

## Florida's Internet Cafés: The Future of Gaming or a Vanishing Loophole?

Lawrence G. Walters

*Editor's note: Initial legal issues arising from the Game Promotion statute were preliminarily addressed in the May 15, 2011 issue of Gaming Law Review & Economics. However, this article will cover recent legal and legislative developments, and evaluate the relevant issues, in greater depth.*

IN RECENT YEARS, FLORIDA RESIDENTS have become accustomed to seeing signs for “Internet Sweepstakes Cafés” throughout the state. Currently, there are up to 600 Internet café establishments operating sweepstakes games throughout Florida, creating an estimated \$1 billion a year marketplace.<sup>1</sup> These businesses allow patrons to use computers to play instant “sweepstakes” games, as a means of promoting other consumer goods or services, under Florida’s “Game Promotion”<sup>2</sup> statute. And while this business model has risen in popularity in recent years, the legal issues have yet to be settled. Operators are now bracing for legal developments from the courts, and are also contending with new regulatory legislation at both the local and state levels. While this business model has risen in popularity in recent years, the legal issues have yet to be settled and therefore retail operators are bracing for decisions from the courts and contending with legislation at both local and state levels.

Typically, the operators of these cafés sell Internet access time or long distance phone cards to con-

sumers in connection with their gaming activity. In theory, the businesses allow the public to use their facilities to purchase time on the Internet (or long distance telephone connection minutes) and that “consumer service” is promoted by one or more sweepstakes games played on video terminals available at the location. The purchase of Internet or long distance time is generally associated with credits, which can be used to participate in the instant sweepstakes game, where winners are ultimately revealed on video monitors through entertaining game play.<sup>3</sup>

The winning “tickets” or “chances” provided to players are pre-determined by the sweepstakes software, and winners are typically rewarded with cash, prizes, or more sweepstakes chances. Most sweepstakes software allows the winning tickets to be revealed immediately through an “auto-reveal” option selected by the player, or they can be revealed

---

<sup>1</sup>See *Sweepstakes Viddie Battles Intensify in Georgia & Florida*, 51(4) VENDING TIMES (Apr. 2011), available at <<http://www.vendingtimes.net/ME2/dirmod.asp?sid=EB79A487112B48A296B38C81345C8C7F&nm=Vending+Features&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=93240345D3134B03A4DDB89EBE4F9415>> (last visited Apr. 25, 2011).

<sup>2</sup>FLA. STAT. § 849.094(1)(a) (2010)—“Game promotion” means, but is not limited to, a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present.

<sup>3</sup>Sweepstakes games and other games of chance or contests, are permitted under Florida law so long as the operator of the gaming activity abides by all game promotion requirements set forth in § 849.094. However, commercial bingo games and sports betting are specifically excluded from the protection that is, in essence, provided by compliance with the Game Promotion statute. FLA. STAT. § 849.094 (2010). Conditions on bingo games are located in FLA. STAT. § 849.0931 (2010).

---

Lawrence G. Walters, Esq., heads up Walters Law Group, <<http://www.GameAttorneys.com>>, which is headquartered in Orlando, Florida. Mr. Walters has represented online gaming interests for over two decades, and has written articles for numerous publications, including several law review articles and a chapter for the annual *Internet Gambling Report*. He can be reached at: [Larry@GameAttorneys.com](mailto:Larry@GameAttorneys.com).

more slowly, through games that resemble a slot machine or another casino game.

Because of their overt similarities to Vegas-style games, many entrepreneurs, academics, and law enforcement officials have come to question the legality of these operations. Are they permitted by relevant statutes or are they simply flying under the radar until caught by law enforcement authorities? The answer is far from clear, but Florida's "Game Promotion" statute provides a compelling legal argument for these businesses.

The key to providing legal gambling under the "Game Promotion" statute is the association of some legitimate consumer product or service, which the gaming activity is designed to "promote." The statute was originally passed to allow companies like McDonalds® to give away game cards, such as their popular Monopoly game promotion, which provides customers with a chance to win a free hamburger, or perhaps a cash prize, as a means of generating interest in their primary product: hamburgers. It is when the gaming activity becomes the primary draw for a given business—with the consumer product or service secondary—that the business operation gains the attention of law enforcement. Notably, however, nothing in the law requires the consumer service to be the main attraction in the business. So long as the gaming activity is used to promote some consumer product or service, just about any game of chance or contest of skill can be used as a promotional tool, assuming the remaining elements of the statute—such as free entries—is satisfied.<sup>4</sup> Predictably, many Internet cafés have become more popular for their promotional activity than for their primary consumer products or services. Several such businesses have been threatened, prosecuted, and/or shut down by the authorities, who claim they are engaged in illegal gambling activities, not legitimate game promotions.<sup>5</sup> However, no convictions have resulted from these investigations, and the Game Promotion statute has still not been authoritatively construed by any published court decision in Florida.

Like most states, Florida prohibits all forms of unlicensed gambling, including lotteries, bingo, cards and slot machines.<sup>6</sup> Wagering on contests of skill is likewise generally prohibited.<sup>7</sup> However, the Game Promotion statute permits both contests and games of chance to be offered to the public as promotional devices. Most of the legal requirements

imposed by Florida law relate to the manner in which the game promotion is conducted by the individual or corporate entity operating<sup>8</sup> the Internet café. For example, Florida law requires that a

<sup>4</sup>As noted above, bingo and sports betting activities are not permitted under the statute.

<sup>5</sup>On Apr. 14, 2010, the Multi-Agency Drug Enforcement Taskforce (MADET) of the Marion County Sheriff's Office raided three Internet cafés in Marion County. In Ocala, Jeffrey Reed, owner of the Cyber Zone E-Café was arrested and charged with keeping a gambling house, promotion of a lottery, and possession of coin-operated devices. John R. Andrews, the manager of Cyber Zone, was arrested and charged under FLA. STAT. § 849.01 (2010), with keeping a gambling house. In addition, Kamaljit Rai, owner of Gatorcafe II, was arrested after MADET raided his establishment, charging him with possession of gambling devices, keeping a gambling house and conducting an illegal lottery. Austin Miller, *Agents arrest owners of Internet cafes on gambling charges*, OCALA STAR-BANNER (Apr. 14, 2010), available at <<http://www.ocala.com/article/20100414/ARTICLES/100419846>> (last visited Apr. 28, 2011). As of Dec. 10, 2010, the case against Jeffrey Reed was closed after prosecutors dropped the charges. Suevon Lee *State folds in cafe case*, OCALA STAR-BANNER (Dec. 14, 2010), available at <<http://www.ocala.com/article/20101214/ARTICLES/101219869>> (last visited Apr. 28, 2011). During the same raid, Tim and Jeaneen Crisante, operators of Marion Internet Services, were charged with operating a gambling house and possessing slot machines. The *Crisante* case is the only case resulting from the Marion County raids that has gone to trial thus far, and a jury found the Crisantes not guilty on all counts in October of 2010. *See State of Florida v. Crisante*, Case No. 2010-CF-1543 (Fla. Marion Cty. Ct. 2010). On Mar. 30, 2009, the Metropolitan Bureau of Investigation, a task force comprised of agents from the Orlando Police Department and Orange County Sheriff's Office, raided an Orlando Internet café, Plinko's Business Centers. Four of the establishment's operators were charged with racketeering, keeping a gambling house, engaging in unlawful financial transactions, unlawful possession or operation of a coin-operated device, and conducting an illegal lottery, respectively. All five of the charges against each defendant were dismissed in November of 2010. *See State of Florida v. Jules Ross*, et. al. Case No. 2009-CF-004445 (Fla. Orange Cty. Ct. 2010).  
<sup>6</sup>*See* FLA. STAT. Ch. 849 (2010).

<sup>7</sup>FLA. STAT. § 849.14 (2010)—Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depository of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree.

<sup>8</sup>FLA. STAT. § 849.094(1)(b) (2010) defines "Operator" as "any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, except any charitable nonprofit organization."

retailer: 1.) post all applicable rules and regulations pertaining to played promotions at any facility providing the gaming promotion;<sup>9</sup> 2.) provide the State Department of Agriculture and Consumer Service with those rules and regulations (which must be fixed, as the rules may not be modified upon filing);<sup>10</sup> 3.) publish a copy of any applicable rules and regulations in all advertising materials used in connection with the game promotion; and 4.) include the contact information (e.g., a telephone number) where any rules and regulations may be obtained.<sup>11</sup>

Gaming operators must also establish a surety bond or a trust account pertaining to prizes, with a balance sufficient to cover the valued sum of the prizes offered.<sup>12</sup> In all game promotions where the total announced value of the prizes offered is greater than \$5,000, the operator must also: 1.) provide the Department of Agriculture & Consumer Services with a certified list of the names and addresses of all persons who have won prizes which have a value of more than \$25.00; 2.) indicate the value of such prizes; and 3.) list the dates on which such prizes were won—

all of which must occur within 60 days after the winners have been finally determined.<sup>13</sup> Furthermore, retailers must maintain a list of winners<sup>14</sup> and provide the list to anyone requesting such documentation, or else publish said list within 2 months of the conclusion of the promotion.<sup>15</sup>

The primary theory under which gambling activity through the Game Promotion statute is legal is due to the lack of “consideration,” which is a necessary element to meet the definition of “gambling.”<sup>16</sup> Customers must not be required to purchase goods or services, or pay any entry fee, in order to take part in the promotional gaming activity offered by the business.<sup>17</sup> Otherwise, the sweepstakes offered by these Internet cafés would simply be illegal lotteries. Thus, on its face, the Game Promotion statute applies to the existing Internet cafés, which allow customers to participate in the sweepstakes without requiring that consumers purchase Internet time or long distance minutes. This requirement is met in a number of different ways, by different operators, but most establishments permit customers to receive a certain number

<sup>9</sup>FLA. STAT. § 849.094(3) (2010)—Gaming operators must conspicuously post the rules and regulations of the game promotion filed with the Department of Agriculture and Consumer Service in each and every retail outlet or place where the game promotion may be played or participated in by the public.

<sup>10</sup>*Id.*—Gaming operators must file a copy of the rules and regulations of the game promotion, and a list of all prizes and prize categories, with the Department of Agriculture and Consumer Services at least 7 days before the commencement of the game promotion, in all instances where the total announced value of the prizes offered is greater than \$5,000. These rules and regulations may not be altered, modified or changed after filing them with the Department of Agriculture and Consumer Service. Additionally, the gaming operator must transmit a non-refundable filing fee of \$100 for each submission of the game promotion rules to the Department of Agriculture and Consumer Service, to pay the costs incurred in administrating and enforcing revisions of Florida law.

<sup>11</sup>*Id.*—Gaming operators must publish a copy of the rules and regulations in all advertising materials used in connection with the game promotion. Operators must also include a toll-free telephone number or mailing address where the full rules and regulations may be viewed, heard or obtained for the full duration of the game promotion (if all of the specific rules and regulations are not included in all advertising of the game promotion.)

<sup>12</sup>FLA. STAT. § 849.094(4)(a) (2010)—In any instance where the total announced value of prizes offered is greater than \$5,000, gaming operators must establish a trust account in a national or state chartered financial institution, with a balance sufficient to pay the total prizes offered; or, obtain a surety bond in the amount equal to the total amount of the prizes offered.

<sup>13</sup>FLA. STAT. § 849.094(5) (2010)—Every operator of a game promotion in which the total announced value of the prizes offered is greater than \$5,000 shall provide the Department of Agriculture and Consumer Services with a certified list of the names and addresses of all persons, whether from this state or from another state, who have won prizes which have a value of more than \$25, the value of such prizes, and the dates when the prizes were won within 60 days after such winners have been finally determined.

<sup>14</sup>*Id.*—Gaming operators must maintain a list of winning entries for at least 90 days after the close or completion of the game promotion.

<sup>15</sup>*Id.*—Gaming operators must provide a list of winners, without charge, to any person who requests it; or, in lieu of providing a list, publish the list of winners in a Florida newspaper of general circulation within 60 days after the winners have been determined, and provide the Department of Agriculture and Consumer Service with a certified copy of the publication containing the information about the winners.

<sup>16</sup>The three elements of gambling as expressed by Florida case law are: 1.) a prize; 2.) awarded by chance; 3.) for consideration. See *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855 (Fla. 1939); *Dorman v. Publix-Saenger-Sparks Theatres*, 184 So. 886 (Fla. 1938). Under Florida law, “gambling” means whoever plays or engages in any game at cards, keno, roulette, faro, or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree. FLA. STAT. § 849.08 (2010).

<sup>17</sup>See FLA. STAT. § 849.094(e) (2010). Thus, the common disclaimer, “No purchase necessary,” in many game promotions offered by mainstream businesses.

of free “chances” upon request, without requiring any previous purchase.<sup>18</sup>

Even if a given game promotion fulfills the previously mentioned filing and disclosure requirements imposed by the Department of Agriculture and Consumer Services, the retailer must still comply with the basic obligation of offering a consumer product or service to the customer.<sup>19</sup> Even though the product or service in question may be perceived to be secondary to the gaming activity, the offering of such goods or services is imperative to the legality of a game promotion operation.

Thus far, the primary legal concern noted by Florida law enforcement officials is where the consumer goods or services are incidental or illusory. The legal sufficiency of the promoted goods or services is a crucial issue that has resulted in two advisory legal opinions from the Florida Attorney General (AG).<sup>20</sup> In 1998, the Office of the Attorney General issued an Opinion to the Sheriff of Clay County, Florida, finding that “the purchase of a telephone calling card with an attendant ticket for a sweepstakes attached that awards prizes by chance constitutes an illegal lottery pursuant to § 849.09 of the Florida Statutes.”<sup>21</sup> This business model is notably similar to that currently used by modern Internet cafés—however, Internet time is substituted for long distance telephone time.<sup>22</sup> Unfortunately for the sweepstakes industry, this early Florida AG opinion deemed game promotions associated with telephone cards to be illegal gambling.<sup>23</sup> Since the receipt of the prize depended on an element of chance, the machine used in the promotion was found to constitute an illegal slot machine<sup>24</sup> as prohibited by Florida law. The Attorney General’s Office found that although the device in question did provide a product to the customer (i.e., the calling card), the “incidental delivery of merchandise will not remove a machine from the proscriptions of section 849.15,” citing a 50-year-old Florida Supreme Court decision: *Deeb v. Stoutamire*,<sup>25</sup> construing a different statute. Oddly, no attempt was made to explain this conclusion, or reconcile it with the plain wording of the Game Promotion statute, which makes no reference to “incidental” delivery of merchandise, as compared with some other form of delivery.

Subsequently, in 2007, the Florida Attorney General’s Office, in an Opinion issued to the Cedar Grove Police Department, once again visited the

issue of whether telephone card sweepstakes games violated the state’s gambling laws. Coming to the same conclusion that it did almost a decade earlier, the Opinion found that the use of interactive computer terminals in a somewhat standard “calling card sweepstakes” promotion constituted an illegal lottery and utilization of a slot machine, both in violation of Florida law.<sup>26</sup> The Attorney General again relied on the “element of chance” rationale in *Deeb* in finding that the business model did not

<sup>18</sup>The number of chances provided free of charge may impact the legal analysis. For example, if only 100 chances are provided to free players, while other players can pay for thousands of chances at a time, the free play may not be found to be on equal footing with the paid play. The Game Promotion statute does not define how much free play must be provided, and the Florida courts have not addressed how many chances must be provided free of charge for the business model to comply with the law.

<sup>19</sup>FLA. STAT. § 849.094 (2010).

<sup>20</sup>A.G.O. 2007-48; A.G.O. 98-07.

<sup>21</sup>A.G.O. 98-07.

<sup>22</sup>As noted above, many retailers offer both Internet time and long distance minutes.

<sup>23</sup>*Supra* note 21. Lotteries, other than those operated by the state, are generally prohibited by the Florida Constitution and by statute. FLA. CONST. ART X, §§ 7, 15; FLA. STAT. § 849.09 (2010). Neither FLA. STAT. § 849.09 (2010), which prohibits lotteries, nor the Constitution actually defines the word “lottery.” *M. Lippincott Mortgage Investment Co. v. Childress*, 204 So.2d 919, 921 (Fla. 1st DCA 1967); *Blackburn v. Ippolito*, 156 So. 2d 550, 553 (Fla. 2d DCA 1963), *cert. denied*, 166 So. 2d 150 (Fla. 1964).

<sup>24</sup>FLA. STAT. § 849.16 (2010) describes the prohibited machines or devices as follows: 1.) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her may: a.) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or b.) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

<sup>25</sup>53 So.2d 873, 874 (Fla. 1951) (A coin operated “crane game” qualifies as a slot machine or device within the meaning of FLA. STAT. Ch. 849 (1941).

<sup>26</sup>FLA. STAT. §§ 849.09 (2007) (lottery); 849.16 (2007) (slot machines).

comply with the Game Promotion statute.<sup>27</sup> Since the award of the prize was governed by chance, the Opinion concluded that the computer terminals could be classified as slot machines under Florida law.<sup>28</sup> Importantly, however, the Opinion noted that the ultimate decision as to whether Florida's gambling laws were violated by the operator of these machines is a determination that must be made by local law enforcement "based on the particular facts of each case."<sup>29</sup> Since the Opinion never evaluated the lack of consideration, and failed to acknowledge that these sweepstakes games were being used to promote a consumer service under the apparent authority of the Game Promotion statute, the legality of the business model remains an unsettled issue under Florida law.

Clearly, the Game Promotion statute allows the merchant to offer a game of chance in conjunction with the sale of consumer products or services, notwithstanding a decades-old Florida Supreme Court decision construing slot machine prohibitions. The Attorney General Opinions addressing this issue carefully avoided the nagging question of whether Internet cafés that use sweepstakes games to promote consumer services and allow consumers to play without making a purchase, are in compliance with Florida law.

The risks for Internet café operators are clearly substantial, especially given that there are so many ambiguities and variables leading to possible criminal prosecution. And while operators of many Florida gaming establishments assert that they are not violating the law, the authorities often take a contrary view. Numerous raids and arrests have occurred throughout the state. Local law enforcement officials are likely concerned with the fact that these Internet sweepstakes cafés "look" and "feel" too much like illegal gambling, even if their operation may be technically permitted by the Game Promotion statute.

For example, in 2009, the Longwood Police Department raided an Internet café located in Seminole County, Florida.<sup>30</sup> Although no arrests were made, law enforcement's threats of criminal prosecution towards the café's landlord ultimately resulted in the business's demise.<sup>31</sup> After Seminole County Commissioner Dick Van Der Weide went on record urging local law enforcement to "crack down" on Internet cafés, Seminole County Sheriff Don Eslinger acknowledged the ambiguities of the applicable law in stating that the Sheriff's Office

had been waiting on the courts to determine whether or not the cafés were actually breaking the law.<sup>32</sup>

On Jan. 11, 2011, Seminole County took matters into its own hands by enacting an ordinance that, in short, "prohibits the use of simulated gambling devices."<sup>33</sup> The ordinance, which is the first of its kind in Florida, takes an extremely aggressive approach in addressing this type of gaming, by banning all activity that "simulates gambling," which includes most, if not all, adult arcades and sweepstakes redemption centers in the county. The ordinance at issue acknowledges the legality of game promotion activity, but nonetheless bans it within the confines of Seminole County, Florida. The county gave businesses less than a month to comply with the new regulation and noted that violators could be fined

---

<sup>27</sup>*State Department of Business and Professional Regulation, Division of Alcoholic Beverages v. Broward Vending, Inc.*, 696 So.2d 851 (Fla. 4th DCA 1997) ("In the instant case, the owner of the machine admitted that chance is an element of the game. Indeed, if a player does not manipulate the levers to improve the score, the machine is preset for the player to win 55% of the time, although that percentage could be modified by an adjustment of the machine. While skill will significantly improve the player's winning percentage, it does not eliminate the element of chance in the machine itself. The machine is not like the bowling machine, which requires solely the skill of the player to slide the puck and knock down the pins, the machine merely tabulating the score. Here, the game is set to play itself and to record a certain win/loss ratio. Thus, the element of chance is inherent in the game.").

<sup>28</sup>A.G.O. 2007-48.

<sup>29</sup>*Id.*

<sup>30</sup>See Gary Taylor, *State Law Makes It Hard to Stop Internet Cafés From Operating*, ORLANDO SENTINEL (Dec. 4, 2010), available at <<http://www.orlandosentinel.com/news/local/volusia/os-internet-cafes-sidebar-20101203,0,7747169.story>> (last visited Apr. 28, 2011). Seminole County has a long history of opposition when it comes to gambling-related activities. In 1996, the County banned all casino gambling within its limits. A county-wide measure was adopted in 2004 to specifically prohibit the use of slot machines.

<sup>31</sup>*Id.*

<sup>32</sup>See Samantha Dilday, *Seminole Commissioner Pushes to Close Sweepstakes Centers*, SANFORD HERALD (June 7, 2010), available at <[http://mysanfordherald.com/view/full\\_story/7823952/article-Seminole-commissioner-pushes-to-close-%E2%80%98sweepstakes%E2%80%99-centers?instance=news\\_page](http://mysanfordherald.com/view/full_story/7823952/article-Seminole-commissioner-pushes-to-close-%E2%80%98sweepstakes%E2%80%99-centers?instance=news_page)> (last visited Apr. 28, 2011). Referenced Board of County Commissioners Meeting minutes available at <<http://www.seminoleclerk.org/bcc-documents/board-minutes/5-11-2010.shtm>> (last visited Apr. 28, 2011).

<sup>33</sup>Seminole County Ordinance 2011-1, available at <[http://www.seminolecountyfl.gov/ca/pdf/Ordinance\\_2011-1.pdf](http://www.seminolecountyfl.gov/ca/pdf/Ordinance_2011-1.pdf)> (last visited Apr. 28, 2011).

up to three hundred dollars (\$300) per day.<sup>34</sup> Such a ban, if adopted in other counties, would more than likely cripple Internet café operations throughout the state.

Allied Veterans, a company operating about 35 Internet cafés throughout Florida, along with several café operators and software developers engaging in business within the county,<sup>35</sup> subsequently filed suit in federal court against Seminole County, questioning the legality of the ordinance.<sup>36</sup> The parties challenged the ordinance on constitutional grounds, arguing that the law was overbroad, vague and conflicts with state law on the same subject.<sup>37</sup> Shortly after the suit was filed, the district court granted a temporary restraining order on First Amendment grounds, prohibiting the County from enforcing the ordinance and effectively allowing the operators to remain in business.<sup>38</sup> The trial court denied the Motion for Preliminary Injunction filed by the plaintiffs, and the issues are now in the hands of the Eleventh Circuit Court of Appeals.<sup>39</sup> It is unclear whether any court will specifically ad-

dress the legality of Internet cafés in ruling on the legal challenges in this case, but as this article goes to press, operators, software vendors, and government officials are anxiously awaiting a decision from the court of appeals on this precedent-setting issue. Considering the volume of Internet cafés operating throughout the state, it is only a matter of time before the legalities are clarified—either through judicial action, or via state legislation.

In fact, both the Florida House of Representatives and the Senate are considering bills that would impose stringent regulations on the operation of Internet cafés throughout the state.<sup>40</sup> In launching the Simulated Gambling Prohibition and Community Protection Act, Representative Scott Plakon (R-Longwood) declared that the Act was drafted with the intention to “close the loophole” in Florida law that allows Internet cafés to continue operating.<sup>41</sup> Specifically prohibiting games of chance, while allowing certain games of skill,<sup>42</sup> HB 217 calls for amendments to the Florida statutes relating to game promotion and closely parallels the

<sup>34</sup>*Id.* Under the ordinance, businesses located within the county had until Feb. 1, 2011 to comply with the law, at which point any violation would lead to the specified penalties. The County granted an exception to churches and charitable organizations, allowing them to utilize the prohibited games for fundraising purposes, but no more than twice a year.

<sup>35</sup>See *Allied Veterans of the World Inc., et al v. Seminole County*, Case No. 6:11-cv-155-Orl-28GJK (M.D. Fla. 2011). Note: The author represents the Intervenor in this litigation, which include several operators, an individual owner, and a software developer.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* In the case, the Plaintiffs and Intervenor argue that the Seminole County ordinance violates the First and Fourteenth Amendments of the U.S. Constitution since it attempts to ban speech based on its content, merely because it simulates gambling. Plaintiff’s attorneys correlate the activities prohibited by the ordinance with protected speech that is lawful even if the action depicted or referenced in the speech is not: “It’s like saying: It’s illegal to murder somebody so we’re going to bar video games [that] simulate murder.” Eloísa R. González, *Seminole County bans machines that simulate gambling*, ORLANDO SENTINEL (Jan. 11, 2011), available at <[http://articles.orlandosentinel.com/2011-01-11/news/os-seminole-internet-cafe-ban-20110111\\_1\\_internet-cafes-sweepstakes-games-gambling-devices](http://articles.orlandosentinel.com/2011-01-11/news/os-seminole-internet-cafe-ban-20110111_1_internet-cafes-sweepstakes-games-gambling-devices)> (last visited Apr. 28, 2011).

<sup>38</sup>*Id.* District Court Judge John Antoon, in granting the restraining order, found that the Plaintiff made a *prima facie* showing that there is a substantial likelihood of succeeding on the merits of the case, citing *Interactive Digital Software Assoc. v. St. Louis Cnty., Mo.*, 329 F.3d 954, 957 (8th Cir. 2003) (“[W]e see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games

are not entitled to [First Amendment protection]”); *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1044 (N.D. Cal. 2005) (finding that video games, “though mere entertainment, are nonetheless protected by the First Amendment”); and that they will suffer irreparable harm if subjected to the ordinance; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

<sup>39</sup>*Allied Veterans of the World, Inc., et al. v. Seminole County, Florida*, Case No. 11-12185 (11th Cir. Filed May 12, 2011).

<sup>40</sup>See Florida House Bill 217 (2011), Electronic Machines and Devices for Sweepstakes Prohibited Act; Florida Senate Bill 576 (2011) (same). HB 217 is available at <<http://www.flsenate.gov/Session/Bill/2011/217>> (last visited Apr. 27, 2011).

<sup>41</sup>“Plakon said his bill is designed to close a loophole in state laws that permit what he termed ‘convenience gambling’ to exist, legally.” Marcus Webb, *Florida Bill Would Eliminate Internet Sweepstakes Games*, 51(4) VENDING TIMES (Apr. 2011), available at <<http://www.vendingtimes.com/ME2/dirmod.asp?sid=EB79A487112B48A296B38C81345C8C7F&nm=Vending+Features&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=1F3A96D54CAF43878B041A00F5F14431>> (last visited Apr. 28, 2011).

<sup>42</sup>“Skill” is defined in the bill as “the outcome is not based on chance or is not unpredictable to the player or is an outcome in which the player or patron is able to select a specific outcome in advance of actual play and then, by use of eye-hand coordination, physical dexterity, speed, or accuracy, employ or manipulate the game’s controls in such a way as to catch, capture, or achieve the preselected outcome in at least 51 percent of 20 contiguous iterations of game play.” HB 217, creating FLA. STAT. § 849.162(3)(3) (2011).

above-referenced Seminole County ordinance in prohibiting the use of simulated gambling devices in connection with a game promotion, sweepstakes, drawing, raffle, or any game of chance.<sup>43</sup> Plakon's bill has moved relatively swiftly through its first House vote in the Business and Consumer Affairs Subcommittee and now rests in the House Appropriations Committee.<sup>44</sup> Whether the existing operators could successfully convert their games to comply with the skill component of the proposed bill is uncertain, but presents interesting possibilities.

Considering the public's continued demand for more gambling activity, Internet café operators will almost certainly continue to test the boundaries of Florida's Game Promotion statute until the state judiciary or legislature specifically prohibits or regulates such activity. Repeal of the statute is not a realistic option, since doing so would significantly impact mainstream businesses seeking to use prize

giveaways to promote their businesses. Despite the fast-paced consideration of Plakon's bill by the Florida House, it failed to pass before the 2011 session ended. Certainly, the political forces both supporting and opposing Internet Sweepstakes Cafés will continue to gather steam in anticipation of the next legislative session in Spring of 2012. In the meantime, Florida's Internet sweepstakes cafés will be forced to play the odds, and hope for the best from the courts or the Florida legislature.

---

<sup>43</sup>HB 217. Representative Plakon's bill does not entirely eliminate the Florida law "loophole" utilized by Internet cafés, as the proposed law allows for devices used in playing skill-based games to remain lawful.

<sup>44</sup>*Id.* HB 217's companion bill, SB 576, has yet to be heard in the Florida Senate. Available at <<http://www.flsenate.gov/Session/Bill/2011/576>> (last visited Apr. 27, 2011).

