ANATOMY OF AN OBSCENITY PROSECUTION:
THE TAMMY ROBINSON CASE STUDY

BY: LAWRENCE G. WALTERS
WESTON, GARROU & DEWITT
WWW.FIRSTAMENDMENT.COM

CAUTION: THIS ARTICLE IS NOT INTENDED FOR READERS UNDER THE AGE OF 18

Sometimes, in order to see where you are going, you have to look at where you have been. History can often be the best predictor of the future, particularly in law enforcement matters. Given the promised wave of obscenity prosecutions to be brought by the Justice Department against adult webmasters, and others involved in the industry, the time is right to take a look back at the very first obscenity prosecution against an adult Website; the case of Tammy & Herbert Robinson.

Those of us who were involved in the adult Internet industry in 1999 could not avoid the widespread media exposure relating to the Robinson case. For those readers who got involved after the case was resolved, and for those who do not remember, a brief review of the facts of that landmark case is in order.

In early 1999, Tammy Robinson, a/k/a "BeckaLynn" (www.BeckaLynn.com), received a death threat via email from some crazed individual. She took this threat quite seriously since certain information contained in the email indicated that this person knew where she lived, and it made specific reference to doing harm to her children. Without delving into the details of this threat suffice it to say that the actions described would turn any reader's stomach. Tammy immediately called the FBI, who would not be bothered with the incident, but who referred her to the "Polk County Sheriff's Office, Computer Crimes Unit."

For anyone who is not familiar with Polk County, Florida; it is a largely rural, conservative, and religious county situated directly between Tampa and Orlando, both thriving cosmopolitan cities. Polk County is a bit of an oddity in this State. The old joke around here is: "If you enter Polk County, set your watch back 50 years." Although one relatively large municipality exists in Polk County, the City of Lakeland, it is largely made up of orange groves, farm houses and churches. For 20 years, the Sheriff and the State Attorney's Office have been battling to completely rid the county of all forms of adult entertainment. This well-publicized yet successful battle involved questionable intimidation tactics, including threats to the landowners of any adult entertainment businesses, who were charged or threatened with racketeering offenses if they failed to evict their adult entertainment tenants and consent to a deed restriction prohibiting the property from ever being used for adult entertainment in the future. It is against this backdrop that Ms. Robinson's request for law enforcement assistance must be evaluated.

The "Computer Crimes Unit" in Polk County consisted of one sheriff's detective: Charlie Gates. Detective Gates had been moved around from department to department, and he had a somewhat checkered past with the Sheriff's Office. His superiors ultimately stuck him behind a computer to look for child pornography and "obscenity" violations.

Detective Gates responded to the Robinson home to begin investigating the death threat in February 1999. During the process of interviewing Tammy, Detective Gates noticed a web page displayed on her personal computer that contained her picture. Detective Gates inquired as to the nature of the Website, and Tammy openly described her involvement with an amateur Website called Cyber Dream Makers, found at: www.DreamNet.com. Tammy inquired as to whether there was anything illegal about participating in such a Website and sending her images

to the business, which was based in Arizona. However Detective Gates assured her that there was no legal problem with the site. Ms. Robinson also offered to take the site down if there was any potential concern, but Detective Gates insisted that she leave it up, and that she not be worried.

Predictably, law enforcement was not being particularly forthright in this instance, and Detective Gates quickly abandoned the death threat investigation, and turned to investigating the Robinsons for obscenity violations under Florida law. As alluded to earlier, Polk County seeks to set itself apart and establish its own "community values" that are often at odds with the surrounding areas, and the country at large. Although it is unclear whether the government-mandated virtue is supported by the citizenry of Polk County, the law enforcement community vigorously seeks to do "the Lord's work" by acting as the morality police and eliminating what it sees to be unhealthy entertainment in the form of topless bars, adult video stores and, in this case, adult Websites. The Sheriff's Office had succeeded in ridding the county of virtually every other form of adult entertainment prior to this time, however adult imagery was now coming into the hallowed halls of Polk County in droves, via the Internet. The State Attorney's Office, in conjunction with the Polk County Sheriff's Office, therefore decided it was time to clean up the Internet, at least that part of the Internet that invades Polk County. This time, however, the County bit off more than it could chew.

Detective Gates initiated his investigation by posing as a customer of Tammy's Website, and downloading a number of images to a floppy disk, (without the permission of the copyright holder). The Sheriff then took the images to the local judge who, significantly, issued a multiple "probable cause determinations" finding each individual image obscene. Investigators used those probable cause determinations to secure a tremendously overbroad search warrant that

authorized the seizure of all "pornography" or any "means used to create pornography." The warrant also authorized investigators to seize Ms. Robinson's clothing, sex toys and bank account records.

Early one morning in March, 1999, a SWAT Team of over 20 police officers showed up at the Robinson residence while she was taking a shower. They pounded on the door and demanded to be let in. When Tammy asked for a moment to be able to put on some clothes (since she had just gotten out of the shower), they kicked in the door and paraded her around naked in front of multiple male officers before being allowed to clothe herself. She and her husband were taken into separate rooms and interrogated about their involvement in the DreamNet.com Website. The investigators tried to make the case that the couple's children were being exposed to this adult business, and should therefore be removed from the home based on some trumped-up charge of child abuse or neglect. Parenthetically, the Florida Department of Children and Family Services quickly dismissed such allegations as absurd. During the search, the house was ransacked, and many videos were seized including the videotape of Tammy giving birth to her child. Interestingly, some girly magazines were seized, while others were left at the residence. Officers simply decided to pick and choose what constituted "pornography" and what was not. Ultimately, the couple was charged with wholesale promotion of obscenity, a felony in the State of Florida, based on the following set of images: http://www.AdultIndustryUpdate.com/Robinson.

As is obvious to even the most casual observer, the images alleged to be obscene in this case are mild compared to standard online adult fare in modern times. This was even true to a certain extent in 1999, as none of the images even depicted actual penetration. Keep in mind, however, that the *Miller* Test does contemplate that non-sexually explicit images can be obscene.

For example, the threshold test to determine whether the *Miller* Test applies is whether the materials depict sexual activity or contain a lewd display of the genitals. The government can therefore charge, as obscene, *Hustler*-style nude images – requiring the defendant to defend based on the other elements of the *Miller* Test, i.e., that the images are not patently offensive, do not appeal to the prurient interest (based on community standards) and contain serious artistic literary political or scientific value.[1]

The arrest of Tammy and Herbert Robinson for this felony activity caused great disruption in their personal and business lives. Herbert Robinson lost his job at a large supermarket chain, based solely on the arrest allegations. As noted earlier, Tammy Robinson faced the loss of her children through a Family Services investigation. They both had to scrape up money for a bail bondsman, just to be released pending their trial. Shortly after getting over the shock of the initial arrest, the Robinsons were hit with a forfeiture complaint, wherein the Sheriff's Department sought a forfeiture of all of the Robinson's personal property that was of any value, including computers, CD players, cameras, money and other electronics.

At this point, the Robinsons realized that they were in over their head, and needed an experienced First Amendment attorney to defend their interests. This author was proud to assist in representing Tammy and Herbert Robinson throughout all stages of this nightmare. Interestingly, another amateur adult Website couple was arrested in Polk County on the same day as the Robinsons. They were involved with the Website known as iFriends.com. Their attorney appeared on television the day after the arrest and observed that the local convenience stores carried adult videos that were more hard core than the materials alleged to be obscene in these cases. The very next day, the Sheriff's Office raided all of the convenience stores, which quickly

[1] *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

complied with the Sheriff's demands by taking all adult videos out of public circulation. So much for that argument!

It then became obvious that the State was out for blood, and wanted these individuals to do time. In other words, this case was serious. Sometimes, this author has learned over the years, the best defense is a good offense. Accordingly, the decision was made to turn the prosecutors into the defendants by filing not one, but two, federal lawsuits against both the Sheriff's Office and the State Attorney's Office, based on various civil rights violations, including a First Amendment prior restraint claim.

This case was much different than any other the Polk County Sheriff's Office had ever litigated in the past. Initially, it had to do with computers and the Internet – an element that was not often involved in the typical criminal case in Polk County, Florida. Moreover, this case differed from the typical obscenity case in many important respects: For example, the defense quickly filed a motion to determine the geographic scope of the community since it was unclear which community's standards would apply in this case, and what kind of jury instruction would be given to the jury when it came time to evaluate the community standards issue.[2] The defense also raised concerns with the way this obscenity case was being prosecuted, including the presentation of individual allegedly obscene images to the court, instead of evaluation of the entire Website "as a whole" as required under the *Miller* Test. The dreamnet.com site included many other models and hundreds of images that could be part of the whole Website. It has still not been determined what the "whole work" is when it comes to online materials, which do not

[2] That motion was something of a foreshadower of significant constitutional issues to come, given the community standards debate that has occurred in the COPA litigation. See: *ACLU v. Reno,* 217 F.3d 162 (3rd DCA 2000), *vacated by, Ashcroft v. ACLU,* 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), *on remand, ACLU v. Ashcroft,* 322 F.3d 240 (3rd DCA 2003). Even after substantial litigation in the Third Circuit Court of Appeal, along with the United States Supreme Court, the issue of which community standards to apply to online communications has still not been resolved. That issue will likely be a focus of some components of the upcoming Extreme Associates case in the Western District of Pennsylvania.

have a convenient beginning, middle or end. Many of these issues may not be sorted out for years to come, given their complexity and the potential for varying inconsistent determinations by the courts. However, another more traditional concern raised in the Robinson case was the legality of the search warrant used to ransack the residence. As noted earlier, the search warrant authorized the seizure of all "pornography" and means used to create pornography. The case law relating to searches and seizures of materials protected by the First Amendment is relatively complex; but it has been well established that law enforcement officers cannot rifle through one's personal belongings and decide for themselves what materials are obscene and what materials are legal. Only specifically identifiable titles may be seized, and then only after an adversary judicial determination of obscenity.[3] Given the arbitrary decisions obviously made by the officers in taking some adult items, while leaving others, this warrant was patently defective and unquestionably overbroad.

As a result of the various lawsuits facing the prosecution, and the significant legal issues raised by the defense, the State Attorney's Office began to wonder whether this case was all worth it, and became concerned that its prosecution was falling apart. Once the defense called in an expert witness from halfway across the country to testify as to the community standards issue, the prosecution knew the defense team was serious, and never let him take the stand by immediately proposing a means by which the case could be dismissed to the satisfaction of all parties involved. The case was finally dismissed on January 29, 2001.

The dismissal of the case between Tammy and Herbert Robinson was one of the highlights of this author's practice. However, that victory was not without its moments of despair and terror for the clients. Throughout the proceedings, the Robinsons understood that

[3] *Marcus v. Search Warrant,*367 U.S. 717 (1961); *Roaden v. Kentucky,*413 U.S. 496 (1973); *Heller v. New York,* 413 U.S. 483 (1973).

they could each go to prison for a period of up to five years, and loose contact with their children (and each other) during incarceration. Moreover, they could both be convicted felons for the rest of their lives. The mainstream media took a great interest in this matter, and the case was highlighted on *Fox Files, 48 Hours* and the *Oprah Winfrey Show*. The media spotlight shone brightly on Polk County, Florida, which became increasingly embarrassed about its Puritanical morality being stuffed down everyone's throats. Ultimately, that spotlight was too bright for the censors, and they backed down.

Several important lessons can be learned from the successful resolution in that case. First, and as poignantly illustrated by the Extreme Associates case, the government would like to establish legal precedent that allows it to proceed separately against individual images or video clips, and charge them separately as obscene "works." Webmasters have, over the years, learned that the *Miller* Test requires that all obscene works must be evaluated "as a whole" and thus it may be wise to include literary, artistic, scientific or political speech as part of the sexually oriented expression on an adult Website, to assist in defending the materials. If the government succeeds in convicting a defendant based on a single image, web page or video clip, an important defense to obscenity charges will be eliminated, and the *Miller* Test turned on its head. It would be like alleging one page of a magazine to be obscene. To the extent that webmasters can present images in the context of stories or interrelated communications that bind all web pages together on a Website, such presentation may bolster the argument that individual images, or web pages, cannot be independently evaluated for purposes of the *Miller* Test.

The next lesson that can be taken from the Robinson case is more of an observation: When the government comes after you, they hit you with all they've got! Law enforcement in the United States will not bring a mellow test case, filed solely for the altruistic purpose of

testing community standards, where conviction will result in no more than taking the material out of circulation – and all with your hard-earned tax dollars. The industry saw that approach in the charges filed against Sweet Entertainment in British Columbia in 2001. The United States' brand of justice is a bit different: Webmasters can expect to be hit with felony criminal prosecution, "charge stacking,"[4] forfeiture proceedings, administrative complaints, license revocations, family services investigations, and a media blitz. This onslaught is designed to overwhelm the defendant and cause him or her to loose all hope of defending against these multiple proceedings with the end goal of causing the defendant to simply give up. While this form of governmental intimidation is usually very successful, it is often nothing more than a bluff. Many of the counts, proceedings, and allegations may ultimately be unsupported by the facts or the law, and are often dismissed after evaluation by a competent attorney. The key is to weather the storm past the initial onslaught, and start picking apart the government's case – bit by bit. The prosecution is not used to this sort of perseverance and the microscopic analysis of its allegations; which is a benefit to the defendant.

Something else that the industry can take away from the Robinson case is inspiration. Tammy Robinson, a housewife and mother of three, who had never been in trouble with the law in her life, suddenly found herself facing a massive governmental felony prosecution. Her husband was also charged, stressing their marriage, and her children were in danger of being taken away. Yet as a result of all this, a freedom fighter was born, and Tammy Robinson decided to stand and fight, instead of rolling over and playing dead. There was some indication that the government would have initially been satisfied if the Robinsons were willing to shut down their Website and agree to never enter the adult entertainment industry again. Instead of accepting an

[4] "Charge stacking" is the questionable procedure of filing as many criminal charges against a defendant as may conceivably apply in an effort to intimidate the defendant into pleading guilty to one or more of the counts, in exchange for dismissal of all the others.

agreement so offensive to First Amendment rights, Tammy turned up the heat by launching a legal defense fund Website – the first of its kind. On the site, BeckaLynn posted nude pictures of herself in exchange for donations to her attorneys; something that irked law enforcement to no end. BeckaLynn had a loyal following on the Web, and those who learned of her story after her arrest came to her aid through significant donations to the legal defense fund. These donations allowed Tammy and Herbert Robinson to file a pair of federal lawsuits against Polk County law enforcement officials, which ultimately turned the tide in their favor. This sort of industry and public support was the single most critical factor that drove the favorable result in her case. Without sufficient funding, the Robinsons would have remained on the defensive instead of taking the offense in this case against those who are prosecuting her. As the adult Internet industry braces for the onslaught of federal criminal indictments promised by the Ashcroft Justice Department, it should remember what worked in the past and lend its financial and moral support to those who are singled out for this initial round of prosecutions, regardless of the personalities involved or the offensive nature of the content selected for prosecution. The government is expected to pick easy targets; those whom other industry participants can readily agree are on the fringe, or are somehow deserving of criminal prosecution. Thus far, the government has focused on sexual violence,[5] and defecation material.[6] If the industry turns its collective backs on those selected for prosecution in these early stages, it will be doing itself a substantial disservice in the long run.

A final lesson that can be learned from the first obscenity prosecution against an adult Website is that of courage. Any form of litigation will be a give and take process where one minute, you're on top of the world, and the next, you feel like the case is over and you've lost.

[5] See: *United States v. Extreme Associates,*(W.D. Penn. 2003).
[6] See: *United States v. Corbett, et. al.* (S.D. W.V. 2003).

The Robinsons faced years of incarceration in prison and a conservative jury pool, but never lost hope or faith in their attorneys, even in the darkest times. Some hearings went well, and others were a disaster. There were unexpected difficulties and surprises around every corner, and no amount of preparation can account for everything that could happen in the course of complex state and federal court litigation. At any point, the Robinsons could have thrown in the towel and said "We're finished, this is too expensive, we'll simply give them what they want." But that never happened – not for a minute. Some adult Internet industry participants are quick to do what is in their own best interests without consideration for the greater good. Freedom Fighters like Larry Flynt (*Hustler*), Phil Harvey (PHE Entertainment, d/b/a Adam & Eve) and Joe Redner (Mons Venus) refuse to be intimidated by government threats and roadblocks along the path of their individual fights for freedom. The price of freedom is eternal vigilance. The right to free expression has cost some their lives and others a substantial amount of their personal liberty.

The time is soon upon the adult Internet industry where companies will be fighting for their lives, and their owners will be fighting for their freedom. Attorneys and other industry leaders will have little time to write articles and give speeches, to provide the industry with the benefit of our experiences. Instead, we'll be fighting in courtrooms across the country and endlessly toiling away on legal briefs and motions, in the effort to ward off the new wave of government censorship. It is this author's sincere hope that those selected for obscenity prosecution will stand and fight, and that other industry participants will support those defendants in their efforts. Tammy and Herbert Robinson stood and fought, and their "Notice of Dismissal" hangs on this author's wall as an eternal reminder of their courage and vigilance. Their actions should truly be an inspiration to an industry under siege. If the defendants in the

next round of cases show the same courage and tenacity, the government is likely to rethink the wisdom of its censorship campaign.

Lawrence G. Walters, Esq., is a partner with the law firm of Weston, Garrou & DeWitt, which maintains offices in Orlando, Los Angeles and San Diego. Mr. Walters represents clients involved in all aspects of adult media. The firm handles First Amendment cases nationwide, and has been involved in significant Free Speech litigation before the United States Supreme Court. All statements made in the above article are matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. You can reach Lawrence Walters at Larry@LawrenceWalters.com, www.FirstAmendment.com or AOL Screen Name: "Webattorney."