

Department of Justice Improves the Odds of Online Gambling

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As seen in *Business Lexington*.

The online gaming, or igaming, industry, which began in 1995, is thriving. Now, thanks to a recent legal opinion from the Justice Department, many states may soon move to capitalize on the industry's momentum.

According to the American Gaming Association, global online gambling revenue in 2010 was nearly \$30 billion, with roughly \$4 billion originating in the United States. While igaming is generally illegal in the United States — simulcast wagering on horseracing, legalized by the Interstate Horseracing Act of 1978 and exempted from the 2006 Unlawful Internet Gambling Enforcement Act, being the exception — most igaming operators are legal and licensed in their home jurisdictions and operate legally in many countries around the world. Because these igaming companies operate outside of the United States, it is difficult to monitor or prosecute their activities within U.S. borders.

Two days before Christmas, the Justice Department released a legal opinion that could pave the way for legalized online gambling in the United States. The Memorandum Opinion, written by Deputy Attorney General Virginia Seitz, was issued in response to inquiries from New York and Illinois as to the legality of the sale of lottery tickets over the Internet. The Justice Department's response not only confirms the legality of these intrastate (transactions limited to within the state's borders) online lotteries under the federal Wire Act, but it may also open the door to other forms of intrastate online gaming, including poker.

Historically, the Justice Department vehemently opposed online gambling — including, peculiarly, simulcast wagering on horse racing — on the grounds that it violated the Wire Act, 18 U.S.C. § 1084, which was passed in 1961, in response to rampant organized crime. Notably, the Wire Act was enacted before the existence of the Internet, but there has been no attempt to amend it in the intervening 40 years. In fact, earlier in 2011, the Justice Department filed indictments against three high-profile online-poker companies: PokerStars, Full Tilt Poker, and Absolute Poker.

The Wire Act prohibits the placing of wagers by wire transmissions; more specifically, as noted by the Department in its Opinion, the relevant provision of the Wire Act contains two broad clauses. First, the act prohibits anyone who engages in the business of betting or wagering from knowingly using a wire communication facility to transmit interstate bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest. Second, the act prohibits using a wire-communication facility to transmit communications that entitle the recipient to receive money or credit, either as a result of bets or wagers or for information assisting in the placing of bets or wagers.

The central question before the Justice Department was whether both provisions of the Wire Act apply only to betting on sporting events or contests, or whether the second provision effects a broad prohibition of all gambling transactions by wire. Reversing its previous interpretation, the Justice Department in its December Opinion found that, even though the phrase "on any sporting event or contest" does not appear in the second clause, "the references to 'bets or wagers' in the second clause are best read as shorthand references to the 'bets or wagers on any sporting event or contest' described in the first clause."

Thus, the Wire Act only prohibits certain interstate wagers on sporting events or contests — and wagers that are outside of this category fall beyond the scope of the Wire Act's prohibitions. As such, because the New York and Illinois online lottery plans do not relate to a "sporting event or contest," the Wire Act does not prohibit them.

In so ruling, the Justice Department pointed to legislative history and Congressional testimony contemporary with the passage of the Wire Act. Congress's focus in the act, the Justice Department wrote, was to stop the use of wire communications for sports gambling.

"This focus on sports-related betting makes sense," the assistant attorney general wrote, because "the record before Congress indicated that sports bookmaking was the principal gambling activity for which crime syndicates were using wire communications at the time."

The Justice Department did not address other forms of Internet wagering, but states that are eyeing expanded gaming as a way to boost revenue are looking to seize the moment and pass legislation that will allow them to regulate — and thus tax — online gaming companies that wish to operate within their borders. The District of Columbia and Nevada have recently approved limited intrastate Internet gambling, and California and New Jersey have also introduced legislation that would legalize online gaming. According to the New York Times, Steven Grossman, Massachusetts state treasurer and chairman of the New York Lottery Commission, believes the Justice Department's Opinion is a "turbocharged opportunity to engage new markets" and that it "will put additional pressure on Congress and others to allow online poker and other Internet gambling." Meanwhile, gaming industry groups, such as the American Gaming Association, are lobbying for federal legislation to establish consistent regulatory standards and prevent fraud and money laundering. Such legislation could provide a mechanism for regulating and taxing foreign operators in order to protect players.

While legalized online gaming is not in Kentucky's immediate future, Gov. Steve Beshear is pushing another form of expanded gaming as a revenue-generating measure. Beshear, working with leaders in the state legislature, recently advanced a plan to legalize casino gaming in the commonwealth. Kentucky is currently one of only nine states that have not legalized some form of casino gambling, and many argue that the horse industry has suffered as a result, since the casino states, such as Pennsylvania, have used casino revenues to subsidize purses, attracting horsemen and boosting their state breeding industries — resulting in the loss of breeding stock from Kentucky. In the race to implement expanded gaming, Kentucky is gaining momentum but still has significant ground to cover in light of the bids of Nevada, New Jersey and other states to get a piece of the \$30 billion online gaming industry purse.