

Internet Casino-Style Gambling: Is It Legal in Nevada?

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Abstract

The State of Nevada, to retain its position as pace setter in U. S. casino gaming regulation, took important legislative steps to prepare for online gambling. When these legal efforts were discouraged or blocked by the U. S. Department of Justice a new direction emerged. This article traces the shift from implementing online gambling across state lines to intrastate gaming within Nevada with hand-held devices in auxiliary areas of a casino complex beyond the casino floor. Regulatory issues are raised and prospects for inaugurating interactive gaming are discussed.

Key Words: Internet gambling, e-gambling, interactive gaming, intrastate gaming, wireless gaming, mobile gaming, Wire Act

Introduction

Commercial gambling over the Internet has been taking place since at least 1995. In fact, at the beginning of the 21st Century, it was estimated that with a click of the mouse a person could visit any one of approximately 1,400 websites and place some sort of e-gambling wager and it is now estimated that there are approximately 2,100 Internet gambling websites located in approximately 80 countries to choose from. Moreover, it has been estimated that the global revenues derived from Internet gambling were at least \$4.2 billion in 2003 and will reach more than \$24 billion by 2010, with none of the profits being reaped by United States-based operators despite the fact that upward of 50 to 70 percent of those who bet online do so from within the United States¹. In this year alone, it is estimated that Americans will lose more that \$7.2 billion of an estimated \$15 billion in lost wagers, with approximately 300 online companies sharing these profits². The absence of United States-based operators in this robust and ever-expanding genre of gaming, in which start up costs and recurring expenses are minimal when contrasted to the revenues that a successful online gaming operation can generate, is clearly traceable to the long-standing position of the federal government and, more specifically, the United States Department of Justice ("DOJ"), that Internet gambling is illegal in the United States.

Assembly Bill 466 (2001) – "Interactive" Casino-Style Gaming

In June 2001, while well aware of the legal position of the DOJ, the Nevada Legislature passed and Governor Kenny Guinn signed into law Assembly Bill ("A.B.") 466³. This bill, which is now codified in Nevada Revised Statutes ("NRS") 463.750 through 463.780, positioned Nevada and, more specifically, most Nevada casinos for the day, if ever, in which operating interstate online casino-style gaming websites is clearly legal within the United States.

Pursuant to A.B. 466, the Nevada Gaming Commission ("Commission") was granted the authority to, with the advice and assistance of the Nevada State Gaming Control Board ("Board"), adopt regulations governing the licensing and operation of "interactive

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gaming”, which, by definition, includes interstate Internet casino-style gambling (NRS 463.016425). However, as prescribed in A.B. 466, before the Commission may adopt such regulations, it must first find that:

- (1) Interactive gaming can be operated in compliance with all applicable laws;
- (2) Interactive gaming systems are secure and reliable, and provide reasonable assurance that players will be of lawful age and communicating only from jurisdictions where it is lawful to make such communications; and
- (3) The regulations are consistent with Nevada’s public policy concerning gaming set forth in NRS 463.0129.

In 2002, the Commission addressed these three enabling provisions. Specifically, at its monthly meetings, the Commission received input from interested parties, including Board staff, representatives from the gaming industry, computer hardware and software manufacturers and providers, testing laboratories and gaming attorneys. Most notably, the Commission and Board sent a letter to the DOJ requesting clarity as to its position with respect to the legality of online gambling. As suspected, in a well publicized response, the DOJ advised the Commission and Board in August 2002 that it believes that federal law prohibits gambling over the Internet, including casino-style gaming. Among the federal statutes cited by the DOJ were the Wire Act, 18 U.S.C. 1084, the Travel Act, 18 U.S.C. 1952, and the Illegal Gambling Business Act, 18 U.S.C. 1955. Interestingly, the DOJ issued this opinion despite a prior ruling by the United States District Court, Eastern District of Louisiana (“Court”), in February 2001, which appears to suggest that the Wire Act only applies to Internet sports wagering, not casino-style gambling (*In re MasterCard Int’l, et al.*, 132 F. Supp. 2d 468 (E.D. La. 2001)).

In the *In re MasterCard Int’l, et al.* case, the Court dismissed plaintiffs’ class-action lawsuit filed against several banks and credit card companies wherein the plaintiffs attempted to use the Racketeer Influenced and Corrupt Organizations (“RICO”) Act of 1970 to avoid debts incurred when they used credit cards to purchase chips with which they gambled at online casinos. In order to successfully assert a RICO Act violation, the plaintiffs had to demonstrate, among other things, “a pattern of racketeering activity” which requires the establishment of two or more predicate acts. Such acts could either be a state or federal crime. Among the federal criminal laws that the plaintiffs alleged the defendants violated was the Wire Act.

With respect to the Wire Act, the Court found that “[a] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.” Accordingly, since the plaintiffs failed to allege that they engaged in Internet sports gambling, the Court concluded that they could not rely on the Wire Act as a predicate offense necessary to establish a RICO Act violation and, ultimately, dismissed the lawsuit. The decision of the Court was subsequently affirmed by the United States Court of Appeals, Fifth Circuit in November 2002 (*In re MasterCard Int’l, et al.*, 313 F.3d 257 (5th Cir. 2002))

The DOJ did not address the *In re MasterCard Int’l, et al.* case in the letter to the Commission and Board. However, it has subsequently indicated that it does not give credence to the Court’s decision because it was not a party to the litigation and the Court failed to take into account the two other federal statutes cited in the letter - the Travel Act and Illegal Gambling Business Act - when rendering its ruling. Accordingly, despite suggestions from proponents of online gambling that the position of the DOJ is tenuous, given the legal ruling in the *In re MasterCard Int’l, et al.* case, the Commission concluded that it could not adopt interactive gaming regulations pursuant to the authority vested in it under A.B. 466. Nor is it likely that the Commission will implement such regulations in the foreseeable future given the political climate on Capitol Hill.

Overwhelmingly, over the past decade, the focus of Congress has been on passing legislation that would effectively ban Internet gaming as opposed to regulating and taxing

such activity. Since 1999, a number of federal bills have been introduced in both the House and Senate which, if enacted, would make it illegal to process Internet gaming transactions by credit card and other payment instruments (H.R. 4419 (2000); H.R. 2579 (2001); H.R. 556 (2001); H.R. 21 (2003); H.R. 2143 (2003); S. 627 (2003)). In fact, as recent as November of 2005, Rep. James Leach (R-Iowa), introduced similar legislation which is currently pending before the House of Representative's Subcommittee on Financial Institutions and Consumer Credit (H.R. 4411 (2005)) and, in September 2005, Senator Jon Kyl (R-Ariz.) unsuccessfully attempted to tack similar legislation onto an appropriation measure.

Moreover, as noted by the Commission, these Congressional efforts to ban Internet gaming are consistent with the recommendations of the National Gambling Impact Study Commission⁴ (NGISC) which was created by Congress in 1996 to examine the social and economic impact of gambling, including Internet gambling. As well documented in its 1999 report, the NGISC recommended that the federal government prohibit any Internet gambling not already authorized and also encourage foreign governments not to harbor Internet gambling organizations. Additionally, the NGISC recommended that Congress pass legislation prohibiting the collection of credit card debt for Internet gambling. Not so surprisingly, the social and economic concerns raised in the NGISC report regarding Internet gambling were some of the same public policy concerns raised by the Commission in regards to A.B. 466, namely, underage gambling, pathological gambling, lack of consumer protections, and criminal abuse.

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Will the federal government ever reverse its position concerning the legality of Internet gaming? Many experts in this field believe it's not a matter of if, but when, this will occur, given the unrelenting growth of Internet gambling worldwide. As suggested, if effectively regulated and taxed, whether at the federal or state levels, Internet gaming would provide an enormous financial boost to the United States' economy. On the other hand, opponents of online gambling often cite the social, economical and criminal ramifications often allegedly tied to Internet gambling, including those mentioned by the NGISC.

Suffice to say, if the federal government ever reverses its position regarding the legality of Internet gambling within the United States, Nevada is poised to jump into the fray. As Commission Chairman, Peter C. Bernhard, stated, when assessing the three enabling provisions in A.B. 466 in May 2004, "*the technology is either there or almost there to provide the protections for security and reliability. It's there or almost there to provide the age verification and to make sure that the border control provisions can be followed.*"

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More specifically, if the proponents of Internet gaming, ultimately, prove to be correct and the operation of interstate Internet casino-gambling becomes legally permissible in the United States, the adoption of regulations pursuant to A.B. 466 would allow those Nevada casinos, which offer at least one slot machine and table game for play along with the legislatively-imposed hotel room, bar and restaurant amenities, to seek licenses to operate interactive gaming. As prescribed in A.B. 466, the fee for such a license would be \$500,000 for an initial two-year licensing period and, thereafter, \$250,000 annually. Additionally, revenues captured by licensed operators of interactive gaming would be taxed at the same percentage tax rates currently imposed on gaming revenues generated from existing Nevada casinos' slot machine and table game operations.

Assembly Bill 471 (2005) – Intrastate Casino-Style Mobile Gaming

Although the movement to legalize Internet gambling on an interstate basis was placed in a holding pattern with the DOJ letter in hand, it was replaced with the notion of possibly affording Nevada gaming licensees with the opportunity to offer computer-based gaming on strictly an intrastate basis. As Chairman Bernhard, when discussing the enabling provision set forth in A.B. 466 in May 2004, noted that “*the compliance with applicable laws section is not – does not have the same ramifications when we’re talking about intrastate as it does when we’re talking about interstate.*” However, he went onto caution that even if offering intrastate computer-based gaming may not violate any laws, it could only become a reality if it is consistent with the public policy of Nevada with respect to gaming as prescribed in NRS 463.0129. Hence, the Commission proceeded to examine whether regulating computer-based gaming via the Internet or otherwise within the borders of Nevada is viable without impinging upon the public policy of Nevada concerning gaming. Ultimately, with input from the Board, the Commission concluded that it was within the purview of the Nevada Legislature to decide this question.

In March 2005, a bill was submitted to the Nevada Legislature by proponents of intrastate computer-based gaming. After careful consideration, the Nevada Legislature passed A.B. 471⁵, which Governor Guinn signed it into law on June 1, 2005. Pursuant to A.B. 471, the Commission was authorized to adopt regulations which would allow gaming patrons to use wireless handheld communications devices, such as cell phones, personal digital assistants and other proprietary gadgets, linked to a central computer to play casino games, such as blackjack, roulette, video poker and craps, from approved public areas of licensed gaming establishments. More significantly, A.B. 471 expressly prohibited the use of the Internet to facilitate the implementation of this new form of gaming, which is defined as “mobile gaming”, thus, eliminating the legal impediment which, eventually, resulted in the undoing of its predecessor, A.B. 466.

In accordance with A.B. 471, the Commission, with the assistance of the Board adopted regulations in March 2006 governing the licensing and operation of mobile gaming. As dictated by A.B. 471, the regulations restrict mobile gaming operations to those Nevada gaming establishments where 100 or more slot machines and at least one other gambling game are exposed for play at all times and only by those persons who have been issued licenses by the Commission to operate mobile gaming systems. Additionally, the regulations define the public areas where activation of the handheld communications devices is permissible. By definition, they include all areas within a licensed gaming establishment where gaming devices may be lawfully operated, except for rooms available for sleeping, living accommodations that are accessible from rooms, parking lots, parking garages, and any other areas which the Chairman of the Board deems inappropriate. Finally, the regulations require each patron wishing to obtain a handheld communications device to appear in person and fund a wagering account.

To ensure that the wireless handheld devices are only used in approved public areas and only by persons of lawful age who open wagering accounts, the Board also adopted technical standards for the hardware and software used in connection with the underlying mobile gaming systems. Pursuant to these technical standards, each mobile gaming system must be capable of restricting the operation of the handheld communications devices to the permissible public areas of the casino and by only persons over the age of 21. Thus, similar to the approval process for slot machines, mobile gaming systems will be subject to review and inspection by the Board’s new game lab and placed on field trial at one or more Nevada casino before they will be considered by the Commission for final approval. This approval process will likely take several months and, assuming the Commission has already issued at least one license to operate a mobile gaming system, it is anticipated that the earliest that wireless handheld devices will be available for patron play will be sometime in the second half of 2006.

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Once mobile gaming systems have been approved by the Commission and licenses to operate such systems have been issued, it will be interesting to see to what degree, if any, the advent of mobile gaming results in an increase in gaming revenues. Pursuant to A.B. 471, mobile gaming revenues will be taxed at the same percentage tax rates as the gaming win generated by the slot machines and table games currently on Nevada casino floors. Additionally, each wireless handheld communications device which is made available for patron play, whether used or not, will be subject to a quarterly fee of \$20.00 and an annual excise tax of \$250.00.

In summary, it is safe to say that, with the passage of A.B. 471 and the subsequent adoption of the enabling regulations by the Commission, a balance has been struck between the entrepreneur spirit of the Nevada gaming industry and the responsibility of the Board and Commission to ensure that gaming is properly regulated, including regulated in conformance with all federal laws⁶. Additionally, with the

passage of A.B. 466, Nevada, as the recognized world leader of regulated gaming, has also positioned itself for the day, if ever, in which Internet casino-style gaming may legally be offered from within the United States on an interstate and international basis.

To answer the initial question about the legality of Internet casino-style gaming in Nevada, until such time as the federal government, as a whole, finds this type of gaming legally acceptable, thus, enabling the Commission to move forward and adopt regulations pursuant to A.B. 466, it will continue to remain illegal to offer from within Nevada on an interstate and international basis. Further, although A.B. 471 and the accompanying regulations have paved the way for gaming patrons to use wireless handheld devices to play casino-style games from approved public areas of licensed gaming establishments, given that the Internet cannot be used to offer this type of gaming, Internet casino-style gaming is also currently illegal to offer on an intrastate basis. Accordingly, it is safe to say that, to date, with the passage of A.B. 471 and the subsequent adoption of the mobile gaming regulations by the Commission, a balance has been struck between the entrepreneur spirit of the Nevada gaming industry and the responsibility of the Board and Commission to ensure that gaming is properly regulated, including regulated in conformance with all federal laws. Additionally, with the passage of A.B. 466, Nevada, as the recognized world leader of regulated gaming, has also positioned itself for the day, if ever, in which Internet casino-style gaming may legally be offered from within the United States.

Notes

- ¹ Estimates of Internet gambling revenue vary according to several informal sources.
- ² For a discussion of revenues and the online gambling market, see, Walker, Terri C. *The Online Gambling Market Research Handbook, 2003*.
- ³ For an extensive paper on Nevada's legislative concerns regarding A.B. 466, see, Rodefer, Jeffrey R. *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*. Mr. Rodefer was Assistant Chief Deputy General for the Nevada Attorney General's Office, Gaming Division.
- ⁴ The Final Report of the National Gambling Impact Study Commission (1999) can be found online at <http://govinfo.library.unt.edu/ngisc/index.html>.
- ⁵ The full text of AB471 as enrolled for inclusion in the Statutes of Nevada can be found at the website of the Nevada State Legislature. Search the 77th Session, 2005. The specific URL is: http://www.leg.state.nv.us/73rd/bills/AB/AB471_EN.pdf.
- ⁶ For a critical research article on the federal connection, see, Gottfried, Jonathan. *The Federal Framework for Internet Gambling*, 10 *Richmond Journal of Law & Technology* (2004), at <http://law.richmond.edu/jolt/v10i3/article26.pdf>.

Article submitted: 2/1/06
Sent to peer review: 2/1/06
Reviewer's comments sent to author: 2/7/06
Author's revised version received: 2/7/06
Article accepted for publication: 2/8/06