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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 IRA ISAACS,

16 Defendant.
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NO. CR-07-732-GHK

**PARTIES JOINT CONSOLIDATED
FILING CONTAINING PRETRIAL
MOTIONS AND MEMORANDA OF LAW**

20 Pursuant to the Court's Order, plaintiff United States of
21 America, by and through the United States Attorney for the Central
22 District of California, and the Defendant, Ira Isaacs, by and
23 through his counsel of record, Roger Jon Diamond, submit the
24 following joint consolidated brief relating to pretrial motions.
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1 **DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**

2 The Defendant, Ira Isaacs, submits the following motion and
3 memorandum of law to dismiss the indictment.

4 **I INTRODUCTION**

5 The United States Government began its investigation of
6 Defendant Isaacs in February of 2004. On January 9, 2006 Special
7 Agent Courtney B. Pillsbury of the Federal Bureau of Investigation
8 submitted an affidavit to United States Magistrate Judge Paul
9 Abrams to obtain a search warrant for the purpose of searching the
10 premises at 3699 Wilshire Boulevard, Suite 1290A, Los Angeles,
11 California 90010. On January 9, 2007 Judge Abrams issued a search
12 warrant for the premises (Magistrate Case No. 07-0019 M).

13 On January 17, 2007 numerous FBI Agents, five Los Angeles
14 police officers, Assistant U.S. Attorney Craig Missakian, and
15 Department of Justice trial attorney Sheila Phillips, executed the
16 search warrant at the premises. Substantial evidence was seized
17 pursuant to the search warrant and Defendant Isaacs was
18 interviewed. The case is being handled by the "Obscenity
19 Prosecution Task Force" which is part of the Department of Justice.
20 The director of the Obscenity Prosecution Task Force is Brent Ward.

21 On or about July 24, 2007 the United States Grand Jury for the
22 Central District of California handed down an 8 count Indictment
23 against Defendant Isaacs. The Government is also seeking
24 forfeiture.

25 Counts 1 through 4 charge violations of Title 18, United
26 States Code, Section 1465 (distribution of four allegedly obscene
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1 movies on May 11, 2004, July 21, 2006, October 20, 2006 and October
2 26, 2006).

3 Counts 5 and 6 of the Indictment charge violations of Title
4 18, United States Code, Section 1462(a) (delivery of obscene movies
5 on October 20 and October 26, 2006).

6 Counts 7 and 8 of the Indictment charge the Defendant with
7 violating Title 18, United States Code, Section 2257(f)(4),
8 shipping materials depicting sexual activity on October 20, 2006
9 without affixing a label indicating where certain documents may be
10 located. Finally, the Government seeks to forfeit Defendants'
11 property and proceeds from the shipment of such movies.

12 Defendant Isaacs was arraigned by the United States Magistrate
13 on August 27, 2007.

14 The Court has set trial by jury for February 26, 2008 and has
15 set a hearing on all pretrial motions for February 11, 2008.

16 **II STATEMENT OF THE CASE**

17 This motion to dismiss is not dependent upon the presentation
18 of any evidence. Rather, this motion is dependent upon the Court's
19 reading and consideration of the Indictment and applying the
20 applicable constitutional law to the Indictment. Thus, there is
21 no need to provide a summary of evidence or provide a factual
22 background. For purposes of this motion Defendant concedes that
23 he was and is in the business of distributing motion picture films.
24 The distribution of motion picture films can be done on the
25 Internet and with common carriers and the United States Post
26 Office. Defendant anticipates that the Government will concede that
27 if the statutes are unconstitutional the Indictment must be

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1 dismissed without the need for the presentation of evidence. If
2 necessary, Defendant asserts, and the Government will not deny,
3 that the distribution of the motion picture films in this case
4 involved consenting adults. The Government has no evidence that
5 Defendant Isaacs shipped any movies to minors or to any adult who
6 did not want to receive the materials. If the Government does not
7 concede these facts than the Defendant does respectfully reserve
8 the option of putting on limited evidence on these points.

9 **III ARGUMENT**

10 **A. A DISTRICT COURT MAY DISMISS AN INDICTMENT IF IT IS BASED**
11 **UPON A STATUTE UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED**

12 The current Attorney General of the U.S. of America is Michael
13 B. Mukasey. Attorney General Mukasey has had a distinguished
14 career. He served as a federal judge for many years. When he was
15 a private attorney he represented defendants charged with various
16 obscenity violations. In United States v. Carlin Communications,
17 Inc., 815 F.2d 1367 (10th Cir. 1987), Attorney General Mukasey, as
18 a private attorney, successfully moved to dismiss a 23 count
19 indictment in the United States District Court in Salt Lake City,
20 Utah, which indictment charged the defendants “. . . with various
21 federal obscenity crimes. . . .” The District Court’s dismissal
22 of the indictment in its entirety was affirmed by the U.S. Court of
23 Appeals for the Tenth Circuit in United States v. Carlin
24 Communications, supra. The law is clear that if the indictment in
25 this case does not cover the conduct described in the Indictment or
26 if the Indictment is facially invalid, the Court must dismiss the

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1 Indictment. Again, Defendant Isaacs does not anticipate that the
2 Government will disagree with this general proposition.

3 We will now go forward to analyze the two statutes in question
4 in this case. Whether facially or as applied, the statutes are
5 invalid and the Indictment must be dismissed.

6 **B. THE FEDERAL OBSCENITY STATUTES ARE UNCONSTITUTIONAL**
7 **FACIALLY AND/OR AS APPLIED**

8 Counts 1 through 4 charge violations of Title 18, United States
9 Code, Section 1465, and Counts 5 and 6 charge violations of Title
10 18, United States Code, Section 1462(a). For purposes of this
11 motion the two statutes will be considered together. Section 1462
12 and Section 1465 are both part of Chapter 71 of the United States
13 Code, which deals with the general subject of "obscenity."

14 Section 1462(a) provides, in part, as follows:

15 "Whoever brings into the United
16 States . . . or knowingly uses any
17 express company or other common
18 carrier or interactive computer
19 service . . . for carriage in
20 interstate or foreign commerce -
21 (a) Any obscene, lewd,
22 lascivious, or filthy book, pamphlet,
23 picture, motion - picture film,
24 paper, letter, writing, print, or
25 other matter of indecent character...
26 Shall be fined . . . or imprisoned
27 not more than five years, or
28 both...."

Count 5 alleges that Isaacs violated this statute on October
20, 2006 with respect to a movie titled "Hollywood Scat Amateurs
No. 7."

1 Count 6 of the Indictment alleges that Defendant Isaacs
2 violated Section 1462 (a) on October 26, 2006 with respect to the
3 motion picture film entitled "BAE 20."

4 Section 1465 provides, in part, as follows:

5 "Whoever knowingly . . . Uses a
6 facility or means of, interstate or
7 foreign commerce or an interactive
8 computer service . . . for the
9 purpose of sale or distribution of
10 any obscene, lewd, lascivious, pr
filthy book, pamphlet, picture, film
. . . or any other matter of indecent
or immoral character, shall be fined
under this Title or imprisoned not
more than five years, or both."

11 The defendants in the case of United States v. Extreme
12 Associates, Inc., 352 F.Supp.2d 578 (D.C. W.D. Pa. 2005) were
13 facing identical charges. The defendants in that case were in the
14 business of producing and selling sexually explicit films. The
15 defendants in that case filed a motion to dismiss the indictment on
16 the ground that the federal obscenity statutes infringed on the
17 rights of liberty and privacy guaranteed by the Due Process Clause
18 of the United States Constitution. District Judge Gary L.
19 Lancaster, in a brilliant decision, granted the defendants' motions
20 and dismissed the indictment. The defendants conceded, for
21 purposes of their motion, that the films involved in the case were
22 obscene within the meaning of the applicable federal statutes as
23 defined by the United States Supreme Court in Miller v. California,
24 413 U.S. 15 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

25 The District Court in a careful analysis of the applicable
26 case law concluded that the federal obscenity laws do not survive
27 the strict scrutiny test . The District Court followed very

1 carefully the recent decision of the United States Supreme Court in
2 Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508
3 (2003).

4 The District Court noted the Government's argument that even
5 after Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d
6 542 (1969) (Supreme Court holds a state cannot make the mere
7 private possession of obscene matter in one's home a crime) the
8 Supreme Court refused to recognize a correlative First Amendment
9 right to distribute such material. The Government, the District
10 Court noted, relied upon a number of United States Supreme Court
11 decisions and those were set forth in the opinion of the District
12 Court. However, the District Court very carefully distinguished
13 all of the Supreme Court decisions upon which the Government
14 relied. After reviewing all of the Supreme Court cases upon which
15 the Government relied, the District Court noted that the Supreme
16 Court had never considered a substantive due process challenge to
17 the federal obscenity statute. The District Court then proceeded
18 to discuss the federal obscenity statutes in light of the recent
19 decision of the United States Supreme Court in Lawrence v. Texas,
20 supra. While disclaiming any complete reliance upon Lawrence v.
21 Texas, the District Court noted that the Lawrence case was
22 important because the Lawrence case did stand for the proposition
23 that public morality was not a legitimate state interest sufficient
24 to justify infringing on adult, private, consensual, sexual conduct
25 even if that conduct is deemed offensive to the general public's
26 sense of morality. The District Court concluded that the federal
27 obscenity statute did place a burden on an individual's fundamental

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1 right to read, view, or think what one wants to in the privacy of
2 his own home." The District Court stated that the "upholding of
3 the public sense of morality is not even a legitimate state
4 interest that can justify infringing one's liberty interest to view
5 sexually explicit material in private.

6 The District Court expressly rejected the Government's
7 argument that a total ban on sexually explicit material was
8 necessary in order to prevent that material from being viewed by
9 others in places other than private locations. The District Court
10 also rejected the Government's argument that the federal obscenity
11 statutes could be justified by the goal of keeping obscene
12 materials from minors. The District Court quite correctly pointed
13 out that there are numerous ways to protect minors from exposure to
14 obscene materials that are less restrictive than a complete ban on
15 the distribution of such material to consenting adults.

16 The District Court then reached the following conclusion:

17 "We find that the federal obscenity
18 statutes burden an individual's
19 fundamental right to possess, read,
20 observe, and think about what he
21 chooses in the privacy of his own
22 home by completely banning the
23 distribution of obscene materials.
24 As such, we have applied the strict
25 scrutiny test to those statutes. The
26 federal obscenity statutes fail the
27 strict scrutiny test because they are
28 not narrowly drawn to advance the
asserted governmental interests of
protecting minors and unwitting
adults from exposure to obscene
materials, as applied to these
defendants and the facts of this
case. Because the federal obscenity
statutes are unconstitutional as
applied, defendants' indictment must
be dismissed."

1 Defendant Isaacs believes the decision of the District Court
2 for the Western District of Pennsylvania is right on the mark.
3 Obviously this Court is not bound to follow the decision but is
4 certainly free to consider it for whatever persuasive authority it
5 has. Defendant Isaacs submits that the decision is extremely
6 persuasive. It makes sense and should be followed by this Court.

7 It is true that the United States Court of Appeals for the
8 Third Circuit reversed the District Court and reinstated the
9 obscenity charges. On December 8, 2005 the Third Circuit filed its
10 decision in United States v. Extreme Associates, 431 F.3d 150 (3rd
11 Cir. 2005). The Third Circuit reversed the District Court because
12 the Third Circuit was of the opinion that the United States Supreme
13 Court has already spoken on the issue of the constitutionality of
14 federal obscenity statutes. The Third Circuit criticized the
15 District Court for utilizing Lawrence v. Texas, supra. The Third
16 Circuit felt that the cases distinguished by the District Court
17 were not distinguishable.

18 With all due respect to the Third Circuit, the decision of
19 which is not binding on this Court, Defendant Isaacs respectfully
20 submits that the Third Circuit got it wrong. The most recent
21 discussion of the general issue of public morality and whether it
22 is a legitimate interest to consider is contained in the most
23 recent United States Supreme Court decision in Lawrence v. Texas,

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1 supra, and that decision should have persuaded the Third Circuit
2 that the District Court's analysis was proper. ¹

3 **C. TITLE 18, UNITED STATES CODE, SECTION 2257(f)(4), IS**
4 **UNCONSTITUTIONAL**

5 Counts 7 and 8 of the Indictment charged Defendant Isaacs with
6 violating Title 18, United States Code, Section 2257(f)(4) on
7 October 20, 2006 with respect to the alleged shipment of two
8 movies, "Hollywood Scat Amateurs Number Seven," and "Laurie's
9 Toilet Show." The specific allegation is that the movies were
10 shipped without the appropriate label describing where required age
11 documentation records for all performers depicted in the movies
12 could be located. There is no contention by the Government that
13 the age documentation records were not kept by Defendant as
14 required by law. The only claim is that the movies themselves did
15 not have the label describing the location of the required age
16 documentation records. It also must be noted that there is no
17 contention that the performers in the movies were not adults. So,
18 the performers were adults and the records of those performers were
19 properly kept. All we are talking about here is labeling.

20 Title 18, United States Code, Section 2257(f)(4), provides, in
21 part, as follows:

22 "It shall be unlawful -
23 . . . for any person knowingly to
24 . . . transfer . . . any . . . film

25 ¹ While it is true the Supreme Court of the United States
26 denied certiorari in Extreme Associates, Inc., v. United States, 126
27 S.Ct. 2048 (2006), the denial of certiorari is not an indication as
to how the Supreme Court views a particular issue. The denial of
certiorari is without legal significance.

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. . . which -
(A) Contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and
(B) Is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;
Which does not have affixed thereto, in the manner prescribed as set forth in subsection (e) (1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept. . . .”

By virtue of Section 2257(i), a violation of the section is punishable by imprisonment for five years. Also a fine may be imposed. A challenge was made to Title 18, United States Code, Section 2257 in the United States District Court for the Northern District of Ohio. Producers of sexually explicit videos challenged the constitutionality of the law by filing a civil suit against the Government. The case was filed in September of 1995. After earlier proceedings in the District Court and in the Sixth Circuit, the case was finally returned to the District Court. The Government moved for dismissal and for summary judgment. The District Court granted the Government’s motion for summary judgment and the plaintiffs who were challenging the constitutionality of the statute appealed to the United States Court of Appeals for the Sixth Circuit.

On October 23, 2007 in the case of Connection Distributing Co., v. Keisler, ____ F.3d ____ (6th Cir. 2007), United States Court

1 of Appeals for the Sixth Circuit reversed the judgment that had
2 been granted in favor of the Government and remanded the case to
3 the District Court with instructions to enter judgment for the
4 plaintiffs.

5 The Sixth Circuit began its analysis of the statute by first
6 examining the statutory provisions and then discussed the concept
7 of facial overbreadth. The Court stated,

8 "The overbreadth doctrine allows a
9 party to challenge a statute on its
10 face, even if the statute would be
11 considered constitutional as applied
12 to that party. . . ." (Slip Opinion,
13 p. 7).

14 The Sixth Circuit rejected the Government's argument that the
15 record keeping requirement was only aimed at conduct. The Court
16 stated that in effect the statute was "regulating protected speech
17 in order to get a conduct."

18 Relying upon the decision of the United States Supreme Court
19 in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) the Court
20 concluded that the statute swept up too much free speech activity.
21 The Court noted,

22 "Producers are also chilled if they
23 are aware that the statute applies to
24 all photographs of such conduct.
25 The court concluded that the record
26 keeping statute failed to the test of
27 overbreadth."

28 The Court stated at p. 13 of the Slip Opinion:

" . . . The burden this record keeping
statute places on protected speech is
large; the statute unquestionably
chills speech, particularly because
violations are felonies punishable by
up to five years in prison and a
mandatory two years with a maximum of

1 stated, are the inadvertent failure to include the label on the
2 box. For this inadvertent action Defendant Isaacs is facing five
3 years imprisonment on each count.

4 This Honorable Court should dismiss Counts 7 and 8 of the
5 Indictment whether or not it dismisses Counts 1 through 6. The
6 inclusion of Counts 7 and 8 contaminate Counts 1 through 6. The
7 jury will be prejudiced because Counts 7 and 8 deal with child
8 pornography, but Counts 1 through 6 do not. The Government will
9 confuse the jury by including Counts 7 and 8 in this case and by
10 presenting evidence. If the Indictment is not dismissed with
11 respect to Counts 7 and 8 and it is later determined that the
12 statute is unconstitutional, any conviction of the Defendant with
13 respect to Counts 1 through 6 will have been tainted by the
14 inclusion of evidence with respect to Counts 7 and 8.

15 **IV CONCLUSION**

16 For the foregoing reasons, Defendant Ira Isaacs respectfully
17 asks this Honorable Court to dismiss Counts 1 through 8. At a
18 minimum, the Court should dismiss Counts 7 and 8. The statute is
19 clearly unconstitutional.²

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23 ² If the Court is not willing to dismiss Counts 7 and 8 now
24 the Court should sever Counts 7 and 8 and try the case separately from
25 Counts 1 through 6. In that way the Court will be ensuring that
26 Defendant Isaacs suffers no prejudice with respect to Counts 1 through
27 6. Defendant Isaacs may very well have violated Title 18, United
States Code, Section 2257, but the violation was inadvertent and the
purpose for the statute is not furthered by prosecuting Isaacs in this
case. The Indictment with respect to Counts 7 and 8 amounts to
Government overreaching.

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1 **GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION AND**
2 **MEMORANDUM OF LAW TO DISMISS THE INDICTMENT**

3 The United States of America, by and through the United States
4 Attorney for the Central District of California, submits the
5 following memorandum of law in opposition to the Defendant's Notice
6 of Motion for Order Dismissing Indictment and corresponding
7 Memorandum of Points and Authorities.

8 **FACTUAL BACKGROUND**

9 On May 11, 2004, Agent Mark Hunter used an undercover credit
10 card and purchased from the internet website www.scatmovies.com
11 movie "# 521," entitled "Gang Bang Horse 'Pony Sex Game'." This
12 movie was purchased by computer in California from Defendant Ira
13 Isaacs and his California-based business LA Media for delivery to
14 an undercover address in California. The DVD was shipped from LA
15 Media by Federal Express.

16 On July 21, 2006, Agent William McDermott used an undercover
17 credit card and purchased from the internet website
18 www.scatmovies.com movie "#1562," entitled "Mako's First Time
19 Scat." This movie was purchased by computer in Virginia from
20 Defendant Ira Isaacs and LA Media for delivery to an undercover
21 address in California. The DVD was delivered from LA Media by
22 United Parcel Service.

23 On October 20, 2006, Agent James Myrick used an undercover
24 credit card and purchased from the internet website
25 "www.stolencarfilms.com" movie "#1203," entitled "Hollywood Scat
26 Amateurs No. 7," and movie #751, entitled "Laurie's Toilet Show."
27 These movies were purchased by computer in Virginia from Defendant
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1 Ira Isaacs and LA Media for delivery to an undercover address in
2 Virginia. The DVDs were sent from LA Media by United Parcel
3 Service. Both of these movies did not have a statement affixed
4 thereto which identified the location of the seller's records
5 pertaining to the identity of the movie's participants involved in
6 sexually explicit conduct.

7 On October 25, 2006, Agent Myrick used an undercover credit
8 card, and purchased and captured (downloaded) movie "#1083,"
9 entitled "BAE 320." This movie was downloaded by computer in
10 Virginia from Defendant Isaac and LA Media's internet website
11 www.scatcinemax.com. This movie also did not have a statement
12 affixed thereto which identified the location of the seller's
13 records concerning the identity of the movie's participants that
14 were involved in sexually explicit conduct.

15 On July 24, 2007, Defendant Ira Isaacs was indicted (CR: 07-
16 732 GHK) on four counts of 18 U.S.C. § 1465 (counts one through
17 four), two counts of 18 U.S.C. § 1462(a) (counts five and six), two
18 counts of 18 U.S.C. § 2257(f) (4) (counts seven and eight), and one
19 count of 18 U.S.C. § 1467 (forfeiture allegation). The counts
20 charging 18 U.S.C. § 1462(a) and 18 U.S.C. § 1465 relate to the
21 defendant's sale and intrastate or interstate distribution of four
22 movies that the government alleges are obscene and in violation of
23 the obscenity laws of the United States.³ These movies are "Gang
24 Bang Horse 'Pony Sex Game,'" "Mako's First Time Scat," "Hollywood

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26 ³ The federal obscenity statutes, 18 U.S.C. §§ 1461, 1462, and
27 1465, proscribe the use of the mails, express delivery services or
28 interactive computer services for the transportation or delivery of
obscene material.

1 Scat Amateurs No. 7," and "BAE 320." The counts charging 18 U.S.C.
2 § 2257(f)(4) relate to the defendant's sale and transfer of
3 sexually explicit material, specifically the movies "Hollywood Scat
4 Amateurs No. 7" and "Laurie's Toilet Show," without a required
5 statement concerning the location of records affixed thereto. The
6 count of 18 U.S.C. § 1467 relates to the defendant's forfeiture of
7 assets in the event he is adjudicated guilty at trial.

8 Relevant portions of the charged federal obscenity or record-
9 keeping statutes are:

10 Section 1462 states:

11 Whoever brings into the United States ... or knowingly
12 uses any express company or other common carrier or
13 interactive computer service ... for carriage in
14 interstate or foreign commerce-(a) any obscene, lewd,
15 lascivious, or filthy book, pamphlet, picture, motion-
16 picture film, paper, letter, writing, print or other
17 matter of indecent character; or (b) any obscene, lewd,
18 lascivious, or filthy phonograph recording, electrical
19 transcription, or other article or thing capable of
20 producing sound ... or [w]hoever knowingly takes or
21 receives, from such express company or other common
22 carrier or interactive computer service ... any matter or
23 thing the carriage or importation of which is herein made
24 unlawful-[s]hall be fined under this title or imprisoned
25 not more than five years, or both, for the first such
26 offense and shall be fined under this title or imprisoned
27 not more than ten years, or both, for each such offense
28 thereafter.

18 U.S.C. § 1462.

21 Section 1465 states:

22 Whoever knowingly transports or travels in, or uses a
23 facility or means of, interstate or foreign commerce or
24 an interactive computer service ... in or affecting such
25 commerce for the purpose of sale or distribution of any
26 obscene, lewd, lascivious, or filthy book, pamphlet,
27 picture, film, paper, letter, writing, print, silhouette,
28 drawing, figure, image, cast, phonograph recording,
electrical transcription or other article capable of
producing sound or any other matter of indecent or

1 immoral character, shall be fined under this title or
2 imprisoned not more than five years, or both ...

3 18 U.S.C. § 1465.

4 Section 2257 states:

5 (a) Whoever produces any book, magazine, periodical,
6 film, videotape, digital image, digitally- or computer-
7 manipulated image of an actual human being, picture, or
8 other matter which (1) contains one or more visual
9 depictions made after November 1, 1990 of actual sexually
10 explicit conduct; and (2) is produced in whole or in part
11 with materials which have been mailed or shipped in
12 interstate or foreign commerce, or is shipped or
13 transported or is intended for shipment or transportation
14 in interstate or foreign commerce; shall create and
15 maintain individually identifiable records pertaining to
16 every performer portrayed in such a visual depiction . .
17 . (f) It shall be unlawful . . . (4) for any person
18 knowingly to sell or otherwise transfer, or offer for
19 sale or transfer, any book, magazine, film, video, or
20 other matter . . . which has been mailed or shipped in
21 interstate or foreign commerce, which (A) contains one or
22 more visual depictions made after the effective date of
23 this subsection of actual sexually explicit conduct; and
24 (B) is . . . shipped in interstate or foreign commerce .
25 . . . which does not have affixed thereto, in a manner
26 prescribed as set forth in subsection (e)(1), a statement
27 describing where the records required by this section may
28 be located

18 U.S.C. § 2257.

18 **ARGUMENT**

19 **I. THE STATUTES CHARGING THE DEFENDANT WITH THE OBSCENITY**
20 **VIOLATIONS ARE CONSTITUTIONAL.**

21 Defendant Ira Isaacs, in principal reliance on *United States*
22 *v. Extreme Associates*, 352 F.Supp.2d 578 (W.D.Pa 2005) and *Lawrence*
23 *v. Texas*, 539 U.S. 558 (2003), claims in his "Notice of Motion for
24 Order Dismissing the Indictment; Memorandum of Points and
25 Authorities" that the four counts of 18 U.S.C. § 1465 and two
26 counts of 18 U.S.C. § 1462(a) charged in the indictment should be
27 dismissed, in substance, because these statutes infringe on the

1 liberty and privacy rights guaranteed by the United States
2 Constitution. This contention lacks merit.

3 First, the two primary cases upon which the defendant believes
4 demonstrate that certain counts of the indictment, under a
5 substantive due process or right to privacy type of analysis,
6 should be dismissed provide no reasonable basis for dismissal. The
7 district court ruling in *United States v. Extreme Associates*, 352
8 F.Supp.2d 578 (W.D.Pa 2005) (*Extreme Associates I*) has specifically
9 been overruled by the Third Circuit in *United States v. Extreme*
10 *Associates*, 431 F.3d 150,155 (3rd Cir. 2005) (*Extreme Associates*
11 *II*). Moreover, the logic within the district court's decision in
12 *Extreme Associates I*, see *Extreme Associates I*, 352 F.Supp.2d at
13 591, suggesting that the effect of *Lawrence v. Texas*, 539 U.S. 558
14 (2003) - that is, the premise that the government can no longer
15 rely on the advancement of a moral code as a legitimate or
16 compelling state interest to uphold a federal statute - somehow
17 negates the constitutionality of federal obscenity statutes has
18 also been specifically rejected by the Third Circuit. See *Extreme*
19 *Associates II*, 431 F.3d at 161.

20 Clearly, the Supreme Court of the United States has repeatedly
21 and explicitly upheld the constitutionality of federal statutes
22 regulating the distribution of obscenity while, pursuant to *Stanley*
23 *v. Georgia*, 394 U.S. 557, 567-68 (1969), maintaining an
24 individual's right to possess, read, and observe obscene material
25 in the privacy of the individual's home. These cases include *Smith*
26 *v. United States*, 431 U.S. 291, 309 (1977); *Hamling v. United*
27 *States*, 418 U.S. 87, 116-18 (1974); *United States v. Reidel*, 402

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1 U.S. 351, 354-56 (1971); *United States v. Thirty-Seven (37)*
2 *Photographs*, 402 U.S. 363, 376 (1973); *United States v. 12 200-Ft.*
3 *Reels of Super 8mm Film*, 413 U.S. 123, 126-29 (1973); *United States*
4 *v. Orito*, 413 U.S. 139, 141-42 (1973); *Paris Adult Theatre I v.*
5 *Slaton*, 413 U.S. 49, 69 (1973).⁴ The 9th Circuit has also upheld
6 the constitutionality a federal obscenity statute's ability to
7 prohibit the distribution of obscene material. See, e.g., *United*
8 *States v. Hurt*, 795 F.2d 765, 769-70 (9th Cir. 1986) (finding that
9 the statute prohibiting the use of mails for delivery of obscene
10 materials, 18 U.S.C. § 1461, could constitutionally be applied to a
11 person using mails for the order and delivery of obscene materials
12 for personal use in his own home); *United States v. Miller*, 505
13 F.2d 1247, 1247 (9th Cir. 1974) (finding 18 U.S.C. § 1461 is not
14 void for vagueness).⁵

15 Furthermore, with respect to the issue of whether any legal
16 precedent, such as *Lawrence*, truly invalidates the
17 constitutionality of any federal obscenity statute, the Supreme
18 Court has explicitly directed that "[i]f a precedent of this Court
19 has direct application in a case, yet appears to rest on reasons
20 rejected in some other line of decisions, the Court of Appeals
21

22 ⁴ In denoting a distinction between what is constitutionally
23 protected conduct in the home, as enunciated in *Stanley*, and what may
24 be prohibited in public, the Supreme Court in *Orito* indicated that
25 "[i]t is hardly necessary to catalog the myriad activities that may
be lawfully conducted within the privacy and confines of the home, but
may be prohibited in public. *Orito*, 413 U.S. at 142-43.

26 ⁵ See also *United States v. Levinson*, 959 F.2d 242 (9th Cir.
27 1992) (upholding 18 U.S.C. § 1461, a statute prohibiting the use of
U.S. mails to distribute obscenity, from a challenge claiming that the
statute is overbroad and vague) (unpublished opinion).

1 should follow the case which directly controls, leaving to this
2 Court the prerogative of overruling its own decisions." *Rodriguez*
3 *de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484
4 (1989). The Supreme Court, in *Agostini v. Felton*, 521 U.S. 203,
5 237 (1997), also articulated this position to lower courts, stating
6 "[w]e do not acknowledge, and we do not hold, that other courts
7 should conclude our most recent cases have, by implication,
8 overruled an earlier precedent." Therefore, the defendant's
9 desire, under a substantive due process or right to privacy type of
10 analysis, to eviscerate numerous years of Supreme Court and other
11 legal precedent upholding federal obscenity statutes based upon an
12 interpretation of *Lawrence* that the government cannot advance a
13 moral code as a legitimate state interest, and based upon the
14 defendant's desire to create a right to distribute obscenity from
15 the protections of viewing obscenity in the home as enunciated in
16 *Stanley*, as well as from constitutionally protected legal rights
17 associated with intimate relationships, such as the privacy of
18 marriage, motherhood, procreation, and child rearing, is
19 misplaced.⁶

20 The defendant's additional reliance on, or suggestion in his
21 motion that, *United States v. Carlin Communications, Inc.*, 815 F.2d

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23 ⁶ Contrary to what the defendant suggests in his motion, the
24 concept that *Lawrence* eliminated the government's ability in federal
25 obscenity cases to advance as a legitimate state interest the need to
26 protect society, and even children, from obscenity in the stream of
27 commerce also seems weakened, at least somewhat, by the Supreme
28 Court's long-standing implication that "the authority of Congress to
keep the channels of interstate commerce free from immoral and
injurious uses has been frequently sustained, and is no longer open
to question." *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

1 1367 (10th Cir. 1987), somehow supports his contention that the
2 federal obscenity statutes are unconstitutional is inapposite. In
3 *Carlin*, the defendants were charged with federal obscenity crimes
4 in connection with the operation of a "dial it" telephone service
5 whereby persons could call a New York City telephone number and
6 listen to a sexually suggestive, pre-recorded message. *Id.* at
7 1367-68. The only germane issue on appeal in *Carlin* was whether or
8 not the "dial-it" service, which offered callers who chose to dial
9 the opportunity to hear the pre-recorded telephone messages of a
10 sexually explicit nature, violated the provisions of 18 U.S.C. §§
11 1462 and 1465, and 47 U.S.C. Section 223(a). *Id.* The Tenth
12 Circuit ultimately ruled that Sections 1462 and 1465 relate only to
13 the transportation of tangible objects or sound-producing devices,
14 not the transmission of sound itself. *Id.* at 1371. Therefore, the
15 court determined that dismissal of the indictment against the
16 defendants, whose conduct essentially involved the transportation
17 of sound, was appropriate because their conduct did not fall within
18 the proscriptions of the obscenity statutes. *Id.* Accordingly, the
19 defendant's reliance on *Carlin* is inapposite.

20 Defendant Isaacs also contends that this Court should
21 determine that the statute, 18 U.S.C. § 2257, is unconstitutional
22 and that as a consequence counts seven and eight of the indictment,
23 which charge a violation of Section 2257(f)(4) of Title 18, must be
24 dismissed. In a very conclusory fashion the defendant premises
25 this contention exclusively on the decision of the United States
26 Court of Appeals for the Sixth Circuit in *Connection Distributing*

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1 *Company v. Keisler*, 505 F.3d 545 (6th Cir. 2007) (petition for
2 rehearing *en banc* filed by the United States January 7, 2008).

3 In the *Connection Distributing* case a panel of the Sixth
4 Circuit Court of Appeals held Section 2257 unconstitutional, both
5 facially and as applied to the defendants in that case,⁷ because
6 the statute could criminalize the activity of private individuals,
7 e.g. a married couple who film themselves engaging in sexually
8 explicit conduct for private use in their own home, if such
9 individuals fail to create and maintain the age and identity
10 verification documents required by the statute. *Connection*
11 *Distributing Company v. Keisler*, 505 F.3d at 551-552. Such a
12 construction or application of the statute, the 6th Circuit panel
13 held, would render the statute unconstitutionally overbroad. *Id.*
14 at 564. Noting that the decision in *Connection* is not binding on
15 this Court, the defendant nonetheless asks this Court to adopt the
16 6th Circuit's decision, hold 18 U.S.C. § 2257 unconstitutional and
17 dismiss those counts. This request should be denied.

18 In 1986, the Attorney General's Commission on Pornography
19 found that "child pornography is extraordinarily harmful both to
20 the children involved and to society" and warned that "dealing with
21 child pornography in all its forms ought to be treated as a
22 governmental priority of the greatest urgency." Attorney General's
23 Commission on Pornography, Final Report, 417-418 (July, 1986)
24 ("Final Report"). In particular, the Commission found that

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26 ⁷ The United States has filed a petition for rehearing and
27 rehearing *en banc* of this 6th Circuit decision in *Connection*
28 *Distributing Co. v. Mukasey* (No. 06-3822).

1 "[p]ornographers use minors as performers in films and other visual
2 depictions." *Id.* at 618. To close that loophole in existing law,
3 the Commission recommended that "Congress should enact a statute
4 requiring the producers, retailers or distributors of sexually
5 explicit visual depictions to maintain records containing . . .
6 proof of performers' ages." Recommendation No. 37, *id.* at 618.
7 Congress adopted the Commission's recommendation, and in 1988
8 enacted 18 U.S.C. § 2257, which establishes a comprehensive record-
9 keeping system for verification of the age of performers used in
10 the pornography industry.⁸

11 In its current form, the record-keeping statute provides that
12 all producers of matter containing visual depictions of "actual
13 sexually explicit conduct . . . shall create and maintain
14 individually identifiable records pertaining to every performer
15 portrayed in such a visual depiction." 18 U.S.C. § 2257(a)(1),
16 (b). Those records must contain the names (including aliases) and
17 date of birth of the performers portrayed in the depictions, and
18 the date of birth must be established "by examination of an
19 identification document containing such information" 18
20 U.S.C. § 2257(b)(1). The statute requires that the records be
21 maintained at the producer's business premises or as elsewhere
22 permitted by regulations, and that the records be made available
23 "to the Attorney General for inspection at all reasonable times."
24 *Id.* § 2257(c). The statute also provides that producers must affix

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26 ⁸ Section 2257 was first enacted as part of the Child
27 Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690,
28 102 Stat. 4487-89.

1 to each copy of material covered by its provisions a statement
2 describing where the sexual performers' age verification records
3 may be located. *Id.* § 2257(e)(1). Furthermore, the statute makes
4 it unlawful for any person to sell or otherwise transfer . . . any
5 book, magazine, film, video, or other matter . . . which does not
6 have affixed thereto, in a manner prescribed as set forth in
7 subsection (e)(1), a statement describing where the records
8 required by this section may be located. *Id.* § 2257(f)(4).

9 As originally enacted in 1988, the record-keeping requirements
10 applied to the producers of "a book, magazine, periodical, film, or
11 video tape" 18 U.S.C. § 2257(2)(A)(ii) (1988). In 2003,
12 Congress in the Prosecutorial Remedies and Other Tools to End the
13 Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117
14 Stat. 650 ("PROTECT Act"), amended Section 2257 to confirm that the
15 record-keeping requirements apply to digital pornography because
16 "the vast majority of child pornography prosecutions today involve
17 images contained on computer hard drives, computer disks, and/or
18 related media." PROTECT Act, § 501(6). Responding in particular
19 to the explosion of pornography on the Internet, Congress extended
20 Section 2257's record-keeping obligations to include the producers
21 of any picture, digital image, or digitally or computer
22 manipulated image. *Id.* § 511(2) (now codified at 18 U.S.C.
23 § 2257(h)(2)).

24 The record-keeping statute's requirements do not apply to all
25 sexually related images, but only to depictions of "actual sexually
26 explicit conduct," which it limits to five specific types of actual
27 sexual conduct: (1) "sexual intercourse, including genital-

1 genital, oral-genital, anal-genital, or oral-anal" sex, whether
2 between persons of the same or opposite sex, (2) "bestiality," (3)
3 "masturbation," (4) "sadistic or masochistic abuse," and (5) the
4 "lascivious exhibition of the genitals or pubic area of any
5 person." *Id.*, § 2257(h)(1) (incorporating the definitions
6 contained in 18 U.S.C. § 2256(2)(A) (i-v)).⁹

7 Only the producers of depictions of sexually explicit conduct
8 are subject to the record-keeping requirements. Producing includes
9 "actually filming, videotaping, photographing, creating a picture,
10 digital image, or digitally- or computer-manipulated image of an
11 actual human being," "digitizing an image of a visual depiction of
12 sexually explicit conduct," "assembling, manufacturing, publishing,
13 duplicating, reproducing, or reissuing" hard-copy or digital
14 depictions of actual sexually explicit conduct, or "inserting on a
15 computer site or service a digital image of, or otherwise managing
16 the sexually explicit content, of a computer site or service that
17 contains a visual depiction of, sexually explicit conduct." 18
18 U.S.C. § 2257(h)(2)(A) (i)-(iii). Producing does not, however,
19 include photo processing, distribution, or any other activity not
20 listed within the statutory definition which "does not involve
21 hiring, contracting for, managing, or otherwise arranging for the

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23 ⁹ The definition of "actual sexually explicit conduct" was
24 amended in the most recent changes to Section 2257. See *Adam Walsh
25 Child Protection and Safety Act of 2006*, § 502, 120 Stat. 587, 625-626
26 ("the 2006 Act").

27 The 2006 Act also added a new provision, 18 U.S.C. § 2257A, to
28 extend the age verification and documentation requirements to sexual
performers depicted in images of simulated sexually explicit conduct.
Adam Walsh Child Protection and Safety Act of 2006, § 503, 120 Stat.
587, 626-629.

1 participation of the performers depicted." *Id.* § 2257(h)(2)(B).
2 Nor does it include either "the provision of a telecommunications
3 service, or of an Internet access service or Internet information
4 location tool," or "the transmission, storage, retrieval, hosting,
5 formatting, or translation (or any combination thereof) of a
6 communication, without selection or alteration of the content of
7 the communication . . ." *Id.* § 2257(h)(2)(B)(iv)-(v).

8 Section 2257 generally provides that the Attorney General may
9 "issue appropriate regulations to carry out this section." 18
10 U.S.C. § 2257(g).¹⁰ Pursuant to this statutory authority, the
11 Attorney General has issued regulations implementing the record-
12 keeping requirements. 28 C.F.R. pt. 75.

13 Section 2257 generally provides that no information or
14 evidence obtained from required records shall be used "directly or
15 indirectly" as evidence against any person with respect to any
16 violation of law. 18 U.S.C. § 2257(d)(1). The records may be
17 relied upon, however, as evidence in a prosecution for a violation
18 of Section 2257 itself, for a violation of chapter 71 (defining
19 crimes relating to obscenity and child pornography), "or for a
20 violation of any applicable provision of law with respect to the
21 furnishing of false information." *Id.* § 2257(d)(2). Persons
22 violating Section 2257 are subject to fines and imprisonment, with
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¹⁰ In addition, the Attorney General is empowered to specify:
25 (1) any additional identifying information to be contained in the
26 records required by the statute, *id.*, § 2257(b)(3), (2) the places
27 where such records are to be kept, *id.* § 2257(c), and (3) the manner
and form of the statement describing where the required records may
be located, *id.* § 2257(e)(1).

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1 a maximum sentence of five years for a first offense. *Id.* § 2257(i).

2 Despite the defendant's argument to the contrary and despite
3 the 6th Circuit's decision in *Connection Distributing Company v.*
4 *Keisler*, 505 F.3d 545 (6th Cir. 2007), this Court should conclude
5 that 18 U.S.C. § 2257 is constitutionally sound for several
6 reasons. First, "[f]ederal statutes are to be so construed as to
7 avoid serious doubt of their constitutionality." *International*
8 *Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961); see also
9 *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) ("When a federal
10 court is dealing with a federal statute challenged as overbroad, it
11 should, of course, construe the statute to avoid constitutional
12 problems, if the statute is subject to such a limiting
13 construction."). Accordingly, it is a "'cardinal principle' that
14 we should seek statutory constructions which avoid constitutional
15 doubts" when such a construction is fairly possible." *Chelsea*
16 *Community Hosp. v. Michigan Blue Cross Ass'n*, 630 F.2d 1131, 1135
17 (6th Cir. 1980).

18 "Congress passed the Act [18 U.S.C. § 2257] in order to
19 prevent the use of underage performers in the production of
20 sexually explicit materials." *American Library Ass'n v. Reno*, 33
21 F.3d 78, 87 (D.C. Cir. 1994) ("ALA"). By requiring proof of age
22 for sexual performers at each stage of pornography production, the
23 Act prevents the use of minors as sexual performers in an industry
24 where the models, overwhelmingly, are young, and it thereby
25 "advance[s] the abatement of child pornography in fundamental
26 ways." *Id.* at 88. The text, purpose and history of the Act all
27 show that 18 U.S.C. § 2257 targets commercial pornography, and is

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1 not meant to reach images created by individuals for their own
2 private use in the home. Textually, the Act is directed at
3 participants in the professional pornography industry; the models
4 are "sexual performers" who must provide their "alias, nickname,
5 stage, or professional name" (18 U.S.C. § 2257(b)(2)), and the
6 producer's relationship with the performer is described as "hiring,
7 contracting for, managing and otherwise arranging for the depiction
8 of" the performer (*id.* § 2257(h)(2)(B)(iii)). Records must be
9 kept for "every performer portrayed" (suggesting multiple
10 performers); a disclosure statement is to be affixed to "every
11 copy" of covered sexually explicit material (suggesting multiple
12 copies); a disclosure statement is to be affixed to any book,
13 magazine, periodical, film, video, or other matter describing where
14 the records required by this section may be located (suggesting
15 multiple copies); and producers working with images already in
16 existence by definition produce explicit materials "intended for
17 commercial distribution." *Id.* § 2257(a), (e)(1), (f)(4),
18 (h)(2)(A)(ii). Age records are to be maintained at the producer's
19 "business premises" and made available for government inspection
20 without warrant. *Id.* § 2257(c).

21 Structurally as well, the Act serves its law enforcement and
22 deterrent purposes only in the context of commercially-available
23 images. The Act prevents minors from being used as sex models in
24 the pornography industry by requiring an image's creator to
25 "actually confirm that a prospective performer is of age; it deters
26 children from attempting to pass as adults; and, most important,
27 creates the only mechanism" through which pornographers compiling

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1 images obtained from others "can be required to verify the ages of
2 the individuals pictured in the materials they will be producing."
3 *ALA*, 33 F.3d at 89. The legislative history of the Act underscores
4 that Congress intended to regulate the pornography industry, rather
5 than the citizenry at large. The statute was proposed by the 1986
6 Pornography Commission, which described the legislation as reaching
7 anyone "engaged in the sale or trade of sexually explicit material"
8 so that minors could be protected "through every level of the
9 pornography industry." *Final Report* at 619. The Act is thus
10 properly construed as applying to images of actual sexually
11 explicit conduct produced for distribution in commercial sale or
12 trade, but not to explicit images created by individuals for
13 private use. Therefore, because Section 2257 can fairly be read to
14 impose obligations only upon the producers of sexually explicit
15 images for public distribution in commerce, the 6th Circuit in
16 *Connection II*, under settled principles of statutory construction,
17 should have adopted that narrower reading and sustained Congress's
18 enactment, rather than striking it down and thereby leaving
19 children vulnerable to exploitation by the pornography industry.
20 The court should have followed the dictate of constitutional
21 avoidance following the principle that "[f]ederal statutes are to
22 be so construed as to avoid serious doubt of their
23 constitutionality." *International Ass'n of Machinists v. Street*,
24 367 U.S. at 749; see also *United States v. Crosson*, 462 F.2d 96, 98
25 (9th Cir. 1972) ("We start with the premise that it is our duty to
26 uphold, if possible, the constitutionality of the legislation.").
27 This statutory construction, significantly, would give full
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1 credence or recognition that the Act is only one part of a
2 comprehensive scheme to protect minors. The Act serves the goal of
3 keeping minors from being depicted in pornographic images, while
4 other goals are achieved elsewhere. See, e.g., 18 U.S.C. §§ 2251,
5 2251A, 2252, 2252A.

6 This Court should also not determine that 18 U.S.C. § 2257 is
7 unconstitutional because prior to *Connection II*, the 6th Circuit, in
8 *Connection Distributing Co. v. Reno*, 154 F.3d 281, 293 (6th Cir.
9 1998), *cert. denied*, 526 U.S. 1087 (1999) ("*Connection I*"), and the
10 District of Columbia Circuit, in *American Library Ass'n v. Reno*, 33
11 F.3d at 87, both rejected First Amendment challenges to the Act.

12 In *Connection I*, the business "Connection Distributing
13 Company" published and distributed "'swinger'" magazines.
14 *Connection I*, 154 F.3d at 285. Its publications allowed
15 individuals and couples to arrange sexual encounters with one
16 another by placing and responding to advertisements for sex. *Id.*
17 *Connection's* magazines consisted largely of such advertisements, in
18 which subscribers published descriptions of their bodies, their
19 sexual tastes, and the types of sexual encounters they seek. *Id.*
20 Most of the advertisements include photographs of the people who
21 placed them and the advertisers were usually depicted posing nude
22 or engaged in sexual activity. *Id.* Many photographs depicted only
23 parts of the subjects' bodies, usually the genital area. *Id.*
24 Although some of the business's magazines allowed the advertiser to
25 post his or her address in the advertisement, in the others, the
26 advertiser was identified through a code that appeared at the
27 beginning of the text of each message. *Id.* Readers responded to

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1 advertisements by writing to Connection, which charged a fee to
2 forward each response to the advertiser. Connection also
3 established "900 number" voice mailboxes for individuals who wished
4 to respond by telephone, and it has also set up an "on-line"
5 Internet service. *Id.* Ultimately, Connection made a challenge to
6 18 U.S.C. § 2257, claiming that it and its regulations violated the
7 First Amendment by, among reasons, unconstitutionally suppressing
8 the free speech rights of the business and its subscribers. *Id.*
9 The challenged record-keeping and labeling provisions required
10 anyone appearing in a sexually explicit visual depiction to produce
11 photographic identification and require anyone publishing such a
12 visual depiction to maintain identification records and label the
13 publication as to the location of those records. *Id.*

14 In an extensive analysis, the court, in *Connection I*, held
15 that the age verification and record-keeping statute at issue here
16 is "content-neutral" and subject to intermediate scrutiny under the
17 First Amendment. *Connection I*, 154 F.3d at 290-91. It also
18 concluded that the statute is narrowly tailored to serve the
19 significant "goal of preventing the sexual exploitation of chil-
20 dren." *Id.* at 290. As the court explained, narrow tailoring does
21 not require that a statute be the least restrictive means of
22 achieving the governmental interest, but only that it not burden
23 substantially more speech than necessary. *Id.* at 292. While
24 Connection asserted that most of its advertisers were well over the
25 age of majority, the court concluded that it is "critical" to the
26 important governmental interest in preventing sexual exploitation
27 of minors that there be "universal requirement of age disclosure,

1 regardless of the apparent age" of the person, because otherwise
2 the age determination would be based on "ineffectual subjectivity,"
3 which was the "target of the Act in the first place." *Id.* For
4 this reason, the Court also held that the statute was not
5 "overbroad." *Id.*; see also *Grayned v. City of Rockford*, 408 U.S.
6 104, 114 (1972) (a statute is overbroad when it includes within its
7 prohibitions activities that are constitutionally protected).
8 Finally, the court also determined that the statute left ample
9 alternative channels for communication, because Connection's
10 subscribers could communicate their messages through sexual images
11 not subject to the record-keeping requirements, through text or
12 phone messages, or by using the Internet service. *Id.* at 293-94.
13 On this basis, the court rejected Connection's First Amendment
14 challenges to the statute's constitutionality.¹¹

15 In *ALA*, the appellees were trade associations and corporations
16 that were engaged in, or whose members were engaged in, the
17 production and distribution of visual images containing actual and
18 sexual conduct of adults. *ALA*, 33 F.3d at 83. They contended that
19 the record-keeping and disclosure requirements of 18 U.S.C. § 2257,
20 as applied to them, placed a burden on lawful speech and violated
21 the First Amendment. *Id.* The court, however, applying a "content-
22 neutral" level of scrutiny ultimately determined that because
23 "content-neutral" regulations that have an incidental effect on
24 First Amendment rights will be upheld if they further an important

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26 ¹¹ In *Connection I*, the Supreme Court denied Connection's
27 petition for a writ of *certiorari* in *Connection Distributing Co. v.*
28 *Reno*, 154 F.3d 281, 293 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087
(1999).

1 or substantial governmental interest," the statute was
2 constitutional because it, among other things, promoted the
3 prevention of the exploitation of children. *Id.* at 84-86.
4 Moreover, the court concluded that although "section 2257 may
5 impose certain obligations on the speakers, they place no
6 restrictions on the speech itself." *Id.* at 86.

7 In *Connection I* and *ALA*, both courts held that by requiring
8 proof of age, Congress had furthered the government's compelling
9 interest in preventing the sexual exploitation of minors by
10 requiring the pornography industry to use sex models who are at
11 least eighteen years old, and had done so without
12 unconstitutionally burdening speech. As both courts recognized,
13 the Act does not prohibit any speech, but rather imposes record-
14 keeping requirements that are narrowly tailored to prevent the
15 exploitation of minors in the production of sexually explicit
16 images. *Connection I*, 154 F.3d at 292; *ALA*, 33 F.3d at 90.

17 Additionally, Defendant Isaac's request that this Court
18 conclude that the statute is facially overbroad or unconstitutional
19 as applied to him should be denied because he has failed, in any
20 real sense, to demonstrate how the labeling requirements of 18
21 U.S.C. § 2257(f)(4), which mandate that he affix a statement to his
22 sexually explicit movies that identifies the location of records
23 concerning participants in the sexually explicit films "Hollywood
24 Scat Amateurs No. 7" and "Laurie's Toilet Show," are
25 unconstitutional. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612
26 (1973) (litigants bring a facial challenge where they attack a
27 statute not because of their rights of free expression are

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1 violated, but because the statute's very existence may cause others
2 not before the court to refrain from constitutionally protected
3 speech.). The defendant sells sexually explicit films, some of
4 which he produces, over the internet from his California-based
5 business, LA Media. These movies, which involve a variety of
6 sexually explicit conduct such as urination, bestiality, and the
7 use of feces during sexual intercourse, depict individuals of
8 unknown ages and backgrounds. Defendant Isaacs fails to explain how
9 he and his business, LA Media, might suffer deprivation of a
10 claimed free speech right resulting from application of the
11 labeling requirements of the statute.¹² The record-keeping and
12 labeling requirements of the Act, inclusive of 18 U.S.C.
13 2257(f)(4), neither impinge on the content of his movies nor
14 prevent him from selling them. They only help deter the
15 exploitation of children by requiring the maintenance of records
16 and, among other things, statements on, for example, pornographic
17 films that identify the location of records for the movie's
18 participants who engage in sexually explicit conduct.

19 Finally, in his request to this Court the defendant
20 fails to identify any relevant precedent from the United States
21 Supreme Court or the Ninth Circuit which demonstrates that the
22 statute is a burden to legitimate speech. See *Ashcroft v.*

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24 ¹² The statute represents the government's interest in protecting
25 children from harmful materials, and in one sense, Defendant Issacs, an
26 adult, has failed to demonstrate an unnecessarily broad suppression of his
27 speech with respect to the labeling requirement to such an extent that the
28 government, in one sense, does what it is prohibited from doing; that is,
"reduc[e] the adult population . . . to only what is fit for children."
Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727,
759 (1996).

1 *American Civil Liberties Union*, 535 U.S. 564, 585 (2002) (holding
2 that a statute that is national in scope may rely on community
3 standards for determining what is harmful to minors without being
4 substantially overbroad for First Amendment purposes); *Reno v.*
5 *American Civil Liberties Union*, 521 U.S. 844, 877-879 (1997)
6 (finding provisions of the Communications Decency Act facially
7 overbroad given that in order to deny minors access to harmful
8 speech, certain provisions effectively suppressed speech that
9 adults have a constitutional right to receive and to address one
10 another, with no demonstration less restrictive alternatives would
11 be at least as effective in achieving the purpose the statute was
12 enacted to serve); *United States v. Dhingra*, 371 F.3d 557, 562-63
13 (9th Cir. 2004) (rejecting defendant's claim that 18 U.S.C. §
14 2422(b), a statute that imposes criminal liability on a person who,
15 among other things, induces a minor to engage in sexual activity
16 for which any person can be charged with a criminal offense, is
17 overbroad given that, among other things, the statute does not
18 prevent the speaker from communicating with other adults; also
19 rejecting defendant's claim that the statute violates First
20 Amendment by improperly imposing a nationwide standard of decency
21 with respect to sexual activity given that "the inducement of
22 minors to engage in sexual activity enjoys no First Amendment
23 Protection.").

24 For all of the reasons recited above the defendant's request
25 that 18 U.S.C. § 2257 be deemed unconstitutional should be denied.

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1 **CONCLUSION**

2 Wherefore, the United States requests that the defendant's
3 motion to dismiss the indictment be denied.

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1 **DEFENDANT'S MOTION FOR ACCESS TO WEBSITES WITH COMPARABLE MATERIALS**

2 The Defendant, Ira Isaacs, submits the following motion and
3 memorandum of law for and Order allowing Defendant to Access
4 Websites with Comparable Materials. This motion is being filed
5 with the Court out of an abundance of caution. The government has
6 advised the Defendant that no motions are to be filed by the
7 Defendant alone. Rather, according to the government, the
8 Defendant is to submit his motion to the government and then one
9 single document is to be presented to the Court containing both the
10 motion and the response. Defendant objects to this procedure if it
11 does exist on the ground that it interferes with the Defendant's
12 right to the effective assistance of counsel under the Sixth
13 Amendment. It also would deprive the Defendant of the right to
14 file a reply to the government's opposition. Furthermore, the
15 preparation of the combined motion and response would require the
16 attorneys to meet personally, which is impossible for the defense
17 attorney, who has a number of other trials that will require his
18 personal presence.

19 There is no authority for the requirement that the Defendant
20 has to submit motions to the government and depend upon the
21 government to include them accurately in one brief. The defendant
22 in a criminal case should not have to be dependent upon the good
23 will and cooperation of the government with respect to the filing
24 of defense motions.

25 Any requirement that the defendant meet with the government
26 and depend upon the government to prepare the combined motion and
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1 response would violate the separation of powers doctrine of the
2 United States Constitution.

3 If the Defendant is wrong with respect to these assertions and
4 if there is an order barring the defendant from filing this motion
5 then this motion should be deemed withdrawn by the Defendant.

6 One of the major issues in this case is whether or not the
7 materials in question which the government alleges are obscene
8 exceed the relevant community standard. According to Hamling v.
9 United States, 418 U.S. 87 (1974), the relevant community for
10 determining community standards would be the Central District of
11 California. The Hamling case was decided before the advent of the
12 Internet. The Internet makes available pornography throughout the
13 world. The issue would be whether or not the world wide
14 pornography that exists on the Internet is available and is
15 accessible in the Central District of California.

16 To make this determination the government needs to prove what
17 the community standard is of the Central District of California.
18 Under the Hamling decision the government might be able to prove
19 this without evidence but simply depend upon the collective
20 experience of the jurors. However, if the jurors are not drawn
21 from throughout the Central District then there is no adequate
22 cross section of the Central District and the government would be
23 required to put on evidence of the community standard.

24 Out of an abundance of caution in case the Court should
25 disagree with this position and allow the government to put on its
26 case without requiring expert testimony to establish the community
27 standard, Defendant wants to be able to demonstrate the existence
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1 of comparable material in the community. To do this the defense
2 will need to have available in the courtroom during the jury trial
3 a computer with access to the Internet to be able to demonstrate to
4 the jury exactly what is available and what is not available in the
5 community. The defense would anticipate accessing numerous web
6 sites with the same or comparable materials for which the Defendant
7 is on trial. The United States Supreme Court in Hamling v. United
8 States, supra, did not hold that comparable materials were not
9 admissible in obscenity cases. See People v. Heller, 96 Cal.App.3d
10 Supp.1; 157 Cal.Rptr. 830 (1979). The only way the defense can
11 establish the existence of comparable materials in the Central
12 District of California is to utilize a live demonstration with a
13 computer and the Internet.

14 By this motion the defense seeks a ruling in advance of the
15 trial to allow the defense to follow this procedure. There are
16 numerous web sites in the world that are available in the Central
17 District of California. The defense wishes to establish the
18 existence of these web sites that have comparable material and also
19 further wishes to demonstrate their availability in the Central
20 District. In addition, if the Defendant is able to do so,
21 Defendant will try to present evidence as to how many "hits" are on
22 these web sites. There may be a difficult matter of proof to the
23 extent that the web sites may exist outside the territorial
24 jurisdiction of the Central District or the United States. For
25 example, if there are web sites in another part of the world they
26 are accessed all the time and to a great degree by residents of the
27 Central District of California that would tend to establish the

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1 community standard in the Central District. However, the web site
2 host may be beyond the subpoena power of the Court. Also, the web
3 site hosts arguably could assert the Fifth Amendment and resist any
4 subpoenas or request Fifth Amendment protection from being
5 questioned on the witness stand.

6 _____The defense is willing to consider any alternate proposal
7 suggested by the government that would aid in the truth
8 ascertainment process. After all, the purpose of a trial is to
9 ascertain the truth. If there are substantial materials of a
10 comparable nature in the Central District the government may not
11 try to preclude the defense from putting on such evidence. Indeed,
12 the government would be obligated to produce the same evidence
13 under Brady v. Maryland.

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1 **GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE DEFENSE EVIDENCE**
2 **AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR ACCESS TO**
3 **WEB SITES WITH COMPARABLE MATERIALS**

4 The United States of America, by and through the United States
5 Attorney for the Central District of California, submits the
6 following motion and memorandum of law in opposition to the
7 defendant's intention to use certain evidence at trial.

8 **FACTUAL BACKGROUND**

9 Defendant Ira Isaacs, who sold various movies over the
10 internet from his Los Angeles, California-based business LA Media,
11 is charged with various federal obscenity violations concerning
12 distribution or record keeping violations associated with the
13 movies "Gang Bang Horse 'Pony Sex Game,'" "Mako's First Time Scat,"
14 "Hollywood Scat Amateurs No. 7," "Laurie's Toilet Show," and "BAE
15 20." In order to prove various charges in the indictment, the
16 government intends to play for the jury the DVD-movies "Gang Bang
17 Horse 'Pony Sex Game,'" "Mako's First Time Scat," "Hollywood Scat
18 Amateurs No. 7," and "BAE 20."¹³ The defendant sold the movie
19 "Gang Bang Horse 'Pony Sex Game'" over the internet in May 2004.
20 He sold the other movies over the internet between July and October
21 2006. Summaries of the allegedly obscene movies are as follows:

22 "Gang Bang Horse 'Pony Sex Game" is approximately two hours in
23 length; however, the last hour of the movie contains a blank
24 screen. During the movie, a female undressed herself while

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26 ¹³ The defendant is charged with a record keeping violation,
27 18 U.S.C. § 2257(f)(4), for distributing the movie "Laurie's Toilet
28 Show." For purposes of this indictment, the government is not
contending this particular movie is obscene.

1 touching and petting two horses. After removing all but her
2 underwear, she then masturbated with her hand while petting the
3 horses. In the following scene, she masturbated with a carrot for
4 a few minutes then broke the carrot and fed it to the horses. The
5 movie depicted and focused on the female masturbating one horse
6 while masturbating herself. The movie also showed her licking the
7 horse's penis and later lying on a hay bale under one horse while
8 masturbating herself and the horse. She then forced the horse's
9 penis inside of her vagina and masturbated the horse. Later, she
10 performed oral sex on the horse until it ejaculated in her mouth.
11 Afterwards, she allowed the ejaculate to run out of her mouth and
12 then rubbed it over her body. The movie continued with the female
13 having sex with the animal as she had the horse vaginally penetrate
14 her with its penis and also performed oral sex on the horse. After
15 performing oral sex, she reinserted the horse's penis in her vagina
16 and masturbated the horse until the horse ejaculated in her vagina
17 and on her body. Thereafter, the woman got underneath the horse on
18 a bale of hay and masturbated the horse until it ejaculated on her
19 abdomen and chest, at which time she smeared the ejaculate over her
20 body. The movie ended with the female lying down in a corner of
21 the stable and going to sleep.

22 "Mako's First Time Scat" is approximately two hours in length
23 and is divided into four scenes. All of the scenes involve the
24 same female engaging in sexually explicit and obscene conduct with
25 additional males. During the movie, a male binds the woman in a
26 variety of ways, including duct taping her wrists to her ankles and
27 suspending her from the ceiling with rope. A male also slapped and
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1 whipped her and a male urinated in her mouth and she later drank
2 it. She also defecated in a bowl and ate it and some male rubbed
3 feces on her face and she rubbed it in her hair and all over her
4 body. She also ate feces and performed oral sex on the male while
5 she had feces in her mouth. Additionally, a male also forced his
6 penis into her throat causing her to vomit several times. A male
7 also inserted his fingers into the woman's mouth and caused her to
8 vomit and a male inserted his fingers into the woman's anus,
9 removed feces, and had the female suck his fingers. At one point,
10 a male held a champagne glass under the woman's anus and she
11 released the semen from her anus into the glass. Thereafter, she
12 drank the semen. She drank her own urine and feces from a bowl and
13 cried throughout much of the movie.

14 "Hollywood Scat Amateurs No. 7" is approximately one hour and
15 twenty-three minutes in length. The beginning of the DVD had
16 trailers of other DVDs produced by Stolen Car Films. The total
17 length of the trailers was approximately eleven minutes and had
18 numerous scenes involving urination and defecation. The trailers
19 indicated that the DVDs could be purchased at www.scatmovies.com.
20 The featured film began after the trailers with the text "Stolen
21 Car Films presents Hollywood Scat Amateurs #7," "Female Toilet
22 Mouth," "Starring April," "directed by Joseph K." The movie
23 started in what appeared to be a private residence. The windows in
24 the room were covered with dark, blackout curtains, the furniture
25 was pushed to the sides of the room, and clear sheets of plastic
26 covered the floor. What appeared to be filming lamps were also in
27 the room, as well as only one female and one male. This male does

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1 not completely appear in the movie. Instead, only the lower
2 portion of his body is depicted and filmed.

3 During the movie, the male filmed by hand or on what appeared
4 to be a tripod and ordered the female to commit various sexual
5 acts, including oral sex, urination, and placing what appears to be
6 feces in her mouth. She also smeared feces on her face and body,
7 as well as on the male's penis before performing oral sex on him.
8 Additionally, there are numerous scenes wherein the female placed
9 what appeared to be feces in her mouth, followed by chewing and
10 spitting the feces back out. She also urinated in a glass pan,
11 placed feces in the urine, and then poured the urine in a glass and
12 drank some of it. Later, she performed oral sex on the anus of the
13 male, who also had intercourse with her from behind while she
14 straddled a leather desk chair. Ultimately, the movie ended with
15 the text "copyrighted 2004 Stolen Car Films" "all models are over
16 18 years."

17 "BAE 20" is approximately two hours in length. At the very
18 outset of the movie, information indicates that "You can buy this
19 at Scatmovie.com. The webs largest DVD and VHS Fetish Superstore."
20 The movie also displayed the text "Subway Innovative Productions"
21 and "Avantgarde Extreme." The movie also had written displays that
22 appeared to be in German text and the dialogue during the movie
23 sounds German.

24 During the movie, various males engaged in multiple scenes of
25 sexual activity with various females. The scenes were always with
26 one female and either one or two different males. Moreover, these
27 scenes occurred at various locations, including a bedroom, an
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1 office, a kitchen, and a bathroom. The sexual activity included
2 masturbation by the males and females, anal sex, oral sex of the
3 penis and anus, urination, and defecation. There are approximately
4 nine scenes wherein these males defecate on the females' faces and
5 in their mouths. In several of these scenes, the males also
6 smeared feces on the females' faces and there were approximately
7 five scenes that involved the males urinating on the females' faces
8 and in their mouths. Ultimately, the movie ended with an
9 advertisement indicating that you can buy the movie at
10 scatmovies.com.

11 During discovery, the defendant provided the government notice
12 of various items of evidence he would like to introduce at trial.
13 This evidence includes the DVD-movie "Team America World Police,"
14 the DVD "Surfing the Web Part I," the DVD "Surfing the Web Part
15 II,"¹⁴ twelve different advertising flyers designed and produced by
16 the defendant,¹⁵ and an April 7, 2003 letter from a customer which
17 indicates that the customer turned to "Jesus Christ" after
18 purchasing two unidentified movies from LA Media.¹⁶ The defendant
19 also informed the government that he wants to search the internet

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21 ¹⁴ According to information provided by the defense on or about
22 January 10, 2008, the DVDs "Surfing the Web Part I and II" were
recorded by Defendant Isaacs in or about December 2007.

23 ¹⁵ These twelve advertisements are for various types of
24 businesses or commercial establishments, specifically six dry cleaning
businesses, a burger take-out, two pizza restaurants, a chicken
restaurant, a saloon, and a laundry service.

25 ¹⁶ The defendant also provided the government two copies of the
26 DVD-movie "Berlin Extreme 20." One copy was purchased from a
27 "lovelot" website and the second copy was purchased from the website
"scatlover." "Berlin Extreme 20" is the same movie the government
alleges in the indictment to be obscene under the title "BAE 20."

1 on a computer during trial, and show the jury various types of
2 sexually explicit material, including movies involving "scat"
3 (sexual activity with feces) and "bestiality" (sex with animals),
4 that can be found on various websites on the internet.
5 Additionally, the defendant provided the government notice that he
6 might request four expert witnesses to testify at trial. These
7 witnesses are Dr. Mohan Nair, Vadim Grinburg, Trey Parker, Matt
8 Stone, the latter two of which produced the movie "Team America
9 World Police."¹⁷

10 ARGUMENT

11 **I. THE DEFENDANTS' EVIDENCE SHOULD BE PRECLUDED OR SIGNIFICANTLY 12 LIMITED CONCERNING THE QUANTITY AND QUALITY OF COMPARABLE 13 EVIDENCE AND EXPERT WITNESS TESTIMONY.**

13 The defendant's request to introduce or use additional
14 sexually explicit material as comparable evidence at trial should
15 be denied or, at a minimum, significantly limited or restricted.
16 Federal and state courts rarely admit such comparison evidence when
17 offered by a defendant, and only if a rigorous foundation for its
18 admissibility is satisfied. In *United States v. Pinkus*, 579 F.2d
19 1174 (9th Cir. 1978), the court, in reference to this foundation
20 requirement, stated that the predicate for a conclusion that
21 proffered comparable materials are admissible as probative of
22 community standards are, first, that there must be a reasonable
23 resemblance between the proffered comparables and the allegedly
24 obscene materials. *Id.* at 1175. Second, the proponent of the

26 ¹⁷ A copy of the defendant's notice of evidence, which
27 summarizes the expected testimony of witnesses, is attached for the
28 Court's convenience.

1 comparable materials must establish a reasonable degree of
2 community acceptance of such works as another part of this
3 foundational requirement. *Id.* The trial judge has wide discretion
4 whether or not admit the introduction of such materials, as well as
5 to determine how much of each proffered comparables need be
6 displayed to the jury. *Id.*

7 The United States Supreme Court has indicated that comparable
8 evidence is of questionable relevance and generally is
9 inadmissible, stating: "Mere availability of similar material by
10 itself means nothing more than that other persons are engaged in
11 similar activities." *Hamling v. United States*, 418 U.S. 87, 126
12 (1974) (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2d
13 Cir.1971). In *Hamling*, the defendants offered as evidence at trial
14 several types of allegedly comparable material: (1) materials which
15 had received second-class mailing privileges; (2) materials which
16 had previously been the subject of litigation and had been found to
17 be "constitutionally" protected; and (3) materials openly available
18 on the newsstands.¹⁸ *Hamling*, 418 U.S. at 125. The Supreme Court
19 upheld the exclusion of this evidence by the district court,
20 stating further that "[m]uch of the material offered by petitioners
21 was not of demonstrated relevance to the issues in this case. Such
22 of it that may have been clearly relevant was subject to the

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24 ¹⁸ 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 "the
28 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.*

1 District Court's observation that it would tend to create more
2 confusion than enlightenment in the minds of the jury" *Id.*
3 at 127. The principles or reasoning in *Hamlin* concerning the
4 inadmissibility of comparables has been followed by other federal
5 and state courts. *See, e.g., United States v. Ragsdale*, 426 F.3d
6 765, 776 (5th Cir. 2005) (upholding the trial court's ruling that
7 allegedly comparable visual materials purchased from a local adult
8 video store chain and mainstream bookstores were not admissible
9 evidence at trial because the material was not comparable enough to
10 the tapes at issue at trial or the defense did not show the
11 comparable materials were accepted within the community); *United*
12 *States v. Thevis*, 490 F.2d 76, 77 (5th Cir. 1974) (upholding the
13 trial court's refusal to permit evidence of comparables and
14 indicating that "[i]f expert testimony is not required to determine
15 obscenity, it is certainly within the trial judge's discretion not
16 to allow comparable evidence."); *see also United States v. Petrov*,
17 747 F.2d 824, 831-32 (2d Cir. 1984); *United States v. Various*
18 *Articles of Merchandise*, 750 F.2d 596, 599-600 (7th Cir. 1984);
19 *Womack v. United States*, 294 F.2d 204, 206 (D.C. Cir. 1961) *Flynt*
20 *v. State of Georgia*, 264 S.E.2d 669, 675 (Ga. Ct. App. 1980).

21 Based upon the above-noted legal precedent and the facts and
22 circumstances of this case, this Court should, among other reasons,
23 preclude the defendant's use of all the so-called comparable
24 material consistent with its judicial authority. *See Fed.R.Evid.*
25 611(a) ("The trial court shall exercise reasonable control over the
26 mode and order of . . . presenting evidence so as to (1) make the
27 interrogation and presentation effective for the ascertainment of
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1 the truth, (2) avoid needless consumption of time, and (3) protect
2 the witnesses"); Fed.R.Evid. 403 ("evidence may be excluded
3 if its probative value is substantially outweighed . . . by
4 considerations of undue delay, waste of time, or needless
5 presentation of cumulative evidence."). Defendant Isaacs seeks
6 to introduce the movie "Team America World Police," two DVDs which
7 record him searching the internet in or about December 2007 for
8 various types of pornography or sexually explicit material, twelve
9 different advertising flyers designed and produced by the
10 defendant, and an April 7, 2003 letter from a customer of LA Media
11 which indicates that the customer turned to "Jesus Christ" after
12 viewing two unidentified movies. First, the defendant's so-called
13 comparable materials should not be admissible because, as the
14 Supreme Court stated in *Hamling v. United States*, 418 U.S. at 126,
15 "[m]ere availability of similar material by itself means nothing
16 more than that other persons are engaged in similar activities[,]"
17 and availability does not imply acceptability. *United States v.*
18 *Various Articles of Merchandise*, 750 F.2d at 600. Moreover, none
19 of the defendant's so-called comparable evidence is truly similar
20 to the movies which the government alleges are obscene. The movie
21 "Team America World Police," which was produced in 2004, depicts
22 six puppet-style animated characters with human-like features
23 fighting as "Team America." These six characters fight against
24 other puppet-style animated characters who are portrayed as
25 terrorists, including one that is portrayed as the leader of North
26 Korea. During this approximately 98 minute movie, two of the
27 characters - "Gary" and "Lisa" - are depicted, approximately forty-

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1 two minutes into the movie, engaging in what is portrayed as sex.
2 During this approximately one minute and thirty-second sex scene,
3 these two characters - although devoid of genital parts - simulate
4 various sexually explicit positions, including oral, anal, and
5 genital or vaginal sex. Moreover, at one point during this
6 encounter, Gary urinates on Lisa's face and she excretes feces on
7 his face.¹⁹

8 The two DVDs "Surfing the Web" Parts I and II are recordings
9 of the defendant searching the internet for "scat" (sexual activity
10 involving feces) and "bestiality" (sex with animals) movies being
11 sold on different websites.²⁰ Part I is approximately two hours and
12 twenty minutes, and Part II is an additional approximately thirty
13 minutes. During the recordings, the defendant uses the "Google"
14 and "Yahoo" search engines, inserts the words "scat" and
15 "bestiality" - as well as other words associated with them - into
16 the search index, and locates numerous websites and businesses that
17 sell sexually explicit movies involving "scat" and bestiality.
18 These websites, which include but are not limited to, "Scatcorp,"
19 "Scatlover," "PassionBarn," Japan DVD World," "CyberScat,"
20 "ZooCamalia," and "BeastyHeaven," provide pictures, trailers
21 (previews of movies), and free movies that depict or portray nudity

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25 ¹⁹ The movie "Team America World Police" does not depict or
portray nudity or sexual conduct by human beings.

26 ²⁰ Part II also contains a Scene Selection. This apparently
27 is nothing more than a limited and selected version of some of what
is recorded in Parts I and II.

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1 and sexually explicit conduct with feces and animals.²¹ Among other
2 statements the defendant made while narrating these internet
3 demonstrations, he indicates, in reference to the businesses or
4 individuals responsible for the websites, "I don't know where these
5 people are" who are selling the material. He also indicates that
6 he is surveying the internet "totally impromptu" and that he has
7 "no idea where I am going to go next" because, in making reference
8 to "scat" and bestiality material, so much of "this stuff" is on
9 the internet.

10 The twelve advertising flyers the defendant wants to introduce
11 as comparable evidence are nothing more than advertisements for
12 businesses. Unlike the movies which the government intends to
13 introduce into evidence at trial as obscenity, these advertising
14 flyers do not depict or portray any nudity or sexual conduct. In
15 that sense, these flyers - just like the other proposed comparable
16 evidence from the defense - bear no reasonable resemblance to the
17 government's evidence, and they provide minimal, if any, probative
18 value concerning a reasonable degree of community acceptance of
19 such works. See *Flynt v. State of Georgia*, 264 S.E.2d at 675
20 (where the trial court properly excluded other magazines and books;
21 newspaper advertisements for "adult" movies; excerpted parts of
22 books available in the local library; and magazines distributed by
23 the Atlanta News Agency). Therefore, their use, consistent with
24 *United States v. Pinkus*, 579 F.2d at 1175, should be precluded.

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26 ²¹ For example, during some of these scenes derived from these
27 websites women eat feces and engage in oral or vaginal sex while feces
28 is smeared on their body or in their mouth. Women also have sex with
dogs, horses, and ponies.

1 Additionally, the defendant's desire to use recordings of
2 himself searching the internet ("Surfing the Web Parts I & II)
3 suggests that he believes that the standard from which the jury
4 must make a finding of obscenity concerning the movies is a global
5 or national standard. This is not true. Contrary to what the
6 defense suggests, jurors are entitled to draw on their own
7 knowledge of the views of the average person in the community or
8 vicinage from which they come in making the required obscenity
9 determination.²² See *Hamling v. United States*, 418 U.S. at 104;
10 see also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (indicating
11 that *Miller* makes clear that state juries need not be instructed to
12 apply "national standards"); *United States v. Dachsteiner*, 518 F.2d
13 20, 22 (9th Cir. 1975) (recognizing that because the jurors resided
14 in the Northern District of California they were allowed to draw
15 upon their knowledge which may be representative of that area);
16 *United States v. Miller*, 505 F.2d 1247, 1247-48 (9th Cir. 1974)

18 ²² In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564,
19 583 (2002), the Supreme Court held that internet users generally are
20 judged by the community standard of the community into which they
21 direct material. Consequently, it is a reasonable extension of this
22 conclusion that information found on the internet is not a part of,
23 nor does it change, the community standard from which jurors determine
24 obscenity. Any holding to the contrary would mean that all sexually
25 explicit material, be it legal or otherwise, and no matter from what
26 form of media (i.e., radio, television, movies, internet) or country
27 or venue or origin, would constitute the community standard.
28 Moreover, it would change a community into a national or global
standard, thus eviscerating significant Supreme Court and other legal
precedent establishing a community standard. See *Rodriguez de Quijas*
v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989) ("[i]f a
precedent of this [Supreme] Court has direct application in a case,
yet appears to rest on reasons rejected in some other line of
decisions, the Court of Appeals should follow the case which directly
controls, leaving to this Court the prerogative of overruling its own
decisions.").

1 (finding that contemporary community standards, rather than a
2 national standard, is applicable for federal obscenity
3 prosecutions); *United States v. Jenkins*, No. 1:06-cr-430-WSD, 2007
4 WL 1087337, slip op. at 2 (N.D. Ga. April 5, 2007) (rejecting
5 defendant's claim that because material is distributed over the
6 internet, and the internet is a worldwide community, the community
7 standard does not apply).

8 Assuming this Court determines that some of the defendant's
9 proffered evidence might be admissible, this evidence should be
10 precluded or significantly restricted as unnecessarily cumulative,
11 and prejudicially so. Voluminous quantities of comparable evidence
12 might involve the trial in countless days and hours of viewing
13 additional sexually explicit material, and such material might
14 confuse the jury as to their duty to determine if the four movies
15 noted in the indictment are obscene. *See Huddleston v. United*
16 *States*, 485 U.S. 681, 691 (1988) (trial court can determine, under
17 Rule 403, whether the probative value of similar acts evidence is
18 outweighed by its potential for unfair prejudice). Furthermore,
19 the defendant's allegedly similar material should be excluded
20 unless and until he demonstrates to the Court that the proffered
21 material existed in the community between 2004 and 2006. The
22 bestiality movie, "Gang Bang Horse 'Pony Sex Game,'" was purchased
23 from the defendant in 2004. The movies "Mako's First Time Scat,"
24 "Hollywood Scat Amateurs No. 7," and "BAE 20" were purchased from
25 the defendant in 2006. In that sense, the jury should evaluate the
26 movies noted in the indictment in light of the adult, contemporary
27 community standard during the time period of each movie's sale by

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1 Defendant Isaacs. See *Pinkus v. United States*, 436 U.S. 293, 298-
2 300 (1978); *Smith v. United States*, 431 U.S. 291, 301 (1977);
3 *Miller v. California*, 413 U.S. 15, 24 (1973); see also *Hamling v.*
4 *United States*, 418 U.S. at 104 (a juror is entitled to draw on his
5 own knowledge of the views of the average person in the community
6 or vicinage from which he comes for making the required obscenity
7 determination). Therefore, any material concerning bestiality
8 which the defendant seeks to introduce into evidence as comparable
9 material would not be relevant or admissible unless and until he
10 proves that the proffered material existed and was accepted in the
11 community in or about 2004. See Fed.R.Evid.401 (relevant evidence
12 makes "the existence of any fact that is of consequence to the
13 determination of the action more probable or less probable").
14 Likewise, any material concerning "scat" that the defendant seeks
15 to introduce into evidence as comparable material is not relevant
16 or admissible unless and until he proves that the proffered
17 material existed and was accepted in the community in or about
18 2006. Accordingly, assuming this Court permits the introduction of
19 any so-called comparable material, it should only allow such
20 evidence which the defense proves existed within the relevant time
21 periods of the indictment for each type of obscenity, and, more
22 importantly, the proffered evidence satisfies the requirements of
23 *Pinkus v. United States*, 579 F.2d at 1175. This negates
24 the defendant's ability to use the "Surfing the Web" recordings of
25 himself perusing the internet in or December 2007. In addition to
26 the movie "Team America World Police," which was produced or
27 distributed in 2004, it also precludes him from searching the

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1 internet on a computer during trial, and attempting to demonstrate
2 to the jury various types of sexually explicit material that can be
3 found on various websites in 2008.²³ See *Bourjaily v. United*
4 *States*, 483 U.S. 171, 175 (1987); see also *Huddleston v. United*
5 *States*, 485 U.S. at 690 (noting proponent has burden of
6 establishing the admissibility of evidence); *United States v.*
7 *Pinkus*, 579 F.2d at 1175 (noting proponent's burden to establish
8 acceptance of material).

9 The defendant's additional desire to introduce into evidence
10 an April 7, 2003-letter from a customer which indicates that the
11 customer turned to "Jesus Christ" after purchasing two unidentified
12 movies from LA Media should also be denied. Clearly, this letter,
13 consistent with *United States v. Pinkus*, 579 F.2d at 1175, is not
14 comparable evidence; it is simply not relevant and it is
15 inadmissible hearsay for purposes of this trial. See Fed.R.Evid.
16 801(c) ("Hearsay' is a statement, other than one made by the
17 declarant while testifying at the trial or hearing, offered in
18 evidence to prove the truth of the matter asserted."); Fed.R.Evid.
19 802 ("Hearsay is not admissible except as provided by these rules
20 or by other rules prescribed by the Supreme Court . . .").

21 Furthermore, the defendant's desire to potentially have expert
22 witnesses testify at trial should also be denied at this time. See

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24 ²³ Unlike the bestiality movie, "Gang Bang Horse 'Pony Sex
25 Game,'" that the defendant sold over the internet in May 2004, the
26 movie "Team America World Police," which was apparently produced and
27 distributed in 2004, does not contain bestiality. Therefore, it seems
28 that unlikely that "Team America World Police" could have any
probative value concerning the issue of community acceptance of
bestiality, which is apparently one reason the defendant seeks to
introduce this movie at trial.

1 *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002)
2 (addressing the exclusion of an expert witness's testimony as a
3 sanction for the defendant's failure to give proper notice under
4 Rule 16(b)(1)(C). The defendant identified Dr. Mohan Nair, Vadim
5 Grinburg, Trey Parker, and Matt Stone as the expert witnesses, and
6 he provided some information, albeit very brief, concerning what
7 their testimony will be.²⁴ Based upon the information provided thus
8 far, this testimony should be excluded.

9 First, recognizing that the issue of whether materials or
10 movies are obscene can be decided by viewing the materials alone
11 because expert testimony is not required or necessary when the
12 materials or films are in evidence, *see Paris Adult Theatre I v.*
13 *Slaton*, 413 U.S. 49, 56 (1973); *Hamling v. United States*, 418 U.S.
14 at 100; *Ginzburg v. United States*, 383 U.S. 463, 465 (1966), the
15 defendant's expert testimony should be precluded unless and until
16 the defendant provides sufficient, or more complete, information
17 concerning the nature of the expert witness's testimony in relation
18 to relevant issues at trial. Moreover, the defendant needs to
19 provide any studies or documents that such expert's will rely on as
20 the basis for their testimony, and he needs to provide detailed
21 qualifications or background information concerning each potential
22 expert witness. *See* Fed.R.Evid. 701 (which helps ensure that a
23 party will not call a layperson in the guise of, or under the
24 pretext that he or she is, an expert witness); Fed.R.Evid. 702

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26 ²⁴ A copy of the documents provided by the defendant which
27 identify the potential expert witnesses, their background, and their
28 expected testimony is being filed as an attachment as Documents 1, 2,
3, and 4.

1 (noting the requirements, such as the witness's expertise and
2 education, for the admissibility of expert testimony and
3 establishing that there must be a justification for such
4 testimony); Fed.R.Evid. 704 (allowing experts to testify, absent
5 ultimate issues concerning matters for the trier of fact alone,
6 concerning their opinions). This information will allow the Court,
7 the jury, and the government to make a proper and complete
8 assessment concerning whether such proffered testimony is relevant
9 and whether such person is truly qualified to offer opinions
10 concerning obscenity.²⁵ See *Daubert v. Merrell Dow Pharmaceuticals,*
11 *Inc.*, 509 U.S. 579, 589 (1993) ("the trial judge must ensure that
12 any and all scientific testimony or evidence admitted is not only
13 relevant, but reliable.").

14 **CONCLUSION**

15 Wherefore, the United States requests that this Court grant
16 the above-noted motion in limine.²⁶
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23 ²⁵ The district court's decision concerning the admissibility
24 of expert witnesses is reviewed for an abuse of discretion. See
25 *Taylor v. Illinois*, 484 U.S. 400, 414-16 (1988); *United States v.*
Nash, 115 F.3d 1431, 1439-40 (9th Cir. 1997).

26 ²⁶ The Government, through this motion, is requesting that the
27 Court consider the admissibility of the voluminous quantities of the
28 defendants' allegedly comparable evidence in a hearing prior to trial.

1 **DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE**
2 **DEFENSE EVIDENCE AT TRIAL**

3 The Defendant, Ira Issacs, submits the following memorandum in
4 opposition to the government's motion to exclude defense evidence
5 at trial.

6 **I INTRODUCTION**

7 On Wednesday, January 16, 2008 the Government served by
8 electronic mail a 14 page motion designed to gut the defense in
9 this case. On that day the attorney for Defendant was unable to
10 respond because his secretary was out with the flu. She did
11 eventually return but attorney Roger Jon Diamond could not prepare
12 a detailed response to the 14 page motion in the two days allotted
13 to him by the Government to the extent that it waited until
14 Wednesday January 16 to file its motion. This Court may take
15 judicial notice that Saturday and Sunday were January 19 and 20,
16 respectively. Moreover, Monday January 21, 2008 was a national
17 holiday, the birthday of Martin Luther King.

18 Government attorney Kenneth F. Whitted advised defense counsel
19 that any opposition by the defense had to be served by Tuesday
20 January 22, 2008 in order to be included in the "integrated joint
21 brief" that the Court apparently requires of the parties. The
22 defense previously attempted to file motions but this Court struck
23 the motions on the ground that all motions have to be submitted to
24 the Government and that all opposition has to be submitted to the
25 Government, which then apparently is to prepare one "integrated
26 joint brief." The Government contends that the "integrated joint
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1 brief" in this case must be filed by Tuesday January 22, 2008,
2 which essentially gave the defense three days to respond.

3 With all due respect to the Court, Defendant Ira Isaacs
4 respectfully objects to this procedure, which is unprecedented with
5 respect to criminal cases. The defendant should not have been
6 compelled to serve his motion first on the Government rather than
7 filing it with the Court and depend upon the Government to prepare
8 the "integrated joint brief." The normal and established practice
9 is for each side to file motions with the Court and serve the other
10 side, which is then in a position to file a written response (or
11 electronic response under the new rules). Replies to opposition
12 are apparently also allowed.

13 As matters now stand Defendant Ira Isaacs may not file his
14 reply with the Court (even assuming he could get it timely filed).
15 Rather, he apparently is compelled by this Court to submit his
16 reply to the Government and then depend upon the Government to
17 include his reply in some sort of "integrated joint brief."

18 With all due respect to the Court, a defendant in a criminal
19 case should never have the filing of a key defense motion dependent
20 upon the cooperation of the Government. Also, in this particular
21 case the time frame is unacceptable.

22 Rule 12(b) of the Federal Rules of Criminal Procedure
23 contemplates the filing of pre trial motions. In particular, Rule
24 12(b) (2) provides as follows:

25 "A party may raise by pretrial motion
26 any defense, objection, or request
27 that the court can determine without
28 a trial of the general issue."

1 Federal Rule (c) allows the Court to "set a deadline for the
2 parties to make pretrial motions. . . ." In this case the Court
3 did not set a deadline for the filing of pretrial motions. Rather,
4 this Court required the parties to meet and confer and prepare one
5 "integrated joint brief. . . ." This requirement runs contrary to
6 Rule 12 of the Federal Rules of Criminal Procedure.

7 The local criminal rules of the Central District of California
8 do not authorize the Court to require one "integrated joint brief."
9 In short, this Honorable Court had no legal authority to alter the
10 Federal Rules of Criminal Procedure to the detriment of the
11 defendant, who is now beholden to the Government and dependent upon
12 the Government to prepare the integrated joint brief.

13 Defendant respectfully objects to the procedures set forth by
14 the Court and respectfully contends that it violates his Due
15 Process right to a fair trial under the Fifth Amendment to the
16 United States Constitution.

17 These comments should be construed along with the comments
18 contained in the motions which the defense attempted to file with
19 the Court, but which the Court struck.

20 With respect to the particular motion filed by the Government
21 regarding comparable materials, Defendant respectfully disagrees
22 with the motion and respectfully contends that Hamling v. United
23 States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974) does not
24 stand for the proposition for which it has been cited. To the
25 contrary, Defendant Isaacs respectfully refers this Honorable Court
26 to People v. Heller, 96 Cal.App.3d Supp.1; 157 Cal.Rptr. 830 (1979)
27 for the proposition that it would be reversible error to exclude
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1 the evidence that the Government seeks to exclude in this case. In
2 the Heller case the defendant was convicted after the trial court
3 refused to allow comparable evidence to be admitted. The
4 California Appellate Department reversed the conviction. With
5 respect to the issue of whether Hamling v. United States, supra,
6 justified the exclusion of the evidence, the Appellate Department
7 People v. Heller, stated, 96 Cal.App.3d Supp. at 6:

8 ". . . Nowhere in Hamling is it
9 stated that comparable materials are
10 not relevant or are inadmissible on
11 the issue of community standards. . . .
12 Unlike the situation in Hamling,
13 where the Defendant's four expert
 witnesses testified on the issue of
 community standards, defendant herein
 had no other evidence of those
 standards and thus his offered
 evidence was not cumulative."

14 In the instant case the defense intends to call its expert Dr.
15 Mohan Nair, on the issue of scientific value of the materials, not
16 on the issue of community standards. The two issues are separate
17 and distinct, but both are extremely relevant to the determination
18 of whether the materials are legally obscene.

19 If given more time to prepare this opposition Defendant would
20 have gone into the cases in more detail. However, given the demand
21 by the Government that this opposition be submitted by January
22 22, 2008 Defendant was not in a position to research the other cases
23 and provide a more detailed explanation and analysis.

24 For the foregoing reasons and for reasons to be set forth
25 during oral argument on the motion, Defendant Ira Isaacs
26 respectfully asks this Honorable Court not to gut his defense and
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1 to give him a fair trial by allowing evidence of comparable
2 materials to be considered by the jury.

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1 response would violate the separation of powers doctrine of the
2 United States Constitution.

3 If the Defendant is wrong with respect to these assertions and
4 if there is an order barring the defendant from filing this motion
5 then this motion should be deemed withdrawn by the Defendant.

6 In Miller v. California, 413 U.S. 15,37 L.Ed.2d 491, 93 S.Ct.
7 2607 (1973), the United States Supreme Court held that to avoid a
8 violation of the First Amendment material may not be deemed obscene
9 unless, among other things, the material, "taken as a whole,
10 appeals to the prurient interests. . . ."

11 Also, the relevant inquiry is whether the material, "taken as
12 a whole, lacks serious literary, artistic, political, or scientific
13 value. . . ."

14 In this particular case certain movies are charged to be
15 legally obscene. The materials, according to the United States
16 Supreme Court, will have to be considered as a whole. The jury
17 will not be able to focus on isolated parts. To consider the
18 movies as a whole the jury will have to know what is being said by
19 the actors and actresses in the movies. Many of the movies in this
20 case are only in foreign languages. It is anticipated that the
21 government will assert that the movies need not be translated into
22 English. By this motion the Defendant advises the Court and the
23 government that it will object and does hereby object to any movie
24 being shown to the jury unless the movie is translated into English
25 by the government.

26 It is not the Defendant's burden to provide a translation.
27 The government has the burden of proof. The government can no
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1 more provide a movie in the foreign language without English
2 translation than it could provide simply half the movie. Clearly
3 the government could not present half a movie and then impose upon
4 the Defendant the obligation to present the remainder of the movie.
5 It is the government's initial burden to present the entire movie
6 to the jury. Likewise, the government may not rely upon the
7 Defendant to provide the translation. It is the government's duty
8 to present the movie in its entirety in a way that the jury can
9 understand it. Accordingly, unless the government provides English
10 translation of the foreign language movies at issue in this case
11 the defense will object to those movies. The defense will not
12 provide its own translation. The defense does not want to be in
13 the position of having its translation questioned or second guessed
14 by any member of the jury. The government must fulfill its
15 obligation.

16 When the government seeks to impose restrictions on speech the
17 government has the burden of proof. See e.g., Lim v. City of Long
18 Beach, 217 F.3d 1050 (9th Cir.2000), cert.den. 531 U.S. 119 (2001).

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1 *California*, 413 U.S. 15, 24 (1973).²⁷ This issue is moot, as the
2 government intends to have both movies whose language or content
3 are substantially presented in a foreign language transcribed from
4 the foreign language into the English language for purposes of
5 trial. See *United States v. Ragsdale*, 426 F.3d 765, 775 (5th Cir.
6 2005) (determining that it was not necessary for a foreign language
7 translation of videotapes to aid the jury's determination of
8 obscenity given that the dialogue of the videotapes in the foreign
9 language was not so significant in magnitude); *United States v.*
10 *Miscellaneous Pornographic Magazines*, 526 F.Supp. 460, 466
11 (N.D.Ill. 1981) (holding that given that obscenity vel non can be
12 determined only in terms of the work taken as a whole, the
13 materials are required to be translated where the text is of
14 sufficient magnitude that it might reasonably save otherwise
15 confiscable illustration). The movie "Mako's First Time Scat" will
16 be transcribed from Japanese into English and "BAE 20" will be
17 transcribed from German into English.

24 ²⁷ Pursuant to *Miller v. California*, for a work or film to be
25 obscene, the jury, applying contemporary community standards, must
26 find that: (1) the work, taken as a whole, appeals predominantly to
27 "prurient" interest, (2) the work depicts or describes sexual conduct
in a patently offensive way, and (3) the work, taken as a whole, lacks
serious literary, artistic, political or scientific value. *Miller v.*
California, 413 U.S. at 24.

1 **CONCLUSION**

2 Wherefore, the United States requests that motion be denied
3 given that it is moot.

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1 In Field v. Clark, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36
2 L.Ed. 294 (1892) the United States Supreme Court stated:

3 "That congress cannot delegate
4 legislative power to the President is
5 a principle universally recognized as
6 vital to the integrity and mainten-
7 ance of the system of government
8 ordained by the Constitution. . . ."

9 The United States Supreme Court followed this principle in
10 A.L.A. Schechter Poultry Corp., v. United States, 295 U.S. 495, 55
11 S.Ct. 837, 79 L.Ed. 1570 (1935) and Panama Refining Co., v. Ryan,
12 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446 (1935).

13 The Supreme Court of the United States reaffirmed this
14 essential principle of constitutional law in Mistretta v. United
15 States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) when it
16 upheld the delegation of sentencing regulations to a sentencing
17 commission. In upholding the sentencing commission guidelines the
18 Supreme Court in the Mistretta case noted to survive a challenge
19 under the Separation of Powers Doctrine the delegation of authority
20 must include specific directives. The Court did note that the
21 sentencing commission was placed in the judicial branch. In
22 footnote 17 of the Mistretta decision the Court stated,

23 "Indeed, had Congress decided to
24 confer responsibility for
25 promulgating sentencing guidelines on
26 the Executive Branch, we might face
27 the constitutional questions whether
28 Congress unconstitutionally had
assigned judicial responsibilities to
the Executive or unconstitutionally
had united the power to prosecute and
the power to sentence within one
Branch. . . ."

1 The federal obscenity statutes allegedly violated by Defendant
2 Isaacs in this case are extremely vague. They require the jury to
3 apply the following guidelines (a) whether the "average person,
4 applying contemporary community standards" would find that the
5 work, taken as a whole, appeals to the prurient interest; (b)
6 whether the work depicts or describes, in a patently offensive way,
7 sexual conduct specifically defined by statute and (c) whether the
8 work, taken as a whole, lacks serious literary, artistic,
9 political, or scientific value. See generally Miller v.
10 California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and
11 Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct. 990
12 (1977).

13 In the Marks case the Supreme Court's majority stated,

14 "We have taken special care to insist
15 on fair warning when a statute
16 regulates expression and implicates a
17 First Amendment values. . . . Section
 1465 is such a statute. . . ."
 Marks v. United States, 430 U.S. at
 196, 97 S.Ct. At 995.

18 The current federal obscenity statutes violate the Separation
19 of Powers Doctrine because Congress has essentially delegated
20 legislative authority to the Executive Branch of government because
21 essentially it is the Executive Branch of government that now
22 determines the community standard. It was the obvious intent of
23 Congress to allow the community standard to change over time.
24 There is no fixed community standard that applies at all times.
25 Congress obviously intended that the community standard may vary
26 over time. That is, the community standard in theory is supposed
27 to be expansive to allow more material to be tolerated as the
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1 community becomes more liberal. The community standard must be
2 flexible by definition, but who is able to change the community
3 standard. If a pornographer, as for example Defendant Isaacs,
4 tries to change the community standard by distributing something
5 slightly beyond what the current community standard allows he is
6 subject to prosecution by the Executive Branch. Essentially,
7 therefore, the Executive Branch controls the establishment of the
8 community standard. Yet, the establishment of the community
9 standard should be the function of the Legislative Branch of
10 government, not the Executive.

11 The cause of this problem is the federal congressional statute
12 which criminalizes obscenity, but then essentially delegates the
13 task to the Executive Branch. Thus, the federal obscenity
14 statutes violate the Separation of Powers Doctrine established by
15 the United States Supreme Court based on the United States
16 Constitution. Essentially Mr. Isaacs and others are at the mercy
17 of the Executive Branch. This is not right. Congress should set
18 the policy, not the Executive Branch. Congress should specify
19 exactly what is obscene and what is not obscene.

20 Essentially the problem is this - Congress has basically
21 recognized that the community standard can change over time. Yet,
22 if someone such as Mr. Isaacs attempts to change the community
23 standard by introducing material that goes beyond the contemporary
24 community standard he is subject to prosecution because by
25 definition his product may not be consistent with the contemporary
26 community standard, but rather is designed to enlarge the community
27 standard to allow for more materials. By criminalizing Mr. Isaac's
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1 conduct to the extent that he may have gone beyond the contemporary
2 community standard, the Executive Branch essentially precludes
3 people such as Mr. Isaacs from trying to change the community
4 standard. By definition anyone who exceeds the community standard
5 is violating the criminal law.

6 Congress has created a dilemma. Essentially Congress states
7 that one must obey the contemporary community standard, which would
8 mean that nobody could try to change the community standard, yet
9 Congress apparently has recognized that the community standard may
10 be changed over time but, as stated above, if one such as Mr.
11 Isaacs attempts to exceed the contemporary community standard he
12 violates the criminal law. Essentially persons such as Mr. Isaacs
13 are subject to prosecution and punishment for attempting to do what
14 Congress apparently contemplated such a person may do.
15 Essentially Congress, by violating the Separation of Powers
16 Doctrine, has set a trap, and the trap is administered by the
17 Department of Justice.

18 Isaacs has been caught up in the attempt by the Executive
19 Branch of government to affect the community standard by going
20 after him for trying to exceed the community standard.

21 All of this, of course, makes no sense. Bank robbery, arson,
22 mail fraud, or perjury before a Grand Jury, are always crimes when
23 committed. They do not change over time.

24 With the advent of the world wide Internet we have a further
25 problem. The community is no longer a limited, federal district,
26 but is, perhaps, the entire world.

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1 While it might have made sense before the invention of the
2 Internet to apply a geographic limit to the relevant community, see
3 Hamling v. United States, 481 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d
4 590 (1974), it no longer makes sense to apply a geographic area for
5 the purpose of determining the relevant community standard. In the
6 days of Hamling v. United States, supra, geography was important to
7 the extent that one could limit sales to a particular geographic
8 area or one could limit the exhibition of a particular motion
9 picture film to a particular geographic area. Now there is no
10 limit. The Internet is world wide.

11 For these reasons the Indictment must be dismissed. The
12 federal obscenity statute constitutes an improper delegation of
13 legislative authority to the Executive Branch and also makes no
14 sense in light of the community standard principle set forth by the
15 Supreme Court in Hamling v. United States, supra, prior to the
16 advent of the Internet.

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1 **GOVERNMENT'S RESPONSIVE MEMORANDUM CONCERNING DEFENDANT'S MOTION TO**
2 **DISMISS THE INDICTMENT BECAUSE THE STATUTES IMPROPERLY DELEGATE**
3 **LEGISLATIVE AUTHORITY TO THE EXECUTIVE BRANCH**

4 The United States of America, by and through the United States
5 Attorney for the Central District of California, submits the
6 following responsive memorandum concerning the defendant's motion
7 to dismiss the indictment because the statutes improperly delegate
8 legislative authority to the executive branch. On November 5,
9 2007, this Court directed the parties to file a joint brief
10 containing all motions, responses, and memorandums of law
11 concerning this case by January 22, 2008.²⁸ On January 22, 2008, at
12 approximately 3:00 p.m. (East Coast Time), the defendant
13 sent the government "for the first time" a new motion, entitled
14 Defendant's Motion to Dismiss the Indictment because the Statutes
15 Improperly Delegate Legislative Authority to the Executive Branch.
16 This motion was received by e-mail. Given the untimely nature of
17 the receipt of this particular motion by the United States, it
18 would be unfair to require the government to prepare and file an
19 appropriate response to this motion with the filing of the Joint
20 Brief of the parties on January 22, 2008. Therefore, unless
21 otherwise directed by the Court, the government provides notice
22 that the government will file a response to this particular motion
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24 ²⁸ Actually, the November 5, 2007 stipulation approved by this
25 Court specified that the joint brief must be filed at least three
26 weeks before the February 11, 2008 motions hearing date. This,
27 however, required that the joint brief be filed by January 21, 2008,
28 a federal holiday (Martin Luther King, Jr. Day); therefore, the brief,
pursuant to Rule 45(a) of the Federal Rules of Criminal Procedure,
need be filed by Tuesday, January 22, 2008.

1 within seven days, that is, by on or about Tuesday, January 29,
2 2008.

3 Respectfully Submitted,

4 THOMAS P. O'BRIEN
United States Attorney

5 CHRISTINE C. EWELL
6 Assistant United States Attorney
7 Chief, Criminal Division

8 1/23/08
9 DATE

10 /s/
CRAIG H. MISSAKIAN
KENNETH F. WHITTED
Assistant United States Attorneys

11 Attorneys for Plaintiff
12 United States of America

13 1/23/08
14 DATE

15 /s/
ROGER JON DIAMOND
Attorney for Defendant
IRA ISAACS

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