

## ADULT INDUSTRY UPDATE™

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### PROTECT ACT PASSED

The adult industry was sent reeling this month by the news that the federal PROTECT Act – presented to the electorate as an “Amber Alert” Bill – had been signed into law. S. 885. In fact, the Act goes far beyond assisting with the location of missing children, and is in reality a law largely aimed squarely at the adult entertainment industry. For example, the Act requires the Attorney General to appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice who are required to focus on the investigation and prosecution of federal child pornography “and obscenity laws.” § 513. The Justice Department has received essentially a blank check for funding these new attorneys, since the Act states: “There are authorized to be appropriated to the Department of Justice such sums as may be necessary to carry out this subsection.” § 513(a)(2). Moreover, the Department of Justice must report in the next 9 months, and every 2 years thereafter on what it is doing to enforce child pornography offenses, along with certain obscenity offenses relating to children. § 513(b)(1). Apart from that, the Act demands a separate report in one year about § 2257 enforcement. § 511(b). The Act also includes new crimes relating to virtual child pornography and the use of misleading domain names covered in detail in last month’s Update.

Of significant concern to adult webmasters are the beefed up sentences required under the Act for child pornography and obscenity crimes. The “Feeney Amendment” to the Bill was designed to essentially eliminate the discretion of judges to depart downward from the

sentencing guidelines in these cases. § 401. Of course, the judges still are free to give harsher sentences.

The penalties for violation of Section 2257 relating to records keeping have also been increased from two years up to five years incarceration. §511(a)(3)(B). Repeat offenders get up to ten years. Again, there are no downward departures for these crimes under the Feeney Amendment. Conforming amendments to the sentencing guidelines can be expected. Parenthetically, the scope of media covered by Section 2257 has also been expanded, or clarified, to include any “computer generated image, digital image, or picture.” § 511(a)(2). While the existing definitions contained in Section 2257 were probably broad enough to already include online erotica, the Legislature has now made it clear that webmasters will be on the hook for compliance with Section 2257. The Attorney General’s obligation to report to Congress regarding the number of inspections and/or prosecutions initiated under Section 2257 is nearly certain to trigger enforcement. Moreover, in the past the records that the adult industry was required to keep under Section 2257 could not be used against the individuals required to maintain them. That stood to reason, since the government should not require you to maintain certain records, and then use those records against you in a criminal prosecution. This implicates the right against self-incrimination. However, the PROTECT Act now allows the government to use such records as evidence in child pornography and – you guessed it – obscenity prosecutions.

It is hard to over-state the impact of this new legislation. This law was passed without any public input, much less protest, from the adult industry. Certainly, the presentation of this Bill as a “child protection act” focusing on recovery of missing children made it difficult to oppose for any lawmaker, however the add-on amendments bode ill for the adult industry and

should have been challenged prior to passage. At this point, any affected parties must resort to the judicial system to obtain potential any relief.

### **STEGANOGRAPHY REVISITED**

In November, 2001, this author alerted the adult Internet industry to the issue of “steganography” which involves the embedding of small digital images or messages in otherwise innocent online pictures, as a means of clandestine communication. At that time it was speculated that the 9-11 hijackers and other Al Qaeda operatives used steganography to communicate with each other by embedding messages in erotic images posted on the Internet. That speculation has now been confirmed with the discovery of coded erotica containing images of the Twin Towers, downloaded just days before the 9-11 attacks.<sup>1</sup> On September 4, 2001, pictures of the World Trade Center were saved as temporary files on one of the computers used by Abu Saleh, an Egyptian currently facing trial *in absentia* in Milan on charges of international terrorism. The images had apparently been manipulated, with their colors modified, and mixed with various adult pictures, and sent back to the Web.<sup>2</sup> Law enforcement officials claim that, in this way, Al Qaeda cell members communicated back and forth without being detected. Although the digital evidence is still being analyzed, this discovery provides additional potential grounds on which to investigate adult Websites. The last thing the adult Internet industry needs is to be inadvertently linked with terrorism, which might be used as a basis for investigation of adult Websites under the Patriot Act. Speaking of which . . .

### **THE END OF THE PATRIOT ACT?**

In a victory for civil liberties, Senate Republicans recently backed down from an effort to make the sweeping surveillance and investigative powers provided by the Patriot Act,

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<sup>1</sup> A. Salomon, “Porn – Concealed Terror,” *ABCNews.com* (May 2003).

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

permanent.<sup>3</sup> Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, abandoned his effort to extend the Patriot Act legislation which is scheduled to expire in 2005. However, the Senate did approve a measure expanding the government's ability to use the super-secret surveillance tools provided by the Act even if it cannot link the terrorist suspects to a known terrorist group. As the law currently reads, United States officials must establish a link to a foreign terrorist group in order to invoke the surveillance powers. "There's a delicate balance between liberty and security," said Senator Charles E. Schumer, the lawmaker who authored the expanded powers. The attempt to make the Patriot Act permanent touched off a significant civil liberties debate from lawmakers concerned about the reach of "Big Government."<sup>4</sup> In a brave statement, a spokesman for Representative F. James Sensenbrenner, Jr., a Wisconsin Republican who chairs the House Judiciary Committee, said that extending the Patriot Act's powers, "will happen over his dead body."<sup>5</sup> The American Civil Liberties Union called the defeat of the proposed extension "a major victory."<sup>6</sup>

#### JUDICIAL UPDATE

In a major victory for peer-to-peer file swappers, a Los Angeles federal judge ruled last month that companies, such as Kazza, which provide software and assistance to enable file swapping amongst Internet users, are not liable for illegal copying of music and videos by those users.<sup>7</sup> "It's a vindication, we are not pirates," said Wane Rosso, President of Grokster, one of the file swapping companies.<sup>8</sup> A spokesman for the Recording Industry of America expressed

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<sup>3</sup> E. Lichtbalu, "Senate Deal Kills Effort to Extend Anti-terror Act," *NewYorkTimes.com* (May 9, 2003).

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

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

<sup>6</sup> *Id.*, quoting Timothy Edgar, Legislative Counsel for the ACLU.

<sup>7</sup> "Court Rejects Music Industry Suit Against Web File Swappers," *Associated Press* (April 25, 2003).

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

disappointment at the ruling, which will likely be appealed. Notably, the rate of swapping of copyrighted adult video files is skyrocketing.

### **SPAM, SPAM, SPAM, SPAM, SPAM**

The Federal Trade Commission, (“FTC”) has gone on the offensive against “deceptively bland” spam, and has asked a federal judge to block unsolicited emails that use innocuous subject lines, false return addresses and empty “reply to” links.<sup>9</sup> The FTC asked for a restraining order against Brian Westby, an alleged spammer based in St. Louis. The FTC cited such unassuming subject lines as “married but lonely” and “did you hear the news” as examples of the illegal deception.<sup>10</sup> Also brought to the limelight was the issue of “spoofing,” where the sender of junk email makes it appear that the mail came from an innocent third party.<sup>11</sup> The FTC has become more active in pursuing spammers in recent years, and has announced hundreds of settlements.<sup>12</sup>

The State of Virginia has also gone on the offensive against spam by passing a new law criminalizing the transmission of unsolicited bulk electronic email.<sup>13</sup> The law makes it a felony to transmit more than 10,000 unsolicited bulk emails in a 24 hour period, or more than 100,000 attempted recipients in any 30 day time period.<sup>14</sup> Also included in the prohibitions are penalties for enabling the falsification of electronic mail transmission or other routing information.<sup>15</sup>

It is likely that spammers will be faced with many more such laws in the near future, as spam continues to clog our inboxes, and make email communication less and less efficient.

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<sup>9</sup> “Judge Asked to Quash ‘Deceptively Bland’ Spam,” *Reuters* (April 17, 2003)

<sup>10</sup> *Id.*

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

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

<sup>13</sup> Ch. 987, HBNO 2290.

<sup>14</sup> *Id.*

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

## WAL-MART CENSORSHIP

Magazines, which are considered relatively benign by most in the adult Internet industry, are being pulled from the shelves of Wal-Mart, and labeled “too racy” for Wal-Mart shoppers.<sup>16</sup> *Maxim*, *Stuff* and *FHM* men’s magazines will no longer be carried by the nation’s largest retailer.<sup>17</sup> While private companies are entitled to make business decisions as to what media is sold, any decision by this huge retailer greatly affects the availability of the censored product. During the formation of our country, when publishers used the printing press to communicate, the government was in the strongest position to influence the availability of a specific publication, through its censorship policies. However, in present times, decisions such as this by Wal-Mart have a greater impact, as *de facto* censorship, than the government could ever have by passing a law.

Wal-Mart’s attempt at taking the moral high-ground may be a bit hypocritical if reports from female employees in San Francisco are true. More than a hundred complaints have been filed by the women against the company, as part of a lawsuit against the retail chain, alleging that male managers at Wal-Mart stores required their female counterparts to attend meetings at strip clubs and Hooter’s.<sup>18</sup> The plaintiffs’ attorney claims that “women are treated as second class employees at Wal-Marts from Florida to Alaska.”<sup>19</sup> The workers are attempting to certify a class action against Wal-Mart based on discrimination against female employees.<sup>20</sup> At least those employees will not be forced to look at those racy men’s magazines any longer!

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<sup>16</sup> D. Carr & C. Hayes, “3 Racy Men’s Magazines Banned by Wal-Mart,” *NewYorkTimes.com* (May 6, 2003).

<sup>17</sup> *Id.*

<sup>18</sup> “Female Wal-Mart Workers: Meeting Held at Strip Clubs,” *USAToday.com* (April 29, 2003).

<sup>19</sup> *Id.*, quoting Brad Seligman.

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

## **PRODUCER GONE WILD**

In a black eye for the adult industry, the owner and producer of the successful “Girls Gone Wild” video line is facing sex and drug charges in Panama City, Florida.<sup>21</sup> Joe Francis, Chief Executive of Mantra Entertainment, was arrested in April on allegations that he told minors to lie about their age on camera.<sup>22</sup> After a search of five locations and his private jet turned up corroborating videotapes and drugs, Francis was charged with drug trafficking and racketeering relating to prostitution.<sup>23</sup> Three of his employees also were charged. Francis has denied the charges but documents relating to the case have been sealed as part of an ongoing investigation.<sup>24</sup>

## **VIDEO GAME INDUSTRY UNDER FIRE**

The State of Washington has proposed a Bill making it illegal for retail stores to provide violent video games to minors.<sup>25</sup> The measure passed in both the State House and Senate, and the Governor is expected to sign the Bill shortly. Store clerks and owners who violate the law could face fines up to \$500 per instance. The Washington Chapter of the ACLU, the Media Coalition and the Interactive Entertainment Merchants Association have called on the Governor to veto the Bill on First Amendment grounds, calling it “an attack on Free Speech.”<sup>26</sup> The courts have issued conflicting decisions as to the constitutionality of similar laws, and the United States Supreme Court has yet to speak on the issue.

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<sup>21</sup> “Maker of ‘Girls Gone Wild’ Videos Faces Sex, Drug Charges,” *Associated Press* (April 11, 2003).

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

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

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

<sup>25</sup> M.Frisher, “Video Game Merchants Under Fire,” *WiredNews.com* (May 2, 2003).

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

## ODDITIES

Do we really live in a world where large groups of men and women masturbate in public at a “Masturbate-A-Thon?”<sup>27</sup> Or where investors snap up shares of a publicly-traded brothel?<sup>28</sup>

Or where 87 passengers fly nude from Miami to Mexico on a commercial airline?<sup>29</sup> Yes we do.

The times, they are a-changing.

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<sup>27</sup> “San Francisco Hosts ‘Masturbate-A-Thon,’” *Reuters.com* (May 5, 2003).

<sup>28</sup> “Investors Pounce on Brothel Shares,” *Reuters.com* (May 1, 2003).

<sup>29</sup> “Passengers Take it Off at Takeoff,” *CNN.com*(May 7, 2003).