

Statement of
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before the
Senate Banking, Housing, and Urban Affairs Committee

on

Proposals to Regulate Internet Gambling

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Mr. Chairman and members of the Committee, my name is Stewart Baker. I serve as general counsel to the U.S. Internet Service Provider Association (US ISPA). US ISPA is a trade association made up of major service providers. Its members include America Online, Cable & Wireless, EarthLink, eBay, Teleglobe, SBC Communications, Verizon Online, and WorldCom. US ISPA focuses on legal and policy issues that have a direct impact on the service provider industry in the areas of cybercrime, security, content liability, critical infrastructure protection, and unsolicited email. Its major goal is to work with lawmakers to formulate sound policy that avoids unintended consequences that may stifle the growth of the Internet.

We appreciate the Chairman's invitation to testify at the hearing on "Proposals to Regulate Internet Gambling." We welcome the opportunity to discuss several key principles that we believe Internet gambling legislation must contain to help foster industry and law enforcement cooperation without placing an undue burden on the service provider industry.

Service providers are committed to a safe and secure online experience for our customers. Our members go above and beyond what the law requires to combat criminal activity online, at considerable expense to themselves, because they understand the need for good corporate

citizenship and because they realize that building consumer trust in their service is critical to their own business success. Among other industry initiatives, US ISPA supports measures that encourage greater cooperation between law enforcement and service providers to combat online crime.

Our members share your opposition to criminal conduct online. All of our members rigorously cooperate actively with law enforcement to combat illegal conduct. US ISPA's members have longstanding working relationships with law enforcement at both the federal and state level. For example, our members work to respond thousands of times daily to judicial process to furnish electronic evidence relevant to investigations, and have worked to put in place internal procedures so that their responses are both timely and effective. They likewise include explicit language in customer contracts that prohibits illegal activity and makes clear that service providers have the right to terminate the accounts of customers who act in violation of the law.

We believe that law enforcement and the service provider industry can most effectively work together to remove illegal gambling sites from the Internet by identifying its source and the service provider that controls the computer server (a machine on which users may make the website available) where that content has been placed online. Only the website operator or the service provider that controls the computer server where the material is located can make the content inaccessible to Internet users in a reliable and effective manner.

We appreciate the opportunity to testify today and work with the committee to develop legislation that will provide an effective tool against illegal Internet gambling. The service provider industry has worked with various lawmakers in the past in attempt to strike an appropriate balance between developing effective measures to combat unlawful Internet gambling, and avoiding unworkable measures that will stifle future economic growth on the

Internet. In our efforts, we have developed key principles that any Internet gambling legislation must contain before it begins to strike this appropriate balance. First, Internet gambling legislation must not require service providers to block customer access to Internet gambling sites not residing on their networks and not under their control. This type of regulatory scheme is unworkable and will disrupt ecommerce and speech on the Internet. The most effective way to combat Internet gambling is by attacking it at the source, requiring website operators or service providers that control an illegal gambling website to take it down after receiving notice from a court of the illegal activity.

Second, legislation should contain clear court-ordered notice and takedown procedures to ensure appropriate employees receive notices of illegal websites, so the service provider can quickly take down the illegal material. The notice and takedown procedures should also give websites an opportunity to appear to refute notices for illegal activity that may not reside on the service providers networks or may not be illegal.

Third, service providers should be given immunity from liability for good faith efforts to comply with a notice. Service providers should not be held liable for complying with a notice and the inadvertent takedown of an innocent website.

Fourth, Internet gambling legislation should contain language that clearly states that no service provider has any duty or obligation to monitor its networks for illegal activity, or disable or block customer access to websites not under the service provider's direct control or residing on its network. Such obligations are not technically feasible in most circumstances, and in any event would create an incredible burden on the service provider industry that would have dire economic consequences

Finally, as service providers are already subject to portions of the Wire Act, 18 U.S.C. § 1084, it is important that there be a single, clear federal standard governing service providers' obligations with regard to gambling material that third parties place on their systems.

No requirement for service providers to block or disable access to websites that do not reside on their networks

Internet gambling legislation must not contain any requirement for service providers to block or disable access to websites that do not reside on their networks. Service providers are unable to block user access to websites on other service providers' networks with any reliability. Blocking efforts can be easily circumvented and will seriously disrupt legitimate ecommerce and speech.

Illegal gaming websites can easily circumvent blocking methods by rapidly change locations, or proliferate at multiple Internet addresses using the same Uniform Resource Locator ("URL") (www.____.com/filename). This is because the actual location of a website on the Internet is not its URL (www.____.com/filename), but something called an "IP address"—a long string of numbers punctuated by periods that is sometimes visible, for example, when a user types in a URL into a browser. All devices on the Internet communicate with each other using IP addresses, but because IP addresses are difficult for people to remember, web browsers allow users to access a site by using URLs instead of an IP address. When a user types the URL into a browser on the user's computer, that request is translated into a request for an IP address by one of many domain name system ("DNS") servers located throughout the world. DNS thus operates like a set of phone books for the Internet. These DNS servers are not controlled by any one service provider. Rather, control of the domain name system is distributed among many unrelated entities in many different countries, with multiple levels of redundancy, and the various DNS servers are updated constantly.

Blocking an unlawful website by its IP address also runs the risk of seriously disrupting a large number of lawful communications and legitimate ecommerce. The main reason for this is different websites can share the same IP address. In fact, it is a fairly common practice for large web hosting companies to place a large number of customer websites on the same IP address. According to a recent study entitled “ Web sites Sharing IP Addresses: Prevalence and Significance,” developed by Benjamin Edelman of Harvard Law School’s Berkman Center for Internet and Society, finds that “eighty-seven percent of all active domain names are found to share their IP addresses with one, and more than two third of active domain names share their addresses with fifty or more additional domains.” If an service provider controlling another network attempts to block one of these websites by its IP address, it will block user access to all the other sites. This type of approach will almost certainly disrupt ecommerce by decreasing traffic to legitimate on-line businesses.

The only way reliably to combat illegal Internet gambling is to make sure that the content is removed from the Internet at the source where it resides on the Internet. For example, service providers in the United States and in other countries routinely cooperate with law enforcement to remove illegal content from their computer servers when it appears there. Such cooperation cuts off availability of the illegal activity. It is essential to the service provider industry that any Internet gambling legislation does not require service providers to block access to remote websites not located on their networks.

Internet gambling legislation should contain clear notice and takedown procedures

Any Internet gambling proposal, requiring service providers to remove illegal gambling sites from their networks, must contain clear court-ordered notice and takedown procedures. A lack of clear procedures has serious consequences for operators and the effectiveness of the law.

Notice and takedown procedures ensure the appropriate person in an service provider will receive appropriate notice from a court, and will quickly act to remove the website from the Internet. Without a clear procedure in place, it is very possible notices could be delivered to the wrong employee (possibly a low level employee like a customer service representative). Once received, an untrained customer service representative may not understand the importance of the notice and not act on it; thereby increasing the time it takes to remove the illegal material, and possibly opening up an operator to criminal liability. To avoid confusion, and increase the efficiency and effectiveness of the statute, Internet gambling proposals should make it clear that an appropriate officer or counsel for the service provider shall receive the notice from a court to remove illegal content. Clear and simple notice procedures will make certain that court-ordered notices are quickly acted on and decrease the burden placed on service providers.

Also, Internet gambling proposals should give service providers the ability to challenge a notice in the instance that the notice does not pertain to illegal activity. Service providers should have the ability to contest the legitimacy of a notice. Notices should not have the full weight of the law without giving a website any type of process to appear and refute a notice.

Immunity for good faith efforts to comply with a notice

If an operator is acting in good faith under the orders of law enforcement, it should be given protection from potential lawsuits resulting in the unintentional take down of innocent material. In an effort to combat illegal activity, it is possible for a law enforcement agent mistakenly to order the takedown of a legitimate website, not engaged in gambling. In the spirit of cooperation and compliance, an service provider will probably not question the notice, and in good faith may remove a legitimate website from the Internet. Under these circumstances, an service provider should not be held liable for cooperating and complying with a law enforcement

notice to takedown a website. An operator does not determine whether or not a website contains illegal material, and should not be held accountable for mistakes made by law enforcement.

No duty to monitor networks or disable access to websites not residing on the service providers network

Service Providers do not have the ability or means to monitor their networks for illegal activity, nor should they be required to serve as the policemen for the Internet. This principle has been widely accepted and included in various federal and state statutes. Any Internet gambling bill should contain language that reinforces this principle by clearly stating that the statute does not require an service provider to monitor networks for illegal activity. Any Internet gambling legislation should also contain the principle already enacted in U.S.C. 47 § 230, which protects from liability service providers who voluntarily restrict access to objectionable or unlawful material. Any provision should make plain that Section 230(c) applies to any action taken by service providers against Internet gambling or provide similar protection. At the same time, the United States should embrace the concept that requiring service providers to block customer access to websites not under the service provider's control is an ineffective and unworkable solution for the reasons described in this testimony. Language should be included in Internet gambling legislation stating that service providers do not have any duty to block or disable customer access to websites not under that service provider's control or residing on its system. Requiring service providers to block access to websites not under their control threatens the functionality of the Internet.

Single federal standard governing service providers' obligations

Finally, it is important that Congress adopt a single, clear standard governing service providers' obligations under federal law for gambling content that third party users may place on service providers' networks. In particular, portions of the Wire Act, 18 U.S.C. § 1084, apply to

service providers' operations. It would be very helpful if Congress adopted a single set of requirements that govern service providers' obligations under the Wire Act, and any legislation that this Committee may adopt.

Conclusion

Members of US ISPA are committed to taking action against illegal activity on the Internet. When lawmakers craft liability rules, we ask that you do so carefully to assign liability to actual wrongdoers, while respecting free speech and legitimate e-commerce. Obviously, enforcement strategies must start with and focus on wrongdoers by deterring and punishing illegal conduct. Service providers play an important role in supporting enforcement of such laws by devoting significant resources to assisting law enforcement investigations promptly, taking down illegal sites and hypertext links to illegal material that they learn has been posted on their computer servers.

Internet gambling proposals should adopt effective, efficient enforcement approaches to illegal gambling on the Internet, approaches that are adapted to the ways that Internet technologies function. At the same time, proposals should reward service providers for quickly cooperating and complying with the law by granting immunity for potential mistakes made in the enforcement of the law.

We thank you, Mr. Chairman and members of the Committee, for considering our views, and hope that you and other members of this Committee will keep these principles in mind when considering what sorts of enforcement strategies should apply in the area of Internet gambling.