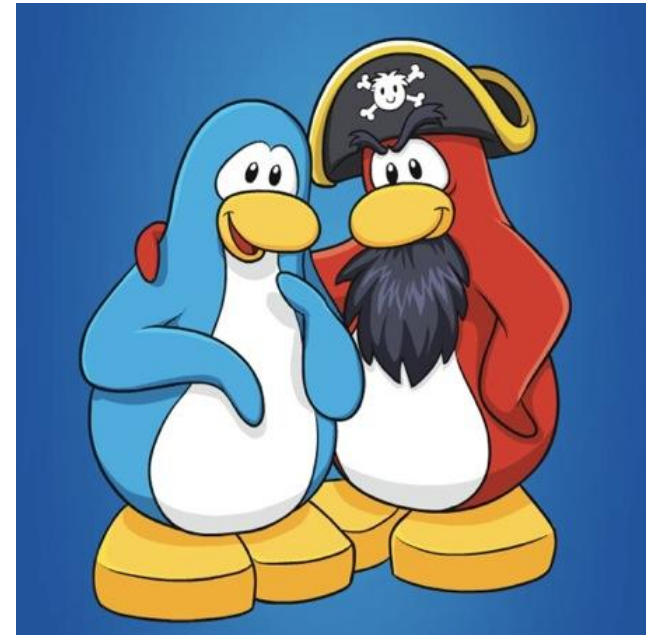
2. “Why do I care if kids are making content?”

- Since children can't enter into contracts; they're voidable.
- You already know to tailor EULAs to specify that kids voiding contracts for services also terminate the service/return the e-goods/etc.
- The other side of the coin is kids and user content. They do have a valid copyright in their creation, which has to be licensed to whoever is distributing it.
- You have to get the parent to enter into the contract rather than the child.
 - **Parent is licensee, child is sublicensee**
 - *Motise v. America Online, Inc.*, 346 F.Supp.2d 563 (S.D.N.Y. 2004)
 - **Credit card can be implied consent**
 - **Club Penguin Methodology**
- Still many unclear areas
 - **Assent to Machinima Rules?**
 - **Does CC to service (Xbox Live) assent to all games?**
 - **User content when there is no parental license?**



3. “You’ll never take me alive, COPPA!”

- **13** is the magic number
- MUST post Privacy Policy
- Regulation only controls “Personally Identifiable Information” (π)
 - Have to get “verifiable parental consent” before collecting π from children
 - Parents have to be given a choice about data distribution to 3rd Parties
 - Minimize π collected and maintain security



More COPPA?

- COPPA 2.0: Extend COPPA to everyone 17 and under
- States with COPPA 2.0 (aka Little COPPAs)
 - New Jersey
 - North Carolina
 - Georgia
 - Illinois
 - Maine
 - Most stringent of all; Sec. 1. 10 MRSA c. 1055
 - Parental consent under 18; Covers information collected offline
 - Went into effect Sept. 2009, Likely to be challenged, May be struck down along the lines used to strike COPA or by pre-emption
- Looking more and more like Franchise regulation in the US: Comply with the most stringent state, and/or filter by states

More COPPA?

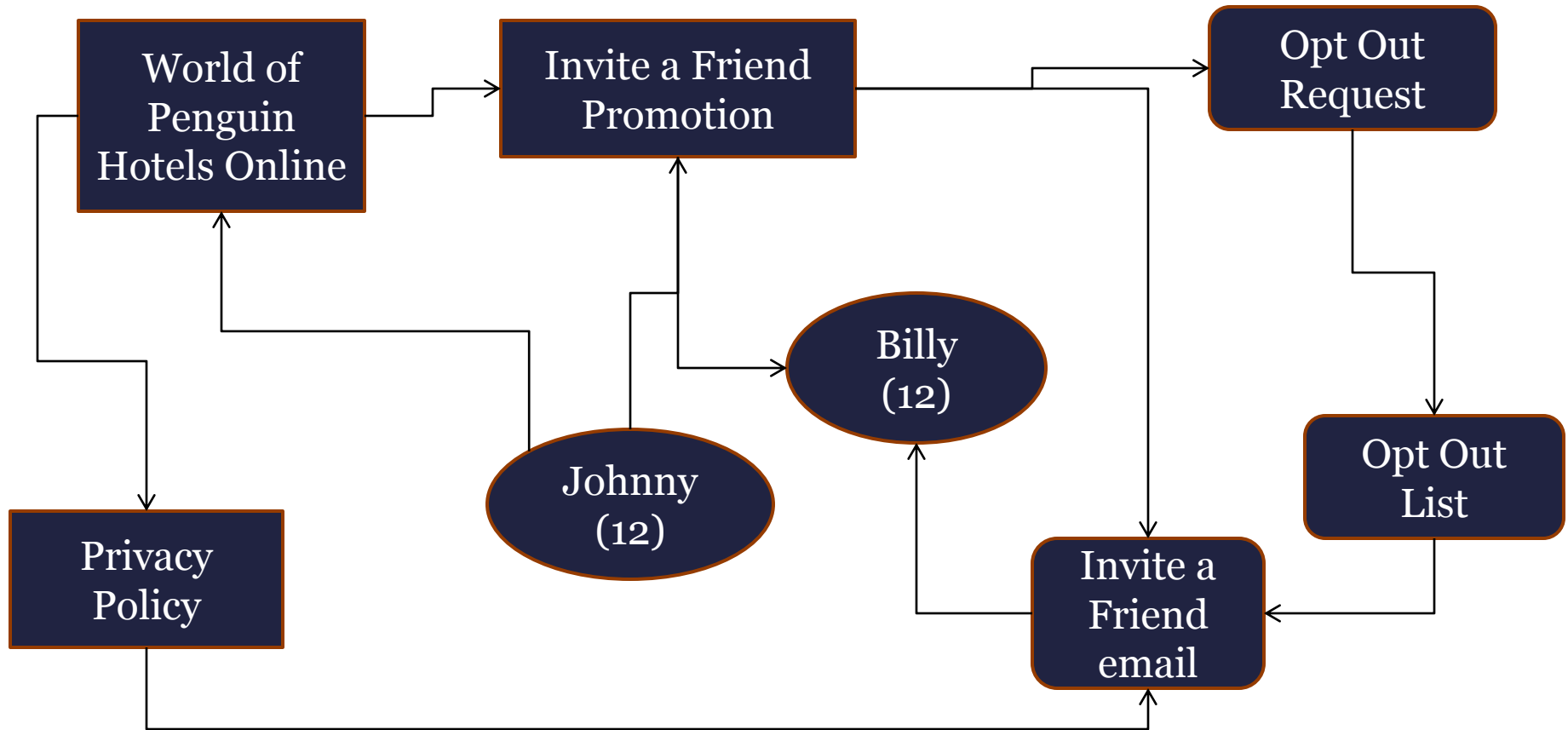
- COPPA also ties into CAN-SPAM
- eCards and “Forward to A Friend” deals
 - CAN-SPAM requires an opt-out list...
 - ...but COPPA requires parental consent to keep a child’s e-mail on file
 - ...and you might have an issue disclosing the inviter’s email to the invitee.
 - This can all be reconciled, but you have to wait for the next slide to get the answer.
- And they aren’t kidding around...COPPA fines have hit as high as \$1 Million (Sony)
- Are we having fun yet?



The Sanctified COPPA+CAN-SPAM Flowchart

...Of Awareness and Invisibility (and Maybe Haunted Dreams)

Grants User +100 Confusion and +22 Agility



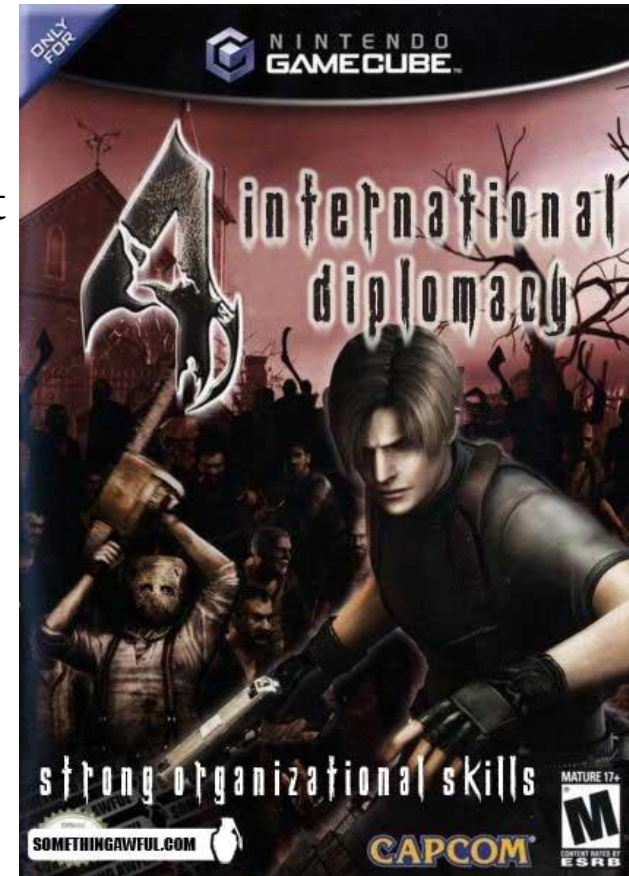
(Or maybe you're much better off with a "Referred By Username" box on your new player registration page.)

4. “What’s the government talking about this time?”

- COPPA 2.0
- FTC Report on Explicit Content for Minors in Virtual Worlds
 - Recommends age screening and even age segregation
 - More self-regulation and possible language filters
- No news on FTC’s look into Digital Rights Management
- Concerns over possible regulation of digital distribution related to consumer protection
- Always ongoing concerns related to internet predators and children.

5. “Wait, the rules in Europe are different?”

- Of course they are. And if you have servers in the EU, those rules on privacy apply to those servers to the extent they have personal information about living, identifiable people.
- Data must be handled according to 8 principles:
 - 1. fairly and lawfully processed;
 - 2. processed for limited purposes;
 - 3. adequate, relevant and not excessive;
 - 4. accurate;
 - 5. not kept for longer than is necessary;
 - 6. processed in line with your rights;
 - 7. secure; and,
 - 8. not transferred to countries without adequate protection.
- Consent can generally be secured for most any activity with data, but must be spelled out in terms and conditions (EULA, ToS/ToU, Privacy Policy, etc.)



6. “What’s the deal with cookies in Europe now?”



- Previously, cookies OK if users notified and provided an opt-out
- Nov. 24, 2009 – The EU adopts new rules for cookies to be implemented by the member states by 2011
- “Breathtakingly stupid.” –Struan Robertson (technology lawyer with Pinsent Masons)
- Can’t use cookies unless the user consents after getting “clear and comprehensive information”
 - Or strictly necessary to provide services explicitly requested by the user
- Browser settings might be considered consent

7. “My business model changes when I get taxed?”

- US income is taxed in the year it's earned, but in certain circumstances, it may not be earned when you receive the money.
- In a model where people buy points that buy goods, but can cash the points out (i.e. get a refund) at a later date, you only earn income when the points are spent.
- However, this plays into another potential problem...



8. “What do you mean I might be a bank?”



- Virtual currency might have a new downside: it might make you a bank.
- A virtual currency could be anything that can be bought with cash and later cashed out, even as a refund.
- Besides the possible implications in banking regulations, you then may also be under financial institution privacy regulations.

9. “Hedges? Why do I need shurbs?”

- While we’re on the topic of money, if you’re running a global micro-transaction model, you should probably at least look into hedging currency.
- Currency hedging is legal, and may very well be a wise business move, especially with so much movement in the dollar’s value lately.
- The micro-transaction model may find it especially beneficial because transaction volume can be erratic and over a long period of time.



10. “Did you hear about Zynga poker?”

- In case you missed it, Zynga Poker, in particular, has been the subject of a number of online gambling investigations.
- This whole area of law is a bit nebulous, and has confused a lot of people, lawyers included.
- Consider this a mini-primer in online gambling.



Online Gambling Basics

- Legally, gambling is generally defined as an activity with three components:
 - **Consideration** – A payment of something of value to participate
 - **Chance** – A random element determines the outcome
 - **Prize** – A thing of value to be won
- Generally, people argue about chance vs. skill...
- ...but under the UIGEA in the US, the term “game subject to chance” is used, meaning arguably any chance element includes a game, and interpretations have included pure skill games. (Though fantasy sports are specifically excluded under the act.)

But the chips have no value!

...or do they?



- In short the problem with Zynga Poker is two fold, and both aspects are facilitated in some way by the game:
 - You can buy chips.
 - There's also a black market to *sell* chips, which are relatively easy to transfer between parties.
- Which means, to the authorities, these chips *could have value*.
- Which means Zynga Poker can be viewed as gambling.

Solutions?

- If you think gambling will attract consumers, divorce yourself as much as possible from real currency. That means even fighting the black market to the best of your ability.
- If you want to have real currency (item auctions, micro-transactions, etc.), avoid gambling in your game.
- If you want to be the test case and have substantial funds for a legal battle, then get into the grayest part of the gray area.
- ...Or just wait and see what happens to Zynga, and use that as a guideline.



Don't forget sweepstakes!

- Lost in a lot of the gambling discussion is that sweepstakes are governed by part of the gambling laws as well.
- Obviously, sweepstakes are by and large legal, but adding the internet and social networking has made complying with those laws more complicated.
- Anything of value can be the subject of a sweepstakes, even a digital or virtual good.
- Some states require bonds or other deposits be made, which do not have to be stated in the rules.
- If you're going to offer a sweepstakes, don't just cut and paste rules from someone else; check and see how the laws apply to what you want to run. Lots of sweepstakes are being run right now with a certain level of risk tolerance in some states, and so other rules may not be in line with your risk tolerance.



Questions?

Mark Methenitis is an attorney with The Vernon Law Group, PLLC, in Dallas, TX, as well as a columnist for Joystiq. He is the author of the Law of the Game (<http://www.lawofthegame.com>) blog, which was honored as one of the American Bar Association Journal's Top 100 Legal Blawgs in 2007. His 2005 paper on MMORPG gambling was one of the first on the topic and has been widely cited, and his 2007 update to that paper was published in the Gaming Law Review in August 2007. Mark is also on the board of the Dallas chapter of the IGDA. Mark practices primarily in the area of international transactional and compliance law. To assist electronic entertainment clients, both gambling and video gaming, Mark focuses on emerging and continuing legal issues created in the electronic gaming world. He has handled many complex transactional and structuring issues, but also has found solutions to very complex compliance problems, especially related to regulations in the international trade, gambling, and FTC arenas. Mark is a member of the Texas Bar. He earned his BA from the University of Texas, and his JD and MBA from Texas Tech University.