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## Ensuring that Only Adults “Go Wild” on the Web: The Internet and Section 2257’s Age-verification and Record-keeping Requirements

### I. INTRODUCTION

Throughout the week, millions of viewers tune in to Comedy Central’s popular lineup of critically acclaimed programming like *The Daily Show with Jon Stewart*, *The Colbert Report*, and *South Park*.<sup>1</sup> During commercial breaks, these viewers are routinely subjected to commercials for the *Girls Gone Wild* video series.<sup>2</sup> The series involves a man traveling around the country to various college campuses who asks coeds to lift up their shirts to expose their breasts, and even sometimes to lift up the shirts of other women or to engage in sexual conduct with them.<sup>3</sup> On the commercials, various body parts are strategically blurred out.<sup>4</sup> The commercials market videos with names such as *Girls Gone Wild College Girls Exposed/Sexy Sorority Sweethearts*, *Girls Gone Wild on Campus Uncensored*, and *Ultimate Spring Break*.<sup>5</sup> The risqué commercials have become almost as much a part of the Comedy Central landscape as the political satire and foul-mouthed cartoon boys themselves.

*Girls Gone Wild* is produced by creator Joe Francis and his Santa Monica, California-based production company Mantra Films, Inc.<sup>6</sup> In 2006, the *Girls Gone Wild* franchise was in legal trouble after two seventeen-year-olds in Florida claimed that Francis and his crew filmed

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1. *Nielsons: CBS leads the way in prime time*, U.S.A. TODAY, Oct. 14, 2008, [http://www.usatoday.com/life/television/news/2008-10-14-nielsen-analysis\\_N.htm](http://www.usatoday.com/life/television/news/2008-10-14-nielsen-analysis_N.htm) (last visited Nov. 10, 2008); *COMEDY CENTRAL(R) Honored With Three Primetime Emmy(R) Awards*, REUTERS, Sept. 22, 2008, <http://www.reuters.com/article/pressRelease/idUS163498+22-Sep-2008+PRN20080922> (last visited Nov. 10, 2008).

2. *Politician wants ‘Girls Gone Wild’ ads banned*, MSNBC, Jan. 12, 2007, <http://www.msnbc.msn.com/id/16599461/> (last visited Nov. 10, 2008); ASSOCIATED PRESS, *Bill to Ban ‘Girls Gone Wild’ TV Likely Dead for 2nd Year*, Apr. 8, 2008, <http://www.wate.com/Global/story.asp?S=8137118> (last visited Nov. 10, 2008).

3. *See Remove Pornographic Girls Gone Wild Ads From Comedy Central*, <http://www.petitiononline.com/comedyad/petition.html> (last visited Nov. 10, 2008).

4. *Id.*

5. Terry Frieden, *‘Girls Gone Wild’ producers fined \$2.1 million*, CNN, Sept. 12, 2006, <http://www.cnn.com/2006/LAW/09/12/ggw.plea/index.html> (last visited Nov. 10, 2008).

6. *Id.*

them engaged in sexual conduct at the beach.<sup>7</sup> The company faced many charges as a result of these allegations, but most of them were dropped.<sup>8</sup> However, Francis and the company did plead guilty to federal charges for failing to properly document and record the ages of some of the women used in their videos, as well as for failing to properly mark the videos with information as to where these records could be found.<sup>9</sup> They agreed to pay \$2.1 million in fines and restitution for their failures to comply with the record-keeping laws.<sup>10</sup>

These record-keeping requirements are imposed by federal law in Section 2257.<sup>11</sup> Although the law has been around since 1988, the Justice Department said that the prosecution of Francis and Mantra Films was the first suit filed under the law.<sup>12</sup> The law is designed to ensure that the adult entertainment industry does not use under-age performers.<sup>13</sup> Assistant Attorney General Alice Fisher said, “[t]oday’s agreements ensure that Girls Gone Wild will comply with an important law designed to prevent the sexual exploitation of minors and puts other producers on notice that they must be in compliance as well.”<sup>14</sup> Many adult entertainment sites on the Internet have made efforts to comply with this law, but the exact requirements of the law and its constitutionality are questioned by, not only those who produce and distribute adult content, but also by the courts.<sup>15</sup>

Most people would agree that protecting children from sexual exploitation is a legitimate state interest and a worthy goal for society.<sup>16</sup> However, the rise of the Internet and some free-speech concerns have cast doubt on whether Section 2257 is a practical way—or even an effective way—to protect those children most in need of protection. This article will summarize the specific requirements of Section 2257 and then review its history, starting with its adoption by Congress and tracing its treatment by the courts to the present day. It will then analyze how the

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7. *34 charges dropped vs. ‘Girls Gone Wild,’* MSNBC, Jan. 5, 2007, <http://www.msnbc.msn.com/id/16477843/> (last visited Nov. 10, 2008).

8. *Id.*

9. Frieden, *supra* note 5.

10. *Id.*

11. 18 U.S.C. § 2257 (2000 & Supp. 2005).

12. Frieden, *supra* note 5.

13. *Id.*

14. *Id.*

15. See Robert D. Richards & Clay Calvert, *The Legacy of Lords: The New Federal Crackdown On the Adult Entertainment Industry’s Age-Verification and Record-Keeping Requirements*, 14 UCLA ENT. L. REV. 155, 159 (2007); *Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 548 (6th Cir. 2007).

16. See Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247, 297-98 (2004).

rise of the Internet has significantly impacted Section 2257. It will also focus on problems with Section 2257 and discuss its future, including ways for Congress to address these problems. The article will conclude by suggesting that if Congress rewrites Section 2257, it can make a law for the Internet Age that protects children without violating freedom of speech. A new Section 2257 can balance the security of children and the First Amendment in a way that the current law fails to do, ensuring that adults can express themselves without intentionally or unintentionally harming children in the process.

## II. AN OVERVIEW OF SECTION 2257

Section 2257 is found in Title 18, in the middle of the chapter entitled “Sexual Exploitation and Other Abuse of Children.”<sup>17</sup> It is thus facially obvious what the legislative purpose was in establishing the age-verification and record-keeping requirements for producers of sexually explicit entertainment. To accomplish this goal of protecting children, Section 2257 requires producers of adult material, *inter alia*, to verify the age of every performer in the work, to record that information, to maintain those records at the business site, and to make those records available to the authorities upon demand.<sup>18</sup> Additionally, the law requires producers to organize and maintain the records in specific ways so the Attorney General can easily inspect them upon demand.<sup>19</sup> As a whole, Section 2257 sets up a detailed process for any producers of adult entertainment.

Section 2257’s record-keeping requirements apply to “[w]hoever 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.”<sup>20</sup> This includes those that actually create the images or films, termed “primary producer[s]” under the Attorney General’s regulations.<sup>21</sup> It also includes those who assemble, publish, or reproduce materials that contain the image, as well as those who upload such images onto the Internet,<sup>22</sup> termed “secondary producer[s]” under the regulations.<sup>23</sup>

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17. 18 U.S.C § 2257 (2000 & Supp. 2005).

18. *Id.*

19. *Id.*

20. *Id.* at § 2257(a).

21. 28 C.F.R. § 75.1(c)(1) (2008).

22. 18 U.S.C §§ 2257(h)(2)(A)(ii), (iii) (2005).

23. 28 C.F.R. § 75.1(c)(2) (2008).

Anyone who produces depictions of actual sexually explicit conduct must inspect a government-issued identification for every performer engaged in such depiction.<sup>24</sup> The producer must record the name and date of birth, as well as “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>25</sup> The regulations then specify that the producer must photocopy the identifications and file the records in alphabetical or numerical order so they will be available to the Attorney General without advance notice.<sup>26</sup>

The producer must also affix to the image or video a statement including the address where these records are kept and maintained.<sup>27</sup> The regulations are so specific that they require producers to use certain font sizes and colors in the text.<sup>28</sup> Failure to comply with any part of Section 2257 may result in being guilty of a felony punishable up to five years in prison and substantial fines.<sup>29</sup> A second conviction can be punishable up to ten years.<sup>30</sup>

### III. THE HISTORY OF SECTION 2257

The original Section 2257 law was passed as part of the Child Protection and Obscenity Enforcement Act of 1988 after Attorney General Edwin Meese’s commission recommended record-keeping requirements for producers of sexually explicit material.<sup>31</sup> Immediately after the law passed, the adult entertainment industry challenged the constitutionality of Section 2257, but in 1994, the D.C. Circuit Court of Appeals ruled against the industry and found that the age-verification and record-keeping requirements were constitutional.<sup>32</sup> It found that Section 2257 was narrowly tailored<sup>33</sup> and helped prevent the sexual exploitation of children in three ways: (1) it ensured that producers verified the age of

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24. 18 U.S.C § 2257(b)(1) (2000 & Supp. 2005); 28 C.F.R. § 75.2(a)(1) (2008).

25. 18 U.S.C § 2257(b)(1),(2) (2000 & Supp. 2005).

26. 28 C.F.R. § 75.2(a),(d),(e) (2008).

27. 18 U.S.C § 2257(e) (2000 & Supp. 2005).

28. 28 C.F.R. § 75.6(e) (2008).

29. 18 U.S.C § 2257(i) (2000 & Supp. 2005).

30. *Id.*

31. Richards & Calvert, *supra* note 15, at 162; Free Speech Coalition, 2257, <http://freespeechcoalition.com/FSCprint.asp?coid=137> (last visited Nov. 10, 2008).

32. *Am. Library Ass’n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994); Audrey Rogers, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 VILL. L. REV. 87, 103 (2005).

33. Free speech questions are analyzed under an intermediate level of scrutiny when the statute is deemed content neutral. *Am. Library Ass’n*, 33 F.3d at 88. To pass constitutional muster in such cases, the statute should be “narrowly tailored to serve a significant government interest . . .” *Id.* Protecting children from exploitation is a significant or compelling government interest. *Id.*

performers, (2) it denied child pornographers access to commercial markets, and (3) it aided law enforcement in checking whether a performer is in fact of age.<sup>34</sup> In spite of this ruling in favor of Section 2257’s constitutionality, Janet Reno did not enforce it during her tenure as Attorney General.<sup>35</sup>

When the Bush Administration took over in 2001, the adult entertainment industry feared that enforcement of Section 2257 was just around the corner.<sup>36</sup> However, Attorney General John Ashcroft did not investigate, let alone prosecute anyone for violating Section 2257.<sup>37</sup> Ashcroft reported to Congress that new regulations were needed to adapt the law to the Internet-age and under his successor, Alberto Gonzales, the Justice Department created new regulations.<sup>38</sup> At the same time, Congress added amendments to various bills that changed provisions of Section 2257 to try to modernize the language by incorporating the Internet.<sup>39</sup>

In 2006, the FBI began inspections of companies under Section 2257.<sup>40</sup> That same year, the Justice Department made its first Section 2257 prosecution by charging *Girls Gone Wild* creator Joe Francis and his company Mantra Films.<sup>41</sup> Inspections continued throughout 2006 and 2007, putting those in the adult entertainment industry on notice that they could be inspected at any time to review their Section 2257 compliance.<sup>42</sup>

At the same time, the Free Speech Coalition, an adult entertainment industry trade association, filed suits in federal court to stop the enforcement of these regulations and Section 2257 in general.<sup>43</sup> The industry won a partial victory in 2005 when a federal court ruled that although Section 2257 is constitutional, it is unconstitutional as it applies to secondary producers or those that are uninvolved with “hiring, contracting for managing” or otherwise have no direct contact with

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34. *Am. Library Ass’n*, 33 F.3d at 86.

35. Richards & Calvert, *supra* note 15, at 175.

36. *Id.*

37. *See id.*

38. *Id.* at 176; Free Speech Coalition, *supra* note 31.

39. Rogers, *supra* note 32, at 100; *see also* Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003 (PROTECT ACT), Pub. L. No. 108-21, 2003 U.S.C.A.N. (117 Stat.); 650 Pub. L. No. 108-21, § 101 (2003); 18 U.S.C. § 2252A (Supp. III 20033); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 2006 U.S.C.A.N. (120 Stat.); 587.H.R. 4472, 109th Cong. § 503 (2006).

40. Richards & Calvert, *supra* note 15, at 156–57.

41. Frieden, *supra* note 5.

42. Richards & Calvert, *supra* note 15, at 161.

43. Free Speech Coalition, *supra* note 31.

performers.<sup>44</sup> The judge also said that “there is a significant market for pornography involving young-looking performers . . . . Such a demand creates a risk of under-age participation which can be prevented or discouraged by disclosure and reporting requirements.”<sup>45</sup>

The Free Speech Coalition’s most successful legal victory came in October 2007, when the 6th Circuit Court of Appeals ruled that Section 2257 is unconstitutional.<sup>46</sup> The Court ruled that the requirements were impermissibly overbroad because they significantly burdened protected adult speech.<sup>47</sup> On April 10, 2008, however, the opinion was vacated when the 6th Circuit granted a rehearing en banc.<sup>48</sup> While the finality of the court’s decision is still in question, this case raises questions about the vitality of Section 2257 and is yet another chapter in Section 2257’s curious history. Not only did the 6th Circuit’s decision create a split among the Circuit Courts, but it highlighted the problems with applying a law designed for magazines and VHS tapes to the new age of the Internet and the Information Superhighway.

#### IV. SECTION 2257 AND THE INTERNET

An attorney for the adult entertainment industry told two Penn State professors that “[t]here are substantial problems with applying Section 2257 to where the greatest amount of distribution is currently occurring, which is on the Internet.”<sup>49</sup> The executive director of the Free Speech Coalition claims that there is compliance with Section 2257 with regards to VHS and DVD sales, but that many of those “who provide adult material on the Internet are extremely vulnerable . . . to 2257 issues. They don’t think it applies to them.”<sup>50</sup> With the ever evolving nature of the Internet and its relationship with the adult entertainment industry, many questions regarding the proper scope of Section 2257 in cyberspace constantly arise.

The Internet was not “The Internet” as we know it today back when Congress originally passed the Section 2257 regulations in 1988.<sup>51</sup> The

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44. Free Speech Coal. v. Gonzales, 406 F. Supp. 2d 1196, 1204 (D. Col. 2005).

45. *Id.* at 1207.

46. Connection Distrib. Co. v. Keisler, 505 F.3d 545, 548 (6th Cir. 2007).

47. *Id.*

48. *Id.* at 545.

49. Clay Calvert & Robert D. Richards, *Inside the FBI Inspections of Adult Movie Company Age-verification Records: A Dialogue with Special Agent Chuck Joyner*, 15 UCLA ENT. L. REV. 55, 80 (2008).

50. Calvert & Richards, *supra* note 16, at 298.

51. See Karl A. Menninger, II, *Cyberporn: Transmission of Images By Computer As Obscene, Harmful to Minors, or Child Pornography*, 61 AM. JUR. POF. 3D 51, 64 (2008).

ARPAnet infrastructure that later developed into the Internet was just becoming available to commercial entities at that time<sup>52</sup> and the “World Wide Web” project was not even invented until 1989.<sup>53</sup> The rise of the Internet has expanded the list of “producers” who are potentially subject to the record-keeping requirements of Section 2257. In response to these technological developments, Congress amended the law in 2003 to specifically include those involved with the distribution of pornography on the Internet, and the law in its current form also covers the Internet sites.<sup>54</sup>

A simple Google search for “2257” reveals the dramatic reach of Section 2257 and the vast network of adult content on the Internet.<sup>55</sup> Aside from Wikipedia, most of the hits on the first dozen pages of links direct Internet users to statements from adult content providers about their compliance with Section 2257.<sup>56</sup> The existence of these sites indicates that many adult content providers are obviously taking the law seriously and attempting to meet its age-verification and record-keeping requirements. However, it is unknown, given the almost limitless potential to post pictures online, what percentage of adult websites attempt to comply with Section 2257. This is especially true given the global nature of the Internet and the fact that users inside the United States may still access adult materials that come from foreign countries where Section 2257 does not apply.<sup>57</sup>

The continuing evolution of the Internet creates many questions about the scope of Section 2257. Perhaps the biggest problem relating to Section 2257 and the Internet is that much of the adult material that is available comes from non-traditional, non-commercial sources. Professor Lawrence Lessig said:

With the costs of production so low, a much greater supply of porn is produced for cyberspace than for real space. And indeed, a whole

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52. *Id.*

53. CERN, *The Website of the World's First-ever Web Server*, <http://info.cern.ch> (last visited November 10, 2008).

54. Philip Green, *Hair Splitting on the Sundance Case in the Adult Industry*, 23 ENT. & SPORTS LAW 14, 15 (2006).

55. Google search of “2257” performed by the author on November 13, 2008. The search returned approximately 47,100,000 hits and after a Cornell Law site with the actual statute and a Wikipedia article on the statute, the majority of the hits on the first dozen pages were to notices of compliance with Section 2257 and information as to where the custodian of records could be located. Examples of sites found in the search include [katesplayground.com](http://katesplayground.com), [adultprovide.com](http://adultprovide.com), [hustler.com](http://hustler.com), and [schoolbuschicks.com](http://schoolbuschicks.com). Similar searches of “2256” and “2258” returned 24,700,000 and 24,400,000 hits respectively.

56. *Id.*

57. See *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004); *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 789, 811 (E.D. Pa. 2007).

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category of porn exists in cyberspace that doesn't in real space – amateur porn, or porn produced for noncommercial purposes. That category of supply simply couldn't survive in real space.<sup>58</sup>

It is easy for an individual to create their own website or to post pictures on a blog. An individual does not need fancy, expensive professional equipment to “produce” pictures of himself. He can use a basic digital camera from Wal-Mart or even his cell phone to take a picture of sexual conduct. Then, with the click of a mouse, he can put the picture on the Internet for the whole world to see. This rise of “amateur porn” exponentially increases the number of those producers now subject to Section 2257.

While many commercial producers and distributors in the adult entertainment industry are familiar with Section 2257, the individual posting adult content online from the comfort of his own home would likely be unaware of the law. He likely will not know that he must create records with a copy of his government identification and any name he may have ever been known by, as well as a list of any other sexually explicit picture or video he has ever made.<sup>59</sup> In addition, he will be unaware that he must also include a notification online with the posted picture or video of the address where the Attorney General can find the required records.<sup>60</sup>

The ever-growing popularity of social networking sites such as Facebook and MySpace adds another aspect to Section 2257 enforcement on the Internet. Does the host of the site need to maintain records for those pictures posted by users of the site? Or should the poster himself maintain the information for the records on her profile page? Before these questions can be answered, however, the government must determine whether social networking sites even fall within Section 2257's detailed definition of “producer.”

A similar problem arises with the advent of YouPorn and other adult sites where individual users can upload their own videos of themselves onto the network for all to see. These sites are the perfect forum for the amateur porn that Professor Lessig said is proliferating on the Internet.<sup>61</sup> YouPorn is quickly becoming one of the most popular sites on the Internet and has the most traffic of any adult site.<sup>62</sup> Anyone can post a

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58. LAWRENCE LESSIG, CODE VERSION 2.0 248 (2006).

59. See 18 U.S.C § 2257(b)(1),(2) (2000 & Supp. 2005).

60. See 18 U.S.C § 2257(e) (2000 & Supp. 2005).

61. See LESSIG, *supra* note 58, at 248.

62. Regina Lynn, *Proposed Law Could be Cold Shower for YouPorn*, WIRED, Oct. 19, 2007, [http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/10/sexdrive\\_1019](http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/10/sexdrive_1019) (last visited Nov. 10, 2008).

video of herself on the site in a manner modeled after YouTube, but as the name of the site indicates, these videos are of naked people that are often engaged in sexual conduct.

Questions arise as to how Section 2257 applies to these sites. Would everyone who uploads a picture also have to submit to the host site their Section 2257 compliant photo identification and information?<sup>63</sup> Would YouPorn then need to maintain these records as long as the picture existed, which in some form in cyberspace could be forever?<sup>64</sup>

Currently, YouPorn, PornTube, and other similar sites do not require those who post to also submit their Section 2257 information and they do not maintain the records.<sup>65</sup> Many bloggers viewed the 6th Circuit’s decision on the unconstitutionality of Section 2257 as a green light to use these “amateur porn” sites without the fear of needing to follow Section 2257.<sup>66</sup> These sites are walking a tightrope because, if Section 2257 does in fact apply to them, it will result in an unprecedented cross-referencing, record-keeping, and age-verification program that would likely sink the sites.<sup>67</sup> With the future of adult entertainment online pointing in the direction of increased demand for user-oriented social networking and personal video upload sites, the answers to these questions with regards to Section 2257 are very important.

#### V. PROBLEMS WITH SECTION 2257

In addition to the problems with implementing Section 2257 on the Internet, there are other problems with the law in general. One of the biggest criticisms of Section 2257 is that it targets those who do not have a problem with exploiting children, but instead only produce content with adult performers.<sup>68</sup> Professors Calvert and Richards of Penn State University interviewed several people who are associated with the adult entertainment industry either as the custodians of records for their businesses or editors of their publications.<sup>69</sup> All of them denied that there is a problem with using under-age performers in the industry.<sup>70</sup> While a couple of the interviewees admitted that a few under-age performers have actually been involved in their films, they said that these performers

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63. *Id.*

64. *Id.*

65. Salon.com, *You and YouPorn are now free to make porn*, Oct. 24, 2007, [http://machinist.salon.com/blog/2007/10/24/porn\\_law/](http://machinist.salon.com/blog/2007/10/24/porn_law/) (last visited Nov. 10, 2008).

66. *Id.*

67. *Id.*; Lynn, *supra* note 62.

68. Richards & Calvert, *supra* note 15, at 173

69. *Id.* at 165–67.

70. *Id.* at 170–73.

“used fake IDs to defraud the industry in order to perform in movies . . . .”<sup>71</sup> Thus, even though the producers were in fact following the strict requirements of Section 2257 in good faith, the process was unable to prevent against all possible uses of under-age performers in the films.

The adult entertainment industry’s argues that pedophiles are not likely to comply with Section 2257 in any case. When Congress was considering amending Section 2257 in 2006, the Association of Sites Advocating Child Protection (ASACP) wrote a letter to Representative James Sensenbrenner of Wisconsin.<sup>72</sup> While the group agreed that preventing child exploitation was a worthy goal, it stated:

[D]ata clearly shows that 99.9% of new, unique verifiable [child pornography] reports are not related to the professional adult entertainment industry. Instead, they are attributable to pedophiles and criminals who are not about to maintain any records of the type regulated under section 2257. They would therefore be unhindered by this legislation.<sup>73</sup>

Meanwhile, the pedophiles and people that are actually exploiting children and producing child pornography are extremely unlikely to put Section 2257 labels on their work and, even if they did, they are unlikely to admit in the records themselves that they used underage performers.<sup>74</sup>

However, Congress seems to have recognized this potential problem even as it was passing the legislation two decades ago. Senator Orrin Hatch of Utah stated at a Judiciary Committee hearing that was first considering Section 2257 that those legitimate adult businesses were not producing child pornography for the most part, but “the supply of these materials for an ever increasing market has shifted to a well-organized network of child molesters who simply make their own recordings or photographs and share them between themselves.”<sup>75</sup> Congress recognized that the adult entertainment industry was not the chief culprit in creating child pornography, but it also recognized that the record-keeping requirements of Section 2257 should apply to all producers if the

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71. *Id.* at 170.

72. ASACP: Association of Sites Advocating Child Protection, *ASACP Responds to HR 4472*, Mar. 8, 2006, <http://www.asacp.org/page.php?content=news&item=312> (last visited Nov. 10, 2008).

73. *Id.*

74. Richards & Calvert, *supra* note 15, at 182.

75. *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing on S. 2033 and S. 703 Before the S. Comm. on the Judiciary*, 100th Cong. 110 (1988) (statement of Senator Hatch).

law was really to protect children from the psychological harm of being photographed in sexually explicit ways.<sup>76</sup> The requirements would also provide an additional avenue for prosecuting anyone who produces child pornography.

Another concern deals with the costs of compliance with Section 2257. Big companies can afford the legal teams and custodians to make the records. Smaller companies and individuals do not have the economic resources to do what is required to keep all the records called for under Section 2257.<sup>77</sup> With the increase in amateur porn on the Internet and private individuals sharing sexually explicit images of themselves online, these concerns are further brought to the forefront.

The extension of Section 2257 to individuals online raises significant privacy concerns. While big production companies can put their business addresses online to ensure compliance with Section 2257, some producers have expressed uneasiness with having private individuals put their home addresses online.<sup>78</sup> In its recent decision, the 6th Circuit hypothesized that if private individuals understood that they would be required to comply with Section 2257, “many would choose to not create the images rather than creating the records, affixing the statements, maintaining the records, and opening their homes to government records inspectors. Indeed, many would choose not to create such images simply to preserve their interest in remaining anonymous.”<sup>79</sup> This concern about possible chilling effects due to privacy issues is real because the Attorney General’s regulations for Section 2257 explicitly state that a “post office box address does not satisfy this requirement.”<sup>80</sup> An individual who wants to put a picture of herself on the Internet is thus faced with a dilemma. She has two choices. She can either put her personal address in the public domain next to sexual pictures of herself and thus risk becoming the victim of various sexual crimes at the hands of those who may view her picture; or instead, she can simply not express herself and ignore her free speech rights.

Perhaps the most problematic issue with Section 2257 is its potential to be unconstitutionally overbroad in violation of the First Amendment. The 6th Circuit found Section 2257 unconstitutionally overbroad because the Court had significant concerns that even though the purpose of the

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76. *Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 553-54 (6th Cir. 2007).

77. Tristan Taormino, *The Danger of Protecting Our Children: Government Porn Regulation Threatens Alternative Representations and Doesn’t Save Kids*, 18 YALE J.L. & FEMINISM 277, 280 (2006).

78. See Richards & Calvert, *supra* note 15, at 193-96.

79. *Connection Distrib. Co.*, 505 F.3d at 563.

80. 28 C.F.R. § 75.6 (2008).

record-keeping requirements was to make sure no one under age eighteen is sexually exploited, producers must maintain records for every single performer even if it is obvious that the performer is not eighteen.<sup>81</sup> In addition, the Court referred to a hypothetical couple where the “performer” is the spouse of the “producer” taking pictures in their own bedroom that are only intended for the private use of the couple.<sup>82</sup> Technically, in order to comply with Section 2257 this couple would need to have one spouse check the other’s photo ID, make a photocopy of it, cross reference the name with any other alias the spouse has used and any other picture or film they are in with sexual conduct, and keep those records available for the Attorney General to inspect on demand.<sup>83</sup> The 6th Circuit noted that while the extensive cross-referencing requirements “may not be that large [a burden] for a commercial entity, it is likely to be more burdensome for those motivated by noncommercial purposes.”<sup>84</sup> The Court found that people engaging in constitutional adult speech were required to comply with the statute, and the burdens associated with it could chill their speech.<sup>85</sup> One judge in concurrence discussed a suggestion that the statute be amended to only make producers verify age and keep records for those performers that are under age twenty-six, analogizing the procedure to that of tobacco sales where the seller only asks for the ID of those that appear to be close to underage instead of every single customer.<sup>86</sup>

Given the fact that it took nearly two decades for government officials to begin enforcing Section 2257, there are relatively few academic studies about it. However, recent inspections by the FBI have generated the interest of two Penn State professors.<sup>87</sup> Professors Robert D. Richards and Clay Calvert interviewed both representatives of the adult entertainment industry and the FBI agent in charge of the inspections.<sup>88</sup> The professors concluded that they do not think Section 2257 accomplishes its goal of protecting children.<sup>89</sup> They believe it burdens constitutionally-protected adult speech and the cost to the government to inspect also drains taxpayer dollars.<sup>90</sup> This view reflects

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81. *See Connection Distrib. Co.*, 505 F.3d at 552.

82. *Id.* at 552, 557.

83. *Id.* at 552.

84. *Id.* at 560.

85. *Id.*

86. *Id.* at 571 (Moore, J., concurring).

87. *See Richards & Calvert, supra* note 15; Calvert & Richards, *supra* note 16; Calvert & Richards, *supra* note 49.

88. Richards & Calvert, *supra* note 15, at 165-66.

89. *Id.* at 206.

90. *Id.*

that of most within the adult entertainment industry, who feel that Section 2257 requires too much of them.<sup>91</sup>

## VI. THE FUTURE OF SECTION 2257

These concerns about Section 2257 leave the fiercest advocates of children with a choice. They can either continue to fight for a law that has potential constitutional issues and is impractical given the evolution of the Internet, or they can sit down with representatives of the adult entertainment industry to craft a new Section 2257, one that both protects children and protects free speech. The goal of protecting children is vitally important and is recognized as such by both sides.<sup>92</sup>

In finding any solution to these problems, it is important to note that child pornography is not constitutionally protected.<sup>93</sup> No matter how much the adult entertainment industry mentions free speech in discussing Section 2257, the speech that Congress is trying to prevent enjoys no constitutional protection.<sup>94</sup> Congress placed Section 2257 on the fault line between protected and unprotected speech. The line between the two is not blurry. There is no grey area. A performer is either underage or not. It is hard to think of anything that is more despised in society than exploiting children by creating or viewing child pornography. Congress decided that Section 2257 was a perfectly legitimate way to protect children and the D.C. Circuit agreed.<sup>95</sup>

In many ways, Section 2257 could be viewed not only as a way to protect children, but as a way to help producers of adult films protect themselves from mistakenly producing child pornography. The adult entertainment industry is faced with a dilemma. There is a demand for performers that look young. Kat Sundlove, the executive director of the Free Speech Coalition noted:

Some of our producers and distributors have talent that present themselves as the teeny-bopper high school cheerleader with bobby socks – the Catholic school girl look. This is all clearly fantasy – we’re not dealing with underage people. . . . ‘[B]arely legal’ doesn’t mean not legal. It means 18 years old. So it’s an enticing come-on for those who

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91. *See id.* at 180-82.

92. *See id.* at 159.

93. *See generally* *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that a statute that singled out child pornography was valid because child pornography is not entitled to First Amendment protection).

94. *Id.*

95. *See* *Am. Library Ass’n v. Reno*, 33 F.3d 78, 94 (D.C. Cir. 1994).

like the young. There's a beauty about youth and innocence that is really very aesthetic.<sup>96</sup>

While there is a high demand for “youthful-looking subjects,” producers must also use extreme caution to avoid using a performer who is actually under age eighteen.<sup>97</sup> By stressing the importance of keeping the records to verify age, Congress creates an additional incentive to ensure that the adult entertainment industry does not mistakenly use an underage performer in one of their sexually explicit productions.

Many of the businesses in the adult entertainment industry are currently taking Section 2257 seriously. After the *Girls Gone Wild* case, an attorney for Mantra Films said that “Mantra takes these issues very seriously and has done everything it can to make sure this never occurs again.”<sup>98</sup> Sundlove noted that “[t]he video producers grumble, but they’re doing it. They had a hard time with it, and it is really extreme, but we agreed with the purpose. We don’t want kids in this industry.”<sup>99</sup> FBI Special Agent Chuck Joyner said that in his experience with conducting inspections companies take Section 2257 seriously.<sup>100</sup> He found one company that hired someone with a PhD in Computer Science as custodian of records because they would understand the complexity of the requirements and would be able to help the company take Section 2257 seriously.<sup>101</sup> The complex requirements of cross-referencing performers’ names with every other work and every other nickname, alias, or stage name they have ever used require diligence and special attention from producers of sexually explicit material.<sup>102</sup>

While the Free Speech Coalition has gone to court over Section 2257 on behalf of the industry, those in the industry are “simultaneously . . . in compliance with the law.”<sup>103</sup> They lament that the law is not simpler; one representative even claimed that if Congress had just worked with the industry at the beginning of the process, they could have reached a simple, non-burdensome agreement.<sup>104</sup> Jeffrey Douglas, an attorney for the industry, said, “Make it as simple as possible so that it’s not economically burdensome and then everyone can comply, no matter

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96. Calvert & Richards, *supra* note 16, at 267-68.

97. Jorn Axel Holl, Comment, *Judges, Congress, and the Sixteen-year-old Porn Star: Questions on the Proper Role of the First Amendment*, 75 IOWA L. REV. 1355, 1355 (1990).

98. Frieden, *supra* note 5.

99. Calvert & Richards, *supra* note 16, at 298.

100. Calvert & Richards, *supra* note 49, at 78.

101. *Id.*

102. 18 U.S.C. § 2257 (2000 & Supp. 2005).

103. Richards & Calvert, *supra* note 15, at 182.

104. *Id.* at 181.

what their education level, and they don’t need to consult with a lawyer. I hear that all the time.”<sup>105</sup>

Going forward, Congress has three main options with Section 2257 that it can pursue in the age of the Internet: (1) keep it exactly as it is; (2) ignore enforcement of Section 2257 and get rid of it altogether; or (3) do more than simply amend it by rewriting the entire statute in a simpler, more direct form. Each of these three options would focus on different interests and would have advantages and disadvantages.

First, Congress can decide to keep Section 2257 exactly how it is. This includes the extensive cross-referencing requirements to include aliases and stage names, as well as all other productions the performer has ever performed in. By keeping all the requirements in place, it not only makes the industry verify that no children are used in sexually explicit productions, but it also creates a valuable paper trail for law enforcement to track down those producers that may have used underage performers. If Congress adopts this option, it is focusing almost exclusively on the important interest in keeping children safe from sexual exploitation, regardless of the costs to the adult entertainment industry.

Second, Congress can let Section 2257 fade away and simply rely on the assumption that the fear of child pornography prosecutions will naturally make the adult entertainment industry self-regulate. This option gives primacy to the important constitutional values of freedom of speech and expression. While questioning the usefulness of Section 2257, Douglas said that the fear of prosecution for making child pornography would be enough of a natural deterrent to producers to cause them to verify that their performers are not underage.<sup>106</sup> If Congress adopts this option, the hope is that those in the adult entertainment industry have enough integrity to protect minors and incentive from other laws to ensure that they do not use underage performers. However, this option might limit the effectiveness of the authorities to protect children by making them track down the youthful-looking performers themselves to verify the age.

Third, Congress can streamline Section 2257, not by simply amending it, but by fundamentally rewriting it to make it simpler. As noted earlier, Douglas believed that Congress missed an opportunity to make a more effective law when it originally drafted Section 2257:

At the beginning of the process, if the regulators had just sat down with the industry . . . then we could have set up a system that would have

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105. *Id.*

106. *Id.* at 180.

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been simple, effective, and largely non-burdensome. . . . In terms of effectiveness, this would have been more effective than the current system because it would have been far easier to comply with and, therefore, compliance would have become universal.<sup>107</sup>

Congress can attempt to hit the reset button and go back to 1988 to draft a new Section 2257, but with the added knowledge that a new invention called the Internet has revolutionized the adult entertainment industry and will continue to do so. This option would also be a realistic and constitutional way to balance the competing values of protecting children and maintaining freedom of speech and expression.

If Congress rewrites Section 2257, it should make it simple.<sup>108</sup> This legislation should seek a balance between the constitutional overbreadth issues and the concerns about exploiting children. It should address constitutional concerns by only requiring ID checks for those under age twenty-five or thirty. It should not allow the Attorney General to inspect them at any time, but only when there is reasonable suspicion that a performer is underage. The new law should not require individuals to put their home addresses online if they decide to post sexually explicit pictures of themselves online, but instead allow them to maintain the records at another place. Through this new process of age verification, these individuals could easily show that the pictures are of themselves and exercise their First Amendment rights.

A new Section 2257 should also make it easier for producers to keep the records. The requirements to cross-reference every name ever used by a performer should disappear, and instead the producers should simply be required to verify and keep the record for that specific work. It seems that if the producers of legitimate pornography are really concerned about child pornography, they could keep simple records of their performers so the inspectors can quickly check when the inspectors wonder whether a youthful-looking performer is underage. Given the industry's focus on having women that appear young, it is likely that on occasion, the government will be concerned that the performer is actually underage. It is a small burden on the producers to let the government ensure that their performers are not underage and this new Section 2257

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107. *Id.* at 181.

108. In the appendix at the end of this article, I include an example of what a new Section 2257 might look like. This proposed statute includes changes to address the concerns of both the 6th Circuit and those in the adult entertainment industry. It is by no means a perfect solution, but it might serve as a starting point for both sides as they discuss ways to strike a balance between protecting children and protecting speech to finally bring the age-verification and record-keeping requirements into the ever-changing Internet age.

would help give the inspectors more time and resources to go after those situations where there might be a question.

In the end, the new Section 2257 should reflect Jeffrey Douglas’ idea that “[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>109</sup> If Congress rewrites this statute to make it truly that simple, the adult entertainment industry and private individuals can easily comply by doing quick, easy checks of records and keeping them in simple databases without unnecessary burdens on free speech. This new Section 2257 will allow producers to use all the adults that they want in making their productions while simultaneously ensuring that no children will end up being exploited in those productions. It will strike a constitutional balance between protecting children and protecting free speech in the ever-evolving Internet Age.

## VII. CONCLUSION

By not simply amending, but fundamentally rewriting Section 2257, Congress could resolve the vast majority of objections to it, not only by the courts, but by the adult entertainment industry itself. While Section 2257 can be an important way to curtail adult content online, that is not the primary focus and reason for the legislation. The law was passed to protect children. This is the interest that should motivate everyone, from the producers of constitutionally-protected adult content to the consumers to the government enforcers.

At the same time, this country is concerned with free speech. By revising Section 2257 to simplify the requirements and ensure compliance by the adult entertainment industry and private producers, Congress can shift resources towards going after those who are more likely to be producing actual child pornography. Legitimate producers of adult material can do the first level of checking for the government by verifying for themselves that there are no underage performers. That way, the government can instead focus on producers who fail to maintain the records because those people would have more to hide and be more likely to actually be using children.

A new Section 2257 would provide a way for those in the adult entertainment industry to limit the government’s intrusion into their industry while still ensuring that they do not use children in sexually explicit productions. Throughout their interviews, people associated with the adult entertainment industry stressed that while they agreed that

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109. Richards & Calvert, *supra* note 15, at 188.

children should not be exploited, they felt that Section 2257 goes too far.<sup>110</sup> If Congress works with the industry to draft a new, less-intrusive version of Section 2257, it can find a balance between the extremely important need to protect children from sexual exploitation and the important First Amendment values that free society cherishes. Congress can update the law to reflect the realities of the 21st century and sexual content on the Internet. Ultimately, by rewriting Section 2257, Congress can ensure that producers do not exploit children, either intentionally or unintentionally, while still having the chance to express themselves however consenting adults may seem fit.

*M. Eric Christensen\**

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110. See Richards & Calvert, *supra* note 15, at 179-82.

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APPENDIX – A PROPOSED REVISION TO SECTION 2257<sup>111</sup>

(a) Whoever produces or publishes<sup>112</sup> any visual depiction including, but not limited to, a picture, videotape, digitally- or computer-manipulated image of an actual human being, book, magazine, periodical, film, webpage or computer service,<sup>113</sup> or other matter which—

(1) contains one or more visual depictions made after January 1, 2009 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer under 30 years of age<sup>114</sup> portrayed in such a visual depiction.

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111. The original Section 2257 record keeping statute is found at 18 U.S.C. § 2257 (2000 & Supp. 2005). Recently, the U.S. Court of Appeals for the 6th Circuit struck down this statute for being unconstitutionally overbroad. *See Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 548 (2007). This proposal is an attempt to correct these overbreadth problems. Most of the language in this proposal comes from the current version of Section 2257.

112. I added the term “publishes” to clarify that this statute is meant to cover both those who create the image and those who transfer them to others through print media and the Internet. The definition of “publishes” is found *infra* at § 2257 (h)(3).

113. I added the terms “webpage or computer service” to this list of possible images that need compliance with 2257 to make it clear from the very beginning who is subject to the requirements. These terms should encompass all the ways to post the images on the Internet, including personal blogs, social networking sites, and video uploading services such as YouPorn.

114. The 6th Circuit struck the original statute down in part because it required records to be kept for every performer, even if those performers are clearly over the age of eighteen. *See Connection Distrib. Co.*, 505 F.3d at 559. The concurring opinion discusses limiting the verification requirements to those whose age is close to eighteen by analogizing to the requirements for retailers to ask for identification when someone under twenty-six attempts to purchase tobacco products. *Id.* at 571 (Moore, J. concurring).

The language that I use comes from a Maine statute governing the sales of tobacco products, 22 ME. REV. STAT. ANN. TIT. 22, § 1555-B (2008), which reads:

A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age. Tobacco products may not be sold at retail to any person under 27 years of age unless the seller first verifies that person’s age by means of reliable photographic identification containing the person’s date of birth.

I chose thirty years of age to make it less likely that a producer making a visual assessment of a performer before filming will mistakenly fail to verify the age of a minor. A seventeen-year-old performer might pass for twenty-five, but probably not for thirty.

(b) Any person to whom subsection (a) applies shall, with respect to every performer under the 30 years of age<sup>115</sup> portrayed in a visual depiction of actual sexually explicit conduct —

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations; and<sup>116</sup>

(2) record in the records required by subsection (a) the information required by paragraph (1) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his or her business premises, residence,<sup>117</sup> or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d) (1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e) (1) Any person to whom subsection (a) applies shall cause to be affixed with every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers

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115. *Supra* discussion in note 114.

116. The original Section 2257 included an additional paragraph that required the producer 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” and record the information. 18 U.S.C. § 2257(b)(2)&(3) (2000 & Supp. 2005). I deleted this provision even though the 6th Circuit did not specifically address it because it could easily be viewed as an overbroad burden on protected speech that is not narrowly tailored to the government interest. The Congressional purpose of the statute is to prevent child abuse. *See Connection Distrib. Co.*, 505 F.3d at 553.

117. The original statute only mentioned “business premises.” 18 U.S.C. § 2257(c)(1) (2000 & Supp. 2005). The 6th Circuit said this language made it confusing as to whether only commercial producers were covered or all people who create such images. *See Connection Distrib. Co.*, 505 F.3d at 552. I added “residence” to clarify that all producers must comply. The Attorney General regulations should provide other options for non-commercial producers to keep the records in order to address privacy concerns, perhaps by reversing the current policy and instead allowing a P.O. Box to satisfy the address requirement. 28 C.F.R. § 75.6 (2008).

under the thirty years of age<sup>118</sup> depicted in that copy of the matter may be located. In this paragraph, the term “copy” includes every page of a website on which matter described in subsection (a) appears.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(3) The information affixed with the image pursuant to paragraph (1) of subsection (e)—

(A) need not be affixed on the actual image, but must be easily available on the same webpage or computer service; and

(B) must include the place where the records are kept, but the names of performers may not be attached to the actual image without the performer’s consent.<sup>119</sup>

(f) It shall be unlawful—

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection;

(4) for any person to whom subsection (a) applies<sup>120</sup> knowingly to sell or otherwise transfer, or offer for sale or transfer, any visual depiction of actual sexually explicit conduct<sup>121</sup> which does not have affixed, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept; and

(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

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118. *Supra* discussion in note 114.

119. These corrections are intended to address the 6th Circuit’s concerns with protecting the anonymity of the performers. *See Connection Distrib, Co.*, 505 F.3d at 557.

120. I added “to whom subsection (a) applies” to the original statute to keep the language the same throughout here.

121. I deleted some repetitive language here because it was just repeating the language of subsection (a).

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) In this section—

(1) the term “actual sexually explicit conduct” means actual but not simulated conduct as defined in clauses (i) through (v) of section 2256(2)(A) of this title;

(2) the term “produces”—

(A) means—

(i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;

(ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or

(iii) inserting on a webpage or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct; and

(B) does not include activities that are limited to—

(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231)); or

(iii) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; and

(3) the term “publishes”—<sup>122</sup>

(A) means—

(i) transferring, assembling, manufacturing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape,

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122. *Supra* discussion in note 112.

digital image, or picture, or other matter intended for distribution, that contains a visual depiction of sexually explicit conduct; or

(ii) inserting on a webpage or computer service a digital image of sexually explicit conduct, or otherwise managing the sexually explicit content of a webpage or computer service; and

(B) does not include activities that are limited to—

(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. § 231)); or

(iii) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; and

(4) the term “performer” includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct.

(i) 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.