

NCLGS
Internet Gaming Update
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Frank Catania, Catania Consulting Group, Inc.

The near-passage of Internet gaming prohibition in the past several sessions of Congress as well as the actions of the Department of Justice have caused nearly all businesses and governmental authorities in the United States to avoid all aspects of online gaming.

As Legislators from gaming states, you are probably aware of the Department of Justice's policy with regard to online gaming under Attorney General John Ashcroft. The DOJ sent letters to some States and Territories as well the Senate Banking Committee indicating that in its opinion the Wire Act of 1960, *U.S.C. Title 18 Section 1084* makes online betting of any kind -- including casino style gaming -- illegal.

As a result of the DOJ's actions, Nevada gaming regulators are asking all applicants for associated gaming equipment approvals if they have any dealings with offshore companies or individuals. Colorado gaming regulators refuse to grant gaming licenses to game testing laboratories that have any dealings with companies or even gaming jurisdictions that permit any form of Internet gaming. Missouri gaming regulators went so far as to attempt to revoke a temporary supplier's license without providing notice to the licensee of their anticipated action. (The licensee had acquired a company that had a subsidiary involved in what many attorneys had opined was a legal Internet business. The licensee brought a declaratory action in the civil courts to halt the Missouri Gaming Commission from proceeding with the revocation action.)

House of Representatives

In June 2003, the U.S. House of Representatives passed H.R. 2143, commonly know as the Bachus Bill. The Bachus Bill would have attempted to prevent online gaming by making the banks and other financial institutions such as Visa and MasterCard the watchdogs or Internet police by preventing the use of U.S. financial instruments for online gaming.

The Bachus Bill did exempt "any lawful transaction with a business licensed or authorized by the state." Therefore, for any state that legalized online gaming, the Bachus Bill would not have applied within its borders. It should be noted that the Bachus Bill had no criminal penalties nor did it have an exemption for Indian gaming.

The 109th Congress convened last week and no Internet gaming prohibition bills have been filed. That does not mean that some members of the House of Representatives will abandon their effort to prohibit Internet gaming. Most likely a bill similar to H.R. 2143 will be introduced by Congressman Bachus; however, it is unsure whether it will include criminal penalties. In the last session of Congress the Leach Bill, which was similar to the Bachus Bill, included criminal penalties. The Leach Bill died after the House Judiciary Committee removed all of the carve outs, which are needed for passage by the full House of Representatives. Any new prohibition legislation is not likely to include criminal penalties, in an effort to avoid jurisdiction of the Judiciary Committee.

Senate

The Senate had a similar bill, S.627 introduced by Senator Kyl, after the House of Representatives passed the Bachus Bill. However, there were some significant differences between the two. Given that Indian tribes have land-based casinos in 29 states and a strong lobby in Washington, the Kyl Bill was amended to be friendly to Indian tribal interests by allowing limited tribal online gaming. The Department of Justice then got involved by providing the Senate Banking Committee members a legal opinion prepared by its staff stating that the Wire Act makes all types of betting, including Internet casino and sports betting, across state lines illegal.

The Banking Committee proceeded to delete the exemption allowing states to regulate online gaming. That led the American Gaming Association to join the National Indian Gaming Association in opposing the Kyl Bill. The only carve outs in the S.627 voted out of the Senate Banking Committee, were for horse and dog racing. In June 2004, the United States Chamber of Commerce sent letters to all Senators advising them of the Chamber's "strong opposition" to S. 627.

It was always the intent of the sponsors of the prohibition bills in both houses to have some form of a prohibition bill passed out of each house and then have a conference committee combine the bills, which would then be passed by both houses and sent to the President for his signature. The plan was to include the criminal penalties at the conference committee stage.

What will happen in this session of the Senate is not so clear. There have been rumors that Senator Kyl would be satisfied with a prohibition bill that targets sports wagering only.

Courts vs The Department of Justice

Judge Duval of the 5th Circuit Court of Appeals rendered a decision in *In Re MasterCard* (*In re MasterCard, Int'l, Inc.*, 313 F.3rd 257 (5th Cir.2002) that the Wire Act was not applicable to casino style games offered over the Internet. However, in June 2003 the Criminal Division of the United States Department of Justice sent a letter to the National Association of Broadcasters, and other broadcasting and publishing trade groups, which stated 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. The sheer volume of advertisements for offshore sports books and online casinos is troubling because it 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 will continue to pursue such cases.

Notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate 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.”

On August 9, 2004, Casino City, Inc. a media company, filed a declaratory action in the United States District Court for the District of Louisiana challenging the Department of Justice’s advertising policy on First Amendment grounds. The DOJ filed an answer and then a motion to dismiss, which has not yet been decided. This case may take years to be resolved, and even a decision favorable to media companies may be of no help in furthering the legality of online gaming, since the issue raised by Casino City is one of First Amendment protections.

The World

According to Interactive *Gaming News*, there are currently 82 jurisdictions worldwide providing some form of regulation for various types of Internet gaming. No one knows for sure, but estimates range from 1,800 to 2,500 Internet gaming sites. The recent upsurge in the popularity of poker and the increase in the number of sites that are exclusively devoted to poker make estimates of gross revenue even more speculative than usual. In 2004, Christiansen Capital Advisors estimated that global Internet gambling revenue, including poker sites, totaled \$8.3 billion for 2004. Christiansen projects that revenue will grow to \$10.3 billion in 2005 and \$12.5 billion in 2006. Poker sites alone could have revenue estimated at \$2 billion. None of these Internet gaming sites are located in the United States, so not one cent of tax revenue is being generated for any governmental agency here.

The dominant Internet gaming regulatory jurisdiction will shortly become operational from the United Kingdom. The Gambling Bill received a second reading on November 1, 2004, and should receive approval in the House of Lords and Royal Assent in March 2005. The Gambling Bill will revamp the gaming industry in the United Kingdom and will include the licensing and regulation of Internet gaming operators. Licensees are not expected to restrict bets from the United States, therefore making the U.S. player more comfortable dealing with an operator licensed by a prominent first world power such as the UK.

Other Internet gaming jurisdictions that once prohibited play from the United States have modified their regulations to allow their licensed operators to take bets from the United States. The Isle of Man, located in the Irish Sea between England and Ireland, and once considered by some major gaming companies to be the ideal place to locate their online gaming businesses, last week issued a joint statement by its Treasury and Department of Trade and Industry to “...ensure that the Island remains at the forefront of competitive jurisdictions” the Isle of Man will actively market itself as a jurisdiction that does not place restrictions on its licensees accepting bets from U.S. players.

Alderney, which like the Isle of Man is a self-governing, dependent territory of the British Crown, has also made it known that it will not restrict its operators from accepting wagers from the United States. The trend is for jurisdictions not to restrict their operators from taking U.S. play, which serves to enhance the U.S. status as a prime market.

World Trade Organization

Last year, in a precedent-setting case, a panel of the World Trade Organization issued a ruling supporting a complaint by Antigua and Barbuda that the U.S. prohibition of Internet gaming violated the General Agreement on Trade in Services, known as GATS.

On the surface, it may seem odd that Internet gaming became a trade issue. But Antigua argued, successfully, that the gaming Web sites that were based in Antigua had lost revenue and laid off employees because of U.S. laws. The WTO found that the U.S. commitment under GATS to eliminate trade barriers in services had included gambling services. The WTO acknowledged that this may have been an oversight on the part of U.S. trade negotiators, but said nevertheless that the U.S. is bound by its commitment.

It's important to note that Antigua told the WTO panel that its case was not about unregulated, "free for all" gambling. Antigua said that it has always regulated Internet gaming, and pointed to its laws aimed at preventing money laundering and prohibiting gambling by minors. It also said that its regulatory system includes requirements for identity verification and fraud prevention, and requires site operators to post information to assist problem gamblers.

Antigua said that it had offered to discuss any concerns that the U.S. had about its regulatory system, but that the U.S. had declined to engage in such discussions. The U.S. never really challenged the adequacy of Antigua's regulatory system, and the WTO panel chided the U.S. for refusing to discuss whatever concerns it had.

The Interactive Gaming Council, which has served since 1996 as the main trade organization of the Internet gaming industry, has long advocated the principle of technological neutrality, arguing that the Internet is simply another means of delivering the product of gaming. The IGC believes that when gaming in real-world casinos is legal and regulated, as it has been for years in many countries, gaming via the Internet must also be legal and regulated.

The WTO panel concurred with the IGC's approach. The panel ruled that the cross-border supply of services implied the supply "through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of 'technological neutrality,' which seems to be largely shared among WTO Members."

Last Friday (Jan. 7), the U.S. filed its appeal of the WTO decision. The appellate body is expected to rule in March, and of course it's impossible to predict how an appellate body will rule. But the very fact that the case has gone this far shows how the U.S. approach to Internet gaming is out of step with much of the world's thinking on the subject.

Why the United States Should Regulate Rather Than Prohibit

While the number of Internet gaming players residing outside the United States has been increasing, the play from the United States still accounts for over 50 percent of all wagers made. This means that large sums of money are being sent out of the United States, and that operators are paying taxes to those other jurisdictions, wherever they are located. At a time when governments are looking for new sources of income, a large source of tax revenues is being sent abroad.

Gaming regulators here are confident that they could use their existing agencies to strictly regulate an Internet gaming licensee if the laws in the United States would so allow. In fact, the ability to do real time auditing makes regulation easier and more efficient than the systems currently used by the terrestrial casino regulators. State-of-the-art technology, combined with proper operating procedures, has proven effective in preventing minors from gambling online and in combating money laundering.

Prohibition didn't work for alcohol, and it will not work for Internet gaming. Lawmakers may make it more difficult by passing prohibitory legislation, but determined players will still be able to find ways to place a bet online. This form of gambling cannot be stopped, but it can be effectively regulated and taxed.

As most of you are well aware, the states have done an excellent job of regulating the land-based casino industry, without interference from the federal government. Many states have in place an experienced and tested regulatory structure, and there is no reason that they cannot also regulate Internet gaming. New technology brings its own challenges, to be sure, but our state gaming regulators and their staffs can meet these challenges. After all, the broad principles of effective gaming regulation are the same, regardless of the specific gaming product under consideration.

Frank Catania is president and a principal in Catania Consulting Group, Inc. of New Jersey, a consulting firm with extensive experience in gaming issues. An attorney, he is also counsel to Catania & Associates, Law Offices, LLC.

Mr. Catania's gaming expertise stems from his years as Assistant Attorney General, Director New Jersey Division of Gaming Enforcement; Vice President, Compliance Officer, Players International; Deputy Speaker of the New Jersey General Assembly and counsel to the Law Firm of Sterns and Weinroth. He served as the first president of the International Masters of Gaming Law, vice chair and chair, respectively, of the International Association of Gaming Regulators, past chairman of the Forum of American Casino Regulators, and was first President of the International Masters of Gaming Law (IMGL), a non-profit association dedicated to the education and advancement of gaming law.