

# worldonline gamblinglawreport

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# Assessing liability of social networking sites

The evolution of the web and developments in online gambling have seen gambling and betting services being offered on social networking platforms, allowing individual gamblers to wager against one another. With the recent US crackdown on internet gambling, Joseph V. DeMarco, Esq, partner in DeVore & DeMarco LLP, speculates on the potential criminal liability of such platforms under the Federal Wire Wager Act.

Few areas of e-commerce have grown as exponentially as internet gambling. Yet, despite wildfire growth of this multi-billion dollar-a-year industry<sup>1</sup>, internet gambling and in particular internet sports betting, remains illegal under US law. Among the several United States federal laws that regulate gambling,<sup>2</sup> a statute known as the Wire Wager Act makes it a felony for a person in the business of betting or wagering to take bets on line, or to even transmit betting-related information across state or international boundaries.<sup>3</sup> Federal law also prohibits aiding and abetting violations of the Wire Wager Act, as well as conspiracies to violate the Act.<sup>4</sup> Yet internet gambling continues to flourish as website operators take advantage of the borderless nature of the internet and the fact that gambling remains lawful in certain jurisdictions. 'Social networking' websites devoted to gambling are just one of the veritable cottage industry of support services and derivative websites that have developed in response to the phenomenal success of some of these sites.

Unlike traditional gambling websites, social networking gambling sites do not accept wagers per se, but instead act as forums for individual gamblers to wager against one another. While they each vary in nature and purpose, many do little more than bring people together in a fashion loosely analogous to Facebook.com and Myspace.com so that they can bet against each other. Subscribers can typically wager on any subject they wish - from who will be the next presidential candidate to whether someone can eat five McDonald's Big Macs in under ten minutes. Along with such fanciful betting, however, two leading sites, Betcha.com and Gottabet.com, also serve as a forum for participants

who wish to bet on sporting events such as football, baseball, and golf. Bettors typically can wager scrip issued by the site, services (e.g., the loser does the winner's laundry for one week) or, in some cases, real money. Ordinarily, the websites take no part in collecting winning bets; rather, these are left to the individual gamblers on an honor system with the websites posting 'ratings' on a subscriber's reliability in paying losing wagers. Notably, however, when real money is at stake, some websites take a commission in the form of a small percentage of the wagered funds.

Do 'social networking' gambling sites run afoul of the Wire Wager Act? If so, are they likely to be prosecuted in the United States? In order to answer these questions, it is necessary to understand the Act; legal precedents established by internet-era prosecutions brought under the Act; and certain aspects of how these websites function.

## The Wire Wager Act

Among the various federal statutes that apply to gambling, the 'Wire Wager Act,'<sup>5</sup> applies most pointedly to internet gambling. It provides, in part, that: 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 placement 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>6</sup>

In order to establish a violation of the Act, the government must prove:

- First, that the defendant was

engaged in the business of betting or wagering - in other words, that unlike a casual bettor, he or she derived business income from gambling.

● Second, that the defendant transmitted, in interstate or foreign commerce, any one of the following types of material: (a) bets or wagers; (b) information assisting in the placement of bets or wagers on any sporting event or contest; or (c) a communication that entitled the recipient to receive money or credit as a result of bets or wagers. Notably, although the overall purpose and structure of the statute seems at first glance to be focused solely on sports betting, the United States Department of Justice (DoJ) has taken the position that the statute is not limited to sport betting. Rather, the DoJ has asserted that the Act applies to all forms of gambling.<sup>7</sup>

● Third, that the defendant used a 'wire communication facility' (which encompasses telephone as well as internet communications<sup>8</sup>) to transmit these materials.

● Fourth, that the defendant acted 'knowingly.' Notable for present purposes, the government need not prove that the defendant knew he was violating the law.<sup>9</sup> Rather, all that must be shown is that he knowingly (and not by accident or mistake) used a wire communications facility to engage in any prohibited transmission.<sup>10</sup>

As far as liability is concerned for 'secondary actors,' Title 18, United States Code, Section 2 - the federal aiding and abetting statute - provides that:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal [and] [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense

**It is always difficult to predict which entities may be the subject of future enforcement actions**

against the United States, is punishable as a principal.<sup>11</sup>

Thus, accomplice liability attaches to those not directly engaging in conduct that violates the Act, but who nevertheless 'aid[]' or 'abet[]' prohibited conduct.

**Internet prosecutions under the Wire Wager Act**

In recent years, the federal government has investigated and prosecuted numerous operators of internet gambling websites.<sup>12</sup> Under a theory of aiding and abetting, the government has also investigated and prosecuted secondary actors whose activities supported those of the primary website owners.

For example, in September 2004, the government settled forfeiture allegations totaling \$158,000 against three radio stations that knowingly received money from operators of internet gambling websites to advertise those sites on local radio stations.<sup>13</sup> In the same vein, in January, 2006, the federal government settled criminal charges against the owners of an advertising and media company that performed advertising services for gambling websites.<sup>14</sup> That company, Vulcan Sports Media, Inc., was fined \$7.2 million.<sup>15</sup> And in 2006, federal agents arrested Stephen Eric Lawrence and John David Lefebvre, the founders of Neteller PLC, an online payment services company (a so-called 'e-wallet') for violating the Wire Wager Act.<sup>16</sup> Both later pled guilty.<sup>17</sup> Press reports also indicate that various investment banks who funded gambling-related websites received subpoenas from prosecutors investigating their role in assisting those sites.<sup>18</sup>

These investigations and prosecutions are instructive in two respects. First, they demonstrate the wide breadth of liability under the Act for persons who run

gambling websites and those that assist them - even if they believed their actions were lawful. Second, they indicate the government's willingness, as a matter of enforcement policy, to bring actions against both 'core' violators of the Act, and those whose conduct is arguably less blameworthy. Put differently, notwithstanding the difficulties of bringing cases against persons involved in internet gambling (e.g., many are located offshore and are not subject to arrest), the government has clearly decided not to 'look the other way' when it comes to betting online. Against this legal and policy backdrop, it is not clear that websites that purport to do no more than 'network' individuals so that they can bet online can 'breathe easy.'

**Future prosecutions**

Although actions to date give some indication as to the focus of the government's concerns, it is always difficult to predict which entities may be the subject of future enforcement actions. In the face of such uncertainty, experience suggests that, although not legally dispositive, the following are some of the factors that a prosecutor might take into account in exercising his prosecutorial discretion in favor or against prosecution:

● Nature of the site: Is the social networking site engaged in the business of betting or wagering? Does it generate significant revenue as a consequence of gambling that is facilitated through the site, such as subscription fees or by taking a cut of the money staked? Alternatively, does it earn no revenue whatsoever as a consequence of the betting it facilitates, but instead earns all of its money through other means - for example, by selling enhanced profile creation, search

functionality, or advertising.

● Nature of the wagering: Does the website permit wagers on any subject of traditional gambling - sports, horseracing, cards, or casino games, or does it flatly prohibit such wagers. Regardless that it may violate the Act, it is difficult to imagine a federal prosecution of a website limited purely to sophomoric wagering such as how many sausages a person can eat or whether the next Pope will be fat or thin.

● Contacts with the United States: Where is the website located? If it is located outside the United States what measures, if any, has it taken to prevent persons in the United States from using the site as a forum to gamble?

● Response to regulators: When made aware of the regulators' interest in their conduct, what was the website owner's response? Did they consult with counsel and seek to modify their operations in any way to assuage the regulators?

Determining the likelihood of prosecution in any area of crime is no easy task. The difficulty of making such predictions for social networking sites in the area of internet gambling is compounded by the relatively low standard of proof for a successful prosecution, and by the federal government's demonstrated willingness to prosecute not only core violators of the law but also those whose conduct is more attenuated. In the end, assessing the likelihood of criminal exposure requires experienced counsel to engage in a highly fact-specific and fact-intensive analysis of these and other factors through the prism of legislation and regulation governing this rapidly-evolving area of the law.

**Joseph V. DeMarco Esq** Partner  
DeVore & DeMarco LLP  
[jvd@devoredemarco.com](mailto:jvd@devoredemarco.com)

1. See <http://www.cbsnews.com/stories/2005/11/17/60minutes/main1052420.shtml>

2. See e.g., 18 U.S.C. § 1952 (interstate travel in aid of racketeering enterprises (including enterprises involving gambling)), 18 U.S.C. §1953 (interstate transportation of wagering paraphernalia), and 18 U.S.C. § 1955 (prohibiting operation of illegal gambling businesses). New York Law state law prohibits internet gambling under the state constitution (Article I, Section 9 bans all forms of gambling not specifically authorized by the Legislature) and Section 225.05 of the Penal Law (making it a crime to advance or profit from any unlawful gambling activity, which is defined as gambling activity not specifically authorized by law). In addition, Section 5-401 of the General Obligation Law provides that all wagers bets or stakes made to depend on . . . "any gaming by lot or chance ... or unknown or contingent event[s]" are unlawful.

3. Title 18, United States Code, Section 1084, Section 1084, which was enacted in 1961 as part of a series of anti-racketeering laws, compliments other federal anti-gambling statutes. "The purpose of the statute is two-fold: (1) to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and [(2)] to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce." *United States v McDonough*, 835 F.2d 1103, 1105 n.7 (5th Cir. 1988) (quoting legislative history).

4. Title 18, United States Code, Section 2 (aiding and abetting); Title 18, United States Code, Section 371 (conspiracy).

5. Title 18, United States Code, Section 1084(a).

6. Title 18, United States Code, Section 1084.

7. See *Proposals to Regulate Illegal Internet Gambling, Including S. 627, to Prevent the Use of Certain Payment Instruments, Credit Cards and Fund Transfers for Unlawful Gambling Before the S. Comm. On Banking, Housing, and Urban Affairs, 108th Cong. 9 (2003)* (statement of John G. Malcom, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice (asserting that any business that accepts any kind of bet or wager from customers located in the United States violates the Wire Wager Act)). At least one New York state court has ruled that the Act covers gambling which is unrelated to sporting events. See *People v. World Interactive*

*Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Court 1999).

8. A 'wire communication facility' is defined in Section 1081 as 'any and all instrumentalities, personnel, services ... used or useful in the transmission of writings, signs, pictures, and sounds of all kind by aid of wire, cable, or other like connection.' It plainly covers internet transmissions.

9. See *United States v Cohen*, 260 F.3d 68, 75-76 (2d Cir. 2001).

10. See *id.*

11. Title 18, United States Code, Section 2.

12. See *United States v Cohen*, 260 F.3d 68, 75-76 (2d Cir. 2001).

13. Press release 'St Louis Sports Radio Stations Pay Over \$158,000 to the Justice Department to Settle Forfeiture Allegations Involving the Stations' Aiding and Abetting Illegal Offshore Gambling Activities,' United States Attorney's Office Eastern District of Missouri, September 24, 2004.

14. Press release 'Past Promotion of Illegal Gambling Costs the Sporting News \$7.2 Million,' United States Attorney's Office Eastern District of Missouri, January 20, 2006.

15. *Id.*

16. See <http://www.usdoj.gov/usao/nys/pressreleases/January07/Neteller%20Arrests%20PR.pdf>

17. See <http://www.internetnews.com/bus-news/article.php/3689631>

18. See <http://www.redherring.com/Home/20863> (discussing subpoenas served on HSBC, Dresdner Kleinwort, Credit Suisse, and Deutsche Bank).



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