

# From the Protection of Children Against Sexual Exploitation Act of 1977 to the Adam Walsh Child Protection and Safety Act of 2006: How Congress Went From Censoring Child Pornography to Censoring Protected Sexual Speech

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## Introduction

In 1990, police officers and sheriff's deputies ordered visitors to leave the Contemporary Art Center in Ohio while the officers videotaped evidence of Robert Mapplethorpe's photo exhibit.<sup>1</sup> The photos consisted of two children with exposed genitals juxtaposed with men engaging in sadomasochistic acts.<sup>2</sup> A grand jury indicted the art center and its art director on obscenity charges.<sup>3</sup> But during the trial, the jury found that the art center's display of Mapplethorpe's works was protected by the First Amendment and, therefore, acquitted the art center and its director.<sup>4</sup> Mapplethorpe's case is not an isolated incident. In 1994, local officials

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1. Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 245 (2007).

2. *Id.*

3. *Id.* at 245–46, 285.

4. *Id.*

locked down an art gallery in Louisiana and removed two of Roberta Cohen's drawings.<sup>5</sup> One of the drawings depicted a nude faceless man with an erection choking a nude faceless woman.<sup>6</sup> Cohen found that roughly four thousand women in the United States die each year because their husbands beat them to death.<sup>7</sup> Although Cohen artistically portrayed the grim reality of sexual violence, visitors complained that her work was "pornographic" and unsuitable for display in an art gallery.<sup>8</sup>

Mapplethorpe and Cohen were denied their right of expression in the name of combating obscenity.<sup>9</sup> Today, sexual expression is restrained in the name of child pornography.<sup>10</sup> In 2005, the United States Department of Justice established the Obscenity Prosecution Task Force.<sup>11</sup> One of the weapons in its arsenal is the record-keeping requirement as codified in 18 U.S.C. § 2257. Originally, § 2257 was designed to supplement existing anti-child pornography statutes. However, § 2257 in its current form is so broad that it infringes on constitutionally protected speech.<sup>12</sup> As such, the

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5. NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 160-61(1995).

6. *Id.*

7. *Id.*

8. *Id.*

9. Obscenity is the first area of sexual expression that was denied protection under the First Amendment. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press.").

10. In 1977, Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 ("1977 Act") to eliminate the "highly organized multimillion dollar industries that operate on a nationwide scale" that produce child pornography. S. REP. NO. 95-438, at 3 (1977) (Conf. Rep.). Since the 1977 Act, anti-child pornography laws have been amended five times to remedy constitutional violations and to expand the scope of the laws. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984); Child Protection and Obscenity Enforcement Act of 1988, 134 Cong. Rec. E3750-0 (1988); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 311, 104 Stat. 4789 (1990); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 511, 117 Stat. 650 (2003); and Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502, 120 Stat. 587 (2006).

11. United States Department of Justice, Obscenity Prosecution Task Force, <http://www.usdoj.gov/criminal/optf> (last visited Feb. 28, 2008).

12. In 1988, record-keeping requirements were introduced to help the government ferret out child pornographers. *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1182 (D.C. Cir. 1992). The record-keeping requirements are aimed at visual depictions of sexual images, a category protected by the First Amendment as long as the depictions are not obscene or child pornography. Compare 18 U.S.C. § 2257 (2006) (requiring producers of sexually explicit depictions to keep thorough records), with *Roth*, 354 U.S. at 476 (holding that only obscene material can be banned constitutionally), and *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is not protected under the First Amendment).

Sixth Circuit has held that the statute must be struck down as a whole.<sup>13</sup>

Indeed, the current form of § 2257 infringes upon protected First Amendment rights. Although some may find sexually explicit expression<sup>14</sup> between adults offensive, the First Amendment protects this type of expression.<sup>15</sup> In addition, pornography is a valuable source of entertainment and constitutes an important part of the United States' economy. Further, sexually explicit material has educational value and can contribute to the overall health of the population.

This Note will provide an overview of the First Amendment, including what constitutes protected and unprotected speech, and the role the Constitution plays in protecting sexually explicit expression. Then it will provide a timeline of anti-child pornography statutes, and the cases challenging such statutes, eventually leading to the Adam Walsh Child Protection and Safety Act of 2006, which the Sixth Circuit deemed unconstitutional. Next, the Note will assert that the Sixth Circuit's holding is important because 18 U.S.C. § 2257 puts law-abiding producers of sexually explicit material in danger of prosecution while allowing producers of illegal child pornography to go undetected. In addition, it argues that legal forms of pornography deserve protection because they constitute a substantial part of our economy and provide health benefits to consumers. Finally, the Note will suggest solutions to amend § 2257's record-keeping requirements to ensure that they fall within the boundaries of the Constitution.

## I. First Amendment Protections and Limitations

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>16</sup> Simply stated, the First Amendment "[is] the foundation of democracy: the ability to speak and to engage in expressive conduct . . . protecting material that individuals, on their own, don't like."<sup>17</sup> The First Amendment protects both verbal expression and non-verbal conduct that is intended as

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13. *Connection Distrib. Co. v. Keisler*, 505 F.3d 545 (6th Cir. 2007).

14. "Sexually explicit expressions" will be used interchangeably with pornography for sake of brevity. Although the term pornography has been used for political means in the last half-century. STROSSEN, *supra* note 5, at 92.

15. See *Miller v. California*, 413 U.S. 15, 24–25 (1973) (providing a three-prong test for obscenity for determining whether speech is obscene and, thus, not protected under the First Amendment).

16. U.S. CONST. amend. I.

17. *Richards & Calvert*, *supra* note 1, at 250–51.

expression.<sup>18</sup> Conduct which does not contain any expressive elements is not speech; thus, it is not protected.<sup>19</sup> Moreover, the First Amendment does not protect expressive conduct that is harmful.<sup>20</sup>

Sexually expressive speech is protected under the First Amendment, but child pornography and obscenity are not because “the [latter] expressions . . . extend beyond the speaker and harm others.”<sup>21</sup> For example, producing child pornography harms children because it requires the performance of sexual acts with children, which constitutes sexual abuse.<sup>22</sup> The Court in *New York v. Ferber* explained that the government’s interest in protecting a child’s physical and psychological health significantly outweighs an adult’s interest in possessing or producing child pornography.<sup>23</sup> Using this rationale, the Court held that a New York statute that both criminalized sexual productions made using a person under sixteen years old and prohibited parental consent for such productions does not infringe on free speech.<sup>24</sup> Further, the Court held there is a “modest, if not de minimis” value in allowing children to be depicted sexually and such depictions are “unlikely important” to literary, scientific, or educational work.<sup>25</sup>

18. See, e.g., *Spence v. Washington*, 418 U.S. 405, 410–11, 414 (1974) (holding that appellant was protected by the First Amendment when he burned a flag on his property because his conduct was expressive).

19. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“[T]o preserve [free speech] freedoms, and to protect speech for its own sake, the Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”).

20. Compare *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (“The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech.”), with *Am. Library Ass’n v. Thornburgh*, 713 F. Supp. 469, 472 (D.D.C. 1989) (“This [First Amendment] right reflects the ideal that no one’s expression should be curtailed unless it potentially harms another.”).

21. *Thornburgh*, 713 F. Supp. at 472; see also *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (holding that sexual expression is protected under the First Amendment, but the government can regulate such expression to achieve a compelling interest, such as protecting the physical and psychological of children, as long as the regulation is narrowly tailored to achieve its goal).

22. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

23. See *id.* at 775 (“The audience’s appreciation of the [sexual] depiction is simply irrelevant to [the state’s] asserted interest in protecting children from psychological, emotional, and mental harm.”).

24. *Id.* at 750–51, 774.

25. *Id.* at 762–63. Not all of the justices agreed with the Court’s statement: Justice O’Connor believed that

it is quite possible that New York’s statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York’s statute. Nor might such depictions feed the poisonous “kiddie porn” market that New

Obscenity, unlike child pornography, is not so easily defined. In declaring obscenity exempt from First Amendment protections, the *Ferber* Court did not clearly define it. For example, Justice Stewart declared that when it comes to obscenity, “I know it when I see it.”<sup>26</sup> A little less than a decade later, the Court attempted to clarify the definition of obscenity in *Miller v. California*, but again failed to clearly define it.<sup>27</sup> For example, in its description of recognizing obscenity, the Court stated, “When [one] cross[es] a red light, [one] know[s] it’s red, even if [one’s] color blind, because of the positioning of the lights. Here, this is an abstraction.”<sup>28</sup> The *Miller* Court did, however, provide a three-prong test for obscenity.<sup>29</sup> But, because the test utilizes a community standard for obscenity, the meaning of obscenity may vary from one area to the next.<sup>30</sup> For example, in communities such as San Francisco’s Castro District, where homosexuality is prevalent and welcome, depictions of homosexual adults engaging in sexual activity will most likely not be found obscene.<sup>31</sup> On the other hand, more conservative communities may come to the opposite finding. Accordingly, under the *Miller* standard, one may be convicted under obscenity laws in communities within Georgia and Utah, but not in

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York and other States have attempted to regulate. . . . [P]ictures of children engaged in rites widely approved by other cultures, such as those that might appear in the National Geographic, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York’s statute.

*Id.* at 775 (O’Connor, J., concurring). Justice Brennan believed depictions of children that are in themselves serious contributions to art, literature, or science are not de minimus. *Id.* at 776 (Brennan, J., concurring).

26. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The fact that Stewart uses the subjective word “I” means that his view of obscenity might be different than someone else’s view of obscenity, perhaps even another justice’s view. With a standard like this, how is one to know whether his view of obscenity comports with the Court’s view?

27. See generally *Miller v. California*, 413 U.S. 15, 24–25 (1973).

28. Richards & Calvert, *supra* note 1, at 263.

29. Material is obscene when an average person in the community would find that it appeals to a prurient or unhealthy interest in sex, is “patently offensive,” and lacks serious value. *Miller*, 413 U.S. at 24–25.

30. *Id.*

31. Some pornographers have dealt with this by making different versions of a product to be tailored to particular geographic regions, leading some areas to become flush with pornography that is unavailable in other localities. For example, “[T]he hardest European porno [was found] in New York and San Francisco throughout the 70s and 80s when things were much more repressed.” Richards & Calvert, *supra* note 1, at 280. Adult producer Max Hardcore points out that he makes a European and U.S. version of his films, but would not put “pissing, fist fucking, and pooping—[he] never did that anyway—or gagging a girl until she vomits in the U.S. version. There are some states that are particularly bad.” *Id.* at 277.

communities within California and New York.<sup>32</sup> In contrast to this community standard, the Court in *Lawrence v. Texas* held that the government cannot criminalize intimate sexual conduct between people of the same sex, thereby affording homosexuals the universal right to engage in sexually intimate acts.<sup>33</sup> Ironically, the *Miller* test allows a jury to find such constitutionally protected acts obscene if they are photographed, filmed, or otherwise depicted as speech, even though the First Amendment portends to protect such speech if it does not harm others.<sup>34</sup>

While the law clearly prohibits child pornography,<sup>35</sup> the law remains ambiguous as to what is and what is not allowed when applied to producers of adult pornography. This puts producers of adult pornography in danger of prosecution and, therefore, has a chilling effect on their exercise of First Amendment expression. For example, adult entertainment producer Larry Flint practices “self censorship” and has notified all of his distributors not to ship his products to Georgia, Utah, and Kansas.<sup>36</sup> Producer Max Hardcore avoids potential prosecution by only manufacturing his product, and leaving the shipping to a third party.<sup>37</sup> Although producers are in danger of being prosecuted under *Miller’s* vague guidelines, it may be preferable to Stewart’s “I know it when I see it” approach or no test at all.<sup>38</sup>

The First Amendment does not protect child pornography or obscene material. However, it does protect other forms of sexually explicit material. Under Stewart’s test, judges would use a purely subjective standard based on their own personal reactions to sexually explicit material to determine whether it should be classified as obscene. This test lacks predictability and leaves those who produce sexually explicit materials to guessing whether or not their products would be deemed obscene. The *Miller* test, which superseded Stewart’s test, defines obscenity based on a community standard. Although this test gives producers a better idea of whether or not their material will be deemed protected by the First Amendment, it is still problematic because community standards, by definition, vary from place to place. Such vague standards for obscenity have a chilling effect on sexual speech that is protected by the First Amendment.

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32. Larry Flint, publisher of *Hustler*, points out that to avoid prosecution “[t]hey just notified all of the distributors don’t [sic] ship to Georgia, Utah, and Kansas.” *Id.* at 275.

33. *Lawrence v. Texas*, 539 U.S. 560 (2003).

34. *Miller*, 413 U.S. at 25.

35. A minor is a person under eighteen years of age. 18 U.S.C. § 2256(1) (2008).

36. Richards & Calvert, *supra* note 1, at 275.

37. *Id.* at 277.

38. *Id.* at 262; *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

## II. Anti-Child Pornography Statutes

At the most basic level, using minors in sexually explicit productions such as photographs and videos is a crime. Under the amended anti-child pornography statutes, however, producers of any type of sexually explicit material have a difficult time complying with the law even if they do not produce child pornography. This section will provide an overview of the laws created to eliminate child pornography, the reasoning behind their enactment, the changes to the laws, and what these changes mean.

### A. Protection of Children Against Sexual Exploitation Act of 1977

In 1977, Congress expressed concern that child pornography and prostitution had become a nationwide problem that was operated by highly organized, multi-million dollar industries.<sup>39</sup> Further, it found that child pornography “is very harmful to both the children and the society as a whole.”<sup>40</sup> As a result, Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 (“1977 Act”) to criminalize the production of child pornography.<sup>41</sup> Under this Act, a minor<sup>42</sup> cannot be used to make a sexually explicit “visual or print medium” if the producer knows or should know that such material will be or has been transported in interstate commerce.<sup>43</sup> A violation of the Act may result in up to ten years in prison, a \$10,000 fine, or both.<sup>44</sup> Subsequent violations may result in a prison sentence lasting up to fifteen years, a \$15,000 fine, or both.<sup>45</sup>

### B. Child Protection Act of 1984

The 1977 Act had several shortcomings. First, it did not adequately address sexual abuse because it imposed an eighteen-year-old age limit on

39. S. REP. NO. 95-438, at 5 (1977).

40. *Id.*

41. H.R. REP. NO. 95-811, at 5 (1977) (Conf. Rep.).

42. A minor is a person under sixteen years old for the purposes of the sexually explicit conduct part of the statute. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978) (codified at 18 U.S.C. § 2251(b)(1) (1978)). For purposes of transporting children in interstate or foreign commerce for prostitution, a minor is a person under eighteen years old. *Id.* § 3(a), 92 Stat. at 7 (codified at 18 U.S.C. § 2423(b)(1) (1978)).

43. *Id.* § 2(a), 92 Stat. at 7 (codified at 18 U.S.C. § 2251(b) (1978)).

44. *Id.* (codified at 18 U.S.C. § 2251(c) (1978)); *see also* 18 U.S.C. §§ 2253(2)(A)-(E) (1978) (providing that violations include producing sexually explicit depictions of a minor engaging in actual or stimulated sexually explicit conduct involving all forms of sexual intercourse, bestiality, masturbation, sadomasochistic abuse (for the purpose of sexual stimulation), or lewd exhibition of the genitals or pubic area).

45. Protection of Children Against Sexual Exploitation Act Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978) (codified at 18 U.S.C. § 2251(c) (1978)).

prostitution while only imposing a sixteen-year-old age limit on child pornography, even though both types of activities involve child abuse. In addition, the 1977 Act only prohibited child pornography that was transported across state lines. This left a huge gap in the law and allowed producers to create and sell child pornography, and thereby engage in child abuse, so long as their work did not enter the stream of interstate commerce.

The problematic provisions were amended in 1984 via the Child Protection Act of 1984 ("1984 Act"). The amendment increased the age of majority from sixteen to eighteen, and made criminal all production of child pornography regardless of whether it was produced for transportation in interstate commerce.<sup>46</sup> Also, the 1984 Act criminalized all child pornography, not only child pornography made for "pecuniary profit."<sup>47</sup> It increased penalties for first-time violators from \$10,000 to \$100,000, and for second-time violators, from \$15,000 to \$200,000.<sup>48</sup> Violators that qualified as organizations could be fined up to \$250,000.<sup>49</sup> In addition, the 1984 Act added a disgorgement provision requiring those convicted of child pornography offenses "to forfeit their interest in property constituting or derived from gross proceeds obtained from the offense and any property used, or intended to be used, to commit such offense."<sup>50</sup>

### **III. Congress Amends the Child Pornography Statutes, Introduces 18 U.S.C. § 2257, Violates the Constitution, and Amends the Statutes Again**

Although the 1977 and 1984 Acts directly targeted child pornography and increased child pornography prosecutions by six hundred percent, Congress was not satisfied.<sup>51</sup> The Attorney General's Commission on Pornography found that producers of sexually explicit content tended to use very young performers to give viewers the impression that the performers were minors.<sup>52</sup> Congress feared that those who used minors in their

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46. Compare Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a), 98 Stat. 204 (codified as amended at 18 U.S.C. § 2253 (1984)), with Protection of Children Against Sexual Exploitation Act § 2(a), 92 Stat. at 7 (codified at 18 U.S.C. § 2251(b)(1) (1978)), and *id.* § 3(a), 92 Stat. at 7 (codified at 18 U.S.C. § 2423(b)(1) (1978)).

47. Child Protection Act of 1984 § 5(a), 98 Stat. at 204 (codified as amended at § 18 U.S.C. 2253 (1984)).

48. *Id.* § 3, 98 Stat. at 204 (codified as amended at 18 U.S.C. §§ 2251(4)-(5) (1984)).

49. *Id.* (codified as amended at 18 U.S.C. § 2251(6) (1984)).

50. *Id.* (codified as amended at 18 U.S.C. §§ 2253(a)(1)-(2) (1984)).

51. See 134 CONG. REC. E3750-01 (1988) (statement of Hon. Hughes).

52. *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1182 (1992).



productions could escape prosecution by claiming that they were misled by the performer's age or did not know the performer's true identity.<sup>53</sup> To address this problem, Congress introduced a record-keeping provision, which required producers to maintain individual records of each person depicted in sexually explicit material. However, unlike the 1977 and 1984 Acts, this record-keeping provision targeted not only child pornography, but also sexually explicit expression that the First Amendment protects.<sup>54</sup>

#### A. Child Protection and Obscenity Enforcement Act of 1988: Congress Introduces Record-Keeping Requirements

The record-keeping requirements added by the Child Protection and Obscenity Enforcement Act of 1988 ("1988 Act") require a producer of sexually explicit depictions to "maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction" if the depictions are "intended for shipment in interstate or foreign commerce."<sup>55</sup> In order to comply with this provision, the producer must obtain and examine two forms of identification from each performer, at least one of which contains the performer's name and date of birth.<sup>56</sup> Further, the producer must "ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name."<sup>57</sup> These requirements "help authorities to verify the age of the models," and in the event that the performer is underage, enables them to track down other producers who use the same underage performer.<sup>58</sup>

After ascertaining the required information, the producer must create a record and "maintain it at the place of business for inspection."<sup>59</sup> In addition, on each and every copy of sexually explicit material, producers

53. *Id.*

54. *See id.* Compare *supra* notes 39–41 and accompanying text (Congress declaring that child pornography had become a nationwide problem and enacting the first anti-child pornography statute in 1977 to prevent producers from using children under age 16 in their productions), and *supra* notes 46–49 and accompanying text (Congress revising the 1977 statute in 1988 illegalizing the use of people under age 18 in their productions, and increasing penalties for violations of the statute), with 134 CONG. REC. E3750-0 (1988) (statement of Hon. Hughes explaining that 18 U.S.C. 2257 will be amended to add a record-keeping provision for all producers of sexual materials regardless of performers' ages); see 18 U.S.C. § 2257 (1989) for the adopted changes.

55. 134 CONG. REC. E3750-0 (1988) (statement of Hon. Hughes); 18 U.S.C. § 2257(a) (1989).

56. 18 U.S.C. § 2257(b) (1989).

57. *Id.*

58. *Id.*

59. 18 U.S.C. § 2257(b)-(c) (1989).

must affix a statement with the name of the record-keeper<sup>60</sup> and the address of where the records are located.<sup>61</sup>

### B. *American Library Ass'n v. Thornburgh*

In *American Library Ass'n v. Thornburgh*, the plaintiffs—associations representing producers and distributors of books, magazines, films, and other materials protected by the First Amendment—challenged the constitutionality of the record-keeping requirements, and sought an injunction against the enforcement of the 1988 Act.<sup>62</sup> Applying the strict scrutiny test, the court granted the plaintiffs' request for an injunction and held the 1988 Act unconstitutional.

Under strict scrutiny, the government can regulate material that falls under the protection of the First Amendment so long as the regulation is meant to achieve a legitimate interest, is narrowly tailored to pursue that interest,<sup>63</sup> and does not unnecessarily interfere with First Amendment freedoms.<sup>64</sup> Using the strict scrutiny test, the *Thornburgh* court took issue with the 1988 Act because the record-keeping requirement as codified in 18 U.S.C. § 2257 “(1) burden[ed] too heavily and infringe[ed] too deeply on the right to produce First Amendment protected material and (2) . . . [was not] narrowly tailored to fit the legitimate governmental interest of stopping child pornography.”<sup>65</sup>

First, the court found that the Act's requirements directly burdened much material that is clearly protected by the First Amendment:

What makes the requirements extraordinarily burdensome is the remarkable breadth of who must fulfill the record-keeping requirements and how much effort many “producers” would have to take to meet the legal requirements. The result of the requirement that each producer along the stream of commerce must *personally* contact the model or performer and *personally* ascertain the model's or performer's age, current name, maiden name, professional name, and other information will undoubtedly be the effective prohibition of the distribution of much First Amendment protected material. . . . To take one example, a film distributor who makes copies of films for distribution would be faced with the often-insurmountable task of

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60. The record-keeper is the person who maintains records of the individuals depicted in sexually explicit materials. 18 U.S.C. § 2257(a) (1989).

61. 18 U.S.C. § 2257(e) (1989).

62. *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 472 (D.D.C. 1989).

63. A regulation is narrowly tailored to a legitimate interest when the burdens it imposes are not greater than necessary to pursue that interest. *Id.* at 476.

64. *Id.*

65. *Id.* at 477.

having to track down personally any performer in a “lascivious” scene, *even if* the original producer of the film provided the distributor with his own documentation of the age of every performer.

Moreover, the Act applies to all depictions made since early 1978 and applies even to images made overseas, where a large percentage of “lascivious” images are created. To require a publisher or producer to travel to Europe or Asia to track down every “lascivious” model or performer shown in a book, magazine, or film originally created a decade earlier is overly burdensome.<sup>66</sup>

In addition, the court found that the 1988 Act’s requirements were not narrowly tailored to the government’s interest of stopping child pornography.<sup>67</sup> First, the 1988 Act focuses on every person along the chain of commerce, not only the person who produced the original product.<sup>68</sup> For example, both the person who takes a nude picture of an individual and the person who places the photo in a magazine are considered producers. Even if the photographer verifies that the model is an adult and has otherwise complied with the 1988 Act’s record-keeping requirements, anyone who subsequently uses the photograph must personally contact the model and start a record of their own. Simply obtaining a record from the photographer is not enough.<sup>69</sup> Because the 1988 Act focuses on all actors along the chain of commerce, and not only the person who produced the original product, the court found that it was not narrowly tailored enough to pass Constitutional scrutiny.<sup>70</sup>

Second, the 1988 Act requires that mainstream producers abide by record-keeping requirements even if they do not produce child pornography.<sup>71</sup> The court assumed that this would limit law-abiding producers to either complying with the requirements or suppressing protected material to avoid keeping records.<sup>72</sup> Ultimately, the court held that because of this limited choice, the statute was not narrowly tailored:

66. *Id.* (emphasis added).

67. *Id.*

68. *Id.*

69. *See id.* at 478 (“A more sensible and narrowly tailored legislative effort might focus on the original photographers, who could be required to document the performer’s age and then pass that information along the stream of commerce. Such a system that focused on those that have direct contact with the models and performers could be equally—and perhaps more effective—in ferreting out child pornography, while at the same time not placing unconstitutional burdens on the producers, publishers, and distributors of First Amendment protected material.”).

70. *Id.* at 477.

71. *Id.*

72. *Id.*

“[T]hese requirements would do as much to hinder protected material as they would to halt child pornography.”<sup>73</sup>

Third, the 1988 Act does not address child pornography from black markets, nor does it prevent producers from being fooled with false identifications from minors. As such, the *Thornburgh* court concluded that the Act was not narrowly tailored to prevent child pornography, but rather “would do more to infringe, hinder, and in some cases effectively prohibit the production and distribution of protected First Amendment ‘erotic’ material.”<sup>74</sup>

### C. Child Protection and Restoration Act of 1990

Noting the shortcomings of the 1988 Act, Congress passed the Child Protection Restoration and Penalties Enhancement Act of 1990 (“1990 Act”) and amended the record-keeping provisions to comply with the decision in *Thornburgh*.<sup>75</sup> For example, the 1990 Act eliminated the presumption of minority when records are incomplete, but increased the penalties for noncompliance.<sup>76</sup> In addition to the increased penalty provision, the 1990 Act was slightly less onerous than its 1988 predecessor: Only images made after November 1, 1990 had to conform to record-keeping requirements; the definition of production was narrowed to include only hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted, and; actual sexually explicit conduct was narrowed to exclude lascivious exhibition of the genitals or the pubic area.<sup>77</sup>

### D. *American Library Ass’n v. Reno*

Although the 1990 Act contained less onerous requirements, the appellees in *American Library Ass’n v. Reno* challenged the Act on the grounds that the record-keeping and disclosure requirements unlawfully burdened protected speech.<sup>78</sup> The court held that the regulation was content neutral because Congress’s sole purpose was to address a deficiency in child pornography laws; thus, it reviewed the claim under an intermediate scrutiny standard.<sup>79</sup> This standard is satisfied if a statute

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73. *Id.* at 477–78.

74. *Id.* at 479.

75. *Am. Library Ass’n v. Barr*, 956 F.2d 1178, 1186 (D.C. Cir. 1992).

76. Child Protection Restoration and Penalties Enhancement of 1990, Pub. L. No. 101-647, § 311, 104 Stat. 4789, 4816 (adding subdivision (i) to 18 U.S.C. § 2257 for the first time).

77. *See id.*; *see also* 18 U.S.C. §§ 2257(h)(1), (h)(3) (1990).

78. *Am. Library Ass’n v. Reno*, 33 F.3d 78, 83 (D.C. Cir. 1994).

79. *Id.* at 81.

serves an important government interest through substantially related means. Under intermediate scrutiny, the *Reno* court held that the statute is constitutional because its purpose is not regulating sexually explicit materials, but rather furthering the government's important interest in preventing child pornography.<sup>80</sup> The court found that the 1990 Act's requirement that producers comply with record-keeping requirements was not meant to affect the content of sexually explicit materials, but, rather, to protect children from sexual exploitation.<sup>81</sup>

Although the *Reno* court upheld the record-keeping requirements, the intermediate scrutiny standard differs from the strict scrutiny test applied by the *Thornburgh* court.<sup>82</sup> Specifically, the intermediate scrutiny test only requires the regulation to be substantially related to an important government interest instead of requiring that the regulation be narrowly tailored to fit the legitimate governmental interest. However, even under the intermediate scrutiny test, the record-keeping requirements could be found unconstitutional. The appellees in *Reno* argued that the record-keeping requirements are overly burdensome on appropriationist artists—photographers who create distinct works that incorporate photographs taken by others.<sup>83</sup> The court, however, stated that the appellees were mistaken in their assertion because they incorrectly assumed that appropriationists are considered primary producers.<sup>84</sup> The court held that appropriationists may actually fall under the category of secondary producers allowed to maintain records by accepting them from primary producers and by keeping records of the name and address of the primary producers.<sup>85</sup> Even if appropriationists are considered secondary producers, the court admitted that the 1990 Act would still raise a serious First Amendment problem because the artists may encounter difficulties in securing the information that secondary producers are required to keep on file.<sup>86</sup> The court, however, failed to address this issue because it could not be resolved on the present record.<sup>87</sup>

The dissent in *Reno* asserted that the 1990 Act is overly broad, has a chilling effect on free speech, and is a questionable deterrent to child

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80. *Id.* at 86, 94.

81. *Id.* at 86.

82. *See* *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 476–77 (D.D.C. 1989) (applying strict scrutiny to the record-keeping requirements in the Child Protection Act of 1984).

83. *Reno*, 33 F.3d at 93.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

pornography.<sup>88</sup> It argued that the 1990 Act should fail under the intermediate scrutiny standard as articulated in *United States v. O'Brien*:

[C]ontent-neutral government regulation of expressive conduct is justified if that regulation: (1) is within the government's constitutional power; (2) furthers a substantial governmental interest; (3) the government interest is unrelated to speech; (4) incidental restrictions on First Amendment freedoms are "no greater than is essential to the furtherance of that interest."<sup>89</sup>

The scope of the 1990 Act is not limited to depictions that involve or are likely to involve children and reaches far beyond the realm of child pornography.<sup>90</sup> As a result, the dissent argues that it regulates non-suspect producers in the same burdensome manner as it burdens those who illegally produce child pornography.<sup>91</sup> This culminates in a law that is overly broad, chills protected speech, cannot be written to withstand judicial scrutiny, and is on its face directed at a particular type of expression.<sup>92</sup> Further, the statute does not help prevent child pornography because the 1990 Act precludes records from being used in a child pornography prosecution.<sup>93</sup> Under the *O'Brien* intermediate scrutiny test, the 1990 Act, therefore, should have been deemed unconstitutional.<sup>94</sup>

#### **IV. Congress Broadens Anti-Child Pornography Laws to Illegalize Images That Do Not Include Actual Children**

In *New York v. Ferber*, the Supreme Court upheld as constitutional a New York statute that prohibited child pornography arguing that the state's pursuit of a legitimate interest in protecting children from sexual exploitation and abuse dwarfs impermissible applications.<sup>95</sup> When Congress passed the Child Pornography and Prevention Act of 1996 ("CPPA"), it took the *Ferber* holding one step further by also prohibiting sexually explicit images of children produced without using actual

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88. *Id.* at 94 (Reynolds, J., dissenting).

89. *Id.* at 95 n.2 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

90. *Id.* at 95.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *New York v. Ferber*, 458 U.S. 747, 773 (1982).

children.<sup>96</sup> This constituted a violation of the First Amendment of the Constitution.<sup>97</sup>

### A. Child Pornography Prevention Act of 1996

The CPPA prohibits producers from using digital technology and adult models who look like minors to create what appears as explicit images of children.<sup>98</sup> Congress found that even though children may not be harmed directly by the creation of such images, they may be harmed indirectly.<sup>99</sup> For example, pedophiles might use the images to coerce children to engage in sexual activities or the images may “whet [pedophiles’] sexual appetite” and encourage further production of child pornography.<sup>100</sup> Finally, Congress expressed the fear that the availability of digitally produced images of children would interfere with the prosecution of pornographers who use actual children in their productions because as technology advances, it would be increasingly difficult to determine which image is produced using a child and which image is not.<sup>101</sup>

### B. *Ashcroft v. Free Speech Coalition*

The Court in *Ashcroft v. Free Speech Coalition* recognized that Congress has an interest in protecting children from abuse, but ultimately struck down the CPPA because “[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech.”<sup>102</sup> The Court noted that the CPPA is so broad that it goes so far as to prohibit images in a psychology manual along with “a movie depicting the horrors of sexual abuse.”<sup>103</sup> In addition, it found that “[t]he CPPA prohibits speech despite its serious literary, artistic, political, or scientific value,” including William Shakespeare’s *Romeo and Juliet*; Best Picture-nominee, *Traffic*; and Academy Award-winning, *American Beauty*.<sup>104</sup> To rebut the government’s argument that even despite their social value, such images may encourage pedophiles to use virtual child pornography to seduce children, the Court explained that the possibility of misuse is not enough for prohibition.<sup>105</sup>

96. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–40 (2002).

97. *Id.*

98. *Id.* at 239–40.

99. *Id.* at 241.

100. *Id.*

101. *Id.* at 242.

102. *Id.* at 245.

103. *Id.* at 246.

104. *Id.* at 246–48.

105. *Id.* at 251.

Further, the government cannot suppress a substantial amount of lawful speech in order to eliminate unlawful speech even if the two types of speech bear a close resemblance to each other.<sup>106</sup> The Court held that the CPPA is overbroad and unconstitutional under the First Amendment because it infringes on a substantial amount of protected speech that neither harms children in its production nor is obscene.<sup>107</sup>

## V. Anti-Child Pornography Acts Today: The Government Gets Tough

As shown by the passage of the CPPA, Congress has been increasingly concerned with digital technology that could increase the proliferation of child pornography. As a result, in 2003, Congress amended § 2257 to prohibit sexual images of children generated by computer.<sup>108</sup> This provision was found unconstitutional and eliminated in 2006. Further, the Sixth Circuit in *Connection Distribution Co. v. Keisler* found that § 2257 as a whole is unconstitutionally overbroad.<sup>109</sup> However, that decision has recently been vacated.<sup>110</sup> Consequently, it may be easier to prosecute producers of sexually explicit material under the auspices of § 2257.

### A. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003

Congress amended § 2257 in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (“PROTECT Act”) as a response to changes in technology and, particularly, the Internet.<sup>111</sup> Congress expanded the definition of “produce” to include the creation of “computer generated image[s], digital image[s], or picture[s].”<sup>112</sup> It also expanded the definition of secondary producer to include any person “who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that

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106. *Id.* at 255.

107. *Id.* at 256.

108. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 511(a)(2), 117 Stat. 650, 684–85 (2003) (codified as amended at 18 U.S.C. § 2257(h)(3) (2003)).

109. *Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 548 (6th Cir. 2007) (opinion vacated on April 10, 2008 after rehearing en banc).

110. *Id.*

111. Prosecutorial Remedies and Tools Against the Exploitation of Children Today § 501, 117 Stat. at 676–78; see *Free Speech Coal. v. Gonzalez*, 406 F. Supp. 2d 1196, 1200 (D. Colo. 2005).

112. *Gonzalez*, 406 F.Supp. 2d at 1200.



contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.” The PROTECT Act also increased record-keeping obligations: First, it required that producers keep copies of all visual depictions produced; second, if the material is published on an Internet computer site or service, the producer must keep a copy of any URL associated with the depiction; and finally, if no URL is associated with the depiction, the producer must keep on record some other uniquely identifying reference associated with the location of the depiction on the Internet.<sup>113</sup>

Like the 1988 Act, the compliance statement must include the record-keeper’s name and the street address of where the records are located and must be displayed on all copies of material containing the depictions.<sup>114</sup> The information helps inspectors locate producers during business hours, or in the absence of a separate business office, at his or her home.<sup>115</sup> However, this intrudes upon individual privacy and deters potential producers from producing or distributing sexually explicit materials. For example, someone who searches for a record-keeper’s name or a producer’s address on the Internet can easily discover that such persons are involved in the adult industry, a taboo enterprise. The fear of being discovered may thwart people from producing sexually explicit expressions, even if they have a desire to do so.

Those who are not deterred by the name and address requirement described above may become targets of Federal Prosecution. The most notable portion of the PROTECT Act is the requirement that the attorney general submit a report to Congress detailing the number of times the Department of Justice has inspected the records of producers since 1993, including the number of violations prosecuted as a result of the inspections.<sup>116</sup> Such a requirement may very well lead to overzealous prosecution. Perhaps this was the goal. The attorney general was to appoint twenty-five trial attorneys to prosecute adult producers.<sup>117</sup> Such appointments would cost an estimated \$55 million over a five-year period, including \$30 million “to accommodate convicted offenders in federal

113. *Id.* at 1200–01.

114. *See supra* notes 57–59 and accompanying text; Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 § 511, 117 Stat. at 650, 684–85 (note that 18 U.S.C. § 2257(e) was unchanged by this act).

115. *See supra* notes 57–59 and accompanying text.

116. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act § 511(b), 117 Stat. at 685.

117. *Id.* § 513(a).

prison.”<sup>118</sup> Court costs would also increase \$9 million over the five-year period due to the new appointments, and the estimated six hundred new child pornography cases that would be brought during that time.<sup>119</sup> Under the PROTECT Act, the prison population is expected to increase by an estimated one thousand per year by 2008.<sup>120</sup> It is unclear how the attorney general estimated the increase in prison population when it only started carrying out record keeping inspections in 2006.<sup>121</sup>

## B. Adam Walsh Child Protection and Safety Act of 2006

*Ashcroft v. Free Speech Coalition* held that it is unconstitutional to prohibit sexually explicit images not based on actual children;<sup>122</sup> therefore, Congress had to amend the PROTECT Act. The Adam Walsh Child Protection and Safety Act of 2006 rid the problematic provision from the 2003 statute by explicitly stating that only images created using actual children are prohibited.<sup>123</sup>

## C. *Connection Distribution Co. v. Keisler*

Despite the Adam Walsh Amendment, the Sixth Circuit held that § 2257 was still unconstitutional.<sup>124</sup> The facts of *Connection Distribution Co. v. Keisler* illustrate that § 2257 not only impacts the adult entertainment industry, but can impact private individuals as well.<sup>125</sup> Unlike previous cases in which the plaintiffs that challenged the anti-child pornography laws were members of the adult entertainment industry,<sup>126</sup> the plaintiffs in *Keisler* were private individuals who wished to “publish their photographs in *Connection*’s magazines, but [were] unwilling to do so because they [did] not wish to create and maintain the required records nor [did] they wish to provide *Connection* with identification, which

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118. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003, S. 151, 108th Cong. (2003).

119. *Id.*

120. As of 2003, each prisoner will cost \$7,000 per year. *Id.* Over five years, this equals \$30 million. *Id.*

121. Robert D. Richards & Clay Calvert, *The Legacy of the Lords: The New Federal Crackdown on the Adult Entertainment Industry’s Age Verification and Record-Keeping Requirements*, 14 UCLA ENT. L. REV. 155, 174 (2007).

122. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

123. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502(a)(1), 120 Stat. 587, 625 (2006).

124. *Connection Distrib. Co. v. Keisler*, 505 F.3d 545 (6th Cir. 2007).

125. *See id.*

126. *See, e.g., Am. Library Ass’n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989); *Am. Library Ass’n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994); *Ashcroft*, 535 U.S. 234.

Connection must to comply with the recordkeeping requirements at issue.”<sup>127</sup> *Connection* is a personals site and magazine for swingers (couples who have sex with other couples). Members of *Connection* usually post sexually explicit photographs of themselves in the magazine.<sup>128</sup>

The *Keisler* court struck down § 2257 because the statute is overly broad. In conducting such an over breadth analysis, the court must “examine the scope of the statute and try to construe the scope narrowly to avoid constitutional infirmity.”<sup>129</sup> First, the court must determine “whether and to what extent the statute reaches protected conduct or speech.”<sup>130</sup> Second, the court must “determin[e] the ‘plainly legitimate sweep’ of the statute, that is, the sweep that is justified by the government’s interest.”<sup>131</sup> Third, the court must determine the extent to which the statute is a burden on speech.<sup>132</sup> Finally, the court must weigh these factors together, “paying particular attention to the burden on speech when judging the illegitimate versus legitimate sweep of the statute.”<sup>133</sup>

However, “[the] Court may impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.”<sup>134</sup> A court can impose a limiting construction when a statute can be made constitutional with slight changes. Because § 2257 defines “producer” so broadly, the court in *Keisler* found that the statute was not “readily susceptible” to a limiting construction and therefore could not be read narrowly to avoid constitutional problems.<sup>135</sup> Considering the definition of “produce,” provided for in § 2257, couples who submit sexually explicit photographs to magazines like *Connection*, and those who take sexually explicit photos of themselves for personal use must create and maintain records.<sup>136</sup> To comply with the requirements of § 2257, the couples would have to place their home address (assuming they are not storing records somewhere else)

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127. *Keisler*, 505 F.3d at 550.

128. *Id.*

129. *Id.* at 552 (citing *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

130. *Id.* at 555 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

131. *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

132. *Id.* at 555.

133. *Id.*

134. *Id.* at 552 (quoting *Reno v. ACLU*, 521 U.S. 844, 884 (1988)).

135. *See Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 552 (6th Cir. 2007).

136. *See id.* (“The statute by its plain terms makes no exceptions for photographs taken without a commercial purpose, for photographs intended never to be transferred, or for photographs taken with any other motivation.”).

on every image they create even if no one ever sees the image.<sup>137</sup>

Because adult sexual conduct is protected speech, § 2257 is overly broad and, therefore, unconstitutional. Section 2257 requires producers of sexually explicit images to maintain records even if these images are only kept in the privacy of one's home.<sup>138</sup> Further, the person must allow government agents into her home to inspect the records and must place her name and address in a compliance statement that is accessible to the public.<sup>139</sup> Under the First Amendment, people have the right to speak anonymously.<sup>140</sup> The fact that the plaintiffs in *Keisler* revealed their physical identities does not negate the right.<sup>141</sup> The government can enact regulations to prevent child abuse, but it cannot prohibit protected speech, such as depictions of sexual activity not intrinsically related to the sexual abuse of children, as a means of eliminating child abuse.<sup>142</sup>

The prohibition against child pornography is conduct regulation and entirely acceptable because child abuse is illegal and the images of child pornography cannot be created without engaging in such abusive conduct.<sup>143</sup> Unlike child pornography, adult sexual conduct is constitutionally protected. Although § 2257 regulates child pornography, it also infringes upon protected speech.<sup>144</sup> Consequently, the Sixth Circuit held that § 2257 is unconstitutional because it is overbroad.

Additionally, because the Sixth Circuit found that the section could not be severed to make the statute constitutionally valid, the Court struck down the statute in its entirety.<sup>145</sup> The court explained, “[S]aving this statute requires more extensive editing, and we believe ourselves unable to intrude into Congress’s domain in such a manner”; furthermore, it could not sever the statute in a way that would still “adequately address Congress’ expressed concerns.”<sup>146</sup>

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137. *See id.*

138. *See id.*

139. *Id.* at 557.

140. *Id.* at 557–58.

141. *Id.* at 558 (quoting *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002)).

142. *Keisler*, 505 F.3d at 557.

143. *Id.* at 556.

144. *Id.* at 557.

145. *Id.* at 552–53, 564.

146. *Id.* at 564.

## VI. The Adult Entertainment Industry Today

*Connection Distribution Company v. Keisler* was decided at a crucial time. In September 2006, the FBI began inspecting records pursuant to § 2257.<sup>147</sup> However, the adult entertainment industry had only received relief from prosecution during the Clinton administration. In 1986, the National Obscenity Prosecution Unit was formed in the Justice Department.<sup>148</sup> The Unit's operation successfully drove some businesses to agree to take constitutionally protected works such as the popular *Playboy* and *The Joy of Sex* off store shelves, and others to shut down altogether.<sup>149</sup>

The adult industry escaped federal obscenity prosecutions during the Clinton administration, but not during the Reagan<sup>150</sup> and George H. W. Bush<sup>151</sup> administrations.<sup>152</sup> However, even during the Clinton administration, the industry was still subjected to local legislation and zoning regulations.<sup>153</sup> During George W. Bush's administration, obscenity prosecution was reinvigorated. And scholars predicted that "the 'signature issue' for Alberto Gonzalez's tenure as attorney general 'may end up being his press to increase enforcement of obscenity laws to protect minors.'"<sup>154</sup>

Before the Sixth Circuit's decision in *Keisler*, plaintiffs in *Free Speech Coalition v. Gonzalez*, including adult entertainers, tried to prevent potential prosecution by obtaining a preliminary injunction to enjoin the enforcement of § 2257 against them.<sup>155</sup> Although the plaintiffs met the heavy burden required for a preliminary injunction,<sup>156</sup> their relief was only temporary. Two years later, the plaintiffs sought a permanent injunction; but, the court granted the attorney general's motion for summary judgment

147. Richards & Calvert, *supra* note 1, at 233. Presumably, these inspections were pursuant to 18 U.S.C. § 2257.

148. STROSSEN, *supra* note 5, at 92.

149. *Id.* at 93, 95, 98.

150. Reagan was in office from 1981 to 1989. Biography of Ronald Reagan, <http://www.whitehouse.gov/history/presidents/rr40.html> (last visited Feb. 28, 2008).

151. George H.W. Bush was in office from 1989 to 1993. Biography of George Herbert Walker Bush, <http://www.whitehouse.gov/history/presidents/gb41.html> (last visited Feb. 28, 2008).

152. Richards & Calvert, *supra* note 1, at 235 n.12.

152. *Id.* at 239.

153. Richards & Calvert, *supra* note 1, at 278.

154. *Id.* at 236.

155. *Free Speech Coal. v. Gonzalez*, 406 F. Supp. 2d 1196, 1199 (D. Colo. 2005). This occurred before the Sixth Circuit's decision in *Connection Distribution Co. v. Keisler*, 505 F.3d 545, 557 (6th Cir. 2007).

156. To obtain a preliminary injunction, plaintiffs have to show a "clear and unequivocal" right to relief. *Id.* at 1201 (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003)).

in significant part, thus allowing § 2257, as amended in 2006, to be enforced against the plaintiffs.<sup>157</sup>

The FBI appears to have been conducting record-keeping inspections in a reasonable fashion.<sup>158</sup> However, some adult producers feared that this would change if Special Agent Chuck Joyner, who ran the inspections, was replaced.<sup>159</sup>

One of the Obscenity Prosecution Unit's raids in 1990 serves as a warning of what may result from a § 2257 inspection gone wrong. There, the Unit sent six FBI agents and plainclothes police officers with guns and badges to San Francisco-based internationally renowned photographer Jock Sturge's apartment because the artist photographed nude families, including nude children. There, the FBI agents "forc[ed] their way into his apartment and began canvassing the place, observing everything [he] own[ed]. [His] address books. [His] clothes. The art on [his] walls. Every page of [his] personal diaries."<sup>160</sup> The artist's property was confiscated for two years while the Unit searched for evidence of child pornography.<sup>161</sup> Finally, the grand jury found that his photographs of nude children were not child pornography, but art, and his property was returned.<sup>162</sup>

Given the scenario described above, it is not surprising that adult producers fear inspections under § 2257. Today, § 2257 regulations allow FBI agents to show up at an adult producer's door unannounced.<sup>163</sup> Agent-wary producers may keep their § 2257 records away from their other material so that FBI agents conducting inspections only have access to the records.<sup>164</sup> However, given space limitations and the volume of information producers are required to keep—in hard records—under § 2257, some producers might not have that option.<sup>165</sup> Thus, the producers

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157. *Free Speech Coal. v. Gonzalez*, 483 F. Supp. 2d 1069, 1075–77, 1082 (D. Colo. 2007).

158. *See Richards & Calvert*, *supra* note 1.

159. After a conference between the FBI agents and select members of the adult industry, Diana Duke, a person in the adult industry, expressed concern if the head of inspections was replaced, the story may be different. *Id.*

160. STROSSEN, *supra* note 5, at 94.

161. *Id.*

162. *Id.*

163. *See Richards & Calvert*, *supra* note 121, at 187.

164. Although the FBI has already seen a selection of the company's material before conducting the inspections, keeping § 2257 records away from other material might be a necessary safety measure to prevent the FBI from inadvertently coming across material that they deem "obscene" or material where the adult performer appears to be a minor.

165. *Richards & Calvert*, *supra* note 121, at 185; *see Child Protection Restoration and Penalties Enhancement Act of 1990*, Pub. L. No. 101-647, § 311, 104 Stat. 4816–17, 4789 (1990); *Record-Keeping And Record Inspection Provisions*, 26 C.F.R. § 75.3 (2008) (providing that records must be categorized under all names of the performer, including the performer's

are faced with a choice: they can either print out the records and maintain hard copies pursuant to the FBI's wishes, or they can print out the records when the FBI does an inspection.<sup>166</sup>

### A. Child Pornography Has Not Become a Sudden Problem

Section 2257 was enacted in 1988 in response to the child pornography problem, but the federal government did not enforce its provisions until eighteen years later.<sup>167</sup> Congress enacted § 2257 partly in response to the Traci Lords case, where adult producers were discovered using Traci Lords, an under-aged female performer, in their productions.<sup>168</sup>

Even though § 2257 was enacted in response to the Traci Lords case, law enforcement officials did not want to enforce § 2257. Attorney General Janet Reno, who worked the Clinton administration thought that the law "was, essentially, really, really stupid."<sup>169</sup> Even Attorney General John Ashcroft, seemed reluctant to enforce § 2257. He claimed that the regulations were unenforceable "because the regulations were just hopelessly out of date compared to the technology that currently existed."<sup>170</sup> In contrast, when Attorney General Gonzalez took office, he publicly vowed to take down the adult entertainment industry.<sup>171</sup> Consequently, inspections under § 2257 were carried out for the first time in 2006, sixteen years after it was enacted. Mark Kulkius and Mark Kernes, members of the adult industry, believe that the inspections were a means to appease the religious right, which was vehemently opposed to pornography in general.<sup>172</sup>

Kulkius's and Kernes's ideas may not be far fetched. Child pornography does not appear to be a chronic problem in the adult entertainment industry. The industry works with the Association of Sites Advocating Child Protection ("ASACP") to prevent child pornography.<sup>173</sup>

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actual name, nickname, maiden name, stage name, or professional name, and must be categorized under the name, number, or any other identifier of the video, DVD, book, or any other medium where the performer appears).

166. Although this is an option, there is nothing stopping the FBI agents from looking at the computer screen while the records are being printed. There is even a possibility that the FBI may copy the hard drive in its entirety. See Richards & Calvert, *supra* note 121, at 185.

167. See *id.* at 162.

168. *Id.* at 156.

169. *Id.* at 175.

170. *Id.*

171. *Id.* at 178.

172. *Id.* at 177, 179.

173. ASACP: Association of Sites Advocating Child Protection, <http://www.asacp.org/page.php?content=aboutus> (last visited Feb. 28, 2008).

ASACP's website makes it extremely easy to report child pornography (a person who comes across child pornography on a website can fill out a short form). ASCAP then conducts investigations based on these reports to determine the hosting, billing, IP addresses, ownership, and linkage to such sites.<sup>174</sup> If a site appears suspicious, ASCAP forwards the site to the FBI, the National Center for Missing and Exploited Children, and European hotlines.<sup>175</sup>

In addition to ASACP, the Free Speech Coalition, an organization supporting the well-being of the adult industry, also combats child pornography.<sup>176</sup> To encourage people to report child pornography, the Free Speech Coalition offers a \$10,000 reward "for information that leads to the conviction of child sexual abusers" and is more than willing to work with Congress to eliminate child abuse. Three thousand, five hundred members of the adult industry are members of the Free Speech Coalition and support their efforts.<sup>177</sup> Those who work in adult entertainment are no different than those who do not. They too are parents and grandparents who are concerned about the welfare of their children and grandchildren.<sup>178</sup>

Although the adult industry wants to eliminate child pornography, they assert that Congress's current regulations are too broad.<sup>179</sup> Section 2257 focuses on sexually explicit materials as a whole and does not differentiate between legal and illegal sexual material.<sup>180</sup> This is problematic because the majority of the adult industry operates in conformance with the law. In fact, in all the instances (a dozen at most) where a minor has performed in an adult film, it was the minor that defrauded the company.<sup>181</sup> Mark Kulkius, head of an adult film company points out that there is simply too much money to be made to take the risk

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174. Compare ASACP: Association of Sites Advocating Child Protection, Report a Website, <http://www.asacp.org/page.php?content=report> (last visited Feb. 28, 2008) (providing a simple form for reporting child pornography), with ASACP: Association of Sites Advocating Child Protection, Statistics, <http://www.asacp.org/page.php?content=statistics> (last visited Feb. 28, 2008) (providing statistics on the effectiveness of ASCAP's reporting system).

175. ASACP: Association of Sites Advocating Child Protection, Statistics, <http://www.asacp.org/page.php?content=statistics> (last visited Feb. 28, 2008).

176. Free Speech Coalition, Testimony Submitted to the House Committee on Energy and Commerce Concerning: "Deleting Commercial Child Pornography Sites From the Internet: The U.S. Financial Industry's Efforts to Combat This Problem (2006)," <http://www.freespeechcoalition.com/webdocs/092106FSCtestimonytoHouseEnergyCommittee.pdf>.

177. *Id.*

178. *Id.*

179. *Id.*

180. See generally Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502, 120 Stat. 587, 625-29 (2006) (codified as amended at 18 U.S.C. § 2257 (2008)).

181. Richards & Calvert, *supra* note 121, at 170.



of using a minor in his films.<sup>182</sup> Jan La Rue, chief counsel for the Concerned Women for America, spent her life attacking the adult industry, but agrees that child pornography is not a problem within the adult entertainment industry because “it makes no economic sense” for producers of adult materials to engage in such illegal conduct.<sup>183</sup> It makes more sense to pay a minor \$50,000 to stay away.<sup>184</sup> The industry is so concerned about keeping minors out of the industry that if they discover that a minor is attempting to be in a film, the producer will notify every person in the industry.<sup>185</sup> It simply is not good for the industry to be tainted with child pornography, as it gives the industry a bad public image. Further, there are no shortages of adult entertainers who are willing to perform.<sup>186</sup> Even if there is a desire for youthful-looking performers, it is more sensible to use an adult who appears to be a minor than to use a minor and face a fifteen-to thirty-year prison sentence.<sup>187</sup> In sum, the adult industry is not the source of illegal child pornography and therefore should not be targeted by regulations seeking to prevent it.

### **B. The Adult Entertainment Industry is Becoming Mainstream and Gaining Popular Acceptance**

The adult entertainment industry has gained more widespread acceptance and is more readily available than ever; however, § 2257 may be stunting its growth as an industry.<sup>188</sup> As of 2006, the adult entertainment industry was earning nearly \$13 billion per year.<sup>189</sup> Yet, with § 2257 in place, the industry has only grown with the rate of inflation.<sup>190</sup> Because pornography is easily accessible on the Internet, it is reasonable to assume that pornography would have grown more rapidly without the limitations imposed by § 2257. However, § 2257 “creat[es] a series of rules and obstacles that are great enough” to deter people from participating in the adult entertainment industry altogether.<sup>191</sup> According to Jeffrey Douglas, an industry insider, an adult magazine publisher informed the FBI

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182. *Id.* at 172.

183. *Id.* at 171.

184. *Id.* at 172.

185. *Id.*

186. *Id.*

187. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623–24 (2006) (codified as amended at 18 U.S.C. § 2251 (2008)).

188. Richards & Calvert, *supra* note 1, at 236.

189. Richards & Calvert, *supra* note 121, at 156 n.3.

190. *Id.*

191. *Id.* at 180–81.

“that he has twelve employees dedicated to 2257 compliance, with four additional management personnel devoting ‘a substantial amount of time’ to supervising those individuals.”<sup>192</sup> Steve Orenstein, who runs a production company with five hundred movies and compilations, has one full time employee who deals solely with § 2257 compliance.<sup>193</sup> Douglas also points out that it is extremely difficult to retain employees because the job is “mindless and boring” and “[t]here’s no room for error.”<sup>194</sup> In fact, keeping records that completely comply with § 2257 regulations is so difficult that out of the first ten inspections the FBI conducted, only two companies had perfect records.<sup>195</sup>

In addition, § 2257 compliance places a large financial burden on companies within the adult industry. While large adult companies have the financial resources to shoulder this burden, small companies may be forced out of business because they lack the financial resources to comply.<sup>196</sup> The situation is worse for private individuals like the plaintiffs in *Keisler* who most likely have even fewer financial resources. Beyond resources, such private individuals may not even be aware of § 2257 regulations and its compliance requirements. In the event that they discover what it entails, and that a violation includes fines and a prison sentence, such individuals may refrain from taking sexually explicit photos of themselves even if they wish to do so. Thus, in its effort to prevent illegal child pornography, § 2257 may infringe upon both private individuals’ and the adult industry’s right to express themselves. The First Amendment protects sexually explicit images as speech, even for those not rich enough to comply with regulations.

## VII. Economic and Health Benefits of Pornography

The adult industry is a multi-billion dollar industry that has been legal for the past thirty years.<sup>197</sup> In California, for example, the adult industry “work[s] with the business community because porn is an economic engine in California.”<sup>198</sup> Being a porn star is a job that allows women who otherwise would not “have the opportunity to make a high-level salary

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192. *Id.* at 187–88.

193. *Id.* at 190.

194. *Id.* at 189.

195. *Id.* at 205.

196. *See id.* at 189, 191.

197. Clay Calvert & Robert D. Richards, *Porn in Their Own Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 288–89, 293 (2006).

198. *Id.* at 275.

without an education.”<sup>199</sup> In addition, the adult industry feeds the economy as a source of tax revenue like any other business.<sup>200</sup> Though people may be hesitant to admit their fondness for the business, the facts show that at least a certain segment of the population enjoys pornography very much. Hotel guests, for example, spend up to \$190 million per year on adult films.<sup>201</sup> DirecTV subscribers spend nearly \$200 million on such films, and people spend \$4 billion on graphic sex films and \$800 million on less graphic sex films in retail outlets.<sup>202</sup> This does not include the amount of money people spend on sexually explicit content on the Internet.

Although spending money on pornography does not make pornography good for people, it is a form of entertainment, which “has the same goal” as other forms of entertainment—“to make people forget about their problems, whether it’s for two minutes or for two hours.”<sup>203</sup> Further, pornography may have educational value. For example, Nina Hartley, a pioneer of the adult industry, points out that marriage counselors recommend her tapes to their client couples.<sup>204</sup> In addition, the Meese Commission recognized that “sexually explicit materials have been used for positive ends [such as] the treatment of sexual dysfunctions and the diagnosis and treatment of some paraphilias.”<sup>205</sup> The Commission has also found that pornography may reduce the impulse to commit crimes and can be used to teach sexual techniques that may improve marriages.<sup>206</sup> This holds true for couples who have “clinical sexual problems” and for those who are merely seeking a more adventurous sex life.<sup>207</sup>

For those who are not married, do not have sex partners, or cannot find a sex partner due to disabilities, geographic isolation, age, unattractiveness, inhibitions, and other reasons, pornography is an alternative to unsafe sex, and it can provide “information or pleasure.”<sup>208</sup> Further, it can provide validation to those who are ashamed about their sexuality that their “sexual practices and preferences” are acceptable.<sup>209</sup> As shown above, pornography is a billion dollar enterprise that is both

199. *Id.* at 277, 285.

200. *See id.* at 277.

201. *Id.* at 289.

202. *Id.*

203. *Id.* at 277–78.

204. *Id.* at 265, 294.

205. STROSSEN, *supra* note 5, at 163.

206. *Id.*

207. *Id.* at 163–64.

208. *Id.* at 164.

209. *Id.* at 165.

entertaining and beneficial to society. In addition to such merits, the First Amendment protects sexually explicit expression, such as adult pornography. Accordingly, § 2257 should be amended in a way that promotes instead of hampers such expression.

### VIII. In Simple Terms: What Producers and Others Have to Do to Comply

Before considering potential amendments, the statute must be understood in its current form. This section will describe § 2257's requirements in simple terms and how creators of sexually explicit content can comply with the record-keeping requirements. Then it will provide solutions that will ease the burden on producers.

#### A. Who Section 2257 Covers

Under § 2257, a producer must maintain records of sexually explicit conduct if the conduct was made into a visual depiction after November 1, 1990.<sup>210</sup> A producer is one who creates a sexually explicit image of an actual human being.<sup>211</sup> The image can be made in a film, videotape, photograph, picture, digital image, or digitally (i.e., computer) manipulated image.<sup>212</sup> Producers are not limited to those who create a visual depiction. It also includes those who intend to distribute such content for commercial purposes, as well as those who assemble, manufacture, publish, duplicate, reproduce, or reissue such materials.<sup>213</sup> In the digital context, a producer includes one who inserts or manages sexually explicit content on a computer site or service if the image is intended for commercial distribution.<sup>214</sup>

Those who do not fall under the definition of producer, such as Internet servers, are not exempt from record-keeping requirements.<sup>215</sup> While non-producers do not have to keep records themselves, they must verify that the producer has kept the required records and ensure that the producers have attached disclosure statements to each sexually explicit

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210. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502(a)(1), 120 Stat. 587, 625 (2006)(codified as amended at 18 U.S.C. § 2257(a) (2008)).

211. *Id.* § 502(a)(4), 120 Stat. at 625 (codified as amended at 18 U.S.C. § 2257(h)(2)(A)(i) (2008)).

212. *Id.* (codified as amended at 18 U.S.C. § 2257(h)(2)(A)(i) (2008)).

213. *Id.* (codified as amended at 18 U.S.C. § 2257(h)(2)(A)(ii) (2008)).

214. *Id.* (codified as amended at 18 U.S.C. § 2257(h)(2)(A)(iii) (2008)).

215. *Id.* (codified as amended at 18 U.S.C. § 2257(h)(2)(B) (2008)).

image.<sup>216</sup> However, unlike the producers, such persons do not have to ascertain that the records are accurate.<sup>217</sup>

## B. Information the Producer Must Obtain From the Performer and What the Producer Must Do With the Information

Producers must obtain the performer's<sup>218</sup> name and birth date based on the performer's government-issued identification.<sup>219</sup> Then the producer must photocopy the identification and ascertain and record all other names ever used by the performer including, "maiden name, alias, nickname, stage, or professional name."<sup>220</sup> In addition, individually identified records must be maintained for each performer.<sup>221</sup> Further, the producer then must determine the exact location that the performer appears.<sup>222</sup> For example, in a magazine this location is the page where a reader can see a performer's nude photo, whereas in a DVD it is the time frame where we can see the performer. Once the producer determines where a performer can be found, he must attach a statement to every copy of the magazine, DVD, or any other medium, disclosing the exact location of the records for that performer.<sup>223</sup> In the case of the Internet, a "copy" includes every page of a website that depicts sexually explicit content.<sup>224</sup> So, an adult producer who runs a website must place record-keeping information on every page of his website.

In addition to creating and maintaining records, producers must allow the attorney general to inspect such records "at all reasonable times."<sup>225</sup> It is unlawful to refuse to submit to such inspections.<sup>226</sup> The attorney general may inspect these records without advance notice up to once every four months or more often if he or she has reasonable suspicion that the producer has violated a provision of the record-keeping requirement.<sup>227</sup>

216. *Id.* § 503(a), 120 Stat. at 626 (codified as amended at 18 U.S.C § 2257(f)(4) (2008)).

217. *Id.* (codified as amended at 18 U.S.C § 2257(f)(4) (2008)).

218. A performer is "any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct." *Id.* § 502(a)(4), 120 Stat. at 625 (codified as amended at 18 U.S.C § 2257(h)(3) (2008)).

219. *Id.* (codified as amended at 18 U.S.C § 2257(b)(1) (2008)); 28 C.F.R. § 75.1(b) (2008).

220. *Id.* (codified as amended at 18 U.S.C § 2257(b)(2) (2008)).

221. *Id.* § 502(a)(1), 120 Stat. at 125 (codified as amended at 18 U.S.C § 2257(a) (2008)).

222. *Id.* § 503(a), 120 Stat. at 626 (codified as amended at 18 U.S.C § 2257(e)(1) (2008)).

223. *Id.* (codified as amended at 18 U.S.C § 2257(e)(1) (2008)).

224. *Id.* (codified as amended at 18 U.S.C § 2257(e)(1) (2008)).

225. *Id.* (codified as amended at 18 U.S.C § 2257(c) (2008)).

226. *Id.* (codified as amended at 18 U.S.C § 2257(f)(5) (2008)).

227. 28 C.F.R. § 75.5(d) (2008).

### C. To Avoid Imprisonment and Fines, Do Not Make Any Mistakes

Violators of 18 U.S.C. § 2257 face up to five years in prison and a fine.<sup>228</sup> One who violates this section more than once faces a minimum of two years in prison and a maximum of ten years in prison in addition to a fine.<sup>229</sup> Because § 2257 does not have an element of intent, even if a producer does everything within his ability to comply, he may be punished because of a miniscule oversight that has nothing to do with child pornography.<sup>230</sup>

## IX. Proposal to Change 18 U.S.C. § 2257

Jeffrey Douglas points out, “[t]he record keeping requirement could be as simple as: check the ID, make a copy of the ID; and that’s the end of it.”<sup>231</sup> If the requirements are really meant to ensure that the prospective performers are over eighteen years old, Douglas’s suggestion should be the only requirement necessary. A photocopy of a legitimate form of identification maintained in separate, organized, and easily accessible file should be enough. Under the current form of the law, the producer can only accept select forms of identification, such as passports, permanent resident cards, or drivers’ licenses, that “bear . . . the photograph and the name of the individual identified, and provide . . . sufficient specific information that it can be accessed from the issuing authority.”<sup>232</sup> The fact that only bona fide forms of identification are acceptable provides a sufficient safeguard against the falsification of identification and thereby precludes minors from participating in the creation of sexually explicit material. Of course, there is always the possibility of the falsification of bona fide forms of identification such as driver’s licenses. However, the burdensome record-keeping requirements of § 2257, as described above, do nothing to mitigate this problem. Rather, they merely produce extraneous copies of the false identification.<sup>233</sup> As a result, eliminating certain portions

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228. 18 U.S.C. § 2257(i) (2008).

229. *Id.*

230. See *infra* notes 233–34 and accompanying text.

231. Richards & Calvert, *supra* note 121, at 188.

232. 28 C.F.R. § 75.1(b) (2008).

233. See 18 U.S.C. § 2257(a) (2008) (“Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which . . . contains one or more visual depictions . . . of actual sexually explicit conduct . . . shall create and maintain *individually identifiable records pertaining to every performer* portrayed in such a visual depiction.” (emphasis added)); see also *supra* notes 217–22 and accompanying text.

of the record-keeping requirements would not put children at any more risk than they already are under § 2257 as it stands today.

### A. Add an Element of Intent

Because § 2257 does not have an intent requirement, a producer may be fined and imprisoned even if he or she acts in good faith to comply with the requirements.<sup>234</sup> For example, if a prospective performer gives a producer very good false identification and the producer honestly believes that the minor is an adult, the producer may be subject to punishment under § 2257 for his honest mistake.<sup>235</sup> Because producers may be fooled by false identification, they should not be automatically deemed guilty of creating child pornography unless intent is established.

Intent is not difficult to establish in the case of child pornography. The physiology and facial features of a child are clearly different than that of an adult.<sup>236</sup> A producer who argues that he thought a ten- or thirteen-year-old teenager was actually an adult would not pass the laugh test. On the other hand, it is plausible that a producer is deceived by a seventeen-year-old performer's false identification. In fairness to producers who make a conscientious effort to obey the law, such a producer should be allowed to prove that he did not intend to use a minor in his productions.

### B. Abolish the Multiple Name Requirement

Section 2257 requires producers to "ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name."<sup>237</sup> Such requirements, however, do not help prevent child pornography. The performer is already required to provide a form of identification that can be

234. See 18 U.S.C. § 2257(i) (2008) ("Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both."). Note that § 2257(i) does not have an intent requirement.

235. *Id.*

236. See generally Male Development, <http://www.ucsf.edu/sfshare/maledevelopment.html> (last visited Mar. 3, 2008) (providing illustrations of the changes in the male body from childhood to adulthood); Female Development, <http://www.ucsf.edu/sfshare/femaledevelopment.html> (last visited Mar. 3, 2008) (providing illustrations of the changes in the female body from childhood to adulthood); Face Variations By Age, [http://www.beautyanalysis.com/mba\\_facevariationsbyage\\_page.htm](http://www.beautyanalysis.com/mba_facevariationsbyage_page.htm) (last visited Mar. 3, 2008) (providing pictures of humans from infancy to adulthood to old age).

237. 18 U.S.C. § 2257(b)(2) (2008).

authenticated by the issuing authority.<sup>238</sup> Although the extra name requirement is meant to help track the performer and to ascertain her identity, § 2257 requires producers to ascertain *any name* that the performer has ever used.<sup>239</sup> It is unclear how such an exhaustive list of nicknames is in any way helpful in preventing the creation of child pornography. Further, it may be impossible for a producer to ascertain every nickname and name that the performer has ever used. For example, the performer may not remember every nickname he or she has ever used. However, the producer would be liable for his performer's forgetfulness under § 2257.

### C. Eliminate the Public Labeling Requirement

Currently, § 2257 requires any producer of sexually explicit material to place his or her real name and business address on every visual depiction of sexually explicit conduct.<sup>240</sup> Thus, if his or her business and home addresses are the same, the public would have access to his or her home address. Sex can be a sensitive or even taboo topic. Thus, people may be deterred from producing sexually explicit depictions if their identity is revealed. The First Amendment protection is useless if the people are intimidated from engaging in protected expression. Instead of making public the names and addresses of adult entertainment producers, such producers should be able to register their company on a database only accessible to the attorney general and federal authorities in charge of record-keeping inspections. Such a system would help the FBI locate companies before a records inspection and while at the same time protect the identity of the record keeper.

### D. Abolish Record-Keeping Requirements for Secondary Producers

Because primary producers are already required to maintain comprehensive records, secondary producers should not have to. Not only does requiring secondary producers to keep records place an unnecessary burden on them, it neither helps to prevent the creation of child pornography nor does it help ensure good record-keeping. If a primary producer violates § 2257, the violation has already taken place. Requiring a secondary producer of that illegal work product to maintain records does not cure nor prevent the primary producer's violation. Further, secondary producers are not required to check the accuracy of § 2257 records, so the

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238. 28 C.F.R. § 75.1(b) (2008).

239. 18 U.S.C. § 2257(b)(2) (2008).

240. *See id.*; *id.* § 2257(e)(1).



additional record-keeping requirement neither enhances accuracy nor provides a safeguard against the proliferation of material created by producers with noncompliant records.<sup>241</sup> Eliminating record-keeping requirements for secondary producers would lift an unnecessary burden off of the First Amendment expression of secondary producers of adult material.

### E. Adopt a Totality of Circumstances Standard

Section 2257 requires producers to meet very high standards but does not provide an exception for mistakes.<sup>242</sup> Producers should not be imprisoned or fined on the basis of technicalities, such as failing to determine a performer's nickname or accidentally keeping an additional piece of paper in the performer's file. Instead, a totality of the circumstances approach should be adopted. Under this approach, in determining whether a violation of § 2257 has occurred, the prosecutor should ask whether the producer acted in good faith based on the totality of circumstances. Factors may include the following: (1) whether the performer has a record on file and whether the file contains a photocopy of an accepted form of identification and (2) whether the performer's age and appearance can be clearly determined by the photocopy. A clear copy of the performer's identification placed in a file would show that the producer obtained a copy of the identification in good faith and that she has nothing to hide about the performer's identity.

Another factor that should be considered is the extent of the violation. For example, if the producer actually uses a minor in one of its productions, that producer should receive a much more severe punishment than a producer who uses only adult performers, but makes a nonmaterial mistake, such as failing to ascertain a nickname that the performer once used. Another factor in determining good faith may depend on the size of the company and its financial resources. An individual person who wishes to place sexually explicit pictures of himself or herself over the Internet may have fewer resources than a large adult magazine. Further, if the company has an attorney or can afford an attorney, it can reasonably be expected to be at a higher level of compliance than a less wealthy company or individual.

Because § 2257 has technicalities that would cause a producer to be imprisoned even if he or she tries to comply with the statute in good faith, but fails because of a small oversight, it may preclude potential producers

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241. See *supra* text accompanying note 215–17.

242. See 18 U.S.C. § 2257 (2008).

from exercising their First Amendment right to produce sexually explicit material. With the suggested amendments, producers may be less inhibited to exercise their First Amendment rights because they will not fear the consequences of unforeseen mistakes.

### Conclusion

Since the Court held that the government can regulate child pornography in *New York v. Ferber*, Congress has passed laws that seem to try to stamp out pornography in general. First, Congress illegalized child pornography in the Protection of Children Against Sexual Exploitation Act of 1977 and increased the penalties for those found guilty of child pornography in the Child Protection Act of 1984. Although these statutes directly dealt with child pornographers and increased child pornography prosecutions by 600 percent, Congress was not satisfied. Then, in 1988, Congress introduced the record-keeping requirements as codified in 18 U.S.C. § 2257. Unlike the previous 1977 and 1988 Acts, which directly targeted child pornographers, § 2257 encompassed the entire adult entertainment industry and provided no additional assurances that child pornographers would be discovered. Section 2257 has been amended twice, the last of which was held unconstitutional in *Connection Distribution Company v. Keisler*. In order to ensure that the First Amendment right to free speech is fully protected, the holding in *Keisler* must be upheld. The First Amendment protects sexual speech as long as it is not obscene and not child pornography. Therefore, its protections extend to speech that certain sectors of society may find unacceptable. Further, even if some find sexually explicit materials offensive, pornography is a multi-billion dollar business. It also provides a desired source of entertainment, as well as health benefits. Thus, as the court suggests in *Keisler*, § 2257 must be struck down in its entirety or extensively rewritten.