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INTERNET GAMBLING ADVERTISING BEST PRACTICES

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I. INTRODUCTION

In the ever-evolving realm of digital media and technology, any business that desires to sustain itself must implement a marketing plan designed to keep pace with Web 2.0 developments. Adapt or die, is the saying. Online gambling is no exception; however the unsettled legal issues associated with the underlying gambling activity complicate the efforts to develop an effective,, compliant advertising strategy. That, combined with the paucity of existing advertising regulation, and the absence of established, global industry best practices for online gambling advertising, begets an environment calling out for clarity and consistency.

As with most Internet-based media, online gambling advertising is inconsistently regulated and often unaddressed by most countries. Although some nations have cobbled make-shift parameters through case law or scholarship, the lack of guiding precedent or universal standards is increasingly problematic. That said, the purpose of this article is to describe the existing legal environment relating to online gambling advertising, such that it is, and offer up suggested industry best practices for advertisers and media outlets. It is hoped that development of recognized industry advertising practices will ward off mandatory regulation, which often goes further than necessary to address any legitimate governmental interests in protecting against fraud, or excluding minors and problem gamblers. Taking into account the somewhat negative perception associated with gambling as a “vice” activity in some parts of the world, adherence to constructive, thoughtful online advertising standards is vital to effectively preserve the industry’s integrity and foster its future development and legitimacy. As technology advances, so do target demographics, thus the legal parameters and ads themselves must evolve accordingly. This article intends to provide a glimpse into the developing world of online gambling advertising, in this ever-changing environment.

In order to explore the best practices relating to online gambling advertising, some effort must be devoted to outlining the current legal climate and the myriad of factors that may lead to the legality of such promotional materials being called into question. Accordingly, this article will discuss the legal standards employed by select countries, in an attempt to glean necessary principles for development of regulation or best practices. Given that so many countries have left the matter of online gambling as a whole, untouched, the author highlights three countries: the United States, Canada and the United Kingdom as providing the most detailed framework for

existing and future regulatory policies. Further discussion will be devoted to evaluating the available legal remedies, i.e., injunctions, administrative proceedings, and criminal/civil penalties. Ideally, this article will serve to enlighten both online gaming businesses and regulators, who must both consider the wisdom of various policy options in formulating appropriate standards or restrictions on Internet gambling advertising content and methods.

II. CURRENT LEGAL CLIMATE IN SELECT JURISDICTIONS¹

A. United States of America

While the legality of various forms of online gaming, itself, is still an unsettled question in the United States, the legal issues relating to advertising Internet gambling services are even more difficult to ascertain. The main reason for this distinction is that the power of the United States government to regulate a particular activity (like gambling) is not co-extensive with its ability to regulate or ban *advertising* for that same activity. In other words, while the government might be able to regulate (or completely prohibit) the conduct of gambling itself, it is less free to regulate commercial speech about that conduct, under the First Amendment.² Therefore, affiliates, promoters and marketing agencies associated with the marketing of online gaming will be somewhat less constrained, from a legal perspective, than those individuals or companies operating the gambling venture itself.

For decades, the Communications Act of 1934; 18 U.S.C. § 1304³ (hereinafter “§1304”) prohibited the radio or television broadcast of advertising for gambling activities. Although §1304 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 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 decision in *Greater New Orleans Broadcasting Association v. United States*.⁴

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¹ The author would like to thank the several foreign lawyers who contributed invaluable information to this publication regarding their particular jurisdiction, including Michael D. Lipton, Q.C., Garron Whitesman, Justin Franssen, Sophia Lobo, Herbert Young, Jose Luis Benavides, Dotan Baruch, Yap Wai Ming, and Maire Conneely.

² *Greater New Orleans Broadcasting Assn. v. U.S.*, 527 US 173, 119 S.Ct 1923, 144 L.Ed.2d 161 (1999).

³ 18 U.S.C. § 1304

⁴ *Greater New Orleans*, *supra* note 2.

In deciding the *Greater New Orleans* case, the Supreme Court ruled that the broadcasting ban violated First Amendment free speech rights provided by the U.S. Constitution as the ban was so wrought with exceptions that it could not fulfill its stated purpose, or advance the government's interest of minimizing the alleged ills of gambling. Citing to the hypocrisy that some form of gambling was legal in nearly every state,⁵ the Court specifically held that in connection with gambling advertisement, the power to prohibit or regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.⁶ In coming to this conclusion, the Court looked to the principles set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁷ Using the "*Central Hudson Test*," a 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, as the typical "parade of horrors" associated with gambling and its establishments tend to not apply in the virtual world.⁹

Although U.S. advertising outlets have generally not been criminally prosecuted,¹⁰ the last decade has demonstrated that Internet gambling advertisers and media outlets are still being targeted by governmental authorities.¹¹ Legal concerns relating to online gambling advertising

⁵ 119 S.Ct. at 1932, N.5.

⁶ 119 S.Ct. at 1934.

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.

⁹ For example, online gambling cannot be accused of causing increased prostitution or drunkenness. Nor can the government seriously maintain that Internet gaming is controlled by organized crime. In seeking to justify any form of gambling advertising, the government typically introduces this "parade of horrors" allegedly caused by gambling. Typically, the government will claim that land-based gambling increases local crime, fosters prostitution, causes corruption and results in the infiltration of organized crime. The same cannot logically be said about online gambling.

¹⁰ The notable exception appears to be DME Global Marketing & Fulfillment, Inc., a Florida marketing company that was included as a defendant in the Indictment returned against BetOnSports.com; Criminal Case Number 4:06CR337 CEJ, (E.D. MO). Most other legal actions against U.S. advertisers have been civil in nature, and have focused on extracting monetary penalties against the targeted media outlets. *See also*, note 19.

¹¹ K. Smith, "They're Baaack - Next Round of Subpoenas Targets Esquire," *Interactive Gaming News* (April 21, 2005), found at: <http://www.igamingnews.com/index.cfm?page=artlisting&tid=5823&k=bodog%20poker>. *See also*, E. Swoboda, "State AGs Appeal to U.S. Congress for Help in Fighting Online Gambling," *Interactive Gaming News* (March 24, 2006).

came to a head in mid-2003, when the U.S. Department of Justice (“DOJ”) launched its campaign designed to combat the activity under the theory that the widespread advertising of online gambling misled the public into thinking that online gambling was lawful.¹² The DOJ took the position that such advertising rendered the any cooperating media outlets guilty of aiding and abetting Wire Act (and other statutory) violations, and conspiracy to violate the same.¹³

This campaign prompted a test case initiated against the DOJ by a gambling industry resource website, however, the court ruled that the site did not have standing to mount the challenge, thus failing to clarify the muddled waters of online gambling advertising law.¹⁴ 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.”¹⁵ 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.¹⁶ The court made no effort to distinguish between the types of gambling advertised, but instead concluded that all online gambling is illegal.

Shortly after the *Casino City* case was meeting its demise, the DOJ began pressuring several advertising outlets, such as Google, Microsoft and Yahoo!, into cessation of their online gambling advertising activities, and seeking the imposition of monetary penalties for past infractions. Subtly, but greatly, expanding its war of intimidation against Internet gambling, the DOJ effectively forced the media powerhouses to pay over \$31.5 million in fines to settle claims that the companies had promoted illegal gambling by running ads on the Internet.¹⁷ During this influx in attention from the government came one of the first legal decisions to apply the *Greater*

¹² 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.

¹³ In seeking to apply either the conspiracy or aiding and abetting laws to advertisers, the government would need to prove a close association between the promoter and the casino operator. Depending on the theory utilized, then, the government might not need to prove that someone actually gambled online or that the conspirators knew that the advertising scheme was illegal.

¹⁴ Complaint at 2, *Casino City, Inc. v. U.S. Dep’t of Justice*, No. 04-557-B-M3 (M.D. La. Aug. 7, 2004).

¹⁵ Ruling at p. 14

¹⁶ *Id.*

¹⁷ DOJ Fines Microsoft, Google, and Yahoo \$31.5 Million for Advertising of Internet Gambling, *Tech Law Journal* (12/19/2007), found at: www.techlawjournal.com/topstories/2007/20071219.asp.

New Orleans case to offshore gambling advertising; the BetOnSports.com prosecution by the U.S. Department of Justice.¹⁸

Charged with various federal racketeering violations based on their involvement in online gambling activity that reached U.S. players, several BetOnSports.com (“BoS”) principals, and BoS’s marketing company, all found themselves in hot water with the U.S. government.¹⁹ The defendants argued that the First Amendment to the US Constitution protected the company’s advertising statements as a form of commercial speech, which can only be banned or regulated if the government meets the *Central Hudson* Test.²⁰ Analogizing their case with *Greater New Orleans*, the BoS defendant claimed that the gambling activity in question was legal in the jurisdictions where it was conducted.²¹ Therefore, because BoS was fully licensed to provide online gambling in those jurisdictions, the advertising in question should be deemed legal within the U.S. as well. Completely ignoring the fact that the *advertising* of the gambling activity was at issue, not the gambling activity itself, the government countered with the argument that Internet gambling is illegal in the specific states where the bets are made.²² The court accepted the government’s argument and issued a preliminary ruling stating, “To hold otherwise would effectively permit any activity licensed in a foreign jurisdiction to be legal in the United States without reference to local law.”²³ Also included in the twenty-two count BoS indictment was an unfair advertising claim arising from alleged violation of the Federal Trade Commission’s (FTC)²⁴ Deceptive & Unfair Trade Practices Act, which prohibits false or misleading advertising.²⁵ The government alleged that BoS had made fraudulent and deceptive statements – which would not be protected by the First Amendment - in its promotional material when it claimed that its gambling-related services were “legal.”²⁶ BoS claimed, on its website, that its betting services were, in fact, lawful, as evidenced by the company’s legal licensure in Antigua, Barbuda and Costa Rica (the jurisdictions which acted as hubs for the business).²⁷ The DOJ disagreed and argued that advertisements directed at U.S. customers containing such language were illegal regardless of the jurisdiction of origin.²⁸ However, a guilty plea effectively ended the case before a decision could be rendered on the merits, so the preliminary ruling represents the first and only substantive analysis of the First Amendment advertising issue raised by the *Greater New Orleans* case, as applicable to Internet gambling.

¹⁸ *U.S. v. David Carruthers, et al.*, Case No.: 4:06CR337CEJ(MLM), (E.D. MO May 7, 2007). *See also*, Indictment, available at <http://www.nytimes.com/packages/html/technology/gambling-indict.pdf>.

¹⁹ DME Global Marketing & Fulfillment, Inc., a Florida marketing company and its individual owners, were included as defendants in the Indictment returned against BetOnSports.com. The alleged unlawful activities, specific to the advertising outlet include: disseminating advertising in the United States and on line to direct traffic to websites such as www.betonsports.com and telephone call centers, including such innocuous direct marketing activities such as mailing brochures, coupons, and flyers, and placing print, radio and television advertising. *See also*, Indictment, available at <http://www.nytimes.com/packages/html/technology/gambling-indict.pdf>.

²⁰ Carruthers, *supra* note 18.

²¹ Order at p. 13.

²² *Id.*

²³ Order at p. 14.

²⁴ Notably, the FTC has not been actively involved in prosecuting gambling promotions since the BoS case.

²⁵ 15 U.S.C. §§ 45, 52, respectively. Accordingly, promotion of a gambling activity that can be deemed “unfair” significantly increases the potential for legal liability, and in the BoS case, this could have proved problematic regardless of the means or medium used to communicate the message.

²⁶ Carruthers, *supra* note 18.

²⁷ *Id.*

²⁸ *Id.*

While the government has various prosecution options available to it in its effort to criminalize online gambling advertising, any such effort directed against U.S. advertisers will inevitably be countered by a Free Speech defense under the First Amendment; thus creating a unique legal climate specific to the U.S. The First Amendment's protections extend to commercial speech such as advertising and, despite the defeat suffered on the BoS case, any effort to prosecute advertisers, affiliates, or media outlets may run afoul of those constitutional protections.

The government cannot do, through criminal law enforcement, that which it is prohibited from doing directly through legislation. Meaning, if an outright ban on Internet gambling advertising is unconstitutional, so would be a *de facto* advertising ban accomplished through aggressive law enforcement actions. The 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, and an example of overreaching by U.S. authorities. Nevertheless, it seems that the U.S. government will continue its attempt to restrain online gambling advertisements reaching U.S. players until some recognized legalization scheme comes into being at the state or federal level.

B. CANADA

Although it by no means openly embraced online gaming, Canada has taken a much more careful approach in applying its gambling laws to online gambling promotion. While it is certain that selected online gambling promotions reaching Canadian provinces could violate the country's anti-gambling laws, the Canadian government – both provincial and federal - has yet to pursue any sort of prosecution for such marketing activities. Under Canadian law, an illegal “gambling” conviction requires some form of risk, reward and consideration present within the gaming activity in question.²⁹ Using the “consideration” element as the proverbial wildcard, Canadian Internet advertisers capitalize on the grey space within the law and have taken to marketing so-called “freeroll” websites. Commonly promoted as “instructional” in nature, the freeroll sites allow users to gamble online without the risk of losing any monetary consideration, thus bypassing the relevant Criminal Code provisions.³⁰ Notably, this concept of offering free play on a “Dot Net” variant of a company's “Dot Com” domain name was also briefly adopted by companies directing advertising to the U.S beginning in approximately 2003, but most such advertising ceased after the adoption of the Unlawful Internet Gambling Enforcement Act of 2006³¹ (“UIGEA”), coupled with the aggressive stance taken by the U.S. Department of Justice against any online gambling businesses.

Should an online gambling advertising entity find itself within the Canadian Crown's sights, there are three Criminal Code provisions that could pose a problem for the promoter³²:

²⁹ Canadian Criminal Code Section VII – Disorderly Houses, Gaming & Betting.

³⁰ “Freeroll” sites are prohibited from providing links or generating pop-up ads directing users to “real-money” gambling websites.

³¹ 31 U.S.C. §§ 5361.

³² The Canadian Criminal Code provisions listed above have the potential to impact any online advertiser, which includes those involved in affiliate marketing. Although it appears that there has never been a prosecution involving an affiliate marketer of online gambling content, arguably the Criminal Code could be triggered if a computer

1. Advertising of sports betting services [C.C.C. s-s. 202(1)(h)]³³
2. Advertising of lotteries and games of chance [C.C.C. s-s. 206(1)(a)]³⁴
3. Importing gambling advertising [C.C.C. s-s. 202(1)(g)]³⁵

With the law distinguishing between “gaming” and “betting,” Subsection 202(1)(h) could be interpreted as a prohibition on advertising related to betting activities, therefore, clearly encompassing sports booking services regardless of their location. Consequently, sports book websites advertising in Canada typically adopt the “freeroll” business model. It could be speculated that Subsection 202(1)(h) was drafted so specifically and is construed so rigidly as a direct result of the country’s government sanctioned online sports betting lotteries offered within the Canadian provinces.³⁶

Addressing games of chance specifically, Subsection 206(1)(a) could proscribe any marketing promotion involving casino games that allow the player to post stakes, for example; roulette or other lottery-style games. Should the advertised game require an element of skill at any point, such as (arguably) casino card games like blackjack or poker, the content will likely fall within the law’s apparent loophole. Notoriously labeled as a “game of mixed chance and skill,” poker websites are the most likely to capitalize on this grey area within the Canadian Criminal Code. Despite the fact that Subsection 206(1)(a) expressly lists “cards” as a forbidden means of “disposing of property” for gaming purposes, Canadian case law states that such disposal via card play must occur while participating in a “game of pure chance” to trigger criminal violation.³⁷

Although it does not expressly reference advertising like the previous two Criminal Code provisions, Subsection 202(1)(g) could be interpreted as applicable to gambling promotions. Given the law’s focus on importation of material that is “intended [...] or likely to promote...gambling or betting,” the scope of the law is effectively narrowed, therefore only

located within the Canadian borders is utilized to direct online traffic to sports booking websites (s-s. 202(1)(h)) and/or websites offering casino-type games of pure chance (s-s. 206(1)(a)).

³³ Subsection 202(1)(h) of the Code makes it an offense to “advertise, print, publish, exhibit, post up or otherwise give notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest.”

³⁴ Subsection 206(1)(a) of the Code makes it an offense to, “among other things, advertise or cause to be advertised any proposal, scheme or plan for disposing of property by any mode of pure chance.”

³⁵ Subsection 202(1)(g) makes it an offense to “import or bring into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse race, fight, game or sport.”

³⁶ Most of the Canadian provinces maintain government operated lottery commissions to their citizens; some of the provinces provide online sports booking as a part of their lottery services. Thus, any private entity offering those same services online and/or promoting such services, would be in direct competition with the Canadian government.

³⁷ *R. v. Shabaquay*, 2004 CarswellOnt 2309 (Ont. Ct. of J.)

applying to advertising content produced outside of Canada and then utilized within the country's borders.³⁸

Similar to the United States' First Amendment, Canada provides its own potential freedom of expression defense to Internet gambling advertising violations. Found in the *Canadian Charter of Rights and Freedoms* (the "Charter"), Canadian citizens are guaranteed the "freedom of [...] expression, including freedom of the press and other media of communication."³⁹ Such freedoms are subject to the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁴⁰ Arguably, the online gambling advertising prohibitions listed in the Canadian Criminal Code could infringe on the speech-related freedoms set forth in the Charter, however, the infringement may be upheld based on the Charter's "reasonable limits" savings clause.⁴¹ Laws criminalizing speech have generally been upheld as lawful where the Court found that the government's objective in enacting the provisions was to "avoid harm to society."⁴² Debatably, the legislative intent behind the above referenced "anti-gambling" statutes is not to ban gambling promotion, but rather to restrict it to circumstances where the gambling activity in question is licensed by the province (e.g. province-operated lotteries and/or online sports booking).⁴³

C. OTHER JURISDICTIONS⁴⁴

i. Mexico

In Mexico, governmental permission must be sought before advertising online casino games and sports betting.⁴⁵ Several criteria are included in the statute, including confirmation that the gaming enterprise has secured a proper permit, that the advertisement is accurate (and not deceptive), and that all ads include a statement that minors are prohibited from participating.

³⁸ Notably, the Criminal Code does not include exporting "gambling" material to Canada in violating s-s. 202(1)(g). Accordingly, only the Canadian-based recipient of the advertising materials in question runs the risk of being charged under this provision.

³⁹ s-s. 2(b)

⁴⁰ § 1; see also, *R. v. Oaks* [1986] 1 S.C.R. 103.

⁴¹ In determining if the Canadian government is justified in infringing on the free speech rights of online gambling promoters, the court would look to the following test: 1) Is the law designed to achieve an objective that is of sufficient importance to warrant overriding freedom of expression; 2) If so, is there a rational connection between the criminal sanction and that objective; 3) Is the impairment on expression minimal in light of the standard imposed; 4) Is the criminal prohibition proportionate, when one weighs the importance of the objective sought against the degree of the infringement. *Oaks*, supra.

⁴² *Id.*

⁴³ *R. v. Andriopoulos*, [1993] O.J. No. 3427 (Gen. Div.); aff'd 1994 CarswellOnt 3947 (C.A.). In a decision from the Ontario Court of Appeal, *Andriopoulos* holds that gambling is permitted when there is sufficient control of the activity by the province so as to ensure that the public interest is protected. Accordingly, when a province regulates a particular form of gambling within its jurisdiction, the courts may safely assume that there is sufficient protection for the public and the gambling activity is compliant with the Canadian Criminal Code.

⁴⁴ This section could not have been written without the valuable assistance of several members of the International Masters of Gaming Law, who provided information pertaining to their respective countries' online gaming laws, including: Michael D. Lipton, Q.C., Garron Whitesman, Justin Franssen, Sophia Lobo, Herbert Young, Jose Luis Benavides, Dotan Baruch, Yap Wai Ming, and Maire Conneely.

⁴⁵ *Art. 10, Regulation for the Implementation of the Federal Gaming & Drawings Act of 1947* (Reglamento de la Ley Federal de Juegos y Sorteos, 2004). The *Regulation* went into effect on October 15, 2004.

Although the requirement of a permit before airing an advertisement offends traditional North American Free Speech principles, as a “prior restraint” on expression, the Mexico statute contains other laudable elements, such as exclusion of minors and problem gamblers, which are consistent with industry best practices.

ii. Israel

Until fairly recently, advertising of online gambling activities was quite prevalent in Israel. However, in the wake of several police raids on Internet gambling advertising portals, such advertising is now far and few between. Israeli, like many countries, has not enacted specific legislation dealing explicitly with the advertising of online gambling activities. Law enforcement simply relies on the country’s existing “terrestrial” legislation to battle the alleged unlawful marketing. Similarly, the country’s controlling case law generally deals with foreign terrestrial gambling, providing little guidance as well.⁴⁶

iii. Singapore

Singapore, like many other countries, including some listed here, currently lacks any laws regulating online gambling. Given that the country still regulates gambling activities under archaic statutes enacted to monitor gambling dens during the country’s colonial period, there are conflicting opinions as to how, or if, the laws could be interpreted in conjunction with cyberspace.⁴⁷ However, the Singapore government has chosen to take a firm stance against gambling by enacting stringent guidelines for the advertising of land-based casino operations.⁴⁸ Arguably, the same regulations would apply to online gambling activities. But such speculation is doubly inconclusive, as the issue has yet to reach the Singapore courts and country’s online gambling industry appears in no hurry to launch such promotional content.⁴⁹

iv. Ireland

Ireland has not passed specific laws in relation to online gambling advertising. Gaming in Ireland is currently governed by the Gaming & Lotteries Act 1956 which, due to its age, does not make any reference to online gambling, let alone the advertising of such.⁵⁰ Ireland’s Gaming & Lotteries Act contains provisions restricting the promotion of “unlawful gaming”⁵¹ and the advertising of lotteries,⁵² both of which *could* encompass the marketing of Internet gambling activities. However, recognizing the need to stay relevant in the cyber economy, Ireland is currently undertaking a review of its gambling laws and is expected to announce the details of

⁴⁶ Israeli seminal case

⁴⁷ Singapore law

⁴⁸ *Id.*

⁴⁹ article

⁵⁰ See generally, Gaming & Lotteries Act 1956.

⁵¹ Section 4(1) of the Gaming and Lotteries Act 1956 states that “no person shall promote or assist in promoting or provide facilities for any kind of [unlawful] gaming ...”

⁵² Section 21(1) of the 1956 Act has a similar provision specifically in relation to lotteries and that section provides that “no person shall promote or assist in promoting a lottery” that is not deemed to be lawful. In addition, Section 22 of the 1956 Act prohibits all print and radio advertisements of lotteries (including bingo).

the draft legislation within the year.⁵³ With the proposals rumored to mirror the United Kingdom's gambling regulations, the new legislation will more than likely address online gambling advertising.⁵⁴

v. Costa Rica

Several Central American countries have openly encouraged the development of the online gaming industry, thus choosing not to implement laws against advertising within the industry.⁵⁵ For example, the nation of Costa Rica – despite the strong presence of online gambling entities in that jurisdiction – has adopted no regulations relating to online gambling advertising, or online gaming in general. It is speculated that adoption of regulations is highly unlikely due to the country's desire to capitalize on its label as an international hub for sports betting operations, and thereby encourage foreign gambling companies to relocate to Costa Rica.

III. CRITIQUE OF CURRENT APPROACHES TO ONLINE GAMBLING ADVERTISING

Advertising related to online gambling activities is often not regulated, or occasionally treated identically to the gambling activity, itself. But distinct considerations exist when developing regulatory policies and best practices relating solely to promotional activities like marketing and advertising. Whether due to the content's association with traditionally iniquitous activities or simply the boundlessness nature of the Internet, most current regulatory practices are disconnected, conflicting and often problematic. Although several jurisdictions throughout the world have implemented laws regulating gambling advertising in its print or terrestrial broadcasting form, the difficulty in translating those laws into the online world is noteworthy.⁵⁶ Although commercial in nature, online gambling promotions are still expressive activity, and deserve unique consideration as a form of speech. Governmental bodies should be more cautious, and the resulting regulation more narrowly-tailored, given the expressive nature of the activity involved. Online gambling advertising is by no means entitled to be a marketing free-for-all, but any regulation should be limited to achieving a specified, legitimate governmental interest. Greater regulation of online gambling advertising, merely because it involves gambling, is illogical and unwarranted.

Jurisdictional disparities pose a serious issue for online gambling promotions. As a result, lawmakers in various countries have proposed legislation requiring gambling advertising outlets to employ geo-targeting⁵⁷ efforts to limit the reach of advertisements to an audience

⁵³ The new legislation is not expected to be made law until late 2013.

⁵⁴ *Written evidence submitted by the United Kingdom Advertising Association*, Parliament Session 2010-2012, available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomeds/writev/gambling/m74.htm>.

⁵⁵ E.g. Panama, Costa Rica,

⁵⁶ *See eg*, the FTC Endorsement Rule. In an effort to adapt regulations targeted at Web 2.0 environment, the FTC updated its Guides Concerning the Use of Endorsements & Testimonials in Advertising. The revised Guide basically updates the earlier Guide with particular attention to the use of endorsements, and testimonials on blogs, in word-of-mouth advertising campaigns and on new media platforms, and became effective December 1, 2009.

⁵⁷ Noted promotional technique is also known as "geo-blocking."

legally entitled to engage in the gaming activity.⁵⁸ Although these proposals have yet to pass in their respective jurisdictions, it may only be a matter of time before legislators succeed in their efforts to force online gaming sites to use current technology to limit the reach of their advertisements. Geo-targeting is an Internet-based marketing tool that allows an advertising outlet the ability to target a promotional campaign at a limited set of recipients based on geographic location.⁵⁹ Most marketing initiatives that support geo-targeting allow the advertiser to control where the promotional materials are displayed based on individualized restrictions like country, state, city, or proximity within a given physical address.⁶⁰ Lawmakers often sing the praises of this marketing technique without taking into account the feasibility of its use for the average online gambling entity. It is true that with the help of geo-targeting advertising, online gambling promoters could direct their campaigns solely to jurisdictions where the underlying gambling activity is completely lawful. The technique has even been used by some in the industry already.⁶¹ However, with effective geo-blocking solutions still fairly pricey, and so many countries still in limbo on whether online gambling ads are even a problem, industry advertisers – particularly small affiliates – are forced to evaluate efforts are worth it. Geo-targeting is just one example of several solutions du jour bombarding online gambling advertisers that may be effective, but will no doubt take a considerable amount of time to resonate as an industry standard. While voluntary geo-blocking may be an effective tool to be considered by advertisers in developing best practices, mandating its use under the pain of civil or criminal penalties may be too much for many promoters to bear.

As referenced above, current legislative struggles with online gambling marketing seem to ignore the distinction between a gambling violation and a violation of advertising laws. To bypass such a clear distinction not only subjects today's online advertisers to potentially excessive penalties, but also sets extremely an extremely dangerous precedent for all future Internet-based marketers. Most jurisdictions have well-settled gambling laws. Such laws denote specific aspects of gambling as criminal acts, often punishable by incarceration or asset seizure.⁶² On the other hand, most jurisdictions have yet to even address the legality of online gambling advertising, let alone penalties associated with such activities.⁶³ Because there is an unmistakable division between an advertisement and the underlying conduct being advertised, logically, penalties arising from online gambling marketing should not rise to the same severity as a violation of gambling laws. It stands to reason that penalties associated with Internet-based gaming ads should be limited to civil sanctions such as injunctions, fines or consent decrees

⁵⁸ Cite to proposed bills.

⁵⁹ Cite to Web 2.0 article.

⁶⁰ *Id.*

⁶¹ Required by Kentucky court order in *141 Domain Names* case to avoid forfeiture.

⁶² Cite to US law for example. Domain Name Seizures. Current practice as a penalty for criminal violations – seizure occurs before a finding of guilt: eg – Black Friday, MegaUpload, etc. NEVER acceptable for gambling advertising violation/civil or criminal violation → Effectively eliminates an entire platform of speech and denies access to media by customers/players from jurisdictions where advertising may be perfectly legal analogy – seizing projectors in movie theater for playing pornographic materials. Instrumentality of speech must be treated differently than other ‘assets’ for forfeiture purposes, due to the consequential impact on speech. Governments must recognize that is dealing with the Internet no country’s laws justify the ability to impact speech that reaches the entire world. Alternative approach - Domain names deemed protected “expressive” asset, exempt from forfeiture. Can punish individuals and corporations, with fines and penalties (and possibly incarceration in egregious cases), but TLD’s must remain exempt from punishment based on the content of speech appearing on the TLD.

⁶³ List countries from below without relevant laws.

restricting future conduct.⁶⁴ While criminal penalties like incarceration may be more effective in inducing compliance, expressive activity like advertising must be afforded due deference. An evolved approach to online gambling advertising regulation would limit penalties to those which are civil in nature.

Under the U.S. model, advertising regulations are generally enforced, at the federal level, by the Federal Trade Commission (“FTC”). This administrative agency typically encourages compliance through civil, as opposed to criminal, remedies.⁶⁵ The FTC further issues policy statements or warning notices to companies alleged to be engaged in deceptive advertising, in an effort to alter the content of future promotions, without actually taking enforcement action. Occasionally, administrative complaints will be initiated, resulting in consent decrees whereby the alleged violator agrees to take some remedial action and perhaps pay some fines or costs of investigation. In more serious cases, the FTC will seek court injunctions, to halt the offending marketing practices. However, only in the most egregious of advertising cases should the harsh penalties of criminal prosecution be invoked.⁶⁶ The underlying reasons for this approach relate to the expressive nature of the advertising activity, and the sensitivity to potential censorship concerns. Concerns over potential self-censorship, are even more probable if incarceration is threatened as a penalty. Only where specific intent to violate the law exists, coupled with a compelling governmental concern (such as willful marketing to minors) should criminal penalties be an available remedy.⁶⁷ Model advertising regulations should include defenses based on good faith efforts, or substantial compliance, to further protect the expressive activity at issue. Much like print or terrestrial commercial speech, if the advertiser knows it cannot be held strictly liable for rogue advertisements reaching improper jurisdictions so long as it has made reasonable efforts to avoid such occurrences, self-censorship becomes less likely. Any restriction on advertising practices necessarily impacts speech, which should enjoy a favored position as part of the marketplace of ideas. Any advertising regulations should be cognizant of these concerns, and use the least restrictive means of accomplishing any legitimate governmental objective.

IV. SUGGESTED “BEST PRACTICES” IN REGULATING ONLINE GAMBLING ADVERTISING

In developing best practices for marketing ventures, regardless of the industry, it is helpful to look to existing laws and regulations as a guide, and as evidence of the current regulatory viewpoint. Such laws may impact the method used to convey the commercial message, or the content of the message, itself. Given existing efforts to capitalize on technological advancements in communication, such laws may include restrictions on the use of unsolicited commercial e-mail communications (i.e. “spam”), instant messages (“spim”), message board posts, and even unsolicited calls and text messages to mobile devices. Laws restricting these activities are generally developed with consumer protection in mind, and

⁶⁴ See, note 10.

⁶⁵ Cite to FTC remedies statutes and rules.

⁶⁶ For example; intentional misrepresentation, deceptive, etc, which will be covered by other existing laws such as fraud.

⁶⁷ See, *U.S. v. X-Citement Video*, 513 U.S. 64 (1994).

adhering to them (or standards modeled from them), even if an entity is not jurisdictionally required to do so, may provide the ancillary benefit of evidencing a public commitment to consumer protection. Demonstrating such commitment, at the current stage of development in the online gambling industry, will help foster a cooperative environment in which the industry will ultimately flourish through effective self-regulation. Adapting “best practice” approaches premised on voluntary industry regulation of the *type* of media used to distribute online gambling advertisements as well as the *content* contained within those ads, would appear to yield the best results when implemented on a global scale. Such approach was effective for the Hollywood motion picture industry as well as the music recording industry, in avoiding potentially oppressive content regulations.

A. SELF-REGULATION BASED ON THE ADVERTISING MEDIUM OR METHOD

In the United States, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003⁶⁸ (“CAN-SPAM”) governs the transmission of what is commonly referred to as “spam.” CAN-SPAM generally requires⁶⁹:

1. Accurate header information. For example, the “From” field and underlying IP address of the sender must be accurate.⁷⁰
2. The physical address of the sender.
3. An accurate Subject heading.
4. Opt-out capability, either via a return e-mail address or some other clear and conspicuous mechanism that allows the recipient to opt out of future commercial messages.
5. A disclaimer which clearly and conspicuously indicates that the message is an advertisement.

From a logical standpoint, there is little argument that not being deceptive is a best practice. Accurate header information and subject fields seem like obvious positive attributes for marketing material. Similarly, a functioning opt-out mechanism is more than reasonable, especially when limiting the ability to opt-out to commercial messages unrelated to any existing business/customer relationship. Even if a customer opts out of “commercial”⁷¹ messages, as that

⁶⁸ 15 U.S.C. § 7701.

⁶⁹ This particular list focuses solely on electronic mail messages that do not contain “sexually oriented material. E-mail containing sexually oriented material must conform to additional requirements as set forth at 15 U.S.C. § 7704(d).

⁷⁰ While the majority of CAN-SPAM factors are only applicable to “commercial” messages which advertise or promote a commercial product, this requirement is also applicable to “transactional” and “relationship” messages, which are messages that a business sends existing customers and which concern a transaction or the specific, already-established relationship between the sender and recipient.

⁷¹ The term “commercial electronic mail message” means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet

term is defined by CAN-SPAM, such opting out does not prohibit a business from sending unsolicited messages about a customer's account or about new features that may be added to a service to which the customer already subscribes.

Numerous misconceptions exist relating to CAN-SPAM; the most dangerous of which is that CAN-SPAM has no effect if a recipient has given some prior consent to receiving the message. While consent does affect *some* of the above requirements, consent does not completely negate the requirements. For example, even if a user of a poker site has consented to receiving commercial messages, an opt-out mechanism is still required. In fact, under CAN-SPAM – assuming the substantive elements of the law are met - a business does not need prior affirmative consent before sending an unsolicited commercial message. It truly is an *opt-out* mechanism. There is, in effect, an implied consent prior to the recipient exercising the opt-out right.

Canada's anti-spam law, sometimes referred to as the Fighting Internet and Wireless Spam Act⁷² ("FISA") was passed in December 2010 and is set to take effect in the near future. Presuming that the law is unchanged between now and when it becomes effective, FISA employs an *opt-in* approach to e-mail marketing. Therefore, consent must be obtained either impliedly or expressly prior to sending the message.

Of these two countries' mechanisms, a hybrid approach may be appropriate. CAN-SPAM's allowance of an initial unsolicited commercial message is obviously valuable from a business perspective, however, obtaining prior consent before sending commercial messages may offer the site operator or advertiser added layer of good faith to its marketing practices. Whether through regulation or best practices, the concerns of consumers over being bombarded with irrelevant and often annoying commercial messages on every electronic device available, should be considered. Importantly, prior consent should not, and arguably, *cannot*, be legally obtained through dubious promotional techniques or suspect contractual drafting; i.e. burying the consent in the middle of a lengthy Terms of Service document, or combining consent with other necessary consumer responses during a sign-up process. Just as consent to a website's Terms of Service should be obtained via clear and conspicuous means, the same standard should apply to consent to receive non-relationship-based commercial solicitations directed to online gaming customers. For example, a separate check box allowing the site operator to send the customer promotional material from partner or third party sites may be an effective way to obtain prior consent.⁷³ The decision to create such an obvious opt-in procedure will depend on factors such as the jurisdiction(s) in which the site intends to operate, the jurisdiction(s) in which the site intends to target its marketing, and the jurisdiction(s) which may potentially assert legal authority over the site. Irrespective of the legal requirements, some form of conspicuous consent or opt out procedure is consistent with recommended industry best practices.

website operated for a commercial purpose). The term "commercial electronic mail message" does not include a transactional or relationship message. 15 U.S.C. §§ 7702(2)(A), (2)(B).

⁷² *Canadian House Government Bill C-28 – Fighting Internet and Wireless Spam Act (FISA)*;

⁷³ The author recognizes that many customers will simply ignore such a box, and, consequently, providing that option may not be desirable.

With gambling addiction being one of the foremost social concerns in regulating online gambling advertising, it would serve operators and promoters well to take this issue into account when developing industry best practices.⁷⁴ As stated above, offering a self exclusion option is an important industry best practice. Accordingly, developing an industry-wide database comprised of problem gamblers that have chosen to opt-out of certain online gambling advertisements would serve both purposes of social responsibility and suggested advertising guidelines. Accessible to participating online gambling advertising outlets across the globe, the database would house the e-mail addresses and other electronic contact points for consumers that have indicated their desire to no longer receive online gambling solicitations. Similar to the FTC's National Do Not Call Registry, any entity accessing the database would be required to certify that it is doing so for the purpose of preventing distribution of solicitations to parties who have chosen to opt-out from contact.⁷⁵

Again, using CAN SPAM as a model, the statute imposes requirements relating to identification of the party sending the commercial message, and the promotional nature of the message itself.⁷⁶ However, CAN-SPAM's physical address and advertising disclaimer requirements can be burdensome for some businesses for two reasons:

1. Not all businesses want to publish their physical location;⁷⁷
2. A clear and conspicuous disclaimer that a message is an advertisement or solicitation is almost guaranteed to result in the message being filtered via the inevitable multiple spam filters that exist between the sender and recipient.

In these areas, voluntary best practices may diverge from legal compliance methods. Certainly, any online gaming e-mail advertisements targeting U.S. consumers should comply with the applicable legal requirements. However, given the burdensome nature of these requirements, they are unlikely to be voluntarily adopted as best practices. Only through legislative reform will the compliance obligations change, although the difficulties associated with applying U.S. law extraterritorially often results in these obligations being disregarded by foreign promoters.

Irrespective of whether promoters decide to comply with the disclosure and disclaimer requirements of CAN SPAM, inclusion of an opt-out requirement is recommended. Adopting this minimally-disruptive opt out and/or database exclusion standards will be beneficial to the industry's image and demonstrate commitment to effective self-regulation.

Online gambling advertising best practices do not end with simply establishing e-mail marketing guidelines. As discussed earlier, various countries have expressed intent, or at the

⁷⁴ Cite to gambling addiction stats.

⁷⁵ Any advertising entity that accesses the database would be required to certify, under penalty of law, that it is accessing the database solely in an effort to comply with industry-regulated, voluntary best practices attempting to foster socially responsible online gambling marketing activities. Use of the database for any other purposes could subject the advertising entity to industry sanctions.

⁷⁶ Cite to the portion of the law that requires the subject include a label identifying it as an advertisement.

⁷⁷ This is especially true for business entities in so-called "vice" industries like gambling and adult entertainment, where anonymity is not only preferred among industry participants, but can also be a key component in success.

very least, willingness to apply dated “terrestrial” gambling promotion laws to Internet marketing activities. Any legal success in doing so could easily foster motivation to employ those same obsolete regulations to mobile device-based promotions, and to other technologies yet to be developed. Mobile devices and social media applications are quickly becoming the predominant way in which businesses identify and communicate with their customers. In the U.S., this has resulted in old laws being repurposed to address changing technologies. For example, the Telephone Consumer Protection Act of 1991⁷⁸ (“TCPA”), which actually predates short message service (“SMS”) text messaging, has recently been interpreted to include promotional SMS text messages as “calls.” The TCPA has its own triggering events and requirements concerning consent, some of which differ from CAN-SPAM. In fact, the TCPA is more of an opt-*in* model, requiring “prior express consent” before sending an unsolicited commercial advertisement. Should an online gambling advertiser choose mobile marketing as part of its gambling promotion strategy, at a minimum, prior express consent must be obtained via a clear and conspicuous process under the TCPA. Accordingly, when collecting a user’s cell phone number, regardless of the communication medium utilized in the collection, a highly recommended best practice would encourage the marketing entity to capture and log the users’ consent to receiving the gambling promotion messages on their mobile devices.

Under CAN-SPAM and the TCPA, the company that is responsible for initiating or procuring the e-mail or text advertisement is ultimately legally responsible for the message. This means that any commercial messages that an affiliate might be sending on behalf an online gambling advertising outlet will be attributed to that advertising outlet.⁷⁹ This puts a substantial risk on initiating party, especially when dealing with content that may be unlawful in certain jurisdictions, like online gambling advertisements. This risk is also the reason that many affiliate programs flatly prohibit their participants from using e-mail as a marketing medium. Great care should be taken when utilizing e-mail marketing methods, to ensure compliance with the relevant jurisdictions spam laws. Moreover, standardized best practices should be utilized to provide recipients with accurate, truthful information, avoid targeting minors, exclude compulsive gamblers, and allow anyone to halt future undesired communications.

Some websites also employ a “Refer-a-Friend” model wherein an existing customer is given some benefit⁸⁰ for filling out a form which initiates a marketing e-mail to the user’s friend. The generated e-mail would likely identify the referring friend and suggest that the recipient visit a given website and play any of the several casino games offered to users. When the recipient registers as a user of the site, the referring friend could receive something as minimal as temporary access to a high stakes online poker game. Despite the fact that the promoted site did not trigger the chain of events that lead to the recipient receiving that e-mail, under the FTC’s interpretation of CAN-SPAM, that e-mail was, in effect, sent by the promoted site, not by the referring friend. It can be argued that the referring friend was induced to send, and then rewarded for sending, the message. As such, in keeping with the attempt to develop advertising

⁷⁸ 47 U.S.C. § 227.

⁷⁹ Affiliate marketing is a highly efficient and inexpensive way to market online gaming and betting sites is through the use of affiliate marketers. Affiliates use their computer servers to direct traffic to websites, and are paid commission for the customers they acquire.

⁸⁰ Such a “benefit” does not have to be monetary in nature. The FTC restrictions encompass any sort of advantage given to the referring user, for example, virtual tokens, game credits, future discounts, etc.

best practices within the gambling industry, it would be wise to maintain the e-mail marketing requirements set forth above even for e-mails purportedly sent at the volition of third parties who receive some benefit for initiating the communication

Similarly, under the TCPA, if the required “prior express consent” does not include consent for someone other than the company obtaining such consent to actually send certain promotional text messages, then the company who obtained the consent, but did not actually send the messages, is subjected to potential liability. For example; Company A obtains its users’ prior express consent to receive promotional text messages from its “affiliates and brands,” but Company A’s users actually receive promotional text messages from Company B. Regardless whether Company B had some type of a marketing relationship with Company A, if it was not a legal “affiliate or brand,” Company A has opened itself up to a myriad of legal consequences.⁸¹ Clearly, this indicates that the specific language used in obtaining consent from advertising recipients is critically important.

These examples, under U.S. law, demonstrate how a website’s affiliates and/or marketing partners can expose the website’s operators to liability. While some of these requirements may appear unfair or heavy-handed, they provide an opportunity to inform best practices protocol that might satisfy regulators and politicians in other countries, and ultimately result in some level of legislative reform in the U.S. Only if a website operator or affiliate program operator can be sure that its affiliates and/or marketers are sending messages that comply with the website’s established best practices should e-mail be allowed as a method to market the website. This can be accomplished by providing the affiliate or marketer with specific text or e-mail templates that must be used, along with insistence on clear, written affiliate agreements outlining any prohibited marketing practices.⁸² Also, any time that prior express consent is sought, the website operator must consider the scope of consent sought to be obtained. An “affiliate” marketer might not be a legal “affiliate” of the website as defined by the jurisdiction’s relevant case law or statutes. Finally, if using a “refer-a-friend” model, any resulting messages or transmissions should conform to the site’s best practices for sending e-mail and should not be considered an independent message sent by the user, such that it is immune from the site’s policies.

Another danger area in regards to online gambling advertising is with the increasingly popular practice of utilizing published “reviews” to generate business. Many consumers have become accustomed to immediately scrolling down to the consumer reviews of any product or service offered online, before making the decision to purchase. Online gambling services are no different. The value (and danger) of truthful, reliable consumer reviews cannot be understated in the current ecommerce environment.

However, many websites employ a “reviewer affiliate” model wherein an affiliate with some tie to the business purports to “review” the services found on a website. The review will often contain links back to the site or service being reviewed, and those links often have affiliate tracking codes embedded in them to ensure payment or other compensation is sent to the affiliate for any resulting sign-ups or clicks. In the U.S., the FTC has crafted guidelines for such

⁸¹ Satterfield

⁸² Many operators that manage affiliate programs disclose to their marketers upon registration, that deviation from the relevant e-mail template or text language is grounds for termination from the affiliate program.

“endorsements” which require that the review or endorsement disclose any “material connection” between the reviewer and the company providing the product or service being reviewed.⁸³ As with CAN-SPAM and the TCPA, the company responsible for causing the review to be published will be legally responsible for it. As mentioned at the beginning of this section, the purpose for such regulations is consumer protection, and this is especially true with promoting socially-disfavored entertainment activity such as gambling⁸⁴ promotions. While a review with embedded affiliate codes in the links back to the reviewed site may be recognized as an obvious “paid review” by some, others may genuinely think that the particular website provides the “best” casino game on the Net, or that it has the “highest payouts,” and that it is completely “lawful” in every aspect – if such claims are made in the reviews. Under current FTC policy if the reviewer received any sort of credit or incentive for writing that endorsement, the website operator is responsible for making sure that the material connection between the reviewer and the reviewed content is conspicuously identified. This fair disclosure of any tie between purported “reviewers” and the service being reviewed should be an integral part of any best practices list.⁸⁵

B. SELF-REGULATING BASED ON THE ADVERTISING CONTENT

Prevention of misleading advertising is a serious concern for most lawmakers in regulating online gambling promotions. Regulating content in any form requires a delicate balance of recognizing individual rights in conjunction with societal obligations. This is especially true in dealing with a so-called “vice” industry like online gambling. For example, in the U.S., any law affecting commercial speech must be clear, narrowly tailored and supported by identified, legitimate governmental goals.⁸⁶ Because of this rigorous standard imposed on advertising-related regulations, legislative bodies must be cognizant of infringing on what could be legally protected commercial speech.⁸⁷ As this standard arises from the U.S.-specific First Amendment, notably not all countries place such rigid restrictions on their advertising. However, in addressing best practices in a world wide industry, online gambling marketers might consider the benefits of such advertising standards when applied via self-regulatory guidelines instead of government imposed laws.

Although many online gambling promotions may not rise to the level of ‘deception,’ it is not uncommon for advertisements in such an under-regulated industry to ride the line of ‘misleading’ when attempting to capitalize on a global market. Given the anonymity that comes along with advertising in the virtual world, it is crucial that advertised services are portrayed accurately in any promotional materials. This is especially true for online gaming marketing,

⁸³ FTC Endorsement Rule

⁸⁴ The author makes no “value judgment” regarding gambling or gaming activity, but simply observes that gambling – despite its ancient roots – has in modern history often been viewed as a “vice” activity, or social ill, as opposed to a mainstream product or service, in many countries.

⁸⁵ While not directly addressing “fake reviews” and online affiliate marketers, Canada’s Competition Act is similar to the U.S.’s FTC Act in that it prohibits false and misleading representations in marketing.

⁸⁶ Intermediate scrutiny. i.e., not vague / i.e., restricting access by minors, ensuring truth in advertising, addressing compulsive gambling

⁸⁷ eg – FDA/cigarette ad litigation → what NOT to do [should note that these restrictions would likely not be problematic in other countries. Canada already has such a packaging requirement even in light of their Charter of Rights and Freedoms.

where a simple opinion from a player could be seen as a fraudulent promise to future users. For example, online gambling promotions should not guarantee a specific rate of return on wagers,, provide false or exaggerated probabilities of success, or even draw success rate comparisons between itself and competitors without specific, factual bases. Although statements of opinion utilized in marketing materials should certainly remain within the realm of protected speech, implementing self-governed guidelines to avoid deceiving consumers – whether intentional or not – would aid in leveling this global playing field, and legitimizing the industry as a whole. For example, using promotional materials laden with statements declaring a particular website is: “The best chance of winning on the Internet!” could qualify as a misleading opinion statement. So although, this statement is (and should be) completely *legal*, it may warrant a second look from a best practices perspective.

In examining this concept of misleading online gambling, advertising outlets must consider the fact that their services are *not*, in fact, legal in all jurisdictions, despite the ability to reach all such jurisdictions. Taking that into account, a beneficial best practice would not only be to prohibit false claims of legality, but to take the concept a step further and also warn the consumer of potential illegality. The beauty and the curse of the World Wide Web is just that; it is world-wide. Online gambling promotional materials will inevitably reach consumers located in jurisdictions that have outlawed Internet gambling. If the industry adopts standards proscribing blanket statements of legality in its advertising, this ostensibly lessens the potential for claims that consumers were misled into believing their online gambling activities were perfectly legal.⁸⁸ Because e-commerce business models cultivate legal inconsistencies by their very nature, judicious use of disclaimers and disclosures should likewise be adopted. Encouraging advertising outlets to include a warning of sorts, thus notifies consumers that they have a duty in determining if participation in the advertised gaming conduct is illegal in their particular jurisdiction. Although some of the above-referenced proposals may be resisted initially, introducing self-regulated, heightened standards in online gambling advertising is likely to foster a cooperative environment with legal and legislative bodies, as the online gambling industry continues its struggle for worldwide legitimacy.

V. CONCLUSION

Although some of the world’s most politically visible countries have introduced varying forms of regulation for modern online gambling advertisements, it is the obligation of the Internet-based gaming community as a whole to call on each other in enacting self-regulatory principles, and demand a higher level of professionalism and truth in advertising from each other. The information contained herein is intended to instill an understanding of the ongoing evolution of the Internet gambling industry and its multifaceted marketing concerns. Because legal scrutiny of online gambling advertising is still in its infancy, the best practices and procedures identified in this article will ideally play a part in the development of more definitive,

⁸⁸ See generally, BetOnSports.com prosecution. See also, http://www.usatoday.com/tech/news/2009-11-03-betonsports-founder-prison_N.htm. Prosecutors said the company falsely advertised that its gambling operations were legal, and misled gamblers into believing that money transferred to BetOnSports was safe and available to withdraw at any time. Instead, investigators said, the money was used to expand operations, including purchase of a rival betting firm.

industry-wide standards. Many countries are just now evaluating their stance on internet gambling and related activities. Voluntary development of best practices, at this crucial time in the industry's overall development, will help ward off overreaching mandatory regulation, and fulfill laudable goals including exclusion of minors and compulsive gamblers, and inclusion of truthful, accurate information regarding the increasingly popular pastime of online gambling.

Nothing contained in this article is intended as legal advice. Please contact an attorney licensed in the appropriate jurisdiction with any specific legal questions. Mr. Walters can be reached at Larry@GameAttorneys.com or 800.530.8137.