

**BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE  
Washington, D.C. 20530**

In the Matter of

Docket No. CRM 104

Revised Regulations for Records  
Relating to Visual Depictions of  
Sexually Explicit Conduct

AG Order No. 2888-2007

RIN 1105-AB18

To: Andrew Oosterbaan, Chief  
Child Exploitation and Obscenity Section  
Criminal Division  
United States Department of Justice  
Washington, D.C. 20530  
Attn: "Docket No. CRM 104"

**COMMENTS**

These comments are permitted pursuant to the above captioned proposed rule, dated July 12, 2007, 69 F.R. 38033, and relating to 18 U.S.C. § 2257, ("2257").

**BACKGROUND AND INTRODUCTION**

The undersigned attorney is a partner in the law firm of Weston, Garrou, DeWitt & Walters, which represents many producers and distributors of still and motion picture and print publications, to which 2257 applies. Our clients include both brick-and-mortar businesses and Internet-based webmasters. The firm also represents numerous Internet service providers, hosts, search engines, age verification services, access providers, forum operators, blogs, as well as entrepreneurs involved in emerging technologies and communication devices not yet released. All of the proposed regulations apply to at least some of those clients. The undersigned has solicited and obtained significant input from the firm's clients, and has used factual data and other information in compiling these Comments.

**I.**

**THE REGULATIONS IMPOSE UNDUE AND EXCESSIVE BURDEN  
ON SECONDARY PRODUCERS**

Imposing the requirements of full 2257 document maintenance and inspection on so-called "secondary producers" having no involvement in the actual hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers, imposes an undue and excessive burden on those secondary producers. The regulations interpret the Adam Walsh Child Safety and Protection Act, Public Law 109-248 (hereinafter "the Adam Walsh Act") as requiring full compliance by all producers with respect to any depictions subject to 2257 compliance, produced after July 27, 2006. The Department contends that while it could require

compliance for images produced after July 3, 1995; the effective date of 2257; it chooses not to do so to avoid any “conceivable *ex post facto* concern.” However, significant *ex post facto* concerns remain with respect to requiring compliance for all images produced after July 27, 2006. Importantly, secondary producers had, until May 1, 2007, relied on the protections of the preliminary injunction issued in *Free Speech Coalition v. Gonzalez*, Case No. 1:05-cv-01126-WDM-BNB (D. Co.), which prevented records inspections and enforcement actions against secondary producers/Free Speech Coalition members. This injunction was based on the well-reasoned decision of *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998) holding that 2257 did not apply to secondary producers. As a result of these unique circumstances, many secondary producers have been unable to acquire age verification documents mandated by 2257, in connection with images displayed on secondary producers’ websites. Primary producers of such material have been hesitant to circulate personal information relating to performers depicted in such content, citing privacy concerns and the potential for stalking and/or identity theft resulting from widespread circulation of this information to all secondary producer/webmasters displaying the images on the Internet. This hesitancy was buttressed by the injunction rendered in favor of the Free Speech Coalition, as many primary producers took the position that secondary producers did not need to acquire 2257 documents. As a result, if the regulations are adopted with an effective date for compliance by secondary producers of July 27, 2006, a host of depictions, otherwise protected by the First Amendment to the United States Constitution, will be suddenly criminalized, and their continued display subject to federal felony prosecution. Such widespread criminalization of protected material offends basic First Amendment principles and must be avoided. The undersigned suggests that any records keeping requirements imposed upon secondary producers must be prospective only, or at the very least, relate back only to the date the Free Speech Coalition injunction was vacated.

The undersigned echoes the concerns expressed by the Free Speech Coalition in its comments simultaneously submitted. In particular, the undersigned can confirm that astronomical costs will be borne by industry producers in the attempt to ensure compliance with the new regulations. These costs take the form of additional staffing, software development, updating and maintenance, and institution of new compliance procedures. These costs will be excessive for large businesses, and insurmountable for smaller operations. Many secondary producers in the online community are operated by one or two individuals with a minimal legal compliance budget. Imposing complex document collection and cross-referencing requirements on such small business, when objectively reasonable alternatives remain available, is unnecessary and unduly burdensome. For many such businesses, this new regulatory requirement will mean the difference between a viable business, and a net loss. Any legitimate concerns relating to document availability can be addressed by allowing secondary producers to designate the name and address of the primary producer’s records custodian, without requiring the maintenance of a separate and duplicate set of regulatory documents.

The legal costs alone, to be borne by affected producers to ensure proper 2257 compliance, will be excessive. Some companies will be required to hire a specialized attorney to do nothing other than oversee the company’s 2257 compliance obligations. Given the draconian sanctions for failing to comply with one or more of the numerous substantive or procedural requirements imposed by the statute and the regulations, hyper-technical compliance oversight

and constant review is required. The cost to be borne by the industry, and the individuals involved, is exorbitant and unnecessary.

The undersigned reiterates the other concerns identified by the Free Speech Coalition with respect to the expense of storage or 2257 material, the volume of material required to properly comply, the cost of software to facilitate compliance, the expense of hiring Records Custodians available during all business hours for potential inspections, the practical and privacy concerns associated with address disclosure requirement for home-based businesses, the inapplicability of the regulations to live webcam performances, the inability to inspect original ID's by secondary producers, and the additional concerns regarding retroactivity. If records keeping obligations are to be imposed on secondary producers at all, the undersigned urges the Department to make any such obligations prospective only, and not retrospective to July 27, 2006 – or any other date in the past.

## II.

### **CONCERNS WITH THE “LASCIVIOUS DISPLAY” DEFINITION**

The proposed rule seeks to impose 2257 obligations on the commercial display of depictions involving the “lascivious exhibition of the genitals or pubic area of the person.” 28 C.F.R. § 75.1(n) (proposed). The Comments to the proposed regulations recognize that this term has been interpreted by federal case law, citing *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987) (setting forth the so-called “*Dost* factors” for determining whether the display of a child’s genitals or pubic area is “lascivious” under 18 U.S.C. §2256). However, application of the *Dost* factors is not readily transferable to evaluating whether images depicting adults should qualify for 2257 compliance. The *Dost* factors primarily relate to whether the set, setting, pose, and visual depictions are appropriate or natural for a child on the one hand, or unduly suggestive or erotic for a child, on the other. These factors are virtually nonsensical when applied to depictions of adults. Children cannot legally be portrayed in adult-oriented, sexual poses and situations. Therefore, the factors set forth in the *Dost* opinion have some logical bearing on determining whether an image is an innocent depiction of a nude child – such as in a bathtub or a crib – versus a depiction of illegal child pornography. However, given the First Amendment’s protection of sexually explicit material, the factors make no sense when applied to erotic depictions of adults. Such depictions are not inherently illegal or improper. Therefore, considerations such as whether “the focal point of the visual depiction is on the child’s genitalia or pubic area; whether the child is depicted in an unnatural pose or in inappropriate attire; whether the child is fully or partially clothed; whether the visual depiction suggests sexually coyness or willingness to engage in sexual activity and whether the visual depiction is intended or designed to elicit a sexual response in the viewer,” are not appropriate or logical considerations where adult images are concerned.

Moreover, if case law is to determine the applicability of 2257 obligations to images involving the lascivious display of the genitals or pubic area, another decision renders the regulatory scheme entirely unworkable. In *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), the court concluded that federal child pornography laws could apply even to depictions of minors who are fully clothed, if other factors set forth in *Dost* were present. As a result, 2257

obligations could be imposed on an extremely voluminous amount of depictions – the vast majority of which should not be within the purview of the regulations, given their spirit and intent. Millions of images on websites such as *Myspace.com*, *Youtube.com*, and *Facebook.com*, given their commercial display, may now require full 2257 compliance even though they do not involve nudity or sexual activity. Expanding the scope of content covered by 2257 regulatory obligations by using the judicial interpretations of § 2256 – related to child pornography – causes the regulations to become overly broad and applicable to content to which they were never intended to apply. While the Comments to the proposed Rule refer to the previous statutory exclusion of lascivious depictions as an “anomaly,” it is more likely that the exclusion of this category of content was an intentional effort to restrict application of the law to only those images involving actual sexually explicit conduct, and avoid the overbreadth concerns resulting from application of the statutory and regulatory obligations to images depicting fully clothed adults.

Further concerns are generated by imposing a cutoff date of July 27, 2006, for 2257 compliance with respect to images depicting the lascivious display of the genitals or pubic area. Now, both primary producers and secondary producers/webmasters, many of whom have had no involvement in the creation of the content at issue, will be required to divine the date on which all content was originally produced (even though such information was never required by the 2257 statutory scheme) and isolate those images that somehow fall within the *Dost* factors for lascivious display, and further ensure that those images are fully supported by 2257 age documents. The potential for inadvertent erroneous compliance efforts in this regard is overwhelming. The producers should not be put in the position of first attempting to apply an illogical legal test to determine whether a particular depiction fits within the regulatory scheme, and then seek out information that was never required by the statute, to determine whether 2257 obligations attach to each and every image displayed on a website – sometimes numbering in the millions. These concerns render the proposed regulations overly broad and excessively burdensome.

### III.

#### **REQUIRING A FULL 2257 DISCLOSURE STATEMENT ON EACH WEB PAGE IS UNNECESSARY AND OVERLY BURDENSOME**

As proposed, 28 C.F.R. § 75.6(a) requires that the statement describing the location of 2257 records be included on “every page of a website on which a visual depiction of an actual human being engaged in actually sexually explicit conduct appears.” This new obligation is unnecessary and overly burdensome.

The current regulations adopted on June 23, 2005, require that a link to the mandated disclosure statement appear on a website’s homepage or principle URL. § 75.8(d). The proposed regulations dramatically increase the required locations and reproductions of the full disclosure statement by mandating that it appear on each and every webpage where triggering content appears. No rationale is offered by the Comments to the proposed regulations for this dramatically more burdensome compliance obligation, and none exists. Affixing the required disclosure statement to the homepage or principle URL of a website has worked within the

industry for years. This compliance method was the industry standard even before the 2005 regulations first imposed the requirement. Now, the proposed regulations seek to require that webmasters reproduce the entire disclosure statement on each and every webpage, even though the information was readily accessible and immediately viewable when the user first entered the website.

Clearly the imposition of the requirement that the entire disclosure statement be placed on each page is not derived from the statute, and it is the proposed regulations that impose the unconstitutional burden on speech, not the statute. Specifically, § 2257(e)(1) states,

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 [Emphasis added.]. In this paragraph, the term “copy” includes every page of a website on which matter described in subsection (a) appears.

It would not be an unreasonable implementation of the statute for the Department to apply the above by requiring that the disclosure statement on each applicable page be posted by way of a hyperlink, as allowed by the current regulations. While the interference with First Amendment freedoms might still be impermissible by such an implementation of the statutory requirement of that a disclosure appear on each page, it certainly would be a considerable step in the right direction, and perhaps the best that the Department can do without contradicting the requirements of the statute.

In the absence of some commonsense modification, the proposed duplicitous requirement will only increase the cost of regulatory compliance, and will do nothing to protect children or make the required information more readily accessible to the Department. Several pieces of information are required for a compliant disclosure statement. Moreover, since secondary producers are allowed to list the primary producers’ Records Custodian(s), as an optional disclosure compliance method, and since many websites are made up of content provided from numerous primary producers, the disclosure statement for some websites runs several “pages” long. This, combined with the newly-minted regulatory requirement of including an original date of production (as discussed *infra*) in the disclosure statement, will transform many websites into more disclosure statement than website. The new requirement will decimate the look and feel of all websites to which the regulations apply, and will require a complete restructuring of each and every website to allow for this substantially-increased compliance obligation.

It should be noted that website space is at a premium. Website designers struggle to include only the most relevant and necessary information on any particular webpage, given the short amount of time that a typical user spends on any given webpage.<sup>1</sup> Website “clutter” is a constant problem for web designers who seek to create a clear interface that is not confusing or

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<sup>1</sup> The typical website user’s attention span is measured in seconds. [Mainte-Net.com](http://Mainte-Net.com).

overwhelming for users. Requiring that each webpage now include a substantial amount of regulatory information, just for the privilege of displaying otherwise protected expression without criminal penalties, violates traditional notions of expressive freedom, interferes with the creative process, and is overly burdensome.

#### IV.

#### **MANDATING THE DATE OF ORIGINAL PRODUCTION IN THE DISCLOSURE STATEMENT IS UNWORKABLE AND OVERLY BURDENSOME**

As proposed, 28 C.F.R. § 75.6(b)(2) inexplicably would change in the available dates that can be used to satisfy the ‘date’ requirement in the disclosure statement. While the current regulations allow each producer to select from the following dates: (as most applicable to the particular depiction) “manufacture, publication, duplication, reproduction, or reissuance of the matter;” the proposed regulation limits the information to the “date of original production of the matter.” Interestingly, nowhere in the existing statute or regulatory scheme is the original date of production required for triggering content. In fact, the current regulations, at § 75.2(e), require that the required information be segregated from all other records, which shall not contain any other records. Accordingly, it would have been a regulatory violation to include the original date of production of any depiction within the required 2257 records, and that still appears to be the case today. Therefore, the proposed rule mandates inclusion of information in the disclosure statement that cannot and must not be found within the required 2257 records. As a result, the requirement is *ultra vires*, illogical and overly burdensome.

Even if access to the original production date information were readily available, this new requirement (not found anywhere in the statute) will mandate a massive overhaul of each and every disclosure statement now existing in connection with any triggering content. Given the inability for most secondary producers to access original production date information for content appearing on websites, the vast majority of secondary producers choose from one or more of the other currently-authorized dates when completing their disclosure statements. Many use the date of duplication, reproduction, or reissuance – all of which would ordinarily be within their unique knowledge. If a new production-date requirement is imposed upon all producers, specifically included secondary producers/webmasters, such entities will be put to the Herculean task of identifying an original production date for each and every image appearing on their websites, which often number in the hundreds of thousands, if not millions, for some mega-sites. As noted above, the original production date is often not readily available, particularly since this information has never been required by § 2257. Consequently, hosts of most websites will immediately become out of compliance with 2257 obligations, in the event the proposed regulations include a new, original production date requirement for disclosure statements.

Another concern relates to the difficulty encountered in developing a rational system for tying production dates to images appearing on websites. Many webpages include content produced on different dates, within the same webpage. In many cases, each image will have been produced on a different date, although all are included in the same webpage. Accordingly, each webmaster will need to develop a unique system of cross-referencing, coding, or identifying the production date of each image on any given webpage, within the disclosure statement. This

new obligation will result in substantially increased burden and cost of compliance, if the information can be required at all. The undersigned therefore urges the Department to maintain the current system, allowing webmasters to identify the most relevant date, for the depictions in question, by authorizing producers to select from the dates of production, manufacture, publication, duplication, reproduction, or reissuance of any given depiction.

## V.

### **THE PROPOSED RULE WILL HAVE AN ANNUAL EFFECT ON THE ECONOMY WHICH WELL EXCEEDS \$100 MILLION DOLLARS**

The Department contends, in accordance with Executive Order 12866, that the proposed rule will not have an annual effect on the economy of \$100 million or more. This is factually untrue. The Department, itself, estimates that there are currently five-hundred thousand (500,000) websites producing visual depictions of actual sexually explicit conduct, constituting approximately five thousand (5,000) businesses. See, Comments to proposed rule. While the undersigned believes, having had considerable exposure to the industry, that the actual numbers are substantially higher, using the Department's own estimates, it cannot be said that the impact of the proposed rule will be less than \$100 million per year.

As noted by the Free Speech Coalition in its comments, the burden on both small and large businesses in terms of increased staffing, software support, and legal advice will be substantial and possibly incalculable. The need for secondary producers to employ a Records Custodian to be available a minimum of twenty (20) hours per week for five thousand (5,000) businesses would exceed the \$100 million threshold itself,<sup>2</sup> but the substantial costs resulting from the redesign of each website to accommodate for a disclosure statement on each and every webpage, along with the research and implementation of the production date requirement, will easily exceed the threshold impact itself.

A poll of this firm's web-based clients requesting a cost estimate to comply with the new disclosure requirements indicates an average cost of annual compliance at \$210,092 per business. This, multiplied by the minimum 5,000 affected businesses, well exceeds the \$100 million threshold requirement. Accordingly, this rule should be reviewed and promulgated in accordance with the requirements pertaining to rules which will have a greater than \$100 million annual impact on the economy.

## VI.

### **CONCLUSION**

In summary, the undersigned requests that the Department substantially revise the proposed Rule to address the concerns outlined herein. The burden imposed upon producers as a result of compliance with the proposed Rule would be clearly excessive. This concern, along

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<sup>2</sup> Assuming that an average Records Custodian would require a salary of at least \$30,000 per year, times five thousand (5,000) businesses, results in an annual impact of \$150 million itself.

with the other legal issues identified in these Comments, should be considered and addressed when adopting the final Amended Regulations.

Respectfully Submitted,



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