

Making Sense of Virtual Dollars

November 28, 2011 by Thayer Preece

Financial institutions and currency transactions are highly regulated in the United States. That much is common knowledge. However, game developers may not realize that by creating a system of virtual currency within a game that can be purchased with or redeemed for real currency, they could be opening themselves up to legal issues arising from this morass of federal and state laws, regulations, and rules.

Regulation of virtual currency in online games is a largely untested field. Online game companies and their legal advisors are making their best guesses as to how these systems will be treated by courts and regulatory bodies. However, most agree that the laws and regulations discussed below may apply to virtual currency, depending on how the currency system is implemented. (Please note that this article is only intended to provide an overview of regulations that may be applicable to virtual currency systems—in order to determine whether any of these laws apply to your specific situation, please consult an experienced attorney.)

Return with me, for a moment, to the magical cupcake fields of our imaginary social game, Sprinkle Harvest (see <http://www.lawofthelevel.com/2010/08/articles-1/intellectual-property/trademarks-for-social-games-a-recipe-for-success/>), which is about to launch its lucrative new premium currency, "Cupcake Cash." (CC\$25 for only US\$5! Free frosting-maned unicorn with purchase!) The makers of the game are faced with decisions such as, should players be able to redeem Cupcake Cash for real money? Or transfer it to their friends? Use it in other developers' games? If a player wants to buy 50,000 Cupcake Cash in a single day, is that ok? What if, several years later, there is still 1,000 unused Cupcake Cash left in that account? Can they give away Cupcake Cash in a promotion? Or use it for an in-game lottery? The answers to these questions have as substantial impact on the legal obligations and liabilities that the

developer may confront. These questions, and those posed below, illustrate only a few of the many situations in which the laws regulating currency transactions and financial institutions may be triggered.

Gift Card Laws

Can Cupcake Cash have an expiration date? Both Federal and State governments have enacted regulations regarding the use and purchase of gift cards and similar instruments, such as limitations on the expiration of purchased value or the ability of the card issuer to impose fees on the user. These laws may be applicable to virtual currency, and would clearly apply in cases where the developer offers actual gift cards that are redeemable for virtual currency. In addition, these laws may also impact third parties who sell gift cards redeemable for virtual currency.

Prepaid Access Laws

How much Cupcake Cash can a user purchase in one day? The Financial Crimes Enforcement Network (or "FinCEN" for short), is organized by the U.S. Treasury Department in order to combat money laundering and terrorist financing, among other financial crimes. The regulations enacted in connection with FinCEN impose certain tracking and reporting obligations on the part of businesses involved in financial transactions. These regulations may also require registration as a Money Services Business when providing a prepaid access program. In certain circumstances, limiting the amount of currency that can be purchased or redeemed in any given day may provide certain exemptions from these requirements.

Money Transmitter Statutes

Can Cupcake Cash be fully transferrable and redeemable for real money? Depending on the scope of how a virtual currency can be used, state laws may require registration or licensing of the issuing company as a money transmitter in every state where the company is offering transactions. These laws are particularly applicable when the currency can be redeemed through third parties or transferred between users, though other situations may also trigger these laws. Proper registration as a money transmitter is a major undertaking with significant compliance obligations. However, failure to comply with these laws can result in both civil and criminal penalties.

Unclaimed Property / Escheat Laws

What happens to unused Cupcake Cash? If a user purchases virtual currency, but leaves it unused for a certain period of time, that non-use could potentially trigger unclaimed property or "escheat" laws. Such laws vary by state, but may require tracking the use of purchased currency and relinquishing any unused virtual currency to the state. Failure to comply can sometimes result in penalties for the company that exceed the amount that was due to be turned over.

Gambling/Sweepstakes Laws

Can Cupcake Cash be given away? Or used in a virtual poker game? To the extent that virtual currency may be offered as a prize or giveaway, or used by players to place bets or gamble, gambling or sweepstakes laws may be triggered. Both the federal and state governments regulate gambling, sweepstakes, and contests, and these laws should be considered before implementing any offering of virtual currency.

Sales Tax

Is there a sales tax on purchases made with Cupcake Cash? The exact regulations governing when sales tax must be imposed on purchasers are determined by state and municipal law. However, depending on local laws, there may be requirements mandating the collection of sales tax on purchases made with virtual currency.

Privacy/Data Security Laws

Can user data obtained when purchasing Cupcake Cash be used in other marketing offers? By sharing user information with any third parties, including information about virtual currency, federal and state privacy laws may be triggered. Certain states have laws governing specific requirements that must be met by a company's privacy policy, as well as laws governing how certain types of data must be stored. Privacy regulations are particularly important when information regarding minors may be collected. Additionally, any company that is processing credit card numbers, and any company that can be classified as a "financial institution" (which isn't only restricted to banks) must comply with strict data security laws.

Recurring Transactions

Can users purchase monthly Cupcake Cash subscriptions? In situations where a user is charged a preauthorized amount on a recurring basis, such as an auto-renewal subscription fee, certain federal and state laws may apply. Various penalties may be imposed for non-compliance with those laws, including, under some states' laws, the transformation of the charged subscription into a gift.

Obviously, there are a vast number of statutes and regulations that may be applicable to virtual currency transactions, depending on how those transactions are structured. If you are considering implementing a virtual currency system within your game or software application, you should definitely speak with your attorney about how to structure that system to ensure compliance with these laws. At this point in time, regulatory agencies have not yet focused much on game providers. However, with the large amount of real currency being spent on the virtual currency market (virtual goods transactions being estimated by some at over a billion dollars this year alone), it is likely that these systems will be receiving increased governmental scrutiny.

Take a hard look at any virtual currency system before you implement it, or, if you have already launched one then conduct a thorough review promptly. If you don't, the villains at your door may not be virtual ones.

Authored By:

[Thayer Preece](#)

650.815.2618

tpreece@sheppardmullin.com