

Three Persisting Myths of Gaming Technology Law

By Louis V. Csoka

Perhaps no other area of law is more fascinating or holds more surprises than gaming laws. As a result of their multifarious and rich history, gaming laws across the United States are full of interesting anomalies and contradictions. Given this diverse landscape, our basic assumptions and conclusions about gaming laws, especially in the area of high technology, are sometimes erroneous or incomplete. The purpose of this article is to briefly examine some of these apocryphal beliefs.

Myth One: All Forms of Gaming Are Prohibited on Aircrafts

Many of us have heard that, for more than a decade, federal laws have prohibited gambling on all airplanes. Specifically, in 1994, the Gorton Amendment added the following provision to the US Code: "An air carrier or foreign air carrier may not install, transport, or operate, or permit the use of, any gambling device on board an aircraft in foreign air transportation."¹ As a result of the Gorton Amendment and the prior Johnson Act, the Federal Aviation Administration today prohibits (1) gambling on *all flights within United States* airspace, (2) gambling on *flights to and from this country* regardless of the nationality of the carrier, and (3) gambling on all domestic and international flights of *US carriers*.²

A closer reading of the statute, however, reveals that not all forms of gambling are expressly prohibited by the Gorton Amendment. In particular, both the Gorton Amendment and the related Johnson Act appear to be aiming their prohibitions only at "gambling devices" and not, more generally, at all forms of

gambling. Of course, to be a "gambling device," one would anticipate that the prohibited item would have "slot" and a "hopper" or, at a minimum, a "random number generator."³

Most significantly, given this narrower definition for a "gambling device," gambling with cards, for example, does not appear to be expressly prohibited under the Gorton Amendment. This is particularly true when the airplane is in international airspace. Under this apparent exemption, private planes of Las Vegas Sands Corporation will offer baccarat on their Hong Kong to Las Vegas flights, unequivocally proving that not all gambling is prohibited on airplanes.

Myth Two: All Forms of Gaming Are Prohibited on the Internet

Many of us have heard that Internet gaming is illegal in the United States. This is true in large part. Specifically, *interstate* casino-style wagering over the Internet continues to remain, and will likely remain, prohibited in the United States for many years to come.⁴

On the other hand, "skill gaming" and "sweepstakes" have become multimillion dollar industries by themselves over the past few years. This is because, under common law principles, prohibited lottery and gambling offenses normally involve only activities in which each of the following elements is present: (1) the award of a prize, (2) determined on the basis of chance, (3) when consideration was paid.⁵ If any one of these elements is missing, then, in some cases, some activities do fall outside laws prohibiting illegal or unregulated gambling. For example, if the element of "chance" is missing, as in a game of skill, then the activity may be permissible in some cases. Similarly, if there is no "consideration" collected from any of the participants, then the activity may be permissible as a sweepstake.⁶

On September 29, 2006, the US Congress provided assurances to at least some segments of the skill gaming industry by passing the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). While UIGEA prohibits processing of payments for unlawful Internet gambling, certain fantasy sport contests are expressly exempted from the federal definition of unlawful Internet gambling, provided that they meet the narrow definition set forth in the UIGEA itself.

Specifically, pursuant to UIGEA, certain fantasy sport contests have been exempted from the definition of an

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illegal “bet” or “wager” under federal law when game players are engaged in a fantasy sports game in which:

no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization . . . and that meets the following conditions: (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events . . . [and] (III) No winning outcome is based . . . (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.⁷

As a result of such skill gaming exemptions, several large corporations, such as CNN, Fox News, and Yahoo, have successfully conducted skill gaming events over the Internet from time to time. Similarly, as a result of sweepstakes exemptions, several large corporations, such as McDonald’s and Pepsi, also have successfully conducted sweepstakes gaming events over the Internet, as UIGEA did not change the landscape for any of these contests.

Myth Three: The Wire Act Prohibits (or Allows) All Interstate Gaming Data Transmissions

Many of us have heard that the Wire Act prohibits all interstate gaming data transmissions. By way of background, the Wire Act is the federal statute that most directly precludes efforts to transmit wagers electronically in interstate commerce if any part of that communication occurs in the United States. Some zealous opponents of high-technology wagering, including Internet wagering, have also argued that the Wire Act prohibits all data transmissions associated with such wagering across state lines. Of course, proponents of such wagering have taken the opposite view, namely that the Wire Act allows all sorts of data transmissions, so long as the wagering is legal on both ends of the transmission. The truth, however, appears to lie somewhere in between these two extremes.

Specifically, the Wire Act provides that:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information . . . *assisting in the placing of bets or wagers* on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.⁸

Most significantly, the Wire Act’s exemption applies only to the transmission of “information assisting in the placing of bets,” not to the interstate transmission of (1) bets or wagers themselves or (2) wire communications entitling the recipient to money or credit as a result of such bets or wagers.⁹ With respect to transmissions of “information assisting in the placing of bets,” that exemption is significantly narrowed by the requirement that the betting at issue be legal in both jurisdictions in which the transmission occurs.¹⁰

In particular, under this apparent exemption, certain slot machine manufacturers are able to transmit some limited forms of wagering-related accounting information electronically across state lines between those jurisdictions where they are conducting or participating in legal and licensed gambling. Off-track betting facilities and multi-state lotteries, such as Powerball, engage in similar acts of interstate information distribution, provided that these entities do so by also relying on other federal laws in making their argument that their activities are permissible.

Conclusion

When it comes to new technologies, gaming laws can hold a number of surprising exemptions. Furthermore, these laws are in a constant state of flux. As such, it is a worthwhile exercise to reexamine some of our old conclusions from time to time to determine whether new or different opportunities have emerged. Nevertheless, given that civil and criminal penalties can be imposed for a violation of gaming laws, it is always advisable to consult with a qualified gaming practitioner on any specific issue.¹¹

Notes

1. 49 U.S.C. § 41311(a) (1994).
2. *See generally* 15 U.S.C. § 1171, *et seq.*
3. *See* 49 U.S.C. § 41311(a) (1994); *see also* 15 U.S.C. § 1171, *et seq.*; *see generally* NRS 463.0155 (1993) (defining “gaming device” as “any equipment or mechanical, electromechanical or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game which affects the result of a wager by determining win or loss. The term includes: 1. A

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slot machine. 2. A collection of two or more of the following components: (a) An assembled electronic circuit which cannot be reasonably demonstrated to have any use other than in a slot machine; (b) A cabinet with electrical wiring and provisions for mounting a coin, token or currency acceptor and provisions for mounting a dispenser of coins, tokens or anything of value; (c) A storage medium containing the source language or executable code of a computer program that cannot be reasonably demonstrated to have any use other than in a slot machine; (d) An assembled video display unit; (e) An assembled mechanical or electromechanical display unit intended for use in gambling; or (f) An assembled mechanical or electromechanical unit which cannot be demonstrated to have any use other than in a slot machine. 3. Any mechanical, electrical or other device which may be connected to or used with a slot machine to alter the normal criteria of random selection or affect the outcome of a game. 4. A system for the accounting or management of any game in which the result of the wager is determined electronically by using any combination of hardware or software for computers. 5. Any combination of one of the components set forth in paragraphs (a) to (f), inclusive, of subsection 2 and any other component which the Commission determines by regulation to be a machine used directly or remotely in connection

with gaming or any game which affects the results of a wager by determining a win or loss”).

4. Radley Balko, “Internet Gambling Ban: Why You Should Oppose It” (Dec. 31, 2007), available at www.foxnews.com (last visited Mar. 3, 2008).
5. See, e.g., *Mobil Oil Corp. v. Danforth*, 455 S.W. 2d 505, 507 (Mo. 1970); see also *EC.C. v. American Broadcasting Co.*, 347 U.S. 284, 289-291 (1954).
6. Every contest should be carefully analyzed on its own merits to determine whether it is permissible under gambling laws. Additionally, some states have prohibitions even on skill gaming and, arguably, even on sweepstakes.
7. 31 U.S.C. § 5362(1)(E)(ix) (2006) (state laws still need to be examined separately for the legality of sweepstakes or a fantasy sports game).
8. 18 U.S.C. § 1084(b) (emphasis added).
9. Cf. *id.* at § 1084(a).
10. See *id.* at § 1084(b).
11. Any and all gaming activities must be specifically evaluated on their own unique facts to determine whether they are legal under state and federal laws.

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