

SCIARRINO & SHUBERT, PLLC
BROADCAST & MEDIA LEGAL SERVICES

Don't Gamble on Internet Café Advertising in Kentucky

Advertising Internet cafés have always been a risky bet, but Kentucky broadcasters now need to give them a wide berth. The business models of many Internet cafés have always resembled prohibited lotteries to greater or lesser degrees, and this spring, a new Kentucky law has changed Kentucky's gambling laws to render most if not all Internet cafés illegal. The Internet café business model typically involved the sale of Internet access at computer terminals located at the café's premises; from those same terminals, various forms of sweepstakes or other games were offered for play. Some cafés also provided food and beverages for sale; others were not "cafés" in that usual sense of the word. Some had procedures for persons to enter promoted sweepstakes without charge; others allowed only those who'd paid for Internet access to play and win.

If that sounds like dangerous territory for a broadcaster, it was and is. As a general rule, federal law prohibits a broadcaster from airing any "advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme[.]" Broadly speaking, if a sweepstakes, game or other activity involves a prize, the payment of money or the giving of any other thing of value by the entrant, and the element of chance in determining a winner, then it's a lottery covered by the statute. The definition of "gambling" under Kentucky law includes the same three elements of a prohibited lottery. Exceptions to the federal prohibition on lottery advertising exist for State-run lotteries and lotteries authorized or not prohibited by State law, lotteries or gaming conducted by charitable organizations, promotional sweepstakes which are "clearly occasional and ancillary" to a company's primary business, and certain gaming on Tribal lands. In general, lotteries and other forms of gambling are not legal in Kentucky, with limited exceptions, such as certain games available at race tracks and charitable gaming, which is subject to detailed licensing and regulatory requirements.

Some Internet cafés structured their businesses, or at least their advertising, in ways that did not amount to promoting a lottery. For example, one Internet café structured the sweepstakes game they planned to advertise so that any interested person could play for free, without using the café's services. By eliminating the element of consideration, the café took the game to be advertised outside of the traditional definition of a lottery. Other cafés sought to focus their advertising on the less legally-fraught aspect of their business – the sale of Internet access – similar to the longstanding practice of advertising the non-gambling entertainment offerings of casinos. Still others, however, claimed that they were lawful by determining in advance whether a particular bettor would win, thus eliminating the element of chance. Such a claim has always been somewhat dubious – there would almost surely be some level of randomness in which terminal a user chose, when in the user's use of the computer he or she decided to play one of the games (if at all), which one to play, how long to stay, etc. Even if an Internet café so successfully rigged its games that chance was eliminate, that approach would raise the specter of fraud – in order to induce customers to pay to enter a game, there would need to be at least the implicit promise that the customer had a chance to win something, however unlikely.

Until recently, a Kentucky broadcaster had to look to the details of the Internet café's operations, and carefully parse the café's proposed advertisement, to determine whether accepting a particular ad would run afoul of the prohibition against advertising lotteries. For the past few years, a number of state and local officials had expressed intentions to review the legality of Internet cafes, and in February of 2015, the Kentucky Attorney General acted, issuing an opinion that the online sweepstakes generally conducted at Internet cafés are indeed illegal lotteries. According to the Attorney General, in the typical Internet café, Internet access was “merely incidental to the game of chance” and the non-gambling Internet access offering was rarely used and little valued by customers, amounting to a “subterfuge” to circumvent the anti-lottery statutes. And since then, the Legislature has passed, and the Governor signed into law, SB 28, which amended the definition of a “gambling device” to include any mechanical or electronic device on business premises that allowed for the playing of “simulated gambling programs” in exchange for consideration. The new law was directed specifically at games conducted at Internet cafés – it expressly names payment for Internet access as a form of consideration for online gambling.

While there may be some Internet café models that would escape the reach of the new law – for example, by allowing for completely free play with no purchase, or by not awarding prizes – the vast majority of Internet cafés that remain in business are conducting a form of gambling outlawed by Kentucky’s statutes. Advertising Internet cafés is now a very big gamble for broadcasters in Kentucky, and we would advise against taking this risk.

This document is provided to introduce the reader to the fundamental basics of internet café advertising. It should not be taken as legal advice on a specific case. Please contact the KBA Legal Hotline or your communications counsel.

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