

GOVERNMENT-SANCTIONED COPYRIGHT INFRINGEMENT?

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A little-known dispute between the island nation of Antigua and the United States may turn into a major headache for media companies, including those in the adult entertainment industry. Specifically, Antigua is threatening to withdraw its agreement to protect United States copyright and other intellectual property rights, as a result of the United States' refusal to honor a World Trade Organization ("WTO") ruling, finding it in non-compliance with the 1994 General Agreement on Trade and Services (GATS).

The WTO dispute arose out of United States' efforts to criminally prosecute online gambling websites – particularly those involved in sports betting. Antigua happens to be one of the nations that issues licenses for Internet gambling businesses. Accordingly, it has become a virtual haven for online gambling companies looking to set up shop and offer their services throughout the world, including to customers in the United States. A United States entrepreneur by the name of Jay Cohen decided to set up such a business, headquartered in Antigua, around the turn of the century. The United States Government took the position that his online sports betting service violated the Wire Wager Act,¹ and claimed that Cohen could be held criminally responsible as a United States citizen, even though his business was established offshore, in a jurisdiction that specifically permits online gambling. Cohen was convicted at trial, and his conviction was affirmed on appeal.² The United States Supreme Court refused to intercede, and allowed the conviction to stand.³ Cohen served about 18 months in jail, and has since been released.⁴

This prosecution, and other saber-rattling by the United States against Antiguan casinos and sports books, caused the Country to evaluate its legal options in response. The option it chose to pursue was a formal claim filed with the World Trade Organization, alleging discriminatory treatment by the United States against offshore gambling enterprises, as compared to those based in the United States. Interestingly, the United States appears to allow some forms of online gambling – particularly off-track horse betting via the Internet⁵ – while it completely prohibits any such gambling on foreign-based websites. While Antigua raised a number of other

¹ 18 U.S.C. § 1084.

² *U.S. v. Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert. den.* 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777 (2002).

³ *Id.*

⁴ Ed Koch, "Net gaming operator Cohen freed from prison," *Las Vegas Sun* (March 23, 2004), which can be viewed at: <http://www.lasvegassun.com/sunbin/stories/sun/2004/mar/23/516573962.html>.

⁵ See, Title 15 U.S.C. § 57, the Interstate Horseracing Act.

arguments in the WTO proceeding, the discriminatory treatment claim ultimately succeeded, both at the initial level and in the Appellate Body.⁶

As a result, the United States was found to be in substantial non-compliance with its GATS treaty, and was given a period of time to correct the problem. Instead of taking any steps to open the door to offshore betting, the United States increased its hostility level towards online gambling, by initiating additional prosecutions against BetonSports.com, and others, and even charging industry service providers, such as NETELLER[®] with money laundering.⁷ As one might imagine, such actions did not make Antigua happy, and put the United States at risk of substantial sanctions from the WTO. So, in an unprecedented move, the United States decided to withdraw its market access commitment – covering gambling – from the schedule of services it negotiated in the GATS treaty. In short, the United States essentially said that it would not play by the rules anymore.

While technically, the United States is permitted to withdraw its commitments in this manner, doing so exposes a country to compensation claims by other WTO members for lost trade opportunities resulting from the withdrawal. Any WTO member can seek financial compensation from the United States, if it can prove losses resulting from the withdrawal of commitments. In addition, Antigua is also considering its own retaliation against the United States by suspending its concessions and commitments under the “Trade Related Aspects of Intellectual Property Rights Agreement.” This important agreement protects intellectual property rights, such as copyrights and patents relating to pharmaceuticals, as well as the software and entertainment industries. Ultimately, Antigua could become a haven for the distribution of pirated DVDs and website content. Given the global reach of the Internet, Antiguan companies could compete with existing media outlets for United States customers by offering V.O.D. and other media delivery systems, containing bootlegged material. There may be little that United States webmasters – or the United States Government for that matter – can do to enforce their intellectual property rights against a country who has suspended its agreement to recognize those rights. Other industries are sweating out this issue as well, as pharmaceutical makers depend heavily on their patents to exclude competing generic brands, in order to maximize profit and recovery of research and development funds. Hollywood filmmakers and mainstream musicians are exposed as well.

All this may be the result of the stubborn insistence of the United States Government on protecting the gambling monopoly currently held by the brick and mortar casinos in Las Vegas and elsewhere. Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) last year, despite the fact that over 85% of American citizens believe that the government should not restrict online gambling.⁸ The UIGEA was the last gasp of a soon-to-be-ousted Republican Congressional majority that attempted to preserve its position by pandering to family values groups on the Internet gambling prohibition, as well as other hot button issues, like prohibition on gay marriage and stem cell research. Their strategy failed, but the country is left with the

⁶ World Trade Organization, “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Report of the Appellate Body,” (April 7, 2005).

⁷ *US v. Lawrence, et. al.*, Case No: 1:07-cr-00597-PKC (S.D. NY 2007).

⁸ Zogby International Poll: 87% believe online gambling is a personal choice which should not be banned; *Wall Street Journal* Poll: 85% oppose government prohibition of online gambling.

consequences of their actions. Ultimately, this misguided effort to prohibit one form of gambling entertainment activity may result in a disaster for a wide variety of United States' industries reliant upon international enforcement of intellectual property rights.

Some light exists at the end of the tunnel, however. Representative Barney Frank (D-Mass) has introduced legislation that would allow United States and foreign companies to obtain licenses to conduct online gambling, and offer those services to United States customers.⁹ Representative Wexler (D-FL) introduced a bill that would exempt poker from the definition of "gambling," allowing online poker rooms to again serve United States' customer demands.¹⁰ These baby steps may ultimately take the U.S. to a place of compliance with WTO rulings, or at least allow a settlement to be achieved with Antiguan authorities. For now, oddly enough, the fate of the adult Internet community may well be tied to the fate of the online gambling industry.

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⁹ H.R.2046, "Internet Gambling Regulation and Enforcement Act," which can be viewed at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2046ih.txt.pdf

¹⁰ H. R. 2610, "Skill Game Protection Act," which can be viewed at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2610ih.txt.pdf