



United States v. Kane

PIIT Assignment – Court Case – Cyber Crime

Syed Asad Abrar – L164292 – Section E

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Introduction

United States v. Kane (United States of America v. John Kane and Andre Nestor) is a court case against two American citizens John Kane and Andre Nestor because they allegedly exploited a software bug in a video poker machine to win several hundred thousand dollars. This case was filed in the District Court of Nevada on January 19, 2011. The government (plaintiff) in this case alleged that both John Kane and Andre Nestor had violated Title 18 U.S.C. § 1030(a)(4) of the Computer Fraud and Abuse Act (CFAA). One important talking point in this case was that whether a video poker machine could be classified as a “protected computer” or not.

Background

Video poker machines offer different varieties of poker for customers to play. To exploit the video gaming machines, the government alleged that the Defendants would ask a casino employee to activate the “double up” feature on certain video poker machines. Essentially, the “double up” feature allows casino patrons to double their winnings or lose their bet. The defendants then legitimately played video poker until they obtained a winning hand of cards and collected their proper winnings. The government alleged that the defendants then used a complex combination of game changes, bill insertions and cash outs to access previous winning hands of cards, use the “double up” feature to change the denomination in the middle of the game to the highest denomination, and trigger a second jackpot. Because of a series of programming errors, the machine re-evaluated the original game at the new, higher denomination, triggering a jackpot which paid out at a higher denomination than the defendants had initially wagered. The two continued this for nearly five months, from April 2009 to September 2009.

Suspicious were posed at the Silverton Casino Lodge on July 3, 2009 when Kane claimed five jackpots in under an hour, each with 820-1 odds. After this, two Nevada’s Gaming Control Board engineers were called in to test the system for foul play. There, after studying the logic tray of the computer and EEPROM, the engineers found a previously unknown hardware flaw that Kane had manipulated to win the payouts for the jackpot.

Both Kane and Nestor were subsequently arrested and charged with conspiracy to commit wire fraud and infringing CFAA Title 18 U.S.C. § 1030(a)(4) on allegations that they exceeded "authorized" access to a protected computer in support of fraud.

Court Proceedings

Following their indictment, the Defendants filed a motion to dismiss, moving the Court to dismiss the charges alleging violations pursuant to Title 18 U.S.C. § 1030(a)(4), arguing that "even accepting all of the Government's factual allegations as true, the Government has failed to state a cognizable offense under the law."

Protected computer

Addressing the Defendants claim that video poker machines are not "protected computers", the Court first defined a computer to having the meaning given by 18 U.S.C. § 1030(e)(1) (the Computer Fraud and Abuse Act). Kane, in his reply, argued that due to their lack of keyboards, network connection, and ability to read or accept new information, video poker machines should thereby be excluded from this provision, highlighting 18 U.S.C. § 1030(e)(1) which continued to state that, "such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device."

However, whilst the Court acknowledged the exceptions listed in this provision, the Court argued that video poker machines are not "sufficiently similar" to an automated typewriter or typesetter or a portable hand held calculator to qualify for exclusion. Consequently, the Court held that the video poker machines perform functions that directly align it with what constitutes a computer under 18 U.S.C. § 1030(e)(1).

Having concluded that video poker machines are computers, the Court then sought to address the Defendants claim that such machines are not "protected computers". To do this, the Court called upon 18 U.S.C. § 1030(e)(2)(B). The arguments were as follows:

1. The Defendants, citing Natinonal City bank, N.A. v. Prime lending, Inc., argued that because the video poker machines lacked the ability to connect to the internet, they are

not protected computers. However, the Government, citing *U.S. v. Mitra*, 405 F.3d 492 (7th Cir. 2005), reasoned that while internet connectivity is sufficient in establishing a computer as a protected computer, it is not required.

2. Addressing this, Kane noted how critical to the Seventh Circuit's holding in *Mitra* was the issue of having operated in a medium of interstate commerce that was within a federally regulated domain. Thus, he argued, *Mitra* is not applicable to this case, for video poker machines are not subject to federal regulation. The Government refuted this claim, arguing that the Gambling Devices Act of 1962 (15 U.S.C. § 1171-78) subjugated these devices to federal regulation, therefore they operate within the same regulated domain.
3. The Government argued that, due to the video poker machines "attracting customers from all over the country to Las Vegas" to play them, they thereby affect interstate commerce.

Exceeds authorized access

To address the Defendants claim of not having exceed authorized access the Court first held that the Defendants, due to them having physically "interacted with the video poker machines in the manner for which they were designed", had accessed the video poker machine. Subsequently, the Court defined the term exceeds authorized access using 18 U.S.C. § 1030(e)(6). With the Defendants actions allowing them to obtain previously played hands, the Government argued that they had subsequently "obtain[ed] or altered information" that they were not authorized to access, thereby exceeding their authorized access.

However, with the Government having conceded that the Defendants were authorized to play video poker, the Court disagreed with the Government's claim, as it effectively sought to criminalize the way the Defendants played the game. Upholding the Ninth Circuit's opinion in *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), the Court ruled that the "CFAA does not regulate the way individuals use the information which they are otherwise authorized to access" as such an application of CFAA would "transform whole categories of otherwise

innocuous behavior into federal crimes simply because a computer was involved”. Resultantly, the Court held that the Defendants did not exceed their authorized access.

Ruling

Having affirmed that the video poker machines failed to constitute protected computers and that the Defendants actions failed to constitute exceeding authorized access, the Court concluded that the Defendants’ Motion to Dismiss charges under Title 18 U.S.C. § 1030(a)(4) should be granted.

In its ruling, the Court held the following:

1. The Court sided with the Government in that internet access is not the only way to constitute a computer as a protected computer.
2. The Court sided with the Defendant for, unlike the radio system in *Mitra*, a video poker machine has no such capability to transmit, receive, or otherwise communicate information across state lines.
 1. Additionally, the Court rejected the Government’s Gambling Devices Act applicability argument, declaring it invalid as this act functioned to merely regulated the shipping and transportation of these devices.^[7] Thus, “the machines themselves do not function within those channels as anything more than cargo”.
3. The Court held that the Government’s argument of affecting interstate commerce through the attraction of customers fails for two reasons:
 1. This proposed effect only holds in the aggregate, as the Government cannot show an individual video poker machine to have such an effect on interstate commerce.
 2. The basis of this argument derives from having “divorce[d] the function of the device, i.e. logical, arithmetic, or storage functions, from its supposed effects in interstate commerce.”

Analysis

The quality of evidence was very good. Right from the start, technical staff (engineers from the Nevada Gaming Control Board) were consulted and later proper legal procedures were followed. Relevant legal options were explored and all legal boundaries were tried in order to bring the alleged criminals to justice. However, I believe there existed a lack of technical expertise after the initial investigation because they did not refer to a technical expert for advice when ascertaining that whether a poker machine constituted a computer or not. They only looked at the legal definition which led to confusion and weakened the plaintiff's case.

The evidences presented in court were minimal and they helped build the case for its eventual dismissal as requested by the defendants because all evidence supported the fact that the plaintiff's accusations were blind-sided and would not work given the circumstances of the case.

The claim by the defendants that their use of the poker machines was not unlawful because they did not physically tamper the machines but were merely using it under the boundaries set by the software of the machines itself. Hence, their actions were due to the fact that the machines allowed them and hence it wasn't their fault that the machines allowed such actions. In my opinion, the court gave an excellent decision because the points presented by the defendants conformed to the law and also followed an earlier precedent. Hence, the court judgement was a good decision and the case was rightfully dismissed.