

The Freedom to Market

■ An evaluation of online gambling advertising issues under U.S. law

By: Lawrence G. Walters, Esq.
www.GameAttorneys.com

The popularity of online gaming has increased exponentially in recent years, making “Texas Hold Em” an indispensable American past-time, as well as a billion dollar industry. While millions of Americans decide whether to hold or to fold in front of their computers, the courts are still wrangling with the legality of such activities. These legal issues become even more clouded when the concept of commercial speech is injected in the mix, as with advertising activity. Yet advertising in the United States remains a critical part of any viable business plan, given that the vast majority of the industry’s customers come from this country. Creative marketing representatives continue to test the murky waters of advertising regulation, with novel promotional campaigns, designed to catch the eye of the potential bettor, while skirting possible legal pitfalls. Given the renewed effort by U.S. authorities to crack down on Internet gambling operations¹, using both state and federal law, a renewed look at the advertising issues is essential to determine whether a given gaming promotion will earn you a cool million, or put you in hot water. This article will explore the historical treatment of gambling advertising by the courts, evaluate the current regulatory climate and discuss some considerations for the future of online gambling advertising.

Historical Overview

As is evident from early United States history, the government has viewed gambling as a “vice” activity; the same as drugs, prostitution and pornography. The government has used this

¹ “Arrest, Bill Won’t Deter Online Gambling,” *USA Today* (August 21, 2006), which can be viewed at: http://www.usatoday.com/tech/news/2006-08-20-online-gambling_x.htm; “Chairman of Online Casino Arrested in NY,” *New York Times* (September 7, 2006), which can be viewed at: http://www.nytimes.com/2006/09/07/business/07end-sptbet.html?_r=1&oref=slogin.

categorization to justify significant regulation of both the conduct of gambling, and by extension, advertising activity. It seeks to prevent citizens from engaging in these vice activities out of a paternalistic belief that it has a responsibility to protect the individual from himself, given its “police power” to preserve the health, safety, and morals of the community. However, the power of the United States government to regulate advertising of a particular product or service is not coextensive with its ability to regulate the actual consumption of that same product or service. In other words, as discussed below, while the government might be able to regulate or even ban the conduct of gambling itself, it is less free to regulate the actual commercial speech about that activity.

The United States government has an extensive history with regulating the promotion of gambling. As early as the 1800’s, Congress made it illegal to mail letters containing information about lotteries or other similar enterprises offering prizes of any kind.² By 1890, Congress extended the ban to include newspapers as well.³ The mailing of gambling advertisements in print form is still prohibited.⁴

For decades, the Communications Act of 1934⁵ (hereinafter “§1304” or the “Act”) prohibited the broadcast and advertising of gambling activities. Although the Act appeared only to prohibit the advertising of information concerning lotteries, various regulatory and enforcement agencies had interpreted the law to include proscribe other forms of gambling advertisements as well. Throughout the years, exemptions had been carved out, allowing advertising for Indian casinos, state lotteries, jai alai, and other activities. Private casinos, however, were not granted an exemption, and accordingly, substantial efforts were devoted to

² Act of July 27, 1867 §13, 15 *Stat.* 196.

³ §1, 26 *Stat.* 465.

⁴ See, Title 18 U.S.C. § 1952(a) [the Travel Act].

⁵ Title 18 U.S.C. §1304

invalidating or limiting §1304 by U.S. casino gaming interests. Those efforts finally succeeded in 1999, when the federal ban was struck down by a unanimous Supreme Court. In *Greater New Orleans Broadcasting Association v. United States*,⁶ the Justices ruled that the ban violated the First Amendment and was so wrought with exceptions that it could not fulfill its stated purpose of minimizing the ills of gambling. The ruling granted more First Amendment protections to commercial speech than ever before.

Current Legal Standards

Traditionally, a First Amendment challenge to advertising restrictions is analyzed by the principles set forth in the *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* case.⁷ In what has been referred to as the “*Central Hudson Test*,” the court must first determine whether the First Amendment applies at all. In doing so, the proper inquiry is whether the advertisement concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to a particular kind of commercial speech at issue, the speech may be restricted only if:

1. The government’s interest in doing so is substantial;
2. The restrictions directly advance the government’s asserted interest; and,
3. The restrictions are no more extensive than necessary to serve that interest.⁸

It is the first element of the test that can be such a nuisance for the online gaming industry, and where many cases are won or lost. Although it may be true that the government has a substantial interest in regulating gambling in general, it is difficult to prove that such interest extends to online gambling. For example, online gambling cannot be accused of causing increased prostitution or drunkenness. Nor can the government seriously maintain that Internet

⁶ 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999).

⁷ 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

⁸ *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351.

gaming is pervasively controlled by organized crime. Yet in seeking to justify regulation of any form of gambling advertising, the government typically introduces this “parade of horrors” allegedly caused by gambling. However, the government’s hypocrisy becomes quite apparent when one reviews the many exceptions for Indian gambling, fishing tournaments, lotteries and the like, weighing against the argument that it has a substantial interest in restricting advertising for similar enterprises.

When the Supreme Court considered the *Greater New Orleans Broadcasting Association v. U.S.*, §1304 was analyzed using the *Central Hudson* test. According to Justice Stevens, the ban failed the test. The extent of the exemptions granted to other forms of gambling had made it so that the law could no longer be said to advance the government’s interest. In striking down the ban, the Justices recognized that some form of gambling was legal in nearly every state.⁹ In light of the decision, the state of the law regarding the government’s ability to regulate gambling advertising had become increasingly murky. While it is a generally accepted principle that the government can ban gambling all together because of its associated negative impacts on society, the First Amendment prohibits the government from banning all associated advertising. Yet from the perspective of the Department of Justice, all online gambling is illegal, and thus advertising such illegal activities is also unlawful.¹⁰ Although the decision may have seemed like a green light for the advertising of online games, the government quickly discovered other avenues to halt such advertising activities.

Online Gambling Advertising Taken to Task

By 2001, advertising for online gambling ventures had become ubiquitous on cable television and AM Radio, and was competing with the most popular industries, including retail

⁹ 119 S.Ct. at 1932, N.5.

¹⁰ *Casino City v. United States Department of Justice*, ___ F.Supp.2d. ___, Civil Action No. 04-557-B-M3 (M.D. La. 2004).

and travel. In June 2003, the U.S. Justice Department shocked the online gambling industry by warning numerous media outlets that the continued acceptance of advertising from online gambling facilities may constitute “aiding and abetting” criminal conduct under federal law.¹¹ Given the widespread mainstream promotion of online gambling, the government had become concerned that the average American could conclude that online gambling is perfectly legal. Apparently, the Department of Justice felt the time had come to do something about the proliferation of online gambling advertising on television, radio and the Internet. In an attempt to remind U.S. citizens that online gambling and sports betting is illegal, including the promotion thereof, an investigation emanating from the Eastern District of Missouri began. Before long, a series of investigative subpoenas were issued. Although no charges were ever brought against any of the targeted advertisers, the investigation created such a sense of fear that several large media outlets ceased, or dramatically decreased, their promotion of online gambling ventures on their own accord out of fear of prosecution. Some companies reached civil settlements with the government, and agreed to cease carrying online gambling advertising.¹² For example, several St. Louis, Missouri, radio stations agreed to forfeit \$158,000.00 to the Department of Justice, based on allegations that their commercials for offshore gambling operations violated, inter alia, the Wire Act.¹³ The government claimed that this settlement was part of over \$30 million dollars in forfeitures, back taxes and penalties paid to the Department of Justice as a result of investigations conducted from 2000-2003.¹⁴

¹¹ See Correspondence from John G. Malcolm, Deputy Asst. Attorney General, Criminal Division, United States Department of Justice (06.11.03). A copy of the letter can be viewed at http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf.

¹² Chuck Humphrey, “DOJ Recovery from St. Louis Radio Stations,” www.Gambling-Law-US.com (February 27, 2005), found at: <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm>.

¹³ <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm>.

¹⁴ <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm>

By 2004, large media outlets including Infinity Broadcasting, Clear Channel Communications, and Discovery Networks, the parent of the Travel Channel had pulled their ads.¹⁵ The decision to pull out of the online gambling advertising business by Discovery Network caused problems for Paradise Poker, who had contracted with the Network for advertising its services, before the decision was made. The intimidation took a serious turn soon thereafter when Paradise Poker attempted to recover \$3.25 million dollars in unused advertisements. Specifically, Paradise Poker had a \$3.85 million dollar contract with Discovery Communications to air a series of 30-second ads.¹⁶ After only a portion of those ads were aired by Discovery Communications, Paradise Poker filed suit in the Federal District of Maryland to recover the remaining balance. Instead, U.S. Marshals seized the money, on grounds that it was generated by illegal online gaming activity, and earmarked to advertise that activity in the mainstream media.¹⁷

Bigwig search engines like Google and Yahoo also followed suit and discontinued acceptance of advertisements.¹⁸ The Sporting News paid 7.2 million dollars in fines and compelled public statements about the dangers of online gambling, to avoid criminal charges arising out of the investigations.¹⁹ The increasingly aggressive DOJ investigations combined with a lack of case law and precedent governing the issue of advertising made it too risky for public companies like Yahoo to continue gambling with such lucrative advertising contracts.

¹⁵ "Advertising Internet Gambling, Chuck Humphrey," (February 27, 2005) <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm>

¹⁶ "U.S. Steps Up Push Against Online Casinos by Seizing Cash," *The New York Times* (May 31, 2004), which can be viewed at: <http://www.nytimes.com/2004/05/31/technology/31gambling.html?ex=1401422400&en=32b386c595a19305&ei=5007&partner=USERLAND>.

¹⁷ *Id.*

¹⁸ "Advertising for Online Gambling," *E-Commerce Times* (April 28, 2005), which can be viewed at: <http://www.ecommercetimes.com/story/42696.html>

¹⁹ "Latest Arrest Chips Away at Online Betting," *LA Times* (September 8, 2006), which can be viewed at: <http://www.latimes.com/news/nationworld/nation/la-na-online8sep08,1,2052648.story?coll=la-headlines-nation&track=crosspromo>.

These actions by the Justice Department illustrate the lengths to which the government may go to achieve a desired result. From the DOJ perspective, advertising for online gambling is just as illegal as the activity of online gambling, itself. But since online gambling advertising is not specifically prohibited by federal law, prosecutors used a “catch all” provision to fill in for the missing gaps of federal legislation. In so doing, the Justice Department succeeded in creating a “chilling effect.” By threatening enforcement and prosecution, the DOJ forced many companies to forego their constitutional right to engage in commercial speech. Although precedent criminalizing traditional advertising activities does not exist, the intimidation worked, and mainstream advertisers steered clear of the online gambling sector.

The government’s campaign against advertisers in the U.S. prompted one online gambling advertiser to initiate a test case. While most mainstream media outlets decided to shy away from the online gaming industry for a while, Casino City, a Louisiana company that operates the Casino City Network, filed a complaint in federal court against the Department of Justice. The complaint alleged that it advertised lawful overseas companies that offer online casino and sports betting, and was threatened with prosecution based on threats and subpoenas from the Justice Department. Casino City sought a judicial declaration that the aiding and abetting statutes cannot be constitutionally applied to criminalize online gambling advertising. Unfortunately for the industry, the District Court refused to issue a ruling on the merits of the First Amendment claims, and dismissed the case on the grounds that Casino City had not been threatened directly with legal action by the DOJ.

But the court went even further than it had to in order to resolve the case, and issued rulings on the constitutional claims. In doing so, it noted that the advertising involved in the case

was directed to “illegal activity, namely Internet gambling.”²⁰ The court further stated that the speech was not protected by the First Amendment because it was misleading and contained information regarding illegal activities, namely internet gaming.²¹ The court made no effort to distinguish between the types of gambling advertised, but instead concluded that all online gambling is illegal. This ruling was unusual, particularly given the fact that this case was filed in the Middle District of Louisiana, which is governed by the Fifth Circuit Court of Appeals – the court that issued the *In Re Mastercard* decision.²² That case distinguished between sports betting, which is clearly prohibited by the Wire Act, and typical casino gambling, which is not.²³ Since the trial court ignored the precedent from a binding, higher court, the ruling was susceptible to reversal on appeal. However, the parties voluntarily withdrew the appeal before any decision was issued.²⁴

The issues surrounding of First Amendment protection as applied to online gambling advertisements have yet to be clarified by the courts. The DOJ maintains that the advertising is completely illegal. From a constitutional perspective, the answer is more complicated. Based on the ruling in the *Greater Orleans Broadcasting* case, an argument can be made that online gambling advertising is lawful, so long as the gambling activity is legal in the jurisdiction from which it emanates.²⁵ However, the Government will likely contend that such analysis is limited to gambling activity that is legal in the United States, and not by some rogue nation. But the legal basis for such distinction is dubious. Courts in the future will likely wrestle with these

²⁰ Ruling at p. 14

²¹ *Id.*

²² *In Re Mastercard International, Inc., Internet Gambling Litigation*, 132 F.Supp 2d 468 (E.D.La. 2001), *aff’d* 313 F.3d 257 (5th Cir. 2002).

²³ *Id.*

²⁴ B Vallerius, “Casino City Drops First Amendment Case Against DOJ,” *Interactive Gaming News* (January 30, 2006), found at: <http://www.igamingnews.com/index.cfm?page=artlisting&tid=6401&k=casino%20city>.

²⁵ 527 U.S. at 176.

complex issues of international jurisdiction and constitutional law. Notably, to date, no online gambling establishment has been prosecuted nor convicted for online gambling advertising.

Current Regulatory Options and Efforts

The regulation of online gambling advertising may take several different forms based on several different federal statutes and legal theories. For example, radio and television broadcast is regulated by §1304, but that statute was invalidated by the courts. Cable television and the Internet communications are not “broadcast,” and thus are not covered by that prohibition. The “Wire Act”²⁶ may address illegal gambling ads on such venues, in conjunction with the Aiding and Abetting statute.²⁷ Direct mail promotions, on the other hand, would fall under Title 18, U.S.C. §1302. This statute is specifically limited to the use of the mail in regards to advertisements of lotteries and the offering of prizes dependent upon lot or chance, but is generally regarded as including virtually all forms of gambling.

An additional option for federal regulation would be civil, administrative, or criminal enforcement of the Deceptive and Unfair Trade Practices Act or False Advertising legislation. The Federal Trade Commission (“FTC”) may investigate and prosecute claims if a specific advertisement is deemed to involve illegal activity, or is alleged to be somehow deceptive or unfair. Although the definition of what constitutes “unfair” is extremely broad and can vary from case to case, the FTC has not been actively involved in prosecuting gambling advertisement thus far. Although certain violations carry potential criminal penalties, advertising regulation is almost universally enforced through civil or administrative proceedings where jail is not a realistic consequence.

²⁶ Title 18 U.S.C. §1084.

²⁷ Title 18 U.S.C. § 2.

Various state governments have passed legislation that either specifically or tangentially affects the promotion of online gambling in the subject state. These laws are somewhat inconsistent with each other, and many were passed before the proliferation of Internet gambling, and as such, are vague when it comes to online gaming promotion. At any rate, these laws may be vulnerable to constitutional challenges, under the Commerce Clause or the First Amendment. As the states become more active in attempting to curb online gambling, legal challenges are certain to ensue, and the legal landscape will inevitably be clarified.

The Future of Online Gambling Advertising

The state and federal governments appear to be moving squarely in the direction of prohibiting all forms on online gambling. Some states have passed specific statute prohibiting various activities associated with online gaming; yet advertising is generally not included within these prohibitions.²⁸ The Louisiana statute, which makes it a felony (punishable by up to five years in prison or extensive fines) to use a computer to place bets or wagers, was the first to be used against a foreign gaming site executive. On September 7, 2006, SportingBet.com executive, Peter Dicks, was arrested only moments after stepping foot on American soil at JFK International Airport. Dicks was detained at the airport on a Louisiana warrant that charged him with gambling by use of a computer.²⁹ Similarly, just months before, David Carruthers, CEO of BetOnSports was arrested on federal charges pertaining to the Wire Act of 1961 when his plane landed at the Dallas Forth Worth Airport.³⁰ These efforts will likely continue, as state and

²⁸ Eight states have passed legislation specifically banning online gaming, including Washington, Nevada, Illinois, Indiana, Louisiana, South Dakota, Michigan, and Oregon.

²⁹ However, Dicks was later released by a New York judge, and permitted to return home pending resolution of the Louisiana charges.

³⁰ “Arrest Made in Crackdown on Internet Betting,” *The New York Times* (July 18, 2006), which can be viewed at: <http://www.nytimes.com/2006/07/18/technology/18gamble.html?ex=1310875200&en=86d23b44d0868c0e&ei=5088&partner=rssnyt&emc=rss>

federal prosecutors vie for headlines, in the moral crusade to end the corruption allegedly generated by online wagering.

More recently, Congress introduced legislation targeting online gaming, The Unlawful Internet Gambling Prohibition and Enforcement Act of 2006. The Bill essentially modernizes the Wire Act of 1961, and specifically outlaws the placing of bets and wagers through the Internet using United States bank and credit transactions. The Act would also clarify the Wire Act so that all forms of gambling, not just sports betting, would be banned. Senate Majority Leader Bill Frist, self-appointed moral authority, has made statements that he is committed to banning online gambling and hopes to have this Bill heard on the Senate floor. The potential impact of the law on Internet gambling advertising remains to be seen, but if passed, online casino operators could no longer claim that their activities are not prohibited by the Wire Act, thereby making it easier for the federal authorities to regulate online casino advertising.

Online gaming operators, and their marketing representatives, continue to develop unique and interesting ways to get their message across to their intended consumers. After mainstream media outlets backed off from real money gambling ads, the 'play for free' or 'dot net' site was born. By providing only educational services about how online casino or poker games are played, and using only play money 'chips', the industry found a way to promote their brand name without risking the necks of their media outlets who accepted the ads. While not a perfect solution, the .net site allowed the gambling operation to create some brand awareness, while hopefully encouraging users to learn the games and 'cross over' to the '.com' site where they could play for real money. Other companies used streakers at football games, ebay promotions, or poker tournaments to publicize their site, outside the traditional media commercial formula. Undoubtedly, the creative minds that developed existing forms of online marketing will continue

to ponder the vague legal restrictions on Internet gambling advertising, in the attempt to develop the next safe way to promote their services. The law will never catch up with the technology.

Conclusion

Despite the best efforts of the Department of Justice, online gambling advertising is here to stay. Whether through the dot net site, or the next Virgin Mary grilled cheese sandwich, online gaming entrepreneurs will make their voices heard to a willing audience. The current legal actions being initiated against online gaming executives may help clarify some of the unsettled issues pertaining to online gambling advertising. In the end, the industry may need to resign itself to a continual 'cat and mouse' game of legislation and invention, until more progressive politicians realize that American citizens will find ways to gamble, despite attempts to silence advertisers. Perhaps then, the paradigm shift will occur, and talks of legalization will begin.

This article was authored by Lawrence G. Walters, Esquire, a partner in the law firm of Weston, Garrou, DeWitt & Walters, www.GameAttorneys.com. Mr. Walters' practice focuses on Internet law and gaming issues, along with advertising and First Amendment law. He frequently lectures on these issues and has published numerous articles in the field. The firm has engaged in significant First Amendment litigation in the United States Supreme Court, and has handled cases in virtually every jurisdiction in the United States. Mr. Walters regularly advises advertising agencies, software developers and online gaming companies regarding the legal issues associated with promoting Internet gambling and advertising. For more information, access www.GameAttorneys.com, or contact Mr. Walters at Larry@LawrenceWalters.com.