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

In the Matter of	Docket No. CRM 103
Inspection of Records Relating to Depiction of Sexually Explicit Performances Pursuant to the Child Protection Restoration and Penalties Enforcement Act of 1990 and the PROTECT Act.	AG Order no. 2723-2004 RIN 1105-AB 505

To: Andrew Oosterbaan, Chief
Child Exploitation and Obscenity Section
Criminal Division
United States Department of Justice
Washington, D.C. 20530

COMMENTS

These comments are submitted pursuant to the above captioned proposed rule, dated June 25, 2004, 69 F.R. 35547, and relating to 18 U.S.C. § 2257.

BACKGROUND AND INTRODUCTION

The undersigned law firm represents many producers of still and motion pictures and print publications to which 18 U.S.C. § 2257 applies, as well as webmasters, Web hosts, Internet service providers and access providers, age verification services and distributors of such still and motion pictures in videotape, DVD, magazine and other formats, including the Internet. All of the proposed regulations apply to at least some of those clients. Following are the most significant concerns of those clients.

I.

THE EFFECTIVE DATES OF THE STATUTE AND REGULATIONS ARE CONTRARY TO LAW AND PRECEDENT

Enforcement of 18 U.S.C. § 2257 and the regulations thereunder promulgated by the Department was enjoined from the outset until July 3, 1995. Thereafter, the Department, in response to threatened litigation, agreed that the effective date of both 18 U.S.C.§ 2257 and the regulations promulgated thereunder would be July 3, 1995, rather than the effective dates specified therein, respectively November 1, 1990 and May 26, 1992. Because the district court conclusively established July 3, 1995 as the effective

date, which the Department publicly agreed would be uniformly applied, producers and distributors of materials made before then cannot be forced to comply with the statute and regulations retroactively.

Background

The Child Protection Restoration and Penalties Enhancement Act of 1990 was enacted on November 29, 1990. PL 101-647, 104 Stat 4789. Compliance with 18 U.S.C. § 2257, according to the face of the statute, was required as of November 1, 1990. *Id*., § 301(b); 18 U.S.C. § 2257(a)(1).

The regulations promulgated pursuant to the Act, 57 FR 15017-01, issued April 24, 1992 established an effective date for their application as May 26, 1992. 28 C.F.R. §§ 75.2(a, b), 75.6 and 75.7(a)(1).

On February 21, 1991, several plaintiffs filed suit in the United States District Court for the District of Columbia, challenging the constitutionality of the Act, along with an application for a temporary restraining order. *American Library Association, et al. v. Thornburgh, et al.*, case number 91-cv-00394-SS. Five days later, the court entered a "Stipulated Order by Judge Stanley Sporkin re Non-Enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990 Until Regulations Implementing the Act become effective; allowing time for comment following publication; and extending Filing Time for all Motions and Responses."

The regulations promulgated pursuant to the Act, 57 FR 15017-01, issued April 24, 1992 established an effective date for their application as May 26, 1992. See 28 C.F.R. §§ 75.2(a)(1-2), 75.6 and 75.7(a)(1).

Following a flurry of briefing and argument, the court in the *American Library Association* case granted summary judgment in favor of the plaintiffs, largely striking down the statute:

> "ORDER by Judge Stanley Sporkin: granting motion for summary judgment [36-1] by plaintiff(s), denying motion for summary judgment [25-2] by RICHARD THORNBURGH, DOJ; declaring that the record-keeping and labeling provisions of the Child Protection Restoration and Penalties Enforcement Act of 1990 as applied to producers and distributors of any material that contains depictions of people under 18 years of age is constitutional; declaring that the Act as applied to producers and distributors of any material who have satisfied themselves after due diligence that such material does not contain depictions of people under 18 years of age is unconstitutional; and enjoining the defendants from

> enforcing the record-keeping and labeling provisions of the Act with respect to producers and distributors of any material who have satisfied themselves after due diligence that such material does not contain depictions of people under 18 years of age."[1]

The supporting opinion is published, *American Library Ass'n. v. Barr*, 794 F.Supp. 412 (D.D.C. 1992).

The resulting permanent injunction remained in effect during the appeal process, which ultimately resulted in some aspects of the Act being found unconstitutional, but finding that the Act in general did not offend the Constitution. *Id.*, *affirmed in part, reversed in part sub nom. American Library Ass'n. v. Reno*, 33 F.3d 78 (D.C. Cir. 1994) *rehearing denied* (1995), *suggestion for rehearing en banc denied* 47 F.3d 121 (28, 1995) *cert. denied* 515 U.S. 1158, 115 S.Ct. 2610, 132 L.Ed.2d 854 (1995).

The Court of Appeals received notice on June 27, 1995 that the United States Supreme Court had denied the petition for writ of certiorari on the previous day. Accordingly, the mandate of reversal was issued by the Court of Appeals on July 3, 1995.[2]

The effect of the issuance of the mandate of reversal was to dissolve the permanent injunction and its prohibition against the enforcement of the Act. On July 28, 1995, a hearing was held in the district court concerning the issue of enforcement of the Act with respect to activities that took place prior to the July 3, 1995 mandate, dissolving the injunction. The court found that the Department should be prohibited from enforcing the Act with respect to materials produced prior to that date. The order, in relevant part, stated:

> ". . . [D]efendants shall not seek to enforce the Act against, or hold liable under the Act, plaintiff producers and distributors, their members or anyone in their chain of supply or distribution, for materials containing visual depictions made prior to July 3, 1995, provided such producers and distributors satisfied themselves after due diligence that such visual depictions are not of people under 18 years of age."

The Department appealed from that order to the United States Court of Appeals for the District of Columbia Circuit.

---

[1] The forgoing is according to the records of the United States District Court for the District of Columbia, case number 91-cv-0394, which records can be accessed at the PACER ("Public Access to Court Electronic Records") Web site. See *http://pacer.psc.uscourts.gov*.

[2] The forgoing is according to the records of the United States Court of Appeals for the District of Columbia Circuit, case number 92-5271, which records also can be accessed at the PACER Web site.

Meanwhile, those in the adult industry raised same issue with respect to those that were not plaintiffs in the *American Library Association* litigation. The Free Speech Coalition, an adult-industry trade group not a plaintiff, threatened to undertake litigation to achieve the same result as in the *American Library Association* case. However, after some negotiation, Deputy Assistant Attorney General Kevin V. DeGregory wrote a letter to Paul J. Cambria, Esq., the attorney who had been representing the Free Speech Coalition in the matter, as follows:

> "Dear Mr. Cambria:
>
> > "It has come to my attention that you intend to file a complaint in the United States District Court for the Central District of California challenging the constitutionality of the recordkeeping statute, Title 18 United States Code, Section 2257 ("the Act"). It is my understanding that your primary concern is that your clients be treated similarly to the plaintiffs in American Library Association v. Reno with respect to compliance obligations under the Act in the period May 26, 1992 to July 3, 1995.
> >
> > "The Department will apply the ultimate judicial determination in the ALA case to your clients. Thus, if the United States pursues its appeal of the July 28, 1995 order in American Library and is not successful, or determines not to pursue the appeal, your clients' obligations under the Act would be identical to the obligations of those explicitly covered by the July 28th order.
> >
> > "I hope this proposal offers a solution to your clients' concerns and that your proposed lawsuit proves unnecessary. Please do not hesitate to contact my office if I can provide more assistance on this or any other matter."

On November 29, 1995, the Department moved the court of appeals to dismiss the appeal, which motion was granted on December 18, 1995.[3]

Since then, the entire adult entertainment industry has been laboring under the reasonable belief that the effective date of both the Act and of the underlying regulations was July 3, 1995. Numerous articles in trade publications and on Internet sites have expressed that position.[4] Moreover, on November 29, 1995 Ann M. Kappler, Esq., one

---

[3] *Id*., case number 95-5342.

[4] *E.g.*, *Special AVN Report on the Labeling and Record-Keeping Compliance*, ADULT VIDEO NEWS September, 1995, p. 265, *Clyde DeWitt's Legal Commentary*, ADULT VIDEO NEWS October, 1995, *Clyde DeWitt's Legal Commentary*, ADULT VIDEO NEWS December, 1995, *The Labeling and Record Keeping Law As We Now Know It*, ADULT VIDEO NEWS January, 1996, *YNOT News, Ask the Lawyers*, April 3, 2003, *http://ynotnews.ynotmasters.com/issues/040303/page7.html*, *Gone Too Wild*, AVN ONLINE, April,

of the attorneys in the American Library Association case, issued a memorandum to the Plaintiffs "and supporters", announcing that the government was filing its motion to dismiss the appeal from the order concerning the effective date of the Act and its regulations.

> "Once the court grants [the Department's motion to dismiss the appeal of the order concerning the effective date], Judge Sporkin's order will become final. Because the government has already informed interested parties that it will adopt a uniform enforcement policy, the order will apply to everyone.
>
> "In sum, once the court grants the motion to dismiss, it will be absolutely clear that images created prior to July 3, 1995 are not subject to the recordkeeping law (regardless of when they are published, duplicated or distributed. [Emphasis in the original.]"

That memorandum was widely circulated in the adult media industry, and was relied upon universally, as was the letter from Deputy Assistant DeGregory.

There remains in place the July 28, 1995 order, prohibiting the Department from enforcing the Act against the *American Library Association* plaintiffs "or anyone in their chain of supply or distribution."

Suggested Remedy

The regulations should respect that injunction, and its corresponding promise to obey it and enforce the Act along with the implementing regulations evenhandedly. Accordingly, 28 C.F.R. § 75.2(a) should be corrected by substituting July 3, 1995 in place of November 1, 1990; 28 C.F.R. § 75.2(a)(1) should be corrected by substituting July 3, 1995 in place of May 26, 1992; 28 C.F.R. § 75.2(a)(2) should be corrected by substituting July 3, 1995 in place of May 26, 1992; 28 C.F.R. § 75.6 should be corrected by substituting July 3, 1995 in place of May 26, 1992; and 28 C.F.R. § 75.7(a)(1) should be corrected by substituting July 3, 1995 in place of May 26, 1992.

2003, p. 32, *The Labeling And Record-Keeping Requirements of 18 U.S.C. § 2257*, ADULT VIDEO NEWS June 2003, p.305 and *Knock, Knock, It's the 2257 Man*, ADULT VIDEO NEWS June, 2004, p. 279.

II.

THE REQUIREMENTS IMPOSED UPON "SECONDARY PRODUCERS" EXCEED STATUTORY AUTHORITY

The underlying statute expressly states that the requirement to inspect and copy identification documents, acquire information from performers and keep and index records to be available for inspection applies to anyone who produces qualifying images which, according to statutory definition, "does not include mere distribution or any other activity which does not involve hiring, contracting for[,] managing or otherwise arranging for the participation of the performers depicted." Both as originally enacted and as proposed to be amended, the regulations require what are defined as "secondary producers" to keep, index and make available for inspection the enumerated records, despite the clear statutory exemption for most of those so defined. The only case addressing the issue, *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), held that aspect of the regulations exceeded the Department's statutory authority. The proposed, amended regulations, nonetheless, effectively retain the requirement that secondary producers maintain records in the same manner as primary producers, a requirement that was squarely struck down in *Sundance*. Additionally, a requirement that primary producers supply to all secondary producers copies of information about the performers, including identification documents typically including the performers' residential addresses, serves no purpose but creates a significant risk that private information about the performers will become publicly available.

Background

While anyone involved in the distribution of an image that falls within the purview of 18 U.S.C. § 2257 is required to insure that the required statement is attached, the statute commands that producers also examine identification, collect information and keep and index the records created as a result, allowing inspection by the Attorney General. Those requirements apply to "[w]hoever produces" the material in question. 18 U.S.C. § 2257(a). The statute defines "produces" as "to produce, manufacture, or publish any book, magazine, periodical, film, video tape or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. § 2257(h)(3).

However, both the original regulations and the proposed, amended regulations define producers as both "primary producers" and "secondary producers," the latter including a large universe of functionaries engaging in an "activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted." This was challenged with respect to the original regulations in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir.1998), which held that the application of the producer requirements to "secondary producers" who engaged in an

"activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted" exceeded the regulatory power that Congress granted the Department of Justice. The proposed, amended regulations leave the defect found in the *Sundance* case materially unchanged.

Requiring webmasters and others in the chain of reproduction to obtain copies of age records is of particular concern because of understandable concern about performer privacy. Most age records contain substantial private, personal identification information such as driver's license numbers, telephone numbers, residence addresses and, perhaps, social security numbers. The more this information is shared with third parties, the greater the likelihood that the information will fall into the wrong hands, and be used for improper purposes, such as identity theft or stalking.

Additionally, many webmasters obtain content from a large number of content producers, and have invested significant resources in establishing their online presence by displaying many gigabytes of content previously licensed from third party content producers. Given the industry-wide acceptance of the *Sundance* decision as the law, and its prevalence as industry standard, few webmasters have obtained copies of age records from every content producer from whom they have licensed or purchased content displayed on their websites. This new requirement would mandate that webmasters seek out age records from content producers, many of whom have moved, ceased doing business, or simply disappeared since the content was purchased. Those content producers, if they can be located, normally would have little or no incentive (and, certainly, no financial incentive) to provide the requested records. The webmaster would be forced to remove the content from display even though the content has been duly licensed and appropriate records custodian disclosures appear on the website. The practical implication of this requirement would be to immediately criminalize the display of a substantial amount of First Amendment-protected material on the Internet, because of the lack of supporting records.

Suggested Remedy

The proposed regulations, 28 C.F.R. § 75.1(c)(4) should be modified to strike the words ", other than those activities identified in paragraphs (c)(1) and (2) of this section," so that all of the activities exempted by the statute are likewise exempted by the regulations.

III.

THE EXPANDED DEFINITION OF "PRODUCER"

Section 75.1(c)(5) of the proposed regulations defines "producer" to include "any subsidiary or parent organization, and any subsidiary of any parent organization, notwithstanding any limitations on liability that otherwise would be applicable." This

expands the burden on organizations related to the producing organization well beyond anything authorized by the statute. The scope of this definition would impose criminal liability on, for example, a far-flung corporation that does not itself engage in any publishing activities at all, if it did not itself keep, index and allow inspection of records generated by another subsidiary of the same conglomerate which was in the publishing business a half a world away.

Background

28 U.S.C. § 75.1(c) defines a producer as follows:

> "Producer means any person, including any individual, corporation, or other organization, who is a primary producer or a secondary producer."

28 U.S.C. § 75.1(c)(5) states:

> "A producer includes any subsidiary or parent organization, and any subsidiary of any parent organization, notwithstanding any limitations on liability that would otherwise be applicable."

As explained above, the definition of "secondary producer" broadly causes to be included in the definition of "producer" effectively anyone who makes any modification of the image to which § 2257 applies. Proposed § 75.1(c)(5) causes further and unjustifiable expansion of those upon whom the producer's requirements are imposed. There are two points of comment concerning this, one practical and one legal.

From a practical standpoint, this stands to place burdens on corporations that the Department (or Congress, for that matter) could not possibly have intended. For example, in the circumstance of a conglomerate corporation with wholly owned subsidiaries in a variety of endeavors around the country and the globe, the fact that one subsidiary produces, modifies or reproduces so much as one image requiring compliance with § 2257 and its regulations would require the home office of the parent corporation and all of the subsidiaries around the world to have the mechanism to display the records at its office and for at least 5, and perhaps as many as 12, years, 10 hours every day.

Moreover, this section raises the question of whether, in the above circumstance, the statement must disclose each of the dozens of locations where the records are stored. But, so long as there is one location where the records can be found, the objective of the statute clearly is achieved.

From a legal standpoint, § 75.1(c)(5) violates the principles articulated in *Sundance* more dramatically than the requirements imposed by the regulations on a

"secondary producer." This further expansion of the "producer" definition, well beyond what § 2257 authorizes, cannot possibly pass muster in the courts.

Suggested Remedy

Delete 28 U.S.C. § 75.1(c)(5) of the proposed regulations.

IV.

OTHER REGULATIONS EXCEED STATUTORY AUTHORITY

The proposed regulations exceed the Department's authority under the statute in additional ways. First, as with the original regulations, the proposed, amended regulations require that the disclosure statement include "the date of production, manufacture, publication, duplication, or reissuance of the matter." Second, the proposed, amended regulations purport to partially exempt non-commercial activities. Those components of the proposed regulations exceed the authority of the statute, for much the same reasons as do the requirements imposed upon "secondary producers", as explained above.

Background

First, 18 U.S.C. § 2257(e)(1) requires that producers affix to every copy of any material within the scope of the statute, "in such a 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*." Nothing in this section either requires the producer to include in the statement anything about any date or does it authorizes the Attorney General to promulgate regulations requiring that the disclosure statement include any date. Nonetheless, 28 C.F.R. § 75.6 (a)(2) requires that every statement shall contain "the date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter." None of those dates have any bearing on where the records can be located, nor do the categories of required dates further the objectives of the statute in protecting children from involvement in the production of sexually explicit material.

Second, 18 U.S.C. § 2257(a) states that "whoever produces any book . . . or other matter which . . ." is within the purview of the statute ". . . shall create and maintain individually identifiable records . . .." The balance of the statute defines the required conduct and prohibited conduct to "any person", without any reference to or requirement of commercial activity, and without any exemption for non-commercial activity. Nonetheless, as proposed, 28 C.F.R. § 75.1(d) states that "sell, distribute, redistribute and re-release refer to *commercial* distribution" of materials covered by the statute, "but does

not refer to non-commercial or educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations."

The terms defined in § 75.1(d) do not appear to be operative terms anywhere in the statute or regulations such that an exemption of non-commercial would be effected by § 75.1(d). The terms sell, distribute, redistribute and re-release are not found elsewhere in the regulations other than in the proposed 28 U.S.C. § 75.6, which states, "The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, computer-generated image, digital image, picture, or other matter is sold, distributed, redistributed, or rereleased." The statute, at 18 U.S.C. § 2257(f)(4), defines an offense for someone to "sell or otherwise transfer, or offer for sale or transfer" any material requiring a disclosure but does not have one.

Thus, to the extent that the proposed 28 C.F.R. § 75.1(d) is an effort to exempt to some extent noncommercial activities from compliance with the requirements of the statute, it does not appear to do so. To the extent that it might create such an exemption, the statute is plainly designed to apply with equal force to noncommercial activity.

In *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), as explained above, the court addressed the issue of the extent to which 18 U.S.C. § 2257 authorized the Attorney General to promulgate regulations. In so doing, the court noted that the starting point of any analysis of the breadth of regulatory authority begins with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, the court noted,

> "As an initial matter, we decide whether Congress has directly spoken to the precise question at issue. . . . If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." 139 F.3d at 807 (internal quotations and citations omitted).

The court went on to note that where "the text and reasonable inferences from it give a clear answer against the Government," that is "the end of the matter." *Id*. at 808. Nothing is different here. The plain language of the statute allows the Attorney General to promulgate regulations with respect to the "form" of the "statement describing where the records . . . may be located." It neither requires a statement concerning any date nor authorizes the Attorney General to promulgate regulations with respect to any disclosure, other than "where the records . . . may be located." A date is a "when", not a "where". Congress could not have been clearer. Nor does the statute authorize the Attorney General to exempt selected activities from liability.

Suggested Remedy

28 C.F.R. § 75.6 (a)(2) should be deleted, thereby eliminating the regulatory, but not statutory requirement that the statement include "the date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter." 28 C.F.R. 75.1(d) should be deleted, eliminating any suggestion of an exemption for noncommercial activity.

V.

THE REGULATIONS UNREASONABLY REQUIRE THAT THE RECORDS BE KEPT AT THE PRODUCERS PLACE OF BUSINESS

Although the regulations are not entirely clear on this point, the Department has consistently taken the position that the place where the records must be maintained and made available for inspection be the producer's and custodian's place of business. So long as the records are situated in a place where they reasonably can be inspected, there is no justification for requiring that they be at the producer's and custodian's place of business.

Background

With the advent of inexpensive video technology, a large, heavily capitalized organization is no longer required for the production of motion pictures, and it never has been necessary for the production of photographs. Many producers do not maintain an office, accomplishing photography at "locations" that are either a producer's residence or leased from the locations' owners. And to the extent that secondary producers are required to keep and index records and make them available for inspection, Web site operators are implicated, and it is well-documented that many webmasters do not maintain places of business outside of their residences.

As interpreted by the Department, the current and proposed regulations require that a producer identify a place of business – which in thousands upon thousands of instances would necessarily be the producer's residence, for lack of any other place over which the producer has control – at which the records are located and available for inspection. As the industry understands the Department's position, it will not approve location of the records at a commercial repository.

This has a substantially detrimental impact upon speech, given the controversial nature of this genre. By this regulation, the Department imposes – uniquely upon authors of sexually oriented speech – a requirement that a controversial speaker reveal his or her residential address on every copy of every publication. Faced with that requirement, and

without the wherewithal to maintain a commercial operation, some producers will decide simply to not go forward.

Moreover, the above-described individuals have a tendency to move their residences more often than is typical of those involved in commercial endeavors, although even the larger producers move their businesses with some regularity. The requirement that the location of the records be the producer's place of business is thereby counterproductive to the purpose of the statute. Once the materials are in circulation, the location of the custodian of records – *at the time of its release* – remains affixed to the matter. If the producing business moves, particularly if it is a small one, the Department may have no way of knowing where the producer's office has relocated, thus frustrating the ability to inspect the records.

Additionally, this requirement has an immense financial impact on publishers, especially of print or DVD media. It is common knowledge that the "setup cost" for any printed material (which would include magazines, the boxes for video tapes and the paper inserts for DVDs), as well as for DVDs, is immense. Accordingly, printed materials and DVDs normally are initially produced in sufficient numbers to anticipate all future sales. If the producer moves, the inventory of unsold copies of magazines, DVDs and boxes for videotapes becomes worthless.

Suggested Remedy

Third parties should be allowed to act as custodian of records. If the regulations were to require third-party custodians to register with the Department and to notify the Department of any change of address, the Department would be assured that inspection of the records would be possible, notwithstanding the fact that a producer relocates, dies or goes out of business. The producers, of course, would be responsible for ensuring that the third-party custodian continued in compliance.

VI.

THE DEFINITION OF "NORMAL BUSINESS HOURS" IMPOSES AN UNREASONABLE BURDEN ON PRODUCERS

In defining the time when inspections must be allowed, the time includes "normal business hours," defined as 8:00 AM to 6:00 PM local time, and any time when the producer is conducting business. That definition imposes unreasonable burdens on producers for two reasons. First, it requires that they be open for business 10 hours per day on every day of the year, requiring the records custodian to be present for unannounced inspections during all such hours, under penalty of incarceration, without any break, meals or vacation, which may violate state and federal employment laws.[5] Second, it requires that inspections be allowed any time the producer is conducting

[5] Notably, the proposed regulations do not provide for designation of alternate records custodians.

business, including production, such that inspections must be allowed at the producers place of business when, for example, the producer is creating a "location" production on another continent.

Background

28 C.F.R. § 75.5(c)(1), as proposed, requires:

> "Inspections shall take place during normal business hours and at such places as specified in § 75.4. For the purpose of this part, 'normal business hours' are from 8 a.m. to 6 p.m., local time, and any other time during which the producer is actually conducting business relating to producing depiction of actual sexually explicit conduct."

This imposes two extremely unreasonable requirements on producers.

First, this requires that they be open for inspection 10 hours per day, 365 days per year. There is no exemption for holidays or weekends, no allowance is made for lunch breaks, and a 10-hour day is two hours longer than what is typical in American businesses, as recognized by wage-and-hour laws of many states.

Second, this requires that the producer be open for inspections any time the producer is conducting business involving production. Accordingly, for example, if a producer based in Los Angeles is filming on location in Budapest from 8:00 AM until 4:00 PM Budapest time, he would be required to keep his Los Angeles offices open from 11:00 PM until 7:00 AM to allow for an inspection because the producer is engaging in activity relating to producing.

18 U.S.C. § 2257(c) requires that a producer make the records available at "all reasonable times". The times specified above are patently unreasonable, and thus not authorized by Congress.

All of this must take into account the fact that not all producers are large companies, and they do not necessarily produce large numbers of motion pictures or other images which are regulated by § 2257. The above regulations require the producer of a single photograph to be open for business as described above for many years after the production.

Suggested Remedy

Limit the time of inspections to days and times on which the producers in fact are open for business at the office of the custodian, requiring that the business hours be posted at the custodian's office.

VII.

THE PROVISION ALLOWING SEIZURE OF EVDIENCE DURING AN INSPECTION EXCEEDS STATUTORY AUTHORITY AND IS CONTRARY TO THE LAW

Inspectors, who can be anyone designated by the Attorney General, are generally granted broad authority to seize any evidence of the commission of any felony during the course of an inspection. Evidence of a felony could include evidence of violation of an obscenity statute, and seizure of media materials under those circumstances without a *judicial* determination of obscenity would offend the First Amendment. Moreover, this provision runs afoul of the established Fourth Amendment principles relating to searches and seizures. Finally, there is no limit to what the inspectors can copy, thus allowing the Department to require the producers to produce exactly the type of membership lists that the Supreme Court has held protected.

Background

As proposed, § 75.5(g) of the regulations, Inspection of Records, states:

> "(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."

The plain language of this proposal is extraordinarily broad, and is objectionable for a variety of reasons, especially when taken along with other regulations.

First, the term "law enforcement officer" is not defined anywhere in the proposed regulations or the underlying statute. A private citizen, not otherwise a law enforcement officer, who is deputized as an "inspector" by the Attorney General pursuant to § 75.5(a) of the proposed regulations could be said to be a "law enforcement officer" by virtue of that designation, alone. The proposed regulations certainly do not preclude such an interpretation.

Moreover, restricting the definition of "law enforcement officer" to someone who under some law is deemed a "law enforcement officer" of any variety does not necessarily limit to appropriately qualified personnel the class of persons who can exercise the broad seizure power granted by this proposed section. While every state presumably has standards for training and certification of law-enforcement personnel, those standards do not guarantee that a given inspector will be properly trained. For example, WIS. STAT. § 165.85(4)(b) excepts from much of the training and certification requirements law enforcement officers serving on a temporary or probationary basis. *See*

Kraus v. City of Waukesha Police and Fire Com'n., 261 Wis.2d 485, 497, 662 N.W.2d 294 (2003). And lack of qualification of the inspector may not provide any protection for the subject of the inspection. For example, in *Barnes v. State*, 305 Ark. 428, 810 S.W.2d 909 (1991), the Arkansas Supreme Court held that failure to meet Arkansas' statutory law enforcement standards does not invalidate actions taken by law enforcement officers, in that case warrantless arrests.

Even assuming appropriately qualified inspectors, this proposal is riddled with potential violations of the Constitution. The most significant is that violation of any federal anti-obscenity law is a felony, *e.g.*, 18 U.S.C. §§ 1461, 1462, 1465 and 1466, as is violation of the obscenity laws of many states, *e.g.*, OKLA. STAT. ANN. TITLE 21 § 1021 and N.D. CENT. CODE § 12.1-27.1-01, including some states that define the offense as a felony, notwithstanding the fact that the punishment is more akin to that generally associated with a misdemeanor. *E.g.*, ARIZ. REV. STAT. § 13-3502, LA. REV. STAT. ANN. § 14:106 and OHIO REV. CODE ANN. § 2907.32. Moreover, of course, violation of 18 U.S.C. § 2257 itself is a felony. Accordingly, this proposed regulation authorizes an inspecting law-enforcement officer to seize an extraordinarily broad array of evidence items.

Most striking is the authorization concerning obscenity offenses. The Supreme Court has long held that a prior restraint of speech cannot be brought about absent appropriate procedural safeguards. As explained in *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986):

> "We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. In *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), for example, we held that the police may not rely on the 'exigency' exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a 'prior restraint.' In *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), we had gone a step farther, ruling that the large-scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity. In *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a 'prior restraint,' but instead would merely preserve evidence for trial, the seizure must be made

> pursuant to a warrant and there must be an opportunity for a prompt postseizure judicial determination of obscenity. And in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity. *Marcus*, *supra*, at 732, 81 S.Ct., at 1716; *see also Stanford v. Texas*, 379 U.S. 476, 486, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965)." 475 U.S. at 873-74.

The proposed regulation fails to take the above into account. For example, if an inspecting law-enforcement officer personally believes that a particular motion picture is obscene, although it never has been so adjudicated, this regulation allows the officer, upon reviewing the copy of it that is required to be kept with the records pursuant to the proposed § 75.2(a)(9)(i), to seize, with no warrant, every copy of the motion picture, along with any document constituting evidence of the operation of the production company involved in its distribution. As noted above, a warrant authorizing the very same seizure would be held invalid under the special constitutional protections afforded to expressive material. In another example, if while inspecting an Internet company an inspecting law-enforcement officer found in the records a depiction that the officer personally regarded as obscene, the inspector by this regulation is authorized to seize the computer that is disseminating the Web site, along with any records that evidence the operation of the Web site.

It is not only obscenity offenses that are problematic. Similar drastic consequences are authorized where an inspecting officer, for example, in reviewing the records of a particular performer for compliance with these regulations, finds that the records omit one of the stage names that the inspector remembers that the performer had used, there is little limit as to what the officer could seize in an effort to demonstrate that the omitted stage name was known to the producer. To the extent that records are kept and indexed on a computer – which is effectively required because of the extensive indexing requirements of proposed §§ 75.2(a)(3) and (d) and 75.3 – the officer's observation of a single violation of these regulations, no matter how technical, would authorize the seizure of at least the computer and all backup files, as well as any paper records that might evidence anything about the operation of the subject business. Seizure of every copy of a producer's records that are kept as required by these regulations not only places a producer in the untenable position of being unable to comply with the statute for want of records, it also has the effect of preventing the producer from, for example, continuing to operate the producer's Web site or selling motion pictures, neither of which can be done without the infrastructure to comply with these regulations. This is akin to seizing the projector from a movie theater, a practice that has been universally

condemned by the courts as an unlawful prior restraint of speech, back when local police departments occasionally would engage in such tactics. *E.g.*, *Maguin v. Miller*, 433 F.Supp. 223 (D. Kan. 1977) and *Bongiovanni v. Hogan*, 309 F.Supp. 1364, 1366 (S.D.N.Y. 1970); *see also Southland Theatres, Inc. v. Butler*, 350 F.Supp. 743, 745 (W.D. Tex. 1972)(return of the projectors was ordered.). More to the point, even if one of the films eventually were to be adjudicated obscene, the business cannot be closed as a consequence, regardless of procedural safeguards, *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), much less on the inspecting officer's personal conclusions alone with no judicial intervention.

Additionally, this broad provision runs afoul of established, constitutional limits on search and seizure. Assuming *arguendo* that law-enforcement officer inspector is properly entitled to conduct an inspection according to these regulations, the inspector's broad authority that would be authorized by this seizure proposal runs afoul of established rules concerning search and seizure. The effect of this regulation, as proposed, fails the requirement that administrative searches be "carefully limited in time, place, and scope." *New York v. Burger*, 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), *citing United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). Viewed another way, "if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment – or at least no search independent of the initial intrusion that gave the officers their vantage point." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). And "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Id.* at 374. This proposed regulation ignores the caveats established by these cases. Nothing in the regulation at all limits the scope of the search or confines that which can be seized to either what is incidental to the search or what is of immediately apparent incriminating character. If the evidence of commission of a felony is found in the records themselves, those records can be copied pursuant to § 75.5(e) and according to the recent amendments to the underlying statute, used against the business maintaining the records.

As a last point with respect to seizure, all of the wrongs that would be authorized should this provision be adopted are exacerbated by the Department's requirement that the records be kept and made available for inspection at the producer's/custodian's place of business which, in the case of an increasingly large number of producers, means the producer's residence. The prohibition against third-party custodians, which has been the Department's consistent position, allows the law-enforcement inspectors to engage in this intrusive search and seizure activity in a producer's residence. The home has consistently been afforded the highest level of constitutional protection against unreasonable searches and seizures by the courts.

Finally, § 75.5(e) allows the inspectors without any limitation to copy "any" record subject to inspection. The absence of limitation allows the inspectors to copy *every* record subject to inspection, which means *every* record of *every* depiction that the

producer has made since the effective date of these regulations. The impact of this is to allow the Department to amass a database about every performer involved in these productions. There is no need for the Department to create a database of performers' records merely to satisfy its idle curiosity. This proposed regulation allows the Department to do indirectly that which it cannot do directly, which is to force the industry to produce the functional equivalent of membership lists of people engaged in constitutionally protected (*albeit* controversial) activity. The Supreme Court long ago rejected such a practice. *National Ass'n. for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

Suggested Remedy

Delete proposed § 75.5(e), and limit § 75.5(g) to copying at no expense to the producer, rather than seizure.

VIII.

EXEMPTIONS FROM THE BURDENS IMPOSED ON "PRODUCERS" SHOULD ADDITIONALLY INCLUDE PRINTERS, AS WELL AS WEB HOSTS, DUPLICATORS OF VIDEOTAPES, DVDS, AND OTHER MEDIA

Apart from the fact that a mere printer, video duplicator, DVD replicator or duplicator of other media must be excluded from the requirements imposed upon producers because to do otherwise would exceed statutory authority according to the *Sundance* case, *supra*, there is no practical need for those entities to be subject to the requirements imposed upon producers. Nevertheless, both the original regulations and the proposed new ones broadly impose such burdens upon printers and the like. Moreover the failure to exclude "printers, film processors, and video duplicators whose sole function is to provide similar services to a producer" fails to take into account the holding in *American Library Ass'n. v. Reno*, 33 F.3d 78, 94 (D.C. Cir. 1994), invalidating the statute and regulations to the extent that they apply to those functions.

Background

The proposed regulations include a definition of "producer" that includes a "secondary producer", which would include printers, videotape duplicators, DVD replicators and, but for the express exception in proposed § 75.1(c)(4)(i), photo processors. In *American Library Ass'n. v. Reno*, 33 F.3d 78, 94 (D.C. Cir. 1994), the court addressed this issue:

> "The next objection concerns the inclusion within the definition of 'secondary producers' of persons who duplicate or reproduce sexually explicit materials that are

> intended for commercial distribution. 28 C.F.R. § 75.1(c)(2). Appellees [challenging the regulations] point out that such persons include printers, film processors, and video duplicators whose roles are functionally indistinguishable from that of photo processors, who are specifically excluded from the definition of 'producer.' See . . . § 75.1(c)(4)(i). As we understand the photo processing exception, it applies to persons to whom a producer delivers films for development or the making of prints and who, on completing their work, return the films and prints to the producer. The Government does not explain what interest is served by according different treatment to printers, film processors, and video duplicators whose sole function is to provide similar services to a producer. We agree, therefore, that the Act does not apply to persons who perform such services and return their work product to the producer who employed them."

The regulations should respect the decision of the court on this point. Moreover, those who perform solely those functions are engaged in "activity which does not involve hiring, contracting for[,] managing or otherwise arranging for the participation of the performers depicted." Accordingly, the *Sundance* case, *supra*, likewise prohibits imposing producer requirements on those engaged in the above functions.

Suggested Remedy

At the very least, § 75.1(c)(4) of the proposed regulations should be altered to specifically exclude from the definition of "producer" those "persons who perform only duplication services, and return their work product to the producer who employed them." More appropriately, the entire holding of the *Sundance* case should be embraced.

IX.

THE REQUIREMENTS CONCERNING THE SIZE AND LOCATION OF THE STATEMENT ARE UNREASONABLE IN MANY RESPECTS

When evaluated in the context of real-world publications of magazines, motion pictures and Web sites, the regulations concerning the size and location of the required statement are sometimes overly burdensome in some instances, vague in others and, in still others, do not make practical sense or reasonably further any legitimate purpose of the statute. The requirement that the typeface of the statement be at least as large as the largest typeface of the performers, director, producer, or owner, for example, likely would require the typeface of the statement in a magazine be the same size as the title,

which might easily be 100-200-point. Likewise, with respect to a motion picture, a title screen of a motion picture often names the producer in a typeface equal to the title which, again, would cause the typeface for the statement to be very large. Further, the minimum requirement of 11-point type on a videotape, DVD or Web page is immeasurable because the typeface of the statement is a function of the screen dimensions and settings of the monitor on which the material is viewed.

Background

Section 75.6(e), as proposed, requires that the statement be in the type size at least as large as the largest used to identify a performer, director, producer or owner, or in any case no smaller than 11-point-type, in black and white, un-tinted background. However, the 11-point-type requirement is meaningless in the context of cyberspace. The type display size will depend on the size of the monitor and/or chosen screen dimensions. Most Windows-based programs for example, allow for modification of screen size with a click of a mouse, which consequently modifies the type size of all text. Reference to any type size is illogical as it pertains to digital display. The same is true for video media, where the size of the typeface is a function of the size of the video monitor on which the matter is viewed.

Moreover, requiring the disclosure to be in a size equal to the largest used to identify a performer, director, producer or owner is overly burdensome, and amounts to forced speech that significantly impacts the message being conveyed in the media. Many adult-oriented websites use the name of the performer as the title of the website, which is often in very large type, which is typical of titles in any form of media. Requiring the disclosure to be in the same sized type as the title, forces the webmaster to substantially reduce the title size, or provide for a disclosure in huge letters, taking up many web pages of space.

With respect to many magazines, the title is often the name of the owner or producer. Titles, of course, are invariably in a very large typeface. The unreasonableness of a requirement of a statement in 144-point type, for example, is obvious. Similarly, the star performer in a motion picture or its producer often appears above the title and in an equally large typeface. This creates an equally unreasonable regulation.

Finally, the requirement that the type be "black on white, untinted background" is unreasonable. Many web pages use templates for their creation, wherein each page is the same color throughout the website. Requiring the first page to be white, with black type, could require substantial redesign of entire websites, merely to comply with the disclosure requirement. Such requirement would also potentially interfere with the theme and message sought to be conveyed by imposing artistic and editorial control on webmasters under penalty of fine and incarceration.

Suggested Remedy

Require only that the disclosure to be plainly viewable by the reader, thereby allowing the publisher or webmaster to choose the size of the text, along with the theme and color of the background.

X.

WITH RESPECT TO DVDS AND COMPARABLE MEDIA, THE LOCATION OF THE STATEMENT SHOULD BE SPECIFIED

DVDs were not in existence at the time the original regulations were promulgated, they are not considered by the proposed, amended regulations and, as they now are likely the most popular means of distribution of motion pictures, should be addressed by the regulations. Given the mechanism by which DVDs operate, it would be entirely consistent with the stated purpose for the statute to allow the statement to appear either on the opening screen or, in the alternative, on a conspicuous screen accessible from the opening screen.

Background

The required location of the statement is defined by the proposed regulations as follows:

> "§ 75.8 Location of the statement.
>
> "(a) All books, magazines, and periodicals shall contain the statement required in § 75.6 or suggested in § 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 that contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in § 75.6 or § 75.7 shall be presented at the 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 . . ..
>
> "(e) 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."

Other than the addition of vague requirements for locating the statement on Web pages (addressed elsewhere), this regulation, as proposed, would remain unchanged. DVDs are eclipsing videotapes as the preferred medium for prerecorded motion pictures. The functionality of DVDs is different from videotapes in that the latter, like motion picture film, is simply played from beginning to end (videotapes having the additional fast-forward and fast-reverse functions). DVD technology allows that functionality, but the more popular format allows a "home" screen, allowing the viewer to choose from various functions, such as out-takes, previews of other motion pictures, interviews with the performers or the director, jumping to a particular point in the motion picture (to allow resumption of viewing after only viewing part of the motion picture), along with simply playing the motion picture from start to finish. The purposes of the statute could be served completely if the regulations allowed one of the selections on the "home" screen to direct the viewer to the disclosure required by the statute.

Additionally, the proposed regulations are perplexing in some circumstances with respect to DVDs. For example, a DVD could contain more than one motion picture, with a home screen allowing the viewer to select from two or more that are available. Other DVDs have one motion picture available in multiple languages or varying screen formats. It is not clear from the regulations where the disclosure should be situated, on the home screen, at the beginning of the motion picture selected from the home screen, or along with the end credits found at the end of the motion picture(s).

Suggested Remedy

Add a subsection to § 75.8 specifying where the statement should be placed on a DVD. The most practical and reasonable method would give the producer the option of either placing the statement on the first screen displayed or, alternatively, displaying it on a screen that can be selected from the first screen displayed.

XI.

THE REQUIREMENT WITH RESPECT TO THE LOCATION OF THE STATEMENT IN MOTION PICTURES AND VIDEOTAPES IS UNREASONABLE

Both as written and according to the proposed, amended regulations, the statement with respect to motion pictures and videotapes is required to be at the beginning of the tape unless there are end titles or end credits to the motion picture, in which case the statement must be associated with the end credits. Since "end credits" and "end titles" can be ambiguous in the context of current videotapes, the producer should always be given the option of placing the statement at the beginning of the videotape or motion picture.

Background

For reasons that never have been made clear, the regulations as originally promulgated and as now proposed require that the statement on motion pictures be at the beginning of the motion picture but, if there are end titles or credits, with them, then the statement must be associated with them:

> "(b) In any film or videotape that contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in § 75.6 or § 75.7 shall be presented at the 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." 28 C.F.R. § 75.8(b-c).

From the standpoint of producers, this regulation is onerous because some statements at the conclusion of a motion picture may or may not consist of an "end title" or "end credit", depending upon how those terms are interpreted. For example, if at the conclusion of the motion picture there is a copyright notice identifying the producer, is that an "end credit"? Is one "credit" sufficient to require that the disclosure be at that point, or must there be more?

Suggested Remedy

28 C.F.R. § 75.8(b-c) should be combined and modified to state,

"Any 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. If the film or videotape has one or more end titles or end credits, the required statement may, instead or in addition, follow the final end title or end credit."

XII.

THE REQUIREMENTS THAT THE REQUIRED RECORDS BE ENTIRELY SEGREGATED FROM ALL OTHER RECORDS AND NOT CONTAIN ANY OTHER RECORDS ARE AT ODDS WITH THE PURPOSE OF THE ACT AND PLACE AN UNNECESSARY BURDEN ON THE RECORD KEEPER

The proposed regulations require that the required records be entirely segregated from and not contain any records other than those required to be maintained under the statute and regulations. While producers as a general matter would be expected to segregate required records simply to protect the integrity of trade secrets and other confidential information, an absolute ban on commingling any non-required records prevents, for example, inclusion of a copy of a second form of identification or additional information that would be helpful in locating performers.

Background

28 CFR § 75.2(e), as proposed, says, "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 [emphasis added]." While technically feasible, conforming to this regulation is extremely impractical. As proposed, the regulation essentially defines as a felony including one item of information not required by the statute and regulations. This, for example, would prohibit the careful producer from retaining copies of additional identification documents or information that would assist in locating the performer. All of that runs counter to a stated purpose of the statute and regulations, to identify performers who may have been photographed when underage.

There are legitimate business reasons for generally segregating the required records from a producer's general business records. To do otherwise would cause inspections to be disruptive to the producer's business operation. Additionally, commingling records could give inspectors access to trade secrets and other sensitive information that should not be public. Thus, this proposed regulation is not necessary.

Indeed, in articles written about the subject, lectures and legal advice given to producers, attorneys for the industry have uniformly advised producers to keep records required by these regulations segregated from other company records. Almost uniformly, producers are following this practice with no known exceptions.

A practical problem created by this requirement which results in it being unreasonable arises from the use of a computer to keep the records, which is effectively mandated for all but the smallest producers because of the indexing requirements of §§ 75.2(a)(3), 75.2(d) and 75.3. Even assuming that the producer uses a computer with no information stored on it other than records required by these regulations, those records are not entirely segregated from each other because they all are found on the same storage device (*e.g.*, hard disk); and the computer must contain other data, such as executable programs, cache files, and so on.

Suggested Remedy

Delete 28 CFR § 75.2(e). Alternatively, modify it to require that the records "should be segregated from *materially all* other records, shall not contain any unrelated records . . . ," and to take into account the reality that records often will be kept on computers.

XIII.

THE REGULATIONS IMPOSE UNREASONABLE AND VAGUE REQUIREMENTS UPON OPERATORS OF WEB SITES

Section 75.2(a)(1)(ii), as proposed, requires that the records must include "where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction." This requirement is vague, and subject to misinterpretation, and inadvertent noncompliance. The regulations must clarify what information, exactly, must be included with the depiction in terms of a URL or domain name, and limit it so as to be reasonable.

Background

According to The American Heritage® Dictionary of the English Language (Houghton Mifflin 4th ed. 2000), "URL means:

> "An Internet address (for example, *http://www.hmco.com/trade/*), usually consisting of the access protocol (*http*), the domain name (*www.hmco.com*), and optionally the path to a file or resource residing on that server (trade)."

Thus, even according to a recognized lexicon, "URL" is a vague term. For example, using the above, simply a copy of the letters "*http://www.hmco.com/trade/*" may or may not be in compliance. Or, again using the above, a photocopy of what appears on *http://www.hmco.com/trade/* may, or may not, be compliant. But the language of the proposed regulation, requiring a copy of "*any* URL *associated with* the depiction," could easily be interpreted to include a copy of every page on the entire Web site on which the image is published. Thus, another interpretation, using the above example, would require all of the pages associated with *http://www.hmco.com/* to be recorded, which would be the entire Web site. Many of them include hundreds or thousands of pages and images.

Assuming the webmaster could determine which "URL" to copy (unless it were limited to simply the URL address, *e.g.*, *http://www.hmco.com/trade/*), the webmaster is next faced with the dilemma arising from the fact that, unlike print and motion picture media, Web pages regularly change, some every day. For example, materially every major newspaper – and for that matter, most every non-major news publications – has an "online edition", the content of which changes at least at the rate of publication (*i.e.*, daily, weekly, etc.), and often hourly. Adult entertainment Web sites are no different, updating content on a regular basis. Thus, this regulation may leave webmasters with the daunting and unacceptably burdensome task of changing all of the required records every time a Web page is changed.

Arguably, however, the above requirement, as written, requires only a copy of the URL at the time the record is made, and does not require updating. If that is the case, then this is duplicative of the preceding requirement that the records include "a copy of the depiction."

Finally, imposing the burden of continuously updating the copy of the URL serves no purpose sufficient to justify that burden. The presumed purpose of it, to allow inspectors to correlate the performers with the depictions, is not furthered by requiring continuous updating of the records in that regard.

Suggested Remedy

Eliminate § 75.2(a)(1)(ii).

XIV.

THE REQUIREMENT OF INCLUDING A COPY OF THE DEPICTION IS VAGUE AND OVERLY BURDENSOME

Section 75.2(a)(1)(i) requires that a "copy of the depiction" be kept with the age records pertaining to all content subject to the requirements of § 2257. The requirement is vague and overly burdensome.

Background

In the context of traditional media, compliance with this requirement means that a copy of an entire motion picture or magazine be in the file along with the balance of each of the performer's records. This serves no purpose, so long as the depiction is adequately identified. The regulations already require a copy of an identification card containing the performer's photograph, along with records identifying the material(s) in which the performer is depicted. Thus, faced with the need to verify that a particular performer appeared in a motion picture or magazine in question, the records already identify the motion picture or the issue of the magazine in which the performer can be found, along with a photograph of the performer found on the identification document. Thus, this requirement is duplicative.

The requirement also is particularly burdensome. To the records already required, this adds that a copy of the material be associated with each performer depicted in it. Thus, for example, if a publisher produced a magazine depicting 50 individuals, the publisher would be required to cram 50 copies of the magazine in with its records – for each month, assuming a monthly publication. The problem is magnified with respect to videotapes, and particularly motion pictures recorded on traditional film (a print of a typical motion picture feature length film consumes one or two cubic feet of space).

Of particular concern would be streaming video that changes from day to day, even hour to hour. It would be a near impossibility for a webmaster to keep a "copy" of digital media generated from a camera that may be running as much as 24 hours per day in one of the many "voyeur rooms" or "voyeur houses" available for access online.

In sum, this requirement serves little or no useful purpose, but is extraordinarily burdensome on publishers.

Suggested Remedy

Eliminate § 75.2(a)(1)(i-ii).

XV.

CATEGORIZATION REQUIREMENT

Sections 75.2(a)(3), 75.2(d) and 75.3 require that all records be retrievable in the following manners: 1) alphabetically; 2) numerically; 3) by legal name; 4) by alias; 5) by maiden name; 6) by nickname; 7) by stage name; 8) by professional name; 9) by title; 10) by number; 11) by "similar identifier of the media." This is unreasonably burdensome on producers. Moreover, as proposed, the amended regulations would set forth indexing requirements in three places, §§ 75.2(a)(3), 75.2(d) and 75.3. The addition of § 75.2(d), to the extent that it is not duplicative of what already is found in §§ 75.2(a)(3) and 75.3 is unreasonable, particularly if applied to secondary producers.

Background

As proposed, 28 C.F.R. § 75.2(a)(3) states:

> "(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, computer-generated image, digital image, picture, URL, or other matter."

The above is identical to the existing regulations, except that it adds "computer-generated image, digital image, picture, URL," which is not a material change given the "or other matter" language, a catch-all that would have included computer-generated images in any event (assuming that they are images of actual persons[6]). The same is true with respect to § 75.3, which, as proposed, would provide:

> "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, computer-generated image, digital image, picture, or other

[6] The industry always has assumed – and there is no reason to believe otherwise – that § 2257 does not apply to visual depictions that are not of actual persons, given that it would be impossible to have an "identification document" for other than a natural person. Moreover, *actual* sexually explicit conduct can only take place between actual, natural persons.

> matter. 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."

Notwithstanding the above, comprehensive indexing requirements, the proposed, new regulations add a third indexing requirement, largely duplicative of the first ones:

> "(d) For any record created or amended after [insert date 30 days after publication of the final rule in the Federal Register], all such records 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, computer-generated image, digital image, picture, or other matter (including but not limited to Internet computer site or services). If the producer subsequently produces an additional book, magazine, film, videotape, computer-generated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of actual 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."

First, it makes no sense to include three subsections that address indexing of records. And to the extent that this new section adds anything, either legally or in practice, to the existing requirements of §§ 75.2(a)(3) and 75.3, it is unimaginable that it is necessary. Indeed, the requirements are unduly burdensome as they exist.

In practice, the indexing requirement for the most part accomplishes little. If it is necessary to determine the date of birth of a performer, that can be accomplished with little indexing. So long as the records, for example, associated with the performers in a particular motion picture or magazine list the actual names of those depicted therein, the inspector can turn to the records concerning the particular performers. Otherwise, the burden of the required indexing is not justified by what it might accomplish. Most performers who appear in multiple motion-picture productions, multiple magazines or multiple Web sites, work for many producers. And since the indexing is on a producer-by-producer basis, if the objective of the indexing is to locate other places that a

particular performer has appeared, the most cursory search of the Internet is likely to produce profoundly more useful information.

Worse, if this requirement is allowed to apply to secondary producers, materially every adult Web site displaying images to which § 2257 applies will be required to create a computer database which likely will be more costly than is the operation of the site.

Suggested Remedy

Delete 28 C.F.R. §§ 75.2(d) and 75.3, and modify 28 C.F.R. § 75.2(a)(3), limiting the mandated indexing to a requirement that the records associated with any motion picture, magazine, or Web site include the actual names of all relevant performers or models[7] depicted therein.

XVI.

THE SEVEN-YEAR REQUIREMENT

Section 75.4 requires that the records be maintained for seven (7) years from the last amendment to the record. This is unreasonable, and contrary to the decision of the United States Court of Appeals for the District of Columbia Circuit.

Background

In *American Library Ass'n. v. Reno*, 33 F.3d 78 (D.C. Cir. 1994), the Court held that the open-ended requirement in the present regulation was unreasonable, rendering a saving construction:

> "Pending its replacement by a provision more rationally tailored to actual law enforcement needs, we will accept a period of five years as reasonable. We do so because it conforms with both the five-year statute of limitations applicable to the Act, 18 U.S.C. § 3282 (1988), and the minimum period recommended by the Pornography Commission." Final Report[8] at 621." *Id.* at 91.

---

[7] There may be portions of, for example, a motion picture or a magazine that do not contain any visual depiction of actual sexually explicit conduct. Accordingly, there need not be any records with respect to the performers depicted in those scenes so long as they are not in other scenes depicting actual sexually explicit conduct. A good example of this is an advertisement in a magazine, where the advertisement contains no depiction of actually sexually explicit conduct, but such depictions are found elsewhere in the issue.

[8] Attorney General's Commission on Pornography, Final Report (1986)

There is no justification for requiring that records be retained for more than five (5) years. Nor is there justification for the requirement later in § 75.4 that the records be kept for five (5) years after the dissolution of the relevant organization. In total, § 75.4 can require that a record be retained as long as 12 years after its last amendment.

Suggested Remedy

Re-write the regulations to state that, notwithstanding any other requirement of these regulations, records need not be retained more than 5 years after the making of the depiction.

XVII.

THE SELLER'S ACCURACY BURDEN

Section 75.6(d) requires that "[t]he information contained in the statement must be accurate as of the date on which the [material] . . . is sold, distributed redistributed, or re[-]released." 18 U.S.C. § 2257(f)(4), in turn, defines a felony criminal offense for selling or transferring materials covered by the statute and regulations without "a statement describing where the records required by this section may be located." As written, the regulation could be construed to prohibit a wholesale or retail distributor from selling materials with an outdated statement, notwithstanding the statutory caveat that "such person shall have no duty to determined [*sic*] the accuracy of the statement or the records required to be kept."

Background

In interpreting § 2257 and the current regulations, the court in *American Library Ass'n. v. Reno*, 33 F.3d 78 (D.C. Cir. 1994) found that the requirement that the statement be accurate as of the date of sale, etc., could not be applied to re-sellers:

> "On its face, the regulations' updating requirement would reach wholesale and retail transactions that lie entirely beyond the scope of the Act. *See id.* at § 75.1(d) (defining 'sell, distribute, redistribute, and re[-]release' to include 'commercial distribution of a book, magazine, periodical, film, videotape, or other matter' covered by the Act). The Act, however, imposes the obligation to keep records and affix statements only on those who 'produce[ ] any book, magazine, periodical, film, videotape, or other matter which . . . contains . . . depictions . . . of actual sexually explicit conduct,' 18 U.S.C. § 2257(a)(1); and it defines 'produces' to mean 'produce, manufacture, or publish any

> [such material] . . . and includes the duplication, reproduction, or reissuing of any such matter.' *Id.* § 2257(h)(3). Because the Act does not apply to those solely engaged in the sale of these items, its requirements may not be imposed on them. The Act cannot be read to require a magazine vendor, for example, to revise the statement in a pornographic periodical 'as of the date on which [it] is sold' to a consumer." *Id.* at 93.

The proposed regulations ignore the above.

Suggested Remedy

Modify § 75.6(d) to require only that "[t]he information contained in the statement must be accurate as of the date on which the [material] . . . is sold, distributed redistributed, or re-released *by the primary producer*."

XVIII.

THE BURDEN OF VERIFYING PERFORMERS' ALTERNATIVE NAMES

Section 75.2(a)(2) requires that the producer obtain from the performer "any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name." Arguably, this requires some variety of verification from the performer, although the Department has taken the position that the producer need only inquire of the performer and accept as true the performer's response. The regulations, as written and as proposed, if construed literally would hold the producer responsible for the difficult task of verifying the accuracy of each of the names given by the performer and the impossible task of insuring that the performer did not omit any name.

Background

A statement of a person's family history, which would include a name maiden name or a nickname, is a recognized exception to the hearsay rule. *E.g.*, FED. R. EVID. 804(b)(4). If there is not a dispute at the time, legal scholars tell, it can be considered sufficiently trustworthy that it is admissible. If there is an issue of trustworthiness, as may be the case in this instance as to the performer's identity or date of birth, it does not apply. Thus, the requirement that the producer examine an identification document is not unreasonable (at least whether the performer is over 18 years of age might be called into question). However, a statement of someone's maiden name or nickname has no lack of indicia of trustworthiness. Producers should be allowed to take the performer's word for those facts.

More fundamentally, however, is that there is usually no other source. Unlike a person's legal name, which can be verified – more or less – by documents such as drivers' licenses, there is no source for verification that a list, for example, of stage names is complete. If, for example, a producer knows that a performer has a stage name that the performer did not list, failure to include that name in the records likely would violate § 2257(f)(2). But a producer cannot determine the negative. If a performer has used a particular stage name, but fails to reveal it to the producer, it is unfair to hold the producer responsible

Suggested Remedy

Add to § 75.2(a)(2) a caveat, similar to that found in § 2257(f)(4), that the producer "shall have no duty to determine the accuracy of the performer's representations beyond examining the required identification document."

XIX.

THE IDENTITY OF INSPECTORS AND THEIR CREDENTIALS MUST BE ADDRESSED IN REGULATIONS

The regulations permit the Department to appoint inspectors on an *ad hoc* basis. Moreover, there are no standards for inspectors, so the Department can appoint as inspectors anyone ranging from private censorship groups to convicted felons. Additionally, there is nothing found in the proposed regulations establishing any identification cards or credentials for the inspectors, leaving producers prey to imposters.

Background

Proposed 28 U.S.C. § 75.5(a) states:

> "(a) Authority to inspect. Investigators designated by the Attorney General (hereinafter 'investigators') are authorized to enter without delay and at reasonable times (as defined in subsection (c)(1)) any establishment of a producer where records under § 75.2 are maintained to inspect, within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of 18 U.S.C. 2257."

However, the underlying statute requires only that the records be made "available to the *Attorney General* at all reasonable times [emphasis added]." 18 U.S.C. § 2257(c). The Department obviously takes the position here that Congress could not have intended

to limit the inspection privileges exclusively to the Attorney General – the member of the President's Cabinet – personally. What Congress clearly did not do, however, is allow the Attorney General to deputize any private citizen to conduct inspections under this Act. And there are good reasons Congress did not write such expansive language as is found in the regulations.

28 U.S.C. § 515 defines persons who can act for the Attorney General:

> "Authority for legal proceedings; commission, oath, and salary for special attorneys
>
> "(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.
>
> "(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney."

The proposed regulations are not authorized by Congress to the extent that they allow inspections by other than those persons identified in § 515, above. Worse, the regulations do not identify any class of persons or qualifications required for those designated as inspectors. There is a good reason why Congress enacted § 515 and why the Department of Justice has rigorous standards for employing attorneys. This regulation empowers a low-ranking attorney in the Department to deputize virtually anyone as an investigator. And, although it can be presumed that those appointed as investigators would not be convicted felons or minors, certainly zealots who oppose any form of erotic expression will be knocking on the Department's door to volunteer.

While it is doubtful that anyone other than those identified in § 515 could legally be appointed as inspectors, at the very least the class and qualifications for inspectors must be included in the proposed regulations and subjected to public scrutiny and comment. Indeed, the list of each individual proposed as an investigator should be subject to such scrutiny.

Most important is that individuals who fall under § 515 are issued identification badges by the Department of Justice. A producer subject to an inspection can become acquainted with the character of those identification badges, as is done with drivers' licenses to identify the age of a performer, so as to be able to verify the credentials of a purported inspector.

The records required by § 2257 maintained contain very sensitive information, most significantly the residence address of a performer. Under the proposed regulations, that places a producer confronted with someone claiming to be an inspector in an untenable position. The producer could be guilty of a felony by refusing to allow the inspection, or could subject performers to harassment by allowing an imposter to inspect and copy the identification documents.[9]

If inspections are to be allowed by other than Department of Justice Attorneys – the legality of which is doubtful – the Department must, by regulation, create a special identification document (such as a card), affirming the inspector's appointment by the Attorney General. By so doing, producers can learn to recognize such documents, thereby knowing whether the inspector is bona fide or an imposter. By the creation of such an identification document, anyone forging one would be subject to punishment under 18 U.S.C. § 1028, and other anti-forgery statutes.

Suggested Remedy

Modify the proposed § 75.5(a) to replace "Investigators designated by the Attorney General" with "The Attorney general and anyone designated by 28 U.S.C. § 515". In any event, the investigators must be specifically defined, and an identification document establishing authority to conduct inspections must be created.

XX.

THE EXCLUSIONS FOR WEB HOSTING SERVICES

The exclusion from the definition of "producer" of certain Web hosting services exceeds the Department's regulatory authority, and is vague and inadequate, ignoring the realities of the Internet.

Background

Section 75.1(c)(4)(iv) excludes from the definition of a producer "a provider of web hosting service who does not manage the content of the computer site or service." This exclusion is vague, and does not clearly exempt all hosts and other service providers

[9] This is for exactly that reason that California has excluded drivers' license records from the public. CAL. VEHICLE CODE § 1808.21(a).

who merely allow for access to some form of online content without exercising editorial decisions over the content. For example, some hosts or service providers may exercise editorial or managerial control over some forms of content online, such as free hosts who include banner advertisements on the display of various websites, as their means of revenue generation. Other hosts may, to a certain extent, control the way in which content is displayed, thus, potentially removing those hosts from the scope of the exemption. To include them would apparently contradict the presumed intent of the exemption.

More fundamentally, however, the exclusion must be broadened to embrace the decision in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998) which, as explained earlier, prohibits the regulations from requiring record keeping by anyone involved only in an activity "which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted."

Suggested Remedy

Combine 75.1(c)(4)(iv) and 75.1(c)(4)(v), to state, "A provider of Web-hosting services, of an electronic communication service or of a remote computing service engaged only in activity that does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted." At least, the word "content" should be modified with the words "sexually explicit," thereby changing the definition to "a provider of web hosting services who does not manage the sexually explicit content of the computer site or service."

XXI.

THE LOCATION OF THE DISCLOSURE ON A WEB SITE

The required location of the disclosure on a Web page is unreasonable and vague.

Background

As proposed, § 75.8(d) requires:

"A computer site or service or Web address containing a computer-generated image, digital image, or picture, shall contain the required statement on its homepage or principal URL."

This creates several problems. First, many websites operate under a "sub-domain" business model, wherein a particular domain can have hundreds or thousands of sub-domains, making the "principal URL" or "homepage" difficult to identify with certainty. Moreover, requiring the entire text of the disclosure, which may involve

records custodian names and addresses for many content producers, which in some cases may consume pages and pages, will substantially interfere with the content and message sought to be conveyed on websites complying with the disclosure. The homepage of a Web site is often designed to be quickly loaded by a user's computer because studies have established that Web surfers will not wait very long for a page to load; but will instead stop the loading process and go to another website if any substantial delay is generated by the loading of too much information on a homepage. Requiring the disclosure statement to be contained on the "homepage" or "principal URL" may cause significant downloading delays, resulting in lost user traffic and reduced revenue.

Moreover, an alternative that would be perfectly acceptable and consistent with the purpose of the statute would be to establish a link on the home page, directing the viewer to a page where the required information is displayed. Many Web site operators have adopted that approach, and in no case is there any difficulty locating the statement. Further, that approach allows the webmaster to place the link on a number of different pages where there might be some doubt as to which is the homepage or principal URL.

Suggested Remedy

Rewrite § 75.8(d) to state, "An interactive computer service shall contain the required statement either on a document that can be viewed by utilizing a conspicuous link from the first page accessed, or on that page."

Respectfully submitted,

WESTON, GARROU & DEWITT

12121 Wilshire Boulevard, Suite 900
Los Angeles, CA90025
(310) 442-0072
Fax (310) 442-0899

781 Douglas Avenue
Altamonte Springs, FL 32714
(407) 389-4529
Fax (407) 774-6151

Dated: August 24, 2004