

JOSEPH M. KELLY

Internet Gaming

I would like to thank the commission for giving me this opportunity to discuss certain aspects of Internet gambling.

I. Present Status of Internet Gaming

Generally, there is agreement that Internet gaming is certainly a growth industry. Predictions, however, have occasionally ranged to extremes. The Chicago Crime Commission, a non-profit, anti-crime organization, predicted in November 1997 that Internet gambling would become a \$25 billion annual business by the year 2000.¹ On the other hand, Prof. I. Nelson Rose has suggested "Internet gambling is a flop... There is money to be made in Internet gambling, but it is not from gambling. The only people making money on the Internet are those who tell other people how to make money on the Internet and vapor-casino operators with stock to sell."²

Perhaps more typical of the average prediction is the comment of Bill Haygarth of William Hill, one of the three largest betting establishments in the United Kingdom, who said, "If I had a pound for everyone who's tried to sell me an interactive betting service, I'd be a rich man. I have heard of 30 different organizations touting various ways of mounting interactive betting. But it's coming, and soon. Companies will emerge which will provide the plumbing--the interactive conduit to carry betting services online--while we will act as betting operator. William Hill would want to offer such a service very soon after it was available."³

II. Governmental Attitude toward Internet Gambling

It would be an understatement to say that jurisdictions that offer gaming are unclear as to how to approach this relatively recent phenomenon. For example, SAGRA (the South African Gaming Regulators Association) has stated that "controls had to be found for the worldwide Internet gaming problem, which allowed gamblers to play games of chance via the Internet even

from areas where such activities were banned or controlled. Bets and service fees are made via credit card, but local gaming regulators and governments receive no taxation or other revenue from the activity." SAGRA met again this May in order to determine what to do about Internet gaming.⁴ Similarly, the Gaming Regulators European Forum, including representatives from the Gaming Board of Great Britain and other European countries, has established "an Internet Gaming Working Party" that is preparing a "position statement" when the parties soon meet in Helsinki.

"[Specifically], the regulators in each nation would, if they so wish, authorize the establishment of Internet gaming within that country, but on the basis that it is not available outside. This is said to be the course adopted in Finland and Norway where lottery tickets are sold over the Internet, but only to Finnish and Norwegian residents, respectively, who must prove their bona fides by providing details of bank accounts and social security numbers. [The Secretary of the Gaming Board of Great Britain] appreciates that this arrangement is difficult to police, but said that to his knowledge the Finnish authorities check the validity of a social security number when quoted, even if they are unable to check whether a buyer quoting it is the genuine holder thereof. There is, however, no plan to implement any such arrangement in the UK where...the authorities do not perceive Internet gaming as a problem."⁵

Other jurisdictions, such as Canada, considered seriously a Private Members Bill introduced in the last session of the Canadian Parliament that would have regulated Internet gambling.⁶ This Bill, however, died when the general election was called and it is uncertain whether it will be introduced in this session of Parliament. Unlike Canada, the United States has considered only prohibition. Certain state governments have prohibited Internet gambling, certain attorneys general have initiated civil and/or criminal proceedings against operators or pressured or even encouraged ISP's or Western Union not to participate in Internet gambling. Most important, however, is the Kyl Bill,⁷ but the latest version does not attempt to enforce US law in foreign countries.

III. Is Prohibition Viable?

When considering prohibition such as the Kyl Bill, one has to decide whether a government wants to go after the operator, the carrier (ISP), the gambler or all three. If the goal is prohibition, one has to consider seriously what to do about international gaming regulation in Liechtenstein and in Australia. In Liechtenstein, the government has operated an Internet lottery since 1995 that is audited by a major accounting firm. The government has also contracted with the International Red Cross, where, since 1997, the International Red Cross has split certain lottery proceeds with other charities. In fact, the Liechtenstein Lottery has suggested that it would establish a "US Independence Day 'Liberty's Loot.'" Tickets would depict great American scenes such as Mount Rushmore, the White House, and Uncle Sam. "All the cards are finished off with a US flag and rosettes.... The top prize is a whacking 50,000 Swiss Francs, enough for a ticket to Washington, DC, to party away July 4 in real style."⁸

A Canadian member of Parliament (Ron McDonald), in commenting on the Bill C-253 to regulate Internet gambling, was impressed by the Liechtenstein example.

"Today in my office--I did not know you could do this--I sat down, worked around for a bit and hooked up with the Liechtenstein Gaming Corporation in Liechtenstein. It is a city, a mountain, a river, and that is it. That is what the place is. I was in the Liechtenstein Gaming Corporation casino....

It was properly regulated. The first thing it indicated was that this gaming corporation was sanctioned and regulated by the Government of the Duchy of Liechtenstein according to internationally accepted guidelines and procedures. I had a bit of comfort that I was not dealing with the mob. I was not dealing with somebody some place down in the United States, Aruba or somewhere running a scam on the Internet.

If I wanted to do my scratch and wins, I had to set up my account. I had to be verified. If I won, it automatically went into my bank account in Canada just like that, an instantaneous transaction."⁹

More seriously is the project planned by the Liechtenstein Lottery and the International Red Cross billed as the first worldwide lottery called \$1 Billion through "Millions 2000." The result would create 2000 millionaires who will have purchased tickets for \$10 (plus \$2 handling)

that will have been sold throughout the world on the Internet and in other ways. The Secretary of the International Red Cross in supporting the project opined: "We cannot fight tomorrow's battles with yesterday's weapons.... This means that we have to steer beyond the traditional fundraising mechanics and develop alternatives, which appeal to a global audience."¹⁰

The American Red Cross, similar to the Red Cross in Japan,¹¹ New Zealand and other countries, had decided to opt out of participation in earlier Liechtenstein lotteries. Concerning the \$1 Billion Millions 2000 Lottery, the American Red Cross "will decide in the next few weeks whether it will participate in the fund raiser.... We wanted to kind of let it work its way through the newness in terms of the technology, the accountability and the safety of money transferability," said an American Red Cross spokesperson.¹²

One reason for hesitation might be concern as to its legality. While "[t]he legal advisers to PLUS Lotto are of the opinion that, when entering the Millennium Draw through the Internet, whether via computer or telephone, Players are traveling to Liechtenstein where the transaction takes place. Individuals should satisfy themselves as to their particular status before entering."¹³

John Russell, spokesperson for Internet gambling issues in the Department of Justice, said "the department could not comment on whether it would be illegal for someone in the US to participate in the Red Cross lottery specifically." He did reiterate that US criminal law prohibits the use of wired communications networks to place bets overseas. The result could be a \$250,000 fine, two years in prison, or both.¹⁴

Within the United Kingdom, the government has indicated that promotion of Millions 2000 "would be unlawful" since tickets would be sold for an overseas lottery that would be in violation of the 1976 Lotteries and Amusements Act. The Home Office Minister specifically informed the International Red Cross that Millions 2000 would be an illegal lottery.¹⁵

While Liechtenstein might be tolerated by US enforcement authorities as a relatively small lottery, the same may not be said of Australia which is on the verge of legalizing Internet gambling in three states, viz., New South Wales, Victoria, and especially Queensland where a bill has already been passed by Parliament on March 18, 1998.¹⁶ Unlike many Caribbean jurisdictions, Australia has had a long tradition of regulating gambling, and no one doubts that its gaming regulators have the necessary expertise and autonomy. Australian officials/regulators seem unconcerned about threats from various Americans, such as that issued at the end of March by a gaming consultant and attorney. He told an Australian gambling conference that Australian policy, which would allow Internet gambling and the acceptance of bets from throughout the world, including jurisdictions such as the United States, would disregard "American feelings," which will result in "American jurisdictions (retaliating) against this and the revenue produced for Australian racing will be lost." This comment brought a response from a Victorian regulator that Americans convey the impression "that globalization of the Internet is fine, provided that you do it as the Imperial master."¹⁷ Last August, I personally spoke with Australian gaming regulators from states other than Victoria, and they seem unconcerned or perhaps almost pleased at the possibility of the passage of the Kyl Bill.

Thus, with Liechtenstein and other jurisdictions having already established Internet gambling, and Australia having indicated that it will do so in the very near future, it would seem that the prohibition option of the United States would simply allow other countries and jurisdictions to be able to tax and regulate bets and wagers from the United States without any benefit to America.

Of more immediate concern would be the criminal complaints filed against 21 Internet owners, operators and managers alleging a conspiracy to violate the Wire Act.¹⁸ All individuals

and Internet operations had used an 800 number and some operated out of Antigua in the West Indies. Predictably, these complaints have upset the Antiguan government since the operation apparently was honestly conducted by individuals licensed in Antigua, and the matter might possibly result in a protest by the Antiguan government which might "reevaluate its extradition agreements with the US... It could be determined that the US is operating outside their legal bounds, infringing on Antiguan sovereignty."¹⁹

IV. Opposition to Internet Gambling

Undoubtedly, you have heard presentations from individuals who have explained how terrible Internet gambling is and occasionally they are opposed to all gambling, with Internet gambling perhaps being the most dangerous for religious or other grounds. More importantly, would be the opposition to Internet gambling from governmental and private enterprise that has already engaged in the business of gambling. Take, for example, the comments of the managing director of Osterreichische Lotterien of Austria. The director stated that presently "we are confronted with a tremendous increase in the number of Internet operators both in the casino and lottery sectors. Actually this is not a big economic threat, but it is a threat to the gaming monopolies on principle.... Offering games of chance via the Internet means a de facto liberalization of the gaming market and could be interpreted...as the end of the gaming monopolies."²⁰ Almost as an afterthought, the manager mentioned that unregulated Internet gambling might result in fraud.

It would be an understatement that Native American Internet gambling operations, especially the Coeur d'Alene, has concerned gaming regulators. Liechtenstein, for example, sees the "U.S. Lottery," operated by the Coeur d'Alene, as "our major competitor--they're the most aggressive on the Internet."²¹ The "U.S. Lottery" basically would allow players in about three

dozen states where lotteries are legal to participate in a national lottery operated from Idaho. Many attorneys general are opposed to the Coeur d'Alene and cite various reasons. Jay Nixon (Mo.), for example, stresses fear of crime. "I'm not that worried about the Modoc tribe.... I'm worried about the Gambino tribe."²² More significant would be the perception that Indian lottery is perceived as a threat to the state's lottery monopoly which provides much needed revenues.

US casinos are unsupportive of Internet gambling, not because of fear of competition, but rather because of lack of regulation and an unwillingness to jeopardize an expensive gaming license granted by Nevada, New Jersey or some other jurisdiction. Should casinos enter Internet gambling, they would easily drive out of business the rather small Internet casino operators in the Caribbean or elsewhere. By no means am I suggesting that casino opposition new forms of gambling has always been motivated by altruistic reasons such as lack of regulation. In my *Drake Law Review* article, "American Indian Gaming Law," April 1995, I strongly suggested that casino opposition to the developing Native American casinos was based on fear of competition, but almost always expressed in terms of fear of organized crime or in defense of existing religious/charitable bingo operations from Native American competition.

Instead, casinos fear that unregulated Internet gambling could result in the following situation, which would have a backlash on all casino gambling.

"Multigigabux, which has a brief record of paying off on its games, like Ponzi, is based on a tiny Caribbean island where the prime minister and his government have been frequently cited for fraud and other malfeasances in US news articles. A few days after the disregarded announcement date, comes a short wire dispatch from our island in the sun. The Multigigabux offices have been found abandoned. Over \$800 million has vanished into thin air or, more aptly, into cyberspace.

The prime minister claims it was a plot of Yankee gangsters. The credit card companies say: 'Sorry, we've already transferred all the cash.' And there's nobody left to sue. Naturally all hells breaks loose among the US. Bettors....

The anti-gaming camp jumps in. They have found a perfect excuse to call for the outlawing of all forms of gaming. A congressional committee examining the subject finds more and more 'contrarinicks' to back them up. It's almost

impossible for the honest, legitimate operators to get a word in edgewise."²³

Besides lack of regulation and a possible backlash, casinos in the US do not wish to jeopardize a costly gaming license. In order to obtain a gaming license in jurisdictions such as Nevada or New Jersey, the casino must prove suitability, occasionally by clear and convincing evidence. Thus, a casino owner would be very wary of possibly jeopardizing his casino license renewal by participating in a gray area of gambling. In fact, Global Casinos Inc. formed Global Internet Corp. to explore the development of Internet gaming sites.

"Management became aware that Internet gaming could impair the Company's Colorado state gaming license. As a result, the Company initiated actions to divest itself of its investment in Global Internet. A separate board of directors of Global Internet was established, with no overlapping members of the Company's board, and the Company assigned its voting rights to a member of the Global Internet board, who is not related to the Company."²⁴

If prohibition is not considered to be a viable alternative, then it is strongly suggested that regulation of Internet gambling with high taxation be considered. Australia already has made it clear that it will set up Internet gambling that is available to American bettors. It is also possible that the industry itself might set up a viable Internet gambling board. The reputable Internet operators for some time have been trying to form an Internet gaming board made up of members independent of control by the regulators. They should retain the services on the board of a former regulator, preferably from the United Kingdom, an accountant, an attorney with experience in the gaming business, somebody who has worked for a gaming board in a security aspect, and other reputable persons. The reputation of the board throughout gaming jurisdictions would depend upon how well its members were regarded. The board should pass upon the suitability of any applicant and also have as its function the ensuring of the integrity of any offered games, preferably through utilization of a prominent, Big Eight accounting firm as is done in Liechtenstein and provide measures for arbitration and resolution of disputes between

Internet casinos and its patrons. An unworkable solution would be to have the Internet gaming authorities regulate themselves through some sort of code of conduct.

V. Native American Casinos

Various attorneys general, e.g., Wisconsin, Missouri and Minnesota, have sued certain Internet gambling operators while others have pressured/suggested that ISP's cease providing services to offshore operations. Generally, they have been successful in establishing necessary minimum jurisdictional contacts for litigation.

More complicated is current litigation involving Native American Internet gaming. The uncertainty is compounded by the failure of the National Indian Gaming Commission, the federal regulatory body that supervises Indian gaming to make any decisions on Internet gambling. On November 14, 1997, it held a hearing on Internet Tribal Gambling, but the Commission has not decided whether it will issue regulations.

The pressing unresolved issue is whether the Coeur d'Alene may operate an Internet lottery, a Class III game, in those states that already have lotteries. Both Missouri²⁵ and Wisconsin²⁶ have sued the tribe and its operator, Unistar. The tribe has successfully removed the cases to respective federal courts which then ruled that the tribe, but not Unistar, is immune from liability for off-reservation activity. While the decisions are on appeal, all sides are waiting to hear how the United States Supreme Court will decide *Kiowa Tribe v. Manufacturing Technologies Inc.*²⁷ where the issue is the defense of tribal sovereign immunity for contractual activity outside of tribal lands.

Telephone companies, however, continue to be in limbo. On February 28, 1996, the Coeur d'Alene tribal court (affirmed on appeal on July 2, 1997) ruled that state attorneys general are prevented by the 1988 Indian Gaming Regulatory Act from interfering with the Internet

lottery. It also ruled that long distance carriers cannot refuse to provide requested Internet service based on the Anti-Wire Act, since it is inapplicable to the Coeur d'Alene lottery.

Eighteen attorneys general sent notices to AT&T and other carriers that this decision was incorrect. Predictably, AT&T has sought declaratory and other relief from the Idaho federal court on this matter since "AT&T may be held in contempt of the Tribal Court if it refused the Tribe's request for 800 Service. Conversely, if AT&T provides 800 Service to the Tribe, it may be subject to criminal charges in one or more of the opposing States."²⁸

Perhaps less controversial or complicated would be tribal Internet Class II gaming which does not require a tribal/state compact. Megamania, an electronic bingo game that is utilized by about 40 to 50 tribes, has 2400 machines, and has been classified as a Class II game by the National Indian Gaming Commission. Megamania "provides satellite linked, high stakes bingo games and interactive high speed bingo games played on interconnected electronic player stations to participating bingo halls" on tribal reservation.²⁹ More controversial would be the attempt by the St. Regis Mohawks to offer Class II Internet games from its New York and Michigan reservations. Predictably, this has brought opposition from the attorneys general of New York, Missouri and Wisconsin.

¹ AFX News, Oct. 1, 1997.

² I. Nelson Rose, *Gambling and the Law*, § 122, 123, April 1998.

³ "A Revolution in Cyberspace: Betting," *Financial Times* (London), Sept. 27, 1997 at 20.

⁴ "Southern Africa: Regional Southern African Gaming Association Formed," *Africa News*, March 19, 1998.

⁵ Letter from Tony Coles, Esq., Green Russell Solicitors, to Joseph Kelly, Esq., May 1, 1998; "Can Digital Betting Achieve a Payoff?" *Marketing Week*, April 16, 1998.

⁶ Bill C-353, "An Act to Amend the Criminal Code of Canada (the Regulation of Internet Casinos)."

⁷ Internet Gaming Prohibition Act, Sec. 4, "Sense of the Senate."

⁸ Plus Lotto, June 7, 1997.

⁹ Speech, House of Commons, Feb. 13, 1997 at 8116.

¹⁰ "Millions 2000," Press Release, April 8, 1998.

¹¹ *Daily Yomiuri*, Jan. 20, 1998.

¹² Karen Kaplan, "Fund Raiser Might Violate US Law," *Los Angeles Times*, April 20, 1998 at D6.

¹³ Millions 2000, "Rules and Regulations," May 2, 1998.

- ¹⁴ Kaplan, *supra* n12.
- ¹⁵ "Global Gamble," *Marketing Week*, April 23, 1998. European restraints on gaming from other EC countries might be in violation of European Community Law as explained in the *Schindler* decision.
- ¹⁶ The Bill's spokesman said, "With everything on line and recorded in central computers, regulators will be able to monitor games more easily than say a black jack table in a real casino all bets and pays will be recorded." *AAP Newsfeed*, March 18, 1998.
- ¹⁷ "US Expert Warns AUS on Internet Gambling Laws," *AAP Newsfeed*, March 31, 1998.
- ¹⁸ "None of the complaints relies exclusively on Internet activities in support of the charges. They do, however, attempt to equate Internet and telephone use." Kenneth A. Precling and Ronald E. Wiggins, "Internet Law," *The National Law Journal*, March 30, 1998 at B7.
- ¹⁹ Comments of Gyneth McAllister, a gaming consultant to the Free Trade Zone of Antigua; John Borland, "Offshore Gambling Havens Standing Firm," *Techweb News*, April 1, 1998.
- ²⁰ *International Gaming and Wagering Business (IGWB)*, Jan. 1998 at 50.
- ²¹ "Internet Lotto" (Liechtenstein), *IGWB*, Feb. 1998 at 1.
- ²² *Time*, June 2, 1997.
- ²³ "Internet Wagers Could Hurt Gaming," *IGWB*, May 1996.
- ²⁴ *Global Casinos, Inc., Report*, 1997.
- ²⁵ "Missouri Sues to Stop Indian Internet Gambling," *Consumer Protection Report*, March 1998 at 22.
- ²⁶ "Internet Gaming Provider Vows to Fight Back," *Milwaukee Journal*, Feb. 21, 1998 at 5.
- ²⁷ Cert. granted June 1997, 117 S.Ct. 2506.
- ²⁸ Civ. 97-0392 (D.C. Idaho).
- ²⁹ *Business Wire*, March 12, 1998.