

A Mixed Bag: Will the Justice Department's Recent Attempts to Prosecute Non-Resident Defendants Inform Future Charging Decisions?

A. Jeff Ifrah
Jeffrey Hamlin
Ifrah PLLC
Washington, D.C.

The explosion of the Internet seems to have triggered a corresponding explosion of transnational criminal activity. United States law enforcement has sometimes struggled to keep pace with the proliferation of online pharmacies, real-money gambling sites, and file-sharing platforms.¹ In recent years, authorities in several federal districts have stepped up their prosecution of nonresident individuals allegedly involved in illegal gaming businesses, online piracy, and mortgage fraud. Prosecutors have obtained significant forfeitures of related proceeds; but, by other measures, the results arguably have been mixed.

- In October 2010, authorities in the Eastern District of Virginia charged two Pakistani men and their alleged accomplice with multiple counts of mail fraud, wire fraud, and related conspiracy charges in connection with a mortgage fraud scheme.² Two years later, one defendant, Pervaiz Arshad, pled guilty. He was sentenced to 4 years in prison and ordered to pay \$1.6 million in restitution. The other two defendants are still at large.³
- On April 15, 2011, federal authorities in the Southern District of New York unsealed an indictment charging eleven individuals with violating the UIGEA, operating illegal gambling businesses, conspiracy to commit bank and wire fraud, and participation in a money laundering conspiracy.⁴ Prosecutors alleged a massive operation involving the three largest poker operators, PokerStars, Full Tilt Poker, and Absolute Poker/Ultimate Bet. Offense conduct allegedly occurred in Antigua, Australia, Costa Rica, Ireland, Isle of Man, and the United States. At that time, nine of the defendants resided outside the U.S. To date,

six of them have returned to the U.S. and surrendered to authorities. Three are still at large.

- In January 2012, German national and New Zealand resident Kim Dotcom was indicted with eight co-defendants in the Eastern District of Virginia for criminal copyright infringement, racketeering, and money laundering offenses.⁵ To date, none of the defendants are in U.S. custody. Dotcom is in New Zealand awaiting his extradition hearing, which has been postponed until August 2013.
- In February 2012, four Canadian citizens were indicted in the District of Maryland for allegedly running an offshore sports betting business.⁶ Owner Calvin Ayre reportedly runs his company, Bodog Entertainment Group, from outside the United States. All the defendants' assets are outside the U.S. as well. To date, none of the defendants have appeared in the U.S. to answer the charges.

Nonresident defendants in these cases and others like them have eluded law enforcement. In such cases, two aims of criminal law—retribution and rehabilitation—apparently have not been served. However, nearly all Internet gaming and file-sharing businesses have moved their operations offshore. Indeed, all major online gambling providers have shut down their operations in the U.S. and moved to offshore jurisdictions that permit online gaming. Many providers no longer market real-money games to players in the United States. Criminal prosecution therefore *has* served the goals of incapacitation and deterrence.⁷ One may ask whether these results have come at too high a price. Has the Justice Department's seeming inability to

bring nonresident defendants to trial weakened the Department's standing in the world? Should it matter? If so, should prosecutors consider the possibility of achieving comparable results through civil forfeiture actions instead of criminal proceedings?

Whether past experience informs future charging decisions remains to be seen. This article considers whether procedural hurdles related to extradition of nonresident defendants as well as uncertainties in U.S. law may dissuade prosecutors from seeking justice through criminal proceedings. The article then discusses, in the context of the Justice Department's principles of prosecution, whether civil forfeiture proceedings offer a better alternative for achieving similar results.

I. Potential Obstacles to Criminal Prosecution of Nonresident Defendants

There are several potential barriers to prosecution of foreign citizens for gaming- and piracy related conduct that reaches the United States, including procedural hurdles related to extradition and litigation risks associated with unsettled aspects of federal law. These barriers to prosecution are particularly evident where gaming offenses are concerned.

A. Procedural Hurdles: Extradition

Authorities seeking to prosecute a non-resident defendant for the operation of an offshore gaming business may not be able to try their case without requesting extradition assistance from the country in which the defendant resides. But extradition is by no means a certainty. Federal law provides that, with few exceptions, an international fugitive is extraditable only if the U.S. has an extradition treaty with the country in which the defendant is found.⁸ In such cases, the second question to be answered is whether the alleged conduct constitutes an extraditable offense. To be extraditable, an offense must be specifically identified as such in the relevant extradition treaty or otherwise comport with the principle of "dual criminality" or "double criminality." "Dual criminality" recognizes that, for a crime to be extraditable, the offense conduct must be criminal under the laws of the requesting state

and surrendering state.⁹ It is not necessary that both nations refer to the crime by the same name, that the scope of liability be the same, or that the elements of one be substantially analogous to the other.¹⁰ The doctrine simply requires that underlying conduct be criminal in both jurisdictions.¹¹

A related but distinct principle, called the Rule of Specialty, limits actual prosecution in the requesting country to the specific offenses that the other jurisdiction has found to be extraditable.¹² While the doctrine of dual criminality focuses on whether certain conduct is criminal, the Rule of Specialty focuses on whether prosecution would be time-barred in the surrendering state.¹³

Since passage of the Uniform Illegal Gambling Enforcement Act ("UIGEA") of 2006¹⁴ and subsequent federal prosecution of crimes associated with Internet gaming, many gaming providers have moved offshore. Most of them operate from jurisdictions that permit and, in some cases, regulate online gaming—for example, Alderney, Antigua, Aruba, Costa Rica, Curacao, Gibraltar, the Kahnawake Mohawk Nation, Isle of Man, and Malta. As a result, U.S.-based prosecutors who wish to prosecute defendants in these jurisdictions must consider whether extradition assistance will be required. Although the U.S. currently has extradition treaties that govern with respect to these jurisdictions,¹⁵ the inquiry does not end there. Prosecutors seeking extradition may find that "dual criminality" does not exist for the particular offense conduct at issue. Gambling offenses as defined under the Wire Act,¹⁶ the Illegal Gambling Business Act,¹⁷ and UIGEA are not likely extraditable because the underlying conduct—*e.g.*, transmission of wagering information or electronic funds—is not criminal in the offshore locations from which the gambling businesses operate.

B. Substantive Hurdles: Unresolved Questions of Law

In addition to procedural hurdles associated with extradition, prosecutors targeting online gaming face litigation risks due to unresolved questions of federal and state law. Federal offenses for Internet gaming activity are defined primarily under the Wire Act, the IGBA, and the UIGEA—

statutes that may not support a conviction for real-money peer-to-peer poker, for example.

Many gambling operators have been prosecuted for violations of the Wire Act. That statute makes it a crime for anyone engaged in the business of betting or wagering to knowingly use a wire communication facility to transmit in interstate or foreign commerce wagering information related to a sporting event or contest.¹⁸ Some courts have held that the statute reaches only sports betting.¹⁹ The Department of Justice agreed. Last year, Assistant Attorney General Virginia Seitz issued a memorandum opinion stating that the “Wire Act does not reach interstate transmissions of wire communications that do not relate to a ‘sporting event or contest . . .’”²⁰ It is therefore risky for prosecutors to rely on the Wire Act for prosecution of online gaming unrelated to sports betting.

The extent to which the IGBA and UIGEA reach certain types of gaming is less clear. The IGBA prohibits the operation of an “illegal gambling business” but defines that term to mean “a violation of the law of a State or political subdivision in which it is conducted.”²¹ Moreover, the statute defines “gambling” to include “pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.”²² Thus, the statute proscribes conduct that fits within the definition of “gambling,” but only if that form of gambling is illegal in the state in which it is conducted. Notably, the federal district court for the Eastern District of New York recently held that peer-to-peer poker is not gambling under the IGBA.²³ In his well-reasoned decision, Judge Weinstein explained that, for purposes of federal law, poker is a game of skill, not a game of chance.²⁴ As such, poker does not fit within the IGBA’s definition for “gambling,” and the related question of whether such activity is proscribed under state law is moot.²⁵

Like the IGBA, the UIGEA employs a somewhat circular definition of unlawful Internet gambling. That statute “prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”²⁶ “Unlawful Internet gambling” is defined to mean the

placing, receiving, or knowing transmission of a bet or wager by any means that involves use of the Internet and that is unlawful under federal or state law.²⁷ A “bet or wager” is defined to mean “the staking or risking . . . of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance . . .”²⁸ The holding in *Dicristina* compels a conclusion that games of skill, such as peer-to-peer poker, do not involve “bets or wagers” as defined under the UIGEA. As such, those types of games do not constitute “unlawful Internet gambling” under federal law, and the question of whether or not a particular state proscribes the activity becomes moot.

In the wake of *Dicristina*, prosecutors face increased litigation risks that charges filed under the IGBA or UIGEA might well be dismissed with respect to conduct involving games of skill. Prosecutors should consider these uncertainties when deciding whether to initiate criminal proceedings against nonresident defendants.

II. Prosecutorial Charging Decisions

When making charging decisions, prosecutors should account for the types of procedural and substantive hurdles described above. No doubt, federal prosecutors have broad discretion for deciding whether and whom to prosecute for apparent violations of federal criminal law.²⁹ But prosecutorial discretion must be exercised consistent with the Justice Department’s principles for prosecution. Ordinarily, a federal prosecutor should initiate criminal proceedings if he or she believes that an individual has committed a federal offense within the prosecutor’s jurisdiction and that admissible evidence is likely sufficient for a conviction.³⁰ But a prosecutor may decline to prosecute if he or she decides that criminal proceedings would not serve a substantial federal interest or that adequate non-criminal alternatives exist to remedy the alleged harm.³¹

A. Substantial Federal Interest

To decide whether criminal prosecution would serve a substantial Federal interest, prosecutors are instructed to “weigh all relevant considerations,” including the nature and seriousness of the offense,

deterrence effects, and the individual's probable sentence, among other things.³²

A primary factor to be considered with respect to the nature and seriousness of offense conduct is the actual or potential impact on the community, such as resulting economic harm to community interests. The seriousness of an offense can be measured by public attitudes toward enforcement. Indeed, prosecution may not be warranted where the offense conduct is a "minor matter of private concern" and the purported victim "is not interested in having it pursued."³³ An argument can be made that some offenses, like real-money peer-to-peer poker, are essentially matters of private concern. Given the absence of any real "victim," criminal proceedings may be unwarranted.

Prosecutors must also remember that deterrence is a primary goal of the criminal system. As such, any charging decision should take into account whether criminal prosecution is likely to deter the particular offense conduct or criminal activity in general. As explained above, the Justice Department's aggressive prosecution of major gaming operators put one out of business and forced two others offshore.³⁴

Finally, prosecutors must consider what penalty is likely to be imposed and whether the likely penalty justifies the time and effort of prosecution. In cases involving nonresident actors who cannot be brought to justice without extradition assistance, prosecutors must consider whether "dual criminality" exists to support extradition and, if so, whether unresolved questions regarding substantive law make a conviction more or less likely.

B. Non-Criminal Alternatives to Prosecution

Government attorneys may also decline to prosecute based on the availability of non-criminal alternatives to prosecution.³⁵ Relevant factors to be considered include (i) the sanctions available under non-criminal alternatives; (ii) the likelihood that an effective sanction will be imposed; and (iii) the effect of a non-criminal disposition on federal law enforcement interests.³⁶ Thus, a prosecutor may decline to initiate a criminal action in cases where the alleged harms can be addressed in civil

proceedings or through complaints to a licensing authority, for example.

These aspects of DOJ policy seem to weigh against the criminal prosecution of persons outside the U.S. who are suspected of online gaming or piracy offenses. Indeed, civil forfeiture may be sufficient to shut down an offending business or force it out of the U.S. market.

Section 981 of title 18 of the United States authorizes civil forfeiture for a long list of federal crimes.³⁷ The statute provides that property is subject to forfeiture if it is involved in specified transactions or if it constitutes proceeds traceable to the specified conduct.³⁸ In a civil forfeiture proceeding, the action is against the property itself, not the owner of the property.³⁹ As such, forfeiture does not depend on a criminal conviction.⁴⁰ Civil forfeiture proceedings are governed by 18 U.S.C. § 983 and by Supplemental Rule G of the Federal Rules of Civil Procedure. Like civil actions generally, civil forfeiture proceedings involve civil discovery, tighter filing deadlines, and a lower burden of proof.⁴¹ Whether these are beneficial depends on the particulars of each case. Where nonresident defendants are involved, civil forfeiture may increase the government's odds of obtaining relief and obtaining it more quickly.

There are disadvantages, though. First, civil forfeiture is limited to property that is directly traceable to a criminal offense. By contrast, criminal forfeiture is a judgment against the individual and, therefore, allows for substitution of assets.⁴² Second, the civil discovery permitted in a civil forfeiture action could compromise the government's criminal case with respect to U.S. residents who acted in concert with a nonresident defendant. Finally, if the Justice Department were to favor civil forfeiture over criminal prosecution of nonresident defendants, the message sent would be that the Department is more concerned with money grabs based on weaker evidence of wrongdoing than divesting individuals of profits obtained through provable crimes.

Conclusion

Ultimately, a prosecutor's choice whether to indict or initiate civil forfeiture is a false one because prosecutors have the discretion to initiate parallel

proceedings.⁴³ But in cases where nonresident defendants are suspected of non-violent offense conduct, issues related to extradition and unresolved questions of federal law may make criminal proceedings a less attractive option. In such cases, civil forfeiture may be the most efficient way to divest wrongdoers of their criminal proceeds and shut down their operations in the United States.

Endnotes

¹ See, e.g., David O. Stewart, *Online Gambling Five Years After UIGEA* at 7 (Am. Gaming Ass'n 2011) ("The FBI, through painstaking and aggressive effort, has used UIGEA to build a criminal case against major online poker operators, but that has proved the legal equivalent of house-to-house combat. As soon as some operators are shut down, others step forward to serve the demand."); Tom W. Bell, *Internet Gambling: Prohibition v. Legalization* at 1 (Cato Inst.1998) available at <http://www.cato.org/publications/congressional-testimony/internet-gambling-prohibition-v-legalization> (last visited Jan. 14, 2013) ("[T]he Internet offers an instant detour around merely domestic prohibitions.").

² Indictment, *United States v. Mirza*, No. 1:10-cr-419-TSE (E.D. Va. filed Oct. 28, 2010).

³ Three other co-conspirators were charged in a related proceeding. See Indictment, *United States v. Mirza*, No. 1:08-cr-0081-LMB (E.D.N.Y. filed July 11, 2008). All three defendants in that case pled guilty, received jail sentences of 1 to 5 years, and were ordered to pay \$5 million in restitution.

⁴ Superseding Indictment, *United States v. Scheinberg*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed Mar. 10, 2011).

⁵ Indictment, *United States v. Dotcom*, No. 1:12-cr-00003 (E.D. Va. filed Jan. 5, 2012).

⁶ Indictment, *United States v. Bodog Entm't Group S.A.*, No. 1:12-cr-00087-CCB (D. Md. filed Feb. 22, 2012).

⁷ Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 55 U.S. ATTORNEYS' BULLETIN 6 at 8 (Nov. 2007) (explaining that asset forfeiture is a form of incapacitation and serves deterrence interests).

⁸ 18 U.S.C. § 3184; *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled . . . the legal right to demand his extradition and correlative duty to surrender him to the demanding country exist only when created by treaty." (citing *United States v. Raucher*, 119 U.S. 407, 411 (1886))); U.S. Dep't of Justice, Criminal Resource Manual 603(A) ("[G]enerally extradition is not available unless there is a treaty in force between the United States and the country where the fugitive is located.").

⁹ See *Wright v. Henkel*, 190 U.S. 40, 58 (1903); *Emami v. United States*, 834 F.2d 1444, 1449 (9th Cir. 1987) (stating that offense must be extraditable in both jurisdictions in order for dual criminality to be satisfied); *Caplan v. Vokes*, 649 F.2d 1336, 1343 (9th Cir. 1981) ("[N]o offense is extraditable unless it is criminal in both jurisdictions."). But see *Laubenheimer*, 290 U.S. at 299-300 (rejecting view that dual criminality, whether expressed or not, is a principle implicit in all extradition treaties).

¹⁰ *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008).

¹¹ *Id.*

¹² *Theron v. United States Marshal*, 832 F.2d 492 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1998).

¹³ *Id.* at 498.

¹⁴ 31 U.S.C. §§ 5361-67.

¹⁵ 18 U.S.C. § 3181.

¹⁶ 18 U.S.C. § 1084.

¹⁷ 18 U.S.C. § 1955.

¹⁸ 18 U.S.C. § 1084(a).

¹⁹ See, e.g., *In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.", *aff'd*, 313 F.3d 257 (5th Cir. 2002). But see *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (holding that 18 U.S.C. § 1084(a) is not confined entirely to wire

communications related to sports betting or wagering).

²⁰ U.S. Dep't of Justice, Office of the Legal Counsel, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violates the Wire Act*, 35 Op. O.L.C. 1 (2011), available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf> (last visited Jan. 13, 2013).

²¹ 18 U.S.C. § 1955(b)(1).

²² 18 U.S.C. § 1955(b)(2).

²³ *United States v. Dicristina*, No. 11-cr-414, 2012 WL 3573895, at *50 (E.D.N.Y. Aug. 21, 2012), appeal docketed, No. 12-3720 (2d Cir. Sept. 19, 2012).

²⁴ *Id.* at *56.

²⁵ *Id.* at *60-61.

²⁶ *Id.* at *45 (citing 18 U.S.C. § 5363).

²⁷ 18 U.S.C. § 5362(10)(A).

²⁸ 18 U.S.C. § 5362(1)(A).

²⁹ USAM 9-27.110 (citing *Oyler v. Boles*, 368 U.S. 448 (1962); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967)).

³⁰ USAM 9-27.220.

³¹ *Id.* The USAM also provides that prosecutors may decline to prosecute if the putative defendant is subject to effective prosecution in another jurisdiction. USAM 9-27.220; 9-27.240.

³² USAM 9-27.230.

³³ *Id.*

³⁴ Some have noted that the Justice Department's aggressive prosecution of gaming operators has "push[ed] the market into the hands of online gambling operators that are generally less regulated and trustworthy." Stewart, *supra* note 1, at 9.

³⁵ USAM 9-27.250.

³⁶ *Id.*

³⁷ 18 U.S.C. § 981.

³⁸ 18 U.S.C. § 981(a)(1).

³⁹ *United States v. \$734,578.82 in U.S. Currency*, 286 F.3d 641, 657 (3d Cir. 2002).

⁴⁰ *United States v. Cherry*, 330 F.3d 658, 666 n.16 (4th Cir. 2003) cited in Cassella, *supra* note 7, at 15.

⁴¹ Cassella, *supra* note 7, at 17-19.

⁴² *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (holding that defendant could be ordered to forfeit "every last penny" as substitute assets in satisfaction of a money judgment).

⁴³ See *United States v. Kordel*, 397 U.S. 1, 2-6 (1970).