

## ADULT INDUSTRY UPDATE

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[www.FirstAmendment.com](http://www.FirstAmendment.com)

### FEDS DUST OFF THE OBSCENITY LAW

Conventional wisdom holds that the War on Terrorism has diverted the attention of the Justice Department just long enough for webmasters to escape the expected onslaught of obscenity prosecutions threatened by Attorney General John Ashcroft back in June, 2002. 47% percent of the American people polled in December, 2002, even thought that the government should violate their civil liberties to prevent terrorism.<sup>1</sup> Unfortunately, nobody told the “Child Exploitation and Obscenity Section” of the Justice Department that it was time to pack up and go home in light of the more pressing foreign policy concerns. Several federal obscenity cases have been initiated within the last few months, all involving online content to one degree or another.

A gentleman from Science Hill, Kentucky was charged with obscenity violations arising out of operation of a Website known as “taboomovies.net,” and his distribution of a video tape titled “#90 *Extreme Underground*” via the United States mail. It appears that use of the mail was the problem here, not just operating the Website. However, the feds found him through the Website and thereafter initiated an investigation. He was arrested on November 5, 2002, and the case is pending in the Eastern District of Kentucky.<sup>2</sup> Another individual from Kokomo, Indiana, was arrested on obscenity and child exploitation charges for downloading obscene material, including bestiality and child pornography, from the Internet to his personal computer.<sup>3</sup> That case is pending in the Southern District of Indiana. The Child Exploitation and Obscenity

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<sup>1</sup> “Notebook Numbers,” *Time Magazine* (December 2002)

<sup>2</sup> Press Release from Office of the United States Attorney, Eastern District of Kentucky (2002)

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

Section (“the Section”) was involved with both of these cases, and the announcements came from Andrew G. Oosterbaan; the Chief himself. Each obscenity charge carries a potential sentence of up to five years imprisonment and a fine of up to \$250,000. The government is also seeking forfeiture of all computer equipment involved in operating the Website and downloading the materials.<sup>4</sup> Particularly disturbing in the second case is the government’s position that downloading obscene images from the Internet onto a home computer constitutes a crime. Historically, simple possession of obscene material in one’s home was protected by the Right to Privacy guaranteed by the United States Constitution.

### **OBSCENE “THINGS”?**

Apparently obscenity is not just for pictures anymore. State and federal law enforcement officials have begun applying the concept of “obscenity” to non-media items such as used underwear and sex toys. In one case, a Greenville, South Carolina woman was convicted of a federal felony for mailing “obscene, lewd, lascivious, indecent, filthy or vile articles or things in violation of Title 18, *U.S.C.* §1461.”<sup>5</sup> Before this case, the federal obscenity law had not been applied to non-media “items or things.” Indeed, even the United States attorney assigned to the case, Kevin McDonald, recognized the uniqueness of attempting to construe the federal obscenity law in this fashion when he stated that during his research he “couldn’t find any other reported cases.”<sup>6</sup> In another recent case, Texas authorities stopped a woman for DUI and found 17 items described as “obscene materials and obscene devices during the resulting search.”<sup>7</sup> The woman charged is a distributor for the national company known as “Slumber Parties, Inc,” and

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

<sup>5</sup> A. Simon, “Central Woman Pleads Guilty to Mailing Indecent and Filthy Items,” *The Greenville News* (July 6, 2002).

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

<sup>7</sup> J. Lynch, “Police find 17 sex toys in local woman’s car during DUI traffic stop,” *News-Journal.com* (December 2002)

calls the charge, which carries a maximum penalty of two years in jail, “kind of ridiculous.”<sup>8</sup> “Believe it or not, there’s a lot of women who go to these parties...it’s very popular,” she added.<sup>9</sup> Local law enforcement must be behind the times: Although officers were accustomed to finding drugs and guns during such traffic stops, this was the first confiscation of sex toys in the arresting officer’s 22 years of experience.

### **HITTING CLOSE TO HOME**

Orlando, Florida law enforcement authorities have initiated more obscenity cases against local adult bookstore owners last month, using the State’s powerful racketeering laws. Under Florida law, an individual can be prosecuted for RICO violations if he or she manages the affairs of an enterprise which participates in a pattern of racketeering activity. A pattern of racketeering activity can be established by the sale of two or more obscene videotapes within a five-year period.<sup>10</sup> Many states have similar laws. Florida officials recently filed racketeering charges against several individuals associated with two separate video stores, setting the stage for a First Amendment showdown in the Author’s hometown. One of the stores sold a variety of videos, from G-rated films to musicals and adult films.<sup>11</sup> One customer criticized the overzealous police action by stating: “It looks like they have got better things to worry about than a little place like this.”<sup>12</sup> Bail for some of the individuals arrested was originally set at \$50,000, but was quickly lowered to amounts between \$1000-\$5000. Authorities claimed that the material forming the basis for the racketeering charges violates Orlando’s community standards. It has been well over a decade since any obscenity prosecutions have been brought in this area, and the last State Attorney to initiate such prosecutions in the early 1990’s was voted out of

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

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

<sup>10</sup> §895.05, *Fla. Stat.* (2002).

<sup>11</sup> P. Gutierrez, “Porn arrests such down East Orange video store,” *Orlando Sentinel*, (November 28, 2002).

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

office after a grass-roots anti-censorship campaign took hold. Free Speech advocates are hoping for a similar result this time around.

### **VICE POLICE HEATING THINGS UP IN THE GREAT WHITE NORTH**

A major content producer located in Vancouver was also the subject of obscenity charges last month. On December 9, 2002, Vancouver police seized about a hundred computers and thousands of videos, CDs and files when they raided the studios of Sweet Entertainment Group, a well-known company amongst the adult Internet industry. “This is a major organization that we’ve taken down,” said Sgt. Doug Lang of the Vancouver Vice Unit.<sup>13</sup> In a prepared statement, Sweet Entertainment Group maintained its innocence and vowed to zealously defend the charges. Canada protects Free Expression in a manner similar to that provided by the First Amendment in the United States. It appears that we have a test case in the making. Given the significant amount of adult content produced in the Vancouver area, many eyes and ears are anxiously awaiting the verdict in this case.

### **AND THE WINNER IS...**

Although the choice was difficult this month, the award for the most ridiculous use of obscenity laws goes to Australian police who seized an “obscene” Bin Laden T-shirt on sale in a market in the state of Queensland.<sup>14</sup> Apparently the T-shirt showed President Bush and al Qaeda leader Osama bin Laden engaged in a sexual act. Details were scant as to the nature of the sexual act depicted, but one can only imagine...

### **CINCINNATI WHACKO’S AT IT AGAIN**

Our friends, the Citizens for Community Values, (“CCV”), a Cincinnati pro-censorship group known for threatening hotels with obscenity prosecutions unless adult movies are

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<sup>13</sup> “Local Illegal Porn Manufacturers Busted,” *Canada.com News* (December 10, 2002).

<sup>14</sup> “Police Seize ‘Obscene’ Bin Laden T-Shirt,” *Reuters* (December 2, 2002).

removed, is back in the news again. The CCV has now targeted Red Roof Inn in Clermont County's Union Township, where the group's President used to live. "We're going on the offensive and we're going to stay on the offensive," said Phil Burress, the group's president.<sup>15</sup> The CCV is now publishing a list of "clean" hotels; those which do not offer adult fare, on its Website, CleanHotels.com.<sup>16</sup> Ironically, travelers looking for adult fare might find the site beneficial as a directory of lodging to avoid.

### **SPAMMERS RUINING EMAIL**

The flood of spam hitting the average email inbox threatens to drive some people to use other forms of electronic communication. The rising flood of adult material, weight loss drugs, inkjet cartridges and silly toys threatens to keep the Web from reaching its full potential as a method of communication, according to experts.<sup>17</sup> The percentage of junk email has climbed from 8% in September of 2001 to 40% in December, 2002.<sup>18</sup> Fewer people are seeing a substantial value in email given the amounts of SPAM clogging the inbox; some of which is considered disturbing to look at. "We're approaching a time when people are going to stop using email," said John Mozema, spokesman for the Coalition Against Unsolicited Commercial Email. Currently, 16 states have laws regulating unsolicited email, although federal legislation has been stalled.<sup>19</sup>

### **WORLD WIDE INSULTS**

The bounds of Internet jurisdiction were tested by a pair of competing court decisions involving the concept of Web libel. In early December, 2002, an Australian High Court issued a ruling suggesting that online publishers are fair game for libel suits anywhere their content

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<sup>15</sup> "Ohio Activists Target Two More Hotels' Adult Pay-Per-View," *AVN News* (December 12, 2002).

<sup>16</sup> *Id.*

<sup>17</sup> F. James, "Flood of spam threatens to drive some people off the Internet," *Chicago Tribune* (December 26, 2002).

<sup>18</sup> *Id.*

<sup>19</sup> See: [www.spamlaws.com](http://www.spamlaws.com)

appears. However, shortly thereafter, the Fourth Circuit Court of Appeals went the opposite direction, holding that two Connecticut newspapers could not be sued for libel in a Virginia court on the basis of allegedly defamatory articles posted on their Websites.<sup>20</sup> The Australian decision sent shockwaves through the world of online publishing when it stated that Dow Jones News Organization would be hailed into court to defend a defamation lawsuit filed by a Melbourne, Australia, businessman in an Australian court. The Fourth Circuit Court of Appeal's decision turned on whether the newspaper directed its Website content to a particular audience. It held that such content was aimed at a Connecticut audience, and thus the newspaper was not responsible for defending itself in a Virginia court.<sup>21</sup>

#### **UPSKIRT OUTLAWED**

The latest state "upskirt" photography ban was initiated by Seattle, Washington. A new law was introduced as a result of a recent state Supreme Court decision, finding that video filming underneath clothing was legal if it took place in a public area without a reasonable expectation of privacy.<sup>22</sup> Rumor has it that Panty-Free Friday has been reinstated in Seattle workplaces.

#### **NEW VIRTUAL CHILD PORN LAW FIZZLES**

At the federal level, the news of note was Congress' failure to pass a new virtual child pornography law. After the decision by the United States Supreme Court in *Ashcroft v. Free Speech Coalition*,<sup>23</sup> invalidating portions of the Child Pornography Prevention Act of 1996, various legislators attempted to push through curative legislation again prohibiting virtual child pornography. Some members of Congress even proposed a constitutional amendment to prohibit

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<sup>20</sup> D. McCullagh, "U.S. court says no to Web libel lawsuit," *CNet News.com* (December 16, 2002).

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

<sup>22</sup> "Seattle bans 'upskirt' photography," *CNN.com* (December 11, 2002).

<sup>23</sup> 122 S.Ct. 1389 (2002).

such imagery, but civil liberties groups quickly shot down that idea and the proposal was flushed.<sup>24</sup> Although the House passed a bill introduced by Rep. Lamar Smith (R-TX), the Senate introduced its own bill which differed from the House's bill. Given that the two competing bills could not be reconciled, they failed to make it to the President's desk for signature.<sup>25</sup> Apparently the House and Senate plan to work on a compromise to introduce new legislation when Congress reconvenes this month.<sup>26</sup> Get ready for round two in the courts.

### GAY DAY AT THE SUPREME COURT

The eyes of the adult industry will once again be on the United States Supreme Court this term, which intends to pick up a challenge to a Texas anti-sodomy law.<sup>27</sup> The issue for the Supreme Court will be whether it is legal for police to charge gays with having sex in their own homes. This decision came shortly after the Fourth Circuit Court of Appeals upheld Louisiana's sodomy law.<sup>28</sup> Once again, the Bayou State has set the moral compass for the rest of the country. Don't forget, Mardi Gras is right around the corner.

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<sup>24</sup> M. Madigan, "Feds Fail to Pass Child Porn Laws," *PC World.com* (November 27, 2002).

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

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

<sup>27</sup> P. Johnson, "U.S. Supreme Court Takes Up Gay Challenge," *365gay.com* (November 30, 2002).

<sup>28</sup> C. Burdeau, "Appeals court upholds Louisiana's 197-year-old law against oral and anal sex," *Associated Press* (November 22, 2002).