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BEWARE THE LEGAL TRAPS HIDING IN FREEMIUM GAMES

by Joseph Lewczak

Free-to-pay, or “freemium,” games are not only wildly popular, they’re hugely profitable—with top earners pulling in over a million dollars a day. Some of the biggest grossing titles you’ve probably heard of include Mobile Strike (made famous by Arnold Schwarzenegger and some very expensive Super Bowl advertising), Clash of Clans, Pokémon GO, Candy Crush and 8 Ball Pool.

“Freemium,” of course, is a misnomer. While all of these games are free to download and play (to an extent), they generate revenue through a simple combination of in-game purchases and advertising. In-game purchases can include everything from additional lives and gold coins for spending in-game, to character upgrades, special “skins” and quicker completion of activities. The financial beauty of the model is that most in-game purchases are effectuated through an existing account through the applicable app platform or store, so that users may not have any real notion that they are spending money. We’ve all likely heard of or seen stories of users spending thousands, and sometimes tens of thousands, of dollars on in-game purchases.

When so much money is potentially at stake, both for game players and app developers, regulators, lawmakers, competitors and consumer groups frequently take a keen interest to see if there’s any way they can “cash in” as well.

Therefore, for any tech start-up interested in creating the next Angry Birds or Game of War, here are five important promotions, marketing, and intellectual property legal issues to consider before you get started in freemium games.

1. **Win a Prize!** The promotions and lottery laws generally require that chance or consideration be removed from promotions in order for them to be legal—if you have all three elements of prize, chance and consideration you have an illegal lottery. The lottery laws are typically not a problem with games themselves, being free to pay. However, be wary about creating an unintended sweepstakes or illegal lottery within the game. Many games allow users to purchase packages of in-game merchandise that includes rewards which may vary from user to user. If all or certain of the components of the rewards packages include items that can be separately purchased, you may have created an illegal lottery with all three elements of prize (the reward), chance (the variability in the prize) and consideration (the purchase price for the reward package).

Also, if you intend to run a sweepstakes in-game, be sure it otherwise complies with applicable laws. In particular: (a) there should be no cost to participants to enter if winners are chosen at random; (b) you should have complete official rules, easily accessed by entrants; and (c) be sure to comply with applicable registration and bonding requirements in states like New York and Florida.

Further, don’t misrepresent any prize that a consumer might be able to receive. A minor upgrade to a character or weapon as a prize, for example, should not be labeled as “huge.”

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2. **Free, Free, Free!** Don't mischaracterize items in the game as free, bonus or similar terms if they actually aren't. Federal and state law requires that all terms and conditions of any free offer be clearly and conspicuously disclosed at the outset of the offer in order to avoid any reasonable misunderstanding of the offer. In addition, as the FTC has stated, "[b]ecause the purchasing public continually searches for the best buy, and regards the offer of "Free" merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived." Don't make something seem like it is free when it actually isn't or that is free in a limited circumstance when it's always free anyway.

3. **Be Careful with Children.** Children have long been afforded special protections under the law, and that certainly continues to be the case for apps. If your app is made for children, especially those under the age of 13, be sure to take special care of your legal compliance obligations. Over the past few years most of the major app platforms were found liable for children's in-app purchases, agreeing to change their billing practices and pay tens of millions of dollars.

If your game is targeting kids under 13, or you know you are collecting data from kids under 13, be sure that it's compliant with the Children's Online Privacy Protection Act (COPPA). Among other things, COPPA requires parental notice and verifiable consent when collecting personal information from children under 13. Personal information includes not only the obvious name, address and telephone number, but also persistent identifiers, photographs and certain geo-location information.

4. **Mind Your Privacy Practices.** Games that collect personal information, like all apps, must have a privacy statement that accurately indicates the app developer's data collection practices. Both the California and New York attorneys general have been active in this area, with Attorney General Eric T. Schneiderman in February announcing settlements with two mobile app developers for their failure to disclose their data collection practices in a privacy policy.

5. **Get Appropriate Clearances.** Finally, be sure that you aren't infringing any third-party rights in connection with the creative components of your game. Music, photos, videos, props and visual imagery (including landmarks and props), third party names and logos, as well as individual persons (real or cartoon-like) may be protected by copyright, trademark or other intellectual property-related laws. Be sure to have a robust clearance process in place to ensure appropriate agreements or work-arounds are implemented prior to launch.

"Freemium" games and apps are certainly the current darling of the mobile industry, don't let the promise of seemingly unlimited financial rewards prevent you from taking the right legal steps to protect you, before, during and after app development.

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