

Op-Ed/Editorials: Gambling and the Law®: Prosecutors Claim Internet Gaming Ads Violate Local Laws

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Here's a quote that should scare anyone involved with any form of legal gaming.

The federal Department of Justice ("DOJ") got Google, Microsoft and Yahoo to agree to pay \$31.5 million in fines to settle claims that they had promoted illegal gambling by running ads on the Internet. The DOJ announced that the fines were "for corporate conduct the government found in violation of the Federal Wire Wager Act, federal wagering excise tax laws, and various states' statutes and municipal laws prohibiting gambling."

The DOJ has been waging a war of intimidation against Internet gambling for almost 10 years. It has been effective, although slightly deceptive.

For example, the DOJ warned that "gambling on the Internet" was illegal - although there are, in fact, no federal laws against merely making bets.

It declared that it can extradite, or even kidnap, British subjects who violate American laws - although the U.S. is not going to invade England to grab a bookie.

It told Nevada regulators that regulations for online casinos would result in arrests - although it knew courts had ruled that the Wire Act applies only to race and sports bets.

Now the DOJ has subtly, but greatly, expanded the war. It has openly declared that it has the right to file criminal charges against anyone who violates any state or municipal law against gambling.

Of course, every state, city and county has laws against gambling. Nevada, for example, actively prosecutes illegal bookies and anyone else who operates commercial gambling without the necessary licenses.

And every state and municipality has laws against advertising illegal gambling, and often, even legal gambling.

A Georgia law, for example, reads:

“A person who knowingly prints, publishes, or advertises any lottery or other scheme for commercial gambling or who knowingly prints or publishes any lottery ticket, policy ticket, or other similar device designed to serve as evidence of participation in a lottery commits the offense of advertising commercial gambling.”

Under this law, everyone who advertises a licensed casino, cardclub or out-of-state lottery in Georgia is committing “a misdemeanor of a high and aggravated nature.” There is no express exemption for Internet ads. An Atlantic City casino that allows residents of Georgia to register online might be violating this statute.

The immediate reaction has to be, “What about the First Amendment?” The constitutional protections around free speech are greatly weakened when it comes to advertising, especially the advertising of gambling. In what is known as the commercial speech cases, courts have ruled that governments sometimes can prohibit these ads.

In a case that it later criticized, but did not expressly overrule, the High Court ruled that Puerto Rico could prohibit casino advertising to its residents.

The Supreme Court also declared that it was constitutional for Congress to limit television and radio state lottery commercial broadcasts to states with state lotteries. That is still the law today: A Las Vegas T.V. station might lose its license if it airs an ad for the California State Lottery.

In the Greater New Orleans Broadcasting case, the Court ruled that it did indeed violate the First Amendment for Congress to prohibit a Louisiana-licensed casino from advertising on Louisiana T.V. and radio stations. The main problem was that the prohibition was irrational, since identical, but tribally-owned, casinos could broadcast their commercials.

The case also involved Mississippi casinos, so it seems clear that the federal ban on T.V. and radio ads for licensed casinos was invalid, but only in states with casinos. Ironically, it was the DOJ that expanded the decision, by announcing that it would no longer go after any casino broadcaster under federal law, even in

states without licensed casinos.

But the DOJ, and, of course, the states, never said they would not enforce their own state prohibitions on gambling ads. And the Supreme Court has never said those state statutes are unconstitutional.

The good news is that there is so much legal gambling in the country now, that it would be difficult for a state, or the DOJ, to defend a state law that prohibits the advertising of legal gaming from another state. And the Internet, like television and radio waves, cannot be kept out. Utah may not like it, and it might even have violated Utah state laws if the T.V. or radio tower had been within that state, but commercials for Nevada casinos are received in the beehive state.

As a nice twist, one of the lawyers for the American Gaming Association in the Greater New Orleans Broadcasting, arguing for the right of casinos to advertise, was my former classmate, John Roberts, now Chief Justice of the United States.

Although advertising has some protections, free speech does not apply to the actual act of gambling. Anyone who takes a bet online might be violating some state or local law. And the DOJ has now declared that it will use those laws to go after anyone who advertises those websites.

The operators who would appear to be most at risk are not all overseas. The DOJ believes interstate wagers on horseraces are illegal, despite the Interstate Horseracing Act and the express authorization of more than 20 states.

It is possible that DOJ is once again merely beating its chest, and not intending to go after any more online advertisers. And it's not even clear if local laws do apply to the Internet.

Still, if I were in charge of a licensed casino, I would have my lawyers look again at my web advertising, with an eye on avoiding "various states' statutes and municipal laws prohibiting gambling."

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