



The Volokh Conspiracy

# Abortion, ICANN, and Internet governance



By **David Post** September 1 at 1:17 PM

I have a feeling that I will be spending increasing amounts of my time in the next year or so on “Internet governance” questions, and particularly those connected to [ICANN](#), the folks who oversee the operation of the Internet’s domain name system, and I’m always on the lookout for good illustrations of why ICANN matters, and why ‘Internet governance’ matters, and what they have to do with one another.

So [a story in yesterday’s New York Times magazine](#), on the operation of the Dutch website “[Women on Web](#),” caught my eye. The basic story (with lots of twists and turns I won’t go into) is this: women who access the website (from anywhere) can obtain medical advice from practitioners (located inside the

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Netherlands) about so-called ‘medical abortions’ – using the drugs mifepristone (which used to be called RU-486) and misoprostol, to induce miscarriages in the first trimester of pregnancy – and the website will in the appropriate case arrange for the drugs to be shipped to the pregnant woman from a manufacturing facility in India. The system has been designed to enable women in countries where abortion clinics are nonexistent or highly restricted – as the article points out, roughly 40 percent of the world’s population lives in countries, primarily in Latin America, Africa, Asia and the Persian Gulf, where abortion is either banned or severely restricted – to obtain assistance in terminating their pregnancies, and the Women on Web has apparently helped thousands of women, from all over the planet (Costa Rica, Malta, Pakistan, New Zealand, Chile, India, Uganda, Ireland, Brazil, South Korea, Saudi Arabia, the United Arab Emirates, Poland, Algeria . . .) to obtain the drugs which they could not have done using their local health systems.

There is a great deal one might say about this, and many angles from which one can view it. It’s a wonderful illustration of both the promise and the problem of Internet communication; to some, this is a wonderful example of how the border-disregarding nature of Internet communication enables people around the globe to evade oppressive and unreasonable local laws; to others, it’s an example of how the Net enables law-breaking, plain and simple. To my eye, it has the classic features of the central



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problem of Internet law, one that has been around for quite some time but which we have not managed to solve. An Internet site, operating lawfully in the jurisdiction in which it is physically located (the Netherlands), is accessible by users located in jurisdictions where local law prohibits the website's activities (Ireland, or Algeria). [Cyberlaw oldtimers know this as the "Yahoo! Problem," after the well-publicized case in the late 1990s involving the display of Nazi memorabilia on a Yahoo! auction site, accessible from within France where such displays are illegal]. Irish or Algerian authorities might well view the website operators as violating their local law – just as US authorities assert that Internet gambling sites, or file-trading sites, violate US law when they send information, or provide services, to users from within the US. The Dutch might view things differently. Irish officials might obtain a judgment under Irish law, from an Irish court, ordering the website closed, which they might bring to the Netherlands and seek assistance from the Dutch authorities. It is a pattern repeated over and over again, every day, thousands or hundreds of thousands of times, and yet the international legal systems has no straightforward answer to the straightforward question: is Women on Web violating Algerian (or Irish, or Brazilian . . .) law, or not? Do the Algerian/Irish/Brazilian authorities have some legal recourse against it, or not?

Which is where ICANN comes in. ICANN, through its control over the global Internet domain name system, is in a unique position with respect to

enforcement of local law against website operators.

To put it bluntly, ICANN is in a position to make the Women on Web website entirely inoperable – by ordering it removed from the .org database. That is a power that it is not exercising – at the moment; ICANN’s dispute resolution system deals exclusively with claims that website names are infringing local trademark protections, not with larger questions about violations of other legal rules. But there is a vacuum in international law, and ICANN is in a position to fill that vacuum, and it just might be interested in doing so. It will surely be under increasing pressure to do so from the many governments out there, and the many private interests out there, that are frustrated with the inability to deal with law-breakers on the Net.

Whether or not ICANN takes on this role, and the strictures under which it would operate were it to do so, strike me as critically important for the next decade or so.

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