

Advertising Online Casinos

An Analysis of the Legal Rights and Risks

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I. Introduction

With revenues pegged at anywhere between two hundred million and two billion dollars per year, numerous mainstream companies currently accept advertising from online casinos that are most often based in jurisdictions outside the United States. Some foreign online casinos also generate their own marketing strategies in-house. Notably, many webmasters have implemented or are considering some form of online casino affiliate program. While the legality of online gaming itself is still an open question as a result of conflicting court decisions and stalled legislation, the legal issues relating to advertising online gambling services are even more obscure. One of the reasons is that the power of the government to regulate advertising of a particular product or service is not coextensive with its ability to regulate or ban the same product or service. This article will explore the historical treatment of gambling advertising by the courts, evaluate the current regulatory climate and suggest some possible theories for legal challenges in the future.

II. Historical Treatment of Gambling Advertisements

A. Traditional Federal Regulations of Gambling Promotion

The promotion of commercial lotteries and other forms of traditional gambling has long been the subject of state and federal regulation. As early as 1827, Congress passed a law that provided: "No Postmaster, or Assistant Postmaster, shall act as agent for lottery offices."¹ By 1868, Congress made it unlawful to mail any letters or circulars concerning lotteries or other similar enterprises offering prizes of any kind or any pretext whatsoever.² Congress extended the mailing ban from letters to cover newspapers through the Anti-Lottery Act of 1890,³ which was upheld in the face of an 1892 First Amendment challenge.⁴ By 1895, Congress eliminated interstate lotteries altogether, and prohibited the transportation of lottery tickets in interstate commerce.⁵ The Supreme Court upheld this law despite a Commerce Clause challenge.⁶

The current federal law prohibiting the broadcast advertising of gambling activities (presumably including Internet gambling) is the Communications Act of 1934,⁷ currently codified in 18 U.S.C. §§1304 and 1307, (hereafter referred to as "§1304" or "§1307"). While the law only appears to prohibit advertisement of information concerning lotteries, it has been interpreted by the regulatory and enforcement agencies to prohibit the advertising of private casino gambling as well.⁸

B. Setting the Stage with a State Law Challenge

The states have also implemented various regulations on the advertising of legal gambling, examples of which are discussed later. One such regulation, passed by the Territory of Puerto Rico, made its way to the United States Supreme Court, and provides an appropriate starting point for the legal analysis of gambling promotion.⁹ In that case, a partnership franchised to operate a casino in Puerto Rico challenged the constitutionality of Puerto Rico's Games of Chance Act of 1948. This law legalized certain forms of casino gambling in licensed locations in order to promote the development of tourism, but also provided that "no gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico."¹⁰ The casino operators were fined by the public entity authorized to administer the law, for violating the

advertising restrictions. In response, they challenged the Act as unconstitutional in violation of the First Amendment and the Equal Protection and Due Process clauses of the United States Constitution. The law contained broad prohibitions even on the use of the word "casino" on such promotional items as matchbooks, lighters, envelopes, napkins, menus, plates, banners, fliers, etc.¹¹ An intermediate appellate court in Puerto Rico narrowed the scope of the law to prohibit only those advertisements directed to *bona fide* residents of Puerto Rico in the local publicity media.¹² Under that narrow construction, advertising was allowed if it was directed to tourists, provided that the advertisements did not invite residents of Puerto Rico to visit the casinos, even though the advertisements may incidentally reach the hands of a local resident.¹³ The United States Supreme Court accepted the case and reviewed the constitutionality of the Act in light of the interpretation placed on it by the appellate court.

A First Amendment challenge to advertising regulations is analyzed by the general principles set forth to in *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*.¹⁴ Under the *Central Hudson* analysis, the court's first duty is to determine whether the First Amendment applies at all. In so doing, the proper inquiry is whether the advertisement concerns a lawful activity and is not misleading or fraudulent.¹⁵ Once it is determined that the First Amendment applies to a particular kind of commercial speech at issue, the speech may be restricted only if: (1) the government's interest in doing so is substantial; (2) the restrictions directly advance the government's asserted interest; and (3) the restrictions are no more extensive than necessary to serve that interest.¹⁶ Notably, the *Central Hudson* test would be the analysis used by a reviewing court in determining the constitutionality of any American Internet gambling restriction. Applying the *Central Hudson* test to the advertising restriction at issue in *Posadas*, the United States Supreme Court upheld its constitutionality. The Court initially found that the First Amendment applies since the advertising of casino gambling concerned a lawful activity that is not misleading or fraudulent. The Court went on to review whether the government has a substantial interest in regulating the advertising of casino gambling. All of the typical concerns relating to traditional gambling were advanced to justify the government's substantial interest, such as the serious harmful effects on the health, safety and welfare of Puerto Rican citizens, the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption and the infiltration of organized crime.¹⁷ Such negative impacts are consistently cited as justification for anti-gambling statutes. The continued viability of such justifications is questionable in the context of Internet gambling, given the critical differences between virtual gambling, and gambling in a traditional casino, as discussed later in this Article.'

Interestingly, the Court in *Posadas* cited another Supreme Court case, *Renton v. Playtime Theaters, Inc.*,¹⁸ in connection with the alleged governmental interest in regulating gambling advertising. The *Renton* case involved regulation of adult entertainment, which has faced a myriad of local and state restrictions on its display and promotion, despite the fact that adult entertainment has been recognized as free expression protected by the First Amendment, on repeated occasions in the courts. Many of the same issues and arguments litigated in adult entertainment cases relating to the government's substantial interests in regulating adult entertainment facilities would be applicable to cases involving the validity of Internet gambling advertising regulations, given the similar legal analysis employed by the courts.

Upon review of the "parade of horrors" asserted as justifying Puerto Rico's governmental interests, the United States Supreme Court in *Posadas* had no difficulty concluding that the government's interest was "substantial." The last two steps of the *Central Hudson* analysis essentially involve a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends.¹⁹ In reviewing these final two steps, the Court concluded that the restrictions on advertisement to Puerto Rican residents directly advance the government's asserted interests since, essentially, advertising works! Therefore, local residents would be encouraged to gamble more based on more advertising. Finally, the Court concluded that the restrictions are no more extensive than necessary to serve the government's interest since Puerto Rico could have simply banned casino gambling altogether.²⁰ It is this analysis that has

been called into serious doubt by later United States Supreme Court cases which have concluded that the government's power to ban the underlying activity does not necessarily provide the concurrent power to ban all speech associated with that activity. Thus, while the gambling advertising restriction was upheld in *Posadas*, other advertising restrictions would meet a different fate in later cases.

C. Challenges to Federal Restrictions

The federal statute prohibiting casino gambling advertising, §1304, has been the subject of numerous constitutional challenges. The United States Supreme Court first considered the constitutionality of this law in the 1993 case of *U.S. v. Edge Broadcasting Co.*²¹ In that case, a broadcaster licensed with the FCC in the State of Virginia, challenged the prohibitions of 18 U.S.C. §§1304 and 1307 which prohibit the broadcast of information regarding state-run lotteries to residents of non-lottery states. Virginia was a lottery state, although its broadcast was accessible to residents of neighboring North Carolina, a non-lottery state. The Virginia broadcasting company wished to broadcast Virginia lottery advertisements even though such information was accessible to residents of North Carolina. Edge Broadcasting therefore filed a First Amendment and Equal Protection challenge to the federal legislation. Although the lower courts invalidated the regulation as applied to Edge Broadcasting, the United States Supreme Court reversed and held that the government has the constitutional power to protect the non-lottery states from receiving the information regarding the prohibited activity in the lottery states. Allowing Edge Broadcasting to carry the lottery advertisements to North Carolina residents would be in derogation of the federal interests supporting the state's anti-lottery laws and would permit Virginia's lottery laws to dictate what stations a neighboring state may air.²²

The analytical framework for gambling advertising challenges changed dramatically after the United States Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*²³ which cast significant doubt on the reasoning contained in the *Posadas* case. While no unanimous opinion was produced by the *44 Liquormart* decision, a majority of the Court agreed to strike down two Rhode Island statutes which prohibited the advertising of alcoholic beverage retail prices anywhere other than at a point of purchase. The various opinions produced by the *44 Liquormart* decision provided additional strength to First Amendment challenges directed at advertising restrictions.

Subsequent to the *44 Liquormart* decision, the Ninth Circuit Court of Appeals considered another challenge to §1304, this time brought by Valley Broadcasting Company and Sierra Broadcasting Company, both Nevada corporations which operate television stations in Las Vegas and Reno, Nevada.²⁴ The broadcasters desired to broadcast advertisements for casino gambling, an activity that is legal in the State of Nevada, but which could also be heard by audiences in California and Utah. This time, under the guidance of the *44 Liquormart* decision and *Ruben v. Coors Brewing Co.*,²⁵ a case involving the "strength wars" between brewing companies, the Ninth Circuit struck down §1304 on First Amendment grounds. Although the Court concluded that the government still had a substantial interest in protecting citizens against the negative impacts of gambling like moral corruption, crime and prostitution,²⁶ the Circuit Court found that the restriction could no longer meet the remaining parts of the *Central Hudson* test. In analyzing the last two prongs of the test, the Ninth Circuit was particularly concerned with the numerous exceptions contained in §1304, allowing many other forms of gambling such as any gaming by the Indian tribes, fishing tournaments and state-run lotteries. If the government's interest were truly focused on reducing gambling, it would not have included all of these bizarre exceptions. Since §1304 permitted advertising of commercial lotteries for non-profit organizations, governmental organizations and Indian tribes, it was therefore impossible to materially discourage public participation in commercial gambling.²⁷ The Court further noted that after the *44 Liquormart* decision, the continued validity of much of the reasoning in *Posadas* is no longer as compelling.

The United States Supreme Court addressed the issues raised by *Valley Broadcasting* in another challenge to §1304 in *Greater New Orleans Broadcasting Association, Inc. v. U.S.*²⁷ There, a broadcaster association from Louisiana challenged §1304 by suing the FCC for a declaratory judgment, asking the Court to rule that the law violated the First Amendment. Although the case worked its way up and down the court system for a while, ultimately the United States Supreme Court held that the law was unconstitutional as applied to the radio and television stations located in Louisiana, where gambling was legal. Again, the Court found that the advertisements were protected by the First Amendment, and that the government's interest was substantial; the first two prongs of the *Central Hudson* test. However, the Court created a new legal paradigm for analyzing gambling advertising restrictions when it held that the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.²⁹ In other words, the Government's ability to ban gambling all together does not confer unlimited power to restrict or ban advertising about the subject. The Court noted that the federal policy towards gambling has become increasingly unclear with the addition of various exemptions to the broadcasting ban. The exemptions have grown to include gambling schemes conducted by states and local governments, gambling on pari-mutual animal racing or Jai-Alai games, and casino gambling on Indian reservations. Those exemptions make the advertising prohibitions somewhat unclear and demonstrate an inconsistent approach to the overall concept of gambling regulation in the United States. In addition, the Court noted "some form of gambling is legal in nearly every state."³⁰

In analyzing the two remaining prongs of the *Central Hudson* test, the government must demonstrate that the harms it recites are real and its restrictions will, in fact, alleviate the harms to a material degree. The challenged regulation should indicate that its proponent carefully calculated the cost and benefits associated with the burden on speech imposed by its prohibition.³¹ While the government argued that reducing the advertising of gambling decreased the demand for such gambling, the Court stated that it is also reasonable to assume that much of the advertising would merely channel gamblers to one casino rather than another.³² Moreover, any analysis of this issue must consider the fact that the government simultaneously allows the encouragement of tribal casino gambling, which would have the same deleterious results that it claimed it was trying to vanquish by the advertising ban. However, the most critical flaw in the government's justification of §1304 came in the existence of the numerous exemptions such that the government could not hope to exonerate it. The Court noted that under the current law, a broadcaster could not carry an advertisement about privately operated commercial casino gambling, regardless of the location of the station or casino, while on the other hand, advertisements for tribal casino gambling authorized by state compacts are not subject to a broadcast ban, even if the broadcaster is located in a jurisdiction with the strictest of anti-gambling policies. In sum, the Court noted that the government is committed to prohibiting accurate product information only when conveyed over certain forms of media and when promoting certain types of gambling, even certain brands of casino gambling. This apparent random discrimination between types of media, physical locations and types of gambling, helped push the Court over the edge to invalidate the advertising ban. There was little chance that the speech restriction could have directly, materially advanced the government's aim, as written.³³

III. Application of Existing Legal Principles to Online Gambling Promotions

A. General Considerations

The above legal analysis represents the current state of the law concerning traditional land-based gambling ad regulation challenges. The promotion of Internet gambling raises some unique legal issues not addressed in the existing court decisions. Initially, these decisions involved the use of traditional media and not advertising on the Internet. Since Internet advertising is contemporaneously available everywhere on the planet, and not "broadcast" in the traditional sense, any analysis based on the location of the transmission or the recipient may be logically

flawed. In addition, the existing cases do not address the legality of Internet gambling, and what effect that licensure of the online casino in foreign countries has on the legal analysis. For example, if current case law suggests that the advertising of private casinos is protected by the First Amendment if it occurs in a place where gambling is legal, does that mean that all Internet advertising by a virtual casino, which is duly licensed by some government, is legal? Those and other complex legal questions will almost certainly be addressed by the courts in the future. To begin to assess the risks associated with promotion of online casinos in the United States, an assessment of the potentially applicable legislation is appropriate.

B. Federal Regulatory Options

Internet gaming promotion might be regulated by several different federal statutes and legal theories. The applicable law will partially depend on the medium chosen to market online gambling. Radio and television broadcast is regulated by §1304, which has been the subject of substantial constitutional litigation as described above. Cable television and the Internet are not "broadcast" and thus are not covered by that prohibition.

If direct mail is selected as the advertising medium of choice, Title 18, *U.S.C.* §1302 is implicated. This statute is specifically limited to use of the mail and prohibits the "advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance." The postal service is empowered to issue "stop mail" orders to prevent violations of this statute. Both the FCC and the Post Office have taken the position that "lotteries" include virtually all forms of gambling, including casinos. Thus, §1302 appears, on its face, to prohibit the use of the mail to promote online casinos.

Currently, substantial debate exists regarding the applicability and scope of the "Wire Act,"³⁵ with regard to Internet gambling. Indeed, conflicting decisions have been reached by the courts on the issue of whether the Wire Act prohibits gambling that occurs solely on the Internet. Assuming that the Wire Act is eventually found to apply to some form of Internet gambling, the advertising or promotion of such services may also be considered a violation of the Wire Act under a conspiracy or aiding/abetting theory. Notably, only advertisements that solicit participation by United States citizens could be deemed to violate the Wire Act under those theories.³⁶

"Aiding and abetting" is defined under Title 18 *U.S.C.* §2, which provides, in pertinent part: "(a) Whoever commits an offense against the United States or aides, abets, counsels, commands, induces or procures its commission, is punishable as a principal." That offense occurs when a defendant willfully associates himself in some way with the criminal venture and willfully participates in it as he would in something he wished to bring about.³⁷ Conspiracy, on the other hand, requires the government to prove knowledge of, and voluntary participation in an agreement to violate the law.³⁸ Conspiracy does not require a completed crime, while "aiding and abetting" does not expressly require proof of an agreement to violate the law.³⁹

Often, the United States government casts its conspiracy net wide enough to ensnare all individuals who were in any way associated with a criminal enterprise. Whether the conspiracy laws are broad enough to encompass individuals or companies that promote Internet gambling through advertising is an open question. The courts will, however, cut off the reach of a statute if it is applied to situations absurdly remote from the concerns of the statute's framers.⁴⁰ That principle of law has prevented credit card companies from being swept up in allegations that their services aided and abetted an illegal online gambling enterprise.⁴¹ However, given the lack of a precise federal prohibition on the advertising of Internet gambling, remote theories such as conspiracy or "aiding and abetting" may be the only available option should law enforcement decide to prosecute the advertisers of Internet gambling.

One additional option for federal regulation would be civil, administrative or criminal enforcement of the Deceptive and Unfair Trade Practices Act or False Advertising legislation.⁴² The Federal Trade Commission ("FTC") investigates and prosecutes claim of deceptive or unfair advertising. If the specific advertisement is deemed to involve illegal activity or is otherwise alleged to be somehow deceptive or unfair, the FTC may become involved to protect United States consumers. The definition of what constitutes "unfair" is extremely broad, and can vary from case to case. Thus far, however, the FTC has not been actively involved in prosecuting gambling advertisements.

In sum, Congress has not seen fit to pass legislation specifically prohibiting or regulating the advertising of online gambling thus far. Given the broad scope of existing advertising regulations, however, such promotions may already be prohibited by existing laws regulating traditional gambling advertising. Other, more general, prohibitions might also be used to punish allegedly illegal, unauthorized or deceptive gambling advertising. The applicability of any of these provisions is dependent on the type of gambling being promoted, and the medium used to disseminate the message.

C. State Regulatory Options

Various state governments have passed legislation that either specifically or tangentially affects the promotion of online gambling in the United States. The validity of any of these laws, as applied to online transactions, is questionable given the constitutional restriction on legislation affecting interstate commerce under the Commerce Clause of the United States Constitution.⁴³ However, to the extent that the regulation is found to be consistent with the Commerce Clause, it must also comport with the First Amendment. That analysis will come down to the *Central Hudson* test, discussed above. The following are examples of some gambling advertising restrictions that have been enacted by various states:

California: California prohibits: "Prevailing upon a person to visit a place of illegal gambling or prostitution." Cal. Penal Code §318. It is also a crime to knowingly transmit racing information to gamblers. Cal Penal Code §337i. Those provisions do not appear to be broad enough to encompass the advertising of casino gambling, although it would not be impossible to bring a test case challenging those or similar broad prohibitions. It is unclear whether simple advertising of Internet gambling "prevails upon" a person to visit a "place of illegal gambling" when the gambling occurs in cyberspace and not in any geographic location. These advertising prohibitions have not been used successfully against online gambling promotion thus far.

Georgia: Georgia makes it a criminal offense to advertise commercial gambling:

(a) A person who knowingly prints, publishes, or advertises any lottery or other scheme for commercial gambling, or who knowingly prints or publishes any lottery ticket, policy ticket, or other similar device designed to serve as evidence of participation in a lottery commits the offense of advertising commercial gambling.

(b) A person who commits the offense of advertising commercial gambling shall be guilty of a misdemeanor of a high and aggravated nature. Code of Georgia Advertising Commercial Gambling §16-12-26.

However, Georgia has not sought to regulate the advertising of Internet gambling, or the gambling activity itself. According to one official, online betting "is not on the forefront for us."⁴⁴

Idaho: Idaho regulates gambling advertising on signs:

Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided as law. Id. St. §52-106.

Kentucky: Similar to many other states, Kentucky prohibits the "promotion" of gambling:

(1) A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity. Ky. St. §528.030.

Although the term "promote" may be equated with "advertise," the Kentucky statute specifies the manner in which the gambling must be promoted in order for the Statute to be violated.⁴⁵ Advertising does not fall into the prohibited categories.

Minnesota: Minnesota allows the advertising of legal gambling, but regulates the content of the advertising. All marketing materials relating to gambling must:

(1) be sufficiently clear to prevent deception and; (2) not overstate expressly, or by implication, the attributes or benefits of participating in legal gambling. Mn. St. §325E.42.

New Hampshire: New Hampshire addresses the issue by prohibiting the distribution of literature promoting gambling machines in any state which prohibits such literature:

Literature advertising or promoting the use and possession of gambling machines may not be printed in and distributed from this State; provided, however, that such literature shall not be designed for distribution in any state which forbids such literature. NH. St. §287-C; 2.

New Jersey: New Jersey regulates the content of advertising by requiring that any casino advertising contain language providing information about social assistance for compulsive gamblers. Such language must appear on all print, billboard and sign advertising of casinos. N.J.-St. 5:12-5. No mention is made of Internet advertising.

Florida: Florida's approach to the advertising issue is illustrative of the fact that a state need not have enacted specific anti-gambling advertising legislation in order to take action. During 1998-99, the Florida Attorney General distributed "Cease and Desist" letters to at least ten media companies providing publishing or broadcasting advertisements for offshore computer gambling sites.⁴⁶ Florida, however, does not have in place any specific prohibition on the advertising of gambling, let alone Internet gambling. Florida law prohibits anyone from keeping any gaming apparatus or from playing any game of chance for money, but the issue of advertising is not specifically addressed by the gambling legislation.⁴⁷ The Attorney General's actions prompted many Florida media companies to scale back their operations, move out of Florida or get out of the business all together.⁴⁸ More recently, however, Florida seems to have ducked the issue of Internet gambling advertising and devoted resources to other matters.⁴⁹

Wyoming: The Wyoming statutes contain a specific reference to the type of gambling advertising that is allowed, but are less clear as to the prohibitions. Section 6-7-104 of the Wyoming Statutes, entitled "Advertising of Allowable Gambling Activities or Events," states:

Nothing in this Chapter prohibits the advertising of any gambling activity or event excluded from gambling under W.S. 6-7-101(a)(iii) and conducted by or for any charitable or non-profit

organization or conducted as a promotional activity by a private business entity, which is clearly occasional and ancillary to the primary business of that entity.

Although the Statute appears to be somewhat vague, it may be difficult to enforce against the advertising of Internet gambling by a charitable organization, or a business that is primarily engaged in something other than gambling.

These state regulatory examples demonstrate the wide variety of legislation available to regulate gambling advertising. The applicability of such laws to virtual casinos remains an open question since these laws were enacted before online gaming began. Moreover, constitutional problems are created when a state attempts to apply inconsistent regulations to global communications.

V. Prosecution Risk Factors

The likelihood of facing some sort of civil, criminal or administrative prosecution under state or federal law depends not only on the availability of an appropriate statutory prohibition, but also on more intangible factors such as the ever-changing political climate and resource allocation policies. At any given time, a politician may decide to make the policing of Internet gambling a political issue, thus raising the stakes for the advertisers along with the online casinos themselves.

Certain areas of the country have also historically been more hostile toward vice activities such as gambling, drugs and prostitution. The "Bible Belt" states would almost certainly be more likely to initiate some sort of governmental action in response to a high-profile Internet gambling advertising campaign. On the other hand, the perceived more liberal states in the northwest, such as Oregon and Washington may be less likely to react in such a manner just given their politics culture. Big cities may also be more tolerant of vice activities than more rural areas. However, the winds of politics are always subject to sudden change, and thus an advertising campaign cannot be solely based on the current political climate.

The legal issues encountered in connection with the advertising of Internet gambling may also significantly depend on the type of media chosen for the promotional campaign. The laws relating to traditional advertising media are well established, and thus the only factor remaining is the legality of the underlying activity itself. If the Internet is the choice of media for the marketing campaign, the legal issues become even more complicated and unsettled. For example, if an online casino licensed in a foreign jurisdiction chooses to launch an Internet promotion through banner placement on other Websites viewed by individuals worldwide, the United States government may be hard-pressed to identify a valid basis and appropriate vehicle for regulation of such advertising. However, should that same online casino choose to promote its services by distributing unsolicited email to United States citizens, one or more state or federal laws may be implicated to criminalize the advertising campaign. For example, at least sixteen states have already passed laws regulating the content of SPAM e-mail. Such a promotional campaign may also run afoul of various states' deceptive and unfair trade practices laws. Accordingly, any legal analysis of a promotional campaign must include, at a minimum, a review of the following factors:

1. The specific gambling activity being advertised, i.e., casino gambling, sports betting, etc.
2. The target audience.
3. The medium and means used to disseminate the message.
4. The potential applicability of the target jurisdiction's laws.

Certain practical realities regarding the advertising of Internet gambling should be recognized as well. A relatively low-key mailing or Internet promotion is simply less likely to garner the attention of law enforcement than a prime time television-advertising blitz. The content of the marketing

materials, itself, will also bear on the likelihood of government intervention. The use of sexually-oriented images or suggestive language will make a promotional piece stand out. The intended target audience also remains a critical factor. For example, online advertising directed at a global audience is less likely to capture the attention of a particular state or even the federal government than a more targeted advertising campaign intended to perk the interest of gamblers of a particularly conservative state or locality. The fact that a particular casino has been licensed in a foreign jurisdiction will also factor into the likelihood of governmental intervention. Unlicensed casinos may be presumed to be breaking the law in every jurisdiction, and therefore their advertisements may be deemed more suspect. Those and a multitude of other intangibles will play into the risk factoring associated with any particular advertising campaign.

V. Potential Legal Challenges

Many of the legal issues associated with advertising online casinos will be brought to the courts and resolved. The development of Internet gambling advertising law is at its early formation stages, and therefore many of the legal issues are unsettled. The following are a sampling of such legal issues that will likely be litigated by online casinos, or their promoters, in the near future.

A. The Legality of the Underlying Business Activity.

Can United States residents legally gamble online with licensed foreign casinos? The applicability of various state and federal laws to this relatively new form of home entertainment is at best unsettled, and at worst a hopelessly confused morass of conflicting court decisions interpreting obviously outdated anti-gambling laws. The question is not so much whether online gambling is legal; the question is: **where** is the activity legal? As opposed to an all-out ban or legalization of Internet gambling throughout the United States, the more likely result is in the development of "pockets" of legal, licensed jurisdictions permitting online gambling within defined geographic boundaries. The issue will then become whether certain states, or localities, can constitutionally regulate their jurisdictions differently than the rest of the nation. Those imponderables likely have been the primary reason why government officials have not been more proactive in investigating and prosecuting the promotion of online casinos thus far. Each solution produces another question: Does the regulation violate the First Amendment? If not, what about the Commerce Clause? However, the Supreme Court has established that the legality of the underlying business transaction is not determinative of the legality of all advertising associated with that business activity. With the legality of Internet gambling up in the air, the validity of any particular promotion associated with online gambling becomes exponentially more difficult to evaluate. However, the courts will still look at this factor in analyzing the legal issues associated with the marketing of online casinos in the United States pursuant to the *Central Hudson* test.

B. The Sufficiency of the Governmental Interest.

The legal analysis applicable to Internet gambling advertising will include an evaluation of the sufficiency of the stated governmental interest in regulating the online activity.⁵⁰ While the courts have unhesitatingly found that a substantial governmental interest exists in limiting or regulating information about traditional gambling, the sufficiency of any such interest relating to the online version remains an open question. Several of the arguments advanced to justify the sufficiency of the governmental interest relating to traditional gambling may not be present in the cyberworld. Take, for example, the major premise that gambling is a "vice activity" that can be banned all together.⁵¹ While the United States may have the power to ban traditional gambling anywhere within its borders, it does not have the coequal power to prohibit the establishment of online casinos in cyberspace nor their licensure in foreign jurisdictions. This is particularly true given the increasing number of foreign countries willing to recognize the legality of such business operations.

The government also traditionally argues that a wide variety of social ills are caused by traditional gambling which is still allegedly permeated by organized crime connections.⁵² Online gambling did not evolve as a moneymaking opportunity for the Chicago crime families. While traditional casinos may have attracted organized crime groups over the years,⁵³ the same cannot be said about virtual casinos. The other "secondary effects" allegedly caused by traditional gambling may also not be present in any way, shape or form as a result of Internet gambling. For example, it is difficult to imagine a serious argument being made that Internet gambling fosters prostitution. The government ran into this same problem when it attempted to justify regulations on adult Websites based on the traditional presumed negative impacts caused by brick-and-mortar adult entertainment establishments such as adult bookstores.⁵⁴ The courts simply did not accept the proposition that the two types of businesses cause the same kind of problems.⁵⁵ In short, the traditional arguments supporting the alleged governmental interest in regulating or banning land-based gambling promotion may not support regulation or prohibition of the online counterpart.

C. Geographic Prohibitions.

Gambling advertising restrictions traditionally have been analyzed based on their geographic scope and impact. In general, if the advertising is directed at those individuals who can legally engage in the gambling activity, the advertising restrictions have been upheld. Typical broadcast or direct-mail advertising of online gambling will be analyzed in a manner similar to advertisements for traditional gambling activities, as discussed earlier. However, Web-based advertising and even direct email promotions will be evaluated somewhat differently due to the inability to geographically limit the recipients of the promotion under existing Internet technology. That United States Supreme Court has acknowledged that Webmasters do not currently possess the technology to geographically block certain communities from receiving communications on the Internet.⁵⁶ While advancements are constantly being made, the current technological handicap forces the courts to recognize that any online communication restriction that is dependent upon the definition of a geographic-based audience is extremely problematic from a constitutional standpoint. After all, it is both pragmatically unfair and constitutionally problematic to require advertisers of Internet gaming services to limit or target their promotion to recipients in the location where, for example, the online casino is licensed to operate, or where residents are allowed to gamble. The inability to impose such geographic restrictions may render any legislation requiring same, defective.

VI. Conclusion

The concept of Internet gaming advertising raises a host of legal issues that are dependant on a number of factors, including the medium chosen for the promotion and the potential applicability of various state and/or federal laws. The courts will employ the same legal analysis used to evaluate traditional gambling advertising regulations, but under a relatively new paradigm that is based on the underlying premise that the government's power to prohibit or regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.⁵⁷ The traditional justifications for imposing restrictions on gambling advertising may well be lacking in the context of online gambling promotion. Virtual casinos do not generate increased prostitution or drug activity, and have not been historically infiltrated by organized crime. The inability to effectively geographically limit the target audience for online gambling advertising may also impair the government's ability to constitutionally restrict advertising about online gaming services to areas where it is considered a legal activity. Thus far, the United States government has not specifically legislated in the area of Internet gambling, let alone the advertising of such services. While the various states have touched on this subject, or have enacted legislation which appears to regulate or prohibit such promotions, the validity of any such laws as applied to virtual casinos is questionable.

Obviously, a legal compliance review of any online gambling marketing activity available to, or directed at, United States citizens is critical. The legal principles concerning Internet gambling

promotion are not well-defined, and the law is still developing. Therefore, marketing executives must make educated guesses based on legal precedent as to what the courts might do in any particular circumstance.

Another option is to proactively initiate litigation challenging the applicability of a particular state or federal law that appears to regulate or inhibit the advertising of online casinos, thereby bringing a "test case." A suit for declaratory judgment as to the constitutionality or applicability of online gambling advertising restrictions may be appropriate.⁵⁸ Regardless of whether promoters take the offensive, or are put on the defensive by way of a prosecution, the legal issues identified in this article will be resolved for better or worse. The online gaming industry is currently looking through a window of opportunity to assist the courts in making the right decisions to protect the public's right to receive truthful information regarding this popular form of home entertainment.

¹Act of Mar. 2, 1827 §6, 4 *Stat.* 238.

²Act of July 27, 1867, §13, 15 *Stat.* 196.

³§1, 26 *Stat.* 465.

⁴*Ex Parte Rapier*, 143 U.S. 110, 112 S.Ct. 374, 36 L.Ed 93 (1892).

⁵Act of Mar 2, 1895, §1, 28 *Stat.* 963.

⁶*Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed 492 (1903).

⁷48 *Stat.* 1064, 1088.

⁸*FCC v. American Broadcasting Co.*, 347 U.S. 284, 290-291; *Greater New Orleans Broadcasting Association, Inc. v. U.S.*, 119 S.Ct. 1923, 1927 (1999).

⁹*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

¹⁰106 S.Ct. at 2970.

¹¹*Id.* at 2972-73.

¹²*Id.* at 2793.

¹³*Id.*

¹⁴447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

¹⁵*Posadas* at 2976; citing: *Central Hudson*.

¹⁶*Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351

¹⁷*Id.* at 2977.

¹⁸475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986).

¹⁹*Posadas* at 2977.

²⁰*Id.* at 345.

²¹509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 245 (1993).

²²*Id.* at 2699.

²³517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

²⁴*Valley Broadcasting Co., v. U.S.*, 107 F.3d 1328 (9th Cir. 1997).

²⁵514 U.S. 46, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995).

²⁶Interestingly, the Court still recognized the connection between organized crime and gambling, although it recognized that the threat of organized crime control has diminished considerably. Should casinos at some point be capable of submitting evidence that organized crime is no longer associated with casino gambling, or a particular form of casino gambling, such as Internet gambling, the continued validity of the government's "substantial interest" in prohibiting advertising relating to such activity is at risk."

²⁷*Id.* at 1335.

²⁸527 U.S. 173, 119 S.Ct 1923, 144 L.Ed.2d 161 (1999).

²⁹119 S.Ct. at 1934.

³⁰119 S.Ct. at 1932, N.5.

³¹*Id.* at 1932, citing: *Cincinnati v Discovery Network Inc.*, 507 U.S. 410, 417, 113 S.Ct 1505, 123 L.Ed.2d 99 (1993).

³²*Id.* at 1932-33.

³³*Id.* at 192.

³⁴18 U.S.C §1084

³⁵Compare *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001) [Finding that the Wire Act prohibits Internet gambling in some forms] with *In re MasterCard International, Inc. Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D. La. 2001), *aff'd* 2002 WL 31627004 (5th Cir., November 20, 2002)[Finding that the Wire Act does not prohibit Internet gambling.] .

³⁶See *Cohen, Supra*.

³⁷*United States v. Indelicato*, 611 F.2d 376, 385 (1st Cir. 1979); see also: *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978).

³⁸*United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980).

³⁹*Perenira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed 435 (1954).

⁴⁰*Jubelirer, v. MasterCard Intern. Inc.*, 68 F.Supp.2d 1049, (W.D. Wis. 1999).

⁴¹*Id.*

⁴²15 U.S.C. §§45, 52, respectively.

⁴³See: *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.2d 737 (E.D. Mich. 1999); *PSINET, Inc. v. Chapman*, 167 F.Supp.2d 878 (W.D. VA 2001).

⁴⁴M. Ritchel, "US Firms Roll Legal Dice With Stake in Online Gambling," *Chicago Tribune*, (July 6, 2001).

⁴⁵Traditional advertising does not appear to violate the Kentucky statute.

⁴⁶*Id.*

⁴⁷§849.01, *Fla. Stat.* (2002).

⁴⁸M. Ritchel, "US Firms Roll Legal Dice With Stake in Online Gambling," *Chicago Tribune*, (July 6, 2001).

⁴⁹*Id.*

⁵⁰*Central Hudson, supra*.

⁵¹*Posadas, supra*.

⁵²E.g., *Valley Broadcasting* at 1332.

⁵³*Organized Crime and Gambling: Hearings Before the President's Commission on Organized Crime*, (June 1985)

⁵⁴*Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); compare with: *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986)

⁵⁵*Id.*

⁵⁶*Ashcroft v. ACLU*, Case Number 00-1293 (May 13, 2002).

⁵⁷*Greater New Orleans Broadcasting, supra*.

⁵⁸18 U.S.C. 2201, *et. seq.*