

Op-Ed/Editorials - Making Your Web Site Too Good Can Get You Into Trouble

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Professor I. Nelson Rose

Whittier Law School

Costa Mesa, CA.

Can you be dragged across the country, or the world, forced to defend yourself in a foreign courtroom, merely because you have a site on the World Wide Web?

Judges around the U.S. are being asked that question in cases that often involve Internet gambling.

The most recent example is a lawsuit filed by the National Football League against Ken Miller, doing business as the web site nfltoday.com. Miller is a resident of California and nfltoday.com, if it is located anywhere on Earth, is in California. The NFL is a New York company with New York lawyers, who naturally filed the lawsuit in New York.

The United States Supreme Court has declared that an out-of-state defendant can be sued in a state if it has "minimum contacts" with that state. What exactly constitutes minimum contacts has given nightmares to tens of thousands of first-year law students.

We know that a mail order business which solicits and makes sales to customers in another state may be sued by buyers in that state if the products are defective. Courts have had little trouble extending the doctrine to the Internet: A company which knowingly takes orders over the net can be dragged into courthouses wherever it ships its products.

A trial judge and the Court of Appeals in Minnesota went even further, ruling that it was fair to force a Nevada company, Granite Gate, to defend a lawsuit in Minnesota which alleged that Granite Gate falsely advertised online that anyone, including residents of Minnesota, would be able in the future to make bets legally through its web site. The justices of the Minnesota Supreme Court were exactly

evenly divided on whether this was sufficient minimum contacts.

But Miller did not do any business directly with New York through nfltoday.com, not even advertising anything for sale. In fact, District Court Judge John S. Martin, Jr., noted that the web site operator "rarely sells anything to his visitors."

Yet Judge Martin went on to rule that Miller had to appear in his New York courtroom.

So, how did nfltoday.com make any money? And why was Miller forced to cross the country to defend a lawsuit?

Miller made his income from selling advertising space on the nfltoday.com web site. Some of those advertisers were foreign sports books, willing to take bets from Americans.

The NFL suit alleged Miller was using its trademarks without authorization and violating its copyrights. Its main complaint was that nfltoday.com was linking (in both a psychological and cyberworld sense) the NFL with gambling, causing damage to the NFL in New York.

Miller's problem was that he did too good a job in designing nfltoday.com.

The web site itself provided information which might prove useful to anyone who wanted to make a bet on an NFL game. With a name like nfltoday.com, Miller was obviously targeting NFL fans. Judge Martin found that Miller "had to recognize that, since there are two major NFL teams that some people still refer to as the New York Giants and New York Jets even though they play in New Jersey, it was likely that his site would ultimately appear on thousands of computer screens in New York."

Miller's error was creating hyperlinks both to electronic bookies and to the official NFL site, nfl.com. To the NFL the final insult was that anyone who clicked on the link to nfl.com would see that site appear in the center of his or her screen, framed by the nfltoday.com site.

Whether Miller will win or lose remains to be seen. The NFL is going to have to prove that computer users were confused by nfltoday.com into believing that the NFL itself endorsed gambling.

My personal belief is that anybody interested enough in betting on football to go to a site named nfltoday.com and then jump to the official site or an online sports book knows exactly how the NFL feels about gambling on professional football games.

But, it's not whether you win or lose, but can you afford the lawyers.

Companies that have never been sued fear runaway juries. But more than 90% of lawsuits are settled. Usually neither party would be too unhappy with what they paid or received in a settlement, if that were the only money which changed hands.

The problem is the cost of the lawsuit itself.

Lawyers usually want cases to settle. They know that the longer the legal battle drags on, the more unhappy the client will be, even if the client eventually "wins."

I recently spoke with the general counsel for a major gaming company. I was not involved in the case, but I understand it involved complicated patent claims, allegations of breaches of contracts, charges of misconduct and counter-charges.

The impression I got from the general counsel was that he could live with the final settlement. But he was incensed that it cost his company more than three years and \$2 million. This from a gaming executive who is also a lawyer and understands the system.

A major, unspoken goal of pre-trial legal maneuvers is to make fighting the case as expensive as possible for the other side, while keeping costs down for your own side. An easy way for a lawyer to do this is to have the case heard in a local court, especially when the opposing party is located on the other side of the country or the world.

Now that California-based nfltoday.com has to find a New York law firm and travel 3,000 miles every time there is a fifteen minute hearing, I suspect we will soon hear the case has been settled.

Already Miller, "as a courtesy to the NFL," changed nfltoday.com to badbet.com.