

THE GOLD STANDARD: WHY FOREIGN WEBMASTERS SHOULD CARE ABOUT U.S. LAW

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INTRODUCTION

The United States does not control the Internet. This basic precept should be common knowledge by now, but since the inception of online communication, American lawmakers have attempted to impose a variety of legal regulations directed specifically at Internet commerce. For example, the U.S. Department of Justice has regularly prosecuted foreign website operators for violating U.S. online gambling laws.¹ Domain names are routinely seized by U.S. authorities based on alleged violations of federal statutes.² The Federal Trade Commission has forcibly shut down hosting services for foreign website operators based on their alleged malicious online activities.³ Copyright holders have taken to U.S. courts to sue foreign website operators for intellectual property infringement.⁴ The fact that the U.S. Department of Commerce still exerts substantial control over ICANN, further adds to the perception that American law controls the Internet.⁵

Aside from the efforts to impose U.S. law on foreign webmasters through civil lawsuits and criminal prosecution, basic business concerns reinforce the need for compliance with U.S. law. Thus, a foreign content producer or webmaster, hoping to distribute and promote adult materials to U.S. customers may be dependent on a variety of U.S. based service providers – affiliates, billing processors, hosts – to successfully facilitate its online business model. For any of these domestic service providers to be comfortable doing business with the foreign customer, compliance with U.S. law is essential. Few American service providers will chose to do business

¹ See e.g., B. Collison, “Defendant in Black Friday Indictments Ira Rubin Arrested in Guatemala,” *Poker News Daily* (April 28, 2011), available at: <http://www.pokernewsdaily.com/defendant-in-black-friday-indictments-ira-rubin-arrested-in-guatemala-18967/>.

²See “Bodog.com Domain Seized by American Authorities,” *Poker.org* (February 28, 2012), available at: <http://www.poker.org/news/bodogcom-domain-seized-by-american-authorities-14498/> (Wire Act violations); M. Richtel, “U.S. Cracks Down on Online Gambling,” *New York Times* (April 15, 2011), available at: <http://www.nytimes.com/2011/04/16/technology/16poker.html> (online gambling violations); M. Schwartz, “Feds Seize 150 Web Domains Before Cyber Monday,” *Information Week* (November 28, 2011), available at: <http://www.informationweek.com/security/management/feds-seize-150-web-domains-before-cyber/232200295> (150domains seized for intellectual property violations). See also, *Commonwealth of Kentucky v. 141 Domain Names*, Case No.: 08-CI-1409 (Franklin Cir. Ct. 2008); *Interactive Media Entertainment & Gambling Association, et. al*, Case Nos.: 2008-CA-002019, 2008-CA-002000, 08-CA-2036 (Kentucky Ct. App. 2008).

³B. Krebs, “FTC Sues, Shuts Down N. Calif. Web Hosting Firm,” *Washington Post* (June 4, 2009), available at: http://voices.washingtonpost.com/securityfix/2009/06/ftc_sues_shuts_down_n_calif_we.html.

⁴ See the author’s previous article on the subject of extraterritorial application of intellectual property laws against online service providers, available at: <http://lawofsex.wordpress.com/2012/05/04/the-ends-of-the-earth-how-far-can-u-s-content-producers-pursue-foreign-infringers>.

⁵ While the Department of Commerce signed a document giving up formal control over ICANN in 2009, the Governmental Advisory Committee (“GAC”) still exerts significant influence over ICANN’s affairs. See, E. Yu, “U.S. Government Finally Lets ICANN Go,” *Business Week* (October 2, 2009), available at: http://www.businessweek.com/globalbiz/content/oct2009/gb2009102_460955.htm.

with foreign operators who openly flout U.S. law.

While the borderless technology of the Internet is not amenable to effective legal regulation by any particular country, U.S. law has become the *de facto* ‘Gold Standard’ for webmasters to achieve. Whether the U.S., or any other country, should attempt to impose legal restraints on the World Wide Web is a philosophical question beyond the scope of this article. However, given the current reality of the global legal landscape, foreign website operators and content producers have tremendous incentive to voluntarily comply with U.S. laws – even if such laws are technically inapplicable to them as foreign nationals.

As this article goes to press, the United States is deep within the throes of yet another presidential election. In keeping with tradition, both parties have stuck to the typical hot-button political issues, one of which being the exodus of American businesses seeking refuge overseas. The adult industry has not escaped this phenomena, as many adult entertainment companies have restructured their corporate operations abroad, and have begun to target foreign consumers. Ireland, Luxembourg, and other European countries, have become a welcome home for many online businesses looking for more favorable tax treatment and business-friendly economic policies. India and China are poised to overtake the U.S. in terms of economic success, and have become highly-prized markets for both adult and mainstream online businesses. But operating from a foreign jurisdiction does not eliminate the need for considering compliance with U.S. law. Instead, foreign webmasters should carefully consider a variety of U.S. laws impacting their operation before conducting any online business.

I. PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS IN U.S. COURTS

As noted above, U.S. state and federal courts routinely assert jurisdiction over foreign defendants in both civil and criminal cases. Although the judiciary has been increasingly hesitant to find the existence of jurisdiction based on mere web presence, U.S. courts can exercise jurisdiction over a foreign defendant if the party has certain “minimum contacts” with a particular state, or the United States as a whole. *Fed.R.Civ.P. 4(k)*. In most cases, the imposition of extraterritorial jurisdiction is permissible so long as doing so constitutes ‘fair play,’ and otherwise comports with basic notions of Due Process.⁶ The resolution of these jurisdictional disputes involves a fact intensive analysis, which often makes such cases expensive to litigate. Thus, even if a foreign defendant ultimately prevails in a jurisdictional defense, the attorneys’ fees and court costs necessary to do so can substantially burden the average adult website operation. Minimal efforts devoted to compliance with U.S. law can greatly reduce the potential for this sort of litigation, and significantly increase the likelihood of prevailing in any enforcement action.

II. CIVIL LIABILITY

A substantial source of civil liability for adult webmasters – particularly sites permitting user generated content (“UGC”) – is the Copyright Act and the DMCA. Yet the DMCA also provides substantial legal defenses for webmasters who follow its technical, legal obligations. Online service providers (“OSP’s”) must provide a vigilant removal system, adopt a policy for

⁶ *International Shoe v. Washington*, 326 U.S. 310 (1945).

termination of repeat infringers and designate an agent for receipt of copyright infringement notices.⁷ Website operators who fail to implement a legally compliant safe harbor regime do so at their own peril. As seen in numerous cases in recent years, foreign webmasters have been routinely sued for failing to adequately protect copyrights from being infringed by their third party users. Without the ability to rely on a safe harbor defense, website operators can be responsible for injunctive relief and substantial monetary damages, along with extensive court costs and attorneys fees.

Other sources of potential civil liability include various forms of intellectual property infringement, for example, trademark or patent violations. Adult webmasters have been increasingly subject to trademark infringement claims as copyright holders have become frustrated with the DMCA safe harbor defenses asserted by copyright defendants. Rights holders have also asserted patent claims against adult website operators – both foreign and domestic. Standard civil claims such as trade secret violations, unfair competition, deceptive advertising and breach of contract claims are also commonplace. The same ‘minimum contacts’ jurisdictional analysis referenced above will be applied to claims of this nature. Generally, engaging in any actionable conduct that causes injury to a claimant in the U.S. will provide a basis for suing a foreign defendant. Thus, foreign webmasters remain exposed to a wide variety of civil claims by U.S. plaintiffs.

III. CRIMINAL LIABILITY

Of more concern than any potential civil liability is the potential for criminal prosecution in U.S. courts. While copyright claims are most often asserted in civil cases, there exists the potential for criminal prosecution, based on willful copyright infringement. In early 2012, the story of the Hong Kong based website, Megaupload.com, ripped through headlines around the globe. Megaupload, one of the most used file storage websites in history, was shut down as the United States Department of Justice seized its domain names and almost \$40 million in assets in connection with a criminal copyright infringement investigation. Even more importantly, such seizures occurred on the heels of the very public arrest of the site’s four corporate owners – all German or Dutch nationals. Among other things, the Indictment against Megaupload claimed that the defendants had actual knowledge of the alleged infringement taking place on their sites and the site did not comply with the requirements necessary for a valid safe harbor defense under the DMCA.⁸ Given the (still occurring) attempt to extradite the executives to U.S. soil to face racketeering and money laundering charges,⁹ a foreign webmaster’s potential exposure to criminal copyright claims remains controversial focal point in the online world.

⁷ The full scope of DMCA safe harbor requirements is beyond the scope of this article, but is addressed in the author’s article regarding DMCA compliance, available at: <http://www.firstamendment.com/site-articles/dmca-agent>.

⁸ See, *Megaupload Indictment*, available at: <http://www.washingtonpost.com/wp-srv/business/documents/megaupload-indictment.pdf>.

⁹ N. Tajitsu, “New Zealand Court Delays Megaupload Extradition Hearing to Next Year,” *Reuters*, (July 9, 2012), available at: <http://www.reuters.com/article/2012/07/10/net-us-megaupload-extradition-idUSBRE86901Y20120710>.

The involvement of minors in online adult material generates yet another very real and very serious threat of criminal prosecution against foreign content producers and webmasters. Web 2.0's virtually anonymous interactive networking capability results in an unnervingly high likelihood of underage material finding its way onto a UGC website. Even the best efforts of content producers to verify the age of performers cannot weed out every mature-looking minor with a fake ID. Regardless whether the unlawful material reaches a site via user generated content, advertisements, or seemingly legitimate purchases from content producers, foreign webmasters remain vulnerable to U.S. criminal prosecution in the event a minor is depicted in sexually explicit material on a website under his or her control. However, compliance with yet another U.S. law, 18 U.S.C. §2258A, may provide immunity to prosecution for certain activities involved in the identification and reporting of child pornography by OSP's. Careful evaluation of potential legal concerns associated with underage material is therefore essential for both domestic and foreign webmasters.

The U.S. has enacted an expansive definition of "child pornography" to include any visual depiction of a subject under eighteen (18) engaged in sexually explicit conduct.¹⁰ A foreign webmaster should be concerned with U.S. anti-child-pornography laws two-fold: 1) The interpretation of the definition of a "minor" – anyone under the age of eighteen (18) at the time the visual depiction was made (not at the time the visual depiction was published and 2) the extremely broad definition of "sexually explicit conduct," which includes actual or simulated sexual activity of any kind and "lascivious" exhibition of the genitals or pubic area, even where covered by clothing.¹¹

Taking the protection of minors even one step further, the United States utilizes a federal statute requiring that any visual depiction of "actual and simulated sexually explicit conduct" have accompanying records and copies of identification documents. Found in 18 U.S.C. §2257 ("Section 2257"), federal law mandates that such records must be indexed and accompanied by a disclosure statement revealing where they are can be found and the location of the records custodian. Section 2257 has the unique ability to impact almost everyone involved with the production and distribution of erotic material; from a veteran adult content distributor to the most inexperienced online affiliate. While Section 2257 obligations may not, arguably, have an extraterritorial effect given the lack of similar laws in other countries, certain business considerations militate in favor of Section 2257 compliance by foreign webmasters. Affiliates, billing processors, hosts and other service providers often base their decision to conduct business with a customer on whether proper 2257 compliance regimes have been implemented. U.S. affiliates, who are clearly subject to U.S. law, may be hesitant to promote content that was not produced in accordance with the dictates of Section 2257. Others may be unwilling to provide related services that will facilitate the distribution of such content, out of fear they may be charged with conspiracy, or 'aiding and abetting' unlawful conduct. These business concerns offer a powerful incentive to foreign webmasters when it comes to U.S. legal compliance.

¹⁰ 18 U.S.C. § 2256.

¹¹ *United States v. Knox*, 977 F.2d 815, 817 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

U.S. child pornography and records keeping violations yield potentially Draconian penalties. As a result, U.S. webmasters are painfully aware of the dismal fate of not only their business, but also their own freedom, should child pornography find its way to their site. Accordingly, careful compliance with U.S. laws pertaining to child exploitation is essential for webmasters who make erotic content available in the United States.

CONCLUSION

The Internet has caused the world to become a much smaller place, and has opened up tremendous opportunities to conduct business on an international scale. While no single country controls online commerce, the U.S. remains at the forefront of Internet regulation. Given the willingness of American courts to enforce domestic law against foreign parties in both civil and criminal arenas, compliance with U.S. law is an important consideration for foreign webmasters. This, combined with the prized U.S. consumer market, provides valuable reasons to consider the impact of U.S. law when developing any legal compliance regime.

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 Walters can be reached at larry@firstamendment.com or www.FirstAmendment.com.