

# ADULT INDUSTRY UPDATE™

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By: Lawrence G. Walters

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## WAR ON PORNOGRAPHY BEGINS

Justice Department officials promise to “send ‘ripples’ through an industry that has proliferated on the Internet and grown into an estimated \$10 billion-a-year colossus profiting Fortune 500 corporations such as Comcast, which offers hard-core movies on a pay-per-view channel.”<sup>1</sup> For the first time in ten years, the government is spending millions of dollars bringing anti-obscenity cases. With 32 prosecutors, a team of FBI agents and many investigators combing the Internet for pornography, many cases are expected to be filed in the near future. The government has warned that no material is off limits, including soft-core television programs like HBO’s show *Real Sex* or adult movies offered in hotel rooms,<sup>2</sup> notwithstanding its wide acceptance.

The Bush administration boasts about its perfect record in prosecuting the 25 adult obscenity cases filed so far. The cases it has brought in mainly conservative communities have ended in two guilty verdicts and 23 guilty pleas.<sup>3</sup> Bruce Taylor, the new head of the anti-obscenity effort at the Justice Department, recently stated, “Just about everything on the Internet and almost everything in the video stores and everything in the adult bookstores is still

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<sup>1</sup> L. Sullivan, “Administration Wages War on Pornography,” *Baltimore Sun* (April 6, 2004), at <http://www.baltimoresun.com/news/bal-te.obscenity06apr06.0.3004361.story?coll=bal-home-headlines>.

<sup>2</sup> *Id.*

<sup>3</sup> S. McCaffrey, “Justice Dept. Cracks Down on Adult Porn,” *The Charlotte Observer* (April 3, 2004), at <http://www.charlotte.com/mld/observer/news/8345436.html>.

prosecutable illegal obscenity.”<sup>4</sup> The Justice Department’s apparent strategy is to target not only the most egregious hard-core pornography, but also more conventional material in order to most effectively hit those found most responsible for the proliferation of pornography on the Internet. The new trend by federal prosecutors is to initiate cases in communities to which the materials are distributed, as opposed to where they are made or from where they are sent.<sup>5</sup> The latest information indicates that new prosecutions are being filed across the country – one in Pittsburgh, three in Kentucky, five in Southern West Virginia, six in Utah and eight in Eastern Virginia.<sup>6</sup> A federal prosecutor recently acknowledged that investigators are focusing on the most egregious and widely available materials, in selecting cases for prosecution.<sup>7</sup> Interestingly, the United States Attorney involved in a recent Internet obscenity case arising from Bluefield, West Virginia, admitted he does not “pretend to know where community standards are and where to draw the line.”<sup>8</sup> Well now, if the prosecutors can’t know community standards, how are the webmasters supposed to divine that very same concept . . . under the penalty of criminal prosecution? With the number of adult-oriented Web sites surging over the last four years to approximately 1.6 million from 88,000 in 2000,<sup>9</sup> and President Bush’s 2005 budget proposal containing a \$4 million devotion to targeting obscenity, the industry is certainly in for some trying times.<sup>10</sup> The time has never been better to focus on legal compliance.

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<sup>4</sup> L. Sullivan, “Administration Wages War on Pornography,” *Baltimore Sun* (April 6, 2004), at [http://www.baltimoresun.com/news/bal-te.obscenity06apr06\\_0,3004361.story?coll=bal-home-headlines](http://www.baltimoresun.com/news/bal-te.obscenity06apr06_0,3004361.story?coll=bal-home-headlines).

<sup>5</sup> A. Walls, “Prosecutors seek conservative venues for porn trials,” *Pittsburgh Tribune-Review* (May 18, 2004), at [http://www.pittsburghlive.com/x/tribune-review/trib/pittsburgh/s\\_194571.html](http://www.pittsburghlive.com/x/tribune-review/trib/pittsburgh/s_194571.html)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> T. Coleman, “Porn Cases Raise Concerns,” *Charleston Daily Mail* (May 10, 2004), at <http://www.dailymail.com/news/News/2004051011/?pt=0>.

<sup>9</sup> R. Pardon, “Porn Sites Surge to 1.6 Million,” *XBiz* (April 5, 2004), at [http://www.xbiz.com/news\\_piece.php?id=2707](http://www.xbiz.com/news_piece.php?id=2707).

<sup>10</sup> S. McCaffrey, “Justice Dept. Cracks Down on Adult Porn,” *The Charlotte Observer* (April 3, 2004) at <http://www.charlotte.com/mld/observer/news/8345436.html>.

## OBSCENITY PROSECUTIONS

Twenty-nine adult novelty items purchased at the Lion's Den Adult Superstore in Dickinson County, Kansas, were deemed obscene by a grand jury. Kansas is one of six states with a law prohibiting the sale of dildos and other items designed or marked primarily for the stimulation of human genitals. After receiving a complaint from the Citizens for Strengthening Community Virtues, that gathered enough voter signatures to force a prosecution, the Dickinson County Sheriff's Office purchased 36 novelty items including "artificial devices, vaginas, dildos" from the Lion's Den.<sup>11</sup> All of the 29 counts in the indictment allege that between October 28, 2003, and the present time, the Lion's Den "knowingly, recklessly and unlawfully is engaged in promoting obscenity . . ." <sup>12</sup> Under Kansas law, selling and promoting obscene adult novelties is a misdemeanor for the first offense, which may be punished by up to one year in jail and/or a \$2,500 fine.<sup>13</sup> Dickinson County Attorney Kristie Hildebrand stated, "The grand jury's indictment here may lead to other obscenity cases being filed across the state."<sup>14</sup> Additionally, Hildebrand has contacted Bruce Taylor, who has agreed to provide assistance for prosecuting this case through "drafting responses to Motions typically filed in such cases."<sup>15</sup> Meanwhile, the United States Court of Appeals for the Eleventh Circuit is wrestling with an appeal from a District Court that has twice struck down an identical Alabama law.<sup>16</sup>

In another case, Gary A. Robinson pleaded guilty to transportation of obscene materials in what United States Attorney Bill Mercer believed constituted the first federal obscenity

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<sup>11</sup> S. Ross and A. Anderson, "Major Brand Novelties Deems Obscene by Kansas Grand Jury," *AVN* (April 12, 2004), at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action](http://www.avn.com/index.php?Primary_Navigation=Articles&Action).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Williams v. Pryor*, No. 02-16135-00 (11<sup>th</sup> Cir.), argued September 23, 2003.

prosecution in Montana.<sup>17</sup> Robinson's videotapes entitled "Ride'um Cowgirl" and "Dogs and Horses and Pigs and Chickens" among others, contained bestiality as well as excretory functions. The videotapes were sent through the United States Postal Service. Robinson has been released until sentencing.

In the second obscenity case brought within the same week in Montana, two men, Thomas Lambert and Sanford Wasserman, were charged with transportation of obscene materials and face numerous other federal charges. The allegedly obscene videotapes include such titles as "Rape and Sodomize" and "Physically Raped."<sup>18</sup> The two men could face a maximum prison sentence of 20 years and a \$500,000 fine for money laundering, and may face a prison sentence of five years and a \$250,000 fine for transportation of obscene material and conspiracy.<sup>19</sup>

### LEGISLATIVE UPDATE

The House of Representatives Judiciary Committee voted to approve the Video Voyeurism Prevention Act, S. 1301, an Act that would outlaw many forms of voyeurism occurring with miniaturized technology such as cameras on cell phones.<sup>20</sup> Passed by the Senate in September, the Act would prohibit picture taking in bedrooms, locker rooms, among other locations where there is a reasonable expectation of privacy.<sup>21</sup> The Act would punish violators

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<sup>17</sup> T. Brown, Man Pleads Guilty to Federal Obscenity Charges in Montana, *AVN* (March 25, 2004), at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action](http://www.avn.com/index.php?Primary_Navigation=Articles&Action).

<sup>18</sup> C. Johnson, "Porn Charges Denied; Defendants Made \$400k Selling Videos, Lawmen Say," *The Billings Gazette* (April 2, 2004), at <http://www.billingsgazette.com/index.php?display=rednews/2004/03/30/build/local/30-lavina-porn.inc>.

<sup>19</sup> *Id.*

<sup>20</sup> R. Pardon, "Anti-Video Voyeurism Federal Bill Moves Forward," *XBiz.com* (May 13, 2004), at [http://www.xbiz.com/print\\_content.php?cat=2&id=3314](http://www.xbiz.com/print_content.php?cat=2&id=3314).

<sup>21</sup> *Id.*

with a maximum one year prison sentence and fines.<sup>22</sup> The Act now moves to the full House for consideration.

Texas Governor Rick Perry wants to implement a tax on adult clubs to help pay for public school education, but the State Comptroller Carol Keeton Strayhorn wants to pass a law depriving adult clubs of liquor licenses, which may put them out of business.<sup>23</sup> Perry's strategy is to lower taxes on property and increase what he calls "sin taxes" through the creation of a \$5 tax to enter adult businesses, and a \$1 tax on cigarettes.<sup>24</sup> The Governor's plan would minimize the tax burden on home owners while at the same time maintaining school funding. However, Strayhorn disagrees with this plan stating, "I don't want my five granddaughters growing up in a state where the governor says partnering with sexually oriented nightclubs is an acceptable way to finance their education."<sup>25</sup>

On the spam front, Maryland is considering a bill containing some of the toughest punishments for sending spam proposed in all 50 states.<sup>26</sup> The bill, which contains provisions for jail sentences of up to ten years for fraudulent and deceptive email practices by Internet marketers and up to five years in prison for misleading headers on spam, is expected to be signed into law by Maryland Governor Robert Ehrlich.<sup>27</sup> State Senator Robert Garagiola "analogize[s] it to putting more anti-spam cops on the beat. There are finite resources to fight crime. As you see more people being gone after and more spammers captured and prosecuted, you're going to see less spam as a result."<sup>28</sup> The state of Virginia has passed a similar law, which provides for

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<sup>22</sup> *Id.*

<sup>23</sup> Reuters, "Tax Plan Turns Into Strip Club Spat," *CNN.com* (April 22, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/04/22/texas.politics.reut/index.html>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> G. Gallen, "Maryland Lawmakers Lean Hard on Spammers," *XBiz.com* (April 26, 2004), at [http://www.xbiz.com/print\\_content.php?cat=2&id=3027](http://www.xbiz.com/print_content.php?cat=2&id=3027).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

up to a five year jail sentence for individuals who send fraudulent emails.<sup>29</sup> Although most state spam laws have been pre-empted by CAN-SPAM, that Act allows states to regulate spam in limited ways, particularly in the area of fraudulent practices.

Notwithstanding objections about the limitation on free speech rights, Missouri is in the process of approving a bill prohibiting new adult-oriented billboards and requiring existing adult-oriented billboards to be removed within three years after the bill's passage.<sup>30</sup> The bill has passed the House and the Senate and is now in Missouri Governor Bob Holden's hands. The bill would also ban signs on adult entertainment businesses within a one-mile radius of a highway, and would only allow those establishments to post two signs: one sign displaying the business name and hours of operation and the other sign stating that minors are not allowed in the establishment.<sup>31</sup> Commenting on the billboard legislation, Republican Representative Bob Johnson stated, "What we're talking about here is probably a violation of the United States Constitution. This singles out certain businesses and their ability to conduct their business."<sup>32</sup> See, there are some legislators who read the Constitution.

### **LAWSUITS INITIATED UNDER THE CAN-SPAM ACT**

Four individuals in Detroit were charged with violating the CAN-SPAM Act by fraudulently promoting weight loss products.<sup>33</sup> The four are charged with hiding their identities in hundreds of thousands of emails, and using relay computers to deliver their messages.<sup>34</sup> According to a professor at the Mayo Medical School consulted by federal investigators, the

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<sup>29</sup> *Id.*

<sup>30</sup> AP, "Missouri Governor Mulls Ban on Sexy Signs," *CNN.com* (May 7, 2004), at <http://www.cnn.com/2004/US/Midwest/05/07/sexy.billboards.ap/index.html>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> AP, "Four Charged Under New Spam Law," *AZCentral.com* (April 28, 2004), at <http://www.azcentral.com/business/articles/00428internet-spam28-on.html>.

<sup>34</sup> *Id.*

ingredients in the product promoted did not work.<sup>35</sup> The case is still pending, and no judgments have been obtained under the CAN-SPAM Act as of yet. Jeffrey G. Collins, United States Attorney for the Eastern District of Michigan, stated, “The cyber scam artists who exploit the Internet for commercial gain should take notice. Federal law now makes it a felony to use falsehood and deception to hide the origin of the spam messages hawking your fraudulent wares.”<sup>36</sup> Moreover, as of May 19, 2004, all adult-oriented emails must contain the term “Sexually-Explicit,” as the first 19 characters of the subject line and in the text, as very specifically set forth in the regulations.

### **H.I.V. ADULT INDUSTRY SCARE**

The H.I.V. outbreak is the first involving performers in the San Fernando Valley adult-video industry since 1999. It forced a voluntary moratorium on filming adult-oriented productions,<sup>37</sup> which was lifted on May 12, 2004.<sup>38</sup> Darren James is the actor believed to have brought the virus into the industry after he did a film in Brazil.<sup>39</sup> Five actors have since tested positive for the virus.<sup>40</sup> In response to the outbreak, Los Angeles County and state officials attempted to force actors in adult entertainment productions to use condoms in scenes involving sexual activities.<sup>41</sup> The idea was struck down by the adult industry in California, which produces approximately 4,000 videos per year (probably tens of thousands of sex scenes), with the majority of producers calling mandatory condom use, “an attack on their business and the quality

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<sup>35</sup> *Id.*

<sup>36</sup> AP, “First Four Charged Under ‘CAN-SPAM’ Law,” *CNN.com* (April 29, 2004), at <http://cnn.com/2004/LAW/0428/internet.spam.ap/index.html>.

<sup>37</sup> N. Madigan, “New H.I.V. Infection in Sex-Film Industry,” *The New York Times* (April 30, 2004), at <http://www.nytimes.com/2004/04/30/nation/30porn.html>.

<sup>38</sup> R. Pardon, “AIM Lifts Porn Moratorium a Month Early,” *XBiz.com* (May 12, 2004), at [http://www.xbiz.com/news\\_piece.php?id=3306](http://www.xbiz.com/news_piece.php?id=3306).

<sup>39</sup> N. Madigan, “New H.I.V. Infection in Sex-Film Industry,” *The New York Times* (April 30, 2004) at <http://www.nytimes.com/2004/04/30/nation/30porn.html>.

<sup>40</sup> R. Pardon, “AIM Lifts Porn Moratorium a Month Early,” *XBiz.com* (May 12, 2004) at [http://www.xbiz.com/news\\_piece.php?id=3306](http://www.xbiz.com/news_piece.php?id=3306).

<sup>41</sup> D. Evans, “County Can’t Force Condoms, Porn Lawyers Say,” *Daily Journal Staff Writer* (April 21, 2004), at <http://www.dailyjournal.com>.

of films.”<sup>42</sup> Some production studios located in San Fernando stated that they would move their production business from California if mandatory condom use was required.<sup>43</sup> The National Institute for Occupational Safety and Health is currently investigating the H.I.V. outbreak in the adult industry, and will offer advice to the Los Angeles Health Department concerning potential workplace safety and health solutions for adult production sets.<sup>44</sup> The backlash from this looms large for content producers.

### **ANTI-SMUT DVD UNIT**

The first DVD unit, which skips over swearing, nudity, violence, explicit drug use, and other allegedly offensive content, is now available at Wal-Mart.<sup>45</sup> The DVD player sells for \$79, and allows users to fast-forward and filter original movies depending on how the user has preprogrammed the machine.<sup>46</sup> However, the DVD player is involved in a legal battle with Steven Spielberg, Martin Scorsese, Steven Soderbergh as well as other members of the Directors Guild of America.<sup>47</sup> They argue that the DVD units allow users to violate copyright law when users “mute and skip the playback of movies on DVDs that they have lawfully bought or rented.”<sup>48</sup> Issues relating to the creation of unauthorized “derivative works” are also implicated by the device. The lawsuit is still pending.

### **SEX NEWS**

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<sup>42</sup> AFP, “US Porn Films Roll Again – Without Condoms,” *The Sunday Times* (May 14, 2004), at <http://www.sundaytimes.co.za/zones/sundaytimes/newsst/newsst1084524294.asp>.

<sup>43</sup> *Id.*

<sup>44</sup> R. Pardon, “AIM Lifts Porn Moratorium a Month Early,” *XBiz.com* (May 12, 2004), at [http://www.xbiz.com/news\\_piece.php?id=3306](http://www.xbiz.com/news_piece.php?id=3306).

<sup>45</sup> Hollywood Reporter, “Wal-Mart Sells Anti-Smut DVD Player,” *Reuters* (April 13, 2004), at <http://channels.netscape.com/ns/news/story.jsp?id=2004041304450002746727>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Keira, a freshman at Indiana University, operates and poses nude on her Web site [www.teenkeira.com](http://www.teenkeira.com) that she produces from her seventh floor dorm room.<sup>49</sup> Richard McKaig, Dean of Students, stated that since the freshman uses the school's space, and probably its name, without the school's authorization, it is up to the campus judicial system if Keira broke the school's ethics rules.<sup>50</sup> If so, punishment would range from a reprimand to expulsion.<sup>51</sup>

In other news, "tooththing" is the latest sex craze to hit the United Kingdom.<sup>52</sup> Tooththing is when wireless technology devices and pre-specified language is used to help two strangers meet for anonymous sexual encounters.<sup>53</sup> Tooththing boards, blogs, and Web sites are available on the Internet, where devoted toothers can meet and share ideas.<sup>54</sup> As a tooththing Web site states, "Tooththing is a form of anonymous sex with strangers – usually on some form of transport or enclosed areas such as a conference or training seminar. Toothers meet by first connecting suitable equipment – such as a modem, phone or palmtop computer. Users discover other computers or phones in the vicinity and then send a speculative message."<sup>55</sup>

### **SAY NO TO CRACK**

The Louisiana House Criminal Justice Committee just approved House Bill 1626, the "Baggy Pants Bill," which states: "It shall be unlawful for any person to appear in public wearing his pants below his waist and therefore exposing skin or intimate clothing."<sup>56</sup> The Baggy Pants Bill would punish violators with 3 eight-hour days of community service and a

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<sup>49</sup> R. Pardon, "Porn Stars Blooming at Indiana University," *XBiz.com* (April 7, 2004), at [http://www.xbiz.com/news\\_piece.php?id=2766](http://www.xbiz.com/news_piece.php?id=2766).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> G. Gallen, "Tooththing Sex Craze Underway," *XBiz.com* (April 19, 2004), at [http://www.xbiz.com/news\\_piece.php?id=2916](http://www.xbiz.com/news_piece.php?id=2916).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> B. Thomas, "Memo to Britney: Lose the Low-Slugs," *NBC News*, May 13, 2004, at <http://www.msnbc.msn.com/id/4963512/?GT1=3391>.

maximum fine of \$175.<sup>57</sup> State Representative Derrick Shepherd, when asked about the Bill, stated, “Hopefully, if we pull up their pants, we can lift their minds while we’re at it.”<sup>58</sup> However, Joe Cook, Executive Director of the A.C.L.U. Louisiana Chapter, believes the Bill “infringes on young people’s freedom of expression and their privacy rights.”<sup>59</sup>

*Lawrence G. Walters, Esquire is a partner with the law firm of Weston, Garrou & DeWitt, with offices in Orlando, Los Angeles and San Diego. Mr. Walters represents clients involved in all aspects of adult media. The firm handles First Amendment cases nationwide, and has been involved in much of the significant Free Speech litigation before the United States Supreme Court over the last 40 years. All statements made in the above article are matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. You can reach Lawrence Walters at [Larry@LawrenceWalters.com](mailto:Larry@LawrenceWalters.com), [www.FirstAmendment.com](http://www.FirstAmendment.com) or AOL Screen Name: “Webattorney.”*

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*