Case No. 10-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREE SPEECH COALITION, INC., *et al.,*
Plaintiffs - Appellants,

– vs –

ATTORNEY GENERAL OF THE UNITED STATES,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

APPELLANTS' BRIEF

J. MICHAEL MURRAY (0019626)
jmmurray@bgmdlaw.com
LORRAINE R. BAUMGARDNER (0019642)
lbaumgardner@bgmdlaw.com
BERKMAN, GORDON, MURRAY & DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
Telephone: 216-781-5245
Fax: 216-781-8207

Counsel for Plaintiffs-Appellants

Of Counsel: Reed C. Lee (06189908)
J.D. Obenberger and Associates
Three First National Plaza
70 West Madison Street, Suite 400
Chicago, Illinois 60602
(312) 558-6427

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-4085

Free Speech Coalition, Inc., et. al.

v.

Attorney General of the United States

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Free Speech Coalition, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not applicable

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

/s/ Lorraine R. Baumgardner
(Signature of Counsel or Party)

Dated: 10-27-10

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-4085

Free Speech Coalition, Inc., et. al.

v.

Attorney General of the United States

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, American Society of Media Photographers, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not applicable

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

/s/ Lorraine R. Baumgardner
(Signature of Counsel or Party)

Dated: 10-27-10

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-4085

Free Speech Coalition, Inc., et. al.

v.

Attorney General of the United States

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Townsend Enterprises dba Sinclair Institute makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not applicable

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

/s/ Lorraine R. Baumgardner
(Signature of Counsel or Party)

Dated: 10-27-10

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

ADDENDUM (CONT'D)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONAL PROVISIONS

STATUTES, RULES AND REGULATIONS

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS

TABLE OF AUTHORITIES (cont'd)

JURISDICTIONAL STATEMENT

Plaintiffs filed this action in the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §§ 1331, 1346(a)(3), 2201, seeking a judgment declaring 18 U.S.C. §§ 2257, 2257A and their implementing regulations unconstitutional and for injunctive relief against Defendant, the Attorney General of the United States. App. at 150-81. The District Court granted Defendant's Motion to Dismiss on July 27, 2010. App. at 7. Plaintiffs filed a timely Motion to Alter and Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. DDE #71, Motion. The District Court denied Plaintiffs' Rule 59(e) Motion on September 17, 2010. App. at 120-28.

Plaintiffs filed a timely notice of appeal on October 14, 2010. App. at 1. This Court has jurisdiction to review the dismissal with prejudice of Plaintiffs' claims pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting Defendant's motion to dismiss Plaintiffs' Complaint for failure to state a claim when the Complaint presented plausible claims that 18 U.S.C. § 2257, 18 U.S.C. § 2257A and their implementing regulations ("the challenged statutes"), which require anyone who produces a depiction of sexual imagery to obtain photo identification from all persons depicted, to maintain records that include those identification documents, to place a

label on every image describing where the records are located, and which authorize federal agents to demand entry to inspect the records without a warrant, are unconstitutional, on their face and as applied, under the First, Fourth, and Fifth Amendments? App. at 150-81; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 19-56; DDE #17, Defendant's Motion to Dismiss at 11-12; DDE # 25, Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 1-46; App. at 31-119.

2. Whether the Complaint presents a plausible claim that the challenged statutes are unconstitutional under intermediate scrutiny, because they do not advance an important governmental interest in a direct and material way, are not narrowly tailored to a legitimate and important governmental interest, and are overinclusive and burden substantially more speech than is necessary? App. at 174-75; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 20-31; DDE #17, Defendant's Motion to Dismiss at 13-31; DDE #25, Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 4-25; DDE #71, Memorandum of Law in Support of Plaintiffs' Rule 59 Motion at 2-12; App. at 63-75, 120-28.

3. Whether the Complaint presents a plausible claim that the challenged statutes are unconstitutionally overbroad? App. at 175; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 31-33; DDE #17,

Defendant's Motion to Dismiss at 31-34; DDE #25, Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 25-27; App. at 75-84.

4. Whether the Complaint presents a plausible claim that the challenged statutes are content-based regulations of speech which must, but do not, satisfy strict scrutiny? App. at 174-75; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 33-37; DDE #17, Defendant's Motion to Dismiss at 13-17; DDE #25, Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 27-31; App. at 57-63.

5. Whether the District Court erred in concluding that Plaintiffs Free Speech Coalition and Conners were collaterally estopped from challenging 18 U.S.C. § 2257 on the basis of an interlocutory order entered in prior litigation, even though no final judgment on the merits was entered in the case and the court granted Plaintiffs' motion to voluntarily dismiss without prejudice? DDE #48, Defendant's Supplemental Brief at 10; DDE #50, Plaintiffs' Supplemental Brief at 3-5; App. at 48-52.

6. Whether the Complaint presents a plausible claim that the challenged statutes are unconstitutional under the Fourth Amendment? App. at 178; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 46-56; DDE #17, Defendant's Motion to Dismiss at 41-48; DDE #25, Plaintiffs'

Memorandum in Opposition to Motion to Dismiss at 37-46; App. at 96-119.

7. Whether the district court erred in denying Plaintiffs leave to amend their Complaint to include an allegation that members of Plaintiff Free Speech Coalition had been subjected to warrantless inspections under the statutes? App. at 182-87; DDE #53, Defendant's Opposition to Motion for Leave to Amend at 3-13; App. at 99-100.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no pending cases or proceedings related to this case.

STATEMENT OF THE CASE

Plaintiffs filed suit on October 7, 2009 challenging the constitutionality of 18 U.S.C. §§ 2257, 2257A, federal criminal laws imposing record-keeping and labeling requirements on producers of expression containing sexual imagery, and their implementing regulations under the First, Fourth and Fifth Amendments to the United States Constitution and seeking a judgment declaring the statutes and regulations to be unconstitutional and enjoining their enforcement. App. at 150-81.

Defendant moved to dismiss Plaintiffs' Complaint in its entirety for failure to state a claim under Rule 12 (b)(6), Federal Rules of Civil Procedure, and moved, under Rule 12 (b)(1), Federal Rules of Civil Procedure, to dismiss Plaintiffs' Fourth Amendment claims for lack of subject matter jurisdiction on ripeness and standing

grounds. DDE #16, Defendant's Response; DDE #17, Motion to Dismiss.

On March 12, 2010, the district court held oral argument. Following the argument, the parties submitted additional briefing pursuant to the court's letter orders, DDE #48, 50, 52, 57, 58, and Plaintiffs sought leave to amend their complaint to address Defendant's challenge to their standing on their Fourth Amendment claims. App. at 182-87.

On May 19, 2010, the district court denied Plaintiffs' Motion for a Preliminary Injunction without prejudice, DDE #63, Order, and on July 27, 2010, the district court issued an order and lengthy opinion granting Defendant's Motion to Dismiss, dismissing the Complaint with prejudice, and denying Plaintiffs' Motion for Leave to Amend Their Complaint. App. at 7-119. In dismissing Plaintiffs' claims, the court determined there was no need for discovery or an evidentiary hearing, App. at 14, 66, and decided, as a matter of law, that the statutes did not violate the First, Fourth or Fifth Amendments. App. at 74-75, 84, 87, 88, 91, 119.

On August 24, 2010, Plaintiffs filed a timely Motion to Alter or Amend Judgment pursuant to Rule 59 (e), Federal Rules of Civil Procedure. DDE #71, Motion. The district court denied Plaintiffs' Motion to Alter or Amend on September 17, 2010. App. at 120-28.

Appellants filed a timely notice of appeal on October 14, 2010. App. at 1.

STATEMENT OF FACTS

I. TEXT OF 18 U.S.C. § 2257 AND 18 U.S.C. § 2257A

Title 18 U.S.C. §§ 2257, 2257A[1] require "[w]hoever produces any book, magazine, periodical, film, video tape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter" that contains sexual imagery to demand a government-issued photo identification document such as a driver's license or passport from each person to be filmed, photographed or otherwise depicted visually and to make a copy of the identification card. 18 U.S.C. § 2257(a), § 2257A(a); 28 C.F.R. § 75.2(a)(1).[2] If the person to be depicted refuses to produce a copy of his or her driver's license or passport, whether out of privacy or other concerns, even if the person has requested to be depicted in the image, the creation of the sexually explicit picture is forbidden. 18 U.S.C. § 2257(f). Publication of a single message without the requisite documentation places the producer at risk of a term of imprisonment of up to five years for a visual depiction of actual sexual

[1] 18 U.S.C. § 2257A was enacted as a companion statute in 2006–roughly eighteen years after 18 U.S.C. § 2257 was enacted.

[2] Title 18 U.S.C. §§ 2257, 2257A, their implementing regulations, 28 C.F.R. § 75 *et seq.,* have been reproduced in the addendum at the end of the brief pursuant to Rule 28 (f), Federal Rules of Appellate Procedure.

conduct[3]–with any subsequent violation being punishable by a term of imprisonment of not less than two years and not more than ten years. 18 U.S.C. § 2257(i).

Adult film makers and website operators, photographers, artists, educators, journalists, and citizens who create private, erotic expression must maintain a copy of the requisite photo identification of each person depicted in the sexually oriented expression, together with all other names used by the person along with a copy of the depiction and its date of production. 18 U.S.C. § 2257 (b); 28 C.F.R. § 75.2 (a)(1), (a)(4). The records must be organized alphabetically by the legal name of the person depicted and must be indexed or cross-referenced to each other name used and to the title or identifying number of the depiction, 28 C.F.R. § 75.2 (a)(3), and retrievable by name or title. 28 C.F.R. § 75.3.

All producers of sexual imagery must affix to their expression, a label that is "prominently displayed" and that identifies the address where the identification records can be found. 18 U.S.C. § 2257(e)(2); 18 U.S.C. § 2257A(e)(2); 28 C.F.R. §§ 75.6, 75.8. The label must be printed in no less than 12-point type or no smaller than the second largest typeface on the material in a color that contrasts with its background. 28 C.F.R. § 75.6(e). On electronic material, the notice must be displayed for a sufficient duration and be of sufficient size that it is capable of being

[3] A visual depiction of ***simulated*** sexual conduct without the requisite documentation carries a prison term of one year. 18 U.S.C. § 2257A (i).

read by the average reader. *Id.* Failure to affix this label is likewise punishable by a term of imprisonment of up to five years. 18 U.S.C. § 2257(f)(4).[4]

In addition to the original creators of the image, anyone else who publishes the depiction in a book, magazine, or film, or inserts the depiction on a computer website or service must likewise comply with the record keeping and labeling requirements by acquiring copies of the photo identification and other records from the original producer and by labeling the material with the location of the records. 18 U.S.C. § 2257(a), (h) (2); 28 C.F.R. § 75.1 (c)(2). And what is more, retailers bear the burden of checking the materials they disseminate to verify that they have the requisite label, for they are subject to criminal sanction for distributing sexually explicit material without the label. 18 U.S.C. § 2257(f)(4); 18 U.S.C. § 2257A(f)(4).

Information from the records required to be maintained can be used by the government in prosecutions for violations of federal obscenity law and other offenses. 18 U.S.C. § 2257(d)(2).

The records must be maintained for seven years from the date of their creation. 28 C.F.R. § 75.4.

The statutes and regulations empower the government to appear, without advance notice and without a warrant, and demand entrance to the place where the

[4] Failure to affix the label to expression depicting simulated sexual conduct is punishable by a prison term up to one year. 18 U.S.C. § 2257A (i).

records are maintained "without delay and at reasonable times...during regular working hours and at other reasonable times" to inspect the records. 28 C.F.R. § 75.5(a), (b), (d). If the producer of the depiction "does not maintain at least 20 normal business hours per week," then the producer must provide notice to the government "of the hours during which records will be available for inspection, which in no case may be less than 20 hours per week." 28 C.F.R. § 75.5(c). Refusal to permit the inspection is a felony. 18 U.S.C. § 2257(f)(5); 18 U.S.C. § 2257A(f)(5).

The government investigators are authorized to copy any document subject to inspection, without a warrant–including driver's licenses or passports and the images themselves, and may seize any evidence they believe is related to the commission of a felony–again without a warrant. 28 C.F.R § 75.5(e), (g). The regulations secure to the investigators "otherwise lawful investigative prerogatives" while conducting their inspections. 28 C.F.R § 75.5(f).

Title 18 U.S.C. § 2257A, unlike 18 U.S.C. § 2257, contains a provision that allows ***commercial*** producers of expression that contains ***simulated*** sexually explicit depictions or "lascivious exhibition of the genitals" to be exempted from the record-keeping and labeling obligations imposed by the legislation. 18 U.S.C. § 2257A (h). Instead, they may simply certify to the Attorney General that they maintain individually identifiable information regarding their performers for other purposes,

such as for compliance with tax or labor laws or pursuant to industry standards. 18 U.S.C. § 2257A (h)(1)(A)(ii). Non-commercial producers are not entitled to the exemption, nor are any producers of expression depicting ***actual*** sexual conduct–whether commercial or non-commercial– entitled to the exemption.

II. JUDICIAL EVALUATION OF 18 U.S.C. § 2257

The constitutionality of 18 U.S.C. § 2257 has been the subject of judicial debate at the federal appellate court level in two other circuits. In *American Library Association v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994) *cert. denied*, 515 U.S. 1158 (1995), two members of the panel found that 18 U.S.C. § 2257 was a constitutional content-neutral regulation of speech as applied to the plaintiffs in that case. While acknowledging that several of the law's applications "exceeded constitutional boundaries," they declined to address the issue of the statute's overbreadth because of their concern that the record before them failed to present "concrete facts that would enable [the court] to test the limits" of the statute. *Id*. at 83, 90, 94. The third member of the panel dissented, finding that the statute should be struck down as unconstitutionally "overbroad, chilling" and an "unwarranted intrusion into...First Amendment rights." *Id*. at 94-95.

More recently, a splintered Sixth Circuit sitting en banc, after vacating a panel decision that had struck down the statute as unconstitutionally overbroad, *Connection*

Distributing Co. v. Keisler, 505 F.3d 545 (6th Cir. 2007), affirmed the district court's grant of summary judgment in favor of the government. *Connection Distributing Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc).[5] The majority found, over the dissent of six judges expressed in four separate opinions, that 18 U.S.C. § 2257 was not unconstitutional as applied to the plaintiffs in that case and that it was not unconstitutionally overbroad.

While the majority of the court in *Connection* found that 18 U.S.C. § 2257 survived constitutional scrutiny, it acknowledged–as the D.C. Circuit Court had in *American Library Association*–that certain applications of the statute were problematic. For instance, the majority acknowledged that one of the dissents made a convincing case "why [18 U.S.C. § 2257] would have difficulty withstanding an as-applied attack by a mature-adults-only magazine that included photographs only of readily identifiable mature adults." *Id*. at 334, 336. As for application of the statute to "a couple who produced, but never distributed, a home video or photograph of themselves engaging in sexually explicit conduct," and "the hypothetical

[5] In addition to the decisions in *American Library Association* and *Connection* evaluating the statute's constitutionality, the Tenth Circuit in *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998) addressed a challenge to an earlier iteration of 18 U.S.C. § 2257's implementing regulations and determined that they exceeded the statutory authority and were, therefore, partially invalid. *See also, Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005) (dismissed without prejudice, D.C. COLO. L. Civ. Rule 41.2).

pornography magazine or sex manual that involves only the middle-aged and the elderly," the majority found that such application did not justify facial invalidation of 18 U.S.C. § 2257 because of the "contextual vacuum" and "law-enforcement vacuum" on the record before it. *Id*. at 339, 340. The court–declaring these applications too abstract–declined to invalidate the statute under the overbreadth doctrine. *Id.* at 341.

The six dissenting judges roundly disagreed and, in four opinions, meticulously laid bare the constitutional defects in the statute.

Judge Kennedy, joined by Judges Martin, Moore, Cole, Clay, and White, articulated point-by-point the constitutional analysis requiring invalidation of the statute under the overbreadth doctrine. The dissent also pointed to the body of law that recognized the importance of protecting the privacy of communication and the right to speak anonymously in preserving First Amendment rights, exemplified most recently by the Supreme Court's decision in *Watchtower Bible v. Village of Stratton*, 536 U.S. 150, 170 (2002). *Id.* at 346-47. Title 18 U.S.C. § 2257, it found, inhibited "protected speech, under circumstances far flung from the underlying purposes of the statute," and therefore, was unconstitutionally overbroad. *Id.* at 358.[6]

[6] The correctness of Judge Kennedy's analysis under the overbreadth doctrine was subsequently underscored by the Supreme Court's decision in *United States v. Stevens*, 559 U.S. __, 130 S.Ct. 1577 (2010).

Judge Moore, joined by Judges Martin and Cole, also concluded that 18 U.S.C. § 2257 was unconstitutional as applied to the Plaintiffs. *Id*. at 362; *see also, id.* at 360-61. (Kennedy dissenting).

III. THE PLAINTIFFS

Plaintiffs, each of whom is subject to the record-keeping and labeling requirements of the federal criminal statutes here at issue, represent a broad array of producers and users of sexually explicit expression–none of whom could in any way be confused as a producer of child pornography. They include the Free Speech Coalition, the trade association of the adult industry, whose mission is to protect and preserve First Amendment freedoms, App. at 156-57, a journalist who reports on that industry, App. at 161, and responsible members of that industry who portray sexual conduct as part of the genre enjoyed as entertainment by millions of adults. App. at 160, 169-70. They include individual photographers whose expression captures and depicts sexual imagery as part of their artistic expression and who are commissioned by married couples and other adults to produce erotic portraits of them. App. at 158-59, 164,166-67,168-69,170. They include the American Society of Media Photographers, an organization that represents 7,000 photographers among whom are members who create photographs depicting sexual conduct commercially. App. at 157-58. They include leaders in the field of sex education and therapy whose

materials necessarily depict sexual imagery in examining and discussing human sexuality. App. at 162, 165, 171.

The record-keeping, labeling, and inspection demands of the statutes impose burdens on Plaintiffs' expression that have, by turns, inhibited, chilled, and suppressed it. *See e.g.,* App. at 171-72. (Plaintiff Dodson eliminated 2,000 images of genitalia from a gallery on her website that provided a forum for adults to work through their shame related to the look of their genitalia and that served as an important source for her own research on sexuality, for which she could not secure requisite photo identification); *see also,* App. at 157, 158, 159-60, 160-61, 161-62, 162-63, 164-65, 165-66, 167-68, 169, 170, 170-71. (describing the particular censorial effects of the statutes and regulations on each Plaintiff).

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' Complaint, which presents plausible claims for relief under the First, Fourth and Fifth Amendments. *Ashcroft v. Iqbal*, 556 U.S. , 129 S. Ct. 1937, 1949-50 (2009). The detailed factual allegations of the Complaint, when taken as true, establish that Plaintiffs' expression has been unconstitutionally inhibited and that they are entitled to relief.

Plaintiffs presented plausible claims that the challenged statutes do not withstand intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 799

(1989). In imposing their burdens on expression depicting adults, the statutes do not directly and materially advance the government's interest in combating child pornography. Nor are they narrowly tailored to achieve that interest; rather they are narrowly tailored to achieve an illegitimate governmental interest in requiring all producers of expression to establish that their expression is not child pornography, thus reversing the constitutional presumption conferred on all expression required by the First Amendment. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989). Moreover, the statutes are overinclusive and burden substantially more speech than is necessary to advance its avowed interest in battling child pornography.

The statutes likewise are unconstitutionally overbroad. In addition to Plaintiffs' constitutionally protected expression, the statutes apply to a vast quantity of private, non-commercial expression between adults.

Moreover, the statutes are content-based regulations of expression that do not survive strict scrutiny. The statutory purpose is designed to influence and affect the content of speech and thus the statutes are content-based. *Simon & Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105, 116 (1991). Moreover, an exemption created for commercial expression containing simulated depictions of sexual activity, but not for depictions of actual sexual activity–an exemption thus based solely on the content of the expression–underscores the statutes' content-based

nature.

Plaintiffs Free Speech Coalition and Conners are not collaterally estopped from joining the other Plaintiffs in making the foregoing First Amendment challenges to 18 U.S.C. § 2257 on the basis of an interlocutory order entered in prior litigation, in which no final judgment on the merits was entered and in which the court granted Plaintiffs' motion to voluntarily dismiss without prejudice. *Allen v. McCurry*, 449 U.S. 90, 94-95 (U.S. 1980); *Semtek International Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 505-06 (2001).

In addition to the First Amendment claims described above, the Complaint presented other plausible claims challenging the statutes' constitutionality under the First Amendment as well as under the Fourth and Fifth Amendments.

Specifically, the inspection regimen established in furtherance of the record-keeping mandates violates the Fourth Amendment. The regulations authorize governmental agents "to enter without delay" the business premises and homes where the records are kept and to search through and seize private records and expression without a warrant. Refusal to permit the inspection constitutes a felony. The statutes and their implementing regulations thus authorize warrantless searches and seizures in violation of the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). Moreover, the district court erred in denying Plaintiffs leave to amend their

Complaint to include an allegation that members of the Free Speech Coalition had been subjected to warrantless inspections under the challenged statutes.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' CLAIMS.

A. STANDARD OF REVIEW

"Review of a dismissal of a complaint under Rule 12(b)(6) is plenary," *Stevenson v. Carroll*, 495 F.3d 62, 65 (3d Cir. 2007), *quoting Lake v. Arnold*, 112 F.3d 682, 684-85 (3d Cir. 1997). Likewise, questions of subject matter jurisdiction raised on a motion to dismiss under Rule 12(b)(1) are reviewed *de novo*. *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 163 (3d Cir. 2010). The substantive claims forming the basis of the Complaint, *infra* at 22-45, 49-59, are, therefore, reviewed *de novo* as well.

B. THE COMPLAINT PRESENTS DETAILED ALLEGATIONS PRESENTING PLAUSIBLE CLAIMS THAT THE CHALLENGED STATUTES AND REGULATIONS ARE UNCONSTITUTIONAL.

Plaintiffs' Complaint sets out detailed factual allegations in support of their claims that the statutes are unconstitutional on their face and as-applied under the First, Fourth and Fifth Amendments. App. at 150-81. Together with their Complaint, Plaintiffs filed a 57-page Memorandum in support of Plaintiffs' Motion for Preliminary Injunction setting forth the case law and other legal authority in support

of Plaintiffs' facial and as-applied constitutional challenges. DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction.

The district court, in reviewing Defendant's Motion to Dismiss, was to accept the actual factual allegations (as opposed to legal conclusions) of the Complaint as true and was required to determine "if they plausibly suggest[ed] an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. , 129 S. Ct. 1937, 1949-50 (2009).

The question before the court was not whether there was a probability that the factual allegations asserted a claim, but rather whether taken as a whole, they presented a plausible claim for relief. *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 320, n.18 (3d Cir. 2010); *West Penn Allegheny Health System, Inc. v. UPMC,* 627 F.3d 85, 98 (3d Cir. 2010). The Complaint at issue here clears that bar with room to spare.

This is particularly so in a case such as this that challenges, on First Amendment grounds, laws regulating speech. *See, West Penn,* 627 F.3d at 98 (reiterating rule that "judging the sufficiency of a pleading is a context-dependent exercise"). In such cases, it is the ***government*** that bears the burden of proving that a law that regulates expression comports with constitutional requirements. To that end, the government bears the burden of demonstrating, at minimum: (1) the existence of the problem which it claims the regulation addresses, *United States v.*

Playboy Entertainment Group, Inc., 529 U.S. 803, 819 (2000), (2) the regulation advances its goals in addressing that problem, *United States v. Stevens*, 533 F.3d 218, 234-35 (3d Cir. 2008)(en banc), 559 U.S.__, 130 S.Ct. 1577 (2010), and (3) the regulation is narrowly tailored and does not burden substantially more speech than is necessary. *Ward*, 491 U.S.at 799; *Brown v. City of Pittsburgh*, 586 F.3d 263, 277 (3d Cir. 2009). The government must put on evidence establishing each component; Plaintiffs are likewise entitled to put on evidence showing that these constitutional requirements have not been met as well as evidence in support of their claims that the statutes are unconstitutional. *See e.g., Conchatta v. Miller*, 458 F.3d 258, 268 (3d Cir. 2006); *American Civil Liberties Union v. Reno*, 217 F.3d 162, 170, 177 (3d Cir. 2000); *Philips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). The development of an adequate evidentiary record is also fundamental to the assessment of Plaintiffs' as-applied challenges. *See Brown*, 586 F.3d at 289.

II. PLAINTIFFS' COMPLAINT PRESENTS A PLAUSIBLE CLAIM THAT 18 U.S.C. §§ 2257AND 2257A ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

Appellants contend that the statutes do not survive scrutiny under First Amendment precedent, as will be discussed below. But at the outset, an unconstitutional flaw in their very fabric stands as an important backdrop for that analysis.

Like its progeny, the original version of 18 U.S.C. § 2257 passed by Congress in 1988 imposed record-keeping and labeling obligations on producers of sexually explicit expression. Pub. L. 100-690.[7] However, no criminal or civil penalties punished non-compliance with its provisions; rather the only consequence for failing to comply with the legislation's record-keeping or labeling requirements was a "rebuttable presumption that the performer in the material was a minor" in a prosecution for a violation of 18 U.S.C. § 2251(a), prohibiting child pornography. In this form, Congress aimed to confine the statute's burdens to those who might "face prosecution for sexual exploitation of children." Hearing Before the Committee on the Judiciary, United States Senate, 100th Cong. Second Session, on S. 703, S. 2033, June 8, 1988 at 266. This presumption "could easily be rebutted" by the producer by presenting documentation of the performer's age. *Id.* The statute thus targeted child pornography.

The United States District Court for the District of Columbia struck down this version of 18 U.S.C. § 2257 as unconstitutional under the First and Fifth Amendments in *American Library Association v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989) *vacated as moot*, *American Library Ass'n v. Barr,* 956 F.2d 1178 (D.C. Cir. 1992)–finding, among other things, that its rebuttable presumption was

[7] A copy of Pub. L. 100-690 is included in the addendum.

unconstitutional on due process grounds. *Id.* at 480, 482. In response to the decision in *Thornburgh*, Congress amended the statute, excised the presumption, and instead directly imposed criminal sanctions for failing to maintain photo identification records for persons depicted in sexually explicit expression and for failing to label the expression accordingly. Pub. L. 101-647, Nov. 29, 1990.

Congress's "fix" of the due process violation wrought by the statute's presumption only served to exacerbate its unconstitutional incursions under the First Amendment, however. The reach of the amended statute extended to expression far beyond its professed target of child pornography and, disturbingly, dismantled the presumption of protection conferred on expression by the First Amendment.

The statute in this form requires ***all*** producers of sexually explicit expression to demand and maintain records proving–on penalty of criminal sanction–that their expression depicts adults and is, therefore, protected expression. Put another way, the statute imposes the burden on producers of sexually explicit expression (expression that is presumptively protected by the First Amendment) to ***prove*** that their expression is not unprotected–by requiring them to maintain records and label their expression in consonance with the statute's dictates. And thus, the statute effectively and definitively reverses the presumption of protection that the First Amendment confers on all expression. *Fort Wayne Books*, 489 U.S. at 67

("presumption [is] that expressive materials are protected by the First Amendment"); *Stevens*, 130 S.Ct. at 1591; *Stevens,* 533 F.3d at 224; *Near v. Minnesota*, 283 U.S. 697, 721 (1931) (rejecting notion that a publisher of expression "could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined.")

A. THE STATUTES ARE UNCONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY.

The constitutionality of a law that is deemed to be content-neutral depends on a showing by the government, under intermediate scrutiny, that it advances an important governmental interest, is narrowly tailored to serve that interest, does not burden substantially more speech than is necessary, and leaves open ample alternative avenues of communication. *Ward*, 491 U.S. at 791.

Plaintiffs contend that 18 U.S.C. § 2257 and 18 U.S.C. § 2257A are content-based regulations of expression that should be evaluated under strict scrutiny. *See infra* at 42-45. Nevertheless, even under intermediate scrutiny, the statutes are so overinclusive they cannot satisfy the demands of the First Amendment because they do not advance an important governmental interest, are not narrowly tailored, and burden substantially more speech than is necessary. *See Simon & Schuster*, 502 U.S.

at 122, n.

1. Title 18 U.S.C. § 2257 and 18 U.S.C. § 2257A Do Not Advance an Important Governmental Interest in a Direct and Material Way.

To survive under intermediate scrutiny, a regulation of speech must advance an important governmental interest "in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994); *Stevens*, 533 F.3d at 234-35 (3d Cir. 2008); 559 U.S.___, 130 S.Ct. 1577 (2010); *Brown*, 586 F.3d at 299; *Service Employees International Union v. Mt. Lebanon*, 446 F.3d 419, 427 (3d Cir. 2006). To satisfy this requirement, the government "must do more than simply 'posit the existence of the disease sought to be cured.' ... It must demonstrate that the recited harms are real, not merely conjectural...." *United States v. National Treasury Employees Union,* 513 U.S. 454, 475 (1995). "Mere conjecture" has never been accepted "as adequate to carry a First Amendment burden." *Service Employees International*, 446 F.3d at 428,

Thus, the government must offer some proof of "the true nature and extent of the risk" of the alleged problem the statutes were designed to address. *Playboy*, 529 U.S. at 819; *Brown*, 586 F.3d at 279 (record must establish support for "factual proposition" that regulation of speech needed to achieve City's legitimate interests.) Here, the government claims, and the district court found, that the statutes "were enacted to combat the use of children in the production of pornography." App. at 56.

Plaintiffs do not dispute that combating child pornography is an important, indeed compelling, governmental interest. They are universally and unqualifiedly opposed to the exploitation and abuse that child pornography represents. But intermediate scrutiny requires more than just an evaluation of whether the regulation involves an important interest; it requires a showing that the regulation at issue advances that particular interest.

The question presented by this statutory scheme is whether the record-keeping and labeling burdens that it imposes upon constitutionally protected expression depicting ***adults*** directly and materially advances the battle against child pornography. Judge Moore in *Connection* described the heart of the problem:

> The regulation at issue in this case, § 2257, does not apply solely to child pornography. It applies to a class of materials much broader than those depicting what Congress ultimately seeks to prevent, and therefore does not seek to advance Congress's ultimate goal directly, or even as directly as § 2252's prohibitions on distribution, receipt, and possession of child pornography. Instead, Congress seeks to supplement these existing bans by imposing age-verification and record-keeping requirements on all visual depictions of actual sexually explicit activity, regardless of the age of the performers. In this regard, the means employed by § 2257 are distinguishable from, and significantly broader than, those employed by §§ 2251 and 2252.

Connection, 557 F.3d at 363 (Moore dissenting).

The court below found that the statutes' record-keeping and labeling requirements aided in suppressing child pornography in four ways: (1) they ensured

that producers of sexually explicit expression confirmed the age of their models before filming them; (2) they permitted persons who publish the depictions to be ensured that the models were not children; (3) they prevented children from trying to pass themselves off as adults; and (4) they aided law enforcement in distinguishing between children and adults in sexually explicit expression. App. at 64, *quoting Connection*, 557 F.3d at 329-30. The problem with the court's analysis, however, is that no evidence was offered to demonstrate the problems it identified were "real, not merely conjectural."

The first two objectives–ensuring that producers and publishers of sexually explicit expression confirmed the adulthood of the persons depicted–are premised on the notion that commercial producers of sexually explicit expression either deliberately or negligently fail to verify that their performers are adults, and thus, the statutes' mandatory record-keeping scheme is necessary to assure that they do. Not only has the government failed to produce any evidence that producers of adult expression do not verify the ages of the performers in their expression, but had Plaintiffs been afforded the opportunity to adduce evidence below, they would have established the exact opposite.[8] The adult industry does, in fact, verify and document

[8] This is precisely the type of evidence that could be produced in the course of litigation to which the court in *Phillips v. County of Allegheny* referred in instructing that a Complaint not be dismissed if its allegations "call[] for enough facts (continued...)

that the performers appearing in their films are adults. Those producers do not simply make a subjective judgment. Wholly apart from § 2257, these producers have always checked the IDs of their performers. That has been a long-established industry practice. As recognized by the exemption in 18 U.S.C. § 2257A pertaining to depictions of simulated sexually explicit conduct, the record-keeping requirements are not necessary to achieve its objectives in those instances.

Nor has the government adduced any evidence establishing a widespread problem with children attempting to pass themselves off as adults in the production of sexually explicit expression. The oft-cited example of the adult industry's use of a minor in adult films is Traci Lords, who with her agent "perpetrated a massive fraud on...the adult entertainment industry...in...an artful, studied and well-documented charade whereby Lords successfully passed herself off as an adult." *United States v. United States District Court*, 858 F.2d 534, 536 (9th Cir. 1988). Importantly, the statutes' record-keeping provisions would not have prevented her appearance in adult films–given her elaborate fraud.

As for the fourth objective–applying record-keeping requirements to address

---

[8](...continued)
to raise a reasonable expectation that discovery will reveal evidence of the necessary element" 515 F.3d 224, 234 (3d Cir. 2008)–that element being the practices of the adult industry in verifying the ages of its performers in the same way that other motion picture producers accomplish that end.

a problem experienced by law enforcement in proving that the person depicted is a minor–the empirical evidence does not support the existence of that problem either. The government's own data shows that child pornography prosecutions have steadily grown in number and continue to result in high rates of conviction. *See United States v. Williams*, 553 U.S. 285, 326, n. 4 (2008) (Souter dissenting) (describing robust state of federal prosecutions and convictions for child pornography offenses); *See also,* http://www.usdoj.gov/oig/reports/plus/e0107/results.htm (last visited January 20, 2011)(Review of Child Pornography and Obscenity Crimes Report Number I-2001-07 July 19, 2001; http://www.gao.gov/new.items/d03272.pdf (last visited January 20, 2011) ("Combating Child Pornography" November 2002, data demonstrating growth in child pornography prosecutions between 1989 and 2002). Thus, federal prosecutions for child pornography offenses have grown considerably as have the rates of conviction. *See* http://www. fbi.gov/stats-services/ publications/ innocent-images-1 (last visited January 20, 2011).

There is simply no support for the government's claim that the statutes' burdensome criminal record-keeping and labeling mandates as applied to all protected sexual images of ***adults*** are needed in prosecuting child pornography.[9] To the

[9] Moreover, just as Justice Breyer observed in *Watchtower Bible v. Village of Stratton*, 536 U.S. 150, 170 (2002) (Breyer concurring) about an ordinance aimed at preventing theft and fraud by requiring canvassers to register with the village, that it (continued...)

contrary, Title 18 of the United States Code contains a spate of statutes with which law enforcement is armed for combating child pornography, and as the data show, have provided them with powerful ammunition in prosecuting offenders.[10]

In short, the statutes' application to constitutionally protected expression depicting adults simply does not advance or promote the Government's efforts in prosecuting child pornography.

2. The Statutes Are Not Narrowly Tailored to Advance a Legitimate and Important Governmental Interest.

Narrow tailoring analysis is designed to measure where the burdens of a law regulating speech fall with respect to the identified governmental interest justifying it. To make that evaluation, the law's "tailoring" must be measured against the same governmental interest identified in satisfying the first step of intermediate scrutiny–*i.e.,* the interest identified as justification for the law in the first instance. *Simon & Schuster*, 502 U.S. at 120. Here, the proper inquiry is: are the statutes narrowly tailored to achieve the government's interest in suppressing child

---

[9](...continued)
is "intuitively implausible to think" that crooks and con men will register with the authorities, it is likewise "intuitively implausible to think" that persons who produce sexually explicit depictions using children will keep records of their victims' ages and label those depictions with the location of those records to comply with 18 U.S.C. § 2257.

[10] *See,* 18 U.S.C. §§ 2251, 2252, 2252A, 2253, 2254, 2255, 2258, 2258A, 2258C, 2259, 2260, 2260A.

pornography?

Simon & Schuster requires that the exact same interest must satisfy both the significant interest and the narrow tailoring inquiries. If the interest shifts for narrow tailoring purposes after another interest (or even what seems to be merely another version of that interest) has been found sufficient, the reformulated interest must again be subjected to sufficiency analysis. And if that interest – no matter how well it fits the imposed burdens – is found wanting, the challenged statute cannot survive. In this regard, the Court in *Simon & Schuster* admonished that the Government cannot take the effect of the statute and posit that effect as the Government's interest for purposes of evaluating whether it is narrowly tailored. *Id.* at 120 (noting "this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.")

The district court below committed the error that the Supreme Court condemned in *Simon & Schuster*. The court below determined that the Government's interest in suppressing child pornography is substantial. App. at 57. It further concluded that the challenged statutes were narrowly tailored–***not*** to its interest in ***suppressing child pornography***, but rather to the Government's interest in having ***all producers establish that their expression is not child pornography***.[11] App. at 71-74.

[11] Indeed, the district court followed the very path rejected by the Court in (continued...)

The interest to which the court found the statutes were narrowly tailored was ***different*** than the interest it found served as their justification under the first prong of the intermediate scrutiny analysis. As the Supreme Court explained in *Simon & Schuster,* if the interest is re-defined for purposes of evaluating whether the law is narrowly tailored, the restated government interest *itself* must be subjected to the appropriate interest inquiry.

Having redefined the interest for the purposes of evaluating the statutes' narrow tailoring, the district court was obligated to perform a fresh evaluation of this re-stated interest.

In this case, the interest to which the district court found the statutes were narrowly tailored (compelling producers of sexually explicit expression to establish that their expression is, in fact, protected depictions of adults and not child pornography) amounts to a reversal of the First Amendment's presumption that expression is constitutionally protected. *See supra* at 22. Since a statute may not reverse a constitutional presumption, the only interest to which the challenged statutes are narrowly tailored is illegitimate. The statutes fail to pass constitutional

---

[11](...continued)
Simon & Schuster of positing the effect of the statutes (requiring producers of sexually explicit expression to demand age verification records from every performer depicted) as the government's interest for purposes of narrow tailoring. 502 U.S. at 120.

muster on that ground.

On the other hand, if, as *Simon & Schuster* instructs, the statutes are properly measured against the Government's interest in suppressing pornography depicting actual children–the interest offered to justify the statute under the first prong of intermediate scrutiny, the challenged statutes are not narrowly tailored but are unconstitutionally overinclusive.

The mischief[12] at which the Government properly aims is child pornography, and it may properly target all such expression. Yet here, Congress has targeted a much larger category of expression: what "might conceivably . . . be[]" child pornography. *A.L.A.,* 33 F.3d at 90. Conceivable child pornography is to actual child pornography what the group of all drivers is to the set of drunk drivers or, more aptly, the class of all reputation-damaging criticism (whether true or false) is to actionable defamation.

Because the First Amendment does not permit Congress to require that speakers disprove "conceivabl[e]" nonprotection, the burdens imposed by the statutes

---

[12] The seminal work concerning under- and overinclusiveness in constitutional law spoke of the "mischief" legitimately targeted by the government and the "trait" selected by the legislature for regulation; and it presented diagrams which help to visualize narrow tailoring questions in those terms. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. l. Rev. 341, 347 (1949). The fourth of those diagrams – a small M (mischief) circle lying entirely within a much larger T (trait) circle – illustrates the overinclusiveness which is the principal problem addressed here.

challenged here must be narrowly tailored to the set of all actual child pornography rather than to this broadest possible superset of all "conceivable child pornography." Taking actual child pornography as the reference point, it is readily apparent that the challenged statutes apply to a "significant universe of speech which is neither obscene under *Miller* [*v. State of California*, 413 U.S. 15 (1973)] nor child pornography under [*New York v.*] *Ferber*, [458 U.S. 747 (1982)]." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002). The class of expression covered here is many, many times larger than the class of actual child pornography and thus, by no means, can the statutes be deemed narrowly tailored. App. at 174.

In fact, 18 U.S.C. § 2257A demonstrates how 18 U.S.C. § 2257 could be narrowly tailored to meet its objectives as applied to the adult film industry. Title 18 U.S.C. § 2257A(h)(1) establishes a certification procedure under which commercial producers of motion pictures are exempt from record-keeping and labeling burdens in recognition that these producers routinely and customarily verify the ages of their performers. The certification would likewise accomplish the statutory goals as applied to the adult industry using a far more narrowly tailored mechanism.

3. Title 18 U.S.C. § 2257 and 18 U.S.C. § 2257A Are Overinclusive and Burden Substantially More Speech Than Is Necessary.

In addition to showing that a regulation of speech is narrowly tailored to

advance an important government interest, the government must also show that the regulation does not burden substantially more speech than is necessary. *Brown,* 586 F.3d at 281.

Title 18 U.S.C. § 2257 and 18 U.S.C. § 2257A, by their plain terms, apply to all visual depictions–both commercial and non-commercial–containing sexual imagery. 18 U.S.C. § 2257 (a), (h); 18 U.S.C. § 2257A (a), (h). They impose their criminal record keeping and labeling requirements on ***all*** expression containing sexual imagery. The text is clear: the requirements apply to "whoever produces" a sexual image. The ***entire*** universe of constitutionally protected expression involving sexually oriented images of ***adults*** is burdened by these laws. Even private, intimate expression falls within the statutes' mandates.

In one quick blow, the statutes knock out the right to communicate anonymously on matters of utmost privacy. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Lawrence v. Texas*, 539 U.S. 558 (2003). As the Court observed in *Watchtower:*

> It is offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

536 U.S. at 165-66. Judge Kennedy emphasized that *Watchtower* "drew attention to the historical protection of anonymity as against the government, not the general

public," and therefore, reasoned that "an individual may be willing to expose his or her physical presence in sexually explicit imagery or otherwise which acquaintances may recognize, and still retain an interest in not disclosing identifying information to the government." *Connection*, 557 F.3d at 348. (Kennedy dissenting).

Here, citizens must not only keep records for government inspection as to the identity of the persons depicted in their intimate messages, but must further emblazon them with a label identifying the address where those records can be found–which, in many instances, will be the citizen's home.

The Government in the court below protested this conclusion (apparently recognizing the threat it posed to the statutes' constitutionality) and argued that the statutes are confined to expression offered "for sale or trade."[13] But the unambiguous language of the statutes leaves no room for this argument. *Stevens*, 130 S.Ct. at 1587-88.

Moreover, the exemption from compliance provided for certain producers of simulated sexually explicit expression confirms that the statutes apply to non-

[13] As support for its position in the court below that the statutes did not reach non-commercial, private expression, the government relied on a passage in the preamble to the regulations in which the Department of Justice stated that the statute is "limited to pornography intended for sale or trade." Defendant's Memorandum, pp. 26, n.12; 33, citing 73 Fed. Reg. at 77456. As noted above, the statutes and regulations lend themselves to no such interpretation and the very same preamble from which the government draws support contains passages, discussed *infra* at 36-37, that completely contradict that claim.

commercial expression. It reads in relevant part:

> The provisions of this section and section 2257 shall not apply to matter, or any image therein, containing one or more visual depictions of simulated sexually explicit conduct, or actual sexually explicit conduct as described in clause (v) of section 2256(2)(A) [lascivious exhibition of the genitals or pubic area], if such matter–
>
> (A)(i) ***is intended for commercial distribution***; ....

18 U.S.C. § 2257A (h)(1) (emphasis added). As the first of several conditions necessary to qualify for the exemption, Congress requires the producer of that material to establish that its expression "is ***intended for commercial distribution***." (emphasis added). If 18 U.S.C. §2257 applies only to material produced for sale or trade, as the government maintains, there would be no need whatsoever for 18 U.S.C. §2257A (h)(1)(A)(i); there would be no reason to require a producer to establish that his expression is intended for commercial distribution to qualify for §2257A (h)'s exemption, if, in fact, that were the only type of expression regulated by 18 U.S.C. §2257 in the first instance.

Additionally, the regulations implementing 18 U.S.C. §§ 2257, 2257A make clear that private expression is subject to the record keeping statutes. Title 28 C.F.R. § 75.1 (c)(1) defines *primary producer* (those individuals who actually create the visual depiction) to include ***any*** person who produces expression with sexual imagery; it contains no language confining the statutes' or regulations' application to

expression intended for sale or trade. The regulations also define the term, *secondary producers*, those who publish or reproduce sexually explicit depictions, even though they have not actually created them, as part of a book or magazine or on a computer website and who are also subject to the record-keeping and labeling provisions of the act.

The regulations create two categories of secondary producers: (1) those who produce, assemble, manufacture, publish, duplicate, reproduce, or reissue a book, magazine, periodical, film, videotape, or digitally- or computer-manipulated image, picture, or other matter ***intended for commercial distribution*** and (2) those who insert such depictions on a computer site or service. 28 C.F.R. § 75.1 (c)(2) (emphasis added). For one discrete class of secondary producers, the regulations restrict application of the record keeping requirements to matter for commercial distribution. The regulations impose no such qualification on secondary producers who post images on computer websites. Thus, it is clear that their application is not limited to expression offered for sale or trade.

The preamble to the regulations, in fact, explains that the record-keeping requirements apply to private, non-commercial expression containing candid sexual images that adults post on social networking web sites. *Id*. at 77437. ("[O]ne who posts sexually explicit activity on 'adult' networking sites may well be a primary or

secondary producer. Users of social networking sites may therefore well be subject to the proposed rule, depending on their conduct.") *See also,* USDOJ: CRM: OPTF: 2257 Compliance Guide, http://www.justice.gov/criminal/optf/guide /2257-compliance-guide.html (last visited Jan. 18, 2011). In another passage in the preamble, the government reiterates that it "cannot exempt the users [of adult social networking sites] from the record keeping requirements." *Id*. at 77461. Clearly, the expression posted by these citizens is private, non-commercial expression.

Similarly, in response to another comment regarding the application of the record-keeping requirements to expression posted on a website like YouTube, that allows users to upload videos for sharing with others, the government expressly states in the preamble that a person who posts a video that includes sexual imagery on a website like YouTube "is required to affix a disclosure notice to each page of a sexually explicit depiction." *Id*. at 77439.

The district court, nevertheless, found that the statutes did not unnecessarily burden a substantial amount of speech on the basis that the statutes could tolerate no subjectivity in evaluating a person's age if they were to accomplish their objective of suppressing child pornography.

But that premise withers under examination.

First, as Plaintiffs would have demonstrated at hearing, the adult industry does,

in fact, verify and document that the performers appearing in their films are adults. Those producers do not simply make a subjective judgment. As the exemption in18 U.S.C. § 2257A recognizes, the record-keeping requirements are not necessary to achieve its objectives in those instances.

As for the necessity of the record-keeping requirements in addressing the inadvertent use of minors in other contexts, that claim has no footing either.

Clearly, there is no chance of error in making the determination that a person depicted in a sexually suggestive pose is not a minor when he is in his 30s, 40s, 50s or beyond. The record keeping requirements are not necessary to achieve the government's objectives in those instances.

Likewise, there is no chance of error in making that same determination when the person depicted is the individual himself, or his spouse or his lover with whom he is intimately familiar. The millions of Americans who post their own images and the images of their partners on adult social network websites do not need to check their IDs to know that they are adults. See *Connection*, 557 F.3d at 370 ("[W]e do know that millions of adults exchange or share personally-produced sexually explicit depictions. See J.A. at 1007-11 (stipulation of the parties noting the existence of, and incorporating an exhibit listing over 13 million personal ads containing sexually-explicit text and images on a single website for sex and swinger personal

ads, of which those examined showed that 94% involved adults over 21.)") Nor do the countless American couples who e-mail explicit images to one another or send "sext" messages on their cell phones need to look at their own IDs to verify that they are adults. See http://www. aarp. org/family love/articles/ sexting_not_just_for_kids. html (last visited January 20, 2011)(discussing incidence of sexting among older adults); *Miller v. Mitchell,* 598 F.3d 139 (3d Cir. 2010).

Nor do the regulations allowing the use of third-party recordkeepers lessen the burden as the government suggested in the court below. *See* 28 C.F.R. § 75.2.

While 28 C.F.R. § 75.2 allows those who want and can afford to hire someone to keep and maintain their records for the requisite period of seven years (an improbable and costly option for millions of Americans who post sexual imagery on adult websites or email or text each other, individual photographers like Plaintiffs Barone and Levingston, and others), it comes with an enormous risk. Title 28 C.F.R. § 75.2(h) reads:

> A primary or secondary producer may contract with a non-employee as a custodian to retain copies of the records that are required by this part. Such custodian must comply with all obligations related to the records that are required by this Part, and ***such a contract does not relieve the producer of his liability under this part.***

(emphasis added). Under the regulations, the producer is criminally liable if the third-party custodian makes a mistake and fails to maintain the records in consonance with

the statutory and regulatory requirements. 18 U.S.C. § 2257(f)(1); 18 U.S.C. § 2257A(f)(1).While allowing a producer to retain a third-party custodian, the regulation requires that the producer, nevertheless, assume criminal liability for any missteps by the third-party custodian.

The statutory requirements burden substantially more speech than is necessary.

B. TITLE 18 U.S.C. § 2257 AND 18 U.S.C. § 2257A ARE UNCONSTITUTIONALLY OVERBROAD.

A nearly unanimous Supreme Court in *United States v. Stevens*, 559 U.S.__, 130 S.Ct. 1577 (2010) recently affirmed the en banc decision of this Court, 533 F.3d 218 (3d Cir. 2008), and invalidated a federal statute criminalizing depictions of animal cruelty as unconstitutionally overbroad on its face under the First Amendment. The Court explained that "[i]n the First Amendment context, ... a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449, n.6 (2008) (internal quotation marks omitted)." 130 S.Ct. at 1587. *See also, Free Speech Coalition*, 535 U.S. at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.")

In proceeding to evaluate the overbreadth of the statute before it, the Court emphasized that "the first step in overbreadth analysis is to construe the challenged statute." *Id*. at 1587. It, therefore, turned its attention to the text of the statute–finding no ambiguity in its terms and instructing that its language "should be read according to [its] ordinary meaning." *Id*. at 1588. Following those parameters, the Court determined that the statute criminalized a substantial amount of protected expression. *Id.* at 1588-90.

The same conclusion is merited here. A vast quantity of protected sexually explicit expression is created by adults–nearly all of whom are clearly mature adults who could not be mistaken as children– that is subject to the statutes at issue here. *Supra* at 31-32, 39. The statutes apply to a huge body of protected private speech between adults including expression shared by the millions of adults who upload sexually explicit expression on tube sites and who post sexually explicit expression on other social networking sites, *see* 73 Fed. Reg at 77437, 77439, 77461, as well as those who email or send "sext" messages on their cell phones to one another. Add to that, the constitutionally protected speech by the various Plaintiffs in this case, and the number of impermissible applications is enormous.

Nor can the government's claim that it will interpret the statutes to apply only to materials offered for sale or trade, save them. The Court in *Stevens* made short

work of a similar claim by the government in that case:

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6-7. The Government hits this theme hard, invoking prosecutorial discretion several times. See *id*., 6-7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of noblese oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. *Cf. Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001).

Id. at 1591; *see also*, *Conchatta*, 458 F.3d at 265. Plaintiffs have presented a plausible claim that the statutes are unconstitutionally overbroad.

C. TITLE 18 U.S.C. § 2257 AND 18 U.S.C. § 2257A ARE CONTENT-BASED REGULATIONS OF SPEECH AND ARE UNCONSTITUTIONAL UNDER STRICT SCRUTINY.

On their face, 18 U.S.C. §§ 2257 and 2257A are content-based regulations of speech: they single out a particular category of expression (visual depictions of sexually explicit conduct) and restrict its dissemination by imposing identification and labeling requirements on it. They are, therefore, not content-neutral.

Judge Moore explained in dissent in *Connection*:

> [T]he evil at which § 2257 is aimed, child pornography, is a type of speech, albeit, unprotected, that is a subset of the regulated speech, sexually explicit images. It is therefore impossible to separate the content-based aspect of the regulation from the justification [of deterring the depiction of children in sexually explicit expression], as the justification itself relates to an aspect of the speech: its sexually explicit nature.

557 F.3d at 362 (Moore dissenting).

"The government's purpose is the controlling inquiry" in distinguishing between content-based and content-neutral regulations of expression. *Ward*, 491 U.S. at 791. To qualify as content-neutral, a regulation must "serve[ ] purposes unrelated to the content of expression." *Id*.

The purpose of 18 U.S.C. § 2257, according to the government, is to prevent the use of minors in visual depictions of sexually explicit activity. While that objective is no doubt worthy and laudable, it cannot be said that it is unrelated to the content of expression. Indeed, in keeping with that purpose, the statute is designed precisely to influence and affect the content of sexual expression. Specifically, the goal of the statute is to induce a producer of visual depictions to make one of two choices: either (1) use only adult performers if his work includes depictions of sexual activity, or (2) remove any sexual activity from the work if using a performer who has not yet reached the age of majority. The justification for the statutes, therefore, ***cannot*** be said to be ***unrelated*** to the content of the speech that they regulate. This is so even without evidence of "an improper censorial motive." *Simon & Schuster,* 502 U.S. at 116.

The content-based nature of 18 U.S.C. § 2257 is further demonstrated by the difference in treatment of expression based on its content contained in 18 U.S.C. §

2257A(h)(1). Title 18 U.S.C. § 2257A(h)(1) exempts expression depicting ***simulated*** sexually explicit conduct or lascivious display of the genitals or pubic region produced commercially from the record keeping and labeling requirements under a prescribed set of circumstances. ***No such*** exemption is provided for expression depicting ***actual*** sexually explicit conduct. The distinction in treatment is based solely on the content of the expression at issue.

If the expression is limited to ***simulated*** sexual imagery, then its commercial producer can avoid the onerous record-keeping and labeling requirements simply by certifying to the Attorney General that it maintains information on its performers in the form of tax or labor records or other records pursuant to industry standards. But if the content of the expression depicts the disfavored ***actual*** sexually explicit conduct, its producer is entitled to no such exemption–even if the producer (as many of the members of Plaintiff Free Speech Coalition do) stands in the same shoes as the producer of simulated sexually explicit expression qualifying for such exemption, *i.e.* intends the expression to be distributed commercially, is created as part of a commercial enterprise, maintains individually identifiable information regarding all performers, pursuant to Federal and State tax, labor or other laws or industry standards, that includes the name, address, and date of birth of the performer. Title 18 U.S.C. § 2257A therefore discriminates between types of expression based on its

content–the very type of viewpoint discrimination that demands strict scrutiny under the First Amendment. *Simon & Schuster*, 502 U.S. at 119; *Brown*, 586 F.3d at 274.

It is self-evident that imposing stringent age verification record-keeping and labeling requirements on ***constitutionally protected adult expression*** is not the least restrictive means of combating child pornography. Rather the direct criminal sanctions on child pornography in 18 U.S.C. § 2251, *et seq.,* are obviously a less restrictive means of doing so. The statutes cannot survive strict scrutiny.

D. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONNERS AND FREE SPEECH COALITION WERE COLLATERALLY ESTOPPED IN CHALLENGING 18 U.S.C. § 2257 ON FIRST AMENDMENT GROUNDS.

1. Standard of Review

A lower court's decision to apply defensive collateral estoppel is subject to plenary review. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 247-48 (3d Cir. 2006).

2. Plaintiffs Conners and Free Speech Coalition Were Not Collaterally Estopped from Pursuing Their First Amendment Challenge to 18 U.S.C. § 2257 by Prior Litigation.

The district court, while acknowledging that it need not reach the issue, nonetheless, stated that, as an alternative holding, it was dismissing the First Amendment challenges, except those exclusive to 18 U.S.C. § 2257A, of Plaintiffs Conners and Free Speech Coalition on issue preclusion grounds. App. at 52.

In 2005, Plaintiff Free Speech Coalition and David Conners filed suit in the United States District Court for the District of Colorado, challenging 18 U.S.C. § 2257 and its regulations on the ground that the regulations exceeded the scope of the statute, in addition to other challenges.[14] *Free Speech Coalition, et al. v. Gonzales*, Case No. 05-01126 (D.Colo) (Miller, J.).[15] The district court in that case, in ruling on Plaintiffs' Motion for Preliminary Injunction, found that there was a likelihood that Plaintiffs would prevail on their claim that the regulations exceeded the statutory scope and therefore enjoined their enforcement against secondary producers, *citing Sundance Assoc., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998); it also found that Plaintiffs would likely succeed in showing that certain applications of the regulations were unconstitutionally burdensome. The district court, nevertheless, determined that Plaintiffs had not demonstrated a likelihood of success with regard to their other attacks on the constitutionality of the statute. *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005). Both parties appealed.

During the pendency of the appeal, 18 U.S.C. § 2257 was amended–for the first

---

[14] *See*, https://ecf.cod.uscourts.gov/cgi-bin/DktRpt.pl?38250698051032-L_534_0-1.

[15] This Court may take judicial notice of pleadings in prior proceedings in reviewing a challenge based on issue preclusion. *See Toscano v. Connecticut Gen. Life Ins. Co.*, 2008 WL 2909628, at * 1 (3d Cir. July 30, 2008); *Gwynedd Properties, Inc. v. Lower Gwynedd Tp.*, 970 F.2d 1195, 1206, n.18 (3d Cir. 1992).

time making it a felony to refuse to permit an inspection of records and expanding the definition of *producer*, 18 U.S.C. § 2257A was enacted, and new implementing regulations were to be issued. In light of the amendment, both parties dismissed their respective appeals. *Free Speech Coalition v. Gonzales*, Case Nos. 06-1044, 06-1073 (10th Cir.). On remand, the district court granted partial summary judgment in favor of the government. Plaintiffs filed a motion to reconsider. Without ruling on Plaintiffs' motion to reconsider, the court administratively closed the case, while new regulations implementing the amended statute as well as its new companion statute, 18 U.S.C. § 2257A, were being drafted. *See*, D.C. COLO. L. Civ. Rule 41.2. Ultimately, on April 13, 2009, the district court granted Plaintiffs' Unopposed Motion to Dismiss without Prejudice, without reaching the merits.

The court below held that the order granting partial summary judgment that preceded the dismissal without prejudice collaterally estopped Plaintiffs Free Speech Coalition and Conners from challenging 18 U.S.C. § 2257 (but not 18 U.S.C. § 2257A) on First Amendment grounds. The Court was mistaken.

That ruling has no preclusive effect here. For res judicata or collateral estoppel to preclude litigation of a party's claim, the prior ruling on which such defense is based must be a final judgment constituting an "adjudication on the merits." *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980). *See* Restatement (Second) of Judgments § 27

(1980).

The partial grant of summary judgment did not constitute a final judgment. Rule 54 (b) of the Federal Rules of Civil Procedure expressly states that "any order or other decision...that adjudicates fewer than all claims...does not end the action as to any of the claims or parties...and may be revised at any time before the entry of a judgment adjudicating all the claims."

Moreover, the Supreme Court made clear in *Semtek International Inc. v. Lockheed Martin Corp*., 531 U.S. 497 (2001), that a "dismissal without prejudice," the ruling rendered by the Colorado federal court, is not an adjudication on the merits for purposes of res judicata or collateral estoppel. *Id*. at 505-06. See also, *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 396 (1990), ("'[D]ismissal ... without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits' . . . . and thus does not have a res judicata effect.") The Colorado proceedings, therefore, have no preclusive effect on the First Amendment claims of Free Speech Coalition or David Conners.

III. PLAINTIFFS' COMPLAINT PRESENTS A PLAUSIBLE CLAIM THAT 18 U.S.C. §§ 2257, 2257A AND THEIR IMPLEMENTING REGULATIONS ARE UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

Title 18 U.S.C. §§ 2257 and 2257A provide:

(c) Any person to whom subsection (a) applies shall maintain the

> records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.
>
> * * * * * * * * * * *
>
> (f) It shall be unlawful–
>
> * * * * * * * * * * *
>
> (5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

Title 18 U.S.C. § 2257 provides: "The Attorney General shall issue appropriate regulations to carry out this section"; while 18 U.S.C. § 2257A provides: "The provisions of this section shall not become effective until 90 days after the final regulations implementing this section are published in the Federal Register."

New regulations amending the existing regulations (effective June 23, 2005) took effect in January, 2009 and March, 2009, respectively. The regulations set forth the inspection regime as provided in 18 U.S.C. §§ 2257 and 2257A.

Title 28 C.F.R. § 75.5: (1) "authorizes" an investigator "to enter without delay and at reasonable times any establishment" where a producer of expression maintains identification records ***without notice and without a warrant***, § 75.5 (a), (b); (2) authorizes the warrantless seizure of evidence, § 75.5 (e), (g); and (3) imposes no limitation on the scope of the search and seizure. § 75.5 (f). Refusal to permit the

inspection is punishable as a felony. 18 U.S.C. §§ 2257(f)(5); 2257A (f)(5).

The statutes and regulations therefore authorize unconstitutional warrantless searches and seizures in violation of the First and Fourth Amendments.

At the outset, it must be stressed that the searches authorized here involve constitutionally protected expression. The records are not ordinary business records; they are records kept in connection with the production of speech, and the expression itself, which brings into play the well-established precedent imposing rigorous standards on searches involving constitutionally protected expression and requiring that the Fourth Amendment be meticulously applied so as to invoke the utmost solicitude for protected expression. *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961); *See also, A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 213 (1964); *Stanford v. Texas*, 379 U.S. 476, 484-85 (1976); *Roaden v. Kentucky*, 413 U.S. 496, 502-06 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968).

The regulation at issue here authorizes warrantless searches not only of business premises but, in the instance of Plaintiffs Barone, Conners, Hartley, Nitke, many members of the American Society of Media Photographers and countless other Americans like them, the ***homes*** of those who produce expression containing sexual imagery. App. at 9, 10, 11, 18, 21. *See Ray v. Township of Warren,* 626 F.3d 170, 175 (3d Cir. 2010) (discussing "sanctity of the home" and rejecting "community

caretaker" exception to justify warrantless search of home).

In evaluating the inspection scheme, the district court lost sight of several bedrock Fourth Amendment principles.

1. When federal law enforcement officials enter private homes or business premises (in this case, of producers of sexual images) to investigate compliance with a federal criminal law, that is a search within the meaning of the Fourth Amendment. *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Camara v. Municipal Court*, 387 U.S. 523, 534, 536 (1967); *See v. City of Seattle*, 387 U.S. 541, 543 (1967); *G. M. Leasing Corp. v. United States,* 429 U.S. 338 (1977); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Thomas v. Independence Tp.*, 463 F.3d 285, 296 (3d Cir. 2006). It is also a search when they enter (for the same purpose) the premises of third party record keepers,[16] whether business premises or homes, (if that is where they choose to operate their record keeping service.) Id.; *Steagald v. United States*, 451 U.S. 204 (1981).

The presumption is that they need a warrant to enter any of these premises. *Arizona v. Gant,* 556 U.S.__, 129 S.Ct. 1710 (2009); *Kyllo v. United States,* 533 U.S. 27, 31(2001); *Camara,* 387 U.S. at 544-45. They certainly need probable cause.

[16] The regulations permit producers to contract with third parties to maintain the requisite records. 28 C.F.R. § 75.2. *See supra* at 39-40.

United States v. Ross, 456 U.S. 798, 809 (1982). Since, under the statutory scheme at issue here, they need neither, for that entry by federal officials to comport with the Fourth Amendment, they must rely upon an exception to both the warrant and the probable cause requirements of that Amendment

2. When, after gaining entry to the private premises of a producer, the federal law enforcement agents proceed to the area where private records are maintained and search through those records, that is also a search within the meaning of the Fourth Amendment. *G.M. Leasing*, 429 U.S. at 354; *Payton v. New York*, 445 U.S. 573, 586-87 (1980). When, after gaining entry to the private premises of a third party record keeper, they then search through the private records belonging to the producer, that is a search of the ***producer's*** private records that have been entrusted to the third party record keeper, a search implicating the Fourth Amendment rights of ***both*** the producer and the third party record keeper. *Rakas v. Illinois*, 439 U.S. 128, 136 (1978); *G.M. Leasing*, 429 U.S. at 352-53; *United States v. Leary*, 846 F.2d 592, 596-97 (10th Cir. 1988); *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968). *See also, Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979). The presumption is that a warrant is needed for that search. *McDonald v. United States*, 335 U.S. 451, 453 (1948). Probable cause is also necessary. *In re U.S. for an Order Directing a Provider of Electronic Communication Service*, 534 F. Supp.2d 585, 586-87 (W.D.

Pa. 2008).

Thus, for the search of those records to comport with the Fourth Amendment, the government must be able to point to an exception to both the warrant and the probable cause requirements of that Amendment.

3. When, after searching through those private records, the agents make copies of them, whether at the producer's premises or at his third party record keeper's premises, this constitutes a seizure of those records belonging to the producer within the meaning of the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Walter v. United States,* 447 U.S. 649, 654 (1980); *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973). The presumption is that a warrant is needed for this seizure. *Id.* At a minimum, probable cause is necessary. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). Because the statutes require neither, to justify the seizure, the government must be able to point to an exception to both the warrant and probable cause requirements.

Here, no exception exists justifying the regulation's authorization of warrantless searches and seizures to allow inspections of the records required to be kept by the criminal statutes here–including that authority permitting warrantless administrative searches.

The United States Supreme Court in *New York v. Burger*, 482 U.S. 691 (1987)

set forth the circumstances under which "warrantless administrative searches" could be lawfully conducted of business premises in a "closely regulated industry"–where the expectation of privacy is sufficiently diminished by a history of government oversight. *Id.* at 701.[17] The threshold issue, therefore, is whether the inspection procedures challenged here apply to a "closely regulated industry"–such that "regulatory presence is sufficiently comprehensive and defined that the owner of ***commercial property*** cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). (emphasis added).

The inspection regimen in the statutes and regulations at issue here is not limited to commercial premises but applies to private homes as well. Thus, for that fundamental reason alone, the body of law permitting warrantless administrative searches of commercial property has no application. Nor are the record-keeping inspections limited to a specific industry, let alone one that is part of a "closely regulated industry." The inspection provisions apply to a vast assortment of disparate producers of expression–artists, free lance photographers and journalists, sex

[17] *See United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168, 1176 (9th Cir. 2006) listing closely regulated industries subject to the warrantless administrative search exception: liquor distribution; sale of sporting weapons; stone quarrying and mining; automobile junkyards; veterinary drugs; transportation of hazardous materials.

educators and therapists, lovers–all of whom create non-commercial expression and none of whom are part of any industry, much less a closely regulated one. Yet the statutes clearly apply to all producers of expression–whether private, non-commercial or otherwise–and authorize warrantless searches of their homes and studios.

However, even if the intrusion were confined to the commercial premises of producers of sexually explicit expression, it would fail under *Burger* because they, too, are not part of a closely regulated industry; the First Amendment prevents that very circumstance. *J.L. Spoons v. City of Brunswick*, 49 F. Supp. 2d 1032, 1040 (N.D. Ohio 1999); *See also, Deja Vu v. Union Township*, 326 F.3d 791, 806 (6th Cir. 2003) *reheard en banc*, 411 F.3d 777 (6th Cir. 2005);[18] *Annex Books, Inc. v. City of Indianapolis*, 333 F. Supp. 2d 773, 787-89 (S.D. Ind. 2004) *reversed on other grounds,* 581 F.3d 460 (7th Cir. 2009).

Plaintiffs find themselves in much the same position as the plaintiff in *Marshall v. Barlow's Inc.*, 436 U.S.307 (1978).

At issue in *Barlow's*, was the Occupational Safety and Health Act, which provided (in language identical to that at issue here) that the government was "authorized ...to enter without delay" any factory or establishment "to inspect and investigate" conditions, equipment and the like, in furtherance of its compelling

[18] The *en banc* court did not reach the merits of the Fourth Amendment issue.

interest in securing the safety of America's workers. *Id.* at 309, n.1. Unlike the statutes at issue here, an agency regulation required the inspector to seek compulsory process if a party refused a requested search. *Id.* at 310, n.3.

Acting pursuant to the statute, an OSHA inspector entered the customer service area of the Plaintiff, showed the business owner his credentials, and advised the owner that he was going to conduct a search of the business's working areas under the Occupational Safety and Health Act. *Id.* at 309-10. In response to the business owner's inquiry, the inspector explained that no complaint had been made against the business, but that Barlow's had simply turned up as part of the agency's "selection process." *Id.* at 310. The inspector then asked to gain access to nonpublic areas of the business, and the business owner asked if the inspector had a warrant. *Id.* When the business owner learned the inspector had no warrant, he refused the inspector access to the non-public areas of his business. *Id.* The Secretary of Labor sought and obtained an order in federal court, compelling the business owner to admit the inspector. *Id.* The business owner once again refused to permit the inspection and sought injunctive relief in federal court–claiming that the warrantless searches permitted by the Occupational Safety and Health Act violated the Fourth Amendment.

The Supreme Court agreed with the plaintiff:

> If the government intrudes on a person's property, the privacy interests suffer whether the government's motivation is to investigate violations

> of criminal laws or breaches of other statutory or regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, *See v. Seattle*, [387 U.S. 541 (1967)] would require a warrant to conduct the inspection in this case.

Id. at 312-13. In finding as it did, the Court rejected the notion–"stoutly argue[d]" by the Secretary of Labor–that warrantless searches were essential to the administration of OSHA. *Id.* at 315-16. Rather, the Court remained "unconvinced...that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective." *Id.* at 316.

Additionally, the Court rejected the premise, adopted by the district court here, that warrantless inspections were permitted on the basis that the industries subject to inspection were "pervasively regulated businesses" that had been "long subject to close supervision and inspection." *Id*. at 313. The Court emphasized that only where it is established that there is a "long tradition of close government supervision, of which any person who chooses to enter such business must already be aware," might an exception to the Fourth Amendment's warrant requirement be considered. *Id.* at 313.

The Court, therefore, held that "Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent and to an injunction enjoining the Act's enforcement to that

extent." *Id*. at 325.

Barlow's mandates the same result here. Section 2257's inspection scheme contains the precise constitutional flaws that the Court in *Barlow's* found could not withstand scrutiny under the Fourth Amendment and held that the statute's authorization of such inspections had to be struck down on its face.

IV. PLAINTIFFS' COMPLAINT PRESENTS OTHER PLAUSIBLE CLAIMS UNDER THE FIRST AND FIFTH AMENDMENTS.

In addition to the First and Fourth Amendment claims discussed above, the Complaint also presented other plausible claims, which were briefed in the court below. Specifically, Plaintiffs contended that the statutes unconstitutionally suppressed anonymous speech, App. at 176; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 37-39; imposed a prior restraint on protected expression, App. at 175-76; DDE #3,Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 39-41; unconstitutionally imposed strict liability for failing to create and maintain the requisite records, App. at 176; DDE #3, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 41-44; violated equal protection of laws, App. at 177; DDE #3, Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at 44-46; were unconstitutionally vague, App. at 177-78; DDE #57, Letter Brief at 1-3; and violated the privilege

against self-incrimination. App. at 178-79; DDE #57, Letter Brief at 3-5. In the face of these claims, supported by the factual allegations of the Complaint, the district court erred in dismissing the Complaint for failure to state a claim.

V. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT.

A. STANDARD OF REVIEW

This Court reviews the denial of a motion for leave to amend a complaint for an abuse of discretion. *Toll Bros., Inc. v. Township of Reading*, 555 F.3d 131 (3d Cir. 2009).

B. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO AMEND THEIR COMPLAINT TO INCLUDE AN ALLEGATION REFLECTING THAT PLAINTIFF FREE SPEECH COALITION'S MEMBERS HAD BEEN SUBJECT TO INSPECTIONS UNDER 18 U.S.C. § 2257.

The district court denied Plaintiffs' Motion for Leave to Amend Their Complaint to include an allegation asserting that members of the Free Speech Coalition had, in fact, been subjected to inspections under the statutes' inspection regime. App. at 99-100. Plaintiffs sought to add an allegation to their Complaint in response to the Government's challenge to Plaintiffs' Fourth Amendment claim on ripeness grounds–a claim they contested, but nevertheless sought to address by amending their Complaint. The allegation that they sought to add stated:

Several of Free Speech Coalition's members have been subjected to

> inspections pursuant to 18 U.S.C. § 2257 and its implementing regulations. In each instance, a team of FBI agents came to the member's private business premises, without a warrant or prior notice, gained access under authority of 18 U.S.C. § 2257 and its implementing regulations, entered areas of the business premises not open to the public, searched through the business's files and records owned and possessed by the member pertaining to its sexually explicit expression and made copies of certain records. The agents also took photos of the interior areas of the business premises–again, all without a warrant. Inspections have also been made by FBI agents of producers who are not members of Plaintiff Free Speech Coalition, and in two instances, upon information and belief, inspections were conducted at private residences of the producers because that is where their records were maintained.

App. at 185.

In the face of the Government's argument that Plaintiffs' Fourth Amendment claims were not ripe in the absence of an allegation that their records had, in fact, been inspected, it was error to refuse to grant leave to allow Plaintiffs to amend their complaint. *Phillips*, 515 F.3d at 245 ("[A] district court ***must*** permit a curative amendment unless such an amendment would be inequitable or futile."); *Toll Bros.*, 555 F.3d at 144.

All of the Plaintiffs in the case were subject to inspection at any time, and thus, their claims were ripe for adjudication. What is more, Free Speech Coalition had associational standing to plead claims on behalf of its members who had, in fact, had their records inspected. *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 283 (3d Cir. 2002) (internal quotations omitted). *See*

also, Connection Distributing Co. v. Reno, 154 F.3d 281, 295 (6th Cir. 1998)(finding magazine publisher had jus tertii standing to represent its readers in challenge to 18 U.S.C. § 2257 that ultimately led to the en banc opinion cited *supra* at 11).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the judgment of the court below and remand for further proceedings.

Respectfully submitted,

/s/ J. Michael Murray
J. MICHAEL MURRAY (0019626)
jmmurray@bgmdlaw.com
LORRAINE R. BAUMGARDNER (0019642)
lbaumgardner@bgmdlaw.com
BERKMAN, GORDON, MURRAY &DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
Telephone: 216-781-5245
Fax: 216-781-8207

Counsel for Plaintiffs-Appellants

Of Counsel: Reed C. Lee (06189908)
J.D. Obenberger and Associates
Three First National Plaza
70 West Madison Street, Suite 400
Chicago, Illinois 60602
(312) 558-6427

CERTIFICATE OF COMPLIANCE WITH RULES 32 (a) (7)(B), FEDERAL RULES OF APPELLATE PROCEDURE AND RULES 28.3 AND 31.1 3RD CIRCUIT LOCAL APPELLATE RULES AND SERVICE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Third Cir. R. 28.3 and 31.1, the undersigned certifies:

1. THE UNDERSIGNED IS A MEMBER OF THE BAR OF THIS COURT;

2. EXCLUSIVE OF THE EXEMPTED PORTIONS IN FED. R. APP. P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS: 13920 words.

   THE BRIEF HAS BEEN PREPARED:

   In proportionally spaced typeface using:

   Software Name and Version: Corel WordPerfect 10

   In: Times New Roman, 14 font

3. A COPY OF THE FOREGOING APPELLANTS' BRIEF WAS FILED ELECTRONICALLY ON FEBRUARY 16, 2011, WITH NOTICE BEING SENT TO ALL PARTIES. TEN HARD COPIES OF THE BRIEF AND FOUR HARD COPIES OF THE APPENDIX WERE MAILED TO THE CLERK'S OFFICE ON THIS DATE AS WELL.

4. THE TEXT OF THE ELECTRONIC BRIEF IS IDENTICAL TO THE TEXT OF THE PAPER COPIES;

5. SYMANTEC ENDPOINT PROTECTION HAS BEEN RUN ON THE FILE AND NO VIRUS WAS DETECTED.

/s/ J. Michael Murray
J. MICHAEL MURRAY (0019626)
LORRAINE R. BAUMGARDNER (0019642)
BERKMAN, GORDON, MURRAY & DEVAN

ADDENDUM

TABLE OF CONTENTS

C

Effective: July 27, 2006

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)
§ 2257. Record keeping requirements

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which--

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct--

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such re-

ADDENDUM 1

cords available to the Attorney General for inspection at all reasonable times.

(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located. In this paragraph, the term "copy" includes every page of a website on which matter described in subsection (a) appears.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful--

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection;

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which--

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

ADDENDUM 2

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determined the accuracy of the contents of the statement or the records required to be kept; and

(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) In this section--

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in clauses (i) through (v) of section 2256(2)(A) of this title;

(2) the term "produces"--

(A) means--

(i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;

(ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or

(iii) inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct; and

(B) does not include activities that are limited to--

(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

ADDENDUM 3

(ii) distribution;

(iii) any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231)); or

(v) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; and

(3) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

CREDIT(S)

(Added Pub.L. 100-690, Title VII, § 7513(a), Nov. 18, 1988, 102 Stat. 4487, and amended Pub.L. 101-647, Title III, §§ 301(b), 311, Nov. 29, 1990, 104 Stat. 4808; Pub.L. 103-322, Title XXXIII, § 330004(14), Sept. 13, 1994, 108 Stat. 2142; Pub.L. 108-21, Title V, § 511(a), Apr. 30, 2003, Stat. 684; Pub.L. 109-248, Title V, § 502(a), July 27, 2006, 120 Stat. 625.)

Current through P.L. 111-312 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-296, and 111-309) approved 12-17-10

END OF DOCUMENT

ADDENDUM 4

C

Effective: July 27, 2006

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)
→ **§ 2257A. Record keeping requirements for simulated sexual conduct**

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter that--

(1) contains 1 or more visual depictions of simulated sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of simulated sexually explicit conduct--

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at their business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

ADDENDUM 5

(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in subsection (a)(1) in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located. In this paragraph, the term "copy" includes every page of a website on which matter described in subsection (a) appears.

(2) If the person to whom subsection (a) applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful--

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; or

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, that--

(A) contains 1 or more visual depictions made after the date of enactment of this subsection of simulated sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign

commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

(g) As used in this section, the terms "produces" and "performer" have the same meaning as in section 2257(h) of this title.

(h)(1) The provisions of this section and section 2257 shall not apply to matter, or any image therein, containing one or more visual depictions of simulated sexually explicit conduct, or actual sexually explicit conduct as described in clause (v) of section 2256(2)(A), if such matter--

(A)(i) is intended for commercial distribution;

(ii) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that such person regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer; and

(iii) is not produced, marketed or made available by the person described in clause (ii) to another in circumstances such than [FN1] an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in section 2256(8); or

(B)(i) is subject to the authority and regulation of the Federal Communications Commission acting in its capacity to enforce section 1464 of this title, regarding the broadcast of obscene, indecent or profane programming; and

(ii) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that such person regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer.

(2) Nothing in subparagraphs (A) and (B) of paragraph (1) shall be construed to exempt any matter that contains any visual depiction that is child pornography, as defined in section 2256(8), or is actual sexually explicit con-

duct within the definitions in clauses (i) through (iv) of section 2256(2)(A).

(i)(1) Whoever violates this section shall be imprisoned for not more than 1 year, and fined in accordance with the provisions of this title, or both.

(2) Whoever violates this section in an effort to conceal a substantive offense involving the causing, transporting, permitting or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of this title, or to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor, including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic, in violation of this title, shall be imprisoned for not more than 5 years and fined in accordance with the provisions of this title, or both.

(3) Whoever violates paragraph (2) after having been previously convicted of a violation punishable under that paragraph shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

The provisions of this section shall not become effective until 90 days after the final regulations implementing this section are published in the Federal Register. The provisions of this section shall not apply to any matter, or image therein, produced, in whole or in part, prior to the effective date of this section.

(k)[FN2] On an annual basis, the Attorney General shall submit a report to Congress--

(1) concerning the enforcement of this section and section 2257 by the Department of Justice during the previous 12-month period; and

(2) including--

(A) the number of inspections undertaken pursuant to this section and section 2257;

(B) the number of open investigations pursuant to this section and section 2257;

(C) the number of cases in which a person has been charged with a violation of this section and section 2257; and

(D) for each case listed in response to subparagraph (C), the name of the lead defendant, the federal district in which the case was brought, the court tracking number, and a synopsis of the violation and its disposition, if any, including settlements, sentences, recoveries and penalties.

ADDENDUM 8

CREDIT(S)

(Added Pub.L. 109-248, Title V, § 503(a), July 27, 2006, 120 Stat. 626.)

[FN1] So in original. Probably should read "that".

[FN2] So in original. No subsec. (j) enacted.

Current through P.L. 111-312 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-296, and 111-309) approved 12-17-10

END OF DOCUMENT

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.1]

[Page 315-318]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; PROTECT ACT; ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006; RECORDKEEPING AND RECORD-INSPECTION PROVISIONS--Table of Contents

Sec.

Authority: 18 U.S.C. 2257, 2257A.

Source: Order No. 2765-2005, 70 FR 29619, May 24, 2005, unless otherwise noted.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257, and as provided in this section. The

[[Page 316]]

terms used and defined in these regulations are intended to provide common-language guidance and usage and are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes (i.e., 47 U.S.C. 230, 231).

(b) Picture identification card means a document issued by the United States, a State government, or a political subdivision thereof, or a United States territory, that bears the photograph, the name of the individual identified, and the date of birth of that individual, and provides specific information sufficient for the issuing authority to confirm its validity, such as a passport, Permanent Resident Card (commonly known as a ``Green Card''), or employment authorization document issued by the United States, a driver's license or other form of identification issued by a State or the District of Columbia; or a foreign government-issued equivalent of any of the documents listed above when the person who is the subject of the picture identification

ADDENDUM 10

card is a non-U.S. citizen located outside the United States at the time of original production and the producer maintaining the required records, whether a U.S. citizen or non-U.S. citizen, is located outside the United States on the original production date. The picture identification card must be valid as of the original production date.

(c) Producer means any person, including any individual, corporation, or other organization, who is a primary producer or a secondary producer.

(1) Primary producer is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or a picture of, or who digitizes an image of, a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. When a corporation or other organization is the primary producer of any particular image or picture, then no individual employee or agent of that corporation or other organization will be considered to be a primary producer of that image or picture.

(2) Secondary producer is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or digitally- or computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of, an actual human being engaged in actual or simulated sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing. When a corporation or other organization is the secondary producer of any particular image or picture, then no individual of that corporation or other organization will be considered to be the secondary producer of that image or picture.

(3) The same person may be both a primary and a secondary producer.

(4) Producer does not include persons whose activities relating to the visual depiction of actual or simulated sexually explicit conduct are limited to the following:

(i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) Distribution;

(iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) The provision of a telecommunications service, or of an Internet access service of Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231));

(v) The transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material

[[Page 317]]

made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; or

(vi) Unless the activity or activities are described in section 2257(h)(2)(A), the dissemination of a depiction without having created

ADDENDUM 11

it or altered its content.

(d) Sell, distribute, redistribute, and re-release refer to commercial distribution of a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, but does not refer to noncommercial or educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations.

(e) Copy, when used:

(1) In reference to an identification document or a picture identification card, means a photocopy, photograph, or digitally scanned reproduction;

(2) In reference to a visual depiction of sexually explicit conduct, means a duplicate of the depiction itself (e.g., the film, the image on a Web site, the image taken by a webcam, the photo in a magazine); and

(3) In reference to an image on a webpage for purposes of Sec. Sec. 75.6(a), 75.7(a), and 75.7(b), means every page of a Web site on which the image appears.

(f) Internet means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which constitute the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(g) Computer site or service means a computer server-based file repository or file distribution service that is accessible over the Internet, World Wide Web, Usenet, or any other interactive computer service (as defined in 47 U.S.C. 230(f)(2)). Computer site or service includes without limitation, sites or services using hypertext markup language, hypertext transfer protocol, file transfer protocol, electronic mail transmission protocols, similar data transmission protocols, or any successor protocols, including but not limited to computer sites or services on the World Wide Web.

(h) URL means uniform resource locator.

(i) Electronic communications service has the meaning set forth in 18 U.S.C. 2510(15).

(j) Remote computing service has the meaning set forth in 18 U.S.C. 2711(2).

(k) Manage content means to make editorial or managerial decisions concerning the sexually explicit content of a computer site or service, but does not mean those who manage solely advertising, compliance with copyright law, or other forms of non-sexually explicit content.

(l) Interactive computer service has the meaning set forth in 47 U.S.C. 230(f)(2).

(m) Date of original production or original production date means the date the primary producer actually filmed, videotaped, or photographed, or created a digitally- or computer-manipulated image or picture of, the visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. For productions that occur over more than one date, it means the single date that was the first of those dates. For a performer who was not 18 as of this date, the date of original production is the date that such a performer was first actually filmed, videotaped, photographed, or otherwise depicted. With respect to matter that is a secondarily produced compilation of individual, primarily produced depictions, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction in that compilation was produced. For a performer in one of the individual depictions contained in that compilation who was not 18 as of this date, the date of original

ADDENDUM 12

production is the date that the performer was first actually filmed, videotaped, photographed, or otherwise depicted for the individual depiction at issue.

[[Page 318]]

(n) Sexually explicit conduct has the meaning set forth in 18 U.S.C. 2256(2)(A).

(o) Simulated sexually explicit conduct means conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean not sexually explicit conduct that is merely suggested.

(p) Regularly and in the normal course of business collects and maintains means any business practice(s) that ensure that the producer confirms the identity and age of all employees who perform in visual depictions.

(q) Individually identifiable information means information about the name, address, and date of birth of employees that is capable of being retrieved on the basis of a name of an employee who appears in a specified visual depiction.

(r) All performers, including minor performers means all performers who appear in any visual depiction, no matter for how short a period of time.

(s) Employed by means, in reference to a performer, one who receives pay for performing in a visual depiction or is otherwise in an employer-employee relationship with the producer of the visual depiction as evidenced by oral or written agreements.

[Order No. 2765-2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77468, Dec. 18, 2008]

ADDENDUM 13

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.2]

[Page 318-320]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped, transported, or intended for shipment or transportation in interstate or foreign commerce, and that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or one or more visual depictions of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall, for each performer portrayed in such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of a picture identification card prior to production of the depiction. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall also include a legible hard copy or legible digitally scanned or other electronic copy of a hard copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible hard copy of a picture identification card. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after June 23, 2005, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall include a copy of the depiction, and, where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction. If no URL is associated with the depiction, the records shall include another uniquely identifying reference associated with the location of the depiction on the Internet. For any performer in a depiction performed live on the Internet, the records shall include a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.

ADDENDUM 14

[[Page 319]]

(2) Any name, other than the performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in a visual depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter. Producers may rely in good faith on representations by performers regarding accuracy of the names, other than legal names, used by performers.

(3) Records required to be created and maintained under this part shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter.

(4) The primary producer shall create a record of the date of original production of the depiction.

(b) A producer who is a secondary producer as defined in Sec. 75.1(c) may satisfy the requirements of this part to create and maintain records by accepting from the primary producer, as defined in Sec. 75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records. The copies of the records may be redacted to eliminate non-essential information, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm the name and age may not be redacted.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the date of original production of the visual depiction to which the records are associated. If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to Sec. 75.2(a)(2). Producers of visual depictions made after July 3, 1995, and before June 23, 2005, may rely on picture identification cards that were valid forms of required identification under the provisions of part 75 in effect during that time period.

(d) For any record of a performer in a visual depiction of actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) created or amended after June 23, 2005, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, all such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by

ADDENDUM 15

last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service). If the producer subsequently produces an additional book, magazine, film, videotape,

[[Page 320]]

digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records, and such records shall thereafter be maintained in accordance with this paragraph.

(e) Records required to be maintained under this part shall be segregated from all other records, shall not contain any other records, and shall not be contained within any other records.

(f) Records required to be maintained under this part may be kept either in hard copy or in digital form, provided that they include scanned copies of forms of identification and that there is a custodian of the records who can authenticate each digital record.

(g) Records are not required to be maintained by either a primary producer or by a secondary producer for a visual depiction of sexually explicit conduct that consists only of lascivious exhibition of the genitals or pubic area of a person, and contains no other sexually explicit conduct, whose original production date was prior to March 18, 2009.

(h) A primary or secondary producer may contract with a non-employee custodian to retain copies of the records that are required under this part. Such custodian must comply with all obligations related to records that are required by this Part, and such a contract does not relieve the producer of his liability under this part.

[Order No. 2765-2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77469, Dec. 18, 2008]

ADDENDUM 16

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.3]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.3 Categorization of records.

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

ADDENDUM 17

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.4]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business or at the place of business of a non-employee custodian of records. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business or at the place of business of a non-employee custodian of records. If the organization is dissolved, the person who was responsible for maintaining the records, as described in Sec. 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

[73 FR 77470, Dec. 18, 2008]

ADDENDUM 18

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.5]

[Page 320-321]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.5 Inspection of records.

(a) Authority to inspect. Investigators authorized by the Attorney General (hereinafter ``investigators'') are authorized to enter without delay and at reasonable times any establishment of a producer where records under Sec. 75.2 are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements

[[Page 321]]

of the Act and any other provision of the Act (hereinafter ``investigator'').

(b) Advance notice of inspections. Advance notice of record inspections shall not be given.

(c) Conduct of inspections. (1) Inspections shall take place during normal business hours and at such places as specified in Sec. 75.4. For the purpose of this part, ``normal business hours'' are from 9 a.m. to 5 p.m., local time, Monday through Friday, or, for inspections to be held at the place of business of a producer, any other time during which the producer is actually conducting business relating to producing a depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, the producer must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than 20 hours per week.

(2) Upon commencing an inspection, the investigator shall:

(i) Present his or her credentials to the owner, operator, or agent in charge of the establishment;

(ii) Explain the nature and purpose of the inspection, including the limited nature of the records inspection, and the records required to be kept by the Act and this part; and

(iii) Indicate the scope of the specific inspection and the records that he or she wishes to inspect.

(3) The inspections shall be conducted so as not to unreasonably disrupt the operations of the establishment.

(4) At the conclusion of an inspection, the investigator may informally advise the producer or his non-employee custodian of records of any apparent violations disclosed by the inspection. The producer or non-employee custodian or records may bring to the attention of the investigator any pertinent information regarding the records inspected or any other relevant matter.

(d) Frequency of inspections. Records may be inspected once during any four-month period, unless there is a reasonable suspicion to believe that a violation of this part has occurred, in which case an additional

ADDENDUM 19

inspection or inspections may be conducted before the four-month period has expired.

(e) Copies of records. An investigator may copy, at no expense to the producer or to his non-employee custodian of records, during the inspection, any record that is subject to inspection.

(f) Other law enforcement authority. These regulations do not restrict the otherwise lawful investigative prerogatives of an investigator while conducting an inspection.

(g) Seizure of evidence. Notwithstanding any provision of this part or any other regulation, a law enforcement officer may seize any evidence of the commission of any felony while conducting an inspection.

[Order No. 2765-2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77470, Dec. 18, 2008]

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.6]

[Page 321-322]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.6 Statement describing location of books and records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued after July 3, 1995, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter to affix the statement. In this paragraph, the term ``copy'' includes every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears.

(b) Every statement shall contain:

[[Page 322]]

(1) The title of the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter) or, if there is no title, an identifying number or similar identifier that differentiates this matter from other matters which the producer has produced;

(2) [Reserved]

(3) A street address at which the records required by this part may be made available. A post office box address does not satisfy this requirement.

(c) If the producer is an organization, the statement shall also contain the title and business address of the person who is responsible for maintaining the records required by this part.

(d) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, digitally or computer-manipulated image, digital image, picture, or other matter is produced or reproduced.

(e) For the purposes of this section, the required statement shall be displayed in typeface that is no less than 12-point type or no smaller than the second-largest typeface on the material and in a color

ADDENDUM 21

that clearly contrasts with the background color of the material. For any electronic or other display of the notice that is limited in time, the notice must be displayed for a sufficient duration and of a sufficient size to be capable of being read by the average viewer.

(f) If the producer contracts with a non-employee custodian of records to serve as the person responsible for maintaining his records, the statement shall contain the name and business address of that custodian and may contain that information in lieu of the information required in paragraphs (b)(3) and (c) of this section.

[Order No. 2765-2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77470, Dec. 18, 2008]

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.7]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) or 18 U.S.C. 2257A(a)-(c), as applicable, and of this part if:

(1) The matter contains visual depictions of actual sexually explicit conduct made only before July 3, 1995, or was last produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995. Where the matter consists of a compilation of separate primarily produced depictions, the entirety of the conduct depicted was produced prior to July 3, 1995, regardless of the date of secondary production;

(2) The matter contains only visual depictions of simulated sexually explicit conduct or of actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person, made before March 18, 2009;

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) or 18 U.S.C. 2257A(a)-(c), as applicable, and of this part.

[73 FR 77471, Dec. 18, 2008]

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.8]

[Page 322-323]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.8 Location of the statement.

(a) All books, magazines, and periodicals shall contain the statement required in Sec. 75.6 or suggested in Sec. 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears.

(b) In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in Sec. 75.6 or Sec. 75.7 shall be presented at the

[[Page 323]]

end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer.

(c) Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture shall contain the required statement on every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears. Such computer site or service or Web address may choose to display the required statement in a separate window that opens upon the viewer's clicking or mousing-over a hypertext link that states, ``18 U.S.C. 2257 [and/or 2257A, as appropriate] Record-Keeping Requirements Compliance Statement.''

(e) For purpose of this section, a digital video disc (DVD) containing multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD.

(f) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

[Order No. 2765-2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77471, Dec. 18, 2008]

[Code of Federal Regulations]
[Title 28, Volume 2]
[Revised as of July 1, 2010]
From the U.S. Government Printing Office via GPO Access
[CITE: 28CFR75.9]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE (CONTINUED)

PART 75_CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990;

Sec. 75.9 Certification of records.

(a) In general. The provisions of Sec. Sec. 75.2 through 75.8 shall not apply to a visual depiction of actual sexually explicit conduct constituting lascivious exhibition of the genitals or pubic area of a person or to a visual depiction of simulated sexually explicit conduct if all of the following requirements are met:

(1) The visual depiction is intended for commercial distribution;

(2) The visual depiction is created as a part of a commercial enterprise;

(3) Either--

(i) The visual depiction is not produced, marketed or made available in circumstances such that an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in 18 U.S.C. 2256(8), or,

(ii) The visual depiction is subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent, or profane programming; and

(4) The producer of the visual depiction certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer. (A producer of materials depicting sexually explicit conduct not covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime.)

(b) Form of certification. The certification shall take the form of a letter addressed to the Attorney General signed either by the chief executive officer or another executive officer of the entity making the certification, or in the event the entity does not have a chief executive officer or other executive officer, the senior manager responsible for overseeing the entity's activities.

(c) Content of certification. The certification shall contain the following:

(1) A statement setting out the basis under 18 U.S.C. 2257A and this part under which the certifying entity and any sub-entities, if applicable, are permitted to avail themselves of this exemption, and basic evidence justifying that basis.

(2) The following statement: ``I hereby certify that [name of entity] [and all sub-entities listed in this letter] regularly and in the normal course of business collect and maintain individually identifiable information regarding all performers employed by [name of

ADDENDUM 25

entity]''; and

[[Page 324]]

(3) If applicable because the visual depictions at issue were produced outside the United States, the statement that: ``I hereby certify that the foreign producers of the visual depictions produced by [name of entity] either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or have certified to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications.'' The producer may provide the following statement instead: ``I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, or other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area of any person were not minors at the time the depictions were originally produced.'' ``Reasonable steps'' for purposes of this statement may include, but are not limited to, a good-faith review of the visual depictions themselves or a good-faith reliance on representations or warranties from a foreign producer.

(d) Entities covered by each certification. A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of all sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entity served as the producer.

(e) Timely submission of certification. An initial certification is due June 16, 2009. Initial certifications of producers who begin production after December 18, 2008, but before June 16, 2009, are due on June 16, 2009. Initial certifications of producers who begin production after June 16, 2009 are due within 60 days of the start of production. A subsequent certification is required only if there are material changes in the information the producer certified in the initial certification; subsequent certifications are due within 60 days of the occurrence of the material change. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or federal holiday.

[73 FR 77471, Dec. 18, 2008]

"(7) 'custody or control' includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.".

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2251 the following:

"2251A. Selling or buying of children.".

SEC. 7513. RECORD KEEPING REQUIREMENTS.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 2257. Record keeping requirements

"(a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which—

"(1) contains one or more visual depictions made after February 6, 1978 of actual sexually explicit conduct; and

"(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

"(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

"(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

"(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

"(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

"(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times. Regulations.

"(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in paragraphs (2) and (3), be used, directly or indirectly, as evidence against any person with respect to any violation of law.

"(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of any applicable provision of law with respect to the furnishing of false information.

"(3) In a prosecution of any person to whom subsection (a) applies for an offense in violation of subsection 2251(a) of this title which has as an element the production of a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct and in which that element is sought to be established by showing that a performer within the meaning of this section is a minor—

19-194 O—91—Part 5——16 : QL 3

"(A) proof that the person failed to comply with the provisions of subsection (a) or (b) of this section concerning the creation and maintenance of records, or a regulation issued pursuant thereto, shall raise a rebuttable presumption that such performer was a minor; and

"(B) proof that the person failed to comply with the provisions of subsection (e) of this section concerning the statement required by that subsection shall raise the rebuttable presumption that every performer in the matter was a minor.

"(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

"(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

"(3) In any prosecution of a person for an offense in violation of section 2252 of this title which has as an element the transporting, mailing, or distribution of a visual depiction involving the use of a minor engaging in sexually explicit conduct, and in which that element is sought to be established by a showing that a performer within the meaning of this section is a minor, proof that the matter in which the visual depiction is contained did not contain the statement required by this section shall raise a rebuttable presumption that such performer was a minor.

Regulations. "(f) The Attorney General shall issue appropriate regulations to carry out this section.

"(g) As used in this section—

"(1) the term 'actual sexually explicit conduct' means actual but not simulated conduct as defined in subparagraphs (A) through (E) of paragraph (2) of section 2256 of this title;

"(2) 'identification document' has the meaning given that term in subsection 1028(d) of this title;

"(3) the term 'produces' means to produce, manufacture, or publish and includes the duplication, reproduction, or reissuing of any material; and

"(4) the term 'performer' includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by adding after the item relating to section 2256 the following:

"2257. Record keeping requirements.".

18 USC 2257 note. (c) EFFECTIVE DATE.—Section 2257 of title 18, United States Code, as added by this section shall take effect 180 days after the date of the enactment of this Act except—

(1) the Attorney General shall prepare the initial set of regulations required or authorized by section 2257 within 90 days of the date of the enactment of this Act; and

(2) subsection (e) of section 2257 of such title and of any regulation issued pursuant thereto shall take effect 270 days after the date of the enactment of this Act.