

# ADULT INDUSTRY UPDATE™

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## PERFECT 10 STRIKES OUT IN COURT

Norman Zada, the owner of Perfect 10, Inc., filed a lawsuit against Visa, MasterCard, First Data Corp., Cardservice International, and Humboldt Bank in January for contributory and vicarious infringement, which was dismissed by the United States District Court for Northern California.<sup>1</sup> Zada's lawsuit alleged that the companies and banks facilitated and profited from the illegal use of his copyrighted material on other adult entertainment websites. The case was dismissed by Judge James Ware for Perfect 10 failing to provide enough evidence that the companies participated in copyright infringement. Zada claims over the past six years he has lost in excess of \$29 million due to illegal use of his content, and he has spent nearly \$8 million for attorney's fees defending his content. The court found that the credit card companies were too far removed from the content for vicarious liability to attach. Perfect 10 plans to appeal the ruling.

This ruling comes on the heels of after another ruling in a similar case, *Perfect 10, Inc. v. CCBill, LLC, et al.*, where Perfect 10 sued iBill, Internet Key, CWIE, and CCBill for copyright and trademark infringement, trademark disparagement, unfair competition, false advertising, violation of right to publicity and violations of RICO. In July, United States District Judge Lourdes G. Baird rejected in part Zada's lawsuit against CCBill, iBill, and Internet Key based on the determination that the three companies did not directly or knowingly infringe on Perfect 10's

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<sup>1</sup> Gretchen Gallen, "Perfect 10 Lawsuit Tossed," *XBiz.com*, (Aug. 10, 2004), found at [http://www.xbiz.com/news\\_piece.php?id=4707](http://www.xbiz.com/news_piece.php?id=4707).

content and that they qualified for the safe harbor protections under the Digital Millennium Copyright Act (“DMCA”). The Court noted that CCBill merely “provides a connection to the material on its clients’ websites through a system which it operated in order to provide its clients with billing services.”<sup>2</sup> The Defendants also sought protection from the state law claims under Section 230 of the Communication Decency Act (“CDA”). Perfect 10 responded by claiming that the CDA’s legislative purpose was to protect minors from harmful material on the Internet, that the Defendants aid in the distribution of offensive and obscene material, and thus the Defendants should not be afforded protection under the CDA. However, the Court stated that CDA immunity is not based on the content of information, and the portion of the CDA attempting to regulate indecency on the Internet based on content has consistently been found unconstitutional by the courts.<sup>3</sup> Therefore, the CDA barred the state law unfair practices claims.

### SPAM UPDATE

The Federal Communications Commission (“FCC”) moved to insulate cell phones and personal digital assistants (“PDAs”) from receiving e-mail spam, by issuing rules requiring marketers to have explicit permission from wireless-device users before sending any commercial e-mail.<sup>4</sup> The FTC also urged the industry to develop technologies to prevent spam from overwhelming wireless devices the way it has inundated computers. The rules are not applicable to cell phone to cell phone text messaging or to services that simply forward existing computer e-mail messages to a wireless device or allow the wireless device to connect to a computer-based mail account. FCC Chairman Michael Powell said in a prepared statement, "By prohibiting all

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<sup>2</sup> *Perfect 10, Inc. v. CCBill, LLC, et al.*, at 38.

<sup>3</sup> *Id.* at 53.

<sup>4</sup> Jonathan Krim, “FCC Blocks Spam on Wireless Devices,” *WashingtonPost.com* (Aug. 5, 2004), found at [http://story.news.yahoo.com/news?tmpl=story&cid=1804&ncid=1211&e=1&u=/washpost/20040805/tc\\_washpost/a41009\\_2004aug4](http://story.news.yahoo.com/news?tmpl=story&cid=1804&ncid=1211&e=1&u=/washpost/20040805/tc_washpost/a41009_2004aug4).

commercial messages to wireless phones and PDAs absent affirmative consent from the consumer, Americans can now use their wireless devices freely, without being bothered by unwanted and annoying messages."<sup>5</sup> This rule is in contrast to the CAN-SPAM Act, which allows marketers to send unsolicited spam e-mail until consumers request them to stop.

### **SPAM PROSECUTIONS**

United States District Court Judge Manuel Real ordered Daniel Khoshnood, the owner of a California-based Internet company, to pay Microsoft \$3.95 million for illegally using Microsoft's trademarks and name in "typosquatting" spam messages.<sup>6</sup> Microsoft filed the lawsuit last year against Khoshnood and his companies, Pointcom and Joshuathan Investments, before the CAN-SPAM Act became effective, for sending millions of unsolicited email messages in violation of the Washington Commercial Electronic Mail Act and the Washington Consumer Protection Act. Microsoft Attorney Aaron Kornblum stated that spammers "need to understand that their activity is illegal and that if they inundate consumers with spam they will be identified, targeted and sued."<sup>7</sup> In fact, Microsoft has filed approximately 60 lawsuits against alleged spammers in the United States since 2003 and has been awarded a total of \$54 million in resolved cases.

### **SEX NEWS**

The newest in the legal dispute over Cameron Diaz's S&M video "She's No Angel: Cameron Diaz," escalated with allegations that Seth Warshavsky, who released the Pamela

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

<sup>6</sup> Rhett Pardon, "Alleged Spammer Hit With \$3.95M Judgment," *XBiz.com* (July 21, 2004) found at [http://www.xbiz.com/news\\_piece.php?id=4412](http://www.xbiz.com/news_piece.php?id=4412).

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

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Anderson-Tommy Lee sex tape on the Web in 1997, may be linked to the video's distribution. Diaz's video features her topless, wearing S&M clothing. Cameraman John Rutter and Diaz have been battling over the tape's rights for almost one year. An anonymous source claimed that Warshavsky, who allegedly fled to Thailand in 2002, is involved with the Diaz video. However, the anonymous source stated, "Some of the guys [reputedly involved with the Diaz video] are offshore, and you can't do anything about them."<sup>9</sup>

In other news, the Brantley Harbor Homeowners Association, located near Orlando, Florida, won its lawsuit against a gay Website, College Boys Live, which they sued for violating regulations concerning running a home-based business.<sup>10</sup> Benjamin Bull, chief counsel for the Alliance Defense Fund, the organization who funded the lawsuit, stated that the gay Website was a commercial business that generated income "from illicit activity . . . (that) was not only a nuisance that was in clear violation of the homeowners' association regulations (but) also posed a danger to residents."<sup>11</sup> He denied homosexuality was a motive in the lawsuit and articulated that the dangers of the site included increased speeding cars in the neighborhood and increased noise from parties. The dispute began in 2001, after a water balloon broke a window in the house and a curious neighbor came to help, following which the "curious neighbor logged on (to College Boys Live), launching the firestorm of controversy."<sup>12</sup>

### **GIRLS GONE WILD SETTLE WITH THE FTC**

Mantra Films, the sellers of *Girls Gone Wild* videos and DVDs, has settled unauthorized shipping and billing charges with the FTC for \$1.1 million, as a combined consumer redress and

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<sup>8</sup> Ed Palomar, "Cameron Diaz Video Scandal Escalates," *XBiz.com* (July 22, 2004) found at [http://www.xbiz.com/news\\_piece.php?id=4423](http://www.xbiz.com/news_piece.php?id=4423).

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

<sup>10</sup> Charles Farrar, "Live Gay Website Loses Homeowners Association Suit," *AVN.com* (July 20, 2004), found at [http://www.avnonline.com/index.php?Primary\\_Navigation=Web\\_Exclusive\\_News&Action=View\\_Article&Content\\_ID=131616](http://www.avnonline.com/index.php?Primary_Navigation=Web_Exclusive_News&Action=View_Article&Content_ID=131616).

<sup>11</sup> *Id.*

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

a civil penalty.<sup>13</sup> In 2003, the FTC filed the complaint against Mantra Films and its stockholder Joseph Francis for violating the FTC Act, the federal Electronic Fund Transfer Act, and the Unordered Merchandise Statute. A court order was issued barring Mantra Films from future activities involving failure to disclose how continuity programs work clearly, enrolling customers in the programs without their consent, and charging customer's credit or debit cards automatically without the customers' consent. According to the Settlement Order, \$548,392.00 of the money will go to consumers who are put into the continuity programs without their consent from February 2002 through June 2003, but canceled enrollment when they returned the first monthly shipments for refunds and got no refunds. The remainder will pay for the civil penalty. Mantra Films will have 60 days from its July 30th signing to comply with the redress order.

### **COURT BANS SEX TOYS IN ALABAMA**

In *Sherri Williams et al v. Attorney General of Alabama*,<sup>14</sup> the Eleventh Circuit Court of Appeals upheld a 1998 Alabama law banning the sale of sex toys, which include "any device designed or marketed as useful primarily for the stimulation of human genital organs." After Alabama's law went into effect in 1998, a group of plaintiffs sued then-Alabama Attorney General William H. Pryor Jr., alleging that the new law violated their civil rights, including the guarantees of free expression, due process and safety from unreasonable government searches of homes. With the ruling, Alabama joins Georgia, Mississippi, and Texas (and perhaps Kansas) with adult toy bans. Most sex toys are illegal to sell in those states, but shops often can survive prosecution if they can prove the products are for novelty use only. The court said that Alabama's sex-toy laws, which are punishable by up to one year in prison, do not affect the use

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<sup>13</sup> Charles Farrar, "Girls Gone Wild Sellers Settle With FTC," *AVN.com* (Aug. 2, 2004) found at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=185125](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=185125).

<sup>14</sup> 2004 WL 1681149 (Ala. 11<sup>th</sup> DCA 2004).

of condoms and Viagra or similar drugs, and do not apply to sex toys prescribed by a physician.

However, the Court's reason may be flawed because the United States Supreme Court recently ruled that the right of privacy extends to personal sexual autonomy.<sup>15</sup> Williams plans to appeal the case to the United States Supreme Court.

### **OBSCENITY PROSECUTIONS**

Phillip Beard and Chris Brown, former radio disc jockey's, were charged with felonies for the alleged possession and distribution of hardcore obscene pornographic DVDs at the Conway Gay Pride Parade in Arkansas.<sup>16</sup> The parade's sponsors filed a complaint about the incident with police. Beard and Brown allegedly distributed hardcore gay pornographic DVDs to bystanders, including at least one minor, a 16-year-old boy. Each charge carries a maximum jail term between one and five years and maximum fines of \$2,000, and additional charges could be filed as the case progresses.

### **LAWSUITS OVER GAMBLING ADS**

Sex.com, along with a list of Internet firms such as Google, Alta Vista, Overture, and 100 John Doe defendants, were named in a class-action lawsuit filed in the San Francisco Superior Court, claiming that the companies sell rights to web advertisements that are illegal in California.<sup>17</sup> The suit demands that the companies stop accepting the advertisements based on searches for terms such as "illegal gambling," "Internet gambling" and "California gambling," and requests that the companies to give California consumers "millions of dollars in ill-gotten gains." The plaintiffs seek restitution, forfeiture and disgorgement of illegal gambling proceeds, which would be distributed to spouses of gamblers who have had community property taken

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<sup>15</sup> *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

<sup>16</sup> Carl D. Holcombe, "Former Radio Personalities Charged in Porn Case," *Arkansasbusiness.com Daily Report* (July 21, 2004), found at [http://arkansasbusiness.com/news/headline\\_article.asp?aid=38087](http://arkansasbusiness.com/news/headline_article.asp?aid=38087).

<sup>17</sup> Rhett Pardon, "Internet Companies Slapped With Suit Over Gambling Ads," *XBiz.com* (Aug. 4, 2004), found at [http://xbiz.com/news\\_piece.php?id=4621](http://xbiz.com/news_piece.php?id=4621).

from them as a result of the gambling, as well as to California Indian Tribes, other licensed gambling businesses and to the state treasury. The plaintiffs also seek to enjoin the defendants from participating in, and continuing to market, sell, and display advertising for Internet gambling in California.

Another suit, filed in the Eastern District of Louisiana, by Casino City against the Justice Department, seeks a determination that online gambling advertising is protected by the First Amendment to the United States Constitution. The Supreme Court has suggested that such protection exists for gambling advertising as commercial speech.

### **LEGISLATIVE UPDATE**

The House Judiciary Subcommittee voted 18-9 in favor of the Family Movie Act, which would allow filters to edit sex scenes and allegedly obscene material in films, and would eliminate copyright claims from movie producers for those companies that develop such technology.<sup>18</sup> This vote follows the United States Supreme Court decision on the Child Online Protection Act, where the Court ruled that a law aimed to punish pornographers who give access to adult material to minors most likely constitutes an unconstitutional infringement on free speech. The Act's sponsor, Representative Lamar Smith (R-Texas), stated, "Parents should have a right to show any movie they want and skip or mute any content they find objectionable."<sup>19</sup> However, Representative Howard Berman (D-Calif.) stated the Act is problematic in that the filters could next be used to automatically remove commercials from television programs and that it "gives for-profit companies the right to commercially exploit the copyrights of movies without input from creators."<sup>20</sup> The Act is currently awaiting approval by the full House.

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<sup>18</sup> Rhett Pardon, "Bill to Strip Sex From Movies Inches Forward," *XBiz.com* (July 21, 2004), found at [http://www.xbiz.com/news\\_piece.php?id=4409](http://www.xbiz.com/news_piece.php?id=4409).

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

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

## FTC VOTES ON WIRETAP RULES

The FTC voted 5-0 vote toward passing regulations intended to assist police and spy agencies in eavesdropping on all forms of high-speed Internet access, including cable modems, wireless, satellite and broadband over power lines.<sup>21</sup> The vote came approximately five months after the FBI, the DEA, and the DOJ formally requested guaranteed wiretapping access to broadband networks. The FCC's five commissioners agreed that the 1994 Communications Assistance for Law Enforcement Act ("CALEA") clearly covers VoIP services and walkie-talkie style telephone calls. Still, the FCC did not grant the police agencies' request to extend CALEA to cover instant messaging and VoIP programs that are not "managed," meaning they do not use the public telephone network. FCC Commissioner Kathleen Abernathy stated that there is "no higher priority than promoting national security. All of us are in favor of doing all we can to assist law enforcement."<sup>22</sup> This vote constitutes public notice of proposed rulemaking and requests public comment before formal regulations are adopted. Final approval is expected. However, many groups including the ACLU, Americans for Tax Reform and the Center for Democracy and Technology suggest that the FCC's final decision may be vulnerable to a legal challenge since, because Congress did not explicitly include the Internet in the law when CALEA was enacted a decade ago.

## SAY WHAT???

A group of 20 anti-pornography activists protested in the Farmingdale Home Depot, condemning a recent Playboy.com nude pictorial featuring "The Women of Home Depot."<sup>23</sup>

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<sup>21</sup> Declan McCullagh and Ben Charny, "Feds back wiretap rules for Internet," *CNet News.com* (Aug. 4, 2004), found at [http://news.com.com/Feds+back+Internet+wiretapping+rules/2100-7352\\_3-5296417.html?tag=nefd.top](http://news.com.com/Feds+back+Internet+wiretapping+rules/2100-7352_3-5296417.html?tag=nefd.top).

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

<sup>23</sup> Jennifer Smith, "Anti-porn group slams Home Depot: Group upset over Playboy.com nude pictorial featuring 'The Women of Home Depot,'" *Newsday.com* (Aug. 5, 2004), found at <http://www.newsday.com/news/local/longisland/ny-liplay053918103aug05.0.6990576.story?coll=ny-topstories-headlines>.

They have threatened to boycott the company unless it issues an apology and institutes changes to its employee policy to ensure the photo spread would not happen again. Home Depot and Playboy.com representatives said Home Depot had nothing to do with the pictorial, which is displayed in a Web-only feature posted on Playboy.com. Robert Lloyd, executive director of Long Island Citizens for Community Values, said, "We are asking Home Depot to get out of the porn business."<sup>24</sup>

In other news, the irukandji jelly fish, found only in the Queensland's Mackay-Whitsunday region of Australia, may provide a solution for treating male sexual dysfunction.<sup>25</sup> Lisa-Anne Gershwin, a PhD student at James Cook University, said prolonged erections may occur after a man is stung by the jelly fish. However, Gershwin stated, "It's not the kind of thing that you'd want to say 'woo hoo, hot date tonight, jump into the water in Mackay.'"<sup>26</sup> Gershwin noted, "The irukandji syndrome that it produces is dangerous, [and] could potentially be fatal."<sup>27</sup>

Also, when returning home from a Costa Rican vacation, Oscar Arela and his girlfriend, Tala Tow, were ejected at Miami International Airport from an American Airlines flight, after a flight attendant asked Arela to change his shirt showing a female breast.<sup>28</sup> The couple alleges that the airline violated their First Amendment right to free speech. Regarding the shirt, Tow said, "It's a picture of a man and woman, and the woman's breast is showing. The flight attendant basically walked up to us and yelled, 'You have to take off that shirt right now.'" Tim Wagner, spokesman for American Airlines, claimed that crew members acted properly and that the shirt was more graphic than the couple described. Wagner noted American Airline's policy

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

<sup>25</sup> "Deadly jellyfish holds clue to sexual dysfunction," *ABC News Online* (July 21, 2004), found at <http://www.abc.net.au/news/newsitems/200407/s1158285.htm>.

<sup>26</sup> *Id.*

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

<sup>28</sup> Associated Press, "Airline bounces couple for risqué T-shirt," *CNN.com* (Aug. 2, 2004), found at <http://www.cnn.com/2004/US/South/08/02/flight.breasts.ap/index.html>.

clearly states that someone who is "clothed in a manner that would cause discomfort or offense to other passengers" can be removed from a flight. American Airlines gave the couple a refund.

Dress codes in the air? So much for the mile high club.

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