

## ADULT INDUSTRY UPDATE™

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### FEDERAL SPAM LAW BECOMES REALITY

After years of trying without success, the United States Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”), the first federal anti-spam legislation, which requires email marketers, amongst other things, to accurately identify themselves and to provide an email opt-out option. Effective January 1, 2004, all unsolicited emailed transmissions, commonly known as “spam,” must comply with the CAN-SPAM Act. The CAN-SPAM Act does not completely ban unsolicited email, but imposes a list of requirements, including special requirements for adult-oriented spam. The requirements include, but are not limited to, banning deceptive messages, forged header information, false email sender accounts, and deceptive subject headings. The Act also requires emails to contain a functioning return address that works for 30 days after the email transmission, spammers must stop transmitting unsolicited emails after users opt-out, and the spam email must contain the sender’s location along with a physical address. Additionally, adult-oriented emails are required to contain a label on the subject line designating the correspondence as adult-oriented, along with other requirements yet to be determined. The effects of these new regulations on the industry have yet to be seen, since adult websites have primarily relied on commercial email for both marketing and promotion. At the very least, all webmasters should now adopt a “Spam Policy” that complies with the new legislation.

The CAN-SPAM Act imposes penalties on businesses who do not comply with its provisions. Statutory damages can range from \$250 per violation up to \$2 million, with

aggravated damages in the amount of three times statutory damages. Reduction of damages may be allowed under mitigating circumstances, and reasonable attorney's fees are available. Primary enforcement was delegated to the FTC, although state's attorneys general can also initiate enforcement actions. Although no general private right of action is allowed, certain Internet access providers that have been damaged by violations of the Act can seek reduced damages and reasonable attorney's fees.<sup>1</sup>

### **OBSCENITY PROSECUTIONS**

On December 30, 2003, the Alabama Supreme Court ruled that an individual can only be convicted once for possession of obscene material, no matter how many images the individual had when arrested. Alabama Supreme Court, in an 8-0 decision, struck down nine of the ten convictions of David A. Girard for possession of obscene images of boys under the age of 18 on a computer disk. The Alabama Supreme Court found that possessing obscene materials is one offense, "regardless of how many items are actually possessed."<sup>2</sup> Oddly, simple possession of obscene material involving only adults is generally protected by the right of privacy.

In another case, a Texas woman, Joanne Webb, faces criminal obscenity charges for promoting and selling, to two undercover policemen, sexual devices, which is defined as "any device which stimulates the genitals." Texas law states that it is legal to own sexual devices, however promoting and selling the devices as more than a "novelty" is illegal and obscene. BeAnn Sisemore, Webb's attorney, stated, "If it's legal to have it and legal to use it, then why is it illegal to sell it? You can lie about it and sell it, but if you tell people what these devices are and what they do, that's against the law. I want someone to explain that to me, because that is

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<sup>1</sup> 15 U.S.C.A. § 7701-7713

<sup>2</sup> Gadsdentimes, December 30, 2003,

<http://www.gadsdentimes.com/apps/pbcs.dll/article?date=20031230&category-apn&artno=312301023>, last accessed on January 2, 2004.

flawed.”<sup>3</sup> This is the third criminal case involving sale of obscene devices in Texas in recent times.

### **PUBLIC NUDITY POSTED ON WEBSITES DRAW CHARGES**

Lincoln, Nebraska resident Melissa Harrington, who posed naked for pictures at a local martini bar, posted images of public nudity on her website. The police ticketed her for violating the city’s public nudity ordinance, which if convicted, carries a maximum of six months in jail and a \$500 fine. The pictures of Harrington were taken on the upper balcony of the martini bar. She plans to plead innocent at her January 20, 2004, court appearance, claiming her public nudity did not hurt anyone. On her website, she states “I like being naked in public, and I like it even more when there are a lot of people that watch.”<sup>4</sup> She has no plans to stop posing nude; in fact, she is scheduled to pose for a spring issue of Penthouse.

### **TYPOSQUATTER CONVICTED**

John Zuccarini, a Florida typosquatter, was finally found guilty of registering misleading domain names for explicit intent to lead children to adult websites, under the recently-passed PROTECT Act. It was revealed that a Dutch web host, PGW Internet Solutions, allegedly hosted many of the typosquatter’s misleading domain names. Adult sites paid for the misleading domain names’ traffic, and Zuccarini grossed nearly \$1 million in referral fees. Zuccarini admitted to targeting children due to their likelihood of misspelling domain names. Some of the misleading domain names included variations of the names of Brittany Spears, George Bush,

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<sup>3</sup> Laurie Fox, *Sales Woman Finds Texas Obscenity Law an Obscenity*, The Dallas Morning News (December 22, 2003).

<sup>4</sup> Leah Thorsen, *Getting Naked Gets Forman in Trouble*, The Lincoln Journal Star, December 30, 2003, located at [http://journalstar.com/printer-friendly.php?story\\_id=110315](http://journalstar.com/printer-friendly.php?story_id=110315).

Bob the Builder, and The Cartoon Network. Additionally, Zuccarini pleaded guilty to one count of possessing child pornographic images on his computer, among other charges.<sup>5</sup>

### **VIDEO VOYUERISM THIRD DEGREE CRIME IN NEW JERSEY?**

New Jersey lawmakers unanimously voted to make video voyeurism a third degree crime. This increases sentences for selling, distributing, or publishing video tapes created without an individual's consent to a maximum of five years in prison and \$15,000 in fines. New Jersey's governor is currently reviewing the video voyeurism bill. This wave of anti-voyeurism laws has the potential of diminishing or halting the distribution of actual video voyeurism images on the Internet.<sup>6</sup>

### **PDA AND MOBILE PORNO**

The Personal Digital Assistant ("PDA"), paired with the adult entertainment industry, may be the next new rage. Although there is consumer interest in the product, technology currently does not have the capability to display quality images on the PDA. Alan Rieter, president of Wireless Internet and Mobile Computers, stated, "It's easy to look at a crumby screen and say, 'Who can get excited by that?' But don't look at today's tiny postage-stamp screen. Speeds are increasing. They already get 64kbps in Japan."<sup>7</sup> This may be the next new innovation in the adult entertainment industry.

New regulations in the United Kingdom, to prohibit children who buy the latest mobile phones with Internet access from accessing pornography and gambling, are also being adopted by the area's six largest mobile phone operators. The new regulations, agreed to by Orange, O2,

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<sup>5</sup> Gretchen Gallen, *Typosquatter Aided By Web Host*, Xbiz.com (December 16, 2003), located at [http://xbiz.com/artilces/index.php?article\\_idp=930](http://xbiz.com/artilces/index.php?article_idp=930).

<sup>6</sup> Corry Kincaid, *New Jersey Outlaws Video Voyeurism*, Xbiz.com (December 17, 2003), located at [http://xbiz.com/articles/print.php?article\\_idp=931](http://xbiz.com/articles/print.php?article_idp=931).

<sup>7</sup> J.B. Houck, *PDA Porno: The Next Naughty Thing?*, Wireless News Factor (January 9, 2004), located at [http://wireless.newsfactor.com/story.xhtml?story\\_title](http://wireless.newsfactor.com/story.xhtml?story_title).

T-Mobile, Virgin, Vodaphone, and 3, will stop children from entering chatrooms, porn sites and gambling services. The regulations came after increased pressure from child protection organizations to in an attempt to halt Internet pedophilia. The regulations will ensure that companies require a customer to be over the age of 18 before purchasing a mobile phone with unlimited Internet access. The regulations will come into force later this year.<sup>8</sup>

### **PENNSYLVANIA PORN LAW BLOCKS PROTECTED WEBSITES**

Pennsylvania child-pornography law blocks more than 600,000 websites from being accessed in Pennsylvania, such as a tribute to a soccer player, a vendor of family DVD's, and reviews of an opera singer. Internet Service Provider Plantagenet, Inc., and the Pennsylvania Chapter of the ACLU have sued to overturn the law, alleging that it is an unconstitutional restraint on speech. The law authorizes district attorneys to require Internet Service Providers to block websites they believe contain images of child pornography. The Pennsylvania law affects out of state users because Internet providers like AOL have no way to restrict access only for Pennsylvania customers.<sup>9</sup>

### **NUDE IMAGES ON CAR – ART OR OBSCENITY?**

Erica Meredith, while driving her boyfriend's vintage Buick, was arrested for images of a naked exotic dancer painted on the trunk of the car. She was charged with disseminating matter harmful to minors. The arresting officer stated that the image, while "applying contemporary standards, displays a theme which appeals to the prurient interest of sex." The image shows a naked exotic dancer's breast and pubic area. Indiana Civil Liberties Union Attorney Ken Falk stated, "The question is, is this constitutionally protected expression, and is it trumped by the interest we have in protecting minors? Part of that might depend on Indiana law." However, the

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<sup>8</sup> David Batty, and Justin McCurry in Tokyo, *Children to Be Shielded From Abuse Via Mobiles*, The Guardian at [www.guardian.co.uk/uk\\_news/story/0,3604,1120770,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1120770,00.html) (01.12.04)

<sup>9</sup> Andy Sullivan, *Pennsylvania Porn Law Blocks Too Much?*, Reuters (January 6, 2004).

owner of the vehicle stated the mural of the exotic dancer was analogous to artwork and a tattoo, both of which are forms of protected expression.<sup>10</sup> Does the expression “You’ve got to be kidding?” come to mind?

### **SEX AND PORNOGRAPHY SELLS**

Washington-based Internet filtering company N2H2 stated that the number of pornographic websites has increased dramatically over the last six years. N2H2, in a study released September 2003, reported an increase from 71,831 adult websites in 1998 to 1,300,000 adult websites in 2003.<sup>11</sup> Currently, over 1.3 million Internet sites produce almost 260 million pages of pornographic content according to N2H2’s study. The National Research Counsel estimated that these adult entertainment websites generate \$1 billion every year.<sup>12</sup> Furthermore, the National Research Counsel, which advises Congress on issues concerning technology, generated a report in 2002 predicting that the online adult entertainment industry will grow in the next five years to a \$5 to \$7 billion business.<sup>13</sup> Many would challenge these number to be too low. Sex still sells.

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<sup>10</sup> Tom Spalding, *Driver Arrested Over Car Art*, The Indianapolis Star (January 10, 2004), located at <http://indystar.com/articles/7/110230-2727-P.html>.

<sup>11</sup> <http://www.cnn.com/interactive/tech/0312/facts.online.porn/popup.porn.stats.gif>, last accessed on December 10, 2003.

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

<sup>13</sup> Jeordan Legon, *Sex Sells, Especially to Web Surfers*, CNN.com (December 10, 2003), located at <http://cnn.technology.printthis.clickability.com/pt/cpt?action>.