

ADULT INDUSTRY UPDATE™

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THE RETURN OF THE OBSCENITY SECTION

It appears that the Child Exploitation and Obscenity Section of the Justice Department's Criminal Division is back in action, after over a decade of relative calm for the adult industry. Recent comments and legal actions indicate that the "Section" is gearing up for an assault on the industry, using beefed-up obscenity laws, now that Congress passed the PROTECT Act. "I have the feeling that something big is going to happen in the near future," said Patrick Trueman, a former federal obscenity prosecutor and current consultant to the American Family Association – referencing upcoming obscenity prosecutions.¹ "I have been assured of that," he added.² Andrew Osterbaan, head of the Section, said that new prosecutors and Internet analysts were recently added to target those who sell obscene materials over the Internet and promised, "We hope to alter criminally offensive conduct on the Internet as you see it."³ Osterbaan is also well aware of the inevitable First Amendment challenges that will be asserted in any such prosecution: "Obviously we're going to be developing some new case law in that area," he said.⁴ Recently, however, Trueman has been complaining about the lack of results by the Justice Department. "This is an issue they haven't handled well . . . they haven't made it a priority, and therefore there have been less than a handful of prosecutions and no prosecutions to date of major

¹ T. Bensman, "Obscenity Case May Be Renewed," *The Dallas Morning News* (July 15, 2002).

² *Id.*

³ *Id.*

⁴ *Id.*

pornographers who are violating the law,” he said.⁵ Violating the law in whose opinion, one might wonder.

Possibly in response to this kind of pressure, Alabama Republican Senator, Jeff Sessions and Texas Republican Representative, Lamar Smith, are planning to introduce a resolution urging the Justice Department and all 93 United States Attorneys across the country to be more aggressive in prosecuting obscenity.⁶ Concerned Women for America (“CWA”), a so-called public policy group that also supports the resolution, accused United States Attorneys across the country of ignoring over 22,000 complaints of obscenity forwarded to them for investigation since June of last year through the “ObscenityCrimes.org.”⁷ The group is urging citizens to write letters to their United States Attorney, asking: “What are you doing about obscenity enforcement?”⁸

Disturbingly, eight out of ten Americans believe that federal laws against Internet obscenity should be vigorously enforced, according to a recent poll by the Wirthlin Worldwide research company.⁹ Another poll, conducted by Morality in Media, a well-known censorship group, concluded that 70% of respondents did not believe that obscenity laws were being vigorously enforced.¹⁰ The reliability of these polls is certainly suspect.

Signs of the upcoming obscenity prosecutions are already apparent: The Justice Department has initiated an obscenity prosecution against Mike and Sharon Corbett, alleging that videos sold through the Website, www.girlspooing.com, are obscene. The Justice Department is also looking to renew a 1998 obscenity investigation involving Garry Ragsdale and Clarence

⁵ L. Morahan, “Resolution Urges ‘Vigorous Enforcement’ of Obscenity Laws,” *CNSNews.com* (May 15, 2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Thomas Gartman, in connection with various rape-torture fantasy videos.¹¹ Finally, there was the well-publicized raid against Xtreme Associates, conducted in April, 2003. All of this leads to the inevitable conclusion that obscenity battles are looming on the horizon, and that the adult Internet industry must organize and make their stand.

STREAMING ADULT VIDEO PERFORMANCES NOT PROTECTED BY THE FIRST AMENDMENT

In a disturbing blow to the First Amendment's protection of erotic speech, a federal judge recently ruled that the First Amendment does not protect "live acts of sexual intercourse, masturbation or oral sex between marital partners captured on 'streaming' or real time video tape for dissemination over the Web."¹² The judge issued the ruling in connection with a case brought by a former Sheriff's Deputy against his former employer, the Palm Beach County Sheriff's Office, alleging a deprivation of First Amendment rights as a result of his termination for engaging in group sexual activities displayed on the Internet.¹³ The court dismissed the Plaintiff's claims, concluding: "[G]roup physical sexual activity staged, and photographed in a hotel room for mass distribution over a pay Website, does not constitute expressive conduct within the meaning of the First Amendment."¹⁴ While the court paid lip service to the well-established precedent protecting the right to distribute or view non-obscene, sexually explicit materials, it denied such protection for those who "engage" in public sexual activity, "either in the middle of the street, or in a hotel room under the eye of a camera with intent to capture and distribute the images over the Web to a mass audience."¹⁵ This ruling strikes at the heart of the constitutional protections afforded those who perform in sexually oriented media. Given the

¹¹ T. Bensman, "Obscenity case may be renewed," *The Dallas Morning News* (July 15, 2002).

¹² *Ronald Thaeter v. Palm Beach County Sheriff's Office, et. al.*, Case No.: 02-80462 *et. seq.* (S.D. Fla. May 21, 2003).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

financial status of the Plaintiffs, an appeal of this unfortunate decision is unlikely in the absence of significant industry support.

BILLING WOES

Pressure from Visa and MasterCard over administrative and chargeback requirements have caused a major Internet billing company to go under. Websitebilling.com announced its withdrawal from the Industry and cessation of business on May 23, 2003, citing “arbitrary fines” by card associations, foreign banks and their agents.¹⁶ Relatedly, a multi-million dollar fraud suit has been initiated by Paycom against MasterCard, accusing the credit card association of fraud and antitrust.¹⁷ Paycom is complaining about the “monopolistic” rules and “illegal” fines ranging in the millions of dollars.¹⁸

However, it is not only the adult Internet companies that are accusing the credit card companies of fraud. Another fraud suit was filed by three mainstream Internet merchants against Visa, MasterCard, American Express and Discover, claiming that these associations actually profit from Internet fraud and do not seek to stop it.¹⁹ The Complaint seeks class action status, claiming that the merchants bear virtually all the costs associated with fraud and theft online. Allegations of monopolistic abuse have also surfaced in this suit.²⁰ “What we’re seeking is not only restitution of excessive penalties but also to cure tomorrow,” said the attorney representing the Plaintiffs in the Raleigh, North Carolina, litigation. The named Plaintiffs are eGeneral, which runs a health Website, New York-based Direct Foreign Exchange, PLC, which runs an online currency exchange, and West Virginia-based Howell Automotive, which sells auto parts online. The damages claimed in this suit could run into the hundreds of millions of dollars.

¹⁶ C.Farrar, “Websitebilling.com Collapses, Says Under Visa/MC Pressure,” *AVN.com* (May 27, 2003).

¹⁷ D. Kawamoto, “MasterCard sued over online billings,” *ZDNet.com* (May 14, 2003).

¹⁸ *Id.*

¹⁹ B. Sullivan, “Suit: Visa, AmEx profit from fraud,” *MSNBC News* (May 22, 2003).

²⁰ *Id.*

“They are abusing their monopolistic powers because merchants cannot function online without being able to accept these credit cards,” Ishman added.²¹

This suit comes hot on the heels of a settlement reached by MasterCard and Visa in litigation brought against them by various retailers regarding their debit card practices.²² Visa/MasterCard agreed to pay three billion dollars to settle the class action case, and agreed to lower debit card fees and allow merchants to refuse certain cards.²³ Hey, it’s just monopoly money!

The adult Internet Industry is frantically searching for a solution to its credit card and billing problems. With PayPal withdrawing, adult Websites are faced with fewer and fewer options. If the current impasse is not resolved soon, the government may not need to launch an assault on the industry to achieve its desired censorship result.

SPAM UPDATE

Federal lawmakers are continuing to wrestle with the Spam issue. The House is currently debating a bill being called “Reduction and Distribution of Spam Act,” authored by Representative Richard Burr (R–NC), which may have the best chance of being passed by the full House in light of its political support.²⁴ Violators could spend up to two years in prison, and ISPs would be allowed to sue for \$10 per each email sent to an opted-out recipient, with a cap of \$500,000.²⁵ However, critics are calling the bill “weak,” claiming that it would do more to protect mass email advertising than to combat spam.²⁶ “If I thought that everything that was legal under this bill would end up in my mailbox, I’d jump off the Capitol building,” said one

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ C. Farrar, “Two Years Prison For Porn Spam: New House Bill,” *AVN.com* (May 27, 2003).

²⁵ *Id.*

²⁶ J. Krim, “Draft of Bill on Mass E-Mail is Called Weak,” *WashingtonPost.com* (May 13, 2003).

Internet industry participant.²⁷ Lobbyists representing several direct marketing groups attended some of the meetings relating to the proposed legislation, which may have contributed to the weakening of the bill.²⁸ Some state Attorneys General claim that the bill is riddled with loopholes, which may prevent the states from enforcing their own, tougher anti-spam laws. For example, the draft bill would provide any company with a “preexisting relationship” with customers the right to send email for up to three years.²⁹ Anti-spam groups have also criticized the bill. “This is yet another bill . . . attempting to get rid of the porn and the scams, but really clearing the way for legitimate companies to spam,” said Joe Mozena, co-founder of the Coalition Against Unsolicited Commercial Email, or CAUSE.³⁰ It is currently estimated that spam comprises over 40% of all email.³¹

One spammer felt the wrath of EarthLink’s disdain for the practice this month. Howard Carmack, identified as a ringleader of spammers, was hit with a \$16.4 million judgment and a permanent injunction in federal court, in a lawsuit brought by EarthLink.³² A number of similar federal lawsuits are pending against other notorious spammers in an effort to cut down on junk email.³³

EYE IN THE SKY

Smile for the camera: Big brother is watching you – without a warrant. High definition satellite imagery is currently available to the government, and anybody else with a credit card. Under existing technology, high resolution images of virtually any coordinates on earth can be

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² P. LaHay, “Judge awards EarthLink \$16 million over ‘spam’ e-mail” *Associated Press* (May 7, 2003).

³³ *Id.*

obtained through powerful satellite cameras.³⁴ However, the widespread availability of these images is raising significant privacy concerns. “Do we really want the ability to track everybody all the time, without any suspicion, or without probable cause?” asked Attorney Doug Klunder, in a recent interview.³⁵ These issues were recently the subject of a Washington Supreme Court case on whether a warrant should be required to track a person’s movements using satellite devices.³⁶ A previous United States Supreme Court opinion, authored by conservative Justice Antonin Scalia, indicated that a warrant would be required to observe heat signatures emanating from a home, in connection with a marijuana growing investigation.³⁷ In the home “all details are intimate details, because the entire area is held safe from prying government eyes,” Scalia said in the opinion.³⁸ Maybe this will create a new niche for adult Websites: SatelliteVoyeurism.com?

ANTI-PATRIOT ACT

In a brave move, the small town of Arcata, California, made it a crime to comply with the USA Patriot Act.³⁹ The city ordinance would impose a fine of \$57 on any City department head who voluntarily complies with investigations or arrests under the Patriot Act.⁴⁰ Town officials acknowledge that the law is mostly symbolic, since federal law would trump any local ordinance; however the move has put the small town in the limelight. Critics of the Patriot Act claim that it violates civil liberties, however supporters claim that it helps fight terrorism.⁴¹ Perhaps Arcata will start a trend. On the other hand, the Commissioners may just end up in a CIA holding cell for all eternity.

³⁴ J. Bamford, “Big Brother is Tracking You. Without a Warrant.” *NYTimes.com* (May 18, 2003).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ “Town criminalizes compliance with Patriot Act,” *CNN.com* (May 19, 2003).

⁴⁰ *Id.*

⁴¹ *Id.*

GRADY ACQUITTED

The highly publicized case against James Grady ended in an acquittal recently.⁴² Grady was initially arrested on 886 counts of sexually exploiting children through child modeling sites operated in Arapahoe County, Colorado. However, when the trial started, the number was reduced to 39. The jury acquitted Grady of all 39 counts.⁴³ The charges involved photographs of young girls, some 13 years old, in provocative poses with suggestive clothing, which prosecutors claimed constituted sexual exploitation of a minor. However, Grady had received written permission from the parents of the teens to post the pictures on his Website, trueteenbabes.com. The case is largely seen as precedent-setting for the child modeling industry.

SCORE ONE FOR ACACIA

The adult Internet industry is closely following the patent suit brought by Acacia Media over its claimed right to control the use of common video downloading technology over the Internet. Recently, Acacia won the right to use the term “adult entertainment” in describing the alleged infringers.⁴⁴ Homegrown Video and New Destiny Media filed a motion asking the judge to remove all references to “adult entertainment,” which the movants sought to strike based on fears of prejudice.⁴⁵ The judge allowed the descriptions to stand.⁴⁶ Several adult Internet companies have come together to fight the patent claims. The group contends that the patent cannot be enforced since the technology had already existed and was being used at the time that the patents were awarded to Acacia.

⁴² J. Kim, “Photographer found not guilty in child exploitation case,” *9NEWS.com* (March 13, 2003).

⁴³ *Id.*

⁴⁴ C. Farrar, “Acacia Wins ‘Adult Language’ Point, Licenses LodgeNet,” *AVN.com* (May 15, 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

CENSORSHIP BATTLES DOWN UNDER

“Plain silly.” That’s what an adult industry crusader in Australia called Queensland’s pornography laws.⁴⁷ The statement was made in Brisbane District Court in a case involving the selling of some banned X-rated films and magazines by a company known as “Good Vibrations.”⁴⁸ The company was found not guilty of selling the items, but the Office of Fair Trading appealed.⁴⁹ The legal arguments focused on the interpretation of the Australian Constitution, as it applies to adult materials. In describing the prohibition on sale of adult materials in certain parts of Australia, the company’s lawyer claimed, “that’s not just unconstitutional, it’s just plain silly.”⁵⁰ This case may set precedent for another 100 prosecutions, also pending in Queensland. See, the United States is not the only source of “silly” anti-porn laws.

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⁴⁷ T. Keim, “Porn crusader brands laws as ‘silly,’” *News.com.au* (May 14, 2003).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*