

THE INTERNET GAMBLING FALLACY CRAPS OUT

By Joel Michael Schwarz[†]

ABSTRACT

Despite the tremendous amount of media attention and the growing body of academic literature on the legality of Internet gambling, several issues remain contentious. Many groups continue to argue that Internet gambling takes place offshore, outside of United States jurisdiction, and is therefore not subject to United States law. These groups also argue that Internet gambling is legal in numerous states around the country. Finally, many Internet gambling proponents argue that even if Internet gambling were found to be illegal within the United States, and even if it were deemed to be subject to our laws, these laws are nonetheless impossible to enforce because of the boundless nature of the Internet. The author first considers current anti-gambling laws and applies them to the Internet, concluding that gambling activity is illegal under federal law, as well as under state law absent explicit state authorization. Next, the author examines the locus of the gambling activity and determines that the gambling occurs where the gambler is located, regardless of where the servers are located. The author finally addresses various methods for enforcing a judgment against an Internet gambling business. By concentrating on cutting off access to the Internet gambling website and rendering the Internet gambling operators unable to secure funds from United States citizens, the author argues that law enforcement can in fact stem the offering of illegal Internet gambling within the United States.

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I. RULES OF THE GAME: AN INTRODUCTION

Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed by a substantial majority of Americans.¹

The foregoing statement was issued in 1976 as part of the opening remarks of the Commission on the Review of National Policy Toward Gam-

1. COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING, FINAL REPORT 1 (1976).

bling. Although these words were written almost a quarter of a century ago, long before the Internet was used as a commercial communications medium, they could just as easily have been written today about Internet gambling. Akin to the concerns with which the Commission was faced in 1976, many state and federal law enforcement agencies currently wrestle with the difficulty of prosecuting crime that utilizes a borderless and boundless medium such as the Internet.²

The advent of the Internet presents a new and unique challenge for regulators. Unlike traditional casinos, Internet gambling sites cannot be shut down by merely chaining the doors. Nor can we emulate Fiorello LaGuardia's famous crusade against gambling by taking a sledgehammer to the gambling machines and pushing them onto the New York City barge.³ In fact, unlike gaming of the past, Internet gambling does not even need to be hosted in the state or the country where the player logs in. The fact that Internet gambling knows no boundaries adds an additional layer of complexity that distinguishes it from its predecessors.

Some of the oft-cited reasons for prohibiting land-based gambling have been: (1) a fear of encouraging addicted gamblers who may squander their limited family resources in furtherance of their addiction;⁴ (2) a concern about the ability of regulators to oversee gambling activity so as to ensure honest practices and prevent rigged gaming and other fraudulent gaming enterprises;⁵ (3) a need to prevent the operation of gambling en-

2. See Kenneth A. Freeling & Ronald E. Wiggins, *Despite Tough Talk From Prosecutors, and Despite Indictments of Those Charged With Internet Gambling, No Court Has Held That U.S. Law Prohibits Such Betting*, NAT'L L.J., Mar. 30, 1998, at B7; see also Elliott Almond, *Borderless Betting*, SAN JOSE MERCURY NEWS, Jan. 24, 1999, at D1; Ian Plumley, *Visions of New Gaming*, LA FLEUR'S LOTTERY WORLD, May 1998, at 15.

3. See Roger Dunstan, *Gambling in California*, CALIFORNIA RESEARCH BUREAU ch. II (Jan. 1997) <<http://www.library.ca.gov/CRB/97/03/crb97003.html>>.

4. See, e.g., *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 213 (N.Y. 1964) ("The New York constitutional provisions were adopted with a view toward protecting the family man of meager resources from his own imprudence at the gaming tables."); *Roland v. United States*, 838 F.2d 1400, 1402 (5th Cir. 1988); *United States v. Martinez*, 978 F. Supp. 1442, 1447-48 (D. N.M. 1997); see also Davan Maharaj, *Web Bettors Push Odds With Credit Card Debt*, L.A. TIMES, November 22, 1999, at A1, A7 (Fred Marino, a California man who has more than \$100,000 in credit card gambling bills, said that he felt he "had to gamble to make [his] losses back up" and that he "ended up maxing out all [his] cards and losing [his] home.").

5. See, e.g., *Intercontinental Hotels*, 203 N.E.2d at 213 (noting that unsupervised, unregulated gambling "affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices"); *DeMarco v. Colorado Ltd. Gaming Control Comm.*, 855 P.2d 23, 26 (Colo. Ct. App. 1993) (explaining that the Gaming Act provides detailed regulation of those involved in the legalized gambling industry, in order

terprises by criminals and organized crime,⁶ and (4) a concern that legalized gambling may encourage gambling by minors.⁷

The very same public policy concerns that have led many states to prohibit land-based gambling are even more cogent when viewed in light of the increased freedom, anonymity and ease of access offered by the Internet. For example, evidence suggests that the problem of addictive gambling grows even greater as access to gambling devices increases.⁸ Additionally, honesty and fairness in the gaming venture become even more elusive when gambling is offered over the Internet, since there is a distinctive “lack of consumer protection” in Internet gambling, as well as an inability to ensure that consumers who choose to gamble actually get paid for their winnings.⁹ Moving gambling onto the Internet may also open up a whole new world for criminals and organized crime, since the initial investment required for setting up a cyber-gambling operation is

“to assure that honest wagering actually takes place and to maintain public confidence that such is the case”); *People v. Busco*, 46 N.Y.S.2d 859, 871 (Ct. Spec. Sess. 1942) (holding that the Penal Law prohibition against gambling was enacted to completely eliminate professional gambling which is “injurious to the morals and welfare of the people”).

6. *See, e.g.*, *Greater New Orleans Broadcasting Ass’n v. United States*, 149 F.3d 334, 338 n.9 (5th Cir. 1998) (“The social problems encompass rises in organized crime, violence, embezzlement, fraud ... theft....”); Romualdo P. Eclavea, Annotation, *Validity, Construction & Application of 18 U.S.C.A § 1955 Prohibiting Illegal Gambling Businesses*, 21 A.L.R. FED. 708 §1[c] (1974) (setting forth the Congressional findings which led to passage of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955); Meg Vaillancourt, *Cellucci Cool to Expansion of Gaming, But Gambling Issue May Heat Up Again*, BOSTON GLOBE, Jan. 30, 1999, at E2 (“Reilly also expressed concerns that expanded gambling could lead to an influx of organized crime in the state.”).

7. *See, e.g.*, *Carver, Inc. v. State*, 672 So.2d 1141, 1143-44 (La. Ct. App. 1996) (affirming administrative revocation of a video gaming license based upon its finding that a young child was allowed to play or operate a video gaming device in violation of a statute prohibiting minors from playing such devices); *Pando ex rel. Pando v. Fernandez*, 485 N.Y.S.2d 162, 165 (Sup. Ct. 1984). *See generally Greater New Orleans Broadcasting*, 149 F.3d 334.

8. *See* Anthony Cabot, *A Primer on the Legality of Gambling on the Internet*, ANDREWS GAMING INDUSTRY LITIG. REP. 3, 4 (Sept. 1997) (noting that online gambling “is the equivalent to placing slot machines in millions of homes”); *see also* Stevie A. Kish, *Betting on the Net: An Analysis of the Government’s Role in Addressing Internet Gambling*, 51 FED. COMM. L.J. 449, 453 (1999); John T. Fojut, *Ace in the Hole: Regulation of Internet Service Providers Saves the Internet Gambling Prohibition Act of 1997*, 8 DEPAUL-LCA J. ART & ENT. L. 155, 161-62 (1997).

9. *See generally* Wendy R. Leibowitz, *Senate Bans Most ‘Net Gambling; Many Bet on Poor Enforcement*, NAT’L L.J., Aug. 10, 1998, at B6. *See also* Anthony Cabot, *Internet Gambling in the Information Age*, 7 NEV. LAW. 20, 21 (1999).

significantly lower than the cost of establishing a real-world casino.¹⁰ Finally, one of the largest potential problems with Internet gambling is the inability of Internet gambling operators to prevent minors from logging in to a website and placing wagers.¹¹

Because of its borderless nature, Internet gaming also allows the gambling enterprise to completely shift the costs of gambling-related remedial measures. In states where land-based gambling is permitted, the licensed gambling entities presumably pay taxes and licensing fees; at least some of these revenues aid the states in dealing with gambling's social ills, as well as fund various state enforcement mechanisms. By contrast, Internet gambling operators do not pay a dime to the state.¹² In fact, they do not even need to set foot into the state, or anywhere in the United States. Yet, it is the state in which the gambler resides that will have to contend with the fallout from unlawful gambling, including treatment and care of addicted gamblers, enforcement initiatives to enjoin fraudulent gambling businesses, criminal prosecutions to terminate criminal ventures, and the expenditure of state funds to help protect underage gamblers.

This new advance in technology requires a change in resources and a new application of the existing arsenal of enforcement mechanisms, which will require forward thinking by prosecutors.¹³ It also requires a fresh look at anti-gambling laws in order to apply them to the new challenges at hand. Just as changing jurisdictional boundaries have presented new but surmountable challenges for courts, obstacles created by Internet gambling are likewise surmountable. Current anti-gambling laws need only be adapted to a new perspective. By applying to the Internet the enforcement mechanisms already available under various federal and state gambling statutes, in conjunction with a concerted effort to enact new legislation specifically directed to the online world, regulators can gain significant control over Internet gambling operations within their borders. As such, the primary purpose of this article is to gain a better understanding of

10. See Cabot, *supra* note 8, at 3 (noting that with the advent of Internet gambling, "the gambling industry is [essentially] left in the hands of every shyster or con artist who can afford a computer and a programmer").

11. See Brad Knickerbocker, *For Many Teens, Gambling Starts at Home. First It's a Scratch of a Lotto Ticket. Eventually It Could be Stealing to Support An Addiction*, CHRISTIAN SCI. MONITOR, Jan. 7, 1999, at 3; see also Fojut, *supra* note 8, at 161-62; Kish, *supra* note 8, at 451.

12. See Mark G. Tratos, *Gaming on the Internet*, 3 STAN. J.L. BUS. & FIN. 101, 114 (1997).

13. See, e.g., Jack Goldsmith, *What Internet Gambling Legislation Teaches About Internet Regulation*, 32 INT'L LAW. 1115, 1118-20 (1998).

these federal and state gambling statutes, the various enforcement options currently available, and the options that may be available in the future.

Part II of this Article briefly describes how the Internet works and how individuals actually log in to an Internet gambling website and place bets. After highlighting the federal statutes that were designed to prohibit illegal interstate and international gambling activity, Part III reviews various state constitutions and gambling statutes, and concludes that gambling must be explicitly authorized by a state in order to be legal. Part IV begins with an examination of case law pertaining to the assertion of personal and subject matter jurisdiction over an Internet gambling business. Part IV then examines the notion that Internet gambling is beyond the reach of United States law enforcement because it occurs offshore where the gambling servers are located and licensed. Part IV concludes that regardless of where the gambling servers are located and licensed, the gambling is deemed to occur in the United States, in violation of United States law. Proceeding from the presumption that an offshore Internet gambling enterprise will refuse to comply with a court order prohibiting the offering of gambling services to United States citizens, Part V explores the various mechanisms that may be used to sever domestic access to illegal Internet gambling. Part VI discusses the current controversy of how best to combat Internet gambling, and concludes that regardless of whether or not there is a nationwide crackdown on such activity, Internet gambling remains a prosecutable offense under pre-existing federal and state laws.

II. ANTE UP: HOW TO LOG IN TO AN INTERNET CASINO

Access to the Internet is generally accomplished through the use of a modem, which is attached to a user's computer and a phone line in the user's home.¹⁴ After the user's modem has dialed onto the Internet through the use of a commercial or non-commercial interactive computer service provider ("ICS provider"),¹⁵ the user can log in to a website such as a vir-

14. *See* *ACLU v. Reno* (CDA I), 929 F. Supp. 824, 832 (E.D. Pa. 1996).

15. An interactive computer service is "any information service, system, or access software provider that uses a public communication infrastructure or operates in interstate or foreign commerce to provide or enable computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." S. 692, 106th Cong. § 2(a)(6) (1999).

tual gambling casino.¹⁶ The user can then enter the virtual casino and play blackjack, slots, roulette, and various other games of chance.¹⁷

After selecting a game, a user makes numerous gambling-related decisions from the comfort of his or her own home, including how much money to bet, and enters this information into the computer.¹⁸ Similarly, after reviewing the applicable odds, point spreads and other relevant data, a user may place a bet on a sporting event through an online bookie.¹⁹

With the press of a button, or the click of a mouse, the information is transmitted over the phone lines, which are connected through a network of interstate and international wire communication facilities, to the servers of the business hosting the Internet gambling website.²⁰ These servers are generally located offshore in a country that issues Internet gambling licenses, such as Antigua or Australia.²¹ In fact, as of the end of 1998, there were approximately twenty-two jurisdictions outside of the United States that were licensing, and in some manner regulating, Internet gambling.²²

The servers hosting the Internet gambling operations in turn transmit information to a user's home computer, providing the user with an "interactive gaming experience."²³ Thus, by hosting a virtual casino and ex-

16. See generally *CDA I* at 833. See also Peter Brown, *Regulation of Cybercasinos and Internet Gambling*, 547 PLI/PAT 9, 12-13 (1999).

17. See Jose Martinez, *A Gambler in Boston Laid 45 Grand on This Weekend's Football Games*, BOSTON HERALD, Nov. 2, 1998, at 3. See generally Freeling & Wiggins, *supra* note 2.

18. See generally Almond, *supra* note 2. See also James Rutherford, *Special Report: Internet Gambling: The Newest Casinos*, CASINO PLAYER, Dec. 1997, at 36, 36 ("Right now, somewhere out there in that wondrous global supermarket they call the World Wide Web—just a mouse click away on your home computer—the cards are snapping, the reels are spinning, the dice are rolling. About 60 'casinos' are up and running on the Internet, ready to take your bets for real money . . .").

19. See, e.g., Martinez, *supra* note 17; Almond, *supra* note 2.

20. See generally Freeling & Wiggins, *supra* note 2, at B7 ("The Internet can be much more effective than the telephone for interstate gambling. The Internet's reach makes possible practically unlimited simultaneous multi-channel communications. The potential number of bettors who can access a Web-based service is limited only by the number of connections to the Web and the service's ability to handle traffic."). See also *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *5-6 (N.Y. Sup. Ct. July 22, 1999).

21. See Almond, *supra* note 2, at D1 ("Web surfers can wager on horse racing in Germany or place a bet in Australia, Antigua and a host of other countries without anyone being the wiser."). See also Fojut, *supra* note 8, at 169.

22. See Martinez, *supra* note 17.

23. See generally Martinez, *supra* note 17, at 3 ("From the security of his home computer, Mr. Surething logged onto a half-dozen sportsbook sites in England, Costa Rica, Jamaica and Antigua."); Freeling & Wiggins, *supra* note 2, at B7.

changing betting information transmitted internationally between an island offshore and a state within the United States, the business engages in gambling in violation of numerous federal and state laws.

III. ROLLING THE DICE: THE LEGALITY OF INTERNET GAMBLING UNDER CURRENT LAW

Due to the fact that most federal and state gambling laws were enacted long before the advent of Internet gambling, questions have arisen as to the applicability of these laws to the Internet. A careful review of federal gambling laws, however, demonstrates that even before the Internet became a viable commercial medium, Congress had the foresight to draft these prohibitions broadly so as to encompass the possibility that the means for offering gambling may change over time. A review of state constitutional and statutory authority likewise demonstrates that Internet gambling is currently illegal within most states' borders regardless of whether or not the Internet was extant at the time these laws were passed.

A. Federal Anti-Gambling Provisions

The transmission of gambling information in interstate or foreign commerce is illegal under numerous federal laws including the Federal Interstate Wire Act (also known as "the Wire Act"),²⁴ and the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (also known as "the Travel Act").²⁵

The Wire Act provides in part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmis-

24. 18 U.S.C. § 1084 (1994).

25. *Id.* § 1952; see also *World Interactive*, 1999 WL 591995 at *6; Brown, *supra* note 16, at 21-23; Mark G. Tratos, *supra* note 12, at 104-05 (1997).

In addition to the Wire and Travel Acts, the Interstate Transportation of Wagering Paraphernalia Act (also known as the "Wagering Paraphernalia Act") prohibits the interstate or international transportation of wagering paraphernalia in furtherance of a gambling enterprise. 18 U.S.C. § 1953(a) (1994). See also Brown, *supra* note 16, at 23-24; The Gambling Devices Transportation Act, 15 U.S.C. §§ 1171-1178 (1994). For example, an Internet gambling enterprise might be said to have sent a gambling "device" in foreign commerce in violation of the Wagering Paraphernalia Act if the computer servers for the Internet casino are purchased domestically and then shipped offshore. See generally Rutherford, *supra* note 18. Courts have also found gambling enterprises vicariously liable under the Act. See *United States v. Zambito*, 315 F.2d 266, 267 (4th Cir. 1963), *cert. denied*, 373 U.S. 924 (1963). As such, the online casino which solicits United States residents to fund wagering accounts via the mailing of a check, or other such means, could arguably be said to be in violation of the Wagering Paraphernalia Act.

sion in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.²⁶

The Wire Act defines a wire communication facility as “any and all instrumentalities, personnel, and services ... used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.”²⁷

Similarly, the Travel Act states that:

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than five years, or both.... As used in this section (i) “unlawful activity” means (1) any business enterprise involving gambling....²⁸

Although the use of a wire or wire communication facility is not explicitly referenced within the Travel Act, courts have consistently interpreted this statute to include a prohibition against the use of a wire or wire communication facility.²⁹

Since the initial enactment of the Wire and Travel Acts, courts have expanded their application, holding gambling enterprises liable not only for their own use of interstate wire communication facilities, but also for causing “one or more [other] persons to do some act in connection” with

26. 18 U.S.C. § 1084(a) (1994).

27. *Id.* § 1081.

28. *Id.* § 1952(a)-(b).

29. *See* United States v. Villano, 529 F.2d 1046, 1052 (10th Cir. 1976), *cert. denied*, 426 U.S. 953 (1976); United States v. Burke, 495 F.2d 1226, 1228-29 & n.4 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974); United States v. Hanon, 428 F.2d 101, 108 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); United States v. Smith, 209 F. Supp. 907, 916 (E.D. Ill. 1962).

the gambling operation that utilizes those facilities.³⁰ Since Internet gambling also uses wire communication facilities for the purpose of transmitting the gambling information, a logical expansion in the application of these Acts would be to Internet gambling.

In an effort to circumvent the application of the Wire and Travel Acts to Internet gambling, however, some Internet gambling operators have argued that the Acts are inapplicable to their activities because the Internet did not exist at the time of the statutes' enactment. As such, the operators contend that Congress could never have intended for them to apply to Internet gambling.³¹ This argument appears to be fallacious, however, when one reviews the Congressional intent behind the passage of the Wire and Travel Acts.

For example, the legislative history of the Wire Act indicates that it was intended to be applied broadly so as to prevent *any* interstate or international transmission of gambling information to or from the United States using wire communication facilities.³² As former U.S. Attorney General Robert F. Kennedy wrote, "[t]he purpose of [the Wire Act] is to aid ... in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce."³³

Case law also suggests a broad interpretation of both Acts. In *United States v. Smith*,³⁴ the court explained that the Travel Act should be read so as to effectuate the purpose of the statute "especially when it can be, and has been, determined by the Act itself or its legislative history what it is that the Congress is trying to accomplish by the passage of the act."³⁵ In *United States v. Borgese*,³⁶ the Southern District of New York approvingly cited *Smith* when it noted that the Wire Act and the Travel Act "are clearly directed against unlawful activity involving the use of interstate commerce

30. *United States v. Salsbury*, 430 F.2d 1045, 1049 (4th Cir. 1970); *see also* *Bass v. U.S.*, 324 F.2d 168 (8th Cir. 1963).

31. *See, e.g.*, *Fojut*, *supra* note 8, at 157.

32. *See* H.R. REP. NO. 87-967, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631.

33. *Id.* at 2633.

34. 209 F. Supp. 907 (E.D. Ill. 1962).

35. *See id.* at 916 (citing *Brooks v. United States*, 267 U.S. 432 (1925)); *see also* *Kish*, *supra* note 8. As the *Smith* Court noted in dicta, Congress' power to regulate interstate commerce is not in any way limited to only certain forms of media. 209 F. Supp. at 916.

36. 235 F. Supp. 286 (S.D.N.Y. 1964).

facilities.”³⁷ Similarly, as the Fifth Circuit observed in *United States v. Steubben*,³⁸ the Wire Act, the Travel Act, and the Wagering Paraphernalia Act were meant to be interpreted broadly so as to accomplish the Congressional intent behind their passage, namely to regulate “any gambling-related activity that touches upon interstate commerce.”³⁹

In *People v. World Interactive Gaming Corp.*,⁴⁰ the court specifically addressed the application of the Wire and Travel Acts to Internet gambling. In holding that both of these Acts applied to the Internet, just as they do to more traditional gambling, the court noted that

[L]ike a prohibited telephone call from a gambling facility, the Internet is accessed by using a telephone wire. When the telephone wire is connected to a modem attached to a user’s computer, the user’s phone line actually connects the user to the Internet server and then the user may log onto this illegal gambling website from any location in the United States.⁴¹

As such, the court reasoned that “[b]y hosting this casino⁴² and exchanging betting information with the user, an illegal communication in violation of the Wire Act and Travel Act has occurred.”⁴³ The court also found the respondents’ activities to violate the Wagering Paraphernalia Act.⁴⁴

In essence, it would appear that Congress intended to prevent and punish the use of interstate commerce for illegal or immoral purposes such as gambling. There is no reason to believe that Congress would have intended to exempt Internet gambling from the scope of these statutes, since Internet gambling presents precisely the type of evils the statutes were enacted to prevent. Whether gambling occurs in real-space or cyberspace,

37. *Id.* at 296-97. This rationale was likewise adopted by the court in *World Interactive* when it ruled that “the Interstate Commerce Clause gives Congress the plenary power to regulate illegal gambling conducted between a U.S. and a foreign location” and as such “[g]ambling conducted via the Internet ... is indistinguishable from any other form of gambling.” *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *6 (N.Y. Sup. Ct. July 22, 1999).

38. 799 F.2d 225 (5th Cir. 1986).

39. *Id.* at 229; see also *Martin v. United States*, 389 F.2d 895, 899 (5th Cir. 1968); *Borgese*, 235 F. Supp. at 297-98.

40. 1999 WL 591995 (N.Y. Sup. Ct. July 22, 1999).

41. *Id.* at *7.

42. Since the website in *World Interactive*, as well as many other gambling websites, required the user to download software to a computer prior to entering into and registering with the casino, the court reasoned that this created a “virtual casino within the user’s computer terminal.” *Id.* at *6.

43. *Id.*

44. *Id.*

the same interstate wire facilities are used. Therefore, federal statutes regulating traditional forms of gambling are applicable to gambling activities on the Internet.

B. State Anti-Gambling Provisions

An analysis of state constitutions and statutes reveals that gambling is presumptively illegal in a state unless there is explicit state constitutional and/or legislative authorization for the specific gambling activity sought to be undertaken. This holds true both in states that prohibit all land-based casino and sports gambling, as well as in states that permit at least some form of land-based casino and/or sports gambling.

I. *States That Prohibit All Land-Based Casino and Sports Gambling*

In states where land-based gambling is prohibited, such as New York and Wisconsin, Internet gambling would also be illegal under the current laws.

A review of New York's constitutional and statutory authority demonstrates that Internet gambling is illegal in that state for two reasons. First, Internet gambling is not explicitly authorized by the state's constitution. Second, the revenue-raising scheme established by New York for all legalized forms of gambling does not cover Internet gambling.

New York's Constitution prohibits "the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling [within the state], except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature ... and except pari-mutuel betting on horse races as may be prescribed by the legislature...."⁴⁵ In order to enforce this prohibition, the New York Constitution requires the legislature to "pass appropriate laws to prevent offenses against any of the provisions of this section [pertaining to gambling]."⁴⁶

Toward this end, the New York State legislature enacted Article 225 of the Penal Law, which prohibits unlawful gambling activity, as well as the advancement, promotion and/or profiting from unlawful gambling activity, and the possession of gambling records and gambling devices used for unlawful gambling activity.⁴⁷ Unlawful gambling activity has been defined as any gambling activity that is not explicitly authorized by the state of New York.⁴⁸ Since Internet gambling has not been explicitly authorized

45. N.Y. CONST. art. I, § 9 (amended 1966).

46. *Id.*

47. *See* N.Y. PENAL LAW §§ 225.05-225.20 & 225.30 (McKinney 1999).

48. *See* *People v. Kim*, 585 N.Y.S.2d 310, 313 (Crim. Ct. 1992).

in New York, it is logical to conclude that it is unlawful gambling activity. In fact, in *World Interactive*, the New York State Supreme Court recently found an Internet gambling company and its officers to be in violation of Article 225.⁴⁹

A review of the New York Constitution provides a second argument for the illegality of Internet gambling within New York. One of the primary purposes behind New York's legalization of certain types of gambling was to raise revenue for the state.⁵⁰ Pursuant to Article 1, Section 9 of the state constitution, the net proceeds from all state-run lotteries have been designated exclusively for the "support of education in this state."⁵¹ Similarly, New York is required to receive "reasonable revenue" from the operation of state authorized pari-mutuel betting which is to be used "for the support of the government."⁵² The very nature of Internet gambling, however, precludes the state from capturing revenues from online gaming.

Because Internet gambling is not explicitly authorized by a constitutional amendment and in no way raises revenue for the state, it is reasonable to believe that Internet gambling is illegal in New York.

An examination of other state constitutions and statutes likewise demonstrates that gambling is presumptively illegal absent explicit constitutional and/or statutory authorization. For example, the Wisconsin Constitution states that "[e]xcept as provided in this section [entitled 'Gambling'], the legislature may not authorize gambling in any form."⁵³ The Wisconsin Constitution goes on to set forth the types of gambling which are permitted, including state lotteries, bingo and raffle games conducted by religious, charitable, service, fraternal or veteran's organizations which are licensed by the state, and pari-mutuel betting as provided for by Wisconsin law.⁵⁴ Aside from the limited forms of gambling sanctioned by the state, however, all other forms of gambling are unauthorized in Wisconsin, and thus illegal under Wisconsin law.

To enforce this prohibition against unauthorized gambling, the Wisconsin legislature enacted Chapter 945 of its criminal statute, criminalizing both the placing of bets, as well as the operation of a commercial gambling business. Pursuant to Section 945.02, "[w]hoever ... (1) [m]akes

49. See *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *6 (N.Y. Sup. Ct. July 22, 1999); see also *Brown*, *supra* note 16, at 20.

50. See generally N.Y. CONST. art. I.

51. N.Y. CONST. art. I, § 9.

52. *Id.*

53. WIS. CONST. art. IV, § 24(1) (amended 1993).

54. See *id.* § 24 (3)-(6).

a bet ...” is guilty of a Class B misdemeanor.⁵⁵ Section 945.03 criminalizes the operation of a commercial gambling business and specifically provides that:

[w]hoever intentionally does any of the following is engaged in commercial gambling and is guilty of a Class E felony: ... (7) [f]or gain, uses a wire communication facility ... for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or offer to bet.⁵⁶

Because Internet gambling is not explicitly authorized by Wisconsin law, and because Section 954.03(7) explicitly prohibits the use of “a wire communication facility” for the transmission of a communication which entitles the recipient to receive money or credit as a result of a bet, Internet gambling qualifies as “commercial gambling,” and is therefore illegal in Wisconsin.

2. *States That Permit Land-Based Casino and Sports Gambling*

Even in the few states where limited state-approved, land-based casino gambling has been authorized, all forms of gambling not explicitly authorized by constitution and/or statute are still considered illegal.

For example, although many forms of gambling are now legal in Indiana, they are only legal because the legislature passed laws specifically authorizing them. Such operations are subject to state licensing restrictions. Specifically, Indiana permits state-approved lotteries,⁵⁷ licensed pari-mutuel wagering on horse races,⁵⁸ bingo events, charity game nights and raffles by “licensed qualified organizations,”⁵⁹ and licensed riverboat gambling in explicitly authorized counties.⁶⁰ Aside from statutorily authorized and licensed gambling, however, all other gambling is illegal in Indiana.⁶¹

To that end, Indiana’s law defines “unlawful gambling” activity, a Class B misdemeanor, as the knowing or intentional “risking [of] money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device.”⁶² Similarly, Indiana’s code makes

55. WIS. STAT. ANN. § 945.02 (West 1996).

56. *Id.* § 945.03.

57. *See* IND. CODE ANN. § 4-30-1-1 (West 1991).

58. *See id.* § 4-31-1-2.

59. *Id.* § 4-32-1-2.

60. *See id.* §§ 4-33-1-1 & 4-33-9-1 (permitting riverboat gambling only in certain areas).

61. *See* IND. CODE ANN. § § 35-45-5-1 to -10 (West 1991).

62. *Id.* §§ 35-45-5-1 to -2.

it a Class D felony to act as a professional gambler and/or to promote professional gambling.⁶³

The operation of an Internet gambling casino would be considered “unlawful gambling” because it involves the “risking [of] money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device” and because such gaming has not been explicitly authorized by the Indiana legislature.

In fact, Indiana’s Attorney General recently addressed the legality of Internet gambling. In Official Opinion 98-8, the State Attorney General concluded that Internet gambling is illegal based upon Indiana’s definition of gambling, which prohibits any gambling not otherwise explicitly authorized by law.⁶⁴ The Attorney General’s opinion also concluded that the use of the Internet would constitute an illegal “gambling device” under Indiana law.⁶⁵ Thus, despite the legalization of certain types of gambling, Internet gambling is still considered illegal in Indiana.

Even in New Jersey and Nevada, the two states best known for offering a wide array of legalized gambling activities, Internet gambling is still “unauthorized,” and therefore apparently illegal under both states’ laws.

The New Jersey Constitution clearly specifies that “[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people....”⁶⁶ Thus, before a given type of gambling is permitted in New Jersey, it must be submitted to the people of the State of New Jersey for a referendum and approved by the legislature.

The New Jersey Constitution specifically authorizes state lotteries and state sponsored pari-mutuel betting, and also permits the conducting of bingo, lotto and/or raffle games by veterans, charitable, educational, religious, fraternal, civic or service oriented clubs and organizations.⁶⁷ In addition, casino gambling is permitted within the boundaries of Atlantic City because there is specific state constitutional authorization for such activity, but only under the following strict legislative restriction:

[i]t shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the

63. *See id.* §§ 35-45-5-3 to -4.

64. *See* 98-8 Op. Att’y Gen. 1, 3 (1998); Brown, *supra* note 16, at 19-20; *see also* IND. CODE ANN. § 35-45-5-1 to -4.

65. *See* 98-8 Op. Att’y Gen. at 3.

66. N.J. CONST. art. IV, § 7, para. 2 (1998).

67. *See id.* para. 2(A)-(E).

State, of gambling houses or casinos within the boundaries, as heretofore established, of the City of Atlantic City, County of Atlantic ... [t]he type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment *shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof*.⁶⁸

Gambling not authorized pursuant to the constitution is known as “unlawful gambling” and is illegal in New Jersey.⁶⁹ To enforce this prohibition, the New Jersey legislature has criminalized any activity involving unlawful gambling, including the promotion of gambling, the possession of gambling records, the maintenance of a gambling resort and the possession of a gambling device.⁷⁰

At no time has Internet gambling been authorized by the New Jersey Legislature, nor has it been authorized by state referendum. Thus, despite the legalization of licensed casino gambling within the borders of Atlantic City, Internet gambling remains illegal under New Jersey law.

Finally, even in Nevada, where gambling is permitted by law, it is permitted only under very stringent governmental regulation and only when such gambling is explicitly authorized and licensed by the state pursuant to the Nevada Gaming Control Act.⁷¹ In addition to permitting state licensed casino gambling, Nevada permits wagering under the pari-mutuel racing system and on sporting events, but only after securing “all required federal, state, county and municipal licenses.”⁷² Similarly, bingo and keno are deemed permissible gaming under the definition set forth in the Nevada Gaming Control Act and are therefore subject to state licensing requirements.⁷³ Finally, although state-operated lotteries and raffles are prohibited under Nevada law and the Nevada Constitution, lotteries and raffles are permitted when run by qualified licensed gaming establishments, and/or by “charitable, civic, educational, fraternal, patriotic, political, reli-

68. *Id.* at para. 2D (emphasis added).

69. *See* N.J. STAT. ANN. § 2C:37-1 (West 1995).

70. *See id.* §§ 2C:37-2-4, 7.

71. *See* NEV. REV. STAT. ANN. § 463.010-463.720 (Michie 1997 Cumulative Supp.) (providing that gambling is authorized in the state, but only upon the issuance of a license, and is subject to “strict” regulations and any restrictions provided for by the legislature).

72. *Id.* § 464.010.

73. *See id.* § 463.0152.

gious or veteran's" organizations which are not operated for profit, and which are approved by the state.⁷⁴

Any place in Nevada where gambling activity occurs "without a license as provided by law," is defined as a "public nuisance" which is "a crime against the order and economy of the state."⁷⁵

Internet gambling has never been authorized by the Nevada Legislature and has never been licensed by the Nevada Gaming Authority. In fact, in 1997, the Nevada Legislature specifically passed a set of laws to clarify its prohibition of Internet gambling, prohibiting the "transaction of wagers through [various] mediums of communication," which includes "cable, wire, [and] the Internet or any other similar medium."⁷⁶ Under Section 465.092, aside from wagers placed with state licensed and approved entities, as enumerated in Section 465.094, it is illegal, both within and without the state, to accept, receive or allow another to accept or receive wagers from person(s) physically present in the state, through any of the aforementioned "medi[a] of communication," including "the Internet or any similar medium."⁷⁷ Similarly, pursuant to Section 465.093, it is illegal to place, send, transmit or relay wagers into or out of Nevada through the aforesaid "medi[a] of communication," including the Internet, aside from wagers placed with state licensed and approved entities.

The foregoing analysis illustrates that Internet gambling is illegal under both federal and state law. Regardless of whether a bet is called in over the phone or transmitted from a computer via the Internet, the activity still involves an international wire communication transmitted over a wire communication facility. By virtue of Internet gambling's reliance on these wire communication facilities, Internet gambling necessarily violates the Federal Wire Act and the Travel Act. Furthermore, an analysis of state statutes and constitutions illustrates what appears to be a common thread among the states: namely, the universal requirement of explicit state constitutional and/or statutory authorization in order for gambling to be legally conducted within a state.⁷⁸ The presumptive illegality of gambling

74. NEV. CONST. art. IV, § 24; NEV. REV. STAT. ANN. §§ 462.125 & 462.140 (Michie 1997).

75. NEV. REV. STAT. ANN. § 202.450 (Michie 1997).

76. *Id.* § 465.091; *see also* Brown, *supra* note 16, at 15.

77. *Id.* §§ 465.092 & 465.094.

78. Even with regard to activities on Native American reservations, traditionally an area where great deference has been granted since the reservations are considered to be sovereign entities within the United States, federal regulations still require explicit state statutory approval before a given type of gambling may be conducted. *See* The Indian Gaming Regulation Act, (hereinafter "IGRA"), 25 U.S.C. § 2701-2721 (1994). According to IGRA, before a Native American tribe may host casino gambling on the reserva-

activity absent explicit state authorization has also been enunciated by a number of state Attorneys General around the country.⁷⁹ This requirement has also been recognized by both state and federal courts faced with the question.⁸⁰ At no time has Internet gambling been explicitly authorized in any jurisdiction within the United States. Therefore, Internet gambling is necessarily illegal in the United States.

IV. ROLLER CONTROLS THE TABLE: THE LOCUS OF THE GAMBLER PROVIDES JURISDICTION

It is common for Internet gambling operators to claim that they are not bound by the wide range of federal and state statutes which prohibit gambling because they have secured an Internet casino license in a country

tion, the tribe must first enter a state compact permitting said activity. *See id.* §§ 2703 & 2710(d)(1). Thus, even though the gambling operations are considered to occur on sovereign soil, explicit state authorization is still required. It would be quite sophistic to permit a private Internet gambling business to operate online without explicit state statutory authorization, while a sovereign entity, such as a Native American tribe, is required to seek explicit state approval and statutory authority before engaging in the exact same activity on its own reservation. Similarly, it would be irrational to subject a privately-owned Internet gambling business to gambling regulations which are less stringent than those enforced against Native American tribes.

79. *See* Brown, *supra* note 16, at 18-21 (“In three of these states, California, Indiana and Kansas, the Attorneys General have expressly held that any gambling activity not otherwise allowed by law would, if conducted over the Internet, fall within the ambit of their state’s existing statutory framework and therefore be illegal.”).

80. *See, e.g.,* People v. Kim, 585 N.Y.S.2d 310, 312 (Crim. Ct. 1992) (holding that the use of a computer system to transmit orders for out-of-state lottery tickets was illegal since “[a]ll forms of gambling are illegal in New York except those expressly authorized by the New York Constitution”); Seaside Futures, Inc. v. State, No. W-62930-88 slip op. at 5 (N.J. Super. Ct. Feb. 10, 1989) *aff’d*, A-3320-88T3 (N.J. Super. Ct. App. Div. Nov. 2, 1989) (holding that an injunction was warranted against the computer transmission of requests for out-of-state lottery tickets because “[g]ambling activity in this state by the terms of our state constitution and by our common law is illegal unless it is authorized by constitutional amendment”); State v. Fiola, 576 A.2d 338, 340 (N.J. Super. Ct. App. Div. 1990) (holding that the defendants’ business constituted gambling activity within the state of New Jersey, and thus violated the state’s gambling laws, since the New Jersey Constitution prohibits any type of gambling unless the constitution has been amended to explicitly permit the specific type of gambling); United States v. McDonough, 835 F.2d 1103, 1104-05 (5th Cir. 1988) (rejecting defendant’s argument that the Wire Act did not apply to him because gambling information had been transmitted to him in Massachusetts, and there were apparently no laws in Massachusetts which explicitly forbade the transmission of wagers into the state, instead holding that although § 1084(b) permits the transmission of gambling-related information when gambling is explicitly authorized in both the sending and receiving states, it was never intended to authorize gambling when only one of the two locales permits gambling).

where such licenses are issued, and they have physically located their computer hardware there.⁸¹ Essentially they argue that since the computer servers to which wagers and wagering information are transmitted are located offshore, the gambling also occurs offshore and therefore, their activities must be deemed legal since the Internet casino is legally licensed offshore.⁸² Upon examination of this proposition in light of the applicable case law, however, it would appear that the argument is flawed.

A. Jurisdiction May Be Established Even Though The Internet Gambling Business And Its Servers Are Physically Located Offshore

A court's assertion of personal jurisdiction must satisfy the due process requirements of the Fourteenth Amendment.⁸³ This is true even if the potential defendant is not a United States citizen, as the Supreme Court has previously ruled that even non-citizens are entitled to constitutionally guaranteed due process.⁸⁴

In assessing whether the exercise of personal jurisdiction comports with due process, courts have examined whether "minimum contacts exist between the defendant and the forum state" such that the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice."⁸⁵ This test, first established in *International Shoe*, requires a court to examine both the "nature and quality," as well as the "sufficiency" of the contacts with the forum state.⁸⁶ In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court elucidated this standard explaining that a forum may assert personal jurisdiction if the defendant "purposefully avail[ed] itself of the privileges of conducting activities within the forum State" thus invoking the benefits and protections of its laws such that it was "reasonably foreseeable" that the defendant might be "haled into court" in the forum.⁸⁷

81. See Almond, *supra* note 2, at D1 ("Cohen's attorneys argued in court documents that World Sports Exchange (www.wsex.com) is fully licensed and legal in Antigua and the defendant never hid his operation."); Fojut, *supra* note 8, at 169.

82. See Rutherford, *supra* note 18, at 40 ("Proponents of unfettered Internet communication maintain that these laws are obsolete. They say the nature of the technology is such that global computer gambling takes place not in the country where the gambler resides but on the host computer, which is located in a country where, presumably, the gambling is licensed and legal.")

83. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

84. See *Galvin v. Press*, 347 U.S. 522, 530 (1954).

85. *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945).

86. *Id.* at 316-19; see also *Brown*, *supra* note 16, at 36-37.

87. *World Wide Volkswagen Corp.*, 444 U.S. at 297.

In considering the assertion of personal jurisdiction over out-of-state defendants, courts have typically held that incidental contact with the state, such as “[t]he transmission of communications between an out-of-state defendant and a plaintiff within the jurisdiction” would not, standing alone, warrant the assertion of jurisdiction.⁸⁸ Likewise, the mere maintenance of an Internet web page accessible in a state, without more, would not be sufficient to establish jurisdiction.⁸⁹

However, a finding of jurisdiction may be made upon a combination of Internet and non-Internet contacts with the forum state.⁹⁰ For example, in *State ex rel. Humphrey v. Granite Gate Resorts, Inc.*⁹¹ the court found jurisdiction over a non-resident Internet gambling business based upon both cyberspace and real-world contacts.⁹² In dicta, the *Granite Gate* court also noted that, although state interest alone cannot support the exercise of jurisdiction over a non-domiciliary, the state’s interest in providing a forum to enforce its consumer protection and gambling laws can be given weight

88. *Bross Utils. Serv. Corp. v. Aboubshait*, 489 F. Supp. 1366, 1371-72 (D. Conn. 1980), *aff’d*, 646 F.2d 559 (2nd Cir. 1980); *see also* *Scherr v. Abrahams*, 1998 WL 299678 (N.D. Ill. May 29, 1998) (denying jurisdiction although the defendant’s website allowed users to contact him via e-mail, and he sent his publication to users via e-mail).

89. *See* *Hearst v. Goldberger*, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *16 (S.D.N.Y. Feb. 26, 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997). Over time, a “sliding scale” test has developed for purposes of assessing jurisdiction based upon activities that occur over the Internet. *See* *American Homecare Federation, Inc. v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109, 113 (D. Conn. 1998). In essence, there are three points on this “sliding scale” spectrum. *See id.* At one end of the scale is the passive website which contains only information and offers no interaction with the visitor. *See id.* At this end of the scale, the assertion of jurisdiction will likely be declined. *See id.* In the middle of the scale are websites where information is exchanged between the site operator and the visitors, including downloadable files or links to other websites. *See id.* It is in the middle of this scale where the circumstances which will lead a court to assert jurisdiction are most ambiguous. At the other end of the spectrum are the sites that engage in substantial activity within a forum state, such as: 1) sales; 2) solicitations; 3) acceptance of orders; 4) links to other sites; 5) product lists; or 6) the transmission of files. *See id.* at 113-14. It is these sites that will most likely provide a court with ample reason to assert jurisdiction.

90. *See, e.g.,* *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 788 (E.D. Tex. 1998) (conferring general jurisdiction over the company, which in addition to hosting an Internet website within the state, also conducted business there).

91. 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff’d by an equally divided court*, 576 N.W.2d 747 (Minn. 1998).

92. Specifically, the court asserted jurisdiction based upon proof that at least 248 computers located in Minnesota accessed and received transmissions from the website, Minnesota computers were among the 500 computers that most often accessed the website, and persons from throughout the United States, including Minnesota, called the phone numbers advertised on its Internet gambling website. *Id.* at 718-19.

in making the jurisdictional assessment.⁹³ Similarly, the state's "public policy" interest in enforcing its gambling prohibitions within its borders may also be given consideration.⁹⁴

Both cyberspace and real-world contacts also appear to have figured prominently in a Texas court's decision upholding jurisdiction over a California company in *Thompson v. Handa-Lopez, Inc.*⁹⁵ The *Thompson* court noted that the California defendant had not only advertised its Internet gambling casino in Texas, but also permitted the Texas plaintiff to log in and gamble from Texas. Furthermore, the company sent money to the Texas plaintiff when the plaintiff won money or prizes and wished to cash out.⁹⁶

In addition to personal jurisdiction, a court must also possess subject matter jurisdiction over a case in controversy. In an effort to preclude the finding of subject matter jurisdiction, Internet gambling operators have argued that the gambling does not violate United States law since the gambling allegedly takes place offshore, where the computer servers are located and licensed.⁹⁷ As discussed in the next section, however, the gambling is deemed to take place in the state where the gambler is physically located, regardless of where the computer servers are located and licensed.⁹⁸ Even without analyzing the physical locus of the gambler, and assuming arguendo that the gambling is deemed to take place extraterritorially, a forum may still assert subject matter jurisdiction based upon a jurisdictional concept known by various names around the country, including "particular effect,"⁹⁹ "substantial effect,"¹⁰⁰ or "substantial impact"¹⁰¹ jurisdiction. Under this theory of law, subject matter jurisdiction may be found over extraterritorial conduct if the conduct has a particular, substantial or significant impact within the forum state.¹⁰²

93. *See id.* at 721.

94. *See id.*

95. 998 F. Supp. 738 (W.D. Tex. 1998).

96. *See id.* at 743-44.

97. *See* Fojut, *supra* note 8, at 169.

98. *See infra* Part IV.B.

99. *See* N.Y. CRIM. PROC. LAW §§ 20.10(4) & 20.20 (McKinney 1992).

100. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987) ("subject to § 403, a state has jurisdiction to prescribe law with respect to ... (c) conduct outside its territory that has or is intended to have substantial effect within its territory...").

101. *See* Commonwealth v. Bertels, 394 A.2d 1036, 1039 n.9 (Pa. Super. Ct. 1978).

102. *See generally* Cynthia R. Janower, *Gambling on the Internet*, 2 J. COMPUTER-MEDIATED COMM. (1996), available at <<http://jcmc.huji.ac.il/vol2/issue2/janower.html>>.

In *Hartford Fire Insurance v. California*,¹⁰³ the Supreme Court explained that subject matter jurisdiction exists over extraterritorial conduct if there is a “demonstrated effect” within the United States resulting from the foreign entity’s conduct, and, in undertaking that conduct, the foreign entity intended to affect commerce within the United States.¹⁰⁴ In the case of an Internet gambling enterprise, both factors would appear to be present, thus warranting the assertion of subject matter jurisdiction.

As Goldsmith explains in his analysis of modern-day jurisdictional issues, “a transaction can legitimately be regulated by the jurisdiction where the transaction occurs, the jurisdiction where significant effects of the transaction are felt, and the jurisdiction where the parties burdened by the regulation are from.”¹⁰⁵

B. Subject Matter Jurisdiction May Be Established Because The Gambling Occurs Within The United States In Violation Of United States Law

1. The Law Of The Country Hosting The Gambling Servers Is Irrelevant Under Federal Law

Illegal gambling activity might emanate from both within and without the borders of the United States. It was argued to the Supreme Court almost a century ago that “Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities, or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—... need not be challenged in the slightest degree.”¹⁰⁶

Considering the broad authority Congress has to regulate relations with foreign countries, there is no reason to believe that Internet gambling was meant to be excluded from the application of the Wire, Travel and Wagering Paraphernalia Acts.¹⁰⁷ The fact that the gambling information is transmitted to a computer server rather than to a live person does not alter this analysis. Additionally, even though Internet gambling servers may be located offshore, the gambling screens are viewed on a United States resident’s monitor, the gambling decisions are made in the resident’s home,

103. 509 U.S. 764 (1993).

104. *See id.* at 798.

105. Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1208 (1998).

106. *Champion v. Ames*, 188 U.S. 321, 333 (1903) (Argument of William D. Guthrie for appellant). *See, e.g., United States v. Baker*, 364 F.2d 107, 110 (3rd Cir. 1966).

107. *See Brown, supra* note 16, at 21-27; *Tratos, supra* note 12, at 104-07.

and the gambling bets are placed and transmitted from the resident's computer. In essence, all relevant gambling activity takes place at the locus of the gambler, regardless of where the server is located. This leads to the inescapable conclusion that the gambling takes place within the United States, in violation of United States law.

Moreover, the legality of the gambling in a foreign country will not have any impact upon its legality within the United States. For example, in *United States v. Baker*,¹⁰⁸ the defendants printed lottery tickets in the United States for shipment to Haiti, where the games were apparently legal.¹⁰⁹ Subsequent to seizure of the tickets from a garage in Pennsylvania, the appellants were charged with violating the Wagering Paraphernalia Act.¹¹⁰ In their defense, appellants contended that because the lottery for which the tickets were printed was "legal under a statute of the Republic of Haiti, the country where the lottery was to be operated, ... 1953(a) did not apply to their shipments by reason of subsection (b) [which provided an exemption from the Act's prohibition when materials to be used in the placing of bets or wagers are transported into a State in which such betting is legal]"¹¹¹

In rejecting the appellant's argument, the Third Circuit found that:

the word 'State,' as used in the subsection and as the district court [in the same matter] took great pains to point out (241 F. Supp. at 278-280), means one of the United States, and not a country in the international sense.¹¹²

In light of the uniform intent behind the Wire, Travel and Wagering Paraphernalia Acts, it is reasonable to conclude that the *Baker* court's reading of the word "state" in the Wagering Paraphernalia Act may be extended to the Wire and Travel Acts as well. Under such an interpretation, any exemption for the transmission of wagering information between two "states" where it is legal would only apply to the transmission between states within the United States. The licensing of an Internet casino offshore would therefore have no effect on the legality of Internet gambling under federal law. Congress has clearly chosen to exclude extraterritorial gambling from breaching our borders, and no foreign governmental licensing agency can, or should, alter that.

108. 364 F.2d 107 (3d Cir. 1966), *cert. denied*, 385 U.S. 986 (1966).

109. *See id.* at 109-10.

110. *See id.* at 108.

111. *Id.*

112. *Id.*, (citing *United States ex rel. Champion v. Ames*, 95 F. 453 (C.C.N.D. Ill. 1899)).

2. *The Law Of The Country Hosting The Gambling Servers Is Irrelevant Under State Law*

Well before the Internet became a household term, state courts were being called upon to answer questions concerning the use of phone wires for the purpose of transmitting information pertaining to the sale of out-of-state lottery tickets. Since the Internet is essentially a network of computer networks tied together by high speed phone wires, this case law is arguably applicable to transmissions over the Internet.¹¹³

In *People v. Kim*,¹¹⁴ the defendant took orders for Florida lottery tickets from New Yorkers, entered them into his computer terminal and transmitted the orders from inside New York to a host computer outside of New York. Despite the fact that the purchase information was transmitted into a state where such tickets were legally sold, the court held the defendant's activities could violate New York law.¹¹⁵ In so holding, the court reasoned that regardless of the location to which the information was transmitted, the betting would still be deemed to have taken place within New York, since the bets were transmitted from there.¹¹⁶

More recently, in *People v. World Interactive Gaming Corp.*, the operators of an Internet gambling casino argued that although they permitted New York residents to log in and gamble in their Internet casino, they did not violate New York law since the gambling was alleged to occur offshore in Antigua where the computer servers were located.¹¹⁷ In rejecting this argument, the court held that "[t]he act of entering the bet and transmitting the information from New York via the Internet [was] adequate to constitute gambling activity within New York State."¹¹⁸

Similar conclusions regarding the locus of the gambling have been reached in other states that have considered the issue. In *Seaside Futures, Inc. v. State*,¹¹⁹ Seaside, a computer telemarketing business located in New Jersey, allowed New Jersey consumers to purchase out-of-state lottery tickets by phone.¹²⁰ Seaside then transmitted the consumer's request, via computer, to an "independent agent" in the state where the desired lottery

113. See Tratos, *supra* note 12, at 107.

114. 585 N.Y.S.2d 310 (Crim. Ct. 1992).

115. See *id.* at 315.

116. See *id.*

117. *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *2 (N.Y. Sup. Ct. July 22, 1999).

118. *Id.* at *4.

119. No. W-62930-88 (N.J. Super. Ct. Feb. 10, 1989), *aff'd*, No. A-3320-88T3 (N.J. Super. Ct. App. Div. Nov. 2, 1989).

120. See *id.* at 2-3.

tickets originated.¹²¹ The court enjoined Seaside from continuing this business because the activity constituted unauthorized gambling under New Jersey law, since the gambling was considered to have taken place there.¹²² In rejecting Seaside's argument that it was exempt from criminal liability because the lottery tickets were legally authorized in the state to which the transmission was sent, the court held that the gambling activity took place in the state from which the transmission originated.¹²³ Because the lottery tickets were not authorized under New Jersey law, the sales were necessarily illegal.¹²⁴

Similarly, in *L.E. Services, Inc. v. State Lottery Commission*,¹²⁵ the Indiana Lottery Commission sought an injunction against a Delaware corporation which proposed a business plan to provide computers to retail outlets in Indiana, enabling Indiana consumers to purchase out-of-state lottery tickets. According to the business plan, customers would place their orders at retail outlets in Indiana, and the outlets would in turn transmit the orders to L.E. Services through a modem attached to a computer system.¹²⁶ L.E. Services would then purchase the out-of-state lottery tickets from an authorized agent in the state where the lottery originated.¹²⁷ The Indiana Court held this service to be illegal under a state statute that prohibited the transmission of gambling information and enjoined L.E. Services from implementing its business plan.¹²⁸ According to the court, the legality of the tickets in the state from which they are purchased is irrelevant. The gambling would still be considered to take place in Indiana since this was the state where the chance would be staked and from which the orders would be transmitted.¹²⁹ Thus, this scenario would constitute illegal gambling under Indiana law.¹³⁰ This analysis also comports with the Indiana Attorney General's opinion that Internet gambling is illegal under Indiana law.¹³¹

121. *See id.* at 3.

122. *See id.* at 7.

123. *See id.* at 5-6.

124. *See id.*

125. 646 N.E.2d 334 (Ind. Ct. App. 1995).

126. *See id.* at 338-39.

127. *See id.*

128. *See id.* at 341-42.

129. *See id.* at 342.

130. *See id.*

131. *See* 98-8 Op. Att'y Gen. 8 (1998); *see also* Brown, *supra* note 16, at 19-20.

C. The Internet Should Not Provide Sanctuary For Internet Casinos

As the court observed in *World Interactive*, the operators of an Internet gambling website cannot move their computer servers offshore as a means of divesting a state of its jurisdiction and escaping liability.¹³² So long as an individual is able to log in from a given state and place bets, the gambling is deemed to take place there, in violation of both federal and state law, and is a prosecutable offense in that state.¹³³

A gambling operation should not be permitted to escape liability merely because it takes advantage of emerging technology such as the Internet. Gambling-related communications transmitted over the Internet cannot be meaningfully distinguished from any other transmissions over wire communication facilities. Phone wires remain essential to the Internet and are the same medium of communication used by the defendants in *Kim* and its progeny, as well as by the defendants in *World Interactive*. The holdings in *Kim*, *Seaside*, and *L.E. Services* appear to be applicable to the transmission of information to and from Internet gambling servers since they all involve the use of telephone lines.¹³⁴ Such an interpretation would appear to be supported by the post-Internet decision in *World Interactive*.

Regardless of where the transmission originates, both the sending and receiving locations are linked by telephone lines, and are both integral to the gambling activity. In deference to this integral link between the sending and receiving locales, the Wire Act created an exemption for gambling *only* when it involves the transmission of information “from a State where betting ... is legal into a State in which such betting is legal.”¹³⁵

Merely moving a business onto the Internet should not provide a “shield against liability.”¹³⁶ “Invocation of ‘the Internet’ is not the equivalent to a cry of ‘sanctuary’ upon a criminal’s entry into a medieval church.”¹³⁷ So long as wagers or wagering information are transmitted to or from a computer in the United States, the activities should be considered gambling within the states, and, therefore, illegal. The legality of the business in an offshore country where the servers are housed is irrelevant.

132. *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *4 (N.Y. Sup. Ct. July 22, 1999).

133. *See id.*

134. *See* Tratos, *supra* note 12, at 107.

135. 18 U.S.C. § 1084(b) (1994).

136. *World Interactive*, 1999 WL 591995, at *4.

137. *People v. Lipsitz*, 663 N.Y.S.2d 468, 475 (Sup. Ct. 1997).

V. ALL BETS ARE FINAL: ENFORCING AN INTERNET GAMBLING CONVICTION

A separate and distinct question from the legality of Internet gambling is the issue of enforcement. One of the prospective enforcement tools for use by the government in its fight against Internet gambling is the Internet Gambling Prohibition Act ("IGPA").¹³⁸ If enacted, two of the more significant provisions of the IGPA would include a clarification that the criminal prohibitions in the Wire Act encompass the use of the Internet by a gambling enterprise, and a clarification that the Wire Act's criminal prohibitions apply both to casino betting and sports betting.¹³⁹ Additionally, the IGPA authorizes law enforcement to serve notice on an "interactive computer service provider" ordering that provider to remove or disable "access to the material or activity" residing at an online site which violates the Wire Act's gambling prohibitions.¹⁴⁰

Yet numerous critics of the proposed IGPA and Internet gambling regulation in general have argued that laws which prohibit Internet gambling are virtually unenforceable.¹⁴¹ According to these critics, the primary reason for this lack of enforceability is that the only effective means for combating Internet gambling would be to arrest the Internet gambling operators or to seize the Internet gambling servers, both of which are usually located offshore—outside of the jurisdiction of the United States.¹⁴² As

138. This bill passed the United States Senate by an overwhelming 90 to 10 majority when it was voted upon on July 23, 1998. See *Kyl's Latest Bill Revives Assault on Internet Gambling*, CONG. Q. DAILY MONITOR, Mar. 4, 1999, at 1. Although that bill died in the United States House of Representatives due to disputes over enforcement, as well as the House's preoccupation with President Clinton's impeachment, the bill has been reintroduced into the 106th Congress. See S. 692, 106th Cong. (1999); H.R. 3125, 106th Cong. (1999). The bill was approved by the Senate Judiciary Committee on July 26, 1999 and the House version was forwarded by the House Subcommittee on Crime to the full Committee on the Judiciary on November 3, 1999. For current status on these bills, see David Carney, *Summary: Internet Gambling Prohibition Bills in the 106th Congress* (last modified November 5, 1999) <<http://www.techlawjournal.com/cong106/gambling/Default.htm>>.

139. S. 692, 106th Cong. (1999).

140. *Id.*

141. See Andrew Beyer, *Racing Industry Gambling on Internet Legislation*, WASH. POST, March 31, 1999, at D1; Tom Bell, *Internet Gambling Ban Faces Losing Odds*, ALBANY TIMES UNION, January 6, 1998, at A7; Kish, *supra* note 8, at 463.

142. See, e.g., Beyer, *supra* note 141; Janower, *supra* note 102, at 9-10; Internet Gambling: Prohibition v. Legalization, Hearing Before the Nat'l Gambling Impact Study Comm., May 21, 1998 (Testimony of Thomas W. Bell, Cato Institute), available at <<http://www.cato.org/testimony/ct-tb052198.html>> [hereinafter Bell]. Another potential method of enforcement might be to seize any assets of the Internet gambling operation

such, enforcement of U.S. laws would allegedly require the foreign government's cooperation in the form of extradition of the Internet gambling operators and aid in seizing or shutting down the Internet gambling servers.

Such cooperation, according to critics, would be problematic because application of U.S. laws to Internet gambling would mean that the United States is attempting to "regulate the local effects of multi-jurisdictional cyberspace activity," infringing upon the rights of a foreign entity legally operating in a foreign country.¹⁴³ Moreover, there may also be practical constraints on the use of extradition because, in order to extradite an individual, the United States would need to have a pre-existing treaty with the foreign nation from which it seeks extradition.¹⁴⁴ Assuming that such a treaty did exist, extradition would still only be effected if the crime for which extradition is sought "is a crime in both countries—this requisite is often referred to as double criminality."¹⁴⁵ This, of course, would be difficult to establish, since the individuals running these cyber-gambling websites generally tend to locate themselves and their servers in countries that issue Internet gambling licenses, thus legitimizing the businesses under the laws of those governments.¹⁴⁶

Absent a pre-existing treaty, a second option for securing extradition would be pursuant to "a discretionary doctrine based on notions of passive consent and inconvenience, which would lead the courts of one country to give effect to legal acts done in another country," known as "comity."¹⁴⁷ In essence, comity is a doctrine of "diplomatic niceties" performed out of a sense of "international etiquette."¹⁴⁸ Securing extradition through comity is unlikely in the realm of Internet gambling, however, because many of the countries that license Internet gambling actively solicit this business in pursuit of potentially substantial revenues.¹⁴⁹ As such, these

found within the enforcing jurisdiction. See Goldsmith, *supra* note 105, at 1216. The effectiveness of asset seizure is questionable, however, since "[t]he large majority of persons who transact in cyberspace have no presence or assets in the jurisdictions that wish to regulate their information flows in cyberspace." *Id.* at 1217.

143. Goldsmith, *supra* note 105, at 1204.

144. See *id.* at 1220; Fojut, *supra* note 8, at 170.

145. Fojut, *supra* note 8, at 170; see also Goldsmith, *supra* note 105, at 1220.

146. See generally Martinez, *supra* note 17.

147. Fojut, *supra* note 8, at 170 (quoting Hall, *Int'l Comity and U.S. Federal Common Law*, 84 AM. SOC'Y INT'L L. PROC. 326 (1990)). See also Brown, *supra* note 16, at 34-35.

148. See Fojut, *supra* note 8, at 170.

149. See Cabot, *supra* note 9, at 22.

countries have a strong vested interest in providing Internet gambling operators with a safe, extradition-free haven.¹⁵⁰

Without these enforcement mechanisms, any domestic government prohibition of Internet gambling, it is argued, would be mere saber-rattling, placing form over substance.¹⁵¹ While the extradition of individuals accused of operating an Internet gambling website and the seizure of their computer servers are two potential enforcement mechanisms, they are not the only mechanisms available to regulators.¹⁵²

To explore this concept further, it may be helpful to clarify the use of the word "enforceability." If we are referring to jailing the persons responsible for operating the Internet gambling websites, then we may indeed need to rely on extradition and the concomitant cooperation of foreign governments.¹⁵³ The need for cooperation also holds true for seizure of the gambling operation's computer servers. However, if we are referring to preventing the offering of Internet gambling to United States citizens, then enforceability may well be within the reach of domestic regulators and legislators.

Although Internet gambling is hosted in cyberspace, there are still two real-world parties which are essential to an Internet gambling business: the gambler and the intermediary party that facilitates the transfer of funds between the gambler and the gambling business. Elimination of access to either party will accomplish the goal of preventing United States citizens from engaging in Internet gambling.¹⁵⁴

150. See Fojut, *supra* note 8, at 170.

151. See Cabot, *supra* note 9; Andrew Beyer, *Internet Gambling Bill: All Bets Are Off*, WASH. POST, July 25, 1998, at E1, E6.

152. It should also be borne in mind that many of the individuals who have been prosecuted for offering Internet gambling to United States citizens have themselves been United States citizens. See *People v. World Interactive Gaming Corp.*, 1999 WL 591995 (N.Y. Sup. Ct. July 22, 1999); Goldsmith, *supra* note 13, at 1118. As such, the necessity of effectuating extradition of Internet gambling operators may not be as paramount an issue as many Internet gambling proponents assert.

153. It is also interesting to consider that even without extradition, the mere issuance of a warrant for the arrest of the operators of an Internet gambling enterprise, coupled with the possibility of having all domestic assets frozen, may in itself provide an adequate deterrent to the offering of Internet gambling to U.S. citizens.

154. See generally Goldsmith, *supra* note 13, at 1118.

A. Enforcement Mechanisms Focused On The Gambler's Access To The Gambling Site

Many federal and state gambling prohibitions focus on the activities of the gambling business, as distinct from the activities of the gambler.¹⁵⁵ Instead of focusing on the Internet gambling business, however, an alternative enforcement option is to focus on hindering a gambler's ability to access the gambling website. This could be accomplished through a number of mechanisms, including filtering out Internet gambling websites at the ICS provider level, removing the domain name records which point to an Internet gambling website, or cutting-off the telecommunication services used by the website.¹⁵⁶

1. *Blocking or Filtering Access to Gambling Websites*

One way to block access to Internet gambling websites is by focusing on the ICS providers. As Jack Goldsmith points out in his article examining the nature of cyberspace, "[f]iltering is especially important for cyberspace, where the costs of information production and dissemination are extremely low, and thus information overload is a serious concern."¹⁵⁷ Parental control or "content filtering" software, through which parents monitor and control the websites to which their children have access, is the most prominent type of filtering software commercially available.¹⁵⁸ However, content filtering could also be implemented at various junctures along the cyber-highway which connects the content providers and the end-users.¹⁵⁹

155. See, e.g., 18 U.S.C. §§ 1084 & 1952 (1994); N.Y. Penal Law §§ 225.00(4)-(5) (McKinney 1999); Tratos, *supra* note 12, at 105-06. Indeed, the resistance to criminalizing the activity of the gambler was recently demonstrated when a challenge was raised to a provision in the 1998 version of the IGPA which would have created criminal liability for individuals who engage in gambling over the Internet. See S. 2260, 105th Cong. § 1085(b) (1998). In apparent response to this criticism, this provision is noticeably absent from the 1999 version of the IGPA. See S. 692, 106th Cong. (1999). Nonetheless, creating individual criminal liability for placing bets or wagers over the Internet remains a viable means of deterring gamblers from patronizing Internet gambling websites. See Goldsmith, *supra* note 13, at 1118-19.

156. Although the primary goal of the enforcement mechanisms discussed in this section focuses on making it difficult for a potential gambler to engage in Internet gambling on a particular website, these very same mechanisms will, at the same time, frustrate an Internet gambling operation's attempts to do business in the United States, thus potentially causing the operation to cease offering these services to United States residents entirely.

157. Goldsmith, *supra* note 105, at 1228.

158. See *id.* at 1227.

159. See *id.*

Since virtually all Internet users in the United States access the Internet through an ICS provider with a local point of presence (“POP”), these POPs represent the “junctures” along the cyber-highway where filtering software can be employed.¹⁶⁰ “Internet access providers could easily set up proxy servers and block any traffic based on Internet addresses. In principle, the very architecture of the Internet could be structured to block Internet addresses; for example, routers could be programmed not to forward information from particular addresses.”¹⁶¹

Countries such as China, Singapore, and Saudi Arabia already employ filtering and blocking mechanisms to control the Internet content to which their citizens have access.¹⁶² Similarly, the 1999 version of the IGPA devotes an entire section of the bill to requiring that ICS providers block access to Internet gambling websites upon direction by law enforcement.¹⁶³ Pursuant to Section 3(b) of the 1999 version of the IGPA, upon an ICS provider’s receipt of a written or electronic notice from a federal or state law enforcement authority that “a particular online site residing on a computer server owned, controlled, or operated by or for the provider is being used to violate” the IGPA, the provider would be required to remove or disable access to the material or activity residing at that online site.¹⁶⁴ Even if the ICS provider “does not own, operate, or control the site at which the subject material or activity resides,” the provider would still be required to notify the federal or state authorities of that fact, and would have an affirmative obligation to cooperate with the law enforcement authority “in identifying the person or persons who control the site.”¹⁶⁵

Moreover, the IGPA also provides for the issuance of injunctive relief against an ICS provider following the issuance of the aforementioned notice, which would require the provider to both terminate the account of any subscriber who is using an account to violate the IGPA, and to take “reasonable steps specified in the order to block access, to a specific, identified, foreign online location.”¹⁶⁶ In order to promote cooperation by ICS providers, the IGPA would provide both criminal and civil immunity under federal and state law for any ICS provider, which in the absence of

160. See Goldsmith, *supra* note 13, at 1119.

161. *Id.* at 1119 n.16.

162. See James De Tar, *Net Enemies List*, INVESTOR’S BUS. DAILY, Aug. 19, 1999, at A6; see also Goldsmith, *supra* note 105, at 1228; Andy Kennedy, *For China, the Tighter the Grip, the Weaker the Hand*, WASH. POST, Jan. 17, 1999, at B02.

163. S. 692, 106th Cong. (1999).

164. *Id.* § 3(b)(4).

165. *Id.*

166. *Id.* § 3(b)(5).

fraud or bad faith, took action to: i) remove or disable access to Internet gambling material or activity residing at an online site, subsequent to service of the aforementioned notice, or ii) comply with a court ordered injunction.¹⁶⁷ At the same time, however, this immunity is limited solely to an ICS provider that “has established and reasonably implements a policy that provides for the termination of the account of a subscriber of the service system or network of the provider upon the receipt by the provider of a notice described in paragraph (4)(B).”¹⁶⁸

While the employment of filtering technology is a potent weapon for blocking access to Internet gambling by United States citizens, there would still be ways to circumvent this filtering. For example, a potential gambler could work around an ICS provider’s use of filtering technology by accessing the Internet through an ICS provider located outside of the United States. Those ICS providers would presumably not be employing the same filtering technology because they would not be subject to the same requirements imposed upon domestic ICS providers. Even if a few isolated individual users had the knowledge and determination to access the Internet through an offshore POP, however, the cost of accessing the Internet through a long-distance toll call would probably serve as an adequate deterrent to most local bettors.¹⁶⁹

2. *Removing the Domain Name Records Pointing To a Website*

Although most Internet users are accustomed to entering catchy names in order to access a website, such as <www.joescasino.com>, these names are in themselves meaningless to a computer. The computers that comprise the Internet were designed to be accessed not by names, but rather by unique addresses known as Internet protocol (“IP”) addresses.¹⁷⁰ These IP addresses allow one computer to locate another computer on the Internet.

Since it is quite difficult for individuals to remember many IP addresses, domain names were created.¹⁷¹ By accessing a domain name server, a user’s computer can identify the IP address of a host computer, which the user’s computer then utilizes to access the host computer.

167. *See id.* § 3(b)(6)(B).

168. *Id.* § 3(b)(1).

169. *See* Goldsmith, *supra* note 13, at 1119.

170. *See* Robert A. Fashler, *The International Internet Address and Domain System* §1.2 (last revised Sept. 10, 1997) <<http://www.davis.ca/topart/domainam.htm>>; *see also* Al Berg, *DNS Demystified—Take The Magic Out of Mapping*, LAN TIMES (June 9, 1997) <<http://www.lantimes.com/handson/97/706a107a.html>>. IP addresses are currently 32-bit numbers, notated as four numbers (ranging from zero to 255) separated by periods. For example, a typical IP address may read as: “123.56.89.101.”

171. *See* Fashler, *supra* note 170.

As an example, if a user were to type ‘*http://www.joes-casino.com*’ into the ‘location’ or ‘netsite’ line of their browser (or if the user clicked on a link directing their computer to that site) the computer would first look to a domain name server for information on which specific computer on the entire Internet contains the content for ‘*www.joescasino.com*.’¹⁷²

The domain name server would then return the IP address for the computer hosting <*www.joescasino.com*>, and “[t]he user’s computer [would] then go directly to that site without the user’s intervention.”¹⁷³

If the domain name record for a specific website were removed from all domain name servers, the computer attempting to access that website via its domain name would be unable to locate the desired computer. In essence, by removing the record that points from the domain name to the IP address, the website becomes inaccessible.¹⁷⁴ “While the computer would still be located on the Internet, it would not be accessible to the vast majority of users, who would be unaware of the means necessary to work around this technological roadblock.”¹⁷⁵ Accordingly, a court order directing the removal of the record which points from a domain name to its corresponding IP address would render the website inaccessible to most users.¹⁷⁶

In order to be effective, however, a court would need to direct its order to the main domain name servers, called the master servers. The domain name system is hierarchical in nature:

At the top of the DNS database tree are root name servers, which contain pointers to master name servers for each of the top-level domain names.... In turn, the master name servers ... contain a record and name-server address of each domain name.... The individual name servers for each domain ... contain detailed address information for the hosts in that domain.¹⁷⁷

The root name and master name servers are more commonly referred to as upstream domain name servers, which are defined as “those [servers]

172. Letter from James E. Doyle, Attorney General, State of Wisconsin, to Jon Kyl & Dianne Feinstein, Senators, U.S. Senate 2 (Apr. 7, 1999) (on file with *Berkeley Technology Law Journal*) (addressing the “feasibility and effectiveness of blocking Internet gambling sites as an enforcement mechanism”).

173. *Id.*

174. *See id.*

175. *Id.* A user could, however, still access the machine if she knew the computer’s 32-bit IP address.

176. *See id.*

177. Berg, *supra* note 170.

which provide domain name database information to individual providers' domain name servers."¹⁷⁸ By contrast, downstream domain name servers are the lower-level domain name servers, which are owned by individual companies or ICS providers.

Due to the sheer number and diversity of these downstream domain name servers, targeting them would likely be ineffectual because one would need to serve the court order on every company that hosted its own domain name server. Additionally, removing the pointer to a given website from a downstream domain name server would probably not have much of an impact on a user's ability to access the website if the pointer remains on upstream domain name servers. Due to the hierarchical design of the domain name system, if the downstream domain name server were unable to locate the pointer to the requested website because it was removed from that server, the server's "resolver" would send a request to the closest name server that has information on the host name, and the recipient server would then use the information in its cache to provide the correct IP address to the requesting computer.¹⁷⁹ "If the name server is unfamiliar with the domain name, the resolver will attempt to 'solve' the problem by asking a server farther up the tree. If that doesn't work, the second server will ask yet another—until it finds one that knows."¹⁸⁰ The more effective means for blocking a given IP address would therefore be to target the upstream domain name servers, since this would essentially remove all pointers to that website.

In tandem with the removal of a pointer from the upstream domain name servers, prosecutors could also seek a court order canceling the Internet gambling website's registration, as well as prohibiting the operators of the Internet gambling website from registering any additional sites. Securing such an order, however, requires certain logistical considerations. There are currently multiple organizations providing website registration services ("registrars") in the <.com> domain.¹⁸¹ Each of these registrars would need to be served with a court order canceling the registration of the Internet gambling website and prohibiting the Internet gambling operators from registering any additional sites. Further, many expect the introduction of additional top-level domains in the near future, such as

178. Letter from Attorney General Doyle, *supra* note 172.

179. See Kristin Windbigler, *Exploring the Domain Name Space* (last modified Jan. 24, 1997) <http://www.hotwired.com/webmonkey/geektalk/97/03/index4a_page2.html>.

180. *Id.*

181. For a list of these registrars, see ICANN, List of Accredited and Accreditation-Qualified Registrars (visited Nov. 18, 1999) <<http://www.icann.org/registrars/accredited-list.html>>.

<.store> and <.firm>, which would effectively require the addition of new upstream domain name databases (“registries”). To be effective, then, a court order would need to be served on all of the registries and registrars.

Additionally, unless the registry and registrar organizations are actually parties to an action against an Internet gambling enterprise, the binding effect on these organizations of a court order is questionable. Therefore, a critical consideration for a prosecutor prior to commencing an Internet gambling prosecution would be whether to join the registries and registrars. Seeking the voluntary cooperation of the registries and registrars is certainly one option for enforcing a court order; alternatively, prosecutors may wish to include these organizations as “necessary parties” in an action.

Moreover, although the IGPA will certainly help in the battle against Internet gambling, even its passage would not provide any help in this respect. That is because the proposed IGPA does not provide for federal and state law enforcement authorities to serve notice on and apply for injunctive relief against either registry or registrar organizations. While the filtering of access to an Internet gambling website can be a helpful tool for prosecutors, it might only have short-term benefits, as gambling website operators can easily switch their Internet gambling website to another ICS provider and, therefore, a different IP address.¹⁸² In contrast, by canceling the registration of an Internet gambling operation’s website, and by removing the pointer to that site from the upstream domain name servers, access to the website will be much more difficult to obtain, no matter where the website is hosted. Specifically, in order to circumvent this type of enforcement, an Internet gambling operator would need to re-register where the registration services are administered and controlled by another government, or another non-U.S. entity.¹⁸³ Although this circumvention is feasible, there are two reasons why it is unlikely to be very effective. First, United States citizens have grown accustomed to websites which are in the <.com> top-level domain, and are probably largely unaware of the existence of country code top-level domains, such as <.uk> or <.au>. This familiarity with the <.com> top-level domain may render many U.S. citizens reticent to send money to businesses not utilizing <.com>.

Second, once regulators learn of the country in which the foreign domain name registrar is based, regulators could serve a copy of the court

182. See *supra* Part V.A.1.

183. See Letter From Attorney General Doyle, *supra* note 172, at 3; see also Fashler, *supra* note 170, § 1.3, at 2. Another way to circumvent this type of enforcement would be to provide users with IP numbers. However, these numbers would be difficult to remember and consumers may be reluctant to do business with such a site.

order on that registrar.¹⁸⁴ The same holds true with regard to serving a copy of the court order on foreign domain name registry organizations. Assuming that these entities agreed to comply with the court order, the website operator would then need to register in yet another country. Such constant changing of web addresses would be problematic because, as Attorney General Doyle noted in his letter,

gambling businesses, especially those utilizing the Internet, are extremely dependent upon an appearance of stability and legitimacy.... If an Internet site's name were constantly changing, or if it were just a set of numbers instead of the more familiar ".com" type address, this could seriously erode the consumer confidence necessary to build a large Internet gambling business.¹⁸⁵

One objection likely to be raised by opponents of an enforcement mechanism that cancels the registration of a website and removes the pointers to that site, effectively rendering it inaccessible, is that this mechanism may be too far-reaching, since it will not only prevent United States citizens from accessing the website, but it will also prevent non-citizens from accessing this site from outside the United States. This is known as a "spillover effect."¹⁸⁶

The occurrence of a spillover effect as a result of a government's regulation of the local effects of transnational activity is not a new phenomenon. Even before the Internet was used to offer Internet gambling to United States citizens, governments were implementing local regulations that had international impact. The national regulation of transborder pollution, national consumer protection regulation of transnational contracts, and national criminal prohibitions on transnational drug activities all produce spillover effects.¹⁸⁷ Similarly, spillover effects have already been observed in the regulation of cyberspace activity. For example, in December 1995, the Bavarian Justice Ministry threatened to prosecute CompuServe "for carrying online discussion groups containing material that violated German anti-pornography laws."¹⁸⁸ Because the necessary technology did not exist at that time, CompuServe was not able to block access to these groups solely in Germany, so instead CompuServe blocked access to these

184. *See generally* Goldsmith, *supra* note 13, at 1119.

185. Letter From Attorney General Doyle, *supra* note 172, at 3; *see also* Goldsmith, *supra* note 13, at 1119; Tratos, *supra* note 12, at 116.

186. *See* Goldsmith, *supra* note 13, at 1240.

187. *See id.*

188. *Id.* at 1224.

discussion groups by all users, worldwide.¹⁸⁹ This clearly constituted a spillover effect as CompuServe, faced with multiple regulatory regimes, was left with no choice but to cater to the most restrictive.¹⁹⁰

Although minimization of these spillover effects is an ideal for which every government should strive, the fact that a government's paternalistic regulation of illegal cyberspace activities may have spillover effects does not in any way diminish the necessity or propriety of that regulation. "Spillover-minimization is not the criterion of legitimacy for national regulation of harmful local effects."¹⁹¹ "Fairness does not require ... [that a country] yield local control over its territory in order to accommodate the users of a new communication technology in other countries."¹⁹² Nor does fairness require that one country absorb the local costs of foreign activity because of the spillover effects that country's regulation may have on the citizens of other countries.¹⁹³

Courts have already begun to recognize, and to some extent accept, that while minimization of spillover effects may be desirable, governmental regulation is not dependant upon the elimination of these effects. In fact, in *World Interactive*, the court appeared to place the burden of implementing technological protections, which would prevent an Internet gambling website from being accessed in violation of New York law, squarely upon the individuals operating the offending website. Specifically, the respondents in *World Interactive* argued against a finding of liability, alleging that they had unknowingly permitted a New York resident to log in and gamble in their Internet gambling casino, in violation of New York's Penal Law.¹⁹⁴ In rejecting the respondents' argument, the Court noted that the protections implemented by the respondents were inadequate because "New York users can easily circumvent the casino software in order to play by the simple expedient of entering an out-of-state address."¹⁹⁵ In essence, the Court placed the burden of implementing technological protections which would screen for and block access by New York residents upon the respondent operators of the Internet gambling website. It can be surmised from this that if the respondents did not have the technological means with which to perform this screening, the respondents

189. *See id.*

190. *See id.*

191. *Id.* at 1242.

192. *Id.*

193. *See id.*

194. *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *6 (N.Y. Sup. Ct. July 22, 1999).

195. *Id.*

would have to cease offering Internet gambling to all United States citizens. Even assuming *arguendo* that Internet gambling were legalized in a state within the United States, blocking all access to the website might still be necessary if it were the only viable technological means currently available for complying with New York's law. This would clearly constitute a spillover effect of New York law to the state where the activity was, for argument's sake, legal.

As Jack Goldsmith observed, "[c]yberspace users solicit and deliver kiddie porn, launder money, sexually harass, defraud, and so on. It is these and many other real-space costs—costs that cyberspace communities cannot effectively internalize—that national regulatory regimes worry about and aim to regulate."¹⁹⁶ Although Internet gambling takes place in cyberspace, the harmful effects are felt in the real world, with the costs of various remedial measures being borne by the taxpayers in the communities where the real-world effects are felt. It is these effects that would be avoided by canceling a website's registration and removing the pointers to that website. Although such action may have spillover effects on foreign citizens' ability to access an Internet gambling website, akin to Germany's regulation of CompuServe, this action would be a legitimate exercise of the United States's, or any individual state's, paternalistic regulation, designed to protect its citizens.

Besides, the United States cannot control sites registered in another country's top-level domain. Cancellation of a website's <.com> registration, and removal of the pointer to that website from all of the upstream domain name servers in the <.com> domain, would not prevent the website from being made available in an international domain, such as <.au> or <.uk>. Any website that had its domain registration cancelled could re-register in another country, which, presuming they did not permit United States residents to gamble on this new website, would be of no concern to United States regulators. The United States simply should not allow American companies¹⁹⁷ to facilitate criminal activities such as Internet gambling.

3. *Severing a Gambling Website's Telecommunication Service*

One final mechanism for severing access to an Internet gambling website would be to utilize an enforcement provision already available under the Wire Act. Specifically, §1084(d) of the Wire Act provides that:

196. Goldsmith, *supra* note 13, at 1242.

197. Network Solutions Inc., the company that provides registry services for the <.com> domain, is headquartered in Herndon, Virginia.

[w]hen any common carrier, subject to the jurisdiction of the Federal Communications Commission is notified in writing by a Federal, State or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber¹⁹⁸

By way of example, Florida Attorney General Robert A. Butterworth issued a 1084 notice to Sprint in order to terminate the toll-free telephone service used by the Maliseet Indian Tribe to operate a telephone sports wagering business that was available in the State of Florida.¹⁹⁹ Use of the 1084 notice for this purpose has already been upheld by federal courts around the country.²⁰⁰ Moreover, since the Wire Act has been held applicable to Internet gambling, it is reasonable to conclude that the Wire Act's 1084 notice is likewise available for use in Internet gambling cases.²⁰¹ This 1084 notice is especially useful since it may be issued without a court order, and may be used preemptively, before the gambling website becomes operational.

Regardless of the hardware used to link to the Internet, whether via modem, Digital Subscriber Line ("DSL"), or T1 line, the Internet gambling business will still need to subscribe to a telecommunications service.²⁰² As such, so long as the Internet gambling business utilizes a tele-

198. 18 U.S.C. § 1084(d) (1994). *See also* *Tollin v. Diamond State Tel. Co.*, 286 F. Supp. 86, 89 (D. Del. 1968) ("The Section calls for no specific form of notice and no particular language need be employed so long as, under the circumstances of the case, it seems reasonably clear that the notice of termination from the Telephone Company to the subscriber was predicated upon a written communication from a law enforcement agency to the effect that the utility's wires were being used or will be used for the purpose of transmitting or receiving gambling information in interstate commerce in violation of law.").

199. *See* Letter from Robert A. Butterworth, Attorney General, State of Florida & James T. Moore, Commissioner, Florida Department of Law Enforcement, to Sprint (Oct. 25, 1996) (on file with *Berkeley Technology Law Journal*) (serving a § 1084(d) notice "that there is a possibility that [Sprint's] facilities are being used for the unlawful purpose of transmitting or receiving gambling information in interstate or foreign commerce in direct violation of both state and federal law").

200. *See Tollin*, 286 F. Supp. at 92; *Telephone News Sys., Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621, 628 (N.D. Ill. 1963).

201. *See* *People v. World Interactive Gaming Corp.*, 1999 WL 591995 (N.Y. Sup. Ct. July 22, 1999). *See also* *Tratos*, *supra* note 12, at 107.

202. *See* *Goldsmith*, *supra* note 13, at 1120.

communications service registered with the Federal Communications Commission, the gambling business is susceptible to a service interruption by way of a 1084 notice.²⁰³

While a 1084 notice is helpful in terminating the telecommunications service of an Internet gambling operation, such a notice would probably be of little use in terminating the domain-name registration of an Internet gambling website, as discussed in the previous section. That is because the 1084 notice is explicitly limited to common carriers subject to the jurisdiction of the Federal Communications Commission.²⁰⁴ A common carrier has been defined by the Federal Communications Commission as “a telecommunications company that is available for hire on a non-discriminatory basis to provide communication transmission services, such as telephone and telegraph, to the public.”²⁰⁵

In contrast to a telecommunications company which provides “communication transmission services,” a domain-name registrar, such as Network Solutions, Inc., provides only the actual registration of a domain name. Once a domain name is registered, the individual registering the domain name is responsible for locating an ICS provider or other service that will host the individual’s website and provide access to the website through the Internet. Having secured a service to host the newly registered domain name, the IP address of the website residing on that server will be provided to the original registrar, which will in turn be used to link the domain name to the actual website by placing it in the upstream domain-name registry. While the registration of a domain name is critical to setting up an Internet gambling website, it is clear that the registrar does not in fact provide any “communication transmission services” and, as such, could not be considered a common carrier.

Moreover, these registrar services are subject to the jurisdiction of the Internet Corporation for Assigned Names and Numbers (“ICANN”), not the Federal Communications Commission.²⁰⁶ Although the IGPA will help to clarify the application of the Wire Act to Internet gambling and will provide new law enforcement tools, the current version of the IGPA does

203. *See id.*; *see also* S. 692, 106th Cong. (1999); Fojut, *supra* note 8, at 166 (pursuant to a proposed provision in the Internet Gambling Prohibition Act, a law enforcement agency may “acquire an injunction against a common carrier who refuses to terminate access after being notified of an offending site”); Goldsmith, *supra* note 13, at 1119.

204. *See* 18 U.S.C. § 1084(d) (1994).

205. FEDERAL COMMUNICATIONS COMMISSION, A GLOSSARY OF TELECOMMUNICATIONS TERMS (1998).

206. *See* ICANN, *ICANN Names Competitive Domain-Name Registrars* (Apr. 21, 1999) <<http://www.icann.org/announcements/icann-pr21apr99.htm>>.

not expand the applicability of the 1084 notice to domain-name registrars. Thus, regulators will still need to consider joining these registrar organizations in an action as necessary parties if they wish to potentially enforce a court order terminating the registration of an Internet gambling website.

B. Enforcement Mechanisms Focused On The Intermediary Party That Facilitates The Transfer Of Funds Between The Gambler And The Website Operator

An alternative or additional enforcement mechanism for severing access to Internet gambling could focus on the intermediary third party facilitating the transfer of funds between the gambler and the website operator.²⁰⁷ In order for United States residents to gamble, the Internet gambling business must be capable of receiving and processing payments from persons within the United States. This requires the use of third parties to physically transfer the funds from the gambler's account to the Internet gambling business' account. This is generally accomplished through the use of checks, bank wires, Western Union wires, credit cards, or other cyber-cash type payment systems.²⁰⁸ Severing an Internet gambling business's access to these payment systems would deprive the business of its funding, thus making it unprofitable to do business in the United States.²⁰⁹

1. Checks and Wire Transfers

One mechanism available for funding an Internet gambling account involves the use of the American banking system. Even if a U.S. dollar-denominated instrument is issued to a payee outside the country, such as to an Internet gambling operation, the instrument must still clear through a United States bank in order to effect payment.²¹⁰ Since the cost of sending individual checks to the banks on which they are drawn for purposes of clearing would generally be prohibitively expensive, a foreign bank will either maintain a branch in the United States itself through which it can

207. See generally Goldsmith, *supra* note 105, at 1223.

208. See, e.g., Rutherford, *supra* note 18, at 40 ("U.S. banks, along with VISA and MasterCard and Western Union and all the other providers of ... financial services are essential for online gambling"); Martinez, *supra* note 17 (stating that a U.S. resident may choose to gamble on an Internet gambling website through "the account he set up with either Federal Expressed cashiers check or his VISA through a server in the Caribbean"); Fojut, *supra* note 8, at 159.

209. See generally Goldsmith, *supra* note 13, at 1120.

210. See G. JAY FRANCIS, PRINCIPLES OF BANKING 110 (American Banking Association 6th ed. 1998).

clear instruments, or it will utilize a domestic bank to perform clearing services through a correspondent banking relationship.²¹¹

A correspondent bank is defined as a “bank that holds deposits owned by other banks and performs banking services, such as check clearing for banks in other cities [or countries].”²¹² In order to clear instruments through a correspondent bank, the foreign bank literally sends the instrument to the correspondent bank in the United States.²¹³ The correspondent bank, in turn, maintains a deposit account for the foreign bank through which dollar items can be paid and credited to the foreign bank’s account.²¹⁴ Once the money is credited by the correspondent bank to the foreign bank’s account, the instrument is cleared, and the foreign bank can then credit the depositor’s account in the foreign country.²¹⁵

In essence, even if the Internet gambling operation is based entirely outside of the United States, and even if the monetary instruments drawn on United States banks are deposited in accounts outside of the United States, the instruments must still reenter the United States for purposes of clearing. As such, the foreign gambling operation is dependent upon the U.S. banking system for receiving the funds. This reliance therefore provides a mechanism which can be used to eliminate an Internet gambling business’s ability to accept monetary instruments drawn on United States banks.

If legislation were enacted akin to the Federal Wire Act’s 1084 notice provision, law enforcement could summarily sever a foreign business’ access to the American banking system.²¹⁶ Through such legislation, law en-

211. See JAMES M. KOLTVEIT, CPA, ACCOUNTING FOR BANKS § 5.01[6], at 5-13, 5-14 (Matthew Bender 1999).

212. THOMAS P. FITCH, DICTIONARY OF BANKING TERMS 153 (Barron’s 2d ed. 1993).

213. See FRANCIS, *supra* note 210, at 110; KOLTVEIT, *supra* note 211, at 5-13, 5-14.

214. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, COMMERCIAL BANK EXAMINATION MANUAL § 2010.1 (4th ed. 1994).

215. See KOLTVEIT, *supra* note 211, at 5-13, 5-14.

216. See *supra* Part V.A.3. There is ample precedent in this nation’s history which demonstrates the feasibility of severing access to our banking system. For example, after Iraq invaded Kuwait in 1990, President Bush assessed sanctions against Iraq, including the freezing of Iraq’s bank accounts. See Moran, *Where are the Regs: Ad-Hoc Sanctions Against Iraq Give Advocates Room to Wiggle*, LEGAL TIMES, Nov. 12, 1990, at 1. Through the oversight of the United States Treasury Office’s Office of Foreign Asset Control, the United States managed to control the flow of funds through the domestic banking system. See *id.* at 11. In addition to preventing Iraqi companies from utilizing our banking system, the sanctions also “placed 94 Kuwaiti banks and companies under various categories of control.” *Id.* at 11-12. The controls that would need to be implemented in order to effectuate the use of the “bank notice” would probably be much more

forcement could be statutorily authorized to serve a 1084-type notice, or “bank notice,” on a bank facilitating the clearing of United States funds for an Internet gambling business.²¹⁷ This “bank notice” could require that the bank cease providing clearing service for any monetary instruments made payable to the Internet gambling business, as well as all known entities associated with that Internet gambling business. By eliminating an Internet gambling business’ ability to clear United States denominated instruments, the government would effectively render all United States monetary instruments worthless to the Internet gambling operation.

The Internet gambling business’ reliance on correspondent relationships could also be exploited to sever its use of wire transfers. Analogous to the requirement that all United States monetary instruments clear through a United States bank, all wire transfers originating in the United States must also pass through either a foreign bank’s domestic branch, or a foreign bank’s correspondent bank. The same “bank notice” used to prevent the clearing of monetary instruments could also be used to prevent the wire transfer of funds out of the country. However, although wire transfers by definition rely upon the use of wire communication facilities, the Wire Act’s 1084 notice is probably not useful for purposes of preventing the wire transfer of funds between banks because § 1084(d) limits the use of these notices to “common carriers” which are subject to the jurisdiction of the Federal Communications Commission.²¹⁸

Of course, there may be ways to circumvent the use of this notice. For example, an Internet gambling business could change banks in an effort to utilize a foreign bank that maintains a correspondent relationship with a different bank in the United States. Nonetheless, it would merely be a matter of time before law enforcement learned of the new bank and served a bank notice on that bank as well. Additionally, there is a general belief that an Internet gambling business is highly dependent upon both continuity of service and consumer confidence.²¹⁹ Continually changing banks and funding mechanisms available to United States citizens would undermine such credibility and confidence.

rudimentary than those used for implementing the Iraqi sanctions. Nonetheless, the implementation of such controls appears to be feasible.

217. The name and location of the correspondent bank that is being used to clear funds for the foreign bank will be readily available to a prosecutor, either on the Internet site itself, or on the back of a canceled check or money order used to fund a gambling account.

218. See 18 U.S.C. § 1084(d) (1994); see also *supra* Part V.A.3.

219. See *supra* Part V.A.2.

2. *Commercial Money Transfer Businesses*

As an alternative to wiring money through a bank account, many Internet gambling operations also offer the option of funding an account through the use of commercial money transfer businesses such as Western Union or MoneyGram. In order to facilitate the use of a commercial money transfer outlet, an Internet gambling website will often provide the prospective gambler with the name of the foreign bank and the account number to which the money should be directed. These money transfer businesses then presumably use interstate and foreign wire communication facilities for the purpose of transmitting the information necessary to effectuate the transfer; however, as with wire transfers between banks, the Federal Wire Act's 1084 notice is probably inapplicable to these businesses since neither Western Union nor MoneyGram can be characterized as a "common carrier."²²⁰

In lieu of utilizing a 1084 notice, another viable option for preventing commercial money transfers to Internet gambling enterprises may be to secure the voluntary cooperation of these money transfer businesses.²²¹ For example, after being alerted to the fact that its money transfer business was being used "directly or indirectly to pay for sports bets that [were] illegal under Florida law," Western Union entered into an "Agreement of Voluntary Cooperation" with the Florida Attorney General's Office, wherein it agreed to operational modifications of its money transfer business within Florida.²²²

220. See *supra* Part V.A.3.

221. See News Release of Robert A. Butterworth, Attorney General, State of Florida, Western Union Cuts Off Sports Betting Account (Dec. 23, 1997), available at <<http://legal1.firn.edu/newsrel.nsf/b57e80b88fcebfa85256403005cbc7a/06268a62eb5817ba852565b50046b857?OpenDocument>>.

222. Western Union agreed to the following operational changes: 1) "to implement procedures designed to prevent funds from being transferred from Florida through Western Union's Quick Pay service to any of the Western Union Quick Pay subscribers set out in [an] Appendix..."; 2) "to enter into agreements with the ... Quick Pay subscribers [set forth in the agreement] prohibiting the Quick Pay subscribers from accepting payments from Florida for or on behalf of [the gambling businesses in question]"; 3) "to advise its money transfer outlets in the State of Florida that the Florida Office of the Attorney General has advised that it is a violation of Florida law to place bets on sporting events and that they cannot use Western Union facilities in Florida to transfer money to pay for the placement of bets or wagers"; 4) "to notify the entities set out in [an] Appendix ... that ... it is a violation of Florida law to transfer money for the purpose of placing sports wagers in Florida and that they must cease receiving funds through Western Union money transfer services from Florida ..."; 5) "to implement procedures designed to prevent credit card money transfers from Florida to ... recipients outside the United States set out in [an] Appendix ..."; and 6) "to take reasonable steps to monitor periodically the transac-

Although this agreement did not pertain specifically to Internet gambling, it could serve as a model framework for law enforcement authorities that wish to eliminate the use of these commercial money transfer businesses by Internet gambling enterprises.

3. *Credit Cards*

Credit cards represent yet another payment option offered by Internet gambling websites. Since the type of credit card used to fund an account will vary based upon the individual gambler, negotiating an agreement of voluntary compliance with every credit card company may not be the most practical solution for preventing their use in Internet gambling. An alternative would therefore be to make it legally or commercially undesirable for the credit card companies to authorize Internet gambling businesses to accept their credit cards.

One possible mechanism for accomplishing this would be to enact legislation making it illegal for credit card companies to pay businesses for debts incurred through Internet gambling. The standard of knowledge required to establish an infraction by a credit card company could range from: making payments “knowingly;” “knowingly, or under the circumstances should reasonably have known;” or, “knowingly or recklessly” making payment. Since a business must first register with a card provider in order to accept a given type of credit card, this registration process presents an excellent opportunity for the provider to identify potential Internet gambling businesses. Accordingly, credit card companies already possess the means to avoid liability. Nonetheless, any attempt to enact such legislation would likely meet with a great deal of opposition from the credit card companies and their lobbies.

An alternative means for deterring the use of credit cards might be to make it commercially undesirable for credit card companies to allow the use of their credit cards by gamblers. This approach is best illustrated by a

tions of its Quick Pay subscribers and regular money transfer agents in Florida and in the jurisdictions set out in [an] Appendix.” See Agreement of Voluntary Cooperation, between Gary L. Betz, Special Counsel to Robert A. Butterworth, Attorney General, State of Florida, & Lawrence S. Fogelson, Chief Operating Officer—International, Western Union Financial Services, Inc. 2-5 (Dec. 22, 1997) (on file with *Berkeley Technology Law Journal*). This agreement was subsequently amended to update the lists provided in the initial agreement Appendices and to “provide a more effective mechanism for updating these lists in the future.” See Amended Agreement of Voluntary Cooperation, between Gary L. Betz, Special Counsel to Robert A. Butterworth, Attorney General, State of Florida & David L. Schlapbach, General Counsel—International, Western Union Financial Services International (Apr. 19, 1999) (on file with *Berkeley Technology Law Journal*).

countersuit filed by Cynthia Haines of Marin County, California, in response to a suit filed against her by the credit card companies to which she owed \$70,000.00 in Internet gambling debt.²²³ According to the Haines lawsuit, “the card companies never should have given merchant accounts to the online casinos” because the online casinos are not legal entities within the United States.²²⁴ The theory asserted by Haines was that debts owed by California citizens were unenforceable “because gambling is illegal in the state [of California] and on-line wagering is illegal in the United States.”²²⁵

Recognizing “the evolving issues relating to online gambling,” MasterCard International entered a settlement agreement with Haines, for an undisclosed amount of money, which included the issuance of new rules by MasterCard for using its cards to gamble on Internet gambling websites.²²⁶

Without venturing into the morality of permitting consumers to incur debt and escape liability by asserting that the debt is unenforceable, Haines’s suit, and the subsequent concessions of MasterCard demonstrate a potentially potent enforcement tool. Specifically, credit card companies will probably only pay credit card bills so long as they reasonably believe that they will be able to recover the money from the person incurring the charges. If credit card debt incurred through Internet gambling is found to be unenforceable because of long-standing public policy, credit card companies would probably begin to bar the use of their cards on Internet gambling websites. In fact, at least one company has already implemented such a policy.²²⁷ This long-standing public policy against the enforcement

223. *See Lawsuit Could Kill Online Gambling*, AP, Aug. 18, 1998, available at <<http://www.wcco.com/news/stories/news-980818-103333.html>>.

224. *See id.*

225. *MasterCard Sets Rules For Online Gambling to Settle Lawsuit*, AP Newswires, July 12, 1999, available in Westlaw, APWIREPLUS Database.

226. *See id.* (stating that among the rules adopted by MasterCard was a rule that it “will now require Internet casinos that use its cards to ask gamblers where they live and keep a record of the information. The company will also require the sites to post notices stating that Internet gambling is illegal in California and other states.”); *see also* Maharaj, *supra* note 4, at A1.

227. *See* Maharaj, *supra* note 4, at A7 (“Providian National Bank in San Francisco, one of the nation’s largest Visa card issuers, says it will no longer process gambling transactions for its 11 million customers. Other card issuers are expected to follow suit. If enough of them do, that could effectively kill online gambling, observers say, by eliminating the only convenient way to pay.”).

of gambling debts incurred on credit was recognized by the court in Haines's case, as well as other courts around the country.²²⁸

In order to avoid incurring unrecoverable debt, credit card companies could implement policies akin to those employed by MasterCard, and could refuse to make payment to websites that fail to follow those policies. Alternatively, since it may be difficult for a credit card company to ascertain exactly where the card holder is physically located at the time a bet is placed,²²⁹ the company may instead choose to refuse to authorize any Internet gambling businesses to accept its cards.

4. *Electronic Money Payment Systems*

One final type of payment method that bears mentioning is the digital cash and smartcard businesses that have begun to proliferate on the Internet.²³⁰ This includes such businesses as Digicash, Cybercash, e-Cash and Mondex.²³¹ Unlike credit cards, however, digital cash and smartcards function like debit cards, requiring pre-funding of an account which is then spent down as the account holder uses the money online.²³² As such, the inability to enforce debt, which might be a primary deterrent to credit card companies, would likely have little effect on these digital cash companies.

Perhaps the best mechanism available to law enforcement for preventing the use of digital cash by Internet gambling businesses would be to

228. *See id.*; *see also* Metropolitan Creditors Service of Sacramento v. Sadri, 19 Cal. Rptr. 2d 646, 651 (Ct. App. 1993) ("The cornerstone of the Hamilton rule against enforcement of gaming house debts is not simply that the game played is unlawful, but that the judiciary should not encourage gambling on credit by enforcing gambling debts, whether the game is lawful or not."); King Int'l. Corp. v. Voloshin, 366 A.2d 1172, 1175 (Conn. Super. Ct. 1976) ("It is the conclusion of this court that the legalization of gambling in a limited and regulated manner, while constituting a change to some degree in this state's ancient and deep-rooted public policy prohibiting gambling, has had no effect on the long-established policy of this state condemning gambling on credit and prohibiting the enforcement of any claimed obligation relating thereto."); Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 95 (1992) ("Even while legal gambling spreads throughout the country, the public policy of virtually every state makes legal gambling debts unenforceable, treating a casino marker the same as a contract for prostitution.").

229. Which, as noted by the *World Interactive* court, is an essential element in determining where the gambling takes place, and, whether state or federal law is being violated. *See* People v. World Interactive Gaming Corp., 1999 WL 591995, at *5 (N.Y. Sup. Ct. July 22, 1999).

230. *See* Tratos, *supra* note 12, at 108-111.

231. *See* John L. Douglas, *Electronic Money*, in ELECTRONIC COMMERCE LAW 111, 112 (William A. Tanenbaum & Allen R. Grogan, 1998).

232. *See* Tratos, *supra* note 12, at 110-11.

secure voluntary agreements of abstinence from the digital cash companies, similar to the agreement secured from Western Union by the Florida Attorney General.²³³ Another alternative might be to implement legislation akin to that discussed with regard to credit card companies, making it illegal for a digital cash company to “knowingly,” “knowingly, or under the circumstances should reasonably have known,” or “knowingly or recklessly” effectuate payment in furtherance of Internet gambling.²³⁴

VI. SNAKE EYES AND THE HOUSE LOSES: CONCLUSION

The reaction by state and federal regulators to Internet gambling has been as varied as the gambling sites themselves. The inability of regulators to arrive at a uniform method for dealing with this issue was clearly illustrated in January 1998 when Justice Department spokesman John Russell was quoted as saying, “[w]e have no jurisdiction [to prosecute Internet gambling operators]. The offense has not been made on U.S. soil.”²³⁵ By early March 1998, however, the Justice Department completely reversed its position, proceeding to announce a number of federal indictments against Internet gambling operators.²³⁶

While United States regulators continue to wrestle with methods for cutting off access to Internet gambling by American citizens, other countries have taken a more user-friendly approach.²³⁷ For example, on March 18, 1998, the Queensland, Australia legislature passed the Interactive Gambling Bill, permitting the licensing and operation of Internet gambling within its borders.²³⁸ Similarly, the governments of Antigua, New Zealand and other countries have embraced this bold new technology, envisioning a potential windfall from their provision of an apparent “safe-haven” for entrepreneurs interested in starting an Internet gambling business.²³⁹

233. See *supra* Section V.B.2.

234. See *supra* Section V.B.3.

235. See Freeling & Wiggins, *supra* note 2; see also Kish, *supra* note 8, at 462.

236. See Rebecca Quick, *U.S. May Face Enforcement Hurdles In Crackdown on Internet Gambling*, WALL ST. J., Mar. 6, 1998 at B2, col. 1 (“[O]n Wednesday, the federal government began its first-ever crackdown on Internet gambling, charging 14 Web-site owners and managers with illegally using interstate phone lines to take wagers and vowing to bring down a big business that started just a few years ago.”); Cabot, *supra* note 9; see also Michael Grebb, *The Players, Gambling*, BUSINESS 2.0, Feb. 1999, at 47 (quoting Assistant Attorney General Alan Kessner as saying, “[i]f you’re going to choose between imperfect regulation or imperfect prohibition, it’s better to have prohibition”).

237. See Cabot, *supra* note 9 at 22.

238. See *State Tries To Protect Against Internet Gambling Abuses*, AAP NEWSFEED, Mar. 18, 1998, available in LEXIS, AAP Newsfeed File.

239. See Fojut, *supra* note 8, at 169. See generally Cabot, *supra* note 9, at 22.

Private industry's proposals for dealing with Internet gambling have also been quite varied. Some industry lobbies, particularly those whose members include the land-based off-line casino operators, favor a complete ban on Internet gambling. Others favor a cooperative effort between industry regulators and Internet gambling operators.²⁴⁰ Under the latter concept, regulators would theoretically charge licensing fees and set "certifiable standards of randomness, procedures, financial stability and non-criminal activity."²⁴¹ Assuming a gambling website complied with regulator standards and paid the applicable licensing fees, the gambling website would then receive something akin to a "Good Housekeeping Seal of Approval," which could be used by potential gamblers to distinguish between "Gaming Certified" sites and unlicensed sites that do not meet regulator standards.²⁴²

One of the more widely publicized legislative responses to Internet gambling has been the proposed Internet Gambling Prohibition Act.²⁴³ A popular misconception about this bill is the belief that until it is enacted there is no federal ban on Internet gambling. This is incorrect. As a resolution adopted by the National Association of Attorneys General demonstrates, the IGPA was designed to clarify the definitional sections of the Interstate Wire Act and to enhance its effectiveness, not to fill a vacuum and create a new body of law where none existed before.²⁴⁴ Thus, even without passage of the IGPA, Internet gambling operators are already being prosecuted for violations of the Wire Act by both federal and state authorities.²⁴⁵

Additionally, Internet gambling has already been held by at least one state court to be illegal under the Federal Interstate Wire Act, the Travel

240. Compare Bell, *supra* note 141 ("Powerful lobbies favor a ban on Internet gambling. The established, off-line gambling industry has huge overhead costs and a corresponding fear of new competitors. It also brings very deep pockets to the debate.") with Plumley, *supra* note 2, at 15 ("That's right, not to shut down Internet gaming - to capitalize on it. How? By accepting Internet gaming and each other's role in it, with a regulator providing standards of certification to assess the lottery and any other Internet gaming competitors and the lottery delivering strong products to the market.").

241. See Plumley, *supra* note 2, at 16.

242. See *id.*; see also Grebb, *supra* note 236, at 49.

243. See *supra* Part V.

244. See *NAAG Adopts Resolution on Internet Gambling*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL GAMING DEVELOPMENT BULLETIN, July/Aug., 1996; see also Brown, *supra* note 16, at 22.

245. See, e.g., *United States v. Cohen*, sealed complaint, Buchwald, J. (S.D.N.Y. filed Mar. 9, 1998); *People v. World Interactive Gaming Corp.*, 1999 WL 591995, at *6 (N.Y. Sup. Ct. July 22, 1999); Brown, *supra* note 16, at 16-20; Cabot, *supra* note 9, at 21-22.

Act and the Interstate Transportation of Wagering Paraphernalia Act.²⁴⁶ Similarly, Internet gambling appears to violate the law in every state of the country, since no state explicitly authorizes Internet gambling. It also appears that merely locating the gambling servers offshore, where Internet gambling is licensed, does not in any way create a legal umbrella for activity having an effect within the United States. So long as a person who is physically present within the United States logs in to a gambling website and places bets, the crime is deemed to have occurred on United States soil.²⁴⁷

It can therefore be said that Internet gaming operators are not only hosting the gambling, but are, in a sense, gambling themselves. In the latter instance, however, the gamble is not for money. Rather, the gamble is based on the likelihood that federal or state regulators will have the resources and the ability to prosecute them for their crimes, and the ability to utilize various enforcement methods to shut down the Internet gambling website and cut off the business' funding. Thus, the more important question becomes whether the Internet gambling operators are willing to play the odds and risk the potential ramifications of allowing United States residents to log in and place bets.

As Professor Rose alluded to in his historical analysis of gambling, there have been three distinctive waves of gambling resulting in new forms of gambling regulation, the first wave of gambling having been characterized by opportunistic pioneers who had an adventurous spirit, high expectations of making money and who enjoyed taking risks.²⁴⁸ The Internet has likewise been characterized as a new mode of technology which provides those with an entrepreneurial spirit the opportunity to take risks in order to secure great wealth. This new technology has created the potential for many new business models, one of them being the opportunity to host an Internet gambling website. Although the ultimate conclusion to this chapter in gambling history has yet to play itself out, one thing has become clear. The indomitable pioneer spirit is still alive and well on the cusp of the next millennium. The only difference is that now the spirit resides in cyberspace.

246. See *World Interactive*, 1999 WL 591995.

247. See *id.* at *4.

248. See Dunstan, *supra* note 3. The second wave was spurred by the expansion of the western frontier in the mid-1800s to the early 1900s. The third wave began during the Great Depression and led to a greater legalization of gambling. *Id.*