BY BENJAMIN R. MULCAHY

DAVID CARRUTHERS, a resident of Costa Rica and England, was taken into custody this past July during a flight layover in Texas. His alleged crime? Being the CEO of BetonSports PLC, which operates BetonSports.com, an online gambling Web site based out of Costa Rica and Antigua. For that offense, a federal grand jury returned a 22-count indictment charging Mr. Carruthers, BetonSports PLC, and others with racketeering, conspiracy and fraud.

The BetonSports.com operation is legal where it is based, and at press time, BetonSports PLC still hadn’t been duly served, forcing the United States to ask the court for more time to attempt service under the Hague Convention. But that didn’t stop the U.S. Department of Justice from seeking to recover $4.5 billion from the defendants and quickly obtaining a temporary restraining order effectively shutting down the BetonSports.com Web site, possibly forever.

And then, in a broadening attack on Internet gambling, on Sept. 7, New York law enforcement agents arrested the (now former) chairman of Sportingbet PLC, which operates ParadisePoker.com and various other Internet betting facilities out of London, at Kennedy International Airport (he had flown into New York from the UK) on a warrant issued by Louisiana for similar state law offenses, further rocking the foreign stock exchanges where many of the largest online gambling operations are traded.

The growth of the Internet has naturally led to an exponential proliferation of Web sites that are operated offshore but are accessible in the United States. Some of these offshore sites offer goods and services like online gambling that, while legal in much of the world, are clearly or arguably illegal here. The DOJ has targeted online gambling as a particular concern because, in the DOJ’s view, it is difficult to prevent minors from gambling online, unscrupulous online gambling operations can manipulate the odds in their favor with less risk of detection, and online gambling businesses provide criminals and possibly terrorists with an easy and efficient vehicle for laundering money and perpetrating identity theft.

Benjamin R. Mulcahy is a partner in the entertainment, media & communications group of Sheppard Mullin Richter & Hampton, and co-head of the firm’s sports industry team. He practices out of the firm’s New York and Century City offices.

If these online operations have no presence or assets in the United States, they may think that their lack of physical connection with this country will protect them. Indeed, it’s natural to wonder whether the United States would have brought the case against Mr. Carruthers and the other defendants in the indicted group if it hadn’t been able to take Mr. Carruthers into custody.

But the Justice Department had its eye on much more than Mr. Carruthers in this instance, with the indicted group including, among others, American advertising and promotions agencies that provided advertising and promotional services to BetonSports.com. By indicting the advertising and promotions agencies, the Justice Department has expanded its enforcement approach in these circumstances perhaps further than it ever has in the past.

For years, the Justice Department has taken the position that online gambling is illegal in the United States. The U.S. Attorneys’ offices in several districts have successfully prosecuted offshore Internet gambling operations, and law enforcement will likely continue to pursue those types of cases. But as the attempts to duly serve BetonSports PLC illustrate, bringing those cases often involves first having to track down someone to sue and then, once they’re found, having to fight costly and time-consuming jurisdictional disputes that law enforcement officials would prefer to avoid.

As a result, the DOJ has elected to pursue a path of what it perceives to be lesser resistance, going after American companies that provide services to offshore gambling sites (sometimes in addition to the sites themselves, sometimes in lieu of them) on the theory that the American companies are “aiding and abetting” the illegal operations.

Enforcement activity was initially directed at the major credit card companies that process the payments. Those actions resulted in major consumer credit and payment processing operators agreeing to block payment transactions related to online gambling.

Then enforcement turned against the newspapers, online search engines and radio and television networks that run ads for the gambling sites, asserting that American companies that advertise online gambling sites are aiding and abetting those illegal gambling operations. See Statement of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Nov. 20, 2002, http://www.usdoj.gov/criminal/cybercrime/JGM_IntGambling.htm.

With the BetonSports indictment, it now seems that the Justice Department is willing to target the advertising and promotions agencies (and their principals) that create campaigns for and drive traffic to the online gambling sites. The DOJ’s campaign against the media industry forecasts what the advertising and promotions industry can expect.

DOJ Position and Activity

In a letter sent in 2003 to the National Association of Broadcasters and other media trade groups, the DOJ asserted that “[w]ith very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore.” See Department of Justice Letter dated June 11, 2003 to the National Association of Broadcasters.

In the same letter, the DOJ indicated that it considered ubiquitous ads for Internet gambling operations to be “troubling because [the sheer volume of advertisements] misleads the public in the United States into believing that such gambling is legal, when in fact, it is not.”

In a thinly veiled threat that perhaps also provides some insight into how strong (or weak) the DOJ thinks its untested legal position is, the DOJ explained that it was sending its letter “as a public service” because it wanted the National Association of Broadcasters and all of its members to “be aware that the entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities.”

The DOJ has reportedly issued dozens, perhaps hundreds, of subpoenas to various radio stations, television networks and magazine publishers that have run ads for online gambling sites, recently focusing on Esquire as a result of a “Gentlemen’s Guide to Poker” feature in that magazine sponsored by Bodog Poker. But with all the bluster and subpoena activity surrounding advertising for online gambling, actual regulatory actions have been virtually non-existent, or at least not well-publicized.

In one instance that was made public, U.S. marshals seized a reported $3.2 million in ad dollars from Discovery Communications, a television and media company that runs the Travel Channel. The money had been paid to Discovery as part of an ad buy by ParadisePoker.com, where people can play interactive poker for free or for a fee. Most of the major media companies, including broadcast and cable television...
networks, Internet search engines, outdoor advertising
companies and radio networks, now stay away from
-taking ads from online gambling sites out of fear that
they will be charged with aiding and abetting the site
being advertised.

Aiding and Abetting Liability

Under existing statutory law and judicial precedent,
aiding and abetting liability can be imposed on those
who produce or run ads for illegal gambling operations
if the party who produces, accepts and runs the ads
knows the illegal nature of the site being advertised
and provides substantial assistance or encouragement
to the illegal gambling operation.

A quick review of the site being advertised should
reveal whether it is legal or illegal in nature, and
regulators have suggested that even just running the
ads for, and accepting ad dollars from, the
operator might constitute the “substantial assistance
or encouragement” required to support aiding and
abetting liability.

The risk associated with producing or running ads
for sites that are legal in the United States—such as
sites that use technology to prevent U.S. residents from
playing or sites that offer alternatives that are legal
in the U.S., such as poker tips, recreational gambling
that does not require a wager, or sweepstakes—is
relatively low because such activity is entitled to a
level of protection under the First Amendment. But
producing or accepting ads for pure online gambling
operations that accept bets from the United States
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Right of privacy claims arising out of
an employer’s inspection of e-mail
sent to or from a company e-mail
account routinely fail if the company
has a computer usage policy, of
which the employee is aware, that
informs employees that such e-mail,
or indeed the company’s devices, are
subject to monitoring by
company personnel.

and directly links viewers to the gambling Web site
being promoted or advertised. Although an online
or offline static advertisement that merely offers
information but no link conceivably could pose less
risk, an aggressive state prosecutor could still determine
that such a commercial message induces people
to gamble and is sufficient by itself to support aiding
and abetting liability.

Aiding and abetting liability has historically
been reserved for those who substantially assist or
encourage, or directly benefit from, the underlying
illegal enterprise with the knowledge of its illegal
character. Thus, in Emery v. Visa Int’l Serv. Ass’n, 95
Cal. App. 4th 952 (2002), the court rejected aiding
and abetting claims seeking to hold Visa responsible
for losses that the plaintiff suffered when he purchased
illegal foreign lottery tickets using his Visa card.

Addressing the plaintiff’s claim that Visa created
an actual or ostensible agency relationship with the
lottery operator by allowing the operator to exploit
the Visa logo and use the Visa payment system, the court
held that it had no actual or ostensible agency
relationship with the underlying site, and is
not liable for the losses sustained.

(2005), illustrates that it is possible to plead an
aiding and abetting claim against companies that advertise or
otherwise provide services to online gambling sites.

In Shulz, seeking to recover gambling losses and
other damages, attorney fees, disgorgement of profits
and injunctive relief, a purported class of plaintiffs
brought an action under California Business and
Professions Code §17200 against Ginix and other
credit card payment billing and processing companies,
claiming that they aided and abetted an illegal
online gambling operation by processing credit card
orders in connection with the scheme, allowing the
underlying operator to use their logos and link directly
to their payment processing Web sites, and receiving
payment based on user activity, all while at the same
time recognizing that the underlying site was not
an unlawful lottery.

The Superior Court granted the defendants’
demurrer and dismissed the claims, citing Emery.
But the California Court of Appeal reversed as to
defendant Ginix, holding that the complaint adequately pleaded
facts satisfying the aiding and abetting elements of
knowledge and substantial assistance or encouragement,
emphasizing the direct link from the gambling site to
the Ginix site to process credit card payments, the
allegation that Ginix had analyzed the underlying
Web site and recognized that it was an illegal lottery
but went forward anyway because it generated
substantial revenue, and the aura of respectability
and encouragement that the Ginix service and logo lent
to the underlying operation. Accordingly, the Court of
Appeal remanded the cause of action against Ginix.

Unlike the Emery case, where the court
emphasized that Visa should not be held liable
because Visa had no agency relationship with the
foreign lotteries that allowed lottery tickets to be purchased with Visa cards, and Visa had
no control over the preparation or distribution of the lotteries’ solicitations, an advertising or
promotions agency typically has a closer nexus
with its clients. And that nexus is arguably even
closer than usual if the agency has taken the
assignment and structured some sort of incentive
compensation arrangement.

In light of the current enforcement climate, it would
be prudent for advertising and promotions agencies to
bear in mind all potential civil and criminal liability
before accepting an assignment for an online gambling
operation. If an agency ultimately decides to accept
the assignment, it should seek to minimize its exposure
by evaluating the nature of the sites being advertised
in an effort to ensure that they are legal under U.S.
law, at least in part.

It should also probably avoid taking incentive
compensation and, if it handles media buys, should
consider adding provisions to its media orders that
seek to absolve it from liability to the advertiser in
the event any advance media payments are seized
by authorities.

Finally, if its own operations are located outside
of the United States, its principals may want to think
about taking a flight that has a layover here.