

# ADULT INDUSTRY UPDATE™

June 2004

By: Lawrence G. Walters

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



## ASHCROFT WEIGHS IN ON 2257 INSPECTIONS

Attorney General John Ashcroft weighed in on the issue of age records inspections as required by Title 18 U.S.C. § 2257. On June 14, 2004, he proposed tougher regulations that would narrow the list of acceptable forms of identification, and eliminate such options as college I.D.'s and selective service cards.<sup>1</sup> The forms of I.D. would also have to be accessible to government agencies to verify their legitimacy.<sup>2</sup> The new guidelines will take effect after the public has an opportunity to comment. In the course of presenting this proposal, the Justice Department conceded that it has never conducted a records inspection in the adult industry during the entire time the law has been effective.<sup>3</sup> While the adult industry lobbying groups are unlikely to oppose a call for tighter age verification regulations, Ashcroft's attention to § 2257 issues is a likely sign that records inspections are coming. Adult webmasters are encouraged to redouble their efforts to comply with all requirements of federal law pertaining to age verification in light of this recent attention to the issue.

## REGULATION OF CONTENT PRODUCTION IN CALIFORNIA?

California Assemblyman Paul Koretz of the Assembly Labor Committee called a public hearing after a bill to create health and safety standards for the adult movie-making industry stalled in another committee Koretz belongs to. The purpose of the hearing was to gather

---

<sup>1</sup> C. Farrar, *Ashcroft Wants Tougher Records Inspections for Adult Works*, AVN Online, June 14, 2004, at <http://www.avnonline.com>.

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

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

information and to discuss health and safety issues within the adult entertainment industry, where his initial impression was to have the adult industry voluntarily adopt a “condom-only policy.”<sup>4</sup> Many people testified at the hearing, which discussed: (1) whether the measures taken by the adult industry give adult actors sufficient safety and health protections, and (2) whether additional regulations would economically hurt the adult industry.<sup>5</sup>

At the hearing, public health officials and adult performers, as well as other individuals within the adult industry, argued over whether mandatory condom use should be required during filming.<sup>6</sup> While some adult industry leaders warned that mandatory condom use could drive adult production studios underground or out of state, other industry leaders asked for increased governmental protection of adult performers' health and safety. However, some argue that the adult film business may already be regulated to wear condoms by the California Division of Occupational Safety and Health (“Cal/OSHA”), which has a requirement that states all employers must provide their employees “barrier protection” if their eyes, skin, or other membranes are exposed to blood or other bodily fluids carrying pathogens.<sup>7</sup>

A report with specific details on the hearing will be released in the next two to three weeks.<sup>8</sup> Koretz’s recommendations to the state concerning the best way to resolve this issue will be included in the report. Unsure of the nature of his recommendations, Koretz said, “It’s a lot

---

<sup>4</sup> Scott Ross, *Scrutiny of Adult Industry Safety Practices Begins with Public Hearing*, AVN, June 4, 2004, at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=105910](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=105910).

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

<sup>6</sup> Caitlin Liu, *Porn Figures Clash at Hearing*, L.A. Times, June 5, 2004, at [www.latimes.com/archives](http://www.latimes.com/archives).

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

<sup>8</sup> Scott Ross, *Koretz Says Report on Adult Industry Health and Safety Coming Soon*, AVN, June 10, 2004, at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=106423](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=106423).

of food for thought and we're going to analyze all of the information we have and come up with something thoughtful and intelligent to respond.”<sup>9</sup>

### **Z.J. GIFTS SUPREME COURT DECISION**

The Supreme Court's recent decision in *City of Littleton v. Z.J. Gifts* concerned an adult bookstore, Christal's, which opened in Littleton, Colorado.<sup>10</sup> The bookstore did not apply for a license under the adult-business ordinance, but opted to open in violation of the ordinance and challenge it in federal court, arguing that it violated the First Amendment in various respects. Licensing schemes such as that adopted by Littleton, are subject to strict ‘procedural safeguards’ to guard against undue delay in making a licensing decision. One of those safeguards is the requirement of prompt judicial review of any decision to deny a license to engage in protected speech. The Supreme Court reviewed the case to clarify the issue of whether the First Amendment requires a prompt judicial determination of the validity of the denial, or simply prompt access to judicial review, by common law or statutory appeals procedures. In a ruling written by Justice Stephen Breyer, the Court decided that when a government denies adult business licenses, courts must promptly review and rule on the issue; prompt access to a court is insufficient. However, the Court reversed the appellate court’s ruling on the issue, finding that the state’s common law appeals procedure provided prompt judicial review in the abstract, and that there was no reason to conclude that state court judges will not treat appeals of licensing denials in First Amendment cases with proper sensitivity to the loss of speech at issue. Thus,

---

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

<sup>10</sup> Tony Mauro, *Advocates find little to cheer in free-speech victory*, First Amendment Center Online, June 8, 2004, at <http://www.firstamendmentcenter.org/analysis.aspx?id=13488>.

state court judges are expected to promptly expedite such cases and render prompt determinations of the issues when confronted with license denials.<sup>11</sup>

As Justice Breyer's majority opinion stated, "A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being issued within a reasonable period of time."<sup>12</sup> However, he went on to write that Colorado's regular procedures for handling civil lawsuits satisfy the requirement for prompt decisions, "as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly."<sup>13</sup> The fear raised by the decision in the case is that courts can treat appeals from adult businesses the same as other types of suits, where the wheels of justice often grind slowly. In light of this decision, litigants would now need to show that a state court actually delayed the review of a license denial in the course of common law appellate review, in order to establish a First Amendment violation. The courts were previously split as to whether the potential for such delay alone gave rise to a First Amendment violation.

### **OBSCENITY PROSECUTIONS**

Three men were indicted by a federal grand jury on charges of obscenity for allegedly selling sadomasochistic and rape videos on the Internet.<sup>14</sup> Brent Alan McDowell and Clarence Thomas Gartman face charges of conspiracy to distribute, and transportation of, obscene material, aiding and abetting, and mailing obscene materials.<sup>15</sup> Lou Anthony Santilena is charged with conspiracy to distribute obscene material and mailing obscene material.<sup>16</sup> The

---

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

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

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

<sup>14</sup> Scott Ross, *Three Men Indicted on Federal Obscenity Charges*, AVN, May 27, 2004, at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=105547](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=105547).

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

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

three men were allegedly associated with Forbiddenvideos.com and Fetish1000.com, several years ago. McDowell and Gartman were found in Canada, through the assistance of Canadian law enforcement authorities. They now face extradition to the U.S. If convicted, Santilena faces ten years, and Gartman and McDowell each face a mandatory federal prison sentence in the range of roughly 3 – 7 years under the federal sentencing guidelines.

### **PATENT ON PORN?**

Acacia Research Corporation is now trying to enforce a patent on all adult oriented sites by filing a class action lawsuit against all websites using video or audio which require Section 2257 statements and are not paying Acacia a percentage of the revenues.<sup>17</sup> General Counsel for Acacia Robert Berman stated that people, including those in the adult entertainment industry, have been stealing Acacia's intellectual property for many years. On July 7<sup>th</sup>, the judge is expected to render a decision concerning whether this class action lawsuit will be allowed to continue.<sup>18</sup> If the lawsuit is approved, every adult site using audio or video without a license from Acacia will be forced to defend Acacia's patent claims in court.

### **LEGAL VICTORIES**

A Superior Court jury awarded the Flesh Club, a nude cabaret, \$1.4 million for lost profits from when the city of San Bernardino forced it to shut down for four years between 1995 and 1999.<sup>19</sup> Manta Management, the Flesh Club's parent company, argued it was entitled to damages during the club's forced closure when the city of San Bernardino refused to allow the

---

<sup>17</sup> Brandon Shalton, *Acacia to Lump all Adult Industry into Class Action Lawsuit Based on 2257*, FightthePatent.com, June 7, 2004, at <http://www.fightthepatent.com/v2/ClassAction.html>.

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

<sup>19</sup> Jason W. Armstrong, *Verdict Reveals Partial Victory For Flesh Club*, Daily Journal Newswire, <http://www.dailyjournal.com>, June 03, 2004.

club to operate due to an ordinance that was later declared unconstitutional. However, jurors did not completely side with the club when they agreed with the city that some profits from the club arose from "illegal activities."<sup>20</sup>

### **PROJECT SLAM-SPAM**

Despite the CAN-SPAM Act that became effective on January 1, 2004, spammers have been forwarding an increased amount of mass email and very few have been caught due to the difficulty in locating spammers. According to Network Security Company MX Logic, one out of six adult unsolicited emails complied with the CAN-SPAM Act's labeling requirements.<sup>21</sup> Thus, the war against spam has gone to private investigators at large software companies and law enforcement officers who are using traditional investigative techniques as well as cyber-sleuthing in their attempt to catch spammers. The Direct Marketing Association has paid \$500,000 to hire 15 investigators to work with F.B.I. and other governmental agencies in a program known as Project Slam-Spam.<sup>22</sup> Daniel Larkin, chief of the FBI's Internet Crime Complaint Center which coordinates Project Slam-Spam, said "Initially you start to work backwards from the e-mail and find that to be a very frustrating route. That doesn't lead to a live body. We have collectively realized you have to go the other way and follow the money trail."<sup>23</sup> Project Slam-Spam has enough evidence against at least 50 spammers that it will continue to hand over to prosecutors. So, it more important now, than ever, to comply with the requirements of the CAN-SPAM Act.

---

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

<sup>21</sup> Rhett Pardon, *Can-Spam Act Not Yet Effective, Study Asserts*, XBiz, June 10, 2004, at [http://www.xbiz.com/news\\_piece.php?id=3773](http://www.xbiz.com/news_piece.php?id=3773).

<sup>22</sup> Saul Hansell, *When Software Fails to Stop Spam, It's Time to Bring In the Detectives*, The New York Times, May 31, 2004, at <http://nytimes.com/2004/05/31/technology/31spam.html>.

<sup>23</sup> *Id.*

## TRADING RIGHTS FOR SECURITY?

After the 9-11 terrorist attacks, fear launched the government to take away civil liberties for national security purposes, and Americans appear to be willing to trade their rights for safety.<sup>24</sup> American Enterprise Institute Polling expert Karlyn Bowman said, "Most people don't see a broader threat. People seem to be pretty comfortable with the general state of affairs regarding civil liberties."<sup>25</sup> The average American does not appear to be troubled by civil liberty issues like prisoners rights, and tend to turn a blind eye when it does not involve their personal life. The question concerning how far is too far to intrude on Americans' civil liberties has been compared to pornography, with the infamous "definition": maybe you cannot define pornography, but you will know it when you see it. Ken Weinstein of the Hudson Institute said, "Americans react pretty quickly when they think their liberties are being curtailed to any serious degree. The policies of the Bush administration have been fairly well accepted because I don't think they've crossed that barrier where people say, 'Wait a second.'"<sup>26</sup>

## INTERNET WIRETAP USED IN PROSECUTIONS

Twenty-six year old Jason Heath Morgan's Internet activity – email, photo images exchanged, and chat room conversations – were scrutinized by federal agents for more than three weeks, as Morgan became the first United States individual to have Internet usage monitored for a child pornography investigation under the PROTECT Act.<sup>27</sup> Federal agents are now tracking approximately 1,700 e-mail and chat-room users Morgan contacted in connection with stopping

---

<sup>24</sup> Ellen Wulforst, *Experts: Americans Would Trade Rights for Security*, Reuters, June 7, 2004, at <http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=5362171>.

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

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

<sup>27</sup> Sam Stanton and Denny Walsh, *Child-porn Probe used First Live Internet Wiretap*, Sacbee.com, May 20, 2004, at <http://www.sacbee.com/content/news/crime/story/9358093p-10282573c.html>.

a child-pornography ring.<sup>28</sup> In the past, federal agents had limited ways to catch suspects such as Morgan, besides getting a search warrant. However, the PROTECT Act (“Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today”), which passed in April 2003, gives governmental authorities the ability to wiretap a suspect's computer in order to catch child abusers and Internet pornographers. The surveillance technology consists of a monitoring device attached to a suspect's phone line that tracks the suspects Internet use. Sacramento FBI Agent Ronald Wilczynski stated that with Internet wiretaps, "it doesn't matter who you're dealing with, we're standing over the top of you watching everything that's going on."<sup>29</sup> Morgan pleaded not guilty to charges of child pornography and currently remains in federal custody. The extent to which the government is monitoring citizens’ online activities is not known, since evidence of such intrusive surveillance only comes out in the course of a criminal prosecution. It is fair to say that such electronic searches are sure to become more commonplace as the federal government takes a greater interest in prosecuting Internet-related crimes, such as obscenity violations.

### **WILL VIDEO VOYEURISM BE BANNED?**

On May 19<sup>th</sup>, the House Judiciary Committee passed a federal ban on “upskirt” photography as well as other forms of video voyeurism such as filming by cellular telephone cameras and so-called mini-cameras.<sup>30</sup> The Senate also has passed this Bill, which defines “improper image” as including the “naked or undergarment-clad genitals, pubic area, buttocks, or female breast,” if it “is depicted in the improper image under circumstances in which that individual has a reasonable expectation of privacy regarding such body part or parts,” in

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Charles Farrar, *Video Voyeurism Ban Passes House Committee*, AVN, May 20, 2004, at [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=92143](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=92143).

September 2003.<sup>31</sup> If the Bill, written by Senators Mike DeWine (R-Ohio) and Charles Schumer (D-New York), passes the full House and is signed by President Bush, violators of the Bill may be fined and jailed for a year.<sup>32</sup> A time frame for when the Bill will be brought in front of the full House is still unknown. Such public filming prohibitions have been criticized in the past as a potential infringement on freedom of the press or problematic from a security standpoint.

### SEX NEWS

Hitwise Inc., a California-based company that tracks Internet activity, says that adult entertainment websites get approximately three times more hits than the top search engines like Google.<sup>33</sup> Additionally, other large categories spotted by Hitwise include "Adult" visited 18.8%, "Entertainment" at 8%, "Business and Finance" at 7.4%, and "Shopping and Classifieds" at 7%.<sup>34</sup> Such statistics may well show up in the upcoming federal obscenity cases to help illustrate the changing community standards and widespread public acceptance of erotica.

In other news, police in Dallas are posting on the Dallas Police Department's Website pictures of people caught allegedly soliciting acts of prostitution.<sup>35</sup> The Website, which contains these images on the "indecent related offenses" Web page, also posts the hometowns and birthdates of these individuals. The Website got more than 4,100 hits in the first 24 hours the site was active.<sup>36</sup>

Another attempt to stifle sexual activity through public humiliation was made by Pastor Jim Norwood, who started out on a mission to close down local sex shops by photographing customer's license plates and sending them postcards to attend church, and it turned into him

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Lisa Baertlein, *Web Porn Entices Far More Surfers Than Search-Study*, June 3, 2004, at <http://www.reuters.com/newsArticle.jhtml?type=internetNews&storyID=5340076>.

<sup>34</sup> *Id.*

<sup>35</sup> AP, *Web Site Shows Photos Of Prostitutes' Alleged Customers*, Local10.com, June 10, 2004, at <http://www.local10.com/technology/3403038/detail.html>.

<sup>36</sup> *Id.*

being voted into office as the mayor of Kennedale.<sup>37</sup> Now that he is mayor, Norwood will continue fighting adult oriented businesses through increased regulation. The owners of sexually oriented businesses in Kennedale believe they are being unfairly singled out in the community. Regardless, Norwood will continue his fight against the businesses. As Norwood said, "The battle is not mine. It's the Lord's, and I'm confident that I'm not going to be sued."<sup>38</sup>

### **COME VISIT CALIFORNIA—FOR A LAWSUIT**

In the recent case of *Io Group, Inc. v. Pivotal, Inc.*,<sup>39</sup> Chief Judge of the United States District Court for the Northern District of California Marilyn Patel ruled that individuals who steal images or movies from producers based in California may be required to defend their activities in California's courts. The judge held that the intentional tort of copyright infringement can be a basis for determining jurisdiction, especially since the adult industry is mainly located there. In this case, TitanMen.com brought a lawsuit against Pivotal, Inc., who was allegedly stealing images from TitanMen.com to generate traffic and also allegedly redirecting the images in order to earn affiliate commissions at other websites. Pivotal, in a motion to dismiss, argued that since it was a corporation in North Carolina with no connection to California the California courts did not have jurisdiction over the case. Judge Patel did not agree and stated that TitanMen.com "adequately demonstrated that defendants published images belonging to a California company, affecting an industry primarily centered in California, knowing that harm would likely be felt in that state. Construing these facts in a light most favorable to the plaintiff, [Titan] has made a prima facie case that defendants are subject to the

---

<sup>37</sup> *Pastor Brings Porn Fight To Mayor's Office*, NBC5i.com, June 7, 2004, at <http://www.nbc5i.com/news/3369257/detail.html>.

<sup>38</sup> *Id.*

<sup>39</sup> 2004 U.S. Dist. LEXIS 6673 (U.S. Dist., 2004).

personal jurisdiction of this court."<sup>40</sup> This ruling could mean that infringers across the country are subject to suit in the Golden State of California, as the birthplace of erotica. The parties ultimately settled this case out of court.

### **WIRELESS MESSAGE USERS BEWARE**

Text messagers, e-mail users and Internet instant message users beware, because these wireless messages may be saved on computer servers and used in criminal prosecutions. A spokesman for the Cellular Telecommunications and Internet Association, Travis Larson, said text messaging information such as the sender, the recipient, the content, and the sender's location may be stored for billing purposes, even after the user has deleted the messages.<sup>41</sup> Now, text messages sent only a few hours after the woman who alleges that Kobe Bryant raped her may help determine whether the sex was consensual or whether Bryant is guilty of rape as charged. This case seems to be the first high-profile United States criminal case where text messages sent between cell phones could be entered into evidence.<sup>42</sup> Many criminal cases in Europe and Asia have been determined on text messaging conversations. Jeff Kagan, an independent telecommunications analyst in Atlanta, said, "I think in these days of corporate fraud and in these days of terrorism we're seeing more and more reason to store forever. Don't ever say anything on e-mail or text messaging that you don't want to come back and bite you."<sup>43</sup>

---

<sup>40</sup> *Id.*

<sup>41</sup> AP, *Think Before You Text: Wireless Messages Show up in Court*, CNN.com, June 7, 2004, located at <http://www.cnn.com/2004/TECH/ptech/06/07/text.messaging.records.ap/index.html>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## SAY WHAT???

Shaukat Ali Afsar, a cab driver in England, was fined for illegally picking up two undercover police officers in his private car for hire car and showing them hardcore pornography on his in-cab DVD player.<sup>44</sup> The cab driver did not know they were undercover police officers on a sting operation to stop private hire cars from picking up passengers at a rail station. The policemen thought they had caught the driver for illegally picking up passengers, but were stunned to see pornography on their ride. The cabbie pleaded guilty to showing indecent material, driving while being distracted by a television screen, picking up passengers at an illegal area, and driving with invalid insurance.<sup>45</sup>

One final news item of interest: LL Media, a Danish IT business, as a perk gives its employees free subscriptions to Internet pornography websites.<sup>46</sup> The company initiated this policy in order to stop workers from looking at pornography while at work. Levi Nielson, director of LL Media, stated, "We know that 80 per cent of all hits on the Internet are on porn sites. And we can see that people also surf porn pages during work."<sup>47</sup> Nielsen hopes this perk makes employees more efficient and relaxed while at work.

*Lawrence G. Walters, Esquire is a partner with the law firm of Weston, Garrou & DeWitt, with offices in Orlando, Los Angeles and San Diego. Mr. Walters represents clients involved in all aspects of adult media. The firm handles First Amendment cases nationwide, and has been involved in much of the significant Free Speech litigation before the United States Supreme Court over the last 40 years. All statements made in the above article are matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. You can reach Lawrence Walters at [Larry@LawrenceWalters.com](mailto:Larry@LawrenceWalters.com), [www.FirstAmendment.com](http://www.FirstAmendment.com) or AOL Screen Name: "Webattorney."*

---

<sup>44</sup> Louise Male, *Cab driver showed porn DVD*, Leeds Today, May 20, 2004, at <http://www.leedstoday.net/ViewArticle.aspx?SectionID=39&ArticleID=793781>.

<sup>45</sup> *Id.*

<sup>46</sup> ANI, *Surfing porn is a company perk!*, The Times of India, May 30, 2004, at <http://timesofindia.indiatimes.com/articleshow/709026.cms>.

<sup>47</sup> *Id.*