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CRIMINALIZING INTERNET GAMBLING: SHOULD THE FEDERAL GOVERNMENT KEEP BLUFFING OR FOLD?

Wesley Scott Ashton*

Introduction

Worldwide, millions of people gamble on Internet gambling sites, generating billions of dollars of online revenue. Many of these online gambling operations presently accept bets from United States citizens in violation of U.S. federal laws. Most of these Internet gambling operations are based in foreign jurisdictions where Internet gambling is legal. Consequently, it is rare for the U.S. Government to prosecute these crimes. In addition, other changes to the gambling landscape in the U.S. and the world, such as the rise in state-sponsored lotteries, the growth of gambling operations on Native American reservations, and the increase in mainstream foreign investment in online gambling, beg the question: should the Federal Government continue to bluff on the issue of outlawed Internet gambling, or is it time to fold and encourage the creation of state and federal mechanisms for constructively regulating this industry?

This paper first describes the various aspects of Internet gambling, and then reviews the U.S. criminal laws that apply to gambling conducted online. As part of this review, several criminal and civil cases involving Internet gambling activities are discussed. Finally, how the rapidly changing gambling landscape in the United States and the world may affect future federal lawmaking efforts for controlling Internet gambling is considered.

The Evolution of Internet Gambling

In 1999, there were 700 Internet gambling sites.¹ However, by 2004 more than 1,800 offshore gambling Internet sites received about seven billion dollars in bets, with the online gambling industry projected to be an 18.4 billion dollar per year industry by 2010.² Internet gambling sites offer a variety of gambling venues, such as casino-style gambling, off-shore sports booking operations for betting on sporting events and horse races, etc., and, recently, increasingly popular interactive Internet party poker games. A brief explanation of how these various Internet gambling sites operate follows.

An Internet gambling casino is designed to mimic a real casino, and the gambler is typically invited to download gambling software, open an account, wire money to the account to purchase virtual "chips," before the gambler may proceed to play various online games of chance such as slots, blackjack or roulette.³ The outcomes of play are determined by a random number generator.⁴ The winnings are credited to, and the losses are debited from, the user's account.

Another Internet gambling business model is patterned off of bookmaking on sporting events, where the gambler opens an account and then can place bets on various sporting events.⁵ Internet bookmaking activities may charge a commission, called a "vig," on each bet. The vig can be as high as 10% of the total

bet. Similar to the online casino, the winnings are credited to, and losses and fees are debited against, the gambler's account.

A recent addition to Internet gambling is the formation of online poker sites where players log-on to play against other players.⁶ Under this business model, the website operator does not directly participate in the gambling; instead, the web operator manages the poker pot while the players gamble between themselves. The website's random number generator determines what cards the players get and the web operator takes a cut, called a "rake," of each pot, which is the total amount of money bet in a single game. Typically, the rake is 2 to 5 % of the pot. Under this model, the operator of the online poker site does not gamble against the poker players. Only the poker players are gambling, and they gamble against one another.

Federal Laws Applicable to Internet Gambling

There are many federal laws applicable to Internet gambling activities, including (1) 18 U.S.C. § 1084, known as the "Wire Act," which criminalizes the use of interstate telephone facilities by those in a gambling enterprise to transmit gambling-related information, (2) 18 U.S.C. § 1952, known as the "Travel Act," which criminalizes the use of any interstate facility with intent to promote an unlawful activity such as illegal gambling, (3) 18 U.S.C. § 1955, known as the "Illegal Gambling Business Act," which prohibits illegal gambling businesses involving five or more persons, (4) 18 U.S.C. §§ 1956 and 1957, which criminalize money laundering, and (5) 18 U.S.C. §§ 1961 and 1962, which outlaw racketeer influenced and corrupt organizations.⁷ While other federal gambling statutes may conceivably apply to Internet gambling activities, the present article is limited to discussing the seven statutes listed above.⁸

The Wire Act

The Wire Act⁹ pertains to (1) persons engaged in the business of betting or wagering, who (2) knowingly use a wire communication facility (i) for the transmission of bets or wagers, or information assisting the placement of bets or wagers, in interstate commerce or foreign commerce on any sporting event or contest, or (ii) for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or (iii) for information assisting in the placing of bets or wages.¹⁰ However, the Wire Act includes a "safe harbor" provision which exempts from criminal liability the transmission, in interstate or foreign commerce, of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from which a state or foreign country, where betting on that sporting event or contest is legal, into a state or foreign country in which such

betting is legal.¹¹

In other words, the Wire Act prohibits persons engaged in the business of betting or wagering from using interstate telephone facilities to transmit gambling related information. More specifically, the Wire Act prohibits the transmission of any gambling related information and it prohibits the transmission of sports bets. Because the Wire Act is addressed to persons “engaged in the business of betting or wagering,” it applies to those persons operating a betting or wagering business, but not to the customers (i.e., the bettors) who use the services of the business. In order to apply the Wire Act to Internet gambling, the government needs to prove: (1) the website is engaged in the business of betting, (2) the website owner knows that the bets are being transmitted through a wire communication facility, (3) the bets are being transmitted in interstate or foreign commerce, and (4) the Internet gambling business or the players are able to receive money or credit as a result of the bets.¹² However, the scope of the Wire Act may be limited to gambling on sporting events or contests, and may not apply to other forms of Internet gambling such as the virtual casinos or online poker sites.¹³

While the Wire Act has not been invoked extensively in combating illegal gambling, it has been applied to at least one published appellate case of Internet gambling: *U.S. v. Cohen*.¹⁴ In *Cohen*, defendant Jay Cohen had moved to Antigua in 1996 and established himself as President of World Sports Exchange (“WSE”), a bookmaking business patterned after New York’s Off-Track Betting.¹⁵ WSE’s business involved bookmaking on American sports events and was not limited to gambling on horse races.¹⁶

WSE operated an “account-wagering system,” wherein new customers would open an account with WSE and wire at least \$300 into WSE’s Antiguan bank account.¹⁷ A gambler seeking to place a bet would then contact WSE via either telephone or the Internet to bet.¹⁸ WSE would then issue an immediate, automatic acceptance and confirmation of the bet and would subtract losing bets from the gambler’s account and credit winnings to this account.¹⁹ WSE also made money by retaining a “vig” or commission of 10% of each bet.²⁰ WSE advertised its bookmaking operation in the United States by radio, newspaper and television.²¹ WSE’s customers were primarily gamblers located in the United States.²² WSE was successful, and in one fifteen-month period WSE collected about \$5.3 million dollars in funds from U.S. gamblers.

The FBI investigated WSE’s bookmaking operation. FBI agents called WSE from New York, where sports-betting is illegal, and opened accounts and placed sports bets with WSE in Antigua, where it is legal.²³ In 1998, Cohen was arrested and, after a 10-day jury trial, was convicted of five counts of violations of 18 U.S.C. § 1084(a).²⁴ Cohen appealed the Wire Act convictions alleging that (1) the safe harbor provision of 18 U.S.C. § 1084(b) should have been applied, and (2) the government had not shown that Cohen had “knowingly” violated the statute.²⁵ Cohen’s appeal also requested the 2nd Circuit invoke the rule of lenity and reverse the conviction on the grounds the statute was too unclear to provide adequate warning of what conduct is prohibited.²⁶

The 2nd Circuit ruled that the safe harbor provision of 18 U.S.C. § 1084(b) pertains to transmissions wherein (1) bet-

ting is legal in both the place of origin and the destination of the transmission, and (2) the transmission is limited to mere information that assists in the placing of bets as opposed to including the bets themselves.²⁷ Cohen argued that betting was legal in both Antigua and in New York, and that the transmissions by the customers merely assisted in the placing of bets, which was affected in Antigua by WSE. The 2nd Circuit rejected both of these arguments.

First, the 2nd Circuit opined that there was no doubt betting was illegal in New York, which expressly prohibits betting in its Constitution²⁸ and in its General Obligations Law.²⁹ Therefore, the 2nd Circuit concluded the safe harbor provision, 18 U.S.C. § 1084(b), did not apply to Cohen’s case as a matter of law.³⁰ Next, the 2nd Circuit rejected Cohen’s argument that WSE’s account wagering system used transmissions between gamblers and WSE containing only information enabling WSE to place bets in Antigua on behalf of its customers.³¹ The 2nd Circuit noted that WSE could only place bets its customers had requested and authorized to be booked. Therefore, the 2nd Circuit concluded that, by making betting requests and having these requests accepted, WSE’s customers were placing bets, which is conduct falling squarely in violation of § 1084(a) and outside the scope of the safe harbor provision of § 1084(b).³²

The 2nd Circuit also rejected Cohen’s argument that he lacked the requisite *mens rea* to sustain a conviction.³³ The 2nd Circuit ruled that it was only necessary for the government to establish Cohen knowingly committed the deeds violating § 1084(a), not that Cohen intended to violate the statute.³⁴ Therefore, the court concluded that Cohen’s admission that he knowingly transmitted information assisting in the placement of bets was sufficient to satisfy the *mens rea* requirement of the statute.³⁵

Regarding whether lenity should be granted by the court, Cohen argued the statute did not provide fair warning of (1) whether the phrase “bet or wager” included WSE’s “account wagering,” (2) whether “transmission” included receiving information as well as sending information, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction in order to be considered “legal” in that jurisdiction.³⁶ The 2nd Circuit rejected all of Cohen’s arguments for lenity.

Specifically, the 2nd Circuit explained the rule of lenity applies where there exists a “grievous ambiguity” in a statute such that a court would have to “guess” as to what Congress intended.³⁷ In this case, the 2nd Circuit ruled that § 1084(a) was clear so lenity would not be applied.³⁸ With respect to “bets or wagers,” the 2nd Circuit held it was clear that WSE’s account-wagering was in fact “wagering” because a gambler would request a bet by telephone or via the Internet and WSE would accept the bet.³⁹ The 2nd Circuit explained that WSE’s requirement for gamblers to maintain a fully-funded account as a condition to place bets did not obscure the issue.⁴⁰

Regarding the term “transmission,” the 2nd Circuit noted that Cohen had used two wire facilities, the telephone and the Internet, and had marketed these facilities to the public for the express purpose of transmitting bets and betting information.⁴¹ The court noted that Cohen had received transmissions from customers placing bets, and in response, sent acceptance and confirmation transmissions back to these

customers. On these facts, the 2nd Circuit concluded that it was clear that a “transmission” in accordance with § 1084(a) had occurred whether the signal was the betting information provided by the gambler or the confirmation signal provided by WSE.⁴²

Lastly, with respect to Cohen’s third argument, the 2nd Circuit ruled it was plain to all that an act must be permitted by law to be legal.⁴³ The 2nd Circuit reiterated that the safe harbor provision of § 1084(b) was clear and did not apply to the facts of Cohen’s case.⁴⁴

The Travel Act

Under the Travel Act⁴⁵, it is unlawful for a person to (1) use any facility in interstate commerce, (2) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity (i.e., a business enterprise involving illegal gambling), and (3) thereafter perform or attempt to perform any of the following acts: (i) distribution of the proceeds of the unlawful activity, (ii) commit any crime of violence to further the unlawful activity, or (iii) otherwise act to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of the unlawful activity.⁴⁶ Under 18 U.S.C. § 1952(b) of the Travel Act, any business enterprise involving gambling in violation of the laws of the state in which the acts are committed, or in violation of the laws of the United States, is an “unlawful activity.”⁴⁷

Stated otherwise, it is a federal crime to use a facility of interstate commerce to promote, manage, establish, carry on or facilitate any unlawful business enterprise involving gambling, where the gambling enterprise violates either state or federal law. It is important to realize that the Travel Act criminalizes the use of both interstate and foreign facilities in furtherance of unlawful gambling, and not the violation of state law.⁴⁸ Consequently, it is not necessary for the government to prove that a state crime was ever completed.⁴⁹ Furthermore, the Travel Act does not define the term “gambling” per se, so it is likely that Travel Act violations encompass any form of Internet gambling prohibited either by the state or federal law so long as a facility of interstate or foreign commerce is employed.⁵⁰

At least one state court has concluded that gambling via the Internet from New York to an offshore site in Antigua violates New York Penal Law and the Travel Act. In *People v. World Interactive Gaming Corp.*, the Attorney General of the State of New York sought to enjoin World Interactive Gaming Corporation (“WIGC”) from operating within New York or offering to residents of New York the ability to gamble over the internet.⁵¹ At issue was whether the State of New York could enjoin a foreign corporation, which was legally licensed to operate a casino offshore, from offering Internet gambling to individuals located in New York.⁵²

The state court ruled that New York State could enjoin WIGC from offering Internet gambling services to persons located in New York because (1) Article 1 of the New York State Constitution expressly prohibited any kind of gambling not authorized by the state legislature, and (2) Internet gambling would violate New York Penal Law and § 1952(a) of the Travel Act.⁵³

WIGC was a Delaware corporation that maintained corporate offices in New York and wholly owned Golden Chips Casino, Inc. (“GCC”), an Antiguan subsidiary corporation licensed to operate a land-based casino in Antigua.⁵⁴ GCC developed the interactive software and assembled and installed the necessary servers in Antigua that allowed individuals from around the world to gamble from their home computers using GCC’s web-based casino.⁵⁵ GCC promoted its online casino by advertising on the GCC’s website, by advertising elsewhere on the Internet, and by publishing advertisements in a U.S. national gambling magazine.⁵⁶ GCC’s promotions were viewed by residents in New York and across the nation.⁵⁷

In 1998, the Attorney General of New York began investigating WIGC when the company began soliciting investors in Texas and elsewhere for a private securities offering in violation of certain New York laws.⁵⁸ The Attorney General discovered WIGC had informed potential investors that profit margins of web-based casinos were conservatively 80-85%.⁵⁹ As part of its investigation, the Attorney General’s office logged onto the GCC website, downloaded gambling software and began placing bets.⁶⁰

In opening an account with GCC, a user had to enter his permanent address.⁶¹ Users submitting an address in a state that permitted land-based gambling, such as Nevada, were able to access the GCC casino, whereas users submitting an address in a state that did not permit land-based gambling, such as New York, were denied access to the GCC casino.⁶² The Attorney General soon learned that the GCC software did not verify a user’s address, so an individual located in New York would be granted access to the GCC casino by simply changing the state of residence entered into the GCC database from New York to Nevada.⁶³ Once granted access to GCC’s Internet casino, an individual located in New York could play virtual slots, blackjack or roulette.⁶⁴

Subsequently, the Attorney General filed suit seeking to enjoin WIGC and its subsidiary GCC from running any aspect of their Internet gambling business within New York State.⁶⁵ WIGC moved to dismiss the suit on the grounds of lack of subject matter jurisdiction of New York to prosecute alleged violations of the Wire Act⁶⁶, the Travel Act⁶⁷, and the Paraphernalia Act.⁶⁸

In short, WIGC argued that New York lacked subject matter jurisdiction over the Internet gambling activity because the gambling occurred outside of New York State.⁶⁹ The court rejected this argument on the grounds that, under New York Penal Law § 225.00(2), when a person engaged in gambling is located in New York, then New York is construed as the location where the gambling occurred.⁷⁰ The court considered the facts that the monies used to gamble were located in Antiguan accounts and that gambling is legal in Antigua irrelevant because the act of entering a bet and transmitting it from New York via the Internet adequately constituted gambling activity within New York.⁷¹

The New York court also opined that the Wire Act, the Travel Act, and the Paraphernalia Act all applied to WIGC’s Internet gambling activities.⁷² The court explained that the Wire Act applied to businesses involved in betting or wagering, and the Travel Act applied to the use of a facility in interstate or foreign commerce with intent to distribute proceeds of any unlawful activity or to otherwise promote, manage, establish, carry

on, or facilitate any unlawful activity under 18 U.S.C. § 1952.⁷³ In particular, the New York court noted that the Internet is accessed by telephone wire in the same manner as a prohibited telephone call from an illegal gambling facility.⁷⁴ The court reasoned that when a person in New York uses a telephone wire to connect to the GCC server for the purpose of logging onto the illegal gambling website, followed by gambling activity using the website and the transmission by the GCC server of betting information back to the user in New York, there has been a violation of both the Wire Act and the Travel Act.⁷⁵ The New York court also concluded that by hosting a virtual casino, which is created for a time in the gambler's computer in New York, and by exchanging betting information with this computer user, GCC had conducted an illegal gambling communication in violation of the Wire Act and the Travel Act.⁷⁶ Inherent to the court's conclusion is the notion that access to the Internet necessarily involves use of a wire communication facility (i.e., telephone wires), which is an element of a Wire Act violation, and that the Internet is a facility used in interstate or foreign commerce, which is an element of a Travel Act violation.

The Illegal Gambling Business Act

The Illegal Gambling Business Act⁷⁷ pertains to (1) those who conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business, wherein (2) an "illegal gambling business" means a gambling business (i) in violation of the law of the state or political subdivision in which it is conducted, and (ii) involving five or more persons who conduct, manage, supervise, direct, or own all or part of the business, and (iii) that has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000.00 in any single day.⁷⁸ Gambling is defined under the statute as including, but not limited to, pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.⁷⁹

Congress passed the Illegal Gambling Business Act as part of the Organized Crime Control Act of 1970 in an effort to combat large scale illegal activities.⁸⁰ The Illegal Gambling Business Act does not apply to individual players, and is unlikely to apply to Internet service providers, because they are not gambling businesses in accordance with the statute. The statute does not require those operating an illegal gambling business to actually be convicted in a state court, but only that (1) there be some state law violated by the business, (2) the gambling business involved five or more persons, and (3) the business remained in substantially continuous operation for more than thirty days or grossed more than \$2,000.00 in any single day.⁸¹ Furthermore, to be construed as a person involved in the business, it is only necessary for the individual to be considered necessary and helpful.⁸² Thus, computer operators, computer maintenance crews, accountants, telephone operators, on-line help desk operators, and owners may be included as persons involved in the business even though not all of these individuals participate in the actual gambling.⁸³ One interesting feature regarding the Illegal Gambling Business Act is that it may be applied to strictly intrastate illegal gambling businesses.⁸⁴

Based on what is known about online gambling websites, it is likely that these activities involve a violation of state gambling laws⁸⁵, involve five or more people, and have been in substantially continuous operation for 30 days or more or have grossed over \$2,000.00 in revenue in any single day. Specifically, § 1955(b) of the Illegal Gambling Business Act explicitly defines bookmaking activities as "gambling," so online sports betting sites clearly fall within the scope of this Act. Though online casinos rely upon random number generators to play virtual slots, roulette, dice and other traditional casino games, it is uncertain whether they would fall within the scope of the Illegal Gambling Business Act. Section 1955(b) explicitly defines gambling to include activities involving "maintaining slot machines, roulette wheels or dice tables."⁸⁶ It would be reasonable for the courts to construe any corresponding virtual casino games, which determine chance outcomes using electronic random number generators, as falling within the open ended definition of "gambling" provided by the statute.

Less clear is whether online poker sites are involved in "gambling" as defined under the Illegal Gambling Business Act, because it is the players who gamble and not the site operators. Since online poker sites depend upon random number generators to determine which cards are dealt to the players, and since the poker site receives a fee for this service in the form of the rake, the Illegal Gambling Business Act could reasonably apply to online poker sites if the activity is construable as "selling chances" in accordance with § 1955(b)(2) of the Act. Despite the fact that Internet gambling operations have likely violated the Illegal Gambling Business Act, there is no published case of a prosecution of an Internet gambling business under this statute.

Money Laundering Statutes

To deal with money laundering, Congress has enacted various statutes including 18 U.S.C. §§ 1956 and 1957, both of which address the financial disposition of proceeds of various state and federal crimes, including violations of the Wire Act, the Travel Act, the Illegal Gambling Business Act, or any state gambling law punishable by over one year imprisonment.⁸⁷ Section 1956 encompasses several distinct crimes including: (1) laundering with intent to promote an illicit activity such as an illegal gambling business; (2) laundering to evade taxes; (3) laundering to conceal or disguise the nature, location, source, ownership, or control of funds derived from illegal activities; (4) conducting transactions in a way so as to avoid state or federal reporting requirements (i.e., smurfing); (5) international laundering; and (6) "laundering" conduct represented to a government agent authorized to investigate or prosecute § 1956 violations (i.e., laundering conduct by those caught in a government sting operation).⁸⁸

Section 1957 criminalizes the spending of money or assets that are criminally derived, and the elements of such an offense include: (1) knowingly (2) engaging or attempting to engage in (3) a monetary transaction (4) in criminally derived property that is of a value greater than \$10,000.00 and is derived from specified unlawful activity, (5) wherein the § 1957 offense takes place in the United States or in a special maritime and territorial jurisdiction of the United States or the offense takes place

outside of the United States and its jurisdictions but the defendant is a United States citizen.⁸⁹

There has yet to be a reported prosecution of an Internet gambling operation for violations of U.S. federal money laundering statutes. However, it is likely Internet gambling sites are involved in one or more of the placement, layering and integration stages of money laundering.⁹⁰ Placement is the act of depositing illegally derived funds into a financial institution or the act of converting the funds into other monetary instruments. Layering is the act of breaking up and transferring the deposited funds to different accounts and institutions in order to conceal the origin of these deposited funds. Lastly, integration is the act of using the layered funds to purchase legitimate assets or to fund further criminal activities.

Typically, Internet gambling sites require prepayment in electronic dollars (i.e., payment via online credit services or via wire).⁹¹ In addition to providing credit accounts, many Internet gambling services also offer other financial services such as fund transmittal services, check cashing services, and currency exchange services.⁹² Therefore, online gambling sites may collect lawful fees for these ancillary services. Furthermore, Internet gambling is a global industry and many of the customers of these gambling sites are citizens of foreign countries gambling from jurisdictions that do not prohibit Internet gambling.⁹³ Consequently, funds derived from illegal gambling with U.S. citizens are likely intermingled with lawful funds. When Internet gambling sites process these mixed funds with various financial institutions, it is conceivable that one or more of the U.S. money laundering statutes are violated.

Racketeer Influenced and Corrupt Organization Statutes

To combat organized racketeering enterprises, Congress has enacted a series of laws directed to Racketeer Influenced and Corrupt Organizations (“RICO”).⁹⁴ Because the Wire Act, the Travel Act, the Illegal Gambling Business Act, and any violation of a state law punishable by more than one year imprisonment are all RICO predicate offenses, illegal gambling may violate the RICO statutes.⁹⁵ To establish a RICO offense pursuant to § 1962(c), the government must establish (1) an enterprise existed; (2) the enterprise affected interstate or foreign commerce; (3) the defendant was employed by or associated with the enterprise; (4) the defendant conducted or participated, either directly or indirectly, in conducting the affairs of the enterprise; and (5) that the defendant conducted or participated in the enterprise through a pattern of racketeering by committing at least two racketeering predicate offenses within a ten year period.⁹⁶ The RICO Act includes a civil remedies provision, so a private individual may sue for damages incurred as a result of racketeering activities.⁹⁷

While there has been no published federal prosecution of an Internet gambling site provider under the RICO Act, there has been a civil suit to collect damages for alleged RICO violations.⁹⁸ Internet gambling litigation ensued in *In re MasterCard International Inc.* when two luckless gamblers from Kansas and New Hampshire filed suit against the credit card companies and the issuing banks for extending them credit, which allowed the gamblers to gamble at online casinos. On the following facts, the Fifth Circuit Court of Appeals denied the gamblers’ complaint against the credit card companies.⁹⁹

The plaintiffs individually accessed various casino websites where they were instructed to purchase “credit” for gambling.¹⁰⁰ The plaintiffs then entered their billing and credit card information on these websites, and their credit cards were charged for the purchase of the credits.¹⁰¹ Thereafter, plaintiffs were allowed to place wagers.¹⁰² Net winnings would be wired to the plaintiffs and not credited to the credit card account.¹⁰³ One plaintiff purchased \$1,510 in gambling credits and lost it all.¹⁰⁴ The other plaintiff purchased \$16,445 in gambling credit and lost a significant portion of it.¹⁰⁵

The plaintiffs argued that the availability of credit and the ability to gamble are inseparable.¹⁰⁶ By authorizing online casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of credit card transactions through placement of their logos on the Internet gambling sites, and by processing “gambling debts,” the plaintiffs alleged that the credit card companies were facilitating an unlawful gambling enterprise in violation of 18 U.S.C. § 1962(c).¹⁰⁷ In other words, the defendant credit card companies, along with unnamed Internet casinos, had created and were operating a worldwide gambling enterprise in violation of the RICO statutes.¹⁰⁸ The litigation sought recovery of damages under the civil remedy provision of the RICO Act.¹⁰⁹

The appellate court noted that in order to prevail, plaintiffs must show that (1) a person has engaged in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct or control of an unlawful enterprise.¹¹⁰ Furthermore, a showing of “a pattern of racketeering activity” requires establishing two or more predicate offenses and demonstrating the racketeering predicate offenses are related to a continued criminal activity.¹¹¹ In support of their claim, plaintiffs alleged violations of Kansas and New Hampshire state felony gambling laws,¹¹² and federal violations of the Wire Act, the Travel Act, money laundering statutes and mail fraud and wire fraud statutes. The appellate court concluded, for the reasons set forth below, that these allegations were unsubstantiated and therefore that plaintiffs had failed to show a pattern of racketeering activity or the collection of an unlawful debt.¹¹³

As to whether Kansas and New Hampshire state felony gambling laws were violated, the court first determined that only sections (c) and (e) of the Kansas commercial gambling statute were applicable to the present case. However, the court interpreted, under these sections, that the offending conduct can only take place after some form of gambling has been completed. The court ruled that, because the credit card transactions were completed before gambling activities occurred, there was no violation of the Kansas law.¹¹⁴ Regarding the allegation of crimes under the New Hampshire gambling statute, the court held this statute was patently inapplicable to the facts of the case.¹¹⁵ Implicitly, the court’s decision reflected the fact that there was no evidence showing that the credit card companies were involved in conducting, financing, managing, supervising, directing, or owning Internet casinos.

The court also dismissed the plaintiffs’ allegations of federal predicate offenses.¹¹⁶ Regarding the Wire Act, the court ruled that this law was limited to sports bookmaking operations and did not necessarily apply to online casinos.¹¹⁷ Since the plaintiffs’ evidence did not establish gambling on sporting events or contests, the court concluded that no violation of the

Wire Act had been established.¹¹⁸ This court's decision, therefore, raised doubt about the scope of the Wire Act, which at least one state court and the U.S. Department of Justice believed was not limited to sports-related gambling.¹¹⁹ While the Justice Department has recommended that Congress amend the Wire Act to explicitly encompass all forms of gambling, Congress has yet to pass any such legislation.¹²⁰ Regarding the plaintiffs' reliance on federal mail or wire fraud violations as predicate RICO offenses, the court concluded that the plaintiffs could not show that the credit card companies had made any false or fraudulent misrepresentations, or reliance by the plaintiffs on such misrepresentations.¹²¹ The court decided that because online casino gambling did not violate the Wire Act, the plaintiffs' gambling debts were legal.¹²² Consequently, the credit card companies could not fraudulently misrepresent the nature of the gambling debt nor could the issuing banks be involved in a scheme to defraud the plaintiffs.¹²³ In addition, the court noted that the plaintiffs had failed to show that they relied on the defendants' representations in deciding to gamble, which, though not a statutory requirement of mail or wire fraud, courts have required when these offenses are alleged as RICO predicates.¹²⁴ Moreover, the court held that plaintiffs' failure to establish a violation of any state or federal law, as required under 18 U.S.C. §§ 1952 and 1957, compelled the conclusion that no Travel Act or money laundering violations had been shown.¹²⁵ The court concluded that because the plaintiffs had failed to prove that the defendant credit card companies had engaged in a pattern of racketeering, the case had been rightly dismissed under Rule 12(b)(6).¹²⁶

Even though the plaintiffs lost their suit, the *In re MasterCard* litigation may have had an effect on whether some American credit card companies do business with Internet gambling sites. For example, PayPal, Western Union and American Express do not do business with Internet gambling sites,¹²⁷ although MasterCard and Visa do.¹²⁸ It is conceivable that some credit card companies have shied away from doing business with online gambling business out of fear of criminal and/or civil litigation. As a result, new offshore money transfer companies have arisen to service this niche, such as NETeller, a publicly traded company on the London Stock Exchange based in the Isle of Man.¹²⁹ NETeller derives 80% of its revenue from Internet gambling, with projected net earnings of \$32 million for 2004 and \$70 million for 2005.

Changing Gambling Environments in the United States and in the World

The scope of any law depends upon the nation's ability to enforce it. While there are many federal statutes criminalizing various Internet gambling behavior, prosecutions of illegal Internet gambling activities are rare, although in July 2006 the U.S. Justice Department charged eleven people for operating offshore Internet gambling sites, including BetOnSports, a gambling enterprise that handles billions of dollars in bets per year and that is incorporated in the United Kingdom and listed on the London Stock Exchange.¹³⁰ One obstacle to enforcing U.S. federal gambling statutes against online gambling activities, such as BetOnSports, is that the managing organizations are generally based in foreign jurisdictions where Internet gambling is permitted. Since Internet gambling has proven so profitable, there is lit-

tle incentive for foreign countries to curb access by U.S. citizens to online gambling sites, which lawfully generate revenue and jobs in these countries. Thus, change in the global gambling environment has created a disincentive for continued federal criminalization of Internet gambling businesses for many of the following reasons.

Expansion of Global and U.S. Gambling

Since Congress enacted various federal anti-gambling statutes, the gambling landscape in the United States and throughout the world has changed dramatically with the advent of Internet gambling, the increase of state-sponsored gambling and the rise of Indian gaming. Around 1995, the first offshore Internet casinos appeared.¹³¹ By 1999 there were 700 Internet gambling sites, and in 2004, more than 1,800 offshore gambling sites received about \$7 billion in bets. About fifty-four foreign governments sanction some form of Internet gambling.¹³² Interestingly, many of the governments sanctioning Internet gambling are English-speaking countries and former members of the British Commonwealth.¹³³

Recently, online gambling was approved by the Nevada Gaming Control Board and became publicly available to Nevada residents located in that state.¹³⁴ While no other state has approved online gambling, gambling in some form is legal in nearly every state. As of 1999, thirty-seven states and the District of Columbia operated lotteries, and as of 1997 eleven states permitted commercial casino gambling, and about half of the states hosted Class III Indian gaming.¹³⁵ The fact that legal land-based gambling is so widespread in the United States tends to erode the rationale for continued criminalization of web-based gambling.

Rise of Indian Gaming

Oddly, or not so oddly, enough, an unusual American player striving to legitimize online gaming are the Indian nations.¹³⁶ At about the same time Congress was enacting laws to federally criminalize gambling enterprises violating state laws, American Indian tribes began experimenting in the late 1960s and early 1970s with gaming in an attempt to reverse the poverty resulting from decades of genocide and pillage.¹³⁷ In 1987, a U.S. Supreme Court decision paved the way for further expansion of Indian gaming when the Court ruled that state laws regulating bingo and card games did not apply to tribal lands governed by tribal law.¹³⁸ In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA")¹³⁹ to reaffirm tribal authority to use Indian gaming to promote tribal economic development, tribal self-sufficiency and strong tribal government. The result of this positive governmental stance on Indian gaming is that 223 tribes are presently operating Indian gaming facilities in 28 states, generating tribal government revenue through gambling.

Then came tribal online gaming. In 2000, the Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, a federally recognized Indian tribe, operated the Lac Vieux Desert Resort & Casino, a Class II Bingo facility located in Michigan.¹⁴⁰ At that time, this tribe began developing "Proxy Play Bingo," which was a form of Internet gambling.¹⁴¹ During Proxy Play Bingo, the actual game was conducted live on tribal land but a principal could watch the progress of the game from

a remote location via the Internet while a proxy-agent on the reservation played for the principal.¹⁴² The game was played as a typical bingo game until either a proxy-agent or an on-reservation bingo card holder declared bingo.¹⁴³ The result of the game was then posted on the Internet.¹⁴⁴

When the Tribe's planned proxy bingo gaming was reviewed by the General Counsel for the National Indian Gaming Commission, which was the agency responsible for overseeing Class II Indian Gaming under the IGRA, the agency disapproved because proxy bingo would involve players that were located off the Indian reservation.¹⁴⁵ The agency concluded such remote gaming via Internet would fall outside of the IGRA's safe harbor and expose the game operators to possible criminal prosecution under state and federal laws.¹⁴⁶ Hearings on Internet Proxy Bingo were subsequently held before the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee.¹⁴⁷ Following the hearings, the Department of Justice sent a letter to the Lac Vieux Tribe warning them that proxy bingo, if conducted in part off of Indian lands, could violate state and federal laws.¹⁴⁸

The Lac Vieux Tribe filed suit against the United States Federal Government for declaratory and injunctive relief.¹⁴⁹ However, the federal court dismissed the action for lack of subject matter jurisdiction.¹⁵⁰ The district court explained that the Tribe was seeking judicial review of a non-reviewable agency decision, a judicial order pre-empting future enforcement action, and a statement that the IGRA authorized Proxy Play Bingo, and remedies unobtainable from the court.¹⁵¹ While the Lac Vieux Tribe was not successful in obtaining an exception under the IGRA authorizing Internet gaming originating from the Indian reservation, the suit serves to demonstrate an interest on the part of at least one Tribe in the legalization of Internet bingo and online gaming as a whole.

U.S. Obligations Under GATS

Additional pressure to legalize Internet gambling has been exerted by a foreign interest desiring to legalize online gambling activities in the United States through enforcement of the General Agreement on Trade in Services ("GATS"), an international trade treaty.¹⁵² In this trade dispute, Antigua, a former British colony and member of the Commonwealth, filed a complaint in 2003 with the World Trade Organization ("WTO") against the United States alleging that, through state and federal laws, the United States had imposed a "total prohibition" against the cross-border supply of gambling and betting services from Antigua.¹⁵³ Antigua contended that such a "total prohibition" against Antigua's Internet gambling industry was contrary to the obligations of the United States under GATS.¹⁵⁴

The reason for Antigua's concern was that it derived millions of dollars of government revenue from licensing fees to about 119 licensed Internet gambling and betting operations. Therefore, it was in Antigua's interest to expand Internet gambling to markets in the U.S. Antigua argued that the GATS agreement included specific commitments on gambling and betting services, and that state and federal laws of the United States

prohibiting Internet gambling were contrary to its obligation to grant full market access to Antiguan gambling interests.¹⁵⁵

A panel was established to consider Antigua's complaint. In 2004, the panel concluded Antigua had established a prima facie case that certain U.S. federal laws, such as the Wire Act, the Travel Act, and the Illegal Gambling Business Act, as well as numerous state laws, created an impermissible ban against the supply of cross-border Internet gambling services, which was contrary to the obligations of the United States under certain provisions of the GATS.¹⁵⁶ The panel also concluded, in view of the Interstate Horse Racing Act¹⁵⁷, that the United States had failed to show that it did not permit pari-mutuel wagering on horse races via telephone and the Internet.¹⁵⁸

The United States appealed the decision of the Panel, and the matter was considered by the Appellate Body of the WTO. After considering additional arguments filed by Antigua and the United States, the Appellate Body came to six conclusions: (1) the United States had obligated itself under GATS to

Since Internet gambling has proven so profitable, there is little incentive for foreign countries to curb access by U.S. citizens to online gambling sites, which lawfully generate revenue and jobs in these countries.

specific commitments on gambling and betting services; (2) by maintaining the Wire Act, the Travel Act and the Illegal Gambling Business Act, the United States was acting inconsistently with its GATS obligations; (3) the concerns addressed by the Wire Act, the Travel Act and the Illegal Gambling Business Act fall within the scope of public morals and/or public order and are measures necessary to protect public morals or to maintain public order; (4) the United States had demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were necessary to protect public morals and/or maintain public order, thereby justifying acts otherwise inconsistent with GATS; (5) in light of the Interstate Horseracing Act authorizing off-track wagering on horse races, the United States did not demonstrate consistent application of the Wire Act, the Travel Act, and the Illegal Gambling Business Act in accordance with its public morals/public order exception to the GATS obligations; and (6) while the United States had demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Act are measures necessary to protect public morals or to maintain public order, the United States did not demonstrate, in view of the Interstate Horseracing Act, that the prohibitions embodied in the above measures were applied to both foreign and domestic suppliers of remote betting for horse racing.¹⁵⁹ Therefore, the Appellate Body concluded the United States had not demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were measures either protecting public morals or maintaining public order.¹⁶⁰

In other words, the Appellate Body decided the United States had an obligation, under GATS, to permit Internet gambling, though this obligation could be overruled by the need to protect the public morals and/or to maintain public order.¹⁶¹ However, the Appellate Body concluded that, in light of the Interstate Horseracing Act which permitted interstate off-track betting on horse races, the measures applied by the United States to protect public morals and to maintain order, namely the Wire Act, the Travel Act and the Illegal Gambling Business Act, were inconsistently applied and therefore did not meet the requirements of the public morals/public order exception.¹⁶² The Appellate Body also concluded that, by allowing interstate off-

track betting on horse racing, the United States was not applying the prohibitions provided by the Wire Act, the Travel Act and the Illegal Gambling Business Act against both foreign and domestic providers of off-site gambling services relating to horse racing.¹⁶³

In summary, the Appellate Body of the WTO has determined that the United States had not shown it was meeting its GATS obligations regarding gambling and betting services pertaining to off-track wagering on horse racing. How the United States will respond to this interpretation of GATS, as applied to Internet wagering on horse races, remains to be seen.

The Internet Gambling Prohibition and Enforcement Act

In November 2005, H.R. 4411, also known as the "Internet Gambling Prohibition and Enforcement Act," was introduced in the House seeking to strengthen the prohibition on Internet gambling.¹⁶⁴ This measure seeks to strengthen the Wire Act by prohibiting the use of credit cards and electronic fund transfers for the payment of gambling debts.¹⁶⁵ The Act also creates regulations requiring financial institutions to block credit card and electronic fund transfers to Internet gambling businesses whether domestic or overseas.¹⁶⁶ Worth noting is the fact that the Act has no limiting effect on pari-mutuel wagering, which includes off-track betting on horse races.¹⁶⁷ Consequently, the Act maintains the present carve-out exception for interstate off-track gambling involving the Internet. The Act makes no attempt to bring the United States into compliance with the GATS obligations voiced by the WTO in response to the Antiguan 2003 complaint.

H.R. 4411 passed in the House on July 11, 2006 and is now on the Senate Legislative Calendar.¹⁶⁸ It remains to be seen though whether the bill will be passed by the Senate; and even if enacted into law, whether it will have any practical effect on the Internet gambling industry.

Summary

The Internet gambling industry is rapidly growing, and foreign online gambling sites are being created at an amazing rate. Yet Internet gambling has been embraced by only one state, Nevada, and remains an activity otherwise prohibited by many state and federal laws. Despite a multitude of federal laws, such as the Wire Act, the Travel Act, the Illegal Gambling Business Act, and RICO statutes for combating Internet gambling, Internet access to foreign-based gambling websites is readily available to U.S. citizens, and it is rare for an operator of one of these online sites to face federal criminal prosecution.

At the same time, the gambling landscape in the United States is transforming so rapidly with the expansion of state-sponsored gambling, the rise of Indian gaming, and the permissive posture of the U.S. government towards interstate off-track betting on horseracing that continued efforts to criminalize Internet gambling appear both futile and irrational. As the scope of land-based gambling and off-site gambling continues to expand, it is likely that the United States will have continued difficulties in meeting its obligations under GATS if the United States continues its absolute ban on foreign Internet gambling services.

Thus, as to whether the United States Federal Government should continue its efforts to criminalize Internet

gambling, the economics of the gaming industry and the practical limitations regarding enforcement of present or future criminal laws leads to one conclusion: know when to fold. The time is ripe to switch from criminalization to regulation.

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¹ *Hearing on H.R.1223 and H.R. 21 Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary, United States House of Representatives (2003)*(statement of John G. Malcolm, Deputy Assistant Attorney General) available

at www.cybercrime.gov/Malcolmtestimony42903.htm (last visited on March 13, 2005).

² Tony Batt, *Net bet debater mentions Station*, LAS VEGAS REV. - J., February 26, 2005, at 1D.

³ See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847 (N.Y. Sup. Ct. 1999); *In re MasterCard Int'l Inc.*, 313 F.3d 257, 260 (5th Cir. 2002); *International Bancorp, L.L.C. v. Societe Des Bains De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp. 2d 467, 474 (E.D. Virginia, 2002).

⁴ See generally Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, n.10 (2004) (stating that focus of the article, similar to the focus of this article, was on Internet casino games conducted online that have their outcome determined by a random number generator).

⁵ See *United States v. Cohen*, 260 F.3d 68, 70 (2d Cir. 2001).

⁶ Andrew Bary, *Full House*, BARRON'S, February 21, 2005, at 21.

⁷ Charles Doyle, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, CRS REPORT FOR CONGRESS (Congressional Research Service) (November 29, 2004).

⁸ See 18 U.S.C. § 1953 (2006) (prohibiting the interstate transportation of wagering paraphernalia); 28 U.S.C. § 3702 (2006) (prohibiting unlawful sports gambling).

⁹ 18 U.S.C. § 1084 (2006).

¹⁰ 18 U.S.C. § 1084 (a) (2006).

¹¹ 18 U.S.C. § 1084 (b) (2006).

¹² Seth Gorman and Antony Loo, Comment, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling*, 16 LOY. L.A. ENT. L. REV. 667, 671 (1996).

¹³ *In re MasterCard*, 313 F.3d at 262-63.

¹⁴ *Cohen*, 260 F.3d at 68.

¹⁵ *Id.* at 70.

¹⁶ *Id.* at 70 n. 2.

¹⁷ *Id.* at 70.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 70-71.

²³ *Id.* at 71.

²⁴ *Id.*

²⁵ *Id.*

26 *Id.*
 27 *Id.* at 73.
 28 N.Y. Const. art. I, § 9
 29 N.Y. Gen. Oblig. L. § 5-401
 30 *Cohen*, 260 F.3d at 74.
 31 *Id.* at 74-75.
 32 *Id.* at 76.
 33 *Id.*
 34 *Id.*
 35 *Id.*
 36 *Id.*
 37 *Id.*
 38 *Id.*
 39 *Id.*
 40 *Id.* at 76-77.
 41 *Id.*
 42 *Id.*
 43 *Id.* at 77.
 44 *Id.*
 45 18 U.S.C. § 1952 (2006).
 46 18 U.S.C. § 1952 (a) (2006).
 47 18 U.S.C. § 1952(b).
 48 *See* United States v. Campione, 942 F.2d 429, 434 (7th Cir. 1991) (citing United States v. Peskin, 527 F.2d 71, 79 n.3 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976)) (stating 18 U.S.C. § 1952's reference to state law is only to identify the defendant's unlawful activity; the federal crime to be proved is the use of interstate facilities, thus not requiring the completion of a state crime).
 49 Jeffrey Rodefer, *Federal Travel Act Scope and Predicates*, available at www.gambling-laws-us.com/Federal-Laws/travel-act.htm (last visited February 28, 2005).
 50 Gottfried, *supra* note 4, at ¶ 52 (citing 18 U.S.C. § 1952 (2003); *See* United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962)).
 51 *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).
 52 *Id.* at 854.
 53 *Id.* at 853.
 54 *Id.*
 55 *Id.*
 56 *Id.*
 57 *Id.*
 58 *Id.*
 59 *Id.* at 855.
 60 *Id.*
 61 *Id.*
 62 *Id.*
 63 *Id.*
 64 *Id.*
 65 *Id.* at 855-56.
 66 18 U.S.C. § 1084(a).
 67 18 U.S.C. § 1952.
 68 18 U.S.C. § 1953.
 69 *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d at 856.
 70 *Id.* at 850.
 71 *Id.*
 72 *Id.* at 852-53.

73 *Id.* at 861-63.
 74 *Id.* at 862.
 75 *Id.* at 852.
 76 *Id.*
 77 18 U.S.C. § 1955 (2006).
 78 18 U.S.C. §§ 1955(a) and (b) (2006).
 79 18 U.S.C. § 1955(b)(2) (2006).
 80 Gorman and Loo, *supra* note 12, at 675.
 81 *United States v. Murray*, 928 F.2d 1242, 1245 (1st Cir. 1991).
 82 *United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976).
 83 *See* *United States v. Schullo*, 363 F. Supp. 246, 249-50 (D. Minn. 1973), *aff'd*, 508 F.2d 1200 (1975), *cert. denied*, 421 U.S. 947 (1975) ("Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles, and whether they be labeled agents, runners, independent contractors or the like. Only customers of the business were to be excluded.".)
 84 *See generally* *United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996); *United States v. Farris*, 624 F.2d 890, 892 (9th Cir. 1980); *see also* *United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975).
 85 *E.g.*, General Obligations Law, N.Y. Gen. Oblig. L. § 5-401; New York Penal Law § 225.00(2)).
 86 18 U.S.C. § 1955(b)(2).
 87 Doyle, *supra* note 7.
 88 18 U.S.C. § 1956; *see also* Doyle, *supra* note 7.
 89 18 U.S.C. § 1957; *see also* Doyle, *supra* note 7.
 90 *See* Gottfried, *supra* note 4, at ¶ 19 - 25 (laying out the concept of money laundering and ways gambling, particularly Internet gambling can facilitate money laundering).
 91 *See World Interactive Gaming Corp.*, 741 N.Y.S.2d at 847; *Cohen*, 260 F.3d at 70; *In re MasterCard*, 313 F.3d at 260.
 92 Gottfried, *supra* note 4, at ¶ 20 (citing *Hearing on H.R.1223 and H.R. 21 Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary*, United States House of Representatives (2003) (statement of John G. Malcolm, Deputy Assistant Attorney General) available at www.cybercrime.gov/Malcolmtestimony42903.htm (last visited on March 13, 2005).
 93 *See* Gottfried, *supra* note 4, at ¶ 1 (noting 54 governments sanction online gambling); *see also* Bary, *supra* note 6 (stating that the major online poker websites are located out of the United States because of online gambling's status in the United States).
 94 *See* 18 U.S.C. §§ 1961-1965 (2006).
 95 18 U.S.C. § 1961.
 96 18 U.S.C. § 1962(c).
 97 18 U.S.C. § 1964(c).
 98 *See In re MasterCard*, 313 F.3d 257, *passim*.
 99 *Id.* at 264.
 100 *Id.* at 260.
 101 *Id.*
 102 *Id.*
 103 *Id.*
 104 *Id.*
 105 *Id.*

¹⁰⁶ *Id.*
¹⁰⁷ *Id.* at 260-61.
¹⁰⁸ *Id.*
¹⁰⁹ *Id.*
¹¹⁰ *Id.* at 261.
¹¹¹ *Id.* at 261-62.
¹¹² *Id.* at 260, (Kan. Stat. Ann. § 21-4304. This statute, which states that commercial gambling is a “level 8, nonperson felony,” defines commercial gambling as : “(a) Operating or receiving all or part of the earnings of a gambling place; (b) Receiving, recording, or forwarding bets or offers to bet or, with intent to receive, record, or forward bets or offers to bet, possessing facilities to do so; (c) For gain, becoming a custodian of anything of value bet or offered to bet; (d) Conducting a lottery, or with intent to conduct a lottery possessing facilities to do so; or (e) Setting up for use or collecting the proceeds of any gambling device,” and N.H. Rev. Stat. Ann. § 647:2 (I-a)(b). This statute provides that “[a] person is guilty of a class B felony if such person conducts, finances, manages, supervises, directs, or owns all or part of a business and such person knowingly and unlawfully conducts, finances, manages, supervises, or directs any gambling activity on the business premises....”).
¹¹³ *Id.* at 261.
¹¹⁴ *Id.* at 262.
¹¹⁵ *Id.*
¹¹⁶ *Id.* at 262-63.
¹¹⁷ *Id.*
¹¹⁸ *Id.* at 263.
¹¹⁹ Gottfried, *supra* note 4, at ¶ 46 (citing *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850-51 (N.Y. Sup. Ct. 1999) (stating the New York state court applied the Wire Act to an Antigua-based Internet casino).
¹²⁰ James D. Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REV. 0013 (2004) (See para. 10).
¹²¹ *In re MasterCard*, 313 F.3d at 263.
¹²² *Id.*
¹²³ *Id.*
¹²⁴ *Id.*
¹²⁵ *Id.*
¹²⁶ *Id.* at 264.
¹²⁷ Bary, *supra* note 6.
¹²⁸ See, e.g., www.playmc.com/about.html, (last visited May 3, 2005). This Internet Gambling Website states it is licensed in Canada by the Kahnawake Gaming Commission, Mohawk Territory of Kahnawake, is operated by a subsidiary of a Fortune 500 company listed on the NYSE, offers casino gambling, sportsbetting, and online poker, and accepts payments using Visa, MasterCard, Swatch, and Solo credit services.
¹²⁹ Bary, *supra* note 6. (explaining that “NETeller profits from a 3% fee charged to Internet gambling companies when funds are transferred from NETeller account holders into the gaming firm’s bank account.”).
¹³⁰ D. Koenig, *Officials Charge 11 from Offshore Gambling Site*, available at www.msnbc.msn.com/id/13907293/>1=8307 (published

July 18, 2006). The Justice Department alleges defendants committed conspiracy, racketeering and fraud in taking sports bets from U.S. residents, and failed to pay federal wagering excise taxes on more than 3.3 billion dollars in U.S. wagers.
¹³¹ Gorman and Loo, *supra* note 12, at 667.
¹³² Gottfried, *supra* note 4, at ¶ 1.
¹³³ Bary, *supra* note 6 (noting that Sportingbet, is based in the United Kingdom and publicly is traded on the London Stock Exchange; the Kahnawake Gaming Commission is located on a Mohawk Indian reservation in Canada and PartyPoker has operations in India).
¹³⁴ Batt, *supra* note 2.
¹³⁵ See *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 187 n.5 (1999).
¹³⁶ See *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64 (D.D.C. 2004).
¹³⁷ Geoffrey Precourt, *The Next Generation*, FORTUNE, Vol. 151, No. 5, March 7, 2005, at S4.
¹³⁸ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987).
¹³⁹ 102 Stat. 2467, 25 U.S.C. § 2701 et seq.
¹⁴⁰ *Lac Vieux Desert Band*, 360 F. Supp. 2d at 65.
¹⁴¹ *Id.* at 65.
¹⁴² *Id.*
¹⁴³ *Id.*
¹⁴⁴ *Id.*
¹⁴⁵ *Id.* at 65-66.
¹⁴⁶ *Id.* at 66.
¹⁴⁷ *Id.*
¹⁴⁸ *Id.*
¹⁴⁹ *Id.*
¹⁵⁰ *Id.* at 68.
¹⁵¹ *Id.*
¹⁵² See generally World Trade Organization Appellate Body, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005) (hereinafter “*Cross-Border Supply*”).
¹⁵³ *Id.* at ¶ 2.
¹⁵⁴ *Id.*
¹⁵⁵ *Id.*
¹⁵⁶ See *id.* at ¶ 4.
¹⁵⁷ Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 181 (codified as 15 U.S.C. §§ 3001-3007 (2005)). The Interstate Horseracing Act provides that “[a]n interstate off-track wager may be accepted by an off-track betting system” when certain conditions specified by the Act have been met.
¹⁵⁸ See *Cross-Border Supply*, *supra* note 152 at ¶ 7 of Annex I.
¹⁵⁹ *Id.* at ¶ 373.
¹⁶⁰ *Id.*
¹⁶¹ *Id.*
¹⁶² *Id.*
¹⁶³ *Id.*
¹⁶⁴ H.R. 4411, 109th Congress, (2006), available at <http://thomas.loc.gov/cgi-bin/thomas>.
¹⁶⁵ *Id.*
¹⁶⁶ *Id.*
¹⁶⁷ *Id.*
¹⁶⁸ *Id.*