

Profiles and Pitfalls

--Trending Legal Issues with Online Dating Sites

By: Lawrence G. Walters, Esq.

Walters Law Group

While modern adult content producers struggle with issues like piracy and waning profitability, the online dating market continues to grow in popularity. Although the business model has been around for years, widespread accessibility to webcams and high speed broadband connections has allowed dating sites to become richly populated with homegrown erotic content. The insatiable human desire to connect, flirt, find romance, or just plain “hook up”, has continued to drive the popularity of both adult and mainstream online dating sites. Dating site operators encounter many of the same legal concerns as typical adult content producers, such as obscenity, 2257 compliance, age verification, and child exploitation concerns, but they must also wrestle with a host of independent legal issues that are unique to their industry.

Background Checks

Online dating is one of the few web-based business models that relies on successful user interaction offline almost as much as it does online. Because of this unique dichotomy, dating site operators face the ongoing potential of being dragged into court based on the interactions between users of the site once they connect. Recent years have provided shocking headlines of cases where perpetrators have preyed on fellow dating site users and committed horrific crimes ranging from sexual assault to murder.¹ As a result, some of the biggest names in the online dating industry have found themselves in the unwitting role of legal guinea pig, as this unsettled area of liability.² These instances have driven lawmakers in some states to pass statutes imposing certain obligations on dating site operators with regard to criminal history background checks. Some states, like New Jersey,³ New York,⁴ and most recently Illinois⁵, require that dating sites disclose whether they conduct criminal background checks on their users. In response to public pressure, some sites have begun checking their membership lists against national sex offender registries and removing sex offenders from their databases. Other states put more of the onus on the site user, and only require that dating sites provide safety notices to

¹See, Michael Roberts, “Billy Joe Delacey indicted in murder of male escort he met on Craigslist”, Denver Westword Blogs, Oct. 1, 2012, available at: http://blogs.westword.com/latestword/2012/10/billy_joe_delacey_indicted_murder_escort_craigslist.php

² See *Beckman v. Match.com, LLC*, Case No. 13-cv-00097 (D. Nev., filed Jan. 18, 2013); *Doe v. Match.com, LLC*, Case No. BC458927 (Cal. Super. Ct., filed Apr. 13, 2011)

³ New Jersey Internet Dating Safety Act – N.J.S.A. 56:8-168, et seq.

⁴ N.Y. Gen. Bus. Law §394-cc.

⁵ Illinois Internet Dating Safety Act – 815 ILCS 518.

their members, warning them of the dangers of posting certain personal information online.⁶ Thus, it is important for adult dating site operators to develop a well-considered policy regarding background checks, and post required notices or disclaimers, as mandated by applicable state law. These efforts will reduce, but not eliminate, potential liability based on user interactions.

Profile Scraping

One of the primary challenges facing any new dating site operator is obtaining enough member profile content to generate a sufficient level of user interaction. This cyclical problem has no easy solution, since the necessary profile content comes from the members. In other words; the more members, the more content; the more content, the more members. With the successful startup of a dating site resting between the mutual satisfaction of these two interdependent preconditions, operating this type of consumer-facing digital marketplace can be an uphill battle. Some site operators have attempted to address this “chicken and egg” problem by buying, licensing, or even ‘scraping’ profile content from other online dating platforms. While this may seem like a reasonable solution to the content acquisition problem, it can carry a host of legal concerns. Operators can protect most user generated content (for example, dating site profiles) under the legal safeguards provided by Section 230,⁷ the DMCA,⁸ and Section 2257.⁹ By way of summary, Section 230 provides legal immunity to the site operator for most civil claims based on the content of user generated material; the DMCA provides safe harbor and a defense against claims alleging that user generated content violates copyrights; and Section 2257 provides for exemptions to its records keeping and labeling obligations for social networking sites. We call these legal protections the “Trifecta.” Preservation of the Trifecta is an essential component to the success of most dating site business models. However, when user uploaded content is taken from the originating site and placed on a different site - whether pursuant to a contract or otherwise - the Trifecta protections can be forfeited. Any use of third-party content for purposes other than those intended by the original uploader, can have negative consequences for the site operator. Accordingly, licensed or scraped user profiles can be a ticking legal time bomb and result in extensive liability for the site operator. Moreover, any acquisition of profile content without specific permission can result in a variety of claims ranging from copyright infringement to breach of online agreements. Thus, caution is warranted when profile content is acquired in this manner.

(G)host Profiles

The Federal Trade Commission (FTC) frequently enforces federal laws and regulations designed to protect consumers using Internet services. Often these enforcement actions involve concerns relating to the “deceptive” or “unfair” business practices of website operators. One

⁶ Tex. Bus. & Com. Code Ann. §106.

⁷ 47 U.S.C. §230(c).

⁸ 17 U.S.C. §512.

⁹ Title 18 U.S.C. §2257.

potential concern in this regard is the use of “host” or “ghost” profiles; i.e., dating site profiles that are created and maintained by the website operator, as opposed to a real third-party user. Aside from the clear lack of Trifecta protections that would otherwise be afforded to user generated content, such profiles can result in complaints by dissatisfied users that have received multiple messages from these fictitious profiles, but no actual human interaction. Great care must be taken to notify dating site members of the existence of this type of user profile. Ranging from particularized language to the conspicuousness of its placement, the FTC has issued numerous rulings and policy statements detailing the manner in which such consumer disclosures must be published on a website. In short, burying a disclaimer in boilerplate legal terms simply won’t cut it. Failure to properly identify (g)host profiles to your users can result in unhappy customers and again, the potential for serious legal ramifications.

Featured or Promotional User Content

As noted above, dating sites enjoy significant legal protection under Section 230, the DMCA, and Section 2257, relating to their profile content. However, often such content is repackaged and utilized by the site operator in a variety of ways that exceed the original intentions or expectations of the user having provided the content. Examples of these questionable content recycling techniques typically involve featuring the content on a non-profile portion of the site, in the site’s promotional materials, or even on third-party advertisements. The details of how and when these legal protections can be forfeited through unanticipated use will vary with each statute and ultimately depend on the particular circumstances surrounding the use (i.e., the site’s user agreements, efforts in statutory compliance, etc.). However, dating site operators should be aware that any use of profile content outside the context of the profile itself, has the potential to result in legal liability.

Alteration of Exempt Content

Most adult dating site operators take advantage of the exemption contained in Section 2257, which covers activities involving the “transmission, storage, retrieval, hosting, [and] formatting...of a communication without selection or alteration of the content of the communication.”¹⁰ Certainly, many online dating site users would be hesitant to provide 2257 records, including scanned photo ID cards, if such records were required before they could upload sexually explicit material. However, the 2257 exemption is subject to an important limitation, in that the content of the communication cannot be “selected” or “altered” for the exemption to apply. While case law has remained unclear as to the precise level of selection or alteration required to lose the 2257 exemption, even seemingly innocent activities like watermarking images with the site’s brand name or excluding certain images in favor of others, could conceivably constitute exemption-destroying operator activity. These legal nuances

¹⁰ §2257(h)(2)(A)(ii).

reinforce the need for the adoption of well-considered internal operating policies regarding the use, modification and/or publication of sexually-explicit profile content.

Conclusion

In sum, because of the paradox resulting from the unavoidable collision of the hectic and demanding modern-day lifestyle and that pesky human desire for companionship, Internet dating is officially a 21st Century phenomenon. Like most thriving web-based businesses, the public demanded, and the digital marketplace answered. As the popularity of the adult dating site model continues to rise, the surrounding legal issues will undoubtedly move to the forefront. Greater participation in the activity by the general public means greater potential for complaints, lawsuits, and prosecutions. Although still in its infancy, online dating law is complex and constantly evolving. Thus, close attention to the legal details is warranted.

Lawrence G. Walters, Esq. heads up Walters Law Group, and has represented all facets of the adult industry, including adult dating site, for over 20 years. Nothing contained in the foregoing article constitutes legal advice. Mr. Walters can be reached at Larry@firstamendment.com or 800.530.8137.