

VIRTUAL CASINOS

VIRTUAL CASINOS AT THE FRONTIERS OF THE LAW

Alexander Menais and Marie Marcoux, Lovells, Paris

The range of lottery and gambling games available to the public never stops diversifying and the industry benefits from the numerous technical innovations in order to reach a forever wider public. Therefore, currently the French national lottery, "Française des jeux", legally proposes a range of lottery games accessible on the Internet, and the first French group of casinos, the Partouche group is launching a cyber casino website whose lawfulness is disputable and disputed. It is in this context that Senator François Trucy, in a report dedicated to gambling and lottery games in France, at the French Financial Commission of the Senate ("Commission des Finances du Sénat") pleads in favour of an urgent state intervention with a view to legalising and licensing such games on the Internet subject to a number of necessary precautions. It therefore seems the time has come for reform, but before we consider the social and legal parliamentary debate, it is pertinent to examine the status of the law on this subject in order to appreciate the implications of the reforms which are proving necessary.

1. THE LEGAL BACKGROUND TO CASINOS

The activity of casinos is regulated by the law of 15th of June 1907 which provides in its first article that:

"as an exception to the first article of law n° 83-628 of the 12th of July 1983 relating to gambling, it can be granted to casinos in seaside resorts, spas and health resorts, under whatever name these establishments are designated, the temporary licence to open to the public distinct, restricted and separate areas where certain gambling games can be practiced".

Article 57 of law 88-13 of the 5 January 1988 extended this licence to casinos situated in towns with a population of over 500 000 provided they were towns listed as of historic interest and that for more than 40% of their function the casinos operate regularly as a theatre, concert hall or opera. This licence is granted by order of the Home Secretary, after investigation, and in consideration of the specifications founded by the municipal council of the area in which the casino is situated, and approved by the Home Secretary.

It is a question of understanding to what extent the different decisive factors defined by the order of the 23rd December 1959 would represent an obstacle to the online application of virtual casinos.

2. THE APPLICABILITY OF THIS LEGAL BACKGROUND TO VIRTUAL CASINOS

The first factor concerns the location of the establishment. It could indeed be possible that every virtual casino could obtain the licence to practice as a casino from the moment that establishment has the use of a physical address situated in a seaside resort, spa or health resort or in a town with a population of more than 500 000, despite the location of the Internet server. Since it is now established that the factor of the location of the server is not decisive, why not, therefore, consider the Internet website as a continuation of the activity of a casino situated in a seaside resort, or any other licensed place, following the above quoted law of 1988!

The second factor involves the actual activity of the website. Indeed, every casino is in fact obliged to consist of three distinct activities: performance, dining and the games, these three activities should be united under one single management without any of them being leased out. It therefore seems plausible that an Internet portal created and managed by a casino owner could offer online gambling while simply providing the cyber player with online cultural and tourist attractions to be in accordance with the law. All that is required to achieve this is to extend the gambling licence granted by the Home Secretary to activity on the World Wide Web, given that the present wording does not present a major obstacle to such an extension. Indeed, could it not be considered that the ability to download music from a local group does not only promote a cultural attraction but furthers the local music industry?

Nevertheless, a restriction should be formulated as to the nature of the games which could be proposed to the cyber gambler. Indeed, we consider that online gambling is comparable to the category of "slot machines" as defined by the decree of the 22 December 1958 and modified by the order of the 9th of May 1997 as any automatic gambling apparatus including the categories "roller machines" (fruit machines) and "video games" which after introducing a payment card sanctioned in article 7 of the same decree allow the operation of a mechanism which involves displaying a random combination of figurative symbols. It is furthermore specified that "when games are played using a payment card, the winnings paid directly by the machine can only be made in electronic units on the card". There is therefore no major obstacle relating to video games and/or payment cards which could hinder the online application of gambling games.

Law no 87-306 of the 5 May 1987 which modifies certain provisions relating to licensed casinos provides that the use of slot machines be exclusively licensed in casinos. It is further specified by the French commission in charge of gaming ("Commission Supérieure des jeux") that these machines can

only be used one year after the gambling licence has been granted by the Home Secretary.

Thus, online application of slot machines is subordinate to the legal qualification of a casino and in particular to the extension of the casino licensing to the Internet.

The applicability to the Internet of the legal system surrounding casinos also clashes with the difficult question of the respect of the legal provisions relating to those who are prohibited from gambling, namely minors and those aware of their personal addiction who forbid themselves to gamble. On this point, we agree with Senator Trucy who suggests resorting to fingerprint identification and a system, authorised by the CNIL, of computer files accessible to both the Home Office and the casinos as well as an "automatic limitation system of online gambling in the home such as exists for cash withdrawals made from cash dispensers".

All things considered, the major obstacle to the licence being extended to the Internet lies in the specifications defined by the local council. However, it has to be said that local councils enjoy a certain liberty in drafting these specifications. Furthermore it would seem that nothing would oppose the use of this freedom by the local council to benefit from the tax revenue and the promotion of tourism that such an activity would produce.

Consequently, we consider that the current legal framework could be completely applicable to activity on the Internet subject to allowing the possibility for the extension of licensing to the Internet. In other words, the legal insecurity could therefore originate from the fact that this law is indeed applicable but is not, as yet, completely adapted. Those businesses which have decided to practice abroad in order to get round the above regulations should also be made aware of this.

3. Applicability of French law

The issue is fairly simple. To what extent does an economic activity which is illegal in France yet which is practised outside our territory find itself nevertheless subject to French law? The illegal activity which we are considering will therefore be gambling which, as we have seen, can be punishable by law.

It is the article 113-2 of the French Criminal Code which gives the answer by providing that French law is applicable not only for crimes committed inside French territory but also for crimes where any element of the activity took place inside the territory.

For proof, let us remember that the criminal chamber of the French Supreme Court has specified that the circulation of tickets in France for a lottery organized abroad is still subject to French law if any element of the illicit activity takes place on national territory.

It follows therefore that the operation of certain gambling activities on the Internet practised outside French territory in order to get round French law, does not mean those sites, which are practicing an illicit activity, are exempt from the applicability of the French law nor from the jurisdiction of a French judge.

4. ... and the consequences for "Net users"

Once this official statement has been established, there could be a number of different consequences, notably concerning the legal responsibility of the different users of the Internet.

Firstly consider those who produce the online gambling. Once the use of an online casino has been established as an illegal activity, an offence on our territory, it would be possible to institute proceedings against the instigator of the offence. Of course, it will be argued that these activities are largely practiced in places that further such activities or where it would be difficult to apply a legal decision. However this argument has not had success for a long time, even on the Internet.

It is a similar case for the intermediaries of the Internet. It is known that their responsibility has found a legal base with article 43-8 of law no 2000-719 of the 1 August 2000, modifying the law n°86-1067 of 30 September 1986 relating to the freedom of communication. In applying this law, the providers such as, particularly, the Internet Service Providers of the online casino, could be criminally responsible for the illegal provision of an online gambling service to the public if, having been seized by a legal authority, they have not acted promptly in preventing access to the games.

It would be a similar case for advertisers or editorial managers in charge of publishing who welcome on to their portal page websites offering online gambling.

As for the legal responsibility of link suppliers as regards the content of illicit websites, within the domain of gambling, this is not insignificant. First of all, an official statement can be authorised to demonstrate how the promotion of virtual casinos is very profitable for advertising departments. This is the reason why, in these difficult times for advertisers, we can find numerous publicity campaigns for gambling websites.

However, on the grounds of complicity as defined by articles 121-6 and 121-7 of the French Criminal Code, individuals or entities who knowingly promote betting and/or gambling games can be punished for the same reasons as the author of the offence on the grounds that they have knowingly helped or assisted the preparation or the execution of the offence. The question that needs to be asked is as to the liability of a website which displays an advertising banner or agrees to reference a virtual casino website through the medium of a hypertext link. (One could be tempted to reject the hypothesis of an advertising banner; simply because it is known that the website which negotiates advertising space indeed has the possibility of identifying beforehand the activity it wishes to promote). If it were a question of French positive law, the responsibility of the link suppliers would seem to alternate between impunity and culpability. Advertising with banners or referencing would nevertheless be distinct from promotion and therefore would fall within the jurisdiction of article 121-6 and 121-7 of the French Criminal Code. Furthermore, it follows that there is indeed a preliminary intention of the author in the two cases, especially for referencing, to promote this activity. In other words we cannot see how impunity can apply.

More surprising is the possible legal responsibility of financial institutions. In banking law, it appears difficult to maintain that bankers are legally responsible for the choices of their clients, and therefore difficult to consider financial institutions as having participated directly as an author or accomplice to the running of a gambling house as they are not obliged to check up on the business of their clients.

On the other hand, we can question the act of complicity of the financial institution, notably regarding the victims of their acts, in the opening of an account which allows a virtual casino to carry out unlawful acts where the institutions are fully aware of the illegality of a virtual casino. The same applies for the provision of a secure payment solution.

Therefore, it seems unquestionable that the current legal insecurity has to cause a reaction from the legislator. The Trucy report is not an isolated French phenomenon. We can note

that on the European Union level a deliberation has come about concerning the present context of the internal services market policy. The European Commission is preparing a report on all "services" defined by article 49 CE, which may well quote "online gambling" and "casinos" in a list of barriers to the free provision of services as outlined in article 49 CE.

Alexandre Menais, Lovells, Administrator of [juriscom.net](http://www.juriscom.net) <<http://www.juriscom.net>> and **Marie Marcoux**, Lovells, Paris

BOOK REVIEW

Intellectual Property – Asia

Intellectual Property in the Digital Age – Challenges for Asia, edited by Christopher Heath and Anselm Kanperman Sanders, 2001, Kluwer Law International, 220pp., ISBN 90 411 9847 4.

This text comprises the results of a seminar held in June 2000 by the Macau Institute of European Studies which was established in 1995 to act as a bridge between Europe and East Asia in the promotion of European studies. In focusing on intellectual property law this particular seminar sought to restore the subject to the forefront and to reverse the tendency to overlook the subject, as it had been in the past by law schools. The book is divided into six sections which, following a general introduction, cover copyright and data protection; patents and indigenous knowledge; trademarks and unfair competition; and IP and e-commerce in greater China.

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Information Technology

Law, Information and Information Technology edited by Eli Lederman and Ron Shapira, 2001, hard-cover, Kluwer Law International, 426pp. ISBN 90 411 1675 3.

This book contains a selection of papers presented at the Buchmann International Conference on Law, Information and Information Technology held at Tel Aviv University. As the preface indicates: "The evolving information society is creating new economic, cultural and political opportunities. However, it also brings with it new issues and risks, which are creating fresh challenges for every legal system. This selection contains a group of articles, which present multifaceted intersections of law, information and information technology." The papers are divided into six sections – conceptualizing information law; privacy; intellectual property; regulating the Internet; the stock market; and authentication. The work covers a broad range of topics and will be of interest to students and practitioners looking for some broader analysis of the underpinnings and influences shaping the development of law and information technology.

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