

Minnesota retracts online gambling block notice

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Minnesota's Department of Public Safety's Alcohol and Gambling Enforcement Division recently notified eleven ISPs that it was withdrawing a notice which asked them to block access to 200 online gambling sites. Jon L. Fleischaker and Edward T. Depp, of Dinsmore & Shohl LLP - representatives of the Interactive Media Entertainment & Gaming Association (iMEGA), examine why the Wire Act - used as the legal reasoning behind the notice - cannot be used to block access to online gambling sites.

This April, Minnesota became the latest State to fire a shot in the increasing state attacks on internet gaming. In a notice to several Internet Service Providers (ISPs) doing business in the State, the Minnesota Department of Public Safety demanded that the ISPs block access to 200 online gaming websites. The legal theory underlying Minnesota's demand is a novel one: the federal Wire Act of 1960 (18 U.S.C. § 1084) authorizes ISPs to block access to websites operated by out-of-state entities who are not customers of the ISPs. Minnesota's legal theory is also deeply flawed, and the Interactive Media Entertainment & Gaming Association (iMEGA) responded aggressively to block Minnesota's attack by:

- seeking ISP cooperation in resisting Minnesota's actions; and
- suing the Director of the Minnesota Department of Public Safety in federal court for a violation of Constitutional rights and the Civil Rights Act of 1871 (42 U.S.C. § 1983). As more states attempt to interject themselves into online gaming matters, it may be helpful to understand:
 - why Minnesota's attack must fail; and
 - what the industry can do to protect itself.

The Wire Act of 1960 does not apply to internet gaming (SH)

Minnesota's notice mistakenly purports to comply with the requirements of Section (d) of the Wire Act of 1960, which provides as follows:

'(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber... Id. For at least five reasons, this statute cannot be used to block access to online gaming websites. First, ISPs are not 'common carrier[s], subject to the jurisdiction of the Federal Communications Commission.(1)

Moreover, Congress has determined that 'It is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.(2)

Although Section (d) provides that 'no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency', the fact that an ISP is not a common carrier subject to the jurisdiction of the FCC means that it is not entitled to the immunity provided by statute to a common carrier.

Second, Minnesota was not 'acting within its jurisdiction', as is required by the statute. Article II, Section 1, of the Minnesota Constitution provides that Minnesota has jurisdiction only over activities occurring within the physical boundaries of the state of Minnesota. Minnesota, however, requested that the ISPs 'block access' to certain websites even though these websites are not located within Minnesota. Thus, Minnesota's notice surpassed its authority under Article II, Section 1, of the Minnesota Constitution, and it falls outside the scope of Section (d). Bear in mind that other States' constitutions likely contain similar provisions limiting their jurisdictional authority as well.

Third, Minnesota asked the ISPs to do more than 'discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber.'⁽³⁾ Minnesota demanded that the ISPs 'block access' to certain websites. Blocking access to specific websites is not discontinuing or refusing 'the leasing, furnishing, or maintaining' of a facility. The requested action is not related to a 'facility' at all. The action is instead related to an internet service that the ISPs provide to their end-user(s). In addition, Minnesota never requested that the ISPs 'discontinue or refuse, the leasing, furnishing, or maintaining' of a facility. Moreover, Minnesota asked the ISPs to 'block access' without also requiring 'reasonable notice to the subscriber' as is mandated by Section (d).

Fourth, Minnesota's notice also fails to identify how a Minnesota end-user's access to certain websites will result in 'transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law.'⁽⁴⁾ The Notice states only that 'gambling is illegal within Minnesota'. Minnesota provides no further explanation, nor does it cite any Minnesota laws supporting this allegation. It references no criminal actions, and it references no convictions under Minnesota law. It fails to acknowledge federal 'commerce clause' issues that may pre-empt Minnesota from attempting to regulate internet gaming. It also fails to acknowledge ongoing federal lawsuits concerned with the unresolved issue of whether Internet gaming is illegal even under federal laws. Accordingly, it is impossible to determine from the Notice that allowing end-users to access certain gambling websites will necessarily result in the transmission or receipt of 'gambling information in interstate or foreign commerce in violation of Federal, State or local law.'⁽⁵⁾

Fifth, Minnesota's notice clearly infringes upon Constitutionally-protected free speech rights of both web site operators and Minnesota residents. Minnesota does not acknowledge that an end-user may seek access to the websites in question for purposes other than gambling. In fact, online gaming websites do not merely offer wagering opportunities. There may be informational pages, discussion forums, chat rooms, advertisements and other communications that are protected from government suppression. Thus, any action (like Minnesota's) demanding complete blocking of access to gaming websites almost certainly infringes upon 1st Amendment rights to free speech.

What should the internet gaming industry do? (SH)

So, what can you take from Minnesota's misguided actions? First, get familiar with the legal issues surrounding your industry; they will pave the road for your future. Second, do not underestimate the purely political considerations that frequently drive enforcement actions like Minnesota's; there is probably very little coincidence, for example, that Minnesota has a significant 'brick and mortar' casino and horse racing industry. Third, be prepared to aggressively advocate and defend your rights against the legal theory 'du jour' espoused by the politicians driving efforts like that in Minnesota. And fourth, consider getting involved with trade organizations like IMEGA, who work to protect your rights and foster cooperation between the government and the industry.

Thus far, it is clear that Congress believes that the internet should be governed by free market principles, 'unfettered by Federal or State regulation.'⁽⁶⁾ To that end, piecemeal State regulation or enforcement is not

only undesirable but counterproductive. Even so, some federal lawmakers are already looking to backtrack by introducing legislation proposing to regulate the industry.(7)

Only you know what is best for your industry. Get familiar with the issues. Get familiar with your enemies' tactics. Aggressively protect your rights and advocate your cause. As Minnesota's recent actions show, there is no limit to the political creativity that may drive legally unfounded attacks on your industry.

UPDATE:

The importance of aggressively contesting attacks like Minnesota's was confirmed on 5 June, when the Minnesota Department of Public Safety (by letter) notified each ISP that had received its original 24 April notice that it was withdrawing its original notice. In exchange, iMEGA agreed to dismiss its federal court action without prejudice.

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(1) See *Federal Communications Commission v. Midwest Video Corporation, et al.*, 440 U.S. 689, 708-09 (1979) ('The [FCC] may not regulate cable systems as common carriers...'); see also *America Online, Inc. v. Greatdeals.net, et al.*, 48 F.Supp.2d 851, 857 (E.D. Virginia 1999) ('AOL is not a common carrier...'); see generally *Nat'l Cable & Telecommunications Assoc. v. Brand X Internet Svcs.*, 545 U.S. 967 (2005).

(2) 47 U.S.C. § 230(b)(2).

(3) 18 U.S.C. § 1084(d)

(4) 18 U.S.C. § 1084(d) (emphasis added).

(5) 18 U.S.C. § 1084(d) (emphasis added).

(6) 47 U.S.C. § 230(b)(2).

(7) See H.R. 2267, introduced by Representative Barney Frank (providing for the licensing and regulation of internet gambling) (available online at: http://thomas.loc.gov/home/gpoxmlc111/h2267_ih.xml); see also H.R. 2268, introduced by Representative Jim McDermott (imposing a fee on licensed US companies) (available online at: <http://thomas.loc.gov/home/gpoxmlc111h2268ih.xml>).