

## CHAPTER 5. INTERNET GAMBLING

A key mandate of the National Gambling Impact Study Commission was to assess the impact of technology on gambling in the United States. Technology in this area is evolving at a rapid rate, and its potential is only beginning to be glimpsed. This is especially true regarding Internet gambling. On-line wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24-hour access to the full range of gambling in every home.

To better understand the impact of Internet gambling, the Commission and its Subcommittee on Regulation, Enforcement, and the Internet received testimony from technology experts, the interactive gambling community, and public officials and reviewed the growing research on Internet use and the efforts of regulators to match the unprecedented pace of change. This chapter presents a summary of those findings and recommendations for meeting the challenge posed by this technology.

### THE EMERGENCE OF INTERNET GAMBLING

The increasing number of people who use the Internet and the growing consumer confidence in conducting on-line financial transactions have led to a greater number of people who are willing to engage in Internet gambling. Although the phenomenon is difficult to measure, all observers agree that the growth is rapid. Sebastian Sinclair, a research consultant for Christiansen/Cummings Associates, Inc., estimates that Internet gambling more than doubled from 1997 to 1998, the number of gamblers increasing from 6.9 million to 14.5 million and revenues from \$300 million to \$651 million.<sup>1</sup> (See Figure 5-1.) Other studies indicate

similar rates of growth. One study, which looked at Internet gambling revenues and the revenues of companies that produce software for on-line gambling operators, concluded that the Internet gambling industry's revenues grew from \$445.4 million in 1997 to \$919.1 million in 1998.<sup>2</sup>

Although projections concerning the turbulent world of the Internet are notoriously inaccurate, virtually all observers assume the rapid growth of Internet gambling will continue. Sinclair estimates that Internet gambling revenues will reach \$2.3 billion by 2001.<sup>3</sup> *The Financial Times* and Smith Barney have estimated that the Internet gambling market will reach annual revenues of \$10 billion in the beginning of the next millennium.<sup>4</sup>

Obviously, the numbers are greatly influenced by a number of hard-to-predict variables, the most important of which are regulatory measures undertaken by governments. Such efforts are unlikely to be uniform, however: Even as the U.S. Congress debates legislation to prohibit Internet gambling, several foreign governments have moved in the other direction and have licensed Internet gambling operations within their own borders, which Americans can access.<sup>5</sup> Clearly, the politics of Internet gambling are evolving almost as quickly as the medium itself, and with a similar lack of common direction.

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<sup>2</sup> Glenn Barry, "Seven Billion Gambling Market Predicted," *Interactive Gaming News* (May 11, 1998) (<http://www.igamingnews.com>.)

<sup>3</sup> Sinclair, *supra* note 12.

<sup>4</sup> Sinclair, *supra* note 12.

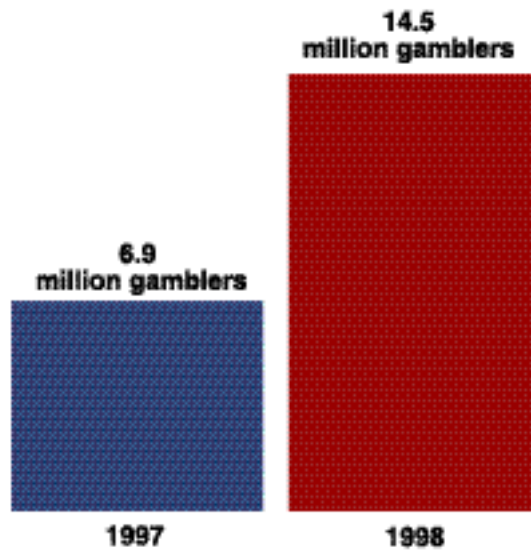
"Starnet Communications: Internet Gambling Pioneer Switches to Starnet Technology," *Business Wire*, Aug. 27, 1998 available in LEXIS, Nexis Library, News File.

<sup>5</sup> The countries with laws in place to extend Internet gambling licenses include: five territories within Australia, Antigua and Barbuda, Austria, Belgium, Cook Islands, Costa Rica, Curaçao, Dominica, Dominican Republic, Finland, Germany, Grand Turk, Grenada, Honduras, the territory of Kalmykia in Russia, Liechtenstein, Mauritius, St. Kitts and Nevis, St. Vincent, South

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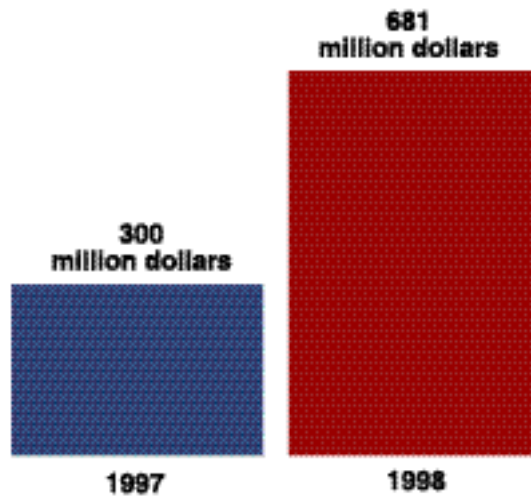
<sup>1</sup> Sinclair, *supra* note 12.

### Increase in internet gamblers, 1997 to 1998



SOURCE: Sebastian Sinclair(Christiansen/Cummings Associates, Inc.)

### Increase in internet gambling revenue, 1997 to 1998



SOURCE: Sebastian Sinclair(Christiansen/Cummings Associates, Inc.)

Figure 5-1  
Internet Gambling

## TYPES OF INTERNET GAMBLING SITES

The most visible indicator of change is the proliferation of Internet gambling sites. At the present, a comprehensive inventory of the number of gambling sites is probably impossible to compile, given companies' constant entry into and exit from the market and the lack of any central registry. In December 1998, the on-line publication *Bloomberg News* reported that 800 gambling-related sites existed, 60 of which offered real-time betting.<sup>6</sup> Reflecting the lack of sharp borders in this area, this estimate includes sites that provide information for all types of gambling, such as Web pages promoting tourism to large casinos. The Web site *Rolling Good Times* provides links to approximately 1,000 Internet sites that offer some form of betting.<sup>7</sup> By itself, however, this number may be misleading, because many of those sites are segments within a single operation and many of the on-line gambling operations are merely subsidiaries of the same companies. Nevertheless, the number of sites can be expected to grow.

Along with a burgeoning presence on the Internet, the design and pace of the on-line games have advanced dramatically over the past few years, as has their ease of use. Gambling sites now feature interactive games, broadcast races in real-time video, and walk customers through a virtual tour of the site, complete with colorful graphics and background music. Prior to gambling, most sites require people to fill out registration forms and to either purchase "chips" or set up accounts with a preset minimum amount. Payment is made using credit or debit cards, money transfers, or other forms of

electronic payment, such as "smart cards" or "Cybercash."<sup>8</sup>

Once registered, the gambler has a full range of games from which to choose. Most Internet gambling sites offer casino-style gambling, such as blackjack, poker, slot machines, and roulette.<sup>9</sup> Casino-style sites also often require gamblers to either download special software or ask for a CD-ROM, with the software to be sent to their home.

Another form of gambling available on the Internet is sports gambling, which is receiving increasing media attention.<sup>10</sup> The January 26, 1998, edition of *Sports Illustrated* highlighted the proliferation of Internet sports gambling sites, which increased from 2 in 1996 to more than 50 by 1998.<sup>11</sup> As of February 1, 1999, *Rolling Good Times* had listed 110 sports-related Internet gambling sites.<sup>12</sup> The rapid increase in sites likely is the result of the financial success of existing operations. According to National Football League estimates, the Internet sports-gambling market will reach \$750 million by the end of 1999.<sup>13</sup>

For many reasons, gambling on sports via the Internet is increasingly financially successful. Unlike casino-style games, Internet sports books do not necessarily use highly complex Web sites that require bettors to download software in order to participate. Whereas casino-style games can generate concerns over the possibility of tampered results, the outcomes of sporting events are public knowledge and are assumed to be beyond the control of the site operator. The

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Africa, Trinidad, Turks and Caicos Islands, four territories in the United Kingdom, Vanatu, and Venezuela. *Interactive Gaming News*, Licensing Information, <http://www.igamingnews.com/articles/licenses/countries.cfm>. (last visited May 10, 1999).

<sup>6</sup>Laurie Berger, "Betting Against the Odds?" *Bloomberg News*, (Dec. 1998) [http://www.bloomberg.com/mag/vp\\_A9801.html](http://www.bloomberg.com/mag/vp_A9801.html).

<sup>7</sup>Rolling Good Times; visited Jan. 31, 1999. <http://www.rgtonline.com>.

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<sup>8</sup>For more information on electronic payment forms visit <http://www.cybercash.com>.

<sup>9</sup>I. Nelson Rose, "Internet Gambling: Domestic & International Developments," *Gambling and the Law*, 4 (Nov. 23, 1998).

<sup>10</sup>Ante Z. Udovicic, "Special Reports: Sports and Gambling A Good Mix? I Wouldn't Bet On It," 8 *Marq. Sports L.J.* 401, Spring 1998 at 11.

<sup>11</sup>Steven Crist & Don Yeager, "All Bets Are Off," *Sports Illustrated*, Jan. 26, 1998, available in LEXIS, Nexis Library, News file.

<sup>12</sup>Rolling Good Times, *supra* note 21.

<sup>13</sup>Jeff Houck, "To A Cyber Abyss," *The Palm Beach Post*, Jan. 26, 1999, p. 1C.

integrity of Internet sports wagering results is therefore less open to question.

Included in several sports-gambling operations is the opportunity to bet on live horse racing events. Through the use of real-time audio and video software, races are broadcast live on the World Wide Web. Presently, at least one domestic Internet operation is solely focused on the pari-mutuel industry. The company *You Bet!* provides information and live coverage of racing as well as the ability to process account wagers on-line.<sup>14</sup> The company has contractual agreements with several racetracks to provide coverage of the races and at-home betting services for pari-mutuel wagering. Like all bets placed through the system of common pool wagering, bets placed using the *You Bet!* Web site are included in the commingled pools at tracks hosting the races.

Other on-line gambling sites offer only lotteries and bingo. In the United States, Powerball and Interlotto maintain Web sites, as does the Coeur d'Alene Native American Tribe in Idaho. In keeping with the borderless world of the Internet, however, many other sites have appeared outside of the United States. One of the largest Internet lotteries, called "One Billion Through Millions 2000," is a site launched by the Liechtenstein Principality under contract with the International Red Cross.<sup>15</sup> The United Kingdom has an Internet site for its lottery, and other European government-sponsored lotteries also are exploring the option of providing lottery and bingo games on-line.

On-line tournaments are another type of Internet operation that may fall into the wagering category. These Web sites offer video games that are the same or very similar to popular at-home video game devices used by millions of children. In tournaments and sweepstakes, Web site patrons compete against either the Web site host or other participants, much like playing a video game. Sites often charge "entrance fees," of which a portion is used in prizes for the

winners. Prizes range from small electronic devices to cars and large cash winnings. These games often find legal loopholes based on how the law defines gambling.<sup>16</sup> As one observer notes, "Tournaments, even slot machine tournaments, for example, have been excluded from the definition of games of chance by the FCC."<sup>17</sup>

## CANDIDATES FOR PROHIBITION

### *Youth Gambling*

Because the Internet can be used anonymously, the danger exists that access to Internet gambling will be abused by underage gamblers. In most instances, a would-be gambler merely has to fill out a registration form in order to play. Most sites rely on the registrant to disclose his or her correct age and make little or no attempt to verify the accuracy of the information. Underage gamblers can use their parents' credit cards or even their own credit and debit cards to register and set up accounts for use at Internet gambling sites.

Concerns regarding underage gambling derive in part from this age group's familiarity with and frequent use of the Internet. *American Demographics* reports that 69 percent of 18- to 24-year-olds use computers for hobbies and entertainment, compared with 10 percent of people ages 65 and older.<sup>18</sup> A 1997 study by the Survey of Public Participation in the Arts (SPPA) showed that 72 percent of people ages 18 to 24 use computers, averaging four hours of use daily.<sup>19</sup> According to the American Internet User Survey, younger users communicate more often on-line and browse more Web sites than

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<sup>14</sup>(Visited March 17, 1999.) <http://www.youbet.com>.

<sup>15</sup>Joseph M. Kelly, *Internet Gambling Law*, (forthcoming 1999) (manuscript at 4, on file with author).

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<sup>16</sup>Cynthia R. Janower, "Gambling on the Internet," 2 *J. Computer-Mediated Com.* 2, (Sept. 1996) <http://jcmc.huji.ac.il/vol2/issue2/janower.html>.

<sup>17</sup>*Ibid.*

<sup>18</sup>John Robinson, et al., "Computer Time," *Am. Demographics* (Aug. 1998) ([http://www.demographics.com/publications/ad/98\\_ad/9808\\_ad/ad98086.html](http://www.demographics.com/publications/ad/98_ad/9808_ad/ad98086.html)).

<sup>19</sup>Crist, *supra* note 11.

older Internet users do.<sup>20</sup> Moreover, younger Internet users are most likely to download video clips and to access bank account information.<sup>21</sup> Given their knowledge of computers and familiarity with the Web, young people may find gambling on the Internet particularly appealing.

Of particular concern is the special attraction of youth to on-line sports wagering, tournaments, and sweepstakes.<sup>22</sup> The National Collegiate Athletic Association has voiced its concern over the problem of Internet sports gambling among college students. In testimony before the Senate Judiciary Committee's Subcommittee on Technology, Terrorism and Government Information, Director of Agent and Gambling Activities Bill Saum stated that sports gambling "remains a growing problem on college campuses.... If left unchecked, the growth of Internet gambling may be fueled by college students. After all, who else has greater access to the Internet?"<sup>23</sup>

### ***Pathological Gamblers***

Pathological gamblers are another group susceptible to problems with Internet gambling. In addition to their accessibility, the high-speed instant gratification of Internet games and the high level of privacy they offer may exacerbate problem and pathological gambling.<sup>24</sup> Access to the Internet is easy and inexpensive and can be conducted in the privacy of one's own home. Shielded from public scrutiny, pathological

gamblers can traverse dozens of Web sites and gamble 24 hours a day. Experts in the field of pathological gambling have expressed concern over the potential abuse of this technology by problem and pathological gamblers. The director of the Harvard Medical School's Division on Addiction Studies, Dr. Howard J. Shaffer, likened the Internet to new delivery forms for addictive narcotics. He stated, "As smoking crack cocaine changed the cocaine experience, I think electronics is going to change the way gambling is experienced."<sup>25</sup> Bernie Horn, the executive director of the National Coalition Against Legalized Gaming, testified before Congress that Internet gambling "magnifies the potential destructiveness of the addiction."<sup>26</sup>

### ***Criminal Use***

The problems associated with anonymity extend beyond youth and pathological gambling. Lack of accountability also raises the potential for criminal activities, which can occur in several ways. First, there is the possibility of abuse by gambling operators. Most Internet service providers (ISPs) hosting Internet gambling operations are physically located offshore; as a result, operators can alter, move, or entirely remove sites within minutes. This mobility makes it possible for dishonest operators to take credit card numbers and money from deposited accounts and close down. Stories of unpaid gambling winnings often surface in news reports and among industry insiders.<sup>27</sup> In fact, several Web sites now exist that provide analysis of the payout activity for Internet gambling operations.

Second, computer hackers or gambling operators may tamper with gambling software to manipulate games to their benefit. Unlike the physical world of highly regulated resort-

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<sup>20</sup> Thomas E. Miller, "Segmenting the Internet," *Am. Demographics* (July 1996) ([http://www.demographics.com/publications/ad/96\\_ad/9607\\_ad/9607af04.htm](http://www.demographics.com/publications/ad/96_ad/9607_ad/9607af04.htm)).

<sup>21</sup> *Ibid.*

<sup>22</sup> Cynthia R. Janower, "Gambling on the Internet," *2 J. Computer-Mediated Com.* 2, (Sept. 1996) (<http://jcmc.huji.ascusc.org/jcmc/vol2/issue2/janower.html>).

<sup>23</sup> Bill Saum, Testimony before the Subcommittee on Technology, Terrorism and Government Information Senate Judiciary Committee (March 23, 1999) (transcript on file with the Subcommittee).

<sup>24</sup> Bernard P. Horn, Testimony before the Subcommittee on Crime, Committee on the Judiciary, U.S. Congress (Feb. 4, 1998).

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<sup>25</sup> Crist, *supra* note 11.

<sup>26</sup> Horn, *supra* note 24.

<sup>27</sup> An example of the risk involved with unscrupulous Internet gambling operators are the experiences of Internet gambler Steve Rudolf. Rudolf has lost several thousand dollars from Internet gambling sites, including \$7,000 from one gambling operation that refused to pay winnings and closed operations without leaving forwarding information.

destination casinos, assessing the integrity of Internet operators is quite difficult. Background checks for licensing in foreign jurisdictions are seldom as thorough as they are in the United States. Furthermore, the global dispersion of Internet gambling operations makes the vigilant regulation of the algorithms of Internet games nearly impossible.

Third, gambling on the Internet may provide an easy means for money laundering. Internet gambling provides anonymity, remote access, and encrypted data.<sup>28</sup> To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small percent of the original funds, then cash out the remaining funds. Through the dual protection of encryption and anonymity, much of this activity can take place undetected. In a study prepared for the Office of Science and Technology Policy and the Financial Crimes Enforcement Network of the Critical Technologies Institute, David A. Mussington and colleagues examined the potential for money laundering on the Internet. The study raises several essential concerns regarding the use of the Internet for money-laundering activities, including the lack of uniform international law and oversight or regulatory regime, the fluidity of funds crossing international borders, and the high degree of anonymity.<sup>29</sup>

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<sup>28</sup>Richard Harms, Ph.D., PriceWaterhouseCoopers, Director in Investigative Services, Remarks at the Second International Symposium on Internet Gambling Law & Management (Nov. 30, 1998). Most messages, especially those containing sensitive information such as financial data, use encryption, a process of encoding messages, thereby preventing access of information by unintended readers. The most commonly used encryption language on the Internet is the Secure Socket Layer (SSL) protocol. This encoded language can layer itself on top of other protocols, such as TCP/IP. For further discussion, see Internet Security and Secure Servers at <http://rho.pmel.noaa.gov/help/HELPSECURITY.HTML>.

<sup>29</sup>David A. Mussington, et al., "Exploring Money Laundering Vulnerabilities Through Emerging Cyberspace Technologies: A Caribbean-Based Exercise."

## STATE OF THE LAW: THE APPLICABILITY OF 18 U.S.C. § 1084

Presently, the most widely applied federal statute addressing gambling on the Internet is 18 U.S.C. § 1084. According to this statute,

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission 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 under this title or imprisoned not more than two years, or both.<sup>30</sup>

This section makes illegal the use of wire communications to place or assist with placing bets or wagers. However, ambiguity does make its appearance. The section of the statute immediately following the quoted passage exempts the use of a wire communication facility to report on, provide information for, or assist with the placing of bets or wagers "from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country which such betting is legal."<sup>31</sup> The statute also outlines the obligation of communications carriers to discontinue providing services once notified of the illegal activity.<sup>32</sup>

The applicability of 18 U.S.C. § 1084 to Internet gambling has given rise to a number of disputes over the past few years. For example, does the phrase "wire communications" include the Internet? Does the specific mention of "sports wagering" and "contests" include all types of gambling on the Internet? When placing a bet

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<sup>30</sup>Wire Communications Act of 1961, 18 U.S.C. § 1084 a (1998).

<sup>31</sup>Ibid.

<sup>32</sup>Wire Communications Act of 1961, 18 U.S.C. § 1084 a (1998).

on the Internet, where does jurisdictional authority reside?

The debate over the applicability of the phrase “wire communications” to the Internet involves both the original intent of the law as well as the future of the technology. Some argue that because there was no technology known as the Internet at the time of the statute’s formulation, the intent of the law applies only to telephone communications.<sup>33</sup> However, because Congress did not write the statute as “telephone communications,” it is argued that its intent was to include any and all wire communication devices.<sup>34</sup> This debate, however, may be moot: Future technological advances may make it possible for individuals to bypass cables and telephone wires when establishing connections to the Internet. For example, cellular access to the Internet is presently available, and several companies are developing hand-held Internet devices that access satellite technology.<sup>35</sup> Perhaps through existing cellular technology and direct satellite feeds, information on the Internet will pass through most computers without any hard wire connection at all to communication devices.

A second point of contention arises over the forms of gambling to which 18 U.S.C. § 1084 applies. It is clear through the specification of “sporting event” that the statute applies to sports wagering. Because it lacks a clear definition of “contest,” however, the statute’s applicability to other forms of gambling is vague. Do contests include bingo, lotteries, or casino-style games?

Definitions are further clouded regarding the unique jurisdictional concerns of the Internet. The mention of “transmission” of bets or wagers or “information assisting in the placing of bets or wagers,” raises concerns over the definition of those words when applied to the Internet.<sup>36</sup> Is posting a Web site that provides citizens an

opportunity to engage in Internet gambling a “transmission” of illegal services and information?<sup>37</sup> The question of who is facilitating the transmission of bets or wagers raises concerns. Where are bets and wagers taking place on the Internet? Are they taking place at the site where the person downloads a Web page onto a personal computer? Is the bet taking place at the point of financial transactions—that is, where the bank account, credit card, or smart card companies are located? Or is the bet or wager occurring at the ISP that hosts the Internet gambling site?<sup>38</sup>

## REGULATION OR PROHIBITION?

### *State Efforts*

Given the traditional responsibility of the states regarding gambling, many have been in the forefront of efforts to regulate or prohibit Internet gambling. Several states, including Louisiana, Texas, Illinois, and Nevada, have introduced and/or passed legislation specifically prohibiting Internet gambling.<sup>39</sup> Florida has

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<sup>37</sup> *Cybersell, Inc. an Arizona corp. v. Cybersell, Inc., a Florida corp.*, 130 F.3d 414 (U.S.C.C. App. 1997). In *Cybersell v. Cybersell*, the court concluded “the essentially passive nature of Cybersell FL’s activity in posting a home page on the World Wide Web that allegedly used the service mark of Cybersell, AZ does not qualify as purposeful activity invoking the benefits and protections of Arizona. As it engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona, Cybersell, FL lacks sufficient minimum contacts with Arizona for personal jurisdiction to be asserted over it there. Accordingly, its motion to dismiss for lack of personal jurisdiction was properly granted.”

<sup>38</sup> Generally, people connect to the Internet from their personal computer through an Internet service provider (ISP). Personal or business accounts to access the Web are often bundled with the ISP service to provide e-mail. In addition to providing access from personal computers to the Internet, ISP’s perform a multitude of functions. Individuals, businesses, universities, government agencies, and organizations contract with ISP’s to “host” Web sites. In hosting Web sites, ISP’s are responsible for launching the data on a particular page to the Internet and often for updating and maintaining the information presented. Web sites are usually hosted by ISP’s that are geographically located in close proximity to their contractors. Additionally, the term ISP is used to refer to the routing computers responsible for sending message packets throughout the network of computers driving the Internet.

<sup>39</sup> 1997 La. Act 1467. S. 4, 91st Leg. 1st Reg. Sess. (Ill. 1999) S. 318, Reg. Sess. (Nev. 1997). S. 1222, 76th Leg. Reg. Sess. (Texas, 1999).

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<sup>33</sup> Janower, *supra* note 16, at 10.

<sup>34</sup> *Ibid.*

<sup>35</sup> Microsoft Corp. and Accord Technologies are developing hand-held devices to access the Internet.

<sup>36</sup> Wire Communications Act of 1961, 18 U.S.C. § 1084 a (1998).

taken an active role, including cooperative efforts with Western Union, to stop the money-transfer service of 40 offshore sports books. On this subject, Florida Attorney General Robert A. Butterworth stated, "Through sports magazines and other media, offshore bookmakers are urging Floridians to place bets by telephone, and the Internet. They are leading people to believe such wagers are legal when in fact they are strictly prohibited by Florida law."<sup>40</sup>

Additionally, Florida's Office of the Attorney General mailed letters to media throughout the State advising them to "cease and desist" advertising for offshore sports books.<sup>41</sup>

A number of state attorneys general have initiated court action against Internet gambling owners and operators and have won several permanent injunctions; some companies have been ordered to dissolve, and their owners have been fined and sanctioned. But the impact has been limited: The large majority of Internet gambling sites, along with their owners and operators, are beyond the reach of the state attorneys general.

### ***Native American Internet Gambling***

The difficulty state governments face in regulating or prohibiting Internet gambling has been made clear in disputes regarding sites owned by Native American tribal governments. A number of state attorneys general have taken action to prevent Native Americans from providing Internet gambling within their states. The unique legal status of Native Americans in the area of gambling, however, creates a number of issues that only the federal government can resolve.

The first such site, called "US Lottery," was launched by the Coeur d'Alene Tribe in Idaho in

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<sup>40</sup> Press Release from the Office of the Attorney General of the state of Florida, "Western Union Cuts Off Sports Betting Accounts," (Dec. 23, 1997) (on file with the office of the attorney general).

<sup>41</sup> Letter from Gary L. Betz, Special Council, Office of the Attorney General of Florida, to various radio stations and print publications, Re: Advice to Cease and Desist, (Dec. 24, 1997) (on file with the attorney general's office).

1998. Before its entry into Internet gambling, the tribe had legally operated a casino on its reservation and had an approved compact with the state of Idaho to do so. The provisions of the Indian Gaming Regulatory Act (IGRA), however, allow tribes to provide games such as bingo without state authorization or regulation. And IGRA is ambiguous on the subject of tribes offering such games to individuals outside of the reservation and into other states and jurisdictions. This lack of specificity has led to several different interpretations in recent court cases.

In 1998, Idaho's attorney general attempted to prevent the site from beginning operations by informing AT&T that his office was taking court action to prevent the company from providing telephone service that facilitated the placing of bets or wagers. AT&T subsequently informed the tribe that it could not provide the service, prompting a tribal court ruling ordering the company to provide the service. The dispute then moved to federal court.

While the case was being heard, the Coeur d'Alene Tribe established the US Lottery Internet site. Much like the Internet gambling sites located outside the United States, the US Lottery site offered information, demonstrations, and payment options via credit card, fax, or telephone.<sup>42</sup> In response, the Missouri attorney general filed a lawsuit against the Coeur d'Alene Tribe and UniStar Entertainment, Inc., in the U.S. District Court for the Eastern District of Missouri, seeking to prevent US Lottery from offering its games to Missouri citizens.<sup>43</sup>

The resulting court rulings have further confused the subject: The Federal Court in 1997 ruled that the Coeur d'Alene Tribe's sovereign immunity preempted them from Missouri state law and regulation of the gambling. This ruling was later reversed by the U.S. Court of Appeals for the 8th Circuit, which stated that the activity concerned occurred off the reservation and thus

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<sup>42</sup> Ibid.

<sup>43</sup> National Association of Attorneys General, *supra* note 126.



was covered by state law. In a third lawsuit, brought by Wisconsin's Attorney General, the U.S. District Court for the Western District of Wisconsin ruled that the Coeur d'Alene Tribe's status as a sovereign nation exempts the tribe from Wisconsin state law. However, the Court did not extend the protection of sovereignty to the technology firms that assist the tribe in providing the Internet gambling site.<sup>44</sup>

### **AN ENHANCED FEDERAL ROLE AT STATE REQUEST**

Given this and other experiences, several states have concluded that only the federal government has the potential to regulate or prohibit Internet gambling. In the words of Florida Attorney General Butterworth:

State law prohibits an individual in Florida from placing a bet or wager by wire communication or by use of the Internet. However... the burgeoning growth of the Internet and the difficulty in adopting and implementing durable and effective enforcement mechanisms, makes any effort to regulate the Internet's use better suited to federal legislation, rather than a patchwork attempt by individual states.<sup>45</sup>

To this end, the National Association of Attorneys General (NAAG) has called for an expansion in the language of the federal antiwagering statute to prohibit Internet gambling and for federal-state cooperation on this issue.<sup>46</sup> In the view of the state attorneys general, existing federal legislation and regulation falls short in several major areas,

including the definition of what constitutes gambling, the need for the law to specifically cover more types of communications devices, and the ambiguity regarding the legality of receiving information on bets or wagers.<sup>47</sup>

NAAG's position on Internet gambling is a rare stance by the association in support of increased federal law enforcement and regulation and is a clear indication of the regulatory difficulties posed by Internet gambling. NAAG usually argues against federal intrusion into areas of traditional state responsibility, such as gambling. However, in a letter to William A. Bible, a member of this Commission and Chairman of the Subcommittee on Regulation, Enforcement and the Internet, James E. Doyle, the attorney general of Wisconsin, wrote that "NAAG has taken the unusual position that this activity must be prohibited by federal law, and that State regulation would be ineffective."<sup>48</sup> In addressing the issue of enforceability of the federal prohibition, Doyle emphasized that "simply because an activity is difficult to control does not mean law enforcement should be forced to stick its head into the sand and act as though the issue does not exist."<sup>49</sup>

### ***Federal Efforts***

The federal government has been active in the area of Internet gambling. Thus far, DOJ has investigated and brought charges against 22 Internet gambling operators on charges of violating the Wire Communications Act.<sup>50</sup> All the defendants operated their businesses offshore and maintained that they were licensed by foreign governments.<sup>51</sup> However, the defendants are U.S. citizens, some of whom were living in the United States at the time of their arrests.<sup>52</sup> In a public statement following the charges, Attorney General Janet Reno

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<sup>44</sup>Ibid.

<sup>45</sup>Letter from Robert A. Butterworth, Attorney General of Florida, to The Honorable Steven A. Gellar, Representative, District 101 (Oct. 18, 1997) (on file with the state attorney general's office).

<sup>46</sup>Letter from James E. Doyle, Attorney General of Wisconsin and Immediate Past President, National Association of Attorneys General, to Commissioner William A. Bible, Chairman of the Subcommittee on Regulation, Enforcement and the Internet, National Gambling Impact Study Commission (Feb. 1, 1999) (on file with the attorney general's office).

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<sup>47</sup>Ibid.

<sup>48</sup>Doyle, *supra* note 88.

<sup>49</sup>Doyle, *supra* note 88.

<sup>50</sup>Dean Starkman, "U.S. Indicts 14 Over Gambling on the Internet," *Wall Street Journal*, March 5, 1998, p. A8.

<sup>51</sup>Ibid.

<sup>52</sup>Starkman, *supra* note 83.

announced, “The Internet is not an electronic sanctuary for illegal betting. To Internet betting operators everywhere, we have a simple message: ‘You can’t hide online and you can’t hide offshore.’”<sup>53</sup>

Ongoing efforts aim to strengthen Federal regulation and prohibition of Internet gambling. Members in both chambers of Congress have introduced legislation to address Internet gambling. The Internet Gambling Prohibition Act, first introduced by Senator Kyl during the 105th Congress, provides for the prohibition of Internet gambling through amending the Wire Communications Act. As reintroduced during the 106th Congress, the bill would expand and/or clarify definitions within the statute to include the technology of the Internet and all forms of gambling.<sup>54</sup> The enforcement mechanisms in the legislation include fines and/or imprisonment for people conducting business or participating in illegal gambling as well as measures against ISPs that provide communications service to Internet gambling Web sites.

## OTHER ACTIONS

Other measures affecting Internet gambling focus on the financial transactions used to make wagers. In at least two cases, individuals have named credit card companies and their banks in lawsuits for permitting them to use their credit cards for illegal Internet gambling. The first, in a California state court, stemmed from a bank’s attempt to collect a \$70,000 debt, incurred through gambling, on 12 credit cards.<sup>55</sup> The resulting countersuit sought to prevent credit card companies from “permitting their credit cards from being used or accepted on Web sites that accept illegal bets from residents of the

State of California.”<sup>56</sup> A similar federal court case in Wisconsin contends that credit card companies and banks have “aided and abetted” illegal gambling and therefore should not be able to collect what are illegal gambling debts.<sup>57</sup>

## OBSTACLES TO REGULATION

Although amending or creating new federal statutes to prohibit or regulate gambling on the Internet would provide law enforcement with greater authority to prosecute owners and operators, there are many ways of frustrating the efforts of regulators. The international nature of business is perhaps the most important facilitator of owners’ and operators’ ability to circumvent regulations.

Currently, governments in 25 countries license or have passed legislation to permit Internet gambling operations.<sup>58</sup> To effectively prohibit Internet gambling, the U.S. government would have to ensure that these licensed operators do not offer their services within U.S. borders, a proposition that poses a range of unanswered questions regarding feasibility. Efforts to prevent customers in the United States from accessing and using these sites may be easily circumvented. For example, the on-line registration process makes possible an initial screening of customers when they disclose the locations of bank accounts or credit card companies. Yet potential customers can take a number of steps to conceal their location within the United States. For example, patrons can establish offshore bank accounts and wire the money from those accounts to the Internet gambling site. In addition, patrons can mask their origins by first dialing an offshore ISP before logging onto a particular site, thereby

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<sup>53</sup> Benjamin Weiser, “14 Facing Charges in First U.S. Action on Internet Betting,” *New York Times*, March 5, 1998, p. A1.

<sup>54</sup> Internet Gambling Prohibition Act of 1997, S.474, 105<sup>th</sup> Cong. (1997).

<sup>55</sup> Joseph M. Kelly, “Internet Gambling Law,” 26 *William Mitchell L. Rev.* (forthcoming Fall 1999) (manuscript at 4, on file with author).

<sup>56</sup> *Ibid* at 38.

<sup>57</sup> The statutes specified in the lawsuit include: 18 U.S. Code § 2, 18 U.S. Code § 1081, 18 U.S. Code § 1084, 18 U.S. Code § 1952, 18 U.S. Code § 1955, 18 U.S. Code § 1957, 18 U.S. Code § 1960, 18 U.S. Code § 1961, 18 U.S. Code § 1962, 18 U.S. Code § 1964, 28 U.S. Code § 2201.

<sup>58</sup> (Last visited 5/7/99.) Interactive Gaming News <http://www.igamingnews.com/articles/licenses/countries.cfm>.

creating the appearance of operating in a legal Internet gambling jurisdiction.

Internet gambling operators also have several tools at their disposal for concealing their activity from law enforcement. Internet gambling operators can change the address of their Web site quickly and without cost, maintaining their easily identifiable domain name. Although Internet users typically key in a domain name to visit a particular site, the addresses of Web sites actually consist of a series of numbers. By changing its numerical address, the site may appear to remain in the exact place each time a user accesses the address, even though the site may have moved or may be one of several mirrored sites. (Mirrored sites are usually created because a particular Internet address cannot handle the number of visitors attempting to access its original location. Popular Internet operations, such as AOL's home page, may have more than 15 different numerical addresses under a single domain name). Changing the numerical address makes it difficult to track the physical location of Internet gambling operators. Internet gambling operators also may notify their regular customers of an address change by sending e-mail directly to their clients. Because of the volume of e-mails sent daily, it may be difficult to monitor or prevent this type of activity. Furthermore, Internet gambling operators can obscure the originating location of e-mails through the service of "re-mailers." Other methods that Internet gambling operators can use to provide information on Web address changes include posting notices on Internet bulletin boards and in newsgroups and chat rooms.

Holding ISP's responsible for information passed through their routers raises technical concerns. Most of the 6,500 ISP's within the United States are local providers. Installing hardware that monitors information would be too costly for most operators and could lead to a dramatic slowdown in the general transmission of information on the Internet as well as the possibility of failures within the system. Likewise, filtering devices may rule out legally

posted Web sites, including those with helpful information on where to receive treatment for problem or pathological gambling.

The possibility of prohibiting Internet gambling also has raised concerns regarding whether the ban will infringe on the constitutionally protected freedom of speech. Congress has made two previous attempts to implement legislation regulating activity on the Internet. The first proposal passed by Congress was the Communications Decency Act (CDA). Incorporated in the Telecommunications Competition and Deregulation Act of 1996,<sup>59</sup> the purpose of the CDA was to protect children on the Internet by discouraging the transmission of potentially harmful information to minors. The intent was to prevent minors' access to obscenities and safeguard them from stalkers and harassment via the Internet. Following passage of the CDA, legal battles ensued regarding the constitutionality of the law; the case eventually was heard before the Supreme Court. In *Reno v. American Civil Liberties Union (ACLU)*, the Supreme Court decided in favor of the ACLU and held that "provisions which prohibit knowing transmission to minors of 'indecent' or certain 'patently offensive' communications (47 USCS 223 (a), 223 (d)) held to abridge free speech protected by First Amendment."<sup>60</sup>

The second law addressing the need to protect children from certain activity on the Internet was the Child Online Protection Act (COPA). Included in the omnibus appropriations bill for the fiscal year ending in 1999, COPA attempted to prohibit the transmission of harmful information to minors over the Internet. In response to the passage of COPA, the ACLU filed for and was granted a preliminary injunction from the U.S. District Court for the Eastern District of Pennsylvania barring the

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<sup>59</sup> 47 USCS § 230, 223 (a), 223 (d).

<sup>60</sup> *Janet Reno, Attorney General of the United States, Et Al., v. American Civil Liberties Union Et Al.*, 117 S. Ct. 2329 (1997).

Department of Justice from enforcing the COPA.<sup>61</sup>

At first glance, the arguments against Congress' previous attempts to regulate speech on the Internet may appear relevant to the issue of prohibiting Internet gambling. In reviewing the legal status of gambling, however, federal courts have undermined the contention that the activity of gambling is protected free speech.<sup>62</sup> Because money is exchanged in gambling, it is considered a commercial act and therefore is not subject to the same protections under the First Amendment as pure speech. The U.S. District Court for the District of Rhode Island, in *Allendale Leasing, Inc. v. Stone*, found that "the commercial act of collecting or raising funds, if it is totally divorced from expression interests, must be subject to reasonable government regulations."<sup>63</sup> Furthering this position, the U.S. District Court for the District of Connecticut, in *Ziskis v. Kowalski*, reasoned that "there is no First Amendment right to conduct or play...a game of chance."<sup>64</sup> Still, free speech issues may remain germane to the discussion if filtering software in ISP's prevents access to legally posted information on the Internet.<sup>65</sup>

## RECOMMENDATIONS

5.1 The Commission recommends to the President, Congress, and the Department of Justice (DOJ) that the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United

States and any foreign jurisdiction. Further, the Commission recommends that the President and Congress direct DOJ to develop enforcement strategies that include, but are not limited to, Internet service providers, credit card providers, money transfer agencies, makers of wireless communications systems, and others who intentionally or unintentionally facilitate Internet gambling transactions. Because it crosses state lines, it is difficult for states to adequately monitor and regulate such gambling.

5.2 The Commission recommends to the President, Congress, and state governments the passage of legislation prohibiting wire transfers to known Internet gambling sites, or the banks who represent them. Furthermore, the Commission recommends the passage of legislation stating that any credit card debts incurred while gambling on the Internet are unrecoverable.

5.3 The Commission recognizes that current technology is available that makes it possible for gambling to take place in the home or the office, without the participant physically going to a place to gamble. Because of the lack of sound research on the effects of these forms of gambling on the population and the difficulty of policing and regulating to prevent such things as participation by minors, the commission recommends that states not permit the expansion of gambling into homes through technology and the expansion of account wagering.

5.4 The Commission recommends to the President and Congress that because Internet gambling is expanding most rapidly through offshore operators, the federal government should take steps to encourage or enable foreign governments not to harbor Internet gambling organizations that prey on U.S. citizens.

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<sup>61</sup> *American Civil Liberties Union, Et. Al. v. Janet Reno, Attorney General of the United States*, No. 98-5591 (E.D. Pa. Feb. 1, 1999) (order granting preliminary injunction).

<sup>62</sup> *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1452-58 (D.R.I. 1985) affd. 788 F.2d 830 (1st Cir. 1986).

<sup>63</sup> *Ibid* at 1457.

<sup>64</sup> *Ziskis v. Kowalski*, 726 F. Supp. 902, 911-912 (D. Conn. 1989).

<sup>65</sup> The American Horse Council, written testimony to the National Gambling Impact Study Commission, Subcommittee on Enforcement, Regulation and the Internet (May 21, 1998).

