The Soft Spot

- *Evaluating the potential criminal liability of gaming software developers*

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The rising popularity of social gaming for so-called "play" money,[1] along with the federal ban on acceptance of illegal online gambling transactions,[2] has resulted in a boon for gaming software developers. Typically, the developers create gaming software that is intended solely for legal purposes; in connection with play money, virtual currency, or social gaming. Sometimes, however, such gaming software can be used for illegal gambling purposes by third party licensees or operators. The potential criminal liability attaching to software developers in such circumstances is unsettled and can create substantial legal headaches for coders.

A prime example of this concern is the recent felony prosecution against Extension Software by New York state authorities, who claim that the company profited from the use of its software for illegal bookmaking activities.[3] The company contends that it merely provides software to the marketplace and was not aware of anyone using it to take illegal bets in the U.S.[4] The owner further stated that the software was not designed to take bets – only to display which sporting events can be offered for betting, and to store related wagering information, all of which is presumptively legal.[5] Numerous other companies provide gaming or sports-betting software to end users, but do not control how the software is used once it is purchased or licensed. Some developers receive compensation on a 'pay-per-head' basis,[6] but that is only one of an infinite variety of compensation relationships that could span the horizon from flat fee purchases to revenue sharing. Moreover, the precise nature of the licensing relationship and the level of knowledge (or willful blindness), will likely play significant roles in determining any potential liability for gaming software developers, under existing law. Regardless of the compensation arrangement, software licensing has become a hotbed of potential legal liability for coders.

The starting point in the legal analysis of software developer liability is with accomplice liability theories. Under U.S. federal law and the laws of most states, those who assist others in committing crimes, or who form agreements to engage in criminal activity, are punished the

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[1] The global social gaming market is expected to generate approximately $8.2bn in revenues in 2012, rising to $14.6 billion by 2015 — a compound annual growth rate of 21 percent. "GamblingData Social Gaming White Paper 2012." GamblingData.com. October 2012. Gambling Data. Available at: http://www.gamblingdata.com/files/SocialgamingDataReportOct2012.pdf

[2] *See,* Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), 31 U.S.C. § 5361.

[3] Kim Zetter, "Write Gambling Software, Go to Prison", WIRED, Jan. 3, 2013, available at: http://www.wired.com/threatlevel/2013/01/coder-charged-for-gambling-software/

[4] *Id.*

[5] *Id.*

[6] Sam Borden, "Neighborhood Bookies Putting Lines Online", The New York Times, Mar. 29, 2012, available at: http://www.nytimes.com/2012/03/30/sports/bookies-using-new-technology-for-old-fashioned-betting.html?pagewanted=all&_r=0

same as those who actually perpetuate the crime. Typically, the government relies on the concepts of "aiding and abetting" or "conspiracy" when mounting such prosecutions. One who substantially assists another individual in committing a criminal offense is guilty of "aiding and abetting."[7] "Conspiracy," on the other hand, requires the government to prove knowledge of, and voluntary participation in, an agreement to violate the law.[8] Conspiracy does not require a completed crime, while "aiding and abetting" does not expressly require proof of an agreement to violate the law.[9] For example, even "teaching" or "instructing" another on how to make an illegal venture succeed can be sufficient for liability to be imposed under aiding and abetting statutes.[10] At least one court has held that a defendant's personal knowledge of the details of a bookmaking operation need not be demonstrated, in order to be guilty of aiding and abetting such an enterprise.[11] Moreover, participants in illegal gambling operations can be held criminally responsible for offenses that are *likely* to occur in the course of such operations, even if not specifically intended.[12] As is evident from the above, the standard for imposing accomplice liability on gambling enterprise participants is somewhat nebulous and therefore, favorable to the prosecution. Even those with minimal participation in gambling operations can be caught up in conspiracy allegations.

Federal gaming statutes have also been broadly applied against a wide variety of participants, from big bosses all the way down to janitors.[13] The U.S. Supreme Court has held that, for purposes of proving a violation of the Illegal Gambling Business Act,[14] the government need not prove that the defendant actually performed any act of illegal gambling; only that the defendant "participated" in the gambling business.[15] However, in construing a separate federal statute prohibiting interstate gambling activity, the High Court found that some level of "active encouragement" of the illegal interstate activity was required.[16] Courts have created various tests in determining the level of involvement required to prove criminal culpability related to a gambling enterprise.[17] With the particulars of each analysis varying, most tend to focus on how *necessary* the defendant's activity was for the operation of the gambling enterprise. Thus, one court has held that imposing liability on those individuals whose activity was merely *helpful* to the gambling operation would push the reach of the law further than Congress intended.[18]

Naturally, most of the cases considering these issues were decided before the Digital Age – many even before the widespread use of personal computers and mobile devices. Thus, the precise issue of software developer liability in the gambling context has not been settled by U.S. courts. It therefore comes as no surprise that the developers at Extension Software were more

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[7] Title 18 U.S.C. § 2.
[8] Title 18 USC s. 371; *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980).
[9] *Perenira v. United* States, 347 U.S. 1, 11 (1954).
[10] *Id.* at 280.
[11] *U.S. v. Miller*, 22 F.3d 1075 (11th Cir. 1994).
[12] *Miller* at 1078-79 ("As an accessory in the gambling business, Miller can be held 'liable for any criminal act which in the ordinary course of things was the natural or probable consequence' of that criminal activity.'")
[13] *U.S. v. Merrell*, 701 F.2d 53 (6th Cir. 1983).
[14] 18 U.S.C. §1955
[15] *Sanabria v. U.S.*, 437 U.S. 54, 70 (1978).
[16] *Rewis v. U.S.*, 401 U.S. 808, 813 (1971).
[17] Compare the "*Boss* Test;" *U.S. v. Boss*, 671 F.2d 396 (1982) with the "*Sanabria* Test", *Sanabria*, *supra*.
[18] *See*, *Boss* at 400 (holding that a waitress who merely served drinks could not be considered part of a gambling enterprise under 18 U.S.C. § 1955).

than shocked upon finding federal agents at their door and a criminal prosecution for promoting gambling activities in their future.[19] Coders across the United States, and the globe, are naturally concerned that any misuse of their software product, or close involvement with licensees, can land them in hot water as a conspirator, or aider and abettor. In 2003, many media outlets were similarly shocked to learn that the U.S. Department of Justice considered the mere advertising of online gambling to constitute "aiding and abetting" under federal law.[20] After announcing its position, the DOJ proceeded to extract millions of dollars in fines and civil penalties from numerous media outlets for their prior advertising of online gambling activity.[21] Routine cash seizures of advertising proceeds occurred under this theory as well.[22] Based on well-founded concerns regarding such accomplice theories, most payment processors and intermediaries fled the U.S. market shortly thereafter.[23]

Certainly, software developers are not automatically liable for any misuse of their gaming software, absent some sort of knowledge of the illegal activity, intricate involvement with the illegal gaming enterprise, or active encouragement of unlawful use of their product. But as in all criminal cases, issues such as "knowledge" or "intent" are decided by a jury, and often based on circumstantial evidence. Thus, all of the surrounding circumstances would likely be considered in determining criminal responsibility of gaming software developers. Some of the issues that might be considered are:

1) The nature and basis of any compensation paid to the developer by end users / licensees;
2) The terms of any contract between the developer and end users / licensees;
3) The existence of any communications between the developer and the end users / licensees, relating to legal/illegal intended use of the software;
4) The extent to which the software is actually used in the market, for illicit purposes;

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[19] *See*, Footnote 3, *supra*.
[20] The "warning letter" sent to the National Association of Broadcasters relating to online gambling is available, here: http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf
[21] For example, *see*: Jason Ryan, "Microsoft, Google, Yahoo to Pay $31.5M Over Illegal Gambling Ads", ABC News, Dec. 19, 2007, available at: http://abcnews.go.com/Technology/FedCrimes/story?id=4029545&page=1#.TyWzBW8V3CI (last visited Jan. 29, 2012).
[22] For example, *see*: Matt Richtel, "U.S. Steps Up Push Against Online Casinos by Seizing Cash", The New York Times, May 31, 2004, available at: http://www.nytimes.com/2004/05/31/technology/31gambling.html?ex=1086580800&en=15eb47a6693627cb&ei=5062&partner=GOOGLE
[23] *See*, Matt Richtel, "Citibank Bans Credit Cards From Use in Web Gambling," The New York Times, June 15, 2002, available at: http://www.nytimes.com/2002/06/15/business/citibank-bans-credit-cards-from-use-in-web-gambling.html; Philbert Shih, "Regulations Changing the Face of Online Billing," Web Host Industry Review, Sept. 26, 2003, available at: http://www.thewhir.com/features/online-billing.cfm; Pete Harrison, "More Firms Flee U.S. Online Gaming Ban," Business Report, October 11, 2006, available at: http://www.busrep.co.za/index.php?fArticleId =3480982; Aaron Todd, "NETeller Exit Impacts U.S. Internet Gambling Market," Casino City Times, January 18, 2007, available at: http://www.casinocitytimes.com/news/article.cfm?contentID=163628; Joshua McCarthy, "Online Poker Transfers No Longer Available Through ePassporte", Online Casino Advisory, April 15, 2008, available at: http://www.onlinecasinoadvisory.com/casino-news/online/epassporte-cancels-online-gambling-transfers-1625.htm; *see also* "Epassporte Statement to PitbullPoker," posted on CompatiblePoker.com, April 11, 2008, available at: http://www.compatiblepoker.com/epassporte-closed.cms.htm.

5) The manner in which the software is designed for easy modification by users for illegal gambling;
6) The existence of legitimate uses of the software (i.e., social gambling,[24] free play, etc); and
7) Any efforts by the developer to avoid gaining knowledge of illegal use of the software (i.e., willful blindness).

Naturally, no one factor would be determinative of imposition of accomplice liability on the developer, or proof of criminal intent. But a combination of factors, showing, for example, that the developer was well-aware of the intended illegal use by licensees, established through communications or otherwise, could be problematic for the developer, even in the absence of direct participation in the gaming enterprise. Notably, the final 'willful blindness' factor can trigger the issuance of an "Ostrich Instruction" by the court to the jury in a criminal trial. This type of jury instruction allows the jurors to infer knowledge from a combination of suspicion and indifference to the truth. In other words, if a person had a strong suspicion that things were not what they seemed or that someone had withheld important facts, yet shut their eyes for fear of what they might learn, the jury can conclude that knowledge of illegal activity exists.[25] The instruction is designed for cases where there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.[26]

While the law remains unsettled regarding the extent of software developer liability, those developers who create products that can be readily adapted for illegal gambling, receive higher-than-market rate proceeds for use of their products, and/or license to users who are known to be involved with illegal gambling, run a substantial legal risk. However, the current state of the law on this issue has the potential to ensnare innocent victims; i.e., those developers who create a legitimate product for legal purposes but whose customers misuse the product for illegal gambling. Circumstances may not always be what they appear, and some developers may find themselves caught in wide conspiracy nets cast by state and federal authorities responsible for enforcing gambling laws. Worse yet, the fear of potential criminal exposure may cause some developers to stop coding, out of fear of getting caught up in a test case, or unwarranted prosecution. This sort of "chilling effect" is constitutionally problematic, since it is well-settled that software is entitled to full First Amendment protection.[27] The mere threat of prosecution can result in significant self-censorship by developers.

The political winds are shifting, however; particularly in the realm of online gambling. Nevada, Delaware and New Jersey have already legalized forms of online gambling, and numerous other states are considering similar legislation. State lotteries are exploring the online sale of lottery tickets, with Illinois already offering this product. Legalization of online casino gambling (and possibly sports betting) is all but inevitable. As with any form of progress, this

[24] Some states permit exemptions from their general gambling prohibitions for 'penny ante' or small stakes games between acquaintances.
[25] *U.S. v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990).
[26] *Id.*
[27] *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 3653 (2011); *New.net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1111 (C.D. Cal. 2004).

evolution will take time. But until legalization becomes a reality, gaming software developers must undoubtedly proceed with caution to avoid becoming a soft target.

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