Gambling and the Law®: An Introduction to the Law of Internet Gambling
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Abstract

This article brings to gaming researchers, with or without a legal education, a roundup of major issues and problems in the unsettled field of Internet gaming. By citing laws, cases, articles and treatises this annotated essay leads the reader through the maze of confusion and contradiction that now clutters the legal scene. Topics touched on include: elements of gambling, Federal, state and local gambling regulation, organized crime implications, extraterritorial jurisdiction, police power and advertising. Conclusions are addressed to businesses considering the risks of operating Internet gambling web sites.

Key Words: Internet gaming law, Wire Act, betting, pay-for-play, police power, advertising, organized crime

Basic Question

The question, "Is gambling on the Internet legal?" is by no means simple (Rose & Owens, 2005). Some state and federal law enforcement officials declare flatly, "Yes, it's all illegal." Yet with thousands of websites taking billions of dollars in wagers each year, fewer than 25 people have ever been prosecuted in the United States for online gambling. Most were bookies who were also taking sports bets by telephone.

Only one was a regular player: Jeffrey Trauman, a car salesman and online sports bettor, pleaded guilty to "placing a wager over $500," a misdemeanor in North Dakota, was fined $500 and given a one-year deferred sentence (Rose, 2003); North Dakota Century Code).

The day seems to have passed when advocates of the Internet would assert that it was something so new and different that there were no laws surrounding online activities, that the Internet is like the Wild West. (Rose & Loeb, 1998). More and more jurisdictions are enacting laws explicitly designed to either prohibit or regulate this new industry (Balestra & Cabot, 2005)). However, many gambling operators still believe that they are protected from federal and state laws if they are licensed in a foreign jurisdiction.

I had dinner with Jay Cohen and others involved with online gaming at the First Internet Symposium on Internet Gambling Law & Management in Washington, D.C., in November 1997. Cohen told me he did not have to worry about being arrested, because he was licensed in Antigua. He did not want to hear my warning, that the federal government was not going to agree. The federal Department of Justice ("D.O.J.") did, in fact, file a criminal complaint against Cohen, charging conspiracy to violate the federal *Wire Act*. Even though he was taking sports bets by phone and online from Americans, Cohen still thought the charges would be dismissed. He became the first person to be convicted by a jury and sent to prison in the U. S. for taking bets online (*United States v. Jay Cohen* 2001)).

To determine whether an activity online is subject to the gambling laws of a jurisdiction, it is first essential to answer the question "is it gambling?" (Rose & Owens, 2005). Obviously, betting on sports events with a bookie, or playing video poker at an

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Internet casino is gambling. But what about free bingo games, skill tournaments and sites which connect bettors to other bettors?

Elements of Gambling

Gambling consists of three elements: consideration, prize and chance. If any one of those three elements is missing, the game is simply not gambling (Rose, 1986)).

Almost all jurisdictions today find there is no consideration for gambling unless players are required to spend money.

Consideration is a legal term, most commonly found in the law of contracts. Usually it means each side puts up something of value, such as cash for a car. However, for non-gambling contracts, consideration can be any expenditure of effort by one side or any benefit to the other side. A very few states follow this rule for gambling contracts. The Washington State Legislature had to pass a law after the Safeway supermarket chain was charged with violating the state's anti-lottery laws for running a free promotion. The state Supreme Court had found consideration because players had to make the effort to fill out forms and the store benefited by having more customers. (*State ex rel. Schillberg v. Safeway Stores, Inc.* (1969, Revised Code of Washington).

Almost all jurisdictions today find there is no consideration for gambling unless players are required to spend money. Commonly called a no-purchase-necessary sweepstakes, legally this is a gift. A free alternative means of entry allows players to have the chance of winning something for nothing. The U. S. Supreme Court ruled, in a case involving T.V. game shows, that even if players are required to spend time and money filling out forms and buying postage, there is still no consideration. Even small amounts of money can be consideration, but in the game show cases, the money went for stamps, not to the operators (*Federal Communications Commission v. American Broadcasting Co.* (1954)).

Bingo is big on the Internet, offering small prizes with no fee to enter. The operators make their profits by selling advertising and mailing lists of their players. An interesting twist is the "No purchase necessary" casino sites, where players can get free chips by email. This creates a legal problem, because players may buy additional chips with their credit cards. A prosecutor would probably have little problem convincing a judge that a player who pays for chips to play roulette online is gambling, whether or not the player was given some free chips when he first signed up.

The second element, "prize," means the player can win something of value. If players cannot win money or merchandise, the activity is an amusement game. Some jurisdictions define "prize" to include free replays. But even if technically a crime, no government is going to go after an Internet operator for running an amusement game in which the only thing a player can win is the right to play the same game again, even if there is a charge to play.

As for the third element, if an activity offers valuable prizes and requires consideration, but the outcome is not determined by chance, it is a game of skill and, by definition, not gambling. For the Internet, the easiest way to run a skill game is to have a tournament, where chance equalizes out over time. Players play against other players, not the house, with a guaranteed prize to the winner. It might be possible to set up a skill game where players pay to play and can win money. The problem is that the first skillful player would bankrupt the site. Worse, some jurisdictions test for a skill game by asking whether the average player can win under normal conditions.

Interesting and fun skill games are difficult to design, especially when players cannot be penalized simply because they have slow Internet connections. One common question is whether video game tournaments would qualify. They might, but the legal problem is getting the owners of the patents, copyrights and trademarks to license their valuable intellectual property.

States have begun putting restrictions and even prohibitions on skill contests. Most statutes are designed to ensure the skill game is fair and records are being kept. But some,

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like Arizona, now place low limits on the amount players can win, even at true contests of skill. (Arizona Revised Statutes).

Gambling and Federal Law

Just because a game has consideration, prize and chance, and is therefore gambling, does not mean it is illegal. Many forms of gambling are legal, and the law can be quite complicated.

For example, in December 2000 Congress amended the Interstate Horseracing Act to expressly make remote wagers across state line on horserace legal, as long as the bet is legal in the states where the bettor is, where the bet is accepted and where the race takes place (*Interstate Horseracing Act*). The concept is called Advanced Deposit Wagering ("ADW"), because punters are required to deposit their money in advance with the licensed operator taking the wagers. At least a dozen states have changed their laws to take advantage of this federal amendment (Rose, 2002). So, now it is perfectly legal for a gambler in Oregon to set up an ADW account with a track in Pennsylvania and to place a bet from home by phone or computer on horserace.

Everyone in the United States is subject to two sets of laws, federal and state. The federal government is not usually concerned with gambling. It only gets involved when it has to, such as with Indian gaming, or when it looks like a problem is too large for a single state to handle. The lottery scandals in the 1890s led to statutes, still on the books, which make it a crime to carry or mail lottery tickets across state lines (18 U. S.C. §§1301-1307).

Since Prohibition, the main target of federal anti-gambling laws has been organized crime, which often seems to be beyond the power of state law enforcement. Modern organized crime was created to supply illegal alcoholic beverages. When Prohibition was repealed, the now organized criminals turned their sights to supplying other illegal goods and services: prostitution, drugs and gambling. Congress reacted by passing special laws. That is why almost all federal prohibitions on gambling are limited on their face to individuals involved on the business end. 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... " (18 U. S.C. §1084, 18 U. S.C. §1955).

Since Prohibition, the main target of federal anti-gambling laws has been organized crime.

Federal legislative history reports that the anti-gambling laws were passed to aid the states in enforcing their public policies. All of these statutes were enacted at times when almost all gambling was illegal. But the laws remain on the books, even though the public policies of most states have switched from prohibition to reluctant legalization to outright promotion. This results in bizarre situations, such as Nevada gambling regulators prohibiting the state's licensed sportsbooks from taking bets from other states and nations via the Internet to avoid violating federal laws which had been enacted to help states like Nevada.

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 very few times the federal Department of Justice has gone after mere gamblers just for making bets, judges have thrown out the cases.

There also has to be some basis in the United States Constitution giving Congress the power to pass an anti-gambling law. Criminal laws in particular are normally a matter left to the states; in fact, Congress does not have the authority that state legislatures have to define what is a crime. The usual basis for a new federal crime is the federal government's power to regulate interstate and international commerce. Federal anti-gambling laws are thus usually limited to activities that are clearly under federal control,

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like using the U. S. mails or transmitting wagers in interstate or foreign commerce. Since organized crime is the principal target of federal criminal statutes, state gambling crimes can be the basis of a separate federal crime, like "*RICO*," for *Racketeer Influenced and Corrupt Organizations*, but only if the criminal organization is large enough to have an impact on interstate commerce (18 U. S.C. §§1961-1968).

The U. S. Supreme Court has cut back on the power of Congress, requiring that there be some actual interstate or international commerce before the federal government can infringe on the states' areas of authority. But a few decades ago the Court upheld the constitutionality of the federal crime of "illegal gambling business" under the *Organized Crime Control Act*, defined as a gambling business which—

- (i) is a violation of the law of a State or political subdivision in which it is conducted;
- (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(18 U. S.C. §1955). The high Court found that an illegal gambling business of this size could have a significant impact on interstate commerce, thus giving Congress the power to make it a separate federal crime for committing a state crime (*Iannelli v. United States* 1975).

Although there are federal laws in the United States that on their face seem to make it a crime, under some circumstances, to take a bet, if the defendant is in the gaming business, there are no similar federal laws making it a crime to merely make a bet.

Senator Jon Kyl (R.-AZ) has long been one of the most active advocates for Congress to take some action to expressly outlaw Internet gambling. (Rose, 2000). His first attempt, in 1995, to enact a proposed *Internet Gambling Prohibition Act* would have made betting a federal crime (*Internet Gambling Prohibition Act* (1995)). This would have been the first time that the federal government would have gone after mere bettors. But the D.O.J., remembering the bad old days when it had to enforce the earlier Prohibition on alcoholic beverages, stated publicly that it did not want to be knocking on bedroom doors to go after $5 bettors. So, today, no one is even proposing making it a federal crime to merely place a bet.

The Wire Act

Internet operators, especially those who do not have licenses from foreign countries, may be violating U. S. federal laws by taking bets online. The major statute, the *Wire Act*, 18 U. S.C. §1084, was passed by Congress in 1961 as part of Attorney General Robert Kennedy's "war on organized crime." Like similar federal anti-gambling statutes, Congress stated that the *Wire Act* was designed to help the states enforce their policies toward gambling. In 1961 the only state with legal casinos was Nevada; there were not even any state lotteries. Given the technology for cross-border gambling at that time, the target of the *Wire Act* was illegal bookies taking bets on sports events by telephone. The federal Department of Justice is now trying to stretch this 45 year-old law to cover Internet casinos in an era when all but two states allow some form of commercial gambling (Rose, 2005).

By its own terms, the *Wire Act* only applies to individuals in the business of gambling who use "a wire communication facility for the transmission in interstate or foreign commerce" of wagers or information useful in the placing of bets. Gambling businesses that conduct 100 percent of their activities inside a single state do not violate the *Wire Act*. Nevada thus has the right to authorize its licensees to take bets from home computers within the state.

The major weakness of the *Wire Act*, besides the fact that it was written long before the Internet was invented, is that it was designed to go after bookmaking. Betting on a sports event or horse race is clearly covered. But a good argument can be made that other

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forms of gambling do not fall under the *Wire Act* as it is presently written, even if they are conducted interstate or internationally.

Three courts have looked at this question (*In re Mastercard International Inc.*, (2001) and (2002), *Jubelirer v. MasterCard International, Inc.*, (1999)). The cases arose when players sued credit card companies to avoid paying for the losses they incurred while gambling on the Internet and to ask for money damages. (Hugel and Kelly 2000). In one important case, 11 class actions were filed in federal courts in Illinois, Alabama, New York and California. The cases, which grew to be 33 by the time of the decision, were all consolidated and transferred to be heard by a single judge, Stanwood R. Duval, Jr., of the U. S. District Court in New Orleans, Louisiana. The major claim was that MasterCard and Visa had violated the RICO statute by participating in Internet gambling. Judge Duval asked the plaintiffs to choose two individuals to test the RICO claims.

RICO requires that there be a pattern of racketeering activity, meaning at least two predicate crimes were committed by the organization. The list of what can be a predicate crime is long, but not endless. It encompasses federal anti-gambling statutes, including the *Wire Act*, and state felony anti-gambling laws. The problem for the plaintiffs in these consolidated cases was that most state prohibitions are only misdemeanors, not felonies. And the test cases they chose involved individuals who bet with Internet casinos, not bookies. Judge Duval held that there was no RICO claim, because the gamblers had not bet on sports events (Rose, 2001; *In re Mastercard International Inc.*, 2001)).

The Nevada State Legislature immediately reacted by passing a statute legalizing Internet betting operations by its casino licensees, so long as no bets on sports events were accepted (Nevada Assembly Bill 578, (2001)). The law required the Nevada Gaming Commission to determine whether online gaming could be conducted safely and legally, before it issued any licenses. It held hearings on whether online gaming would violate the laws of other states. The Commission had no interest in whether Nevada's proposed Internet casinos would be breaking foreign laws. Its major witness was a law student. But it was stopped dead in its tracks when the federal D.O.J. sent a letter saying that federal prosecutors did not care what Judge Duval had ruled. The D.O.J. believed that all forms of gambling were covered by the *Wire Act*, and it would file criminal charges against any Nevada operator who took bets of any kind on the Internet.

Judge Duval's decision was upheld by the Fifth Circuit Court of Appeals, the Court just below the U. S. Supreme Court (*In re Mastercard International Inc.*, (2002)). But the deadlock continues to this day: The D.O.J. is not bound by these court decisions, because it was not a party to the cases. It continues to threaten anyone and everyone with prosecution under the *Wire Act* for any form of online gambling.

Intimidation Tactics

The legal, political and practical reality is that the only operators who cannot take bets on the Internet are licensed casinos in Nevada and elsewhere, with valuable licenses, and others who can be easily grabbed by federal and state law enforcement agents.

The D.O.J. has not limited its campaign of intimidation to operators. (Pope, 2005). Most large portals, after investigating the dangers of linking, decided that the risk was slight compared to the lucrative reward in ad revenue. But, in late 2004, a U. S. Attorney in Missouri sent out federal grand jury subpoenas to every media outlet it could find that had links or ran commercials for online gaming. A letter accompanied the subpoenas, stating that websites, radio stations, magazines, etc, were violating the *Wire Act* by aiding and abetting the illegal operators. Many companies, especially those that did not rely on online gaming for a substantial part of their revenue, were intimidated and dropped all connections with pay-for-play gambling sites. U. S. operators like Yahoo almost immediately dropped all links to pay-for-play sites. Other portals, like Google, still have sponsored links to true online gambling sites, and have not received letters from the D.O.J. to cease and desist. Overseas operators have the greatest protection, since a prosecutor would have to prove not only that the gambling was illegal in his jurisdiction,

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and that the link amounts to complicity in a particular crime, but that no defenses such as national sovereignty or freedom of speech would apply.

The campaign of intimidation has continued. Esquire magazine turned away a million dollars in advertising revenue after the D.O.J. sent it a cease and desist letter for an Internet poker ad insert it ran in 2005.

Police Power

Although there are no federal statutes or regulations that would apply to a casual bettor, state laws are another matter. Every state has what is known as the "police power." This is the right, and perhaps obligation, of the state to protect the health, safety, welfare and morals of its citizens. Gambling has always come under a state's police power. Like other police power issues, such as fire protection and sanitation, gambling falls within the control of local – in this case state as opposed to federal – governments. Historically, morality has been of equal concern to the states as physical safety. Today, it is unfashionable to discuss morals as a public policy issue, but the laws still exist to protect society from moral outrages.

Every state outlaws most forms of gambling, unless licensed by the state. All states outlaw operating gambling businesses for profit, with the obvious exceptions for licensed casinos, racetracks, etc. In addition, approximately half the states have ancient laws on the books which make it a crime even to make a bet, again, with obvious and sometimes not-so-obvious exceptions. Of course, the chances of a bettor getting into any criminal trouble, even if the law applies, is close to zero. No one has ever gone to prison for merely making a bet on the Internet.

Even those states that say they outlaw mere betting have carved out exceptions. As first horse racing and then state lotteries and later casinos spread across the country, it made no sense for a state to legalize these forms of gambling and also keep it a crime to make bets with those authorized operators. Because laws in general and anti-gambling laws in particular are created in a piecemeal fashion to counter a specific problem which has attracted the attention of lawmakers, the prohibitions aimed at the casual bettor are hit-and-miss in their coverage.

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California Law

California is an example of how complicated the law of merely being a bettor can get. The state Penal Code expressly makes it a crime to accept or even make a bet at 11 named games, including roulette and 21, as well as at a banking or percentage game, meaning any casino game, outside of an Indian casino (California Penal Code §330). Therefore, California players are probably technically committing misdemeanors when they play blackjack online. The State Legislature also made it a crime to make, take or even record a bet on "a contest of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus," meaning a sports event or horse race, with exceptions for licensed horsebooks (California Penal Code §337). Millions of Californians unknowingly violate this law each year, including elected officials from the Governor on down, and even religious leaders who, publicly make bets on the SuperBowl and World Series when a California team is involved.

There are California statutes prohibiting running a lottery or a bingo game, other than the state lottery and charity raffles and bingo (California Penal Code §319 et seq.). But, there is no state law preventing a Californian from participating in a foreign lottery or making bets at bingo, even illegal games. (Cf. *Nevcal Enterprises v. Cal-Neva Lodge, Inc.,* (1961).

Poker is exceptionally complex (Rose, 2003B). California makes it a crime to play any "percentage game" (California Penal Code §330). In the rest of the world, a "percentage game" means the house participates and has a percentage advantage. Due to bad case law, in California the term means a game, including a poker game, where

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the operator takes a percentage of the amounts bet or won, even if the operator does not play a hand. (*Sullivan v. Fox*, (1987)). So, participating in a poker game where the house rakes the pot is a crime in California. The state's licensed card clubs were able to get a bill through the California Legislature, so that now, by statute, it is not a percentage game if a poker operator rakes the pot less than four times (California Penal Code §337j). For example, an operator can take nothing from a pot with less than $10, 50¢ from a pot with more than $10 and less than $20, $1 from a pot between $20 and $30, and $1.50 from a pot over $30. But if the operator takes money out of the pot a fourth time, it is not only the operator but the players who are committing misdemeanors. Law enforcement does not know, or care, about such bizarre prohibitions affecting mere players.

This does not mean it is necessarily legal to run poker games and rake the pot less than four times in California. Penal Code section 337j also 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.

There also may be city or county ordinances, although these are never used against online operators who are not physically present in that city or county and thus, as a matter of practicality if not legality, are beyond the reach of local laws. It is almost, but not completely, beyond the realm of possibility that local police or district or city attorneys will try and go after online gambling that violates a local, state or federal law. The District Attorney of Los Angeles County raided the local offices of YouBet! and seized computer information and documents. YouBet! allows punters in many states to place bets via their computers on horse races taking place throughout the country. The bets are forwarded to tracks in states like Pennsylvania, which allows these long-distance wagers. Even though YouBet! did not take wagers from Californians, its computers were in L.A. County. The county D.A. threatened to charge the company with violating the state law against "recording" bets on horse races outside a licensed track. Would a jury buy the idea that in 1909 the State Legislature intended to outlaw computer bets madė between two other states, simply because the computer was in California? YouBet! decided it was cheaper to donate $200,000 to programs like the California Council on Problem Gambling and leave the state than to pay much more in legal fees with the potential of criminal convictions. Within three years the California Legislature changed the law to make it clear that remote wagering on horse races is legal, and YouBet! returned to Los Angeles.

Web operators argue that the bettor is not actually making a bet where they and their computer are located, but rather where the bet is accepted.

Internet gambling operations have attempted to get around anti-gambling laws like these by requiring bettors to deposit money in advance in a bank in a foreign country. When a player makes a bet, the argument goes, they are merely telling their foreign bank to send money to the foreign operator. Web operators argue that the bettor is not actually making a bet where they and their computer are located, but rather where the bet is accepted. This might work for the question of where is a contract created. This is the law of England, which is why foreign Internet operators can advertise on the sides of London taxis. But most U. S. judges would not buy the argument when it came to criminal laws.

It is relatively easy for a government to close down Internet gaming operators who are physically inside its borders. It is also not that difficult for law enforcement officers of one state to bring charges against individuals who target that state with online ads, so long as the web operators reside in another state of the United States. The problems arise when the operation is being conducted from a foreign country, especially when foreign nationals of that country are involved (Rose, (2005)).

The first requirement for any criminal action is to find a statute passed by the legislature making the activity a crime. Almost every jurisdiction in the United States has eliminated the concept of "common law crimes." This means that a judge does not

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have the power to punish as a crime activity that he thinks is bad. No activity can be condemned as criminal unless there is a specific statute outlawing that activity and giving potential offenders adequate warning.

As was seen with the *Wire Act*, a statute on its own terms might not encompass the form of gambling being investigated. The situation is greatly complicated when part of the activity takes place in another jurisdiction, as would be the case with all cross-border Internet gambling.

There are very strong presumptions in the law, federal and state, civil and criminal, that a statute does not have extraterritorial reach unless it expressly says so. (*E.E.O.C. v. Arabian American Oil Co.*, 1991, *United States v. Bowman*, 1922). This is not a question of power because states probably do have the power to make it a crime if their citizens commit criminal acts or are the victims of criminal acts anywhere in the world. The issue here is whether Congress or state legislatures have taken the extremely unusual step of passing laws which do, in fact, cover behavior everywhere on Earth.

No state of the U. S. prohibits its citizens from being involved in Internet gambling, so long as every activity takes place outside of the state's borders. States simply are not interested if none of the operation occurs in that state and particularly if no attempts are made to get residents of that state to make bets. (See, e.g., *Cie v. Comdata Network, Inc.*, 1995).

However, the situation get trickier when part of the activity is in the state. The most common occurrence, where a citizen of a state makes a bet on a website operated outside the state, and usually outside the country, has been rarely addressed by the courts. So there are few definitive decisions on whether a state statute that makes it a crime to conduct an unlicensed gambling business in that state would apply to an online operator in another country who takes bets from residents of that state. However, criminal law in general has no trouble with finding that a state does have power over an out-of-state resident who acts or causes an impact on someone in that state. In fact, it is common for there to be more than one sovereign government with the power to punish a single individual for a single act.

> In theory, there could be four prosecutions for the same crime. Two states could have concurrent jurisdiction—for example, X stands in North Dakota and shoots across the state line into South Dakota, killing Z. The federal government would have jurisdiction if Z were a federal agent. And an Indian tribal court can also have jurisdiction. (Thomas, 2003).

There are so few cases directly on point, we do not even know for sure whether those ancient, never-used state statutes making it a crime to merely make a bet apply when the person making the bet is in-state but the person accepting the bet is overseas. Where exactly does a bet take place?

The Model Penal Code, which has been adopted by about half the states, seems to say that state anti-gambling laws do not apply in these situations, unless the state legislature has expressly declared that they do apply. The Commentary to §1.03, titled "Territorial Applicability," gives gambling as an example of how the presumption that a statute does not reach past its borders prevents the application of a state's anti-gambling laws, unless the state legislature has expressly declared that it intends this criminal statute will apply to conduct taking place outside the state's borders. "If the state wants to make gambling criminal, for example, when the wager is to be placed in another state... it may do so... but you read the statute carefully to see that the legislature really meant to do that and was not only dealing with wagers within the state" (Proceedings 1962).

Disclaimers

Disclaimers have become popular on Internet gambling websites. They are usually along the lines of, "We cannot check the laws of every state and country in the world. It is the responsibility of you, the player, to determine whether it is legal to place a bet." This would probably not be of great help if a law enforcement official decided to go

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after an illegal website, because the duty is on the operator to make sure that they are not violating the law. There are however limits on that duty.

A bank robber cannot pull a gun on someone and then say, "This request for money is void where prohibited." Or a closer analogy: Imagine someone shipping child pornography raising the defense that he did not know it was illegal where received. Ignorance of the law does not work as a defense to American laws. About the only time it might, in some jurisdictions, is if an operator can truly claim that no one would have thought that this particular game would even be considered gambling anywhere in the world.

However, a disclaimer can help If a person intentionally helps another commit a crime – in legal terms, acts as an aider and abettor – that person is guilty of the crime itself. The getaway driver and lookout man are guilty of bank robbery even if they never get near the bank. Similarly, a person can often be charged with the crime of conspiracy for merely agreeing that another person will do a criminal act. Some media outlets try to avoid the risk of a criminal charge by not taking any questionable advertisements. Others require a legal opinion from a knowledgeable lawyer that the advertising does not violate the law. A few require advertisers to put in disclaimers.

Advertising

Is it legal to advertise gambling on the Internet? The answers are often far from clear and can be radically different depending upon the relevant facts and applicable law. (Rose & Owens, 2005; Frese, 2005). But there are ways for individuals and businesses to lessen their potential liability. The law, meaning statutes, regulations and court decisions, is the base. But the reality of how prosecutors decide which cases to file plays an important part.

It is probably best to think of advertising gambling as a continuous spectrum of risks. Note that this is not merely a spectrum of legality, from the fully legal to the fully criminal. It is a measure of the chances of being arrested or sued. Although the law is supposed to underlie all actions taken by law enforcement, practicalities and politics also play a role.

Individuals, from the cop on the beat, through attorneys general, to judges have prosecutorial discretion: The non-enforcement of laws against mere bettors proves that not every lawbreaker is arrested, charged or convicted. Institutional discretion also is part of any decision whether to go after anyone involved with Internet gambling. The elimination of illegal gambling of any kind has a very low priority, unless organized crime or consumer fraud is involved. Advertising also brings in the First Amendment, which only means headaches for a government regulator. The rapid development of the Internet, with its ever-changing laws, has created complex international law issues, which have never been raised, let alone answered. Most government lawyers would rather spend a few minutes prosecuting another car thief than hours figuring out how to even go after an advertiser of Internet gambling.

There is only one way to be 100% safe, by not having any connection with a pay-for-play site. It is equally safe to be advertising a legal form of gambling only in the state that owns or licenses the game under a statute which specifically allows these ads. Legal tribal gaming, either Class II, like bingo, or Class III, casinos, lotteries and off-track betting conducted under a tribal-state compact, is equally safe. This is especially true in the state where the tribe is located, although it must be emphasized that it is advertising that is allowed, not conducting a game online.

On the other end of the spectrum of risks lie unlicensed operators, who are physically present in states with activist attorneys general armed with laws prohibiting advertising Internet gambling. The goal of everyone in between is to figure out how to come as close to the risk-free end of the spectrum as they can, and still make money.

There are a number of factors that increase the risk that an activity will be illegal, or, more importantly, will draw the attention of government regulators. The two are not

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always the same. For example, a gambling site offering cash prizes will draw much more attention from law enforcement than one that only offers goods and services as prizes. Yet, legally, the element of "prize" is met by any award of something of value. Cash has no special legal significance.

Under federal and state laws, the more involved a person is in the operation of a gambling enterprise, the more likely that he will be found to be a part of that business. So, helping to collect a debt can result in being found in violation of the federal statute prohibiting illegal gambling businesses. Being paid a percentage of the amounts a player bets or loses probably makes a person a part of the business, even if that is his only connection. (Traxler, 2004). On the other hand, a supplier who charges the same, flat amounts for supplying goods and services to a gambling business as to a non-gambling one, and who has more non-gambling business clients, should normally not be found to be in the business of gambling. A non-gaming website thus lessens the chance of receiving unwanted attention from law enforcement if it charges a set amount for every person it refers to a gaming site, regardless of whether the potential patron ever makes a bet. Charging the gambling website a flat fee for referrals, not contingent on whether the patron win, loses or even places a bet, allows the non-gambling web operator to argue it was just acting like the telephone company.

This is particularly of interest to web operators, who are paid for pop-ups and other advertising and for referring potential patrons to pay-for-play gambling sites. Referrers are known as affiliates, and can earn millions of dollars a year in revenue for the most popular sites. Empire Poker even advertises itself as the "world's largest poker room," yet it does not actually run any poker games. It operates as a "skin" for real online poker operators like Ultimate Bet. A patron connecting through a skin may think he is at an Empire Poker game, but he really has been forwarded to play with other players at an Ultimate Bet table. Even though Empire Poker is actually only a marketing tool, it would be held to be in the business of gambling, because it does everything that a gambling business does, including earning its revenue from money lost by players – everything, that is, except actually operate any gambling games. Empire recognizes this and states that it has applied for and been granted a gaming license by Gibraltar (Empire Poker, 2005).

Along the same lines, the less a site looks like it is designed purely for gambling, the less unwanted attention the web-operators will receive. The depiction of actual gambling, and inviting people to make wagers, is more dangerous than merely giving visitors information about gambling.

Unfortunately, web operators can be targeted even when a prosecutor is mistaken in his belief that the operator is directly involved in the gambling business. MonetizeMedia.com had links to offshore gambling sites, but it claims it was paid a flat fee and did not receive a share of the wagers or winnings. MonetizeMedia.com had the bad luck to be physically located in Houston when the Texas Attorney General decided to investigate web gaming. No charges were ever filed, although investigations are supposedly continuing. A state court ordered the Attorney General to return the computers, documents and money seized. It is important to note that MonetizeMedia.com was not accused of mere advertising. The government investigators alleged it was promoting illegal gambling by taking a cut of the profits (*In re Attorney General of Texas John Cornyn*, 2000).

When it comes to gambling, the major concerns of government attorneys and law enforcement agents are organized crime and consumer fraud. In the MonetizeMedia case, the Texas Attorney General apparently thought the site had connections with organized crime. Consumer complaints will sometimes trigger investigations by officials. Most gaming sites now have protections in place to set limits on how much a gambler can lose and to prevent minors from betting.

Police and government attorneys are not much interested in cases that clearly do not involve organized crime or consumer swindles. Occasionally, governments will want to make show arrests. But since there are so many operators, government lawyers seek out the easier cases. For example, sports betting clearly falls under the *Wire Act*, but poker

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and bingo are much more problematic. Being licensed by a foreign government does not give absolute protection. But it does raise questions of sovereignty, international laws and treaties that can make a case so complex that it will not be brought in the first place.

Cyberborder software has been developed which effectively prevents computer users in selected states from gaining access to a website. It would have to be perfect to prevent all risk from prosecution or civil suits arising in a blocked state. But in practice, state agents will not take criminal action against an operator who has done everything he could to prevent residents of that state from betting.

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Cross-Border Cases

The more interactive a website is, the more chance there is that the operator could find himself the defendant in a civil or criminal case. For example, the National Football League filed suit against Ken Miller, doing business as the website nfltoday.com (*National Football League,* 2000). Miller is a resident of California and nfltoday.com, if it is located anywhere, is also in California. The NFL is a New York company with New York lawyers, who naturally filed the lawsuit in New York. Miller did not do any business directly with New York through nfltoday.com, not even advertising anything for sale. In fact, District Court Judge John S. Martin, Jr., noted that the web site operator "rarely sells anything to his visitors." Yet Judge Martin went on to rule that Miller had to appear in his New York courtroom.

Miller made his income from selling advertising space on the nfltoday.com website. Some of those advertisers were foreign sports books, willing to take bets from Americans. The NFL suit alleged Miller was using its trademarks without authorization and violating its copyrights. Its main complaint was that nfltoday.com was linking (in both a psychological and cyberworld sense) the NFL with gambling, causing damage to the NFL in New York. The website also provided information that might prove useful to anyone who wanted to make a bet on an NFL game. With a name like nfltoday.com, Miller was obviously targeting NFL fans. To the NFL, the final insult was that anyone who clicked on the link to nfl.com would see that site appear in the center of his or her screen, framed by the nfltoday.com site.

As usually happens with lawsuits, there is no way to know for sure whether Miller would have won or lost at trial. It seems likely that the NFL would lose on the merits, because it would have to prove that visitors to Miller's websites were confused by nfltoday.com into believing that the NFL itself endorsed gambling. Most people interested enough in betting on football to go to a site named nfltoday.com and then jump to the official site or an online sports book know exactly how the NFL feels about gambling on professional football games. However, Miller greatly weakened his case by using a name that was virtually identical to the name of the NFL's own T.V. show, "NFL Today."

In the real world, the most important question is often not whether the parties to a lawsuit will win or lose, but how expensive and inconvenient will it be to take the case through trial and appeals. Because California-based Miller had to find a New York law firm and travel 3,000 miles if he wanted to be present at every fifteen minute hearing, the case was settled. And Miller stated that, "as a courtesy to the NFL," he changed nfltoday.com to badbet.com (Court Will Tackle NFL's Suit, 2000).

Online gambling operators and anyone who has any connection with them have to think about civil suits such as this as well as criminal prosecutions. The first case involving the advertising of an Internet gambling website was filed in 1996 in Ramsey County District Court, a state court in Minnesota (*Minnesota by Humphrey,* (1997)). The plaintiff was Hubert H. ("Skip") Humphrey, III, then Attorney General of Minnesota. The named defendants in the case were Granite Gate Resorts, Inc., and its president, Kerry Rogers. Rogers was linked to the Internet entities On Ramp Internet Computer Services, WagerNet, All Star Sports and Vegas.com.

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Rogers intended to sell information on sporting events that would be useful for making wagers; and "to match up bettors on any sport, anywhere." As he told CBS Evening News, "Someone could be taking a bet in Finland and placing that wager against someone in Ecuador." The "vig," or fee charged for betting, would be 2-1/2%, lower than a licensed Las Vegas bookmaker's. The gambling operation would be licensed by the country of Belize.

In December 1996, District Judge John S. Connolly held that his state can regulate Internet betting, when Minnesota gamblers are being solicited. The Court ruled that Skip Humphrey could seek an injunction to keep unlawful gambling advertisements from entering the state. The Court of Appeals in Minnesota agreed, ruling that it was fair to force this Nevada company and its Nevada owner to defend a lawsuit halfway across the country. The justices of the Minnesota Supreme Court were exactly evenly divided, 4-4, so the appellate decision stands as a precedent.

The courts decided only one question, but one of great practical importance: Can the trial courts of a state, called the forum state, exercise power over an out-of-state Internet gambling operator, who directs his advertisements to residents of the forum state? The fight was over what the law calls "personal jurisdiction."

The tests are well-settled: Did the out-of-state defendant have sufficient "minimum contacts" with the state so that it would be fair to try him in Minnesota? (*International Shoe*, 1945). When the lawsuit is based on the contacts the defendant has with the state, such as this claim for false advertising, courts look primarily at whether the defendant purposely directed his sales-pitch to the Minnesota market.

Rogers also made his case weaker by requiring patrons to agree that WagerNet had the right to file suit in an appropriate court in "your state" if any disputes arise. It was difficult for his lawyer to argue that it would be inconvenient to defend in Minnesota. After all, if this Nevada resident could file a lawsuit in that state, he could just as easily defend one there.

It is important to note that the case did not decide that anyone actually did any false advertising. It is not clear that merely advertising on your own website, even if the ads are intentionally misleading, makes you liable for a claim of false advertising in another state. In the case of Granite Gate, it would have been difficult for Humphrey to have won, because the web operator was not yet taking any bets, so there were no damages. But the case never went to trial, because it was too expensive to defend.

Non-gambling businesses are still at risk if they blatantly advertise Internet gambling in a politically charged environment. The Director of New Jersey's Division of Gaming Enforcement filed complaints against Internet casinos in June 2001, not to put the operators in jail. The goal was to remove billboards directly across from state-licensed Atlantic City casinos. And it worked. The billboard company immediately took down the ads (Attorney General Announces Civil Action, 2001).

Conclusions

The laws surrounding Internet gambling are in flux. (Jarvis, Bybee, Cochran, Rose & Rychlak, 2003). Anyone planning to get involved, even indirectly, in this extremely lucrative business has to understand the dangers that arise when laws are unclear. Although the chances of getting into trouble are small, the penalties are enormous, since statutes designed to hit organized crime can come into play. There are ways for individuals and businesses to increase or decrease their exposure to possible criminal or civil action. But while uncertainty reigns, the winners will be operators who are willing to take those risks, especially those overseas who are beyond the practical reach of American law. The losers are responsible operators, like Nevada casino companies, who cannot risk losing their billion-dollar gaming licenses.

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