

OPINION NO. 90-039**Syllabus:**

A license to operate a concession pursuant to R.C. 1711.11 may be issued by the director of agriculture for the purpose of operating an electro-mechanical game known as "Clown Town" if the outcome of the game is predominantly determined by the skill of the player, the game does not include a mechanical or physical device which impedes, impairs or thwarts the skill of the player, and the game operator does not control the game to the extent that the outcome of the game is determined either partially or entirely.

To: Steven D. Maurer, Director, Department of Agriculture, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 20, 1990

I have before me your request for my opinion as to whether a license to operate a concession pursuant to R.C. 1711.11 may be issued by the director of agriculture for the purpose of operating a game known as "Clown Town."¹ You have described this game as follows:

The Clown Town game is an electro-mechanical device which features a chamber of approximately 32" x 34" x 33".... A playing field on the floor of the chamber contains a layer of tokens arranged by the game operator. A moving pusher blade which is manipulated by the player extends from 8" to 18" during the course of play, thereby creating the potential for pushing tokens off the playing field and into a collection bin for the benefit of the player. A movable token chute is located at the front of the machine and extends to the playing field. The object of the game is to manipulate the chute and the pusher arm in such a manner that the tokens inserted fall upon an open area in the playing field and create a "chain" of tokens which the pusher blade impels into the collection bin. The player may redeem the tokens collected for prizes or may re-insert them into the machine for another play. There is an "out of bounds" area on either side of the playing field into which tokens may fall for the benefit of the game operator.

R.C. 1711.11 requires that a license be obtained from the director of agriculture to operate a concession at any fair or exposition conducted by a county

¹ With your concurrence, I have reworded your question.

or independent agricultural society or by the Ohio expositions commission. R.C. 1711.11(A). "Concession" is defined to include any game. *Id.* Thus, a license pursuant to R.C. 1711.11 must be obtained in order to operate any game at a fair or exposition conducted by a county or independent agricultural society or by the Ohio expositions commission.

Pursuant to R.C. 1711.11(G), the director of agriculture shall adopt all rules that are necessary for the enforcement of R.C. 1711.11. These rules, which set forth a comprehensive scheme for the licensing and regulation of concessions, appear at 2 Ohio Admin. Code Chapter 901:9-2. With respect to games generally, 2 Ohio Admin. Code 901:9-2-02(J) provides that "[a]ll games played at a county or independent fair or the Ohio exposition center shall be games of skill as defined in division (G)² [sic] of section 1711.11 of the Revised Code and the approval and the licensing of all games shall be within the jurisdiction of the director of the department of agriculture or his designee." R.C. 1711.11 distinguishes games of skill from games of chance as follows:

For the purposes of this section...*games...the outcome of which is predominantly determined by the skill of the contestants, participants or players*, whether or not the contestants, participants or players pay a price for the opportunity to win a prize, do not constitute a game of chance or gambling within the meaning, purpose, and intent of this section and section 1711.09 of the Revised Code or sections 2915.01 to 2915.04 of the Revised Code. The foregoing definition does not apply where the...*game...contains or includes any mechanical or physical device which directly or indirectly impedes, impairs, or thwarts the skill of the contestant, participant or player.*

R.C. 1711.11(H) (emphasis added).

Moreover, 2 Ohio Admin. Rule 901:9-2-07 prohibits certain games from play at fairs and expositions:

- (A) No gambling or games of chance shall be permitted.
- (B) No game shall be allowed which, either by its design or by its operation, is controlled by the operator to the extent that the outcome of the game is determined either partially or entirely.
- (C) No game shall be allowed in which the outcome depends upon the word of the operator against the word of the player.
- (D) No game shall be allowed in which hidden numbers are used.
- (E) No game shall be allowed which includes any mechanical or physical device which directly or indirectly impedes, impairs or thwarts the skill of the player.
- (F) Such games include, but are not limited to:
 - ...
 - (39) Penny fall games and/or all pusher-type games.

Thus, a game with any of the characteristics enumerated in divisions (A) through (E) is prohibited. Division (F) lists as examples a number of games which may have one or more of these characteristics and, as such, are prohibited.³

² The description of games of skill appears in division (H) of R.C. 1711.11.

³ I note that this rule implements the policy of the legislature expressed in R.C. 1711.11 to limit games played at fairs and expositions to games of skill.

The game in question, "Clown Town," might be described as a "pusher-type game." The material which accompanied your request contained a description of a game which had substantially the same characteristics as "Clown Town" and which was called a pusher game, presumably because of the pusher blade device which is an important feature of the game. However, the determination of whether "Clown Town" is a pusher-type game is a question of fact for the director of agriculture, and for that reason I do not offer an opinion with respect to this issue. See 1983 Op. Att'y Gen. No. 83-057 at 2-252 ("[t]his office is not equipped to serve as a fact-finding body").

If a determination is made that "Clown Town" is a pusher-type game, then its use may be prohibited if it has any one or more of the characteristics listed in rule 901:9-2-07(A) through (E). In this regard, I find that divisions (C) and (D) do not appear to be relevant to "Clown Town" since it does not employ hidden numbers and the outcome of the game does not depend upon the word of the operator against the word of the player. However, divisions (A), (B) and (E) may be of concern with respect to "Clown Town." Division (A) prohibits gambling and games of chance. "Game of chance" is defined in R.C. Chapter 2915 as "poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance." R.C. 2915.01(D). R.C. 1711.11(H), however, states positively that any game the outcome of which is predominantly determined by the skill of the player is not a game of chance within the meaning of R.C. 1711.11 and R.C. 2915.01 to R.C. 2915.04, unless the game includes a mechanical or physical device which impedes, impairs or thwarts the skill of the player. Thus, if a game is predominantly a game of skill it is not a game of chance pursuant to R.C. 1711.11 and rule 901:9-2-07(A).

Neither "predominantly" nor "predominant" is defined in R.C. Chapter 1711. In the absence of statutory definition, words should be accorded their natural, literal, common or plain meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). "Predominant" is defined as "1. [h]aving greatest ascendancy, importance, influence, authority or force. 2. [m]ost common or conspicuous; prevalent...." *The American Heritage Dictionary* 976 (2d college ed. 1976). If the outcome of a game is predominantly determined by the skill of the player, then skill is the most important factor with respect to the outcome of the game. This definition allows for the possibility that other factors might affect the outcome of the game. As long as skill predominates, a game may contain the element of chance and still be permitted for purposes of R.C. 1711.11.

Whether "Clown Town" is a game of skill cannot be determined as a matter of law. It does appear that it is not purely a game of chance since it contains two devices which a player can manipulate: a button, which stops the movement of the pusher blade, and the token slot, which the player can adjust. To what degree if any these controls affect the outcome of the game, however, is a question of fact. Further, whether the game contains any mechanical or physical device which directly or indirectly impedes, impairs or thwarts the skill of the player in violation of rule 901:9-2-07(E) is also a question of fact. For example, included in the materials which accompanied your opinion request was the report of a statistical study of a pusher machine similar to "Clown Town" which suggests that the very controls ostensibly through which the skill of the player is exercised (i.e., the pusher button and token slot) may themselves serve to impair or thwart the skill of the player.⁴ Additionally, the informational materials which you submitted indicate a raised "lip" located along the front edge of the playing field that might impede the movement of the tokens into the collection bin and thus thwart the skill of the player. These devices and any other such devices on the "Clown Town" game must be analyzed to determine whether they actually impair, impede or thwart the skill of the player in violation of rule 901:9-2-07(E).

⁴ The study found that the player of the machine obtained the worst results when the player used both controls; better results were obtained when the player manipulated neither of the controls or either one control or the other.

Finally, "Clown Town" must be analyzed with respect to rule 901:9-2-07(B) to determine whether the operator can control the game to the extent that the outcome of the game is determined either partially or entirely. The information submitted with your opinion request indicates that the operator's control over the initial placement of tokens and/or prizes on the playing field might affect the outcome of the game. Again, this is a question of fact which must be determined by the director of agriculture or his representative.

Accordingly, it is my opinion and you are hereby advised, that a license to operate a concession pursuant to R.C. 1711.11 may be issued by the director of agriculture for the purpose of operating an electro-mechanical game known as "Clown Town" if the outcome of the game is predominantly determined by the skill of the player, the game does not include a mechanical or physical device which impedes, impairs or thwarts the skill of the player, and the game operator does not control the game to the extent that the outcome of the game is determined either partially or entirely.