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Search engines: safe harbor for sponsored gambling ads

A court in California recently ruled that Section 230 of the Communications Decency Act immunises search engines from liability under Californian law for sponsored gambling advertisements. Joseph V. DeMarco, of DeVore & DeMarco LLP and Ben D. Manevitz, of Manevitz Law Firm, analyse the case and the implications of the court's ruling.

As readers of this publication are aware, neither numerous criminal prosecutions nor the passage of federal legislation adding still further prohibitions to internet gambling have slowed the growth of this ever-growing form of e-commerce. This is due, in large part, to the practical difficulties of bringing actions against site operators located overseas - often in jurisdictions which are friendly to their activities. As a result, governmental officials and private litigants are increasingly bringing actions directed against persons and entities which, although not directly involved in internet gambling, are necessary to facilitate the operations of those sites. These 'secondary actors' have included radio companies, advertising companies, payment processors, and even banks.

California court ruling

Recently, in Cisneros v. Yahoo! et. al.[1], a California Superior Court dismissed a class action against numerous search engines which advertised for gambling websites. The Court concluded that the plaintiffs' claims were barred, in part, by Section 230 of the Communications Decency Act (CDA). Given the limited law on application of the CDA to secondary actors in the gambling context, and although the perils of secondary liability regarding internet advertising for online gaming are real, the Cisneros decision offers some guidance (albeit in limited cases) on the limits of secondary liability.

Section 230 of the Communications Decency Act

Section 230 of the CDA was enacted to ensure that providers and users of 'interactive computer services' would not be liable as 'publishers' of any information provided by another 'information content provider'[2]. Thus, Section 230 protects website operators, search engines and similar services - as well as users of such services - from liability for third-party content published on the site, even if the site operator or user edits the content, for example, by removing inappropriate content[3]. Put another way, the CDA creates a federal safe harbor from certain causes of action relating to the content of the materials posted on a website. However, there are important limitations to this safe harbor. Most notably, immunity is lost whenever the website operator is 'responsible, in whole or in part, for the creation or development of information provided through the internet or any other' interactive computer service[4]. Immunity also is not available where it would 'impair the enforcement of [any] Federal criminal statute'[5]. The contours of what it means to be 'responsible' for the development of content, or to 'impair' the enforcement of a criminal statute are, however, far from clear.

Federal anti-gambling statutes

In the United States, the Wire Wager Act makes it a crime for a person in the business of betting or wagering to take bets online, or to even transmit betting-related information across state or international borders[6]. With regard to the activities of secondary actors, the federal aiding and abetting statue provides that:

'Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal [and] [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is

punishable as a principal[7].

Federal law also prohibits conspiracies to violate the Act[8].

In 2003, based on these laws, the Department of Justice (DoJ) issued a letter to media broadcasters making clear the DoJ's position that since the online gambling violated the law, running advertisements for online gambling could make those broadcasters subject to criminal liability under conspiratorial and aiding and abetting principles outlined above[9]. In part as a result of this scrutiny, in 2004, major search engines stopped running ads for online gaming establishments[10]. Moreover, in 2007, the three largest internet search engine companies (Microsoft, Yahoo, and Google) reportedly agreed to pay approximately $32 million to settle allegations that they had improperly facilitated online gambling[11].

The Cisneros action, decision and implications

Notwithstanding their agreement to forgo advertising for gambling websites, in 2008 a group of plaintiffs filed a private class action lawsuit suit against Yahoo, Google, and 10 other search engines claiming that their sponsored (as opposed to non-sponsored) online ads for online gambling violated certain California consumer protection state statutes[12]. The complaint sought injunctive and monetary relief, including attorney's fees[13]. In November 2008, following a trial, Judge Kramer of the Superior Court of California (San Francisco) ruled that, for the following reasons, the search engine defendants were not liable and that plaintiffs lacked standing to sue them.

Reason one

The Court found that the defendants had rigorous policies and practices designed to detect and prevent the posting of online ads for gambling sites[14]. While conceding that some online gambling sites had likely 'snuck onto' the defendants' websites, the Court concluded that there was not enough evidence to support the plaintiffs' contention that the defendants were 'allowing online gambling links'[15].

Whether a 'Section 230 defense' would survive in the context of a criminal prosecution is also unclear

Reason two

The Court found that the plaintiff's request for injunctive relief was not feasible[16]. The efforts by the operators of gambling websites to circumvent the defendants' policies made a simple injunction against the conduct inappropriate and ineffective, and a set of specific directions to defendants would be outside the court's expertise[17].

Reason three

The Court found that the plaintiffs in the case lacked standing and were not the appropriate individuals to make the claims in the case[18]. Not only had both named plaintiffs (by their own admission) stopped online gambling many years ago, but neither would even need to use the search engines to find such sites to engage in that activity[19]. As the Court noted with respect to one of the named plaintiffs, '[i]f she were to gamble online in the future, it is clear from her knowledge of how to access unsponsored online gambling links, she will be able to do so'[20].

Reason four

Finally, the Court found that Section 230 immunity applied to the defendants' conduct and that the California statutes were inconsistent with and preempted by the CDA. Specifically, the Court held that, although the defendants had established editorial guidelines and otherwise facilitated the placement of the ads, they were immune from liability because they were in no way responsible for creating the content of the ads[21].

In addition, without extensive analysis, the Court rejected the plaintiffs' claim that the search engines were 'aiding and abetting' the illicit gambling occurring on the sites advertised, to a degree which precluded application of Section 230[22]. Judge Kramer explicitly rejected those allegations, citing authority from a federal court of appeals case which drew analogies to newspapers, radios and telephone companies which might have a general awareness that their networks were sometimes used for illegal purposes, but are nonetheless free from liability for the underlying deeds[23]. In sum, the 'defendants' perception of the legality of internet gambling advertisements and the fact that [they] made money from selling internet access to sponsored sites are irrelevant to the application of Section 230[24]'.

Conclusion

Cisneros therefore provides some comfort that online search engines whose networks are used to advertise gambling transactions - notwithstanding rigorous controls they have put in place to prevent placing such ads - invoke the safe harbor protections of Section 230 of the CDA. But larger questions remain as to the reach of that immunity in other cases. It is unclear, for example, whether secondary actors that provide services which are more specialized, and less akin to those of a 'common carrier', will be able to rely on Section 230. Nor is it clear whether secondary actors that actively solicit business from gaming sites are similarly immune. To the extent that the secondary actor is creating or modifying

content posted by others, the reach of Section 230 is also murky. Finally, whether a 'Section 230 defense' would survive in the context of a criminal prosecution is also unclear. In sum, determining the likelihood of whether Section 230 of the CDA applies to secondary actors in future cases is no easy task - a difficulty only compounded by the demonstrated willingness of governmental regulators and private plaintiffs to bring litigation against such persons and entities. In the end, assessing the likelihood of Section 230 safe harbor requires a highly fact-specific and fact-intensive analysis of these and other factors through the prism of legislation and regulation governing this rapidly evolving area of the law.

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1. No. CGC-04-433518 (Cal. Sup. Ct. 6 Nov. 2008).
2. 47 U.S.C § 230(c)(1).
3. Section 230 accomplishes this immunity by providing that '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. 47 U.S.C. § 230(c)(1). The CDA defines 'interactive computer service' as 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions'. 47 U.S.C. § 230(f)(2).
4. 'Information content provider' is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other' interactive computer service. 47 U.S.C. § 230(f)(3) (emphasis supplied).
5. § 230(e)(1).
6. See 18 U.S.C § 1084(a).
7. 18 U.S.C. § 2.
8. See 18 U.S.C § 371.
9. Letter, dated 6 November 2003, from Deputy Assistant Attorney General John G. Malcolm to the National Association of Broadcasters.
10. 'Web Engines Plan to End Online Ads for Gambling', Matt Richtel, New York Times, 5 April 2004.
11. See http://www.financialexpress.com/news/microsoft-google-yahoo-to-settle-gambling-claims/252431 (citing the Associated Press).
12. Complaint at 50-58, Cisneros v. Yahoo! et. al., No. CGC-04-433518 (Cal. Superior Ct.). The Complaint alleged violations of California Unfair Business Practices statute (Cal. Bus. & Prof. Code §§17200 et seq. and Cal. Civ. Code §§17500 et seq.), designed to prevent unfair or 'sharp' business practices from harming California residents.
13. Id.
14. Cisneros, at 7.
15. Cisneros, at 8.
16. Cisneros, at 8.
17. Cisneros, at 8.
18. Cisneros, at 9.
19. Cisneros, at 9.
20. Cisneros, at 10.
21. Cisneros, at 10-12.
22. Cisneros, at 12.
23. Id. (citing Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003)).
24. Id.

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