

**Think you would never cop a plea?**

**Think you would rather fight for your rights in a jury trial?**

**THINK AGAIN**

## **The Realities and Delimmas of Federal Sentencing Guidelines for Obscenity Prosecutions**

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This article deals with an unpleasant topic: sentencing exposure for obscenity-based prosecutions. No adult webmaster or adult entertainment producer or distributor likes to obsess about the possibility of going to federal prison. However, with the Justice Department's public confirmation of the upcoming obscenity crackdown on Internet content<sup>[1]</sup> this unpleasant prospect has taken on a new importance. With 32 prosecutors, investigators and FBI agents spending millions of dollars to bring obscenity cases to courthouses across the country,<sup>[2]</sup> it is likely that one or more adult webmasters or content producers will face the risk of being sentenced to a substantial amount of time in a federal penitentiary. As discussed below, most of those who actually receive such sentences will be as a result of a voluntary agreement to accept a certain negotiated sentence as opposed to rolling the dice at trial; in other words, a plea bargain. The United States Sentencing Guidelines are so severe that they provide unfortunate but substantial motivation for indicted defendants to accept responsibility for their actions and plead guilty to certain offenses, as opposed to exercising their right to a fair trial before a jury of their peers. So how much time would a typical webmaster or adult entertainment producer have to serve on the inside if he or she were prosecuted for common obscenity-related offenses and either plead guilty or lost at trial? While each case is different, some common themes tend to run through obscenity cases.

As mentioned above, sentences in the federal system are calculated using the United States Sentencing Guidelines (USSG or the Guideline(s)). This system uses a number of factors to determine a Level, or numerical score. This number, or Level, then places the individual on a line in a matrix which, when factored to include prior criminal record, if any, results in a range of incarceration that sets a minimum and maximum period to be served.<sup>[3]</sup> The system of determining what the guidelines call the offense level is somewhat complicated, removing human characteristics and considerations and replacing them with analysis of behavior and income in a fashion the IRS would envy. The analysis of any conviction

begins with what is called a base offense level calculation that is dependent on the particular crime charged. For example, the base level offense for distribution of obscene materials is 10.<sup>[4]</sup>

This is only a beginning point in the calculations. Other factors are then applied. For many convictions, including obscenity, the money earned is used to increase the offense level. Under a concept of relevant conduct this will include not just what the person entering the plea made, but can be expanded to all income (not just profit) from all related sources by all persons involved. After the offense level is determined there are additional factors that can be applied, or that could result in reductions in some cases. For example; a person who not only pleads guilty, but accepts the allegations without minimizing or shifting blame, can receive up to three levels in reduction for “acceptance of responsibility.” On the other hand, a person who supervises others can receive up to four levels enhancement for being a supervisor or leader. To show how this might work, some potential scenarios are outlined below. Each scenario will result in a Guidelines Calculation that the government is likely to assert and which will usually be accepted by the probation department, resulting in a sentencing range expressed by certain a number of months; for example 37 to 46 months in prison. The judge makes the final determination, in every case, as to whether the defendant should be sentenced at the lower or higher end of the range or somewhere in between, with broad discretion as to the specific sentence, so long as it falls within the permitted range. Under certain very rare circumstances, the judge can choose to depart upwards from the permitted range, so long as legally sufficient reason is provided for such upward departure. In one recent federal obscenity case handled by our firm, the judge threatened to depart upwards by a full five levels given the “egregious” nature of the criminal conduct involved in that case. For those readers that are curious about this egregious criminal activity, it involved the sale and distribution of a single adult videotape depicting adults involved in fetish activities. Ultimately, the judge was persuaded against any upwards departure.

While the court has the ability to depart upwards and impose a harsher sentence than contemplated by the Guidelines, under the Feeney Amendment to the PROTECT Act, passed in April, 2003, courts are no longer as free to depart downward and provide a more lenient sentence in obscenity cases.<sup>[5]</sup> It should be noted that the following scenarios are those we expect the government to assert.

There are credible defenses that can and will be raised in most cases to the application of many if not all of the enhancements and nothing in the following should suggest that the authors, or our law firms, agree that such calculations are correct. None-the-less they represent what a probation department may find correct and what a sentencing judge may well feel he is forced to impose. As noted in the recent case of *United States v. Weldon Angelos*, judges under current law often find themselves forced to impose sentences that they find to be overly harsh, irrational and unfair. With that in mind, consider the following typical scenarios:

## ASSUMED FACTS

The company and chief operating individuals for an adult content Website are charged with multiple counts of distribution of obscene materials in Salt Lake, Utah. There is a second indictment in Lexington, Kentucky.

The site has been operating for two years. All revenues are derived from memberships and downloads. The average monthly gross income to the site is \$30,000.

The site contains movies that can be streamed or downloaded. There are also individual photo sets that can also be viewed or downloaded, as well as forums for discussion and links to other adult sites (several of which are also owned by the owners of this site).

The Company created a portion of its content.

The material is mainstream and does not intentionally contain bizarre content.

All depictions are of adults.

The Company principals do not have prior criminal records.

## FIRST SCENARIO

A plea is negotiated in either location to one count from each indictment with the government agreeing to maximum acceptance of responsibility.<sup>[6]</sup> The maximum statutory sentence is 10 years (5 years for each count). Based on the Guideline, the following offense level (numerical score) would be applied:

a) Base offense level	<b>+10</b>
b) Value of distribution is set at \$720,000, total gross for the company over the two years.	<b>+14</b>
c) No enhancement for organizer or leadership	<b>0</b>
d) Maximum acceptance of responsibility	<b>- 3</b>
e) Total offense level.	<b>21</b>

### **With no criminal history 37-46 months in prison.**

f) If the individual is determined to be a leader, organizer or manager and/or directed the activity of at least one other person, add an enhancement for organizer or leadership:	<b>+2</b>
g) New total offense level.	<b>23</b>

### **With no criminal history 46-57 months in prison.**

h) The government claims that ONE image out of about 10,000 depicted a person bound in ropes. Even though not the subject of a conviction, this image comes in under relevant conduct because

this Guideline groups behavior and would include all adult material sold whether the subject of conviction or not. Add an enhancement for sadomasochistic material: **+ 4**  
 i) New total offense level. **+27**

**With no criminal history 70-87 months in prison.**

**SECOND SCENARIO**

No plea is taken. The case goes to trial in one location and there are convictions on at least one count that the jury finds particularly offensive. The jury does not convict on most of the counts, and the second indictment is dropped (Yeah, this happens a lot). There is testimony of the involvement of at least one other person who took direction on at least one occasion. The maximum statutory sentence would be 5 years for each obscenity conviction. In addition, if other charges were included the statutory terms for those sentences could be used to increase the sentence for the obscenity conviction even if completely unrelated.

- a) Base offense level **+10**
- b) Value of distribution is set at \$720,000, total gross for the company over the two years. **+14**
- c) Enhancement for organizer or leadership **+2**
- d) Total offense level **26**

**With no criminal history 63-78 months in prison unless this would exceed the statutory maximum.**

- e) The government claims that ONE image out of about 10,000 depicted a person bound in ropes. Note, the government used the same image as before, even though it was not the subject of conviction. It could even have been one of the acquitted counts, but if the judge decides by a preponderance of the evidence <sup>[7]</sup> that it is obscene he can include it. Enhancement for sadomasochistic material: **+ 4**
- f) The government also claims that the organization involved five or more persons. Additional enhancement for organizer or leadership adds 2 more points in addition to the two specified above: **+2**
- g) New total offense level: **32**

**With no criminal history 121-151 months in prison, unless this would exceed the statutory maximum.**

**THIRD SCENARIO**

The company goes to trial in both locations and loses both cases.

**Same as above: with no criminal history 121-151 months in prison**

Each case would be exactly the same as above. There would be two separate sentences; however, the good news is that because of relevant conduct and the fact that BOTH cases were based on the same amount of money, the sentences would run concurrently. The danger, of course, is that if there were a disparity in the sentences, the greater sentence would then govern. The above examples illustrate some salient points:

1) The Sentencing Guidelines create an incentive for pleading guilty before trial. While all United States citizens have a right to go to trial when charged with a criminal offense, that decision is accompanied by some substantial costs in terms of prison time if the defendant is ultimately found guilty. Under the USSG, an individual who accepts responsibility for his or her actions and tenders a guilty plea to one or more of the offenses charged will normally receive a three-point reduction in sentence, which usually shaves off many months in prison.

Additionally, the prosecutors may take less aggressive positions on enhancement issues if the defendant agrees to 'play ball' with the prosecutor. Thus, each adult webmaster charged with obscenity will at some point be faced with the critical decision of whether to accept responsibility and plead guilty, or roll the dice with a trial and hope for the best with the people who chose to show up for jury duty that day. Credit for acceptance of responsibility, second only to lack of resources, is the primary reasons why most indicted defendants in the federal system plead guilty instead of going to trial. (Although it should be noted that pleading guilty alone may not be sufficient for acceptance of responsibility. The government has been known to threaten to object to the reduction where the individual does not agree with the government's view of the facts.) In addition, the government will likely provide significant motivation for the defendants to enter a plea of guilty to some offense, by charging numerous additional offenses, or threatening to add additional charges, if the defendant refuses to plead guilty.<sup>[8]</sup> Potentially, an adult webmaster or producer may be facing charges relating to Section 2257 violations, credit card fraud, racketeering, money laundering, mail fraud or wire fraud, in addition to the standard obscenity charges. Our firm has been involved in cases where the government also threatened prosecution of unrelated offenses, such as tax evasion or illegal weapons possession, unless the defendant pled guilty to the obscenity offense.

Alternatively, or in addition, the defendant may be looking at defending charges in multiple jurisdictions throughout the United States based on the same Website material, if the government decides to bring charges in more than one jurisdiction. This has been a common tactic in the past, although it has been somewhat curtailed by federal court rulings.<sup>[9]</sup>

Sometimes, the government will be inclined to dismiss or drop one or more of

these additional charges in an effort to persuade the defendant to plead guilty to the offense that the government is most concerned about. This can sometimes be difficult when charges are brought in several different jurisdictions, with each jurisdiction desiring its own pound of flesh.

2. Your cooperation is greatly appreciated. The government likes cooperative defendants. It makes the job much easier. U.S. Attorneys have a life too, and they appreciate anything that makes their prosecution easier, less time consuming, and more effective. This all raises the issue of “Substantial Assistance.” The U.S. Attorney is empowered with the ability to ask the court for a reduction in the sentence either before or after sentencing. As a result defendants often rack their brains in the attempt to come up with useful information for the government, information which may be utilized in future prosecutions or investigations. This information is proffered to the prosecutor in an effort to convince him or her that the cooperation and information is useful, and should provide the basis for a sentence reduction under the Sentencing Guidelines.

Most U.S. Attorneys offices have a limit of three levels decrease on such a motion, although once filed, the judge is not bound by their recommendation. Nonetheless, while there is no guarantee that such information or assistance will result in any sentence reduction, many defendants who are looking at many months in prison will be all too willing to provide whatever information they can, if that information will shave a few months off of their already unfathomable sentence. This is often a government motivation to include people in the indictment that they might not otherwise charge. They count on the pressure created by the charges to create witnesses who are anxious, even desperate, to please. Despite the tough talk in the industry about never cooperating with the feds or turning state's evidence, this may be an all too common scenario once the prosecutions begin in earnest, and the reality of federal sentencing hits home.

3. Money changes everything. Most adult webmasters and adult content producers are in this business to make a living. They seek to generate as much revenue as possible, under their current business plan. However, with the sentencing guidelines, the more revenue you gross, the more severe the sentence. While this is not a reason to intentionally decrease your revenue, it is important to note. It should also be mentioned that any revenue, or other assets associated with the business, will likely be forfeited to the government in connection with any sentence. All such assets will be frozen immediately upon arrest, until final disposition of the case. On a positive note, if you don't have the money to hire the attorney you want, the government will be happy to provide you with one free of charge.

4. It is better to follow than to lead. The USSG impose enhanced penalties upon those individuals who can be fairly categorized as the “leader” or “organizer” of

other individuals who participate in conduct that violates United States law. This can be based on as little as some direction to a single person, but can lead to increased punishment if there are more people and larger leadership roles. The more that one is giving orders, making decisions, and holding oneself out as the head of a particular business venture, the greater the likelihood is that additional points will be added to the Guidelines Calculation.

5. Hurt me, hurt me... hurts you. While most types of obscene adult materials are treated the same for purposes of the Guidelines Calculation, the one exception is any materials that depict sadomasochistic activities. Sadomasochistic material raises the Guidelines Calculation by a full four levels.<sup>[10]</sup> Thus, when evaluating whether to add that S&M fetish gallery, consider the risk created. Of course, the fact that all models depicted in the images consented to that activity is of no consequence from a sentencing perspective. Additionally, the view of the government respecting what is S&M material might vary greatly from what is commonly understood in the industry. Any depiction demonstrating force, pain or restraint can be so construed. Important to note here is that the authors do not recommend any sort of censorship of erotic materials. We have defended all manner of sexually explicit media, from tame to extreme, and will continue to do so for our clients. However, we encourage as much education as possible to allow intelligent decision-making when it comes to publication of adult materials.

6. Where Did That Come From? Remember, the government will not select the best of the material provided on the web site. They will not even feel constrained to select material that is representative of the website as a whole. They will pry into every nook and cranny (we had that case too) to find the material they believe will most offend the jury and the judge. And if they can find anything that looks like under aged models, you know they will grab for that. Know what is on the site. You will be held responsible for it even if you didn't know it was there. Of course, a good argument exists that the website should be taken 'as a whole' in obscenity prosecutions, and all content posted thereon should be considered in determining whether the site is an obscene work. However, the federal government does not share this view, as evidenced by the current prosecution of Extreme Associates in the Western District of Pennsylvania, based on individual video clips posted on its site.

## **Conclusion**

This look at the USSG is sobering and intimidating. This article is not designed to spread fear throughout the industry, but rather, to educate on the realities of federal prosecution, given the specific threats that have been launched of late. The prosecutor ultimately controls the offense charged, and the industry needs to recognize and respect that. In certain cases, the offense charged can be negotiated; particularly where competent legal representation is brought in before a grand jury returns an indictment on specific charges. In other cases, certain counts may be dropped or never charged as part of plea negotiations. Of

course, all adult webmasters and adult entertainment producers hope that they are never charged with any federal offence. If they are charged, they hope that they will prevail in a trial. However, awareness of the realities of the sentencing issues in federal court is a realistic necessity given the current political climate.

**Note:** For you prosecutors reading this article, do not cite it for the proposition that any of this is correct and valid; the above reflects DOJ's agenda and position, not that of the authors.

## Endnotes

[1] L. Sullivan, *Administration Wages War on Pornography*, [www.BaltimoreSun.com](http://www.BaltimoreSun.com) (April 6, 2004).

[2] *Id.*

[3] On October 4, 2004, the United States Supreme Court heard argument on a constitutional challenge to the Sentencing Guidelines. However, one likely outcome even if the Sentencing Guidelines are found to be unconstitutional is that they would still serve as a non-binding guide to sentencing judges.

[4] U.S.S.G 2G3.1.

[5] PROTECT Act at ' 513(a)(2). But see *United States v. Detwiller*, where Judge Panner found the PROTECT Act violates the separation of powers clause because it impinged to far on the discretion of the judge.

[6] Under the Rules of Criminal Procedure, in circumstances where a plea is being negotiated one jurisdiction can agree to the transfer of its case to another jurisdiction. This only works in situations where there is to be a plea. The advantage is the ability to dispose of more than one case in a single proceeding, in a single state, and before a single judge.

[7] One of the issues presently before the Supreme Court is whether the preponderance of the evidence standard is allowable for sentencing. There is support for this standard being increased to a reasonable doubt standard.

[8] An example receiving national press is the *United States v. Weldon Angelos*. Mr. Angelos professed his innocence and turned down a plea agreement to serve 16 years in prison. The government superceded the indictment adding charges that could send him to prison for over 100 years. Even though he was acquitted of some of the most serious charges, the judge was constrained by law to impose a sentence of 55 years on Mr. Angelos. The constitutionality of that sentence now starts its way through the courts.

[9] *PHE, Inc. v. United States Department of Justice*, 743 F.Supp. 15 (D.D.C. 1990).

[10] *Id.*

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