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Via email to: admin.ceos@usdoj.gov

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Re: **Docket No.** Docket No. CRM 104
AG Order No. 2888–2007

RIN: 1105–AB18

Comments on Proposed Rule: Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct

Dear Mr. Oosterbahn:

The comments which follow are submitted by me personally and represent the views of no one else.

I am an attorney practicing law in Chicago, Illinois. For thirteen years, my practice has included the representation of adult-oriented businesses in the Chicago metropolitan area, including businesses selling explicit sexual material at retail. During the past six years my practice has increasingly included broader aspects of Free Speech, including the representation of numerous adult-oriented erotic websites and the producers of image content for adult-oriented erotic websites. Our practice has included the representation of two photographers whose Section 2257 records were seized under search warrants executed by local law enforcement agencies or task forces composed of local and federal law enforcement agencies and the defense of one charged with obscenity.

In addition to formulating advice for and discussing these issues with clients and a substantial number of other persons involved in the Adult Internet, I have had extensive discussions with other lawyers who concentrate on matters concerning sexually oriented expression as well as with many other persons who are involved in the production and dissemination of some of that expression: During the past seven years, I have appeared to speak or participate in forums concerning the law of the adult Internet *approximately fifty times in five nations, three Canadian provinces, and eight American States*. I have met with producers and webmasters and have answered their questions and discussed the operation of Section 2257 at each of these fifty events; I have met and discussed Section 2257 and its implementing regulations with hundreds, and perhaps more than one thousand, photographers and webmasters at every level of the Adult Internet.

As a result of this background too, the members of my firm have had the opportunity to give careful thought to Section 2257 and to the regulations which have been promulgated previously in implementation of that Statute and, now, to the newly proposed changes to those regulations.

The regulation of speech is simply not the same thing as the regulation of trucks, airlines, securities, banks, drugs and guns; Harsh regulations that are expensive and difficult to comply with will not generally cause the invalidation of general regulations; When it comes to speech, any regulatory burdens that exceed the least onerous and least expensive restrictions that protect the compelling government interests are unconstutional. I believe that the regulatory scheme fashioned by the Department of Justice to implement Section 2257 works unreasonable hardship on content producers and publishers, burdening the creation and expression of erotic works far beyond what is reasonable, far beyond what is necessary for the protection of children, and far beyond what is constitutionally permissible. There are those who contend that all of Section 2257 and all of the Regulations which enforce it are constitutionally impermissible. I am not a member of that camp. I believe that Section 2257 serves a legitimate purpose, and that in protecting children, it also indirectly protects content producers from inadvertent graphic depictions involving late teens who represent themselves as adults as it forces them to inspect, copy, and retain proof of age and identity. My point is that large chunks of the regulatory scheme have made no sense, have caused huge but needless financial and time burdens because the persons writing the regulations knew little if anything as to the actual commercial practices involved and have disregarded the valuable comments of knowledgeable members of this industry in past rulemaking, and suffer because, in a mistaken effort at economy of regulation, they have, by combining provisions for print, video, and the Internet in one regulation, created a monster that often creates unnecessary ambiguity of a fundamental nature as these regulations apply to the Internet. None of my comments are meant to endorse the constitutionality of any part of the regulatory scheme, which I believe operates unconstitutionally. In the interest of enacting at least sensible regulations until the constitutional issues are resolved, and for no other purpose, I propose the following comments for your thoughtful consideration.

Comments

I. **Section 75.1 (m)** – **Date of Production**. On August 24, 2004, I wrote to you: “But the required records all should properly apply to the *initial* image-making event, when the performers were present and their ages at issue.” My comment was disregarded, and an entirely unnecessary ambiguity continued to exist in the law. This ambiguity was perpetuated in the letter of Assistant Attorney General Sam Kaplan in his informal response to interrogatories dated July 18, 2005 in the context of the litigation in Denver concerning this Section. Now, finally, the Department of

Justice, apparently for the first time, realizes that the only date that matters to protecting children is the date of original photography. Congratulations on this insight. But now, it is not so simple to regulate when, twelve years after the first Regulations in this area were issued. DOJ has never required anything as basic as a requirement that photographers record the date of photography. As a result, some did not. Your Regulations permitted a putative webmster to lawfully create Disclosure Statements precisely as described in faulty regulations by indicating such things as a date of redistribution – something that hardly protects persons who were younger than 18 when the video was rolling, and this may, in fact, have contributed the photography of underage persons with delayed release and a Disclosure Statement that meets the letter of the law as it accompanies unlawful child pornography. Your regulations *remain faulty* because they do not specifically require that a record be made of a date of original production, though it now seems that the proposed regulations will require it to be stated in the Disclosure Statement. The Regulations should require that a record be created and maintained concerning the *first date of each photographic shoot*; that is, the date when images were first created for a set of photographs or a video. That date should be the only permissible date on Disclosure Statement pertaining exclusively to that work, as in a video originally created for DVD distribution. As I will detail later, composite works must be dealt with in a manner that best serves the purposes of the Statute. Finally, because the original date of photography was not preserved or recorded concerning at least some of the images in the commercial market, because you did not so require, you must come to terms with pre-existing content about which no records exist as to the date of original photography. If you fail to do so, you will retroactively ban the distribution of lawful images now already in commercial distribution, and that simply is not constitutionally permissible.

II. Section 75.1 (e) (1), 75.6 (a) and 75.9 (d) and Other More Fundamental Ambiguities.

a. An ambiguity now exists in the statute and is perpetuated by the proposed amendments [75.1 (e) (1), 75.6 (a) and 75.9 (d)] that should be resolved by regulation to avert the possibility of interpretation that only some pages actually containing actual depictions need to contain a Disclosure Statement - or as we suggest, a link to a Disclosure Statement in keeping with the present regulation.

b. The actual practice of the industry has been to attach a link - or more commonly a link to a notice - on the index page, that is the title page of websites containing covered depictions - whether or not that page actually contains covered depictions. That is a good and salutary practice in keeping with the highest purposes of this legislation. **The index page, the home page of a website is where law enforcement agents and the general public have always looked to find contact information concerning the operators of a website, and it seems to me unimaginable that, assuming the validity of Section 2257, a Disclosure Statement on the home page, through a loophole of ambiguity and because that page itself contains to covered depiction, should not be required on the home page.**

c. A further and more fundamental ambiguity needs to be resolved which has existed since development of web sites under Section 2257, as a product of an inartful attempt (by persons with little insight into web operations) to meld the Internet into regulations which were created for the print, tape, and disc world. The one-size-fits-all approach simply cannot work and has created fundamental conceptual ambiguities.

d.What is the matter to which a Disclosure Statement relates? What is a web site’s status under Section 2257 (a)? If a web site is a regulable matter, do each of its elements under your view remain individually regulable matters?

e. This inquiry resembles theological inquiries into the nature of the Trinity; Is a website as a whole a “matter” for the purpose of the scheme, or is it simply an amalgamation of many “matters”, and do they in whole form another matter, or do they remain independent for Disclosure Statement purposes? We have no Aquinas here to guide inquiring minds, just hazy and confusing regulations and the prospect of judicial interpretation of the needlessly mysterious. Ignoring the ambiguities, you can be sure, will not work to the advantage of the Justice Department nor perhaps to the regulated persons.

f. In a typical book or magazine or videotape or box cover with covered depictions which are used with the latter, the regulations have provided for, and the producers have created and affixed one and only one Disclosure Statement for the entire work. *The individual pictures in a print, tape, or video sexually explicit work have not been required to have affixed individual Statements.* The different segments of a videotape have not been required to have affixed into the continuity of the work a separate Disclosure Statement for each scene, even if they are the work of different hands, and in fact the regulations require a Disclosure Statement on the title page of a hard copy print work, or in the closing credits of a movie, and if there are no closing credits, at the very start. Your proposed regulations only now contribute to an ambiguity permitting an interpretation that a website may need numerous different Disclosure Statements for the different parts of one work. In fact, the proposal is consistent with a notion that a website simply is not a work at all, when in fact it is, but merely a set of individual pages containing individual images, that each require their own notice. You have never required this of any other media and I cannot imagine that you think that it’s constitutionally reasonable to burden the operator of an adult site with 500,000 images, organized into galleries of still images relating to the same model, to create 500,000 Disclosure Statements.

g. Have you any idea that these galleries are composed of sets of images that are purchased in bulk and uploaded to servers via automation which then recomposes the pages and the indexes to a site? What purpose exists in requiring such a Statement with regard to each image? These sets often contain twenty to 150 images. What purpose is served by multiplying the obligation from a Statement concerning one photographic event into 150 notices?

h. If, as seems susceptible of interpretation in your Proposal, each single image and each singe video online requires a Statement, then is it your view that the web site as a whole requires no such notice? How do you expect a web site Disclosure Statement to read when the site is composed of disparate elements from many sources? How is it to be harmonized with the myriad individual Statements? This a fundamental nightmare deeply contained in your regulatory scheme, and the problem with the limited nature of your Proposal, is that it pretends that the problem does not exist. **The purpose of the Disclosure Statement is to provide information concerning the date of photography and the name and address and title of a person who produced (including its insertion into a web page) it and who holds the records. With respect to websites, that Statement should identify the operator of the site, the date of last site update, and that notice should cover all of the content included.** If it is your aim to be able to fix responsibility to works found later on hard drives in isolation from the web site where they appeared, an additional Statement relating to it at the point of download will be of no utility if you don’t know where the works came from, keeping in mind that filenames are frequently changed by downloaders. The ambiguity you maintain in this Proposal simply harasses the webmasters without any real or practical advancement of the purposes of the Statute.

i. These proposed amendments also perpetuate another thorny ambiguity: Who bears the obligation of providing a Disclosure Statement when one site frames content originating from,

and wholly contained on the servers, of another producer, which is selected and changed in the originator's sole and exclusive discretion?

III. Section 75.1 (e) (3). Disclosure Statements on Each Page of a Website.

a. Contrary to the Comments introducing the proposed amendments, the Adam Walsh Act does not require an entire Disclosure Statement to be set forth on every page of a web site. It requires that such a Disclosure Statement be "affixed" to every page of a website in the "manner and form" determined by the Attorney General.

b. The kind of notice that, by statute, must be affixed to every page of a website on which matter described in Section 2257 (a) appears is a matter for determination by the attorney general, and nothing contained in the statute constrains the attorney general in regulating the kind of statement necessary. The Attorney General may regulate the "manner and form" of the notice.

c. It is inappropriate that the notice be set forth in full because it will fundamentally affect the expression on each page, as it intrudes a legal notice inescapably into a creative work far more than a link. It would dramatically increase the easy and obvious public exposure of the identity of the producer and thereby tend to chill a significant number of individual operators from nonobscene but sexually explicit erotic web productions. It will serve no further purpose than a link, and accordingly burdens expression far more than is necessary to serve the public interest involved in this statute.

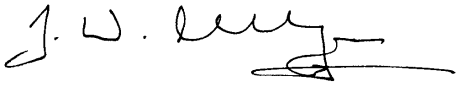
d. The basic requirement of law is that a Disclosure Statement be "affixed" to the work. **The manner of affixation is a matter entrusted to the administrative discretion of the attorney general**. Under existing law, with respect to magazines, books, tapes, and boxcovers for discs, such a notice might be printed on a plastic tag and attached securely by secure nylon wire (that is essentially unbreakable by unaided human hands) to the work - in the manner done to store merchandise to prevent shoplifting - and it seems plain that such affixation would meet the requirements of statute and of both the existing regulations and the proposed amendments. Congress has never required that the Disclosure Statement be originally printed itself onto printed copies, and it is only in the context of movies and their content that the regulations necessarily require the Disclosure Statement to actually become part of the **content** of the work itself.

IV. Section 75.2 (a) (1). URLs.

The proposals perpetuate and do nothing to rectify one of the most arduous and daunting requirements of the scheme: the indexing of content to every URL upon which a producer publishes it. This is not a good mooring for anything of importance because URLs change frequently and are sometimes assigned for one-time use only, creating an expensive nightmare that is simply impossible. In time, if retained, it will undoubtedly be ruled so burdensome as to be unconstitutional. It arises from the sometimes view of the Justice Department that each image, and sometimes each page, and sometimes each web site is regulable matter. The sensible answer that works is one notice linked to every page of a site. That link and notice provides everything the Justice Department will need to enforce by identifying the responsible party and the place where the records are located.

For all of the foregoing reasons, the proposed amendments should be carefully re-examined and each of its provisions re-examined in the context of the Statute and its amendments, in view of the existing Regulations which you do not propose to change, and in light of these and other Comments presented.

Respectfully submitted,



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