

# ADULT INDUSTRY UPDATE™

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The fundamentalist extremists did not waste any time in pushing their agenda after the re-election of George W. Bush to a second term as President of the United States. In less than 10 days (and with little notice to anyone), they started holding Senate hearings on how adult materials forever change the human brain's biological composition, and are more addictive than heroin.<sup>1</sup> The Hearing was stacked with anti-porn activists with questionable credentials, and nobody from the adult industry or the Free Speech community was invited to present a balanced view.<sup>2</sup> Incredibly, the Committee members kept a straight face while they were dutifully informed how "science" shows that pornography is eroding family values, diminishes the marriage commitment, the desire to have children, and satisfy one's sexual partner.<sup>3</sup> All the traditional anti-porn arguments were trotted out, including the claim that erotica is a catalyst to domestic violence and rape, reduces respect for women, and promotes a distorted view of sexuality.<sup>4</sup> However, a slew of new statistical and 'scientific' arguments were tried, including:

- \*70% of hits on adult websites occur between 9 & 5 on business computers.
- \*40% of viewers of adult materials will lose their spouse as a result of pornography.
- \*27 - 40% of pornography viewers will lose their jobs as a result.
- \*50% of pornography viewers will have financial difficulties as a result.

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<sup>1</sup> Notes from the Hearing held on November 11, 2004, before the Senate Committee on Commerce, Science and Transportation, entitled: *The Science Behind Pornography Addiction*.

<sup>2</sup> Kernes, Mark. "U.S. Senate Committee Hears Bad Science," *AVN.com* (November 22, 2004), found at: [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=206762](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=206762).

<sup>3</sup> Notes from hearing, *supra*.

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

\*Pornography viewers are more likely to commit crimes like prostitution, sexual violence, rape and incest.

\*There is no known benefit to use of pornography (a personal favorite!).

\*Porn addicts relapse more than other addicts, and there is no detox for porn addicts.

\*Adult content producers tailor their products to consumers based on instantaneous feedback obtained, thereby creating the equivalent of a 'designer drug' in the form of custom made porn.

Of course, little if any real scientific proof is offered for any of these controversial conclusions. For example, there is no direct proof that consumption of adult materials was the sole factor affecting those who lost their jobs or spouses. Many outside influences could have contributed to such social circumstances. Additionally, is it possible that the difference in global time zones could have contributed to the spike in hits during "9am – 5pm" on business computers? It's always the middle of the night somewhere, and it is doubtful that researchers considered that substantial traffic may be coming from locations where the users were in a different time zone. More importantly, experts have universally concluded that many factors cause individuals to commit sexually deviant behavior, such as rape, molestation, or incest.<sup>5</sup> Those factors include poverty, the offender's family relationships, and various community factors.<sup>6</sup> The one factor that sexual offenders have in common is a skewed belief system in which they convince themselves that they are entitled to a certain form of sexual gratification, or that their actions do not really harm their victims.<sup>7</sup> There is not one factor, such as consumption of pornography, which leads to sexual deviance, but rather, multiple developmental pathways that lead sexual offenders to

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<sup>5</sup> Collar, Jim. "Many factors create sex abusers: Reasons behind deviant sexual behavior complicated," *theNorthwestern.com* (November 15, 2004).

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

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

perpetrate.<sup>8</sup> Interestingly, however, alcohol has been found to play a much more significant role in crime, including sexual assault, than, for example, pornography.<sup>9</sup> The Senate hearings involved no discussion of reinstating Prohibition, however.

More disturbing than the junk science being bantered about this hearing was the short shrift given to the First Amendment's undisputed protection of sexually explicit materials. A clear effort was being made by the witnesses testifying at the hearing to devalue the protected status of adult materials. Suggestions were made that pornography was not 'merely an expression' but was actually a harmful, addictive product which should outweigh any protection it may have as expression.<sup>10</sup> This is dangerous ground to travel, and seeks to uproot decades of First Amendment jurisprudence protecting erotic material from government censorship.

So what was the purpose of this dog and pony show? The stated purpose was to establish a basis for Congressional financing for the research of "porn addiction."<sup>11</sup> Apparently, the lengthy testimony of this anti-porn crowd was not enough, and the Senate intends to spend more of our tax dollars trying to come up with evidence that pornography is harmful; a conclusion that has eluded scientists ever since the Meese Commission. Parenthetically, one of the witnesses dug up for this hearing, Dr. Judith Reisman, actually testified before the Meese Commission on the issue of cartoons in adult magazines.<sup>12</sup> But the real intent of this whole effort is much more insidious, in this author's opinion. Most likely, the government is attempting to justify the regulation of human sexuality, through obscenity laws, or harmful materials regulations, through scientific evidence. Until now, most courts simply accepted, as a fundamental truth, the

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

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

<sup>10</sup> Notes from hearing, *supra*.

<sup>11</sup> Ross, Scott. "Senate Subcommittee Holds Hearing on Porn Additction," *AVN.com* (November 18, 2004), found at: [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=206620](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=206620).

<sup>12</sup> Collar, Jim. "Many factors create sex abusers: Reasons behind deviant sexual behavior complicated," *theNorthwestern.com* (November 15, 2004).

necessity of some regulation of adult media; primarily on moral grounds. As that justification has begun to fade, given society's current preoccupation with forensic evidence due to Law & Order and other similar shows,<sup>13</sup> the censors are desperately trying to maintain current sex laws with this kind of supposed scientific 'proof.' The continued validity of any legitimate governmental interest in regulating private sexual activity has come into serious question with the *Lawrence v. Texas*<sup>14</sup> decision by the U.S. Supreme Court, striking down sodomy laws across the country, and other sex regulations may be next, including obscenity laws. In fact, Justice Scalia observed that under the reasoning of the court, laws regulating prostitution, bigamy and obscenity should likewise be invalidated.<sup>15</sup> Therefore, the pressure is on for the thought police to come up with some 'evidence' to demonstrate the existence of a 'compelling governmental interest' in order to justify restrictions on protected speech, under the 'strict scrutiny' test used by the courts in such instances. To the extent they can portray erotic materials as causing the same kind of harm as drugs, they've won the war. Every effort must be made to beat back this tide of falsehoods that threatens to justify censorship of adult materials.

### **Ashcroft Out, Gonzales In**

As Bush's Cabinet departed in droves recently, the adult industry buzzed with speculation regarding how Attorney General John Ashcroft's replacement might approach regulation of erotic materials. The jury is still out, so to speak, as Alberto F. Gonzales has not been terribly vocal in regards to his views on sexually explicit content. It is clear that he falls squarely into the conservative camp, and was the chief architect of the justification for treating terrorists as enemy combatants, to whom the Geneva Convention does not apply, which led to

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<sup>13</sup> Walsh, Jim. "Prosecutors: Crime shows blur reality," *AZCentral.com* (August 29, 2004); found at: <http://www.azcentral.com/specials/special21/articles/0829csieffect28.html>

<sup>14</sup> *U.S. v. Lawrence*, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

<sup>15</sup> *Id.*, 123 S.Ct. at 2495 (J. Scalia, dissenting).

the torture of prisoners at Abu Graib detention facility in Iraq.<sup>16</sup> He was also instrumental in ending the American Bar Association's involvement in commenting on federal judicial appointments.<sup>17</sup> The ABA was perceived as too liberal a group to have any viable role in the appointment process, and not their recommendations are given very little weight. Fortunately, Gonzales' focus in the past has been on international issues such as terrorism, so it is hoped that domestic issues such as sex industry regulation remain out of the limelight for him, as the United States is still embroiled in fighting the War on Terrorism.

### **2257 Regulations . . . Where are you?**

The period for public comment on the proposed regulations pertaining to 2257 records keeping compliance closed on August 25, 2004, but the regulations have not been published in the Federal Register as of the date this article goes to print. The adult industry remains on pins and needles as various groups posture to challenge whatever regulations are passed, and webmasters scramble to comply with perceived new obligations such as obtaining copies of age records compiled by primary producers. The adult Internet industry remains in limbo as to what is required to comply with 2257 until the final regulations are passed, and the anxiety level remains high in light of the results of the presidential election. A second term Republican generally spells bad news for the adult industry, as Bush is no longer concerned with re-election. Some will remember the Meese Commission which occurred in a second term Republican Administration. Few webmasters have initiated full compliance with the proposed regulations before they are formally adopted, given the onerous requirements, instead choosing to wait and see what provisions actually make their way into the Federal Register. Now that the election is

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<sup>16</sup> Kernes, Mark and Scott Ross. "Incoming Attorney General Supported Abu Graib Torture, Government Secrecy About 9/11," *AVN.com* (November 10, 2004), found at: [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=204944](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=204944)

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

past the Bush Administration, they have little to fear, justifying any further delay in adopting a tough set of regulations. However, given the industry's strong outpouring of criticism against the proposed regulations, Department of Justice lawyers may be reviewing and editing the proposed regs in the attempt to develop a more defensible version before they 'go live' with the amendments.

### **Obscenity Update**

Two important obscenity cases progressed this month: Defense attorneys asked the U.S. District Court to dismiss the federal government's prosecution of Extreme Associates, arguing that the right to watch pornographic or even obscene materials in the privacy of one's home means nothing if the government can criminalize the means of getting that content in the home.<sup>18</sup> The court did not immediately rule on the motion; accordingly, many important issues remain undecided in this first case involving application of obscenity laws to the transmission of allegedly obscene materials across the Web. Parenthetically, Extreme Associates recently implemented this author's age verification device, the BirthDateVerifier to screen users from access to its free tour areas.<sup>19</sup>

In another case, Barbara Nitke and the National Coalition for Sexual Freedom began its trial in New York in the case it filed against the Department of Justice, claiming that sections of the Communications Decency Act (CDA) prohibiting "obscene" transmissions are

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<sup>18</sup> Ross, Scott. "Sirkin Argues Obscenity Laws Unconstitutional in Extreme Associates Case," *AVN.com* (November 2, 2004), found at: [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=203405](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=203405)

<sup>19</sup> "Extreme Associates Implements Birth Date Verifier™ Age Check System," *AVN.com* (September 13, 2004).

unconstitutional as applied to Internet content.<sup>20</sup> The court is considering whether the failure to define the ‘community’ whose standards are to be applied in resolving the obscenity question, renders the CDA unconstitutional given the global nature of the Internet.<sup>21</sup>

Obscenity cases continue to be filed throughout the country. The latest involved the owner of a video store in Bastrop, Louisiana, based on the sale of adult novelties (which, of course, are not protected by the First Amendment). The district attorney claimed, “State law is very clear about what constitutes obscene material,” and “there is no question the merchandise . . . meets those requirements.”<sup>22</sup>

### **At Least it’s not China**

China shut down 1600 Internet cafes in the last few months, and levied over \$12 million dollars in fines, against those cafes that allowed children to play violent or adult-only games and other violations.<sup>23</sup> Thus far, Internet cafes in the U.S. remain open, but it’s still early in Bush’s second term.

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<sup>20</sup> Farrar, Charles. “Fetish Photographer’s Suit Against Ashcroft Begins in Court,” (October 28, 2004), found at: [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=203006](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=203006)

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

<sup>22</sup> Ross, Scott. “Adult Novelty Sales Lead to Obscenity Bust in Louisiana,” *AVN.com* (October 4, 2004), found at:

<sup>23</sup> “China Closes 1600 internet cafes in crackdown,” *NZHerald.co.nz* (November 1, 2004).