

# **Internet Gambling Legal Or Not?**

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## I. Introduction

Internet gambling is the transformation of casino games of chance and skill to the internet, through the use of technology that recreates the experience found in a land based casino.

The concept of playing a computer-based game while sitting in a multi-billion dollar casino may be a stretch of the imagination for some, but the technology that is moving rapidly towards the internet is in many instances being used everyday to entertain guests and enhance the gambling experience. Many games have an electronic /computer component, unseen and unquestioned by the player. Progressive slots, introduced in the late 1980's by companies such as IGT, combine the pleasure and simplicity of a slot machine with the payout of a multi-state lottery. The participating slot machines are linked via a computer network allowing the sponsor to pool the played monies into a larger more appealing prize. In return the player gets the anticipatory excitement of participating in a lottery sized payout while enjoying the features of their favorite slot machine. Another developer of slot technologies has recently received approval to deploy on Indian Gaming properties, a user selectable slot engine, whereby the requested game is downloaded to the terminal from a server on the casino property after being selected by the user. This functionality also allows the casino to adjust the payback percentage and player point awards depending upon promotions or time of play.

When I began to research the legal concepts surrounding internet gaming, I did so from the perspective of a player, one that has enjoyed the thrill and excitement of free-play (non cash play) and the anxiety of having money on the line. On more than one occasion, I found myself making comparisons between different online casinos in a fashion similar to the comparisons made to the mega-casinos of Las Vegas, Atlantic City, Canada and the islands.

What I've learned, is that the issue (Internet Gambling and its legal consequences) is a misunderstood and incorrectly reported legal concept. The dominant conclusion and most relevant to players and financial institutions, is that in the United States, Internet Gambling is a violation of both state and federal law. When in fact the correct interpretation is more appropriately; it depends.

From a business perspective and more realistic point of view; the Internet Gambling industry is a multi-billion dollar cash cow, with revenues anticipated to grow at double digit rates over the foreseeable future. In April 2004 CNN estimated that "...the online gambling industry was worth \$5.7bn (£3.1bn) last year and is expected to reach \$18.4bn (£10bn) by 2010."<sup>1</sup> With the grotesque amount of money to be made and the potential tax revenues flowing from it, it is reasonable to expect that by 2010 Internet Gambling will be a regulated and socially accepted form of entertainment. The abundance of internet gaming sites, a growing number of professional organizations and numerous jurisdictions providing a legal framework from which to operate, the conclusion is self supporting.

## **II. The world of internet gambling**

Current estimates place seventy-six<sup>2</sup> governments or territories providing or contemplating providing a regulatory scheme to the online gaming industry. Three (3), The State of New Jersey, The State of Nevada and the US Virgin Islands go head-to-head with the current United States Department of Justice (DOJ) perspective. The DOJ has stated that internet gambling is a violation of existing federal law designed to prohibit gambling from crossing state lines. In furtherance of the US Governments position, Congress has debated numerous bills,

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<sup>1</sup> Computing, April 1, 2004, (available in 2004 WL 62911071)

<sup>2</sup>GamblingLicenses.com - Internet Gambling Licenses <<http://www.gamblinglicenses.com/licensesdatabase.cfm>> (accessed 10/24/2004)

with limited results over the last ten years in attempts to ban outright Internet Gambling. The attempts covered criminalizing the activity, hence making the gambler the target of enforcement or making the industry currency of choice (credit cards) unusable for betting purposes. More recently, the Attorney General has looked to stifle the growth of players by attacking the source of information to new players, advertising.<sup>3</sup> The probable outcome of litigation stemming from this action is expected to be that the restrictions are an unreasonable infringement on commercial speech and that the advertisement of a legal and permissible activity in another jurisdiction in one in which it is not is not illegal. New York has numerous billboards carrying adverts for Foxwoods on state highways. The restriction of advertising on the internet would serve no reasonable purpose and accomplish little if the intent is to reduce illegal gambling. The governments' actions conflict with the traditional stance that gambling is a state specific issue, regulated by the individual state(s) and not the federal government with limited exceptions.

Outside the U.S., a number of jurisdictions have taken the lead on developing regulatory schemes for Internet Gambling. Countries and territories with locations as diverse as the English Channel, the South Pacific, the Caribbean, and South America have chosen to provide for the legitimate operation, taxation, oversight and consumer protection one expects when participating in a sanctioned sport or past-time. This has become and will continue to be both an embarrassment and a nuisance for the United States, due in fact that the industry draws more than half its traffic and much of its money from US Citizens or residents.

### ***a. The United States and its Territories:***

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<sup>3</sup> Alan Sayre, *Web site wants free speech for foreign gambling ads*, Associated Press/ USA Today (posted 8/16/2004, available at [http://www.usatoday.com/tech/webguide/internetlife/2004-08-16-casino-ads\\_x.htm](http://www.usatoday.com/tech/webguide/internetlife/2004-08-16-casino-ads_x.htm))

Internet Gambling is not illegal under federal law in the United States of America, with the exception of sports betting. The purpose of specifying the sports betting exemption has to do with the distinct character of gambling. In short, gambling can be separated into distinct parts; games of skill, games of chance, lotteries and sports betting. Each of these activities, are subject to laws and regulations pertaining to it and its subsequent presence on the internet and in the states.

Because of the unique system of government in use in the United States many issues contain oversight by both the individual state and the central government. But when the central government finds it necessary to establish a uniform interpretation of law or through its commerce or foreign relations power dominates, it is referred to as preemption. Through this, it is conceivable that Internet Gambling could fall victim to decisions by U.S. legislators. If this occurs it would spell the legal death knell for Internet Gambling in the United States, resulting in limited, if any, protection for consumers harmed by unscrupulous businesses and operators.

The one area dominated by the central government relating to gambling is in Native American lands. The Indian Gaming Regulatory Act (IGRA)<sup>4</sup> lays out the relationship between the states and the Indian Nation(s) within their borders. Within the IGRA the federal legislature established the rules pertaining to gambling on recognized Indian Tribal lands (sovereign nations) within the individual states in which they sit and how the relationship between the state and the Indian nation must proceed when gaming is at issue. The resulting preemption is that many states that have traditionally not had casino gambling, in many cases, have become Indian Casino havens. Connecticut with its pristine lands finds itself home to the world's largest casino,

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<sup>4</sup> The Indian Gaming Regulatory Act, 25 USCS §§ 2701 et seq. (2003)  
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Foxwoods, owned by the Mashantucket Pequot Tribal Nation<sup>5</sup>. New York, which specifically contains a prohibition against gambling within its constitution,<sup>6</sup> has had extreme difficulty in getting legislation passed relating to casino gambling and the necessary constitutional amendment to the people for decision. But, should you be traveling along the northern spur of the New York State Thruway, stop in and spend some gambling time with the Oneida Indians at the Turning Stone Casino<sup>7</sup>. These are simple examples, ones experienced first hand by me, yet many states have witnessed an explosion of casino gambling due to Federal recognition of the sponsoring tribes and lands. Casino Player magazine carries advertising from many of these and lists even more in the slot payout section at the back of its monthly pages.

The IGRA makes legal any game of chance on Indian Tribal lands, having established federal recognition, which the state allows to the general public. Therefore if the host state allows blackjack during fund raising events for charitable institutions, i.e. volunteer firefighters; then it is required to allow it on tribal lands. One caveat is that the IGRA requires the State and the Indian Nation to negotiate in fairness as to the impact areas of concern to the state. Some items of discussion and compromise are revenue sharing, traffic considerations, and environmental impact.

Earlier I noted that the federal government took small steps at creating a framework for assisting the states in enforcement of their gambling laws. This was done through the implementation of The Wire Act<sup>8</sup>. Its purpose was and is to restrict sports betting within the borders of each state that allow it or in the alternative out of the ones that don't. The Wire Act forbids the use of any wire service (read and understood as the telephone or the telephone

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<sup>5</sup> Foxwoods Casino <<http://www.foxwoods.com/>> (accessed 11/05/2004)

<sup>6</sup> NYS Constitution, , see Article 1, § 9, <<http://assembly.state.ny.us/leg/?co=3>> (accessed 11/05/2004)

<sup>7</sup> The Turning-Stone Casino <<http://turning-stone.com/>> (accessed 11/02/2004)

<sup>8</sup> The Wire Act, 18 U.S.C. § 1084(a)

networks) to place a bet or receive the results of such betting, i.e. you won or you lost. This is only applicable when the jurisdiction that the bet is placed in or sent from does not allow sport betting. For example, you're standing in Nevada and place a bet to the local sports book. No violation here. Both the receiver and the transmitter are within a jurisdiction that allows sports betting. Now move one participant outside of the condoning jurisdiction. In this example, the bettor is in Atlantic City, NJ and the bookmaker in Las Vegas, NV. The result is a violation as, 1) Sports betting is illegal in New Jersey and 2) The placement of the bet is not only in Nevada with the sports book but in New Jersey where the call initiated, in effect the Wire Act reads the action as taking place simultaneously in both places, similar in construction and interpretation to a conversation covered by a wire tap.

One would expect this to apply to the Internet and Internet gambling, but one must define gambling into its component parts before drawing any conclusion. First, there is Internet Sports Betting and then there is Internet Casino style gaming. With the purpose of the Wire Act being to add teeth to the antigambling statutes aimed at curbing the spread and social impact of sports betting, this logically translates to its application to the Internet when sports betting is the purpose. In effect Internet Sports Betting is illegal under federal law if the state in which a bet is placed or received does not allow it under its own laws. On the other hand the Wire Act does not apply to casino style gaming, because these are games of skill and chance and were outside the consideration of the legislators at the time the act was debated and enacted. Furthermore, casino gaming was illegal in most states at the time of the acts enactment and generally speaking one needs to be standing in front of a roulette wheel, sitting at a blackjack table, or leaning over a craps table to play the games. The concept of these games as "virtual" or in a non-traditional

form was far removed from the legislative intent or anticipated future of the drafters let alone the lexicon of the time and aptly does not apply as no reference can be drawn or inferred.

In 2001 the United States District Court for the Eastern District of Louisiana substantiated this position. The court consolidated several credit card cases relating to internet gambling from multiple jurisdictions under the MDL statute. Some of these cases involved plaintiffs attempting to disavow gambling debts incurred on credit cards used for Internet gambling (the credit card is one of the many possible ways of transmitting funds to a gambling account and is likely the most popular), arguing that if the activity was illegal, the debts incurred were illegal and uncollectible under law. The plaintiffs also claimed various violations of the RICO statutes and the sister legislation of the Wire ACT.

In In re MASTERCARD INTERNATIONAL INC., INTERNET GAMBLING LITIGATION, and Visa International Service Association Internet Gambling Litigation, 132

F.Supp.2d 468 (E.D. LA. 2001) the court declared

...a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under [18 U.S.C. § 1084](#). Recent legislative attempts have sought to amend the Wire Act to encompass "contest[s] of chance or a future contingent event not under the control or influence of [the bettor]" while exempting from the reach of the statute data transmitted "for use in the new reporting of any activity, event or contest upon which bets or wagers are based." *See* S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the "Internet Gambling Prohibition Act of 1999." *See*, S. 692, 106th Congress (1999). That act sought to amend [Title 18](#) to prohibit the use of the internet to place a bet or wager upon "a contest of others, a sporting event, or a game of chance..." *Id.* As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committee Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse \*481 racing and other sporting events." *See* 107 Cong. Rec. 16533 (Aug. 21, 1961). Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests.

Concluding clearly, "...internet gambling in connection with activities other than sports betting is not illegal under federal law", *supra*.

This decision both clarifies and clouds the issue relating to Internet gambling in the United States. First the federal government is declared to be a non-participant in gambling except where sports-betting is concerned<sup>9</sup>; as current legislation does not apply to games of chance or most games of skill (experts have determined that Blackjack and Poker are games of skill because the players' knowledge of the game and the mathematics inherent in the game make the decisions of the players influential in the outcome). Finally, this leaves the 50 states and their sister protectorates the sole law relating to internet gambling. As one would expect this leads to a fragmented view as to how this should or can be done.

Three U.S. jurisdictions have taken a proactive approach. Nevada has passed legislation relating to internet gambling and subsequently placed the decision as to how and when it will be applied in the hands of the US' preeminent gaming regulator (the Nevada Gaming Commission) once issues relating to regulation, licensing, taxation, enforcement, identification of participants, consumer protection and the like are addressed<sup>10</sup>.

The New Jersey Assembly has proposed the creation of an Internet gaming study commission through an Assembly Joint Resolution in December 2002 (AJR No. 51, New Jersey Assembly) and the United States Virgin Islands published proposed regulations in November 2002 to develop a regulatory and licensing scheme for internet gambling. Regardless of the acts of the other sister states, the United States as a whole is faced with a potential patchwork of permissive and "dry" environments relating to Internet Gambling.

Over the past few years, the United States House of Representatives and Senate have presented numerous bills relating to internet gambling, most have attempted to criminalize the

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<sup>9</sup> see generally, NY v. World Interactive Gaming Corporation, 185 Misc. 2d 852, 714 N.Y.S. 2d 844 (1999)

<sup>10</sup> Las Vegas Sun, Internet gambling Ok since mid-2001 in Nevada, but no regs yet,

<<http://www.lasvegassun.com/sunbin/stories/sun/2002/feb/21/022110501.html?internet%20gambling>>

activity or ban the use of monetary instruments in connection with Internet Gambling. The prohibitionists, led by Representative Jim Leach and Senator Jon Kyl, have failed multiple times in getting a bill to the president's desk and signed into law. The overwhelming intent of much of this legislation was cutting off the financial resources of betting operators by making it illegal to transfer money in any of its current forms to operators. The New York State Attorney General has managed to convince several major credit card originators, issuers and processors to deny card holders the ability to use cards as a source of funds for gambling, in the end accomplishing through strong arm tactics what the U.S. Congress has failed to do through procedural avenues. On the other hand Representative John Conyers, sponsor of House of Representatives Bill 1223, put forth a proposal to establish a commission to study Internet gambling in order to provide an informed opinion as to the possibility of and how to handle the regulation, taxation and general oversight of the industry.

### ***b. Gambling Jurisdictions outside of the United States***

Unlike the United States with its patchwork of jurisdictions and outright hostile political environment other jurisdictions have embraced the concept of a regulated and controlled online gaming market. Numerous regions provide the technological infrastructure and legal environment to tax, license and regulate internet gambling. Here are but a few, some known and some uncommonly odd.

#### **I. The Caribbean**

- The Caribbean lends itself to a virtual smorgasbord of licensing jurisdictions providing havens for Internet Gaming operators. Areas such as Antigua, The Dominican Republic, and the Netherlands Antilles all provide the necessary groundwork for the creation and launch of an Internet gambling web

site. Many of these areas have stable monetary, infrastructure and political environments that tax and regulate the operators within their respective territories. This governmental supervision, while limited and not necessarily associated with the most transparent of systems, as many are recognized as tax havens, does provide a level of legitimacy for the operator.

- Ironically, Antigua a tiny twin island nation with a large number of Internet Gambling operators filed a complaint with the World Trade Organization against the United States and as of April 2004 has successfully drawn the U.S. to the negotiating table relating to the U.S.'s negative stance on Internet Gambling. The end result could be that due to the trade issues relating to cross border transactions and the internet in general the U.S. may be forced to reevaluate its stance and accept the inevitable.<sup>11</sup>

## **II. Australia and the South Pacific**

- The dominant player in the regulation of Internet Gambling is by far Australia. After being the first to put its stamp of approval on it, Australia went on to develop procedures that many jurisdictions look towards even today when creating their own, very much like many look towards Nevada when drafting regulations relating to land based casinos. In 1997 Australia created the Draft Regulatory Control Model for New Forms of Interactive Home Gambling. The purpose was to develop standards that local jurisdictions could use to create their own regulatory systems as applied to their residents. Overall the concept was to address the local use of interactive gambling services and provide for oversight,

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<sup>11</sup> Caribbean Update, 8/1/2004 (available at 2004 WL 55027265)

taxation, and control as well as address the social aspects of problem gamblers, underage use and so forth.

- Between May 2000 and May 2001, Australia introduced a moratorium period whereby it investigated the effect of interactive gambling and created an additional framework to encompass new services and ways of distribution to the public, i.e. Internet capable cell phones, the use of banking instruments to pay for gambling services and the cost of problem gambling as it relates to the Australian population. The end result in Australia is it is now illegal for Australian residents to use interactive / online gambling services. Their use results in monetary fines to the operator accruing daily for those targeting Australian residents as potential or actual customers. The Australian government has also made it impossible for offshore banking entities to collect on gambling debts created by online gamblers, by effectively making Australian money worthless to money transmitters and facilitators to the online industry all the while allowing operators to continue to offer services to customers from outside of Australia. (A position accomplished through litigation in the United States as there are several credit card companies, Visa and Paypal, do not allow their products to be used for Internet Gambling). To add insult to injury, the Australian government recently concluded that no change is needed on their stance relating to Internet Gambling and has decided to continue to allow the states to address the issue as they see fit.<sup>12</sup>

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<sup>12</sup> Northern Territory News/Sunday Territorian, 6/8/04, (available at 2004 WL 78038011)

- **The Republic of Vanuatu-** during my research I discovered that many of the smaller jurisdictions have made overt attempts to garner the business and revenue that can be generated by legitimizing online gambling. This small island republic in the middle of the south sea has made it possible. Literally in the middle of no where, Vanuatu passed the Interactive Gaming Act in 2000, offering a regulatory environment, taxation, licensing and the like to operators looking to make their home there.

### **III. Channel Islands**

- More aptly known as a tax haven for wealthy investors, these little islands sitting between the United Kingdom and France are rapidly becoming a launching pad for Internet Gambling operators, specifically bookmakers looking for a stable economic and political environment. Sark Island, a small member of this chain with a population of roughly 600 people in the early part of 2003 passed legislation to authorize internet gambling. Oddly enough, while this island authorizes internet gambling and has the technological structure to support it, it doesn't allow its residents to travel by car.

### **IV. North America**

- The Mohawk Territory of Kahnawake provides a regulating and licensing environment for operators of Online Gambling services within Canada. The Mohawk Indians of Canada through their national lands have created what is effectively the Caribbean of the North. Through the use of hosting and telecommunication services they are fulfilling a need being overtly ignored by other governments of the region. The Canadian

Provincial governments operate the casinos and lotteries within their territories and in general prohibit the sale of such products across provincial lines. The existence of the hosting services and regulation by the Mohawk Territory could lead to a clash between the Federal and or Provincial governments, dumping the issue into the courts and the politics therein.

- The upside is that the structure could likely lead to a multitude of hosting environments within the United States, should the US Congress pass and the President sign a bill into law authorizing the operation of online casinos or acquiesce to the sovereignty of the Tribal Nations. The current communication networks have the potential to allow small recognized tribal nations to put in place hosting and regulatory environments similar to the Kahnawake nation.

### **III. Industry Regulators / Self-Regulatory Organizations**

The industry is composed of two distinct units.

The first, the licensing jurisdictions that tax, regulate and provide for the structural legitimacy of the licensed operators'.

Second are the nascent online organizations; effectively trade groups, attempting through the introduction of codes of conduct, arbitration agreements and other self regulatory activities, similarly found in high profile organizations such as the New York Stock Exchange and the NASD, to provide legitimacy and a client directed structure to the industry. The unfortunate downfall to both the industry they serve and the public at large is that industry-based groups in

general are inherently biased as to the outcome of disputes between consumers and members. It is this shortcoming that needs to be addressed before such groups are recognized as legitimizing authorities. For example, the United States securities industry trade group, The National Association of Securities Dealers (now known as the NASD) provides public information relating to registered members, both persons and business, as well as statistics relating to arbitrations, awards, customer complaints and the specific issues raised. Through this it further provides an accepted route to voice concerns and air disputes between customers and members, with an expected procedural chain for the initiation and conclusion of the action. Additionally, through contract (i.e. the arbitration agreements) clients and providers can avert the courts influence and form the industry into one that weeds out the undesirables without government influence. While no one would logically expect such an organization to sprout up overnight, the online gambling industry as a whole should build on the legitimacy created by operating in regulated environments and create such an industry wide multinational trade group. There has been some movement in this direction. John Anderson, in an article printed in Business 2.0's April 2003 issue declared that Casino-on-net.com has joined such a nascent group.<sup>13</sup>

Effectively there exists no regulation to the industry as a whole. This is not to ignore the individual jurisdictions that license and support online operators. Much of their oversight stems from the financial gain involved with the industry and their desire to make sure that the operator has enough capital to pay for the services necessary to establish his business, as the licensing fees range from several thousand dollars to several hundred thousand dollars with trailing fees for each year of operation and the associated cost of telecommunication services, technical services and specialized personnel can add substantial costs to a site operator's budget.

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<sup>13</sup> see generally, Business 2.0 <http://business2.com/articles/mag/print/0,1643,47727.00.html> (accessed April 8, 2003)

#### **IV. What's the difference between Land Based Gambling and Online Casino Style Gambling?**

When compared to the land based games, little difference exists between the contents of the mega structures of the Las Vegas Strip or Atlantic City and the online venues that can be accessed from most anywhere one has a computer and an internet connection. If you remove the cocktail waitress, the free alcohol, clamoring slot machines (which don't make much "clank" in some jurisdictions due to cashless slots or the existence of Video Lottery Terminals (VLT's)), blinking lights and thousands of people, the games played are within reason the same. The land or in some cases the riverboat gambling venues provide the gambler with the same service and at times fewer choices of games to play due to local ordinances determining available games. For example Craps, a popular game in the United States was outlawed in commonwealth countries until a short time ago. The original intent was a Kings' desire to keep his sailors and soldiers from their unoccupied time gambling.

The entertainment concept should remain in the forefront when thinking of gambling in general. Experts tell us that the games are designed to benefit the house, lending credence to the aptly repeated motto, "...Vegas wasn't built on winners", author unknown. Mathematicians conclude that some games are beatable or at the very least can have the odds turned in favor of the player. Without attempting to diverge, the games that offer the player an advantage are Sports Betting, Poker and if played with an advanced level of skill and understanding of its rules, Blackjack. Sport Betting and Poker are games played not against the house but against other players, whereby the house gains a fee from the players for providing the matching services or facilities or both. Blackjack, on the other hand, is a game of dependant trials. Dependant trials

means that the events that transpire during play have a direct effect as to what can happen next. For example, if you are playing at a typical strip casino and an ace appears on the felt there is one less ace to appear later. When the hand is complete that ace is placed in the discard holder along with the other cards that were dealt. When calculating the probability of another ace, or other desired card, the odds change as there are now less aces, 10's, 2's, etc. to appear during the play of the next hand. Card counters have learned to use this skill to adjust bet spreads and decisions to turn the miniscule house advantage to their favor. Of course this changes to complete or as complete a random set of events as possible when one is playing against the new continuous shuffling machines being introduced in many casinos today. The other games, craps, roulette, slots, etc, are games of independent trials. Regardless of the outcome of the last round, there is no relation to the next. Theoretically a slot machine could pay out a dozen jackpots in a row. The result, besides being absolute terror for the house, could theoretically happen.

In here lies the nexus to online gambling, the random number generator or RNG. The RNG creates the random, independent activity one sees when playing slots, replicates the spinning dice when playing a round of virtual craps, and selects the next card during Let-it-Ride, Blackjack or 3 card poker, when played in an electronic format. The accuracy and validity of the online games/software is checked through relationships with audit firms such as Pricewaterhouse Coopers Inc<sup>14</sup> and the developers of the software that drive the online gambling environment. The accuracy and openness of the testing procedures, mirrored and monitored in the real world, provides a baseline to the fairness of the games to the public. When comparing the electronic or virtual to the physical, one only needs to take a stroll through a modern casino where it can be seen that many games are offered virtually at gaming terminals. This author has played blackjack

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<sup>14</sup> Diamond Casino.com <[http://www.diamondcasino.com/fair-gaming.asp?BTag=DC\\_Direct](http://www.diamondcasino.com/fair-gaming.asp?BTag=DC_Direct)>

through a slot machine looking device on the floor of the MGM Grand Casino in Las Vegas and has seen thousands if not hundreds of thousands of people play the extremely popular multi-line video slots from Australia that resemble the Atari games of old more than the one-armed bandits that established the popularity of the slot machine.

The computer has come of age in gambling and the progression towards home-based entertainment is more logical than the prohibitionist policies that have attempted to dominate the field thus far. Many states that have horse racing and other forms of sanctioned gambling also provide for betting accounts, whereby the player funds the account and then either using the telephone or an interactive television terminal selects races, places a bet and awaits the outcome. These gaming accounts have the potential to be applied to lottery subscriptions, cell phone based sports betting and electronic scratch off tickets at the very least. The result is a potential for revenue generation and an expansion into a market that is more technologically savvy than the average player of today.

## **V. How does the Gambler pay for the services?**

If the body of the monster is online gambling then the heads of the hydra is the funding mechanism. Currently, there exist potentially dozens of ways to move funds on the Internet ranging from simple debits of ones' credit card to online checks/ ACH transfers, money transfer services or third party services.

Funding facilitators such as the very popular Paypal<sup>15</sup> allow users to transfer money from one person to another or one vendor to another through deposits originating from a bank account or credit card. Other facilitators have taken a similar approach and have developed systems that drag the modern banking structure well into the 21<sup>st</sup> Century. ACH, Online Checks,

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<sup>15</sup> Paypal.com <<http://www.paypal.com/>> (accessed April 28, 2003)  
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Visa/MasterCard Debit Cards, Virtual ATMS and the common standbys of Western Union and the good old fashioned handwritten check all provide ways for the gambler to fund his account with the online casino<sup>16</sup>. Before anyone should decide to put the breaks on this, take a walk through one of the “legitimate” casinos and ask how you can put your money up.

On a recent trip to Atlantic City, I counted no less than four ways to move money into the cage without actually touching it. While sitting at a blackjack table, I learned that I could purchase gaming checques, commonly referred to as chips, by using my credit card as a cash advance, take a short stroll to the ATM machines, a bank of which were within 25 feet of my table, a line of credit drawn from my checking account (this does require some previous set up with the casino cage), wiring money from my bank to the cage (setup prior is required) to an established account at the cage, and of course the most old fashioned way of doing things, taking cash from my pocket and placing it on the felt between myself and the dealer.

Currently U.S. legislators are moving to restrict the financial avenues that online casinos use to support their customers. The law makers approach is simple, if you can’t prohibit people from participating in the past time; dry up the money and the rest will take care of itself. So goes the theory. In the end, the theory makes it impossible or prohibitively expensive to accept action from the United States<sup>17</sup> or other jurisdictions that look to prohibit its residents/citizens from participating in this form of entertainment. The most draconian of this group is currently the one that pioneered the regulation of online casinos, Australia, where it is currently illegal for any resident of Australia to participate in online gambling and any operator to accept bets from such

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<sup>16</sup> For a brief description of various online payment options available to gamblers visit [http://www.diamondcasino.com/casino-purchasing-options.asp?btag=DC\\_Direct](http://www.diamondcasino.com/casino-purchasing-options.asp?btag=DC_Direct) (accessed October 29, 2004)

<sup>17</sup> A.Lindner, [Opposing I-gaming Bills to Be Heard Next Week in US Congress](http://www.igamingnews.com/index.cfm?page=artlisting&tid=4192), Interactive Gaming News, <http://www.igamingnews.com/index.cfm?page=artlisting&tid=4192> (updated April 24, 2003)

persons.<sup>18</sup> A recent review of the regulatory environment in Australia concluded that a de minimis number of persons, relative to the population of Australia, engaged in online gambling and no further federal action is necessary leaving any additional regulation to the individual states.

## **VI. Who develops the casinos?**

Just like any other business the product must be manufactured, packaged and distributed before it gets to the consumer. A handful of developers dominate the industry and produce a product that creates an environment that provides an online experience players find intuitive and comforting.

Many online casino developers facilitate other relationships necessary to the online casino. Just like their land based brethren, an online casino must provide a way for its players to fund their exploits; it must also provide a venue to visit and in the end must establish a sense of fair play between itself and its players.

In the beginning, and literally in the biblical sense of the word, there were a handful of software developers providing the licensing connections in island nations, necessary to establish a base of operations, money processing systems and banking relationships and the software to create a turnkey casino operation. During the late 1990s it was as simple as placing a call or sending an email to the software developer and the rest was handled by a customer service representative. Today, the establishment of such an operation can be done with the aid of a service partner and little outlay of funds. Back then the popular place to establish an online casino was Antigua, still today a substantial supporter of Internet Gambling

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<sup>18</sup> RGT Online news, [Australian Laws Not Stopping Online Gambling](http://admin.rgtonline.com/newspage2/detail.psp.q.All.e.(!0001c97f!).a.htm), from the Sidney Morning Herald, April 26, 2003 <[http://admin.rgtonline.com/newspage2/detail.psp.q.All.e.\(!0001c97f!\).a.htm](http://admin.rgtonline.com/newspage2/detail.psp.q.All.e.(!0001c97f!).a.htm)>

As the industry is still in its infancy, being by rough calculations fifteen years old, there exist a substantial number of providers that customize what has become off the shelf software, not to mention the various providers of web based java clients providing for a non-downloadable experience<sup>19</sup>. This is not as bad as it looks; consistency is just one more of the many legs necessary to place under the industry to build legitimacy. When potential customers can move from venue to venue, web site to web site and determine the source of the software they are playing, they in turn develop a level of expectation leading to comfort. For example, go to a McDonalds in New York and order a hamburger, now travel to any other McDonald's restaurant and order another hamburger. Aside from the various ways of preparing it akin to local custom, i.e. ketchup and mustard, the product is the same. This continuity and cookie cutter process has contributed to making McDonalds what it is today. The online casino industry has similar participants. The list according to Excellent-online-casinos.com is rather extensive. Two of the oldest participants are Bossmedia<sup>20</sup> and Microgaming<sup>21</sup>. These two software manufacturers develop front and backend systems to create the gambling experience. While it is not necessary to expand upon the relationships that these participants have created, it is safe to say that many gambling sites that one would come across while surfing the World Wide Web, most likely would, have a relationship with either of these two companies.

## **VII. What is the likely result for the American Gambler?**

America's paternalistic legislators have over the last several years attempted to ban Internet casino style gambling. This was done through either attempts at outright bans or amendments to the Wire Act. Prior to 2002 the dominant point of view from the US Department

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<sup>19</sup> Blackjack21, <<http://blackjack21.casino-builder.net/>>, see also My Casino Builder <<http://casino-builder.net/>>

<sup>20</sup> Bossmedia, <<http://www.bossmedia.se/>>

<sup>21</sup> Microgaming <<http://www.microgaming.com/>>

of Justice was that online gambling violated the Wire Act and therefore was illegal, unfortunately they maintain the same myopic view echoed by others. The Federal Court in the Eastern District of Louisiana declared that this is not so, when games of chance or skill are at issue. This declaration further stoked the fires and resulted in a move to circumvent current laws through the introduction of legislation making it nearly impossible to pay for gambling services.

The American gambler is faced with a dilemma. On one hand, the federal government does not regulate gambling, except as it relates to Indian gaming and within limits Sports Betting. Therefore, the decision is left up to the states to decide as to the legality of Internet Gambling or other forms of gambling for that matter as most states have some form of gambling whether a state run lottery, scratch-off games, horse racing, or Indian gaming. Another point is that the understanding of the legislators and the legislatures as a whole is well behind what is necessary to make an educated decision on how to proceed with this opportunity. This is not to say that all or even most lawmakers don't have what it takes to make a decision that would benefit the public at large, but it must be realized that government is not generally in the business of protecting people from themselves. The fact remains that computers and socially accepted gambling are generational issues. With thirty years between my father and myself, I was the one to expose him to a casino and a computer. The social aspects are seen daily on television, just look at the current Dell commercials following the exploits of college-aged interns or the World Series of Poker on cable. Gambling and computers are parts of a world very different from what most lawmakers see as moral. The prohibitionist attitude and proposed legislation all point to the decision that we as consumers cannot decide for ourselves what is good and what is not.

The system as it exists in the United States provides for a bright avenue out of this quandary. Action by the individual states may very well put an end to the clamoring in Congress.

As specified in the 10<sup>th</sup> Amendment to the Constitution, what is not specifically delegated to the federal government is reserved to the states. Gambling is one of those areas. Indian Gaming falls under the commerce clause and foreign relations powers of the federal government but local, purely domestic gambling is reserved to the states. For example, New York can choose to have a state lottery even if 49 other states choose to make theirs illegal and discontinue operations. It simply doesn't matter. On the other hand, if New York, like Nevada decides to allow Internet gambling operators to conduct business with New York gamblers and legislation has been proposed requiring such operators to register with the department of state for service of process and disclosure purposes, then the federal government has little to say. The feds do have one determinative way of making Internet gambling illegal. If they choose to dominate the field, they can preempt the state laws relating to Internet gambling entirely. It is unlikely that this will occur. First, as Tevya would say, TRADITION. The United States government has not attempted to regulate the conduct of the individual states relating to gambling. The Wire Act and its kindred were not designed to make gambling illegal but to support states that chose to keep it from within its territory; therefore, it had little effect within Nevada as the state allowed the conduct.

Major players in the Las Vegas Casino market have moved to embrace online gambling. Both MGM Mirage and the parent company of the Venetian Hotel and Casino have addressed the potential of online gambling and have either applied for or gained an operators licensed from a foreign jurisdiction and the Atlantis Casino in the Bahamas recently discontinued its online presence due to similar concerns. As of this writing, changes in the legal environment have made them rethink their position on the issue and remains up in the air. Realistically speaking this activity could only drive their brand names and build a base of clients for both business

entities to exploit. During an episode of modern business on the history channel, approximately two years ago, Philip Satre the chairman of Harrah's Entertainment specifically noted that new mediums (the internet) will be the frontier for entertainment companies to exploit in the future. All participants acknowledge that there are realistic hurdles to cross and in many cases agree with the concerns of the legislators; most have concluded that the concerns relating to gambling, i.e. underage participants, debt, abuse, fraud, etc. can be addressed with the technological tools available today. In its most basic form, trace route tools can reasonably locate a computer in the very country if not the state from which it is connected. Other services used in the prevention of fraud, Autocheck, Choicepoint, and VerifyMe can be used to provide age verification and identity confirmation for online patrons in real-time. Combine this with a compliance engine designed to coordinate these tools and one could restrict access based on several criteria. The other issues can be addressed with anti-gambling programs, similar to the anti-smoking campaigns today and be funded through money garnered from the taxation, regulation and licensing fees of operators.

The immediate conclusion that many legislators in the United States must face is that Americans gamble and the legislator's current choice of action is to arrest the gambler or shut down the site. Since arresting the gambler would probably result in a public outcry sure to drag home and privacy issues into the mix, the only course left is to arrest operators. Claims of lack of jurisdiction are flimsy at best. Zippo<sup>22</sup> established some of the basics of jurisdiction on the internet and International Shoe<sup>23</sup> providing the substantial contacts test, have led to effective jurisdiction over many operators that violate state laws. The reality, while one may violate the

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<sup>22</sup> Zippo MANUFACTURING COMPANY v. Zippo DOT COM, INC., 952 F.Supp. 1119, 65 USLW 2551, 42 U.S.P.Q.2d 1062 (W.D. Pennsylvania 1997)

<sup>23</sup> International Shoe v. State of Washington, Office of Unemployment Compensation and Placement, et al., 66 S. Ct. 154 (1964)

law, gaining physical control over a defendant is difficult if not impossible if they don't respond to charges. Conceivably a state could require an operator to post a bond based on anticipated revenue drawn from the state in order to create a pool from which to draw reimbursements to players in the event of misconduct.

The American legislator must face facts, this is one instance that must be regulated and not prohibited. Just as the prohibition of alcohol made millionaires of those that choose to supply their customer with what they wanted, online casinos will continue to supply to their customers the games they wish to play and in turn will deny desired tax revenue to those jurisdictions that choose to prohibit it, all the while costing potentially millions of dollars in meager attempts at enforcement.

## **VIII. Proposed Regulatory Framework**

Now that we have concluded that online gambling is here and will probably outlive the very people that are looking to ban it. I would like to take the time to propose a framework to regulate the industry. Considering the structure of the United States and the dual system of government in place, it is my recommendation that Congress take the lead and formally authorize Internet Gambling, at the same time allowing the individual states to either allow or ban Internet Gambling as they see fit without restricting the transmission of gaming services, data or information, relating to internet gambling on the communications networks within their borders.

A similar dual structure exists in the securities industry. Commonly referred to as Blue Sky laws, each state regulates the types of securities offered and sold to its residents/citizens. On one hand the Federal Government would not be stepping on the police powers of the states as it

relates to gambling but in affect sharing the field, while maintaining a dominant position based on both the commerce clause and the inherent foreign relations powers provided by the U.S. Constitution. This action would eliminate the refusal of states to carry the communications of betting information over their domestic telecom systems.

A closely related case involved The Coeur D'Alene Tribe and AT & T corp.<sup>24</sup> where the telephone company refused to provide toll free service to the Tribe for operation of their lottery. The case decided by the ninth circuit concluded that AT&T was not required to furnish service in any state that informed it that the lottery would violate its laws. Toss in the Arizona train case (through analogy), whereby Arizona restricted the length of trains traveling through its borders, and one can easily conclude that a state that wished to offer Internet Gambling could effectively be cut off by the actions of other states, hampering their rights of participation and the benefits anticipated.

Looking towards the framework of the regulatory body, a group of students from the School of International Public Affairs of Columbia University<sup>25</sup> have proposed creating a regulatory body within the Federal Trade Commission. While this consideration would take into account the already available personnel and structure of a regulatory body, this author believes that the FTC is not only incapable of dealing with online gambling in an effective manner but lacks the necessary specialized knowledge of the industry and its component parts to make the launch of such a regulatory arm worthwhile.

When developing a regulatory body for this, the specifics that must be covered and dealt with. They are:

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<sup>24</sup> AT&T Corporation v. Coeur D'Alene Tribe, 295 f.3d 899 (2002)

<sup>25</sup> William B. Eimicke, Faculty Advisor, School of International and Public Affairs, The Future of Internet Gambling, Fall 2002 Policy Workshop

- 1) the social implications of gambling,
- 2) money laundering,
- 3) consumer education,
- 4) consumer protection,
- 5) operator oversight,
- 6) operator protection,
- 7) Funding the mechanism,
- 8) Disclosure of principals,
- 9) Payment of funds to winners,
- 10) Self banning of gamblers,
- 11) Vetting of Principals, who makes the decisions and controls the funds and casinos

The organization would fund itself with fines, licensing fees and revenues derived from the relationship between the agency and the operators, similar in function as the gaming compacts between American Indian Tribes with gambling establishments and the states in which they reside. This is not a symbiotic business relationship but a progressive tax structure based on the funds flowing in and out of the operators and their clients' related accounts. The regulatory body should not be a federal entity but a government sponsored corporation, which leads us to item number #2. With the great concern of money laundering and terrorist activity attached to "dirty money", the current legislation known as the USA Patriot Act would apply to the movement of and the beneficial owners of the funds. Account information similar to that garnered on a new account form from almost any online securities broker dealer would provide the foundation, and combined with the identity verification mechanisms available today, i.e. VerifyMe, Choicepoint, etc, should sufficiently reduce the possibility of illicit activity. Additionally, taking a page from history, the initial licensing scheme should be directed at the operators. As Nevada once allowed only individuals (real persons, not corporations) to hold casino licenses, the initial stages of internet gambling regulation should do the same. By doing so, a formal face and name can be associated with the service. Additionally there will be no confusion as to who will be called to task when illegal activity occurs. Mind you, numerous

proponents of the banning movement have laid claim that Internet Gambling provides an avenue for terrorist financing and money laundering in general. While no empirical evidence was found during my research, the concern in and of itself is legitimate and should not be taken lightly even though the reality may prove itself unworthy of the concern.

Add to this mix an oversight committee with audit powers and an enforcement mechanism; problems, i.e. complaints, concerns, inappropriate business behavior, could be dealt with, without stifling the growth of the industry and the enjoyment of its patrons.

Operator and consumer oversight while serving different purposes relate to the same outcome; to make sure that all parties abide by the rules of professional conduct and fair play. Through regular audits, published financial statements and related persons disclosure; all that benefit from or participate in online gambling have the potential of being treated fairly and equally.

Though listed first, the final concerns are the social implications. To some the social issues relate to the use of the funds gained by the regulatory body and the programs that can and should be created to benefit the public. Just as the increased taxes on cigarettes play a role in the reduction of teenage smoking, funds gained through taxation or revenue sharing can be applied to educate the consumer about the entertainment value and responsibilities of online gambling, the creation and enforcement of a self imposed and operator directed opt-out program for persons that are predisposed to compulsive behavior or have been banned by operators due to excessive losses within a compressed period of time and to the treatment of compulsive gamblers.

The bottom line, while government can't stop something that it understands little about; it can take steps to control it with a little help from the industry itself. Many software manufacturers produce client tracking systems used by land casinos. This software could be

applied online by creating a central database of clients and players, their betting habits, losses (for tax purposes) and if they have been banned from or have chosen to self-ban or opt out of play.

Before anyone decides that this is a large order to fill, let's look at the alternative. In order to block access to each and every gambling site on the web the federal government would have to filter all IP addresses through a central Domain Name Server, effectively turning over control of the free flow of ideas to bureaucrats, creating a system similarly imposed by nations that have deemed the content and advantages of the web to be a threat to their very existence. Within the last year, there have been discussions in the United Nations to create an oversight board to manage the internet; the proponents of this action included numerous regimes known for their disregard for the individual and his rights, nations such as Libya, Vietnam, China, etc.

Internet Gambling is here to stay. An attempt to regulate it is the only legitimizing action a government can take. Just recently, the United Kingdom has decided to address the legitimacy of Internet Gambling in its newest gambling bill, South Africa while having chosen not to address it specifically has noted that it may become an issue in the near future and Australia has concluded that the existence of Internet Gambling in its current form requires no additional regulation and shall leave any new regulations to the states at this time.

In the end, if other major governments find the need, and the ability to regulate Internet Gambling, how can the United States state that it can not be done if others have already done it?

One last item; Internet Gambling not only refers to the playing of casino style games via a computer, it extends to other electronic mediums such as the multimedia cell phone, handheld computing devices, interactive television, and the like. Some state governments have already embraced these technologies, in support of the horseracing industry and lotteries.

It is only a matter of time before the spread becomes uncontrollable.