

Gambling Law Update™
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The Advertising Conundrum

Grand Jury investigations? Subpoenas? Aiding and abetting? What on earth is going on? Advertising for Internet gambling in the United States is an issue that has continued to spark debate among industry participants as well as federal and state lawmakers. Recently, the federal government has begun to harden its stance at both the federal and state levels, against Internet gambling, and at least one portal site has been subpoenaed to appear in a United States federal court in relation to advertising Internet gambling services. Interactive Gaming News (“IGN”) obtained a copy of the subpoena issued to the operator of a portal site to testify October 29, 2003, before a grand jury in the Eastern District of Missouri. The operator of the portal site provided IGN a copy on the condition of anonymity.¹ Citing letters from Department of Justice officials to a handful of trade organizations, advising them not to accept advertising from such businesses since it could be in violation of federal law, the feds, through the subpoena, are seeking all commercial and financial information related to the advertisement of Internet casinos and sports books. The subpoena also calls for the operator to turn over any notes or correspondence relating to the legality of accepting advertising from Internet casinos and sports books.²

However, given the fact that courts have consistently upheld advertising as a form of speech, prosecutors may have wagered more than they bargained for in attempting to regulate advertising for Internet gambling services. The First Amendment provides significant protection

¹ www.igamingnews.com, *US Court Subpoenas Gambling Portals*, www.igamingnews.com/index.cfm?page=artlisting&tid=4553 (09.30.03)

² *Id.*

towards this type of commercial speech. The government's ability to regulate advertising for Internet gambling is not coextensive with its ability to regulate online gambling activity, itself. The prevailing test that has previously been used by the courts to evaluate the legality of any particular gambling advertising material is known as the *Central Hudson* Test.³ Under that Test, the court's first duty is to determine whether the First Amendment applies at all. In doing so, the proper question is whether the advertisement concerns a lawful activity and is not misleading or fraudulent. This produces an interesting conundrum for the future reviewing courts since the legality of Internet gambling in the United States is currently the subject of proposed legislation and heated controversy. Moreover, if the gambling activity is legal in the jurisdiction where it is licensed, that may suffice for purposes of this prong of the Central Hudson Test.

Once it is determined that the First Amendment applies, the courts employ a three part analysis that allows commercial speech to be restricted only if: 1) the government's interest in doing so is substantial; 2) the restrictions directly advance the government's asserted interests; and 3) the restrictions are no more extensive than necessary to serve that interest.⁴ The government may find it more challenging to justify its attempt at regulating, or criminalizing, online gambling advertising because of the markedly different negative effects caused by traditional gambling operations as compared with the online counterpart. The government has traditionally emphasized the 'parade of horrors' when it attempts to justify gambling advertising restrictions, such as the increase of drugs, prostitution and other crime, along with the moral decay of society engendered by the presence of a casino in a community. The same arguments cannot withstand scrutiny when online gaming is involved. Crime does not surround

³ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.E.D.2d 341 (1980).

⁴ For further discussion on this topic, please see authors' article *Advertising Online Casinos - An Analysis of the Legal Rights and Risks* at http://www.firstamendment.com/advertising_casinos.php3

an Internet gambling website. The typical justifications go out the window when online gambling advertising is the subject of governmental regulation. Perhaps in anticipation of this argument, the Justice Department has threatened to rely on the amorphous concept of ‘aiding and abetting’ as the legal vehicle to pursue advertisers of online gambling services. Although the courts have not considered such an argument in relation to online gambling in the past, using the criminal aiding and abetting laws to impose criminal liability against online gambling advertisers is a bit of a stretch, even for a conservative Administration. While this novel approach may win brownie points with the right wing conservatives, it would set a dangerous legal precedent, and runs rough shod over the Free Speech rights of advertisers who are promoting a service that is legal and licensed in its forum jurisdiction. This issue will certainly be the subject of future coverage.

The Advertising Saga Continues. . .

With the arrival of fall, the National Football League season is well underway, and sports book operators are hoping to embark on their busiest and most lucrative time of the year. Wagering on athletic games is the most widespread form of gambling in the United States, according to a 1999 report by the National Gambling Impact Study Commission. Bettors illegally wager an estimated \$80 billion to \$380 billion on sports each year. About 118 million Americans bet on sports, a recent ESPN survey found.⁵ This recent surge in interest in sports betting from the general American public has local regulators, and, in particular, the National Collegiate Athletic Association (“NCAA”), up in arms. Bill Saum, Director of Agent, Gambling and Amateurism Activities for the NCAA, holds the belief that more people are watching the game for the point spreads than for the action. According to him, consumers are converting

⁵ Teresa Black and Shweta Govindarajan, *Sports Gambling is Illegal, but Man Think, So What?*, <http://www.ivpressonline.com/articles/2003/09/10/news/news05.prt> (09.11.03)

themselves into gamblers by believing that because it is published in the mainstream press it is legitimate.⁶ Point spreads, or the margins by which a team is expected to win, are published in newspapers across the country, perhaps legitimizing sports betting in the eyes of the public.

The NCAA maintains a hard-line stance on sports gambling, which officials say damages the integrity of the game, and with the National Basketball Association (“NBA”), are coming together to combine efforts to get radio ads pulled from stations that broadcast their events. Regular listeners of sports talk radio in Memphis have begun hearing a new product advertised on local stations, and the NCAA and the NBA are not happy about it. The ads promoting Internet sports wagering which run locally on WHBQ-AM (560) and WMC-AM (790) have caught the attention of the NCAA and NBA. On Thursday, the NCAA asked the University of Memphis to tell WMC, its flagship station, to quit running the ads. “Our bottom line is that anyone who is representing a team should not be promoting a casino or operation that allows sports gambling,” said Tim Frank, a spokesman for the NBA. University of Memphis’ contract with WMC says nothing about ads promoting Internet gambling, and the NCAA does not have any legislation prohibiting an affiliated station from running them. However, according to Bill Saum, the association is advising member institutions to use their influence to stop the ads.⁷ WMC Senior Vice-President Terry Wood told the Associated Press that the station would continue to air the commercials but key personalities within the University of Memphis broadcasts would not be associated with them. The station receives valuable revenue from the ads and the announcers are also given additional payment for reading them. He said the station has never aired the ads during University of Memphis broadcasts or high school sports and that policy would stay the

⁶ Staff at OnlineCasinoNews.com, *Popularity of Online College Sports Betting Continues. . .*, www.onlinecasinonews.com/ocnv2_1/article/article.asp?id=3940 (09.08.03)

⁷ Teresa Black and Shweta Govindarajan, *Sports Gambling is Illegal, but Man Think, So What?*, <http://www.ivpressonline.com/articles/2003/09/10/news/news05.prt> (09.11.03)

same.⁸ The legality of Internet gambling is an issue that federal as well as state lawmakers are attempting to tackle, however, in the meantime, those in the gaming industry should make themselves well aware of their local regulations governing this matter. As evidenced by the recent subpoenas in the Eastern District of Missouri, and States attempting to regulate gambling within their borders, this type of strong-arming from opponents of gambling is sure to continue while lawmakers deal with this hot topic.

Gambling Around the States

Activists in the Internet gambling arena are taking charge as state and federal governments push further in their attempt to restrain American use of Internet casinos and sports books. Legislators, regulators and gaming interests from around the United States met in Newport, Rhode Island, this past month to discuss issues surrounding legalized gambling such as casino legislation, tribal-state relations and federal efforts to minimize the spread of Internet gambling. “Budget crises have dramatically altered what in many cases have been long-standing relationships between gambling interests and states,” said Florida State Senator Steve Geller, president of the National Council of Legislators from Gaming States. This year 17 of 19 states that considered adding slot or video lottery machines at racetracks opposed the proposals or took no action, he continued.⁹ Maine and Colorado will put the question to voters later this year. Rhode Island could serve as a case study for the eight-year-old non-profit council, which has members from 12 states including Alabama, California, Connecticut, Delaware, Florida, Georgia, Kansas, Michigan, Missouri, Pennsylvania, Rhode Island and Texas. This year, Rhode Island responded to declining tax collections by increasing its share of the profits from its two

⁸ Zack McMillin, *Sports Betting Radio Ads Prompt Concerns*, http://www.gomemphis.com/mca/other_sports/article/0,1426,MCA_1757_2255623,00.html (09.13.03)

⁹ Dave, *US Legislators Meet for Gambling Summit*, www.onlinecasinonews.com/ocnv2_1/article/article.asp?id=3962 (09.08.03)

video-lottery-terminal operators. Gambling revenues have helped Rhode Island avert deep cuts in government services, though some worry the state may be too reliant on gambling.

In the face of opposition from the mainstream casino industry, Senator Jon Kyl, R-AZ, expects his Senate bill S. 627 to restrict Internet gambling to pass Congress this year. Kyl, said that he is willing to talk to gambling lobbyists but pointedly noted that the industry's support is not essential to his bill's passage. "One way or another, we're going to get a bill," Kyl said. "I hope (the casinos) can see their way clear to help us out."¹⁰ Unlike mainstream casinos, the Indian gambling industry generally supports Kyl's bill, which passed the Senate Banking Committee by a 19 to 0 vote in July. The Kyl bill would allow tribal reservations to maintain technological links for bingo and other forms of gambling. The Kyl bill, S. 627, provides for a six-month period for Federal regulators to prescribe regulations, and establish policies and procedures, including enforcement by the Federal Trade Commission and Federal functional regulators. However, the gambling industry is not alone in groups that would be affected by this pending legislation. Banks could be put on the front line in stopping Internet gambling – and they are not happy about it. Katherine Pulley, a spokeswoman for the American Bankers Association, said the group is worried that lawmakers are trying to put badges on tellers. "One big issue, is that someone could send money to a company called, say 'AMC Funtimes' and it could be an online casino. But how do we know," Pulley added.¹¹ The bill also would prevent states from legalizing online wagering within their borders. This restriction would violate states' rights, said Frank Fahrenkopf, president of the American Gaming Association. "This can easily be fixed by including language which would say gambling must be legal in states where the

¹⁰ GamblingMagazine.com, *Senator Kyl Expects Gambling Legislation to Pass*, www.GamblingMagazine.com/managearticle.asp?c=280&a=8510 (10.02.03)

¹¹ RGTOonline.com, *Bank Could Become Gaming Cops*, <http://rgtonline.com/article.cfm?articleId=43900&CategoryName=Headline&SubcategoryName=News>

(Internet) gambling transmission is coming from,” Fahrenkopf continued.¹² If passed, the bill would only be enforceable here in the United States, where most leading credit card companies have already ceased processing payments to gambling Websites after New York Attorney General Elliot Spitzer’s lobbying campaign last summer. So far, no state has specifically legalized Internet gambling. But Internet wagering has tremendously increased from \$445 million in bets six years ago to projected wagers of \$4.2 billion this year on more than 1,800 offshore Websites.

International Gambling Outlook

As regulation of Internet gambling tightens in one area of the globe, the industry is continuing its proliferation into new and unmarked territory in other areas in search of revenue. A controversial gaming regulation reform allowing Internet gambling became law in New Zealand this past month, amid warnings that it would lead people to not even get out of bed to place a bet. The controversial new law, which requires the electronic monitoring of all slot machines within the next three and a half years and does not allow for any more offline casinos, actually has the ironic effect of making gambling easier, from the point of view of anti-gamblers. For example, the New Zealand Lotteries Commission is now allowed to run Internet gambling. “The Internet gambling, to be allowed by the Lotteries Commission, has got to be the worst provision, the worst anti-family provision,” said National MP Judith Collins.¹³ “... (People will) be able to go online with credit cards. They don't even have to get out of bed to gamble. It’s a 24-hour activity and it's going to be taking money out of the communities that can least afford to

¹² GamblingMagazine.com, *Senator Kyl Expects Gambling Legislation to Pass*, www.GamblingMagazine.com/managearticle.asp?c=280&a=8510 (10.02.03)

¹³ Stuff.co.nz, *Controversial Gaming Reform Become Law*, <http://www.stuff.co.nz/stuff/print/0,1478,2656213a6160,00.html> (09.11.03)

lose it. That's the sad thing," she continued.¹⁴ These types of reactions by gambling antagonists stemmed from last minute changes tacked on by legislators in the passing of the bill. Slot machines will also be permitted to accept banknotes (cash) of \$20 NZ, angering social agencies who need a more traceable transaction system to levy taxes on poker playing, which is needed for their social programs.

New Zealand is not the only country eyeing the prospects of gambling. The industry has continued to extend its reach to the far, less developed nations of the world. The Republic of Palau has introduced a new bill seeking to legalize casino gambling within its borders. Senator Lucius Malsol said allowing casino gambling in Anguar State will earn money for the financially troubled Palau government.¹⁵ The bill, which seeks to establish a Gaming Control Commission to license all gaming operations in the state, proposes that after five years it will evaluate the gaming industry to determine its positive and negative effects to Palau.

In Malta, the Chairman of the Malta Financial Services Authority, Joe Bannister, provided an interview for the *Financial Regulator* magazine where he discussed the nation's move from a tax haven to a more European-like regulatory environment and the International Monetary Fund finding their regulatory system "very robust."¹⁶ Malta has an opportunity to be one of the early adapters of Internet gaming legislation, and is one of several European nations that are either considering licensing online casinos from their jurisdictions or have already done

¹⁴ *Id.*

¹⁵ ABC Radio Australia News, *Palau Legalizes Casino Gambling*, www.abc.net.au/ra/newstories/RANewsStories_943419.htm (09.11.03)

¹⁶ IGamingNews.com, *Global Policy Review- September 2003*, <http://www.igamingnews.com/index.cfm?page=artlisting&tid=4516> (08.12.03)

so. However, prior to releasing a final draft of the legislation, the Malta Lotteries and Gaming Authority will be considering comments from all interested parties.¹⁷

Isle of Man Mess

Europe has attempted to distinguish itself further as a leader in the Internet gambling industry, which stemmed in part, from strict regulations put in place by the Isle of Man, a small island-nation off of the coast of Britain which created Internet gambling regulations to offset its declining tourism economy. Those strict regulations, however, have brought to light the possibility that this flourishing center for off-shore casinos in the British Isles could be going on hiatus. Sportech, PLC, owner of Littlewoods Gaming (www.littlewoodscasino.com) is moving its Internet casino from the Isle of Man to Curacao, Netherlands Antilles, so that it can offer more games to its players, according to a press release.¹⁸ Suzanne Judge, Head of Corporate Communication for Sportech, said the regulations in the Isle of Man, “precluded us from offering person-to-person poker games and integrated jackpot games, so therefore we’ve moved to a jurisdiction where we will be able to offer those games.”¹⁹ The Isle of Man has now lost all three of its original licensees, as well as other licenses within the last year. Citing the Island’s regulatory standards, Rank Interactive Gaming called it quits on the operation. Following that move was MGM Mirage, Action Online, Sun International and finally Littlewoods. However, despite the area’s recent departures, the Gaming Control Board says it is still very much open for business and is looking to license more operators. The Island is set to review its regulatory policy, and will contemplate changes to make the jurisdiction a favorable location for players

¹⁷ Staff, *Malta on the Starting Block*, http://www.onlinecasinonews.com/ocnv2_1/article/article.asp?id=4153 (10.02.03)

¹⁸ Press Release, *Cyberluck Licenses Littlewoods in the Netherlands Antilles*, www.winneronline.com/articles/september2003/cyberluck-licenses-littlewoods-netherlands-antilles.htm (09.10.03)

¹⁹ Release, *Littlewoods Leaves Isle of Man for Curacao*, www.igamingnews.com/index.cfm?page=artlisting&tid=4494 (09.08.03)

and operators alike. In line with this optimism, the Department of Trade and Industry has appointed an “e-gaming ambassador,” John Gilmore, whom they say is confident some of the gambling giants can be persuaded to return. Chris Corlett, Chief Executive of the Department of Trade and Industry, is hopeful changes to the regulations can be made this year.²⁰

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²⁰ Isle of Man Online, *Isle of Man Gets Online Gaming Ambassador*, <http://rgtonline.com/Article.cfm?ArticleId=44628&CategoryName=Headline&SubCategoryNam> (09.17.03)