

ADULT INDUSTRY UPDATE™

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PRIVACY POLICIES MAY NOW BE REQUIRED!

California's new Online Privacy Protection Act is effective starting this month.¹ The Act requires all commercial Internet businesses doing business in California to conspicuously post privacy policies in one of the following three ways: (1) post the full privacy policy on the home page or on the first significant Web page after entering the site; (2) post an icon on those pages, containing the word “privacy” and that must contrast with the color on the Web page; or (3) post the privacy policy on another Web page that is linked to the home page or first significant page by hypertext. The Act requires that the privacy policy text or icon must be bigger than its surroundings. The Act also requires sites to disclose what personal identification information they collect, use, and share. Third parties and those who offer managing services are exempted from the Act. The type of consumer information that is protected, as defined under Section 22577 of California’s Business and Professions Code, is as follows: (1) first and last name; (2) home or other physical address; (3) e-mail address; (4) telephone number; (5) social security number; (6) identifiers that allow a person to be contacted; and (7) any information used in combination with 1-6 above.² Additionally, personally identifying information when combined with cookies, profiles and preference combined with 1-6 appear to be protected. An operator of a Web site will receive notice if their site is not in compliance, and will have 30 days to post a

¹ Charles Farrar, *California E-Privacy Law Takes Effect*, AVN, July 7, 2004, at http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=107617.

² Ian Rambarran, *Web Site Operators Must Prepare to Follow Privacy Act*, Los Angeles Daily Journal, June 25, 2004, Page 7.

compliant Privacy Policy after it receives notice. Since most Web sites will do business at some point with users or members located in California, all sites should become compliant with this new law.

New Section 2257 Regulations

As noted in last month's *Update*, a new set of regulations were introduced by Attorney General John Ashcroft, substantially amending and clarifying the records keeping obligations of content producers and distributors of adult-oriented materials. The proposed regulations, located at <http://www.regulations.gov/freddocs/04-13792.htm>, are not final yet, but may take effect on or after August 24, 2004, when the period for public comment closes.

The most significant change is the requirement that all secondary producers (now including webmasters that do not themselves produce content) must obtain copies of age-verification records and I.D.'s required by Section 2257, and maintain them in accordance with the law, in the same manner as primary content producers. §75.1(2). Compliance with the new regulations also means that any performers residing in countries outside of the United States must now produce a passport as the only means of identification, assuming that the regulations are approved as proposed. International or foreign driver's licenses or country I.D. cards will not be acceptable for foreign models. Additionally, the required age records must be maintained and cross indexed in such a way that they are alphabetically and numerically (whatever that means) retrievable.

The other significant change is the updated requirement for the location of the Disclosure pertaining to the Custodian of Records. Under the proposed regulations, the Disclosure must be contained on the Web site's "home page" or "main URL." §75.8(d). The Disclosure must be in typeface not smaller than 11 points and must be displayed in black type, on a white, untinted

background. §75.6(e). Moreover, under the proposed regulations, the Disclosure must be displayed in the same typeface as the names of the performer, director, producer, or owner, whichever is largest, and shall be no smaller in size than the largest of the names of the performers, director, producer, or owner.

There are a couple of other miscellaneous changes worth mentioning. First, Section 2257 obligations now apparently apply to any content produced on or after November 1, 1990. Given that the universally recognized effective date for the law was June 30, 1995, webmasters will now need to determine which date to use, in consultation with their attorneys. Also, as alluded to above, those individuals required to keep records, must maintain those records for a period of seven (7) years, unless the producer goes out of business, in which case the retention period is five (5) years. §75.4. In regards to Section 2257 inspections, inspections can only occur between the hours of 8 a.m. and 6 p.m. – every day of the year, including weekends and holidays! §75.5(c)(1). Generally there can be no more than one inspection every four months of a particular individual's records, unless there is reason to believe that continued violations are occurring. §75.5(d). Inspectors must produce valid credentials showing that they have the right to inspect the records, and they must explain the purpose of the inspection. §75.5(2). The Records Custodian may provide additional information to the inspectors bearing on any concerns identified during the inspections. §75.5(4). Finally, Section 2257 Records must be kept separate from all other business records. §75.2(e). Now, more than ever, is the time to make ensure that all website content complies with Section 2257, and begin preparing for the ultimate adoption of the new regulations.

KENTUCKY'S OBSCENITY LAWS

Jeree Mills, owner of Dreamworld, an adult shop in Knox County, Kentucky, and employee Belinda Brown were arrested and charged with a misdemeanor for violating Kentucky state law against distributing obscene material.³ Leanna Philpot, manager of the store, stated that after the arrests, Dreamworld closed for just over three weeks, but reopened shortly after. The sheriff's office does not anticipate more arrests until the courts decide whether or not Dreamworld's products are obscene under the law.⁴ Both entered a plea of not guilty.

COMBATTING SPAM

Time Warner Inc.'s America Online, Yahoo Inc., EarthLink Inc., Microsoft Corp., Comcast Corp., and BT Group Plc have developed a proposal with voluntary guidelines that would allow Internet providers to unplug users who allow their computers to forward unwanted spam emails.⁵ The proposal was developed due to the fact that spam accounts for approximately 83 percent of e-mail traffic, and costs large Internet providers billions of dollars each year because of the wasted bandwidth, legal bills and additional customer service. The group's main recommendations relate to stopping channels that allow spammers to cover their identity, like making sure the Internet company's equipment is properly secured so messages cannot be routed through it by spammers. The plan also sets out that the amount of email user's are allowed to send out should be limited, and that consumers should be held accountable if their computers are infiltrated by spammers.

³ AP, *Porn Store Owners Will Challenge Obscenity Laws*, WKYT.com, June 14, 2004, at <http://www.wkyt.com/Global/story.asp?S=1937947>.

⁴ *Id.*

⁵ Reuters, *E-mail Providers: Unplug Spam-sending PCs*, CNN.com, June 22, 2004, at <http://www.cnn.com/2004/TECH/internet/06/22/tech.spam.reut/index.html>.

SPAM PROSECUTIONS

Twenty-four year old Jason Smathers, an AOL software engineer in AOL's Virginia office, was arrested for stealing AOL's entire subscriber list consisting of 92 million screen names and selling the list to Sean Dunaway, a spammer in Las Vegas.⁶ The list was used by Dunaway in promoting his online gambling site and he also resold the list to other spammers for a price of \$52,000. The complaint also alleges that Smathers sold an updated list with 18 million screen names for \$100,000 to Dunaway. A spammer who purchased the lists from Dunaway helped the Secret Service's probe in order to be granted leniency in the alleged conspiracy. Smathers and Dunaway are charged with conspiracy, which has a five year maximum prison sentence.

In the first instance a spammer has been successfully prosecuted in Russia, a Russian university student was convicted of sending "spam" for hacking one of Russia's largest mobile phone operators and using a program to send an obscene text message to approximately 15,000 cell-phones.⁷ He was ordered to pay a fine of 3,000-roubles (around \$100) and given a one-year suspended sentence.

DO NOT E-MAIL LIST

Implementing a "do not e-mail list" was declared to be an ineffective solution to spam by the Federal Trade Commission. Timothy J. Muris, the chairman of the FTC, stated, "A national registry was a great solution to unwanted telemarketing calls. At this time it's not the solution to unwanted e-mail."⁸ In the CAN-SPAM Act, which passed last December, Congress ordered the

⁶ *Pair Nailed In AOL Spam Scheme*, The Smoking Gun, June 23, 2004, at <http://www.thesmokinggun.com/archive/0623042aol1.html>.

⁷ Reuters, *Court Convicts Obscene Text Messenger*, Yahoo! News, June 24, 2004, at http://story.news.yahoo.com/news?tmpl=story&cid=569&ncid=738&e=2&u=/nm/20040624/tc_nm/russia_spammer_dc.

⁸ Saul Hansell, *Federal Agency Declines to Create Do-Not-Spam Registry*, The New York Times, June 16, 2004, at <http://www.nytimes.com/2004/06/16/technology/16spam.html?hp>.

FTC to report on the effectiveness of implementing a do not e-mail list. The FTC report proposed that the best way to stop spam was to create new technology, which verifies that e-mail messages are sent from the e-mail address it claims to be from. The FTC proposed creating a federal advisory committee to encourage adoption of a standard, if a standard does not emerge soon. Many Internet companies and e-mail marketers reject the idea of a do-not-e-mail list, since most spammers would ignore the list by using methods to avoid detection. The report stated that in Britain, a country that has banned unsolicited e-mail, the amount of spam has increased.

The FTC is also considering another approach of putting a bounty on spammers' heads, which would give spammer hunters no less than 20 percent of the fines imposed against the spammer.⁹ The FTC is compiling and reviewing expert testimony on the bounty plan and will report back to Congress by September on whether the idea is viable. Stanford Law School professor Lawrence Lessig said, "If the vigilantes who are working so hard to keep lists of offending e-mail servers were to turn their energy to identifying and tracking down spammers, then this passion to rid the world of spam might actually begin to pay off -- both for the public and for the bounty hunters."¹⁰

But the bounty plan has received criticism. As Spokesman for the Direct Mail Association Louis Mastria eloquently stated, "If spammers are difficult for the FTC, the FBI, the state attorneys general and even ISPs to track down, it's difficult to imagine that I can sit at home one day and say 'I'm going to hunt me down a spammer.'"¹¹ But this is not the end of the debate on how to end spam. Jana Monroe, with the FBI's Cyber Division, testified last month before Congress that the bureau is "actively pursuing criminal and in some cases joint civil

⁹ Mike Bruner, *FTC Mulls Bounty System to Combat Spammers*, MSNBC Interactive, June 30, 2004, at <http://www.msnbc.msn.com/id/5326107/>.

¹⁰ *Id.*

¹¹ *Id.*

proceedings” against 50 spammers -- including three groups that may constitute organized criminal enterprises -- and is likely to act before the end of the year.”¹²

SEX NEWS

John K. Coil admitted in a plea deal to mailing fraudulent tax returns and transporting obscene materials, specifically the video: "Nympho Bride."¹³ Prosecutor Tim Gallagher said, "It's not that it portrays sexual conduct; it's that it portrays it in a patently offensive way."¹⁴ John A. Coil, his son, admitted to making false statements on his tax return. They held corporations in different names in order to avoid paying taxes, to hide income, and to insulate them from police enforcement. The federal case dismantled most of the adult empire Coil had built over the last three decades. The United States' government initially wanted to seize 58 properties located in seven states and estimated at about \$9.7 million, but plea negotiations led to only 45 Texas properties being confiscated, including homes, office buildings and approximately 24 adult video stores.¹⁵ John K. Coil's wife and daughter and three others have also entered a guilty plea to tax fraud or evasion, but he faces the harshest sentence of up to 10 years in prison.

Jenna Lewis, a contestant on Survivor, was caught engaging in various sexual acts in a home video, which was filmed on her wedding night with her new husband, Travis Wolfe. The couple eloped to Las Vegas after knowing each other for only six weeks.¹⁶ The Internet site selling the video does not say how the video was acquired. The lawyers representing the couple are attempting to stop distribution of the videotape. If Lewis did not provide the tape to the site

¹² *Id.*

¹³ AP, *Porn Mogul, Son Plead Guilty in not Paying Taxes*, CNN.com, June 14, 2004, at <http://www.cnn.com/2004/LAW/06/12/porn.mogul.ap/index.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Frank Meyer, *Survivor Sex Tape Scandal: Jenna Lewis Caught In The Act?*, AVN Online, June 23, 2004, at http://www.avnonline.com/index.php?Primary_Navigation=Web_Exclusive_News&Action=View_Article&Content_ID=106726.

and the tape is truly authentic, Lewis will join other celebrities, like Paris Hilton and Pamela Anderson, whose private sex lives went public due to someone stealing their home videos.

An invasion or privacy suit brought by Paris Hilton against an Internet company that distributed video of her having sex with an ex-boyfriend, was recently dismissed by a Los Angeles judge. Florida-based Kahantani Ltd., was a party to the \$30 million lawsuit over the notorious 45 minute video that circulated on the Internet involving Hilton, who claimed the video had been “intended only for personal use.”¹⁷ Hilton asked the judge to dismiss her lawsuit against the Internet company, but she reserved the right to refile the suit. The suit’s dismissal was part of Hilton's "litigation strategy," her lawyer Heather McCloskey said.¹⁸

ONLINE GAMING SITES

Nielsen/NetRatings tracked the Internet activities of more than 46 million users in the United States that participated in Internet gaming and released a report finding that online gaming is the stickiest content on the Web.¹⁹ Kaizad Gotla, an Internet analyst for Nielsen/NetRatings, said, "Ranging from sites that offer original games to content sites that offer the latest information on popular console and PC games, the gaming industry's presence online is indisputable."²⁰ Astonishingly, the report shows that middle-aged females outnumbered teenage boys on the gaming sites. According to Business Week, video games are a bigger business than movies, measured by revenues, and online gaming is contributing significantly to overall industry growth. Another report released by IDC, tech industry data providers, computer-based Internet games had revenues of \$450 million in 2003, which is expected to triple to \$1.5 billion

¹⁷ Reuters, *Paris Hilton Privacy Suit Dismissed*, CNN.com, July 13, 2004 at www.cnn.com/2004/LAW/07/13/hilton.suit.reut/index.html.

¹⁸ News Services, *Speaking of Paris . . .*, STLtoday.com, July 14, 2004 at <http://www.stltoday.com/stltoday/entertainment/stories.nsf/Entertainment/People+in+the+News/2D46EFEFCC0542AD86256ED20008B284?OpenDocument&Headline=Elvis'+women+--+What+would+the+King+say?>.

¹⁹ Gretchen Gallen, *Online Games Stickier Than Porn*, XBiz, June 21, 2004, at http://www.xbiz.com/news_piece.php?id=3927.

²⁰ *Id.*

in 2007. Of course, online gaming sites can raise a host of legal concerns for owners or operators, given various U.S. laws prohibiting gambling in various forms.

ONLINE PORN SITES MOSTLY BASED IN EUROPE AND THE PACIFIC

A study released by the Secure Computing Corporation of San Jose, California, which surveyed non-U.S. country suffixes, such as .de for Germany and .jp for Japan, revealed that most online adult sites are based out of Europe and the Pacific, excluding domains ending in .com and .net.²¹ The study showed approximately 46 million pornography pages in the top 100 individual country suffixes.²² The top countries for porn sites were Germany with 10,030,200 porn domains, followed by United Kingdom at 8,506,800, and Australia at 5,655,800.²³ When broken down into region, the survey revealed that Europe led with 28,430,600 pornographic domains, the Pacific had 12,352,600, Asia had 3,193,000, Latin America had 1,048,600, Africa had 389,400, Canada had 283,600, the Caribbean had 255,000, and the Middle East had 77,800.²⁴ Additionally, the survey showed that almost every country suffix from Europe had a few porn sites, including very small countries.

LEGISLATIVE UPDATE

Some members of Congress are supporting legislation called the Family Movie Act that would allow DVDs to be "sanitized" through filters for home use without violating the federal copyright laws and without first requiring the consent of studios or directors.²⁵ The bill awaits action in the House Judiciary Committee, and the Senate has not introduced any comparable bills. The studios and the Directors Guild contend that this bill, by removing dialogue and

²¹ Rhett Pardon, *Germany Leads in Overseas Porn — Survey*, XBiz, June 24, 2004, at http://www.xbiz.com/news_piece.php?id=3995.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Richard Simon, *Push to Allow DVDs to Be 'Sanitized' Alarms Studios*, L.A. Times, June 23, 2004, at <http://www.latimes.com/business/printedition/la-fi-decency23jun23.1.1706536.story?coll=la-healines-pe-business>.

scenes, can ruin entire films by taking away their meaning.

The movie studios oppose the legislation and consider the bill the most outrageous of a wave of anti-indecency legislation moving through Congress. Included in that wave, a "decency" provision was attached by the Senate as a rider to its annual defense bill, which would increase penalties tenfold for violations of the federal indecency rules. The Senate Bill was approved and would allow the Federal Communications Commission to raise fines from a maximum of \$27,500 to \$275,000 per violation, up to \$3 million a day per broadcaster. Earlier this year, the House overwhelmingly approved a similar bill, which would raise fines to a maximum of \$500,000 per violation, almost ensuring tougher fines will be signed into law.

SAY WHAT???

Mark Roberts, the British man who streaked during the Super Bowl with only a thong and an online casino advertisement painted on his body, was found guilty of criminal trespassing by a Texas jury.²⁷ Roberts admitted that he snuck into the Super Bowl wearing a fake referee outfit. As Roberts said, "If making people laugh is a criminal offense, then they should send me to prison for life."²⁸

Last, but definitely not least, several United States and Canadian anti-adult groups including TheFamily.com, Citizens for Families, and United Mothers and Citizens Voice have combined efforts to start their own war on pornography, which includes the implementation of the new Web site, WarOnPornography.com.²⁹ The Website brags that, "We want to be as effective as possible in protecting and promoting this great institution and know that in order to

²⁶ *Id.*

²⁷ Reuters, *British Streaker at Super Bowl Convicted*, CNN.com, June 21, 2004, at <http://www.cnn.com/2004/LAW/06/21/crime.streaker.reut/index.html>.

²⁸ *Id.*

²⁹ Charles Farrar, *U.S., Canadian Groups Ally For War On Pornography*, AVN, July 6, 2004, at http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=107282.

do so we need to strike at the major root of the problem – pornography – the silent killer of families, individual self-esteem and ultimately the good in our society. It is taking hold of our youth and many adults and locking our society onto a collision course with disaster.”³⁰ WarOnPornography.com claims, without citing any reliable sources, that nine out of 10 minors between the ages of 8 and 16 have seen pornography on the Internet on accident while doing their homework, that minors between the ages of 12 and 17 are "the single largest group of consumers of Internet pornography," and that Internet pornography is more addictive than drugs, alcoholic beverages, and cigarettes. Additionally, the Website boasts that "Pornography knows no borders so there must be a multinational effort in place. We are doing just that. We are establishing an alliance of Family organizations and politicians in both the U.S. and Canada that will pool their resources and become the largest and most influential force in the War on Pornography.”³¹ Who was it that said recently, you can't declare war on a noun?

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³⁰ *Id.*

³¹ *Id.*