



NEW YORK
CITY BAR

REPORT ON LEGISLATION

**A6302
S66**

**AM McEneny
Senator Padavan**

AN ACT to amend the penal law, in relation to including gambling over the internet within provisions of law relating to gambling offenses

THIS BILL IS DISAPPROVED

The Association of the Bar of the City of New York has concerns regarding Assembly Bill 6302, which would amend New York Penal Law § 225 by expanding New York’s prohibitions against Internet gambling (and gambling in general) to prohibit the mere “endorsement” of gambling. We are concerned that (a) the new prohibitions are unnecessary, as present criminal facilitation and aiding and abetting doctrines sufficiently cover conduct directly tied to gambling crimes, and (b) the inclusion of mere “endorsement” is overbroad, would chill legal speech, and thus raises serious constitutional concerns.

Existing New York Gambling Prohibitions

“Advanc[ing]” illegal gambling activity is a crime under New York law. New York Penal Law § 225.05 (second degree); 225.10 (first degree). The “advancing” standard is a very broad one, covering a wide swath of conduct that “materially aids” illegal gambling. For instance, the prohibition covers conduct “directed toward”:

- the creation or establishment of the particular game, contest, scheme, device or activity involved,
- the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor,
- the solicitation or inducement of persons to participate therein;
- the arrangement of any of its financial or recording phases, or

toward any other phase of its operation.

In 1999, the New York Supreme Court held that where one “advances” gambling over the Internet -- even by a gambling operator legally licensed in another jurisdiction -- that also violates New York law. *State of New York v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ct. N.Y. Co. 1999).

Other prosecutors and regulators in New York have successfully used the Penal Law, and related civil statutes, against those who operate or material aid online gambling enterprises. For instance, the New York Attorney General has initiated enforcement actions against credit card banks, requiring them to block these transactions (thus removing potentially harmful “gambling on credit” practices that -- ironically -- are now more prevalent at land-based, rather than Internet, casinos. See press releases available at www.oag.state.ny.us, dated June 13, 2002 (regarding Citibank’s practices) and February 11, 2003 (settlements with ten other banks). The Queens District Attorney has also been active in pursuing illegal online gambling enterprises, particularly where those operations have involved organized crime. See, e.g. press releases available at queensda.org, dated May 5, 2005, and November 11, 2006.

It can hardly be argued that anything that ought be prohibited is not already prohibited. On the other hand, it remains legal in many if not most contexts to *discuss* online gambling -- even, for instance, to endorse the proposition that it should be legal, that it has benefits over land-based casinos (e.g., better odds, avoidance of crowds), or that it simply is enjoyable.

The Proposed Illegalization of “Endorsement” of Gambling

We are concerned that the proposed amendment would impose a blanket ban on the mere “endorsement” of online gambling, thereby either illegalizing or at least chilling a considerable amount of constitutionally protected speech. It is thus unconstitutionally overbroad. See generally *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (ban on material that “conveys the impression” of, or “appears to be,” virtual child pornography was unconstitutional, as it proscribed speech which was neither child pornography nor obscene); *Reno v. ACLU*, 521 U.S. 844, 897 (1997) (striking down statute that prohibited “indecent” and “patently offensive” speech, as, among other things, it would chill “serious discussion” about public matters).

In other words, this bill effectively extends the present “material aiding” standard to an unconstitutional degree, -- and unnecessarily so. Indeed, to the extent such endorsement might truly “materially aid” criminal conduct -- such as where the endorser actively assists in the wrongdoing -- courts may apply the existing Penal Law prohibitions.

Furthermore, we believe that it would be particularly inappropriate to punish such “endorsement” in the context of Internet gambling -- a nascent industry, and even the U.S. Congress is internally at odds about, as to whether it even might be prohibited. Indeed, Barney Frank, Chairman of the House Financial Services Committee, recently has declared that the prohibition of online gambling is “one of the stupidest things I ever saw.”

Moreover, illegalizing “endorsement” of Internet gambling wrongly exports this country’s standards to those outside of the United States. Numerous nations, including the United Kingdom, permit Internet gambling. As a result -- though such gambling may be illegal

in New York -- many well known celebrities have “endorsed” it, often through endorsement deals with large, regulated and/or publicly traded companies, and often while off of U.S. soil, where the activities are legal. These celebrities -- many of whom are avid poker players -- have ranged from former Minnesota Governor Jesse Ventura (betus.com), to actor Tom Arnold (betonsports.com) to former Buffalo Bills quarterback Jim Kelly (sportsinteraction.com).

Numerous other implicit “endorsements” of online gambling have occurred in recent years. Former New York Senator Alfonse D’Amato is a prominent spokesperson for Internet gambling interests. Of perhaps lesser outright political importance, Bodog.com (a well-known Internet gambling site) sponsored the Los Angeles Lakers 3rd Annual Casino Night and Celebrity Poker Invitational benefiting the Los Angeles Lakers Youth Foundation in April 2006. And in a 2005 “Bodog Salutes the Troops” held in Hawaii, and featuring entertainers Snoop Dogg, Wanda Sykes and Paul Rodriguez, no less a force than the United States Department of Defense played host to Internet gambling company Bodog’s charity event.

Surely, it is not in the public interest for these persons, many of whom are entertainers and media personalities to (a) have such speech and/or conduct chilled, or (b) simply avoid traveling to New York for fear of prosecution. Nor it is in the public interest for the New York State Legislature to attempt to keep information from U.S. web users: such an attempt can only prove futile, given the vastness of the Internet; waste public resources; and as discussed above, chill valid and protected speech.