

CALLING THE INTERNET BLUFF: THE INTERPLAY BETWEEN ADVERTISING AND INTERNET GAMBLING

I. INTRODUCTION

The advent of the Internet and the difficulty of regulating a market that can transcend borders has become a growing concern for the regulation of the gambling industry.¹ Both gambling and the Internet have developed into prevalent aspects of American life. It is estimated that Americans spend \$70 billion a year on gambling, approximately three times as much as is spent on other forms of entertainment combined, including movies, concerts, sports, and theater.² Another study estimates that 62 million Americans now have access to the Internet.³ As increasing numbers of Americans began to use the Internet a comparable increase in Internet gambling⁴ activity and spending has occurred.⁵

Courts have held Internet gambling facilities are illegal in the

1. See 141 Cong. Rec. S19113

2. USA Today Research, *States, Cities Ignore Odds, Place New Bets on Gambling*, USA TODAY, June 16, 2003, at 13A, available at LEXIS, News Library. See also, Christiansen Capital Advisors LLC, *Gross Annual Wager Report*, available at <http://www.cca-i.com> (last visited Nov. 17, 2003) [hereinafter *CCA Report*].

3. Testimony at House by Judiciary Committee, (July 16, 2003), as reported by Senator Ron Wyden in *Bills to Ban Unfair Net Taxes Makes Progress in Senate*, available at http://wyden.senate.gov/media/2003/07162003_inettax.html.

4. United States General Accounting Office Report to Congressional Requesters: *Internet Gambling* (Dec. 2002), [hereinafter *GAO Report*], available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-89>. "Internet gambling involves any activity that takes place via the Internet and that includes placing a bet or a wager." *Id.*

5. Anthony Cabot and Robert Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 9-10 (2002). "More than forty percent of American households had access to the Internet in August 2000. . . Moreover, Depart of Commerce research shows that Internet usage is growing among all Americans regardless of income. Increased Internet use has led to a comparable increase in Internet wagering." *Id.* Christiansen Capital Advisors LLC, *Gross Annual Wager of the United States, Table 4: 2001 Gross Gambling Revenues by Industry and Change from 2000*, available at <http://www.cca-i.com>. Between the years 2000 and 2001, consumer spending on Internet gambling increased by more than 89%. *Id.*

United States,⁶ but this has done little to hinder the growth of the industry.⁷ Because the Internet provides immediate, inexpensive access to websites in other countries, people have around the clock access to sites that operate outside the United States. Today, approximately 1,800 offshore websites provide online gambling services.⁸ Online gambling entices us through all forms of advertisements, including radio, newspaper, television, billboards, and web pop-up ads, to target customers.⁹ In particular, children are prime targets of the advertising campaigns.¹⁰

Attempts to prohibit the use of online gambling sites have proven to be a daunting obstacle for the United States government. The advent of Internet gambling in 1995¹¹ has undermined previous anti-gambling laws which did not address the impact technology would have on gambling.¹² In part, the current law being used to stop Internet gambling is not clear as to its applicability and is

6. See *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), *cert denied*, 122 S.Ct. 2587 (2002). See also *GAO Report*, *supra* note 4. "The Wire Act prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires." *Id.* at 12. "[T]o date only the Wire Act has been applied in the federal prosecution of activity relating to Internet gambling." *Id.* Not all courts agree on the applicability of the statute. *Id.*

7. *CCA Report*, *supra* note 2. 2001 Gross Revenues in consumer spending over \$2 billion. *Id.* See also *GAO Report*, *supra* note 4. Bear, Sterns & Co. estimates \$5 billion in revenues for 2003. *Id.*

8. *GAO Report*, *supra* note 4, at 1.

9. See *supra* note 6, at 70. See also Mark D. Schopper, *Internet Gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme*, 5 CHAP. L. REV. 303, 305 (2002). "Internet gamblers locate gambling websites much the same way as they would any other website: through search engines, online advertising, or a variety of other methods." *Id.* Clare Saliba, *New Jersey Takes Aim at Offshore Internet Casinos*, *E-Commerce Times*, June 19, 2001, available at <http://www.ecommercetimes.com/perl/story/11357.html>. New Jersey filed civil lawsuits against three offshore Internet gambling sites. *Id.* Prosecutors state the defendants advertised on billboards in New Jersey. *Id.*

10. Federal Trade Commission, *FTC Warns Consumers about Online Gambling and Children*, June 26, 2002, available at <http://www.ftc.gov/opa/2002/06/onlinegambling.htm>. About 20% of children oriented game sites sport Internet gambling advertisements. *Id.* See Robert MacMillan, *Kids Targeted by Internet Gambling Ads*- FTC, June 26, 2002, available at <http://www.washingtonpost.com>. See also American Psychiatric Association Advisory on Internet Gambling: From the committee on treatment services for addicted patients (2001), available at http://www.psych.org/news_stand/internetgamblingadvisory11601.pdf [hereinafter *APA Advisory*].

11. Nat'l Gambling Impact Study Comm'n, *Final Report*, at 2-15 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/finrpt.html> [hereinafter *NGISC Final Report*].

12. *Id.* at 5-6

causing discrepancies regarding its validity among the states.¹³

Traditionally, gambling has been regulated by individual states.¹⁴ However, the nature of the Internet allows online activities to traverse borders, making individualized state law problematic.¹⁵ Congress has the ability to regulate Internet gambling based on its powers under the Commerce Clause.¹⁶ The ability of the Internet to cross state and national borders qualifies for application of the Clause. Although there has been resistance in allowing the federal government to police traditional state powers, there has been strong support for such federal interference in the Internet gambling context, including the National Gambling Impact Study Commission, the National Association of Attorneys General, and the Federal Judiciary.¹⁷

The Internet gambling industry is vastly increasing the problems associated with gambling addiction and is taking advantage of impressionable young adults by allowing access to gambling opportunities from a home or school computer without warnings of the dangers. Discrepancies in the application of current law to Internet gambling is preventing effective control over the industry. A solution to the harm caused by Internet

13. GAO Report, *supra* note 4, at 12.

14. *Id.* at 11. "In general, gambling is a matter of state law, with each state determining whether individuals can gamble within its borders and whether gambling businesses can legally operate there." *Id.*

15. NGISC Final Report, *supra* note 11, at 5-9. States have expressed a desire for federal control. *Id.*

16. U.S. CONST. art. I, §8, cl.3. Congress has the power to regulate commerce that is among the several states or with foreign nations. *Id.*

17. NGISC Final Report, *supra* note 11, at 3-17. "The Commission recommends to state governments and the federal government that states are best equipped to regulate gambling within their own borders with two exceptions- tribal and Internet gambling." *Id.* The National Association of Attorneys General has also called for federal action, a rare stance for an organization that is usually "against federal intrusion into areas of traditional state responsibility, such as gambling." *Id.* at 5-9. See also Statement of Kevin V. Di Gregory, Deputy Assistant Attorney General, Criminal Division, Before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representative, Concerning Gambling on the Internet, Presented on June 24, 1998, available at <http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm>.

To be perfectly clear, however, the Department believes that many forms of Internet gambling can be effectively prosecuted under existing state and federal law. Because most methods of connecting to the Internet involve the use of 'wire communication facilities' as defined in the Section 1084, anyone in the business of betting or wagering who transmits or receives bets and wagers on sporting events via the Internet is acting in violation of the Wire Communications Act. In appropriate cases, the Department will bring prosecutions under this statute. *Id.*

gambling is needed.

This article will focus primarily on the obstacles as well as the advances in the legal battle against Internet gambling. Part two addresses the current Internet gambling industry. Part three focuses on past, current, and proposed legislation attempting to prohibit Internet gambling. Part four will briefly review the regulation of credit card use on gambling sites as an intermediate device to hinder online gambling. Part five discusses the jurisdictional obstacles encountered when pursuing companies located outside the United States. Part six will focus on the role of advertising in Internet gambling and propose that a ban on such advertising may prove an effective intermediate device to controlling the Internet gambling industry.

II. CURRENT INTERNET GAMBLING INDUSTRY

Very little stands in the way of an individual's, including a child's, ability to gain access to an Internet gambling website. A person can perform a general search for online gambling sites using a search engine, or one can seek out an Internet gambling site seen in an advertisement. Once linked to such a site, a gambler has many payment options to establish an account.¹⁸ There are quick and easy directions available to help start an account.¹⁹ The payouts are just as easy: winnings can be distributed through checks by mail, bank drafts, or be credited to the gambler's account.²⁰

With a mass of sites available²¹ and a multitude of different games on each site,²² it is easy to find something that appeals to all preferences and age groups. The two main types of gambling to

18. See e.g. Worldwide Gamble Online Casino and Sportsbook, available at <http://www.worldwidegamble.com>. This site allows players to use Visa, MasterCard, Bank Wire and FirePay. *Id.* See also Gambling Navigator, available at <http://www.gamblingnavigator.com>. Includes the following statement:

Every online casino accepts Visa and MasterCard. However, it is not certain if an online casino will take YOUR card, which is due to some bank policies in the United States. These banks are trying to take control over how you can or cannot spend your money. Have you suffered from these problems with your credit or debit card in the past? Or do you not won a Visa/MC? Then you might want to check out our list of online casinos, which accept different ways for deposits. *Id.*

19. See e.g. *supra* note 18. To open an account a gambler clicks on the "Join Now" icon. *Id.*

20. Schopper, *supra* note 9, at 305.

21. GAO Report, *supra* note 4, at 1.

22. See e.g. Worldwide Gamble Online Casino and Sportsbook, *supra* note 18.

choose from are the casino-style games and sports wagering.²³ Wagering options have become increasingly creative, going well beyond the outcome of a particular sport.²⁴

A. Autonomy, Ease, and Increases in Problem Gambling

Legalized gambling has long posed a risk to many who have fallen into the trap of compulsive gambling.²⁵ The Internet has caused a tremendous growth in the availability and opportunity to gamble.²⁶ Internet gambling is proving more problematic than legal, land-based gambling because there is no state or federal regulation to control the amount of time an individual spends gambling, the age of players, or the variety of games available.²⁷ Because a person can access the Internet without having to leave their home, a person is able to gamble for unlimited periods without being detected or interrupted.²⁸ While Internet use increases, so does Internet gambling activity, and consequently gambling debt.²⁹

B. Gambling in the Sports Arena

Gambling on sporting events is a well-established and massive

23. Schopper, *supra* note 9, at 305. See NGISC Final Report, *supra* note 11, at 5-3. Casino style games include, among others, "blackjack, poker, slot machines, and roulette." *Id.* These sites are becoming particularly inviting where they now feature "interactive games, broadcast races in real-time video, and walk customers through a virtual tour of the site, complete with colorful graphics and background music." *Id.* See also Worldwide Gamble Online Casino and Sportsbook, *supra* note 18.. Click link for sportsbook: sports wagering can be done on a range of sports, depending on what events are to take place, including football, basketball, baseball, hockey, soccer, tennis, auto racing, golf, horse racing, and boxing. *Id.*

24. See Dave Perkins, *Gaston Deserves a Shot at Big League Job Again*, TORONTO STAR, at C04, Oct. 20, 2003, available at LEXIS, News Library. There exists wagering opportunities for betting options such as the longevity of certain celebrity romances and the number of tropical storms during hurricane seasons. *Id.* Jeff Diamant, *Thoughts of New Pope on Minds of Cardinals at Site of Celebration*, SAN DIEGO UNION-TRIBUNE, at A-26. Oct. 19, 2003, available at LEXIS, News Library. Internet gambling sites accepting bets on successor to the Pope. *Id.*

25. USA Today Research, *supra* note 2. "[M]ore than 5.3 million U.S. adults are unable to limit their gambling to harmless entertainment that they can afford." *Id.*

26. Cabot, *supra* note 5, at 9-10.

27. APA Advisory, *supra* note 10, at 1.

28. *Id.*

29. USA Today Research, *supra* note 2. "[G]overnment officials and industry insiders estimate overall losses on Internet gambling among Americans will amount to more than \$3 billion [in 2003]." *Id.*

business in the United States.³⁰ The advent of the Internet has fostered a tremendous increase in sports wagering.³¹ Internet gambling on sporting events is no longer limited to the outcome of a game.³² With this greater ability to wager on games comes an increase in the problems of control over this immense industry.³³

Internet sports books have proven financially successful to site operators.³⁴ The online sports books do not require bettors to download any of the complicated software needed for most casino-style games.³⁵ Additionally, because sporting event outcomes are public knowledge and not able to be controlled by site operators, sports wagering diminishes concerns about result tampering.³⁶

Professional and college sports leagues have taken a strict approach toward sports wagering.³⁷ The National Football League, Major League Baseball, and the National Basketball Association are examples of professional organizations that have issued rules against sports betting.³⁸ The National Collegiate Athletic Association prohibits staff members and student-athletes of the NCAA conferences from participating in any form of gambling.³⁹

30. See Cabot, *supra* note 5, at 1-2. For a discussion on the history of sports gambling. *Id.* at 3-12. See also NGISC Final Report, *supra* note 11, at 2-14. "Estimates of the scope of illegal sports betting in the United States ranges anywhere from \$80 billion to \$380 billion annually, making sports betting the most widespread and popular form of gambling in America." *Id.*

31. Cabot, *supra* note 5, at 10. "One could place wagers on virtually every professional sporting event on the planet. *Id.* The possible mergers between technology and gambling are virtually endless." *Id.*

32. See <http://www.realcasinosportsbetting.com>. Betting props gives the option to bet on outcomes such as runs per inning, etc. See also Yahoo.com and ESPN.com. Season-long Fantasy leagues are being formed during all seasons based on various professional sports leagues. *Id.* Fantasy leagues are formed with approximately 10-14 teams where a pre-season draft is held for participants to choose their "fantasy team." *Id.* When the actual sports season begins, whether it is football, basketball, baseball, hockey, etc., the participants will pick their starters for the week and get points for the good plays made by the players on the actual field, rink, or arena. *Id.* These leagues are generally run through websites that track players' statistics electronically and award points accordingly. *Id.*

33. Cabot, *supra* note 5, at 12-13.

34. NGISC Final Report, *supra* note 11, at 5-3.

35. *Id.*

36. *Id.* at 5-3, 5-4.

37. *Id.* at 3-11. "The importance of regulating legal sports wagering and stifling illegal sports wagering has been acknowledged by professional and amateur sports organizations, which have strict regulations regarding sports wagering." *Id.* See also Tom Weir, *Online Sports Betting Spins Out of Control*, USA TODAY, Aug. 22, 2003 at A1, available at LEXIS, News Library.

38. NGISC Final Report, *supra* note 11, at 3-11.

39. NCAA, *Sports Wagering: Threat to Collegiate Athletics*, available at

The NCAA believes sports wagering undermines the integrity of sporting events and endangers the interests of student-athletes and others involved in the intercollegiate athletics programs.⁴⁰ Regardless of these regulations, the problem of athletes gambling has continued to worsen.⁴¹ The secrecy and accessibility of the Internet has exacerbated the situation by making it easier for athletes to gamble.⁴²

Technology and the widespread use of the Internet increases the concerns of sports wagering for fans as well.⁴³ Studies have shown that illegal wagering is increasing dramatically.⁴⁴ In 1983, it was estimated that \$8 billion were wagered on sporting events in the United States.⁴⁵ The estimates for 1997, due in large part to the growth of the Internet, increased substantially to a range of \$80 billion to \$380 billion.⁴⁶

C. Internet Gambling Advertising Industry

The Internet gambling industry is substantially sustained by its use of advertisements.⁴⁷ Considering there are 1,800 sites,⁴⁸ all

<http://www.ncaa.org/membership/enforcement/gambling/index.html>. NCAA Bylaw 10.3 states:

Staff members of a member conference, staff members of the athletics department of a member institution and student-athletes shall not knowingly: (a) provide information to individuals involved in organized gambling activities concerning intercollegiate athletics competition; (b) solicit a bet on any intercollegiate team; (c) accept a bet on any team representing the institution; (d) solicit or accept a bet on any intercollegiate competition for any item (e.g. cash, shirt, dinner) that has tangible value; or (e) participate in any gambling activity that involves intercollegiate athletics or professional athletics, through a bookmaker, a parlay card or any other method employed by organized gambling." *Id.* at 53

2003-2004 NCAA Division I Manual, available at http://www.ncaa.com/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf. This bylaw is the same for lower divisions as well. See 2003-2004 NCAA Division II Manual, at 55 and 2003-2004 NCAA Division III Manual, at 47-48.

40. NCAA, *Sports Wagering: Threat to Collegiate Athletics*, supra note 39.

41. Weir, supra note 37.

42. *Id.*

43. Cabot, supra note 5, at 12

44. *Id.* at 8

45. *Id.*

46. *Id.*

47. Student Press Law Center, *Online Gambling Ads: A risk worth taking?* (2000), available

offering similar gaming options, for more than 2 million Americans regularly placing bets⁴⁹ and 62 million Internet users⁵⁰ who are potential customers, the competition for customers begins with advertising campaigns.⁵¹ With the expanse of online gambling sites, the advertisements for these sites are also growing.⁵²

Advertisements for Internet gambling confront the public in a multitude of forms regardless of age, economics and ethnicity. These advertisements target people in conventional ways, through radio, newspaper, television, pop-up ads, and billboards.⁵³ Recently, advertisements for Internet gambling have even expanded to include event sponsorships.⁵⁴ Based on the foregoing, it is logical when considering the relationship between advertisements and Internet gambling, that regulation of the advertising industry would slow the growth by decreasing its exposure.

D. Minors and Young Adults

The concerns previously addressed about gambling addictions, sports betting, and advertising ploys are amplified by the effect gambling has on minors.⁵⁵ Studies have shown that gambling addictions are worsened when a person starts at a younger age.⁵⁶ A

at http://www.splc.org/printpage.asp?id=25&tb=legal_research.

48. GAO Report, *supra* note 4.

49. David Schepp, *Internet Gambling Hots Up*, Feb. 25, 2002, available at <http://news.bbc.co.uk/1/hi/business/1834545.stm>.

50. See *supra* note 3.

51. See e.g. *Credit Cards Can Multiply Betting Losses*, THE BUFFALO NEWS, Oct. 8, 2003, available at LEXIS, News Library. "Sports talk radio is awash with ads for Internet gambling sites touted by your friendly local radio hosts. Drop the host's name when you set up an account and the offshore bookmaker will throw a little monetary bonus to help get you on your way." *Id.*

52. Schepp, *supra* note 49. In online advertisements alone, the Internet gambling advertising sector has become the fifth largest online advertiser. *Id.*

53. See *supra* note 9.

54. *An Online Gaming Company Debuts as the Miami Event's Title Sponsor this Weekend*, Sept. 26, 2003., available at <http://www.gambletribune.org/print.php?pid=703>. At the Grand Prix in late September 2003, Champion Auto Racing Teams decided to use an online gambling company as its title sponsor. *Id.* The Grand Prix four-race event was held in downtown Miami and was "presented by" sportsbook.com, a London-based Internet gambling site. *Id.*

55. See MacMillan, *supra* note 10.

56. See David Crary, *Not a Smart Gamble: Addiction Rates Higher for Teens who Play Stakes*, July 29, 2003, available at <http://www.gambletribune.org/print.php?pid=593>. "Experts say the long-term stakes are high because gamblers who start young are the most likely to develop addiction problems." See also Weir, *supra* note 37. "A 2001 study by the

study by the Federal Trade Commission (FTC) found gambling sites had inadequate or hard-to-find warnings about underage gambling prohibitions, and in 20 percent of the cases, no warnings at all.⁵⁷ The sites studied by the FTC also had no effective mechanisms that would block minors from entering the sites.⁵⁸

Advertisements for Internet gambling often take aim at a younger audience.⁵⁹ The FTC has reported that video game sites that are popular among teenagers contain disproportionate numbers of gambling ads.⁶⁰ Additionally, the interest the youth population has in sports is contributing to gambling problems of minors.⁶¹

III. LAWS AND LEGISLATION SURROUNDING INTERNET GAMBLING

A. The Wire Act

The Wire Act of 1961 (Act) makes it illegal to use a "wire communication facility for the transmission in interstate or foreign commerce of bets or wagers."⁶² To date, the Act is the only federal

Harvard institute suggests young computer uses have an increased risk of becoming problem gamblers. The study found that 5% to 6% of college-age and younger people are pathological in their betting - gambling to recoup losses, spending money they don't have, unable to stop - compared with 1% to 2% of the general population. Updated figures are expected this fall." *Id.*

57. Federal Trade Commission, *supra* note 10.

58. *Id.*

59. *Online Gambling and Kids: a Bad Bet.* June 2002, available at <http://www.ftc.gov/gamble>. "According to the Federal Trade Commission (FTC), it's easy for kids to access online gambling sites, especially if they have access to credit or debit cards. Indeed, some of the most popular non-gambling websites carry ads for gambling sites, and many online game-playing sites link to gambling sites." *Id.*

60. See MacMillan, *supra* note 10.

61. Weir, *supra* note 37. The Director of the New Jersey Council on Compulsive Gambling has stated that among college students, the number one form of problem gambling is Internet sports betting. *Id.*

62. 18 U.S.C. 1084 (2003).

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the

statute that has been used to federally prosecute activities related to Internet gambling.⁶³

As Internet communications are generally carried through wires, it would seem the statute applies to Internet gambling. However, the Act was passed in 1961, before contemplation of global communication through computerized networks, and therefore it is unclear whether application to the Internet is appropriate. Further, it is uncertain whether the Act could prohibit wireless Internet connections and satellite technology.⁶⁴ Additionally, the Act specifically addresses "sporting contests," but fails to explicitly address the other forms of gambling available.⁶⁵ This omission has caused some to believe the Act only applies to bets on contests that involve sports.⁶⁶ Therefore, there exists debate as to whether the Wire Act is the appropriate vehicle to prosecute Internet gambling activities.

The Act does not explicitly cover Internet gambling and therefore its use has been inconsistent and only nominally effective. Shortly after the advent of Internet gambling in 1995, the deficiency of the Act has prompted legislative action to address the problems of Internet gambling, but has not yet resulted in the passage of any bills.⁶⁷ The passage of legislation banning Internet gambling

placing of bets or wagers, shall be fined under this title or imprisoned not more than two

years, or both. 18 U.S.C. 1084 (a).

63. GAO Report, *supra* note 4, at 12. There are three federal statutes that seem to apply to online gambling: the Wire Act, the Travel Act, and the Illegal Gambling Business Act. *Id.* So far, federal prosecution has only used the Wire Act. *Id.* The Travel act imposes criminal penalties on a person or entity that uses interstate or foreign commerce intending to distribute proceeds from any unlawful activity. *Id.* at 14. Such unlawful activity includes business enterprises involving gambling that violates state laws. *Id.* The Illegal Gambling Business Act applies to businesses, not individuals, and makes it a crime to conduct gambling activity that violates state laws for over 30 days. *Id.*

64. Cabot, *supra* note 5, at 20.

65. *Supra* note 62.

66. GAO Report, *supra* note 4, at 12. See *In Re: MasterCard International, Inc.*, 132 F. Supp.2d 468 (E.D. La. 2001). Court held plaintiff's failure to allege sports gambling specifically was a defect in regards to the Wire Act claims. *Id.* at 480. It was the court's view that a plain reading of the statute required the gambling to be a sporting event or contest. *Id.*

67. See generally *supra* note 1. The first attempt at prohibition was sponsored by Senator Jon Kyl (R-Az.), who introduced the Crime Prevention Act of 1995 that proposed to expand the scope of the Wire Act to apply to virtual casinos and reach individuals using the sites along with the business providing the services. *Id.* The latest proposal has been the reintroduction of Unlawful Internet Gambling Funding Prohibition Act on May 19, 2003. 2003 Bill Tracking H.R. 2143. See also 149 Cong. Rec. H. 5129 and 5136. The bill was

activity will also help legitimize a ban on the relentless advertising of Internet gambling that is contributing to the harm caused by the industry.⁶⁸

Another limit on the Act is that its applicability does not extend to individuals.⁶⁹ Instead, the Act applies to those "engaged in the business of betting or wagering."⁷⁰ This limited scope of application precludes prosecution of Americans making bets from their home computers, limiting enforcement to offshore companies. Prosecution of offshore companies may prove ineffective because of the jurisdictional hurdles presented in the international context.⁷¹

Application of the Wire Act is not uniform and, as it presently exists, the Act has not diminished the size of the Internet gambling industry. Courts, such as the District Court in *United States v. Cohen*, discussed below, are using the Act to prosecute Internet gambling business and are hindering the industry, but an affirmative legislative effort has to be made to solidify the state of the law in order to gain uniform implementation.

B. *United States v. Cohen*⁷²

In *United States v. Cohen*, the government was successful in prosecuting an offshore Internet gambling operator, Jay Cohen, with conspiracy and offenses in violation of the Wire Act.⁷³ Cohen was the President of an Internet sports wagering company, World Sports Exchange, operating from Antigua where Internet gambling is legal.⁷⁴ The site targeted United States citizens by advertising

designed to prevent the use of bank instruments, such as credit cards, from being used for Internet gambling. 2001 H.R. 556. See also 143 Cong. Rec. H. 6839. As amended, the bill was passed by the House on June 10, 2003, and on June 11, 2003 was referred to the Senate Committee on Banking, Housing and Urban Affairs where it remains. 2003 Bill Tracking H.R. 2143. To date, the latest activity on this bill was on October 20, 2003, when the House heard remarks from Representative Osborne (R-NE) addressing the importance in enacting the bill in the interest of securing a positive future for the nation's youth. 149 Cong. Rec. H. 9732.

68. See *infra* part VI. A. 2.

69. See *supra* note 62.

70. *Id.*

71. See *infra* part V.

72. See *supra* note 6.

73. Cabot, *supra* note 5, at 22

74. See *supra* note 6 at 70. Cohen previously worked for a San Francisco firm, trading in options and derivatives. *Id.* But in 1996 he and several of his American partners moved to Antigua and started the World Sports Exchange as a bookmaking business for American sporting events. *Id.*

through radio, newspaper, and television.⁷⁵ One fifteen-month period of operation produced \$5.3 million in profits from U.S. customers.⁷⁶

Cohen contended a corrupt motive had to be proven and that he was entitled to a statutory exception because the Wire Act allows the transmission of bets from a jurisdiction in which it is legal to place a bet to a jurisdiction where it is legal to accept a bet.⁷⁷

The court upheld the charges against Cohen finding it was not necessary to prove a corrupt motive and therefore Cohen could be found guilty despite his alleged good faith belief that his conduct was legal.⁷⁸ The court also found he would not be entitled to the statutory exception because betting is in fact illegal in New York even if it is not charged as a crime.⁷⁹

IV. CREDIT CARD REGULATIONS

The lack of legislation overtly banning Internet gambling and the difficulty inherent in enforcing a ban on Internet gambling has caused law enforcement to take an intermediate approach to thwart Internet gambling.⁸⁰ The intermediate method involves attacking the funding of Internet gambling activities by putting pressure on the credit card industry.⁸¹ It has been estimated that between ninety and ninety-five percent of funds used to place bets on Internet gambling sites come from credit cards.⁸² The benefit of this approach is that it is easier for the government to subject credit cards to regulation than it can the amorphous Internet.⁸³ The focus

75. *Id.*

76. *Id.*

77. *Id.* at 71. See 18 U.S.C. 1084 "Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." *Id.*

78. *Supra* note 6, at 71.

79. *Id.* at 73-74. Although New York law designates gambling illegal in the state, the law imposes civil, not criminal penalties. *Id.*

80. See *supra* note 66, at 480-81.

81. Schopper, *supra* note 9, at 308.

82. David Strow, *Wells Fargo to Ban Cards for Internet Gambling*, *Las Vegas Sun*, Dec. 12, 2000, available at <http://www.lasvegassun.com/sunbin/stories/text/2000/dec/12/511161819.html>.

83. Henry Beck, *Government Regulations: Online Gambling and Fund Transfers*, *New York Law Journal*, Sept. 2, 2003, available at LEXIS, News Library.

on payment options helps circumvent jurisdictional hurdles posed by sites taking bets outside United States borders.⁸⁴

Credit card companies are electing not to allow their customers to use their cards for Internet gambling.⁸⁵ These companies are reacting to the reality that many states consider gambling debts uncollectible and will not enforce recovery of outstanding balances from cardholders.⁸⁶ The uncertainty of receiving payment is causing credit card companies to prohibit cardholders from using the cards on Internet gambling sites.⁸⁷ Recently, more banks are getting involved with the ban by signing agreements to block cardholders from performing transactions for Internet gambling.⁸⁸

However, attempting to hinder Internet gambling activity through this intermediate device may be proving inadequate. Even if credit card use is decreasing, there is no correlating data showing a decrease in Internet gambling activity.⁸⁹ Sites are now offering a variety of different payment methods.⁹⁰ Congress has legislation

84. *Id.*

85. Associated Press, *MasterCard sets rules for online gambling to settle lawsuit*. July 14, 1999. available at http://standup.quiknet.com/news/1999/ap_1999_july_14.html. MasterCard issued new rules that will require Internet casinos using its cards to restrict use to United States citizens who are placing bets from states in which gambling is illegal. *Id.* Settlement is a result of countersuit in which a California resident tried to prevent the credit card companies that she was indebted to from recovering because the debt was from her online gambling activities which were illegal. *Id.*

86. Mike Bruner, *Net Gamblers Sue Credit Card Firm: Class-action Lawsuits Allege Debts Are Void Under State Law*, MSN, available at <http://www.msnbc.com/news/280356.asp>.

87. Matt Richtel and John Schwartz, *Credit Cards Seek New Fees on Web's Demimonde*, NEW YORK TIMES, Sec. C, Page 1, column 3, Nov. 18, 2002, available at LEXIS, News Library. GAO Report, *supra* note 4, at 4. Full service credit card companies, such as American Express and Discover, have issued companywide policies restricting credit card use on Internet gambling sites. *Id.* Credit card associations, such as Visa and MasterCard, are less restrictive systems that "enable association members, at their discretion, to deny authorization of properly coded Internet gambling transactions." *Id.* "While the associations do not provide credit card services directly to cardholders or businesses, they establish the operation standards that define the policies, roles, and responsibilities of their member institutions. . . The member institutions issue the credit cards to customers, acquire (sign up) merchants to accept credit cards, or both, along with providing other services directly to the cardholders and merchants." *Id.* at 9-10.

88. *Ten Banks End Online Gambling with Credit Cards*. Press Release from Dept. of Law, NY. Feb. 12, 2003, available at <http://www.winneronline.com/articles/february2003/nylaw.htm>. Citibank agreed to block such transaction in June of 2002. *Id.* The additional banks include: Cayug Bank, Chemung Canal Trust Company, First Consumers National Bank, First Premier Bank, Merrick Bank, Peoples Bank, Trustco Bank, USAA Federal Savings Bank, US Bank NA, Wells Fargo Financial Bank. *Id.*

89. CCA Report, *supra* note 2.

90. See http://www.gambling-pro.com/articles/casinos_payment_methods.htm.

pending to enforce a wider ban on payment options,⁹¹ but this will not eliminate all options, such as opening off-shore accounts, using e-money, or wiring money.⁹²

V. JURISDICTIONAL OBSTACLES

One of the biggest obstacles facing the implementation of laws that prohibit online gambling is lack of proper jurisdiction. In the Internet gambling context, the government faces inter-jurisdictional transactions that, in part, take place in foreign jurisdictions. The use of the Internet allows a person to set up an online gambling site at an offshore location where Internet gambling is legal, while the people accessing the site and wagering on the site are doing so from a state where gambling is illegal. Therefore, even if legislation passes making it undoubtedly illegal to gamble on the Internet in the United States, the government has to have a means of enforcing the law by meeting the requirements of jurisdiction.⁹³

A. Personal Jurisdiction

1. Inside the United States

The protections citizens of the United States receive from the U.S. Constitution created by the Due Process Clause of the Fifth and Fourteenth Amendments are afforded to foreign defendants as well.⁹⁴ The test for personal jurisdiction has evolved through case law in an effort to determine when a court can preside over a person or entity.

Other payment methods used to fund internet gambling accounts include wire transfers, checks, e-cash (open an account with a third party between your bank and an online service where you can fund and withdraw your money and pay the online services instantly), online electronic check services, or charge it to your phone bill through a 900 number. *Id.*

91. See *supra* note 67.

92. Schopper, *supra* note 9, at 321-322 "Electronic money is a digital representation of money that can be placed on computer hard drive, smart card, or other device with memory, including cellular phones and other electronic devices." *Id.* at 314. Mark Alesia, *Sports bets are just a click away on the Internet; Illegal 'offshore' sports gambling industry took in \$27 billion last year from U.S. bettors*, INDIANAPOLIS STAR, Jan. 26, 2003, at 1C available at LEXIS, News Library.

93. The jurisdictional obstacle has already resulted in creative approaches to stop Internet gambling, such as regulation of the credit card industry. See *supra* part IV.

94. See U.S. CONST. amend V. See U.S. CONST. amend 14. See *Galvan v. Press*, 347 U.S. 522, 530 (1954) "An alien has the same protection of his life, liberty and property under the Due Process Clause as is afforded to a citizen."

In order to assert personal jurisdiction over a foreign defendant, there has to be a minimum number of contacts with the United States forum so that the action will not "offend traditional notions of fair play and substantial justice."⁹⁵ The minimum contact test requires a court to examine both the "nature and quality" as well as the "sufficiency" of the contacts to the forum.⁹⁶ Minimum contacts may be established by a showing that a defendant "purposely avails itself of the privilege of conducting activities within the forum state" such that the defendant should "reasonably anticipate being haled [sic] into court there."⁹⁷ A finding of jurisdiction cannot be avoided "merely because the defendant did not physically enter the forum state."⁹⁸ However, it is not sufficient to find jurisdiction based on "[t]he placement of a product into the stream of commerce."⁹⁹ There has to be additional conduct on the part of the defendant to indicate intent or purpose to conduct activities within the forum state.¹⁰⁰

In considering the scope of jurisdictional powers in the new context of the Internet medium, the United States Court of Appeals for the Sixth Circuit, in *CompuServe Inc. v. Patterson*, found substantial contacts could be created through a series of website transactions.¹⁰¹ The *CompuServe* court found personal jurisdiction in Ohio over a Texas Internet user.¹⁰² The defendant subscribed to the CompuServe company in Ohio, entered into an agreement to sell software on the CompuServe system, sent computer software through electronic links to CompuServe, and advertised the software on CompuServe.¹⁰³ The court found that through the totality of the defendant's actions, he "purposefully transacted business in Ohio," and "should have reasonably foreseen that doing so would have consequences in Ohio."¹⁰⁴

In *Bensusan Restaurant v. King*,¹⁰⁵ the defendant's Internet

95. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945).

96. *Id.* at 319-20

97. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

98. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

99. *Asahi Metal Indus. Co., v. Superior Court*, 480 U.S. 102, 112 (1987).

100. *Id.*

101. *CompuServe Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996)

102. *Id.* at 1264.

103. *Id.*

104. *Id.* at 1265

105. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (1996), *aff'd*, 126 F.3d 25 (2d Cir. N.Y. 1997).

activities were less interactive than those of the defendant in *CompuServe*, and the United States District Court for the Southern District of New York was able to distinguish the cases.¹⁰⁶ To determine whether a court had jurisdiction over a website, the *Bensusan* Court found the mere existence of a website on the Internet, without anything further, was insufficient to confer personal jurisdiction over an out-of-state defendant.¹⁰⁷ In *Bensusan*, the defendant created a website to promote its club.¹⁰⁸ The site was created for a Missouri club and contained general information about the club along with a calendar of events and ticket information.¹⁰⁹ The website did not contain any means of placing ticket orders other than providing a telephone number and pick-up information.¹¹⁰ The site was accessible worldwide to anyone with Internet access.¹¹¹ The court explained: "Creating a site, like placing a product into the stream of commerce, may be felt nationwide- or even worldwide- but, without more, it is not an act purposefully directed to the forum state."¹¹²

The United States District Court for the Western District of Pennsylvania, in *Martiz, Inc. v. Cybergold, Inc.*,¹¹³ found jurisdiction could be exercised in a case where a web site had been created for promoting its upcoming Internet service.¹¹⁴ The amount of activity in *Martiz* fell in between that of *CompuServe* and *Bensusan*.¹¹⁵ In *Martiz*, the defendant used a web site to promote a service that was not yet operational.¹¹⁶ The server was based in California, but Missouri residents were able to access the site.¹¹⁷ The court found that characterizing the site as passive was not completely accurate because the website had been obtained "for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access Cybergold's website and eventually sign up on Cybergold's mailing list."¹¹⁸ Based on these findings, the court held

106. *Id.* at 301.

107. *Id.*

108. *Id.* at 297.

109. *Id.*

110. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 297 (1996).

111. *Id.*

112. *Id.*

113. *Martiz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1330.

118. *Id.* at 1333.

Cybergold purposely availed itself of the privilege of doing business with the forum and could reasonably anticipate being haled into a Missouri court.¹¹⁹

The United State District Court for the Western District of Pennsylvania in *Zippo Manufacturing v. Zippo Dot Com*, used a "sliding scale" test to distinguish between those websites that were merely "passive" and therefore not subject to jurisdiction and those sites that were "interactive" and therefore subject to jurisdiction.¹²⁰ These distinctions were based on the findings of other courts pertaining to "interactive," "passive," and "middle ground" sites.¹²¹ Distinctions between the categories were held to be determinative of the existence of personal jurisdiction.¹²²

In *Zippo*, a Pennsylvania corporation brought suit against a California corporation in an Internet domain name dispute.¹²³ The California Dot Com corporation had contacts with Pennsylvania residents through advertisements on its web page, accessible via the Internet.¹²⁴ Dot Com had approximately 3,000 subscribers from Pennsylvania.¹²⁵ The court found, "Dot Com repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania."¹²⁶ The court held that Dot Com had reached the level of an interactive web site.¹²⁷ The exercise of personal jurisdiction was appropriate where Dot Com chose to sell its

119. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996).

120. *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D.Pa. 1997).

121. *Id.*

122. *See American Homecare Federation, Inc., v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109, 113 (D. Conn. 1998). On one end of the scale are those situations where business is clearly being conducted over the internet as evidenced by entering contracts with the foreign jurisdiction and the repeated transmission of computer files. *Id.* These are "interactive" situations where personal jurisdiction is proper. *Id.* The "middle ground" sites are those where users can exchange information. *Id.* Jurisdiction has been established in such situations. *Id.* At the far end of the sliding scale are the "passive" websites that merely have information posted by the defendant that is accessible to users in other jurisdictions. *Id.* Since these sites are only making information available to those interested, personal jurisdiction cannot be exercised over them. *Id.*

123. *Supra* note 120, at 1120.

124. *Id.* at 1121.

125. *Id.*

126. *Id.* at 1126

127. *Id.* at 1125

services to Pennsylvania residents.¹²⁸

In *State v. Granite Gate Resorts*, the Court of Appeals of Minnesota found the existence of jurisdiction over an online gambling service that was not yet available but was advertising and inviting Internet users to subscribe for information regarding the service.¹²⁹ The upcoming services were being offered by WagerNet, which was using a Nevada based website, Granite Gate Resorts doing business as On Ramp, to advertise and allow users to link to WagerNet.¹³⁰ Based on the findings of one of its consumer investigators, the Minnesota Attorney General's office brought suit against the companies for deceptive trade practices and consumer fraud due to falsely advertising in Minnesota with the message that Internet gambling was lawful.¹³¹

Defendants argued personal jurisdiction in Minnesota was not proper because it was a nonresident defendant that only placed information on the Internet and did not purposefully avail itself of the privileges of conducting business within the state.¹³² The Court held, however, that the advertisements did show intent to market in the state.¹³³ By marketing, the court inferred the company was seeking profits from Minnesota consumers which established sufficient minimum contacts.¹³⁴ Further, the Court found that Minnesota had a substantial interest in regulating advertising and gambling and accordingly a foreign corporation could not claim inconvenience to avoid jurisdiction after seeking business in the state.¹³⁵

2. Outside the United States

The Supreme Court of New York, in *Vacco v. World Interactive*, found personal jurisdiction over an Antigua-based Internet gambling company.¹³⁶ In this case, the court had to decide whether the State of New York could enjoin a foreign corporation that was

128. *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126-27 (W.D.Pa. 1997).

129. *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 721 (Minn. 1997).

130. *Id.* at 717

131. *Id.*

132. *Id.* at 718

133. *Id.* at 720

134. *Id.*

135. *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 720 (Minn. 1997).

136. *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 846 (1999).

legally licensed by Antigua to operate an offshore casino that offered Internet gambling to New York residents.¹³⁷ The online gaming site, Golden Chips Casino (GCC), was wholly owned by World Interactive Gaming Corporation (WIGC), a Delaware corporation with corporate offices in New York.¹³⁸ GCC used its website, advertisements and a national gambling magazine to promote an Internet gambling casino.¹³⁹ These promotions were targeted nationally and viewed by New York residents.¹⁴⁰ The administrative and executive decisions were done from New York, as well as computer research and development of the site.¹⁴¹ Additionally, from New York offices, WIGC sent out soliciting information and made cold-calls to investors.¹⁴² The court found that WIGC's contacts with New York were continuous and systematic enough to establish their physical presence in New York and, therefore, personal jurisdiction.¹⁴³

While acknowledging the novelty of applying jurisdiction to Internet transactions, the court stated that for jurisdictional purposes, Internet transactions are like other transactions in that they are "all executed by and between individuals or corporate entities which are subject to a court's jurisdiction."¹⁴⁴ Therefore, the court stated that even without physical presence in New York, the companies could be subject to personal jurisdiction upon satisfaction of the minimum contacts requirement.¹⁴⁵ Aside from using the New York corporate office as their headquarters to download, view, and edit the Internet gambling site, the defendants also conducted a nation-wide advertising campaign that reached New York residents and received phone calls from New Yorkers.¹⁴⁶

Personal jurisdiction over foreign-based Internet gambling sites has been found by the New York courts and would likely be found by jurisdictions applying the substantial contacts test to web site transactions. If the sites were created for the purpose of simply providing information, then they would likely be considered

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 849.

142. *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 849 (1999).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

“passive” sites not created to do business with the state and therefore sufficient to satisfy the substantial contacts test. However, the substantial contacts test would be satisfied where a gambling website reached the level of an “interactive” site. A website would likely rise to the level of “interactive” where it is found the site was constructed with the purpose of doing business in the state, rather than just providing information. Internet gambling websites exist for interactive participation in playing casino style games or placing bets on sporting events. Because these sites require that participants pay to play, the Internet gambling sites can certainly be said to exist for the purpose of conducting business.

B. Subject Matter Jurisdiction

A finding of subject matter jurisdiction is necessary to determine whether a court is qualified to hear a case based on the issue under discussion. Internet gambling operators have made the argument that subject matter jurisdiction is not satisfied because the gambling occurs offshore where the activity is legal.¹⁴⁷ However, subject matter jurisdiction will exist where a particular act of the defendant had a substantial effect in the United States, or where Congress intended the law at issue to extend beyond United States borders.¹⁴⁸ The substantial effects test was articulated by the United States Court of Appeals for the Second Circuit in *United States v. Aluminum Co. of America*.¹⁴⁹ Therein, the court held that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”¹⁵⁰

The Supreme Court, in *Hartford Fire Insurance v. California*,¹⁵¹ explained subject matter jurisdiction could extend outside the United States borders.¹⁵² Jurisdiction could be extended upon the finding of a “substantial effect” that resulted from the conduct of a

147. *Id.* at 850.

148. Scott Girdwood, *Place Your Bets . . . On the Keyboard: Are Internet Casinos Legal?*, 25 CAMPBELL L. REV. 135, 146.

149. *See* *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

150. *Id.* at 443.

151. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). Here, claims were made against both domestic and London-based foreign reinsurance companies for conspiring to effect primary insurance companies in the American market in violation of the Sherman Act. *Id.* at 776. One of the questions the court had to answer was whether the Sherman Act could be applied to these foreign defendants for the alleged conspiracy. *Id.* at 779.

152. *Id.* at 796-798

foreign corporation engaged in activity to affect the United States market, and that there was no real contradiction of law between the United States and the policy of another nation.¹⁵³ The test to extend jurisdiction is therefore twofold: (1) a "substantial effect" on the United States market resulting from a foreign corporation, and (2) no "true conflict" between US law and the law of another nation. As applied to online gambling it can certainly be argued that the conduct of offshore Internet gaming sites have consequences within United States borders. Such consequences include gambling illegally within the United States, increased gambling addiction, the ease at which young people can access gambling sites, and business taken away from land-based gambling facilities. Perhaps the hardest jurisdictional obstacle to overcome however, is the "true conflicts" test which will prove to be problematic because offshore jurisdictions have legalized Internet gambling. If the United States is to assert jurisdiction where there is a "true conflict," the Supreme Court says they will have to conduct a balancing test to determine if the interest in prosecuting Internet gambling business outweighs maintaining good relations with other countries.¹⁵⁴

As to the scope of Congress' intent, courts have found that the Federal Wire Act extends beyond United States borders.¹⁵⁵ The Act specifically prohibits certain "communication in interstate or foreign commerce."¹⁵⁶ An interpretation of the plain language shows Congress' intent to extend enforcement of the Act outside United States borders.¹⁵⁷ In the Wire Act's application to Internet gambling, the court in *Vacco* held the scope of the statute "clearly extends to the transmission of betting information to a foreign country."¹⁵⁸ Finding jurisdiction extends outside the United States borders leads to the conclusion that Internet gambling sites are not outside the reach of the laws of the United States. There are ways to attack the wrongs being committed against U.S. citizens, and a ban on Internet gambling advertisements may prove an effective approach.

153. *Id.*

154. *Id.* at 798.

155. *Supra* note 136, at 851.

156. *Supra* note 62.

157. 18 U.S.C. 1084 "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers. . ." *Id.* at (a).

158. *Supra* note 136, at 851.

VI. ADVERTISING

The Internet gambling industry has grown to enormous proportions and has proven to be particularly difficult to control.¹⁵⁹ But with Americans losing \$3 billion per year gambling on the Internet,¹⁶⁰ this does not mean the government should not take steps to deter the industry. Relentless advertising is driving the Internet gambling industry.¹⁶¹ The Internet gambling advertising industry is targeting consumers in all forms: radio, television, newspaper, billboards, pop-up ads, and event sponsorships.¹⁶² Much of this advertising is aimed at children, a group that cannot legally gamble in the United States.¹⁶³

Arguably, regulation of Internet gambling advertisements would slow the growth of the business by decreasing exposure to those not already betting and not inviting people to bet more than they would have on their own. Additionally, an advertising ban would decrease exposure of the activity to the underage population. However, before such a law could be enforced, it would have to pass constitutional muster under the *Central Hudson* test for regulation of commercial speech.

A. Advertising for Legal Casino Gambling

The first federal attempt to restrict broadcasts of gambling advertisements in the United States, took place with the passage of the Federal Communications Act of 1934,¹⁶⁴ which states:

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme. . . shall be fined under this title or imprisoned not more than one year, or both.¹⁶⁵

The Act is implemented by Federal Communications Commission (FCC) regulation 47 CFR 73.1211.¹⁶⁶

159. *APA Advisory*, *supra* note 10.

160. *USA Today Research*, *supra* note 2.

161. *Supra* note 47.

162. *See supra* note 9, and accompanying text. *See also supra* note 54.

163. *See MacMillian supra* note 10.

164. *NGISC Final Report*, *supra* note 11, at 3-13.

165. 18 U.S.C. 1304. *See also NGISC Final Report*, *supra* note 11, at 3-13.

166. *NGISC Final Report*, *supra* note 11, at 3-13.

1. Greater New Orleans Broadcasting Association v. United States¹⁶⁷

In a challenge to the constitutionality of the Federal Communications Act, the Supreme Court, in *Greater New Orleans Broadcasting Ass'n v. United States*, found the Act violated the First Amendment as it applied to private casino gambling advertisements from radio or television stations located in a state where gambling was legal.¹⁶⁸ The Court recognized and applied the four-part *Central Hudson* test¹⁶⁹ used for evaluating First Amendment challenges to restrictions on commercial speech.¹⁷⁰ The four factors that must be met are: (1) the speech must concern lawful activity and not be misleading; (2) there is an asserted governmental interest that is substantial; (3) the regulation directly advances asserted governmental interest; and (4) the restriction is not more extensive than would be necessary to serve that interest.¹⁷¹

Regarding the first prong of the test, the Supreme Court in *Greater New Orleans* found the content was not misleading and concerned a lawful activity because gambling was legal in the state from which the ad was broadcast, even if it was illegal in the states that received those broadcasts.¹⁷² Addressing the second prong of the test, the Solicitor General contended the ban would serve to protect citizens from "societal ills."¹⁷³ However, the Court responded that these social costs could be offset by countervailing policy considerations, namely the economic advantages achieved through taxes on legal gambling activity.¹⁷⁴ Further, the Court noted that since Congress had given the states the power to determine the legality of gambling within their borders, the Court would similarly strike down an advertising ban that applied nationwide and leave such decisions to the individual states.¹⁷⁵

167. *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999).

168. *Id.* at 176.

169. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 556 (1980).

170. *Supra* note 167, at 184. *See also supra* note 169, at 566.

171. *Supra* note 169, at 556.

172. *Supra* note 167, at 184-85.

173. *Id.* *See* NGISC Final Report *supra* note 11, at 4-1 to 4-14.

174. *Supra* note 167, at 186. *See* http://www.casinochecker.com/casino_knowledge/statistics/revenues.htm. "In the 11 states with commercial casinos in operation in 2000, casinos contributed more than \$3.3 billion in tax revenue to state and local governments." *Id.*

175. *Supra* note 167, at 187. *See* David Waddell, *Courts Uphold Free Speech for Casinos*,

Considering the third prong of the test, the Court determined that the regulation did not directly advance the asserted governmental interest because the effect of an advertising ban would only channel gamblers to tribal casinos as those advertisements fell outside the purview of the Federal Communications Act.¹⁷⁶ Additionally, the exemptions and inconsistencies of §1304¹⁷⁷ were not tolerable: "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."¹⁷⁸ Finally, as to the fourth prong, the Court acknowledged that the government was not required to use the least restrictive means possible, but instead show the means employed were reasonable in light of the costs and benefits.¹⁷⁹ Even using the "reasonable means" standard, the Court determined §1304 would, in effect, prevent an "intolerable amount of truthful speech about lawful conduct" from being conveyed to the public.¹⁸⁰

A nationwide ban on advertising for legal land-based casinos was held by the Supreme Court to be a violation of First Amendment rights to commercial speech.¹⁸¹ However, the reasons the Supreme Court gave for overruling the ban may not prove applicable to advertisements for Internet gambling.

2. *Central Hudson* Test and Proposing a Ban on Internet Gambling Advertisements

Congress has not yet passed a bill that explicitly states it applies to Internet gambling, but legislators continue to introduce new proposals.¹⁸² In its 1999 report, the National Gambling Impact Study Commission recommended that the federal government assert authority over Internet gambling and prohibit it without

July 7, 1999, available at <http://www.info.detnews.com/casino/columns/details.cfm?column=waddell&myrec=4>.

176. *Supra* note 167, at 189.

177. See *NGISC Final Report supra* note 11, at 3-13. Various exceptions to the Act now exist, including exceptions for state lotteries, fishing contests, Indian Tribe gaming, non-profit organizations holding a lottery, promotions held by a commercial organization, horse racing, and off-track betting. *Id.*

178. *Supra* note 167, at 194.

179. *Id.* at 188.

180. *Id.* at 194.

181. See *Id.*

182. See *supra* note 67 and accompanying text.

exceptions.¹⁸³ The Department of Justice has already taken the position that current law applies to the Internet making online gambling illegal.¹⁸⁴ Additionally, the National Association of Attorneys General has requested the federal government explicitly expand the Wire Act to prohibit Internet gambling.¹⁸⁵

If the Wire Act does apply to the Internet, as argued by the Department of Justice, there still exists problems of enforceability because the Internet gambling companies are located offshore.¹⁸⁶ A ban on the advertising of Internet gambling may prove an effective instrument in reducing participation in the activity.¹⁸⁷ Undoubtedly, a proposed ban on Internet gambling advertisements requires an analysis of the constitutionality of prohibiting this commercial speech under the four-part test enunciated by the Supreme Court in *Central Hudson*.¹⁸⁸

If Congress explicitly banned Internet gambling, an inquiry into the first prong would conclude that the advertisements are for an unlawful activity. Even now, without explicit legislation on Internet gambling, courts are applying the Wire Act to prosecute Internet gambling companies.¹⁸⁹ Internet gambling advertisements have also been deemed misleading.¹⁹⁰ The advertising is especially misleading to the underage population.¹⁹¹ Advertisers of Internet gambling are seeking out children-oriented video game sites to post online gambling ads that encourage minors to participate.¹⁹²

Analyzing the second prong of the *Central Hudson* test, the Supreme Court in *Greater New Orleans* recognized the government had a substantial interest in protecting citizens from the social ills of gambling, but argued that this interest was outweighed by the economic advantages provided by taxes on the industry.¹⁹³ For the

183. NGISC Final Report, *supra* note 11, at 5-12.

184. Jeff Simpson, *Justice Department Affirms Ban on Internet Gambling*, LAS VEGAS REVIEW JOURNAL, Aug. 30, 2002, available at http://www.reviewjournal.com/lvrj_home/2002/Aug-30-Fri-2002/news/19526362.html.

185. NGISC Final Report, *supra* note 11, at 5-9.

186. See *supra* note 17, and accompanying text.

187. NGISC Final Report, *supra* note 11, at 3-8. The Commission recommended Congress ban aggressive advertising strategies, noting the advertisements targeted impoverished neighborhoods and youth. *Id.*

188. *Supra* note 169.

189. See *Vacco v. World Interactive*.

190. See *MacMillan*, *supra* note 10.

191. *Id.*

192. *Federal Trade Commission*, *supra* note 10.

193. *Supra* note 167, at 186.

United States, there are no similar economic advantages provided by the current Internet gambling industry.¹⁹⁴ Instead, this industry is taking large sums of money outside the U.S. borders and giving tax benefits to the countries that are licensing the online gambling sites.¹⁹⁵ Additionally, the "social ills" stemming from Internet gambling surpass those of legal land-based gambling.¹⁹⁶ The Internet gambling industry offers autonomous, twenty-four hour availability to anyone with Internet access, without age restrictions.¹⁹⁷

The third inquiry under the *Central Hudson* test inquires as to whether the regulation of Internet gambling advertisements would advance the asserted governmental interest.¹⁹⁸ In *Greater New Orleans*, the Court provided two reasons why a ban on legal land-based advertisements for casinos would not further the government interests.¹⁹⁹ Those concerns are misplaced in the Internet gambling context. First, gamblers would not be channeled to tribal Internet casinos because no Internet gambling would be allowed if the government prohibits the activity in accord with the proposed legislation.²⁰⁰ Similarly, the second concern, referring to the numerous exceptions and inconsistencies of §1304, would not be applicable in the Internet gambling context. If Internet gambling as a whole is prohibited, then a total ban, by definition, would have no exceptions and therefore there would be no differing treatment to those with similar messages.

The final inquiry under the *Central Hudson* test requires a determination as to whether an advertising ban would be more

194. See Peter Shinkle, *U.S. Bettors Send Vast Sums Offshore*, ST. LOUIS POST-DISPATCH, May 4, 2003, at A1, available at LEXIS, News Library. U.S. gamblers are sending vast sums offshore. *Id.* Nearly half the 12 million online gamblers are from the United States, and the industry will take in about \$6 billion in 2003. *Id.*

195. See Roy Mark, *Bad Bet? Congress Wants to Regulate Web Wagering*, March 21, 2003, available at <http://www.internetnews.com/ec-news/print.php/2168531>.

196. *NGISC Final Report*, *supra* note 11, at 2-15. Social ills include: problems for the youth population, a demographic group that is more likely to use computers, more likely to download programs, and particularly attracted to sports wagering; pathological gamblers who will have unlimited ability to gamble without being monitored; criminal use causing concerns for dishonest site operators, computer hackers, and an easy means for money laundering activities. *Id.* at 5-4 to 5-6.

197. See *supra* note 27.

198. See *Central Hudson*.

199. See *supra* part IV. A. 1.

200. 144 Cong. Rec. S. 8815, Prohibition proponent, Senator Kyl advises the Senate that there can be no prohibitions if the policy is to work. *Id.* A proposed amendment to exclude tribal Internet gambling was rejected 82 to 18. *Id.*

extensive than necessary in serving the governmental interest.²⁰¹ The *Central Hudson* test does not require the government to use the least restrictive means possible as long as the means used are reasonable in terms of the costs and benefits.²⁰² In *Greater New Orleans*, even without applying the least restrictive means, the Court found that the costs of the ban outweighed the benefits of targeting social ills where too much truthful speech regarding lawful conduct of legal land-based casinos would also be withheld from the public.²⁰³ This concern would not be applicable in the Internet gambling context. Again, assuming Congress passes the bill that would ban Internet gambling entirely, there would be no lawful Internet gambling conduct and therefore no truthful speech regarding lawful conduct to ban. Additionally, a cost benefit analysis in this context might show the benefits of the ban to be even greater where the societal ills associated with Internet gambling surpasses those associated with legal land-based gambling.²⁰⁴ It is undeniable that Internet gambling has far more potential for danger in terms of its lack of regulation, anonymity, and unlimited accessibility to all ages in all locations.

VII. CONCLUSION

Prominent themes regarding concerns about the Internet gambling industry are the problems of non-uniform applicability of the Wire Act to Internet gambling and enforceability problems due to the jurisdictional obstacles in prosecuting site operators located off-shore. Public policy concerns over the increase in gambling addictions and the exposure to underage individuals would support affirmative action in combating the societal ills associated with Internet gambling.

Assuming a ban on advertisements for Internet gambling passes the *Central Hudson* test for restrictions on commercial speech, such a ban would almost certainly help slow the growth of the industry. Because Internet gambling advertisements are not limited to those placed on the Internet, there are numerous forms of advertisement bans that can easily be enforced. These bans include prohibiting those ads placed on television, in newspapers, on billboards, in

201. *Supra* note 169, at 556.

202. *Id.*

203. *See supra* part VI. A. 1.

204. *Supra* note 26.

event sponsorships, and those promoted by radio hosts.

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