

LEGALIZING INTERNET GAMING, PART 1: BENEFITS AND CONCERNS

By Glenn Light and Karl Rutledge

The Internet is the most powerful tool a gaming operator has to disseminate its gaming business to participants worldwide. Simply, the Internet has a global reach that a brick-and-mortar casino does not. Moreover, the overhead associated with starting and maintaining a website pales in comparison to that associated with land-based casinos. At the advent of the Internet, however, many countries and states felt their borders and laws threatened and thus sought to ban online gaming. The efficacy of Internet gaming and the overwhelming budgetary shortfall have again brought discussion and credence in its push for regulation. Accordingly, over the next several months, we will discuss the potential challenges to its legalization, the pros and cons of legalization as well as several topics that state governments contemplating the legalization of online gaming should be prepared to address.

Internet gaming is not a new notion. For about 16 years, gaming has had an online presence. Several countries, including Malta and Alderney, were quick to reap the benefits associated with online gaming and have established themselves as leading regulators of the online gaming industry. Malta, for instance, has established a regulatory framework that caters to all kinds of remote gaming (including casino type games, sports betting, poker, bingo and lotteries) and also provides for licensing of gaming platforms. Since 2004, Malta has received more than 450 applications for remote gaming licenses and boasts a labor force of 2,085 employees who are directly employed in the remote gaming industry.¹ In contrast, other countries like the U.S. have feared the legalization of online gaming for a myriad different reasons and have thus either ignored calls to legalize the industry or have outlawed such activity.

With specific regard to the U.S., the concept of legalizing online gaming has existed in the country for over a decade. Indeed, in 2001, the Nevada Legislature passed a law authorizing the Nevada Gaming Commission, working in conjunction with the Nevada Gaming Control Board, to explore Internet gaming regulations governing the licensing and operation of Internet gaming. In passing this legislation, the Nevada Legislature foresaw a gaming system available nationwide operated by Nevada companies, thereby generating tremendous tax revenue for the state.

Prior to regulations being adopted, however, the legislation required Nevada regulators to examine Internet gaming systems and make a determination if it could be effectively regulated. Even if the regulators concluded that Internet gaming could be sufficiently regulated, the Nevada Legislature required that they also verify if Internet gaming could be operated in conformity with federal law. Accordingly, the United States Department of Justice (DOJ) advised Nevada regulators in 2002 that, in its opinion, federal law prohibited gaming over the Internet, including casino-style gambling. This assessment effectively ended Nevada's efforts to legalize, regulate and tax interstate Internet gambling.²

Yet, leaders in Nevada, like those in California, Florida, Iowa and New Jersey, recently revisited the Internet gaming issue in terms of intrastate Internet gaming.³ At the beginning of this past year, Iowa, like most states across the U.S., was looking for revenue to shore up its state budget. Accordingly, a bipartisan group of state lawmakers proposed intrastate poker legislation as a solution. The proposal would have allowed for Iowa residents to deposit between \$50 and \$500 into a special account at one of Iowa's casinos. That account could then be used to play poker online from computers situated in Iowa. The proposal, however, was not met with much interest and, consequently, it did not proceed. One likely reason for the disinterest was due to Iowa's small population, and the recognition of insufficient player liquidity to run an intrastate online operation.

In contrast, in early January 2011, the New Jersey Legislature passed the Intranet-State Internet Gambling bill, which will allow residents of the state to participate in Internet wagering at New Jersey casinos and racetracks. The bill will now head to the desk of Gov. Chris Christie for his signature. Once signed, New Jersey will become the first state to regulate Internet gambling. The bill creates an intrastate system of online portals, run by casinos, to allow state residents to gamble on a variety of games, including poker. New Jersey boasts a population of almost 9 million people, and as a consequence, the bill's sponsor, Sen. Raymond Lesniak, D-Union, has estimated that the bill would bring in up to \$37 million in new gaming revenue.⁴ In light of the current financial markets, this figure speaks volumes. Accordingly, the list of states eyeing Internet

gaming to augment declining state revenues will undoubtedly increase.

However, before a state ventures into legalizing Internet gambling, consideration must first be given to the federal laws of the U.S. and the parameters they might impose. Historically, the DOJ has considered even intrastate wagers as a violation of the Federal Wire Act. The Wire Act, 18 U.S.C § 1084, is the statute cited most often as having direct applicability to Internet activities. The act prohibits using almost any known interstate telecommunications medium for transmitting bets or wagers, or information assisting in placing bets or wagers, on any sporting event or contest.

Aside from the debate as to whether the Wire Act even applies to betting on non-sports gaming (which the DOJ maintains it does, despite the Wire Act explicitly enumerating “sporting event or contest” with the word “sporting” predicated both the word “event” and “contest”), the DOJ also has maintained the view that a transmission is in “interstate or foreign commerce” for purposes of the Wire Act if the transmission is routed across state or national boundaries, even though the transmission begins and ends in the same state. Specifically, in testimony before the Congress, a DOJ representative noted: “[The pending bills also permit] ‘intrastate’ wagering over the Internet without examining the actual routing of the transmission to determine if the wagering is ‘intrastate’ versus ‘interstate.’ Under current law, the actual routing of the transmission is of great importance in deciding if the transmission is in interstate commerce. The department is concerned that these two proposals would weaken existing law.”⁵

This position is contrary, however, to the very reason that Congress adopted the Wire Act, which was to assist the states in enforcement of their own state policy toward gaming. This was even previously acknowledged by the DOJ. In earlier testimony before Congress, another DOJ representative stated: “That being said, 18 U.S.C. 1084—the Wire Communications Act—currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest. This law was originally enacted to assist the states and territories in enforcing their laws and to suppress organized crime involvement with gambling.”⁶ For example, the Ninth Circuit has held that the criminal provisions of § 1084 are not applicable to the activity of licensed pari-mutuel wagering where it is lawful under state law.⁷

Moreover, the Unlawful Internet Gambling Enforcement Act (UIGEA) appears to have clarified any confusion. In defining “unlawful Internet gambling” the UIGEA carefully excluded from the term conduct involving intrastate Internet betting or wagering.⁸ In fact, the UIGEA specifies that “[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received or otherwise made.”⁹ Accordingly, the routing of electronic communications constituting bets and wagers through other states will not destroy their intrastate character, as long as the communications are initiated and received in the same state. Thus, bets and wagers initiated and received in the same state, where such bets and wagers are expressly authorized by and placed in accordance with that state’s laws or regulations, do not constitute unlawful Internet betting or wagering under the UIGEA and should not constitute interstate wagering under the Wire Act.

In summation, Internet gaming has been and remains big business in the U.S. Residents from all states access illegal gaming sites on a daily basis to place their wagers. As a consequence, players are vulnerable to exploitation as no regulatory framework exists to govern these websites. Whereas governments are losing out on considerable tax dollars that could otherwise be collected if the

activity were regulated. In light of these benefits, more and more states have begun to seriously consider the regulation of Internet gaming. However, as we addressed at the beginning of this article, before any jurisdiction decides to legalize this business, several key issues should first be considered. First and foremost, the state should give serious thought as to whether such activity will violate federal law. Consideration also should be given to the regulatory framework that will be adopted to regulate and tax the industry. In addition, consideration should be given to such societal concerns as the prevention of underage and problem gaming. Finally, there are technology issues that must be explored, such as maintaining the integrity of the website and ensuring all transactions are secure. All of these issues will be the focus of our upcoming articles in this new series.

1 Malta - A Place to Do Good Business Fact Sheet, Malta Lotteries and Gaming Authority, www.lga.org.mt/lga/content.aspx?id=107696.

2 While Senate Majority Leader Harry Reid pushed a bill that would have regulated online poker federally at the end of 2010, opposition eventually ended any efforts to even make online poker legal.

3 “Intrastate transactions” are generally defined as bets made over the Internet exclusively within a single state, or within a tribal jurisdiction.

4 Juliet Fletcher “Assembly committee approves amended New Jersey Internet gaming bill,” PressofAtlanticCity.com, Dec. 9, 2010.

5 Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, Department of Justice, April 5, 2006.

6 Statement Of Kevin V. Di Gregory, Deputy Assistant Attorney General Criminal Division, Before the Subcommittee on Crime Committee on the Judiciary, U.S. House of Representatives, Concerning Gambling on the Internet, Presented on June 24, 1998.

7 *U.S. v. Donaway*, 447 F.2d 940, 944 (9th Cir. 1971).

8 31 U.S.C. § 5362(10)(B).

9 31 U.S.C. § 5362(10)(E).



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