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## Analog Laws in a Digital World: How State and Federal Governments are Using Existing Laws (and Creating New Ones) to Regulate the Internet

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The new digital economy can expand into existing markets as well as create new markets. In some cases, online companies have expanded into markets and industries where their older, offline counterparts have been traditionally subject to heavy regulation. This has created a tension between the offline companies and their regulators, on the one hand, and the new online companies, on the other. As a result, regulators are grappling with how to regulate new online companies - if at all. In many cases, governments have responded by seeking to apply existing, "analog" laws and regulations to the online world, with varying degrees of success.

### **Online Pharmacies**

Surveys estimate there are at least 400 web sites operating as online pharmacies dispensing prescription drugs in the U.S. In most states, a licensed health care practitioner must physically examine a patient before prescribing a prescription drug, and the patient must have the prescription filled by a registered pharmacist working in a licensed pharmacy. Similarly, most states require out-of-state mail-order pharmacies to be licensed wherever their headquarters are physically located and wherever the patients they serve reside.

Many unlicensed online pharmacies sell popular drugs without a prescription. At least fifteen states have already used existing state laws to take action against physicians and/or online pharmacies that prescribe or supply drugs over the Internet.

Although states have the ability to regulate pharmacies selling prescription drugs to residents of their states, they may lack the authority to regulate online pharmacies which are located in different states or foreign nations. More than a dozen state legislatures have attempted to craft new laws that would authorize regulation of online pharmacies. Such state legislation may, however, be unconstitutional. Several courts have been unwilling to uphold similar legislation with respect to the online sale of alcoholic beverages.

### **Online Alcoholic Beverage Vendors**

Several dozen states ban the direct shipment or sale of alcoholic beverages from outside their borders. Federal courts, however, struck down two state statutes that banned the sale of alcohol over the Internet. The courts held that the statutes unconstitutionally discriminated between in-state and out-of-state sellers of alcoholic beverages. In [Bridenbaugh v. O'Bannon](#), a federal court faulted the Indiana statute for requiring all out-of-state alcoholic beverage vendors to hold a valid Indiana license, even though Indiana never grants licenses to out-of-state vendors. The other case, [Dickerson v. Bailey](#), struck down a similar Texas statute.

Although state legislation aimed specifically at the conduct of business over the Internet may not be enforceable, states can seek to prohibit the sale of alcoholic beverages to their citizens from out-of-state vendors on a case-by-case basis under existing, non-Internet specific laws. For example, in *Missouri v. Beer Nuts Ltd.*, a Missouri court found that the sale of beer over the Internet by a company based in North Carolina to a resident of Missouri violated Missouri's liquor control statute.

### **Internet Gambling**

Recent surveys estimate that approximately 4.5 million Americans have gambled online, and that over 850 Internet casinos are currently in operation. Although most U.S. states prohibit the operation of casinos (whether online or bricks-and-mortar), U.S. Internet users can easily access a large array of online gambling establishments that operate out of countries that lack such restrictions. A number of countries, including several in the Caribbean and Latin America and, until a recent moratorium, Australia, have affirmatively established licensing and regulatory agencies to oversee (and collect fees from) online casinos.

Efforts to regulate Internet gambling in the United States have produced mixed results. Anti-gambling proponents won a significant victory last year in New York, when a state court enjoined World Interactive Gaming Corp. (an Antigua-based Internet casino operator) from accepting wagers from New York residents (click [here](#) for court's decision). The court held that New York's prohibition on gambling applied to the online casino, even though its servers were based offshore. A similar case was decided in Missouri in 1997.

A number of states are considering similar actions or legislation directed at online gambling. In 1998, Illinois enacted legislation criminalizing the operation of online gambling sites.

However, recent initiatives to enact federal legislation prohibiting online gambling have failed. The most recent of these was defeated earlier this month in the House of Representatives for a variety of reasons, including the exclusion from the bill of wagering on horse racing, greyhound racing and jai alai.

### **A Federal Legislative Solution?**

Many industry groups and Internet users oppose government regulation of the Internet on any level. Others argue that regulation of online businesses is necessary to protect the public. Regardless of whether Internet regulation is wise, it appears that Congress is best-positioned to pass legislation regulating online businesses in light of Constitutional limitations and the multi-jurisdictional nature of the Internet.

Federal legislation has been proposed to authorize federal regulatory power over online pharmacies. The proposed legislation would require federal approval of online pharmacies based in the U.S., require online pharmacies to be licensed in each state in which they operate or sell prescription drugs, and require online pharmacies to post notices identifying the states in which they are licensed. Another pending bill would permit states to ask federal courts to enjoin violations of state law involving the importation of alcoholic beverages.

Federal agencies are not waiting for new legislation before acting, however. In February 2000, the FDA sent e-mails to at least a dozen foreign-based online pharmacies, warning them that their prescription drug sales to U.S. citizens may be illegal. Not only did these warning letters mark a new stage in the agency's efforts to regulate the Internet, but they also appear to be the first instance where a federal agency has sent warning letters via the Internet. Although the FDA has no authority over foreign-based web sites, copies of the warning letters were sent to the FDA's counterpart in each foreign country, requesting an investigation.

Indeed, in March 2000, 22 people were arrested in Thailand for allegedly selling prescription drugs over the Internet to U.S. consumers. This appears to be the first case in which the U.S. government had a hand in closing the web sites of foreign companies exporting prescription drugs to the United States. Six people were also arrested in the United States for allegedly buying drugs from a Thai Internet pharmacy.

In sum, state and federal governments are grappling with what legal authority they have - if any - to regulate online businesses. Governments are attempting to use all means at their disposal to address these issues. Only time, the courts and future legislation will tell to what extent various governments may regulate the Internet in the future.

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