

LIVE NUDE GIRLS, PROMOTERS, & PRODUCERS

-The need for multitasking in the modern webcam era

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I. Introduction

At its most basic level, the live webcam phenomenon is merely the next technological extension of the live phone sex craze that started in the 1980's. Today, anyone with a digital camera, a legible picture ID card (evidencing their age of majority), and a healthy dose of exhibitionism, can become a cam girl (or guy, etc, as the case may be).¹ But in addition to being a performer, these individuals must also often take on the roles of publisher, producer, photographer, editor, promoter, and legal records custodian. The details of each relationship between the cam girl and the website operator (assuming these are not one and the same), will significantly impact the additional obligations imposed upon the performer. Given the relatively minimal legal and business training provided to the typical webcam performer before she first clicks the "Broadcast Now" button - to the delight of her ogling fans - this situation is fraught with legal danger. Webcam performers (and website operators) must be knowledgeable in complex legal issues such as §2257 compliance, publicity laws, copyright assignments, obscenity laws, deceptive trade practices, trademark concerns, and a variety of other media law issues. These laws can have both civil and criminal sanctions, if not carefully observed. In short, the modern-day adult webcam performer needs to be a "Jack(y) of all trades," with little room for error.

II. 2257 Concerns

Initially, with regard to matters such as §2257 compliance, an adult webcam performer can easily be considered to be an original or "primary producer" within the meaning of Title 18, *U.S.C.* §2257 and applicable federal regulations.² This means that the performer must be intimately familiar with matters such as the relevant categories of information required to be compiled and maintained by the law, the method of document maintenance, and the precise labeling obligations for all live content. Numerous special rules apply to §2257 compliance where live material is involved, such as the need to capture and preserve a representative video sample of each §2257-triggering "production," the need to record the date of the production, and the need to maintain a full copy of any archived shows with the §2257 records. These requirements exceed the standard §2257 obligations such as recording and cross-indexing the

¹ All references to the feminine gender in this article are intended to apply equally to the male and transgender communities as well.

² 18 U.S.C. § 2257(h)(2)(A); 28 C.F.R. §75.1(c)(1).

performer's legal name and all stage names, the date of birth, a copy of a valid ID (which can vary depending on the location of the performance), and the maintenance of a full list of URLs associated with the performer's material. All of these obligations can raise additional questions and compliance concerns that are routinely debated even among attorneys experienced in adult industry representation. However, the typical webcam performer is often young and inexperienced in the ways of law and business. That is not to say that there are not prominent and obvious exceptions to this general rule, but the general concern continues to exist. The situation is complicated by the fact that many webcam performers are citizens of nations that do not require the complex record keeping obligations for adult media that the United States requires. Naturally, some adult live webcam models receive assistance from studio operators who provide some degree of guidance in connection with many of these issues. But often such advice is dispensed by companies or individuals that are, again, not subject to United States' law. Yet this advice and the resulting operating policies are relied upon by webmasters, models and affiliates throughout the chain of publication and distribution of webcam content. This creates a perfect storm for legal disaster.

III. Intellectual Property Concerns

Aside from concerns with keeping the legally-correct age records, some webcam performers must be conversant in relatively esoteric topics like rights to publicity/commercial exploitation, copyright registration/enforcement, and trademark issues. The webcam model agreements signed by these performers contain an important combination of waivers, assignments, and releases of these rights, which should be clearly reviewed and understood by the model before any documents are signed, or "I agree" buttons pushed. The rights to exploit any webcam content will be dictated by these binding agreements, potentially for all time.

Other intellectual property issues can arise in the context of live webcam performances as well. Something as simple as displaying a copyrighted picture or painting in the background of the performance, using copyrighted music during the performance (a common problem), or displaying a trademarked name or logo on clothing or other objects appearing in the performance area, can result in an expensive infringement action by the intellectual property rights holder. Ignorance of the law is not an excuse – particularly in the intellectual property infringement realm. This set of legal complexities, combined with the foreign location of most webcam models, can result in infringement claims that truly come as a surprise to the model who just seemingly gave a standard performance. Yet these unpredicted legal issues are bound to arise. With the popularity of the live webcam business model showing no signs of stopping – particularly given the inability to pirate the material - and the seemingly inexhaustible supply of attractive men and women willing to show their exhibitionist side on webcam for a few bucks, the legal pitfalls are certain to rise to the surface in the near future.

IV. Content Concerns

One of the most obvious legal concerns relating to a live adult webcam production is the legality of the content of the performances. But given its live nature, there is no editing process, and thus no ability to remove offensive, risky, or potentially illegal content before the broadcast airs. Accordingly, the webcam performer is the “last line of defense” when it comes to avoiding the publication of illegal content, and compliance with acceptable content publishing standards.

Certainly, underage content is the biggest content-related concern existing in the webcam industry, at present. Differences in the legal age of consent for sexual activity throughout the world, combined with lax age verification standards in some nations, gives rise to potential risk of underage web cam model slipping through standard model age checks. This is particularly true for webcam portals that allow electronic uploads of §2257 age verification documents directly by the webcam model. Some of these portal operators may not be able to recognize a fake ID upload – particularly one from a foreign nation where identification documents are not routinely analyzed. The possibility for use of fake, forged, or another person’s ID to get access to webcam broadcasting is always a concern. Obviously, liability for use of a fake ID could be imposed on the model, but if that performer is a minor, law enforcement will likely view the underage model as the victim, and turn its attention on other responsible parties.

The level of control asserted over the webcam performer’s activities may impact the applicability of §2257 exemptions, permitting webcam portals to potentially rely on the same exemptions used by “social networking sites.”³ However, even a solid §2257 exemption will not protect the webcam site operator from a child exploitation charge – particularly if no identification documents were obtained (due to a §2257 exemption or mere ignorance of the law). Given the significant penalties imposed for the publication of underage material, and the cooperation that routinely occurs between nations when investigating child exploitation cases, great care should be taken to ensure the existence of proper §2257 records, even if not technically required by some foreign nation’s law, where the webcam studio might be located.

Other content concerns that typically arise in the webcam realm include the depiction of unauthorized third parties in the broadcast (whether relatives, friends, cats – whatever). All individuals appearing in the webcam broadcast must be signed up on a binding contract, with appropriate releases of rights to the publisher. Children and animals should just be categorically excluded from the broadcast, even if they’re not included in any type of sexual activity, for a wide variety of reasons. Any further restrictions on the themes or fetishes that might be permitted on cam should be the subject of detailed communications with competent legal counsel, after careful evaluation of the risks relating to obscenity and possible business concerns with service providers like credit card processors, hosts and affiliates.

³ 18 U.S.C. § 2257(h)(2)(B)

V. Extracurricular Activities

Every webcam performer is entitled to a social life. However, as this author noted in a previous article entitled [*Dangerous Intersections*](#), any public association between webcam modeling and other forms of erotic entertainment must be carefully considered. Naturally, any connection between the erotic fantasies displayed on webcam broadcasts and the “real world” should be avoided. Meeting customers who viewed performances is a recipe for disaster, given the allegations that could be made by law enforcement (investigating a solicitation charge) that the webcam performance was a “demonstration” of the type of activity that could occur on a date – particularly if any element of commercial activity is involved in the real-world meeting. Even the posting of profiles on “hookup” sites, or “escort sites,” which might be perfectly legal and defensible on their own, may become problematic when linked with explicit sexual activity occurring on live webcam sites. In short, webcam performances should be kept within the realm of online fantasy, with no crossover into the physical world.

VI. Webcam Portal Liability

Ok, so the webcam girls might have their hands full of business and legal issues. But what about the webcam portal operator, which merely makes space available for these webcam models to do as they please? Maybe they charge a fee for the privilege of using their brand and their technology, but isn't there some legal protection for the website operator, as might apply to a host? The answer is a qualified “maybe.” In the event the relationship is truly one of independent contractor, with no control over the performances of the webcam model, this relationship *may* confer some legal benefit upon the webcam service provider to a certain degree. Section 230 immunity and DMCA safe harbor may come into play to deflect certain civil claims, if the relationship is structured correctly. Moreover, in the criminal context, it would seem difficult to impose liability upon a live webcam portal operator for the content of communications that ran afoul of some law – obscenity for example – in the absence of any advance warning that such material would be displayed. This would be akin to attempting to impose liability upon the telephone company for a conversation discussing illegal activity, in the absence of any advanced knowledge of the nature of the conversation by the phone company. Such legal arguments are destined to be made in the event that a webcam portal is charged with any sort of crime arising out of the content of the performances by the models, or interactions between models and viewers. Indeed, the extent of “online service provider” criminal liability is far from settled, despite the fact that various protections may exist for such entities in the civil context.⁴ However, a viable argument could be made that a webcam portal is similar to any other communication facilitator, such as the phone company or a chat software provider, but the

⁴ [“Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers,”](#) *Stanford Law & Policy Review* Vol 23, Issue 1, pp 171-212 (2012)

devil is always in the details. The extent to which the webcam provider attempts to avoid control the content of the webcam performance, along with the details of the financial compensation model employed by the parties, could dramatically impact the available legal arguments in this regard. On the other hand, failure to impose reasonable regulations and restraints on the content of these performances carries with it its own set of legal risks since problematic content is more likely to appear in the performances. This is the legal “Catch 22” that has faced online service providers since the adoption of federal laws statutes such as Section 230,⁵ DMCA safe harbor,⁶ and §2257 exemptions.⁷ Exercising significant control over the content of the performances may make the live cam site operator responsible for the content of all those performances. Exercising no control could result in a content “free for all,” which some prosecutors would not be willing to tolerate, despite the application of legal protection in the civil context.

VII. Conclusion.

As with all evolving business models, it will take some time for the courts to clarify the legal rules that will be used to impose liability on the various actors responsible for civil or criminal violations in the webcam arena. During this developmental period, webcam models will struggle to multitask their various roles involved with self-produced content. The webcam business model, given its global nature and sexually charged theme, will challenge the prosecutors, judges and lawyers called upon to help shape the law in this fascinating field.

Walters Law Group provides legal guidance to webcam operators, performers, and service providers throughout the world. All statements made in the above article involve general information or matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. Lawrence G. Walters can be reached at larry@firstamendment.com or www.FirstAmendment.com.

⁵ 47 U.S.C. § 230.

⁶ 17 U.S.C. § 512 *et seq.*

⁷ 18 U.S.C. § 2257(h)(2)(B)