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VIA FACSIMILE AND FEDERAL EXPRESS

Andrew Oosterbaan
Chief
Child Exploitation and Obscenity Section
Criminal Division
U.S. Department of Justice
Washington, DC 20530

Re: Docket No. CRM 103

Dear Mr. Oosterbaan:

These comments with respect to the proposed amended regulations under 18 U.S.C. § 2257 ("Proposed Regulations") are submitted on behalf of Media Coalition, Inc., a trade association dedicated to the protection of First Amendment rights of its members (trade associations representing most of the book, magazine and computer and video game publishers, booksellers, librarians, movie, recording, video game manufacturers, and recording video and interactive entertainment software retailers in the United States).

1. The Proposed Regulations exceed the authority given in the statute by including within the definition of "producer" persons whose activity does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers. This issue was fully litigated in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), which held that the then-existing regulations were invalid to the extent that their scope was not so limited, and that the clause "other than those activities identified in paragraphs (c)(1) and (2) of this section" should accordingly be stricken from 28 CFR § 75.1(c)(4)(iii). On August 12, 1998 the district court in the *Sundance* case issued an amended judgment to that effect. No appeal was taken by the Attorney General from that order, which thus became binding on the Department of Justice. The proposed amended regulations repeat the invalidated language, in direct violation of the *Sundance* court order.

Similarly, the D.C. Circuit held that printers, film processors and video

duplicators, like photo processors, are not “producers.” *American Library Ass’n v. Reno*, 33 F.3d 78, 93 (D.C. Cir. 1994). While this would be irrelevant if the Proposed Regulations followed the *Sundance* ruling, as they should, neither ruling is in fact reflected in the Proposed Regulations.

In fact, the definition of producer is further broadened in the Proposed Regulations in contravention of these court rulings in a number of respects. First, the definition of “primary producer” (§ 75.1(c)(1)) is broadened by expanding the definition to include a person who “digitizes an image” of a covered visual depiction. Such a person may have no contact with the depicted performer. For example, distributors of videos or DVDs may scan images for advertising or promotional purposes; under the Proposed Regulations these distributors become “primary producers,” with all that entails, although they have no contact with the performers and are merely transforming the format of the pre-existing image. This is not the intention of § 2257; nor is it required by the statute.

Second, under the Proposed Regulations a provider of Web-hosting services, or of an electronic communication service or remote computing service is categorized as a producer unless the provider does not manage the content of the site or service, even if the provider has no connection with the performer.

Third, a person who “enters into a contract, agreement, or conspiracy” to produce, assemble, manufacture, publish, duplicate, reproduce or reissue an item containing a visual depiction of actually sexually explicit conduct is a secondary producer (§ 75.1(c)(2)) and thus criminally liable if the record-keeping obligations are not met. But such a person is likely to have no relationship to the performer and may in fact have no knowledge of the content.

Finally, § 75.1(c)(5) overrides state law as to business entities, and is, moreover, totally unclear. As producers, must each parent and subsidiary maintain the requisite records? Must each parent and subsidiary be listed as a producer on the mandatory notice label? This proposed dramatic broadening of corporate responsibility for compliance ignores both practical reality and corporate law. Nor does the statute authorize it.

In all of these respects, the Proposed Regulations exceed the statutory authorization and contravene the order in *Sundance Associates*.

2. When § 2257 was first passed in 1988, it was challenged in federal court. Extensive and time-consuming litigation ensued, during which time enforcement of the law was enjoined. Ultimately the statute and most of the regulations were upheld in *American Library Assoc. v. Reno*, 33 F.3d 78 (D.C. Cir. 1994). While the final order of the District Court prohibited the government from enforcing the statute against plaintiffs and anyone in their chain of distribution, the government committed to utilize a uniform enforcement policy, so that the statute would not apply to any depictions first created prior to July 3, 1995. Apparently both the order and the Department of Justice commitment were overlooked by the draftsman of the Proposed Regulations, since §§ 75.2(a), 75.6(a) and 75.7(a)(1) refer to November 1, 1990 and § 75.2(a)(2) refers to May 26, 1992. Both of these dates must be revised to conform to the outstanding stipulation, which has been relied upon by the affected industries.
3. In *American Library Assoc.*, the D.C. Circuit described the Congressional purposes in enacting the challenged provisions as threefold:

From the above, we conclude that the congressional purposes in enacting the challenged provisions are threefold: (a) to prevent the exploitation of children by requiring those responsible for photographing or videotaping sexually explicit acts (those defined in the regulations as “primary producers”) to secure proof of the performer’s age and to keep a record of the same as evidence of their compliance, (b) to deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers’ proof that the person depicted were adults at the time they were photographed or videotaped, and (c) to establish a system by which a law enforcement officer in possession of materials containing depictions of sexually explicit acts will be able to identify the performers and verify compliance with the Act.

33 F.3d at 86. It is difficult to see how this applies to computer-generated images that do not involve a living performer. One cannot obtain a passport or driver’s license from a virtual image. Further, by definition, all sex depicted in computer-generated images will be simulated rather than actual and thus will not be covered by § 2257. Finally, under *Ashcroft v. Free Speech Coalition*, 535 U.S.

234 (2002) a child pornography charge cannot be brought in connection with a computer-generated image. Thus, all references to computer-generated images and other depictions not involving possible abuse to actual children in their creation should be removed from the Proposed Regulations; they are, in fact, probably unconstitutional under the *Free Speech Coalition* case.

Yet another problem is raised by the references to computer-generated images. The statute by its terms is limited to "**actual** sexually explicit conduct." The references to depictions of other than living persons blurs and confuses the meaning of "actual sexually explicit conduct." This concerns mainstream media as to the coverage of the statute. The burdensome requirements of § 2257 were written to apply to depictions of actual sexually explicit depictions, the statute was upheld on that basis, and it is important that the line remain clear

4. In *American Library Assoc.*
 - a) the Court required that the information contained in the label be accurate as of the date of manufacture of the goods, not as of sale or distribution. 33 F.3d at 93. Section 75.6 is in violation of this holding.
 - b) the Court accepted the Government's representation that, as to aliases and other names, "this requirement is satisfied if the producer asks the performer for the information" (33 F.3d at 92), which representation was incorporated in the District Court's final order in the case.. This limitation is not found in the Proposed Regulations. In fact § 75.2(a)(2) appears to impose an absolute obligation to discover all names and aliases.
5. The Proposed Regulations as to how the records are to be maintained are unclear and overly burdensome:
 - c) The copy of the depiction (§ 75.2(a)(1)(i)) may be either electronic or a hard copy. With respect to hard copies, such copies cannot be held together with the computerized records that will be required, given the mandate for categorization in § 75.3. How then is the segregation requirement in § 75.2(e) to be met? Further, the segregation requirement — and in particular the mandate that the records shall not "be contained within any other records" — is unclear. If this means that copies of the records must never be in any other company files, it imposes an irrational prohibition not required by the statute.

- d) As to electronic copies of Internet depictions, it is not clear what constitutes a publication, given the regular changing and reformatting of web pages. Nor is it clear what is meant by the URL “associated with” the depiction.

Such vagueness is constitutionally unacceptable in criminal laws relating to First Amendment-protected material.

Further, there are three, differing provisions as to the manner in which the records are to be maintained (§§ 75.2(a)(3), 75.2(d) and 75.3). This is unacceptable in a situation where noncompliance subjects one to criminal penalties.

- 6. The provision in § 75.5(g) authorizing the warrantless seizure of “any evidence of the commission of any crime while conducting an investigation” (emphasis added) is far broader than is permitted under the Fourth Amendment. 3 LaFave, Search & Seizure (3d ed. 1996) § 10.2(f) (warrantless inspection must be carefully limited in time, place and scope).
- 7. The provisions of the Proposed Regulations concerning labeling are equally unclear and overly burdensome:
 - a) The requirement that the label state the date of production, manufacturing, publication, duplication, reproduction or reissuance is not contained in the statute and, other than the original date of creation, is not relevant to the purpose of § 2257. Further, in many cases more than one of these events will have happened, such as production, manufacturing and publication. May any one be listed or must all be listed?
 - b) The requirement in § 75.6(e) that the information be in the larger of 11-point type and the typeface of the name of the performer, director, producer or owner (black on white) is bizarre and unnecessary. In periodicals, the trade name of the producer or owner is often several inches higher. On websites, the name of the performer is often advertised in large type. The location statement need not be larger than 11-point type in printed materials to permit police or other governmental agents to read it. The application of font requirements to websites is curious,

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because the size of the text will vary, regardless of font size, depending on the size of the monitor.

- c) Requiring the statement to be on the home page of a website (§ 75.8(d)) is unduly burdensome, since the statement, in the event of a composite website, could be lengthy.
 - d) Finally, there are certain types of files — .jpeg and .gif, for example — as to which the label cannot be attached if they are uploaded to the Internet.
8. The breadth and burdensome nature of the regulations discussed above are particularly troublesome in light of the 2003 amendment to § 2257(d), which now permits the use of the records by the government as evidence in prosecuting obscenity or child pornography cases. This violates the rights against mandatory self-incrimination as held by the U.S. Supreme Court in *Marchetti v. U.S.*, 390 U.S. 39 (1968).

If you have any questions with respect to these comments, please do not hesitate to contact the undersigned.

Sincerely yours,

Michael A. Bamberger

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