

GAMBLING ON THE INTERNET

REPORT TO THE INTERNATIONAL ASSOCIATION OF GAMING REGULATORS

BACKGROUND AND SCOPE

At its 1998 Annual Conference held in Prague, the International Association of Gaming Regulators established a committee to examine gambling on the Internet from the perspective of the regulator and to report back to the 1999 Annual Conference.

It was recognised that the legality or otherwise of Internet gambling was a matter to be determined by the government of the day for each particular jurisdiction.

This report, therefore, does not canvass the morality of internet gambling, but rather offers some practical assistance to regulators in enforcing the laws as they relate to their own situation. It addresses the legal issues of prohibition and regulation of internet gambling and the technical and operational issues facing the regulator.

GAMBLING ON THE INTERNET: THE LEGAL PERSPECTIVE

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I. INTRODUCTION

As used throughout this report, Internet gambling refers to gambling activity - involving either casino-style games such as blackjack, poker, slot machines and roulette, or betting on sporting events - which is conducted by means of computers accessing the Internet and connecting to sites on the World Wide Web established specifically for gambling purposes.

II. PROHIBITION OF INTERNET GAMBLING

A. Justifications for Prohibition

The justifications generally offered for the prohibition of Internet gambling fall into three broad categories, which are not mutually exclusive:

- Sovereignty Protection. Each jurisdiction has its own carefully crafted policy on gambling, which has usually evolved over time, and which theoretically takes into account the moral, legal and economic considerations that will best address the needs and desires of its population. Internet gambling nullifies this policy by making casino gambling and sports betting available to all citizens with access to a computer. This is not viewed by the government as analogous to having its citizens travel to another jurisdiction where gambling is legal, but, rather, as the equivalent of having outsiders come in and open casinos or betting parlors within the jurisdiction's borders.
- Consumer and Public Protection. It is clear that, to the extent it is controlled at all, Internet gambling involving casino-style games is not and cannot be controlled to the same degree as gambling within real, brick-and-mortar casinos. This raises numerous consumer and public protection concerns including the following: the integrity and financial resources of the operators; the fairness of the games and the possibility of tampering by operators or hackers; the availability of effective consumer-dispute resolution procedures; underage gambling; problem gambling; and criminal activity, including the misuse of patrons' financial information, money laundering, etc. Except for the fairness of the games issue - because the outcomes are public knowledge and are presumably beyond the control of the operators - Internet gambling involving sporting events still raises all the other consumer and public protection concerns.

- Economic Protection. In jurisdictions which have real casinos or sports books, such gambling businesses create jobs, pay taxes, and provide other economic benefits. Real gambling businesses, which are closely regulated and generally bear the costs of their own regulation, also participate in programs designed to address the social problems associated with gambling activities. Internet gambling competes unfairly with real gambling businesses because it is not locally regulated or taxed. It also creates no local economic benefits, simply siphoning off profits and leaving all resulting social problems to be addressed by others. Under this analysis, Internet gambling arguably represents, with regard to jurisdictions which do not welcome it, a completely parasitic industry.

It is possible that developments in technology and regulation of Internet gambling may alleviate some of the consumer and public protection concerns. However, such developments cannot address the sovereignty and economic protection issues.

It should be emphasized that the *theoretical* justifications for the prohibition of Internet gambling are not totally dependent on the *practical* ability of the authorities in a particular jurisdiction to enforce the prohibition, a subject which will be addressed later. As pointed out in the Report of the National Gambling Impact Study Commission (United States, June 18, 1999)(NGISC Report) at 5-9, 5-12, simply because an activity is difficult to control does not mean law enforcement should be forced to stick its head into the sand and act as though the issue does not exist.

Most jurisdictions continue to make and enforce laws against drugs, prostitution, illegal gambling and other vices, even though enforcement efforts are not uniformly successful due to a continuing public demand. The NGISC Report itself at 5-12 recommends

to the President, Congress, and the Department of Justice (DOJ) that the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United States and any foreign jurisdiction.

Moreover, a legal prohibition does not need to be 100% effective in order to achieve its goals. The prohibition will be effective if it deters a *majority* of law-abiding citizens from the undesirable activity. Thus, while determined bettors in a prohibiting jurisdiction may still find ways to gamble on the Internet, most citizens will likely avoid Internet gambling in favor of other, legal methods, at least where such alternative outlets are available and convenient. And most substantial businesses and financial entities - particularly those already involved in legal gaming - will probably shun any industry which is tainted with the stigma of illegality.

B. Legislation Required To Enforce Prohibition

1. Specific vs. General Existing Legislation

Most jurisdictions already have civil and criminal laws against all forms of gambling which are not specifically authorized by law, as well as other forms of criminal activity which may be implicated by Internet gambling. The difficulty with such laws is that they have usually been on the books for quite some time, and may not be clearly addressed to today's technology. The attempted application of such laws to Internet gambling may lead to years of uncertainty and litigation. *See* NGISC Report at 5-6 to 5-7 (identifying multiple areas of uncertainty regarding applicability to Internet gambling of existing United States statute prohibiting the interstate wire transmission of gambling information).

For this reason, most jurisdictions seeking to prohibit Internet gambling have adopted or proposed *new* legislation, which is *expressly* geared toward Internet gambling and is addressed to the state-of -the-art technology. The distinctions between and among such legislation reside in the identity of the party or parties against whom the penalties are directed.

Specifically, it is obvious that, to operate successfully, Internet gambling requires the active involvement of several persons or entities: The operators of Internet gambling sites; Internet service providers, which provide home computer users with access to the Internet including gambling sites; search engines, which locate gambling sites for home computer users; advertisers of Internet gambling sites; financial service providers, *e.g.* banks, credit card companies, etc., which enable the money transfers required for Internet gambling; and bettors, *i.e.* home computer users who participate in Internet gambling. Each of these provides a potential target for prohibitory legislation, as explained in the sections that follow.

2. Legislation against Operators of Internet Gambling Sites

As a historical matter, gambling prohibitions have tended to focus on the *operators* of gambling enterprises rather than on mere *bettors*. This approach has been continued in the legislation thus far adopted or proposed in various jurisdictions to ban Internet gambling. The most significant example of such legislation is the Internet Gambling Prohibition Act of 1999" (S. 692), which is frequently referred to as the Kyl Bill for its sponsor, Senator Jon Kyl, and which remains pending in the United States Senate.¹

The Kyl Bill would create a new section of federal criminal law (18 U.S.C. 1085) which would:

¹A similar, but not identical, bill (H.R. 4427) has been introduced in the United States House of Representatives.

- Make it unlawful for a person or entity engaged in a gambling business to use the Internet or any other interactive computer service to place, receive, or otherwise make a bet or wager or to send, receive, or invite information assisting in the placing of a bet or wager;
- Define gambling business as a business that is conducted at a gambling establishment, or that involves the placing, receiving or otherwise making of bets or wagers, or the offering to engage in the placing, receiving or otherwise making of bets or wagers; involves one or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and has been or remains in substantially continuous operation for a period in excess of 10 days or has a gross revenue of \$2,000 or more from such business during any 24-hour period;
- Impose criminal penalties consisting of - a fine in an amount equal to the greater of the amount that the violator received in bets or wagers as a result of engaging in the gambling business or \$20,000, imprisonment for four years, or both; and
- Provide for concurrent civil remedies, including having interactive computer service providers remove or disable access to an offending Internet site at the request of federal or state law enforcement authorities.

In the State of Nevada, a law has already been enacted to ban Internet gambling. That statute, which is much less detailed than the Kyl Bill, makes it a crime for any person (within or outside of Nevada) to knowingly accept a wager from a person within Nevada through any medium of communication including the Internet. The statute further provides that if the violator is outside the state at the time of the offense, the offense shall be deemed to commence outside, but be consummated within, Nevada. No enforcement mechanisms against out-of-state violators are included.

A proposed bill pending in the State of Illinois would prohibit and establish criminal penalties for Internet gambling and bookmaking. The bill would also provide that premises or buildings knowingly used to conduct Internet gambling constitute a gambling place subject to forfeiture. As is the situation with regard to the Nevada statute, no specific enforcement mechanisms against out- of-state violators are included.

A criminal law already enacted in the State of Louisiana is interesting in that its Internet gambling prohibition extends to:

[w]hoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet, World Wide Web, or any part thereof offering to any client for the primary purpose of the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

As with the other state statutes, no enforcement mechanisms are specified.

3. Legislation against Internet Service Providers

As defined by the Kyl Bill, interactive computer service means any information service, system, or access software provider that uses a public communication infrastructure or operates in interstate or foreign commerce to provide or enable computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet (1085). This definition would encompass an Internet service provider (ISP) or online service provider (OSP), both of which provide access to the Internet for home users.

Although ISPs and OSPs are not themselves the criminal targets of the Kyl Bill, their ability to cut communications between an Internet gambling operator and home users make them an indispensable element in any enforcement scheme. In essence, ISPs and OSPs represent the computer-age equivalent of telephone companies which, under long-standing United States law, are required to discontinue or refuse service to any customer upon notification by a law enforcement authority that the customer is utilizing or will utilize such service to transmit or receive gambling information in violation of applicable law (18 U.S.C. 1084(d)). Similar provisions mandating certain actions by interactive computer services are included in the Kyl Bill.

A pending bill from the State of Texas expressly targets interactive computer services or ISPs. That bill requires that:

a person who provides an interactive computer service to another person for a fee shall block access to direct links to network computers or sites that: (1) would allow the subscriber of the service to violate federal or state laws prohibiting gambling; and (2) are regularly used to violate federal or state laws prohibiting gambling.

Commercial ISPs may nevertheless allow access to the sites specified above if:

(1) the subscriber is at least 18 years of age; (2) the service provider has received a signed, mailed request for the removal of the access block; and (3) the service provider places, on its primary home page, a direct link to information that provides a concise warning regarding: (A) the illegality of gambling on a computer network; and (B) the addictive behavior associated with gambling.

The penalties for violation of these provisions are exclusively *civil* in nature.

A different approach has been suggested in a Statement of the Attorney General of the State of Minnesota on Internet Jurisdiction. In a section captioned *Accomplice Liability*, the Statement says:

Minnesota's accomplice statute provides that one who intentionally aids, advises, counsels, or conspires with another to commit a crime is equally liable for that crime. . . . Therefore, persons or organizations who knowingly assist Internet gambling organizations in any unlawful activity

may themselves be held liable for that unlawful activity. Thus, for example, *Internet access providers* and credit card companies *that continue to provide services to gambling organizations after notice that the activities of the organizations are illegal would be subject to accomplice liability.* [Emphasis added].

Although no actual prosecutions utilizing this theory have been located, accomplice liability provides another means of targeting the activities of ISPs and others whose services are required for the commercial viability of an Internet gambling operation. Indeed, the NGISC Report at 5-12 expressly recommends that, if an Internet gambling ban is enacted in the United States:

The President and Congress direct [the United States Department of Justice] to develop enforcement strategies that include, but are not limited to, *Internet service providers, . . . makers of wireless communication systems, and others who intentionally or unintentionally facilitate Internet gambling transactions.* [Emphasis added].

4. Legislation against Search Engines

Search engines essentially are programs accessible on ISPs that allow home computer users to locate sites on the World Wide Web by using key words or phrases. Because of the tremendous number of Web sites, search engines are essential to the commercial viability of most sites. The only other practical means for home computer users to locate a Web site online would be to see an advertisement for that site on another site containing an automatic or hypertext link. Without search engines or online advertising, commercial Web sites - including those offering Internet gambling - would be forced to utilize more expensive and less effective means of advertising (*e.g.* print and broadcast media, targeted mailings, etc.) to inform home computer users of the existence and address of their Web sites and of the products and services offered there.

The importance of search engines to the commercial viability of Internet gambling sites provides an opportunity for a government seeking to prohibit Internet gambling to make it more difficult for Internet gambling sites to operate. Like ISPs, search engines are generally local, and may be susceptible to criminal or civil restrictions. By exercising control over search engines, governments may be able to concomitantly exert some control, however indirect, over foreign Internet gambling operations by restricting public access to them.

No actual or proposed legislation specifically addressing search engines has been located, although some general statutory prohibitions may be broad enough to include them. Accomplice liability could also provide an avenue for prosecution.

5. Legislation against Advertisers

As indicated in the last section, commercial Web sites - like most businesses - require advertising to be successful. Advertisers can be anything from other commercial Web

sites with hyperlinks to broadcast and print media. And like search engines, advertisers of Internet gambling sites are a potential target for prohibition-minded jurisdictions.

Since broadcast and print media are generally local, legislation prohibiting the advertising of Internet gaming sites and operations would likely be very effective.² For example, as noted in the NGISC Report at 5-8: Florida's Office of the Attorney General mailed letters to media throughout the State advising them to cease and desist advertising for offshore sports books."

Whether because of governmental or self-imposed restrictions, broadcast and print media have a long history of not advertising businesses which sell a product or service that is illegal. Of course, as is the situation with all restrictions on the media, constitutional (*i.e.* free speech) limitations may come into play.

Web sites which carry Internet gambling advertising may or may not be directly subject to the jurisdiction of the prohibiting government. Offshore Web sites will obviously present the same types of enforcement problems as the Internet gambling operations themselves.

²For an example of such legislation, see 18 U.S.C. 1304 (prohibiting broadcast by any licensed radio or television station of advertisements or information concerning lotteries).

6. Legislation against Financial Service Providers

It is obvious that, in order for an Internet gambling operation to be commercially viable, money must flow from bettors to the operator and presumably in the opposite direction as well. The mechanisms for these transfers are the financial service providers, *i.e.* credit card companies, banks, and other companies, that provide the means of funds transfers.

Control of such financial service providers could, therefore, constitute a very potent and effective means of enforcing- albeit indirectly - a prohibition against Internet gambling. In fact, lawsuits, other legal action and legislation have all recognized the potential in such control.

As noted in the NGISC Report at 5-10:

In at least two cases, individuals have named credit card companies and their banks in lawsuits for permitting them to use their credit cards for illegal Internet gambling. The first, in a California state court, stemmed from a bank's attempt to collect a \$70,000 debt, incurred through gambling, on 12 credit cards. The resulting countersuit sought to prevent credit card companies from permitting their credit cards from being used or accepted on Web sites that accept illegal bets from residents of the State of California. A similar federal court case in Wisconsin contends that credit card companies and banks have aided and abetted illegal gambling and therefore should not be able to collect what are illegal gambling debts. [Footnotes omitted].

The NGISC Report at 5-8 also indicates that "Florida has taken an active role [in efforts to regulate or prohibit Internet gambling], including cooperative efforts with Western Union to stop the money-transfer service of 40 offshore sports books."

A proposed bill in the State of Illinois would declare as void all contracts, debts or obligations incurred as a result of Internet gambling. A similar proposed bill in the State of Texas states in part:

A credit card transaction . . . is unenforceable against the obligor if the creditor knew or should have known at the time the transaction occurred that the credit card transaction was an instrumentality used in the commission of an offense [involving Internet gambling].

Because financial service providers will generally be subject to the jurisdiction of prohibiting governments, and because the number of such providers - as opposed to ISPs, search engines or advertisers - is limited, regulation of such providers may prove to be the most viable mechanism for enforcing a ban on Internet gambling. In fact, the NGISC Report at 5-12 expressly recommends:

to the President, Congress and state governments the passage of legislation prohibiting wire transfers to known Internet gambling sites, or the banks

who represent them. Furthermore, the Commission recommends the passage of legislation stating that any credit card debts incurred while gambling on the Internet are unrecoverable.

Credit card companies and money transfer agencies are also recommended targets of law enforcement authorities if a ban on Internet gambling in the United States is enacted. *Ibid.*

7. Legislation against Home Users (Bettors)

As noted at the outset, it is unusual - but not unknown - for governments seeking to prohibit a certain type of gambling activity to criminalize the conduct of bettors. An earlier version of the Kyl Bill (S. 474, 1997) stated:

Whoever (other than a person [engaged in the business of betting or wagering]) knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers, shall be fined not more than \$5,000, imprisoned not more than 1 year, or both.

Although this provision was dropped from the pending version of the Kyl Bill, some enacted and proposed state legislation would make it a crime for home computer users to engage in gambling via the Internet. Of course, the actual detection and prosecution of home bettors is fraught with numerous legal and practical obstacles.

In connection with bettors, one additional matter requires mention. As stated by Professor I. Nelson Rose of the Whittier Law School: "My own solution for fighting gambling on the Internet is for a country to impose a 100% tax on all winnings by its citizens." However tongue-in-cheek this proposal may seem, it does have a serious implication, *i.e.* a government's use of its taxing power over its citizens (including home bettors) may be another avenue by which that government may indirectly seek to prohibit or limit Internet gambling.

C. **Enforcement/Prosecution Legal Issues**

1. Jurisdiction/Extradition

Gambling on the Internet obviously presents many unique jurisdictional issues, the primary one being: Where does the gambling activity actually take place? Is it where the bettor contacts a Web site and places a wager? Is it at the point of financial transactions, *i.e.* where real or virtual money is transferred to or from the bettor or site operator? Or is it at the location of the operator, *i.e.* the computer servicing the Web site?

Although the Internet represents the ultimate multi-jurisdictional venue, simpler issues involving multiple jurisdictions are well-known to the law. In civil cases, due process requires only that a nonresident defendant - such as an Internet gambling operator - have sufficient minimum contacts with the forum state so that such defendant would reasonably anticipate being brought into court there. Put another way, maintenance of the suit in the forum state cannot offend traditional notions of fair play and substantial justice.

Most American jurisdictions utilize a five-factor test in determining whether the assertion of personal jurisdiction over a nonresident defendant is proper. The factors to be considered are: (1) The quantity of contacts with the forum; (2) the nature and quality of those contacts; (3) the connection of the cause of action with the contacts; (4) the interest of the state in providing a forum; and (5) the convenience of the parties.

In criminal cases, Anglo-American common law has long accepted the principle that a person may properly be convicted in a particular state if that person's conduct *or the result of that person's conduct*, take place within that state. Thus, a person firing a gun from State A over the border into State B, and injuring a person in State B, may be prosecuted in State B for the crime. However, unlike the situation in civil cases, criminal jurisdiction generally requires the physical presence of the out-of-state accused, which presence must be secured by extradition or some other means. In fact, one of the recommendations of the NGISC Report at 5-12 is that, assuming a prohibition on Internet gambling in the United States is enacted, the federal government should take steps to encourage or enable foreign governments not to harbor Internet gambling organizations that prey on U.S. citizens.

These theoretical bases for civil and criminal jurisdiction will underpin any legislation seeking to prohibit Internet gambling. Restated in Internet terms, the premise will be that by knowingly making gambling available to citizens of an unwilling jurisdiction, the operators - *regardless of where they may be physically located* - have sufficient minimum contacts with, and are causing harm *within*, the jurisdiction which harm the government has power to prevent and punish.³

Of course, a civil judgment against a nonresident defendant may ultimately be worthless if there are no local assets which can be used to satisfy the judgment. And it is unrealistic to expect that jurisdictions which license and tax operators of Internet gambling sites will willingly turn such operators over to jurisdictions seeking to prosecute them criminally. However, these difficulties do not necessarily doom all attempts at prohibition, as indicated earlier.

³The validity of this premise has been accepted in judicial decisions in the United States. *See, e.g., AT&T Corp. v. Coeur D'Alene Tribe*, Dkt. No. CV97-392-N-EJL (United States District Court, D. Idaho 1998)(holding that Indian lottery, whose operation took place on reservation but which accepted phone orders for tickets from bettors in other states, was not restricted to Indian lands and thus was illegal under the law of the states from which tickets were purchased); *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Ct. App. 1997), *aff'd by equally divided court*, 576 N.W.2d 747 (Minn. 1998)(holding that an American corporation, which operated an Internet gambling site based in Belize, was properly subject to the civil jurisdiction of a Minnesota court where the site had knowingly accepted business from Minnesota residents).

2. Scienter

Most criminal violations require that the actor possess some *scienter*, *i.e.* that degree of knowledge that would make an individual legally responsible for the consequences of his or her act. Usually, the *scienter* requirement is satisfied if the person knows that he or she is committing the act which is made criminal. Sometimes, knowledge that the act is unlawful is also required.

Of course, within constitutional limits, defining the elements of a crime is solely a function of the legislative body. Thus, a government seeking to prohibit Internet gambling may enact a prohibition which requires the least, or the most, by way of *scienter*.

Based on the existing models, it is assumed that most prohibitory statutes will not adopt an absolute liability approach, but will require some *scienter* or knowledge on the part of an Internet gambling operator that such operator was actually accepting bets from home computer users located in the prohibiting jurisdiction. But how can such *scienter* be established?

In test cases brought in the States of Missouri and Minnesota, the facts demonstrated that state investigators made no effort to hide their places of residence from the operators of certain Internet gambling Web sites, and the operators thereafter freely accepted the investigators bets. The operators actions were subsequently held by courts to conclusively establish *scienter*, either as a prerequisite for the exercise of jurisdiction or as an element of a criminal violation. These results suggest that in order to avoid legal liability, Internet gambling operators may be required to keep themselves informed regarding which jurisdictions have prohibited Internet gambling, and to utilize some mechanism for screening out bettors from those jurisdictions.

How active and effective such screening mechanisms must be is a highly debatable issue. It is likely that including a generalized warning to bettors to comply with their own local laws, and then accepting all bets, would be viewed by a court as willful blindness, the equivalent of *scienter*. More active screening methods would include requiring proof of residence, blocking access to addresses which indicate origin in a prohibiting jurisdiction, and precluding access to individuals whose method of funds transfer indicates residence in a prohibiting jurisdiction. No such screening method may be completely effective.

As summed up in A. Cabot, *The Internet Gambling Report* (3rd ed. 1999):

A court may infer that an operator knowingly accepts wagers from the United States if the prosecution shows that wagers were placed from the United States, that the operator knows that most Internet users are U.S. Citizens that can access his site, that the operator took no precautions to prevent them from accessing the site and other factors suggest that these persons were U.S. Citizens, such as the location of their bank accounts. On the other hand, an operator that takes extraordinary precautions is unlikely to be convicted even if some knowledgeable Internet users figure

out ways to avoid the site's precautions and place a wager. Where, in between these two points, the line changes from "knowingly" to "unknowingly" is yet to be determined.

III. REGULATION OF INTERNET GAMBLING

A. Justifications for Regulation

There are essentially two independent justifications for regulation - as opposed to prohibition - of Internet gambling. The negative justification is that Internet gambling is already a reality, and that, even if prohibitory legislation were to be adopted, attempts at enforcement would ultimately prove impractical and ineffective. There is a substantial basis for this view, as detailed in the NGISC Report at 5-10 to 5-11.

The positive justification for regulation follows from the negative, *i.e.* if Internet gambling already exists and cannot effectively be prohibited, regulation - to the extent it can practically and effectively be accomplished - represents a superior alternative to the absence of regulation. Regulation, at least, can address some of the consumer and public protection concerns identified earlier. It can also be used as a means of generating tax revenues and other economic benefits for the regulating jurisdiction.

B. Existing or Potential Legislation Required for Regulation

According to the NGISC Report at 5-1n.5:

The countries with laws in place to extend Internet gambling licenses include: five territories within Australia, Antigua and Barbuda, Austria, Belgium, Cook Islands, Costa Rica, Curacao, Dominica, Dominican Republic, Finland, Germany, Grand Turk, Grenada, Honduras, the territory of Kalmykia in Russia, Liechtenstein, Mauritius, St. Kitts and Nevis, St. Vincent, South Africa, Trinidad, Turks and Caicos Islands, four territories in the United Kingdom, Vanatu, and Venezuela.

With this many countries involved in Internet gambling, there is an abundance of existing legislation providing *authorization* for Internet gambling. However, *regulation* of Internet gambling represents a completely separate issue.

In fact, one of the main obstacles to consumer confidence in Internet gambling has been that such gambling was not regulated by any top-level country with a history of credible and effective regulation of traditional casinos and sports books. This may be changing, as several jurisdictions - particularly those in the Australian region - have adopted or proposed legislation which, while authorizing Internet gambling, also seeks to regulate such gambling in a credible and effective manner.

A model of such legislation is the Interactive Gambling (Player Protection) Act of 1998 of Queensland.⁴ As summarized in that Act, its objectives are as follows:

- (a) to regulate and control gambling (interactive gambling) accessible from the home involving interactive games in which the players participate by means of the internet or through some other telecommunication medium;
- (b) to provide protection for players of interactive games; and
- (c) to provide a basis for implementing an inter-jurisdictional regulatory scheme for:
 - (i) the reciprocal recognition between participating jurisdictions licences, authorisations and other administrative acts;
 - (ii) the regulation and control of interactive gambling in the participating jurisdictions on a cooperative basis; and
 - (iii) the sharing of tax derived from interactive gambling on an equitable basis.

Various sections of this Act, and its implementing regulations, address themselves to the many aspects of each of the objectives. Of course, the accomplishment of any and all of these objectives is dependent on the actual efficacy of Internet gambling regulation.

The key to the Act is its contemplation of a cooperative scheme between Queensland and other, participating jurisdictions for the regulation and control of interactive gambling. To be considered participating, a jurisdiction must adopt complementary laws, and must enter into an intergovernmental agreement with Queensland. This entitles the participating jurisdiction to remittance of that portion of the interactive gambling tax revenue collected by Queensland from its licensed operators which is attributable to Internet gambling play by residents of the “participating” jurisdiction.

Essentially, the Queensland law is intended to provide an incentive for other jurisdictions to permit their citizens free access to Internet gambling as provided by Queensland licensees. In exchange, such jurisdictions will receive tax revenues which they would otherwise not have realized, and without much cost of regulation.

What is conspicuously absent from the Queensland Act is any requirement that its licensees screen out or otherwise block access to residents of jurisdictions which prohibit Internet gambling. The theory is apparently that cooperating jurisdictions can share tax revenues, but prohibiting jurisdictions are on their own.

This approach may lead to friction between jurisdictions which have otherwise cooperated in the regulation of traditional gaming. As an example, a gaming magazine recently quoted a spokesman for the United States Department of Justice as stating that the manager of a certain Internet gambling operator in Australia “could already be arrested for taking Americans bets if he enters the U.S.”⁵ Of course, this situation

⁴The Queensland Office of Gaming Regulation (QOGR) Web site, www.qogr.qld.gov.au, contains information on various forms of gambling regulated by QOGR. In particular, the site contains a link to Interactive Gambling and a subsequent link to Applying for an Interactive Gaming Licence, which contains detailed information including draft technical specifications and a control system outline. A further link to the Office of the Queensland Parliamentary Counsel leads to electronic versions of Queensland's legislation.

⁵AGA Boss: *Australia Model for U.S. Net Bets*, National Gaming Summary, May 24, 1999.

differs little from that which exists today between those jurisdictions which prohibit Internet gambling and those which authorize or license such gambling.

IV. COOPERATION BETWEEN ENFORCEMENT AGENCIES

A. Justifications for Cooperation

The justifications for cooperation between enforcement agencies regarding the transfer and use of sensitive information are substantially the same for Internet gambling as they are for the more traditional forms of legalized gaming. The global economy, as well as consolidation within the gaming industry, has resulted in more multi-jurisdictional gaming companies.

It is to the benefit of such gaming companies, as well as gaming regulators, that regulators be able to transfer and use information which, although obtained by one set of regulators, will be of interest to all. This reduces expenses for the gaming companies and helps insure that all gaming regulators have all the information they need to properly perform their functions.

Of course, conflicts between jurisdictions over Internet gambling policy may affect the level of cooperation which exists. For example, a jurisdiction which prohibits Internet gambling may be less likely to cooperate with a jurisdiction that, while licensing Internet gambling operators, does not require such operators to honor the prohibition imposed by the first jurisdiction. On the other hand, a jurisdiction that licenses Internet gambling operations may be reluctant to assist any jurisdiction which could seek to prosecute one or more of its licensees.

B. Legal Authority Required for Cooperation

In obtaining confidential information from gaming applicants or licensees, most jurisdictions employ a *quid pro quo* approach. This means that the applicants or licensees are required to provide all sorts of sensitive information to the gaming regulators. In exchange, the gaming regulators are required to maintain the confidentiality of such sensitive information, unless some exception to the general rule of confidentiality exists.

In most jurisdictions, such an exception is made for the transfer of sensitive information to gaming regulators in other jurisdictions. Usually, the basis of the exception is statutory. The statutory provision may be fleshed out by an implementing regulation or, in some cases, by an agreement or memorandum of understanding between or among regulatory bodies specifying what information may be transferred and how such information may be used by the receiving agency.

There appears to be nothing unique about information involving Internet gambling which would require an approach to cooperation between regulators different from that which already prevails with regard to traditional forms of legalized gaming. Put another way, whatever statutes, regulations or agreements or memoranda of understanding are currently in existence, should provide a sufficient basis for continuing

cooperation between and among regulators even insofar as Internet gambling and Internet gambling operators is concerned. The only possible exception would be in a situation like that provided for in the Queensland Act, which contemplates intergovernmental agreements which would be supplemental to anything which presently exists, and which would presumably need to be worked out at political and diplomatic levels.

GAMBLING ON THE INTERNET: THE REGULATORY PERSPECTIVE

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INTRODUCTION

The internet presents people with the opportunity to access and interact with a multitude of data bases that provide information and services. It is difficult if not impossible to prevent people having access to the internet, and difficult if not impossible to censor the content of what they see.

Gambling is one of the many services available using the internet. Gambling in general is also an activity that most governments consider necessary to intervene in and control, either through regulation or prohibition. Some have already chosen to prohibit, some to regulate.

Regulation does not imply that every gambling activity on the internet is permitted nor considered legal. Regulation is selective. It legitimises licensed operators and approved games, and prohibits those deemed unsuitable by the regulator.

FRAMEWORK FOR LEGISLATION

Legislation can set out a regime for the regulation of on-line gambling in much the same way that casino gaming is regulated.

The legislation can be drafted to require that operators of internet gambling sites be licensed. Operators may be encouraged to apply for a licence and be subjected to regulation by making it illegal to operate an unlicensed business, or a computer server or to run a related business activity within a jurisdiction that enables internet gambling, or to offer or advertise playing internet games. Persuasion can be reinforced through the establishment of an active disciplinary and compliance regime undertaken by an independent regulator.

Major issues to be covered could include:

- Probity
- Player Protection
- Responsible Gambling

It is essential that new legislation define the scope of gambling products or games that are to be permitted and regulated in accordance with legislation applying to the internet. This is particularly so where there are existing legal gambling products using telecommunications, such as telephone betting on horse racing. In these cases, to avoid confusion, it is recommended that the definition excludes gambling products that are already regulated by other legislation, even if they have a telecommunications component such as wide area linked jackpots on slots or VLTs, telephone betting or lotteries sold through e-commerce.

In recognition of the global nature of internet gambling, it is considered that effective regulation is best achieved through a cooperative approach amongst jurisdictions. Legislatures may wish to consider administrative arrangements to foster cooperation across jurisdictional borders. Legislation or memoranda of understanding can be constructed to provide mutual recognition of licensed interactive gaming providers, players and products, together with inter-governmental agreement for cooperative tax sharing and information sharing amongst participating jurisdictions.

PROBITY

Any licensing regime should aim to protect the public interest through ensuring appropriate standards of honesty, character and integrity of the operator and its associates. As part of a licence application process, the intending operator and its associates would be subject to investigation and assessment of probity and sources of finances.

In determining suitability, regulators can decide for themselves on how much weight should be placed on the extent to which an applicant or operator engages in making its internet gambling sites accessible to jurisdictions that have prohibited this activity. For example, regulators could require that an applicant or operator take all reasonable steps to block access by residents in such jurisdictions, or the regulator may take into account legal action taken by those jurisdictions against the applicant or operator.

In a contrary approach, regulators may choose to ignore what an applicant or operator makes accessible outside of its jurisdiction and leave prohibiting jurisdictions to pursue enforcement on their own.

Such an approach may lessen the willingness of regulators to cooperate in the regulation of traditional gambling. Friction between jurisdictions may also be exacerbated by a perception that jurisdictions that permit licensed internet gambling isolate themselves from bearing the social and economic costs of problems gamblers residing in jurisdictions where internet gambling is prohibited.

PLAYER PROTECTION

With terrestrial forms of gambling, aggrieved players can deal with the operator or regulator with relative ease. However, the ethereal nature of the internet can have the operator physically more remote from the player and regulator. In these circumstances, player protection may require the regulator to be more directive and prescriptive in its approach to policing internet gambling.

The regulator can protect the interests of the player by mandating or approving critical operational processes and procedures, and approving equipment and games,

Operational controls can be imposed to specify how player accounts are held, how and when prizes must be paid. Operators who cannot demonstrate a clear ability to pay major prizes from existing financial reserves could be required to lodge a guarantee from a third party with that capability (e.g. financial institution or parent company)

Additional player protection can be gained by requiring that the premises, internal control systems and equipment for the games be subject to regulator approval. As with the approval of other forms of gambling products, the operator may be required to demonstrate that the system provides effective protection of player entitlements and can be easily audited by the regulator to confirm that all parties are receiving their correct distribution from the product. Moreover, a heavy penalty could apply for unreasonably withholding winnings or money held in a player's account. Increased player confidence can be engendered by banning the operator's employees from gambling on the operator's site.

Player protection can be enhanced by having internet game rules subject to an approval process with an enforceable requirement that the games be conducted in accordance with those rules. Before approving a game, the regulatory body may wish to satisfy itself that:

- the game is not designed to give the player a false expectation by misrepresenting any event;
- the rules of the game are not unfair or misleading;
- the rules of the game are available to the player and the game operates and interacts with the player strictly in accordance with the rules;
- the game has a statistical return to the player of at least an advertised minimum unless the game rules make the house advantage clear to the player.

If considered desirable, a minimum return to player can be stipulated.

RESPONSIBLE GAMBLING

The interactive nature of internet gambling and the level of computer intelligence available to the player presents an opportunity to impose conditions conducive to the promotion of "responsible gambling".

Specific measures may include requiring that:

- players are registered with the operator (i.e. there is no 'casual' gambling).
- registered players identify themselves to the operator.
- registered players must have funds in their accounts with the operator (credit betting is prohibited).
- access to minors is denied (it be an offence for an operator to register a minor as a player).
- there is a means for people to self-exclude themselves from an internet gambling site.
- players can set limits with the operator for the total amounts to be wagered, either for a total session or for each bet.

- operators to make available on their web pages information on contact points for problem gambling services.

RESPONSE TO UNREGULATED INTERNET GAMBLING

In a jurisdiction where internet gambling is regulated, it is likely that there will be unlicensed operators offering games that have not been subject to an approval regime. In these circumstances, the regulator can either:

- block access to the internet gambling site of the unlicensed operator;
- prosecute breaches of legislation; or
- ignore the offenders.

BLOCKING ACCESS

In determining the extent to which a regulator may be prepared to pursue prohibition of unlicensed internet gambling, it is important to understand the nature of the internet and the feasibility of blocking access.

Internet communication, in terms of a receiver and a provider of information, requires each to be identified with an “address” so that the computers (routers) that direct the “packets” of information from the sender to its end destination can route the packets to the appropriate destination. This is done by using Internet Protocol (IP) addresses and Universal Resource Locaters (URLs). A URL appears to the end user as a page name (such as <http://www.gamblewithme.com.zc>) but is actually a set of numbers forming an IP address uniquely identifying that information source.

The Australian Commonwealth Scientific and Industry Research Organisation (CSIRO) reported in June 1998 on the technical aspects of blocking material which is delivered over the Internet (Blocking on the Internet: a Technical Perspective by Phillip McCrea, Bob Smart and Mark Andrews, Mathematical and Information Services). The report can be accessed at <http://noie.gov.au/report/blocking.html>. It concentrated on what can be done to block content which has already been identified by some party as being illegal or offensive.

According to the report, content blocking on the internet can take place at two levels:

- application level - e.g. blocking a particular web page or ftp (file transfer protocol) site by specifying the Universal Resource Locator (URL) of the site (or a particular page or file within a site), or by blocking an entire news group,
- packet level - which requires routers to examine the Internet Protocol (IP) address of the sender of a packet, and compare it with a supplied “black list”.

Application level blocking

Internet Service Providers (ISPs) who provide access to the Internet to end-users are generally suggested as the enforcers of blocking at the application-level. To achieve this, ISPs would direct access, by their end user clients, to the Internet via a proxy server. The ISP then requires each end user client to configure his or her web browser to “point” to the ISP’s proxy server. The ISP’s proxy server then compares every end user client’s request for a URL, such as a specific page, a link within a page (e.g.: a banner add for Gamblewithme Cyberspace Casino or a URL to Gamblewithme Casino embedded in a cyber news article’s text), with a supplied ‘black list’. If the requested URL is black listed the proxy server simply denies the end user’s request. This type of content blocking has been attempted in countries such as Singapore and China.

A number of technical and non-technical difficulties are discussed in detail in the CSIRO report.

Technical difficulties include the failure to capture non standard address configurations, renaming of banned sites, translation services to disguise sites, alternate site names, adverse impacts on reliability of proxy servers on allowed content, and failure to block unsolicited content.

Non-technical issues include the failure to capture organisations that do not access the internet through an ISP but through their own servers; the additional costs imposed on ISPs that do not use proxy servers; dilemmas faced by ISPs in being the moral arbiter of content; the burden of maintaining, updating and distributing a black list; and the subsequent desirability and attraction of a black list.

Packet level blocking

Within the network of computers that make up the Internet are “routers”. Routers serve the specific purpose of receiving information packets and directing each packet to an output port that takes the packet closer to its destination. To do this routers examine the packet, read the IP address to which the packet is being sent to, compares this against a set of routing tables and determines the output port which will best take the packet closer to its destination.

Generally, a router only examines the destination address of the packet. However, a router can be made to examine the source address that is usually contained in the packet. Once the router has determined the source address it can then be required to compare this against a “black list” of prohibited sources, similar to the black list referred to in the application level blocking section. If the source address is on the black list the router simply determines not to send the packet to the output port thus precluding the end user from receiving the packet.

According to the CSIRO report, most internet content resides on servers outside of Australia. It would, therefore, be more efficient to effect packet level blocking through a relatively small number of Backbone Service Providers (BSPs) who provide international internet gateways. This can be implemented by using the BSPs’ router Access Control Feature.

A number of technical and non-technical difficulties are discussed in detail in the CSIRO report.

Technical difficulties include the indiscriminate nature of packet level blocking and possible adverse consequences for e-commerce; the ease with which blocking can be bypassed; and the inadequacy of existing technology. Significant non technical difficulties are that not all overseas' traffic passes through a BSP, and BSPs would incur additional operational costs in configuring routers to implement blocking.

The CSIRO report concluded that the effectiveness of either blocking method is limited.

The Role of a Regulator

Whatever blocking method is employed, someone would have to create, maintain and distribute a black list of banned gambling sites and ensure that the ISPs or BSPs block the black listed sites. Legislation may be required to provide powers to force the ISPs and BSPs to block prohibited sites to ensure that they are not assisting in the conduct of illegal gambling. Problems in enforcing compliance would be encountered in dealing with ISPs and BSPs located outside of the regulator's jurisdiction.

The task may prove to be onerous. For example, enforcing compliance in blocking via ISPs within Australia would require the regular monitoring and identification of gambling sites, of which there are between 400 and 600 gambling sites in the world, and advising and monitoring the performance of approximately 600 ISPs in blocking access to those sites. The magnitude of the task may be reduced, if blocking was done by the BSPs. However, this is considered to be a crude method of censoring undesirable content. A complete website would have to be blocked, including all webpages containing acceptable content, in order to deny access to unacceptable information.

The Australian Commonwealth government has recently enacted an Online Services Act primarily aimed at banning pornography on the internet. The Act prescribes powers for the use of software to block unsuitable content. At this stage, gambling has not been included in the provisions of the Act.

Experience indicates that similar legislation may be subject to attack from two fronts. Civil liberties groups can object to censorship, arguing that citizens will be denied the right to choose for themselves what they wish to see. Businesses can object to moves that will increase the costs of using the internet to conduct business and slow down the speed of transactions. They consider that these technical burdens are serious impediments to the development of an information economy. Associations representing ISPs can seek to discharge their responsibilities by offering to provide down loaded software to end users who wish to block out prohibited sites.

CONCLUSION

Businesses and communities around the world are having to deal with the accelerating changes accompanying the rapid emergence of a truly global economy - a phenomenon commonly referred to as "globalisation". Increasing levels of international trade, integration of

production and distribution, and technological advances are putting pressures on the ability of sovereign states to sustain a sense of identity and maintain community values.

The gambling industry is and has been at the forefront in dealing with the consequences of the current era of “globalisation” and its earlier manifestations. Advances in communications which traverse geographical borders have allowed people to participate in gambling activities emanating from outside of their state, province or country. For many years, postal services enabled people to buy lottery tickets from other countries. Telecommunications then allowed them to wager and place bets on outcomes determined elsewhere. With the advent of the internet, instant and interactive gambling is now available worldwide.

Currently there are an estimated 400 to 600 internet gambling sites offering virtual versions of poker machines, casino style games and wagering. These sites are easily accessed by anyone connected to the internet. The extent to which the games are fair, the prospects of receiving payments, and the security of financial transactions is uncertain for most players.

A decision to regulate not only acknowledges the technical difficulties of prohibition but also the inherent contradiction in making legal particular gambling activities that take place in specific locations (e.g. casinos) but making them illegal when they are conducted in the home. The porous nature of the internet can render futile, attempts to erect and maintain barriers to internet gambling.

Regulators have often had to deal with gambling products and services emanating from outside of their jurisdiction. However, the internet poses a new set of challenges. When the content of the information transmitted over the internet is considered undesirable, jurisdictions can either try to prohibit, regulate or choose to ignore the transfer of that information.

This report has dealt with internet gambling. However, internet gambling is just one example of gambling products arising from developments in information and communications technology. Similar challenges for the regulator are likely to emerge from interactive telephony and digital television. The shared values and expectations of a community reflected through its political processes will determine which response is adopted.

In the end, effective prohibition or regulation will depend on the quality of the technology at the disposal of the regulator, the legislative and coercive powers available, the commitment and skills of the regulator to use them, and close co-operation with other regulators.