

## ADULT INDUSTRY UPDATE™

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### EXTREME INDICTMENT

The adult Internet industry received another jolt this month with the news that a federal indictment had been returned against Extreme Associates, Inc., along with Robert Zicari (a.k.a. Rob Black) and Janet Romano (a.k.a. Lizzy Borden, his wife and alleged business partner). A search warrant had been executed at Extreme Associates months earlier; however this indictment was the first formal action taken as a result of the raid. The Justice Department followed a similar pattern as that seen in the case pending against the Defendants in the West Virginia obscenity case relating to scatological content, and alleged a conspiracy to distribute obscene content through the United States Mail, and further sought forfeiture of proceeds generated as a result of the conspiracy.<sup>1</sup> However, this case differs in one important respect: It also alleges that the Defendants violated the federal obscenity laws by offering Internet content for downloading on the Web.<sup>2</sup> Therefore, this is the first known case to involve the application of the United States' obscenity laws to content available exclusively on the Internet. Previous cases have focused on obscene materials delivered via the United States mail or common carriers. Thus, webmasters can expect to see all of the constitutional arguments play out in this case, which thus far have been merely the subject of academic debate on message boards and resource sites.

The Justice Department promises that this Indictment is merely the first in a “wave of criminal cases” against the adult Internet industry.<sup>3</sup> Reports indicate that the issue of pornography has worked its way to the top of Attorney General John Ashcroft's agenda, now

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<sup>1</sup> *United States of America v. Extreme Associates, Inc. et. al.*, Case No. [Under Seal]; released August 7, 2003.

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

<sup>3</sup> P.Huffstutter, “U.S. Indicts Porn Sellers, Vowing Extensive Attack,” *Los Angeles Times* (August 8, 2003)

that the War on Terrorism is supposedly under control.<sup>4</sup> In announcing the Indictment, Ashcroft said: “Today’s Indictment marks an important step in the Department of Justice’s strategy for attacking the proliferation of adult obscenity. . . [We] will continue to focus our efforts on targeted obscenity prosecutions that will deter others from producing and distributing obscene material.”<sup>5</sup> The prosecution against Extreme Associates will be no cakewalk for the government, however. First Amendment attorney Louis Sirkin of Cincinnati, Ohio has been retained to defend the charges, and other talented lawyers are certain to join in the fray. Because this case raises such groundbreaking issues as which community standard applies to evaluate online communications and what constitutes the ‘whole work’ on a Website for purposes of the obscenity test, the industry will be closely following this case. In the words of Obscenity Czar, Andrew Oosterbaan, “It’s not the first, and it won’t be the last.”<sup>6</sup> This will be an important case for the industry to watch, and will certainly be the subject of future coverage in *Update*.

#### **SUMMER INTERNET DRAWS TO A CLOSE**

The adult Internet industry’s largest tradeshow ended with a bang (or several of them) in early August, as Hollywood, Florida picked up the pieces left by adult webmasters visiting from all over the world. Legal matters were the topic of conversation throughout the tradeshow floor, as webmasters commiserated about issues such as billing woes, Acacia Media’s patent claims, and expected obscenity prosecutions against adult webmasters. This author has never seen the adult Internet industry as fixated on legal issues as it seems to be at present.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> T. Ove, “Indictment made in Pittsburgh signal wider U.S. attack on porn,” *Pittsburgh Post-Gazette* (August 8, 2003).

## ASHCROFT'S LIST

In a move that has shocked many in the legal community, it was recently reported that Attorney General John Ashcroft wants federal prosecutors to create a list of judges who impose more lenient sentences than federal guidelines recommend.<sup>7</sup> Critics say that such a creation of such a blacklist could interfere with judicial independence.<sup>8</sup> Ashcroft directed all United States attorneys to promptly report any judge that imposes a “downward departure” from the sentencing guidelines that are not part of a plea agreement or in exchange for cooperation by the defendant.<sup>9</sup> Those convicted of obscenity offences need not be concerned with such “downward departures” since the recently passed PROTECT Act virtually eliminates the discretion of judges to provide such sentence reductions, in those cases. Ashcroft defended the creation of the list by claiming an interest in making sure that criminal sentences are faithfully, fairly and consistently enforced,<sup>10</sup> which might be read as a complaint about judges who decline to adhere to the Draconian sentencing guidelines, even under very unique circumstances. Interestingly, Ashcroft did not ask for a list of judges who exceed the sentences recommended by the guidelines.

## LEGISLATIVE UPDATE

Yet another anti-erotica bill has been introduced in Congress. This one is called the “Protecting Children from Peer-to-Peer Pornography Act,” and is cosponsored by Joe Pitts (R-Pa.) and Chris John (D-La.).<sup>11</sup> The Bill would require Internet file swapping services to obtain parental consent before allowing children to use their software. “Its alarming today how easy it is for our children to inadvertently access pornography over the Internet and become victims of

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<sup>7</sup> Associated Press, “Ashcroft Wants List of Lenient Federal Judges” (August 7, 2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> L. Morahan, “Anti-Porn Bill Targets Internet ‘File Sharing,’” *CNSNews.com* (July 28, 2003).

sexual predators. . . ,” said Pitts.<sup>12</sup> The Bill requires that the Federal Trade Commission and the Commerce Department develop “do not install beacons” that parents could use to block the ability to download file swapping software. However, some experts express doubt that such technology could be effectively developed.<sup>13</sup> “I don’t think anybody has built such a thing and frankly I don’t think such a thing is possible, or at least not likely to be effective in this kind of world,” said Fred von Lohmann, senior staff attorney with the Electronic Frontier Foundation (EFF),<sup>14</sup> not to mention the fact that children can access erotic material through many other means, such as chat rooms, news groups and email. Acknowledging the difficulty in creating such technology, the Bill’s sponsors provide an eighteen month window within which to develop the “beacons.”<sup>15</sup>

#### GOVERNOR FLYNT

Many Californians reeled, and some just smiled, as *Hustler* publisher Larry Flynt, threw his hat into the ring of gubernatorial contenders in the political circus known as the Governor Davis Recall Vote. Flynt, a registered Democrat, civil libertarian and free speech advocate, claims he would resolve California’s budget problems by expanding slot machine gambling within the State.<sup>16</sup> More than 250 people originally registered to run as candidates in the recall election scheduled for October 7, 2003.<sup>17</sup> The number now has been whittled down to 135. The best known candidate is, of course, Arnold Schwarzenegger. Nobody knows how this menagerie will shake out, but the result may have far reaching consequences for the upcoming presidential election in 2004. The State of California carries the largest number of electoral

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

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

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

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

<sup>16</sup> Associated Press, “Hustler Publisher Flynt to Run for California Governor,” *FoxNews.com* (August 1, 2003)

<sup>17</sup> *Id.*

votes, and is a cherished prize for any presidential candidate. If a Republican is elected as California's new governor, in response to the recall petition, President George W. Bush may stand a better chance of being reelected, depending on the winner's success in attempting to resolve the serious financial woes facing the State of California.

### **TOYS IN THE DISHWASHER**

Life isn't all fun and political games for Larry Flynt. He recently found himself on the receiving end of a law suit for sexual harassment, filed by a former employee who claimed she found sex toys in the company dishwasher.<sup>18</sup> Elizabeth Rene Raymond, a former executive assistant to two top officers of Flynt's company, was fired from her job a year ago, and now claims that Flynt fostered a hostile work environment.<sup>19</sup> She claims that the toys in the dishwasher were used on the prostitutes who visited his office.<sup>20</sup> That's one way to suit up for the Governor's race.

### **TURNING OF THE TIDE?**

The tide may be turning back in favor of individual privacy after a long run in favor of enhanced security measures by the federal government. In two separate moves, the United States House of Representatives voted overwhelming to pull back a key provision of the Patriot Act, which allows the government to conduct a "sneak and peek" searches of private property,<sup>21</sup> and the Senate has moved to kill the Total Information Awareness (TIA) program which would have made records of millions of law abiding Americans subject to governmental scrutiny.<sup>22</sup> The Senate also denied funding to the controversial Computer Assisted Passenger Prescreening System (CAPPS II) which would have evaluated the flight risk of airline passengers upon

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<sup>18</sup> "Larry Flynt Sued Over Sex Toys in Dishwasher," *Reuters.com* (August 6, 2003).

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

<sup>20</sup> *Id.*

<sup>21</sup> A. Clark, "House Takes Aim at Patriot Act Secret Searches," *Washington Post* (July 22, 2003).

<sup>22</sup> Senate moves to kill Pentagon terrorism surveillance program," *CNN.com* (July 16, 2003).

ticketing, until further study can be conducted.<sup>23</sup> Both Houses of Congress may be reacting to a popular backlash against more intrusive surveillance methods proposed or enacted in response to the 9-11 terrorist attacks. Additional evidence of such backlash can be seen in the litigation instituted by the ACLU against the library snitch provisions of the Patriot Act, requiring libraries to provide information about their patron's reading habits.<sup>24</sup> Attorney General John Ashcroft is desperately trying to hold on to the power granted by the Patriot Act, by scheduling an 18 city, 4 week, nationwide tour, during which he will attempt to "explain" the Patriot Act to a skeptical America.<sup>25</sup> United States' citizens are a private bunch of people, and this sort of intrusive spying on domestic citizens was certain not to be tolerated for very long after the initial shock of 9-11 wore off. It appears that surveillance agencies such as the CIA and FBI must now resort to good old fashioned police work, and maybe a healthy dose of information-sharing to avert future terrorist attacks.

### **PENTHOUSE GOES BUST**

After weeks of speculation, and some public denials, *Penthouse* finally threw in the towel and filed for Chapter 11 bankruptcy.<sup>26</sup> The petition for bankruptcy was filed by General Media, Inc, a subsidiary of Penthouse International, Inc., seeking protection so it can restructure its operations and debt.<sup>27</sup> The August issue of *Penthouse* will still be published, although the future of the company thereafter is uncertain. Some industry experts have speculated that print magazines such as *Penthouse* will have difficulty surviving in light of "lad" magazines such as *Stuff* and *FHM*, along with Internet erotica.<sup>28</sup>

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<sup>23</sup> R. Mark, "Senate Cans CAPPs II Funding," *Internet.com* (July 14, 2003).

<sup>24</sup> Bell, Maya, "ACLU offers Big Brother warning to library patrons," *TallahasseeDemocrat.com* (July 31, 2003).

<sup>25</sup> "Ashcroft to Launch Patriot Act Tour," *FoxNews.com* (August 14, 2003).

<sup>26</sup> "Penthouse Publisher Files for Bankruptcy," *Reuters.com* (August 12, 2003).

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

<sup>28</sup> "Limp Sales Send Penthouse Bust," *TheAge.com* (August 15, 2003).

## SHIELDING INNOCENT EYES

With all the talk in the adult Internet industry about challenges to governmental efforts to force the adult industry to protect children from inadvertent exposure to adult content, the adult webmaster community's inherent obligation to do so often gets lost in the mix. Not only is protecting children from adult content the right thing to do, it makes good business sense. Children are a terrible source of traffic, and they increase the legal risks associated with presenting adult content. The adult Internet industry is comprised of brilliant programmers and innovators, some of whom have forged many technological advances such as the VCR and many common business practices found on the Web. Certainly such a talented and diverse group can develop technology designed to weed out the presence of minors from inappropriate content. This author has developed a birth date verification script, which is made available to his clients, as an interim solution until something technologically superior can be developed. However, a collective call should emanate through this industry to focus on the issue of protecting children, while at the same time protecting the rights of adult webmasters to purvey erotic material to a consenting adult audience.

A proposal to create a .xxx domain name was revealed and explained by its proponent, ICM Registry, at the recent Internext convention. Whether through such grouping or other technique, some form of voluntary age restriction must be implemented before the government does it for us.

Just recently, the government filed an appeal to the United States Supreme Court, seeking to reinstate COPA.<sup>29</sup> This issue will truly be the greatest challenge facing the adult Internet industry in the conceivable future.

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<sup>29</sup> C. Farrar, "White House Wants COPA Restored: Report," *AVN.com* (August 14, 2003).

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