

August 30, 2023

BY EMAIL: electronicfilings@ftc.gov

Ms. April Tabor
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: MasterCard Inc. Complaint

Dear Commissioners,

The American Civil Liberties Union (ACLU), Hacking//Hustling, and a coalition of sex-worker-led, anti-trafficking, and LGBTQ+ organizations urge the Federal Trade Commission (FTC) to investigate Mastercard Inc. regarding its 2021 adult content policy: “Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants.”¹ This letter summarizes the evidence that Mastercard’s policy is an unfair business practice under Section 5 of the FTC Act, causes substantial, unavoidable harms to sex workers with no demonstrable benefit, and is within the purview of the FTC’s enforcement authority. We begin by providing an overview of the online adult content ecosystem to contextualize the various and burdensome requirements Mastercard imposes on platforms and sex workers through its policy. Then, we explain how Mastercard leverages its outsized market power to censor lawful sexual content. We then demonstrate how the effects of Mastercard’s policy injures consumers and illustrate how Mastercard’s policy constitutes an unfair practice under the FTC Act. Finally, we close by explaining how investigation and enforcement of Mastercard for these harms is consistent with the mission and priorities of the FTC.

Our organizations have a strong and long-standing interest in supporting sex workers’ fight for the marketplace protections to which they are entitled. Founded in 1920, the ACLU’s mission is to realize this promise of the United States Constitution for all and expand the reach of its guarantees. The ACLU has supported decriminalizing sex work since 1973 and continues to work to ensure that sex workers have equal access to legal protections.² Hacking//Hustling is a collective of sex workers, survivors, and accomplices working at the intersection of technology and social justice to interrupt violence facilitated by technology. Each of the undersigned organizations is committed to ensuring sex workers can live free from discrimination and harm from the government, corporations, and all other entities.

¹ AN 5196 Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants, Mastercard (2021), https://c4swebinars.com/videos/MC_AN5196_RevisedStandards.pdf [Hereinafter “Mastercard Revised Standards”].

² LaLa B Holston-Zannell, *Sex Work Is Real Work, and It’s Time to Treat It That Way*, ACLU (June 10, 2020), <https://www.aclu.org/news/lgbtq-rights/sex-work-is-real-work-and-its-time-to-treat-it-that-way>.

Mastercard's Role in the Adult Content Ecosystem

The adult industry in the United States generates \$1.1 billion annually.³ Despite its economic importance, those who create adult content (also known as pornography) continuously face targeted censorship by private corporations, particularly financial institutions.⁴ Surveys of sex workers⁵ have found that more than half of respondents had had a negative experience with a financial institution, and one survey found that one in six reported that they have had at least one credit card closed or an application denied.⁶ Payment processors, third-party intermediaries who then contract with a credit card company like Mastercard to enable financial transactions, also restrict the financial freedom of adult content creators by dictating how and when these workers receive income.

Like all economic actors who wish to accept payment via credit card, adult content creators and online platforms are required to contract with a payment processor. In the case of adult performers or merchants who sell adult content, the options for these payment processors, also known as “acquirers,” are often quite limited, and they frequently charge a higher percentage than providers who do not serve this market.⁷ In turn, these processors are at the mercy of credit card companies and are thus responsible for compliance with credit card company policies.

Payment processors put credit card policies into practice by imposing requirements on individual sellers, or in some cases, online platforms. Those policies include specific restrictions on the types of speech that adult performers can engage in, including the wording of titles, banning the production of material involving particular types of sex acts, and a variety of other requirements that limit the scope of “acceptable content.”⁸

³ *Adult and Pornographic Websites in the US*, IBIS (June 18, 2022), <https://www.ibisworld.com/industry-statistics/market-size/adult-pornographic-websites-united-states/>.

⁴ See Zahra Stardust, Danielle Blunt, Gabriella Garcia, Lorelei Lee, Kate D'Adamo & Rachel Kuo, *High Risk Hustling: Payment Processors, Sexual Proxies, and Discrimination by Design*, 26 CUNY L. REV. 57, 67–71 (2023).

⁵ We use the phrase “adult content creator” to refer to people who create and distribute adult content, and the term “sex worker” to refer to the broader population of people who engage in sex-related labor, whether through online distribution of pornography or other activities.

⁶ *CLEAR Issue Brief: Shut Down and Shut Out: Access to Financial Services and Online Payments for Sex Workers in the U.S.*, CENTER FOR LGBTQ ECONOMIC ADVANCEMENT & RESEARCH (2021), available at <https://lgbtq-economics.org/wp-content/uploads/2021/06/Shut-Down-Shut-Out.pdf>; see also *Financial Discrimination and the Adult Industry*, FREE SPEECH COALITION (March 2023), available at <https://action.freespeechcoalition.com/files/FinancialDiscriminationandtheAdultIndustry.pdf> (finding that over sixty percent of respondents working in the adult industry had lost a bank account or access to a financial tool due to their source of income).

⁷ Allison Smith, *Collateral Damage in the War on Sex Trafficking*, BLOOMBERG (March 24, 2023, 6:00 AM) <https://www.bloomberg.com/news/articles/2023-03-24/how-sex-workers-are-caught-in-middle-of-legal-fight-against-online-trafficking>.

⁸ See Patricia Nilsson and Alex Barker, *The Billionaire Who Took Down Porn*, FINANCIAL TIMES, <https://www.ft.com/content/1add56d6-82d9-4d83-a6a6-a5cdff70def5>.

Mastercard’s Policy Imposes Burdensome Registration, Monitoring, and Reporting Requirements

Announced in April 2021 and implemented in October of that year, Mastercard’s policy imposes stringent registration, monitoring, and reporting requirements on payment processors, also referred to as “acquirers” that enable on adult content websites (merchants) that use Mastercard’s credit card or payment options.⁹ Under the policy, payment processors are prohibited from processing transactions from merchants selling online adult content that have failed to comply with Mastercard’s onerous requirements. Mastercard’s policy requires payment processors to register all adult content merchants with Mastercard in writing, certifying that each merchant complies with Mastercard’s requirements and has controls in place to take down violating content when necessary.¹⁰ Mastercard additionally mandates a set of processes that adult content merchants must undertake to remain compliant, totally unlike those required for any other industry. These processes include providing Mastercard with a “God mode” account, requiring log-in access to the platform upon request and allowing Mastercard to view all content and monitor the platform to ensure payment processor compliance.¹¹ Merchants must also submit a monthly report to Mastercard listing any content on their sites that was flagged as violating the policy. Importantly, Mastercard’s content prohibitions extend to the appearance of illegal conduct, though the policy does not specifically define what content is permitted.¹² Payment processors, and thus platforms, have broadly interpreted Mastercard’s policy requirements to ban all kinds of constitutionally protected material.

The pornography subject to these restrictions is constitutionally protected speech under the First Amendment.¹³ However, company policy makes it impossible for payment providers to provide services to anyone who engages in it. Mastercard’s vague and ambiguous policy requirements, coupled with the dangerous combination of platform overcompliance and inadequate automated tools, has led to the vast censorship of this entirely lawful category of speech. By chilling this particular form of protected free speech, Mastercard has destabilized businesses and, most notably, the lives of thousands of adult content creators.

Mastercard alleges that its policy addresses acute harms, such as illegal online trafficking, sexual exploitation, and abuse of minors.¹⁴ However, Mastercard has

⁹ Mastercard Revised Standards, *supra* note 1.; for a more detailed description of the financial relationship between Mastercard, acquires, merchants, and content creators, see the discussion on pages 5-6 of the *Coalition Request for Investigation of Mastercard: Supplemental Analysis*.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Mastercard Revised Standards, *supra* note 1 (forbidding content that is “illegal or otherwise violates the Standards.”). In its FAQ, Mastercard explains that: “A Merchant must not offer or purport to offer any illegal content or content that otherwise violates Mastercard Standards at any time.” Mastercard Adult Content and Services Merchant Requirements FAQs, #14 (Oct. 2021) [Hereinafter “Mastercard FAQs”], attached to this document.

¹³ See *Miller v. California*, 413 U.S. 15 (1973).

¹⁴ See John Verdeschi, *Protecting Our Network, Protecting You: Preventing Illegal Adult Content on Our Network*, MASTERCARD: NEWS (April 14, 2021),

overstepped its role as a private company, especially given that these harms are already being addressed by regulatory authorities in the United States at both the state and federal level. For example, federal law requires producers of sexually explicit materials to maintain records of the ages of models and subsequently criminalizes any failures to comply.¹⁵ Mastercard's extralegal attempt to police the economic activity of sex workers goes far beyond government regulations, with no demonstrated benefit. Notably, central to the policy is the prohibition on purporting to offer illegal conduct. This has been interpreted as prohibiting even the appearance of non-consensual content, a standard which sweeps in vast amounts of legal and non-harmful content across platforms. When coupled with a failure to define what exactly constitutes illegal conduct, this provision has had especially detrimental consequences on the ability of adult content creators to engage in both constitutionally protected speech and their very livelihoods.

Mastercard Leverages Its Outsized Market Power to Censor Lawful Sexual Content

Mastercard's current global dominance in online payments gives its policy unique reach, empowering a single private company to hold the entire adult content industry hostage. Mastercard is one of two primary credit card companies and processes close to a quarter of payments in the U.S.¹⁶ Their market share is only larger in the adult industry.¹⁷ Adult merchants must accept Mastercard to remain financially viable and must therefore comply with any restrictions that the company imposes. Further, because Mastercard's policy is vague and enforcement has varied widely, platforms that provide access to sexually explicit content err on the side of caution even when such steps harm adult content providers, a phenomenon that Mastercard is well aware of. Further, by crafting deliberately opaque provisions, Mastercard is effectively opting to engage in business with only those payment processors and adult content websites that have the resources to comply, effectively enabling it to shut down weaker or new platforms who use alternate, less expensive methods of moderating content.¹⁸ Mastercard's role in the ecosystem allows it to dictate the normative practices and the key players of the adult content industry by fiat.

Mastercard is no stranger to unfair tactics disguised as policy changes. The FTC has previously found that Mastercard used its market power to coerce consumers, most recently in the debit card space. In December of 2022, the FTC issued a consent decree

<https://www.mastercard.com/news/perspectives/2021/protecting-our-network-protecting-you-preventing-illegal-adult-content-on-our-network/>.

¹⁵ §2257, a federal law, requires that producers of pornographic content engage in age verification and that these records be kept and made available to the Attorney General upon request. 18 U.S.C. § 2257.

¹⁶ Christy Rodriguez, *U.S. Credit Card Market Share by Network & Issuer – Facts & Statistics*, UPGRADED POINTS (Jan. 4, 2022), <https://upgradedpoints.com/credit-cards/us-credit-card-market-share-by-network-issuer/>.

¹⁷ This is based on Mastercard's relative market share given American Express, representing 20% of the market, does not process payments on adult sites. See Mohamed Dabo, *Campaigners Seek to Block Credit Card Use on Porn Sites*, ELECTRONIC PAYMENTS INTERNATIONAL (June 3, 2020), <https://www.electronicpaymentsinternational.com/news/campaigners-seek-to-block-credit-card-use-on-porn-sites/>.

¹⁸ This practice is an unfair method of competition that is directly in violation of Section 5 of the FTC Act. See 15 U.S.C. § 45.

based on Mastercard's unfair debit transaction policy, where the company was using its debit card practice as a cudgel to restrict the autonomy of merchants and competitors.¹⁹ Mastercard argued that the exact words of its policy did not violate the FTC Act. However, the FTC found that the overall effect of the policy, based on Mastercard's market power, was an illegal restraint on merchants.²⁰ Like its debit card practices, Mastercard's adult content policy is a thinly veiled regulation to restrict consumers, in this case by constraining adult content creators' participation in the market. Moreover, these restrictions stand to significantly benefit Mastercard as the company has now entered the market to sell the very identification screening tools that its own policy requires.²¹

The Effects of Mastercard's Policy Have Substantially Harmed Consumers

Mastercard's policy encourages platform over-compliance to the detriment of content creators. Its policy inflicts substantial harm on these content creators by design. To comply with Mastercard's adult content policy, some platforms have instituted significant procedural changes while others have been forced to shut down entirely.²² According to reports from content creators, these compliance efforts on the part of platforms have made it difficult to continue monetizing content.²³ Given that sex workers are already subject to regular discrimination by financial institutions,²⁴ Mastercard's policy inflicts harm on particularly vulnerable workers. Mastercard's policy and its predictable effects have restricted content creators' earning potential, ultimately increasing barriers to the stability that people once found in online sex work and forcing them into positions vulnerable to trafficking.

To illustrate, a survey of 105 online adult content creators found that 90% had suffered at least one detrimental impact as a direct result of the policy.²⁵ Respondents highlighted experiences such as having their account flagged or closed, removing content to comply with arbitrary documentation rules, reducing content output due to delays, and payment interruptions. Respondents noted a decrease in traffic, spending, and engagement due to a lack of customer confidence as sites seem unstable and unpredictable, with one respondent noting "When OnlyFans announced their removal of

¹⁹ See *Mastercard Incorporated; Analysis of Agreement Containing Consent Orders to Aid Public Comment*, 88 FED. REG. 2357 (Jan. 13, 2023).

²⁰ *Id.*

²¹ *ID a Service by Mastercard*, MASTERCARD AUSTRALIA (Nov. 22, 2022)

<https://www.mastercard.com.au/en-au/vision/who-we-are/innovations/digital-id.html> ("ID, a service by Mastercard, is a global digital identity network that allows individuals to create a secure, verified, and reusable digital identity").

²² Matt Willie, *AVN Stars Will Stop Paying Sex Workers for Their Content Starting Jan. 1*, INPUTMAG (Dec. 3, 2021, 12:13PM),

<https://www.inputmag.com/culture/avn-stars-end-monetization-sex-work-banking-discrimination>; *AVN Stars, GayVN Stars to Close on April 1st*, AVN: BUSINESS (Feb. 1, 2022 10:03 PM),

<https://avn.com/business/articles/video/avn-stars-gayvn-stars-to-close-on-april-1st-905870.html>.

²³ VALERIE WEBBER, *THE IMPACT OF MASTERCARD'S ADULT CONTENT POLICY ON ADULT CONTENT CREATORS* (2022), https://www.researchgate.net/publication/358441297_The_Impact_of_Mastercard's_Adult_Content_Policy_on_Adult_Content_Creators.

²⁴ See Stardust et al., *supra* note 4.

²⁵ *Id.*

adult content, half my sub[scriber]s left. I have had to rebuild that all back on my own, and so many still don't trust the site.”²⁶ In terms of financial impact, one respondent reported that they were “living paycheck to paycheck” and had “no savings anymore.”²⁷ Many others echoed this sentiment. Available data demonstrate the acute harm Mastercard's policy has had on the livelihoods of adult content creators across the country.

MasterCard's Policy is an Unfair Business Practice Under the Enforcement Authority of the Federal Trade Commission

The FTC Act broadly authorizes the Commission to investigate and prosecute unfair and deceptive business acts and practices as well as anticompetitive business conduct.²⁸ Adult content creators are consumers who benefit from payment transactions that occur through Mastercard's products and services and compensate Mastercard when paying transaction fees. The FTC has construed the term “consumer” to include businesses as well as individuals and has long taken the position that its statutory authority to prescribe unfair and deceptive practices incorporates a broad definition.²⁹

The harms that adult content creators have experienced as a result of Mastercard's policy more than satisfy the unfair practice framework under the FTC Act: (1) the injuries that adult content creators have experienced are substantial, (2) those injuries could not be reasonably avoided by these workers, and (3) the policy's benefits do not outweigh its costs.

First, the preliminary data gathered from surveyed content creators demonstrate that their collective monetary losses amount to a substantial injury, most notably in the forms of lost income, inability to pay rent, heat homes, pay for food, and support dependents.³⁰ Second, Mastercard's policy “unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making” because content creators cannot just choose to take their content to another site. Virtually every platform accepts Mastercard, leaving content creators without a pathway to both avoid the effects of Mastercard's policy and earn a stable income within the industry.³¹ Third, Mastercard has failed to demonstrate that any proposed benefits of the policy are sufficient to outweigh the documented harms. The available information, combined with Mastercard's lack of engagement with sex workers when developing the policy, suggests that there are significant disconnects between the policy's aspirations and the realities of its implementation.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See 15 U.S.C. §§ 41-58.

²⁹ See, e.g., *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 934 (N.D. Ill. 2008).

³⁰ WEBBER *supra* note 23. (finding 78% of respondents said that the revised policy has impacted their ability to make ends meet).

³¹ See Fed. Trade Comm'n v. World Pat. Mktg., Inc., No. 17-CV-20848, 2017 WL 3508639, at *15 (S.D. Fla. Aug. 16, 2017) (quoting FTC Unfairness Statement at 1074); see also FSC, *supra* note 6 (demonstrating that at least 62% of those working in the adult industry reported the loss of a bank or other financial tool, such as Venmo or Paypal, which further restricts the ability to avoid the harms of Mastercard's policy).

The FTC Is Well Positioned to Hold Mastercard Accountable for its Abuse of Power

During the lead up to Mastercard's implementation of its new policy in October 2021, adult content creators ran several campaigns to highlight the disastrous consequences of the policy and demand an immediate halt to the implementation of the new adult content requirements, to no avail.³² Given Mastercard's reluctance to engage with the reality of the harms its policies have caused, FTC intervention is especially appropriate. Further, despite being engaged in a legitimate business enterprise, adult content creators often find themselves the target of systemic and interpersonal discrimination and violence.³³ Notably, this targeting has caused disproportionate harm to LGBTQ+ people, a group over-represented within sex work.³⁴

Should the FTC not investigate Mastercard, its harmful policy will continue to generate disastrous consequences for adult content creators. Additionally, investigating and bringing an enforcement action against Mastercard for unfair practices directly aligns with the FTC's current objectives, which focus on removing barriers for underserved populations and prioritizing enforcement in digital marketplaces.³⁵ After enduring decades of financial discrimination, sex workers should receive the same protections available to all workers across their respective industries.

We urge the FTC to investigate Mastercard for their unfair business practices and take appropriate action to ensure that the company is held accountable for the harms outlined in this letter and in our attached Supplemental Analysis. We are grateful for the opportunity to submit stories and perspectives from those who are most harmed by Mastercard's policy and would be happy to provide any additional information requested by the FTC. Thank you for your consideration on this matter.

Respectfully submitted,

LaLa Holston-Zannell
Trans Justice Campaign Manager
National Political Advocacy
Department
American Civil Liberties Union

On behalf of:

³² See, e.g., Acceptance Matters, *Sex Work Banking #Acceptance Matters*, <https://www.acceptancematters.org/wp-content/uploads/2021/09/Sex-Work-Banking-AcceptanceMatters-LGBTQ-Workers-to-MasterCard.pdf>.

³³ See, e.g., Andrew R Flores et. al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey*, SCIENCE ADVANCES (Oct. 2020) at 6, 40, DOI: 10.1126/sciadv.aba6910; *LGBT People in the Workplace*, THE NATIONAL LGBTQ WORKERS CENTER, <https://www.lgbtmap.org/file/LGBT-Workers-3-Pager-FINAL.pdf>.

³⁴ *Id.*; see also FSC *supra* note 6 (finding that 55% of adult content creators identified as LGBTQ+).

³⁵ FEDERAL TRADE COMMISSION STRATEGIC PLAN FOR FISCAL YEARS 2022-2026, https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf.

[American Civil Liberties Union](#) - We are a nonprofit dedicated to safeguarding individual rights and liberties. In advocating for sex workers, the ACLU is working to decriminalize sex work, challenge discriminatory laws, and provide legal support to enhance the safety, rights, and well-being of sex workers while addressing systemic issues. These efforts reflect our broader commitment to defending civil liberties and human rights across various issues areas.

[ANSWER Detroit](#) - We are a sex worker justice collective. We exist for the rights of all people to choose to do sex work on their own terms.

[Bay Area Worker Support](#) - BAWS is a sex worker mutual aid organization providing our communities with emergency grant funds + crowdfunding; harm reduction info and supplies; health, safety, and industry resources; social events; SW therapist lists; Digital security and legal resources; short-term peer-based crisis support. We are an organization that Bay Area folks turn to when they are experiencing financial difficulty or discrimination - we provide initial material support and try to connect them with orgs or people for ongoing support and resources.

[Best Practices Policy Project](#) - BPPP is a sex worker and trans-led organization dedicated to the rights of sex workers across the United States using human rights mechanisms to defend our rights and including the impact of financial restrictions on sex workers as human rights violations in our reporting and organizing.

[BIPOC Adult Industry Collective](#) - The Black, Indigenous, and People of Color (BIPOC) Collective is a disabled, BIPOC, sex worker-led national human rights organization that provides financial assistance, peer-led education, labor advocacy, and expands access to mental health services and medical care to marginalized people in the sex trades.

[Black Sex Workers Colorado](#) - The Black Sex Workers of Colorado is an organization of current & former sex workers and trafficking survivors who advocate for conditions and policies rooted in collective community care, harm reduction, and anti-violence. We provide a variety of direct services & resources to sex workers and trafficking survivors, we engage in policy work, and we work in solidarity with other grassroots, culturally-based community organizations to improve the health, safety, and wellness of sex workers while also fighting to preserve and protect their fundamental rights.

[Black Trans Nation](#) - Black Trans Nation is an advocacy organization dedicated to empowering and supporting Black transgender individuals, and as a stakeholder in financial issues affecting sex workers on adult content platforms, our organization strives to ensure equitable opportunities and fair treatment for this marginalized community.

[Center for HIV Law and Policy](#) - CHLP fights stigma and discrimination at the intersection of HIV, race, health status, disability, class, sexuality and gender identity and expression, with a focus on criminal and public health systems.

[DecrimNow DC/ HIPS](#) - HIPS is one of the US's largest direct service organizations providing social and medical services to sex workers in Washington DC since 1993. Adult content platforms serve as an important alternative to street-based work for sex workers.

[Disabled Sex Workers Coalition](#) - We are disabled people who trade or have traded sex out of choice, coercion, and circumstance. Within each of our capacities, we provide each other mutual aid and solidarity while always working toward our core ethic of intentional nonproductivity and the devalorization of capitalist labor, especially as a source of identity.

[Electronic Frontier Foundation](#) - The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. EFF's mission is to ensure that technology supports freedom, justice, and innovation for all people of the world.

[Equity Strippers Noho](#) - Equity Strippers Noho is the only currently unionized strip club in the United States, and only the second in the nation's history.

[European Sex Workers Rights Alliance](#) - ESWA is a sex worker-led network proudly representing more than 100 organizations in 30 countries across Europe and Central Asia. Our aim is to ensure that all sex worker voices are heard and that their human, health and labor rights are recognised and protected. With our actions and approach inspired by our membership community, we work to build a strong, vibrant and sustainable network that mobilizes national, regional and international advocacy activity that moves us towards long-term, systemic change. ESWA leads on European-level advocacy work and has engaged with various policy stakeholders in relation to sex workers ' digital rights and financial discrimination.

[HIPS/SWAC](#) - SWAC is a group of individuals and organizations promoting the human rights, civil rights and liberties, health, safety, and well-being of sex workers and people profiled as sex workers in Washington D.C. and advocating for legislation and other policy changes to challenge the system of criminalization of sex work.

[Los Angeles LGBT Center](#) - The Center's nearly 800 employees provide services for more LGBT people than any other organization in the world, offering programs, services, and global advocacy that span four broad categories: Health, Social Services and Housing, Culture and Education, Leadership and Advocacy.

[On MUVAS](#) - A mutual aid organization that services mothers and sex workers ages 14-30.

[Performer Availability Screening Service \(PASS\)](#) - PASS is a non-profit organization dedicated to the health and safety of adult industry workers.

[Red Canary Song](#) - Red Canary Song is a collective of migrant massage workers and sex workers of the Asian diaspora. We are directly affected by financial discrimination and anti-poverty regulations.

[SWOP-USA](#) - SWOP-USA is an organization dedicated to advocating for the human rights of people in the sex trade, and access to financial and banking institutions is essential to protecting these rights and the lives of sex workers.

[Trans United Europe](#) - We are an advocacy and policy organization for and by trans-BIPOC Sex workers. Therefore, we assist with matters of support and assistance in crisis situations for our community. Crisis might be severe poverty, violence, murder, trafficking, and insufficient health care issues. As Sexworkers, issues around safety and security are the core of our organizational strategies.

[Woodhull Freedom Foundation](#) - Our work includes fighting censorship, eliminating discrimination based on gender or sexual identity, or family form, and protecting the right to engage in consensual sexual activity and expression. We do this through advocacy, education, and coalition building.

Coalition Request for Investigation of Mastercard: Supplemental Analysis

1. Introduction

The American Civil Liberties Union (ACLU), Hacking//Hustling, and a coalition of sex-worker, LGBTQ+, and anti-trafficking organizations submit our request for the Federal Trade Commission (hereinafter FTC or “Commission”) to investigate and bring an enforcement action against Mastercard Inc. concerning its new policy, “Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants.”³⁶ Announced in April 2021 and implemented in October of that year, Mastercard’s policy requires payment processors who enable transactions on adult content sites to impose a laundry list of demanding registration, monitoring, and reporting requirements.³⁷ These new requirements have resulted in widespread changes to the adult content industry that substantially harm sex workers and their ability to earn a living.³⁸ Moreover, Mastercard has not provided any evidence to show that its onerous requirements have addressed any of its stated policy goals in any way. Accordingly, we encourage the Commission to investigate Mastercard’s policy as an unfair trade practice under the Federal Trade Commission Act (FTCA) given the resulting injuries sex workers experience are

³⁶ AN 5196 *Revised Standards for New Specialty Merchant Registration Requirements for Adult Content Merchants*, MASTERCARD (2021), https://c4swebinars.com/videos/MC_AN5196_RevisedStandards.pdf [hereinafter “Mastercard Revised Standards”].

³⁷ *Id.*

³⁸ VALERIE WEBBER, *THE IMPACT OF MASTERCARD'S ADULT CONTENT POLICY ON ADULT CONTENT CREATORS* (2022), https://www.researchgate.net/publication/358441297_The_Impact_of_Mastercard's_Adult_Content_Policy_on_Adult_Content_Creators.

substantial and cannot be reasonably avoided, and the benefits of Mastercard's policy do not outweigh its costs.

Adult content creators are consumers protected under the FTCA. Unlike other statutes the FTC enforces, the FTC Act does not adopt a narrow test of what constitutes a consumer. In previous enforcement actions, the FTC has construed the term "consumer" to include businesses as well as individuals and has long taken the position that its statutory authority to proscribe unfair and deceptive practices is not limited to individuals buying household or personal goods.³⁹ Sex workers benefit from payment transactions that occur through Mastercard's products and when adult content creators pay transaction fees to sell their work, they compensate Mastercard for its services.

Mastercard's policy substantially harms adult content creators by restricting their earning ability and increasing barriers to the stability that people once found in online sex work.⁴⁰ Further, Mastercard's suggestion that companies rely on automated tools to comply with their policy mandates has already produced inconsistent results that erroneously conflate erotic and illegal content. These inaccuracies have led to content approval delays as well as troves of perfectly legal material being flagged for removal, both of which ultimately translated into lost income for creators. As a result, Mastercard's policy threatens the safety, housing stability, health, and survival of adult content creators, forcing them into financial positions more vulnerable to sex trafficking. Further,

³⁹ See, e.g., *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 934 (N.D. Ill. 2008).

⁴⁰ See Erin Fitzgerald, Sarah Elspeth, Darby Hickey, Cherno Biko, & Harper J. Tobin, *Meaningful Work: Transgender Experiences in the Sex Trade*, TRANS EQUALITY (Dec. 2015), https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.

the policy is disproportionately harmful for LGBTQ+ people and other members of marginalized groups⁴¹ For example, according to a 2023 report by the Free Speech Coalition, 55% of content creators identified at LGBTQ+, and creators are also more likely to be people of color and trans/gender-nonconforming compared to other industries.⁴²

Adult content creators are unable to avoid these harms and subsequent financial hardships given Mastercard's dominant market position as one of two primary credit card companies. Mastercard owns about 22% of the credit card network market share⁴³ but virtually 100% of merchants that take credit cards accept Mastercard.⁴⁴ Mastercard's outsized influence over payment processing has forced platforms into overcompliance with its adult content policy. This restrictive and inconsistent application of the new policy by platforms, coupled with Mastercard's tremendous market power, has enabled a single company to inflict widespread and persistent harm on the entire adult content

⁴¹ See *id*; President Biden has focused on policies that advance the rights of LGBTQ+ people and, thus, investigating a policy that has the opposite effect is aligned with the current Administration's priorities. See, e.g., *Fact Sheet: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month*, THE WHITE HOUSE (June 15, 2022),

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/>.

⁴² FREE SPEECH COALITION (FSC), *FINANCIAL DISCRIMINATION AND THE ADULT CONTENT INDUSTRY*, 1-11, 4 (March 23, 2023),

<https://action.freespeechcoalition.com/files/FinancialDiscriminationandtheAdultIndustry.pdf>

⁴³ Christy Rodriguez, *U.S. Credit Card Market Share by Network & Issuer – Facts & Statistics*, UPGRADED POINTS (Jan. 4, 2022),

<https://upgradedpoints.com/credit-cards/us-credit-card-market-share-by-network-issuer>.

⁴⁴ See Ben Luthi & Sara Rathner, *Who Has the Acceptance Edge: American Express or Discover?*, NERDWALLET (Apr. 15, 2021),

<https://www.nerdwallet.com/article/credit-cards/discover-american-express-acceptance>.

industry. Sex workers are already subject to regular financial discrimination by financial institutions,⁴⁵ amplifying the harm of this new policy.

Mastercard has not publicly released any information about the effects of its policy change and therefore cannot show a measurable benefit that is sufficient to outweigh the policy's documented harms. This insufficient evidence, along with Mastercard's lack of engagement with the sex worker community when developing the policy, suggests a significant disconnect between the policy's aspirations and the realities of its implementation.

To uncover missing information about the total impact and enforcement of the new adult content policy and prevent continued consumer harm, the ACLU and Hacking//Hustling request that the Commission investigate and hold Mastercard accountable for its unfair trade practices. To assist the Commission, we describe the history and requirements of Mastercard's policy and the realities of its implementation. We then provide evidence that the policy violates the FTCA's prohibition on unfair trade practices, as it has caused substantial injury to adult content creators (consumers) that is not readily avoidable, and any purported benefits are outweighed by its costs.

2. Mastercard's Policy Imposes Burdensome Registration, Monitoring, and Reporting Requirements

⁴⁵ See e.g., Zahra Stardust, Danielle Blunt, Gabriella Garcia, Lorelei Lee, Kate D'Adamo & Rachel Kuo, *High Risk Hustling: Payment Processors, Sexual Proxies, and Discrimination by Design*, 26 CUNY L. Rev. 57, 67–71 (2023); Spencer Watson & Kate D'Adamo, *Shut Down & Shut Out: Access to Financial Services and Online Payments for Sex Workers in the U.S.*, CLEAR, <https://lgbtq-economics.org/wp-content/uploads/2021/06/Shut-Down-Shut-Out.pdf>.

In April 2021, Mastercard announced it would enact a new adult content policy ostensibly to combat “unlawful activity” such as online trafficking, violence, and abuse.⁴⁶ The policy, which went into effect six months later, incorporates a variety of requirements that limit the scope of “acceptable content,” including bans on the production of material involving certain sexual acts as well as specific restrictions on the types of speech adult performers can engage in. Mastercard’s policy formally applies to any material that was created or uploaded *after* October 15, 2021. However, given Mastercard’s market control, adult content creators report that merchants have removed legacy content from before October 15, 2021, likely in an attempt to avoid any noncompliance consequences that may arise.⁴⁷

Mastercard’s adult content policy imposes requirements on sex workers through a chain of financial operations. Mastercard enforces its registration, monitoring, and reporting requirements on adult content websites and creators through payment processors and other acquirers.⁴⁸ Under the policy, acquirers are prohibited from processing transactions from merchants selling online adult content who do not comply with the requirements set out by Mastercard.⁴⁹ Understanding the policy requires understanding the actors in that chain (see Figure 1, below):

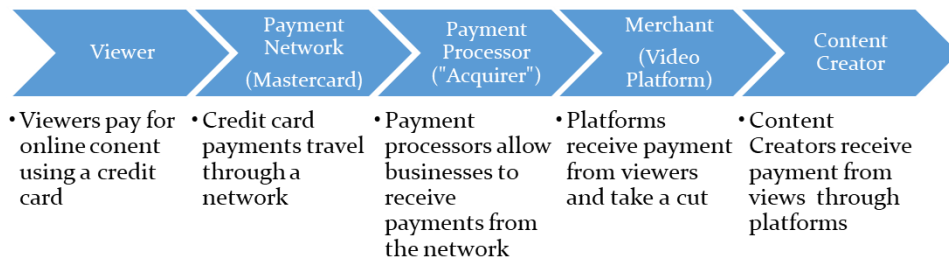
Figure. 1 Mastercard Payment Ecosystem

⁴⁶ See John Verdeschi, *Protecting Our Network, Protecting You: Preventing Illegal Adult Content on Our Network*, MASTERCARD: NEWS (April 14, 2021), <https://www.mastercard.com/news/perspectives/2021/protecting-our-network-protecting-you-preventing-illegal-adult-content-on-our-network/>.

⁴⁷ See discussion *infra* Section 2.b.

⁴⁸ See Mastercard Revised Standards, *supra* note 1.

⁴⁹ See *id.*



- Payment Networks: Payment networks facilitate the movement of money between different parties such as customers and businesses. Mastercard, Visa, and Discover are payment networks.
- Acquirers: ‘Acquirer’ can refer to an acquiring bank that holds the merchant’s account and accepts deposits from transactions through payment networks. It can also refer to payment processors. Payment processors enable businesses to accept payments from credit or debit cards. Acquiring banks and payment processors are members of card networks like Visa and Mastercard. They are licensed to enable merchants’ access to the payments system and must follow regulations from the card networks.⁵⁰
- Merchants: A merchant is the seller of content—often the host of the website—and the party that is paid directly for that content.
- Content creator: A content creator is a third party that makes adult content. Some content creators work directly with payment processors, but many

⁵⁰ See *What Is a Merchant Acquirer?*, INFINICEPT: PAYMENT FACILITATOR KNOWLEDGE CENTER, <https://infinicept.com/payment-facilitator/learn/get-started/what-is-a-merchant-acquirer/> (accessed April 17, 2022).

upload or livestream their content on a platform which allows users to pay for access to the content.

For example, an adult content site like OnlyFans is a merchant, and individuals who upload or stream content on OnlyFans are content creators. Mastercard's adult content policy imposes responsibility on merchants and content creators indirectly through acquirers. The policy prohibits acquirers from processing transactions from merchants selling online adult content who do not comply with the requirements set out in the policy.

There are only a limited numbers of payment processors that currently enable transactions within the online adult content industry, and they often charge a higher percentage than providers who do not serve this market. As a result, adult websites and performers alike have incredibly limited choices in terms of their ability to substitute how they engage in financial transactions. All of the major payment processors work with Mastercard. And because there are a very limited number of payment networks, content creators therefore cannot avoid Mastercard's policy by simply working with another payment network. Consequently, adult performers face targeted censorship by private corporations through these restrictions on payment processors.

Compliance with Mastercard's rules is virtually impossible to achieve manually, and sites must use automated tools for content moderation.⁵¹ Although the policy's stated goal is to eliminate "illegal" content,⁵² the requirement of removing content that even appears

⁵¹ See Mastercard Adult Content and Services Merchant Requirements FAQs, #14 (Oct. 2021) [hereinafter "Mastercard FAQs"], attached to this document.

⁵² Verdeschi, *supra* note 11.

illegal has resulted in the flagging and removal of legal content, as well as a chilling effect on genres and activities that might be showcased in movies and on social media without incident. In sum, the vagueness and breadth of Mastercard's policy has resulted in an inconsistent and unpredictable implementation by platforms with little guidance from Mastercard and significant detriment to adult content creators. The following analysis details Mastercard's policy, the mechanics of its implementation, and its harmful effects on adult content creators since implementation.

A. Mastercard's Imposes Various Policy Requirements on Merchants

Mastercard's new adult content policy includes a myriad of onerous registration, monitoring, and reporting requirements. Mastercard's policy applies to "adult content," which, per the policy, includes online subscription website access, streaming video, images, and videotape and DVD rentals and sales. However, Mastercard fails to explicitly define "adult content" within their policy beyond those examples, leading payment processors to err on the side of caution. Similarly, though Mastercard describes the policy as a limitation on how merchants must treat content that is "illegal or otherwise violates the Standards," they do not provide examples or explain exactly what content would constitute a violation.⁵³ Mastercard's repeated failure to provide definitions and clarifications on key provisions has led to inconsistent implementation results and proven to be overly burdensome to comply with.

Mastercard's policy also requires payment processors to register all adult content merchants (i.e., platforms that host adult content and receive payment from viewers) with

⁵³ Mastercard Revised Standards, *supra* note 1.

Mastercard in writing to certify that each merchant meets Mastercard's requirements.⁵⁴ To comply, merchants must agree to maintain sufficient controls over content that is uploaded or livestreamed and take down violating content when necessary.⁵⁵ As one such control mechanism, acquirers must provide Mastercard with log-in access to the platform upon request, allowing Mastercard itself to view all content and monitor the platform to ensure acquirer compliance.⁵⁶ Merchants must also submit a monthly report to Mastercard listing any content on their sites that was flagged as violating the policy. However, as stressed above and below, the policy does not specifically define exactly what content is permitted.

One of Mastercard's most burdensome policy requirements, referred to as pre-publication review, demands that merchants review all content uploaded by adult content creators for compliance *before* publication.⁵⁷ That merchants must evaluate all pre-recorded content prior to publication ensures that compliance is virtually impossible to achieve manually, and Mastercard recommends that merchant utilize automated tools to meet these requirements. Mastercard also requires real-time monitoring of all streaming services, and similarly encourages the use of automated tools and solutions to meet this burdensome requirement. This policy effectively makes it impossible for sites to

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Samantha Cole, *Pornhub Announces 'Biometric Technology' to Verify Users*, VICE MOTHERBOARD (Feb. 3, 2021), <https://www.vice.com/en/article/m7a4eq/pornhub-new-verification-policy-biometric-id>.

include any live engagement without employing new technological tools, such as facial recognition and other invasive biometric identification screening practices.⁵⁸

Moreover, Mastercard's blithe suggestion that platforms turn to automation to cope with this onerous pre-publication review requirement masks the reality that current automated moderation tools cannot accurately identify harmful or illegal content without sweeping in harmless material.⁵⁹ Rapidly expanding the use of flawed automated tools heightens the risk that genuinely illegal content will circumvent existing moderation frameworks by decreasing human oversight and making it easier for bad actors to test and refine strategies to evade detection. Resulting inaccuracies are likely to amplify and perpetuate existing biases, for example by disproportionately removing content produced by queer adult content creators.⁶⁰ Put simply, Mastercard's policy effectively requires the immediate application of automated tools built on questionable data foundations to highly context-specific questions they are not equipped to evaluate. The result is overbroad limits on speech and wholly inadequate content filtering.

Moreover, the recommendation that merchants engage in real-time monitoring for all live engagement creates a forced choice where merchants must either use automated screening tools like biometrics and other identification services, cease streaming services altogether, or violate the terms of Mastercard's policy. Mastercard's imposition of this

⁵⁸ Mastercard FAQs, *supra* note 18.

⁵⁹ *Id.*

⁶⁰ Compare Melissa Gira Grant, *Nick Kristof and the Holy War on Pornhub*, NEW REPUBLIC (Dec. 10. 2020), <https://newrepublic.com/article/160488/nick-kristof-holy-war-pornhub>, with Mastercard Revised Standards, *supra* note 1.

forced choice is even more concerning as the company has now entered the market with its own suite of digital identification tools.⁶¹

B. Mastercard’s Policy Leads to Overenforcement and Censorship by Merchants

Some content banned by Mastercard’s policy aligns with existing state and federal legal frameworks, including child sexual abuse material, child exploitation under the Trafficking Victims Protection Act (TVPA), non-consensual intimate imagery—i.e., content shared without the approval of the subject—and “obscene” content under the Comstock Act.⁶² Indeed, even prior to 2021, Mastercard’s Security Rules and Procedures already prohibited merchants from processing any illegal transaction on the Mastercard network.⁶³

But rather than clarify how merchants can comply with existing law governing adult content, Mastercard’s policy departs significantly from the current legal landscape. This dramatic departure negates the possibility that the requirements are aimed only at ensuring compliance with the law. Mastercard’s policy is both too broad and too narrow in accomplishing its supposed aims. The policy imposes unreasonably strict registration, monitoring, and reporting requirements on platforms⁶⁴ and the requirements for content

⁶¹ *ID: A Service by Mastercard*, MASTERCARD AUSTRALIA (Nov. 22, 2022), <https://www.mastercard.com.au/en-au/innovation/who-we-are/innovations/digital-id.html> (“ID, a service by Mastercard, is a global digital identity network that allows individuals to create a secure, verified, and reusable digital identity.”).

⁶² Mastercard Revised Standards, *supra* note 1, 18 U.S.C. § 1461.

⁶³ Mastercard’s October 2021 policy is a revision to Section 9.4.1 of the existing Security Rules and Procedures, but it does not currently appear in the complete text of the current Security Rules and Procedures published in February of 2022. *See* MASTERCARD, SECURITY RULES AND PROCEDURES: MERCHANT EDITION 91–106 (2022), <https://www.mastercard.us/content/dam/mccom/global/documents/SPME-Manual.pdf>.

⁶⁴ *See id.*

creators, including record-keeping and age verification, far exceed what is already required by laws such as §2257,⁶⁵ unfairly burdening creators. Additionally, Mastercard's suggestion that merchants meet these new, onerous requirements using automated tools⁶⁶ significantly diverges from existing law and company policy. At the same time, central to the revised policy is the prohibition on purportedly illegal conduct, which is an overly broad and vague mandate that sweeps in legal content and results in a chilling effect of constitutionally protected speech.

For example, fictional depictions of illegal activity and depictions of objects related to violence are being flagged as noncompliant.⁶⁷ This includes the mere presence (even simulated presence) of alcohol, knives, and fictional scenarios or roleplays depicting non consensual acts, such as hypnosis.⁶⁸ This creates a striking double standard: a movie poster where a vampire seduces a young ingenue, unexceptional when a movie theater customer pays for popcorn with their Mastercard credit card, may violate the company's standards if posted on a website that hosts pornography.⁶⁹ Mastercard's failure to clarify the limits of the advertising ban or the definition of illegal conduct causes overenforcement of flagging and content removal, resulting in harm to adult content

⁶⁵ §2257, a federal law, requires that producers of pornographic content engage in age verification, and for verification records to be kept and made available to the Attorney General upon request. 18 U.S.C. § 2257.

⁶⁶ Mastercard FAQs, *supra* note 18.

⁶⁷ iWantClips email forwarded to Arli Christian, Campaign Strategist at the ACLU (enclosing policy updates from adult content platform iWantClips).

⁶⁸ *Id.*

⁶⁹ *Compare* TWILIGHT (Summit Entertainment 2008) *with* Mastercard FAQs, *supra* note 18, at 5.

creators who produce such content and causing them to avoid potentially sensitive material altogether.

Further, a central requirement of Mastercard’s revised policy is that merchants must not market themselves, allow search terms, or otherwise give the impression that they host “illegal” content.⁷⁰ Mastercard’s policy does not describe the relevant jurisdiction under which illegality should be defined nor does it provide any other definition of what illegal or otherwise standard-violating conduct is.⁷¹ Thus, as written, there is a significant lack of clarity about what is allowed, resulting in a variety of implementations across platform websites, leading to financially harmful over-policing of even the appearance of illegal conduct..

C. Implementation of Mastercard’s Adult Content Policy

There is very little information publicly available on Mastercard’s messaging to platforms regarding the implementation of its policy. Though there were reports that Mastercard had distributed “compliance packages” recommending the use of specific tools, the contents of the packages have not been made available to the public.⁷² However, in the aftermath of Mastercard’s announcement of their new policy, many platforms drastically changed their operations and/or removed large swaths of content, including

⁷⁰ See Mastercard FAQs, *supra* note 18.

⁷¹ See Mastercard Revised Standards, *supra* note 1 (forbidding content that is “illegal or otherwise violates the Standards.”). In its FAQ, Mastercard explains that: “A Merchant must not offer or purport to offer any illegal content or content that otherwise violates Mastercard Standards at any time.” See Mastercard FAQs, *supra* note 18.

⁷² See, e.g., Gustavo Turner, *Mastercard: Webmasters Express Concerns About 'Report Abuse' Forms*, XBIZ (Oct. 6, 2021, 4:30 PM), <https://www.xbiz.com/news/262128/mastercards-new-rules-webmasters-express-concerns-about-report-abuse-forms>.

content that did not run afoul of the policy. For example, a few months after Mastercard announced their policy, OnlyFans reported that it planned on banning *all* adult content by October 1, 2021.⁷³ While OnlyFans reversed this decision shortly thereafter due to public backlash, the snafu illustrated a common sentiment among adult content platforms: it may be easier to pull *all* adult content rather than attempt to comply with Mastercard's policy.⁷⁴

Many other adult content platforms reacted to this pressure by over-enforcing or increasing the stringency of the policy's requirements, both of which negatively impacted adult content creators.⁷⁵ Sites such as clips4sale and iWantClips mass-deleted content from their respective platforms and removed volumes of previously uploaded material while the material was "under review."⁷⁶ Some sites enacted increasingly vague and invasive performer verification policies, such as requiring creators to use face-scanning identification technology before uploading content.⁷⁷ Other sites found Mastercard's demands too burdensome or difficult to navigate and have permanently shut down. For example, approximately two months after Mastercard implemented their new policy, AVN

⁷³ See Sheila Dang & Subrat Patnaik, *OnlyFans Reverses Ban on Posting 'Sexually Explicit' Content*, REUTERS (Aug. 25, 2021, 12:06PM), <https://www.reuters.com/business/onlyfans-reverses-ban-showing-sexually-explicit-content-2021-08-25/>.

⁷⁴ *Id.*; see also Anna Iovine, *Online Porn is on Course to Change Forever*, MASHABLE (Nov. 18, 2021), <https://mashable.com/article/future-of-porn-verification>.

⁷⁵ WEBBER, *supra* note 3.

⁷⁶ Iovine, *supra* note 41.

⁷⁷ WEBBER, *supra* note 3; see also Brit Dawson, *Pornhub Continues Its Crackdown on Safety with Biometric Technology*, DAZED (Feb. 4, 2021), <https://www.dazeddigital.com/science-tech/article/51839/1/pornhub-continues-its-crackdown-on-safety-with-biometric-technology>.

Stars and GayVN Stars stopped charging for content and cut payments to creators.

Another two months later, they announced that they would be closing.⁷⁸

To satisfy the burdensome policy requirements, platforms have followed Mastercard's reported recommendation to implement automated tools. For example, iWantClips has described implementing "an AI system (as recommended by Mastercard)." Other platforms, including Pornhub and OnlyFans, have disclosed their use of automated moderation tools without explicit mention of Mastercard. Importantly, none of these sites have publicly detailed where their automation tools come from, how they are built, or how their efficacy can be evaluated. This lack of transparency is particularly troubling given the inadequacy of automated moderation and the use of biometric surveillance in the context of sexually explicit content. When a content creator is successful in their acting, the use of automation is especially concerning: automated tools are unable to discern whether violence or consent in a video is fake, increasing the risk that content will be flagged. Unsurprisingly, this tendency for automated tools to falsely identify illegal content further exacerbates the harms to adult content creators.⁷⁹

Sites that do not utilize automated tools may have difficulty complying with Mastercard's policy, forcing them to resort to similarly inadequate monitoring mechanisms. For example, xHamster has a history of aggressively recruiting "community

⁷⁸ Matt Willie, *AVN Stars Will Stop Paying Sex Workers for Their Content Starting Jan. 1*, INPUT MAG (Dec. 3, 2021, 12:13PM), <https://www.inputmag.com/culture/avn-stars-end-monetization-sex-work-banking-discrimination>; *AVN Stars, GayVN Stars to Close on April 1st*, AVN: BUSINESS (Feb. 1, 2022 10:03 PM), <https://avn.com/business/articles/video/avn-stars-gayvn-stars-to-close-on-april-1st-905870.html>.

⁷⁹ See discussion *infra* Section 3.

reviewer” volunteers to moderate previously uploaded content. Such methods are likely insufficient to meet the demands of Mastercard’s policy revision given the scale and speed of content review required. The situation is all the more distressing given Mastercard has not detailed whether any appeal procedures are in place or anticipated related to its requirements, meaning those adult content creators that become victims of inadequate monitoring mechanisms potentially have no recourse.

Given the lack of publicly available information, it is unknown whether Mastercard has directly enforced their policy against any platform or whether all the removal of content and shutting down of sites has been in response to the mere *threat* of such action. Irrespective of the source, the harshness and ambiguity of these new standards has certainly made compliance extremely difficult for adult content platforms, causing significant confusion, detrimental changes to online sales, and a direct, severe loss of income for adult content creators.

3. Adult Content Creators Are Acutely Harmed by Mastercard’s New Policy

The creator economy is comprised of more than 50 million independent content creators worldwide that make a profit by selling their material, personal brand, or skills directly to consumers.⁸⁰ OnlyFans has facilitated \$6 billion (about \$18 per person in the US) in payouts to creators since 2016, while Patreon says its creators have brought in more than \$3.5 billion (about \$11 per person in the US) worldwide.⁸¹ The adult content creator community is a subset of the creator economy and includes a vibrant network of

⁸⁰ Jessica Elliot, *What is the Creator Economy, and How Does It Work?*, U.S. CHAMBER OF COMMERCE (Aug. 17, 2022), <https://www.uschamber.com/co/grow/thrive/what-is-the-creator-economy>.

⁸¹ *Id.*

individuals that sell sexually explicit material they have produced online.⁸² To do so, many rely on adult content platforms to monetize their talents in creative ways and share their niche passions with broad audiences.

Individuals from all income levels and identities engage in sex work, though sex workers often face legal and financial marginalization. A significant portion of the sex worker community come from economically vulnerable communities that traditionally have had trouble accessing other forms of employment.⁸³ The community of sex workers is also disproportionately consists of historically marginalized groups, such as the LGBTQ+ community.⁸⁴ Black people, transgender people, and people with disabilities have pursued careers in sex work to avoid the discrimination they routinely face in other industries and businesses.⁸⁵ For example, disabled or immunocompromised sex workers can benefit from the flexibility to make their own schedule and to work from home.⁸⁶ When the economy is performing poorly, such as during the early stages of the COVID-19 pandemic, unemployed and underemployed individuals turn to online sex work for a reliable source of income.⁸⁷

⁸² Gwyn Easterbrook-Smith, *OnlyFans as Gig-Economy Work: A Nexus of Precarity and Stigma*, PORN STUDIES (2022).

⁸³ Nastia Voynovskaya, *Sex Workers Are Moving Online, Supporting Each Other During Coronavirus*, KQED (March 25, 2020), <https://www.kqed.org/arts/13877250/sex-workers-are-moving-online-supporting-each-other-during-coronavirus>.

⁸⁴ LGBTQ+ individuals are more likely than the general population to participate in sex work. See *LGBT People in the Workplace*, THE NATIONAL LGBTQ WORKERS CENTER, <https://www.lgbtmap.org/file/LGBT-Workers-3-Pager-FINAL.pdf>.

⁸⁵ See *id.* (explaining that people who lose jobs due to transphobia are 3 times more likely to engage in sex work).

⁸⁶ Easterbrook-Smith, *supra* note 48.

⁸⁷ *Id.*

Adult content creation has allowed many to achieve financial freedom while contributing to the global economy and financial success of various online platforms.⁸⁸ For many, online adult content creation can provide an income significant and reliable enough to serve as the only source of monthly income.⁸⁹ Through their work, adult content creators are able to lead a financially stable life. Nevertheless, sex work remains highly stigmatized, and sex workers are often the target of both systemic and interpersonal discrimination and violence.⁹⁰ Given this unfortunate reality, evidence about the scale and severity of the injury caused by Mastercard's adult content policy has been difficult to gather. However, adult content creators and allies have nonetheless been able to adequately demonstrate specific harms that exemplify how the policy has negatively affected their livelihoods and the industry as a whole.

The empirical evidence that *has* emerged demonstrates that adult content creators experienced and continue to experience significant harms as a result of Mastercard's adult content policy. To illustrate, an initial survey of 105 online sex workers conducted by Dr. Valerie Webber found that 90% had suffered at least one detrimental impact as a direct result of the policy.⁹¹ Respondents highlighted experiences such as having accounts flagged, having to remove content to comply with arbitrary and redundant documentation

⁸⁸ *Id.*

⁸⁹ Raisa Bruner, *How 'Subscribe to Me' Became the Future of Work*, TIME (December 1, 2021), <https://time.com/6124508/creator-economy-onlyfans-twitch-future/>.

⁹⁰ See e.g., Andrew R Flores et. al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey, 2017*, 6, SCIENCE ADVANCES 40, (Oct. 2020) DOI: [10.1126/sciadv.aba6910](https://doi.org/10.1126/sciadv.aba6910); Daniella A Sawicki et. al., *Culturally Competent Health Care for Sex Workers: An Examination of Myths That Stigmatize Sex-Work and Hinder Access to Care*, 34 Sex Relation Ther. 355 (2019).

⁹¹ WEBBER, *supra* note 3.

rules, delays from needing to reupload material for review, payment interruptions, or having an account closed entirely.⁹² More than half of the respondents reported payment interruptions, and 49% suffered four to six distinct detrimental impacts. Among those creators who were forced to remove content, 15% had to take down over 40% of their material.⁹³ Mastercard's policy prevents creators from being able to afford basic living necessities such as stable, safe housing and food, forcing them into more dangerous positions that can lead to exploitation.

A. The Use of Novel Technologies to Comply with Mastercard's Pre-Review Requirement Exacerbates Harm

Adult content creators have difficulty preventing or even predicting when they may be subjected to detrimental impact because Mastercard's policy erroneously conflates erotic and illegal content. The use of new technologies, such as artificial intelligence (AI) technologies and biometric screening tools, further exacerbates these inconsistencies and resulting harms. By censoring legal as well as illegal content, these tools sweep in broad categories of expression which are fully legal and typically tolerated in other content moderation contexts, such as on social media platforms.

To accommodate Mastercard's policy, platforms have significantly adapted their operations. Some have done so in ways that have restricted the channels and media available to content creators. For example, iWantClips temporarily disabled attachments in their messaging features due to the new policy requirements from Mastercard, presumably because the platforms had not figured out how to actually monitor messaging

⁹² *Id.*

⁹³ *Id.*

content.⁹⁴ Other platforms, such as Pornhub, have implemented the use of facial recognition technologies following Mastercard’s policy announcement. This raises major privacy concerns regarding how these images and other data will be stored and protected.⁹⁵ Beyond privacy concerns, facial recognition and other biometric tools may be more likely to make erroneous identifications when used on dark-skinned or transgender adult content creators.⁹⁶

Adult content platforms have also noted patterns where AI moderation tools produce false positives by flagging content that is completely benign and unrelated to the goals stated in Mastercard’s policy. For example, iWantClips’ messaging to content creators explains that “loser” hand symbols, decks of cards, and any objects with sharp edges, such as a knife or knife block in a kitchen, are being falsely flagged as weapons and, subsequently, removed.⁹⁷ AI tools are also erroneously flagging content that involves mirrors, reflections, special effects duplication, and outfit changes for having multiple

⁹⁴ See Documented Impact Report (preliminary collection of information reported by sex workers compiled by ACLU) (Appendix C).

⁹⁵ E.J. Dickson, *How Facial Recognition Technology Could Bring a Slut-Shaming Nightmare*, ROLLING STONE (May 31, 2019).

<https://www.rollingstone.com/culture/culture-features/facial-recognition-technology-porn-stars-sexism-841743>.

⁹⁶ See Cole *supra* note 24; see also Morgan K. Scheuerman et.al., *How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling*, 3 PROC. ACM HUM.-COMPUT. INTERACT.144 (November 2019) (“We found that facial analysis services performed consistently worse on transgender individuals, and were universally unable to classify non-binary genders,”); Patrick Grother, et.al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, U.S. DEPT. OF COMMERCE NATIONAL INSTITUTES OF STANDARDS AND TECHNOLOGY (Dec., 2019), <https://doi.org/10.6028/NIST.IR.8280> (finding that face recognition technologies across 189 algorithms produced the most errors for women of color, mostly from West and East African descent).

⁹⁷ iWantClips Email *supra* note 34.

performers without identity verification even when there was just one performer.⁹⁸ Those who produce fetish, roleplay, or kink content were significantly more likely to see their content removed. As a result of Mastercard’s policy, consensually produced content that involves no actual coercion—such as BDSM content—is also often flagged for removal.⁹⁹ One respondent in Dr. Webber’s report described being required to permanently remove “basically everything that wasn’t solo work with a toy, which was almost 60% of [their] content.”¹⁰⁰ Such broad-sweeping removals reflect the inadequacy of AI moderation tools and their inability to discern a difference between genuine illegal content and mere roleplay.

B. Mastercard Leverages its Outsized Market Power to Censor Lawful Sexual Conduct, Perpetuating Long-Term Harms Against Sex Workers.

Mastercard’s current global dominance in online payments gives its policy unique reach, empowering a single private company to unilaterally control the entire adult content industry.¹⁰¹ Virtually all online merchants must accept Mastercard to remain financially viable. Mastercard processes close to a quarter of payments in the U.S.¹⁰² and, internationally, Visa and Mastercard together control 90% of the credit and debit card market. Mastercard’s increasingly outsized position in the payment ecosystem has allowed

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ WEBBER, *supra* note 3.

¹⁰¹ See *U.S. Credit Card Market Share by Network & Issuer*, UPGRADED POINTS (Jan. 4, 2022), <https://upgradedpoints.com/credit>; Lewis Krauskopf, *Swiping Their Way Higher: Visa, Mastercard Could Be the Next \$1 Trillion Companies*, REUTERS (Jan. 31, 2020 1:21 AM), <https://www.reuters.com/article/us-visa-mastercard-stocks/swiping-their-way-higher-visa-mastercard-could-be-the-next-1-trillion-companies-idUSKBNiZUoJA>.

¹⁰² Christy Rodriguez, *U.S. Credit Card Market Share by Network & Issuer – Facts & Statistics*, UPGRADED POINTS (Jan. 4, 2022), <https://upgradedpoints.com/credit-cards/us-credit-card-market-share-by-network-issuer>.

it to repeatedly censor lawful sexual conduct to the detriment of adult content creators. Mastercard's continued influence over online content has dangerous consequences for the professional and personal livelihoods of sex workers across the world.

Mastercard's policy change comes on the heels of decades of concerted efforts to censor online sex work, both legally and financially. The "war on sex" has caused significant and irreparable destruction to sex worker communities over the years and is increasingly harmful as companies like Mastercard move to codify their attack into formal content policies.¹⁰³ Mastercard's adult content policy is but one chapter in the long history of financial institutions using their market position to financially censor sex workers engaged in constitutionally-protected speech.¹⁰⁴

Through its policy, Mastercard deepens centuries of stigmatization and marginalization of sex work, entrenching popular and harmful stereotypes about sex workers. Conflation of sex work and sexual exploitation perpetuates the narrative that the production of pornography is illegal, an erroneous yet widespread idea that frequently justifies harmful legislation, ignores the realities and intricacies of sex work, and endangers those engaged in it. Though Mastercard's policy claims to fight sexual exploitation, in practice it introduces a degree of financial hardship and uncertainty that is likely to push workers towards less reputable platforms or in-person sex work, where

¹⁰³ See Stardust et al., *supra* note 10.

¹⁰⁴ In 2019 when a campaign was launched to shut down Pornhub, Mastercard discontinued processing payments for the site altogether. Jazmin Goodwin, *Mastercard, Visa, and Discovery Cut Ties with Pornhub Following Allegations of Child Abuse*, CNN BUSINESS (Dec. 14, 2020), <https://www.cnn.com/2020/12/14/business/mastercard-visa-discover-pornhub/index.html>

they face higher risks of violence and are easier targets for those who aim to exploit the vulnerable.

Mastercard's dominant market position has enabled it to shut down weaker or new platforms who have struggled to comply with the onerous policy requirements. By crafting deliberately opaque provisions which effectively demand automation and proactive account shutdowns, Mastercard is effectively opting to engage in business only with those payment processors and adult content websites that have the resources to comply. In turn, this strengthens those players that are already operating in powerful positions within the industry to the detriment of independent creators who will face significantly lower payouts. Accordingly, Mastercard has collapsed the industry into a few large players, an unfair method of competition that is in direct violation of the Section 5 of the FTC Act.¹⁰⁵ That the FTC recently announced it would extend its unfair competition authority to areas outside traditional antitrust law only further strengthens our demand that the agency investigate Mastercard's behavior.¹⁰⁶

4. Mastercard's Adult Content Policy Constitutes an Unfair Practice Under the Federal Trade Commission Act

Mastercard has used their significant market position to force compliance with an arbitrary and extralegal set of standards by instituting a new policy that bans content that is neither illegal nor harmful. In doing so, they have directly and severely harmed adult content creators, and engaged in unfair practice under the FTCA. The FTCA broadly

¹⁰⁵ See 15 U.S.C. § 45.

¹⁰⁶ See *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FED. TRADE COMM. (NOV. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

authorizes the Commission to investigate and prosecute unfair and deceptive business acts and practices and anticompetitive business conduct.¹⁰⁷ The harms stemming from Mastercard's policy comport with the unfair practice framework under the FTCA: (1) the injuries that adult content creators have experienced are substantial, (2) those injuries could not be reasonably avoided by adult content creators, and (3) the policy's benefits do not outweigh its costs.

A. Adult Content Creators are Consumers under the FTCA

Though sex workers are not in privity with Mastercard, the FTC should consider them as consumers who may receive redress by a finding of unfairness, nonetheless. The FTC Act does not define "consumer" nor has the FTC set out a concrete test to determine who is and who is not a consumer. However, the FTC has construed the term "consumer" to include businesses as well as individuals and has long taken the position that its statutory authority to proscribe unfair practices is not limited to individuals buying household or personal goods.¹⁰⁸ Indeed, courts have not applied narrow definitions from other consumer protection statutes to the FTCA.¹⁰⁹ Sex workers benefit from payment transactions that occur through Mastercard's products and services. Even under a strict definition of "consumer," when sex workers pay transaction fees to sell their work, they compensate Mastercard for its services. Further, designating sex workers as "consumers" would align with FTC Chair Lina M. Khan's enforcement priorities and the FTC's discretion in pursuing investigations.

¹⁰⁷ See 15 U.S.C. §§ 41-58.

¹⁰⁸ See *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 934 (N.D. Ill. 2008).

¹⁰⁹ *Id.* at 936.

B. The Documented Harm Flowing from Mastercard’s Policy Amounts to Substantial Injury

In addition to the emotional impact and other subjective harms resulting from this policy, adult content creators have also experienced significant monetary harm. The reported financial losses of adult content creators as a result of Mastercard’s policy raise the injury beyond trivial or merely speculative, and the preliminary data gathered from surveyed adult content creators demonstrate that their collective monetary losses amount to a substantial injury.¹¹⁰ To illustrate, as of February 2022, 75% of responding adult content creators noticed a drop in their sales after the Mastercard policy went into effect.¹¹¹ Among those who experienced a drop in sales, over half lost 50% or more of their monthly income.¹¹²

The loss of income that adult content creators have experienced due to Mastercard’s policy has had immediate and severe consequences. Sex workers report difficulty paying rent, heating their homes, paying for food, and supporting dependents.¹¹³ Those with chronic illness and disabilities, who have depended on online sex work to make ends meet, have lost the independence and autonomy previously afforded by online

¹¹⁰ In *F.T.C. v. Windward Marketing, Inc.*, No. CIV. A. 1:96-CV-615F, 1997 WL 33642380 (N.D. Ga., 1997), a district court found that defendants who conducted a nationwide telemarketing scheme to obtain consumers’ bank account information and then drafted \$297.96 from hundreds of accounts without authorization caused substantial monetary injury of \$12,693,401. *Id.* Individual drafts would not have been sufficient but the large number of consumers with small injuries established substantial injury.

¹¹¹ WEBBER, *supra* note 3.

¹¹² *Id.*

¹¹³ WEBBER, *supra* note 3 (finding 78% of respondents said that the revised policy has impacted their ability to make ends meet).

sex work.¹¹⁴ The surrounding context of the COVID-19 pandemic and its aftermath further exacerbates the financial hardships sex workers face.

One pathway linking Mastercard's policy to adult content creators' financial harms comes in lost revenue from previously uploaded content. The drastic over-removal of previously uploaded content following Mastercard's announcement of its policy, coupled with inconsistency in the re-release practices of platforms, has meant clients who previously purchased clips could no longer access them. Without their content consistently reaching their client base, adult content creators experienced unpredictable losses of income.¹¹⁵ Available evidence demonstrates that at least a small number of content creators have suffered a large financial loss, and many have reported struggling to meet basic expenses due to loss of income after having material taken down.¹¹⁶ Mass removals of previously uploaded content have also forced creators to choose between deleting in-review content to avoid a short-term catastrophic loss of income or retaining

¹¹⁴ WEBBER *supra* note 3 (included testimony from a chronically ill 42-year-old woman with ADHD, treatment resistant depression, severe anxiety disorder, and C-PTSD. She reported: "I help caretake for my disabled military veteran husband with PTSD who is also mentally ill & on disability due to the failed spinal surgeries. I entered SW at age 40, just a few months before the pandemic. I was/am no longer capable of working full-time outside the house due to my mental & physical health. SW allowed me to make literally 2-4 times more than I ever made working full time in business & retail management, and with better overall health. I had hope again for the first time in almost 20 years. Now I am down to making \$500/month and if I cannot manage to get the same traction elsewhere, I am facing having to make myself VERY ill – very possibly to the point of hospitalization – by working in the mainstream workforce, where I am no longer capable of working more than a minimum wage job. This has been 1 of the most gutting experiences of my adult life."

¹¹⁵ Documented Impact Report (preliminary collection of information reported by sex workers compiled by ACLU).

¹¹⁶ WEBBER, *supra* note 3.

their work long-term.¹¹⁷ By deleting legal and previously compliant content, which might otherwise still have been purchased by audiences, adult content creators lost potential profit, and potentially their work, if it was not backed up elsewhere.

Creators have also reported financial harm through the loss of income from *new* content because being forced to move to a new platform has led to a reduction in their client bases. Further, many noted a decrease in spending on their content due to a lack of customer confidence as sites seemed unstable and unpredictable following the implementation of Mastercard's policy.¹¹⁸ Interviews with stakeholders and current adult content creators suggest that these financial harms have persisted through today.¹¹⁹

Mastercard's pre-publication review requirement has significantly contributed to the substantial injury adult content creators have faced. Under Mastercard's new policy, adult content services must now review all content uploaded by content creators for compliance before publication.¹²⁰ This review happens *after* identity checks and other forms of verification have been performed. This highly burdensome requirement represents a distinct departure from existing platform policies and law. Delays between content creation and pre-publication approval exacerbate the financial harms of Mastercard's policy and amplify the resulting income insecurity experienced by creators. For example, some websites allow workers to make custom videos for clients, a practice that is both lucrative and enables greater predictability as creators can be paid up-front.

¹¹⁷ iWant Clips email, *supra* note 34.

¹¹⁸ JP Koning, *Porn, Mastercard Moderation and How Bitcoin Doesn't Fix It*, YAHOO!SPORTS (Oct. 25, 2021),

<https://sports.yahoo.com/porn-mastercard-moderation-bitcoin-doesn-151223561.html>.

¹¹⁹ *Id.*

¹²⁰ Mastercard Revised Standards, *supra* note 1.

Prior to Mastercard’s policy, adult content creators received payment the moment a buyer received a custom video. Now, review of all custom videos is required, unpredictably delaying remuneration.¹²¹

Relatedly, Mastercard’s policy also introduces a new lack of predictability to the industry as platforms implement AI monitoring tools rife with inaccurate assessments in their struggle to comply with the pre-publication requirement.¹²² Though the specifics of Mastercard’s recommendation to platforms regarding the use of automated tools in pre-publication are unknown, the inadequacy of current technology with respect to analyzing sexually explicit content is sufficient to demonstrate substantial injury. Numerous adult content platforms have noted patterns of AI falsely flagging content.¹²³ Moreover, highly context-specific features of sexually explicit content, such as consent and interpersonal violence, are often difficult or impossible to evaluate, even for human reviewers.¹²⁴ Just last year, the FTC issued a report to Congress warning about the use of AI, highlighting inherent design flaws related to inaccuracy, bias, and discrimination.¹²⁵

¹²¹ Documented Impact report, *supra* note 85.

¹²² iWant Clips email, *supra* note 34.

¹²³ *Id.*

¹²⁴ For example, xHamster historically provided its moderation team with a manual explaining how to identify content policy violations but could not provide sufficient guidelines for reviewers to feel confident in their evaluation of attributes like “real” crying, coercion, and the legal age of those depicted. See Sebastian Meineck & Yannah Alfering, *We Went Undercover in xHamster’s Unpaid Content Moderation Team*, VICE WORLD NEWS (Oct. 27, 2020, 6:04 AM) <https://www.vice.com/en/article/akdzdp/inside-xhamsters-unpaid-content-moderation-team>.

¹²⁵ See *Combating Online Harms Through Innovation*, FED. TRADE COMM’N (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Combating%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf.

Given Mastercard’s refusal to divulge the details of the compliance mechanisms they have suggested to platforms, and that their policy effectively requires, an FTC investigation would reap significant benefits and is appropriately aligned with the agency’s key enforcement priorities.¹²⁶

Finally, when consumers are injured by a practice for which they did not bargain, as is the case here, substantial injury is present.¹²⁷ Adult content creators were not involved in Mastercard’s deliberations and did not bargain for the creation of the policy. Mastercard’s repeated refusals to engage with sex worker representatives regarding the contents of the policy and the harms experienced by creators as a result supports this argument. Adult content creators did not consent to Mastercard’s policy and were not afforded the opportunity to bargain on any of the policy’s provisions.

C. The Harms Experienced by Adult Content Creators Stemming from Mastercard’s Adult Content Policy Were Not Reasonably Avoidable

In determining whether consumers’ injuries were reasonably avoidable, courts look to whether the possibility of making a free and informed decision even exists.¹²⁸ Importantly, Mastercard cannot rescue the policy from a determination of unfairness by applying future corrective measures to return content or reinstate steady income for adult content creators because future restitution or mitigation is not sufficient to cure a finding of unavoidable harm.

Mastercard’s policy “unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making,” because Mastercard has such a significant

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See, e.g., Am. Fin. Servs. Ass’n v. Fed. Trade Comm’n*, 767 F.2d 957, 976 (D.C. Cir. 1985).

market share that acquirers and platforms cannot afford to not accept Mastercard, and therefore creators cannot just choose to take their content to another site. Virtually every platform accepts Mastercard, leaving creators without a pathway to avoid the effects of Mastercard's policy or earn a stable income within the industry.¹²⁹ Moreover at least 62% of those working in the adult industry reported the loss of a bank or other financial tool, such as Venmo or PayPal. When the very limited pool of alternative payment options is further evaporated, it becomes virtually impossible avoid the harms of Mastercard's policy.¹³⁰

Even if performers and websites wanted to stop offering Mastercard as a payment option, they could not do so without cutting off so much of their potential audience base that it becomes financially untenable. To avoid relying on Mastercard entirely, adult content creators would be forced to migrate to different and less mainstream adult content platforms, thereby losing followers and content. Mastercard's market power presents a serious obstacle to consumers' freedom in decision-making, and by imposing the adult content policy, the company is taking advantage of that power.¹³¹ Moreover, Visa, which maintains over 50% of the market share among credit card networks, has received

¹²⁹ See *Fed. Trade Comm'n v. World Pat. Mktg., Inc.*, No. 17-CV-20848, 2017 WL 3508639, at *15 (S.D. Fla., Aug. 16, 2017) (quoting FTC Unfairness Statement at 1074).

¹³⁰ See FSC *supra* note 7.

¹³¹ Cf. Michelle Celarier, *Bill Ackman Sent a Text to the CEO of Mastercard. What Happened Next Is a Parable for ESG*, INSTITUTIONAL INVESTOR (June 16, 2021), <https://www.institutionalinvestor.com/article/b1s9f698vwhczr/Bill-Ackman-Sent-a-Text-to-the-CEO-of-Mastercard-What-Happened-Next-Is-a-Parable-for-ESG> (an advocate touted Mastercard's Adult Content Policy "so much more powerful than even the United States enacting such a law" given Mastercard's global dominance in the payment processing industry.)

pressure to and signaled an interest in copying Mastercard’s policy,¹³² effectively making it impossible for adult content creators to avoid these policies and still allow payments via credit card.

D. The Costs of Mastercard’s Policy Outweigh Any Countervailing Benefits

Adult content creators are facing concrete, financial harms because of Mastercard’s adult content policy but it is unclear whether there are any countervailing benefits. The FTC finds unfair consumer injury only where the injury outweighs countervailing benefits of the allegedly unfair practice to consumers or to competition.¹³³ The assessment of relative costs and benefits includes not only those with respect to parties directly before the agency, but also the costs and burdens to society in general “in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters that would flow from government action.”¹³⁴

¹³² See generally Jennifer Surane, *Mastercard Rewrites Rules for Banks Backing Pornography Sellers*, BLOOMBERG (Apr. 14, 2021), <https://www.bloomberg.com/news/articles/2021-04-14/mastercard-rewrites-rules-for-banks-backing-pornography-sellers> (Visa investigated Pornhub after a NYT column accused the website of distributing videos depicting child abuse and non-consensual violence); *Visa and Mastercard Suspend Payments to Pornhub Parent Company Advertising Platform*, MOVIEGUIDE (Aug. 8, 2022), <https://www.movieguide.org/news-articles/visa-and-mastercard-suspend-payments-to-pornhub-parent-company-advertising-platform.html> (“In 2021, Mastercard instituted new policies for combatting sex trafficking and child abuse in pornography. It is past time for Visa to follow Mastercard’s lead[.]”)

¹³³ See *Fed. Trade Comm’n v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1396 (M.D. Fla. 2018).

¹³⁴ *FTC Policy Statement on Deception*, FED. TRADE COMM’N (Oct. 14, 1983) https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

Mastercard itself has not released any data showing that its policy is targeted to reduce the amount of illegal content online nor that any of its stated harms have been mitigated since the policy was implemented. It also has not detailed any plans for subsequent auditing or evaluation of the policy's effects. Additionally, the lack of information about how the policy is enforced, including about the reliability of any AI tools used in enforcement, further exacerbates any unpredictability the policy has created. On the other hand, disturbances to adult content creator livelihoods that have resulted from Mastercard's policy are both documented and disproportionate to the poorly articulated and unclear benefits that could result from its implementation.

Furthermore, there is no reason to believe that Mastercard's policy has had any additional impact on remediating illegal online trafficking, sexual exploitation, and abuse of minors. In fact, it likely did the opposite.-Existing empirical data about the effects of FOSTA-SESTA, a 2017 federal law ostensibly designed to reduce online human trafficking, demonstrate that restrictions of online sex work *increase* the vulnerability of sex workers to labor exploitation and trafficking, pushing the sex industry further underground.¹³⁵

Performer age-verification was already required by federal law prior to the institution of

¹³⁵ See Danielle Blunt and Ariel Wolf, *Erased: The Impact of FOSTA-SESTA*, HACKING // HUSTLING (Jan. 2020), <https://hackinghustling.org/wpcontent/uploads/2020/01/HackingHustling-Erased.pdf>; see also Amelia Gallay, *Sex Sells, But Not Online: Tracing the Consequences of FOSTA-SESTA*, BERKELEY J. CRIM. L. ONLINE (DEC. 4, 2021), <https://www.bjcl.org/blog/sex-sells-but-not-online-tracing-the-consequences-of-fosta-ses-ta> (reporting that the DOJ has to date only prosecuted one case under FOSTA-SESTA; in the same time period, cities like NYC have reported 180% increase in citations for loitering for prostitution after years of continuous decline; overall, the downfall of centralized platforms like Backpage also resulted in a fragmentation of the online sex marketplace, pushing both victims of sex trafficking and purveyors of consensual sex into the dark web and other harder-to-police and higher-risk environments).

the new policy, and platforms were also already barred from supporting the transaction of illegal content.¹³⁶ Mastercard put forth no evidence to support the idea that the imposition of onerous new requirements such as pre-publication review would have any impact on the prevalence of illegal materials on the internet. Over a year has passed since the imposition of the new policy and still, Mastercard has yet to publish such evidence. By opening an investigation, the FTC could compel disclosure of facts speaking to the policy's effectiveness, or lack thereof.

Many specifics of Mastercard's policy remain vaguely defined or concealed from the public. It may take time to account of the policy's long-term implications for adult content creators, the adult content industry, and online content moderation more broadly. However, the information that is available, coupled with Mastercard's failure to engage sex workers as experts in crafting their policy, suggests that there are significant disconnects between the policy's noble aspirations and the realities of its implementation. Although Mastercard will likely raise arguments about the presumptive benefits of the policy to society in reducing trafficking, revenge pornography, and abuse of minors, it must prove that the benefits of the policy have surfaced.¹³⁷ At this time, there is no published evidence that Mastercard's policy has provided the results it purportedly set out to achieve.

Additionally, Mastercard's policy ignores the existence of less invasive and harmful alternatives that mitigate harmful online content as effectively, or even more effectively, without comparable constraints on adult content creators' speech and livelihoods. For example, Meta engages in proactive moderation by utilizing content matching technology

¹³⁶ See 18 U.S.C. § 2257.

¹³⁷ Verdeschi, *supra* note 11.

to prevent child sexual abuse imagery on its platforms¹³⁸, as this form of content is especially amenable to matching by algorithm.¹³⁹ Such tools content-match against databases of prohibited media, in which each piece of content is given a unique identifier. If the algorithm matches newly posted content to something in its database, it prevents that content from actually reaching viewers. Because of the need for specificity in this process, Meta uses these tools to address only two forms of harmful content-- child endangerment and terrorism-related imagery.¹⁴⁰ Absolute efficacy cannot be confirmed without more data from the company, Meta has demonstrated success in catching large volumes of child abuse imagery before it ever reaches the end user.¹⁴¹

Content matching based on existing databases of banned imagery more directly addresses the problems of trafficking, exploitation, and abuse, and incentivizes platforms to improve their own proactive moderation tools. Such mechanisms currently exceed what is legally required for both payment processors and websites to avoid liability under the TVPA.¹⁴² They also prevent the types of harms that content creators have experienced,

¹³⁸ See *Child Endangerment: Nudity and Physical Abuse and Sexual Exploitation in Community Standards Enforcement Report*, META (2022) <https://transparency.fb.com/data/community-standards-enforcement/child-nudity-and-sexual-exploitation/facebook/>; THE JUSTICE COLLABORATORY AT YALE LAW SCHOOL, REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP (April 2022).

¹³⁹ See Spandana Singh, *Everything in Moderation: An Analysis of How Internet Platforms Are Using Artificial Intelligence to Moderate User-Generated Content*, NEW AMERICA (July 15, 2019, 10:21 AM), <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/case-study-facebook/>.

¹⁴⁰ *Id.* (explaining that “this proactive screening process focuses on identifying child endangerment and terrorism-related imagery”).

¹⁴¹ See *Child Endangerment*, *supra* note 109.

¹⁴² *Fleites v. MindGeek S.A.R.L.*, No. CV2104920CJCADSX, (C.D. Cal. July 29, 2022) (holding that for Visa to have conspired with Mindgeek to violate section 1591 of the TVPA, plaintiff

where automated review of materials cannot distinguish between illegal and make believe.

5. Conclusion

Due to the stigmatized nature of adult content, companies, especially those with as much power and influence as Mastercard, may believe they can inflict harms and engage in unfair practices against adult content creators without consequence. The FTC has the opportunity to set them straight, by investigating Mastercard's adult content policy. The policy substantially harms sex workers by causing financial losses to workers at all corners of the industry. A staggering 75% of survey respondents reported such financial losses after Mastercard's policy went into effect.¹⁴³ It is also not reasonable for adult content creators to avoid the policy because Mastercard can leverage its outsized market power to set the status quo of industry practices—causing a significant disruption in services for adult content providers. Finally, the benefits of Mastercard's policy do not outweigh the cost because Mastercard has not provided concrete evidence that any of the harms it seeks to address have been mitigated and substantial portions of the policy target content that is not illegal or even necessarily harmful. Mastercard can and should employ a multitude of less-restrictive means to accomplish its goal of preventing the distribution of illegal content.

would have to demonstrate that it provided the "tools "necessary to conduct the violation and "share[d]...a common plan or design" with MindGeek's perpetration of the violation.); see also *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022) (finding that a failure to implement "basic security measures" such as age verification and IP-address tracking, would not constitute the requisite state of a "knowing" violation under 18 U.S.C. § 1591).

¹⁴³ WEBBER, *supra* note 3.

Mastercard should not be able to set the normative practices of the entire adult content industry. By placating interests that seek to fuel the flames of moral panic, Mastercard denies the reality that sex work is work. The adult content industry has always been and will continue to be a thriving hub of economic activity. Mastercard should be held accountable for designing and implementing a policy that harms the entire industry and threatens sex workers' livelihoods.