



Regulation of the Internet: Which Sovereign Government Has the Last Word?

by Joe Valandra

The Indian Gaming Regulatory Act became law in 1988. The world of gaming has changed in so many ways in the years since. Tribal governmental gaming has become a \$30 Billion player in the overall gaming industry.

Tribal gaming has brought innovation and spurred economic development for tribes and local economies in ways that were hoped for but not fully imagined. The interpretation of the Indian Gaming Regulatory Act (IGRA) by courts has strengthened tribal governments and bolstered sovereignty in all areas.

This is not to say that it has been a smooth road without challenges. Many states have fought to control the growth of tribal gaming and in some cases stop it entirely. The fights center on controlling money and land. The politics are not always straightforward and yet the influence and integrity of tribal governments and their legal arguments have grown.

The Internet has engendered great promises of expanding markets and huge growth in profits. Gaming is a justifiably heavily regulated industry. Tribal gaming is the most regulated industry in the world. The key to unlocking the opportunity of the Internet is regulation that takes into account technology, games, and markets that change at the literal speed of light.

It is a fair observation that regulations and regulators in all jurisdictions have not kept up with the Internet. This is not a criticism, rather a reality that must be faced and solved.

When it comes to tribal gaming and the Internet we are seeing a major complication to the regulatory conundrum – state and federal rules. IGRA makes it clear that gaming that takes place on Indian lands is under the primary jurisdiction of tribes - this general rule is mitigated by tribal/state compacts and applicable federal laws.

The issue simply stated is where the gaming takes place. This is crucial to the application of laws and regulations. There is no dispute that Class II gaming conducted on Indian lands is “legal” gaming. It is also clear that Class III games, as defined in a compact, when on Indian land is “legal” gaming. IGRA and many legal precedents confirm those conclusions.

Until a few years ago most states did not have any laws dealing with Internet gaming. Compacts between states and tribes have generally not touched Internet gaming or have prohibited it through definitions. The federal government has a framework of laws designed to stop the transfer of money derived from “illegal” activity that have been applied to Internet gaming. An example is the Unlawful Internet

Gaming Enforcement Act (UIGEA). This was passed in an effort to give the feds a stronger position with financial institutions to stop “illegal” Internet gaming. UIGEA is specifically limited to “illegal” Internet gaming. Importantly, UIGEA does not change any existing laws, such as IGRA, to make gaming activity “illegal”. If gaming is “legal” under the IGRA or any other law passed by a state or feds, it is not subject to enforcement under UIGEA.

Each sovereign government – tribes, states and the feds – believe they somehow control if and how the Internet is used for gaming. Here is how it breaks out: (1) Is the gaming activity taking place under the jurisdiction of a particular sovereign government? (2) Is the activity “legal” under the laws of the sovereign government? (3) Is there a conflict between sovereign governments and if so, what is the source of the conflict?

In the case of tribal gaming, if the servers and other technology are located on Indian land and the games contained within the technology are Class II games, then it is “legal” gaming. This is true unless, of course, the tribes agreed via compact to cede all or part of their jurisdiction. When the game is “legal” under the IGRA then federal laws will not apply.

If only the world were so simple. States are taking the position that any play using the Internet requires a compact to be “legal”. The feds seem to be agreeing and declaring that play using the Internet is “illegal” gaming and therefore violates federal laws. This paradigm has caused a chill on tribes using the Internet. In some states, tribes are actively pursuing state laws that may enable certain types of games at the cost of paying taxes and partnering with other non-tribal gaming entities.

The political compromise that is IGRA envisioned that tribes have the benefit and opportunity to use technology without limits. The conflict over jurisdiction as currently playing out is certainly limiting the use of the Internet by tribes. This is a real issue and one that cannot be left to the states or the feds to decide alone.

The answer to the question of which sovereign government has the final word will determine the ultimate success of tribes using the Internet. It also will impact how and where tribal governments exercise sovereignty. ♣

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