

# K&LNG Alert

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## Internet Gaming Advertising and Internet Gambling in the U.S.: What's New?

On January 26, 2006, the United States Court of Appeals for the Fifth Circuit granted Casino City's "Consent Motion for Voluntary Dismissal" of its appeal of the trial court's dismissal of its action against the U.S. Department of Justice ("DOJ"). Casino City had sought a declaration that any attempt to enforce the federal Wire Act and other federal anti-gambling laws against advertisers of Internet gambling would violate the First Amendment of the United States Constitution.

Casino City argued that, if the advertisements concerned legal activities, they would be protected commercial speech under the First Amendment to the United States Constitution.

The federal district court, on February 15, 2005, dismissed the case on procedural grounds, concluding that the complaint did not state a "case or controversy" and that Casino City lacked "standing" for basically the same reasons – Casino City did not allege that it was being investigated or that it had received, directly or indirectly, the DOJ letter. The district court, however, also concluded that even if Casino City were to be prosecuted, "it would be for illegal gambling activities" under the Wire Act and that the First Amendment protection for commercial speech would not apply. Casino City, on April 14, 2005, appealed the decision to the Fifth Circuit Court of Appeals. The appeal was argued on December 7, 2005, and Casino City, on January 17, 2006, moved to dismiss its appeal with DOJ's consent.

This abrupt conclusion to the *Casino City* case was unexpected. It was thought that the *Casino City* case might clarify the liability of third-party media and advertisers for running advertisements that promote Internet gambling and for clarification on whether the federal Wire Act prohibits more than sports wagering.

What makes the dismissal of the *Casino City* case more intriguing is the announcement in a press release by the U.S. Office of the Attorney General for the Eastern District of Missouri on January 20, 2006 (only three days after Casino City had filed its motion to dismiss its appeal) that *The Sporting News* had agreed to a \$7.2 million settlement that "resolves claims arising from *The Sporting News'* conduct between the Spring 2000 and December 2003." During that period, the press release notes: "*The Sporting News* accepted fees in exchange for advertising illegal Internet and telephonic gambling enterprises to its United States print, Internet and radio media audiences."<sup>1</sup>

The question that many in the Internet gambling sector are asking is: Why did DOJ consent to the dismissal of the *Casino City* appeal? Others wonder whether the announcement of the settlement with *The Sporting News* was intentionally timed to occur after Casino City had filed its motion to dismiss its appeal. It is impossible for those outside DOJ to answer these and related questions. Nevertheless, an analysis of the relevant background and the reasons provided by Casino City for dismissing its appeal suggest that DOJ and Internet gambling participants are engaged in a delicate balancing act.

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<sup>1</sup> The press release and access to the settlement agreement can be found at [http://www.usdoj.gov/usao/moe/press%20releases/archived%20press%20releases/2006\\_press\\_releases/january/vulcan\\_sports.html](http://www.usdoj.gov/usao/moe/press%20releases/archived%20press%20releases/2006_press_releases/january/vulcan_sports.html) (visited Mar. 19, 2006).

## THE TRIGGER IS PULLED

In June 2003, DOJ sent a letter to numerous media outlets and representatives. The letter informed them that online gambling, including non-sports wagering, is illegal in the U.S. under the federal Wire Act. The letter went on to advise that, therefore, any advertising of online gambling could result in prosecution for aiding and abetting criminal conduct.

The letter triggered action by the U.S. Attorney for the Eastern District of Missouri, who began to investigate the extent to which various media companies might be engaged in allegedly illegal activity. Beginning in September 2003, federal grand jury subpoenas were sent to media outlets that had accepted Internet gambling ads.<sup>2</sup> This investigation prompted many online advertisers to remove gambling advertisements from their websites. For example, in April 2004, it was reported that Yahoo and Google stopped taking advertisements in the U.S. from gambling companies and related companies.<sup>3</sup>

Other media outlets apparently did not stop quickly enough. It has been reported that in 2003-2004, The Discovery Channel had millions seized by the federal government as illegal profits from the advertisement of Internet gambling, including money paid to run Paradise Poker and PartyPoker.com advertisements.<sup>4</sup>

## CASINO CITY'S RETORT

In response to DOJ's letter and the initial reactions of many media outlets, *Casino City*, an online gambling portal that advertises online gambling sites, in August 2004, filed a lawsuit against the United States in the U.S. District Court for the Middle District of Louisiana. Casino City asked the district court to declare that an attempt to enforce the Wire Act and other federal statutes against Casino City and others similarly situated for the advertisement of online gambling would constitute a violation of the Free Speech Clause of the First Amendment to the U.S. Constitution. According to Casino City, the gambling it advertised was legal, so the

advertisements would be protected commercial speech under the First Amendment. Casino City's argument subsumed the issue of what constituted illegal gambling under the federal Wire Act.

The district court, on February 15, 2005, dismissed the case on procedural grounds, concluding that the complaint did not state a "case or controversy" and that Casino City lacked "standing." Casino City had not alleged that it was being investigated or that it had even received the DOJ letter, either directly or from an entity in which it was affiliated. The district court did not stop its analysis with the procedural issues. Instead, the district court went on to conclude that even if Casino City were to be prosecuted, "it would be for illegal gambling activities" under the Wire Act and that the First Amendment protection for commercial speech would not apply.<sup>5</sup> Casino City appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit, and the appeal was argued on December 7, 2005.

The importance of the *Casino City* case and its dismissal is debatable. The Fifth Circuit had already decided that the federal Wire Act does not apply to non-sports gambling. *See In re MasterCard Intern., Inc.*, 313 F.3d 257 (2002). In addition, although DOJ has been vocal regarding its position on the potential for prosecution, there has been little follow-through, at least as far as actual criminal prosecutions are concerned. After receiving the 2003 letter from the DOJ, many entities willingly stopped accepting advertisements for online gambling. Press releases and news reports in the 2003-2004 period trumpeted settlements with or seizures of funds from those advertising Internet gambling.

## WHAT ABOUT THE SPORTING NEWS SETTLEMENT?

Nearly contemporaneously with the dismissal of the *Casino City* appeal was the announcement by the current U.S. Attorney for the Eastern District of Missouri of a \$7.2 million settlement with *The Sporting News*.<sup>6</sup> The settlement agreement calls for

<sup>2</sup> See *U.S. Court Subpoenas Gambling Portals*, INTERACTIVE GAMING NEWS (Sept. 30, 2003), <http://www.igamingnews.com/index.cfm?page=artlisting&tid=4553> (visited Mar. 19, 2006); see also <http://www.covers.com/articles/articles.aspx?TID=43&TheArt=18677> (visited Mar. 19, 2006).

<sup>3</sup> See *Yahoo and Google Ban Gambling Ads*, MACNEWSWORLD (April 5, 2004), <http://www.macnewsworld.com/story/33319.html> (visited Mar. 19, 2006).

<sup>4</sup> See Matt Richtel, "U.S. Steps Up Push Against Online Casinos By Seizing Cash," *N.Y. Times* (May 31, 2004) reprinted at [http://www.osga.com/artman/publish/article\\_1578.shtml](http://www.osga.com/artman/publish/article_1578.shtml) (visited Mar. 19, 2006); see also <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos.htm> (visited Mar. 19, 2006).

<sup>5</sup> See *Casino City Inc., v. United States Department of Justice*, M.D. La. No. 04-557-B-M3. The decision is available on the Casino City website at <http://online.casinocity.com/firstamendment/legaldocuments.cfm> (visited Mar. 19, 2006).

<sup>6</sup> As noted in footnote 1, the settlement agreement can be accessed through [http://www.usdoj.gov/usao/moe/press%20releases/archived%20press%20releases/2006\\_press\\_releases/january/vulcan\\_sports.html](http://www.usdoj.gov/usao/moe/press%20releases/archived%20press%20releases/2006_press_releases/january/vulcan_sports.html) (visited Mar. 19, 2006).

*The Sporting News* to turn over to a "Special Agent" of the FBI a cashier's check for \$4.2 million and agree not to "contest the forfeiture of those funds to the United States." The "forfeitable funds" are described as "resulting from the conduct of [*The Sporting News*] involving [its] processing of payments from or attributable to promoting, inducing, procuring, aiding and abetting offshore gambling enterprises conducting, in whole or in part, on-line and other sports bookmaking and casino-type gambling activities in the United States in violation of federal law." The settlement agreement also calls for *The Sporting News* to provide a \$3 million public service advertising campaign. This three-year campaign is "to inform and educate said audience that offshore/foreign gambling enterprises conducting, in whole or in part, online or telephonic sports bookmaking and casino-type gambling activities in the United States violate federal and state laws, as do United States-based gamblers using those wagering services." In the statement announcing the settlement, the U.S. Attorney reiterated DOJ's position that "[t]he operation of a commercial gambling business where bets or wagers are transmitted in interstate or foreign commerce is illegal under federal law, and that includes Internet communications."

#### WHAT'S GOING ON?

The coincidence of *The Sporting News* settlement and filing of Casino City's uncontested voluntary dismissal of its appeal, ending the *Casino City* case, raises questions. DOJ's filings in *Casino City* highlighted that the government had not threatened or taken any action directly against Casino City. It had not even been the recipient of a subpoena concerning its advertising activity. The district court found this to be a fatal defect of the lawsuit – how could there be any controversy? Of course, this ignored all the threats, subpoenas, seizures and settlements that had occurred as a result of the activities in the East District of Missouri. Why did it take so long for *The Sporting News* settlement to be reached? Was the federal government lying low until *Casino City* was over? Why were other blatant advertisements for Internet gambling permitted to remain in place (such as the billboard located in Times Square, NYC, with a banner reading: "Everybody Bets on the Super

Bowl at Sportsbook.com")? Why have so few U.S. Attorneys taken enforcement action? In New Jersey, state officials in 2003 took aggressive action against Internet gambling and the prominent advertising of Internet gambling in Atlantic City. But for the most part, state and federal authorities have done little to stop the advertising of Internet gambling, including the advertising of Internet sports wagering, the illegality of which under the federal Wire Act is not in dispute.

#### CONCLUSION

While U.S. courts and federal enforcement authorities continue to send mixed messages on the legality of Internet gambling and the scope of the Wire Act, U.S. gamblers continue to pursue offshore betting activities available online. Our economy is global, and Internet gambling is a global industry. Many consider U.S. attempts to prohibit rather than regulate Internet gambling to be ill-advised. Nevertheless, the U.S. Congress continues to address proposals that would attempt to curtail Internet gambling by U.S. citizens. The conflict between the real attraction of Internet gambling and those who seek to outlaw it will continue to evolve. In the meantime, companies in the Internet gambling sector and media companies that advertise Internet gambling need to continue to monitor the U.S. legal landscape for further developments and clarification.

In contrast to the U.S. position, the U.K. has grasped the mettle and from 2007 (when the new U.K. consolidating legislation the Gambling Act 2005 comes fully into operation), it will have modern gambling laws reflecting the Internet age.

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<sup>7</sup> Philip Recchia, "Brit Bookie 'Bowl'ing for N.Y. \$\$," *New York Post* (Jan. 29, 2006) (online edition).

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