

# Payment Intermediaries and Illegal Activity in the United States: A Brief Overview and Recent Developments

Clinical Professor of Law, UC Irvine School of Law

Professor **Jack I. Lerner**

This paper is a record of Professor Jack Lerner's lecture at the in-house meeting "Considering the Issue of 'Financial Censorship' in Expression Regulation by Credit Card Companies, etc.", organized by the NPO Uguisu Ribbon (<https://www.jfsribbon.org/>) on December 3, 2024, at the House of Councillors Members' Office Building.

In Japan, due to the influence of oligopolistic foreign credit card companies, certain fiction works—such as manga, anime, and games dealing with specific themes—have been removed from e-book stores, and credit card payments have been restricted at doujinshi (self-published works) bookstores. This ongoing situation, known as "financial censorship", raises significant concerns. In this lecture, Professor Lerner explains the situation in the United States and provides insights into how this issue should be understood (JILIS Editorial Board).

My name is Jack Lerner. I am a law professor at the University of California Irvine School of Law in the United States, and a Visiting Scholar at Waseda University's Graduate School of Law here in Tokyo. Thank you very much for having me. It is a great honor to be here and to present on this subject. Today I will be discussing how payment processors have dealt in recent years with platforms in the United States that feature adult content. Because I am an attorney by training, my talk will focus more on

the law relative to industry factors or related data.

There is a long history of payment processors interacting with adult content websites on the internet. The most important developments arguably involve private companies making decisions about how to and whether to deal with adult content. Though explicit content including pornography is not illegal in the United States, there is significant concern that adult content platforms host content that is illegal, including non-consensual pornography and child sexual abuse material.

Today I will discuss two important recent developments on this subject.

First, in 2021 Mastercard issued new guidelines for adult content that are relatively stringent compared to previous guidelines, and Visa followed suit with similar guidelines shortly after Mastercard. Second, as Councillor YAMADA Taro mentioned earlier in this meeting, a victim of child pornography achieved an important early victory in a lawsuit against both Pornhub's parent company and Visa, Inc.

## **Fleites v. Mindgeek S.A.R.L., 617 F.Supp.3d 1146** (C.D. Cal. 2022)<sup>1)</sup>

In July 2022, a federal trial court in Los Angeles refused to dismiss a complaint by a young woman who had had videos of her uploaded at age 13. She brought a lawsuit against Pornhub's parent company and also Visa, Inc. and other payment intermediaries. Her claim was based on several causes of action,

1) The opinion is available at <https://brownrudnick.com/wp-content/uploads/2022/08/MG-Dkt-No.-166-Order-Granting-in-Part-and-Denying-in-Part-Visas-MTD367477.pdf>.

but the key law at issue was Trafficking Victims Protection Reauthorization Act.<sup>2)</sup> This was a very important decision even though it was a decision early in the case. Visa filed a motion to dismiss, which in the United States system means that Visa asked the court to decide that, even if all the allegations in the plaintiff's complaint were accepted as true, the plaintiff's legal claims are insufficient to warrant any further factfinding. The court denied the motion.

All the events in this case took place before 2020, and so the guidelines that were introduced later by Visa and Mastercard were not in play here. But what happened was that Visa, according to the plaintiff, had knowledge of illicit activities and a large amount of child pornography on Pornhub and other companies' websites.

There were two major reasons why the court held that Visa must stay in the case and cannot be dismissed at this stage. First, Visa had knowledge of illegal activities. Second, Visa exercised some control over Pornhub's parent company, Mindgeek, and the company that runs other sites at issue in the case. And it exercised that control with its guidelines. In my view, this is a very important case in the history of the of these user-generated content adult websites and the credit card companies' relationship with them. The case is ongoing; it is still in its very early stages, so we'll see where it goes.

## Section 230<sup>3)</sup>

Now I'm going to talk about, a very important law when it comes to digital content in the United States, we call it Section 230, which is a provision in the telecommunications law of the United States. This law creates what we call a safe harbor from claims of defamation or other kinds of things that people who are on platforms do. It applies to "interactive computer services"—which could be email or a digital teleconference, but it could also be any user-generated content website—and provides that the service shall not "be treated as the publisher or speaker of any information provided by another information content provider." In the context of today's discussion, it is important to know that in 2018 Congress amended

Section 230 to add a new exception for sex trafficking and prostitution.<sup>4)</sup>

No United States case has held whether Section 230 protects credit card companies from liability the way it does for user-generated content sites such as Reddit. I think it's important to understand that what Section 230 does and does not do, because it is such an important law in the history of the Internet in the United States.

It is important to note that because Airbnb and Amazon process payments as opposed to publish things that people say, courts have held in some cases that those companies are not covered by Section 230. However, the law is complex in this area and the case law is mixed with respect to both companies.

## Mastercard and Visa Guidelines

Now I'm going to talk a little bit about the recent history of Mastercard and Visa and their relationship with the websites like Pornhub. What you see below is an article published in 2020 that really changed behavior both by the credit card companies and by Pornhub's parent company, MindGeek.

Nicholas Kristof is a prominent columnist in the United States, and at he published this lengthy investigation in the midst of a campaign by nongovernmental organizations to change the behavior of payment processors as regards pornography platforms such as Pornhub. Visa and Mastercard immediately suspended payments to Pornhub. In response, Pornhub removed 80% of its videos. Meanwhile, American Express has not allowed payments for adult digital content since 2000; and PayPal suspended payments to Pornhub in 2019 in light of concerns about illegal activity.

By 2022, Visa also suspended services, not just for the premium (subscription) services of Pornhub but also its processing of Pornhub's underlying ad services infrastructure, called TrafficJunky. Today, Pornhub does not process payments through Mastercard, Visa, or any other major payment intermediary. Instead, it uses just one service called ACH, which provides bank account-to-bank account transfers.

In addition, Mastercard updated its guidelines to

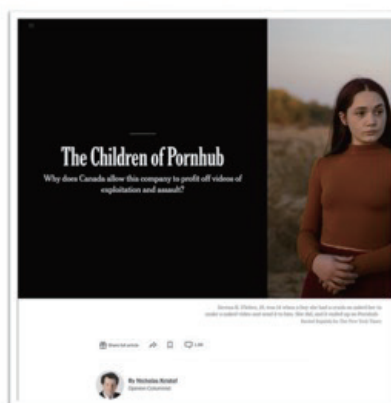
2) 18 U.S.C. § 1591 et seq., available at <https://www.law.cornell.edu/uscode/text/18/1591>.

3) 47 U.S.C. § 230, available at <https://www.law.cornell.edu/uscode/text/47/230>.

4) Public Law 115–164, 132 Stat. 1253 (Apr. 11, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1865/text>, codified at 18 U.S.C. § 2421A and 47 U.S.C. § 230(e)(5).

## 2020, 2022: Mastercard, Visa suspend payments to Pornhub

- Came after NGO campaign, Dec. 2020 Nicholas Kristof columns
- Pornhub removed “unverified” videos, went from 13 million to 4 million
- Paypal had suspended payments in 2019, AMEX has not allowed payments for adult digital content since 2000
- 2022: MC, Visa also suspend service to Mindgeek’s ad services



LERNER Jack, UC Irvine School of Law

6

make them much more stringent. Earlier this year, Texas began to require age verification, and ten other states now also require age verification. These age verification services are usually not payment processing services, but rather, third-party services. So, users in those states cannot access this website and many others without age verification.

A key finding here is that many different payment processors and payment intermediaries in the United States, and I think likely around the world, have very detailed rules and guidelines that merchants must follow. These policies are very detailed and sometimes quite long.

In 2021, Mastercard extended its requirements for what it called its specialty merchant registration requirements, so merchants must now undergo many

steps to comply if they are going to provide adult content. For example, the site must review the content before it is published on the site. As you can imagine, that would not be possible for some of the larger websites.

In addition, live streaming needs to be monitored, and anti-trafficking policies are important as well. What that means in practice is that a company working with Mastercard or Visa will need to coordinate with anti-trafficking groups and NGOs that are working on human trafficking and sexual trafficking.

And also, I want to stress that when we’re talking about illegal activity here, we are really talking about sexual assault and child pornography and other

## 2021: Mastercard extends Specialty Merchant Registration requirements

### Merchants must:

- Use verified content providers only – age and identity with government identification
- Individual content providers must also verify age and ID of performers
- Enter into written agreements with content providers
- Pre-publication review of all content
- Monitor live streaming
- Allow complaint process and appeals for removals
- Not let marketing appear to permit illegal activity
- Implement anti-trafficking policies

Visa issues similar rule in 2022

LERNER Jack, UC Irvine School of Law

9



## Adult content and payment processing timeline

- **1990s:** adult companies pioneer e-commerce and online payment
- **1996:** Section 230 passed – limitation on liability for interactive computer service
- **2000:** American Express will not process adult digital content
- **2007:** Federal appellate court holds payment intermediaries not liable for secondary copyright infringement
- **2018:** FOSTA-SESTA amends Section 230 to add exception for trafficking
- **2019:** Paypal suspends payments to Pornhub
- **2020:** MC, Visa suspend processing for Pornhub premium services
- **2021:** MC issues new more stringent guidelines for adult content
- **2022:** Federal trial court in Los Angeles holds Visa could be responsible for illegal content on Pornhub (*Fleites v. Mindgeek*)
- **2022:** MC, Visa suspend processing for Pornhub-related advertising services

LERNER Jack, UC Irvine School of Law

2

activities; we are not necessarily talking about what would be unlawful in many other countries that are generally lawful in the United States. For example, Korea does not allow much adult content that would be allowed in Japan or the United States. And Japan generally allows less content than United States law. So, for the purposes of this talk, when I refer to “illegal activity,” I’m referring to a smaller, more specific, but very important set of activities and not all adult content, “R18,” or pornographic material.

In other words, the term “illegal activity” as it pertains to the recent actions of Mastercard and Visa—and the *Fleites v. Mindgeek* lawsuit—does not necessarily apply when it comes to the products available on Manga Library Z or the other stores and websites that are having issues with payment processors now in Japan.

## Conclusion

In this talk I have attempted to provide a very brief overview of the relationship between payment intermediaries and adult websites in the United States. One thing I haven’t talked about today is intellectual property enforcement and the payment processors’ role in that. There was an important legal case in 2007 that said that payment processors are not liable for copyright infringement that takes place on

rogue websites.<sup>5)</sup> And when it comes to intellectual property, as with adult content or anti-trafficking initiatives, there have been many cooperative agreements and initiatives between rights holders and the payment industry. The payment industry engages private solutions such as these quite a bit when it comes to intellectual property enforcement, just as it does with adult websites. I would be happy to discuss this subject further with anyone who is interested.

Thank you again. It was a great honor to present to you and to share what I’ve learned about payment intermediaries and this topic.

5) Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007).

## References

- Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1591 et seq., available at
- 47 U.S.C. § 230, Protection for private blocking and screening of offensive material.
- Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115–164, 132 Stat. 1253 (Apr. 11, 2018), available at, codified at 18 U.S.C. § 2421A and 47 U.S.C. § 230(e)(5).
- Pornhub suspends site in Texas due to state's age-verification law, Texas Tribune (14 March 2024)
- Visa and Mastercard suspend payments for ad purchases on Pornhub and MindGeek amid controversy, CNBC (4 Aug. 2022)
- Fleites v. MindGeek S.A.R.L., 617 F. Supp. 3d 1146 (C.D. Cal. 2022)
- Inside the secret, often bizarre world that decides what porn you see, Financial Times (24 June 2022)
- Protecting our network, protecting you: Preventing illegal adult content on our network, Mastercard (14 April 2021); AN 5196 Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants (13 April 2021, effective 15 October 2021)
- Visa and Mastercard to Investigate Financial Ties to Pornhub, N.Y. Times (7 Dec 2020)
- Nicholas Kristof, The Children of Pornhub, N.Y. Times (4 Dec 2020);
- Call for credit card freeze on porn sites, BBC (8 May 2020)
- HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019)
- State Farm Fire & Cas. Co. v. Amazon.com, Inc. , 390 F. Supp. 3d 964 (W.D. Wis. 2019)

### Jack I. Lerner

Legal scholar specializing in information law. Clinical Professor of Law at the University of California, Irvine School of Law. Director of the Intellectual Property, Arts, and Technology Clinic at the same university. Areas of expertise include copyright, privacy, technology, media law, patent law, intellectual property, and freedom of expression. Researches issues at the intersection of law and technology, particularly focusing on how technology law and policy impact innovation and creative expression. Has given numerous presentations and written extensively on topics such as copyright and privacy. Holds a J.D. from Harvard Law School.

### About the Uguisu Ribbon Campaign

A nonprofit organization (NPO) established in 2012, dedicated to advocating for freedom of expression. The organization primarily engages in policy recommendations, particularly in the fields of fiction and creative works. It has proposed frameworks for ensuring freedom concerning regulations based on intellectual property rights, as well as restrictions on sexual and violent expressions.

Website : <https://www.jfsribbon.org/>