

CHAPTER 2

Types of Gaming

Man is a gaming animal. He must always be trying to get the better of something or other.

CHARLES LAMB

GAME FORMATS AND THEIR ONLINE VERSIONS

Gambling can be divided into three basic formats based on style of play: lotteries, wagers, and gaming. All lotteries are gambling, for instance, but not all forms of gambling are lotteries. The same holds true for gaming and wagering. Lotteries and games of chance depend on the generation of random numbers within set parameters: possible results available from fifty-two cards, two dice, three reels, etc. Sports betting (a sportsbook) depends on odds and payoff calculations, measured against results transmitted real-time. All these formats, therefore, are particularly adaptable to the use of computer software and online communication—in other words, the Internet.¹

The legal distinctions between the different formats and the individual permutations of a given game or style of play are based on historic accidents as much as any technical differences. Precedent, tradition, the moral sentiments of the time, and political currents have as much to do with a game's legal status as its actual operation or mechanics of play. For example, during the 1820s and 1830s, and again at the end of the nineteenth century, a series of scandals led to the widespread repression of lotteries in the United States. Many states demonstrated their reforming zeal by outlawing lotteries in their state constitutions. In some cases, these prohibited lotteries were defined as including all activities with consideration, chance, and prize, which would include all forms of gambling. This prohibitionist zeal later resulted in unintended consequences, such as the legalization of tribal casinos, when

¹ See, I. Nelson Rose, *An Introduction to the Law of Internet Gambling*, 10(1) UNLV GAMING RESEARCH & REVIEW JOURNAL (2006).

courts ruled that tribes could operate any form of gambling permitted in the state and states had state lotteries.²

What follows is a description of each format and its development in both U.S. and applicable foreign law.

Lotteries

The concept of pooling wagers, betting on a winning number or token, to be drawn by chance, dates from remote antiquity and retains its appeal today. Lotteries have come to be identified as a distinct genre, more because of their unique legal position as state approved and sponsored entities, rather than any major difference between lotteries and other number-picking games such as keno or bingo. But, even if the different categories are the result of tradition and legal fiat, classifying a game as a lottery, rather than as a form of gaming, can determine whether the game may be legally offered online.

Jurisdictions are free to decide for themselves what is, and is not, a lottery. Governments have looked at factors such as whether a game is 100% chance, whether there are paper tickets involved, whether players have to go to a particular place to participate in the play of a game and whether there is a pooling on bets to create the prize.

The most common types of lotteries are those operated by governments. However, even these state lotteries may be completely private enterprises, licensed by the local government. Because virtually every jurisdiction prohibits non-authorized lotteries, completely privately owned and operated lotteries are rare today.³ The expense and trouble are considerable, customer trust is hard to establish, and most operators prefer to engage in a lottery that has government backing.

Today, government-sponsored lotteries are by far the most numerous. These have been enormously successful, because they are usually monopolies and the approval of the government is generally held to indicate an honest, reliable game. In practice, very few governments actually operate their own lotteries. Most grant licenses to private operators, which include use of the State's name and endorsement.⁴ Government permits range from merely selling licenses—the approach in many offshore locations—to requiring complete background checks and continuing oversight of operators, as in Europe, Australia, and the United States.

²See, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed for lack of jurisdiction*, 957 F.2d 515 (7th Cir. 1992).

³ See, e.g., <<http://www.freelotto.com>>.

⁴ The largest lottery licensee in the U.S. is G-Tech Corporation, whose web page contains useful background information on the working of lotteries generally. See, <<http://www.gtech.com>>.

The second most common form of lottery, although much smaller in size, are charity raffles. Some of these can be quite large, such as Plus-Lotto. The main characteristic they have in common is that they assert that the money raised is going to good causes.⁵

These are drawings where participants are required to pay money to purchase the chance to win.

If a purchase is not required, usually phrased as “Donation Requested,” the game is usually not considered gambling because there is no consideration.

Charity raffles are almost always operated pursuant to rules laid down by state, provincial, or municipal authorities. There is a common misconception that private individuals can conduct raffles, such as selling their home on the Internet, so long as some of the profit goes to charity. In fact, these are almost always illegal. Some states, such as California, expressly prohibit charities from selling raffle tickets online. Some states still outlaw all raffles. But even the states that do permit drawings require that the funds go to the charity and not to any private individual.

Lotteries—Choosing Winners

Although lotteries can encompass almost every type of gambling, including sports betting in Europe and video lottery terminals in the U.S. that are indistinguishable from slot machines, the most common lottery games are instant (scratcher-type) and drawings.

For scratchers, the player uncovers a certain number of hidden dots and squares over dots or squares on the scratcher card or similar device. Scratchers are similar, if not identical, to older forms of paper instant tickets, the pull-tab and punchboard. Pull-tabs are still quite common, especially in bingo operations, and are identical to scratchers, except that players pull off a piece of paper rather than scratch off a latex covering to reveal the hidden symbols. Punchboards, which are rare today, consisted of a board with many covered holes. Players would pay the operators for the right to punch out one of the holes, which contained small slips of paper. If the slip indicated it was a winner, the player was paid by the operator.

Scratchers, pull-tabs, and punchboards were often described in the law as “paper slot machines.” The similarity to modern electromechanical slots is clear when these games are offered on stand-alone video machines or on the Internet. A player “buys” one of these tickets, which may be merely data stored in a cartridge or computer with no physical counterpart. The image of the ticket appears on a screen. The player presses a button or rubs the screen

⁵ Liechtenstein-based Plus Lotto has taken care to identify itself with the International Association of Red Cross/Red Crescent Societies. *See*, <<http://www.pluslotto.com>>.

to reveal symbols which are often identical to those found on conventional slot machines.

These games are often made expressly legal by statutes and regulations. The Indian Gaming Regulatory Act, for example, includes “pull-tab” as a Class II game similar to bingo that can be played wherever bingo is played. The Act allows electronic aids, and video pull-tab dispensers can be found in tribal bingo halls across the nation.

Instant games rarely have large prizes. Number drawings, like lotto, are the opposite, often offering life-changing, multimillion dollar jackpots. For state and national lotteries, the drawing is usually held at least weekly, often televised.

A particular lottery program or business can, and usually does, offer both types. When lotteries were first reintroduced in the late twentieth century, the lottery format was a stand-alone offering, not mixed with other formats. As competitive pressures grow, however, more and more lottery authorities are authorizing additional and subsidiary games such as keno to be offered as additional attractions.

American Lottery Development

Lotteries were outlawed in the U.S. from the 1890s until the 1960s as a result of cheating and corruption scandals at the end of the nineteenth century.⁶ New Hampshire began the change back when it authorized a state lottery in 1963. Today lotteries have regained their popularity nationwide, and 42 of the 50 states and the District of Columbia now sponsor them.⁷ Many states still have laws dating from the Louisiana Lottery Scandal in the 1890s on their books or state constitutional prohibitions from the 1830s. Some archaic laws not only outlaw lottery operations in the state (suitably modified, of course, to permit the local state lottery) but also make it a crime to even possess an out-of-state lottery ticket. These latter laws are never enforced.⁸

⁶ Mississippi prohibited lotteries within the state in its Constitution of 1890, and several other states followed suit. *See*, MISS. CONST. art. 4, § 98. (“No lottery shall ever be allowed . . . and the legislature shall provide by law for the enforcement of this provision; nor shall any lottery heretofore authorized be permitted to be drawn or its tickets sold”), available at <http://mshistory.k12.ms.us/features/feature10/1890_state_constitution.html>. A number of states do not specifically ban any form of gambling other than lotteries, as a result of lottery scandals in the 1820s and 1830s.

⁷ Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, District of Columbia, Virgin Islands, Commonwealth of the Northern Mariana Islands, and Puerto Rico.

⁸ *See, e.g.*, R.I. GEN. LAWS § 11-19-4 (2003); N.J. STAT. ANN. § 2C:37-6 (2003). It is worth noting that while sale, and even possession, of out-of-state lottery tickets is banned in a number of jurisdictions in this fashion, it is unheard of for a liquor store or gas station to refuse an out-of-state traveler the right to buy tickets to the local lottery!

An out-of-state Internet lottery may very well be violating a local law when it accepts customers from a state with prohibitions against selling lottery tickets. The question of whether the player is also breaking the law is of mere theoretical interest. Whether an ancient law that makes it a crime to merely possess a lottery ticket applies to a resident who buys foreign lottery tickets via the Internet has never been, and probably never will be, decided. No law enforcement official wants to be made a laughing-stock in the national news.

Reintroduction of lotteries in the twentieth century meant the use of modern methods to sell and tabulate the tickets. The most important development was the introduction of a wire link from the point of retail sale to the central lottery computer server. These electronic sales are referred to in the lottery industry as “online” to distinguish them from the paper-based scratchers.

It is important to keep the two uses of the term “online” separate and distinct. When state lotteries talk about online games, they are almost always referring to games which are not conducted on the Internet. Rather paper tickets or touchscreen vending machines connect through secure lines with the lottery’s central computer. When other gaming operators talk about online games, they mean games played on the Web or through a closed network. Players usually are participating from their home or office computers. The confusion is going to increase with more state lotteries looking into offering their games on the Internet to players’ personal computers.

Lotteries and the Internet: Expansion vs. Jurisdictional Holds

In the days of paper tickets pulled from barrels, a government license really gave lottery operators a true monopoly. Today, even where government awards a lottery a monopoly, it is easy to buy tickets for lotteries conducted in other states and nations. Almost all state lotteries have agreed informally, and sometimes more formally, not to poach each others’ players: The Washington State Lottery does not try to sell lottery tickets to the residents of next-door Oregon. In the late 1990s international organizations, such as AELLE, the European Association of State Lotteries and Lottos, began holding conferences in which the issue of State Lotteries marketing internationally on the Internet was of primary concern.⁹ The World Lottery Association, comprised of more than 140 lotteries, was created in 1999 by the merger of Intertoto and AILE (the International Association of State Lotteries) to “try and get some control on the Internet,” among other goals.¹⁰ And in the U.S., the individual states are one by one adopting direct Internet sales.

⁹ Professor I. Nelson Rose, one of the co-authors of this book, was the keynote speaker at the 1997 AELLE Congress, held in Portugal, and his presentation and paper on Internet gambling was translated into French, Spanish, Portuguese, and German.

¹⁰ Patricia A. McQueen, *AILE, Intertoto form one group*, INT’L. GAMING & WAGERING BUSINESS, Aug. 1999, at 17, 19.

A typical state lottery limiting play to locals is Oy Veikkaus, the Lottery of Finland, which can be found at <http://www.veikkaus.fi>. Not only does Oy Veikkaus require players to have a bank account in Finland, but the Web site is entirely in Finnish, except for that old Viking term, “Bingo.”

The small Principality of Liechtenstein (population 31,122), on the other hand, is running a true global lottery, accepting wagers from anywhere in the world. A player may click on <http://www.interlotto.com> and choose any language he or she wants and a particular part of the U.S. for faster computer communications.

Liechtenstein’s InterLotto originally would not take bets from everywhere. Its rules stated that “it is unable to accept entries through Swiss Servers. It is also unable to accept PLUS Lotto entries from players in Austria.” A player who enters illegally from Switzerland or Austria and wins will not be paid. A quick look at a map explains why InterLotto respects the laws of Switzerland and Austria. Tiny Liechtenstein is squeezed between the two larger countries.

But other countries, and states like New York, also have laws on their books that declare cross-border lotteries illegal. So, how does Liechtenstein get away with selling lottery tickets in those jurisdictions? It says it isn’t. InterLotto’s legal defense is most creative:

Our legal advisers are of the opinion that, when playing InterLotto on the Internet, Players are traveling to Liechtenstein to enter the lottery. For most individuals it is legal to take part in the legal activities of the country which they are visiting.

InterLotto’s real defense is that it is sanctioned by a sovereign foreign country and it is too difficult, at the moment, for the federal government of the U.S. to prevent it from having American customers.

Interest from other states remains high in such states as Georgia.¹¹ The addition of more U.S. jurisdictions to the ranks of online lotteries is now just a matter of time. Just as the states themselves one by one opened lotteries, the already open lotteries will one by one go online.

Some operators, most notably Liechtenstein’s Plus Lotto, aggressively advertise and sell online tickets around the world. A state proprietor finds itself competing against other operators, and like it or not, in a global market. Lotteries must cope with a constant demand to update and improve their offerings, and the pressure has only become more severe as other forms of gambling are

¹¹ H.B. 346, passed by the Georgia Assembly in 2005, authorized online subscription to the state lottery, but at present is stalled by opposition in the state Senate. See Georgia General Assembly home page, http://www.legis.ga.gov/legis/2005_06/search/hb346.htm (January 16, 2008).

made available to the public. The marketing power of the Internet has therefore become indispensable.

Lotteries outside the USA were to first to use the Web. The pressure on European countries to expand lottery coverage into the neighboring markets has only grown with the adoption of the euro as the common currency. Austria's lottery decided its traditional payout of about 55 percent was too low for the fast-paced Internet games, so on the Net its payout is 90 percent. Legislative restrictions prevent Germany's lotteries doing the same: games must be the same low rate, 50 percent, both traditional and online. The UK national lottery has been online since 2003;¹² while British Columbia and Canada's Atlantic provinces followed suit in 2006.¹³ While some jurisdictions have barred non-nationals from participation in their draws, even online¹⁴ the rule against accepting cross border bets is not as pervasive as in the US. Where the demand is not directly met online, as in the case of Liechtenstein and South Africa selling subscriptions online,¹⁵ various ticket agencies fill the gap, purchasing in-country for foreign clients.¹⁶ Here again, the difference between marketing online and online ticket sales is not only increasingly blurred, but increasingly insignificant. Even Mainland China has experimented with direct online sales of virtual lottery tickets on a small scale.¹⁷ However, concerns about fraud and lack of regulation have slowed nationwide application. The current and recent moratorium is expected to end sometime in 2008 with the issuance of national regulations for this format.¹⁸ The principal barrier to worldwide participation seems to be web pages solely in the Chinese language.¹⁹

¹² See, <<http://www.National-Lottery.co.uk>>.

¹³ See, <<http://www.bclc.com>>; <<http://www.alc.ca>>.

¹⁴ The French national lottery (La Française des Jeux) is an interesting case in point: in June 2001, it launched live cash Internet gaming. Developed by Access Gaming Systems of Australia, it features three instant games with software offering rich animation that mimics real world instant lottery tickets. In keeping with standard European practice at this time, it restricts purchase to residents of France—but this also includes its overseas territories. Thus, residents of Tahiti or Guyana can buy a French lottery ticket online, but not those of Trieste or Germany.

¹⁵ See, <<http://www.nationallottery.co.za>>.

¹⁶ A typical example is the International Lottery Ticket Service (Interlotto). <http://www.winalot.com>. Often it is difficult to tell the actual national lottery apart from a ticket agent. Compare <<http://www.lotto.ie>> with <<http://www.irishlotto.net>>.

¹⁷ In April 2001, the PRC's Welfare Lottery Bureau of Heilongjiang began selling virtual lottery tickets to mobile subscribers (data-enabled cell phones and handheld computers, like Palm Pilots). Mark Anderson, *Killer app for cell phones: Lottery tickets*, SNS TECH TRENDS, MSN MONEYCENTRAL INVESTOR, Apr. 24, 2001, available at <<http://moneycentral.msn.com/articles/invest/trends/6790.asp>>. See also *B&B and Aptus*, WEBB-SITE.COM, Jun. 2, 2006, <<http://www.webb-site.com>>.

¹⁸ See, e.g., *Chinese Government Looks to Corral Lottery Fraud Ahead of Regulations*, INTERACTIVE GAMING NEWS, Jan. 4, 2008, <<http://www.igamingnews.com>>.

¹⁹ In April 2001, the PRC's Welfare Lottery Bureau of Heilongjiang began selling virtual lottery tickets to mobile subscribers (data-enabled cell phones and handheld computers, like Palm Pilots). Mark Anderson, *Killer app for cell phones: Lottery tickets*, SNS TECH TRENDS, MSN MONEYCENTRAL INVESTOR, Apr. 24, 2001, available at <<http://moneycentral.msn.com/articles/invest/trends/6790.asp>>. See also *B&B and Aptus*, WEBB-SITE.COM, Jun. 2, 2006, <<http://www.webb-site.com>>.

Direct vs. Indirect Participation

Each state lottery has a Web page, and uses it to post results of daily and weekly drawings, press releases and so on. There are, additionally, the “for fun” games (actually tutorials on how to play the real ones). Some are going further.

Faced with widespread maturing of markets and even declining sales,²⁰ a number of American state lotteries have turned to using the Internet as part of their actual gaming, not just for advertising. About a dozen feature “second chance” drawings which partially or wholly use the Internet to give losing tickets another opportunity to pay off. And in 2006, four American states—New Hampshire,²¹ New York,²² North Dakota,²³ and Virginia²⁴—began to offer subscription services to their respective state lotteries, available for purchase via the Internet.²⁵

One of the first states to operate lottery services on the Internet was Indiana. In 2001, Indiana’s state lottery sponsored a “second chance drawing” for its 3 and 4 number draws, and these could be entered—by previous ticket purchasers only—via the Internet.²⁶ This is merely a continuation of the telephone entry programs offered by such states as California and Massachusetts in the 1980s. Any player in the state with a losing paper lottery ticket could enter by calling an 800- or 900-number. A number of other lotteries use their web pages in a “semi-interactive” mode, to post second and even third chance drawings for tickets which contained one or more, but not all of the latest lucky numbers. The games are true lotteries, because players can bet more, by dialing the 900-number, for the chance of winning more.

There are also televised “semi-interactive” variations, as in the California lottery, where a closed circuit TV service displays the winning numbers of a “scratcher” game. New games are posted every few minutes.

State lotteries have been looking at having players pay to play online for decades. Long before New York, North Dakota, and Virginia began selling sub-

²⁰ See, e.g., LB&FC REPORT ON STATE LOTTERY FUNDING OF PROGRAMS AND SERVICES FOR OLDER PENNSYLVANIANS (1994), <<http://lbfc.legis.state.pa.us/factsheets/lottery.htm>>; GG 26: INCREASE LOTTERY REVENUES (2003), <<http://www.window.state.tx.us/etexas2003/gg26.html>>.

²¹ <<http://www.nhlottery.com/subscription/>>.

²² <http://www.nylottery.org/ny/nyStore/cgi-bin/ProdSubEV_Cat_401_SubCat_201673_NavRoot_320.htm>.

²³ <<https://www.lottery.nd.gov/LotterySubscription/subscriptions.shtml>>.

²⁴ <<http://www.valottery.com/subscriptions/>>.

²⁵ Emily Swoboda, *US Lotteries Test Internet Waters*, INTERACTIVE GAMING NEWS, October 23, 2006, available at <<http://www.igamingnews.com/index.cfm?page=artlisting&tid=7062&k=Virginia>>. Virginia’s decision to participate is a particularly ironic turn of events, given that Representative Goodlatte of that state’s 6th Congressional District has been an author or sponsor of most of the anti-Internet gaming bills introduced in the House during the last 10 years, including the Unlawful Internet Gambling Enforcement Act of 2006.

²⁶ Indiana’s Internet participation program was discontinued, and the second-chance tickets must now be mailed in, though the web page is used to display winning numbers as before.

scriptions online, there were several U.S. experiments with direct online participation in state lotteries. In 1991, the Minnesota State Lottery announced that it would conduct a market test of at-home lottery games played on Nintendo-style home TV game consoles. The scheme appeared legal, if confined to state residents only; but legislative concerns about underage gambling killed the project.²⁷

In October 2000, the Iowa Lottery introduced a game called “Treasure Tower.” Translated from the successful “Trésors de la Tour” game rolled out that same February by Canada’s Loto-Québec, it was the first U.S. state lottery game played on a CD-ROM.²⁸ The game consisted of two parts: players purchased a package consisting of instant-win scratch tickets and a CD. This disc contained software for a role playing game on a home PC, similar to an interactive video adventure game. Players assumed the role of a character who must solve assorted puzzles and challenges as the story line unfolds. The scratch ticket contained code numbers which had to be entered to play the game. Prizes ranged from \$4 to \$10,000.²⁹ It was technically not necessary to play the game, since the code number revealed on the scratcher showed whether that ticket was a winner. This made the game legally a scratcher. However, the game was controversial, since it appeared so much like a video game and might attract children. So the Iowa experiment was shut down. Loto-Quebec, meantime, has progressed from CD-game programs to embrace cyber-lotteries directly.³⁰

A number of the 46 American states and territories which sponsor lotteries offer subscription purchase programs. Even socially conservative states such as Georgia have considered using the Internet to enable account betting on their lotteries.³¹ At present, New Hampshire,³² New York,³³ North Dakota,³⁴ and Virginia³⁵ all offer subscriptions to their respective state lotteries via the Web. Virginia’s participation is particularly significant, as it is the home state of Representative Robert Goodlatte, noted as a diehard foe of online gaming.³⁶ At

²⁷ See, <<http://www.megspace.com/entertainment/neskingdom/special/lottery/>>.

²⁸ See, Loto-Québec, <<http://www.loto-quebec.com/>>.

²⁹ See, <<http://gamingmagazine.com/managearticle.asp?c=510&a=90>>.

³⁰ See, <<http://cyber.loto-quebec.com/cyber/nav/>>.

³¹ See, e.g., H.B. 346, 2005–2006 Legis. Sess. (Ga. 2005–06), available at <http://www.legis.state.ga.us/legis/2005_06/search/hb346.htm>.

³² See, <<http://www.nhlottery.org/subscription>> (January 16, 2008).

³³ See, <<http://www.nylottery.org/ny/nyStore/>> (January 16, 2008).

³⁴ See, <<https://www.lottery.nd.gov/LotterySubscription/subscriptions.shtml>> (January 16, 2008).

³⁵ See, <<http://www.valottery.com/subscriptions>> (January 16, 2008).

³⁶ Other people’s at least. Not content with passage of the UIGEA, the Honorable Representative has gone so far as to urge the FTC to exercise world-wide jurisdiction over advertising for online gaming, something it is not legally empowered to do. See, e.g., Emily Swoboda, *Goodlatte Implores US FTC to be “Marketing Police,”* INTERACTIVE GAMING NEWS, December 4, 2007, available at <<http://www.igamingnews.com/>> (January 16, 2008). Any efforts of his to shut down Virginia’s stake in online gaming, however, have gone unrecorded.

present, deliberate administrative delays, mainly the use of surface mail, prevent instantaneous play or payoffs, and participation is limited to proven residents of the respective states.³⁷ Nevertheless, this is unquestionably Internet gambling in its classic form: use of a credit card to purchase opportunities to gamble from a web site. Other American states will inevitably follow this example.

Wagers

The generic definition of “wager” is to risk something on the occurrence or nonoccurrence of a particular event outside of the bettor’s control. All wagering is gambling, as we have seen. But paying an entry fee to compete in a contest of skill is not a wager, for a contestant who “puts his money where his mouth is” has a great deal of input to, if not absolute control over, the results.

Parimutuel Betting on Horse and Dog Races

Simulcasting, a short hand for “simultaneous broadcast,” consists of the broadcast of a live race to a remote site, allowing bettors to wager at that site, as well as at the track where the race is being conducted. Simulcasts require the instantaneous transmission of wagering information, so that bettors at one location cannot have an unfair advantage. The most unfair, of course, would be past-posting, where a bettor places a bet after a race has begun or worse, has even already been won. The odds, races and race results are simulcast via a closed circuit TV link from the racetrack itself to other sites, where they are displayed on monitors. Most simulcast races have a merged parimutuel pool, with all bets being treated as if they were actually placed at a single location.

In its broadest definition, therefore, simulcasting is betting on a horse or greyhound race not taking place where the bettor is. The parimutuel industry divides simulcasting into two categories: inter-track wagers, where a person has to go to one track to place a bet on races taking place at another track; and true off-track betting, which includes stand-alone OTB parlors, as in New York City, and at-home wagering.

The categories are partly the result of historic accident. Before the invention of the telegraph, telephone, and parimutuel machine in the nineteenth century, people had to be physically present at the race to make their bets. Technology allowed the development of “pool rooms,” often rooms with chalkboards behind bars in cities like San Francisco. These were the first remote gambling by wire. But these were unregulated and often run by organized crime. States

³⁷ See, Swoboda, *supra*, note 99.

passed anti-bookmaking statutes to close down the pool rooms and required that all bets take place inside the enclosure of the racetrack. Special laws were passed, such as prohibiting telephones at tracks, to prevent attendees from signaling race results to confederates outside the track, who were working with illegal bookmakers.

Legal remote wagering began with intrastate intertrack wagers, permitted only when both tracks were conducting meets. Then betting was expanded to allow simulcasting at fairgrounds and other tracks which were not having races on that day. It was a short step to interstate intertrack wagers. In 1970 New York finally authorized the first stand-alone OTB parlors,³⁸ “to raise needed revenue for the City and State, to combat organized crime’s hold on gambling by providing a legal alternative and to help New York State’s racing industry.”³⁹

Betting on races from homes and offices, first by phone and then by computer, started slowly. In 1990, the New York State Legislature amended the state’s Racing, Pari-Mutuel Wagering and Breeding Laws to allow telephone betting by both residents and non-residents. Patrons were allowed to set up accounts for remote wagering, with different initial deposits required if the patron was from New York, or in a neighboring state, or in a non-contiguous state. So, while the state’s Penal Law prohibited bookmaking, as well as receiving and forwarding money wagered on horse races,⁴⁰ the state’s Racing, Pari-Mutuel Wagering and Breeding Laws explicitly allowed telephone betting by both residents and non-residents.

A minimum balance for a telephone account . . . shall be not less than four hundred fifty dollars at the time of the wager for residents of New York or contiguous states and not less than one hundred dollars at the time of the wager for residents of other states not contiguous with New York state. . . .⁴¹

Because patrons were required to deposit their money in advance, betting on races from homes and offices became known as Advanced Deposit Wagering (ADW). This is still the term used to differentiate it from wagers that are conducted mostly in cash: inter-track wagers and wagers placed at stand-alone OTBs.

States such as Nebraska⁴² and Kentucky⁴³ then passed laws explicitly allowing phone wagers to the states’ licensed OTB operators. None of these

³⁸ New York Off-Track Betting Law, NY Laws ch. 143, 144, 145, April 22, 1970.

³⁹ N.Y. City OTB Web page, <<http://www.nycotb.com/>>.

⁴⁰ N.Y. PENAL LAW §225.05, *People v. Busco*, 46 N.Y.S.2d 859 (1942).

⁴¹ NY RAC.PARI-M. §1012 (1990).

⁴² NEB. REV. STAT. § 2-1239 (2002).

⁴³ KY. REV. STAT. §230.378 (2002).

statutes specifically allowed taking bets from outside the jurisdiction; but, none forbade it, either.⁴⁴

This expansion of remote wagering on races was necessary to meet competition presented by faster, less skillful forms of gambling introduced by the state lotteries and casinos. Horse racing is slow by comparison, with 20 minutes between races. The legalization of lotteries and other forms of gambling in the US meant the end of the near-monopoly that horse racing had enjoyed over the gambling public since the Depression. While licensed tracks have been in decline since the introduction of the first state lottery of this century in 1964, remote wagering has become a vital part of the industry. Allowing bettors to wager on races taking place at other tracks creates non-stop betting action. Such an enormous portion of wagers are now placed on bets that are not taking place in front of the patron that it is not an overstatement to say that the adoption of simulcasting has kept the U.S. horse racing industry alive.

Betting on races over the Internet was a natural development for parimutuel wagering. Simulcasting to other tracks and then to stand-alone OTBs had shown that there is no reason for bettors to be physically present at a track; although, they prefer to be able to see the races, if not live then on a screen. Home and office telephone wagering was actually more awkward than Web betting, since the race had to be broadcast over the air or by cable to the patron's television set. The Internet was also made for race wagering, because operators had adopted computer technology early, and serious fans have been handicapping races with computers for decades. Further, as with sports betting, the outcome of wagers on horse and dog races can be independently verified.

Simulcasting and stand-alone OTBs were the first interactive online gambling mechanisms in the US—albeit a closed loop using a private line. By sending the racing signal intra- and then interstate, the number of races available to bet on, and the pool of bettors quickly doubled and tripled. OTB betting is now a standard feature of race betting throughout the United States,⁴⁵ and the system has been expanded to include even greyhound racing.

While the immediate barrier to any form of legal remote wagering on races is state law, a shadow spread over the entire industry because of the unknown impact of one federal law. The Interstate Wire Act⁴⁶ specifically forbid taking bets by interstate telecommunication facilities. There is an express exception if

⁴⁴ Connecticut's story was typical. In 1993, the state's OTB system was sold to Autotote®, a private operator. Autotote® wanted to take bets from other states. The legislature never approved phone bets per se, but in sections 12-574-F59 and F60 of the Regulations of Connecticut State Agencies, the Division of Special Revenue explicitly allowed them, at least from within the state, and out-of-state residents were not on the list of prohibited bettors per Section 12-574-F59(k).

⁴⁵ *Cf.*, e.g., NEB. REV. STAT. § 2-1247, "Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutuel Wagering" (2002).

⁴⁶ 18 U.S.C. § 1084.

it is legal to take the bet both at the place the bet originates and at the place it is taken. At the time Congress passed the Wire Act only Nevada took bets on out-of-state horse races. The legislative history of the Act makes it clear that Congress only intended by this exception to allow information to be transmitted, not actual wagers.

Subsection (b) contains an exemption from the prohibitions of subsection (a) for bona fide news reporting of sporting events or contests. A further exemption is contained in subsection (b) which would exempt the transmission of gambling information from a State where the placing of bets and wagers on a sporting event is legal, to a State where betting on that particular event is legal. Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a state where betting on the same horserace is legal is not within the prohibitions of the bill. Since Nevada is the only State which has legalized offtrack betting, this exemption will only be applicable to it. For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from New York to Nevada. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill. Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not.⁴⁷

The Department of Justice contends that this is still good law; that the Interstate Horseracing Act⁴⁸ (IHA) only allows information to go across state lines and that people are still required to bet in their home states, even if they do it by computer and even if the wagers are on out-of-state races. Everyone else who has read the IHA sees that it expressly authorizes interstate wagers.

It is also clear that the targets of the Wire Act were illegal bookies. The law was the product of a campaign by Attorney General Robert F. Kennedy, Jr., to fight organized crime by eliminating “the wire,” the telegraph wire illegal bookies used to get instantaneous information on horse races.⁴⁹

⁴⁷ House Report No. 87-967 “Sporting Events—Transmission of Bets, Wagers, and Related Information,” to accompany S. 1656—Interstate Wire Act, 18 U.S.C. §1084, H.R. Rep. No. 967, 87th Cong., 1st Sess. 1961, 1961. U.S.C.A.N. 2631, 1961 WL 4794 (Leg.Hist.) P.L. 87-216 (August 17, 1961).

⁴⁸ 15 U.S.C. §§ 3001 *et seq.*

⁴⁹ David G. Schwartz, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET* (University of Nevada Press 2005).

The threat of federal prosecutions eventually led to the horse racing industry writing a bill for Congress to enact. To eliminate the possibility that the Interstate Wire Act might prohibit a licensed OTB from accepting wagers from out-of-state, Congress amended the IHA in December 2000. The definition of “interstate off-track wager” was expanded to include wagers placed by “electronic media,” meaning by computer on the Internet or by a closed loop.⁵⁰

The statute is perfectly clear, and 17 states have opted in,⁵¹ allowing their residents to place bets with licensed operators in their own states or in other states that have authorized ADW. But, a controversy of international law has brought the specter of federal prosecutions of state licensed operators back to life.

As will be discussed in more detail later, Antigua filed a complaint against the U.S. in the World Trade Organization (WTO), claiming America was discriminating against its licensed Internet gambling operators. The WTO agreed that U.S. federal law did discriminate, because it allowed state licensed, but not foreign licensed, cross-border wagers on horse races under the Interstate Horseracing Act. The U.S., confronted with a statute that did discriminate on its face, should have simply amended the Act to turn it into an International Horseracing Act. Instead, the Bush Administration lawyers took the bizarre position that the Interstate Horseracing Act did not do what it said. They argued, repeatedly and always unsuccessfully, that the IHA only allowed people to make bets on out-of-state races with ADW operators in their own states. They further argued that the IHA could not have changed the Wire Act, since the IHA is a civil statute and the Wire Act is a criminal law. This argument also has consistently failed, in part because the language of the IHA is so clear and in part because there is no such doctrine about civil statutes not being able to change criminal statutes. But, the federal Department of Justice continues to insist that all cross-border betting, and perhaps even all remote wagering, is still illegal under the Wire Act; though it has never arrested a state-licensed OTB or ADW operator.

States, meanwhile, are continuing to change their laws to allow their residents to bet from their homes and offices on horse races by phone and computer. Typical is California.

In 2001 California amended its horse racing laws. A.B. 471, when enacted, constructively transferred any bet on California races made by phone or Inter-

⁵⁰ The operative section now reads:

“interstate off-track wager” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools. 15 U.S.C. §§ 3002(3).

⁵¹ *United States Gaming at a Glance*, 29 INT’L. GAMING & WAGERING BUSINESS, Jan. 2008, at 22.

net from anywhere, and places it within the “licensed enclosure” required by law.⁵² Once the location requirement is met, the Horseracing Act allows almost any form of wager. Bets need not be parimutuel, though this is usual, and any combination of parimutuel wagering pools are permitted. A.B. 471 creates opportunities for licensed ADW operators in other states and even other nations to accept new wagers on horse races. The bill added a new section, 19604, to the California Business and Professions Code. It specifically allows “multi-jurisdictional wagering hubs.” The state legislature intended that out-of-state operators can accept wagers from residents California by phone and computer. The statute contains detailed instructions as to how the handle is to be divided. The statute also requires that a licensed OTB operator, which would include one in another state or country, meets whatever technological and accounting standards the Board issues to ensure that minors are prevented from betting and that only the individual who opens an account can make wagers with that account. The Board requires that an operator outside California make an arrangement with a licensee inside the state to keep control and ensure that the state maximizes its revenue.

As the California law demonstrates, although the convergence of the IHA, Wire Act, and WTO has caused problems for the U.S. Trade Representatives and theoretical worries for the American horse racing industry, in practice licensed operators are taking bets on races across state lines. Further, they are taking bets that clearly fall outside the IHA. People are allowed to make remote wagers on dog races, which the IHA does not address. State racing authorities have approved wagers going overseas. If the Department of Justice were correct, many state racing commissioners would be guilty of federal felonies for this aiding and abetting of violations of the Interstate Wire Act.

The federal Agricultural Code of Canada expressly allows bets on American races.⁵³ OTBs in the United States regularly accept wagers on races taking place in France and Hong Kong. In practice, neither the federal nor state governments seem to be overly concerned that the pooling of parimutuel wagers from different countries may be in technical violation of the IHA and the Wire Act.

For other nations, the cross-border problem scarcely exists. Canada expressly allows licensed betting on races in other countries.⁵⁴ Australia and New Zealand also have parimutuel systems and online wagering sites with worldwide connections but limited participation online.⁵⁵ Many British sites (including Gibraltar) and those from the Caribbean take bets from anywhere. Caribbean, British, and European horse betting is not parimutuel but straight-bet, spread,

⁵² CAL. BUS. & PROF. CODE § 19590 (2002).

⁵³ Canada Criminal Code, R.S.C., part VII, § 204.8.1 (2001).

⁵⁴ *Id.*

⁵⁵ <<https://www.ebetonline.co.nz>>. Since these services are government licensed, no accounts can be set up at this time for U.S. residents.

and exotic betting. Depending on the site, it is possible to bet either against bookmakers or other players.

Sports Betting

Contests of speed, strength, and endurance between man, beast, and machine are a natural subject of wagers, both by participants and onlookers, and the practice dates back to the beginnings of human society.

Informal wagering, between individuals, is practically universal, and not a particular target of law enforcement. In many cases social gambling, where no one makes any money other than what they have won, has been made expressly legal by statute. Sometimes there are additional restrictions, such as the betting must take place in a private home. But in some states, some forms of social betting are still illegal. In California, for example, it is clearly a crime to accept, record, or even make a bet on a sports event, and there is no exception for office pools or bets between friends.⁵⁶ But even in states like California, where social wagering is still illegal, there is never an attempt to arrest casual bettors. Imagine the governor of a state being charged with illegal gambling when he makes a friendly, well-publicized bet with the governor of another state when those states have teams in a national playoff, such as the World Series.

Sports wagering as an organized business is another matter. Periodic attempts by professional gambling rings and organized crime to “fix” or “throw” games in various ways have given the trade a lurid reputation. The introduction of the point-spread increased the fear of corruption, since a player could be paid to still win, but not cover the spread. Even tolerating its existence is widely thought to introduce the risk of corrupting both professional, but especially college athletes. This was the moving spirit behind the federal Professional and Amateur Sports Protection Act,⁵⁷ and other prohibitions on sports wagering.

Of course, it might not technically be gambling for participants to wager on their own performance. It is perfectly possible to bet on oneself and still turn in an honest, 100% from-the-heart performance. But because of the possibility of collusion and corruption it is universally forbidden to players and participants in both professional and organized amateur sports worldwide. As the Pete Rose scandal showed, managers as well as players are the ultimate insiders. Not only might they rig a game to win a bet, even not making a bet on their own team one week would give powerful information to anyone booking sports bets.

The question of which states allow sports betting is of more than passing importance. The Professional and Amateur Sports Protection Act⁵⁸ prohibits any

⁵⁶ CAL. PENAL CODE § 337a.

⁵⁷ Enacted October 28, 1992, codified at 28 U.S.C. §§3701–3704 (2008).

⁵⁸ *Id.*

state or Indian tribe from offering sports betting. However, the Act grandfathered in all existing forms of sports wagering, defined as any type of gambling on sports events authorized by a state “at any time during the period beginning January 1, 1976, and ending August 31, 1990.” (It also gave New Jersey one year to legalize sports betting, but that state’s legislature did not pass enabling legislation). So, the question becomes which states had legal sports betting between 1976 and August 31, 1990.

Betting on college and professional sports was legal in at least the following states:

Delaware—The state lottery can run games based on sporting events.⁵⁹ The lottery did take bets on professional sports events. In 1974 professional sports leagues sued to stop these games, and lost.⁶⁰ The lottery’s game was so poorly designed that it failed, but the state still has the right under federal law to open it again whenever it wishes.

Montana—Allows “Calcutta Pools,” a form of auction pool in which bettors bid against each other to “buy” the team they think will win. Calcutta pools are allowed on all sports, other than elementary school and high school sports events and horse races.⁶¹ The Montana State Lottery can run sports pools.⁶² Licensed operators may conduct sports tab games, “on premises appropriately licensed to sell alcoholic beverages for consumption on the premises. . . .”⁶³ Licensed operators may also conduct sports pools.⁶⁴

New Mexico—The state allows parimutuel betting on bicycle racing. This became a point of contention during the Congressional debate on the Act.⁶⁵

North Dakota—Calcuttas allowed “for professional or amateur sporting events held in this state, but not for elementary, secondary, or postsecondary education sports events.”⁶⁶ And nonprofit organizations may run sports pools on professional sports events.⁶⁷

Oregon—The state lottery can run games based on sporting events.⁶⁸ It is currently taking bets in a form similar to parlays on National Football League games. It took bets for a short while on National Basketball Association games,

⁵⁹29 DEL. CODE ANN. tit. 29, §4805(b)(4).

⁶⁰ National Football League v. Governor of State of Delaware, 435 Supp. 1372 (Del. 1977).

⁶¹ MONT. CODE ANN. §§23-5-221, 23-5-222, 23-5-501.

⁶² MONT. CODE ANN. §§23-5-221, 23-5-501.

⁶³ MONT. CODE ANN. §§23-5-502, 23-5-512, 23-5-513.

⁶⁴ *Id.* See also, §23-5-503.

⁶⁵ See CONG. REC. S18332-01 (Oct. 29, 1992).

⁶⁶ N.D. CENT. CODE §53-06.1-07.3.

⁶⁷ *Id.*, §§53-06.1-03(1)(a), 53-06.1-09.

⁶⁸ OR. REV. STAT. §461.213.

but the lottery could not attract enough players and had to fold, since the size of the prize was determined by the amount of money bet.

Washington—The state allows anyone to conduct low-limit sports pools without a license.⁶⁹

Wyoming—Qualified organizations may conduct calcuttas on amateur sports events, professional golf tournaments and other limited events.⁷⁰

Futures and Proposition Betting

Occasionally both proponents and opponents of legalizing gaming will point out that trading on stock and commodities markets is very similar to gambling. It not only is similar, in the eyes of most state laws, it is gambling. For decades, the U.S. Supreme Court struggled with ways to uphold commodities futures contracts against challenges that they were unenforceable gambling contracts under state law.⁷¹ Finally, Congress enacted the federal securities laws, including express exemptions for exempt puts, calls, options, and other securities and commodities traded on a national exchange from being outlawed by state laws.⁷² This made it legal, for example, for speculators to buy contracts for future delivery of commodities without having to risk having a ton of pork bellies delivered to their door (as old cartoons used to show). Congress had to amend the securities laws to make straight bets on which way the market would go, stock index futures, not gambling.

Day Trading. Speculative trading on foreign legal exchanges are not covered by this federal preemption of state laws and are thus still illegal under some state anti-gambling statutes. Boiler-room operations, where salesmen cold call strangers to sell penny stock on foreign exchanges, thus violate both anti-gambling and securities laws.

So, individual investors with Internet access can legally become “day traders” on listed markets, buying and selling securities such as stocks, bonds, and futures in even the big markets, directly online for their own account. Before the advent of the Internet this was not possible. The risks, behaviors, and fates of many online “day traders” are eerily similar to, if not indistinguishable from, those of online gamblers.⁷³ The comparison can in fact be made point for

⁶⁹ WASH. REV. CODE §9.46.0335.

⁷⁰ WYO. STAT. ANN. §§6-7-101(a)(i), 6-7-101(a)(iii)(F). *See*, CONG. REC. S17434-01 (Oct. 7, 1992).

⁷¹ *See, e.g.*, *Bibb v. Allen*, 149 U.S. 481 (1893), where the Court upheld the contracts because there was no express understanding that the commodities would not be delivered, even though the reality is that futures contracts are almost always closed out without actual delivery.

⁷² 15 U.S.C. § 78bb.

⁷³ To take a near example, even noted authorities disagree on whether online stock trading should be considered gambling, government classification notwithstanding. *See* Nigel Turner, *Internet Gambling: First Person Account*, in *E-GAMBLING: THE ELECTRONIC JOURNAL OF GAMBLING ISSUES*, Feb. 2002, <http://www.camh.net/egambling/issue6/first_person/index.html>.

point:⁷⁴ the very terminology is often interchangeable, in such phrases as “high risk—high reward games.”⁷⁵ Traders who “ride the losses” and reinvest are the counterparts of gamblers who “double down;”⁷⁶ “using the news to evaluate underlying market conditions” is called “handicapping” when a gambler does it.⁷⁷ Likewise, both gamblers online and investors online are notorious for relying on software programmed “systems” and even “black boxes” of doubtful value to make winning picks for them.⁷⁸ The two groups even ignore the same wise warnings: never play with money you can’t afford to lose, never borrow your stake, set a limit for losses and stick to it.⁷⁹

Activities that are not usually thought of as gambling, though they share all the characteristics, are also booming on the Internet. Day trading, involving extremely short term bets on which way stocks and commodities, and their indexes and options, will move, has become a multi-million dollar a day business. Even larger is online stock trading, which is faster, cheaper, and less intimidating than trading with a live broker. Of course, more shareholders holding for short periods creates greater volatility, which entices more individuals to try to guess the direction of short-term market swings. Internet gaming sites have dissolved the line completely between betting and investing by making book on the Dow Jones Industrial average.

Apart from actually buying and selling stocks, gamblers can also bet on the movement of securities on the market: individual stocks, Dow Jones or NASDAQ indexes, commodities, and futures.⁸⁰ Unlike the highly speculative world of traditional commodities trading, where, for example, farmers and bakeries shift the risk of changes in the future price of wheat to gamblers, stock index futures do not even have actual bushels of stocks which have to be delivered at a future date.

Pyramids and Multi-Level Marketing. Network or multi-level marketing (MLM) has been a feature of the commercial landscape since about 1950. Allegedly an arrangement of independent sales representatives, it differs from the standard independent sales organization in that “override” or “downline” commissions are awarded the initial organizers on the sales of the representatives which he recruits, and those of the sub-representatives which they recruit in turn.⁸¹ Where this right to receive rewards based on recruitment is completely

⁷⁴ See J. Bernstein, STRATEGIES FOR THE ELECTRONIC FUTURES TRADER (McGraw-Hill 2001).

⁷⁵ *Id.* at 23.

⁷⁶ *Id.* at 17.

⁷⁷ *Id.* at 82.

⁷⁸ *Id.* at 51, 53.

⁷⁹ *Id.* at 27.

⁸⁰ This being a somewhat esoteric market, [www.betatwallstreet](http://www.betatwallstreet.com) has been acquired by globalsportsnetwork.com. See <www.gobet.net/corp_services.html>.

⁸¹ A more detailed and extremely positive picture of network marketing is offered by noted sales trainer Ziglar in NETWORK MARKETING FOR DUMMIES (IDG Books, 2001).

unrelated to product sales, a company is in danger of violating FTC guidelines for the prevention of pyramid schemes.⁸² Even with a legitimate product to sell, a company can find itself in trouble if it has too many sales levels. Today many representatives and their successive generations of recruits advertise and/or sell online. Goods and services offered range from gold, general legal services, and offshore trusts in Belize to prepaid phone cards, cigarettes and pornography.⁸³ MLM is the subject of recurring controversies and legal actions regarding its fairness and ethics. Certainly the underlying assumptions are uncomfortably similar to the classic “Ponzi” or pyramid scheme.

The Ponzi is a swindle wherein initial investors in a highly-hyped but poorly understood “investment opportunity” are paid very attractive returns, but there is no underlying business to generate profits or dividends. Instead, older investors are paid off with the money “invested” by new suckers. Since such an arrangement requires successive geometric increases in investment to continue, every scheme of this type eventually exhausts the available supply of suckers and implodes, ruining the latecomers.

In a similar way, the MLM’s promises of successive layers of prosperity are often founded on the assumption of an infinite market for selling the goods or services which are allegedly the primary business. The “chain” or “pyramid” structure often means latecomers are faced with a market already saturated by previous entrants, so, they are, in many cases, unable to recover their initial outlay, let alone thrive.⁸⁴ Therefore MLM participation may be said to have a gambling element built in. The initial investment (consideration) is in effect a bet that there is still room to expand. Because the entrant generally does not know whether or not this is so, it can be said that chance determines the outcome, or at least factors beyond the entrants’ control (chance). And of course participants are attracted to the programs by the promise of quick, easy, and substantial profits (prize). In the eyes of a number of states, where this lure of quick reward outweighs the commercial aspects of the program, this is a species of lottery and is explicitly forbidden.⁸⁵ Because it fits the technical description of gambling, MLM marketing as a general proposition has been officially declared as such in several states.⁸⁶ Nevertheless it continues to use the Internet as a recruiting ground, as a look at almost anyone’s email will show.

⁸² Webster v. Omnitrition Int’l. Inc., 79 F.3d 776 (9th Cir. 1996).

⁸³ See, e.g., <<http://www.prepaidlegal.com>>, <<http://www.porntrepreneur.com>>, <<http://www.mlmllegal.com>>. This last site contains excellent summaries of state and federal laws and decisions regarding MLM activity.

⁸⁴ See, <<http://www.falseprofits.com>> for an informed critique of the MLM business model and the industry generally.

⁸⁵ See, e.g., CAL. PENAL CODE §327 (2002). See also Stipulated Final Judgment, FTC v. Futurenet (C.D. Cal. 1998), <<http://www.ftc.gov/os/1998/04/futurenet.pdf>>.

⁸⁶ See, e.g., FLA. STAT. § 849.091 (2002).

A somewhat sophisticated pyramid scheme, masquerading as a stock market, was operated by StockGeneration (SG). The Securities and Exchange Commission (SEC) filed a complaint against SG in June 2000, which was upheld by the federal Court of Appeals. The defendants claimed that they were only running a game. Everyone was informed that every part of this “stock market” was artificial; the companies were fictitious, the products and services, let alone their earnings, never existed. The SEC succeeded in obtaining a judgment that the “stocks,” which admittedly were not shares in real companies, were securities nonetheless, because they were an “investment contract.” The real problem was that SG, operating from the island of Dominica, promised a guaranteed annual return of 215 percent. To do this, the company promised that while all other stocks on its pretend stock market would fluctuate, one company’s stock would always go up. Of course, the only way this could work was for SG to use the money from new suckers to buy that particular stock at ever higher prices. Like any pyramid scheme, this will fail when there is not enough new money to pay off the older “investors.”

Prediction Markets. On the other extreme is an experiment market, which allows you to put up money and win (or lose), when you make a prediction. In 1988, the University of Iowa’s Henry B. Tippie College of Business faculty created the Iowa Electronic Market (IEM).⁸⁷ Designed to be an educational and research project, the IEM allows players to bet real money on unpredictable, future events, in the hopes of winning bigger money—the classic definition of gambling. Instead of betting on the future prices of commodities, like pork bellies, or bundles of stock, traders buy and sell events, like the U.S. presidential election. The final prices in the IEM have proven to be amazingly accurate predictors. The federal Commodity Futures Trading Commission (CFTC) issued a “no-action” letter to the IEM, stating that as long as the IEM conforms to certain guidelines, the CFTC will take no action against it.

One player legally won \$1,300 by “betting” on Al Gore to win the presidential election in 2000. Here’s his story:

So I’m a Yellow Dog Democrat and I’m pretty sure Gore is going to capture the popular vote. On November 1, 2000 I bought about 1,900 futures on Gore at 34 cents which cost a little over \$600. On the 10th of November when the popular count was certified, these contracts were worth a buck apiece. I had earlier found the Market in 1996 when the Republican Convention came here to San Diego. I made some phenomenal money “betting” Buchanan on an uptick after the Arizona Primary, and a good bunch more selling “derivatives” of this market (i.e., campaign buttons with a little stamp on them indicating they could be redeemed for a multiple of their

⁸⁷ Iowa Electronic Markets, <<http://www.biz.uiowa.edu/iem/>>.

purchase price if the candidate won the nomination) backed by an equal number of contracts on the Market.

I'm a little surprised the Nevada books haven't offered action like this. It seems that when people put their money where their mouth is politically and actually win something tangible when their candidate comes through it's a good thing. Here's the actual results from the trade I mentioned:

<u>Date</u>	<u>Contract</u>	<u>Units</u>	<u>\$Volume</u>	<u>LowPrice</u>	<u>HighPrice</u>	<u>AvgPrice</u>
11/01/00	Dem	1,901	646.093	0.311	0.378	0.340

The biggest predictive market is intrade.com, based in Dublin. Under U.S. federal law, securities include not only stocks and bonds but contracts. So a contract that Barack Obama will be elected president is clearly a security when that contract is traded one day at \$30 and the next at \$31. The major legal problem today for sites like intrade would not be state or federal anti-gambling laws as much as federal securities laws. Of course, being overseas, there is little that U.S. law enforcement or regulators can or want to do. But, for American patrons the difference is a difference that does not matter. The buyers and sellers of these contracts may or may not be violating state anti-gambling laws—it doesn't matter since they will never be prosecuted. But it is difficult to get money to and from intrade.com, because the site is blocked by all large American credit cards.

Free markets like this work so well that the Pentagon's Defense Advanced Research Projects Agency, developer of the Internet, planned to set up an experimental Policy Analysis Market to predict terrorism and other future events in the Middle East. An opponent, Senator Ron Wyden (D-OR), put it this way:

You may think early on that Prime Minister X is going to be assassinated. So you buy the futures contracts for 5 cents each. As more people begin to think the person's going to be assassinated, the cost of the contract could go up, to 50 cents.

The payoff if he's assassinated is \$1 per future. So if it comes to pass, and those who bought at 5 cents make 95 cents. Those who bought at 50 cents make 50 cents."⁸⁸

Although Democratic Senators, Sen. Wyden and Sen. Byron L. Dorgan (D-ND), brought the issue to the attention of the press, Republican politicians, smelling blood gushing from this mortally wounded plan, quickly jumped on. The opponents were able to kill the plan, and get extensive media exposure, by call-

⁸⁸ Carl Hulse, *Pentagon Prepares a Futures Market on Terror Attacks*, NEW YORK TIMES, July 29, 2003, at A1, A15.

ing the plan “gambling.” “Spending taxpayer dollars to create terrorism betting parlors is as wasteful as it is repugnant.”⁸⁹ By the next day, the plan was dead.⁹⁰

The opponents do have a point when it comes to bad taste: “Can you imagine if another country set up a betting parlor so that people could . . . bet on the assassination of an American political figure?”⁹¹ But their ignorance of how the world works is appalling. They complained that not only experts would bet on this market to make money, but so might the terrorists themselves. Which is exactly the point. If a Palestinian terrorist runs up the price on assassinating the king of Jordan to make money, we can be confident that the assassination attempt will be made, and we can then take steps to prevent it. Who better than the potential assassin himself to tell us what he is planning to do?

There actually already are sites which take bets on terrorist-related events. Tradesports.com has futures markets on events like whether Osama bin Laden will be captured or neutralized by a certain date, and what the color of the alert status in the U.S. will be in a few months. The difference between the proposed Darpa market and Tradesports.com, was that the U.S. would have been willing to take on any wager, losing money in the process. Without that guaranty, a market can become completely illiquid. For example, Tradesports has found that there were not many people who would bet on Hillary Clinton winning the Iowa presidential caucuses in 2004, no matter what the price.

It is important to understand why the Pentagon’s plan died the day after it was attacked as a form of gambling. The last time a proposal like this was abandoned in less than 24 hours was the day Disney announced it was going to set up an all-lottery TV show, with no-purchase-necessary games for people from states without state lotteries. The hypocrisy is obvious. The government already heavily supports gambling, from state lotteries to Indian casinos to the exemption of conventional futures markets from anti-gambling laws. But, anyone wanting to set up a web site which is not obviously involved with gambling should try and characterize the operation as something else, such as a skill game or sweepstakes.

Experienced politicians understand that gambling is, or at least can be made into, an emotional issue—it’s not just the economy, otherwise every form of gambling would be made legal and possibly a monopoly of the state. Newly elected Governor Mitt Romney of Massachusetts (R) learned this lesson when he floated the idea that Connecticut and Rhode Island should pay Massachusetts \$75 million to NOT have casinos. Romney is an experienced businessman and he thought like a businessman, not a politician. The idea made perfect sense,

⁸⁹ Josh Mener, *Trading on the Future of Terror*, LOS ANGELES TIMES, July 29, 2003, at A1, A19.

⁹⁰ Peter G. Gosselin, *Plan for Terrorism Futures Market Killed*, LOS ANGELES TIMES, July 30, 2003, at A11.

⁹¹ Josh Mener, *Trading on the Future of Terror*, LOS ANGELES TIMES, July 29, 2003, at A1, A19.

but Romney became the butt of political jokes. It does not pay to have a proposal which is economically correct and politically impossible.

There is an old saying describing deep-dyed gamblers: “The folks there would bet on the thermometer.” This is non sports-event or proposition wagering. Well-known bookmakers such as Chandler, William Hill, and Ladbroke’s receive a steady stream of bets on the outcomes of such things as elections, show-business awards, and anything else that takes a bettor’s fancy. Prior to April 2003, bets were even pooled on the chances of Saddam Hussein’s regime surviving the imminent war between the US and Iraq,⁹² and following the severe hurricanes of 2005, on the probabilities that the U.S. coastline would be struck again.⁹³ Some U.S. states allow such colorful bets for charitable purposes, notably Alaska.⁹⁴ Many more, however, specifically forbid election bets at least.⁹⁵

Nevada books once could take bets on future events, like elections and the Academy Awards. Nevada regulators realized that individuals might have insider information; for example, someone at the accounting firm counting up the votes for Best Picture has to know who the winner is, or the film name could not get into the envelope that is opened on-stage during the Oscars. Worse, powerful or corrupt insiders could rig an event.

It is somewhat ironic that risking money on uncertain future events like these are so often dismissed or criticized as “mere gambling.” The Iowa Electronic Markets and other futures markets have been proven to be such great predictors of real-world events that even large companies are using them for internal predictions. On May 1, 2008, the Commodity Futures Trading Commission asked for public comment on regulating prediction markets.

Gaming

Casino-style Table Games

By these we mean every game which is found in a Nevada-style licensed gambling establishment. They may be found alone or in smaller combinations, depending on the licensing rules of particular jurisdictions, which have been known to experiment with some and not others. These include the table games, such

⁹² *Gambling Online over Saddam’s Fate*, THE STRAITS TIMES [Malaysia], Jan. 26 2003, available at <<http://www.thestar.com.my/news/story.asp?file=/2003/1/26/asia/sinline&sec=asia>>.

⁹³ See, *Hurricane Season Brings Betting Surge*, June 2, 2006, <NewsMax.com>.

⁹⁴ Alaska gambling law allows charitable pools on such bets as lowest winter temperature and first iceberg to break in the spring thaw, in addition to dogsled and snowmobile races. ALASKA STAT. § 05.15.100 *et seq.* (2002).

⁹⁵ In Illinois, for example it is specifically forbidden to bet on the “result of any . . . political nomination, appointment or election.” 720 ILL. COMP. STAT. § 5/28-1(a)(2). (2002). It has not yet been determined if this ban was placed to protect the political process or the bettors, or it was just considered unseemly to bet on something as important as choosing the government.

as blackjack, craps, and roulette; slot machines, video poker machines, and poker itself. All these games depend on the generation of random numbers within set parameters: possible results available from 52 cards, two dice, three reels, etc.

Table games: The so called “table games” such as craps and roulette, are played with particular mechanisms on custom tables which are not usable for anything else. Two hundred years ago it was common to find laws making it a crime to possess a gambling table.

Card games: Card games technically require only a horizontal surface, but specialized layouts can add extra options (such as buying insurance for blackjack).

Banked vs. Non-banked

Card games in particular can be classified as “banked” on the one hand and “non-banked” or “round” games on the other. In a banked or banking game, the players compete against one player, usually the gaming establishment, rather than against one another. The term arises from the definition of a bank: in a banking game there is literally a fund of money against which players bet. The banker does not, in fact, make a bet. Rather, the banker “fades” or matches, up to the house limits, the bets made by the players.

The difference between round games and banking games has been recognized for centuries. In 1804 Henry Clay defined banking games as being “those in which one player is continually opposed to all the others . . . In other games, the single player that may be opposed to two or three others usually takes the responsibility upon himself, and for one deal only, so that any advantage he may have is temporary. In banking games, on the contrary, the opposition is continual.”⁹⁶ The identical definition appears in the 1897 Hoyles, the definitive rule book of the era.⁹⁷ And again in 1973 by the leading expert of the time, John Scarne, “Properly speaking, so-called banking games are games in which the gambling establishment or one player is continually opposed to all other players.”⁹⁸

The lawmakers of the nineteenth century knew very well what was a banking game, because the term “banking game” had a legal significance beyond merely describing a particular type of game. “Banking” games required a different procedure in criminal cases than non-banking gambling games. In a criminal indictment charging a defendant with betting on a non-banking gambling game, it was “necessary to set out the names of the persons by whom the game

⁹⁶ Chafetz, *PLAY THE DEVIL* 49 (1960).

⁹⁷ Foster, *FOSTER’S COMPLETE HOYLE: AN ENCYCLOPEDIA OF ALL THE INDOOR GAMES PLAYED AT THE PRESENT TIME* 473 (1897).

⁹⁸ Scarne, *SCARNE’S ENCYCLOPEDIA OF GAMES* 276 (1973).

was played, because, unlike the banking games, it is the playing which constitutes and identifies the particular game.”⁹⁹ Although it is unclear whether this was the general rule, it was the required procedure for such states as Arkansas and Texas in the 1850s and 1860s, and these states were leaders in defining what was and was not a banking game. “[B]anking games, so called whether played with cards, or by means of any other contrivance . . . the distinguishing feature of which is, that they are set up, or exhibited to bet against all comers.”¹⁰⁰ Even the dice game of craps was not a banking game, unless the house took on all bettors. Where the house holds the stakes and takes 10 cents out of the winnings the game is not a banking game. To be a banking game there must have been “one against the many—the exhibitor, with an interest in the game, against the bettors.”¹⁰¹

A percentage game is a game where the house participates as a player and has a percentage advantage. Roulette is the easiest example, since the presence of the zero and double-zero make the house’s advantage obvious. There are 38 numbers on an American roulette wheel: 18 red, 18 black, and two green. A player who bets on a single number is paid off at odds of 36 to one. But the true odds are 38 to one. Similarly, a player who bets on black is paid even money if he wins. But he has only 18 ways to win but 20 ways to lose. The house makes its money in percentage games, not so much from taking the bets of the losers, but by underpaying the winners.

Banking games are usually also percentage games—that is, the house participates in the game, taking on all other players, with a percentage advantage in its favor.

Operators of banking games thus make their money in two ways: They have a percentage advantage built into the rules of the game. Plus, being a fund of money of relatively infinite size, they can outlast any short-term losing streak. Regular players, on the other hand, will eventually hit a losing streak and lose their entire stake.

Casino gambling is thus one of the few businesses in the world where the operator makes its money by beating its own customers at games of chance. With lotteries and parimutuel betting, the operator acts as a disinterested stakeholder, taking a portion of the wagers and returning the remainder to the winners. With banking and percentage games, the house is a player and cares very much who wins and who loses. It is therefore understandable why game security, and paranoia, tends to be tighter for casino games. Certainly, online poker operators are concerned about cheating. Patrons will abandon and bad-mouth a site, if it looks

⁹⁹ *Barkman v. State*, 14 Ark. 704 (1853). *Cf.* *Stearnes v. State*, 21 Tex.App. 205 (1858).

¹⁰⁰ *State v. Hawkins*, 15 Ark. 259, 260 (1854).

¹⁰¹ *Cumming v. State*, 72 S.W. 395, 396 (Tex. Cr. App. 1903); *Choppell v. State*, 11 S.W. 411 (Tex. Ap. 1889) (craps not a banking game where players bet against each other, house did not bet but merely took flat 5 cents for each two throws); *State v. Bradley*, 149 A. 863 (1930), citing 27 C.J. 970 (poker not a banking game); *State v. Rabb*, 130 La. 370, 57 So. 1008 (1912) (craps not a banking game).

like a few players have an unfair advantage, such as forming illegal partnerships through secret, telephone communications while the game is in play. But, if it looks like a player has figured out a way to beat a game like blackjack, or even gain a slight advantage, it is the house, the operator itself, which can be wiped out. Players who win consistently are sometimes forbidden to play, based on the realistic possibility that the player has broken the casino site's security system.

Other Table Games

Finally there are the non-banked or "round" games, played among individual players with no house participation and no single participant has a continuous advantage. The best known round game is poker.

Poker. In non-banked games, like poker, the operator is not a player. Losses go to other players; there is no house. Online poker operators derive their revenue from renting "seats," charging per hand or by taking a percentage of winnings, known as "raking the pot." Internet poker has obviously become big business, attracting both professionals and amateurs, and repeated attempts to outlaw it.¹⁰²

The biggest event in the world of Internet poker took place not online, but in a casino in downtown Las Vegas.¹⁰³ As most poker players already know, on May 23, 2003, Chris Moneymaker won the World Series of Poker (WSOP), and its \$2.5 million top prize, at Binion's Horseshoe Hotel & Casino. With that great name came a wonderful story. It costs \$10,000 to enter the WSOP. Some players pay cash. But Moneymaker put up only \$40. Like dozens of others at the WSOP, he won his entry fee through poker games played entirely online. In fact, Moneymaker never before played in a live poker tournament, where you can see the other players' faces.

This naturally raises the question of whether Chris was breaking the law. The co-author, Prof. I. Nelson Rose, gets more e-mail asking whether it is legal to bet online than on any other subject. Federal law is clear. The federal government's interest in gambling is pretty much limited to organized crime. Federal statutes are written with phrases like, "Whoever being engaged in the business of betting or wagering . . ." or "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business . . ." A regular player cannot get into trouble with the federal government even if the gambling operation is blatantly illegal, unless he does something to help the business. Prosecutors have charged players with being part of the gambling business when they helped operators collect debts from other players. But the

¹⁰² Andy Hobbs, *Online poker a considerable draw: E.V. residents play for keeps, fun; AZ senator wants law*, MESA TRIB. (Ariz.), January 3, 2006, 2006 WLNR 107311.

¹⁰³ Christopher Grohman, *Reconsidering Regulation: a Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34 (Fall 2006).

very few times the federal Department of Justice has gone after regular players, judges have thrown the cases out.

What about state laws? Here the question is more difficult, because many states long ago passed anti-gambling laws, which are still on the books. There was a time when state governments wanted to protect not only the health, safety, and welfare of their citizens, but their souls as well. All states make it a crime to conduct some forms of unauthorized gambling. But about half the states also make it a crime to make a bet under some circumstances, even though nobody is ever charged any more.

There are obvious exceptions to the anti-gambling laws. It would not make sense for a state to run a state lottery and make it a misdemeanor to buy a ticket. Many states also make exceptions for social gambling. For example, the Oregon legislature passed a statute expressly exempting players in social games, like poker, from the prohibition on gambling, as long as the players do not help set up the game and the only money they make is from winning. But a player at a commercial poker web site is not so clearly protected.

The only way for a player to know for sure is to check the laws of his state. No state has passed a law expressly stating that players can or cannot play poker online. So, legal interpretation is required. California, for example, makes it a crime to play 11 named games, including “21,” and any “banking or percentage game.”¹⁰⁴ Unfortunately, a California court ignored the universal definition of a percentage game as a game where the operator participates and has a percentage advantage. Instead, this court ruled, incorrectly, that an operator is running a percentage game if it takes a portion of bets or winnings, amounts bet or won, even if the operator does not play a hand. So, participating in a poker game where the house rakes the pot is a crime in California. The situation gets even more complicated, because the California legislature, by statute, allows licensed card clubs to take up to four levels from a pot, five if the house takes nothing if the pot is too small.¹⁰⁵ For example, an operator can take nothing for a pot less than \$10, \$1 from a pot with more than \$10 and less than \$20, \$2 from a pot between \$20 and \$30, and \$3 from a pot over \$30. This is defined as not being a percentage game. The California Penal Code also makes it a misdemeanor to make sports bets.¹⁰⁶ But other wagers are not forbidden. It is not a crime to buy a lottery ticket, even in an illegal numbers game. So, at least in California, it seems it is not a crime to play poker online for money, if the game is not a percentage game. But, if the operator is raking the pot more than four times, the game is a percentage game, and state law makes it a crime to even make a bet at a percentage game.

¹⁰⁴ CAL. PENAL CODE § 330 (2008).

¹⁰⁵ CAL. PENAL CODE § 337j (2008).

¹⁰⁶ CAL. PENAL CODE § 337a (2008).

Of course, in the real world, prosecutors almost never go after bettors, only operators. It is important to note that this does not mean it is necessarily legal to run such a game and take bets from California. Penal Code section 337j states that it is illegal “to deal, operate, carry on, conduct, maintain, or expose for play in this state any controlled game,” which specifically includes poker. Of course, this opens the question of whether an Internet operator is dealing a game in California if the operator and maybe other players are not in that state. It is also possible that running a tournament using poker hands is not even a form of gambling, but rather a contest of skill, specifically permitted by California state law. Every situation has to be analyzed independently.

It is usually easy to determine whether a game is a banking game or a round game. A player can make a bet at a blackjack game, even if he is the only player at the table. But, if he wants to play poker, there must be at least one other player. Even if there is a house dealer, the dealer does not receive a poker hand. He is there to facilitate the game, and to ensure that the operator gets his fee.

Slots and Similar Forms of Gambling

Most slot machines in land-based casinos are set to deliver a random number on each of three or five “reels.” In some cases the images of reels are still actual circular components with numbers and symbols. But today the majority are mainly computer-generated images. The probability of lower paying numbers is, of course, better.

In the traditional slot machine, the bet is inserted by the player. The first slot machines required a fresh insertion each time, but modern versions take advantage of computer technology to accept larger amounts in a *de facto* account. The amounts bet are parceled out as the player indicates, including the recent feature of the popular “multi-line” bets. The machine continues to deduct losses and credit winnings, as long as the money holds out or until the player ends the session.

Slot machines make more money per square foot than any other business. So naturally there are continuous attempts to find a way around the almost universal prohibitions on unauthorized slots. In a typical case,¹⁰⁷ an Alabama race-track sold cybertime, where purchasers also received entries into a sweepstakes. Patrons could determine whether they had won by many means, including going online. What did the scheme in was the 1,300 sweepstakes entry readers which looked, sounded, and played exactly like slot machines.

¹⁰⁷ Barber v. Jefferson County Racing Association, Inc., 960 So.2d 599, 609 (Ala. 2006).

THE QUESTION OF SKILL GAMES

By definition, skill games are not gambling, even if played for money and awarding valuable prizes. That does not mean they cannot be regulated. The federal and various state governments are also free to decide whether a game is predominantly skill. The result is a wide variety in the way the same games are treated under the law.

Since anything human beings do must necessarily be influenced by chance to some degree, the term “skill game” (sometimes “amusement” or “novelty”) is supposed to mean “a game whose outcome is decided primarily by skill rather than chance.” But it seems that in American terms, at least, classification as gambling or non-gambling is as much a matter of the game’s reputation, as of the mechanics of the game.

Games such as backgammon, whose moves are controlled by dice, and mah-jong, which depends on the draw of randomly mixed tiles, are the basis for substantial betting in the Near East and Asia.¹⁰⁸ Why are they considered skill or amusement games in the U.S., and not hard-core gambling games? In part, it is because the games have too much skill or are otherwise not designed to work well in mass-market casinos. These games were introduced to mainstream America as entertaining sidelines and were never considered serious gambling games by most members of society. The same is true of the commonly played board games such as checkers and chess, held as clearly “skill” today (though anyone can make a bet on the side), even though these board games were the basis of considerable gambling from the High Middle Ages until comparatively recent times.¹⁰⁹

The history of pinball is a prime example of the fickleness of such classifications. Because some pinball machines were used to award cash prizes in the late 1930s and ‘40s, authorities in many states defined them as “games of luck” as opposed to “novelty games”¹¹⁰ and outlawed them well into the 1970s as a threat to public morals. Pinball was found to be a federal offense under the Johnson Act if the player could win money or merchandise “as a result of the application of an element of chance.”¹¹¹ Today, of course, pinball is a legacy rather than a mainstay of amusement arcades—which are themselves declining in the face of gaming based on PC and home enter-

¹⁰⁸ See, I. Nelson Rose, *The Explosive But Sporadic Growth Of Gambling In Asia*, HARVARD ASIA-PACIFIC REVIEW (2006).

¹⁰⁹ See, e.g., David G. Schwartz, ROLL THE BONES: THE HISTORY OF GAMBLING 38 (2006).

¹¹⁰ See, e.g., *The History of Pinball Machines and Pintables*, <<http://www.bmigaming.com/pinballhistory.htm>>. This is also a prime specimen of American legal reasoning as it relates to gambling. Because prizes were awarded at all (this included, at the time, further free plays) the element of chance was often simply assumed.

¹¹¹ 15 U.S.C. § 1171(a)(1)(A). It is not clear, however, whether this statutory language translates into a standard which inculcates any element of chance (see *U.S. v. Two Coin-Operated Pinball Machines*, 241 F. Supp. 57 (D.C. Ky. 1965), or whether there must be a preponderance of chance over skill (see *U.S. v. 5 Gambling Devices*, 346 F. Supp. 999 (D.C. La. 1972)).

tainment consoles. Even when pinball modernized and became digital, the steady advance of video games with additional interactive features, and the advent of handheld, PC, and other “home” video games completely overshadowed pinball both as an amusement and a source of income, legal or otherwise. Today the “arcade style” games, variations on pinball or related themes, are offered by free-play or subscription web sites, and cited as a wholesome example of pure “skill play.”

Online Skill Games With Mass Media Applications

The appeal and action of games are a powerful marketing tool, particularly on the Web. Skill games, like sweepstakes promotions, hold out to advertisers the possibility of increased “stickiness,” visitors who not only come to the page, but stay, and eventually use the service, or at least read the ads.

But attaining that mass appeal on the one hand, without incurring the still-real stigma of “wicked gambling” on the other, can be a difficult matter, even today. The Disney Corporation’s experiment with online skill games, played for prizes is a prime example. The venture collapsed soon after its inception in 2001. Technical difficulties played a part, Skillgames.com, the designated software provider, closed its doors within a year, but so did reputation. To many, even skill gaming seemed to constitute a breach of faith with Disney’s long standing pro-family image, despite exhaustive efforts to comply with both state and federal law.¹¹²

Disney was also concerned about problem gaming. To prevent compulsive gamblers, or gamers, players were limited to charging no more than \$300 per month to their credit card accounts.

Disney, more than others, was concerned about children. Disney had attempted to dip a toe into the true legal gambling waters a few years ago, when it announced it would start a lottery TV show. Viewers in states with state lotteries could play over the air; a no-purchase-necessary sweepstakes would be available for non-gamblers. But, the reaction of the press and public was so immediate, negative, and intense that Disney canceled its plans the next day. Having learned its lesson, that people do not want to see their children gambling, Disney and Skillgames.com, made it very clear that minors could not play and if they played they could not collect.

True skill games are difficult to design. The trick is to create a game that is playable, with an outcome that depends more on skill than luck. The law requires that it must be possible for a skillful player to win under normal playing conditions. Of course, with a true game of skill, the first skillful player could break the bank. So, Disney and Skillgames.com had a maximum win limit. A

¹¹² See, e.g., *Disney Gambles on Skill Games*, AOL NEWS, May 10, 2001, available at <<http://www.disboards.com/archive/index.php/t-30118.html>>.

player who had won an amount equal to a game's top prize could never play that game again.

The major problem is designing an interesting game site that meets the standards of the law, when the law is decades or even centuries out of date. What happens when you mix laws passed in 1850 with Internet technology developed in the twenty-first century? Disney's lawyers put in a lot of time, and came up with the following limitations:

Players must reside in one of the 50 states or the District of Columbia and be at least 18 years old, except in Nebraska and Alabama, where they must be at least 19, and Mississippi, where the minimum age is 21.

Players may not be residents of Arizona, Connecticut, or Vermont. Why these states? Arizona has a very low limit on prizes. Connecticut has a higher limit, but until recently made it difficult to advertise games of skill. As for Vermont, in 1850 the state legislature passed a law, which is still on the books: "A person who pays money or other valuable thing lost at a game or sport or horse race may recover the value thereof of the person to whom it was paid in a civil action, if commenced within one month from the time of payment." In the only two reported cases involving this ancient law, in 1854 and 1856, the Supreme Court of Vermont said the law does not apply to gambling wagers, but anyone who loses money at a game of skill can sue and get his or her money back.

A rival site, WorldWinner.com, has a different list of states: Arizona, Arkansas, Connecticut, Delaware, Florida, Iowa, Louisiana, Maryland, Tennessee, and Vermont. Why the difference? In part, it is because the lawyers for the two companies came to different conclusions about the laws of the various states. But also WorldWinner runs tournaments only; with Skillgames, you had to beat the site's computer, not other players.

They may both be wrong. In Nevada, for example, the State Supreme Court ruled in 1961 that a golf course had to pay the \$5,000 it offered to anyone paying 50 cents and getting a hole-in-one. The court indicated tournaments cannot offer prizes created out of the entry fees of players. And the Nevada Attorney General is one law enforcement official who would love to go after anything that smacks of illegal gambling on the Internet.

Not only gambling, but sweepstakes and contest laws have to be vetted, state by state, to ensure that both statutory limits and community sensibilities are not offended.

Other Internet companies found skill games less of a PR problem. Service providers such as MSN and Yahoo added skill games to their web sites, and dedicated skill gaming sites prospered. Today about fifty full-time skill gaming Web sites accept customers from the U.S. online.¹¹³ Even if the activities are not tech-

¹¹³ See, <<http://www.casinocity.com>> for a periodically updated listing.

nically gambling, operators employ such measures as minimum age, residency requirements, and daily limits on play and money spent to avoid being identified as socially irresponsible. Also, they locate their servers outside the U.S.

Online Versions

Online versions of all these games are offered by Internet gaming sites. The particular mechanisms are explained below. In general, a bettor contacts an online gaming site and establishes an account, funded variously by credit or debit card, or less commonly, bank wire transfers and checks.

Fantasy Leagues

Where fantasy leagues are permitted, it is often because of a implicit assumption that the activity is a contest of skill and not a form of gambling. Computers have made this form of gaming possible. The fantasy league is just that, a fantasy, with fictional teams created out of the statistics of real-world athletes. The most popular version is fantasy football, in part because there are lots of players and games to generate the necessary numbers. Fantasy league players pay an entry fee to become owners of virtual “dream teams,” assembled via a virtual “draft” and “trades” of players. The quarterback comes from one real-world team, the center from another, etc. Computer analysis of the real-world statistics allow the team owners to see how well their artificially concocted teams have done. The “owners” compete against one another by managing their respective clubs online. The performance statistics that a real-world player generates in real games, however, reflect immediately on the fantasy simulations of him that are part of a given fantasy team. Real-life performance—such as touchdowns and passes completed—mean extra fantasy points for the respective virtual teams. In fantasy football, for example, these points determine a winner in a weekly (virtual) head-to-head match-up of two of the fantasy teams. The team that accumulates the most victories over the course of the season—and prevails in the postseason—is declared the League Winner.¹¹⁴ There are fantasy leagues for every popular team sport, and spectator events such as pro golf and auto racing. A number of sites offer substantial prizes.¹¹⁵

There is little if any chance of genuine corruption in these virtual scenarios, and that is probably the reason that fantasy leagues have received sympathetic treatment in several quarters. In Montana, for example, fantasy sports leagues are specifically authorized.¹¹⁶ Entry fees may be collected, and cash and

¹¹⁴ See, e.g., ESPN Fantasy Football, <<http://games.espn.go.com/content/ffl/2002/rules?page=intro>>.

¹¹⁵ Fox TV’s Fantasy Baseball Challenge, for instance, offers a \$10,000 grand prize and \$25,000 total of other prizes weekly throughout the baseball season. <http://www.optilc.com/linkc/sat_b/go.php3?169/>.

¹¹⁶ MONT. CODE ANN. § 23-5-802 (2002).

prizes may be awarded to the “owners” of the winning “teams,”¹¹⁷ but any operation serving as the clearinghouse for such a fantasy league is limited to 15% deduction for expenses.¹¹⁸ Notwithstanding some state hostility, fantasy leagues have received special protection under proposed and even enacted federal laws. When Arizona’s Senator Kyl sought to outlaw Internet gambling with S. 692 in the 106th Congress, a specific exemption was made for fantasy leagues.¹¹⁹ Of course, betting on actual games through this mechanism is forbidden.¹²⁰

In 2006, the Unlawful Internet Gambling Enforcement Act (UIGEA) included, though more sloppily, this tolerance for fantasy leagues. When the UIGEA defined a “bet or wager,” it provided exceptions, including one for fantasy leagues.

The UIGEA was a political ploy by a failed politician. It was rammed through Congress by Bill Frist (R-TN), then Majority Leader of the U.S. Senate, who would not let Democrats even read the bill.

Here is what it says about fantasy leagues,¹²¹ with our commentary:

The term “bet or wager” . . .
(E) does not include—. . .

It is fairly typical of anti-gambling statutes to make exceptions by simply defining a certain activity as not being gambling, or in this case, not being a “bet or wager.”

(ix) participation in any fantasy or simulation sports game or educational game or contest

This is the first indication that the authors of this bill did not know what they were doing. Because there was no review of the language of this law, let alone discussion or public hearings, the UIGEA may have accidentally legalized, rather than outlawed, some forms of gaming. As an example, this exemption is not limited to traditional sports fantasy leagues. Creative entrepreneurs can run far with something as broad as “educational game or contest.” Can you open a poker or blackjack fantasy league?

in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual

¹¹⁷ See, e.g., Passrush Fantasy Football League, <<http://www.passrush.com>>.

¹¹⁸ MONT. CODE ANN. § 23-5-805 (2002).

¹¹⁹ See, Appendix: Federal Law.

¹²⁰ MONT. CODE ANN. § 23-5-806.

¹²¹ 31 U.S.C. § 5362 (2008).

team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28)

This provision makes sense, since it prevents setting up wagers on actual games by pretending they are a fantasy league. But does it? What if the fantasy league team consists of every single actual member of a real team, except for one minor player? How about if all the players are on a football team, except for one substitute linesman?

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.

This is a fairly standard provision of statutes regulating skill contests, to prevent them from being disguised gambling pools. But operators know how to judge what the size of the prize should be. An easy way is to call off the game if too few players have paid their entry fees.

(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.

This provision contradicts, to some extent, the prior requirement that fantasy teams cannot be based on the current membership of an actual team. Also, because leagues are not limited to sports events, almost anything goes. Whether this forbids fantasy versions of such single player sports as golf, archery, or bass fishing is anybody's guess. And vague language like this opens the door to creative entrepreneurs. For example, if a poker league does fall under this exemption, can the "owner" of the team also be a participant on his own fantasy team?

(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.

The authors of this bill again show their lack of knowledge of how sports betting actually works. Straight-up bets and parlays might be forbidden. But par-

lays and proposition bets could be stylized in such a way as to conform with this requirement.

The UIGEA expressly defers to such existing statutes as the Indian Gaming Regulatory Act (IGRA), the Wire Act, and the Sports Protection Act, none of which has been invoked against fantasy leagues. And the UIGEA states that the definition of unlawful gambling depends upon the substantive law of the states where the bettor and operator are. Many states would declare fantasy leagues as predominantly contests of skill, and not gambling. It therefore seems unlikely that the UIGEA will actually establish new penalties for fantasy sports.

Video Games Generally

Almost any game humans play can be transposed into software form. By video games, we mean the games which are available to play over computers, including PCs, laptops, PDAs, and 3G mobile phones; or dedicated platforms, such as TV consoles or handheld devices; whose central feature is a video display and where player input, moves, and results are shown in animated form.

Video games, as the term is used today, have relatively little to do with gambling. This is because the overwhelming majority of video games are skill games. The element of chance, if not altogether eliminated, is minimized, and plays no part in determining the outcome.

To make a brief comparison: Two people playing blackjack at the same table will be dealt different cards, by chance. And the difference in the values of the cards will greatly affect the strategy of play; the player holding an ace and a ten is certainly not going to play in the same way as his neighbor, holding a pair of twos.

But if those same two people were playing a skill game, each would start with identical circumstances (a character or token to maneuver). Each would face the same challenges (chasing Donkey Kong[®], advancing to the next level, etc.) with the same capabilities. Differing outcomes can be traced to different levels of familiarity with the game, timing, hand-eye coordination, and so forth. Next, the success or failure of any one player does not affect anyone else. Until a video game reaches the level of sophistication where one plays interactively against others (see below), each player plays alone. And finally, particularly in the more sophisticated games, the object is not so much to beat the house or another player, but to participate in the story line.¹²²

So while it is possible to wager on the outcome of a contest which involves a video game, gambling per se is not part of the structure of video games, ex-

¹²² Chaplin & Ruby, SMARTBOMB: THE QUEST FOR ART, ENTERTAINMENT AND BIG BUCKS IN THE VIDEOGAME REVOLUTION (Algonquin Books Workman 2005).

cept where it is obviously and openly otherwise, as with custom software for a slot machine, a software program which imitates casino games, etc.

Online Games

While console-style videogame systems such as PS2 have long allowed multi-player participation by allowing up to four handsets to be plugged into one TV console, it was only in 1996 that PC-based games began to network online, offering interactive play with other people, instead of simply against the software. This began with the relatively simple first-person-shooter games (FPS) such as *Quake*[®] and *Doom*[®], but soon expanded to more complex computerized fantasy role playing games (FRPGs) such as *Diablo*[®]. Multiplayer modes are now standard on PC action game releases.¹²³

Virtual Worlds

The assorted video/FRPG combinations, applied to PCs, have been strengthened by digital technology until they have become, in many respects, virtual worlds unto themselves. Also known as “persistent games” or, probably most accurately, “synthetic worlds,”¹²⁴ they represent a new social phenomenon whose impact is only now becoming apparent.

Their development traces back to three interconnecting roots. First, computer power available to the individual user has expanded until it is a given. Today’s game developer/vendor can now assume his customers have computers which use high-resolution multi-angle 3D displays, programs which can store complex maps, and host an AI (artificial intelligence) which interacts with players according to game parameters. In fact, he has to. They demand it.

Second, Internet access has also expanded. Phone, cable, and wireless services are competing to make broadband available to most American households and businesses. This includes the e-commerce power to transfer funds and information instantaneously to and from those ever-more-powerful PCs, laptops and PDAs.¹²⁵

¹²³ See, *All About Multiplayer PC Gaming*, WEBOPEDIA <www.webopedia.com/DidYouKnow/Internet/2005/multiplayer_gaming.asp>.

¹²⁴ Borrowed from Edward Castronova, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* (University of Chicago Press 2005). The most comprehensive study of the phenomenon to date, it analyzes virtual worlds from an economic and social point of view. Very highly recommended, and the source of many of the process/technical descriptions herein.

¹²⁵ In fact, to complete the circle, the latest generation videogame consoles such as PS2 and Xbox 360 are sophisticated single purpose computers in their own right, with hard drives, 700-MHZ Pentium microprocessors and both hard point and wi-fi connections that enable Web access. See, e.g., *Xbox 360 systems specifications*, <<http://hardware.teamxbox.com/articles/xbox/1144/The-Xbox-360-System-Specifications/p1>>.

And those two developments make possible, third, the creation of server-based mega programs, platforms which accommodate not merely scores or even thousands, but hundreds of thousands of players simultaneously, interacting in real time with the “virtual world” and with each other. This is no theoretical flight of fancy. Virtual worlds have been here in their present shape since about 1997,¹²⁶ and even have their own acronym: MMOGs, pronounced “Mogs,” for Massively Multiplayer Online Games, and their very successful subset, MMORPGs, for Massively Multiplayer Online Role-Playing Games (Morpegs). They make up a global, digital, paying Internet business with 16 million customers.¹²⁷ The industry now takes in \$2 billion per year in subscriptions alone, and the numbers are only increasing.¹²⁸

Obviously, when we consider a universally available computer platform which allows instant feedback, interaction with both AI programs and unscripted individuals, and a potently realistic “look and feel,” we are looking at a teaching and communications tool of unprecedented power. But while its social, financial, and ethical ramifications will doubtless fill volumes in the years to come, our discussion here is much narrower: what this new world means for the online gaming we know today, and for the laws that affect it.

How MMOGs Work. Since the overwhelming majority of MMOGs now operating are in fact MMORPGs, we can examine MMORPGs as the standard.

The possibilities of MMORPGS are as vast as the games themselves. Currently, most cater to heroic fantasy, based on legendary themes such as King Arthur or *Lord of the Rings*®.¹²⁹ Players purchase the particular software for that world (in the U.S., about \$50), install it in their PC and subscribe online, via credit card, to the online service, about \$20 per month).

As with previous PC-based RPGs, the player interacts with his new world by means of a virtual character which appears as a humanoid figure in the game. The synthetic world version is known as an avatar, and is the most sophisticated of the breed. It sports the name and fantasy attributes he chooses, and functions as his proxy in the game environment; normally the player “sees” the synthetic world through the avatar’s “eyes.” Via mouse, joystick, or game-code commands the avatars “run” (or “fly” when that option is available) when players want to move

¹²⁶ T.L. Taylor, *PLAY BETWEEN WORLDS: EXPLORING ONLINE GAMING CULTURE* 77 (MIT Press 2006).

¹²⁷ Castronova, *supra* note 198, at 53.

¹²⁸ See, e.g., Tor Thorsen, *Online game subscriptions up 43 percent in 2005*, GAMESPOT NEWS, March 9, 2006, available at <<http://www.gamespot.com/news/6145712.html>>.

¹²⁹ Europe’s ancient past is by means the only option. China and Korea have enormous MMORPGs based on their own heroic legends; a virtual world based on the *Star Wars*® saga has been around for years, along with others for cartoon superheroes, demolition derby, air-to-air combat, city building, and even the Wild West mixed with Gothic horror themes. A coming attraction called *Spore*™ will allow the players to construct game content as they go—from primitive life forms all the way up to planets, stars and galaxies. See, Sam Bhagwat, *Move Over MMORPG! THE STANFORD DAILY ONLINE*, May 10, 2006, <<http://daily.stanford.edu>>.

quickly, “fight” when they wish to combat enemies, and so on. Player/avatars communicate with each other, usually via a built-in keyboard “chat” function, more rarely with voice software. They interact with each other and with “nonplayer characters” (NPCs), which are logistics subroutines of the A.I. and are depicted as merchants, townsfolk, etc., in the course of pursuing various quests. And within broad limits, player/avatars can do in the virtual world almost anything they can do in the real one. That includes buying, selling, and gambling.

Much of the fantasy adventure’s appeal comes from character growth and enrichment. Each begins at a basic, weak level. He acquires experience, equipment, and wealth by fulfilling virtual missions and destroying virtual opponents (generically called monsters or “mobs”). This “earns” him character advancement points, and rewards in the form of tools, such as saddles or magic swords, and also “money”—virtual “coins” and other valuables that he can exchange with NPC “merchants” or with other players, for the things he needs. The successful MMOGs and MMORPGs, in fact, come complete with a working micro-economy.

Real-World Money? MMORPG “coins” and “goods” have begun to have an unexpected effect, because while they exist only inside the virtual world, often they can be traded outside it as well. In fact, because these virtual artifacts are acquired by the expenditure of time and effort, they have been held in the courts of at least one country to have actual real-world monetary value, and their loss through negligence or theft to be legally compensable.¹³⁰ A class action has been filed in Florida against a company that operates a black market in these items. The claim is that the company is facilitating “gold farming.”¹³¹ Companies in China pay a few dollars to workers who play the game for hours, acquiring these virtual items for sell for real dollars.

Are these computerized images of items actual real goods and money? As Castronova points out, the “platinum pieces” of the game called *Everquest*[®] have been known to trade at a better rate to the U.S. dollar than the Japanese yen, Korean won, or the former Italian lira.¹³² e-Bay and other online auction businesses now have whole sections devoted to buying and selling—for U.S. dollars—the “gold and jewels,” “weapons,” and “enchanted items” of several of these synthetic universes, and even pre-developed, off-the-shelf characters to

¹³⁰ See, e.g., *On-line game player wins virtual properties dispute*, XINHUA NEWS AGENCY (Beijing), Dec. 17, 2003, <<http://www.ChinaDaily.com.cn>>. On the other hand, some Chinese authorities do not seem to recognize the theft of virtual property as a crime, or at least to take it very seriously. See, Jonathan Watts, *Harsh reality of China’s fantasy craze*, THE GUARDIAN ONLINE, Mar. 31, 2005, <<http://www.guardian.co.uk>>; which discusses another Chinese case in which hacking/theft of a virtual magic sword led to the real-life thief being actually murdered by the real-life owner, who was unable to obtain satisfaction from the local police in Shanghai.

¹³¹ Jeanette Borzo (ed.), *Fun and Games? Plaintiffs dispute the rules of online game playing*, CALIFORNIA LAWYER, January 2008, at 11.

¹³² Castronova, *supra* note 198, at 19, 149, and 191.

use them.¹³³ It is entirely possible to make a reasonable living as a trader/broker in this \$30 million de facto market.¹³⁴

Curiously, the market in virtual money and goods depends on an “ownership” which is assumed rather than established. The virtual items are, of course, only constructs of the operating companies’ computers. Most if not all virtual worlds require subscribers to adhere to mandatory End User Licensing Agreements and Codes of Conduct, which require players to forego all property claims arising from their play. Presumably this includes currency and valuables. Players have to expressly agree that they will not sell for real money or exchange for real items the virtual goods they acquire. The problem is both one of enforcement and contract interpretation. Black market operators, for example, buy and sell these items, but have no direct agreement with the game operators.

Virtual worlds are supposedly run by the companies which develop and market them. But these proprietors, known as the coding authorities, have very limited power over players. Serious violators can of course have their accounts canceled, but when hundreds of thousands and even millions of players use a virtual world staffed by only fifty or a hundred customer service reps, even detecting offenses and offenders is problematic.

The most effective enforcement mechanism turns out to be peer pressure from other players. But there is a catch: The peer group enforces the peer group’s norms and rules, not necessarily those of the coding authority or the coding authority’s home government.

MMORPGs for Gamblers. Contests and tournaments for cash prizes are now a standard feature of the video gaming world. To date, however, most of these use “first-person shooter” games such as *Doom*[®] and *Castle Wolfenstein*[®], games which are played against the A.I. rather than other players, and operate on a far smaller scale than virtual worlds.¹³⁵ But the contests and prizes are external to the games themselves.

Gambling is technically possible within a MMORPG, either as part of the A.I., for example, an NPC running a dice game, or simply as a wager between players using the game’s chat feature. But even where gambling is present, built-in, or ancillary, it is not a primary purpose of most virtual worlds. Rather it is

¹³³ Some synworlds, notably *Everquest*[®], have convinced eBay and other online auction houses not to carry their particular currency and objects, but this seems to be the exception rather than the rule just now. TAYLOR, *supra* note 200, at 130.

¹³⁴ See, *Journalist Earns Significant Salary Trading Virtual Goods*, Terra Nova blog, Apr. 15, 2004, <http://terranova.blogs.com/terra_nova/2004/04/journalist_earn.html>; see also, Castronova, *supra* note 198, at 149.

¹³⁵ The first tournament was held, naturally, in Las Vegas. See, Clark Boyd, *Olympians of Games World Take Vegas*, BBC ONLINE, Jan. 14, 2004, <<http://news.bbc.co.uk/2/hi/technology/3395375.stm>>. The phenomenon is also spreading to the synthetic worlds. In July 2005 the MMORPG called *Ryl*[™] offered a million-dollar tournament. See, *Would You Risk Your Life for \$1 Million?* DESIGN TAXI, July 29, 2005, available at <<http://www.designtaxi.com/news>>.

only a background feature, added for spice and variety. Aspiring heroes prefer quests and battle—people don't subscribe to *World of Warcraft*[®] for the jackpots, but for the fun of the fight and to win virtual renown battling evil.

Moreover, gambling doesn't fit the ambience of most synthetic worlds. Current gambling games would be equally an anachronism in medieval quests or future space adventures. Virtual worlds based on the Wild West or the Roaring Twenties, conversely, would seem to be more gambling friendly, and *Second Life*[®], which is a modern-day synthetic world, sported a number of casinos and poker contests, until it ran into problems with the federal Department of Justice.¹³⁶ All the same, there is no reason someone can't design and launch gambling-based synthetic worlds, where the avatars are mainly gamblers seeking advanced status and rewards by winning at gambling, so long as the winnings cannot be converted into real-world money. And, if operators are willing to stay offshore, they could create a gambling world with players competing for real cash. In fact, they're on the way already.

"*Pok3d*" (an anagram of "3-D Poker") is a genuine synthetic world based on playing online person-to-person poker. It opened in the fall of 2006.¹³⁷ It not only offers 3D graphics and live, real-time, interactive animation, but a setting for like-minded social interaction in a gambling-based background. Run by Codecom Limited, of Cyprus, *Pok3d* aims to create the new generation of online poker rooms. The object is not merely to provide a game and a place to play, but to attract and keep the ever-fickle online gambler by an offering status and recognition, membership in a supportive and sympathetic interactive community (playing for money, of course). Currently, this is the only MMORPG dedicated to a gambling scenario. But if it succeeds, there are certain to be many more.

Gambling Law Concerns. Is a player gambling in a MMOG or MMORPG breaking the laws of his state of residence? Can the coding authorities be considered as being "in the business of gambling" under U.S. federal and state laws?

Is there consideration? Almost all courts now reject the idea that effort alone can be consideration for gambling. But the MMORPGs require that participants pay real money to participate in their virtual worlds, even if nothing more is required to make bets at a virtual casino. The argument that there is consideration is even greater if the virtual "currency" tendered on an in-game wager could be considered real-world consideration, that is, convertible to actual dollars. Some gaming worlds have moved to limit the transferability of their scrip and in-game constructs.

The next question is whether the game is predominantly chance. A bet on a virtual "dice game" might be, but a wager between two warrior/avatars as to who shall slay the first dragon, probably not.

¹³⁶ See, *Second Life*[®], <<http://www.secondlife.com>>.

¹³⁷ <<http://www.pok3d.com/>>.

A prize, finally, is anything of value. Virtual currency or other prizes that can be converted into real money on eBay or elsewhere might qualify as things of value. But the argument is much harder to make if the virtual gold coins or magic swords are not worth anything outside the gaming world, even though they might be prized online. This echoes back to the question of whether free replays on a pinball machine is a thing of value.

MODE OF PLAY

Another means of differentiating various forms of online gambling is how the game is played; with, or against, whom.

Against the House

Most forms of commercial gambling involve patrons betting against the house. With casino and similar games, this is known as a house banking game. Non-banking table games, also known as “round” games are much less common. The one exception is true poker, where the house cannot participate.

The most common forms of sports betting involve bettors betting straight up against the bookmaker. Here, the sports book acts as the house, setting the odds, collecting from the losing patrons and paying the winners. The sports book makes its money in the same way that a casino percentage game: it pays the winners less than the full odds. For example, bettors often bet \$11 to win \$10. The \$1 difference is seen as a small commission, and is known as the “vig.”

Pooling

Most traditional lottery games involved pools, where the prize was created by the bets, minus a share for the operator. Horse racing took this idea to the next level with the creation first of Calcutta pools or auctions, a primitive form of parimutuel betting, still popular with golf bettors. In a Calcutta, where players bid for the right to “own” a horse; the favorite would go for the greatest amount, say \$100, while a longshot might get no bid over \$2. The pool of money went to the winner, minus, of course, the operator’s percentage. Race wagering today is primarily conducted with computers calculating the parimutuel odds.

Games With More than One Characteristic

Bingo, for example, is normally a pooling game. But bingo jackpots commonly have banking game characteristics, with the house putting up the money for a big prize if a difficult to achieve pattern, like a cover-all, is won by a player in a predesignated, small number of balls being drawn.

Computer Simulations

Almost all gambling games require some form of random number generator (RNG). Traditionally, these have been dice and cards or spinning wheels. Today, formerly electromechanical slot machines use internal computers as RNGs. An online establishment can simulate the probabilities of any game through computerized RNGs, although the image seen on the bettors' screens appear to be dice, cards, or spinning wheels, creating virtual table games, such as craps, roulette, or blackjack, as well as virtual slots and video poker. An RNG and an animation sequence are combined to furnish a simulation of the dice roll, card draw, slot pull, or what have you, and the process appears as an animated simulation on the player's PC monitor. A great deal of effort is put into reproducing the "look and feel" of a crap table, roulette wheel, or video poker machine. Interested parties, take heed: this is definitely the land of *caveat emptor*. There is considerable variation in the software offered by the various sites, in clarity, playability, and honesty. The best regulated sites have the RNG and supporting computer programs tested by independent or government laboratories.

Interactive Person to Person

By 1999, enough broadband was available to allow person-to-person (P2P) games to be offered to the general public.

Poker was first out, and continues to hold first place in P2P games by its huge popularity. Texas Hold'em became the most popular poker game as the result of being televised for the World Series of Poker. The game was one of the favorite games of the professional poker players in the early games, plus, it had up-cards, allowing viewers to have some idea of what was going on. Other poker staples, such as 7-card stud and 5-card draw, can be and are easily simulated online. As with other kinds of online gaming, betting is allowed on an account system.

However, other games such as blackjack and backgammon are also appearing in the P2P arena, each hoping to be the "next online poker."

The Internet allowed the creation of large-scale, commercial P2P betting exchanges. These provide a neutral service for a private wager between individuals. The service matches, for a fee, two or more patrons who want to wager on opposite teams in an upcoming game, often with point spreads or other inducements to encourage betting on the underdog.

The argument is sometimes made that sports P2P is not operating a gambling site, since the bets are all made between private individuals. It is possible this might be true in jurisdictions with narrowly drawn anti-bookmaking statutes. But most courts have no trouble finding a facilitator of bets, who makes money by charging a flat fee or taking a percentage, is in the business of gambling. Financially this is what traditional bookmakers tried to do: have an equal amount bet on each side on every game so that the bookie had no risk of losing.

Computer Skill Games

Many different computer games and even formats share the confusingly broad appellation of “skill games”—probably too many. It is understandable when the term applies to “first-person shooters” such as *DOOM*[®] and arcade-style games, which require good hand-eye coordination, and to PC based military strategy and role-playing games, which emphasize teamwork and planning. Even more confusing, some of these skill games offer prizes and are part of advertising campaigns.

Because the element of chance is not predominant, and at least as importantly, because there is no history linking them to social problems or criminal activity, skill or amusement games are not considered to be gambling in most U.S. jurisdictions.¹³⁸ The lack of gambling “action” limits the direct income from such games. But since they are “clean” in that respect, the lure of gaming competition and prizes represents a powerful marketing tool with very substantial profit potential.

¹³⁸ There are a few seemingly draconian exceptions. Iowa residents are forbidden to “participate in a game for any sum of money or other property,” with no exception made for games of skill. IOWA CODE § 725.7(1)(a). Michigan apparently limits acceptable games of skill to county fairs, bowling leagues, and plush doll carnival booths. MICH COMP. STAT. §§750.310, 310a & 310b. It remains to be seen, however, whether there would be any meaningful attempt to apply such obviously outdated statutes against Internet operations today, particularly if they are otherwise clearly not gambling operations.