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the National Association of Broadcasters and the
Federal Communications Bar Association**

**“Representing Your Local Broadcaster – 25 Issues on a Silver Platter – Ghosts of
Problems Past, Present and Future”**

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**IS YOUR STATION MAKING A RISKY “BET” WHEN IT BROADCASTS
SPOTS THAT PROMOTE INTERNET-BASED GAMBLING?**

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Whether you represent broadcasters, networks, cable systems, satellite providers, telecom carriers, Internet service providers, website operators, newspaper or magazine publishers, or program suppliers, undoubtedly you have been asked whether it is “ok” to carry advertisements promoting Internet gambling. The purpose of this paper is to update you on the position being taken by Federal authorities on this issue.

The Legal Framework Governing the Advertisement of Internet Gambling

Several provisions of the United States Criminal Code may impact the legality of the advertising of Internet gambling operations:

- Section 1084 prohibits the use of 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[.]”¹
- Section 1304 specifically prohibits radio and television stations from airing advertisements or other information concerning “any lottery, gift enterprise, or similar scheme[.]” An advertisement is generally prohibited if the underlying activity awards money or something of value (“prize”) in a manner dependent in part or whole upon lot or chance (“chance”) after participants have paid money or

¹ 18 U.S.C. § 1084(a).

something of value (“consideration”), unless the activity is lawful in the state in which it is conducted.²

- Section 1952 prohibits the use of “any facility in interstate or foreign commerce,” including wire and radio facilities, for the promotion of unlawful gambling.³
- Section 1955 prohibits the operation of any “illegal gambling business,” defined as a business that (i) violates the law of the state or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.⁴

The DOJ’s June 2003 “Warning”

In interpreting the above-referenced provisions of the United States Criminal Code, the Federal government has taken the position that Internet gambling is an unlawful activity, that anyone who disseminates information promoting Internet gambling is guilty of aiding and abetting illegal activity, and that broadcasters have been fully warned of this position.

This position was crystallized in a letter sent on June 11, 2003 by John G. Malcolm, Deputy Assistant Attorney General of the Criminal Division of the United States Department of Justice, to the National Association of Broadcasters.⁵ The Malcolm Letter notes that “advertisements for Internet gambling and offshore sportsbooks operations are ubiquitous on the Internet, in print ads, and over the radio and television,” and expresses concern that these advertisements are misleading the public into “believing that such gambling is legal. [sic] when in fact, it is not.”

The letter goes on to announce the DOJ’s conclusion that Internet gambling violates “Section 1084, 1952, and 1955 of Title 18 of the United States Code.” More critically for those carrying advertisements for Internet gambling, the letter warned that “any person Or [sic] entity who aids or abets in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes.” Finally, the letters asks the NAB to forward this “public service message” to its members because “broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.”

² 18 U.S.C. § 1304. *See also Greater New Orleans Broadcasting Assn., Inc. v. U.S.*, 527 U.S. 173 (1999).

³ 18 U.S.C. § 1952(a), (b)(1).

⁴ 18 U.S.C. § 1955.

⁵ *See* Letter from John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice to the National Association of Broadcasters (June 11, 2003) (hereinafter, the “Malcolm Letter”). Versions of this letter were also sent to the Magazine Publishers of America, the Independent Press Association, and the National Newspaper Association.

The DOJ “Crackdown”

Since 2000, the DOJ has taken steps to enforce the position announced in the Malcolm Letter, lending bite to its bark. Several months after the Malcolm Letter was issued, the U.S. Attorney for the Eastern District of Missouri convened a grand jury to investigate the connections between U.S. companies and offshore gambling operations, as well as the purchase and placement practices of U.S. companies with respect to advertisements for gambling operations. The grand jury issued subpoenas to a wide variety of media outlets, Internet portals, and others.

Largely as a result of the pressure generated by the investigation, and the DOJ’s hard-line position:

- In July 2003, online payment network PayPal Inc. was fined \$10 million in order to settle allegations that it aided and abetted illegal online gambling.⁶
- In late 2003, major broadcasters, including Infinity Broadcasting and Clear Channel Communications, stopped accepting online gambling advertisements.⁷
- In April 2004, Google and Yahoo stopped accepting online gambling ads.⁸
- Also in April 2004, U.S. Marshals seized \$3.2 million in proceeds that Discovery Communications had received for accepting Internet gambling ads.⁹
- In June 2004, Electronic Arts, a major video game producer, stopped carrying Internet casino ads on its website.¹⁰
- In September 2004, Missouri Sports Radio, the licensee of St. Louis sports radio stations KFNS(AM), KFNS-FM and KFRT(AM), agreed to pay \$159,000 to settle claims that they broadcast spots promoting online gambling.¹¹
- In March 2005, “Esquire” decided to stop a multi-million dollar ad campaign for BoDogPoker.¹²
- In January 2006, Vulcan Sports Media, which owns The Sporting News, reached a settlement with the Federal government to pay a \$4.2 million fine and spend \$3

⁶ See *PayPal, eBay Settle Allegations*, COLUMBUS DISPATCH 01B (Jul. 26, 2004).

⁷ See Matt Richtel, *Companies Aiding Internet Gambling Feel U.S. Pressure*, N.Y. TIMES A1 (Mar. 15, 2004).

⁸ See Matt Richtel, *Web Engines Plan to End Online Ads For Gambling*, N.Y. TIMES C1 (Apr. 5, 2004).

⁹ See Matt Richtel, *U.S. Steps Up Push Against Online Casinos By Seizing Cash*, N.Y. TIMES C1 (May 31, 2004).

¹⁰ See Matt Richtel, *Electronic Arts to Stop Advertising For Online Casinos on Its Web Site*, N.Y. TIMES C1 (June 12, 2004).

¹¹ Peter Shinkle, *KFNS Settles with Government Over Betting Ads*, ST. LOUIS POST-DISPATCH 19 (Sep. 25, 2004).

¹² See Amy Yee, *Regulators Fight to Control Online Gaming*, FIN. TIMES 7 (Aug. 20, 2005).

million on a three-year public service campaign against Internet and telephone gambling.¹³

- In March 2006, Clear Channel stated in an SEC Form 10-K filing that it was still involved in the DOJ's September 2003 investigation into "commercial advertising run by us on behalf of offshore and/or online (Internet) gambling businesses, including sports bookmaking and casino-style gaming" and that it was cooperating with this investigation.¹⁴

Catherine Hanaway, the Assistant U.S. Attorney for the Eastern District of Missouri, has claimed that since 2000, settlements involving Internet and offshore gambling have generated more than \$40 million for the U.S. government.¹⁵

How Solid Is the DOJ's Legal Position?

Notwithstanding the DOJ's enforcement efforts, there is considerable debate over whether Internet gambling, and the advertising of such gambling, is actually unlawful under Federal law. If Internet gambling is found to be legal, then the advertising of Internet gambling operations is also likely to be legal. Unsettled issues include: whether Section 1084 of the U.S. Criminal Code prohibits all gambling activity over "wire communications," or simply sports gambling; whether the U.S. government has jurisdiction to prohibit gambling activity over the Internet where the operating entity is an offshore company, or where the website's server is physically located offshore; whether the U.S. government more generally has jurisdiction over the Internet, an inherently international medium not constrained by traditional geographic boundaries; whether advertisements constitute "aiding and abetting" within the meaning of the U.S. Criminal Code; and whether the First Amendment protects advertisements of Internet gambling operations, particularly in light of the outstanding questions noted above.¹⁶

Previous efforts to resolve these issues have proven largely unsuccessful. On the one hand, Congress has considered – but to date failed to enact – legislation that would, in effect, expressly prohibit Internet gambling.¹⁷ On the other hand, despite the existing ambiguities in the statutory framework governing Internet gambling, no entity appears willing to take on the DOJ in this area. In fact, the one entity that did attempt to do so called it quits after losing the first round of its legal challenge.

¹³ Matt Richtel, *Sporting News Settles Case on Gambling Ads*, N.Y. TIMES C1 (Jan. 21, 2006).

¹⁴ Clear Channel Communications, Inc., SEC Form 10-K (Mar. 10, 2006).

¹⁵ Jim Salter, *Sporting News Agrees to \$7.2 Million Settlement over Gambling Ads*, ASSOCIATED PRESS STATE AND LOCAL WIRE (Jan. 21, 2006).

¹⁶ See, gen. Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 594-98 (2005) (generally discussing ambiguities in statutory scheme with respect to Internet gambling).

¹⁷ See, e.g., Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, 109th Cong. (2006). See also *House Panel Clear Anti-Internet Gambling Bill* (Mar. 15, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031501132.html>

In August 2004, Casino City, Inc., a U.S. company that maintained a website advertising overseas Internet gambling and sportsbook gambling operations, filed suit against the DOJ in the Middle District of Louisiana. Casino City contended that the U.S. Criminal Code's prohibition on "aiding and abetting" gambling activity could not be constitutionally interpreted to ban an entity from advertising Internet and offshore gambling operations, since the First Amendment protects such "speech." In February 2005, the court dismissed the claim, finding that Casino City lacked proper standing; the court found that Casino City had failed to establish a justiciable case or controversy under Article III of the U.S. Constitution, since Casino City had failed to establish that it had been investigated or prosecuted, or threatened with investigation or prosecution. In what may be regarded as dicta, the court also rejected Casino City's First Amendment claim, reasoning that "the First Amendment does not protect the right to advertise illegal activity" or to "falsely portray the image that Internet gambling is legal."¹⁸ Casino City filed a Notice of Appeal, but subsequently allowed its appeal to be dismissed without further action.¹⁹

What Advice Is Warranted?

Given the June 2003 warning by the Department of Justice and the investigations and settlements since then, broadcasters, networks, cable systems, satellite providers, telecom carriers, Internet service providers, website operators, newspaper or magazine publishers, and program suppliers should be informed of the serious criminal and financial risks of accepting Internet gambling ads. An attorney's advice to his or her clients should factor in not only federal action in this area, but also the specific law of the state or territory in which the client operates and the underlying gambling activity occurs; a number of states have enacted legislation to make it clear that it is unlawful to conduct or otherwise participate in Internet gambling in their states.²⁰

Broadcasters should also consider the risk to their broadcast licenses. A federal or state criminal conviction – or possibly even the settlement of a criminal complaint involving the use of a station's airwaves to promote Internet gambling – could result in adverse action by the FCC. Broadcasters are licensed to serve the public interest, convenience and necessity.²¹ If the courts or the Commission were to conclude that Internet gambling or the advertisement of Internet gambling is, in fact, unlawful, the FCC might conclude that the station's advertising of Internet gambling operations raises a substantial and material question of fact as to whether the station is serving the public interest, convenience and necessity.²² Furthermore, to the extent that Internet gambling websites are easily accessible by and perceived to be detrimental to children, the FCC might also conclude that a station advertising Internet gambling operations has

¹⁸ See *Casino City, Inc. v. U.S. Dep't of Justice*, Civil Action # 04-557-B-M3, Ruling (Feb. 15, 2005).

¹⁹ See *Casino City, Inc. v. U.S. Dep't of Justice*, No. 05-30403, Order (Feb. 15, 2005) (per curiam).

²⁰ For example, Indiana has specifically defined "unlawful gambling" to provide that Internet gambling constitutes a felony. See Indiana Cd. § 35-45-5-2.

²¹ 47 U.S.C. §§ 303, 307.

²² Among other things, such a finding could jeopardize a station's license renewal. See 47 U.S.C. § 309(k)(1).

abandoned its responsibilities to serve children in the broadcast audience.²³ Moreover, the Commission routinely considers the character of broadcast applicants in assessing their applications for license renewal; a conviction for using the station's airwaves to aid and abet illegal gambling – almost certainly a broadcast-related offense – would reflect poorly on the broadcaster's suitability to remain a Commission licensee.²⁴ For these reasons, any FCC license holder considering accepting Internet gambling spots should seriously consider the broader consequences of “betting” wrong in this area of law.

This is not to say that a media company should turn away all advertisements that touch upon gambling activity. Advertisements for websites intended solely to teach members of the public how to play poker, for instance, should pose a low risk. However, if “teaching” websites themselves promote one or more websites where online gambling is conducted, or provide a hot link to such sites, there is quite a high risk that the advertisement of the “teaching” website will be found to be problematic.

If a media company receives an inquiry from an advertising agency for an online gambling operator that represents to the media company that it is lawful to advertise the underlying gambling operation, the media company should be skeptical of this advice, and should consider asking the advertising agency or gambling operator for a legal opinion or other legal analysis supporting its conclusion. If such an opinion or legal analysis is forthcoming, the conclusions should be reviewed by the media company's communications counsel.

If, after consulting with counsel, the media company still decides to accept an advertisement for Internet gambling, the company should insist upon appropriate representations and warranties from the advertiser and a strong indemnification provision, backed by a financially sound legal entity that can be sued in the United States. If the advertiser has assured the media company that the “teaching” website does not promote or otherwise facilitate access to the online gambling website, the company should obtain a clear representation to this effect and assure itself that the representation is true by routinely checking the pertinent websites.

²³ This danger is particularly pronounced in the context of television, as the FCC has imposed specific obligations on television broadcasters. *See, gen.*, 47 U.S.C. § 303(a); 47 C.F.R. §§670, 671, 673, 4050.

²⁴ *See, gen.*, 47 U.S.C. § 308(b).