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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,  
10 Plaintiff,

11 v.

12 IRA ISAACS,  
13 dba "Stolen Car Films,"  
14 dba "LA Media,"  
15 Defendant.

**NO. CR-07-732-AK**

**GOVERNMENT'S TRIAL MEMORANDUM**

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17 The United States of America, by and through the United States  
18 Attorney for the Central District of California, submits the following  
19 trial memorandum.

20 **CASE SCHEDULING MATTERS**

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22 Jury trial is set for June 9, 2008, at 9:00 a.m. The estimated  
23 time for the government's case-in-chief is two and a half days. The  
24 government anticipates calling three to four witnesses during its  
25 case-in-chief, including one expert witness. For purposes of trial,  
26 the government and the defendant have entered into two stipulations,  
27 one of which relates to evidence and the second relates to asset  
28 forfeiture. In the evidentiary stipulation, the parties, in summary,

1 agree and stipulate that the defendant, doing business as "LA Media"  
2 and "Stolen Car Films," sold the FBI the movies "Gang Bang Horse,  
3 'Pony Sex Game,'" and "Mako's First Time Scat" on May 11, 2004, and  
4 July 26, 2006, respectively. Defendant Isaacs consented to the  
5 admissibility of these movies as evidence, thus alleviating the need  
6 for several potential government witnesses at trial. In the  
7 forfeiture stipulation, the defendant agrees to forfeit copies of any  
8 movie that the jury finds obscene at trial, as well as any domain  
9 names or websites used to facilitate the sale, distribution, or  
10 transfer of any particular movie or movies found obscene at trial.

11 A Daubert hearing (See Daubert v. Merrell Dow Pharmaceuticals,  
12 Inc. at 509 U.S. 579 (1993) and 43 F.3d 1311 (9<sup>th</sup> Cir. 1995))  
13 concerning the admissibility of expert witness testimony is scheduled  
14 for Tuesday, May 6, 2008, at 10:30 a.m. Dr. Mary Anne Layden is  
15 expected to testify for the United States and Dr. Mohan Nair is  
16 expected to testify for the defense.

17 The defendant is not in custody.

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19 **STATEMENT OF FACTS**

20 On May 11, 2004, FBI Special Agent Mark Hunter used an undercover  
21 credit card and purchased the movie "Gang Bang Horse, 'Pony Sex Game'"  
22 from the internet website www.scatmovies.com. This movie was  
23 purchased by computer in California from Defendant Ira Isaacs'  
24 California-based business "LA Media" and it was delivered from "LA  
25 Media" to an undercover address in California by United Parcel  
26 Service.

1           On July 26, 2006, FBI Special Agent William McDermott used an  
2 undercover credit card and purchased the movie "Mako's First Time  
3 Scat" from the internet website www.scatmovies.com. This movie was  
4 purchased by computer in California from "LA Media" and it was  
5 delivered from "LA Media" to an undercover address in California by  
6 United Parcel Service.

7           On October 20, 2006, FBI Special Agent James Myrick used an  
8 undercover credit card and purchased the movie "Hollywood Scat  
9 Amateurs No. 7" from the internet website "www.stolencarfilms.com."  
10 This movie was purchased by computer in Virginia from "LA Media" and  
11 it was delivered to an undercover address in Virginia from "LA Media"  
12 by United Parcel Service.

13           On October 25, 2006, Agent Myrick used an undercover credit card  
14 and purchased and captured (downloaded) the movie "BAE 20," also known  
15 as "Avantgarde Extreme." This movie was downloaded by computer in  
16 Virginia from the internet website www.scatcinemax.com. Between May  
17 2004 and October 2006, each of the websites - www.scatmovies.com,  
18 www.stolencarfilms.com, and www.scatcinemax.com - were owned and  
19 operated by Defendant Isaacs and his California-based business "LA  
20 Media."

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1 **I. THE THREE-PRONG "MILLER" OBSCENITY TEST**

2 Obscenity can manifest itself in conduct, in pictorial  
3 representation of conduct or in the written and oral description of  
4 conduct. Kaplan v. California, 413 U.S. 115, 119 (1973). In the  
5 seminal case of Miller v. California, 413 U.S. 15, 24 (1973), the  
6 Supreme Court enunciated a three-prong test to be applied to materials  
7 when determining whether the material is obscene. Under the Miller  
8 test, the trier of fact must first look through the eyes of the  
9 hypothetical "average person" of the adult, contemporary community to  
10 determine whether the material, taken as a whole, appeals to a  
11 prurient interest in sex and then whether the material depicts or  
12 describes sexual conduct, as applied by applicable state law, in a  
13 patently offensive way. Id. at 24; Pinkus v. United States, 436 U.S.  
14 293, 297-98 (1978); United States v. 2,200 Paper Back Books, 565 F.2d  
15 566, 570 (9<sup>th</sup> Cir. 1977). Finally, the trier of fact must apply the  
16 "reasonable person" standard and determine whether the material, taken  
17 as a whole, lacks serious literary, artistic, political or scientific  
18 value. Miller, 413 U.S. at 24. All three prongs must be met before  
19 the material can be declared legally obscene under Miller.<sup>1</sup> United  
20 States v. Obscene Magazines, Book and Advertising Materials, 653 F.2d  
21 381, 382 (9<sup>th</sup> Cir. 1981); Luke Records, Inc. v. Navarro, 960 F.2d 134,  
22 136 (11<sup>th</sup> Cir. 1992).

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24  
25 <sup>1</sup> As with pictures, films, paintings, drawings, and  
26 engravings, both oral utterance and the printed word have First  
27 Amendment protection until they collide with the long-settled position  
28 of the Court in Miller that obscenity is not protected by the  
Constitution. Kaplan, 413 U.S. at 119-20.



1 unpleasant sensations" or as "causing displeasure or resentment" and  
2 is likened to terms such as "nauseous," "obnoxious," "revolting," and  
3 "affronting." In this context, the material can be determined  
4 "patently offensive" if it affronts current community standards of  
5 decency. Hoover v. Byrd, 801 F.2d 740, 741 (5<sup>th</sup> Cir. 1986). It is  
6 "patently offensive" because it affronts contemporary community  
7 standards relating to the description or representation of sexual  
8 matters. Marks v. United States, 430 U.S. 188, 191 n. 4 (1977);  
9 Hamling v. United States, 418 U.S. 87, 99 n. 8 (1974).

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11 C. Standard to be Applied by the Trier of Fact

12 Pursuant to Miller, the standard to be applied by the trier of  
13 fact concerning whether material appeals to a prurient interest (the  
14 first prong) and is patently offensive (the second prong) are  
15 "questions of fact" to be determined with the application of  
16 "contemporary community standards" by the hypothetical "average  
17 person." See Miller, 413 U.S. at 30; Jenkins v. Georgia, 418 U.S.  
18 153, 159 (1974). This determination is to be made by jurors according  
19 to the average person in the community, rather than the most prudish  
20 or the most tolerant. Smith v. United States, 431 U.S. 291, 304  
21 (1977). Children are not to be considered part of the "community."  
22 Pinkus, 436 U.S. at 297-98. "[T]he community includes all adults who  
23 constitute it, and a jury can consider them all in determining  
24 relevant community standards."<sup>2</sup> Id. at 300. Jurors are to make their

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26 <sup>2</sup> The community, for purposes of the jury determining whom it  
27 is comprised of, includes all adults who compose it, including  
28 (continued...)

1 decisions concerning prurient interests and patent offensiveness based  
2 upon the collective view of the community as a whole, not a juror's  
3 individualized, personal opinion, and not based upon the material's  
4 effect on a particularly sensitive or insensitive person or group.  
5 Pinkus, 436 U.S. at 300-01; Hamling, 418 U.S. at 107. Cautionary  
6 instructions should be given to the jury indicating that they are "to  
7 avoid subjective personal and private views" in evaluating the  
8 hypothetical "average person" and they are to make this determination  
9 based upon the "collective view of the community, as best as it can  
10 be done." Pinkus, 436 U.S. at 300-01.

11 In determining the geographic definition or size of the community  
12 from which the jury will make its determination, each jury is entitled  
13 "to draw on his own knowledge of the views of the average person in  
14 the community or vicinage from which he comes for making the required  
15 determination[.]"<sup>3</sup> Hamling, 418 U.S. 104. The Supreme Court, in  
16 Hamling, 418 U.S. 105-06, indicated its preference for this  
17 determination by stating:

18 The result of the Miller cases, therefore as a matter  
19 of constitutional law and federal statutory construction,  
20 is to permit a juror sitting in obscenity cases to draw  
on knowledge of the community or vicinage from which he  
comes in deciding what conclusion the average person

21 \_\_\_\_\_  
22 <sup>2</sup> (...continued)

23 sensitive persons, and it is error to focus on the most susceptible  
24 or sensitive persons in the community rather than merely including  
them, along with others, in the community. Pinkus, 436 U.S. at 300.

25 <sup>3</sup> The trier of fact is assumed to be inherently familiar with  
26 and capable of applying views of the community, see Hamling, 418 U.S.  
27 at 104-05, and the law does not require the government to introduce  
evidence as to community standards. Luke Records, Inc., 960 F.2d at  
137.

1 applying contemporary community standards would reach in  
2 a given case. Since this case was tried in the Southern  
3 District of California, and presumably jurors from  
4 throughout that judicial district were available to serve  
on the panel which tried petitioners, it would be the  
standards of that community upon which the jurors would  
draw. [Emphasis added]

5 Courts, even against challenges that a national community standard  
6 should prevail in the age of the Internet, have upheld the application  
7 of local community standards, such as state, federal judicial  
8 district, and county standards, by juries in determining what is  
9 obscene. See Ashcroft v. American Civil Liberties Union, 535 U.S.  
10 564, 583 (2002) (Internet publishers must conform to varying local  
11 standards and are to be judged by the standard of the community into  
12 which they direct their material); Jenkins, 418 U.S. at 157  
13 (indicating that Miller makes clear that state juries need not be  
14 instructed to apply "national standards"); United States v.  
15 Dachsteiner, 518 F.2d 20, 22 (9<sup>th</sup> Cir. 1975) (recognizing that because  
16 the jurors resided in the Northern District of California they were  
17 allowed to draw upon their knowledge which may be representative of  
18 that area); United States v. Miller, 505 F.2d 1247, 1247-48 (9<sup>th</sup> Cir.  
19 1974) (finding that contemporary community standards, rather than a  
20 national standard, is applicable for federal obscenity prosecutions);  
21 United States v. Jenkins, No. 1:06-cr-430-WSD, 2007 WL 1087337, slip  
22 op. at 2 (N.D. Ga. April 5, 2007) (rejecting defendant's claim that  
23 because material is distributed over the Internet, and the Internet  
24 is a worldwide community, the community standard does not apply);  
25 United States v. Bagnell, 679 F.2d 826, 836 (11<sup>th</sup> Cir. 1982) (jury  
26 instruction based upon community standards of county sufficient).  
27 Ultimately, there is no requirement that the prosecution prove that  
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1 the jury ultimately applied local or other community standards and no  
2 requirement exists for the prosecution to prove that a jury is  
3 qualified to determine such standards. United States v. Ragsdale, 426  
4 F.3d 765, 773 (5<sup>th</sup> Cir. 2005).

5 "The fact that distributors of allegedly obscene materials may  
6 be subjected to varying community standards in the various federal  
7 judicial districts into which they transmit their materials does not  
8 render a federal statute unconstitutional." Ashcroft v. American  
9 Civil Liberties Union, 535 U.S. at 581. Moreover, in applying  
10 "community standards" in deciding whether materials appeal to a  
11 prurient interest or are patently offensive, the trier of fact is to  
12 base the decision not on whether the average adult in the community  
13 would find that the material is tolerated in the community; rather,  
14 the test is whether the average adult would find that the material is  
15 accepted in the community. Miller, 413 U.S. at 32 ("It is neither  
16 realistic nor constitutionally sound to read the First Amendment as  
17 requiring that people of Maine or Mississippi accept public depiction  
18 of conduct found tolerable in Las Vegas or New York City."). Whether  
19 obscene materials are "tolerated" in a given community should be  
20 irrelevant in determining community standards. See United States v.  
21 ABC, Inc., 952 F.2d 155, 156-157 (8<sup>th</sup> Cir. 1991) (rejecting the  
22 defendant's proposed instruction that the community standard should  
23 be one of toleration, not acceptance); Hoover v. Byrd, 801 F.2d at 742  
24 (determining constitutional a state statute which defined "patently  
25 offensive" material in terms of current community standards of  
26 "decency" but not "tolerance"); United States v. Various Articles of  
27 Obscene Merchandise, 709 F.2d 132, 137 (2<sup>nd</sup> Cir. 1983) (indicating

1 that "the existence of enclaves of tolerated obscenity does not by  
2 itself create a community standard"); United States v. Easley, 927  
3 F.2d 1442, 1446 (8<sup>th</sup> Cir. 1991) (concluding that the district court  
4 did not err in instructing the jury under an acceptance rather than  
5 a tolerance standard). "To consider community toleration as  
6 synonymous with what a community will put up with skews the test of  
7 obscenity and invites one to consider deviations from community  
8 standards, because a community can be said to put up with a number of  
9 disagreeable circumstances that it cannot stop." United States v.  
10 Pryba, 900 F.2d 748, 759 (4<sup>th</sup> Cir. 1990). Therefore, the trial court  
11 should instruct the jury that contemporary standards are "set by what  
12 is in fact accepted in the community as a whole." Smith, 431 U.S. at  
13 297-98.

14 In assessing whether sexually explicit material appeals to a  
15 prurient interest, an issue can arise concerning whether the material  
16 is designed for or appeals to a deviant sexual group, and whether it  
17 is sufficient that the material appeals to the prurient interest of  
18 a member of the deviant group, or whether it must also appeal to the  
19 prurient interest of an average member of the community. Where  
20 allegedly obscene material is designed for and primarily disseminated  
21 to a clearly defined sexual group, rather than the public at large,  
22 the prurient appeal requirement is satisfied if the dominant theme of  
23 the material taken as a whole appeals to a prurient interest in sex  
24 of members of that group. Hamling, 418 U.S. at 128-29; Mishkin v. New  
25 York, 383 U.S. 502, 508 (1966). Moreover, if some part of the  
26 material appeals to the prurient interest of sexual deviants, while  
27 another part appeals to the prurient interest of the average person,

1 a finding that the material appealed to a prurient interest in sex is  
2 permissible. Hamling, 418 U.S. at 128. The prurient appeal  
3 requirement is adjusted to social realities by permitting the appeal  
4 of this type of material to be assessed in terms of the sexual  
5 interests of its intended and probable recipient group. Id. at 129.  
6 Finally, it is insignificant for an appeal to a prurient interest  
7 determination whether or not the person viewing the material would  
8 experience sexual arousal because "the average person comes into the  
9 test not as the object of the appeal but as its judge." Ripplinger  
10 v. Collins, 868 F.2d at 1052 (quoting United States v. Guglielmi, 819  
11 F.2d 451, 454 (4<sup>th</sup> Cir. 1987)); see also Pinkus, 436 U.S. at 299-300  
12 (enunciating the principle that obscenity is not determined by the  
13 sexual arousal or effect on the average person in light of Miller and  
14 Smith precedent).

15  
16 **2. PRONG THREE: WHETHER THE MATERIAL LACKS SERIOUS**  
17 **LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE**

18 Pursuant to Miller, the government must also prove that the work,  
19 taken as a whole, lacks serious literary, artistic, political, or  
20 scientific value. Miller, 413 U.S. at 24.<sup>4</sup> Moreover, material which  
21 may be useful and have scientific or educational value to physicians,  
22 psychologists, psychiatrists or sociologists takes on a different  
23 light when marketed and distributed to an audience outside these  
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25  
26 <sup>4</sup> Serious literary, artistic, political, or scientific value  
27 will redeem a prurient work with patently offensive depictions.  
Miller, 413 U.S. at 26; Kois v. Wisconsin, 408 U.S. 229, 230-32  
(1972).

1 professional groups. See Miller, 413 U.S. at 26; see also Ginzburg  
2 v. United States, 383 U.S. 463, 472 (1966) (deliberate sale of  
3 sexually provocative book outside of intended professional field  
4 rendered it obscene). While the First Amendment will protect works  
5 which, taken as a whole, have serious value, it will not protect the  
6 public portrayal of hardcore sexual conduct for its own sake or for  
7 the ensuing commercial gain. Miller, 413 U.S. at 34-35; see also  
8 Ginzburg, 383 U.S. at 470-471 (evidence of publisher's pandering,  
9 including the circumstances of presentation and dissemination of  
10 accused material, is relevant in determining ultimate question of  
11 obscenity and in determining importance of material).

12  
13 A. Standard to be Applied by the Trier of Fact

14 The third prong of the Miller test is designed to protect  
15 "genuinely serious literary, artistic, political, or scientific  
16 expression." Miller, 413 U.S. at 22-23 (emphasis added). This prong  
17 of the Miller test requires the fact-finder to determine whether the  
18 material "lacks serious literary, artistic, political, or scientific  
19 value". Miller, 413 U.S. at 24. This serious value prong is  
20 evaluated by the "reasonable person" examining the material as a  
21 whole. Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

22  
23 B. Reasonable Person Defined

24 In Pope, the Supreme Court ruled that the hypothetical average  
25 person in any given community would not be used to judge the value of  
26 a particular work. Pope, 481 U.S. at 500. Instead, the Court ruled  
27 that the focus should not be on a subjective judgment by an average  
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1 community member, but on the judgement of a hypothetical "reasonable  
2 person." Id. The Court determined that:

3 The proper inquiry is not whether an ordinary member of  
4 any given community would find serious literary, artistic,  
5 political, or scientific value in allegedly obscene  
material, but whether a reasonable person would find such  
value in the material, taken as a whole. [Emphasis added]

6 Id. at 500-01. In the application of this reasonable person standard  
7 for the serious value prong, the material is viewed objectively and  
8 generally, rather than based upon prevailing local views or particular  
9 parochial biases in a given community. Id. at 501 n. 3. In deciding  
10 how "a reasonable person" would judge the value of the work, the jury  
11 must use its collective knowledge of what a presumably universal but  
12 fictional person of reasonableness would think, and determine how such  
13 a world-wise person would assess the inherent value of the work,  
14 regardless of whether the government or a majority of the people  
15 approve of the ideas the work represents. Miller, 413 U.S. at 34.

16 The fact that an isolated passage or portion of a particular work  
17 has some value or merit will not salvage what otherwise would be found  
18 lacking in serious literary, artistic, political or scientific value.  
19 See, e.g., Miller v. California, 413 U.S. at 25 n. 7 (noting that a  
20 quotation from Voltaire in the flyleaf of a book will not  
21 constitutionally redeem an otherwise obscene publication); Penthouse  
22 International, LTD v. McAuliffe, 610 F.2d 1353, 1368 (5<sup>th</sup> Cir. 1980)  
23 (noting that "sham attempt" insertion of obscene pictures between  
24 books of the Bible will not establish serious value of the work).  
25 Moreover, the mere fact that a particular work contains a storyline  
26 or plot, promotes a societal interest in some sense, or potentially  
27 has some medical or literary, artistic, political or scientific value

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1 will not negate a finding that the material lacks serious value for  
2 obscenity purposes. See, e.g., Kaplan v. California, 413 U.S. at 116-  
3 122 (finding book, which contains no pictures and a most tenuous plot,  
4 lacks serious value); United States v. Obscene Magazines, Book and  
5 Advertising Materials, 653 F.2d at 383 (rejecting doctor's claim that  
6 sexually explicit magazines and book have medical or scientific value  
7 based upon doctor's presentation of insufficient evidence that  
8 material could be so used); United States v. Schein, 31 F.3d 135, 137  
9 (3<sup>rd</sup> Cir. 1994) (ruling that videotapes shown at exhibit funded by  
10 National Endowment of the Arts and sexual participants' actions of  
11 promoting important social interest by wearing condoms and reminding  
12 viewers to have "safe sex" from time to time did not constitute  
13 serious value); Penthouse International, LTD. v. Webb, 594 F.Supp.  
14 1186, 1198 (N.D. Georgia 1984) (concluding that sexually explicit  
15 magazine lacked serious value despite the fact that it contained  
16 fiction article with potentially some literary value, one cartoon with  
17 some slight artistic value, and three items with maybe slight  
18 political value); United States v. One Reel of Film, 481 F.2d 206, 210  
19 (1<sup>st</sup> Cir. 1973) (rejecting conclusion that pornography, because of its  
20 liberating impact or expression of human sexuality, has for that  
21 reason alone serious literary, artistic, political, or scientific  
22 value).

1 **II. EVIDENTIARY ISSUES**

2  
3 A. SCIENTER

4 The degree of scienter, or knowledge on behalf of an individual  
5 defendant, that the government must prove in an obscenity case in the  
6 Ninth Circuit is that the defendant had knowledge of the sexual  
7 orientation of the materials.<sup>5</sup> United States v. Sherwin, 572 F.2d  
8 196, 201-02 (9<sup>th</sup> Cir. 1977). This requirement, that is, that the  
9 government need only prove that the defendant knew the sexual  
10 orientation of the materials sold or shipped in commerce, is also the  
11 standard supported in other jurisdictions.<sup>6</sup> See United States v.  
12 Schmeltzer, 20 F.3d 610, 612 (5<sup>th</sup> Cir. 1994) (scienter requirement for  
13 18 U.S.C. § 1462 prosecution is general knowledge that material is  
14 sexually oriented); United States v. Battista, 646 F.2d 237, 242 (6<sup>th</sup>  
15 Cir. 1981) (scienter requires proof that defendant knew "the general  
16 nature and character of the film"); United States v. Hill, 500 F.2d  
17 733, 740 (5<sup>th</sup> Cir. 1974) (sufficient for the jury to determine that  
18 the defendant had general knowledge that the material is sexually  
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20 <sup>5</sup> Corporations, as defendants, cannot possess mental state;  
21 however, a corporation is criminally liable for the unlawful acts of  
22 its agents if their conduct is within the scope of the agent's  
23 authority. United States v. Investment Enterprises, Inc., 10 F.3d  
24 263, 266 (5<sup>th</sup> Cir. 1993). This corporate liability exists even when  
25 the agent's actions are against company orders. United States v.  
Hilton Hotels Corporation, 467 F.2d 1000, 1004 (9<sup>th</sup> Cir. 1972). Acts  
within the scope of employment include all those acts falling within  
the employee's or agent's general line of work, when they are  
motivated, at least in part, by an intent to benefit the corporation.  
United States v. Singh, 518 F.3d 236, 249 (4<sup>th</sup> Cir. 2008).

26 <sup>6</sup> Circumstantial evidence is typically sufficient to permit  
27 an inference of criminal knowledge. United States v. Bronx Reptiles,  
Inc., 217 F.3d 82, 89 (2<sup>nd</sup> Cir. 2000).

1 oriented, the only scienter required for conviction under 18 U.S.C.A.  
2 § 1462 or § 1465); see also Hamling v. United States, 418 U.S. at 124  
3 (corporate officers, who were directly concerned with the activities  
4 of their organizations, were sufficiently aware of the mail  
5 solicitation scheme and the contents of the brochure to support  
6 obscenity conviction); United States v. Investment Enterprises, Inc.,  
7 10 F.3d at 267 (defendant's status as president of a printing company  
8 that aided and abetted the shipment of obscene videotapes, printing  
9 company's status of largely producing sexually explicit box covers,  
10 and president's close business connections to the business that  
11 distributed videotapes establishes defendant's knowledge of the  
12 sexually explicit nature of the material); United States v. American  
13 Theatre Corporation, 526 F.2d 48, 50 (8<sup>th</sup> Cir. 1975) (knowledge of  
14 nature and character of obscene films established from defendant's  
15 status of being in fact, if not in name, the manager of the business,  
16 the registered agent on Articles of Incorporation, and the person who  
17 ordered the films and directed others which films to show at business  
18 which showed exclusively X-rated films); Huffman v. United States, 470  
19 F.2d 386, 403 (D.C. Cir. 1971) (company president's status of having  
20 day to day contact with materials in the store, president's name  
21 appearing on the corporation's certificate of occupancy and the annual  
22 filing with the Department of License and Inspection provide  
23 sufficient proof of president's awareness of the content of the  
24 obscene materials).

25 The Supreme Court, in Hamling v. United States, 418 U.S. at 123,  
26 specifically rejected the contention that proof of scienter in  
27 obscenity prosecutions requires proof of a defendant's knowledge of  
28

1 the legal status of the materials. Instead, the Court held that "[i]t  
2 is constitutionally sufficient that the prosecution show that a  
3 defendant had knowledge of the contents of the material he  
4 distributed, and that he knew the character and nature of the  
5 materials. Id; see also Mishkin v. New York, 383 U.S. 502, 510 (1966)  
6 (approving jury instruction requiring awareness of character of  
7 material); Rosen v. United States, 161 U.S. 29, 41 (1896) (knowledge  
8 of material's legal status is irrelevant; it must be shown that the  
9 individual had knowledge or notice of the material's contents). The  
10 Court further stated that "Congress did not intend that the question  
11 as to the character of the paper should depend on the opinion or  
12 belief of the person who, with knowledge or notice of its contents,  
13 assumed the responsibility of putting it in the mails of the United  
14 States. Hamling, 418 U.S. at 120. It is therefore not required that  
15 the prosecution prove the defendant knew the legal status of the  
16 material, see Hamling, 418 U.S. at 120-21, and even the precise  
17 contents of the material, or that a defendant had ever personally  
18 viewed the material. Cf. United States v. Brown, 862 F.2d 1033, 1036  
19 (3<sup>rd</sup> Cir. 1988) (defendant ordered obscene tape depicting child  
20 pornography but received a different tape in error.). Similarly, the  
21 government need not prove that the defendant had specific knowledge  
22 of the destination of his materials; he merely had to knowingly use  
23 a facility or means of interstate commerce to distribute the obscene  
24 materials. United States v. Thomas, 74 F.3d 701, 709 (6<sup>th</sup> Cir. 1996).

25 When the government seeks to prove that the defendant had the  
26 requisite scienter, evidence of "pandering" allows the trier of fact  
27 to assess the defendant's knowledge, intent and motivation for  
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1 distributing the obscene material. Ginzberg, 383 U.S. at 470-71; see  
2 also Splawn v. California, 431 U.S. 595, 598 (1977) (evidence of  
3 pandering to prurient interests in the creation, promotion, or  
4 dissemination of material is relevant in determining whether the  
5 material is obscene); United States v. Battista, 646 F.2d 237, 244-45  
6 (6<sup>th</sup> Cir. 1981) (movie's status as a low budget film, that it was  
7 produced by persons who had before made low budget sex films, and fact  
8 that the movie was designed to exploit sex constituted evidence of  
9 pandering to the prurient interests in sex). Such evidence aids the  
10 fact finder in deciding on the obscenity of the material itself,  
11 Ginzberg, 383 U.S. at 465-66, and "[w]here the purveyor's sole  
12 emphasis is on the sexually provocative aspects of his publications,  
13 that fact may be decisive in determination of obscenity." Battista,  
14 646 F.2d at 245.<sup>7</sup> An appropriate instruction concerning pandering  
15 should be given to the jury. See Splawn v. California, 431 U.S. at  
16 598-99 (approving instruction in obscenity prosecution which permitted  
17 jury to consider, on issue whether film was utterly without redeeming  
18 social importance, circumstances of sale and distribution, and

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20 <sup>7</sup> At trial, defendants will sometimes claim that evidence of  
21 pandering or the dissemination of obscene material to consenting  
22 adults is relevant. In Paris Adult Theatre I, 413 U.S. 49, 57 (1973),  
23 the Court specifically rejected the theory that obscene material and  
24 its dissemination acquire constitutional immunity even if the  
25 distribution could be exclusively to consenting adults. To the  
26 Government's knowledge, no federal court has recognized the so-called  
27 "consenting adults" theory as a valid defense to an obscenity  
28 prosecution after Paris Adult Theatre I. Therefore, evidence and  
argument is inadmissible, in any form, concerning the "consent" of the  
participants in the sexually explicit conduct, the "consent" of  
customers who seek out hard-core pornography, the inaction or apathy  
of those who don't seek it out, or the "adulthood" of the "intended"  
recipients as relevant evidence of the community standard in relation  
to questions of "prurient appeal" and "patent offensiveness."

1 particularly whether such circumstances indicated that the film was  
2 commercially exploited for the sake of prurient appeal).

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4 B. EXPERT TESTIMONY

5 Expert witness testimony is not required in an obscenity  
6 prosecution. Pinkus, 436 U.S. at 302; see also United States v.  
7 Arvin, 900 F.2d 1385, 1390 (9<sup>th</sup> Cir. 1990) ("There is a consensus  
8 among the courts that whether the item to be judged is lewd,  
9 lascivious, or obscene is a determination that lay persons can and  
10 should make."). This principle and precedent is established by the  
11 Supreme Court, which has never required expert testimony in an  
12 obscenity case, ruling instead that there is no constitutional need  
13 for expert testimony on behalf of the prosecution, or for any other  
14 ancillary evidence of obscenity, once the allegedly obscene material  
15 itself is placed in evidence. Kaplan, 413 U.S. at 121; Paris Adult  
16 Theatre I, 413 U.S. at 56. Obscenity, for example in the context of  
17 films, "are the best evidence of what they represent" see Paris Adult  
18 Theatre I, 413 U.S. at 56, and traditional expert assistance for  
19 jurors in an obscenity case is unnecessary because such testimony is  
20 usually admitted for the purpose of explaining to lay jurors what they  
21 otherwise could not understand.<sup>8</sup> Id. at 56 n. 6. The exclusion of  
22 expert testimony in obscenity prosecutions is consistent with rulings  
23 in numerous cases. See, e.g., United States v. Ragsdale, 426 F.3d at  
24 776-77 (excluding trial attorney's testimony concerning two jury

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27 <sup>8</sup> "[H]ard core pornography . . . can and does speak for  
28 itself." Paris Adult Theatre I, 413 U.S. at 56 n. 6.



1 be both relevant and not so unduly prejudicial as to outweigh its  
2 probative value. Hamling, 418 U.S. at 127; Ragsdale, 426 F.3d at 772;  
3 John v. State of North Carolina Parole Commission, 764 F.Supp 403, 409  
4 (N.C. 1991); see also Daubert v. Merrell Dow Pharmaceuticals, Inc.,  
5 509 U.S. at 589 ("the trial judge must ensure that any and all  
6 scientific testimony or evidence admitted is not only relevant, but  
7 reliable."); United States v. Arvin, 900 F.2d at 1390 (holding that  
8 expert testimony about "community standards," "prurient interest," and  
9 "patent offensiveness" must be relevant for admissibility);  
10 Fed.R.Evid. 401 (relevant evidence has tendency to make the existence  
11 of any fact of consequence more or less probable); Fed.R.Evid. 403  
12 ("evidence may be excluded if its probative value is substantially  
13 outweighed . . . by considerations of undue delay, waste of time, or  
14 needless presentation of cumulative evidence."); Fed.R.Evid. 611(a)  
15 ("The trial court shall exercise reasonable control over the mode and  
16 order of . . . presenting evidence so as to (1) make the interrogation  
17 and presentation effective for the ascertainment of the truth, (2)  
18 avoid needless consumption of time, and (3) protect the witnesses  
19 . . . ."). Nonetheless, if one of both of the parties introduce  
20 expert testimony, the jury is free to reject the testimony when  
21 deliberating on obscenity vel non. Hamling, 418 U.S. at 100;  
22 Ragsdale, 426 F.3d at 772.

23 The trial court serves as the "gatekeeper" to exclude junk  
24 science or expert testimony that does not meet the relevancy and  
25 reliability threshold requirements of Federal Rule of Evidence 702,  
26 and it is the proponent of the expert who has the burden of proving  
27

1 admissibility.<sup>10</sup> Cooper v. Brown, 510 F.3d 870, 942 (9<sup>th</sup> Cir. 1995).  
2 As established by Daubert v. Merrell Dow Pharmaceuticals, Inc.  
3 (Daubert I), 509 U.S. at 590-94, the trial court must engage in a two-  
4 part analysis. First, it must be determined whether the expert's  
5 testimony reflects "scientific knowledge", whether their findings are  
6 derived by "scientific method", and whether their work product amounts  
7 to "good science." Daubert v. Merrell Dow Pharmaceuticals (Daubert  
8 II), 43 F.3d at 1316. "[T]he party presenting the expert must show  
9 that the expert's findings are based upon sound science, and this will  
10 require some objective, independent validation of the expert's  
11 methodology." Id. There must be a grounding in the methods and  
12 procedures of science, and there must be more than subjective belief  
13 or unsupported speculation. Daubert I, 509 at 590. An expert's bald  
14 assurance of validity is not enough. Daubert II, 43 F.3d at 1316.  
15 Rather the party presenting the expert must show that the expert's  
16 findings are based upon sound science, and this will require some  
17 objective, independent validation of the expert's methodology. Id.

18 Second, it must be determined whether the proposed expert  
19 testimony is relevant to the task at hand; that is, whether it  
20 logically advances a material aspect of the proposing party's case.  
21 Id. Factors federal judges can consider in determining whether to  
22 admit expert testimony on the issue of its reliability under Rule 702

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24 <sup>10</sup> Rule 702, governing expert testimony, provides: "If  
25 scientific, technical, or other specialized knowledge will assist the  
26 trier of fact to understand the evidence or to determine a fact in  
27 issue, a witness qualified as an expert by knowledge, skill,  
28 experience, training or education, may testify thereto in the form of  
an opinion or otherwise." Fed.R.Evid. 702.

1 include: (1) whether the theory or technique employed by the expert  
2 is generally accepted in the scientific community; (2) whether it's  
3 been subjected to peer review and publication; (3) whether it can be  
4 and has been tested; (4) whether the known or potential rate of error  
5 is acceptable; (5) whether the expert is proposing to testify about  
6 matters growing naturally and directly out of the research they have  
7 conducted independently of the litigation, or whether they have  
8 developed their opinions expressly for purposes of testifying.<sup>11</sup> Id.  
9 at 1316-17; Cooper, 510 F.3d at 942-43.

10 The standard of determination by the trial court concerning the  
11 qualifications of a person to be a witness and the admissibility of  
12 the expert testimony is a preponderance of the evidence. Bourjaily  
13 v. United States, 483 U.S. 171, 175-76 (1987). Throughout the court's  
14 inquiry, a judge assessing a proffer of scientific testimony under  
15 Rule 702 should also be mindful of other applicable rules. Daubert  
16 I, 509 U.S. at 595. Rule 703 provides that expert opinions based upon  
17 otherwise inadmissible hearsay are to be admitted only if the facts  
18 or data are of a type reasonably relied upon by experts in the  
19 particular field in forming opinions or inferences upon the subject.  
20 Id. Rule 706 allows the court at its discretion to procure the  
21 assistance of an expert of its own choosing. Id. Rule 403 permits  
22 the exclusion of relevant evidence if its probative value is

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24 <sup>11</sup> If the proffered expert testimony is not based on  
25 independent research, the party proffering it must come forward with  
26 other objective, verifiable evidence that the testimony is based on  
27 "scientifically valid principles." This can be by demonstrating that  
the proffered conclusions have been subjected to normal scientific  
scrutiny through peer review and publication. Daubert II, 43 F.3d at  
1317-18.

28

1 substantially outweighed by the danger of unfair prejudice, confusion  
2 of the issues, or misleading the jury. Id.

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4 C. COMPARABLE MATERIALS

5 Federal and state courts rarely admit so-called comparison  
6 evidence when offered by a defendant in an obscenity prosecution, and  
7 only if a rigorous foundation for its admissibility is satisfied. In  
8 United States v. Pinkus, 579 F.2d 1174 (9th Cir. 1978), the court, in  
9 reference to this foundation requirement, stated that the predicate  
10 for a conclusion that proffered comparable materials are admissible  
11 as probative of community standards are, first, that there must be a  
12 reasonable resemblance between the proffered comparables and the  
13 allegedly obscene materials. Id. at 1175. Second, the proponent of  
14 the comparable materials must establish a reasonable degree of  
15 community acceptance of such works as another part of this  
16 foundational requirement. Id. The trial judge has wide discretion  
17 whether or not admit the introduction of such materials, as well as  
18 to determine how much the proffered comparables need be displayed to  
19 the jury. Id.

20 The United States Supreme Court has indicated that comparable  
21 evidence is of questionable relevance and generally is inadmissible,  
22 stating: "Mere availability of similar material by itself means  
23 nothing more than that other persons are engaged in similar  
24 activities." Hamling, 418 U.S. at 126 (quoting United States v.  
25 Manarite, 448 F.2d 583, 593 (2<sup>nd</sup> Cir. 1971)). In Hamling, the  
26 defendants offered as evidence at trial several types of allegedly  
27 comparable material: (1) materials which had received second-class

1 mailing privileges; (2) materials which had previously been the  
2 subject of litigation and had been found to be "constitutionally"  
3 protected; and (3) materials openly available on the newsstands.<sup>12</sup>  
4 Hamling, 418 U.S. at 125. The Supreme Court upheld the exclusion of  
5 this evidence by the district court, stating further that "[m]uch of  
6 the material offered by petitioners was not of demonstrated relevance  
7 to the issues in this case. Such of it that may have been clearly  
8 relevant was subject to the District Court's observation that it would  
9 tend to create more confusion than enlightenment in the minds of the  
10 jury . . . ." Id. at 127. The principles or reasoning in Hamlin  
11 concerning the inadmissibility of comparables has been followed by  
12 other federal and state courts. See, e.g., United States v. Ragsdale,  
13 426 F.3d at 776 (upholding the trial court's ruling that allegedly  
14 comparable visual materials purchased from a local adult video store  
15 chain and mainstream bookstores were not admissible evidence at trial  
16 because the material was not comparable enough to the tapes at issue  
17 at trial or the defense did not show the comparable materials were  
18 accepted within the community); United States v. Thevis, 490 F.2d 76,  
19 77 (5<sup>th</sup> Cir. 1974) (upholding the trial court's refusal to permit  
20 evidence of comparables and indicating that "[i]f expert testimony is  
21 not required to determine obscenity, it is certainly within the trial  
22 judge's discretion not to allow comparable evidence."); see also

23

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24 <sup>12</sup> In Hamling, the defendants sought the admission of, and the  
25 district court ultimately precluded, a film and two magazines as  
26 comparable materials. Hamling, 418 U.S. at 126. In affirming the  
27 trial court's decision on appeal, the Court of Appeals said that  
28 "the mere fact materials similar to the brochure at issue here 'are  
for sale and purchased at book stores around the country does not make  
them witnesses of virtue.'" Id.

28

1 United States v. Petrov, 747 F.2d 824, 831-32 (2d Cir. 1984); United  
2 States v. Various Articles of Merchandise, 750 F.2d 596, 599-600 (7th  
3 Cir. 1984); Womack v. United States, 294 F.2d 204, 206 (D.C. Cir.  
4 1961).

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7 Respectfully submitted,

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10 April 29, 2008 S/ Kenneth F. Whitted  
DATE

11 KENNETH F. WHITTED  
12 Trial Attorney  
13 Obscenity Prosecution Task Force  
14 United States Department of Justice

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2008, a copy of the following memorandum was hereby mailed to counsel for the defendant as follows: Roger Diamond, Esq., 2115 Main Street, Santa Monica, CA 90405.

S/ Kenneth F. Whitted

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