Banned From the Internet: A Term of Probation That Is Overly Restrictive

October 11, 2010

The following opinion article by Ifrah PLLC founding partner A. Jeff Ifrah and associate Steven Eichorn appeared in the National Law Journal on October 11, 2010.

Banned from the Internet

Prohibiting a defendant on probation from conducting any business online is overly restrictive and not reasonably related to legitimate sentencing goals.

"The Internet is becoming the town square for the global village of tomorrow." — Bill Gates, founder of Microsoft Corp.

Given the pervasiveness of the Internet, it is curious to us that some courts have been all too willing to prohibit Internet use for defendants on probation or supervised release. Are such Internet bans narrowly tailored to affect "only such deprivations of liberty or property as are reasonably necessary," a statutory factor in the conditions of release issued by a judge? Recent cases suggest the answer is no.

Internet bans are most commonly issued by courts as a condition of probation in child pornography cases in which the defendants may have utilized the Internet as a tool to lure their victims. But even when the courts have permitted Internet bans in such cases, they have often noted the harshness of a complete ban and have listed numerous factors to consider before imposing a ban, such as whether it "is narrowly tailored to impose no greater restriction than necessary," the "availability of filtering software that could allow [the defendant's] Internet activity to be monitored and/or restricted" and the duration of the ban. In such cases, appeals courts are diligent in reminding trial courts that such bans must be reasonably related to the statutory factors and that total restrictions "rarely could be justified" even for child pornography defendants. *U.S. v. Burroughs,* 613 F.3d 233 (D.C. Cir. 2010).

Given the limitations imposed in child-pornography cases, the growing number of Internet bans in white-collar cases raises our eyebrows. Is an Internet ban appropriate for a defendant who used the Internet to perpetrate a fraud like a telemarketing scheme or investment fraud? Starting with the U.S. Court of Appeals for the 9th Circuit more than 10 years ago in *U.S. v. Mitnick,* 145 F.3d 1342 (9th Cir. 1998), and much more recently with the 3d Circuit in *U.S. v. Keller,* 366 Fed. Appx. 362 (3d Cir. 2010), courts seem more than willing to say "yes." Courts seem to have concluded that such bans are reasonably related to legitimate sentencing goals, are no more restrictive than necessary and do not impermissibly restrict any First Amendment rights. See, e.g,. *U.S. v. Suggs,* 50 Fed. Appx. 208 (6th Cir. 2002) (computer hacker).

In the most recent case on the topic, *U.S. v. Keller,* the 3d Circuit upheld the following Internet ban for a defendant convicted of traditional mail fraud: "[T]he defendant shall cease and no longer create or conduct any businesses/websites via the internet for the [three-year] period of supervision." While this may not on its face sound onerous, it is crucial to know that Eric Keller did not use the Web to perpetrate a fraud on his customers.

Keller had owned and operated a retail candy business through several Web sites. In order to deliver the candy to the customers, Keller shipped the candy via United Parcel Service. Using fraudulent information, Keller set up 12 different UPS shipping accounts. When one shipping account was suspended for nonpayment, Keller just abandoned that account and opened another account. Keller accomplished this by using various aliases and other trickery. Ultimately, UPS suffered a loss of approximately $155,650.

Despite the fact that the Internet was not used to perpetrate a fraud on Keller's customers, the court saw fit to ban Keller from using the Web in the future for doing business. This lack of a nexus between the fraud at issue and the role of the Internet was also present in an earlier case decided by the 6th Circuit in 2002. In that case, the defendant, Thomas Suggs, was banned from using a personal computer for anything whatsoever. Just like the defendant in Keller, Suggs committed a crime that did not involve perpetrating a fraud on customers over the Internet; Suggs' crime involved an investment scheme involving the financing of computers.

Clearly, courts would not apply a complete ban on conducting business for a defendant who operated many fraudulent brick-and-mortar companies with separate storefronts. Courts readily understand that banning a defendant from conducting any further business is not reasonably related to legitimate sentencing goals and is much more restrictive than necessary. So why are courts willing to place a complete ban on Internet business for defendants who use the Internet to conduct their business and bar them from "the town square for the global village of tomorrow?" And why are courts handing down more restrictive Internet bans in white-collar cases than those handed out in Internet child pornography cases?

The answer may be related to some judges' lack of appreciation of the importance of the Internet in today's society. We hope that, as online commerce becomes universally perceived as being as routine as business conducted in a brick-and-mortar store, courts will be careful to ensure that this critical form of communication with customers is not restricted in the absence of compelling circumstances. Anything less would clearly constitute "deprivations of liberty or property" that are far from "reasonably necessary."

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!