

ADULT INDUSTRY UPDATE™

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JUDICIAL UPDATE

In the courts this month, the Third Circuit Court of Appeal again struck down the Child Online Protection Act (“COPA”). The law has never been enforced and was sent back to the Third Circuit Court of Appeals from the United States Supreme Court to consider additional arguments that the Circuit Court did not resolve the first time around. One concern that the court noted in striking down the law is that in attempting to define “harmful material,” COPA makes no distinctions between things appropriate for a five year old and something harmful to a seventeen year old.¹ Also, since the law requires that surfers desiring to view erotica provide a credit card number, this unfairly requires adults to identify themselves before viewing constitutionally protected material.² Another review by the United States Supreme Court is likely as a result of this decision.

Meanwhile, Texas Republican Representative Lamar Smith unveiled what he calls the “Child Obscenity and Pornography Act of 2003,” which would prohibit the sale or trading of child pornography or obscenity involving prepubescent children.³ Of particular concern is peer to peer file swapping which uses services such as Kazza as a swap meet for child pornography.⁴ One way or another, we will wind up with more federal restrictions on providing adult materials to children.

¹ “Court Strikes Down Law Intended to Keep Kids from Online Porn,” *CNN.com* (March 7, 2003).

² *Id.*

³ C. Farrar, “Anti-Child Porn, Anti P2P Porn Moves in Congress,” *AVN.com* (March 18, 2003).

⁴ *Id.*

The United States Supreme Court rendered an interesting ruling this month: The Court ruled against lingerie seller Victoria's Secret on its trademark claim against a small sex toy and adult video store named "Victor's Secret."⁵ The Court noted that federal trademark law requires substantial evidence that a competitor actually caused harm by using a similar-sounding name.⁶ Notably, this ruling produced a unanimous decision in favor of an adult entertainment establishment. With Justices Scalia and Rehnquist voting in favor of a sex store, perhaps there is hope for justice at the High Court. Notably, this case is not a green light to use sound-alike names – do so only with extreme caution and sound legal advice.

LEGISLATIVE UPDATE

Congress recently passed the new virtual child pornography law, creatively entitled "The Child Abduction Prevention Act of 2003."⁷ Apparently, our lawmakers did not understand the import of last year's United States Supreme Court decision striking down portions of the Child Pornography and Prevention Act of 1996, which was Congress' first attempt to regulate "virtual" child pornography. Many of the same concerns are created by the new legislation, although the House is certainly bobbing and weaving in its attempt to come up with something that will pass constitutional muster. Section 1466A of the Bill prohibits the production, distribution, receipt, or possession with intent to distribute, of any visual depiction which is, or is indistinguishable from, that of a prepubescent child engaging in sexually explicit conduct. This Bill will certainly be challenged if it is passed into law, and the United States Supreme Court may once again be faced with a difficult decision on the constitutional reach of the government's authority to regulate depictions of pretend children. Because it is limited to prepubescent minors, however, there will

⁵ A.P., "Supreme Court Sides With Sex Shop," *MSNBCNews.com* (March 4, 2003).

⁶ *Id.*

⁷ H.R. 1104, 108th Congress – First Session.

be less impetus to challenge it because responsible businesses always stay clear of such images. The likely challenges will come from criminal defendants.

More disturbing than virtual child pornography restrictions are the other add-ons to this Bill, relating to deceptive domain names and federal records keeping requirements. The Bill contains a new prohibition on the use of “misleading” domain names by adult websites. “The Internet can be used to deceive children into viewing inappropriate material,” said Representative Mike Pence (R-Ind.), who drafted the domain name amendment to the Bill.⁸ Specifically, Section 2252B(b) provides, “Whoever knowingly uses a misleading domain name with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this Title or imprisoned not more than four years, or both.”⁹ Interestingly, webmasters who use the words “sex” or “porn” are provided a safe harbor from prosecution. Couldn’t the Representatives come up with a few more words that clearly denote adult content? That project might have provided an interesting afternoon task for some House staffers. The test for determining what is “harmful to minors” under this new Bill is the same test used in the COPA law, which is the subject of substantial federal court litigation regarding its constitutionality. If COPA is struck down by the United States Supreme Court this time around, the misleading domain name law likely will fall with it.

Perhaps most disturbing is the last sub-section of the Child Abduction Prevention Act that requires the Attorney General to submit a report to Congress detailing the number of times since January, 1993, that the Department of Justice has inspected Section 2257 records of adult content producers.¹⁰ This sub-section also requires Attorney General John Ashcroft to disclose

⁸ D. McCullagh, “House Vote Bans Deceptive URLs,” *CNetNews.com* (March 28, 2003).

⁹ *Id.*

¹⁰ *Id.* at §12.

the number of violations prosecuted as a result of those inspections.¹¹ It seems as though any member of Congress could simply pick up the telephone and call General Ashcroft to ask him these questions. Accordingly, it is unlikely that the purpose of the legislation is really to obtain this statistical information. Rather, it is to light a fire under the Department of Justice to persuade federal agents to begin inspecting records and prosecuting violations. This provision, buried in the fine print of this proposed law, should be of extreme concern to all webmasters who have any question about the extent of their § 2257 compliance. It is reasonable to assume that the Department of Justice will begin inspecting § 2257 records on a widespread basis, even if this section of the Bill is defeated (fat chance!). Compliance with the dictates of Title 18, *U.S.C.* §2257 cannot be overemphasized in these uncertain times for the adult industry.

OBSCENITY UPDATE

The Feds are at it again, with at least two new federal obscenity prosecutions directed at adult video content distributed through the United States Mail. Federal agents, postal inspectors and LAPD officers raided the offices of Extreme Associates on April 8, 2003, and seized records, videos and Model Releases relating to several movies.¹² The raid on Extreme Associates came only days after the Justice Department arrested a West Virginia couple on obscenity charges relating to the operation of a “scat” fetish site, *girlspooing.com*.¹³ Justice Department officials have threatened to seize the couple’s home, out of which the business was allegedly operated. The case is pending in Bluefield, West Virginia – hardly a bastion of liberal thought. It appears that the long-feared reinstatement of regular federal obscenity prosecutions against adult content has finally become a reality, prompting many adult industry participants to review their content and seek legal guidance regarding its defensibility. Thus far, distractions

¹¹ *Id.*

¹² T. Brown, “Extreme Associates Busted by Federal Agents,” *AVNONline.com* (April 8, 2003).

¹³ *TheSmokingGun.com* (March 27, 2003).

abroad have likely prohibited an all-out assault on the adult industry by the Department of Justice, just as a matter of resource allocation.

PAYMENT PROCESSOR PANIC

The big news on the payment processing front this month was the pull-out by PayPal from the adult internet industry. Many webmasters were surprised to receive a notice from PayPal that as of May 12, 2003, it would no longer support transactions for adult content or products. PayPal previously had served as a viable alternative means of paying for adult content, especially for smaller amateur sites that could not obtain a merchant account, or afford to comply with the new regulations imposed by the third party billing processors. Some industry leaders have speculated that PayPal's pull out from the adult industry may be a signal of hard times to come; some even suggesting that the company was tipped off and given an opportunity to get out before the going gets tough. While such conspiracy theories are sometimes interesting to consider, there has been no official confirmation that PayPal had access to inside information.

Also generating some panic amongst adult webmasters is the rumor that Visa will no longer provide processing services for AVS sites. Although there is no official word yet from Visa, it is interesting to note that AdultCheck has changed its description of services from an "Age Verification System" to an "Access Verification System."¹⁴ These continued payment processing hurdles force one to consider whether at some point in the future, adult content might only be purchased by sending cash in the mail.

THE INTERNET PATENT MESS

Most tuned-in webmasters are painfully aware of the patent claims by Acacia Research, which contends that it owns patents to what is commonly known as "streaming media." Acacia has sued several adult Websites, and made over 700 claims against companies in the adult

¹⁴ www.AdultCheck.com.

entertainment industry because of their perceived profitability. That conclusion may itself be a miscalculation on Acacia's part, since experts have recently opined that Internet erotica is not the money catcher it's often believed to be outside the professional adult industry.¹⁵ Notably, there have also been some misinterpretations as to the volume of adult material on the Internet. Recent estimates indicate that total erotic content is still less than five percent of all material available online.¹⁶ In any event, Acacia has filed suit against a number of adult companies (along with many non-adult ones) under the theory that they are violating Acacia's patent claims. Several such companies have organized and retained the national intellectual property law firm of Fish & Richardson to defend their interests, in the attempt to defeat the patent claims.¹⁷ Although there's been no resolution to the merits of Acacia's claims, a jury recently struck down four patent infringement claims against two Internet security companies in a Delaware trial, where the Plaintiff claimed to have invented a popular method for processing secure transactions over the Internet.¹⁸ The Plaintiff had been granted seven patents between November, 1993, and October, 1999, to cover Secure Sockets Layer (SSL) which is commonly used to scramble data during Internet transactions between Websites and their customers.¹⁹ A second trial on these issues is looming, and nobody is counting their chickens on that case yet. However, this may be a positive indicator of which way the wind is blowing on Internet patents.

MARRIOTT CONTINUES TO BUCKLE

Another Marriott Hotel in Cincinnati has succumbed to the pressure of the Citizens for Community Values ("CCV"), a censorship group focused on eliminating adult fare from area hotels. The Cincinnati Marriott North in Westchester, Ohio, is the second local hotel to bow to

¹⁵ C. Farrar, "Web Saturated with Porn? Not Quite: Ohio Professor," *AVN.com* (March 17, 2003).

¹⁶ *Id.*

¹⁷ J. Edwards, "Acacia Targets Adult Websites with Lawsuits, Claims Patent on Streaming Media," (April 7, 2003).

¹⁸ G. Gross, "Jury Turns Down Internet Patent Claims," *ITWorld.com* (March 11, 2003).

¹⁹ *Id.*

pressure from the censorship group and law enforcement officials.²⁰ The Butler County Prosecutor's Office warned that owners might face obscenity charges unless they cut off pay per view adult entertainment. After receiving complaints about a couple of movies, local prosecutors indicated that Marriott officials "were very cooperative."²¹ Chilling effect in action!

FEDS SEIZE WEBSITES

In a move that has concerned some civil libertarians, federal agents from the Justice Department are starting to seize and take over Websites owned by businesses that distribute bongos, roach clips, rolling papers and other alleged drug paraphernalia. Civil liberties groups and legal scholars fear that the government could use the new seizure policies to spy on Web surfers who visit the confiscated sites.²² David Sobel, General Counsel for the Electronic Privacy Information Center, recently said, "The government is suddenly in a position of being able to monitor the Web-surfing activities on unwitting individuals who believe they are going to a Website . . . but possibly implicating themselves into some law enforcement investigation."²³ Thus far, 15 to 20 sites have either been taken over or redirected by the Justice Department, according to Attorney General John Ashcroft. In the meantime, those looking to consume tobacco products via exotic smoking devices are encouraged to avoid online shopping and to visit their local head shop instead.

ANTI-SPAM LEGISLATION

Anti-spam crusaders have been emboldened by the recent Eighth Circuit Court of Appeals decision upholding the federal junk fax law.²⁴ In this case, American Blast Fax, Inc. and Fax.com challenged provisions of the Telephone Consumer Protection Act of 1991,

²⁰ M. Clark, "Second Marriott Turns off Adult Movies," *The Cincinnati Enquirer* (March 5, 2003).

²¹ *Id.*

²² "Feds Grab Internet Domains," *CNN.com* (March 5, 2003).

²³ *Id.*

²⁴ *State of Missouri ex. rel. Jeremiah W. Nixon v. America Blast Fax, Inc.*, Case No. 02-2705/2707 (8th Cir. 2003).

prohibiting unsolicited fax advertising on First Amendment grounds. Although the trial court struck down the restrictions as a violation of Free Speech, the Eighth Circuit Court of Appeals reversed and found the legislation constitutional. In light of this court decision, anti-spam advocates began pushing harder for a federal law against unsolicited email. Ray Everett-Church, Counsel to the Coalition Against Unsolicited Commercial Email, claims that the same arguments used to justify the unsolicited fax regulation can be made about spam.²⁵ Comparing spam to fax, Everett said, “The junk email problem cries out even louder for a solution.”²⁶ However, the Electronic Frontier Foundation argues that regulating email spam may not be as easy as regulating junk faxes. The Appeals Court decision focused on the costs associated with tying up fax machines and using up paper and ink to receive faxes, which largely differentiates unsolicited email.²⁷ Nonetheless, Senator Conrad Burns (R-Montana) introduced federal anti-spam legislation called “Controlling the Assault of Non-Solicited Pornography and Marketing Act,” but it was not called to the Senate floor for a vote.²⁸ More recently, a Bill was introduced in Arkansas, requiring spam to contain an identifying URL, the phrase; “ADV: Adult,” a valid functioning email address to allow removal, and a toll-free telephone number for recipients to call to be removed from the list.²⁹ Although approximately sixteen states have passed anti-spam legislation, attempts at regulating unsolicited email at the federal level have thus far been unsuccessful.

ONLINE GAMBLING UPDATE

Online casino gambling has been dealt another potential setback this month as the House Financial Services Committee approved a Bill that would require credit card companies and

²⁵ G. Gross, “Anti-Spam Crusaders Call for New Laws,” *PCWorld.com* (March 25, 2003).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ D. Thompson, “Bill Targets Porn Spam,” *TimesRecord* (March 4, 2003).

payment services such as PayPal to block money transfers to Internet gambling sites.³⁰ “No one is immune to the potential ruin that Internet gambling can bring,” said Committee Chairman, Michael Oxley (R-Ohio).³¹ However, Massachusetts Democrat Bonnie Frank opposed the measure, likening it to a new form of prohibition.³² A similar bill is pending in the Senate. The online gambling industry has been dogged by conflicting court decisions regarding the applicability of federal gambling law to online gaming, along with competing legislation alternatively proposing both criminalization and potential legalization of Internet gaming.

ONLINE POLITICKING

The Internet has provided an ideal venue for grassroots political campaigns, and several new Websites are popping up to assist in the endeavor. For example, MeetUp.com, is a new free service that gathers people together to discuss various subjects that has found a niche in campaigning for candidates.³³ Since its inception, MeetUp.com has held dozens of events around the country for voters to support their presidential candidates. As this author has preached for years, webmasters may hold the key to the next presidential election should they use their power to effect political change.

Blue Balling the Boys Overseas

Last month, *Update* reported that at least one company was sending adult fare care packages to troops stationed abroad. It was not long before censorship groups like Focus on the Family and Concerned Women for America have objected to the offer of erotic assistance. Detractors cited degradation of women and concerns about the Muslim reaction to adult

³⁰ “Net Gambling Ban Wins Key Support,” *MSNBCNews.com* (March 18, 2003).

³¹ *Id.*

³² R. Fitzpatrick, “House Panel Approves Bill Aimed at Online Gambling,” *Global Institute for Gaming Innovation* (March 13, 2003).

³³ L. Poteus, “Political Hopefuls Turn to Web Networking,” *FoxNewsChannel.com* (March 10, 2003).

entertainment as reasons to halt the shipments.³⁴ Focus on the Family also integrated the concept of obscenity; “The interstate distribution of obscene material is a criminal violation, and United States attorneys and even the FBI should investigate . . .”³⁵ The Middle East might as well be initiated with American culture sooner, rather than later.

BIZZARO WORLD

The winner of the bizarre story of the month is a tie: Tennessee has proposed to ban X-rated videos from cars, and a man was arrested after refusing to remove an anti-war shirt in the mall. The State Senate of Tennessee has voted unanimously to ban X-rated videos from cars and other vehicles if the TV screens can be seen from the street.³⁶ Erotica fans can still view the tapes if their car windows are tinted or covered by shades, so long as they keep their eyes on the road! The final oddity this month is the well-publicized arrest of the individual who failed to remove a shirt proclaiming “Peace on Earth, Give Peace a Chance.”³⁷ Mall officials quickly distanced themselves from the security officer’s actions, and the guard was fired. Perhaps these absurd actions are necessary to give the American public a refresher course in First Amendment rights.

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³⁴ C. Farrar, “Porn For The Troops? Not So Fast – Family Groups,” *AVN.com* (April 1, 2003).

³⁵ *Id.*

³⁶ “Tenn. May Restrict X-Rated In-Car Videos,” *WESH.com* (March 18, 2003).

³⁷ “Man Arrested After Refusing to Remove Anti-War Shirt in Mall,” *FoxNewsChannel.com* (March 5, 2003).