Tapping the Aquarium

Legal Implications of Advertising for Online Gambling Sites in the United States

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"The only bad luck for a good gambler is bad health. Any other setbacks are temporary aggravation."
– Benny Binion

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I. INTRODUCTION

With the dawn of the Internet and the first web browsers, the world witnessed a "gold rush" that was global, high-tech, and mostly safer than any other in history. With the prospectors—mostly legitimate folks trying to make an extra buck—came the usual tag-alongs: the vice peddlers. While it is (currently) impossible to take a stiff drink or indulge in certain other vices through a computer screen, it is phenomenally easy to access other classic vices, most notably sexual content and gambling. While the former is the easiest to find—the popular search engine Google offers 407 million results for the simple search "sex"[1] and 97.8 million for "porn"[2]—gambling is not far behind. Searches on google.com for "poker,"[3] "casino,"[4] "gambling,"[5] and "blackjack"[6] return 113 million, 132 million, 60.1 million, and 30.1 million results, respectively. Despite this glut of content and the fact that more than $60 billion was put in play on various online poker sites in 2005,[7] with American gamblers responsible for nearly half of this sum,[8] the legality of online gambling in the United States remains an open question.

Such a thriving and competitive industry requires huge amounts of advertising, and as a result a host of enterprises not directly engaged in gambling have found themselves in hot water. The companies which have found themselves facing legal action over their acceptance of advertisements for online gambling include The Sporting News, various radio stations, Esquire magazine, Google, Yahoo, and Discovery Communications, which owns the Discovery Channel

[1] Google search for "sex", http://www.google.com/search?q=sex (last visited June 11, 2007).
[2] Google search for "porn", http://www.google.com/search?q=porn (last visited June 11, 2007).
[3] Google search for "poker", http://www.google.com/search?q=poker (last visited June 11, 2007).
[4] Google search for "casino", http://www.google.com/search?q=casino (last visited June 11, 2007).
[5] Google search for "gambling", http://www.google.com/search?q=gambling (last visited June 11, 2007).
[6] Google search for "blackjack", http://www.google.com/search?q=blackjack (last visited June 11, 2007).
[7] David Silberberg, *Online Poker: Going All-in to Expose the Internet's Billion-Dollar Bet*, DIGITAL J., May 5, 2006, http://www.digitaljournal.com/news/?articleID=4388 (last visited June 11, 2007).
[8] Physorg, US Crackdown Raises Odds for Internet Gambling (May 23, 2007), http://www.physorg.com/news99145142.html (last visited June 11, 2007).

and the Travel Channel.[9] Perhaps even more significantly, the opposition by the United States government to online gambling undermines the business model of the major search engines, which derive most of their revenue from context-driven[10] advertising placements; online gamblers are more likely than non-gamblers both to click on such ads and to make purchases after clicking.[11] In other words, a wide variety of businesses find their financial well-being depends, at least in part, on the legality of accepting advertisements from online gambling site operators and their affiliates.

This paper will seek to address the practical, legal ramifications of advertising for and by online casinos, both civil and criminal.[12] Because no statute explicitly bans or restricts such advertising at the federal level and no federal court has ruled that any statute does so, any criminal liabilities will necessarily be found under theory of accessory or aiding and abetting. Thus, a significant amount of background is essential. This examination will proceed in six major parts. First, I will define some terms that tend to get thrown around loosely, even in judicial opinions. Second, I will survey the patchwork of federal and state statutes, international agreements, and caselaw governing online gambling itself, with particular note of those areas in which accessory liability could attach. Third, the enforceability of the law will be examined briefly, with an eye to the jurisdictional and cost-of-detection questions implicated in online

[9] Chuck Humphrey, Advertising Internet Gambling, Aug. 6, 2006, http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm (last visited June 19, 2007).

[10] Context-driven advertising, also called context-sensitive advertising, means advertising that is chosen to be especially suitable for the surrounding context. For example, it is typical when watching television to see an add for heart medications in the middle of a situation comedy; this is non-context-driven advertising. On the other hand, a web page about a situation comedy is likely to feature advertisements related to the cast of the show or other entertainment news. *See, e.g.*, Lostpedia, http://lostpedia.com/wiki/Main_Page (last visited July 1, 2007) (showing, at last visit, advertisements for HBO shows and *Lost*-themed mobile phone ringtones). Context-driven advertising is likely to be selected not by humans, but by computer algorithms such as Google's AdWords. http://adwords.google.com/ (last visited July 1, 2007).

[11] Keith Regan, Mac News: E-Commerce: Yahoo and Google Ban Gambling Ads, Apr. 5, 2004, http://www.macnewsworld.com/story/33319.html (last visited June 23, 2007).

[12] It is not seeking, for reasons that will become obvious, to provide a definitive answer as to the legality of certain behaviors. In any case, that question has been addressed at length elsewhere. *See infra*, note 103 and accompanying text.

gambling per se. Fourth, the paper will detail the enforcement actions taken against advertisers and advertising carriers by governments and government agencies acting on the belief that advertising promoting online gambling is illegal. Fifth, the paper will examine relevant civil actions. Sixth, it will explore the various actions taken by online casinos, offline casinos, advertising carriers, and the World Series of Poker, in response to the threats of legal liability. Finally, I will conclude with some tentative guesses about the futures of online gambling generally and advertising-based liability.

II. DEFINITIONS

At this point, some definitions will be helpful, as a great many authors[13]—and judges[14]—get confused over what is and what is not forbidden under various statutes and court decisions. For the purposes of this paper, "gambling" has the everyday meaning of that word: placing real

[13] *See, e.g.*, Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment–Protected Free Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 553 n.26. Frese claims that "[s]everal states, including Illinois, Louisiana, Nevada, Oregon, South Dakota, and Wisconsin, have expressly outlawed Internet gambling." *Id.* (citing Chuck Humphrey, State Gambling Law Summary, http://www.gambling-law-us.com/State-Law-Summary (last visited June 25, 2007) (Humphrey's site now shows nine states with express prohibitions.)). An examination of the statutes of the listed states, however, reveals that most such states have not banned betting, but operation of an Internet gambling site. For example, in Illinois one commits a crime if one

> Knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet.

720 ILL. COMP. STAT. ANN. 5/28-1(a)(12) (West 2000).

[14] For a typical example, *see Missouri ex rel Nixon v. Interactive Gaming & Communications Corp.*, No. CV97-7808, 1997 WL 33545763, at *4 (Mo. Cir. Ct. May 23, 1997) ("*IGCC*"). The *IGCC* court held that

> IGC's conduct in advertising, promoting and selling to Missouri consumers access to its gambling services as described above constitutes the "advancement" and/or "promotion" of gambling under [Vernon's Annotated Missouri Statutes] § 572.010(1). Such activities *on the part of IGC and consumers participating in the services* promoted, advertised and sold by IGC are declared illegal in the State of Missouri by §§ 572.030 and 572.040 . . . .

Id. (emphasis added). The sections purportedly making the consumer activities illegal, however, relate to "promoting gambling in the first degree" and "promoting gambling in the second degree," respectively. MO. ANN. STAT. §§ 572.030, 572.040 (West 1995). The first degree offenses listed include such things as "setting up and operating a gambling device" and "engaging in bookmaking." MO. ANN. STAT. § 572.030. The second degree offense is committed when a person "knowingly advances or profits from unlawful gambling or lottery activity." MO. ANN. STAT. § 572.040. It is therefore far from clear that the consumer acts were prohibited, yet the *IGC* court cited no authority for its assertion to that effect.

money bets or wagers in the hopes of winning money or other valuable prizes, whether on a casino game, lottery, sporting event, or in any other context where people seek to gain based on known or estimated odds of a single event or series of events occurring outside of the control of the betters.[15]

I use "commercial gambling," "gambling enterprise," "operating a gambling site," and similar terms to mean the act of owning in whole or part, operating, managing, directing, or otherwise participating in the business operations of an Internet gambling business, that is, a website offering real-money gambling.

The "Internet" here is defined in its broad sense as the global network of computers, phones, personal organizers, and other electronic devices which can communicate with each other using the internet protocol, or IP. In common sense terms, it might be thought of as all devices capable of accessing websites like www.google.com and www.yahoo.com, as well as all of the cables and radio signals connecting such devices to one another.[16] In more precise terms, because few if any gambling sites use web pages to facilitate playing their games, it is not even necessary that the devices be able to load the web pages mentioned.[17]

[15] This definition does not include speculation or investment in stocks, bonds, options, foreign currency, or other financial instruments. For the purposes of this paper, "gambling" also excludes gambling run by and for charities, as many states regulate gambling for charitable purposes differently from other gambling. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2000) (exempting "Charitable games when conducted in accordance with the Charitable Games Act," 230 ILL. COMP. STAT. ANN. 30/1 (West 2000)).

[16] Note that the ability to access multiple such servers is critical. If, for example, a machine has a route connecting it to Google, but not to Yahoo!, we would concluded that either the device is on an intranet or local area network ("LAN"), rather than on the web, or that its access has been blocked. If a device cannot, by default, access web servers other than "local" ones, it is not on the Internet. In technical terms, we might say that it must be capable, upon request, of reaching the root DNS servers for the major, international, top-level domains (.com, .net, .org).

[17] That is, most online casinos use downloadable software to facilitate play. *See, e.g.*, Party Poker, http://www.partypoker.com/ (last visited June 26, 2007). In technical terms, these software packages use the TCI/IP protocol, but they are not interfacing with a normal "web" server, in that they do not send HyperText Transfer Protocol ("HTTP") requests. Rather, they function more like an instant messaging client, using their own protocols and often operating on network "ports" that are not widely used by other applications.

III. ONLINE GAMBLING REGULATION

The federal government[18] and some state governments[19] have long asserted that gambling over the Internet was prohibited by the Wire Wager Act of 1961 (commonly called the "Wire Act"),[20] the Travel Act of 1961,[21] and the Organized Crime Control Act of 1970,[22] as well as

[18] *See, e.g.*, Letter from John G. Malcolm, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to the Nat'l Ass'n of Broadcasters (June 11, 2003), available at http://ww2.casinocitypress.com/ExhibitAtoComplaint.pdf (last visited June 24, 2007) ("Malcolm Letter").

[19] *See, e.g.*, *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 860–861 (N.Y. Sup. Ct. 1999). The *World Interactive Gambling* court held that

> Even though gambling is legal where the bet was accepted, the act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute illegal gambling activity within New York. . . . The evidence demonstrates that respondents have violated New York Penal Law which states that '[a] person is guilty of promoting gambling ... when he knowingly advances or profits from unlawful gambling activity.'" (citing N.Y. PENAL LAW § 225.05 (McKinney 1999))).

[20] 18 U.S.C. 1084 (2000). Section 1084(a) states:

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

Id. Paragraph (b) of § 1084 exempts news reporting. Paragraph (c) states that § 1084 shall not "create immunity from criminal prosecution under any laws of any State." Paragraph (d) states that common carriers subject to the jurisdiction of the Federal Communications Commission must refuse service to violators or would-be violators of the Wire Act, upon notice "in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by [the common carrier] is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law." The last paragraph, (e), merely defines "State" for the purposes of the Wire Act to include "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States."

[21] 18 U.S.C. 1952 (2000). For discussion, *see infra*, notes 67–70, 75, and accompanying text.

[22] 18 U.S.C. 1955 (2000). In relevant part, the section states that:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section –
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> (1) "illegal gambling business" means a gambling business which--
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> (i) is a violation of the law of a State or political subdivision in which it is conducted;
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> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
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> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

various state laws.[23] Federal courts have, in fact, held that being "engaged in the business of betting or wagering" over the Internet is prohibited by the Wire Act.[24] It is less clear, however, that the act of betting—as opposed to running a gambling business—or any aspect of activities related to casino games—as opposed to sporting events—is prohibited by federal law, though such activities clearly fall within some state prohibitions.[25] There are several problems, however, with many of the assertions about online gambling made by law enforcement officials at both the federal and state levels.

First, many of the statutes invoked, such as the Wire Act, deal explicitly only with "sporting event[s] or contest[s]."[26] Because much of the money wagered online involves not

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> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
> (3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Id. The other paragraphs of this section, (c)–(e), define probable cause for the purposes of warrants, address the disposition of funds seized, and exempt games conducted by an organization exempt from federal taxation under I.R.C. 503(c) (1986), as amended, provided that no "shareholder, member, or employee of such organization" benefit from any such game, except in reimbursement for actual expenses incurred, respectively.

[23] *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 860–61.

[24] *United States v. Cohen*, 260 F.3d 68, 71 (2d Cir. 2001) (quoting 18 U.S.C. § 1084 (2000)).

[25] *See, e.g.*, *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 860–61. *See also* WASH. REV. CODE ANN. § 9.46.240 (West 2006) ("Whoever knowingly transmits or receives gambling information by . . . the internet . . . shall be guilty of a class C felony . . . ."). Washington also issued a "State Policy" note accompanying its 2006 revisions of section 9.46.240, saying

> It is the policy of this state to prohibit all forms and means of gambling, except where carefully and specifically authorized and regulated. With the advent of the internet and other technologies and means of communication that were not contemplated when either the gambling act was enacted in 1973, or the lottery commission was created in 1982, it is appropriate for this legislature to reaffirm the policy prohibiting gambling that exploits such new technologies.

Id. at 2006 c 290 § 1 (West 2006).

[26] 18 U.S.C. § 1084 (2000). *See also In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (5th Cir. 2001). The Fifth Circuit held that the Wire Act applies only to sporting events or contests, because, *inter alia*,

> a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a "sporting event or contest."
> . . . .
> As the plain language of the statute and case law interpreting the statute are clear, there is no need to look to the legislative history of the Act as argued by

sports, but classic casino games like poker,[27] much of the allegedly illegal activity actually falls in a gray area, at least with regard to federal and some state laws. Second, many of the statutes invoked define "gambling" as what is more properly called "operating a gambling enterprise."[28] Thus, everyone interested—including operators, gamblers, academics, and judges—tends to get confused and start using terms in common sense manners, rather that as the terms of art, or at least of inartfully drafted statutes, that they are.[29]

A third and overlapping problem is that many of the statutes which have been drafted with specific reference to the Internet criminalize operating a gambling site,[30] bookmaking over the Internet,[31] or transferring funds to or from a gambling site over the Internet,[32] rather than the act of betting. The latter was the case with the much-vaunted Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").[33] Many members of the online public thought the UIGEA

> plaintiffs. However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084.

132 F. Supp. 2d at 480 (citations omitted).

[27] *See supra* note 7 and accompanying text.

[28] This is the case, for example, in Louisiana:

> Gambling is the intentional *conducting*, or directly *assisting in 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.

LA. REV. STAT. ANN. § 14:90(A)(1)(a) (West 2004) (emphasis added). *Compare* OR. REV. STAT. ANN. § 167.117(7) (West 2003) (defining "gambling" as occurring when "a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person . . . .").

[29] *See, e.g.*, Frese, *supra* note 11, at 553 n.26; *IGCC*, 1997 WL 33545763, at *4

[30] *See, e.g.*, LA. REV. STAT. ANN. § 14:90(A)(1)(a) (West 2004); *supra* note 28.

[31] *See, e.g.*, WASH. REV. CODE ANN. § 9.46.240 (West 2006); *see also supra* note 25.

[32] *See, e.g.*, Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. §§ 5361–5367 (2006) ("UIGEA").

[33] *Id.* The UIGEA has an exceptional and controversial history:

> The Act is Title VIII of the Safe Port Act, a completely unrelated bill that deals with port security. In fact, the UIGEA was pushed through Congress so quickly that no one on the Senate-House Conference Committee ever saw the final language of the bill, according to Senator Frank R. Lautenberg (D-NJ).

Jessica M. Gulash, *The Unlawful Internet Gambling Enforcement Act's Effects on the Online Gambling Industry*, U. PITT. J. TECH. L. & POL'Y, Apr. 1, 2007, http://tlp.law.pitt.edu/SP_Gulash_Internet_Gambling.htm (last visited June 27, 2007). Gulash outlines the efforts from 1996 forward by Senator Jon Kyl of Arizona to pass the Internet Gambling Prohibition Act; though the UIGEA was not Senator Kyl's idea, he has been one of its staunchest proponents. *Id.*; *see also* Senator Jon Kyl, Repealing UIGEA: Don't Bet On It (Apr. 30, 2007), http://kyl.senate.gov/record.cfm?id=273370 (last visited June 27, 2007). The speed with which the UIGEA was

would make it illegal for them to place bets online—it did not, at least not explicitly. On the other hand, the position of many members of the United States Congress was that the UIGEA did not make Internet gambling illegal, but merely provided enforcement mechanisms for activities already illegal under the Wire Act.[34] As I have noted, however, the Wire Act by its terms applies to sporting events and contests only; this is merely another example of the confusion which arises when the terms are thrown around loosely

Fourth, a longstanding debate is raging over what games are prohibited under many of the relevant statutes. Many statutes, particularly at the state level, regulate only gambling on "games of chance," often with little or no definition of what constitutes such a game.[35] No one seriously asserts that skill can prevail over luck in the long run in games like roulette.[36] Poker, however, is a special case, in that players play against each other, not "the house." Because poker is a game in which it is possible for good players to win money at a more or less steady rate in the long term, even in a "raked" game (in which the house withdraws an amount from each pot or charges each player a fixed amount per unit of time played), many players contend that poker

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passed and its attachment to the Security and Accountability For Every (SAFE) Port Act caused many poker players, in particular, to cry foul, and prompted Democratic Congressman Barney Frank of Massachusetts to call the law "one of the stupidest things I ever saw." *Gaming Stocks Revival (Lex Column)*, FIN. TIMES (UK), May 1, 2007, at 16.

[34] Kyl, *supra* note 33.

[35] *See, e.g.*, S.D. CODIFIED LAWS § 42-7B-4(2) ("'Bet,' [means] an amount placed as a wager in a game of chance."). Nowhere does South Dakota define "game of chance." *See also infra*, notes 39–40 and accompanying text.

[36] In a fair game, that is, the glut of "systems" books and the exploits of a few notwithstanding. There are always counterexamples. For example, three British individuals used a device concealed in a cell phone to net £1.3 million playing roulette in 2003; they were arrested but released, and their winnings were returned to them. Paul Lewis, *For Sale for £1,000: Gadget that Means You'll Never Lose at Roulette Again*, GUARDIAN UNLIMITED, Sept. 16, 2006, http://www.guardian.co.uk/gambling/story/0,,1873910,00.html (last visited June 27, 2007). A similar device is now commercially available, giving gamblers a huge edge over casinos. *Id*. Apparently, at least in the United Kingdom, "regulators are unwilling to ban predicting devices because it would amount to an admission that wheels can be biased," so the casinos are left to enforce their own rules regarding such devices.

In a software-driven game, though no random number generator is actually perfectly free of patterns, the real odds *should* be perfectly in line with theory for any practical purposes. Further, the fact that gamblers interact with a computer would make any attempts to exploit a pattern, no matter how subtle, trivial to detect in a high-volume player's activity. Thus, such exploits *should* be impossible on the Internet.

is a game of skill, not chance.[37] Bennett Liebman considers the debate at length but notes that "even the jurisdictions that recognize the great level of skill involved in playing poker nonetheless conclude that the degree of chance involved in the playing of the game renders poker an activity constituting gambling."[38]

The failure of most state legislatures to be precise about what they are and are not banning creates a great deal of initial confusion when each such statute is passed; the definition of "game of skill" is usually hammered out by judicial opinion. For example, North Carolina bans operation of a "game of chance."[39] Not until May of this year did the phrase "game of chance" receive judicial interpretation in North Carolina, however, despite the fact that some version of the same statute had been on the books for at least twenty-eight years.[40]

In other words, while no defendants have been convicted of crimes for placing bets through online gambling sites under state or federal law,[41] the organizers, owners, and operators of online gambling operations have been successfully prosecuted. Further, since public officials continue to proclaim that online gambling is illegal, there is a great deal of confusion about what is and is not illegal in various jurisdictions. As discussed, most of this confusion stems from statutes which fail to define their terms, use terms inconsistently, or use terms in ways that are unnecessarily at odds with everyday usages.

IV. ENFORCEMENT OF ONLINE GAMBLING REGULATIONS

Enforcement of the prohibitions—real or alleged—on various activities related to online gambling tends to be sparse, random, and widely publicized, especially at the federal level. As a

[37] *See generally*, Bennett M. Liebman, *Poker Flops Under New York Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2006).
[38] *Id.* at 22.
[39] N.C. GEN. STAT. ANN. § 14-292 (West 2007).
[40] *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 631 (N.C. Ct. App. 2007) ("[W]e determine that chance predominates over skill in the game of poker, making that game a game of chance under N.C. GEN. STAT. § 14-292 (2005).").
[41] *United States v. Corrar*, No. 1:03CR444 JEC, 2007 WL 196862, at *7 (N.D. Ga. Jan. 22, 2007).

federal court recently noted and "[a]s the [federal] Government [has] conceded, there is a dearth of cases in which defendants have been convicted under the Wire Act as a result of internet gambling, notwithstanding the fact that internet gambling appears to be quite widespread in this country."[42] In fact, in that case, *United States v. Corrar*, each party was able to cite only a single case applying the Wire Act to online gambling activities: *United States v. Cohen*.[43]

The *Cohen* court, just like the *Corrar* court after it, had before it charges related to the business side of gambling. Specifically, in *Cohen*, the defendant and his partners opened a business they called "World Sports Exchange" ("WSE"), in 1996.[44] "WSE's sole business involved bookmaking on American sports events, and was purportedly patterned after New York's Off-Track Betting Corporation."[45] Based in Antigua, WSE collected deposits from bettors, accepted and paid bets, and profited on the "vig," or ten percent commission on each bet.[46] In 1998, Cohen was arrested and on eight charges of conspiracy and substantive violations of the Wire Act; in 2000, he was convicted on all eight counts.[47] In upholding the convictions, the court found, *inter alia*, that the government did not need to show a corrupt motive in charging conspiracy to commit acts that are *malum prohibitum*;[48] that the Wire Act's safe harbor provision did not apply, as the term "legal" in the legal betting exception meant more than "not a

[42] *Id.*
[43] 260 F.3d 68 (2d Cir. 2001) (cited at *Corrar*, 2007 WL 196862, at *7).
[44] 260 F.3d at 70.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 71.
[48] A *malum prohibitum* act is "wrong because prohibited," as opposed to a *malum in se* act, which is "wrong in itself." *Id.* at 71–73. The New York Court of Appeals had ruled, in 1875, that conspiracy to commit an act "innocent in itself" required a showing of a "corrupt" or "evil purpose." *People v. Powell*, 63 N.Y. 88 (1875). The court noted the history of discontent which the *Powell* doctrine had engendered, then cited *United States v. Feola*, 420 U.S. 671, 684 (1975), as authority that no intent to conspire in violation of a statute need be shown where intent to commit the underlying act and intent to conspire were shown. 260 F.3d at 71–73. *Feola* held that, where Congress had expressed no requirement that defendants under 18 U.S.C. § 111 (2000) intend to conspire to assault a federal agent, the intent to assault someone and the actual conspiring to assault someone were sufficient. 420 U.S. at 684. By extension, it was not necessary that Cohen intend to conspire to violate the Wire Act, only that he conspire to commit acts which are, in fact, violative of the Wire Act.

crime;"[49] that transmission of instructions regarding account wagering was the same as transmitting a bet within the meaning of the statute;[50] that Cohen's mens rea with respect to the statute itself was irrelevant;[51] that the Wire Act provides "fair warning" with respect to the definitions of "bet or wager," "transmission," and "legal," making the rule of lenity inapplicable;[52] and that the district court had properly instructed the jury with respect to aiding-and-abetting liability under 18 U.S.C. § 2 (2000).[53]

The findings of the *Cohen* court which are of greatest interest for the present purpose are its discussion of what it means to transmit a bet and its analysis of aiding-and-abetting liability. Cohen had claimed that, because WSE clients used account wagering, while all odds and payments were calculated and applied in Antigua, no *bets* had been transmitted, only *instructions*

[49] *Cohen*, 260 F.3d at 73–74.

[50] *Id.* at 74–75. A typical wager involves a person using cash or some other asset of quantifiable value—a poker chip, a debit card, or a player reward card, for example—walks up to a table, window, or other location where gambling is possible, and places a bet. Classic examples are betting at a window at a horse track or OTB, the idle gambler pausing to drop a coin in a slot machine in passing, or sitting at a card table and betting a stack of chips on a game.

Account wagering, on the other hand, occurs when the person receiving bets holds the bettor's money in an account. This is the normal situation with online gambling—rather than process a debit to a gambler's credit card for each and every hand played, or even every session, the typical online gambling site requires a gambler deposit funds into an account with that site. All bets won or lost are then credited or debited to that account. This lowers the cost of operation for the site, but raises the barriers to entry, albeit slightly, for the gambler. Thus, many online casinos offer large bonuses for the first deposit a new player makes. *See, e.g.*, PokerListings.com, Best US Poker Rooms, http://www.pokerlistings.com/US-poker-rooms (last visited June 30, 2007) (listing the top player-rated poker rooms and the "sign-up bonus" each offers; normally, this page lists the top ten such rooms, but it currently lists only six, under the heading "Best US Rooms 1–10," followed by a UIGEA disclaimer).

[51] That is,

> it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute. See *Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998). Cohen's own interpretation regarding what constituted a bet was irrelevant to the issue of his mens rea under § 1084.

Cohen, 260 F.3d at 75–76.

[52] *Cohen*, 260 F.3d at 76–77. The court noted that a "grievous ambiguity" must exist in the statute for the rule of lenity to apply, of a severity that "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." 260 F.3d at 76 (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974)). The *Cohen* court found no such ambiguities in the Wire Act. *Id.* (finding that "account wagering is wagering nonetheless," any definition which could be offered of "transmission" described Cohen's actions, and even laymen could not find an act to be "legal" when civil, but not criminal, penalties attach to its commission).

[53] 260 F.3d at 77–78.

to place bets; the bets were then made by WSE employees *on behalf of* the clients, in Antigua.[54] The court flatly rejected this contention, noting that the caselaw Cohen cited applied either to proof that transmitted bets had been accepted or to questions regarding the locus of a bet for taxation purposes.[55] Because no such questions existed in Cohen's case, the court found that:

> WSE could only book the bets that its customers requested and authorized it to book. By making those requests and having them accepted, WSE's customers were placing bets. So long as the customers' accounts were in good standing, WSE accepted those bets as a matter of course.
>
> Moreover, the issue is immaterial in light of the fact that betting is illegal in New York. Section 1084(a) prohibits the transmission of information assisting in the placing of bets as well as the transmission of bets themselves. This issue, therefore, pertains only to the applicability of § 1084(b)'s safe-harbor provision. As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here even if WSE had only ever transmitted betting information.[56]

In other words, at least under the Wire Act, the locus of a bet is immaterial, as transmitting information about the bet constitutes the same offense as transmitting the bet, itself.

The *Cohen* court's analysis of aiding-and-abetting liability is also instructive. Cohen complained that the district court had "constructively amended his indictment" when it instructed jurors regarding aiding-and-abetting liability under 18 U.S.C. § 2(b), rather than under paragraph (a) of the same section. The text of § 2 reads:

> (a) Whoever *commits an offense* against the United States *or aids, abets, counsels, commands, induces or procures its commission*, is punishable as a principal.

[54] *Id.* at 74.
[55] *Id.* at 75.
[56] *Id.* at 75.

> (b) Whoever *willfully causes an act to be done* which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[57]

The district court had indicated that Cohen would only be charged with aiding-and-abetting under § 2(a), but then charged him under § 2(b), instead.[58] While § "2(a) requires proof that someone other than the defendant committed the underlying crime" in order for aiding-and-abetting liability to attach,[59] § 2(b) does require that anyone commit an underlying crime, only that the act would have been a crime if committed by the defendant. The Second Circuit found that, because the indictment indicated that Cohen would be charged with aiding-and-abetting under § 2, no amendment occurred, despite the confusion prior to and during the trial. The court also upheld Cohen's conviction for aiding and abetting violations of the Wire Act which took place after his arrest, noting that he "was a moving force behind WSE's entire operation" and continued to benefit from WSE's operations after his arrest.[60]

The *Corrar* court, on the other hand, was faced with charges that the defendant, Danny Corrar, had violated both the Travel Act and the Wire Act.[61] Corrar and two others, all "agents" for PlayWithAl.com ("PWA"), were all engaged in trying to collect a debt from one Larry Parker, who was also a PWA agent.[62] Although the court was imprecise in its description of precisely what happened, it appears that Parker encouraged several friends to play on the PWA website, then found himself indebted to PWA for $20,000, after his friends lost money.[63] Parker

[57] 18 U.S.C. § 2 (2000) (emphasis added).
[58] 260 F.3d at 77.
[59] *Id.* (citing *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999)).
[60] 260 F.3d at 77–78.
[61] 2007 WL 196862, at *1.
[62] *Id.* It appears from the court's opinion that Parker was essentially a promoter for PWA, while the others may have been more adequately described by the popular term "strong man"—it appears that violence was a tool of their trade. *Id.* at *1.
[63] *Id.* It is unclear how Parker assumed his friends' debts. It may be that Parker was essentially given funds to distribute to players, with the understanding that he was liable for any debts if they failed to pay, or it may be that he assumed their debts out of a sense of friendship. The court observed that "Parker contend[ed] that he never attempted to collect money from his friends to pay back his debt to PWA." *Id.* He was, however, entitled to a portion

then began wiretapping his phone conversations with one of the other agents, cooperating with the FBI.[64] The defendant visited Parker at least twice to collect the debt, but the second visit was a sting, where the defendant was arrested.[65] The *Corrar* opinion issued in response to the defendant's Motion for Judgment of Acquittal.[66]

With respect to the Travel Act charge, the court granted Corrar's motion. The Travel Act makes it a crime to "travel[] in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . . and thereafter perform[]" any of the acts specified in the Act, which include "any business enterprise involving gambling."[67] The *Corrar* court found that this requires "1) an unlawful activity, 2) knowledge by the defendant of the unlawful activity, and 3) use of interstate commerce to facilitate the carrying out of the unlawful activity."[68] Applying this test, the court found that "[t]he United States has failed to prove a violation of the Travel Act count because it demonstrated neither an underlying unlawful activity nor facilitation."[69] The

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of his friends' losing bets. *Id.* at *2. Thus, it appears more likely that he was on the hook from the beginning. The court also noted the "rather incredible" story it was asked to believe. *Id.* at *3 n.4. In any case, Parker's failure to pay got him into hot water with PWA, the defendant, and others.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] 18 U.S.C. 1952(a)–(b) (2000). This statute is also quite vague; it is worth quoting paragraph (b)(1) in full by way of illustration. This statute makes criminal some acts that are clearly made criminal elsewhere in the United States Code, but also

> any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States.

Id. It is unclear that Congress intended the "in violation" clause to extend to all enterprises listed, not merely "prostitution offenses," and it is unclear what is meant by "involving."

[68] 2007 WL 196862, at *1 (citing *U.S. v. Corona*, 885 F.2d 766, 771 (11th Cir. 1989)).

[69] *Id.* The court also noted:

> Literally speaking, the Government also fails to satisfy the second prong of the test described in *Corona.* Because the Government has not demonstrated "an unlawful activity," it necessarily cannot demonstrate "knowledge of the defendant of the unlawful activity." However, there is sufficient evidence to establish that defendant was aware of Parker's activities, regardless of their

opinion notes that the government failed to produce any evidence in support of its claims that there had been an underlying violation of Georgia law and that the government also declined to respond to Corrar's arguments on this charge.[70]

On the other hand, with respect to the Wire Act, the court found unconvincing and irrelevant Corrar's arguments that prosecution under the Wire Act "have historically been limited to persons involved in actual bookmaking activities."[71] Further, Corrar had been engaged in transmitting "information assisting in the placement of bets" by telephone, thus violating the statute's terms, regardless of how it had been applied historically.[72] The court therefore upheld the conviction on the Wire Act count.

Finally, the *Corrar* court rejected the defendant's suggested application of the rule of lenity. Specifically, the court found that application of the Wire Act to the defendant's conduct was not a "novel construction" of the Act.[73] Additionally, the court rejected Corrar's defense that "many people are unsure whether internet gambling is illegal," citing *Cohen*.[74] Finally, "even if internet gambling were permissible under state law, using interstate wire communication facilities to promote it would not be. This is why the Wire Act, unlike the Travel Act and 18 U.S.C. § 1055, does not require an underlying violation of state law."[75]

These two cases—*Cohen* and *Corrar*—constitute the sum of federal caselaw on application of the Wire Act to online gambling. While various state cases have held that online

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> legality. Thus, if the Government satisfied the first prong of the test, it would satisfy the second as well.

Id. at *1 n.1.

[70] *Id.* at *3–5.

[71] *Id.* at *5.

[72] *Id.* at *6.

[73] *Id.* at *7.

[74] *Id.*

[75] *Id.* at *8. Again, however, it is worth noting that the Wire Act only explicitly applies to sports-related betting. *See supra*, note 26. Because PWA was a "sports book" and the charges presented all related to sports betting, this case does not stand in opposition to *In re Mastercard*, *supra* note 26, or support the idea that the Wire Act defines offenses related to forms of online gambling not involving "sporting event[s] or contest[s]." *Id.* at *1.

gambling—whether betting, operating a gambling site, promoting one, or some combination of these—is prohibited under state laws,[76] it is therefore unclear how much application these laws will ultimately find without revision, nor is it clear that they will be applied with much consistency or effectiveness.[77] Certainly, the threat of rare prosecution has not stopped the growth of the Internet gambling industry[78] or even prevented online casinos from seeking American bettors.[79]

V. ENFORCEMENT RELATED TO ADVERTISING

Enforcement of statutes related to—or purported to relate to—online gambling advertising is still more sparse and random than enforcement against gamblers and gambling site operators, with two distinctions. First, enforcement against advertisers is often by seizure of funds and has yet to result in any caselaw on the actual legality or illegality of advertising online gambling.[80] Second, few, if any, advertisers or advertising providers have the proper incentives

[76] *See, e.g.*, *supra*, notes 19, 23, 25, and accompanying text.

[77] While it can be difficult to find out the true identity, for example, of a sneaky website owner based in Antigua—a subpoena to the domain registrar may have no effect, as even that company may have no useful information—it is nearly impossible in practical terms to discover the identities of most online bettors. That is, people like Chris Moneymaker, the 2003 World Series of Poker main event champion, and Antonio Esfandiari, a World Poker Tour champion, maintain high profiles and freely admit to gambling online. Most players, however, are completely anonymous. A subpoena issued to a gambling site's operators—assuming they have, in fact, been identified—may therefore have no effect as the operators may have only minimal useful information and are likely outside the United States, making them unlikely to cooperate, anyway, unless they are already under charges in the United States.

For a contrary, if biased, view, consider the claim by David Carruthers, CEO of BETonSPORTS.com, that "[t]he very nature of the Internet is that every transaction is completely auditable from beginning to end. Every keystroke is logged into our system. We are more auditable, more scrupulously clean than the land-based operators." Anne Lindner, Comment, *First Amendment as Last Resort: The Internet Gambling Industry's Bid to Advertise in the United States*, 50 ST. LOUIS L.J. 1289, 1316–17 (2006).

[78] *See* Erana Hansen, UIGEA Impact on Online Casino Progressive Jackpots, Nov. 24, 2006, http://casino.pokernews.com/news/2006/11/uigea-impact-online-casino-progressive-jackpots.htm (last visited July 1, 2007) (noting a 45% decrease in the rate certain progressive jackpots were growing, but that the UIGEA by no means stopped the growth).

[79] *See supra*, note 50 (discussion of PokerListings.com's "Best US Poker Rooms" page, which is running below capacity for its "top ten" ranking, but still lists six sites, including Poker Stars, Bodog Poker, and Full Tilt Poker, three sites which were well known prior to the UIGEA's enactment).

[80] In fact, there is no caselaw at the federal or state levels on advertising-based criminal liability. Possibly the closest any case comes is *Alves v. Player's Edge, Inc.*, No. 05CV1654 WQH (CAB), 2007 WL 1238681, at *3 (S.D. Cal. Apr. 26, 2007). The *Alves* plaintiffs alleged various violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (2000) ("RICO"), by the defendants, citing as support the Malcolm Letter (cited in note 18) and the fact that the defendants continued to advertise online gambling services after the letter was

to mount a serious challenge to any enforcement that occurs, contributing to the lack of caselaw.[81] Some examples will help illustrate these points, but the background is critical to understanding the type of action being pursued.

Most, if not all, of the efforts at the federal level to curtail Internet gambling advertising stem from the Malcolm Letter,[82] which reads in part:

> As you are no doubt aware, *advertisements for Internet gambling and offshore sportsbook operations are ubiquitous on the Internet, in print ads. and over the radio and television*. . . . [This] misleads the public in the United States into believing that such gambling is legal. when in fact, it is not. *Because of the possibility that some of your organization's members may be accepting money to place such advertisements, the Department of Justice, as a public service, would like you to be aware* that the entities and individuals placing these advertisements may be violating various state and federal laws and *that entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities.*
>
> With very few exceptions limited to licensed sportsbook operations in Nevada, *state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore*. United States Attorneys' Offices in several districts have successfully prosecuted offshore sportsbookmaking and Internet gambling operations, and the Department of Justice win [sic.] continue to pursue such cases.
>
> *. . . Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate*

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issued. *Alves*, 2007 WL 1238681, at *3. The *Alves* court, however, made no finding regarding the legality of these actions. Further, when the federal government charged the defendants with various violations of the Wire Act and the Organized Crime Control Act, as well as conspiracy to violate the same, the government did not charge the defendants with any violations on the basis of their advertising activities, per se. *See* First Amended Complaint at ¶ 111–12, *Alves*, 2007 WL 1238681.

[81] United States federal courts do not issue advisory opinions on such matters, given the statement in Article III of the Constitution that "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies. . . ." U.S. CONST. art III, § 2; *see also* Correspondence & Public Papers of John Jay, vol. 3, p. 486 (explaining, in response to a request from the administration of President Washington, that the Supreme Court would not and should not give advisory opinions); *Muskrat v. United States*, 219 U.S. 346 (1911) (disapproving advisory opinions). The high courts of Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota, however, do issue advisory opinions. *See* Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 254–56 (1997) (collecting all state statutory or constitutional provisions permitting or requiring advisory opinions).

[82] *See supra*, note 18 and accompanying text.

> *Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony*. Additionally, pursuant to Title 18, United States Code, Section 2, *any person or entity who aids or abets in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes.* The Department of Justice is responsible for enforcing these statutes. and we reserve the right to prosecute violators of the law.
>
> Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities. . . .[83]

This letter has set the stage for nearly all enforcement action which has followed. It clearly sets forth the opinion of the Department of Justice, though it lacks any confirmation from a federal court that it represents a fair understanding of the cited statutes. Thus, the government has chosen to employ primarily asset seizures and the threat of prosecution, rather than actual prosecution, as the following examples demonstrate.

A prime example of the type of enforcement currently being pursued by the federal government is the government's seizure of funds from Discovery Communications ("Discovery") in 2004. Tropical Paradise, a Costa Rican operator of casinos, paid some $3.85 million to advertise ParadisePoker.com on the Travel Channel and the Discovery Channel website.[84] After running a portion of the ads, Discovery learned of the Malcolm Letter and notified Tropical Paradise that it would not run the rest of the ads.[85] Discovery agreed in writing to return the funds paid for commercials not aired or shown on its website, but failed to do so, prompting Tropical Paradise to bring suit for breach of contract in the federal district court in Maryland, represented by the major firm Greenberg Traurig.[86] As a defense, without arguing that it had a right to the funds, Discovery pointed out that the remaining funds, some $3.25 million,

[83] Malcolm Letter, *supra* note 18.
[84] Matt Richtel, *U.S. Steps Up Push Against Online Casinos by Seizing Cash*, N.Y. TIMES, May 31, 2004, at C1.
[85] *Id.*
[86] *Id.*

had been seized by federal marshals in April 2004.[87] Apparently, no party felt it had sufficient incentives to pursue further legal action—no party pressed its case in court, and Tropical Paradise filed a voluntary dismissal without prejudice in June 2004.[88] Presumably, this is because Discovery had no right to the money as it was clearly in breach of its contracts with Tropical Paradise, while neither Tropical Paradise nor the United States government wished to tangle in court and risk an adverse holding on the legality of online poker betting per se or advertising thereof. Discovery, for its part, was presumably content with the seizure of funds, since it was not entitled to them, anyway, and it has apparently dodged any criminal charges.

Not so lucky was The Sporting News. Facing charges[89] that it was "aiding and abetting in the promotion of . . . illegal gambling sites," The Sporting News, "one of the nation's oldest sports-centered media companies," reached a settlement in 2006 with the United States Department of Justice. As part of the settlement, The Sporting News agreed to pay $7.2 million—$4.2 million in damages plus a $3 million advertising campaign "to educate people about illegal Internet and telephone gambling"—an amount representing the profits it had reaped on advertising placements for online gambling operations over three years.[90] The Sporting News neither admitted nor denied any wrongdoing as part of the settlement.[91]

In another instance, a United States Attorney in Missouri recovered $158,000 from three St. Louis radio stations, in a settlement of charges that the stations violated the Wire Act and 18

[87] *Id.* Apparently at the same time, the marshals also seized $2 million paid to Discovery by PartyGaming, parent of PartyPoker.com. Humphrey, Advertising Internet Gambling, *supra* note 9; *see also* PartyGaming PLC, Prospectus, at 50, http://www.partygaming.com/images/docs/prospectus.pdf (last visited July 1, 2007). As with Tropical Paradise, the funds in question had been paid to Discovery some time earlier, but apparently retained when Discovery stopped running advertisements for all online gambling sites in October 2003. PartyGaming PLC, Prospectus, at 50.
[88] Humphrey, Advertising Internet Gambling, *supra* note 9.
[89] Matt Richtel, *Sporting News Settles Case on Gambling Ads*, N.Y. TIMES, Jan. 21, 2006, at C4. It is unclear if there was ever an indictment; Westlaw contains no case matter whatsoever on this issue.
[90] *Id.*
[91] *Id.*

U.S.C. §§ 1956 (money laundering), 1960 (interstate money transfers stemming from unlawful activity), and 1962 (RICO) by accepting and running advertisements for online casinos and sportsbooks.[92]

VI. CIVIL ACTIONS AGAINST ADVERTISING INTERESTS

Advertising of Internet gambling may also subject both advertisers and advertising providers to civil liabilities. In August 2004, noted class action plaintiffs' firm Lerach Coughlin Stoia & Robbins filed a class action suit against Yahoo, Inc., Google, Inc., and ten other Internet search engines, alleging that the engines had been illegally promoting gambling.[93] The suit seeks to recover funds for California Indian tribes and spouses of gamblers who have had property seized "as a result of illegal gambling," as well as for the state treasury.[94] The action is styled *Cisneros v. Yahoo, Inc.* No decisions have yet been reported in the case.

VII. RESPONSES BY THE GAMBLING INDUSTRY

Responses to the government crackdown have taken two forms: modifications of existing policies regarding advertising for online casinos and aggressive action against the government. The former is by far the most common tactic, taken by most major advertisers, including Discovery, Google, Yahoo, and numerous others.[95] One particularly informative example may be found in the "dot.net conceit." The idea is as follows: most commercial websites, whether or not they offer gambling, are "dotcoms." The ".com" extension is by far the most familiar to the layman, and a person unsure of a website's URL is quite likely to try "[company name].com"

[92] Humphrey, Advertising Internet Gambling, *supra* note 9. Again, it should be noted that all the charges here related to sports betting.
[93] *Id.*; *see also* Tresa Baldas, *Online Gambling, Offline Lawsuits: Net Gambling Leads to Liability, IP Suits*, NAT'L L.J., Apr. 4, 2005, at col. 4.
[94] Humphrey, Advertising Internet Gambling, *supra* note 9.
[95] *Id.*

even before searching for it,[96] so a ".com" name is particularly attractive to businesses. Many businesses, however, also register the ".net" version of their ".com" domain names. Out of this grew an informal practice of setting up real-money ".com" gambling sites, with companion sites at the corresponding ".net" address using play money only. This policy was officially sanctioned by Harrah's at the 2006 World Series of Poker, which banned ".com" advertising on player clothing, but permitted "poker.nets" to advertise, based in part on a memorandum from the Department of Justice to the Rio hotel and casino in Las Vegas.[97] The policy stated:

> Online free to play poker websites (i.e. "poker.nets") need to be in compliance with the standards articulated by the Department of Justice listed below. Please review your website and make changes accordingly. These requirements must be adhered to in order to have a presence within the Rio All-Suite Hotel & Casino during the 2006 World Series of Poker.
>
> 1. There can be no web links from an online free-to-play poker website (i.e. "poker.nets") to a online pay-to-play poker website (i.e. "poker.com") website.
>
> 2. There must be an on-screen disclaimer on the home page of the online free-to-play poker website (i.e. "poker.nets" [sic]) that states that this site is purely educational.[98]

For 2007, however, Harrah's reversed course, allowing advertising for "poker.coms" that do not allow access by United States residents.[99]

Taking the other approach in response to the government crackdown, one online gambling operator, CasinoCity.com, filed suit against the Department of Justice, bankrolled in

[96] *See, e.g.*, Net Nanny, Tricks Pornographers Play, http://www.netnanny.com/learn_center/article/108 (last visited July 1, 2007) (discussing, among other things, the famous instance of whitehouse.com, which leads not to the homepage of the President of the United States, but to a now-famous pornography site).

[97] *See* Memorandum from Rio All-Suite Hotel and Casino Las Vegas to "All Exhibitors," available at http://www.igamingnews.com/articles/files/riomemo-060420.pdf (last visited July 1, 2007) ("Rio Memo"); Humphrey, Advertising Internet Gambling, *supra* note 9.

[98] Rio Memo, *supra* note 97.

[99] PokerPages.com, Harrah's Bans Ads of Online Poker Sites Serving US Players at World Series of Poker, Feb. 25, 2007, http://www.pokerpages.com/poker-news/news/harrahs-bans-ads-of-online-poker-sites-serving-us-players-at-world-series-of-poker-29561.htm (last visited July 1, 2007).

part by the British company Sportingbet PLC.[100] CasinoCity.com alleged that the government's policy on online gambling advertising amounted to unconstitutional censorship, in violation of the First Amendment.[101] In a sweeping decision, the United States District Court for the Middle District of Louisiana dismissed the suit with prejudice on standing grounds.[102]

VII. CONCLUSION—PLACE YOUR BETS

While many gambling statutes do not explicitly address any kind of distance gambling, much less gambling over the Internet, and none appear to address advertising as a route to aiding-and-abetting liability, it is clear that the federal government, in particular, intends to enforce its understanding of the Wire Act, the Travel Act, and other statutes. This is true regardless of the types of gambling in question. It remains unclear what defenses will and will not work against such charges.[103] For a business that is not primarily driven by gambling, then, the smart move appears to be following the lead of companies like Discovery Communications, Clear Channel, Google, Yahoo, and so many others, in avoiding all such advertising entirely. Even for gambling businesses like Harrah's, unless a substantial portion of annual revenues comes from online operations, it has seemed safest to hedge one's bets and avoid (real-money) gambling advertising for the time being. At least until the issue is taken up at the federal appellate level, advertising for online gambling will be a riskier, higher-stakes business than anything found at the tables.

[100] *Id.* For an extended discussion and analysis of this case, *see* Lindner, *supra* note 77, at 1292–1324.
[101] U.S. CONST. amend. I.
[102] *Casino City, Inc. v. United States Department of Justice*, No. 04–557–B–M3, slip op. at 16 (M.D. La. Feb. 15, 2005), http://www.gambling-law-us.com/Articles-Notes/Ruling.pdf (last visited July 1, 2007).
[103] *But see* Lindner, *supra* note 77, at 1324 (concluding that, "[i]f this issue comes before a court again, it is conceivable that a court could rule that a company like Casino City may advertise Internet casinos but not Internet sports betting Web sites."); Andrew Hall, *Online Casino Advertising: Testing the Limits of Commercial Speech*, 10 U. PITTSBURGH J. TECH. L. & POL'Y 2 (anticipating many rounds of appellate litigation before final answers are reached); Frese, *supra* note 13, at 621 (writing before the *Casino City* decision and finding that Casino City should prevail with respect to casino advertising, but fail with respect to the sports betting).