

ADULT INDUSTRY UPDATE™

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SUPREME COURT UPDATE

With the balance of the Supreme Court in play, all eyes were on the Justices this month as rumors of potential retirements ran rampant. As the Court announced its final decisions of this term, Chief Justice William Rehnquist playfully announced the only retirement would come from the Supreme Court's Law librarian. Thus, for now at least, some semblance of balance remains in the nation's high Court – but how long is the question?

The Court gave the nation another pleasant surprise when it rendered its decision in *Lawrence v. Texas*, the now-famous Texas Sodomy case.¹ The decision went much farther than expected by striking down anti-sodomy laws across the country based on an enhanced, due process based, privacy right to be free from governmental interference into private sexual behavior, overruling the 1986 *Bowers v. Hardwick* case, holding the precise opposite. While the Court could have easily rendered a narrow decision striking down the Texas law based on its unequal treatment of same-sex versus opposite-sex behavior, on well recognized equal protection grounds, it went much further by striking down all sodomy laws due to their impact on non-traditional lifestyles. The effect of this decision on future cases involving private sexual activity has yet to be felt, but it cannot be disputed that the mold for new constitutional arguments has just been forged, and civil rights lawyers now have a new weapon in their arsenal to be used when battling governmental interference in our sex lives.

¹ *Lawrence v. Texas*, ___ U.S. ___, Case No. 02-102 (Jun. 26, 2003).

One can only wonder whether last month's decision from the federal court in Miami, Florida, holding that group sexual activity intended for live broadcast over the Internet is not constitutionally protected, would have been different if the Court had the benefit of this recent Supreme Court decision.² In light of the fact that an appeal has recently been filed by the Plaintiffs in that Florida case, we may soon know the answer to that question. For better or for worse, the Eleventh Circuit of Appeal will soon likely render a decision on whether such conduct is constitutionally protected. *Adult Industry Update* will continue to monitor this important case for the adult industry.

PEER-TO-PEER BATTLE

The adult Internet industry may soon gain an unlikely ally: The Federal Bureau of Investigation. A bill entitled "The Piracy Deterrence and Education Act of 2003"³ requires the FBI to develop a program to deter online theft of copyrighted material, particularly through peer-to-peer networks.⁴ The bill also encourages copyright owners, ISPs and other law enforcement agencies to work together to battle this growing concern. Copyright protection apparently makes for strange bedfellows.

The proposal is not without its detractors, of course. The Electronic Freedom Foundation (EFF) predictably complains that the Bill apparently requires ISPs to reveal private information regarding users whenever asked by organizations such as the Recording Industry Association of America.⁵ It also gives the FBI "a chance to scare a lot of users into thinking the government is after them," according to Wendy Seltzer, Staff Attorney for the EFF.⁶

² *Theater v. Palm Beach Co. Sheriff's Office*, CV 02-80462 (S.D.Fla. May 21, 2003).

³ HR 2517

⁴ D. Becker, *New Bill Injects FBI into P2P Battle*, CNetNews.com (Jun. 20, 2003).

⁵ *Id.*

⁶ *Id.*

SPAM & EGGS (& PORN)!

The recent onslaught of anti-spam legislation at the State and Federal levels is being fueled by one thing: porn! Senator Charles Schumer (NY-D), an otherwise liberal legislator, has teamed up with the Christian Coalition to pass the Stop Pornography and Abusive Marketing Act, conveniently known as the SPAM Act.⁷ “Pornographic e-mail is really pushing people to act,” said Ray Everett Church, a consultant at EPrivacyGroup.com.⁸ The Christian Coalition hopes the anti-spam legislation will stop the “filth of pornography and junk e-mail that our children and grandchildren are receiving everyday on the Internet.”⁹ The Act allows consumers to sue spammers for \$1,000 dollars per unlawful message, and creates a national Do Not Spam registry, similar to the Do Not Call lists recently implemented at the federal level aimed at telemarketing solicitors.¹⁰ An influential Senate committee also passed a similar anti-spam measure imposing criminal sanctions on spammers, and providing the Federal Trade Commission with greater authority to track down guilty parties.¹¹ Junk e-mail is now thought to make up over half of all e-mail communications.¹²

Morality in Media takes another tactic when it comes to reducing spam. It says that the answer lies in aggressive enforcement of Internet obscenity laws.¹³ “When U.S. Attorneys begin to vigorously enforce Internet obscenity laws, (and, in appropriate cases, the RICO-Obscenity Law) against websites that market hardcore pornography, these websites will not be around to

⁷ S. Emling, *Porn Outrage Fuels Anti-Spam Push*, Austin American Statesman (June 21, 2003).

⁸ *Id.*

⁹ *Id.*, quoting Roberta Combs, President of the Christian Coalition.

¹⁰ *Id.*

¹¹ A. Sullivan, *Panel Approves Anti-Spam Measures*, Washington Post (Jun. 19, 2003).

¹² *Id.*

¹³ “The Best Way to Stop Porn Spam is to Enforce Internet Obscenity Laws,” says Morality in Media, US Newswire (Jun. 13, 2003).

push unwanted porn spam into countless American homes and work places.”¹⁴ Remember the days when you could have your spam and eat it too?

OBSCENITY UPDATE

“Today’s Internet is overwhelmed by obscenity – much of it illegal,”¹⁵ This quote summarizes our Opposition’s view of online erotica. Groups such as the National Law Center for Children and Families (NLCCF) are shouting: “It’s about time,” in response to the recent Justice Department’s obscenity indictments against a Texas couple who operated an online video business called the “Rape Video Store.”¹⁶ “The good lesson here is that the DOJ is starting to do obscenity cases again,” and said Bruce Taylor, President of the NLCCF. The case that’s got Taylor and company all in a tizzy involves a former Dallas police officer, and his wife, who allegedly sold rape fantasy videos through their website in the mid to late 90’s. Shortly before the statute of limitations ran out, the couple was charged – even after state obscenity charges were dropped. One of the Defendant’s attorneys claims that the indictment is a crusade by the Bush Administration against people who enjoy legitimate erotica. “The Justice Department is running roughshod over my client’s First Amendment rights.”¹⁷ “These new indictments are evidence that the Department of Justice knows how to investigate (obscenity crimes) – they know how to find the criminals – and (also) the good guys are back in business and they know how to do their job,” Taylor added. The “good guys” as of yet do not include Taylor, who has been vying for a high level position in the Justice Department’s Obscenity Unit since Bush took office. Thus far, actual federal obscenity indictments have been scattered, although more

¹⁴ *Id.*

¹⁵ T. Phillips, *Obscenity Indictments Hearten Activists*, FamilyNewsInFocus (Jun. 20, 2003).

¹⁶ *Id.*

¹⁷ T. Heinzl, *Two Accused of Selling Rape Videos*, Star Telegram (Jun. 19, 2003).

intensive enforcement is anticipated by industry leaders now that the United States attorney's have been trained in the lost art of prosecuting a federal obscenity case.¹⁸

Some good news on the obscenity front this month: Jennifer Dute, who had been charged and convicted of pandering obscenity in Hamilton County Ohio, had her conviction reversed and obtained a new trial by the Ohio First District Court of Appeals.¹⁹ Dute had been serving a jail sentence pending appeal but is now entitled to a bond pending her new trial. The Appeals Court found that the Trial Court committed reversible error when it failed to admit other comparable interracial video tapes into evidence to demonstrate community acceptance of the videos alleged to be obscene.²⁰ Secondly, the Court found that the trial judge should have made an individual inquiry of each juror as to whether they had been influenced by media reports broadcast during the trial which referenced Dute's prior conviction for obscenity in 1999. Finally, the Appeals Court noted, the matter of sentencing, that there was no evidentiary basis for Trial Court's finding that Dute was involved with some sort of criminal activity.²¹ Dute was sentenced to spend a year in jail.²²

CHILD PORN EXPLOSION

In a continuing black eye for the Internet industry, police appear to be loosing the battle to close down child porn websites. It has been reported that approximately 90 new child porn websites open every week, making it difficult for law enforcement authorities to keep up.²³ Surprisingly, the United States tops the list of countries where these sites originate, with 1,937

¹⁸ Memorandum for all United States Attorneys from the Department of Justice (May 7, 2002)(Copy reproduced on www.firstamendment.com).

¹⁹ M. Kerns, *Jennifer Dute Conviction Reversed in Orlando*, AVN.com (Jun. 2, 2003).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ A. Gardner, *Ninety Child Porn Websites Started Every Week*, (July 1, 2003).

sites identified last year.²⁴ Russian child porn sites have also skyrocketed within the last year, increasing 106 percent.²⁵ The increase has been blamed on Russian mafia gangs seeking huge profits through child porn. “There is a huge demand for this material,” said detective Peter Spindler of the Mets Protection Group. Adult webmasters are again encouraged to join Adult Sites Against Child pornography, www.asacp.com, which is leading the adult industry’s initiative on this issue.

PATRIOT ACT UPDATE

As predicted, details are now beginning to emerge which confirm previous wide spread fears that the Patriot Act is being used in “non-terror investigations.”²⁶ Official policy allows evidence gathered under the extraordinary anti-terrorism powers conferred by the USA Patriot Act to be used in prosecuting common criminals with no connection to terrorism.²⁷ “We would use whatever tools are available to us, within reason, to prosecute violations of any law,” said Byran Sierra, a Justice Department Spokesman.²⁸ In a recent report, the Justice Department also revealed that information that has been obtained from computer service providers under the Patriot Act and used in investigations unrelated to foreign terrorism.²⁹ Such investigations included a kidnapping, a bomb threat against a school, a hacker who extorted his victim, and a lawyer who defrauded clients.³⁰ Much of the specific information relating to actual uses of the Patriot Act is still being withheld, based on security concerns. The government has still failed to answer the more basic question of whether we as a nation are safer as a result of these new investigatory powers now in the hands of the federal government.

²⁴ *Id.*

²⁵ *Id.*

²⁶ F. Murray, *Patriot Act of 2001 Casts Wide Net*, Washington Times (Jun. 15, 2003).

²⁷ *Id.*

²⁸ F. Murray, *Patriot Act of 2001 Casts Wide Net*, Washington Times (Jun. 15, 2003).

²⁹ *Id.*

³⁰ *Id.*

POLITICAL SOAP BOX

Conventional wisdom holds that two of the most divisive issues of all time are religion and politics. Neither are discussed in *Adult Industry Update* on any regular basis. However, with the upcoming presidential election campaign just starting to heat up, the issue of politics is worth a mention. Initially, the adult Internet industry is made up of both Republicans and Democrats. Regardless of one's political leanings on mainstream issues, it cannot be disputed that Republican Administrations are remarkably less friendly than Democratic ones, to the adult industry as a whole.

During the Clinton Administration, the adult industry enjoyed its heyday, and was essentially free from intensive federal regulation. That has all changed now that the baton has been passed to the Republicans, who quickly appointed John Ashcroft to lead an ultra conservative Justice Department. This industry is in a unique position to influence the next presidential election, given the vast number of potential voters it reaches with its products and communications.

This is not a political endorsement of the Democratic Party. Frankly, this author is of the opinion that both political parties are in need of reform and enlightenment, and he is a registered member of neither party. However, as a matter of industry survival, it is essential that adult webmasters and related service providers begin to organize and plan to influence the upcoming presidential election. It is in the industry's short term interest to help elect a president who will replace the John Ashcroft Justice Department with one headed by a more enlightened, progressive legal thinker who will devote the country's precious law enforcement resources to the detection and prosecution of real crime, and stop trying to influence the type of media adults read and watch.

Moreover, it is in the industry's long term interests to ensure that any Supreme Court justice who decides to retire within the next several years is replaced by an individual who can bring balance and minority voices to the Court, instead of yet another ultra conservative who will tip the scales of every decision in favor of the right wing vote. As we saw with the *Bush v. Gore* decision, the Supreme Court is not immune to politics.

The adult industry must therefore act to preserve its longevity by influencing the upcoming elections in such a way so as to give it the best chance of survival. More than ever, the fate of your business may well hinge on politics.

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