

Gambling in Cyberspace

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James R. Thompson Center, Chicago
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Anthony N. Cabot
Partner, Lionel Sawyer & Collins
Las Vegas, Nevada

Cyberspace gambling presents challenges to government regulation that far exceed any previously encountered. Gambling in Cyberspace simply refers to any type of remote gambling by interfacing two computers; usually one in the home and one someplace else in the world. There are many ways to do this, such as telephone modems that directly link two computers, the Internet and on-line services and private networks such as America Online. The most highly touted avenue is the Internet, which is a network connecting groups of smaller networks of computers, *i.e.*, millions of computers hooked together. It is a place where about 54 million users in the United States can communicate with over 34 million host computers worldwide.

Dismissing the importance of the Internet as vehicle for changing our culture and lifestyles is easy. This is because the genesis of the advancement is computer technology whose application was limited to small segments of the population. The significance of Internet gambling, however, has less to do with the prospect that computer "nerds" or "Netheads" will use their personal computers to gamble, than what will be the natural evolution of this technology.

The real challenge occurs in the future when the general public is exposed to the transparent use of this technology through the growing convergence of television and computers. Microsoft and NBC's formation of a joint venture for an Internet/cable news station called MS/NBC was no coincidence. Nor was Microsoft's investment of one billion dollars in Comcast, the nation's fourth largest cable company. Nor is the computer industry's fight with the traditional television industry to shape the standards for digital television. The television and computer industries are rapidly converging. Within 10 years, the box in most

every American home that we refer to as the television will be a large digital computer monitor with a built-in computer. To the average user, the future television will not look or act like a computer, but will simply be a new television with amazing capabilities. At the viewer's disposal will be hundreds, if not thousands, of television and radio broadcasts. Home users also will be able to play hundreds of video games or have access to a virtual library larger than any physical library in the world. They will be able to comparison shop for any product and have it delivered to their door.

They will also be able to gamble on anything, from lotteries, to blackjack to sports. The computer technologies that are being developed today for the casino will play just as well over the new television.

One should be careful framing the question about gambling and other activities in Cyberspace. The question is *not* whether gambling will be available. The real questions are whether it will be legal and whether governments have the necessary tools to prosecute offenders. These answers will define the size of the industry, not whether it will exist.

Historically, in the United States, primary responsibility for deciding gambling policy has been left to the States. Moreover, state governments have undertaken the majority of gambling enforcement. The question becomes what can States do about Internet gambling? Here I am not talking simply about Utah or Hawaii that have banned all forms of gambling. Internet gambling will impact every state. I look at Nevada and the almost 70 years that it took to develop and refine an effective regulatory system that assures the honesty and fairness of the games and keeps criminals out of the industry. Even it must come to grips with the possibility that every Nevada citizen may gamble from their living room with an unlicensed, unsuitable, and unscrupulous person that is operating offshore.

Old thinking may no longer work. Since the dawn of modern history, man has existed under a system of governance that has relied on the government having physical control over a geographic area and its inhabitants. According to German social theorist, Max Weber, "the state is a human community that successfully

claims the monopoly of the legitimate use of physical force within a given territory." Modern technology has gradually eroded some control – by facilitating inter-jurisdictional transactions. For instance, the advent of a national mail system spurred the creation of mail fraud, as well as the advent of the first national lottery. Likewise, the movement of money received from illegal transactions was much easier to track and prevent before the advent of electronic bank transfers.

The Internet significantly raises those stakes. It is a human community that exists without traditional notions of territory. A challenge to governments is how to *either* extend their monopoly to a boundless territory or to control content of Internet communications within their territorial boundaries. This is not a difficult proposition for many countries. If government controls access to the Internet, it can control what content that its citizen's view. This type of Draconian approach is acceptable in places like Singapore, Vietnam, India or Saudi Arabia. It is unacceptable in most western cultures, such as the United States. Moreover, such policies would probably run afoul of the Federal Constitution. State governments probably cannot restrict Internet access without violating the Commerce Clause. Second, the idea of restricting access to a communication media through prior restraint violates the First Amendment and is contrary to popular and historic underpinnings of the American concept of liberty.

Countries like the United States have the daunting task of trying to maintain traditional governmental controls over its citizens while relinquishing control of the Internet infrastructure. The reason this is such a daunting task is that the Internet changes the way people interact socially and commercially. One can buy virtually anything over the Internet from a business that does not exist anywhere but in cyberspace. The online gaming industry is an example. Where is the casino? Is it really in Antigua where it is licensed or is it next door but only routed through a surrogate server in Antigua? Moreover, how long does it take to move the Internet casino between countries? Simply stated, the physical location of the Internet business is irrelevant. Without having physical control over the business, the government will find it difficult to either regulate or tax.

Some advocates of Internet gambling suggest that any attempts to control the Internet will prove unsuccessful. While they may ultimately prove correct, governments cannot simply resign in defeat. The stakes go far beyond the implications of online gambling and extend to child and consumer protection, criminal activity, and other important social matters. For example, the government's ability to prosecute a hacker that extorts a company by threatening to expose stolen trade secrets is no easier than prosecuting an illegal Internet gambling operator. The same can apply to the child pornographer, or persons that pirate software, defraud customers or businesses, or libel others. The notion that the Internet should be left lawless and uncontrolled where criminals can act with impunity is unacceptable.

The Jurisdiction Question

To retain traditional controls, governments must obtain both jurisdiction and physical custody over the person. Jurisdiction refers to the legal power of a court to decide a matter and render a judgment against a person. In the context of Internet gambling, if a state or federal court has criminal jurisdiction over an Internet operator, it can decide whether the Internet operator violated any criminal laws and, if so, whether the appropriate penalties should include a fine, jail time, probation or other sentence.

In the United States, when a state attempts to assert jurisdiction over a nonresident, the due process clause of the Federal Constitution requires that the nonresident defendant have "minimum contacts" with the forum state such that he would reasonably anticipate being haled into court there. Moreover, maintenance of the suit in the forum state cannot offend traditional notions of fair play and substantial justice.

Acquiring criminal jurisdiction does not require that the person charged ever be physically present in the forum state or country to be subject to its laws. In 1911, the United States Supreme Court held:

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm

as if he had been present at the effect, if the state should succeed in getting him within its power.¹

This principle was extended to telephone communications by a case decided in 1916. In that case, the United States Supreme Court held when a person uses a telephone to commit a crime, the offense takes effect in the place where the hearer, not the speaker, is located.²

This long-held principle is again being tested as it applies to the Internet. To date, the court cases applying this principle to Internet gambling have been limited to state courts in Minnesota, Wisconsin, and Missouri. In each instance, however, the court had no problem extending the jurisdiction of their states to Internet operators. A Minnesota Appellate Court recently upheld a trial court decision in the well-known WagerNet case. The Appellate Court decided that an Internet operator that intended to and advertised that it would accept wagers from Minnesota residents was subject to the jurisdiction of the Minnesota courts. The Appellate Court made the following analogy: "Internet advertisements are similar to broadcast and direct mail solicitation in that advertisers distribute messages to Internet users, and users must take affirmative action to receive the advertised product."³ Under prior case law, several courts have held that persons who advertise over the television knowing that the advertisement will be broadcast in a particular state are subject to being sued there.

The defendant in the WagerNet case, however, did far more than merely advertise on an Internet site. For instance, by maintaining customer lists and failing to disclose them to the court, the defendant allowed the court to assume that some Minnesota residents were on those lists. This established that he had knowledge that the site was being accessed in Minnesota. Moreover, the defendant had a telephone conversation with a person who identified himself as

1 *Strassheim v. Milton Daily*, 221 U.S. 280, 31 S. Ct. 558, (1911).

2 *Lamar v. United States*, 240 U.S. 60, 36 S. Ct. 255 (1916).

3 Analogizing to television cases may become a popular approach when deciding Internet jurisdiction cases. Just as an individual turns on a computer and chooses and views a particular web site may be involuntarily exposed to Internet advertising, television advertising is accessed by an individual turning on a television and choosing a particular channel or program to view.

a Minnesota caller, but was a consumer investigator for Minnesota Attorney General's office.⁴ Finally, a statement on the WagerNet site that it could sue nonpaying customers in their home states established that WagerNet was willing to avail itself of the benefits of conducting business in Minnesota.

WagerNet and similar cases point out that deciding whether a state court has personal jurisdiction over an Internet operator will, inevitably, depend upon specific factual circumstances. As one Court attempting to reconcile recent decisions regarding this issue stated:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ... At the opposite end are situations where a defendant has simply posted information on an Internet web site that is accessible to users in foreign jurisdictions. A passive Web site that does no little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. ... Interactive Web sites where a user can exchange information with the host computer occupy the middle ground. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.⁵

Merely creating a web site that can be accessed may not be sufficient to establish personal jurisdiction absent a showing that the site operator either actively sought business from within the state or directed some other form of conduct at the state. Merely creating a web site and avoiding further contact or commercial interaction with customers, however, makes little economic sense. Devising an Internet gambling operation that is commercially viable and yet still does not create the types of contacts necessary for a state to assert personal jurisdiction would be difficult, if not impossible.

The Physical Custody Question

A trend among some Internet gambling operators is to locate their server in a

4 The telephone conversation alone may have been enough to confer personal jurisdiction. See, *Brianhead v. Governors of the University of Alberta*, 873 F.2d 1257 (9th Cir. 1989).

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

friendly Caribbean nation. For \$100,000 per year, an Internet gaming operator is assured of no regulatory oversight, anonymity and tax-free profits. Countries currently selling licenses include Antigua, St. Kitts, Grenada, St. Martin, Belize, Cook Islands, and the Netherlands Antilles.

This presents difficult problems for both state and federal governments even if their laws prohibit all forms of Internet gambling and issues of personal jurisdiction are resolved in the government's favor. The value of locating offshore has little to do with protections afforded by legally operating under the laws of a sovereign nation. Despite that a foreign government may authorize a foreign-based Internet casino, American law enforcement agencies and its courts still may enforce U.S. laws against an operator who causes an act that produces a detrimental effect in the United States. The laws of foreign countries do not bind American jurisdictions.

Instead, the operators' primary advantage of locating offshore is that they are not physically present in the United States. Suppose federal law enforcement officials gather evidence of the gambling activity and obtain federal indictments against the Internet casino operator, what then? The offshore casino operator could simply ignore service of process and be insulated from United States jurisdiction. An important portion of that 1911 Supreme Court quote on criminal jurisdiction is the final few words that grant powers to the court "if the state should succeed in getting [the defendant] within its power." The ability to prosecute a criminal defendant that resides outside the United States is contingent on obtaining the physical custody of the person.

If those involved in the Internet casino remain outside the jurisdiction of the United States, law enforcement officials have few options. The government could demand that the country in which the Internet casino is based surrender those involved with the casino as fugitives from justice. The right of the United States to request delivery or extradition of a fugitive or federal criminal defendant usually requires the existence of a *treaty* between the two nations. The United States has extradition treaties with only a few countries. Moreover, criminal suspects

can only be extradited for committing crimes that are enumerated in the specific treaty. Therefore, two prerequisites exist to having an Internet gaming operator extradited from a foreign country. First, the foreign country would have to be obligated to do so by treaty. Second, the treaty would have to make gambling an extraditable offense.⁶

Without an extradition treaty, a foreign country would rarely be compelled by sense of loyalty or justice to surrender an Internet gambling operator. This would be particularly true with those countries that have invited Internet gambling operators to conduct business within their borders. Despite the realization that the U.S. federal government does not welcome their actions, these countries have encouraged Internet gambling operators. Moreover, those countries with which the United States maintains extradition treaties may be hesitant to go beyond those crimes enumerated in the treaty and extradite a person based on illegal gambling.

As an absolute last resort, the federal government could obtain custody over a foreign Internet casino operator by force--*i.e.*, by kidnapping. While abduction of a foreign criminal suspect might seem abhorrent, it is an effective means of securing jurisdiction. Surprisingly, most courts dealing with this issue have held that a court's right to try a criminal defendant is not disturbed by the manner in which he was brought within a court's jurisdiction. Following this precedent, most courts have held that due process rights are not affected by abduction from a foreign country. Thus, when the United States government abducted Manuel Noriega from Panama, the court held that due process is violated only when the defendant proves the forcible abduction was accompanied by "torture, brutality, and similar outrageous conduct."

⁶ The federal government also could attempt to obtain extradition of a foreign casino owner or operator through international comity. The doctrine of "comity" is based on a reciprocal courtesy that one nation owes to another based on notions of justice and regard for what is due other states. With comity, the foreign country may voluntarily surrender a fugitive without regard to the existence or nonexistence of a treaty. The United States has sought extradition on the basis of comity on only a few occasions. This is because the Federal law enforcement officials do not have authority to reciprocate in the effecting of an extradition based on comity. An advantage of comity is that the foreign country has the power to surrender a fugitive accused of a crime not named in an extradition treaty.

Even though the government can obtain jurisdiction over a foreign Internet casino operator by way of forceful abduction, government officials are unlikely to view illegal gambling as so egregious as to warrant the physical invasion of a foreign country. As such, without the assistance of an extradition treaty or comity of nations, Internet casino operators operating outside the United States may be free to continue doing so.

In summary, to maintain both traditional controls and an open Internet environment, governments need to deal with the issue of international enforcement of its criminal statutes particularly through the broad establishment and expansion of extradition treaties and to resolve conflicts between the laws of sovereign jurisdictions. In other words, to create wide-ranging international cooperation. This effort will demand full government attention and the use of diplomatic powers if it is to be successful.

Alternative Approaches

Even with the advantage of having extra-territorial jurisdiction, the federal government will find it difficult to prosecute offshore Internet gambling operators. Most operators are likely to hide their involvement in the actual business by using a series of offshore corporations with "nominee" directors that obscure the actual ownership and operation. A company can incorporate in a Caribbean country for about US\$3,000. Annual fees are about US\$500. Moreover, no requirement exists to keep a base of operation within the incorporating offshore country. Nominee directors cost about US\$250 per person. With the use of nominee directors, the actual directors do not have to be disclosed. This makes it difficult for anyone, including law enforcement, to determine the actual owners and operators of the corporation.

Internet operators can further complicate matters by use of surrogate servers. For instance, an Internet site can prevent others from tracking the origination point by using a surrogate server in another country. By stripping off the server's header that indicates the origination point, the operator can make tracking the origin virtually impossible. Thus, the actual server could claim to be

in a foreign country, but actually be located within the United States.

If the surrogate site operates outside the United States, authorities may not be able to use subpoena powers to learn the location or identity of the actual server. Moreover, as a potential threat of prosecution becomes apparent to the operator, he or she can easily relocate to another more accommodating country without disturbing its Internet site.

The battle for control, however, does not stop with the Internet gambling operator. Governments will adopt new approaches to old problems. Yesterday's war on illegal gambling was simpler. An illegal bookie or casino would set up operations in a locale and open for business. Then, they had two options, either attempt to bribe the police or play a game of cat and mouse and hope the law did not catch up to them. Traditional law enforcement efforts centered on trying to arrest either the player or the operator. Both were physically present in the jurisdiction. Sting operations allowed undercover police to pose as players and infiltrate operations to gather evidence. Search warrants could be obtained and premises raided.

A person's bookie today could be as likely be living in Antigua as operating out of the neighborhood deli. Suddenly, traditional methods to police gambling don't work very well. As noted, absent better international cooperation, modern technology frustrates targeting an operator who resides in a foreign country under all the protections that a sovereign government affords. Likewise, the player is secure in his home or office and relatively safe from government scrutiny.

Florida's Attorney General, Bob Butterworth, has undertaken a new approach to the issue. He realizes that he can not arrest the operators of the offshore books, so he is attempting to starve them. He is looking at every avenue to make doing business offshore difficult.

At least five avenues can be explored. The first avenue is regulation of the financial transaction providers. These are the businesses that the operators use to transfer the funds between the casino and the patron. Today, this primarily

involves credit card transactions and traditional money transfers. Tomorrow, it will involve cyberpayment through the transfer of electronic representations of cash.

The second avenue is to regulate the Internet service providers. These are the companies that maintain the communication lines over which data travels between the Internet operator and the patron. The third avenue is to regulate advertising on the Internet and in other media. The fourth avenue is to regulate the index providers. These are the companies that provide computer search engines that allow persons to find sites that are within the perimeters of their search inquires.

Florida Attorney General Bob Butterworth started with the financial transaction providers. After all, unless the bets are paid, betting isn't all that much fun or profitable. He requested and Western Union agreed to cut off service of money transfers to and from about 40 Caribbean sports books. This could hurt many books that do not accept credit cards and relied on Western Union. If they haven't been contacted yet, MasterCard and Visa are the next likely targets of Florida's efforts.

General Butterworth is also going after those who would advertise these offshore books in magazines and newspapers. Finally, one might expect him to talk to the local telephone companies to restrict calls to certain 800 numbers. General Butterworth's approach points out important fact: law enforcement in a technical age must adjust to the technology. Only when law enforcement officials, like General Butterworth, realize their limitations, can they craft effective law enforcement strategies.