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Legalization Attempts and Internet Gambling

The legal landscape of Internet gambling in the United States is ever changing, making it difficult for both the industry and the player to keep up with the pace of the law as it evolves, and the confusion that often arises at the legislative level. The State of Nevada was first to pass an Internet gambling bill in 2001, which created a scheme for regulating some forms of online gambling. However, the language of that bill contained a provision that conditioned the state's establishment of Internet gambling on approval by the federal government.¹ Unfortunately, the U.S. Department of Justice never signed off on the concept and even notified the State of Nevada that proceeding with legalization of Internet gambling would violate the federal Wire Act.² Nevertheless, the State of Nevada is again seeking to bring its gambling industry into the 21st century by allowing limited wireless gaming in licensed casinos throughout the state with the approval of AB 471.³ The bill, which would allow certain casino patrons to use PDA's or similar devices for gambling purposes while roaming its properties, passed the Senate on a 20 to 1 vote,⁴ and was signed into law

¹ See Nevada Lawmakers OK Internet Gambling, www.CBSnews.com located at <http://www.cbsnews.com/stories/2001/06/05/tech/main294997.shtml> (June 5, 2001); See also *Nevada Bill Would Authorize Wireless Gambling at Casinos*, IGamingnews.com located at <http://www.igamingnews.com/index.cfm?page=artlisting&tid=5850> (May 3, 2005).

² *Id.*

³ *Nevada Bill Would Authorize Wireless Gaming at Casinos*, www.interactivenews.com (May 3, 2005).

⁴ K. Smith, *Nevada Mobile Gaming Bill Receives Senate Approval*, IGamingnews.com located at <http://www.igamingnews.com/index.cfm?page=artlisting&tid=5909> (May 31, 2005).

on June 7, 2005.⁵ Decisions must still be made on how to regulate this activity by the Nevada Gaming Commission. Continued efforts by the State of Nevada to expand its popular legalized gambling into the Internet market, even on a limited basis, will break down barriers and preconceived taboos on Internet gambling, ultimately allowing lawmakers and citizens to get slowly accustomed to the idea. Thus far, the Department of Justice has not commented on this new legislation, and its blessing may be determinative of the program's ultimate success.

Given the uncertain of the state of the law, coupled with the recent WTO decision, many states are left unclear as to which way the regulatory pendulum will swing, and have taken on a "wait and see" attitude regarding any new legislation. The individual states are highly influenced by the federal government, which continues to maintain a prohibitionist stance on Internet gambling. For example, the State of North Dakota recently considered passing a bill intending to legalize Internet poker activities,⁶ but before the Senate Judiciary Committee could vote on the bill, the Department of Justice sent a letter to the Attorney General of North Dakota stating that the proposed bill would violate federal gambling laws.⁷ As a result of this warning, the North Dakota Senate voted down the bill by a 43 to 3 margin, although the measure had previously passed the North Dakota House of Representatives.⁸ The Department of Justice has a history of objecting to any legalization efforts, and has shot down several such attempts in the last decade. Notably, prohibition efforts can also come from the state level. For example, a coalition of 29 attorneys general has recently organized in an effort to oppose any attempt to allow Internet gambling through international trade agreements, in reaction to the WTO appeals body ruling.⁹

⁵ IGamingNews.com, *Nambling Notes – June 7, 2005 – Remote Law*, IGamingNews.com located at <http://www.igamingnews.com/index.cfm?page=artlisting&tid=5918> (June 7, 2005).

⁶ H.B. 1509.

⁷ See Letter to North Dakota Attorney General Wayne Stenehjen, dated March 7, 2005, signed by U.S. Assistant Deputy Assistant Attorney General, Laura Parsky.

⁸ K.Smith, *N.D. Senate Kills Companion Poker Bill*, www.IGamingnews.com (March 28, 2005).

⁹ AP, *States Urge Trade Representatives To Fight Internet Gambling*, Kentucky.com located at <http://www.kentucky.com/mld/kentucky/news/state/11837596.htm> (June 7, 2005).

A recent U.S. Supreme Court decision *may* have a favorable impact on the Internet gambling industry, but a celebration may be a few years off. In the combined cases of *Granholm v. Herald* and *Swedenburg v. Kelly*, 125 S.Ct. 1885, 2005 WL 1130571 (U.S. 2005), the Court held that individual states cannot discriminate against out of state wineries by prohibiting Internet sale of wine from outside of the state, while allowing in state wineries to sell their products so long as they did not ship them across state borders.¹⁰ In a 5 to 4 decision, the High Court Justices said that if a state allows in-state wineries to ship directly to residents, then the Commerce Clause of the U.S. Constitution requires out-of-state vintners to be treated equally.¹¹ Nevertheless, in light of the case, individual states may not be able to prohibit out-of-state companies from offering goods or services – possibly even gambling services – to their residents without violating of the Commerce Clause. The full impact of the ruling is not yet known, given its recent issuance. This author has been arguing the potential importance of the commerce clause for years, and this case has stirred up a renewed interest.¹²

Advertising Outlook

A lawsuit was filed last year against Yahoo!, Google, FindWhat, and other major search engine Web sites concerning their display of gambling related ads. Recently, California State Judge Richard Kramer denied the defendant's Motion to Dismiss the plaintiffs' complaint in the case of *Cisneros et al v. Yahoo! et al* (San Francisco Superior Court).¹³ The plaintiffs filed this suit during August of 2004, under the theory that the search engines all aided and abetted illegal gambling websites and violated California law by providing paid advertisements in violation of California Penal Code provisions and the Unlawful Business Practices Act.¹⁴ Californians, including minors, the elderly, and the poor, according to the complaint, have lost millions of dollars to

¹⁰ Roy Mark, *Ban Wine Sales Across the Board?* InternetNews.com located at www.internetnews.com/ec-news/article/php/3508866 (May 31, 2005).

¹¹ *Id.*

¹² See author's article: Lawrence G. Walters, *Advertising Online Casinos - An Analysis of the Legal Rights and Risks*, located at http://www.firstamendment.com/advertising_casinos.php3.

¹³ Press Release, *Plaintiffs' Case to Move Forward*, Press Release at <http://biz.yahoo.com/bw/050603/35588.html> (June 3, 2005).

¹⁴ *Id.*

“unscrupulous” Internet gambling Web sites.¹⁵ Plaintiffs allege that the defendants made enormous revenues actively supporting Internet gambling. “For example, it was alleged that defendant Yahoo! (through its Overture subsidiary) recently made as much as \$12.97 (or more) per “click-through” for directing its users to illegal Internet gambling websites.”¹⁶ The plaintiffs have requested injunctive relief, a declaration from the court that such behavior is illegal, and the restoration to the general public of defendants' ill-gotten gains. Of course, the plaintiffs attorneys will also likely look for some degree of compensation.

U.S. v. Antigua – Continued WTO Ruling Confusion

As previously reported, the World Trade Organization (“WTO”) Appellate Body ultimately reversed the ruling by the initial WTO panel,¹⁷ and found that the United States could enforce its anti-gambling laws, even if such enforcement impacted foreign entities or violated international trade agreements, since the laws were based on public morals and an effort to preserve public order.¹⁸ The U.S. escaped sanctions by the WTO, but was told to revise some of its policies regarding wagering on horse racing online, to avoid apparent inconsistencies with how other forms of gambling are treated.¹⁹ However, following this ruling, nearly 30 states have joined forces to urge the U.S. government to keep Internet gambling out of international trade agreements.²⁰ Utah Attorney General Mark Shurtleff helped organize the effort by the states to protect their gambling laws from actions by the WTO. Shurtleff fears the WTO decision could erode state powers to regulate

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ First Opinion of WTO WT/DS285/R located at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-00.doc> (Part 1); <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-01.doc> (Part 2); <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-02.doc> (Part 3); <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-03.doc> (Part 4); <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-04.doc> (Part 5); <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-05.doc> (Part 6) (11.10.04).

¹⁸ WTO Appeals decision WT/DS285/AB/R located at http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf (April 7, 2005).

¹⁹ *Id.*

²⁰ Associated Press, *States Urge Trade Representatives to Fight Internet Gambling*, Lexington Herald-Leader at <http://www.kentucky.com/mld/kentucky/news/state/11837596.htm> (June 7, 2005).

gaming.²¹ To further their efforts, Shurtleff and 28 other attorneys general released a letter recently petitioning U.S. Trade Representative Rob Portman to redouble efforts to protect the legal rights of states to ban or regulate forms of gambling.²² This action evidences the rampant governmental fear that online gambling will some day, some way, become a legalized activity. The tide can only be held back so long.

About the Author

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²¹ *Id.*

²² *Id.*