

**FILED**  
San Francisco County Superior Court

NOV 7 2008  
GORDON PARKS Clerk  
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

MARIO CISNEROS and MICHAEL  
VOIGHT, on behalf of themselves, all others  
similarly situated and the General Public,

Plaintiffs,

vs.

YAHOO!, INC., GOOGLE, INC., et al.,

Defendants.

) Case No.: CGC-04-433518

) TENTATIVE TRIAL DECISION

INTRODUCTION

This action was filed on August 3, 2004, and the First Amended Complaint was filed on September 8, 2006. The First Amended Complaint alleges that defendants operate internet website search engines that wrongfully post advertisements for illegal gambling activities in violation of Business and Professions Code §§ 17200 et seq. ("the UCL") and various other California laws. The Complaint seeks injunctive relief, restitution, disgorgement and remedies relating to the claims for money.

1 By orders filed on November 2, 2005 and April 13, 2007, this court ruled that under  
2 California law, no form of monetary relief would be available to the plaintiffs in this case, and  
3 thus the remedies of restitution and disgorgement were stricken. Therefore, the remaining  
4 remedies are injunctive and declaratory relief.

5 Over the life of this case, some defendants were dismissed for various reasons. As a  
6 result, the remaining defendants are Google, Inc., Yahoo!, Inc. and Overture Services, Inc.,  
7 which is now known as Yahoo! Search Marketing (these latter two defendants are respectively  
8 parent and wholly-owned subsidiary and shall be referred to as "Yahoo!").

9 The case was tried before this court over several days from February to June, 2008, and  
10 has been fully briefed. In summary, the court finds that plaintiffs are not entitled to injunctive  
11 relief against any defendant for several reasons. These reasons are:

- 12 1. Each defendant has voluntarily ceased the alleged wrongful activity, and there is  
13 no reasonable probability that any defendant will resume allowing sponsored on-  
14 line gambling links its website.
- 15 2. Even if an injunction could somehow be justified here, appropriate equitable  
16 relief could not be fashioned.
- 17 3. Neither plaintiff has standing to obtain an injunction here.
- 18 4. Each defendant is exempt from liability for the content posted on its website  
19 under the Communications Decency Act ("CDA"), 47 U.S.C. § 230.

20 Thus, it is not appropriate to enjoin any defendant from publishing advertising for illegal  
21 gambling activities.

22 As for declaratory relief, for the reasons set forth above, plaintiffs are not entitled to a  
23 declaration that defendants' activities regarding on-line gambling are in violation of the  
24 California Penal Code or the UCL, or are otherwise unlawful or actionable in this case.



1 materials, matters harmful to minors, and known fraudulent enterprises. If an applicant attempts  
2 to sponsor a link to one of these prohibited types of website, the protocols automatically reject  
3 the application.

4 As for links that the search engine operator will allow to appear, both Google and Yahoo!  
5 offer consulting services regarding the choice of search terms that will generate the sponsored  
6 site ad, the wording of the ad headline and text, and other similar matters.

7 Commencing in April of 2004, both Google's and Yahoo's policies have been to prohibit  
8 sponsored links to on-line gambling sites. Google's policy is set forth in Exhibits G07 and G09  
9 and was also established by the testimony of Alana Karen, Google's Manager of its policy  
10 regarding internet gambling. Yahoo!'s policy is set forth in Exhibit Y03 and was further  
11 established by the testimony of Jason Dorn, Yahoo!'s Senior Director of Network Quality. Each  
12 of these witnesses and the documentary evidence submitted through them presented credible  
13 testimony regarding the respective policy and its substance and means of operation. These  
14 witnesses established that neither defendant has provided consulting services to operators of on-  
15 line gambling sites since the inception of its policy prohibiting postings of such materials.

16 The defendants' anti-on-line gambling policies share several important characteristics.  
17 Under each policy, every advertiser must agree to the anti-on-line gambling site policy before its  
18 ad is accepted. Each defendant's automated sponsorship sign-up program uses key words to  
19 detect and reject proposed sponsorships that violate the policy. The key words are updated as  
20 new words used by offenders are identified. Similarly, automated reviews of posted sites using  
21 thousands of gambling terms spot potential violators and flag the potentially offending ads for  
22 human review. Each defendant has allocated and trained employees to enforce their policies. The  
23 employees supplement the automated protocols and perform investigative functions such as  
24 manual review of sponsorship applications, spot checking sponsored sites, regular sweeps of the  
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1 defendant's website at varying locations to spot ads in violation of the policy, and inspecting of  
2 sites flagged for human review by the automated screening programs.

3         The operation of an on-line gambling site can be a highly profitable venture.  
4 Accordingly, since the implementation of each defendant's anti-on-line gambling policies and  
5 enforcement protocols, on-line gambling site operators have employed various artifices to  
6 circumvent defendants' policies and protocols. These artifices include designing links that first  
7 lead to non-gambling sites but allow for forwarding to a gambling site, designing sites that do  
8 not appear to be linked to gambling but actually allow for access to on-line gambling, and  
9 placing initial sites that do not lead to gambling and then changing them so that they do lead to a  
10 gambling site.

11         These schemes precipitate the need for defendants to modify their protocols and to create  
12 other enforcement activities so as to identify sponsored links to on-line gambling sites that have  
13 evaded the defendants' non-gambling website policy. Much like bacteria that mutate in order to  
14 survive antibiotics, would be on-line gambling operators change their tactics to escape detection,  
15 necessitating different enforcement techniques by the defendants.

16         The evidence regarding this back and forth parrying established that despite substantial  
17 effort, it is likely not possible for defendants to avoid the posting of every on-line gambling site.  
18 Once a site is posted, it will exist for some period of time despite defendants' persistent search  
19 and destroy practices. Thus, plaintiffs' evidence that it may from time to time be possible to  
20 access a gambling website using Google or Yahoo!'s search engines is consistent with the  
21 magnitude of the task of policing the defendants' websites. This means that evidence of any such  
22 discoveries by plaintiffs are not by themselves fatal to the following conclusions reached by this  
23 court regarding the nature and quality of each defendant's anti-on-line gambling policy:

- 24         1. Each policy constitutes a reasonable, good faith effort to eliminate the presence of on-  
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1 line gambling sites which could be directly or indirectly accessed through sponsored  
2 search sites.

- 3 2. Each defendant's methodology of communicating and enforcing its policy is  
4 reasonably directed to accomplish the purposes of the policy.
- 5 3. The ongoing efforts of would-be on-line gambling site operators to circumvent the  
6 policies of each defendant are substantial and present difficulties that must be  
7 considered in judging the effectiveness of each policy.
- 8 4. Under all pertinent circumstances, each defendant's policy as applied constitutes an  
9 effective and adequate deterrence to the presence of on-line gambling sites on the  
10 defendant's website.

11 In contrast, plaintiffs did not produce any evidence sufficient to establish that any  
12 defendant was intentionally accepting ads for online gambling sites or that either defendant's  
13 program to prevent and eliminate such sites was not being operated in good faith or was  
14 otherwise inadequate.

15 Similarly, plaintiffs presented no substantial evidence that either defendant has provided  
16 assistance since April 2004 to any gambling web site operator regarding the headline, text or  
17 other similar aspect of an on-line gambling sponsored ad. Defendants, however, each provided  
18 credible evidence that no such assistance was knowingly provided since April of 2004.

19 The evidence also established that any visitor to the defendants' websites could readily  
20 access online gambling through non-sponsored sites.

21 Finally, Plaintiff Voight testified that he has not gambled online "for years" and does not  
22 intend to do so in the future. Plaintiff Dewart has not used any of the defendants' websites to find  
23 on line gambling since 2001, she is aware of the abundance of non-computer casinos in  
24 California where she presently gambles, and she is aware that online gambling sites can be  
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1 accessed without sponsored links.

2 ANALYSIS

3 1. Each defendant has ceased allowing sponsored online gambling links on its website and there  
4 is no reasonable probability that any defendant will resume doing so.

5 In order to obtain an injunction in this action, plaintiffs have the burden of proving actual  
6 or threatened great or irreparable injury that would warrant injunctive relief. C.C.P. § 526, *City*  
7 *of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d. 516, 526.

8 Where the defendant has ceased conducting the alleged harmful activities and there is no  
9 reasonable probability that the acts will be repeated in the future, an injunction should not issue.

10 *Scripps Health v. Marin* (1999) 72 Cal.App.4<sup>th</sup> 324, 332. An injunction “should neither serve as  
11 punishments for past acts, nor be exercised in the absence of any evidence establishing the  
12 reasonable probability the acts will be repeated in the future.” *Id.* Injunctive relief can be denied  
13 where the defendant voluntarily discontinues the wrongful conduct. *Cisneros v. U.D. Registry,*  
14 *Inc.* (1995) 39 Cal.App. 4<sup>th</sup> 548, 574.

15 Without comment on whether defendants’ sponsoring online gambling links in the past  
16 was wrongful, it is clear from the evidence that each defendant has ceased such sponsorship  
17 through policies voluntarily adopted in April, 2004, before this lawsuit was filed. Beyond that,  
18 each defendant has actively taken steps to prevent circumvention of such policies and has  
19 expended substantial resources toward that end. While the nature of how sponsored links are  
20 placed makes enforcement difficult, this court is convinced that each defendant has intended  
21 since April 2004 to terminate on-line gambling link sponsorship and has taken reasonable, if not  
22 aggressive, steps to eliminate all such links from their websites.

23 To be sure, at any point in time there are likely sponsored online gambling sites that have  
24 snuck onto defendants’ websites, but it cannot be concluded that such successful sneaking is  
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1 evidence that defendants are allowing online gambling links or that there is a reasonable  
2 probability that defendants will relax or eliminate their clear preventative policies in the future.  
3 To the contrary, the evidence established that defendants step up their policing in order to thwart  
4 schemes that try to evade their policies and protocols.

5 In addition, the plaintiffs offered absolutely no evidence from which it could be  
6 concluded that the defendants are intentionally allowing online gambling links, that their  
7 policing efforts are less than sincere, or that somehow they will abandon their extensive and  
8 expensive efforts to remove gambling links and resume selling sponsorships to them.

9 2. Appropriate equitable relief could not be fashioned.

10 Even if somehow an injunction could be justified here, this court cannot envision what its  
11 terms would be. Plaintiffs request that defendants be enjoined from “running sponsored  
12 advertisements for online gambling web sites.” Such an injunction would not be appropriate  
13 because, as the evidence showed, there are substantial efforts by gambling site operators to sneak  
14 their links onto defendants’ websites. In light of this evidence, it would not be fair to order the  
15 defendants to prevent something that is beyond their control.<sup>1</sup>

16 An injunction with more specific direction as to what steps the defendants must take to  
17 eliminate online gambling links on their websites would also be inappropriate. This court lacks  
18 any information beyond the evidence presented at trial regarding how the website sponsorship  
19 protocols work, lacks the technical ability to fashion protocols to prevent intrusions, and lacks  
20 the ability to consider modifications and alternatives to protocols once the search sneakers figure  
21 out new and different ways to evade defendants’ policing. Simply put, it appears that the  
22 defendants are doing as good a job as possible at removing on-line gambling links, and that job is  
23 far better than anything this court could come up with in an injunction.

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25 <sup>1</sup> “No man is responsible for that which no man can control.” Civil Code § 3526.

1 Finally, plaintiffs request an injunction requiring defendants to post advertisements  
2 regarding the perils of online gambling, to be targeted to “reach 90% of the Californians who are  
3 potential problem gamblers or have gambled online, and to notify them as to where they can get  
4 psychological and financial help.” There is no basis in this case to render the defendants  
5 responsible to ameliorating the effects of online gambling. The defendants do not operate online  
6 gambling sites. As is set forth above, defendants have sought to eliminate sponsored sites from  
7 their search results and have implemented reasonable and expensive programs to that end. In  
8 addition, the idea that advertising could be targeted to reaching “Californians who are potential  
9 gamblers” is, mildly put, not feasible.

10 Finally, plaintiffs’ request that this court appoint a Special Master to account for  
11 revenues received by defendants from their “business practice” and to require forfeiture of those  
12 revenues is not justified by the findings here, not authorized under California law, and not  
13 consistent with the prior rulings in this case that dismissed all claims for monetary relief.

14 3. Plaintiffs lack standing to obtain an injunction.

15 An injunction is an equitable remedy available only to persons aggrieved by wrongful  
16 acts. In order to obtain an injunction, a party must be beneficially interested in the controversy as  
17 to him/herself. *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4<sup>th</sup> 739, 748. “The party must  
18 be able to demonstrate that he or she has some beneficial interest that is concrete and actual, and  
19 not conjectural or hypothetical.” *Holmes v. California National Guard* (2001) 90 Cal.App.4<sup>th</sup>  
20 297, 315.

21 Neither plaintiff meets the standing requirements for an injunction.

22 Plaintiff Voight has not gambled on-line for years and has not used any search engine to  
23 find any on-line gambling sites since 2001. He has no intention of gambling on line in the future.  
24 Plaintiff Dewart knows how to access modes of gambling that are alternative to on-line  
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1 gambling. She has not gambled on line since 2003, and intends to gamble at physical casinos in  
2 the future. If she were to gamble on line in the future, it is clear from her knowledge of how to  
3 access unsponsored on-line gambling links, she will be able to do so.

4 From these facts, it appears that neither plaintiff is threatened personally with harm from  
5 the claimed risk of future on-line gambling links appearing on a defendant's website. Each  
6 plaintiff will gamble on-line if she or he decides to, whether or not sponsored links appear on any  
7 defendant's website. Each can readily find a non-sponsored link if he or she wants to. Plaintiff  
8 Voight says he will not want to, but it is speculative as to whether he will hold that resolve.  
9 Plaintiff Dewart intends to gamble, perhaps online, and knows how to readily do so without  
10 sponsored links.

11 Indeed, it is undisputed that anyone who might want to could access on-line gambling  
12 without sponsored links on the defendants' websites. While not an issue for this trial, perhaps no  
13 one has standing to get an injunction under this scenario.

14 Be that as it may, it is clear that neither plaintiff here personally faces being aggrieved  
15 from any future sponsored on-line gambling link that may appear on a defendant's website.  
16 Thus, neither plaintiff has standing to obtain the injunction requested here.

17 4. Each defendant is exempt from liability, and hence an injunction, for the content posted on its  
18 website under the CDA.

19 Plaintiffs' claims are based upon defendants' conduct in posting advertisements and links  
20 provided by third parties for online gambling websites. Plaintiffs' claims are barred by section  
21 230 of the CDA" ("Section 230").

22 Under the CDA, providers or users of interactive computer services cannot be held liable  
23 for content provided by a third party. Section 230(c)(1) expressly states: "No provider or user of  
24 an interactive computer service shall be treated as the publisher or speaker of any information  
25 provided by another information content provider."

1           “By its plain language, Section 230 creates a federal immunity to any cause of action that  
2 would make service providers liable for information originating with a third-party user of the  
3 service.” *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327; *see also, Carafano v.*  
4 *Metrosplash.Com., Inc.*, (9th Cir. 2003) 339 F.3d 1119, 1123; *Gentry v. eBay, Inc.*, (2002) 99  
5 Cal.App.4th 816, 833 n.11. The reach of the CDA is broad and preempts all inconsistent state  
6 law, including claims under Section 17200, *et seq. Id.*

7           The purposes of section 230 immunity from liability are obvious. The internet is a robust  
8 means of communication where literally millions of people interact regularly. The magnitude  
9 and nature of internet activity is immense. In order to encourage such exchange of information  
10 and ideas, it is “the policy of the United States...to preserve the vibrant and competitive free  
11 market that presently exists for the internet and other internet computer services, unfettered by  
12 Federal or State regulation.” Section 230(b)(2).

13           If providers of internet access are held liable for the content of that which is posted on the  
14 internet, then providers of access will be chilled from developing and improving access. Further,  
15 Congress intended that the providers of internet access would self-regulate the dissemination of  
16 offensive materials. If in accepting that role the access providers were likewise accepting liability  
17 for materials that were not screened out, then providers would have an incentive to unduly filter  
18 otherwise acceptable materials. *Zeran v. America Online, Inc., supra*, 129 F.3d at 330-31.

19           Thus, the CDA differentiates between those who provide access to the internet and those  
20 who post material on the internet. Under Section 230(c), a provider of an “interactive computer  
21 service” qualifies for immunity as long as it does not also function as an “information content  
22 provider” (“ICP”) for the portion of the statement or publication at issue. An ICP is the entity  
23 responsible “for the creation or development of information provided through the Internet or any  
24 other interactive computer service.” Section 230(d).

25           The evidence presented does not establish that either Google or Yahoo! is an ICP with  
regard to the online gambling ads at issue. While defendants do require third party advertisers to  
follow certain editorial guidelines in creating their advertisements, this fact alone does not  
abrogate the protection afforded by the CDA. *Zeran v. America Online, Inc., supra*, 129 F.3d at

1 330.

2 To the contrary, the evidence established that each defendant polices its website in order  
3 to eliminate on-line gambling sites and has an express policy not to provide assistance to  
4 gambling site operators in the formulation of the form or content of their advertisements. No  
5 evidence was admitted to establish any failure to comply with these policies. Thus, each  
6 defendant has evidenced the self-regulating behavior that was intended by Congress to  
characterize the immunity granted under Section 230.

7 The Court further finds that plaintiffs' claim that the defendants are "aiding and abetting"  
8 crimes or that they profited from the sale of access to the internet does not preclude the  
9 application of Section 230 immunity to defendants. In *Doe v. GTE Corp.* (7th Cir. 2003) 347  
10 F.3d 655, the Court held that GTE was not liable under an aiding and abetting theory for the sale  
11 of videos taken without the knowledge or consent of the college athletes depicted in them. *Id.* at  
12 659-60. The fact that GTE profited from the sale of server space and bandwidth did not result in  
13 liability. Further, the Court noted that "even entities that know the information's content, do not  
become liable for the sponsor's deeds." *Id.* at 658. The Court said:

14  
15 Does a newspaper that carries an advertisement for 'escort  
16 services' or 'massage parlors' aid and abet the crime of  
17 prostitution, if it turns out that some (or many) of the advertisers  
18 make money from that activity? ... Just as the telephone company  
is not liable as an aider and abettor for tapes or narcotics sold by  
phone, and the Postal Service is not liable for tapes sold (and  
delivered) by mail, [a web host] cannot be classified as an aider  
and abettor of criminal activities conducted through access to the  
Internet.

19 *Id.* at 659.

20 Thus, defendants' perception of the legality of Internet gambling advertisements and the  
21 fact that defendants' made money from selling internet access to sponsored sites are irrelevant to  
the application of Section 230.

## 22 CONCLUSION

23 Upon the foregoing, plaintiffs are not entitled to the injunctive or declaratory relief  
24 requested, and each defendant is entitled to judgment on such claims in its favor.


1 FURTHER PROCEEDINGS

2 This matter is set for a Case Management Conference on December 10, 2008 at 3:30 p.m.

3 Each party may on or before December 5, 2008, file, serve, and deliver a courtesy copy to this  
4 court any proposed revisions to this Tentative Statement of Decision. Such proposed revisions  
5 shall not reargue the substance of the matters decided but rather shall be limited to drafting,  
6 factual, or other similar matters.

7 The parties shall also meet and confer before the Conference and submit three courts days  
8 before the Conference a Joint Case Management Conference Statement setting forth what further  
9 proceeding shall be appropriate in this matter.

10  
11 Dated: November 6, 2008

12   
13 Judge of the Superior Court  
14 **RICHARD A. KRAMER**