UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Crim. No. 08-093 (RJL)

v.

JOHN STAGLIANO,
JOHN STAGLIANO, INC.,
EVIL ANGEL PRODUCTIONS, INC.,

Defendants.

DEFENDANT EVIL ANGEL PRODUCTIONS, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE INDICTMENT

In support of its motion to dismiss and in reply to the Government's Omnibus Opposition ("Government's Opposition"), Evil Angel Productions, Inc. ("E.A. Productions") respectfully submits this reply memorandum to this Honorable Court.

I. Contemporary Community Standards

Defendant, E.A. Productions, faces charges of violating §§ 18 U.S.C. 1465 and 47 U.S.C. 223(d) by distributing purportedly obscene material over the Internet. Defendant maintains that, *inter alia,* the First Amendment prohibits prosecution of E.A. Productions for use of an interactive computer service to distribute on-line communications because, unlike many off-line publishers, Internet publishers cannot control the geographic reach of their communications. Accordingly, the use of local

community standards to judge the lawfulness of such on-line communications invariably subjects those communications to the restrictions of the most conservative communities in the nation. E.A. Productions submits that this reality unconstitutionally chills speech by allowing an "Internet heckler's veto" to these conservative communities.

18 U.S.C. § 1465 and 47 U.S.C. § 223(d) are impermissibly overbroad because they employ *Miller's* community standard element in the determination of whether certain Internet communications that are not geographically controlled are obscene. This, frankly, is an impossible task because, while situations where the speaker controls the direction of his communication (as in *United States v. Thomas,* 74 F.3d 701 (6th Cir. 1996), cited by the Government, where the defendant knowingly directed certain on-line communications to a limited group of people who purchased passwords through mail-order applications and direct telephone contacts), the dissemination of the trailer that is the subject of the 18 U.S.C. § 1465 and 47 U.S.C. § 223 charges could not be geographically controlled. Here, defendants are alleged to have simply made the charged trailer available for viewing on a Web site—which is their legal right to do. However, this Web site can be viewed from anywhere in the world, and it is impossible to limit dissemination of the

contents of the Web site to particular geographic areas. *See, e.g., Ashcroft v. American Civil Liberties Union,* 322 F.3d 240, 270 (where the Third Circuit found that application of the community standards element exacerbated the overbreadth of COPA, quoting Justice Kennedy's observation in *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 596 (2002), that "if an eavesdropper in a more traditional rural community chooses to listen in, then there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web"). Consequently, application of community standards to Internet communications necessarily allows the most conservative, restrictive communities to use community standards as a sword that limits on-line expression to the narrowest viewpoints.

The Government responds that the use of local community standards is supposedly mandated under *Miller v. California,* 413 U.S. 15 (1973), insofar as the Supreme Court "adopted the concept of 'community standards' because it determined that use of a national standard for obscenity would be 'an exercise in futility' given the size and diversity of the United States." (Government's Opposition at p. 4). However, review of the *Miller* decision shows that while the Court may have recognized difficulties posed by application of national standards in that

era, it did not conclusively bar the use of such standards in favor of local ones.

Indeed, as Justice O'Connor explained in *Ashcroft v. American Civil Liberties Union, supra*:

> For these reasons, adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity.
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> Our precedents do not forbid adoption of a national standard. Local community standards originated with *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In that case, we approved jury instructions that based the relevant 'community standards' on those of the State of California rather than on the Nation as a whole. In doing so, we held that "[n]othing in the First Amendment requires' that a jury consider national standards when determining if something is obscene as a matter of fact. *Id.* at 31, 93 S.Ct. 2607. . . But we said nothing about the constitutionality of jury instructions that would contemplate a national standard—*i.e.*, requiring that the people who do live in all these places hold themselves to what the nationwide community of adults would find was patently offensive and appealed to the prurient interest.
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> Later, in *Jenkins v. Georgia,* 418 U.S. 153, 157, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), we confirmed that "*Miller* approved the use of [instructions based on local standards]; it did not mandate their use. The instructions we applied in that case charged the jury with applying 'community standards' without designating any particular 'community.' In holding that a State may define the obscenity standard by stating the *Miller* standard without further specification, 418 U.S. at 157, 94 S.Ct. 2750, *Jenkins* left open the possibility that jurors would apply any number of standards, including a national standard, in evaluating material's obscenity.

> To be sure, the Court in *Miller* also stated that a national standard might be 'unascertainable," 413 U.S. at 31, and '[un]realistic,' *id. at 32.* But where speech on the Internet is concerned, I do not share that skepticism."

535 U.S. at 587-88.

While concluding that the State of California's failure to offer evidence of national standards was not error of constitutional stature, the Supreme Court did not rule that national standards may not ever be considered by a jury. *Miller v. California,* 413 U.S. at 31-32. Rather, defendant submits that the Court's primary reservation concerning application of a national standard at that time was that "absolutism of imposed uniformity" would strangle the diversity of expression in the various States. *Id.* at 32. But, imposed uniformity is not required in order to address community standards in the context of on-line communications. The jury need only be permitted to consider what the average American adult would find to be prurient or patently offensive.

Indeed, Justice Breyer's dissent from Part III of the majority opinion in *Ashcroft v. American Civil Liberties Union,* 535 U.S. at 589-90, indicates that the focus should be on an objective test based on the reasonable person standard:

> "I write separately because I believe that Congress intended the statutory word 'community' to refer to the Nation's adult community taken as a whole, not to geographically separate local areas.

> The statutory language does not explicitly describe the specific 'community' to which it refers. It says only that the 'average person, applying contemporary community standards' must find that the 'material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest . . .' 47 U.S.C. § 231(e)(6) (1994 ed., Supp V).
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> To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious. See *American Civil Liberties Union v. Reno*, 217 F.3d 162, 175-76 (C.A.3 2000). And these special difficulties also potentially weaken the authority of prior cases in which they were not present. Cf. *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). A nationally uniform adult-based standard—which Congress, in its Committee Report, said that it intended—significantly alleviates any special need for First Amendment protection. Of course some regional variation may remain, but any such variations are inherent in a system that draws jurors from a local geographic area and they are not, from the perspective of the First Amendment, problematic. See *id.,* at 105-106, 94 S.Ct. 2887.

Ashcroft v. American Civil Liberties Union, 535 U.S. at 589-91.

In any event, it is not incumbent upon the defendants to devise a new approach to the assessment of community standards. If the application of local community standards proves to be

unworkable or excessively restrictive to the new medium of the Internet because it transcends geographic boundaries, then using that approach here should be deemed unconstitutional whether or not this Court believes that a national standard is "unascertainable." *Cf*. *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 813 (2000)(" the right of expression prevails, even where no less restrictive alternative exists"); *id*. at 823 (the "appropriate remedy" is not to repair the law, it is "to enjoin the speech restriction"); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("[T]he state may not regulate at all if it turns out that the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits to be gained from those limitations.") For that reason, the Supreme Court has held that neither national nor local community standards may be used to determine the "serious merit" element of the *Miller* test. *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987). The Court explained that the test for serious literary, artistic, political or scientific value could not hinge on the vagaries of "community" tastes, but instead must be judged by reference to the hypothetical reasonable person.

Even the Government recognizes that *Hamling* and *Sable Communications, supra,* are much different on their facts than the instant case. In both of those cases, the Supreme Court's approval of the application of local community standards was founded on the speakers' ability to control the geographic dissemination of their messages. For instance, in *Hamling,* the defendants mailed obscene brochures to recipients. *Hamling v. United States,* 418 U.S. at 92-93 (1974). In *Sable Communications,* the Supreme Court rejected the dial-a-porn operators' argument that they could not control geographic distribution of their telephone messages, and concluded, therefore, that it was proper to expose the operators to the community standards of those communities into which they chose to send communications. *Sable Communications of Cal., Inc. v. Federal Communications Commission,* 492 U.S. at 125-26 (1989).

In contrast, Internet publishers such as E.A. Productions do not have the ability to control geographic distribution in the context of on-line communications. It is this inability to control the geographic reach of expression that exposes defendant to a risk of non-compliance with the mores of the most conservative communities in the nation and the potential for an Internet heckler's veto in the form of a criminal prosecution premised on those most conservative standards.

Accordingly, defendant contends that the application of community standards to on-line communications of the type charged under 18 U.S.C. § 1465 and 47 U.S.C. § 223(d) unduly chills protected speech and renders the aforementioned statutes unconstitutionally overbroad.

II. 18 U.S.C. § 1465 And 47 U.S.C. § 223(d) Are Unconstitutional Insofar As The *Miller* Requirement That The Work Be Taken As A Whole Cannot Be Met In The Context Of Material On The World Wide Web.

E.A. Productions contends that the *Miller* requirement that the charged works be judged "as a whole" cannot be met in an on-line context. Alternatively, in order to meet *Miller's* mandate, the "whole" at issue with respect to charges of violating 18 U.S.C. § 1465 and 47 U.S.C. § 223(d) is the entire Web site, www.evilangel.com. The Government, however, contends that the trailer named in Counts Three and Seven of the indictment qualifies as the matter to be taken as a whole, and that the recent line of COPA decisions is not controlling on the question of "what is the whole?" in the current prosecution context.

A. "Taken As A Whole" Is Unconstitutionally Vague With Respect to Internet Communications.

The Government describes the charged trailer as "simply one of thousands of 'whole' matters or works available for viewing on the defendant's website, including a vast array of movies, trailers and other products that may be purchased or downloaded

for free. Common sense dictates that the movie trailer is the whole matter, not the entire Evil Angel website." (Government's Opposition at p.7). In actuality, "common sense" indicates, first, that the question of what constitutes the whole of a work on the Internet is the vexing question that Justice Kennedy has described it as, and, second, the "whole" in this case must be at least the entire Evil Angel Web site.

While it is clear that the COPA cases recently litigated in the Third Circuit and the Supreme Court focused, in part, on the "harmful to minors" portion of the statute, that mere fact does not diminish the significance of the problem of how to determine "the whole" work in the Internet context. The fact that the injunction in *American Civil Liberties Union v. Gonzales,* 478 F.Supp. 2d 775 (E.D. Pa. 2007) has recently been clarified so as not to restrict an obscenity-based prosecution under 47 U.S.C. § 231 does not affect the meaningfulness of the decision in that case, and its affirmance in *American Civil Liberties Union v. Mukasey,* 534 F.3d 181 (3d Cir. 2008), especially with respect to the vagueness of the term "taken as a whole" as used in 47 U.S.C. § 231. As the District Court explained, in language approved and relied upon by the Third Circuit:

> COPA does not define the term "as a whole" and the plain language of the statute does not lend itself to an obvious definition of "as a whole" as it might be

> applied to the Internet. 47 U.S.C. § 231. The Third Circuit concluded in a dictum that the language of COPA clearly demonstrated that each individual "communication, picture, image, graphic image file, article, recording, writing or other matter of any kind" should be considered without context. *ACLU,* 322 F.3d at 252. But, as Justice Breyer noted in his dissent, "as a whole" has been traditionally interpreted in obscenity cases to require an examination of the challenged material within the context of the book or magazine in which it is contained. *Ashcroft,* 542 U.S. at 681, 124 S.Ct. 2783 (citing *Roth v. U.S.,* 354 U.S. 476, 490, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). As Justice Kennedy noted in his concurring opinion, "The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." 535 U.S. at 592-93, 122 S.Ct. 1700. Thus, with the disparate views noted above, and as discussed below, in the context of the Web, I conclude that the use in COPA of the phrase "as a whole" without any further definition, is vague.
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> Instead of having a two-hundred page book or an issue of a magazine to look to for context, COPA invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute. As a result, a Web publisher cannot determine what could be considered context by a fact finder, prosecutor, or court, and therein lies the source of the vagueness.

American Civil Liberties Union v. Gonzales, 478 F.Supp.2d at 818-19, *aff'd, American Civil Liberties Union v. Mukasey,* 534 F.3d 181, 205.

In the instant case, the Government has isolated a tiny portion of E.A. Productions' Web site—a single trailer among

what even the Government acknowledges as a much larger entity—and insists that it is permitted to prosecute the trailer as the whole of the charged matter. It takes this position even though it is obvious that the trailer is merely a portion of the Evil Angel Web site that the Government seeks to have judged out of context – indeed, one cannot even get to the trailer without first entering the site's home page and then navigating a series of Web pages within the Evil Angel Web site. Because 18 U.S.C. § 1465 and 47 U.S.C. § 223(d) allow the Government to determine context on the Web at its convenience without sufficient notice to Web publishers, the "taken as a whole" elements of both statutes must be declared unconstitutionally vague.

B. Alternatively, The "Whole" Of The Matter Is The Entire Evil Angel Web Site.

Under the Government's theory, it would be permitted to pick apart even books and magazines, prosecuting only those portions it believes are obscene. A magazine with dozens of articles and hundreds of photographs would be divisible to the smallest unit, and all context of the presentation of the charged portion of the work would disappear. Obviously, this is simply not permitted. *See, e.g., Kois v. Wisconsin,* 408 U.S. 229, 231 (1972); *United States v. Thevis,* 484 F.2d 1149, 1155-57 (5th Cir. 1973).

Defendant submits that the Evil Angel Web site exists as a single entity composed of multiple elements—like a magazine or book. It is more insular than iTunes.com or Amazon.com in the sense that it exists to present and promote unique Evil Angel-themed or produced content, not unlike many brand magazines. The trailer being prosecuted in this case is merely a sample of the many Evil Angel products offered for viewing on the site or for purchase. It is no more permissible for the Government to treat this video clip as the whole of the matter than it would be for the Government to, for instance, divorce a portion of a photo shoot from the context of the whole magazine in which it was presented (or select for prosecution only one reel of a three-reel motion picture). Rather, the First Amendment and *Miller* prohibit partitioning of content in the manner suggested by the Government in the instant case.

Indeed, even the Government's citation to *United States v. Various Articles of Obscene Merchandise, Schedule No. 2098,* 536 F.Supp. 50 (S.D.N.Y. 1981), does not prove its claim to have the power to judge the charged trailer out of context. There, it was clear that the movies contained on the charged videotapes were whole, complete movies, each with their own plots, titles, credits, etc. Put simply, they were traditional movies, not

small digital excerpts from a larger digital database making up the whole of a Web site.

Defendant respectfully submits that *Various Articles* is not on all fours with the case currently before the Court. The First Amendment does not permit expression to be ripped apart and prosecuted out of context, and neither did the court in *Various Articles.* Further, E.A. Productions asserts that a single trailer interlinked with the thousands of pieces of digital information that make up the Web site on which it is found is a much different factual situation than that presented in *Various Articles.* This Court should treat the charged trailer as it truly exists: as a tiny portion of a large digital database that is more akin to a portion of a magazine or catalog than to a complete movie that has a discrete existence as a whole work. In order to ensure that the trailer is prosecuted in context, the Evil Angel Web site should be considered the whole of the matter.

III. The Prohibitions Of Transporting, Transporting By Common Carrier Or By Interactive Computer Service, And Engaging In The Business Of Selling And Transferring Obscene Materials, Unconstitutionally Burden The Exercise Of Free Speech And Due Process Rights By Adults Who Wish To Possess And Use Such Materials In The Privacy Of Their Own Homes.

E.A. Productions maintains that the First Amendment and the Due Process Clause protect defendant's right to distribute

obscene material to adults for viewing and use in private, particularly in light of *Lawrence v. Texas,* 539 U.S. 558 (2003), and the Fifth Circuit's more recent decision in *Reliable Consultants, Inc. v. Earle,* 517 F.3d 738 (5th Cir. 2008). The Government contends that the right to possess obscene materials does not extend beyond the home and, in any event, the determination of defendant's right to distribute obscene materials to consenting adults cannot be addressed by this Court under the rule of *Agostini v. Felton,* 521 U.S. 203 (1997), requiring lower courts to cleave to direct Supreme Court precedent even when such precedent has been destroyed by subsequent decisions.

It is clear that E.A. Productions has derivative standing to challenge the constitutionality of 18 U.S.C. §§ 1462, 1465, and 1466, and it does not appear that the Government opposes such standing. *See, e.g., Carey v. Population Services International,* 431 U.S. 678 (1977); *United States v. Extreme Associates,* 431 F.3d 150 (3d Cir. 2005). Rather, the Government rejects the merits of defendant's right to distribute argument and maintains that the Court is not empowered to consider the issue because the *Reidel/Orito* line of cases still controls disposition of the case. *United States v. Reidel,* 402 U.S. 351

(1971); *United States v. Orito,* 413 U.S. 139 (1973). (Government's Opposition at pp. 18-19).

Defendant contends that, in addition to having a First Amendment right to possess obscene materials in private under *Stanley v. Georgia,* 394 U.S. 557 (1969), it is clear after *Lawrence v. Texas, supra,* that adults enjoy a substantive due process right to obtain such materials for private use, and that the challenged statutes impermissibly burden these rights. *See also, Reliable Consultants v. Earle, supra* at 744 (concluding that Texas' ban on the sale of sexual devices "heavily burdened" the individual's substantive due process right to engage in private intimate conduct of his or her choosing). It does not, as suggested by the Government, require this Court to "unravel years of Supreme Court and federal appellate court decisions" to reach this obvious conclusion; the work has already been done by the Supreme Court in *Lawrence*. (Government's Opposition at p. 16).

Further, this Court's review of defendant's contentions is not impaired by *Agostini v. Felton, supra,* or by the Third Circuit's application of the *Agostini* principle in *United States v. Extreme Associates, supra.* First, an American adult's substantive due process right to sexual privacy even outside the home is apparent from *Lawrence. Id.* at 562 (declaring that the

State is not omnipresent in the home and stating that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds"). Second, defendant respectfully submits that the Third Circuit erroneously concluded that it was constrained from ruling on the substantive due process issue because of *Agostini*. *United States v. Extreme Associates, supra* at 159-60. In fact, *Reidel* and its progeny do not precisely address the substantive due process rights asserted here, and even if such concepts were discussed generally, it was not in a way that is directly controlling of the issue before this Court. Consequently, *Agostini* does not control disposition of the substantive due process claims raised by defendant, and this Court should review and determine the merits argument in favor of E.A. Productions.

CONCLUSION

E.A. Productions respectfully requests that the Court permit it to join in the reply memoranda filed by its co-defendants. Further, for the foregoing reasons, and for the reasons set forth in defendant's Motion to Dismiss Indictment, the Court should dismiss the pending charges against E.A. Productions in their entirety. In the alternative, the Court

should rule that the material to be taken as a whole is the entire Evil Angel Web site.

Respectfully submitted,

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October 31, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2008, a true and correct copy of the foregoing Defendant Evil Angel Productions, Inc.'s Reply Memorandum in Support of Its Motion to Dismiss the Indictment was served by the Court's electronic filing system upon:

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