



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
 ATTORNEY GENERAL

May 5, 2003

The Honorable James H. Merrill
 Member, House of Representatives
 335-D Blatt Building
 Columbia, South Carolina 29211

Re: Advisory Opinion Concerning "Match Play" Video Game

Dear Representative Merrill:

You have requested an advisory opinion from this Office concerning the legality of a particular video game machine. You indicate that constituents of yours have approached you regarding the legality of a coin-operated video machine called "Match Play." By way of background, you indicate that "[i]t is the position of [your] constituents that this game is a game of skill - rather than a game of chance - and is therefore legal under the laws of our state." You further indicate that your constituents would like clarification on this matter.

First, I would like to apologize for the delay in responding to your request. As you may know, this Office has been involved in extensive litigation concerning the legality of another video gaming machine known as the "Chess Challenge." As is discussed more fully below, the history of that matter demonstrates the difficulty in rendering an Attorney General's opinion as to the legality of any particular video game machine. Because of these difficulties and the potential misapplication of opinions rendered in this regard, this Office can only provide the general law in the area of illegal gambling and gaming devices. I trust that this general information will provide sufficient clarification for your constituents.

LAW GOVERNING LEGALITY OF VIDEO MACHINES

Section 12-21-2710 makes illegal the mere possession of certain machines and devices regardless of their intended use. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967); State v. Appley, 207 S.C. 284, 35 S.E.2d 835 (1945). While the statute specifically focuses upon the prohibition of machines such as "slot machines" and "punch boards," it also bans any "other device pertaining to games of chance of whatever name or kind"

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The question thus becomes what is a game of chance? Authorities have defined a “game of chance” as a “game in which chance rather than skill determines the outcome.” See, Black’s Law Dictionary. In Op. S.C. Atty. Gen., Op. No. 3629 (September 25, 1973), this Office defined the word “chance” as “something which happens unpredictably without discernable human intention or observable cause.” In that same opinion, it was noted that “skill” is “the ability to use one’s knowledge effectively and readily in execution or performance.” Id.

Historically, it has been the opinion of this Office, as well as a majority of jurisdictions in this country, that a “game of chance” is one in which the element of chance predominates over any skill involved. On the other hand, a “game of skill” is one in which the element of skill is predominant over the element of chance. See, Ops. S.C. Atty Gen., August 2, 2001; September 5, 1995; December 5, 1978; Op. No. 3629, supra. While the South Carolina Supreme Court has never squarely adopted this so-called “Dominant Factor” test, the dissent in Johnson v. Collins Entertainment Co., Inc., 333 S.C. 96, 508 S.E.2d 575 (1998) indicates that the Court would accept this rule. In Johnson, Justice Burnett, joined by now Chief Justice Toal, opined:

... where the dominant factor in a participant’s success or failure in a particular scheme is beyond his control, the scheme is [a game of chance], even though the participant exercises some degree of skill or judgment. If a participant’s skill does not govern the results of the game, the scheme contains the requisite chance necessary to constitute a [game of chance].

Courts considering whether elements of skill are involved in the playing of a particular game have examined factors such as whether the player must demonstrate attributes such as manual dexterity, hand-eye coordination, reflexes, muscular control or the ability to concentrate. See, U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D. Pa. 1989). Judgment, practice or adroitness are elements to be considered as part of the evaluation. State v. Stroupe, 76 S.E.2d 313 (N.C. 1953). Intellectual abilities are an important factor. In re Allen, 377 P.2d 280 (Cal. 1962).

It is important to remember that the possession of a particular skill in playing the game does not in itself make the game one of skill. Again, the test is whether skill or chance “predominates” in determining the game’s outcome. As the North Carolina Supreme Court summarized in State v. Stroupe, supra, “whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment” is controlling. Games have been ruled to be games of chance even when “the skill of the player may increase the player’s odds of winning but ultimately the player’s skill cannot determine the outcome, regardless of the degree of skill involved.” Op. of the Justices, 795 So.2d 630 (Ala. 2001). As Justice Burnett emphasized in his dissent in Johnson v. Collins, “... skill should be defined in terms of the ability to obtain the desired outcome – a certain [icon, image, point total] – rather than the ability of one player to play more judiciously than another.” 508 S.E.2d at 587.

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Moreover, machines which incorporate into the manner of play the random selection of icons and images through their programming or software must be viewed skeptically when performing a skill/chance analysis. It has been held that such machines, producing images by virtue of a computer program unknown to the player, present only the "illusion of skill." Score Family Fun Center, Inc. v. County of San Diego, 275 Cal.Rptr. 358 (Cal.App. 1990). Also, machines which have as part of their programming the ability to control the percentage of times players win (sometimes referred to as retention ratio or payout ratio) have been viewed as games of chance, despite the existence of some aspects of skill. See Collins Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Commission, 451 S.E.2d 306 (1994); and U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D.Pa. 1989).

DIFFICULTY IN RENDERING OPINION AS TO LEGALITY OF ANY MACHINE

The foregoing summarizes the basic law in determining whether a video game is legal or illegal under South Carolina law. This standard would be applicable to the Match Play game. The problem, however, arises in the application of these legal criteria to the particular facts of a given situation. In numerous instances, the courts, Attorneys General in other jurisdictions, as well as this Office, have recognized that the determination of whether a particular game or machine – in this instance the Match Play – is predominantly a game of skill or one of chance, is primarily a question of fact. See, Commonwealth v. Lake, 317 Mass. 264, 57 N.E.2d 923 (Mass. 1944) ["Whether the game was predominantly one of chance or skill was a question for the jury."]; Ark. Op. Atty. Gen. No. 98-41 (June 26, 1998), 1998 WL 549232 ["the question of whether the games about which you have inquired involve skill or judgment, or whether, by contrast, they are controlled entirely by chance, is a question of fact."]; Tenn. Op. Atty. Gen., No. 92-35, 1992 WL 545006 (April 22, 1992) ["the question of whether chance or skill predominates in a particular variety or type of gambling scheme turns upon the particular facts of that contest, as it is actually conducted in practice. Courts consider this issue a question to be decided by the trier of fact."]; Op. S.C. Atty. Gen., March 30, 1982 [citing Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939) which quoted from State v. Eames, 183 A. 590, 592 to the effect issue of whether a particular game is a lottery is essentially one of fact]; Op. S.C. Atty. Gen., No. 3629, supra [whether skill is involved or not must be determined initially by the law enforcement officer and ultimately by a judicial fact finder].

Of course, in rendering an Attorney General's opinion, this Office has consistently recognized that it cannot make factual findings. As was stated in Op. S.C. Atty. Gen., Op. No. 85-132 (November 15, 1985), "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able in a legal opinion, to adjudicate or investigate factual questions."

The General Assembly has designated the judicial procedure to be used in determining the legality of a particular video machine through the enactment of § 12-21-2712 of the Code. This provision states that "[a]ny machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county ...

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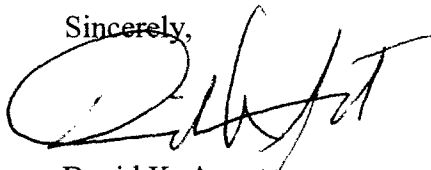
who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed." The State Supreme Court has recognized and commented at length upon this procedure in State v. 192 Coin-Operated Video Game Machines, supra. In that case, the Court concluded that "the magistrate's examination of the seized machines must include an opportunity for the owner of the machines to be heard concerning their legality." 338 S.C. at 195. In the Court's view, due process requires "a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the [machine] ... should not be forfeited and disposed of as provided by law.'" Id.

Moreover, the Court in 192 Video Games, rejected any argument that a legal opinion rendered by the Circuit Solicitor that the machines in question could be legally stored, validated the machines in any way. To the contrary, the Court strongly indicated that the question of the legality of a machine is a matter to be determined by the magistrate pursuant to the procedure established by § 12-21-2712, and that in the case before it, "the magistrates [correctly] set out what statute was violated and how the machines violated it." Id., at 197.

CONCLUSION

It is the opinion of this Office that the appropriate test to apply when determining whether a game is a game of chance or a game of skill is the Dominant Factor test as discussed above. The question of whether any particular machine or device is an illegal game of chance must be determined initially by law enforcement and ultimately by the fact finder in a court of law. Further, this Office cannot resolve the factual question of the legality of a specific video game machine.

Sincerely,



David K. Avant
Assistant Attorney General

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