

# WHAT IS A WEBSITE REVIEW?

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## I. INTRODUCTION

A substantial percentage of adult webmasters are still operating without having had their website reviewed by an attorney. Various reasons are offered for this, including: “I know the law,” “I stick to soft-core content,” “My friend told me what his lawyer said,” or, “What is a website review?” None of those excuses justify the unacceptable risk of publishing online content that has not passed legal clearance; however, this article will attempt to address the last excuse which focuses on the webmaster’s fundamental lack of familiarity with the legal review process. Mainstream publishers have utilized attorneys for pre-publication content review for decades, and publishers of erotic print and film media are typically diligent about legal clearance; however the culture of the adult Internet community often bypasses this most basic industry standard.

## II. SCOPE OF REVIEW

Many webmasters believe that a website review consists largely of an attorney getting paid to look at a bunch of erotic content for compliance with obscenity standards, only to render an opinion that the laws are too vague for any kind of concrete advice, and that the content might be found obscene by somebody, somewhere in the country, at some time. While obscenity laws are by far the most difficult and complex issue that is considered in connection with a website review, the scope of such a review involves substantially broader issues. Typically, our firm breaks down a website evaluation into the following general categories:

- A. Corporate Formation/Structuring;
- B. Online Agreements;
- C. Intellectual Property Concerns;
- D. Infringement on the Rights of Others;
- E. Age Verification/2257 Issues;
- F. Obscenity/Content Issues.

Certain business models may implicate additional, specialized legal concerns, such as public filming, unique fetish issues, intoxication, spam/marketing concerns, or sweepstakes matters, however the above-referenced categories will apply to the vast majority of adult websites published on the Web.

**A. Corporate Formation/Structuring**

One of the first, most basic issues to be addressed is the form of corporate entity being used to operate the website, if any. Many webmasters still operate as sole proprietors, despite the many benefits and “cheap insurance” a corporation provides, particularly as an asset protection device. A website review should include an inquiry as to the current status of the operator’s corporation, and a confirmation that all applicable corporate documents have been prepared, including notices, waivers, minutes, bylaws, and stock certificates, necessary to comply with the formalities of incorporation. Some clients have come to our firm after having filed articles of incorporation for their corporate entity several years ago, and never having paid any more attention to the corporation since that time. Typically, a corporation must conduct annual corporate meetings, generate organizational minutes, Bylaws and written actions, in order to legally maintain itself as a valid corporate entity. The specific formalities differ from state to state, but failure to observe these technical requirements could result in a creditor “piercing the

corporate veil” and holding the shareholders of the corporation liable for corporate debts. Therefore, it is essential to confirm that the corporate house is in order, and all relevant documents are contained in the Corporate Book. A more complex issue that should be addressed in the corporate review is the potential for foreign incorporation and operation of the website from an offshore location. Websites can be run from virtually any location, given Internet technology, and this opens up a world of possibilities, in terms of offshore incorporation. The benefits can be substantial in terms of tax savings and asset protection, and thus all options should be considered in the course of the corporate review.

## **B. Online Agreements**

Many adult websites are severely lacking in the area of online agreements. Given the E-SIGN legislation, electronically signed into law by President Clinton in 2000, webmasters can often form binding electronic contracts with their users, affiliates, or content providers, by posting the agreements to the website in the proper manner. At the very least, typical adult website should incorporate the following online documents:

1. Warning Page/Disclaimer, including Age Verification;
2. User Terms & Conditions;
3. A Privacy Policy;
4. An Affiliate Agreement
5. A Spam Policy; and,
6. A DMCA Designation.

Each of these agreements provides different legal protections, and should be incorporated to assist in reducing the webmaster’s exposure to liability. Many issues can be addressed by proper online agreements, such as the procedure for dispute resolution, venue, choice of law, arbitration,

attorney's fees, digital rights transfer, risk of loss, indemnification, payment terms, etc. In the absence of these terms, a court may impose a variety of "reasonable" terms that the webmaster may not like, or worse yet, may determine that no contract exists. Certain information, like DMCA Designation, is required in order to take advantage of certain 'safe harbors' under federal law. Online agreements are a fairly easy and inexpensive way to significantly reduce potential liability from a variety of sources, including users, affiliates, and the government.

### **C. Intellectual Property Concerns**

Websites can be copyrighted, ideas can be patented, and brand names can be trademarked. Webmasters, overall, do a poor job of protecting their own intellectual property and securing the bundle of available IP rights associated with their site. Software coding can ordinarily receive copyright protection, as can graphics, images, video, and the overall "look and feel" of a website.

If a webmaster has come up with a unique business model or online invention, he or she can obtain patent protection to prevent others from copying that idea or invention. Many online patents have issued, and while some are controversial, the industry is only in the beginning stages of patent right protection. While patent lawyers are a specialized breed, and are specially licensed to practice before the United States Patent & Trademark Office, ("USPTO"), your adult website attorney should be able to identify ideas, concepts, or business models that may qualify for patent protection, and refer you to an appropriate specialist to prosecute patent registration, if desired.

As the online industry matures, the focus is moving away from domain names in favor of online brand names. Online branding is certainly the wave of the future, and the best way to protect infringement on, or dilution of, your unique brand is to register a trademark or service

mark with the USPTO. The process is not terribly complex or costly, while the end result, i.e. a registered trademark, is a valuable business asset that should be seen as a welcome addition to your company's portfolio. A webmaster's leverage in dealing with competitors using the same or similar trade names is greatly enhanced if the webmaster owns a registered trademark. Much has been written on the benefits of copyright protection, but it is important to remember that copyrights cannot be enforced without a valid copyright registration. The availability of all these means of IP protection should be carefully evaluated and considered, in the course of a website review.

#### **D. Infringement on the Rights of Others**

This category involves a two way street: Are you infringing on anyone else's rights, and is anyone else infringing on your rights? While webmasters often review their own content from an obscenity compliance viewpoint, that same content must be reviewed with an eye towards potential infringement actions. Displaying another company's trademarked logo and brand name in the context of an adult video or image is generally asking for trouble, and can lead to an expensive claim. Mainstream companies do not see this exposure as "free advertising," but instead consider it to be trademark dilution or disparagement, since it portrays the company in a bad light, as having some involvement with the adult entertainment industry. Many costly lawsuits could have been avoided by a content review focused on intellectual property issues. Often, an attorney can identify potentially infringing content that the average person would fail to identify as problematic. Saving one trademark infringement claim can pay for a website review many times over.

Websites should likewise be reviewed for potential copyright infringement concerns. For example, instant member post areas, where users are allowed to post their own images, can

provide a forum for widespread copyright abuse. Somebody owns the rights to every image, and those rights must be transferred to the website in order for a legal publication to occur. Remember, just because an image has been floating around the Internet for many years does not mean it is in the “public domain” or that reproducing that image is protected by any form of “fair use.” The potential applicability of any such legal defenses must be carefully evaluated by an attorney trained in copyright law. Certain warnings or disclaimers can help reduce potential exposure in these areas.

Patent infringement is an issue with which the adult Internet industry has become quite familiar, in recent years, thanks to Acacia Media. Many processes on the Internet have been patented, in whole or in part, in the same way that Acacia patented (or bought the patents for) the digital media transfer technology that forms the subject matter of its claims. In the course of a website review, potential patent infringement claims can be identified, and referred to special patent counsel, if necessary.

Other, more esoteric, infringement issues should also be considered, including, if applicable, violations of the Right of Publicity, Right to Privacy, and/or unfair competition. Occasionally, a website may display content under a valid copyright license; however, the photographer may not have obtained a valid transfer of the commercial exploitation/publicity rights, from the models depicted in the image(s). That may entitle the model to pursue the website operator for a variety of claims relating to his/her right to profit from his/her image or likeness, even if a valid copyright license exists. Some websites, particularly those publishing “voyeur” or public filming content need to consider potential claims for invasion of privacy, or “false light” publicity claims, wherein the persons depicted in the content might claim that their privacy rights were violated by the display of private information about them, or the manner in

which they were depicted on the website. These concerns are particularly appropriate to the celebrity genre websites or those depicting even ordinary citizens in a less than flattering manner.

Finally, due consideration should be given to potential unfair competition claims under the Lanham Act, or similar state laws, which prohibits competition in such a way that may be deemed “unfair.” The scope of such laws is not well defined and can potentially apply to any marketing plan or scheme that the average person may conclude is “fishy,” or just does not sound right. An attorney who has developed trained instincts for spotting such concerns can provide invaluable advice for the webmaster who tries to push the envelope in regards to marketing and promotion efforts.

#### **E. Age Verification/2257 Issues**

This review category is critically important and may be worth the cost of the entire evaluation. In an effort to smear the industry and prey upon the protective instincts that most parents possess, the government has historically tried to mix the concepts of child pornography and adult erotica. It is critically important that a website strictly avoid involvement by minors as audience or participants. Thus, a careful review of the website’s model release, age verification, and 2257 compliance procedures is essential. The penalties for involvement with child pornography are staggering, and Section 2257 violations are no picnic either.<sup>1</sup> The unfortunate reality is that the vast majority of adult websites are not 100% compliant with Section 2257.

Although much has been written about this subject, significant misunderstandings as to the precise requirements of the law still remain. The fact that portions of the original statute have been modified or invalidated by case law, coupled with the fact that substantial

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<sup>1</sup> Under Title 18, U.S.C. § 2257, and in particular, the recent amendments imposed by the PROTECT Act, each violation of 2257 obligations is a separate five (5) year federal felony, and repeat offenders qualify for a maximum ten (10) year sentence.

amendments to the regulations implementing Section 2257 have been proposed, contribute to the confused state of affairs and misunderstandings amongst webmasters. Legal advice is critical on these issues given the harsh penalties for noncompliance, and the complexity of the law in this area.

Remember, Section 2257 is the webmaster's friend, since compliance will virtually guarantee that child pornography will not become a problem. Many unsettled issues and nuances exist in this regard, and competent counsel can help guide the average webmaster through issues such as model release indexing, document separation, inspection requirements, acceptable identification papers, requirements for foreign models, live streaming content compliance, model privacy concerns, records custodian duties, and 2257 disclosure statements.

The Attorney General is required, by law, to advise Congress as to how many 2257 inspections it conducts, and how many prosecutions have occurred for noncompliance.<sup>2</sup> Therefore, it is widely believed that the Justice Department, acting through the Attorney General, Alberto Gonzalez, who has publicly announced making enforcement of obscenity laws a priority, will initiate a crackdown on 2257 violators in the very near future. Typically, such regulatory violations would be brought as an ancillary and additional count in a multi-count indictment, alleging violations of the obscenity laws, money laundering, forfeiture, conspiracy, and potentially racketeering statutes. By shoring up the 2257 compliance matters, this potential claim is taken away from the government and can no longer be used as a leverage tool against the indicted webmaster.

Finally, on the issue of user age verification, a website review should include an analysis of the options for keeping children away from sexually-explicit content. These options can range from credit card firewalls, to database checks, sworn statements such as the author's

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<sup>2</sup> The Child Abduction Prevention Act of 2003, H.R. 1104 at §12. 108<sup>th</sup> Congress – First Session.

[BirthDateVerifier.com](http://BirthDateVerifier.com) program, or even a simple 18 + age statement. Each website will have different needs, and each webmaster's risk tolerance level varies. However, all the options should be considered in the course of the review, and a final decision made based on a thorough review of the legal implications.

#### **F. Obscenity/Content Issues**

The obscenity issues are likely the most familiar to the average webmaster, and perhaps best understood as part of a typical website review. While no honest attorney will claim to have the psychic ability to identify obscene content on sight, legal guidance in this area is invaluable. Initially, attorneys trained in obscenity law can help webmaster clients understand the types of content that have been historically prosecuted more often than other types of content. The manner in which certain activities are displayed will also have an impact on the obscenity issues. By way of a brief example, a film depicting a woman urinating into a cup in connection with an explanation about female urology issues will likely contain sufficient "scientific value" to prevent a finding of obscenity in any jurisdiction. However, that same activity performed as part of "sex play" for a watersports film, may well be deemed obscene by some jury, somewhere in the country. An understanding of the unique nuances of obscenity law, obtained through the website review, will be invaluable to the webmaster concerned about managing the legal risks in the industry. Display of certain non-explicit content, on the website itself, which is integrated into, and relevant to, the sexually-explicit material may also be useful in hedging one's bet against an obscenity determination. However, any effort to integrate so-called 'valuable content' is extremely tricky, and, if done incorrectly, can be useless – or worse yet – increase one's legal risk. We are reminded in this regard of what the United States Supreme Court held in another

context when it said, “A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication....”<sup>3</sup>

Hundreds of reported obscenity cases exist, and attorneys who practice in this field will be familiar with most, if not all of them. Unique arguments are being developed on a regular basis to defend against obscenity prosecutions, and it takes constant, continuing legal education to remain current on the state of the law in this area. Webmasters can gain access to the knowledge base acquired by an adult industry specialist by conducting a website review, and that knowledge translates into power for the webmaster. Aside from any potential defenses or proactive moves that can be considered by the webmaster in the obscenity category, merely gaining some insight into how these cases are prosecuted, and what kind of content has been successfully declared obscene, will allow the typical website owner to sleep better at night.

### III. CONCLUSION

The fear of the unknown causes stress, and stress interferes with level-headed decision making in business. With a detached, objective evaluation of the real risks associated with sexually-explicit websites, the webmaster can make appropriate adjustments to reduce legal exposure on a variety of issues, once that knowledge has been obtained. A competent website review will provide this valuable information and allow the website operator to focus on profitability and success, once the legal concerns have been addressed.

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<sup>3</sup> *Kois v. Wisconsin*, 408 U.S. 229, 231, 92 S.Ct. 2245, 2246, 33 L.Ed.2d 312 (1972).