

Lessons Learned from the Recent Round of Obscenity Prosecutions

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I. Introduction

The recent round of obscenity indictments, trials, and resolutions has left some webmasters anxious, and other confused. Few are encouraged by the latest developments. But what should be taken away from this flurry of activity? This article is intended to help sort out fact from fantasy, and identify the lessons that might be learned from the Government's actions in these recent cases.

II. Obscene Paranoia

Being indicted on obscenity-related charges ranks among the top fears for any adult webmaster. Depending on the specific statute supporting the charge, and whether the prosecution is filed in the state or federal system, an obscenity conviction may result in a consequence as minor as fines and probation, or as catastrophic as decades in jail and forfeiture of all business assets. While the risks associated with obscenity have been on adult webmasters' radar for many years, they have been brought back into focus by the recent indictments of Evil Angel/Stagliano in Washington, D.C.; AmateurAction.net/Thomas in San José, California, along with the conviction of Max Hardcore in Tampa, Florida, and the guilty pleas accepted by Karen Fletcher in Pittsburgh, Pennsylvania, and Ray Guhn in Pensacola, Florida. Has the Government turned up the heat in the waning months of the Bush Administration? Will Justice Department officials take a "parting shot" at the industry before their tenure expires? These concerns are a

hot topic of discussion in industry circles, and not without good cause. A number of lawyers and other industry leaders have opined that the current Justice Department will unleash a substantial number of new indictments before the next Administration takes over – particularly if Sen. Barak Obama wins the election in November. This effort is seen as potentially the last opportunity to cause damage to the adult industry, at the federal level, before a more sympathetic Attorney General takes the helm – potentially flushing all further federal obscenity prosecutions as was done during the Clinton era. This may also be the final opportunity for the current Administration to pay back the Religious Right for its unwavering support of President Bush during the last two election cycles.

III. Why Now?

While the above-described theories may justify a growing fear over a new onslaught of obscenity indictments, this author believes that an avalanche of new cases is unlikely – regardless of who prevails at the polls in November, 2008. Instead, the Justice Department is probably closing out the remaining investigations that were accepted by various U.S. Attorneys, after prodding by the Obscenity Task Force during the last few years. As had been widely reported, several U.S. Attorneys refused to take on obscenity cases that were presented by the Washington Office, given concerns over the viability of the prosecutions and the inability to prove guilt of the targeted defendants beyond a reasonable doubt.¹ But a few of these cases did go forward, as evidenced by the recent high profile indictments. These cases often take a year or more to assemble, and the industry is just now seeing the culmination of those investigations that were initiated during the Gonzales Administration.

¹ M. Hayes, “White House May Have Tried to Purge All U.S. Attorneys, Obscenity an Issue,” *Xbiz.com*, (March 14, 2007), found at: http://xbiz.com/news_piece.php?id=20082.

Similarly, the three cases that recently reached conclusion; Max Hardcore, Ray Guhn, and Karen Fletcher, were all pending for many months before the recent resolutions. The Ray Guhn case – a state-level prosecution – had been pending since July, 2006. The raid on Karen Fletcher’s home occurred about the same time. Accordingly, while it might appear that a bunch of action is happening all at once on the obscenity front, this is all largely the result of a confluence of events resulting in a spike of activity in a one or two month period. While any level of obscenity prosecution is unacceptable from a First Amendment standpoint, the recent spurt of news stories and discussion should not be over-emphasized, or result in any greater degree of concern than is warranted. In other words, there does not appear to be a concerted effort to “turn up the heat” on the industry, at this particular point in time, using obscenity prosecutions; instead, a variety of activity in pending obscenity cases all happened to occur during the summer of 2008.

IV. What Does This All Mean?

A. Recent Punishments

Notwithstanding the above admonitions, the industry cannot overlook the fact that one adult content producer has recently been jailed on charges stemming from his adult website operation,² and another will almost certainly follow next month.³ A small time Internet content producer in Orlando, Florida was incarcerated for almost a year during his prosecution for federal obscenity violations until he was sentenced to ‘time served’ and deported pursuant to a plea agreement in September, 2007.⁴ While the writer of erotic stories, Karen Fletcher, avoided jail completely with her plea bargain, the case against her resulted in a *de facto* closure of her

² *State v. McCowen*, Case No. 07-823-CFA (Santa Rosa Cir. Ct.), Plea Agreement resulting in 48 months incarceration.

³ *U.S. v. Paul Little*, Case No. Case No: 8:07-cr-00170-SCB-MSS (M.D. Fla), Guidelines Sentence expected to result in approximately 3 years incarceration with a maximum penalty of 50 years incarceration.

⁴ *U.S. v. Croce, et al*, Case No.: 6:06-cr-00182-GAP-DAB (M.D. Fla. August 29, 2007)

website forever.⁵ As a result of these recent judicial activities, the perception by some in the industry is that the legal risks relating to obscenity have increased. However, a nuanced evaluation is required to more carefully evaluate these concerns.

B. Plea vs. Conviction

First, a significant distinction should be made between guilty pleas and convictions. The conviction of Paul Little, a/k/a Max Hardcore, based on various movies and website clips, operates as a determination on the merits that the subject video content is obscene. The same can be said of the material forming the basis of the corporate conviction in the Five Star Video case.⁶ This content no longer enjoys the presumption of protection it formerly received under the First Amendment, prior to conviction. The Government can now legitimately label the content at issue in the Max Hardcore case, and the one video convicted in the Five Star Video case, illegal contraband. Assuming that a given conviction is not reversed on appeal, this finding of obscenity will be permanent.⁷ While a defendant might argue that he or she did not know whether certain content was obscene when first arrested, no such claim can be made with respect to materials determined to be obscene, on the merits, by a judge or jury at trial.

By way of illustration, the material alleged to be obscene in the Karen Fletcher case has not been determined to be obscene by the fact finder, as a result of her plea bargain. Ms. Fletcher simply agreed to resolve the case by entry of a guilty plea, and accepted the punishment of temporary home confinement. While the Government may claim some sort of victory in exacting a guilty plea from Karen Fletcher, due largely to her documented agoraphobia (i.e., fear

⁵ On August 31, 2008, FBI agents raided Ms. Fletcher's home and seized the computer equipment she used to run her erotic stories website, www.Red-RoseStories.com. Despite numerous requests, the Government refused to return her property, resulting in the closure of the website at issue.

⁶ *U.S. v. Five Star Video, L.C.*, CR-06-515-PHX-ROS (D. Ariz. 2007) (conviction as to Count VII).

⁷ It should be noted, however, that a different court, in a different jurisdiction, could determine that some or all of the subject content is not obscene, depending on how the jurors vote in any future cases. Case in point: The movie *Deep Throat* has been both convicted and acquitted in various courts throughout the country.

of public places) the written material at issue has not been adjudicated obscene. Notably in the Ray Guhn case, the Defendant entered a plea to illegal financial transactions (i.e., “money laundering,”) under § 896.101, *Fla. Stat.* (2006), and not to obscenity or racketeering. As a result, the issue of obscenity was not a major facet of the Plea Agreement, and the material at issue was not judged to be obscene.⁸ However, where an actual conviction results from a trial, the material loses its presumption of protection.

C. Legally Obscene Material

While the Government undoubtedly hopes to strike fear into the hearts of adult content producers and adult webmasters through obscenity prosecution, a very small number of titles have actually been adjudicated obscene by the fact finder at trial, in recent times. Our research has demonstrated that only the following list of movies and video clips have been found obscene in the more recent cases:⁹

Max Hardcore Content:

(Video Clips:) *me20europromo.wmv*, *px19europromo.wmv*, *ffo4promo.wmv*,
pm16europromo001.wmv.

(Movie Titles:) *MAX HARDCORE EXTREME Volume Number 20 – Euro Edition*, *Pure Max 19 – Euro Edition*, *MAX HARDCORE Golden Guzzlers 7 – Euro Edition*, *Fists of Fury 4 – Euro Edition*, *PLANET MAX 16 – Euro Edition*.

Croce Content: *Toilet Man 6*, *Bukkake 3*, *Scat Pleasures*, *Scat Fist Fucking 2*.

⁸ Importantly, however, the State argued that the financial transactions at issue were illegal because they involved transactions relating to material that was alleged to be obscene under federal law. It is an open question whether the state courts would be empowered to make a determination whether erotic material violated federal obscenity statutes; however the guilty plea obviated the need for the court to rule on this legal issue.

⁹ Not included in the list below is any material involved in cases that were resolved by plea, dismissal or acquittal, as such has not been adjudicated obscene. Other material from state level prosecutions not followed by the media may also have been omitted, although the impact of any such convictions is considered *de minimis*.

Gartman/McDowell/Ragsdale Content: *Real Rape 1, Brutally Raped 5,*
www.forbiddenvideos.com.

Five Star Video Content: *Gag Factor 18.*

Given the huge amount of content produced by the adult video and Internet industries each year, the above-referenced material can be viewed as the proverbial “drop in the bucket.” Moreover, the vast majority of this content involves “fringe” fetish behavior, which is not within the mainstream of current erotic fare. While Max Hardcore is a well known name in the adult industry, his material is designed for a very specific viewing audience. The impact of a conviction in his case appears to be minimal, as few adult content producers veer into the fetishes and topics addressed in Hardcore’s videos. Those who do produce such content, have by and large not been deterred by the prosecution and conviction, as of yet. Accordingly, the few titles that have been found obscene in recent times may be dismissed as ‘extreme’ material, which does not translate into a widespread threat to the industry’s well-being.

D. Pending Cases

More disturbing than the recent cases that have been concluded, however, are those that have been recently initiated. In particular, the prosecution of John Stagliano of Evil Angel carries the potential to set the most important precedent of any obscenity case litigated in modern times. The reasons for this are three-fold: One, Stagliano’s material is more closely associated with the mainstream of adult product currently available to the public.¹⁰ While some of the topics like squirting and fisting are still taboo for many companies, they have become familiar fare in most adult films. A conviction on the merits pertaining to any of these films will impact the industry in ways not yet experienced from any other recent case. Secondly, the case is important since it is being brought in Washington, D.C., which is not particularly known for its

¹⁰ The movies named are *Milk Nymphs*, *Storm Squirters 2*, and *Fetish Fanatic 5*.

conservative population and jury pool. Mixing mainstream content with an open-minded jury may be a disaster for the prosecution if the defendant is acquitted, but could also set a tremendously adverse precedent if a conviction results. The final important facet of the Stagliano case is the charge relating to the exposure of allegedly-obscene material available for minors to view on the web, in Count VII of the indictment. This charge stems from the 1989 “Dial-A-Porn” law which was intended to prevent children from accessing phone sex lines, but which has never been used in connection with online pornography. If successful, it could resurrect the age verification concerns that have not been at the forefront of the industry since the passage of COPA in 1998. These issues make the Stagliano case of significant importance to the industry in general, and to the future of free expression, itself.

The Ira Isaacs case exploded in the face of the government, as the presiding judge was found in possession of some interesting erotica on his personal computer web page. He immediately declared a mistrial, and the defendant is seeking to prevent a retrial on double jeopardy grounds. The content involved in that prosecution primarily involves scat fetish material.¹¹ What makes this case important is that it was filed in the heart of the industry’s production jurisdiction – Los Angeles.

The case against amateuration.net¹² is in its formative stages, still, but will also prove to be interesting. The defendant in that case, Robert Allan Thomas, is the same individual whom the government prosecuted in the *U.S. v. Thomas*¹³ case involving obscene material distributed via a Bulletin Board System, during the formative days of the Internet. That case was significant as it approved the government’s strategy of downloading allegedly obscene material in a

¹¹ *Gang Bang Horse, Pony Sex Game, Mako’s First Time Scat, Hollywood Scat Amateurs 7, Laurie’s Toilet Show, and Bae 20.*

¹² See DOJ press release at: <http://www.usdoj.gov/opa/pr/2008/July/08-crm-650.html>.

¹³ 74 F.3d 701 (6th Cir. 1996).

conservative jurisdiction, on the opposite end of the country from where the defendant resided, and using the place of downloading as the forum for the prosecution. The appellate decision was later criticized for its failure to consider the inability of a website operator to block receipt of Internet content by particular geographic locations, thus preventing downloading in communities determined to be too conservative for the content available on the system. Apparently, the Department of Justice is back for round two with the recent Indictment. Although details regarding the actual content forming the basis for the charges are sketchy, at this time, the site appears to focus on “Pissing, Fisting, Peeing, Golden Showers, BDSM, Extreme Insertions & Sex Fetish DVD Videos.”¹⁴ Such topics have been on the government’s obscenity radar for decades, although watersports content has become so pervasive online that its former status as ‘taboo’ or off limits has been diluted in the last decade. Importantly, the government has chosen one of the most open-minded, progressive areas of the country for this prosecution; San Jose, California. It could be argued that the Department of Justice is seeking to establish a track record of prevailing in more ‘liberal’ jurisdictions, thus sending the message that it can win anywhere.

V. Conclusion

The crime of obscenity is, by its very nature, amorphous and not subject to much certainty. It is therefore difficult to grasp the practical impact of a given indictment, prosecution, conviction or acquittal. Usually, one case means very little, on its own, unless it is appealed to a higher court which renders an appellate opinion that becomes binding in a certain jurisdiction. The outcome of trial court cases have, frankly, very minimal impact on the industry as a whole – but certainly have a tremendous impact on the individual defendant(s). In the early days of obscenity prosecution against the adult industry (1970’s), adult theaters would routinely plead

¹⁴ See, www.AmateurAction.net.

out cases and accept the resultant fines as a ‘cost of doing business.’ But today, with instant access to information about every obscenity case, and the industry’s intense interest in the topic (partially fueled by the industry attorneys’ fixation on it) each case is followed through its every twist and turn. The good news is that no adverse precedent has been set by any of the recent obscenity cases. No critical issue has been ruled on to the detriment of the industry, although a few evidentiary rulings could have come out better in certain cases. The appellate courts have not gotten hold of any of these cases, yet, and have been unable to harm or help the development of First Amendment law. The one exception is the *U.S. v. McDowell*¹⁵ case, which established some good law on the issue of *scienter* or criminal intent to violate obscenity laws by a minor participant in a criminal scheme. But otherwise, obscenity law has remained as it was since 1973, when it was first ‘invented’ by the Court in *Miller v. California*. Since then, the U.S. Supreme Court and various Circuit Courts of Appeal have reaffirmed *Miller*’s validity and applicability – even to digital content. The next appeal to the Supreme Court in the COPA litigation may finally give the industry some clarity on issues such as the applicability of local community standards to online material, and the scope of Internet material to be considered as the ‘whole work’ under the *Miller* Test, but that decision is a year or two away, in all likelihood.

Until then, the obscenity issues remain about as clear as mud for the average adult webmaster seeking to operate his or her business in full compliance with the law. If you happen to be selected for prosecution, you are in for months and possibly years of an expensive, difficult time – even if you ultimately win your case. The government often throws in a host of other charges (or threatened charges) unrelated to the obscenity issues, and offers to dismiss those in exchange for a guilty plea to obscenity. Our attorneys have seen the Department of Justice drop

¹⁵ Case No.: No. 06-10818 (5th Cir. 2007).

offenses relating to income tax fraud, money laundering, automatic weapons and other serious charges in exchange for a plea to the lesser crime of obscenity, given the political considerations involved in landing a conviction in these cases. As a result, much plays out behind the scenes in obscenity prosecutions, just like most other criminal cases. While much has been said of the recent round of obscenity cases, the truth is that the climate is much the same as it has been for the last 8 years. Fetish material is being randomly prosecuted, often based on circumstances having little to do with the content, but more to do with the defendant. The most important developments are the willingness of the government to prosecute more mainstream content, and its desire to initiate charges in more progressive jurisdictions. Those cases have not come to fruition yet, but many eyes are on the cases.

Adult webmasters should investigate all the details of any given obscenity case before assigning it any substantial degree of concern. In addition, the industry should be more focused on trends and patterns rather than the results in particular cases. By heeding this advice, you will remain informed while avoiding undue alarm.

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