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THE TRUTH ABOUT OBSCENITY LAW

Substantial misinformation has circulated about the issue of obscenity law and compliance guidelines. This handout is designed to call the readers' attention to some simple truths about the concept of "obscenity," and how the issue is handled in the courts. Nothing contained herein should be considered legal advice. Please consult your own personal attorney on specific legal questions. The author can be reached at Larry@LawrenceWalters.com.

1. "Pornography" is protected speech. "Obscenity" is illegal. True. Significant confusion surrounds this issue, and the press often confuses these two terms. "Pornography" is a lay term generally used to describe sexually-explicit media. All such media is presumed to be protected by the First Amendment to the United States Constitution, unless and until declared obscene by a judge or jury at a final hearing. "Obscenity" on the other hand, is a legal term used to describe material that meets the "*Miller Test*" established by *Miller v. California*, 413 U.S. 15, 93 S.Ct 2607, 37 L.Ed.2d 419 (1973). Although various nuances exist in state statutes, the *Miller Test* can be boiled down to the following:

Obscene means the status of material which: (a) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; (b) depicts or describes, in a patently offensive way, "sexual conduct" as specifically defined by law; and, (c) taken as a whole, lacks serious literary, artistic, political, or scientific value.

2. "Nudity, without sexual activity, cannot be declared obscene." False! The obscenity laws apply to depictions of sexual activity as well as the "lewd display of the genitals." This is different than the scope of materials covered by Section 2257, which governs to records keeping and labeling. That law applies to "actual sexually-explicit conduct," which is generally boiled down to penetration, masturbation, bestiality, or S&M conduct. The scope of materials that can be

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declared obscene is much broader than the scope of materials which requires 2257 compliance. Our firm has defended images depicting even simple nudity against obscenity charges.

3. “Mixing in some famous literary quotes with hard core material will prevent an obscenity charge.” False! While obscene materials are evaluated “as a whole,” to determine whether they lack serious literary, artistic, political, or scientific value, the courts have held that a stray quote from *Voltaire* or Shakespeare on the pages on an otherwise obscene work will not provide a defense. In order for literary material to be considered in the obscenity analysis, it must be integrated and related to the overall theme of the sexually-explicit materials. The advice of an experienced attorney is critical on this issue.

4. “If other webmasters are distributing similar content, I will be safe from an obscenity prosecution.” False! Prosecutors can pick and choose their defendants. The mere fact that many people are violating the law does not mean you have a defense to distribution of obscene materials. Each case is viewed independently. Remember, some content originates from overseas, and therefore may be subject to a different standard than content published in the United States. In addition, the community standards differ from region-to-region. Therefore, the availability of similar materials on the Internet should not be looked to for guidance in content risk analysis.

5. “If adult bookstores in my area are selling similar content as my website, I am in the clear.” Maybe. Some courts will allow defendants to introduce “comparables” in proving the nature of local community standards in an obscenity case. However, judges are not required to do so. Often, judges will exclude such evidence. Moreover, the mere availability of materials in a geographic location does not mean they are “accepted” as required to establish community standards. Proving acceptability requires information such as sales records or consumption statistics.

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6. “I can only be charged where my business is located, or where the website is hosted.” Wrong! The federal government takes the position that defendants in obscenity cases can be charged in any location where the content originates from, passes through, or is received. There is some support for this position in the courts. *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996). Therefore, a defendant in an obscenity case may be charged in a jurisdiction where he or she never anticipated defending the materials. Given the current inability to block specific geographic locations from receipt of website materials, this presents a significant problem for webmasters. Therefore, you should consider the need to defend your content in any location in the United States of America.

7. “Obscenity charges are usually just misdemeanors.” False! While some states treat the retail sale of obscene materials as misdemeanor offenses, operating an adult website can result in felony charges relating to wholesale promotion of obscene materials, distribution of obscene materials across state lines, and/or racketeering. Felony obscenity charges can carry drastic consequences, including decades in jail, six figure fines, and forfeiture of all business assets related to the adult website.

8. “The government has to give me fair warning and an opportunity to remove the materials before charging me with obscenity.” Wrong! No notice is required, and webmasters can be physically taken into custody on obscenity charges without any prior knowledge of the investigation.

9. “The government must at least prove that the defendant knew the materials were obscene, right?” Wrong! The courts typically only require that the government prove the defendant had knowledge of the “nature and character of the materials,” not that they were obscene. Therefore, if you know that you are distributing sexually-explicit materials, the government will likely be able to meet its burden in this regard. The question of obscenity is purely a matter for the jury to decide. Obscenity defendants usually have no idea whether they are innocent or guilty, until the jury returns a verdict.

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10. “The First Amendment provides a defense to obscenity cases though, correct?” Sort of. Obscene materials are not protected by the First Amendment. They fall within an exception to the First Amendment’s protections, like defamatory speech and national security threats. However, your lawyer can argue that the materials are not obscene, and therefore protected by the First Amendment. But once the materials are found to be obscene, they no longer enjoy First Amendment protection, and are treated as contraband, just like drugs, gambling devices, or automatic weapons.

11. “Only the owners, or day-to-day managers of a website operation can be charged with obscenity.” False. First, any individual or company up the chain, from production, through distribution, to retail sale, can be charged with obscenity violations. Only the end user, in the privacy of his or her own home, is safe from obscenity threats, due to the right of privacy. In addition, the government often seeks to indict as many individual participants in any particular case, as they can legitimately get away with. This usually includes webmasters, designers, assistants, spouses, bookkeepers, managers, owners, operators, consultants, and any other individual with virtually any degree of decision making authority. The idea is to compel underlings to provide favorable testimony against more important figures to the operation. Often this becomes a race to the prosecutor’s office, with many co-defendants seeking to be the first to obtain an immunity deal and turn “State’s evidence.” Sometimes, criminal charges are only threatened, and never pursued, in exchange for an agreement to provide favorable testimony. What will the people in your organization do?

12. “There is no way to protect myself from obscenity charges.” False! Educating yourself on the legal issues, with the help of a competent attorney, will allow you to identify your personal comfort zone or risk tolerance level, given previous prosecution trends. Lawyers skilled in this area can quickly review content and advise whether it is out of the mainstream of current defensibility, or within reasonable risk levels. In addition, a good attorney-client team can generate “valuable” content to be integrated into the sexually-explicit materials, in the hopes of providing a potential defense in terms of literary, artistic, scientific, or political value, for the work at issue.

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13. “My chances of being charged with obscenity are astronomically small.” Probably right. Given the vast number of adult websites published on the web at the current time, any given webmaster’s chances of being selected for an obscenity prosecution are remote. However, the stakes are too high, to leave this issue to chance. The likelihood of being targeted for obscenity can be reduced, with proper planning, and the chance of conviction can be likewise reduced by implementing proper legal advice. Practical issues should be addressed as well, like forming a relationship with a bondsman, engaging a private investigator, and establishing a war chest to fight the government if your day to be a freedom fighter comes.