

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

| | | |
|-------------------------|---|-------------------------|
| OPINION | : | No. 81-1009 |
| of | : | <u>FEBRUARY 5, 1982</u> |
| GEORGE DEUKMEJIAN | : | |
| Attorney General | : | |
| John T. Murphy | : | |
| Deputy Attorney General | : | |
| | : | |

THE HONORABLE JOHN K. VAN DE KAMP, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, has requested an opinion on the following question:

Is an electronic computer device which is programmed to play on a video screen, upon insertion of a coin, the card game known as "twenty-one" or "blackjack," and to reward the successful user with additional playing time, a gaming device proscribed by Penal Code sections 33ab and 330.1?

CONCLUSION

An electronic computer device which is programmed to play on a video screen, upon insertion of a coin, the card game known as "twenty-one" or "blackjack," and to reward the successful user with additional playing time, is a gaming device proscribed in Penal Code sections 330b and 330.1 since it involves predominately chance rather than skill.

ANALYSIS

The "machine" has been described to us as a computerized electronic device, about the size of an office typewriter, which is coin-operated and is programmed to play on its video screen a card game known as "twenty-one" or "blackjack." The object of the game is to reach or nearly reach a total score of twenty-one with two or more cards without going over that number or going under the total held by the dealer. The player, upon insertion of a coin, is dealt two cards which are displayed on the screen together with a dealer's card. The player may bet points and play hands, the number of available points and hands being determined by the number of coins inserted at the outset or during the playing of the game. The player, by pressing the appropriate button, is given the option to "double down," "split," "hit," "stand" or "purchase insurance."¹ The device plays the dealer's hand whereby the dealer draws on a score of 16 or less and stands on a score of 17 or more. The player bets points which the machine's computer debits, or in the event of a winning hand, credits to the player's total. The same is terminated when a player has used up his points or played all the hands. The video screen displays messages of enticement and encouragement, coupled with flashing lights and intermittent sounds. The successful player is rewarded with longer playing time.

First, we will examine the relevant statutes. Penal Code² section 330b provides:

"(1) Unlawful acts; regulation of machines on vessels in interstate or foreign commerce. It is unlawful for any person to manufacture, repair, own, store, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to repair, sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained or kept in any place, room, space or building owned, leased or occupied by him or under his management or control, *any slot machine or device as hereinafter defined*, or to make or to permit to be made with any person any agreement with reference to any slot machine or device, as hereinafter defined, *pursuant to which the user thereof, as a result of any element of hazard or chance or other outcome unpredicatable by him, may become entitled to receive any money, credit, allowance, or thing of value or*

¹ These options have been defined in *The Gambler's Bible*, Fisk, M.C., Galahad Books, New York, N.Y., 1979, pp. 81-88, 207-213: double down: player's option to double the bet after receiving first two cards; split: player drawing pair may play on each with additional bet; hit: player draws another card; stand: player stays with cards drawn; insurance: a bet that dealer holds twenty-one when dealer's exposed card is an ace.

² Unless otherwise indicated, all further statutory references will be to the Penal Code.

additional chance or right to use such slot machine or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value; provided, however, that this section, insofar as it relates to owning, storing, possession, or transporting any slot machine or device as hereinafter defined, shall not apply to any slot machine or device as hereinafter defined, located upon or being transported by any vessel regularly operated and engaged in interstate or foreign commerce, so long as such slot machine or device is located in a locked compartment of the vessel, is not accessible for use and is not used or operated within the territorial jurisdiction of this State.

"(2) Definition of slot machine. Any machine, apparatus or device is a slot machine within the provisions of this section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, *as a result of the insertion of any piece of money or coin or other object*, or by any other means, such machine or device is caused to operate or may be operated, *and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive* any piece of money, credit, allowance or thing of value or *additional chance or right to use such slot machine or device*, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value.

"(3) Misdemeanor. Every person who violates this section is guilty of a misdemeanor.

"(4) Games of skill. It is expressly provided that with respect to the provisions of Section 330b only of this code, *pin ball, and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not*, are not intended to be and are not included within the term slot machine or device as defined in said Section 330b of this code." (Emphases added.)

Section 330.1 states:

"Every person who manufactures, owns, stores, keeps, possesses, sells, rents, leases, lets on shares, lends or gives away, transports or exposes for sale or lease or offers to sell, rent, lease, let on shares, lend or give away or who permits the operation of or permits to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, *any slot machine or device as hereinafter defined*, and every person who makes or permits to be made with any person any agreement with reference to any slot machine or device as hereinafter defined, *pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive any thing of value or additional chance or right to use such slot machine or device*, or to receive any check, slug, token or memorandum, whether of value or otherwise, entitling the holder to receive any thing of value, is guilty of a misdemeanor and shall be punishable by a fine of not more than five hundred dollars (\$500) or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment. A *slot machine or device* within the meaning of Sections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, *as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically or manually, and by reason of any element of hazard or chance*, the user may receive or become entitled to receive any thing of value or any check, slug, token or memorandum, whether of value or otherwise, which may be given in trade, or *the user may secure additional chances or rights to use such machine or device*, irrespective of whether it may, apart from any element of hazard or chance also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value." (Emphases added.)

Finally, section 330.5 provides:

"It is further expressly provided that Sections 330.1 to 330.4, inclusive, of this code shall not apply to music machines, weighing machines and machines which vend cigarettes, candy, ice cream, food, confections or other merchandise, in which there is deposited an exact consideration and from which in every case the customer obtains that which he purchases; and it is further expressly provided that with respect to the provisions of Sections 330.1 to 330.4, inclusive, only, of this code, *pin ball, and other amusement machines or devices which are predominantly games of skill, whether*

affording the opportunity of additional chances or free plays or not, are not intended to be and are not included within the term slot machine or device as defined within Sections 330.1 to 330.4, inclusive, of this code." (Emphasis added.)

These statutes bring into our analysis three considerations. We must determine if the points or credits rewarded to the user when he wins a hand while playing the electronic device is an additional chance or right to use the machine within the meaning of sections 330b and 330.1. We must also determine if this reward is the result of hazard or chance or is unpredictable by the user. Finally, we must determine if the machine is predominantly a game of skill coming within the exceptions to sections 330(b) and 330.1 set out in sections 330b(4) and 330.5.

We are informed that the player is required to bet points on each hand and if he wins a hand those points are credited to him. For example, if a player with fifty points bets his total fifty points and wins the hand, he may continue to play the game; if he loses this particular hand, the game would be over because he would have no further points to bet. However, if he continues to win he does not play indefinitely since we are also informed the play will terminate when a predetermined number of hands have been dealt, unless additional coins are fed into the device.

Sections 330b and 330.1 are unambiguous in equating an additional chance or a right to use the machine with a thing of value. Consequently, a payoff in the form of additional playing time comes within the purview of the statute. *Merandette v. City and County of San Francisco* (1979) 88 Cal.App.3d 105 is on point. In *Merandette* the court sustained the constitutionality of sections 330b and 330.1 over a vagueness challenge. At issue was the confiscation by the police of coin-operated, video "21" or "blackjack" game machines which the court, at page 108, briefly described:

"When the player's score is closer to 21 points than the machine's, the player wins an additional, free chance to play, which is signified by illumination of an 'extended play' button permitting the machine to be operated without additional coins while the light remains on."

The court, at page 113, rejected the contention that additional play alone was not a thing of value:

"Sections 330b, subdivisions (1) and (2), and 330.1 explicitly state that their prohibitions apply when the user of a machine, as a result of any element of hazard or chance, may become entitled to receive anything of value *or additional chance or right to use such machine or device*, or to

receive any check, slug, token or memorandum, whether of value or otherwise, entitling the holder to receive anything of value. The underscored language does not appear in section 330a.

"Appellants cite cases holding that the reward of free game alone is not a thing of material value and thus not within the prohibitions of section 330a. (*Gayer v. Whelan* (1943) 59 Cal.App.2d 255 [138 P.2d 763]; *Tanner v. Sherman* (1945) 67 Cal.App.2d 586 [154 P.2d 906].) Acknowledging these cases preceded the enactment of sections 330b, 330.1 et seq., appellant argue that the Legislature could not have intended to overturn these rulings when they added those sections.

"Appellants' argument ignores settled rules of statutory construction. In interpreting statutes, this court must presume that every word, phrase, and provision employed in a statute is intended to have meaning and to perform a useful function. (*Reyna v. City and County of San Francisco* (1977) 69 Cal.App.3d 876, 880 [138 Cal. Rptr. 504].) A specific statute expressly dealing with a particular subject controls and takes precedence over a more general statute covering the same subject. (*Simpson v. Cranston* (1961) 56 Cal.2d 63,69 [13 Cal.Rptr. 668, 362 P.2d 492.].)"

Accordingly, we conclude that the player by winning his bet does obtain an additional chance or right to use the machine.

The next concern is whether or not the reward of additional play is the result of any element of hazard or chance or is an outcome unpredictable by the user. The machine, of course, attempts to duplicate the card game of "twenty-one" or "blackjack" which is a popular casino gambling game. Indeed, the attraction of this game is the risk the player takes in making a bet without certainty as to the next card he or the dealer will draw. The card game of "twenty-one" or "blackjack," when played for a thing of value, is expressly prohibited in California. (§ 330; *United States v. Graham* (9th Cir. 1976) 534 F.2d 1357, 1358.) From the description provided of the machine under discussion, the game is no more predictable or is no less a matter of hazard or chance because it is played on a computer.

Accordingly, we conclude that the device, inasmuch as it is a coin-operated machine which by reason of an element of chance may entitle the user to receive an additional right to its use, comes within the prohibition of sections 330b and 330.1.

The final consideration is whether or not the machine falls within the exception provided for in section 330b(4) and in section 330.5, namely, "devices which are

predominantly games of skill, whether affording the opportunity for additional chances or free play or not. . . ." We discussed this exception in relation to pin ball machines in 37 Ops.Cal.Atty.Gen. 126, 128 (1961):

"In determining whether the 'multi-play' machine in question meets the terms of the exception, it is well to remember that exceptions and provisos in a statute are designed to qualify or limit what is otherwise generally affirmed in the body of the act and that they are to be strictly construed (*McAlpine v. Baumgartner*, 10 Cal.2d 409; *In re Goddard*, 24 Cal.App.2d 132).

The statute expressly provides, as one of the conditions of the exception, that the devices be 'predominantly games of skill.' It is not enough that the machines be partly a game of skill; the machines must be predominately games of skill. 'Predominantly' according to Black's Law Dictionary (4th ed. 1951), means 'some- thing greater or superior in power and influence to others with which it is connected or compared.' In everyday speech, it means the superior or controlling element. As applied to the machines enumerated in the exception provision, the predominant element is the one of greater force and effect in producing the end result than any other element.

"It cannot be said that the Legislature did not intend the language of the statute to be so interpreted for it is presumed that every word, phrase, and provisions employed in a statute was intended to have some meaning and to perform some useful purpose, and any construction should be avoided which implies that the Legislature was ignorant of the meaning of the language so employed or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and sensible purpose (*Prager v. Isreal*, 15 Cal.2d 89). Thus, the Legislature must have had in mind that there are or may be some pinball machines which are so devised as to be predominantly games of chance and that there are or may be some other pinball machines which are so constructed as to be predominantly games of skill."

To the same effect as our opinion, the California Supreme Court, in *Cossack v. City of Los Angeles* (1974) 11 Cal. 3d 726, 732, sustained a trial court's finding that the incorporation of mutually operated "flippers" into pinball games produced games predominantly of skill.

In our present analysis we are limited to the information provided us. There is the possibility that in an adversary, fact- finding proceeding further information might be developed, particularly as to the nature of the machine's computer program, bearing on the factors of skill or chance. The question is whether the machine, as its functions are described to us, is predominately a game of skill or predominately a game of chance.

We do not perceive this game as involving any significant manual dexterity, such as operating flippers or pressing a trigger; or any significant visual perceptiveness, such as watching a rolling ball or a moving target. The player of the game under discussion need only insert coins, press buttons and observe the screen.

The card game "21," though containing the element of chance resulting from the deal of the cards, is deemed by some to also contain the element of skill since a player with training, good memory and mathematical ascendancy may "count cards" (tracking played and unplayed cards), weigh probabilities and make decisions apparently affecting the outcome of the game.³ Such game is played with one or more decks of cards which are shuffled, cut and dealt to the player or players. A player may win by exercising some skill; however, an unskilled player may win also by pure luck. We are not convinced that skill predominates in this game.

We believe the electronic game of "21" described to us presents the user with only the illusion of skill. The player is confronted with a computer program the nature of which is unknown to him. With the pressing of a button, the user does not know what the intricate electric circuitry will produce on the video screen. He cannot inspect the deck, ask for a new deck, have the cards reshuffled or evaluate the dealer. He may believe that his selection of a particular option generated the successful hand but only the machine and its predetermined program knows the real cause and effect.

Possibly a person who repeatedly plays this device might acquire a degree of skill in its operation. However, we are informed that these machines are placed in locations open to the public, usually barrooms. These machines are operated for the use of the general public and not for experts. In 27 Ops.Cal.Atty.Gen. 389 (1956) we concluded that a "claw machine" was a game of chance even though a player might acquire an appreciable

³ See *World's Greatest Blackjack Book*, Humble and Cooper, Doubleday and Co., Inc., New York, 1980; *Playing Blackjack as a Business*, Revere, L., Lyle Stuart, Inc., Seacaucus, N.J., 1980; *How to Play Winning Blackjack*, Braun, J., Data House Publishing Co., Chicago, 1980; *A Winner's Guide to Casino Gambling*, 123; *A Book on Casino Gambling*, Graham and Tulcea, Pocket Books, New York, 1980, pp. 59-110; *Turning the Tables on Las Vegas*, Anderson, I., Vintage Books, New York 1978, pp. 90-112; *Beat the Dealer*, Thorp, E. O., Vintage Books, New York, 1966.

amount of skill with extensive use. We quoted with approval, at page 393, this language from *Tooley v. United States* (D. Nev. 1955) 134 F.Supp. 162, 166-167:

"The machine in question was intended to be played by the average player and should be evaluated from that standpoint and not from the approach of the so-called expert. No one will question the fact that craps, twenty-one and roulette are games of chance with percentages heavily loaded in favor of the house, yet there are some expert players, cross-roaders, who can outplay and break the house even on these admitted gambling games. But that does not convert their games from games of chance to games of skill. Neither, do we think does the fact that Mr. Sidebottom, who devised and built the machine, had appreciably better playing results than the average player convert the machine into an instrument of skill. Certainly it does not so far as average players are concerned. He plays a few times and moves on. He had neither the time nor the inclination to spend a couple of years studying the idiosyncracies of the machine."

We are aware of the rapid growth of coin-operated electronic video machines. From our observations many of the machines involve the manipulation of visible objects shown on a screen. The operator may be required to move a vehicle through ongoing traffic, to destroy missiles with light rays or to intercept spacecraft with explosive charges. The game under discussion does not involve such manipulation whereby the skill of the user is visibly apparent. From the information supplied us, nothing suggests that the skill of the operator of a "21" electronic game predominates over the element of chance built into the game.

Accordingly, we conclude that an electronic computer device which is programmed to play on a video screen, upon insertion of a coin, the card game known as "twenty-one" or "blackjack," and to reward the successful user with additional playing time, is a gaming device proscribed in Penal Code sections 330b and 330.1 since it involves predominately chance rather than skill.
