Internet Gambling: Is It Worth the Risk

James R. Hobbs
Symposium Articles

INTERNET GAMBLING: IS IT WORTH THE RISK?

JAMES R. HOBBS*
AMY R. PERRY

I. INTRODUCTION

The use of Internet technology for gambling is a novel idea to some, but for others it is a criminal prosecution waiting to happen. The convenience of Internet gambling is appealing. No long flights to Las Vegas or Atlantic City, just a click of the mouse and bets are in, and the payoffs can be stunning. But you could be committing a crime. It is possible never to set foot in a state and still break its gambling laws, without even knowing what you did was wrong. Several states are cracking down on Internet gambling and the people who run it. Recently, the attorneys general in Minnesota and Missouri indicted companies who operate Internet gambling sites, saying that residents of their states use these sites and therefore, the companies violated state gambling statutes. But where does the bet actually take place: where the bettor is or where the online service is located? Is it possible for an individual to be guilty of violating a statute without even knowing that statute existed?

An Internet casino allows an individual to play casino-type games, like blackjack or roulette, for money. There are three types of Internet casinos. Some casinos require people to download a

* Adjunct Instructor, University of Missouri at Kansas City Law School; Partner, Wyrsch Hobbs Mirakian & Lee, P.C. Westminster College, University of Kansas at Lawrence, B.A.; University of Missouri at Kansas City Law School, J.D.

program to a computer hard drive in order to play. Other casinos use JAVA applets to run through the World Wide Web browser. Another type of Internet casino uses all HTML and does not require any download time. These different sites may vary in appearance and style, but they all have one thing in common – they are played to win money. A first time gambler on a typical Internet gambling site opens an account by providing his or her credit card number, although some sites require customers to mail in a minimum deposit ahead of time. Site operators use computer programs to simulate several different games of chance. Winnings are paid by check or sometimes credited to the player’s credit card, while losses are debited from the account. With virtual gambling made so simple, it is easy to see why analysts have predicted that Internet gambling sites could handle as much as one billion dollars by the year 2000. There are currently more than four hundred Internet gambling sites in operation, and that number is steadily growing.

This Article examines the current state of gambling statutes across the nation, as applied to Internet gambling, as well as the criminal mens rea requirement that those statutes entail. Finally, this Article explores the issue of jurisdiction and how a civil standard is being applied to Internet prosecutions.

II. GAMBLING STATUTES

The statute governing Internet gambling is 18 U.S.C. § 1084. According to the statute, the elements of Internet gambling are: (1) engaging in the business of betting or wagering; (2) knowingly us-

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2. See Netbet.org, Online Gambling Frequently Asked Questions, at http://www.netbet.org (last modified 1998). This is an Internet site which provides information to new Internet gamblers.

3. See id. (discussing growing popularity of online gambling).

4. See Beth Berselli, Gamblers Play the Odds Online, WASH. POST, Aug. 19, 1997, at A01 (discussing growing popularity of online betting).

5. See id. After the bets are placed, the computer conducts the game, and operators report the results of the game back to the players. See id.

6. See id. (discussing manner in which online transactions are handled).

7. See id. Other analysts in 1997 predicted that Internet gambling was a $200 million per year industry. See id.

8. See Internet Gaming Commission, Frequently Asked Questions, at http://www.internetcommission.com/faq.asq#g1 (last visited Sept. 9, 2000). According to the Internet Gaming Commission ("IGC"), the total number of Internet gaming sites is 428. See id. Of those, 133 are licensed, 120 are unlicensed, 132 are licensed but have not been reviewed by the Internet Gaming Commission, and 43 are licensed but refuse to cooperate with auditors from the IGC. See id.

9. See 18 U.S.C. § 1084 (1999). This statute prohibits the transmission of betting or wagering information where a state or foreign country, either at the site of transmission or reception, has made such activity illegal. See id.
ing a wire communication facility; and (3) transmitting bets or wagers in interstate or foreign commerce. The statute makes it legal to wager on "a sporting event or contest from a state where betting on that sporting event or contest is legal into a state in which such betting is legal." Internet gambling companies, however, usually operate offshore and have licenses from foreign countries to conduct betting. The problems arise because most of their customers are located within the United States where wagering is, for the most part, illegal.

When trying to determine exactly who is in violation of this statute, it is important to look closely at the term "transmission," because courts are divided on how to apply it. Some courts have applied the term to the actual transmittal of wagering information as well as to the receipt of those wagers. Other courts interpret the term "transmission" to apply only to the party initiating the communication and not to the person receiving it. In the future, most jurisdictions most likely will interpret the meaning of "transmission" broadly to include the receiving party if that party actually solicited the communication.

10. See id.; see also United States v. Truchinski, 393 F.2d 627, 630 (8th Cir. 1968) (explaining that defendant must be engaged in business of wagering or betting and using telephone to transmit bets).

11. 18 U.S.C. § 1084(b). This is problematic, however, because every state except Nevada has made this type of gambling activity illegal.

12. See Internet Gambling Commission, supra note 8. Antigua, Curacao, St. Kitts, Grenada, Dominican Republic, Gibraltar and Cook Islands are just a few of the countries that are home to Internet gambling operations. See id. These small countries allow Internet gambling operators to locate and operate there because doing so is a boost to their economies. See id. Companies may pay up to $100,000 to obtain a license in these countries along with ongoing taxes to the local government. See id. Although these sites are located outside the United States, the companies are actually run from within the U.S. See id. Only the servers are located offshore. In fact, several Internet gambling companies are listed on the NASDAQ stock exchange. See id.

13. See United States v. McDonough, 835 F.2d 1103, 1104 (8th Cir. 1988) (holding that § 1084 included placing of bets by telephone from Texas to Massachusetts regardless of whether placing bets in Massachusetts was state criminal offense).

14. See United States v. Stonehouse, 452 F.2d 455, 456-57 (7th Cir. 1971) (holding that text and legislative history of statute support conclusion that "transmission" does not apply to reception); see also Tel. News Sys., Inc. v. Ill. Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963) (rejecting idea that transmission means sending or receiving).

Only four states, Kansas, Louisiana, South Dakota and Indiana, specifically mention the Internet in their gambling statutes. Kansas lawmakers have made it a crime to install communication facilities for gamblers when it is known that these facilities will be used principally for the purpose of transmitting information to be used in making or settling bets. Under the Kansas statute, it is a violation to allow knowingly the use of these devices to transmit information that pertains to the making or settling of bets or to allow the continued use of these devices. According to the interpretation of this statute, placing or forwarding a bet over the telephone or Internet is illegal, just as if the bet were conducted in person.

The Louisiana statute was enacted to prevent and penalize Internet gambling. The statute defines the crime, in part, as “the intentional conducting, or directly assisting in the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet.” The Louisiana statute contains a less specific general intent requirement.

Gambling ranges from a class C misdemeanor to a class A felony in the rest of the country. Only a handful of states do not apply the traditional definition of “knowingly” in their statutes. The remaining states use the general intent requirement, whereby an Internet gambling site operator is guilty of gambling if the operator is aware that three players can gamble on the site. This use of general intent cannot be enough protection because most states can use the


17. See Kan. Stat. Ann. § 21-4308(b). Kansas law defines gambling as, “(a) making a bet; or (b) entering or remaining in a gambling place with intent to make a bet, to participate in a lottery, or to play a gambling device.” Kan. Stat. Ann. § 21-4303. A bet is defined as, “a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.” Kan. Stat. Ann. § 21-4302(a).

18. From the language of this statute, it appears that one would have to know the specific statute exists in order to be in violation of it, or at least have been told of it, and still allow continued use of the communication devices.


21. Id.

22. These states are: Arizona, Illinois, Indiana, Maine, Montana, New Jersey, Ohio, Texas and Utah. Their statutes require “knowingly” as an intent requirement, as well as “purposefully” or “intentionally.”
civil standard of “minimum contacts” to hale a defendant into the state for prosecution.23

Since the technology explosion on the Internet, lawmakers have tried, to no avail, to regulate Internet gambling. In March 1997, United States Senator from Arizona Jon Kyl proposed the Internet Gambling Prohibition Act of 1997,24 which contained the so-called “casual bettor” provision. This provision would have subjected Internet gamblers to as much as three months in prison and fines of $500.25 Two years later, this bill resurfaced without the “casual bettor” provision. Consequently, all attention is focused on the operators of Internet gambling sites and not on the actual users of the sites. Apparently, the motivation behind this type of legislation is quite political because Internet gambling sites are operated offshore and therefore not contributing any money to the U.S. economy.

III. CRIMINAL MENS REA

Knowledge of a material fact is a required element of most offenses. “A person has knowledge of a material fact if he is aware of the fact, or if he correctly believes that it exists.”26 Many times offenses have a willfulness requirement which adds complexity to the issue. The word “willful” can have several distinct meanings, all of which may determine whether an offense has been committed. Possible meanings include “intentional,” or “an act with a bad purpose.”27 The outcome of a case may be determined by these terms’ interpretation. For instance, in Cheek v. United States,28 the defendant professed that he did not disobey federal tax laws because he genuinely believed that they did not apply to him.29 The United States Supreme Court held that it was an error to instruct the jury to ignore evidence of the defendant’s misinterpretation of the tax

25. See Internet Gambling Commission, supra note 8. Many lawmakers were not comfortable with the idea of punishing people for placing bets on their computers. See id. Some of Senator Kyl’s political allies speculated that concerns about enforceability killed this provision. See id.
26. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 109 (1995) (defining common mens rea terms including “knowingly” or “with knowledge”).
27. Id. at 111.
29. See id. at 196 (asserting that defendant did not act with “willfulness” required for conviction).
laws. Since the *Cheek* decision, there has been a split in decisions pertaining to the meaning of "specific intent" or "willfulness."

The *Cheek* decision was expanded from the tax arena to criminal prosecution in *Ratzlaf v. United States*. The Court held that in order to meet the statutory "willfulness" requirement, the government must prove the defendant acted with knowledge that structuring was unlawful, not that the defendant purposely intended to circumvent the bank’s reporting obligation.

In *United States v. X-Citement Video, Inc.*, respondents were convicted of violating 18 U.S.C. § 2252(A)(1) and (2). The United States Court of Appeals for the Ninth Circuit had reversed the trial court, holding that § 2252 was facially unconstitutional under the First Amendment because it did not require a showing that the defendant knew one of the performers was a minor. Upon review, the Supreme Court held that the statute was facially constitutional because a standard presumption favoring a scienter requirement applies to each statutory element, criminalizing otherwise innocent conduct. The Court also held that Congress could not have intended for the statute to apply to actors unaware of the sexually explicit nature of material they transported, shipped, received, distributed or reproduced.

Understanding the above referenced cases is essential in analyzing the scope of criminal liability in Internet gambling cases because the defense will rely on the meaning of the term "knowingly" and how it is applied in this confusing arena. Does a defendant need to know that his conduct violated a specific law? Given the logic in the *Cheek*, *Ratzlaf* and *X-Citement Video* cases, a defendant

30. See id. at 203 (discussing that knowledge and belief were characteristics to be decided by jury).
32. See id. at 136-37.
33. 513 U.S. 64 (1994).
34. See id. at 65-66. This statute prohibits knowingly transporting, shipping, receiving, distributing or reproducing a visual depiction if such depiction involves the use of a minor engaging in sexually explicit conduct. See id. at 65-66 (citing 18 U.S.C. § 2252(a)(1)(A) & (2)(A) (1994)).
35. See id. at 66-67 (discussing defendant’s need of factual knowledge for valid conviction).
36. See id. at 68-69 (holding that “knowingly” modified “the use of a minor”). The Court rejected the Ninth Circuit’s natural grammatical reading of the statute because it “would produce results that were positively absurd.” Id. at 69.
37. See id. at 69. For further discussion of the knowledge requirement, see *infra* note 38 and accompanying text.
could argue either that he/she was not aware that his/her conduct violated a specific law, or that he/she did not think that the law applied to his/her conduct. For those who conduct all of their business over the Internet, it would be impossible to remain up-to-date on all the gambling laws in every state in the country. Even if it were possible to remain up-to-date, it is reasonable to believe that those gambling laws do not apply to them inasmuch as no single state could possibly have jurisdiction over the entire Internet. In *Cohen v. United States,* the Ninth Circuit ruled that actual knowledge of the statutory prohibition against wagering was required in order to obtain a conviction. The Tenth Circuit, however, has recently held that the *Cohen* analysis is not practical. In *United States v. Blair,* defendants operated their gambling operation in the Dominican Republic but accepted bets from people living in Oklahoma. The court held that the knowledge requirement for § 1084 means a general intent to commit the act that forms the basis of the charges. Hence, as long as the defendants' wagering was not a result of mistake or accident, the Tenth Circuit found that general intent satisfied the knowledge element of the statute, and the court refused to require a specific intent that the person making the wager was knowingly committing an unlawful act. The *Blair* analysis, however, does not truly address legitimate questions that may plague a user of the Internet or operator of an Internet gambling company. How is it consistent with due process to convict a

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38. According to the author, it is general knowledge that every state except Nevada has outlawed this type of gambling activity. The author questions whether an Internet gambling site operator would be deemed to be aware of the gambling laws of the other forty-nine states.

39. 378 F.2d 751 (9th Cir. 1967). The *Cohen* court held:
If knowledge of illegality is an element of the section 1084(a) offense, those innocent of intentional wrongdoing are afforded a defense. And if at the same time a rebuttable presumption of such knowledge is recognized, the requirement of knowledge will not substantially impede accomplishment of the statute’s purpose to discourage professional interstate gambling.

Id. at 756.

40. See id. at 757 (noting Congress intended that knowledge of prohibition was required).

41. See *United States v. Blair,* 54 F.3d 639, 643 (10th Cir. 1995) (noting that under “specific intent” crimes it is unnecessary to show defendant knowingly and intentionally violated known legal duty). It is only necessary to do so when Congress clearly intended that it be done. See id. Generally, ignorance of law or mistake is not a defense. See id.

42. 54 F.3d 639 (10th Cir. 1995).

43. See id. at 641.

44. See id. at 642 (distinguishing its interpretation of § 1084 from Ninth Circuit’s interpretation).
person, who operates an Internet gaming company and possesses a lawful license from the site of the company, in the face of technology that allows a person to place a bet from anywhere in the world, if the government only needs to show that an intentional act occurred? Obviously the Internet company acts “intentionally.” The customer presumably acts “intentionally.” The bets or act of accepting bets is not a “mistake” or “accident.” To criminalize such conduct, the law should require something more than general intent, particularly in the face of the complexity of the jurisdictional issues and the conflicting meaning of the terms “knowingly” and “intentionally.”

There has been at least one criminal prosecution in a state court relying on traditional gambling statutes. The statute at issue, section 572.010(1) of the Annotated Missouri Statutes, reads as follows:

A person advances gambling activity if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved. . . .

The case was resolved with a plea agreement, and, as a result, some of the above mentioned issues were never posed for judicial opinion.

IV. CHOICE OF LAW

As mentioned above, Internet gambling prosecutions implicate questions concerning jurisdiction in criminal as well as civil cases. How is it possible for the State of Missouri to exercise jurisdiction over a Pennsylvania resident for operating an Internet gambling business out of Grenada? Some courts in similar cases focus on how interactive the Internet Web site is, meaning the more the site requires participation on the part of a resident, the more a company can be held accountable in that resident’s home state. Courts interpret interaction as a purposeful entry into the forum state and


46. Mo. ANN. STAT. § 572.010(1) (West 1995).

47. See id. (noting complete jurisdictional questions that may arise).
use a "sliding scale" analysis to categorize the interaction. 48 On one end of the scale is the creation of an informational Web site, which requires little or no interaction at all. 49 On the other end of the scale is someone who clearly does business over the Internet. 50 The middle of the scale consists of interactive Web sites where a user can exchange information with the host computer. 51 In these cases, jurisdiction is also based on how interactive the site is. 52 In Minnesota, the Court of Appeals found that personal jurisdiction was proper over an offshore company because of an Internet advertisement concerning an upcoming gambling service and because the defendant developed a mailing list from the Internet that included Minnesota residents. 53 Specifically, the court found that the business had purposely availed itself to do business with residents of the state because Minnesotans accessed the Web site and called the toll-free number that was provided therein. 54 In this case, the court once again focused on the amount of participation the Web site required from residents and used that participation as a basis for exercising jurisdiction. 55

It would seem that the only way to minimize the risk of being haled into a state for prosecution would be to limit the amount of interaction the site requires. This approach, however, would render Internet gambling sites virtually useless. 56 Another option would be for a company to limit the amount of advertising and pro-


49. See Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 298 (S.D.N.Y. 1995) (holding that Web site which listed ticket information for Missouri night club had not operated to entice New York residents and, therefore, could not be brought to New York for trademark infringement action). The court compared the creation of a Web site to placing a product into the stream of commerce and further noted that the site was only a posting of information and not an active solicitation for business. See id. at 300.

50. See Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (holding that personal jurisdiction is proper if defendant enters into contracts with residents of foreign jurisdiction that involve knowing and repeated transmission of computer files over Internet).

51. See Zippo Mfg., 952 F. Supp. at 1124 (noting interaction between host and user).

52. See id.


54. See id. at 718-19 (noting various contacts between business and users).

55. See id.

56. The author notes that limiting the amount of interaction would essentially nullify the Internet gambling site. If the site does not engage the player in a game of chance, and thereby encourage interaction with that player, then it ceases to be a valid Internet gambling site.
motion it does for its site. Given the enormity of the World Wide Web, a company could quite possibly go out of business while waiting for its patrons to stumble upon its site, making this option undesirable. The only other way to limit the risk of liability would be to restrict the site's access. A Web site operator could install a filter either to reject automatically users from certain states, or at the very least post a disclaimer for residents who are illegally accessing the site. This option is not foolproof because the disclaimer could be used incorrectly or a user could avoid the disclaimer entirely.

V. CONCLUSION

The future appears grim for those who operate Internet gambling sites because state gambling statutes are interpreted to find knowledge of a crime where it may not exist, and states can exercise jurisdiction over most non-resident defendants. The frightening aspect of this analysis is that the trend might not stop with Internet gambling. If any state in the country may police the Internet by exercising jurisdiction over defendants, then the World Wide Web is about to get much smaller.

57. The author notes that this would include eliminating hyper-links in related Web sites, as well as removing itself from Internet providers' databases. Many times, players are able to find Internet gambling sites simply by using their Internet provider's search engine and plugging in the words "Internet Gambling."

58. See State, ex rel. Nixon v. Interactive Gaming & Communications Corp., No. CV97-7808 (Mo. Ct. App. May 22, 1997) (noting that site's operator tried to restrict access to Missouri residents; they were still able to log onto site, either by themselves or through site's employees).