

---

# Ace in the Hole: Regulation of Internet Service Providers Saves the Internet Gambling Prohibition Act of 1997

John T. Fojut

Follow this and additional works at: <http://via.library.depaul.edu/jatip>

---

## Recommended Citation

John T. Fojut, *Ace in the Hole: Regulation of Internet Service Providers Saves the Internet Gambling Prohibition Act of 1997*, 8 DePaul J. Art, Tech. & Intell. Prop. L. 155 (1997)

Available at: <http://via.library.depaul.edu/jatip/vol8/iss1/8>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized administrator of Via Sapientiae. For more information, please contact [mbernal2@depaul.edu](mailto:mbernal2@depaul.edu), [wsulliv6@depaul.edu](mailto:wsulliv6@depaul.edu).

# ACE IN THE HOLE: REGULATION OF INTERNET SERVICE PROVIDERS SAVES THE INTERNET GAMBLING PROHIBITION ACT OF 1997

## INTRODUCTION

Gambling is an entertainment industry firmly entrenched in American society.<sup>1</sup> Estimates suggest that the amount of money wagered in the United States each year exceeds \$500 billion.<sup>2</sup> Since approximately eight percent of the total amount wagered is kept as net profits, "legal gambling [is] a \$40 billion industry -- easily bigger than the domestic motion-picture business and the recorded-music industry combined."<sup>3</sup>

Gambling legislation in the United States largely originates with the individual states.<sup>4</sup> Each state determines whether gambling will be permitted within its boundaries -- and if it is permitted, what specific forms of gambling will be allowed.<sup>5</sup> Only Hawaii and Utah prohibit gambling completely; all other states permit legalized gambling,<sup>6</sup> though in varying forms and degrees of restriction. Thus, depending upon where one looks, some popular forms of legalized gambling that one may find in the United States include casinos,<sup>7</sup> horse wagering,<sup>8</sup> dog wagering<sup>9</sup> and lotteries.<sup>10</sup>

---

1. See generally Stephen A. Zorn, *The Federal Income Tax Treatment of Gambling: Fairness or Obsolete Moralism?*, 49 TAX LAW. 1, 2 (1995).

2. Evan I. Schwartz, *Wanna Bet?*, WIRED 3.10, <<http://www.wired.com/wired/3.10/features/gambling.html>>.

3. *Id.*

4. See Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 164 (1996).

5. See *id.*

6. *Internet Gambling*, INDIANAPOLIS STAR, June 11, 1997, at A16.

7. See Paul D. Delva, *The Promises and Perils of Legalized Gambling for Local Governments: Who Decides How to Stack the Deck?*, 68 TEMP. L. REV. 847, 852 (1995).

8. See Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 303-04 (1995).

9. See *id.*

A canopy of federal gambling law rests over the thicket of state gambling legislation, regulating only specific aspects of gambling not easily controlled by the states.<sup>11</sup> One of the most significant pieces of federal legislation applicable to gambling is the Interstate Wire Act.<sup>12</sup> The Interstate Wire Act federally criminalizes the use of wire communications (a telephone call in most instances) in placing a sports wager between states or between a state and a foreign nation.<sup>13</sup> The statute states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>14</sup>

The term “wire communications facility” means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.<sup>15</sup>

The Interstate Wire Act serves its primary objective by curbing the ability of “bookies” to take interstate and foreign bets via a

---

10. See N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 172-73 (1997).

11. Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 588-89 (1997).

12. 18 U.S.C. §§ 1081-1084 (1994).

13. *Id.*

14. *Id.* at § 1084(a).

15. *Id.* at § 1081.

telephone.<sup>16</sup> The utility of the statute is increasingly questioned, however, given the birth and fast-paced growth of a new entertainment industry -- the Internet.<sup>17</sup>

Gambling now occurs on the Internet. Although many contend that on-line gambling is already illegal under the Interstate Wire Act, considerable controversy surrounds whether or not that act does, in fact, cover Internet gambling. Congress, lead by Senator Jon Kyl, is considering new legislation that would amend the Interstate Wire Act so that it is unambiguously clear that Internet gambling is prohibited activity under federal law. In his opening statement before the Senate Judiciary Technology and Terrorism Subcommittee, Senator Kyl noted that “[g]ambling across state lines is illegal, but the advent of the Internet has created the opportunity to gamble in a manner that is not specifically covered by our laws.”<sup>18</sup> Senator Kyl then concluded that new legislation “is necessary for the legal system to keep pace with technology.”<sup>19</sup>

This article analyses the Internet Gambling Prohibition Act of 1997. Section I of the article contains the background of the bill -- the development and nature of the Internet and Internet gambling. Section II discusses the Internet Gambling Prohibition Act of 1997, itself -- considering the motivating concerns that lie beneath the bill and the bill’s amendments to the Interstate Wire Act. Section III discusses the impact the legislation will have if enacted.

## I. BACKGROUND

Most everyone by now is at least cursorily familiar with the Internet -- if not through personal “web surfing” experience, then through second-hand or media accounts of the Internet. “The Internet is a revolutionary tool that dramatically affects the way we communicate, conduct business, and access information. As it knows no boundaries, the Internet is accessed by folks in rural and

16. See Montpas, *supra* note 4, at 180-81.

17. See Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667, 670 (1996).

18. *Press Release of Senator John Kyl, Federal Ban on Internet Gambling Needed, Panel Told -- Witnesses Call for Passage of Kyl Bill to Stop “Abuse, Access, and Addiction”* (July 28, 1997).

urban areas alike, in large countries as well as small.<sup>20</sup> Estimates in 1996 suggest that at least 60 million people, from as many as 160 countries, access the Internet.<sup>21</sup>

The array of Internet information is endless.<sup>22</sup> Available Internet content seems only to be limited by one's imagination. The most casual glance will reveal information from political, social, educational, and cultural fields.<sup>23</sup> Along with the Internet's beneficial offerings, however, exist dubious, if not harmful offerings.<sup>24</sup> Just as one may retrieve instructions for building a toy model boat, one may also retrieve instructions for building a bomb.<sup>25</sup> And just as one may retrieve the text of a prayer, one may also retrieve the text of a manifesto inciting racial hatred.<sup>26</sup>

It was only a matter of time before gambling would find its way to the Internet.<sup>27</sup> Several dozen gambling sites are currently operated on the world wide web.<sup>28</sup> These sites offer all traditional forms of gambling -- casino wagering, sports wagering, horse and dog wagering, and lotteries<sup>29</sup> -- and it is probable that in the not so distant future the sites could offer *virtually* every conceivable form of gambling -- political election wagering<sup>30</sup> and armed conflict wagering to name a few possibilities.

---

20. 143 Cong. Rec. E1633 (daily ed. Sept. 3, 1997) (statement of Rep. Bob Goodlatte).

21. See *Illegal and Harmful Content on the Internet*, Communication to the European Parliament, The Council, the Economic and Social Committee and the Committee of the Regions, <<http://www2.echo.lu/legal/en/internet/content/communic.html>>.

22. See Hon. Robert G. Foster, *Roping Goats on the Internet*, 76 MICH. B.J. 420, 420 (1997).

23. See *Illegal and Harmful Content on the Internet*, *supra* note 21.

24. *Id.*

25. *Id.*

26. *Id.*

27. See Montpas, *supra* note 4, at 167.

28. See John Bigness, *Companies Place Bets on Internet Gambling*, CHI. TRI, Aug. 25, 1997, at 1 (noting that some of the popular Internet gambling sites are: <http://www.wagernet.com>; <http://www.virtcasino.com>; <http://www.ck.cosp.com>; <http://www.sp.cosp.com>; <http://www.Gamblenet.com/sports>; <http://www.globalcasino.com/index.html>; <http://www.casino.org>; and, <http://www.Interlotto.li>).

29. See ANTHONY CABOT, THE INTERNET GAMBLING REPORT 13 (1997).

30. See Schwartz, *supra* note 2.

At present, Internet gambling is not as embraced as traditional gambling. Between \$100 million and \$200 million is estimated to have been wagered over the Internet last year.<sup>31</sup> While that is by no means a paltry sum, it is only a fraction of the \$500 billion wagered each year on traditional forms of gambling.<sup>32</sup> Notwithstanding its current lag behind traditional gambling, Internet gambling is poised to significantly lessen the gap. Steve Toneguzzo, an advisor to the Australian government, believes Internet gambling will generate approximately \$50 billion in revenue by the year 2000.<sup>33</sup> One U.S. analyst predicts even larger figures, stating that the “projection of Internet gambling revenues of \$100 billion to \$200 billion ... by 2005 is reasonable, even conservative.”<sup>34</sup>

From the player’s perspective, the mechanics of Internet gambling are relatively straight forward. After the player accesses an Internet gambling site, he is prompted to register with the operator.<sup>35</sup> At registration, the player is required to provide identification, location information and to establish an account.<sup>36</sup> The account is generally created by executing a credit card or wire transfer of funds to the operator.<sup>37</sup> Most Internet gambling sites require a minimum amount to establish an account, ranging from a few hundred to a few thousand dollars.<sup>38</sup> When the preliminaries are satisfied, the player may enter and exit the site at his pleasure, gambling at whatever game the site offers.<sup>39</sup> Thus, if his taste is blackjack, he “approaches” the blackjack table, places his bet, and awaits his cards.<sup>40</sup> If he loses, the amount wagered is instantaneously deducted from his account.<sup>41</sup> If he wins, the

31. *Internet Gambling*, *supra* note 6, at A16.

32. *Id.*

33. Louise Kehoe & Nikki Tait, *High Rollers in a Virtual Casino*, FIN. TIMES, June 14, 1997, at 9.

34. Bigness, *supra* note 28.

35. See generally <<http://www.wagernet.com>>; <<http://www.virtcasino.com>>; <<http://www.casino.org>>.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. See generally <<http://www.wagernet.com>>; <<http://www.virtcasino.com>>; <<http://www.casino.org>>.

41. *Id.*

amount wagered is either credited to his account or written in the form of a check and mailed back to him.<sup>42</sup>

Despite its ease and convenience, Internet gambling does carry with it notable shortcomings. Certainly, the ambiance of Internet gambling does not quite match that of a “real” casino.<sup>43</sup> For instance, on-line casinos are often slow and unattractive.<sup>44</sup> The possibility of fraud also represents a significant drawback.<sup>45</sup> Specifically, there is a possibility that the gambling is “rigged” or that winnings will not be paid out.<sup>46</sup> “In a real casino, for instance, you can see the blackjack dealer insert a finite number of brand new decks into the card tray. But what’s to stop a virtual casino from fixing the order of a bottomless sequence of cards? ‘They could put a secret algorithm in the program to pull more 21s when the house gets behind ...’”<sup>47</sup> Finally, even if the operator is running an “honest” site, there still exists the possibility that computer hackers may intercept the player’s credit card information<sup>48</sup> or gain access to his gambling account.

## II. THE INTERNET GAMBLING PROHIBITION ACT OF 1997

The Internet Gambling Prohibition Act of 1997<sup>49</sup> significantly amends the Interstate Wire Act. The bill’s amendments are prompted by three genera of concerns: legal; social; and, economic. In light of these concerns, the bill alters the Interstate Wire Act in six notable ways: it identifies the Internet as a “communication facility”; it identifies all forms of gambling as prohibited gambling; it provides penalties for the both the operator and the user; it identifies Internet service providers as “common carriers”; it provides enjoinderment of “common carriers”; and, it provides extraterritorial application.

42. Schwartz, *supra* note 2.

43. See CABOT, *supra* note 29, at 27.

44. Kehoe & Tait, *supra* note 33, at 9.

45. See Mark Fineman, ‘Virtual Casinos’ Cash In on Lax Rules in Antigua, L.A. TIMES, Sept. 21, 1997, at A1.

46. Bigness, *supra* note 28, at 1.

47. Schwartz, *supra* note 2.

48. Kehoe & Tait, *supra* note 33.

49. S. 474, 105th Cong., 1st Sess. (1997).

## A. Concerns

### i. Legal

First, the proposed Act specifically criminalizes Internet gambling in order to clarify the ambiguity of the Interstate Wire Act -- ambiguity created by drafting and technological advances, most notably embodied in the Internet.<sup>50</sup> At its inception, the Interstate Wire Act, enacted in 1961, did not contemplate the existence of a communications facility such as the Internet. Because of this understandable lack of foresight, the Interstate Wire Act did not specifically identify the mode of transmission of information and communication that represents the Internet as a prohibited means of transmission. Further, the Interstate Wire Act only prohibited gambling activity by those in the business of betting or wagering; curiously bypassing any mention of the casual bettor.<sup>51</sup> Finally, while the Interstate Wire Act definitely prohibits sports wagering, the Act fails to identify other forms of gambling as illegal.<sup>52</sup>

### ii. Social

Second, the proposed Act specifically criminalizes Internet gambling in order to curb the insidious effects of under-aged and compulsive gambling. The very nature of the Internet is likely to produce increased instances of both under-aged and compulsive gambling if it remains unfettered.<sup>53</sup> Children and gambling addicts are particularly susceptible to financial ruin when allowed to gamble unchecked. For instance, children are prime victims of Internet gambling because “[w]idely dispersed electronic betting machines ... tempt teenagers already fond of video games’ ... [and since] children often know more about computers than their parents, children are capable of circumventing their parents’

50. See Bigness, *supra* note 28.

51. S. 474.

52. *Id.*

53. Kehoe & Tait, *supra* note 33.

control.”<sup>54</sup> All gamblers, especially compulsive gamblers, are vulnerable to Internet gambling because of the “detached” atmosphere inherent to Internet gambling.<sup>55</sup>

In a casino, for example, the chips are a tangible representation of how much money the gambler has won or lost. As the pile of chips grows or shrinks, gamblers are constantly reminded that they are winning or losing their own money. On the Internet, there is no similar sensation because there is no tangible representation of money. Consequently, the Internet lacks a disincentive that curbs gambling beyond one’s means.<sup>56</sup>

Ann Geer, chair of the National Coalition Against Gambling Extension, highlighted this concern when she testified before the Subcommittee on Technology, Terrorism and Government Information.<sup>57</sup> She stated, “Gambling is one of the fastest growing addictions in the country. Internet gambling would multiply addiction exponentially, increasing access and magnifying the potential destructiveness of the addiction. Addicts could literally click their mouse and bet the house.”<sup>58</sup>

### *iii. Economic*

Finally, the proposed act specifically criminalizes Internet gambling, presumably to minimize the loss of revenue that would otherwise stay in the United States.<sup>59</sup> Currently, legalized gambling in the United States not only yields huge corporate earnings, but it also provides many with a means of employment.<sup>60</sup> In fact, revenue generated from gambling is one of the main reasons why legalized

---

54. Montpas, *supra* note 4, at 173.

55. *Id.* at 172.

56. *Id.*

57. Press Release of Senator John Kyl, *supra* note 18.

58. *Id.*

59. *Internet Gambling*, *supra* note 6 (criminalizing both gambling generated revenue and gambling generated tax revenue).

60. Montpas, *supra* note 4, at 166-67.

gambling is so prominent in the United States.<sup>61</sup> By criminalizing Internet gambling, people must patronize the already existing gambling establishments in the United States if they wish to gamble, thereby preserving the steady influx of business and revenue for the United States' legalized gambling industry. Just as the bill seeks to maintain current levels of gambling generated corporate and personal revenue, it also seeks to sustain current levels of gambling generated tax revenue for state and federal government. "Since many of the online gambling establishments are shadow companies headquartered offshore, [a] ... private cyber casino might offer the perfect shelter from the taxes the government imposes on ... [winnings from legalized gambling]."<sup>62</sup> Criminalizing Internet gambling, therefore, will also preserve the steady influx of tax revenue for state and federal government.

### B. Amendments

#### i. *The Internet as a "Communications Facility"*

The bill redefines the meaning of "communications" in order to specifically incorporate the Internet.<sup>63</sup> In assuring that the Internet is included, the bill first broadens the definition of "communication" by eliminating "wire" as its modifier.<sup>64</sup> The bill further substitutes "transmission or receipt of data, writings" for "transmission of writings."<sup>65</sup> Finally, the bill strikes "or other like ...." and instead inserts "radio, electromagnetic, photo-optical, photoelectric, or other similar facility."<sup>66</sup> The net result of this set of amendments is that the Internet is unequivocally included as a prohibited means of transmitting wagering activity in interstate or foreign commerce.<sup>67</sup>

---

61. *Id.*

62. Schwartz, *supra* note 2.

63. S. 474.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Internet Gambling Legislation Introduced on Capitol Hill*, 13 No. 12

*ii. All Forms of Gambling as Prohibited Gambling*

The bill redefines the meaning of “bets and wagers” in order to specifically incorporate all forms of gambling.<sup>68</sup> To accomplish this objective, the bill inserts the following language:

The term bets or wagers --

(A) means the staking or risking by any person of something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;

(B) includes the purchase of chance or opportunity to win a lottery or other prize;<sup>69</sup>

This added language “[r]emove[s] the limitation that the only prohibited ‘bets or wagers’ are those made on ‘sporting events or contests.’ This would clarify that wagers made with Internet casinos and lotteries would be illegal.”<sup>70</sup>

*iii. Penalties for Both the Operator and User*

The bill increases the penalties for those “engaged in the business of betting or wagering” and it now imposes penalties on the “casual bettor.”<sup>71</sup> The bill strikes § 1084(a) and (b), sections that include “Whoever being engaged in the business of betting or wagering” and “shall be fined ... or imprisoned not more than two years, or both” and instead inserts:

(a) In General --

---

68. S. 474.

69. *Id.*

70. CABOT, *supra* note 29, at 87.

71. S. 474.

(1) Persons Engaged in the Business of Betting or Wagering -- Whoever, being engaged in the business of betting or wagering knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers, shall be fined not more than \$20,000, imprisoned not more than 4 years, or both.

(2) Other Persons -- Whoever other than a person described in paragraph (1)) knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers, shall be fined not more than \$2,500, imprisoned not more than six months, or both.<sup>72</sup>

The bill clearly, then, includes the “casual bettor” as well as one “engaged in the business or betting or wagering.”

#### *iv. Internet Service Providers as “Common Carriers”*

The bill redefines the meaning of “common carriers” in order to specifically include Internet service providers.<sup>73</sup> After every reference to “common carrier” the bill inserts “or interactive computer service provider.”<sup>74</sup> Thus, Internet service providers are now obliged, along with other common carriers, to “discontinue or refuse, the leasing, furnishing, or maintaining” of a facility in violation of this statute upon notification “by a Federal, State, or local law enforcement agency.”<sup>75</sup>

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

v. *Enjoinment of "Common Carriers"*

Further, the bill adds language that permits law enforcement agencies to acquire an injunction against a common carrier who refuses to terminate access after being notified of an offending site.<sup>76</sup> The bill inserts:

Injunctive Relief -- Any Federal, State, or local law enforcement agency acting within its jurisdiction, shall have the authority, following the issuance of a notice under paragraph (1), to seek an injunction or other appropriate relief from a Federal or State court of competent jurisdiction barring access to the communication facility at issue or preventing the use of such facility for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law.<sup>77</sup>

If an Internet Service provider refuses to disallow access to a gambling site, a court, by way of an injunction, may order the provider to terminate access.

vi. *Extraterritorial Application*

Finally, the bill expressly asserts that the statute will apply extraterritorily.<sup>78</sup> The bill inserts the following "sense of the Senate":

It is the sense of the Senate that the Federal Government should have extraterritorial jurisdiction over the transmission to or receipt from the United States of --

---

76. S. 474.

77. *Id.*

78. *Id.*

- (1) bets or wagers (as that term is defined in section 1081 of title 18, United States Code);
- (2) information assisting in the placing of bets or wagers; and
- (3) any communication that entitles the transmitter or recipient to the opportunity to receive money or credit as a result of bets or wagers.<sup>79</sup>

The bill is expressly intended to apply beyond United States' boundaries.

### III. IMPACT

The Internet Gambling Prohibition Act of 1997, if enacted, will successfully prohibit most Internet gambling despite law enforcement's inability to directly manage the activities of Internet gambling operators and users. The prohibition will be enforced indirectly; operators and users will be precluded from engaging in Internet gambling by virtue of the regulation of Internet service providers.<sup>80</sup> By requiring Internet service providers to terminate access to Internet gambling sites, the bill will render it exceedingly difficult for operators and users to participate in Internet gambling. The following subsections consider the specific impact the legislation will have on the various participants of Internet gambling -- both the domestic and foreign Internet gambling operators, the Internet service providers, and the Internet gambling users.

#### *A. Domestic Internet Gambling Operators*

Internet gambling operators in the United States will, for the most part, experience few difficulties in avoiding prosecution.<sup>81</sup> Law enforcement agencies will, presumably, acquire notice of the existence of the prohibited sites by governmental, industry, private organizational or private individual monitoring of Internet

79. *Id.*

80. *Id.*

81. See generally Ingrid Becker, *Cybercrime: Cops Can't Keep Up with Technobandits*, 15 *JUN CAL. LAW* 47 (1995).

gambling sites. When notified of an offending site, an agency should investigate in an effort to identify the location of the Internet gambling operator. If the location of the operator is correctly identified, and if the Internet gambling site is operated from within the United States, no apparent obstacles will prevent an agency from apprehending the operator, terminating the service, and enforcing the legislation through the criminal prosecution of the Internet gambling operator. However, the agency will likely find it difficult to correctly identify the location of the operator.

The Net enables transactions between people who do not know, and in many cases cannot know, each other's physical location. Location remains vitally important, but only location within a virtual space consisting of the "address" of the machines between which messages and information are routed. The system is indifferent to the physical location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction. Although the domain name initially assigned to a given machine may be associated with an Internet Protocol address that corresponds to that machine's physical location (for example, a ".uk" domain name extension), the machine may be physically moved without affecting its domain name. Alternatively, the owner of the domain name might request that the name become associated with an entirely different machine, in a different physical location.<sup>82</sup>

Thus, through the use of a "surrogate server" an Internet gambling operator may "blanket" the identity and location of the actual server by changing the domain name.<sup>83</sup> Most, if not all operators will employ these concealing techniques, and thus, prosecution of domestic Internet gambling operators will be rare.

---

82. David R. Johnson & David Post, *Law and Borders -- The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371 (1996).

83. CABOT, *supra* note 29, at 103.

### B. Foreign Internet Gambling Operators

Since domestic Internet gambling operators will be faced with only minimal risk of prosecution, it is reasonable to conclude that foreign Internet gambling operators will be presented with no risk of prosecution. Internet gambling operations commonly operate offshore to escape the enforcement of United States' legislation.<sup>84</sup> "Most of these operations are based in the Caribbean where gaming licenses are readily available and beyond the jurisdiction of regulators in the home countries of most of their customers."<sup>85</sup> Popular Caribbean Internet gambling host countries include: Antigua and Barbuda, Belize, Grenada, Cook Islands, and Turks and Caicos Islands.<sup>86</sup> But Caribbean nations are not the only ones embracing the establishment of virtual casinos, other Internet gambling host countries include Australia and Liechtenstein.<sup>87</sup>

Running an Internet gambling site in a country where that activity is legal will not preclude application of the legislation to the operators because the legislation expressly applies extraterritorially.<sup>88</sup> Running a site in a foreign country will, however, preclude enforcement of the legislation against the operators because the United States, in most instances, will lack personal jurisdiction over the operators.<sup>89</sup> "[T]he casino itself would only be subject to the personal jurisdiction in the United States if it was incorporated in this country or any of its owners or operators were United States citizens or if any of the owners or operators were physically present in the United States and are arrested here."<sup>90</sup>

Nevertheless, two possibilities exist that could provide the United States with personal jurisdiction over foreign Internet gambling operators, and thus, with the ability to enforce the legislation.

84. Loo, *supra* note 17, at 667-68.

85. Kehoe & Tait, *supra* note 33.

86. Bigness, *supra* note 28.

87. *Id.*

88. CABOT, *supra* note 29, at 103.

89. *Id.* at 103-04.

The United States could exercise personal jurisdiction over a foreign operator if the foreign host country arrested the operator and relinquished him to the United States.<sup>91</sup> This could be effected through two processes. First, under an extradition treaty between the United States and the host country, the operator could be extradited to the United States.<sup>92</sup> Extradition, though, will only occur if Internet gambling is a crime in both countries -- this requisite is often referred to as double criminality.<sup>93</sup> As a result, countries that legalize Internet gambling would be unwilling to extradite an operator.<sup>94</sup> Second, a foreign country may decide to arrest and relinquish the operator to the United States under the auspices of comity.<sup>95</sup> Comity is "defined in fairly broad terms as a discretionary doctrine based on notions of passive consent and inconvenience, which would lead the courts of one country to give effect to legal acts done in another country."<sup>96</sup> In essence, "comity refers to diplomatic niceties performed by [countries] out of a sense of international etiquette rather than binding obligation."<sup>97</sup> Although some foreign countries may be willing to release Internet gambling operators to the United States under the doctrine of comity in an effort to maintain or create "good will" between the two countries, it is unlikely that a foreign country that not only legalizes Internet gambling, but that in fact encourages it, would be willing to release the operator under the doctrine of comity.

Personal jurisdiction over a foreign operator could also be achieved by forcible abduction and transfer of the operator to the United States.<sup>98</sup> United States courts have dismissed challenges to personal jurisdiction attained through abduction in instances where

91. See generally M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (3d rev. ed. 1996).

92. See John T. Soma, et al., *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 333 (1997) (stating that extradition for a computer crime can occur if both countries agree to the illegality of, and punishment for, the activity).

93. See BASSIOUNI, *supra* note 90, at 388.

94. CABOT, *supra* note 29, at 105.

95. See *United States v. Rauscher*, 119 U.S. 407, 412 (1886).

96. Jay Hall, *International Comity and U.S. Federal Common Law*, 84 AM. SOC'Y INT'L L. PROC. 326 (1990).

97. Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S. -- E.U. Comparison*, 30 STAN. J. INT'L L. 525, 527 (1994).

98. See CABOT, *supra* note 29, at 105.

agents of the United States and foreign operatives have abducted an alleged criminal.<sup>99</sup> Abduction of foreign Internet gambling operators, however, is unlikely.<sup>100</sup> The United States is inclined to pursue such abduction only in situations where the alleged criminal poses significant threats to United States' interests. As the case of Manuel Noriega demonstrates, even the abduction of an internationally notorious organized drug offender aroused cries of outrage against the American exercise of this dubious practice.<sup>101</sup> Thus, the United States will almost always lack personal jurisdiction over foreign Internet gambling operators, making them virtually immune from prosecution.

### C. Domestic Internet Service Providers

The success of the legislation rests upon its provisions allowing for the regulation of domestic Internet service providers. The allowance for a governmental agency to request, and if necessary, enjoin an Internet service provider to terminate access to an Internet gambling site is invaluable given the ability of both domestic and foreign Internet gambling operators to evade prosecution.<sup>102</sup>

A governmental agency will notify the Internet service providers of the Internet gambling sites.<sup>103</sup> The Internet service providers, then, "can cause gambling sites to be unavailable to home users, and in essence, create banned sites."<sup>104</sup> It is suggested that monitoring the Internet for gambling sites may lack feasibility because of the millions of existing Internet sites<sup>105</sup> and the ease with which a site address can be changed. While these concerns are legitimate, they will not effect the impossibility of such monitoring. Various bodies will undoubtedly partake in the

99. *See United States v. Noriega*, 746 F. Supp. 1506, 1529-41 (S.D. Fla. 1990); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 661-62 (1992).

100. CABOT, *supra* note 29, at 106.

101. *Protesters On 4,800-Mile March Enter U.S.*, SAN ANTONIO LIGHT, June 25, 1992, at C4.

102. S. 474.

103. *Id.*

104. CABOT, *supra* note 29, at 112.

105. *Id.* at 114.

monitoring, and even if an Internet gambling site goes undetected for some period of time, it will eventually be detected and its accessibility terminated. Additionally, if a site remains undetected, very few individuals would establish a gambling account with that site knowing that it is only a matter of days, or less, before the site will be detected and thus inaccessible.

Regulation of Internet service providers is the key to this bill, and is the legislation's best, and perhaps only line of defense, providing governmental agencies with the power to require Internet service providers to terminate access to Internet gambling sites, and effectively prohibiting Internet gambling.

#### *D. Internet Gambling Users*

The impact of the legislation on the Internet gambling user will be to effect nearly a blanket prohibition. Law enforcement officials can not readily determine if a home user is accessing a Internet gambling site.<sup>106</sup> In fact, like the operator, the Internet gambling user will be virtually immune from detection.<sup>107</sup> One of the few instances that could afford law enforcement with evidence to prosecute a user would be if a governmental agency was able to seize records from an Internet gambling operator. But, as previously noted, the operators are not likely to be caught. Rather, the legislation will effectively preclude the Internet gambling user from gambling by virtue of the fact that the Internet gambling sites will be inaccessible.<sup>108</sup>

### IV. CONCLUSION

Internet gambling is a relatively new activity that combines two of America's favorite forms of entertainment -- gambling and the Internet. Gambling on the Internet is already extensive, and all indications are that it will only increase in popularity. The Internet Gambling Prohibition Act of 1997 emerges as a piece of federal

---

106. *Id.* at 108-11.

107. *Id.*

108. *See supra* section III(c).

1997]

*INTERNET GAMBLING ACT*

173

legislation aimed at resuscitating the ill-equipped Interstate Wire Act -- an older statute whose efficacy has been eroded by technology, especially by the Internet. The Internet Gambling Prohibition Act of 1997 makes several amendments to the Interstate Wire Act that do, in fact, remedy the shortcomings of federal legislation in successfully prohibiting Internet gambling.

Although the bill is a necessary and effective piece of legislation worthy of enactment, "the consensus is that Congress won't [enact the bill] for at least two years, when the findings of the national commission on gambling are due."<sup>109</sup> This will be too late. It is clear that Internet gambling needs to be addressed. More particularly, it is clear that Internet gambling needs to be prohibited, as it is gambling between states and between states and foreign countries -- activity that federal law plainly intended, and intends, to prohibit. The emergence of new technology should not be used to justify the sabotage of long held Congressional intent, especially when there exists a bill that will remedy the defects of current law so as to effectively maintain that intent. Since the bill will effectively prohibit Internet gambling, it is commensurate with the history and intentions of the federal government in dealing with interstate and foreign gambling, and therefore, there is no reason why it should not be enacted without further wait.

*John T. Fojut*

---

<sup>109</sup> *Internet Gambling, supra* note 6.

