Five years ago, as Indian nations turned to the promise of Internet gaming, iGaming experts declared Internet gaming inevitable in the United States. Many thought that iGaming would move quickly through the U.S. market. At the time, there was a lot of interest in iGaming, with many Indian nations supporting federal or state legislation and just as many opposing it. So, what has changed in those five years? What hasn’t? And what can we expect in the future?

What’s Changed?

An important early and positive change was the Department of Justice’s (DOJ) 2011 Wire Act opinion. That opinion essentially encouraged Internet gaming businesses by concluding that the Wire Act’s prohibition on transmitting interstate and foreign wagering communications on the Internet applied to sporting events and contests only. Subsequently, three states, Nevada, New Jersey and Delaware, launched iGaming to disappointing results so far. Presumably as a result of the DOJ Wire Act opinion, Delaware and Nevada have recently entered into a multi-state agreement that would allow member state’s players to play poker against each other. For now, because these two states represent a small population base, this agreement provides a marginal increase in liquidity.

The DOJ opinion galvanized many Indian nations to move forward to launch Class II and III iGaming. A Nation in Oklahoma came close when it reached an agreement with the State to provide international iGaming. That agreement was thwarted, however, by the Department of Interior because the Indian Nation agreed to pay the State too much money under the Indian Gaming Regulatory Act. Others explored the possibilities and discovered that their compacts precluded iGaming. But others continue to develop their iGaming potential.

In the meantime, technology including geo-location and player identification of under-age and problem gamblers greatly improved. While not yet perfect, technologic advances have quieted many who objected to iGaming on the grounds that security concerns and the inability to identify players prevented a safe environment for gambling on the Internet.

Furthermore, flattened casino revenues indicate that it is time for casino owners to reinvent their products. Four casinos in New Jersey closed very recently. Revenue dropped dramatically in the big casinos in Connecticut. Overall there is little increase in gambling revenues throughout the United States. And those small increases can be mostly attributed to new casinos opening rather than any substantial growth in existing operations.

Despite these changes, iGaming’s inevitability does not seem so inevitable any more.

What Hasn’t Changed?

The promise of iGaming seems to have lost its glossy veneer because the objections to iGaming have not changed. Political and legal obstacles still override the possibilities.

Over the past five years, tribal consortia and individual Indian nations announced their decisions to launch iGaming from Indian Country. They rightly hold up examples such as Kahnawake in Canada which runs a successful Internet gaming operation with apparently little interference by the Canadian government. Nations presently attempting to launch off-reservation gaming argue that, even if players are off-reservation, the gaming is located on Indian lands because the gaming system is located there and the player’s bet is accepted there. Therefore, they argue that all of the gaming is on Indian lands and directly governed by the Indian Regulatory Gaming Act. If this legal theory prevails, most Indian nations could immediately proceed to provide Class II bingo and poker wherever players are located. Unfortunately, this legal theory has not been adequately tested, is inconsistent with several court decisions and is generally considered to be risky.

For example, even though Internet gaming was legal in Antigua, the Second Circuit concluded that “[t]he act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling within New York State.” United States of America v. Gotti, 459 F.3d 296, 340 (2nd Cir. 2006) quoting People ex rel. Vacco v. World Interactive Gaming Corp., 185 Misc.2d 852, 859-860, 714 N.Y.S.2d 844 (N.Y.Sup.1999). See also, United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001). Thus, these decisions suggest that players must be located in jurisdictions where Internet gaming is legal.

Even the DOJ opinion may not prevail. Court decisions on the applicability of the Wire Act to iGaming are mixed. The courts in Vacco and United States v. Lombardo, 639 F.Supp.2d 1271, 1280-1282, concluded that the reference to sporting events and contests applied to only one of the three wire communication prohibitions. The other two prohibitions applied to all gaming over the Internet. To the contrary, the court in In Re Master Card International Inc., 313 F.3d 257 (5th Cir. 2002) concluded that the Wire Act requires sporting events or contests to be the object of gambling.

DOJ can be expected, for the time being, to pursue Wire Act litigation only against defendants engaged in sporting events or contests. With a change in the federal administration, continued pressure on DOJ from Congress to reverse its interpretation or additional court decisions to the contrary, the Department may change its views.
The legal risk may not stop Indian nations, known for their willingness to take on state and federal governments and their amazing ability to prevail over them. The legal obstacles do continue, however, to prevent the highly risk-averse credit card companies and banks from cooperating with proposed iGaming businesses. In the face of legal uncertainties and Indian nations’ sovereign immunity from suit, banks and credit card companies view themselves as the likely subject to any lawsuits on the legality of iGaming. Without a change in the legal landscape, through court decisions or state or federal legislation, we can expect banks and credit companies to continue to balk at involvement in iGaming.

Finally, political opposition remains strong despite the new Internet sites sanctioned by three states. Each year, a number of states consider legislation authorizing iGaming but most make little progress. The State of California is widely considered to be the most likely to pass legislation. Nonetheless, although California provides the best opportunity for a lucrative iGaming market, no compromise has been reached among the factions supporting and opposing legislation. Federal legislation also remains in limbo.

**What is the Future of iGaming?**

iGaming’s future may well depend on the November election results. If the Republicans take the Senate majority, there is a stronger chance that, with the strong lobbying efforts of Sands Chairman Sheldon Adelson and bipartisan concern about gaming on the Internet, a bill prohibiting all iGaming or at least extending the Wire Act prohibitions to interstate and foreign gaming will be passed. If legislation reportedly drafted by the office of present Senate Majority leader, Harry Reid, is any indicator, Senator Reid will likely act to protect the State of Nevada’s Internet poker but will not protect Indian nation’s rights to iGaming. Further, because there has never been any strong unified support for iGaming, it is unlikely that the President could be persuaded to veto any iGaming ban.

Without a change in the majority and a compromise among the stakeholders, federal legislation remains unlikely. Consequently, we can expect iGaming development to continue its state-by-state glacial pace. There are a number of obstacles and each provider, state and Indian nation will have to work through those obstacles. In the meantime, the millennials’ affection for mobile media remains a strong incentive for all Indian nations to determine how to leverage the Internet.

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