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Why Hollywood Does Not Require "Saving" From the Record Keeping Requirements Imposed By 18 U.S.C. Section 2257

Attorney Alan R. Levy recently published an article in *The Yale Law Journal Pocket Part* entitled "How 'Swingers' Might Save Hollywood from a Federal Pornography Statute."[1] So eager was Levy to "save Hollywood" from having to keep records to verify that performers engaging in actual sexually explicit conduct are legally adults, that he grossly distorted the meaning and effect of 18 U.S.C. § 2257. Ironically, while exaggerating the negative impact of § 2257, he simultaneously underestimated the problematic nature of a *different* statutory provision potentially requiring record keeping for performers who engage in simulated sexual conduct.

TRUTHS AND FALSEHOODS ABOUT § 2257

Pornography in which any performer is under eighteen years of age is "child" pornography, and it is illegal.[2] To facilitate enforcement of child pornography laws,[3] Congress promulgated § 2257.[4] The record keeping

1. Alan R. Levy, *How "Swingers" Might Save Hollywood from a Federal Pornography Statute*, 118 YALE L.J. POCKET PART 1 (2008), http://yalelawjournal.org/2008/04/28/levy.html.

2. 18 U.S.C.A. § 1466A (2000 & Supp. 2008), *available at* http://www4.cornell.edu/uscode/18/1466A.html, and 18 U.S.C.A. § 2256 (2000 & Supp. 2008), *available at* http://www4.law.cornell.edu/uscode/18/2256.html; NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY FACT SHEET, http://www.cybertipline.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (last visited Aug. 29, 2008).

3. *See* 18 U.S.C.A § 2251 (2000 & Supp. 2008), available at http://www4.law.cornell.edu/uscode/uscode18/usc_sec_18_00002251----000-.html.

4. 18 U.S.C. § 2257 (2000 & supp. 2008); *see also* Adam Walsh Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (amending § 2257), *available at*

requirements of § 2257 are limited to instances of "actual sexually explicit conduct."[5] Because the performers are engaging in actual sex, this is sometimes colloquially referred to as "hardcore" pornography, as contrasted with "softcore," which generally means simulated sexual conduct.

The names of the performers do not need to be affixed to the pornographic works to comply with § 2257. Only "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" does.[6] A typical compliance statement is two or three sentences long.[7] It represents that all of the performers appearing in the work were at least eighteen years old when the photography took place, and it provides a real space address for the designated custodian of records.

When considered through the prism of labor and employment laws,[8] immigration laws,[9] and tax laws,[10] the idea that a contractor would have to ascertain and keep records about the people who perform in an audiovisual work is not surprising or untoward. Given the goal of impeding the production and distribution of child pornography, it hardly seems onerous or

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http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ248.109.pdf.

5. 18 U.S.C.A. § 2257(a)(1) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html; *see* 18 U.S.C.A. § 2256(2)(A)(i) (2000 & Supp. 2008) (defining "sexually explicit conduct"), *available at* http://www4.law.cornell.edu/uscode/18/2256.html.

6. 18 U.S.C.A. § 2257(e)(1) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html.

7. The reader can confirm this by visiting 2257-complaint pornography websites, which will contain text along the lines of:

18 U.S.C. § 2257 Compliance Statement:

> All models appearing on this website were at least 18 years of age on the date of principal photography. The records required pursuant to 18 U.S.C. § 2257 pertaining to this website and all materials depicted hereon, including the dates of production of all such materials, are on file with [real space address].

8. *See* WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #21: RECORDKEEPING REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2007), *available at* http://www.dol.gov/esa/regs/compliance/whd/whdfs21.pdf; OSHA, U.S. DEP'T OF LABOR, OSHA RECORDKEEPING HANDBOOK (2005), *available at* http://www.osha.gov/recordkeeping/handbook/index.html; U.S. Department of Labor, Recordkeeping, http://www.dol.gov/compliance/topics/recordkeeping.htm (last visited Aug. 29, 2008); U.S. Department of Labor, Youth & Labor: Recordkeeping, http://www.dol.gov/dol/topic/youthlabor/recordkeeping.htm (last visited Aug. 29, 2008).

9. U.S. Department of Labor, The Immigration and Nationality Act INA: Recordkeeping, http://www.dol.gov/compliance/laws/comp-ina.htm#recordkeeping (last visited Aug. 29, 2008).

10. Internal Revenue Service, Recordkeeping, http://www.irs.gov/businesses/small/article/0,,id=98575,00.html (last visited Sept. 1, 2008).

unreasonable, despite the strident protestations of one pornography trade group to the contrary.[11] The only pornographer who has been criminally prosecuted for 18 U.S.C. § 2257 violations to date is Joe Francis, who controls the multimillion dollar *Girls Gone Wild* franchise, and only after he repeatedly filmed underage girls engaging in sexually explicit acts.[12]

Nevertheless, pornographers have asserted that this law is an effort to drive adult entertainment sites out of business under the ruse of fighting illegal child pornography.[13] Section 2257 does not affect the content of pornographic works in any way, and imposes only minor logistical burdens upon production and distribution. Barring a proclivity to use underage performers, the contention that the right to engage in commercial distribution of pornography in which the producers and performers are all completely anonymous is more important than a record-keeping requirement that facilitates identification of child pornography seems overblown. Yet that claim has been indirectly advanced by the libertarian advocacy group the Electronic Frontier Foundation[14] because of their support of the plaintiffs in *Connection Distributing Co. v. Keisler (Connection III)*.[15]

In *Connection Distributing* the plaintiffs were described as people who desired to publish sexually explicit photographs in "swingers" magazines, but did not want to create and maintain records required by 18 U.S.C. § 2257 or provide the publisher of the magazines with identifying information.[16] The government asserted that the recordkeeping requirements were aimed at child

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11. *See* Free Speech Coalition, Free Speech Coalition v. Gonzales (2005), http://www.freespeechcoalition.com/FSCView.asp?action=preview&coid=137 (last visited Aug. 29, 2008).

12. *Judge Drops Most Charges Against 'Girls Gone Wild' Producer Joe Francis*, FOX NEWS, Jan. 5, 2007, http://www.foxnews.com/story/0,2933,241910,00.html; Press Release, U.S. Dep't of Justice, "Girls Gone Wild" Founder Joseph Francis Pleads Guilty in Sexual Exploitation Case (Sept. 26, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/September/06_crm_644.html.

13. David Kesmodel, *Web Fight Sites Proof-of-Age Rules for Porn Performers*, WALL ST. J., Feb. 13, 2006, at B1.

14. *See* EFF, Bloggers FAQ—Adult Material, http://w2.eff.org/bloggers/lg/faq-adult.php (last visited Aug. 29, 2008); Kurt Opsahl, Why the Doj's 2257 Regulations Aren't "Just a Porn Problem," Deeplinks Blog, June 24, 2005, http://www.eff.org/deeplinks/2005/06/why-dojs-2257-regulations-arent-just-porn-problem.

15. *Connection III*, 505 F.3d 545 (6th Cir. 2007), *vacated and rehearing en banc granted by* Connection Distrib. Co. v. Mukasey, No. 06-3822, 208 U.S. App. LEXIS 9032 (6th Cir. Apr. 10, 2008), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

16. *Connection III*, 505 F.3d 545, 550 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

abuse, which is conduct rather than speech.[17] However, in an opinion now vacated pending en banc review by the Sixth Circuit,[18] the court concluded that 18 U.S.C. § 2257 was overbroad because it impermissibly impacted what the court framed as a right to speak anonymously and imposed an unconstitutional burden on pornography in which only adults appeared.[19]

The record-keeping requirements of § 2257 apply only to anyone who "produces . . . 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.[20] The meaning of "produces" is limited by § 2257(h)(2)(B)(i) which states that the term "does not include activities that are limited to 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."[21] It is further limited by § 2257(h)(2)(B)(ii) and (iii), which state that the term "produces" does not include "distribution," or "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."[22]

Thus, § 2257 requires that producers of commercially distributed[23] pornography featuring actual sexually explicit conduct verify the age of every performer, keep records about the performers' identities, and make those records available to the government upon request. The "commercial" limitation

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17. *Connection III,* 505 F.3d 545, 556 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

18. *Connection III,* 505 F.3d 545 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

19. *Connection III,* 505 F.3d 545, 557-63 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

20. 18 U.S.C.A. § 2257(a) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html. This requirement applies to "image[s] of an actual human being, picture, or other matter" containing "sexually explicit conduct" that is "produced in whole or in part" with the shipped materials. *See id*.

21. 18 U.S.C.A. § 2257(h)(2)(b)(i) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html.

24. 18 U.S.C.A. § 2257(h)(2)(b)(ii) and (iii) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html.

23. 18 U.S.C.A. § 2257(h)(2) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html; 28 C.F.R. § 75.1(c)(4) (2007), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

is amplified by the associative federal regulations, which explain how the law should be enforced, and state at 28 C.F.R. § 75.1(c)(4) that "producer" *does not include* persons whose activities are limited to "[p]hoto or film processing, including digitization of previously existing visual depictions,"[24] "[m]ere distribution,"[25] and any activity "that *does not involve the hiring, contracting for, managing, or otherwise arranging* for the participation of the depicted performers."[26] In addition, 28 C.F.R. § 75.1(d) specifies that "[*s*]*ell, distribute, redistribute, and re-release* refer to *commercial distribution* of a [work] that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, but *does not refer to noncommercial* or educational distribution of such matter."[27]A reasonable reading of § 2257 and its associative explanatory regulations is that non-commercially distributed pornography does not trigger the record keeping requirements of § 2257.[28] Yet in *Connection Distributing Co. v. Keisler*,[29] some Sixth Circuit judges interpreted these provisions differently, concluding that "the recordkeeping provisions have an extensive reach," and that § 2257 was not adequately limited to commercially produced pornography.[30] There are (at least) two classes of "swingers" and others who may prefer not to comply with the record keeping requirement: those who want to distribute pictures or videos of themselves engaging in sex acts, and those who want to distribute pictures or videos of other people engaging in sex

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24. 28 C.F.R. § 75.1(c)(4)(i) (2007), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

25. 28 C.F.R. § 75.1(c)(4)(ii) (2007), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

26. 28 C.F.R. § 75.1(c)(4)(iii) (2007) (emphasis added), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

27. 28 C.F.R. § 75.1(d)(2007) (second and third emphasis added), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

28. 18 U.S.C.A. § 2257(h)(2) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257----000-.html; 28 C.F.R. § 75.1(c)(4) (2007), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=8f8d503be1688add90823a47d43b348e&rgn=div8&view=text&node=28:2.0.1.1.30.0.17.1&idno=28.

29. Connection Distrib. Co. v. Keisler (*Connection III*), 505 F.3d 545 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

30. Connection Distrib. Co. v. Keisler (*Connection III*), 505 F.3d 545, 557 (6th Cir. 2007), *available at* http://www.ca6.uscourts.gov/opinions.pdf/07a0430p-06.pdf.

acts. As for the first group, it is hard to understand how people commercially uploading images of themselves having sex could have realistic expectations of privacy.

The second group, those who wish to commercially distribute pictures of other people engaged in actual sexually explicit conduct, have an even less compelling claim. Adults appearing in the relevant pornography might be appearing in a magazine or on a web page involuntarily, because they were coerced to pose or perform, or were unaware of or opposed to having explicit photographs taken, or to having the photographs published and widely distributed because they did not wish to become permanent public spectacles. The record keeping requirements of § 2257 may offer some safeguards against unwanted exposure to the subjects of these pornographic works, since they cannot be legally commercially distributed without information provided by these performers.

But it is children for whom the protections of § 2257 are clearly intended. Some twelve-year-olds can be made up to look as though they were twenty-five. If a twelve-year-old is one of the performers, the work is "child" pornography. The record keeping requirements of § 2257 provide law enforcement officials with the tools to uncover child pornography, while leaving pornographic works that only appear to feature child performers in distribution. Surely that is a content-based distinction that the First Amendment can tolerate.

AN ENTIRELY DIFFERENT (AND PROBABLY UNCONSTITUTIONAL) STATUTORY PROVISION: 18 U.S.C. § 2257A

In 2006 Congress passed, and President Bush signed, The Adam Walsh Child Protection And Safety Act of 2006.[31] One of its provisions promulgates a record-keeping requirement for works in which the performers engage in simulated sexually explicit conduct, to be added to Title 18 as § 2257A.[32] Despite Levy's representations to the contrary, § 2257A does not restrict the use of minors in performances involving simulated sex. It does, however, impose record-keeping requirements that will demand judgment calls likely fraught with uncertainty about what constitutes simulated sexually explicit conduct and whether minors are implicated or not.

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31. The White House, Fact Sheet: The Adam Walsh Child Protection And Safety Act of 2006, July 27, 2006, http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html. *See* 109 Pub. L. 109-248, 120 Stat. 587 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ248.109.pdf.

32. 109 Pub. L. 109-248, 120 Stat. 587 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ248.109.pdf.

The text of § 2257A contains an important predicate to enactment, requiring the adoption of negotiated regulations before it takes effect.[33] One subpart, § 2257A(h)(1)(A), creates an exemption for commercial enterprises that collect and maintain information including the names, addresses, and dates of birth of all performers pursuant to industry standards.[34] It is therefore the Adam Walsh Child Protection And Safety Act of 2006 that will potentially "save" Hollywood from additional record keeping obligations, rather than swingers. This provision of § 2257A even expands this exemption to § 2257, and works featuring actual sexually explicit conduct.

It is easy to see how this exemption from both § 2257 and § 2257A record keeping requirements will mollify the most vocal, well funded, and socially acceptable producers of pornography—the traditional or mainstream movie studios. It is not at all apparent that it renders § 2257A constitutional. Whether or not § 2257A violates the First Amendment is a complicated question for another day, and will depend in part on regulations that have not even been written yet.

What is clear is that § 2257 and § 2257A are two distinct statutory provisions that are being instrumentally muddled so that any enforceability issues associated with the far more problematic § 2257A fallaciously appear to apply to § 2257 as well. The true agenda of commercial pornographers who oppose § 2257 is that they don't want to be caught or held accountable for using underage performers. Dishonest pornography industry advocates are attempting to advance this agenda by conflating the legitimate and appropriate record keeping requirements of § 2257 with the deeply disquieting and probably unconstitutional requirements of § 2257A. They should not be allowed to get away with it, and this rebuttal to Levy's article is one effort to see that they don't.

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33. 18 U.S.C.A. § 2257A (i)(3) (2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257---A000-.html, states: "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" and explicitly disclaims retroactive applicability. The final regulations implementing § 2257A have not even been drafted yet, much less published in the Federal Register.

34. 18 U.S.C.A. § 2257A(h)(1)(A)(ii)(2000 & Supp. 2008), *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002257---A000-.html.

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