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TIPS FOR AVOIDING FOREIGN HASSLES
ON THE INTERNET

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Clients worry that their Web-based activities may expose them to liability far from home. Such worries have escalated in light of the November ruling by a French judge that Yahoo!, the California-based Internet giant, must block French surfers from auctions for Nazi material on Yahoo!'s American Web site. The judge gave Yahoo three months to comply and fined Yahoo! \$13,000 for every day of noncompliance thereafter. Last week, French survivors of the Holocaust followed up with a criminal lawsuit against Yahoo!'s CEO.

Yahoo! and its CEO are not alone: in December 2000, Germany's highest court ruled that German law applies even to foreigners who post content on the Web in other countries — so long as that content can be accessed by people inside Germany. The Court found an Australian Holocaust denier guilty of spreading “Auschwitz lies.”

In another variation, a judge in Pune, India put six directors of a portal called Rediff.com. on trial in December for “giving access to pornographic material.”

So, how can you protect your client from inadvertently exposing itself to liability in far-flung jurisdictions because of the content of its Web site? This article explores some practical ways to help: strategically, contractually, and electronically.

Let us review some strategic considerations first.

Tip #1: Know the local law. Clients should know the local laws of any forum to which their activities could be construed as targeted. While there is no universal “test” for jurisdiction — indeed, there may be as many theories of jurisdiction as there are jurisdictions — it is reasonable to assume under any nation's laws that targeting one's activities towards that forum is likely a factor in gaining jurisdiction over that Web site's operator.

Clearly, commercial activity such as consummating on-line contracts for commercial purposes, gathering on-line commercial mailing lists through a Web site, selling goods or services via a Web site, and transmitting products or funds over the Internet are activities that are likely to lead to a finding of personal jurisdiction over the Web site operator.¹

More subtle examples of “targeting” may be as simple as using the local language (or displaying advertisements in that language);² providing local contact information and directing users to local trade shows; or appointing authorized agents to target the forum state. Cases in the United States have suggested that such activities tend to result in a finding of personal jurisdiction over the Web site operator.³

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Although European law of Internet-based jurisdiction is not yet as developed as the United States', U.S. law may be proving persuasive there. Recently an Italian court cited and tracked the reasoning of several U.S. cases in declining to take personal jurisdiction over Microsoft in a trademark suit based on a non-interactive Microsoft Web site.⁴

Tip #2: Situate Internet activities in U.S.-based subs. For clients in industries that are less regulated in America than in foreign jurisdictions, such as media companies, clients can be counseled to house their Internet activities in U.S. subsidiaries and to avoid, to the extent possible, placing substantial assets abroad. Since speech is less regulated in the United States than in most foreign jurisdictions, the United States may be the “offshore” jurisdiction of choice for media companies with substantial Internet activity.

Tip #3: Seize the forum. If a U.S. client is facing a palpable litigation threat from abroad or from a hostile jurisdiction at home, it might serve the client's interest to seize the forum of its choice.

For example, after Yahoo! received the French court's ruling, it moved the Federal District Court in its home district in California for a declaratory judgment setting aside the foreign verdict. Although considerations of comity generally lead United States courts to enforce money judgments issued by foreign courts, courts can refuse to enforce such judgments if the jurisdiction of the foreign court failed to comport with due process-based requirement of minimum contacts and purposeful availment.⁵

Moreover, United States courts can refuse to enforce foreign judgments if such judgments contravene U.S. policy, for example, the strong protection of free speech offered by the First Amendment.⁶ It seems like a relatively logical application of such doctrines to a case where a U.S.-based Internet client faces a foreign judgment that contradicts core Constitutional principles of jurisdiction or free speech.

Contractual Approaches

Tip # 4: Limit liability for use in foreign jurisdictions through Terms of Use. Visitors to Web sites are frequently governed by “Terms of Use.” A Terms of Use link is typically found at the bottom of a Web site's home page. Although there is still a dearth of case law, Terms of Use have thus far been accepted for the most part to bind Web site visitors, provided of course that the terms themselves are reasonable and the user can be reasonably said to be on notice and to have consented to the terms. Such notice and consent is often achieved through “click-wrap” agreements, which are nothing more than a box stating “Yes I Agree” adjacent to the Terms. By ticking the box, users commit to the terms stated in the Terms of Use.

Many Web site operators include terms limiting liability for use in foreign or other unwanted jurisdictions. For example, AOL includes the following International Use Policy in its Web site:

America Online makes no representation that materials on this site are appropriate or available for use in locations outside the United States, and accessing them from territories where their contents are illegal is prohibited. Those who choose to access this site from other locations do so on their own initiative and are responsible for compliance with local laws.

It is not at all clear that this strategy will work in many (or any) foreign jurisdictions, and it is certainly no substitute for Tip #1, which is to know the local law of the jurisdictions to which your client's activities are directed. But having an International Use policy, such as AOL's, does seem to be a widespread practice, and at least it can be said that including it is unlikely to do harm.

Tip #5: Forbid access from unwanted jurisdictions. A stronger approach is to display a list of jurisdictions to which the site is exclusively directed or for which access is forbidden. A variation on this theme is to require users to state that they are from a particular jurisdiction when they enter a site, and to deny access to those from unwanted jurisdictions. Note, however, that this strategy relies upon accurate self-reporting of the Web site user.

To the extent the blockade of users from unwanted jurisdictions is easily circumvented simply by the user's misstating his or her home jurisdiction, such a strategy may not prove particularly convincing to a judge otherwise inclined to find personal jurisdiction.

Such was the case in the landmark New York case of *New York v. World Interactive Gaming*,⁷ in which visitors to an offshore gambling Web site were asked to type in their location before they could gamble on the site. Visitors from jurisdictions that prohibited land-based gambling, such as New York, were refused access, but New York visitors could simply type in Nevada, and the site made no effort to check whether they were telling the truth. Because the blockade against New York gamblers was easily circumvented, it was disregarded for purposes of jurisdiction.

Tip #6: Choose a friendly forum for resolving disputes. Following a time-honored approach in the offline world, many Web operators include a forum selection clause in their terms of use. For example, Covisint, the nascent business-to-business Internet venture formed by five leading car manufacturers, has provided in its Terms of Use that disputes are to be resolved in the state courts in Wayne County (Detroit), Michigan. To make it even stronger, some Web sites, such as sun.com, operated by Sun Microsystems, specify that visitors submit to the "personal and exclusive jurisdiction" of the courts of the site operator's choice.

A different alternative, currently in use by Amazon.com, is to require users to submit to confidential arbitration near company headquarters (in this example, Seattle).

While this tip seems fairly obvious, there are still a number of websites, even well-established Web-based businesses, doing without forum selection clauses. As of this writing, for example, eToys, the on-line toy manufacturer, has none.

Clients should not, of course, assume that such clauses will always be upheld. In both the on-line⁸ and off-line⁹ worlds, jurisdiction, forum selection and choice of law provisions will be upheld only if they are fair and reasonable. In an unpublished decision in September, America Online was criticized by a local judge in Alameda County, California, for requiring AOL users to litigate only in the company's home state of Virginia. The plaintiff had a \$65 dispute with AOL arising from AOL's mailing an unsolicited free disc that promised free trial service for 30 days. Plaintiff alleged that there was small print on the computer screen that was hard to read. The court denied AOL's motion to dismiss for forum non conveniens.¹⁰

Electronic Approaches

Tip #7: Use Blocking Devices as Appropriate. Blocking devices are programmed to determine the location of any potential customers by requiring either zip code or other identifiable data to determine the customer's geographic location. Blocking mechanisms prohibit use, downloads, or orders from foreigners in countries with restrictive laws. The site can then — theoretically — automatically block usage of the site by such persons.

There was conflicting expert testimony, both in the *Yahoo!* case and among its commentators in the press, about the degree to which such devices are even feasible electronically: some said that such devices could be no more than 70 percent effective, while others said they could block out as much as 95-98 percent of unwanted traffic. All agreed, however, that there is no technology as of yet that is 100 percent fail-safe. Indeed, some maintain that there never will be: for as soon as a "failsafe" technique is invented, a determined user will find a way around it.

Ultimately, the only advice that is guaranteed to stand the test of time is for clients to consult counsel knowledgeable about jurisdictional issues, and for counsel to keep on top of both legal and technological developments in this fast-changing area.

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ENDNOTES

- ¹ See *Cybersell v. Cybersell*, 130 F.3d 414 (9th Cir. 1997); *Zippo v. Zippo.com*, 952 F. Supp. 1119 (W.D. Pa. 1997).
- ² There was evidence in the *Yahoo!* case that French users accessing the site were served French-language advertisements.
- ³ See, e.g., *Vitallo v. Velocity Powerboats*, 1998 WI. 246152 (N.D. Ill. April 27, 1998).
- ⁴ *Carpoint S.P.A. v. Microsoft Corp.*, 2000 E.T.M.R. [Appellate Tribunal in Rome]. The court declined jurisdiction because the Web site in question was passive, i.e., purely informational.
- ⁵ See, e.g., *Koster v. Automark Indus.*, 640 F.2d 77 (7th Cir. 1981) (citing *International Shoe Co. v. Washington*, 325 U.S. 310 (1945)).
- ⁶ See, e.g., *Abdullah v. Sheridan Square Press*, 1994 WI. 419847 (S.D.N.Y. May 4, 1994); *Bachchan v. India Abroad Publications*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).
- ⁷ 185 Misc. 2d 852, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).
- ⁸ See, e.g., *Decker v. Circus Circus Hotel*, 49 F. Supp.2d 743 (D.N.J. 1999).
- ⁹ See generally, *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).
- ¹⁰ *Mendoza v. AOL*, No. 827047-2 (unpub. dec. Alameda Co., CA, 9/25/00).