

## Exposing Online Service Providers To Criminal Liability

*Law360, New York (June 06, 2012, 4:56 PM ET)* --Online service providers and traditional publishers, take notice. Starting June 7, 2012, Washington state prosecutors will have a new arrow in their quiver — the nation’s first-of-its-kind criminal law requiring age verification for commercial sexual services advertisements. The landmark law threatens jail time (up to five years imprisonment) and fines for those who violate its strictures, whether through the operation of online classifieds, social networking sites, dating sites, discussion forums, blogs, chat rooms, search engines, or similar sites that allow users to post comments and images. And because the Internet is international in scope, so is the law’s potential impact.

All indications are that this law is only the beginning. Seattle’s mayor calls the law, which unanimously passed both the State House and Senate, a “national model for other states to follow.” Other states appear to agree. Tennessee recently passed a law virtually identical to an earlier version of the Washington statute, and as of this writing lawmakers in New York, New Jersey and elsewhere are contemplating similar legislation.[1]

There is little debate that the law’s stated objective — to prevent minors from being exploited through commercial sex ads — is commendable. But its methods, which threaten far-reaching and unintended consequences, have sparked significant debate. Companies and organizations with no intention of hosting exploitative online or print ads could find themselves caught up in the law’s broad sweep. Indeed, it is this potential for what the law’s critics consider overbroad application that raises the question of whether the law is enforceable in light of protections offered by the federal Communications Decency Act, Commerce Clause, and the First and Fifth Amendments.[2]

While we expect the public debate over the law to grow in the coming months, in the interim online service providers and others hosting third-party content and images should become familiar with the law’s broad proscriptions and consider ways to avoid being caught in its crosshairs.

### Washington S.B. 6251: Noble Goals Generate Novel Legislation[3]

The sexual exploitation of minors deserves both universal condemnation and criminal consequences. But rather than directly target the authors of ads depicting minors, or those directly involved in disseminating exploitative materials, the new law targets a much broader group — including online service providers that allow users to post messages and images on moderated and unmoderated systems.

The potential breadth of S.B. 6251 stands in contrast to its textual length. Its key provisions consume less than one page, all in service of the following prohibition:

A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.[4]

A defendant, moreover, can be guilty of the crime even if the defendant did not know — and had no reason to know — the person depicted in the ad was a minor.[5] Put another way, subject to an affirmative defense discussed below, the law imposes strict liability as to the age of the person depicted.

In turn, the affirmative defense provided by the statute is narrow. A defendant is not guilty if the defendant can prove through a documentary record that the defendant made a reasonable, good faith attempt to verify the depicted person's age by requiring the person whose picture the ad depicts to produce a government or school ID, thus enabling the online service provider to conduct an ID-to-person comparison.[6] That is a high — and, some would argue, impractical — bar in the world of online communications. Which, of course, may be exactly what the law's supporters intended.

The net result is that the statute places new importance on age verification for nearly all types of websites hosting third-party content. Many of these websites, including blogs, do not currently require users/posters to verify the ages of those depicted before posting content.[7] Others use familiar age-verification techniques, such as requiring users to check a box self-certifying that they are over 18. The law declares such traditional screens inadequate. As the law's sponsor, Sen. Jeanne Kohl-Welles, D-Seattle, put it, the law "makes the strongest possible statement that there should be no selling of minors online — or anywhere."

### **Considering Potential Legal Challenges to the Act**

Although it may enjoy strong political support, the act arguably is on less stable legal footing. Challenges to the Washington statute will likely be based on three key arguments.

#### *Preemption under the Communications Decency Act*

The primary challenge to the statute will likely be whether it is preempted by federal law.[8] More specifically, in 1996, Congress enacted the Communications Decency Act, which aims at regulating obscene content on the Internet. But, unlike the Washington statute, the federal act explicitly carves out from liability online service providers by (1) stating that they are not "treated as the publisher" of third-party content and (2) cannot be held liable for their voluntary efforts to filter or restrict content.[9] The act also preempts any cause of action under "inconsistent" state law.[10] These provisions are included in Section 230 of the act.

Congress had two principle reasons to exempt online service providers from liability for information provided by others. The first was to encourage the development of online platforms for communication generally. The second was to encourage online service providers to take an active role in monitoring or editing user content.

The argument for why the federal Communications Decency Act preempts the Washington statute is fairly straightforward. Congress wants the Internet to be a robust means for communications and for online service providers to take an active role in policing the content posted on their site. It, therefore, decided to exempt online service providers from liability for the role they may play in screening or publishing content authored by others.

By imposing on online service providers significant “vetting” burdens and threatening them with criminal liability for content provided by third parties, the Washington statute is arguably inconsistent with both the act’s purpose and its specific exemption. This view draws support from the case law,[11] including several decisions holding that the federal act preempts contrary state criminal laws.[12]

But Washington officials, and other states preparing to enact similar legislation, will have seen this argument coming. They will likely try to distinguish the statute's prohibition on publishing, displaying or disseminating content — or causing the content to be published, displayed or disseminated — from the federal act's focus on the role and liability of a "publisher." They may also argue that the statute functions as an age-verification statute, penalizing failure to properly verify a user’s age, not just the act of “publishing.”

The statute's supporters may also invite the courts to focus on the key purpose of the federal Section 230 exemption, namely, to encourage online service providers to take a more active role in self-regulating the content they post. The exemption was not intended, they will claim, to give shelter to online service providers who fail to police user content.

And by reading the key provision (an online service provider is not a publisher) as a definition and not a statement of immunity, the argument will likely go, the statute protects those online service providers who do in fact fulfill the act’s goal of self-regulating content.[13] To hold otherwise, they will contend, would take away any incentive for online service providers to follow through on the intent of the exemption — to cause service providers to invest in monitoring the content posted on their sites.

Based on the existing case law, however, these arguments against preemption will likely face an uphill climb.

#### *Dormant Commerce Clause*

The Washington statute is likely to also be challenged on the basis of the dormant Commerce Clause. This doctrine holds that, as a necessary corollary of Congress' power to regulate commerce "among the several states," states are precluded from passing legislation placing undue burdens on, or discriminating against, interstate commerce.[14]

Critics of the Washington statute will argue that, by imposing significant age-verification burdens on companies operating far outside Washington’s borders, the Washington statute runs afoul of the dormant Commerce Clause, and, therefore, represents an invalid exercise of state power.

#### *First and Fifth Amendments*

Finally, enforcement of the Washington statute will almost certainly be subjected to careful First Amendment and Fifth Amendment scrutiny. The First Amendment’s protection of speech naturally extends to online content.[15] Critics of the Washington statute will argue that, for the reasons discussed above, the statute is overbroad, is as a practical matter virtually impossible to comply with, and, therefore, unconstitutionally “chills” otherwise lawful speech.

For additional support of this position, critics could point to recent decisions concerning analogous ID/age-verification requirements in the Child Protection and Obscenity Enforcement Act context, which have emphasized the importance of not burdening lawful speech more than necessary to further the state's legitimate interest in protecting children.[16] The related Fifth Amendment argument, in turn, would claim that the statute improperly creates a strict liability crime that unnecessarily criminalizes a broad range of otherwise innocent conduct.

Signaling the seriousness of these legal challenges, on June 5, 2012, Seattle-based U.S. District Judge Ricardo S. Martinez granted a motion for a temporary restraining order filed by Backpage.com, an online classifieds service. Judge Martinez ordered Washington officials to not "tak[e] any actions to enforce SB 6251 or pursue prosecution under the law in any way." [17] This is clearly a significant early victory for the law's critics.

### **Prosecutorial Discretion v. Clearly Defined Rules of Right and Wrong**

Setting aside for now whether the Washington statute will survive such legal challenges, the likely scope of its enforcement also raises more questions than it answers. At first glance, the new law's focus seems quite narrow. Both its preamble and the media coverage accompanying its passage focus on online classifieds services, and in particular on those that allow users to post advertisements through an "adult services" channel. But by its own terms — and, as we shall see, certainly in the hands of an aggressive prosecutor — the law is capable of cutting a much broader swath.

To understand why, consider the hypothetical case of a seemingly unlikely target — say, a trendy new restaurant review website focusing on New York City's eateries. It has no classifieds, and all of the restaurants it reviews and nearly all of its subscribers are located in New York.

As luck would have it, the catchy and innovative restaurant review website has gained a loyal following. And to keep its users plugged in, the website invites users who visited a restaurant profiled on the site to post their own reviews. Before doing so, however, each user must set up a personal profile, complete with a screen name, picture, email address, birth date, and location.

The website, moreover, does not edit or screen user reviews in any way — instead, and like tens of thousands of similar sites, it provides an unmoderated, self-service portal through which users can upload their reviews, or comment on the reviews posted by others.

Now let's suppose that one day an anonymous tipster sends an email to the King County Prosecuting Attorney's Office, and that this email finds its way to the inbox of a particularly aggressive and politically ambitious prosecutor who has just read about the landmark (not to mention unanimously approved) state legislation. The email contains no message other than a link to our hypothetical website's review of an exclusive new restaurant on the Upper East Side. The prosecutor begins scrolling through the user reviews that follow. And there, buried among the others, is a short posting by a user from "Seattle, WA."

Rather than a restaurant review, however, the posting contains an offer for "escort services for the next time you're in the Emerald City." The posting includes a phone number beginning with 206 — the Seattle area code — and at the top is the user's profile picture, which shows a young girl who appears to be in her teens and matches the picture of a known victim of exploitation in the Seattle area.

Surely this New York-based restaurant review website could not be indicted for violating Washington's new anti-exploitation statute, right?

## Examining the Hypothetical Case: When Does “Knowing” Actually Mean “Knowing”?

S.B. 6251 requires online service providers to act “knowingly.” And if faced with criminal charges, online service providers like our hypothetical website will seek shelter under this standard, pointing out that they don’t solicit sex ads, don’t want sex ads, and surely would have removed the ad had they known it was there.

Now view this case through the eyes of our aggressive prosecutor, who has called you, as defense counsel, to her office to discuss possible criminal charges. You sit down across the table and begin discussing the “knowing” standard.

You get five words in before the prosecutor slides his state law handbook across the table. You see it’s open to S.B. 6251, and there is one phrase highlighted — causes directly or indirectly, to be published. “I don’t see anything about ‘knowing’ there,” the prosecutor interrupts. “Your client provided the mechanism to upload a posting,” he continues, “and in so doing clearly ‘caused,’ even if ‘indirectly,’ the ad to be published.”

“That’s a stretch,” you say. “The ‘knowing’ standard applies to both publishing an ad and causing an ad to be published. Otherwise even the cable company, whose high-speed lines ‘caused’ the ad to be published, would be liable. And we both know that courts don’t like strict liability crimes, like the one you’re proposing. You should be gunning for the guy who wrote the posting, not us. We’re an innocent bystander in all of this.”

The prosecutor jabs his finger into the table. He points out that, just as brick-and-mortar companies are liable for the collective knowledge of their employees,[18] online service providers — particularly those operating in exploitation hot-spots like New York — must be accountable for the information stored on their servers or in their source code, which they can access instantly 24 hours a day, seven days a week. “When your site downloaded the posting,” he says, “you, through your site and servers, knew exactly what the posting said and knew it contained a picture; and whether through action or inaction, you published it anyway. And that’s more than enough.”

“Now hold on for just a second,” you say. “You assume that we knew about the posting, but we don’t even screen, see, or approve the user postings. This all happens without us doing anything!”

Now the prosecutor reaches into his bag and retrieves a worn piece of paper. He unfolds it and tapes it to the wall. On the piece of paper is a picture of an ostrich, its head buried deep in the sand. The prosecutor reminds you that a defendant can’t avoid liability by burying its head and pretending it doesn’t see the content of the ads that are uploaded. He says that a reasonable online service provider would have realized, based on the text of the ad, that unlawful content was being posted on its site. And under Washington law, that can count as “knowing.”[19]

“But we didn’t turn our heads. We ask every user to provide his or her birth date, and this user said she was born in 1985.”

The prosecutor continues to be unimpressed. He notes that it is no excuse under the law to not know that the person depicted in the ad is under 18 years old. And the law, indeed, explicitly states that a defendant cannot rely on a written or verbal statement of age.

But you push back. “OK, fine. But isn’t S.B. 6251 limited to online service providers in Washington, thousands of miles away from my client and its subscribers?”

“Wrong again,” says the prosecutor. “The law requires only that the sex act be advertised to take place in Washington. There is no restriction whatsoever on where in the world the ad is posted, or where the online service provider is located. Here, the ad indicates that the ‘service’ is to be provided in Seattle. And that is all that’s required.”

Now you are exasperated. “Even if we had put controls in place, we wouldn’t have caught this comment because it didn’t use any explicit language. You tell me, what were we supposed to do?”

The prosecutor reminds you that, under the new law, an advertisement with “either an explicit or implicit” offer for sex is all that is needed. Then the prosecutor leans forward. “What should you have done? It’s here in black and white. Before publishing any postings from this user, you were required to ask for her ID. Not a copy — an original. And if it said she was under 18, you should have been tracking any postings made under her profile for ones that qualify as unlawful ads, just like this one.”

You now wonder how you will explain to your client that the company — and the managers running it — were supposed to verify its subscribers’ ages through original IDs. “Can you prove that anyone responded to this posting? Can you prove that anyone even read it?” you ask.

“No. And, under the law, I don’t need to,” retorts the prosecutor.

Case closed. From this particular prosecutor’s perspective, your client has two choices: Plead the case out (using the points you made to mitigate the sentence), or roll the dice and go to trial.

### **So What Can You Do About It?**

Legal challenges to the Washington statute will take some time to work their way through the courts. And it remains to be seen how Washington state prosecutors plan to enforce the statute, if it is upheld. It is also conceivable that the law’s backers may have a different longer-term goal — to pressure Congress to amend the federal Communications Decency Act or to directly regulate online service providers. So what are online service providers (and, for that matter, “traditional” publishers of alternative weeklies and the like) supposed to do in the meantime?

Online service providers should, as an initial matter, consult with experienced counsel to understand the law’s scope and to develop a plan to minimize their risk profile. For example, they might consider using crowd-sourcing reviews to solicit alerts of website misuse, and should establish or augment procedures for reporting instances of exploitation to the National Center for Missing and Exploited Children. By understanding the new law, keeping a watchful eye on how it is interpreted and enforced, and developing an internal strategy, online service providers can reduce their risk of getting caught in the cross fire of the important and ongoing battle to end the exploitation of minors.

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[1] See, e.g., "Connecticut Bill Makes Publishers Liable for Escort Ads," Associated Press (March 17, 2012) (available at <http://www.wtnh.com/dpp/news/politics/conn-bill-makes-publishers-liable-for-escort-ads>).

[2] On June 4, 2012, Backpage.com LLC filed suit in US District Court in Seattle (Case no. 12-CV-00954) to block the law's enforcement. On June 5, 2012, the District Court granted Backpage's motion for a Temporary Restraining Order, ruling that Backpage "has shown a likelihood of success on the merits of its claim, pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, as well as irreparable harm, the balance of equities tipping strongly in its favor, and injury to the public interest, justifying injunctive relief."

[3] The full text of SB 6251 is available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/6251-S.SL.pdf>.

[4] Section 2(1).

[5] Section 2(2).

[6] Interestingly, the statute does not appear to require a photo ID.

[7] Cf. 18 U.S.C. § 2257 (setting forth requirements for the "producers" of adult depictions of "actual sexually explicit conduct").

[8] Under the Supremacy Clause, federal law prevails when there is a conflict between it and state law. See U.S. Constitution, Art. VI.

[9] 47 U.S.C. § 230(c).

[10] 47 U.S.C. § 230(e)(3).

[11] See, e.g., *Universal Communication Systems Inc. v. Lycos Inc.*, 478 F.3d 413 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997).

[12] See, e.g., *Voicenet Communications v. Corbett*, case no 04-1318, 2006 WL 2506318 (E.D. Pa. date, 2006).

[13] See *Doe v. GTE Corp.*, 347 F.3d 655, 659-660 (7th Cir. 2003).

[14] See *American Trucking Assoc'n, Inc. v. Michigan Pub. Service Com'n*, 545 U.S. 429 (2005); see also *Direct Marketing Ass'n v. Huber*, No. 10-cv-01546, 2012 WL 1079175 (D. Colo. Mar. 30, 2012).

[15] See generally *Reno v. ACLU*, 521 U.S. 844 (1997).

[16] See, e.g., *Free Speech Coalition Inc. v. Attorney General of U.S.*, 677 F.3d 519 (3rd Cir.(Pa.) Apr 16, 2012) ("[W]e will vacate the District Court's dismissal of Plaintiffs' as-applied First Amendment claim (Count 1) and remand it for further proceedings because Plaintiffs should be afforded the opportunity to conduct discovery and develop the record regarding whether the Statutes are narrowly tailored.").

[17] See Note 2, above.

[18] See, e.g., *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).

[19] See Washington Pattern Criminal Jury Instruction No. 10.02.

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