

## ADULT INDUSTRY UPDATE™

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### GUILT BY EXTREME ASSOCIATION

This month's *Update* will not be the usual collection of interesting news stories and legal tidbits. The current prosecution of Extreme Associates and the industry's response thereto is and must be the single most important issue for adult webmasters to consider presently. That issue therefore will be the focus of this month's *Update*.

Marybeth Buchanan, the Assistant United States Attorney heading up the prosecution against Extreme Associates, claims that even *Playboy* may be obscene in parts of the country.<sup>1</sup> Yes, ladies and gentlemen, this is the United States in year 2003. The Department of Justice refuses to inform the public where it will draw the line regarding what it believes to be obscene, but it promises that at least 49 other federal obscenity prosecutions are in the works.<sup>2</sup> If history is to be any guide as to what to expect in the future, it is likely that the feds will start prosecuting extreme, fringe, fetish material, and slowly work their way towards more acceptable forms of alternative erotica, like BDSM, interracial, facial, or even gay material. The nation's Obscenity Czar, Andrew Osterbaan, recently pointed out that even producers of "mainstream" erotica are not immune, and that cases currently in the works include one of the largest producers of adult videos in the world.<sup>3</sup> There is no list of what content is or is not legal that webmasters can use as a guide in producing erotica. All adult materials are presumed to be protected by the United States Constitution unless and until declared obscene by a judge or jury.

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<sup>1</sup> S. Ross, "ABC Asks the Right Questions in Obscenity Coverage," *AVN.com* (August 28, 2003).

<sup>2</sup> *Id.*, See Also: P. Singer, "Feds again get tough on porn purveyors," *OrlandoSentinel.com* (August 26, 2003).

<sup>3</sup> L. Chwialkowska, "Crackdown on Pornography is Being Launched by Bush," *NySun.com* (September 15, 2003)

The single most significant fact to be gleaned from the Extreme Associates prosecution is the government's contention that individual video clips appearing on ExtremeAssociates.com can be independently alleged to be obscene without taking into consideration any other materials appearing on the site; ignoring the requirement that material be considered as a whole. Should that view prevail, Internet obscenity cases will immediately become significantly more difficult to defend. Currently, many webmasters rely on significant amounts of artistic or literary material appearing on their sites as a means to satisfy the *Miller* Test for obscenity, which provides a defense against charges that a work is obscene, if, taken as a whole, the work either lacks prurient appeal or contains serious literary, artistic, scientific or political value.<sup>4</sup> If the courts will now allow the government to single out individual video clips, or potentially specific images, for prosecution under federal obscenity laws, that would be tantamount to ripping out pages of a book and asking a judge or jury to declare each of those specific pages obscene, without considering the whole book. While the practice of charging individual video clips as independently obscene will certainly be challenged in the Extreme Associates case, it evidences the government's creative, yet sinister, approach to federal obscenity prosecutions.

Equally diabolical is the Department of Justice's decision to bring this case in the Western District of Pennsylvania on the basis that: 1) Video tapes were allegedly sent to that location from Extreme Associates in California, and 2) The video clips were downloaded in Pennsylvania. Mixing the online delivery of Website content across state borders with the physical delivery of tangible media to that same location confuses the community standards issue for the courts and the jury, and muddies the waters on the arguments relating to the difficulties in

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<sup>4</sup> *Miller v. California*, 413 U.S. 15 (1973).

applying the concept of local community standards to online communications. The argument goes something like this:

**Defense counsel:** Your Honor, you can't apply the community standards of Western Pennsylvania to online content originating from California.

**The Government:** But Your Honor, the Defendant sent video tapes into this community, and was certainly aware that their content would be received in that location.

**The Court:** How is this different from any other case where a national distributor sends video tapes to various locations across the country?

**Defense Counsel:** Well, Your Honor, my client did not know that its Website content would be downloaded in Pennsylvania even though it sent similar content through the mail to that location.

**The Court:** Are you asking this Court to instruct the jury to apply a different set of community standards to the online content as opposed to the video tapes?

**Defense Counsel:** Possibly, or maybe there should be a national standard applied to the Website content, and a local standard applied to the video tapes.

**The Court:** Well, it seems like the jury will get awfully confused on what standard they must use to evaluate the legality of these materials, don't you think, counselor?

**The Government:** Your Honor, If Extreme knew that it may be subject to the community standards of Pittsburgh, Pennsylvania when sending video tapes there, the Court should apply local community standards for our purposes when evaluating Extreme's Website content.

**Defense Counsel:** But Your Honor, there's a difference . . .

**The Court:** Sounds reasonable to me.<sup>5</sup>

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<sup>5</sup> The above exchange is presented for purposes of illustrating hypothetical legal argument only, and is not intended to be a factual representation of any of the legal or factual issues applicable in the Extreme Associates case.

The United States government has, without a doubt, thought through many of the legal and constitutional arguments that will be raised in the defense of the Extreme Associates prosecution. The feds often pick specific issues and venues in the attempt to establish precedent in their favor. The Extreme Associates prosecution may be one of those cases. As noted earlier, the government could be starting with the fringe material and working its way to mainstream erotica. According to one Justice Department official, “There is no particular behavior that is off the table.”<sup>6</sup> Along the way, this approach could be calculated to establish precedent favorable to the government to assist in prosecution of the more mainstream material. It will take a team of talented and dedicated attorneys, along with some brave federal judges to recognize what the government is trying to accomplish, and put a stop to this blatant censorship campaign. Should the government obtain victories in the earlier, more difficult cases, that precedent will come back to haunt the industry in a big way. An acquittal in the Extreme Associates case, on the other hand, could prove a huge setback for the government.

The Extreme Associates case should serve as a call to arms for the adult Internet industry since rulings in that case will undoubtedly affect the industry as a whole. Our industry did not assist in any way with the first federal obscenity prosecution against adult webmasters in Beckley, West Virginia.<sup>7</sup> Consequently, the amateur couple producing videos for sale over a Website, along with their webmasters, have all pled guilty to one count of conspiracy to distribute obscene materials, in exchange for the dismissal of three other counts.<sup>8</sup> The industry now has an opportunity to get involved in this current prosecution which specifically involves material downloaded from the Internet. Groups such as the Internet Freedom Association ([www.OnlineFreedom.com](http://www.OnlineFreedom.com)) and the Free Speech Coalition ([www.FreeSpeechCoalition.com](http://www.FreeSpeechCoalition.com))

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<sup>6</sup> “Crackdown on Pornography is Being Launched by Bush,” *supra*.

<sup>7</sup> *United States v. Michael J. Corbett, Sharon Corbett, Joseph Tanner, Randall Rogers*, Criminal No. 5:03-00074.

<sup>8</sup> A. Fox, “Pair pleads to obscene mailing charge,” *RegisterHerald.com*(August 26, 2003).

need your support and membership. If the industry turns its back on webmasters producing extreme or fringe content, the feds may soon be coming for you with a long line of victories in their hip pocket to use against you. Keep in mind, the federal government has unlimited financial resources to prosecute these cases, under the recently-passed PROTECT Act. On the other hand, adult webmasters number in the tens of thousands, and command the attention of millions of online web surfers. This industry can fight back financially and politically by pooling its resources to fight these first few cases brought by the government, and by using the great communication tool called “the Internet” to remove the censors from power.

Rumor already has it that Attorney General John Ashcroft may not return to his post if George Bush is elected to a second term.<sup>9</sup> Ashcroft is already on the ropes, trying to defend the USA Patriot act, however his attempts to do so have met with a cool reception.<sup>10</sup> It has now been established that the Act has been used against common criminals, instead of reserved for the terrorists, as promised.<sup>11</sup> If the moderates and political advisors in the current administration get the message that this campaign against erotica will cost them significant votes from the mainstream, merely to pacify the ultra-right wing zealots, this obscenity campaign will be dropped like a hot potato fresh out of the microwave oven.

The adult Internet industry resents and resists organization and cooperation like the plague. On the one hand, it is such individualistic and rebellious attitudes that make adult webmasters such enjoyable clients to represent. However, in the interests of industry survival, the ego attachments and natural distrust of any sort of formal organization held by the adult

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<sup>9</sup> “Ashcroft and Ridge to Leave if Bush Reelected?” *US News and World Report* (September 6, 2003)

<sup>10</sup> P. Brownfeld, “Patriot Act Opponents Say Law Endangers Rights,” *FoxNews.com* (September 11, 2003) E. Lichtblau, “Ashcroft Criticized for Talks on Terror,” *NYTimes.com*, (August 22, 2003).

<sup>11</sup> “Anti-terror laws increasingly used against common criminals,” *CNN.com* (September 15, 2003).

webmaster community must give way to a collaboration based on the consistency of interests associated with fighting government censorship in the early stages. There is still time.

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