

A Breakdown of the California Gambling Advertising Suit

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Introduction

Despite the recent scramble by search engines Google and Yahoo! to pull gambling advertising content from their sites, both have been named along with various other companies, as Plaintiffs in a class action lawsuit recently filed in San Francisco Superior Court.¹ The suit, brought by California residents Mario Cisneros, who allegedly never engaged in any Internet gambling, and Michael Voight, who claims to have used search engines in California to find gambling sites and lost \$100,000, specifically names 13 Defendants, and 100 “John Doe” Defendants. The Plaintiffs are seeking monetary relief and to enjoin the Defendants from “participating in, and continuing to market, sell, and display advertising for illegal Internet gambling establishments.”² The class sought to be certified in the suit is defined as “All California residents who visited an illegal Internet gambling website and incurred losses therein each found these websites as a result of advertisements contained on Defendants and their affiliates web pages or search results.”³

CDA Immunity

The Complaint alleges that Defendants are not entitled to immunity under Section 230 of the Communications Decency Act (“CDA”) because they do not qualify as “interactive computer services.”⁴ Section 230 immunity completely protects certain Internet access providers from any claims, asserted under state law, and premised on the publication or editing of materials made available online.⁵ Notably, the types of websites deemed by the courts to be covered by Section 230 immunity have continually expanded of late,⁶ and therefore the absence of immunity is not a foregone conclusion for the search engines and certain other defendants.

The Claims

¹ See complaint filed in: *Mario Cisneros et al v. Yahoo!, Inc. et al*, Case No.: CGC-04-433518.

² Id. at 5.

³ Id. at 47.

⁴ Id. at 48.

⁵ Section 230(c)(1)

⁶ *Perfect 10, Inc. v. CCBill, LLC, et al.*, Case No.: CV 02-7624 LGB, United States District Court Central District of California (June 22, 2004); *Grace v. eBay, Inc.*, 2004 WL 1632047 (Cal.App. 2nd Dist. 2004); *Ramey v. Darkside Productions Inc.*, No 00-1415 (2004); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp.2d 532 (E.D.Va. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003).

As a basis of liability, the Complaint alleges that the Defendants “obtain revenue from these Websites when they convince users to ‘click through’ to the advertisers’ websites. In the case of illegal gambling, this ‘click-through’ directs California users to Internet gambling websites where persons in California are enticed to gamble away their hard-earned savings using their home and work computers.”⁷ The Complaint further states that, “Defendants knowingly and willfully conspired with Internet gambling Websites and others to carry out these illegal gambling activities through the use of Defendants’ advertising capabilities and, in fact, carried out these advertising activities in furtherance of the conspiracy, thereby lending aid and encouragement to illegal gambling Websites. Defendants distribute these advertisements to millions of consumers and to affiliate Websites.”⁸

Factual Support

The factual background of the Complaint alleges that 1) Internet gambling is a pervasive and growing problem, and a) noted various article citing the rise of Internet gambling and its availability to U.S. residents,⁹ b) gambling by minors,¹⁰ c) compulsive gambling,¹¹ d) the potential for fraud,¹² e) the potential for organized crime,¹³ f) the potential for money laundering, and g) examined the effects of advertising for Internet gambling, and noted that “The sheer volume of advertisements for Internet sports books and online casinos is troubling because it misleads the public to believe that such gambling is legal, when in fact, it is not.”¹⁴ 2) Internet gambling is addictive to our youth, and noted articles regarding the addictive threat of Internet gambling, especially to teenagers and college students, studies concerning compulsive gambling and athletic participation. The Complaint makes reference to an article by *USA Today*, which noted that “Internet gambling is growing in popularity, raising the odds that people – especially the young and women – might become addicted.”¹⁵ 3) Internet gambling preys on seniors, noting that is harder for a senior citizen to recover after a gambling loss. “Older adults are, perhaps, more vulnerable than other age groups given their greater dependence on fixed incomes and more limited ability to recover to secure debt or recover from gambling losses.”¹⁶ The Complaint also alleges that “Internet casinos are preying on our older citizens,”¹⁷ and points the wide range of games now offered online and to an article found on Google entitled: “For Senior Citizens: - Why Gambling On The Internet is Good For You.” 4) Internet gambling deprives local governments of license and tax revenues, and alleges that “Internet gambling also drains tax revenues from properly licensed and regulated California Indian casinos and the California State Lottery tax revenues that would otherwise accrue to state educational facilities, or could be used to cover the costs of dealing with the social ills caused by gambling.”¹⁸ 5) Internet

⁷ Id.

⁸ Id. at 5-6.

⁹ Id. at 19.

¹⁰ Id. at 20.

¹¹ Id..

¹² Id. at 21.

¹³ Id..

¹⁴ Id. at 22.

¹⁵ Id. at 24.

¹⁶ Id. at 25.

¹⁷ Id.

¹⁸ Id. at 26-27.

gambling deprives California Indian Tribes of exclusivity and State of California revenues. The Complaint notes the deal that Gov. Arnold Schwarzenegger signed with 5 California Indian tribes that gave them the right to operate an unlimited number of slot machines, and pay 15% of their revenue through various licensing fees and additional fees per machine. The Complaint stated that “Internet gambling websites, their co-conspirators and abettors, illegally take money from California citizens, without paying 15% of their revenues to California.”¹⁹ 6) Internet gambling is illegal under California law. a) California law bans conducting, playing or betting on i) most lotteries; ii) a few specific games such as faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one and hokey-pokey; iii) any banking or percentage game played with cards, dice or any device; and iv) most sports bookmaking bets and wagers.²⁰ b) Aiders and abettors to illegal gambling are guilty of violating California’s gambling prohibitions. c) Co-Conspiring to gambling violates California law. The Complaint states that “where one agrees to and does advertise, promote or otherwise facilitate illegal online gambling, with the online gambling business, and that advertisement or promotion or encouragement takes place within California, then the agreement amounts to a conspiracy.”²¹

In evaluating the Defendants wrongful conduct, the Complaint claims that the Defendants posted sponsored advertisements in California for unlicensed gambling Websites, in that “Defendants Advertise and deceptively list numerous advertisements for Internet gambling when an Internet searcher types in the phrase ‘legal gambling,’” however, none of the Defendants provided any disclosure that gambling is in fact illegal under California law;²² 2) Defendants advertising is expressly directed at California locations where gambling is illegal, and noted that “Many Defendants provide localized geo-tracking technologies so that advertisements can be focused on a particular region within a state. For example, Google permits to select regional areas such as the “State of California” or sub-regions in the state.”²³ 3) The Complaint cites specific examples of Defendants wide-scale “illegal” advertising services in California for Internet gambling Websites.²⁴ It also pointed to search results that generated responses on the Defendants’ websites for “illegal gambling,” “Internet gambling,” “California gambling,” and others.²⁵

The Complaint also alleges that the “advertising Defendants, and each of them, conspired in the operation of illegal gambling enterprise by knowingly and purposefully providing advertising in California to the website Defendants to advertise and promote and carry out illegal gambling in California with persons in California. The advertising Defendants knew about the content of the gambling website Defendants’ activities and knowingly conspired to provide advertising to the gambling website Defendants – an illegal act in the State of California.”²⁶

The Complaint makes note of the fact that “Advertising Defendants have for several years advertised illegal Internet gambling in California and have not taken any steps to alleviate

¹⁹ Id. at 30.

²⁰ Id. at 31; See also §§319-322 (Lotteries) and 330-337 (Other Gamblings) of the California Penal Code.

²¹ Id. at 35.

²² Id. at 36.

²³ Id. at 36.

²⁴ Id. at 37.

²⁵ Id. at 39.

²⁶ Id. at 54.

the harm caused by this activity. Although two of the advertising Defendants, Yahoo and Google, have suggested intention to withdraw some or all of their illegal Internet advertising, as of the time of the filing of this Complaint this advertising continues.”²⁷ For this reason, Plaintiffs “seek a declaration of this court that the Internet gambling transactions and the Internet advertisement of gambling websites in California carried on by Defendants, and each of them, are illegal (Penal Code §§230, 321, 322, 330, 337(a) and 337), and constitute illegal unfair business practices under Cal. Bus. & Prof. Code §17200.”²⁸

Novel Theories

All of the above legal theories are untested and novel when applied to online gambling advertising. As has been noted in many of this author’s articles, online gambling advertising is entitled to First Amendment protection as a form of commercial speech, and such protection may affect the viability of one or more of the Plaintiffs’ theories of liability. While the First Amendment will not provide a direct defense to the claims, since the Plaintiffs are not government actors and therefore cannot violate the First Amendment themselves, it may impact the underlying premise that gambling advertising constitutes illegal conduct; a premise which the courts have been hesitant to accept in the past.²⁹

The Plaintiffs also face significant hurdles in their attempt to bring this case as a class action. Class certification is difficult to obtain in any case, and is substantially more challenging where the damages allegedly suffered by each of the individuals making up the purported class vastly differ. Assuming for the moment that the Plaintiffs’ theories of liability are correct, and the court must calculate a damages award for the class, it may be impossible to quantify a ‘standard’ measure of damages for each class member, since each individual California resident may be affected differently by the advertising activities: Some may gamble online in response to the ads; some may become addicted to the services; some may see the ads and ignore them, and some may never see the ads and decide to either gamble or not, independent of their exposure to the ads. While the difference in damages calculations is not an insurmountable hurdle to overcome in class certification, it certainly presents difficulties for the Plaintiffs in this regard.

The Commerce Clause

Although the First Amendment may complicate the legal analysis applicable to this case, the constitutional provision that may be the death knell for this suit is the dormant commerce clause. A number of state laws that attempted to regulate content or transactions on the Internet have been struck down on commerce clause grounds.³⁰ While no case has yet determined the

²⁷ Id. at 54

²⁸ Id. at 55.

²⁹ See *Greater New Orleans Broadcasting Association, Inc., v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.E.D.2d 161 (1999); *United States v. Edge Broadcasting Co.*, 509 US 418 (1993).

³⁰ See *American Libraries Ass’n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997)(N.Y. statute unlawful under Commerce Clause); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999)(N.M. statute unlawful under both First Amendment and Commerce Clause); *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.2d 737 (E.D. Mich. 1999)(prelim. Inj.), aff’d 238 F.3d 420 (6th Cir. 2000); 147 F.Supp.2d 827 (E.D. Mich. 2002)(summary judgment; Mich. Statute unlawful under both First Amendment and Commerce Clause); *PSINet Inc. v. Chapman*, 108 F.Supp.2d 611 (W.D.

applicability of the commerce clause to online gambling advertising restrictions under state law, a sound argument exists that all such state laws are invalid when applied to Internet transactions and advertisements, which inherently involve interstate commerce. The commerce clause prevents the states from trying to regulate commercial activities occurring outside their own borders, which is exactly the type of conduct that the Plaintiffs challenge in the subject Complaint. Given the undeveloped state of advertising law as it relates to the dormant commerce clause, it is impossible to predict how this issue might play out in the courts. However, it is a safe bet that one or more of the Defendants will raise it in defense of the claims.

Conclusion

Regardless how this case ends up in the court system, its filing raises broader issues. The Plaintiffs point to the industry's focus on minors, young adults and the elderly in its marketing activities. Regardless of the truth of these assertions, the points may be well taken. The online gambling industry cannot afford to ignore the public perception that it preys on the defenseless and weak-willed. The claims pertaining to minors are particularly troublesome, and could form the basis for significant private or governmental litigation in the future, if not promptly addressed by the industry as a whole. Gambling is an adult activity. Irrespective of the arguments that might be made pro or con regarding the appropriate age at which one should be allowed to engage in social betting, minors should not be encouraged to gamble given the legal repercussions of doing so; particularly in the United States. Various options exist to verify the age of online users of gambling websites, including [one developed](#) by this author. Additional suits like the instant Complaint are inevitable. Often, perception is reality, and if enough complainants claim that gambling advertising is illegal, the average citizen will begin to accept that reality. Therefore, the more the industry can do to focus its advertising on its desired target market, and avoid spillover effect onto minors, problem gamblers, or the weak-willed, the better it will fare in the courts, and in the court of public opinion.

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Va. 2000)(prelim. Inj.); 167 F.Supp.2d 878 (W.D. Va. 2001), questions certified 317 F.3d 413 (4th Cir. 2003), aff'd 362 F.3d 227 (4th Cir. 2004), rehearing en banc denied 372 F.3d 671 (4th Cir. 2004)(1-4-8)(Va. Statute unlawful under both First Amendment and Commerce Clause); *ACLU v. Napolitano*, Civ. No. 00-505 (D.Ariz. Feb. 19, 2002)(Ariz. Statute unlawful under First Amendment and Commerce Clause); *Southwest Booksellers Ass'n v. McMaster*, C.A. No. 2:02-3747-23 (D.S.Car. July 6, 2004)(summary judgment denied and hearing ordered "with respect to the effectiveness of the proposed alternatives as compared to the challenged statutory proscription," relying on COPA); *ACLU v. Goddard*, Civ. No. 00-505 (D. Ariz. July 22, 2004)(Ariz. Statute still unlawful under both First Amendment and Commerce Clause after amendment).