

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

FREE SPEECH COALITION, INC., : Case No. 05-CV-1126-WDM-BNB  
*et al.*, :  
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 Plaintiffs, :  
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 V. :  
 :  
 ALBERTO GONZALES, :  
 :  
 Defendant. :

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**PLAINTIFFS' REPLY BRIEF  
IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

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**I. Introduction**

Since the filing of this case, the parties have cooperated in an accelerated course of discovery that has involved exchange of written discovery and depositions on both coasts. In the course of discovery, the government submitted a letter dated July 18, 2005 that clarifies certain provisions of the challenged regulations and in some cases narrows the scope of the regulations. Plaintiffs attach this letter at this time to assist the Court in resolving the issues in this case. See letter of July 18, 2005 attached hereto as Exhibit A and incorporated herein by this reference.

**II. Congress, in enacting the PROTECT Act, adopted the Tenth Circuit decision in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10<sup>th</sup> Cir. 1998)**

Section 2257(h)(3) defines the word “produces” as used in 18 U.S.C. section 2257(a). The definition expressly states that the term “produces” “does not include mere distribution or any other

activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted..” As discussed in the previous briefs, the Tenth Circuit in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10<sup>th</sup> Cir. 1998) determined that Congress said what it means in the statute and struck down the expansive definition of “secondary producers” set forth in the Department of Justice regulations as being beyond of the scope of the statute.

The government in its brief, asserts that the Tenth Circuit decision in *Sundance Associates, Inc v. Reno*, does not apply in this case for two reasons:(1) the Department of Justice now has adopted an alternative reading of the language of 18 U.S.C. Section 2257(h)(3) than the one it advanced in 1997 in *Sundance*; and (2) Congress in enacting the PROTECT act of 2003 modified the definition of “producers” to include the words “computer generated image, digital image, or picture.” However, these valiant attempts to avoid the clear and well reasoned holding of *Sundance* are completely unavailing.

In *Sundance*, the Tenth Circuit analyzed the definition of “produces” in detail and concluded that “[t]his is not a case of verbal ambiguity presenting accepted alternative meanings; it is one of an agency twisting words to reach a result it prefers.” *Id.*, at 809. The court found that “we need go no further than the initial analysis” of *Chevron U.S.A. , Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). “The test and reasonable inferences from it give a clear answer against the Government, and that... is ‘the end of the matter.’” *Id.*, at 808 quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994).

The government now asserts that it has come up with a new and improved interpretation of the 18 U.S.C. Section 2257(h)(3), that previously eluded the Department of Justice, Judge Nottingham in 1996, and the Tenth Circuit panel in 1998. The government’s 2005 interpretation is that the exclusion

of “mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted” in the definition of “produces” only applies to the “duplication, reproduction, or reissuing of any such matter” and not to any other component of the definition. This simply does not give effect to the plain language of the statute. As the Tenth Circuit noted in *Sundance* seven years ago, “the government’s explanation simply ignores the obvious import of the final clause of the statute.” *Id.*, at 809.

The government’s new construction limiting the the exclusion provision of section 2257(h)(3) to only “duplication, reproduction or reissuing” is further undermined by an examination of the definition of secondary producer contained in the new regulations. Just as in *Sundance*, “[o]ne wonders, looking at the regulation, why the government did not follow the logic of its own argument when implementing the regulation.” *Id.*, at 809. The new regulation defines “secondary producer” as follows:

any person who produces, assembles, manufactures, publishes, *duplicates, reproduces, or reissues* a book, magazine, periodical, videotape, digital-or computer manipulated image, picture, or other matter, intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or *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 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.* (Emphasis added)

28 C.F.R. Section 75.1( c)(2)

The new regulation expressly includes activities that the government asserts are excluded by the statute under its 21<sup>st</sup> century interpretation of the statute. In fact, the reach of the definition of secondary producers far exceeds the scope of the regulation struck down in *Sundance* by adding the provision “including any person who enters into a contract, agreement, or conspiracy to do any

of the foregoing.”<sup>1</sup> The broad catch-all phrase makes employees of computer web sites or anyone who merely agrees to manage content on a website computer a secondary producer subject to the requirements of the statute and regulations. The exclusions set forth in 28 C.F.R. section 75( c)(4) (I)-(v) do not provide any real relief. Sections (iv) and (v) provide exclusions for web-hosting services and electronic communication services “who do[] not and reasonably cannot manage the sexually explicit content of the computer site or service”. Thus, an individual who does not manage content but reasonably *could* manage the content of a web-hosting or electronic communications service is now a secondary producer, as of June 23, 2005.

The Tenth Circuit in *Sundance* did not spare Congress from criticism in finding that Section 2257(h)(3) “was poorly drafted and should never be used as a model of the English language.” *Id.*, at 809. However, the court concluded, “neither the court nor the Attorney General has the authority to rewrite a poor piece of legislation (if, indeed, that is what it is). That responsibility lies solely with Congress.” *Id.*, at 810.

Congress had a perfect opportunity to rewrite this “poor piece of legislation” in the PROTECT act of 2003, and did, in fact, reenact Section 2257 (h)(3) with the addition of language to modernize the statute to include in the of “produces” a “computer generated image, digital image, or picture.” In readopting the remainder of the language in the definition of “produces”, Congress did not take any steps to overturn the *Sundance* decision or provide support to the Department of Justice regulation extending the definition to include “secondary producers” engage in activities that

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<sup>1</sup> The inclusion of the term “or *conspiracy* to do any of the foregoing” in the latest incarnation of “secondary producer” is real evidence of government hostility towards the content of the protected speech regulated under the challenged statute and regulations since it indicates one can engage in a criminal conspiracy to engage in or distribute constitutionally protected speech.

do “not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted”.

The United State Supreme Court made clear in *Lorillard v. Pons*, 434 U.S. 575, 580-581(1978) that:

“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see [\*Albemarle Paper Co. v. Moody\*, 422 U.S. 405, 414 n. 8, \(1975\)](#); [\*NLRB v. Gullett Gin Co.\*, 340 U.S. 361, 366, \(1951\)](#); [\*National Lead Co. v. United States\*, 252 U.S. 140, 147, \(1920\)](#); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

*See also Shapiro v. U.S.*, 335 U.S. 1( 1948); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3<sup>rd</sup> Cir. 1998); *M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 260 F.Supp.2d 524 (E.D.N.Y.,2003) [when Congress "re-enacts a statute without change," it is presumed that Congress was aware of the interpretations and applications of the law and intended not to disturb it.]; *Kukman v. Baum*, 346 F.Supp. 55 (N.D.Ill.,1972) [“Failure of Congress to amend a statute after it has been judicially construed is persuasive evidence of adoption by Congress of the judicial construction.”]; *Marubeni-Iida (America) Inc. V. Toko Kaiun Kabushiki Kaisha*, 327 F.Supp. 519 (S.D.Tex.,1971)[“Prior interpretation of statute must be deemed to have received legislative approval by reenactment of statutory provision if done without material change.”]

Congress reenacted the definition of producers in section 2257(h)(3) and maintained the exact exclusion language given effect by the Tenth Circuit in *Sundance* without any alteration. Based upon the well established principle that the reenactment of a statute adopts previous judicial construction

of the statute, it must be presumed that Congress adopted the Tenth Circuit decision in *Sundance*. The government cannot point to any other case that deals with the same issue. Thus, contrary to the government's position that the enactment of the PROTECT Act nullifies *Sundance*, the new congressional enactment adopted *Sundance* and completely undermines the new regulations imposing requirements on an even broader group of "secondary producers".

*Sundance* was the law in this circuit before and after enactment of the new regulations. The fact that the government has chosen to ignore *Sundance* does not change the status quo that *Sundance* is the law. Since Plaintiffs have clearly established a strong likelihood of success that the extension of section 2257 to "secondary producers" is contrary to the compelling reasoning in *Sundance* and enforcement of 28 C.F.R. Section 75.1(c)(2) should be enjoined.

**III. 18 U.S.C. Section 2257 is a content based restriction on protected speech that is overbroad and fails to advance the government interest of controlling child pornography and imposes heavy impermissible burdens of Plaintiffs.**

The government relies upon the decisions of *American Library Association v. Reno*, 33 F.3d 78 (D.C. Cir. 1994) *cert. den.* 515 U.S. 1158 (1995) and *Connection Distributing Co. v. Reno*, 154 F.3d 281 (6<sup>th</sup> Cir. 1998) to support its position that 18 U.S.C. section 2257 is constitutional. Both of these decisions analyze Section 2257 under an intermediate level of scrutiny.

Initially, it must be noted that 18 U.S.C. section 2257 is a content based restriction on protected speech that should be evaluated under strict scrutiny analysis. The statute challenged in this case regulates expressive materials that contain "visual depictions" of "actual sexually explicit conduct". The statute imposes heavy burdens on a broad category of constitutionally protected speech, namely

sexually explicit images, based solely on the content of that speech. See *Simon and Schuster v. New York Crime Victim's Bd.*, 502 U.S. 105 (1991). The government asserts that statute and regulations are justified by the important interest of protecting children and combating child pornography without reference to the content of the speech. However, by its own terms, the government purpose refers to the content of unprotected speech and impacts upon the larger category of constitutionally protected speech that involves adults. As stated by in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002):

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. 535 U.S., at 255.

Even if a “defendant can demonstrate that no children were harmed in making the images”, the failure to have the required records for a single image can result in a prison sentence.

The government asserts that 18 U.S.C. section 2257 is properly analyzed under an intermediate level of scrutiny as in the *American Library Association and Connection* cases. Under intermediate scrutiny a government regulation is constitutional if the obligations it imposes are “narrowly tailored to serve a significant government interest, and ... leave open ample alternative avenues of communication.” *Ward v. Rock Against Racism*, 491 U.S., at 781, at 791 (1989). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, (1988). While the statute need not be the least restrictive means of regulation, "this standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, (1989)

Moreover, as noted by Justice Kennedy in his controlling opinion in *City of Los Angeles v. Alameda Books, Inc.*, the government “must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. ....[T]he government] may not assert that it will reduce secondary effects by reducing speech in the same proportion.” The government has the burden of justifying the regulation even on a motion to enjoin enforcement of the regulation. See *Pacific Frontier v. Pleasant Grove City*, \_\_F.3d\_\_, 2005 WL 1625238 (10<sup>th</sup> Cir. July 12, 2005)[based on failure of city to carry burden of justifying ordinance, plaintiffs showed substantial likelihood of prevailing on the merits]. Here the challenged regulatory scheme fails to appreciably reduce the harms sought to be regulated, the exploitation of children, but results in considerable reduction in protected speech involving adults.

Section 2257 applies to a broad range of expression that does not have anything to do with children. Indeed, as discussed *supra*, the extension of Section 2257 to “secondary producers” exponentially increases the numbers of individuals and entities subject to the requirements of the statute.<sup>2</sup> The government has not presented any evidence that any child pornography has been limited by the statute or regulations. The government has not conducted a single inspection of records in the seventeen years since the statute was enacted. as reported in its June 1, 2004 report to Congress. See

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<sup>2</sup> The inclusion of “secondary producers” vastly increases the scope of the statute and regulations and imposes heavy burdens on a far greater universe of persons and expression than covered by the statute. In the event the Court determines that the *Sundance Associates* case does not apply in this case and the expansive definition of “secondary producers” is valid, this increases the constitutional problems with the statute and regulations because the number of effected parties and protected speech impacted by the regulatory scheme is vastly increased. Indeed, Congress in 1993 amended 18 U.S.C. section 2257 to limit its scope after the original statute was declared unconstitutional in *American Library Association v. Thornburgh*, 713 F.Supp 469 (D.D.C. 1989)

Exhibit A, Plaintiff's prehearing brief. Material that clearly involves persons far greater than the age of 18 is subject to the burdens of the regulation without any defense if the required records are not kept. As such, "a substantial portion of the burden on speech does not serve to advance its goals" since a large amount of the regulated speech involves persons who are clearly over the age of 18 and does nothing to effectively assist in actually limiting child pornography. It is a burden without a purpose. The 2257 regulatory scheme diminishes protected speech without doing anything to reduce the harm the government seeks to regulate.

The actual burden on the Plaintiffs' speech is so severe as to cause an overwhelming chilling effect on their protected speech. All of the Plaintiffs in this case have reduced their speech as a result of the new regulations and statute. Deposition testimony to be introduced to the court will show that numerous websites with protected content have reduced their speech See Deposition of Jeffrey Douglas, p. At least one primary producer, Plaintiff Dave Connors, Connor depo, p. 48, 17-19, at least one secondary producer, Plaintiff New Beginnings, Friedlander depo. P. 44, l. 11- p. 46, l. 3, and at least one performer Nina Hartley, Hartley depo., p. 19, l. 10-14, have made significant reductions in their speech, or are contemplating such reductions because of the new regulations. Each of these Plaintiffs will suffer irreparable injury to their First Amendment rights by the enforcement of the 2257 regulatory scheme that imposed heavy burdens on their ability to engage in constitutionally protected speech.

The regulations require that producers maintain a copy of each film, image, photograph, or website iteration along with the required performer identification records. *See* 28 C.F.R. § 75.2(a)(1)(I). While on its face this requirement sounds relatively innocuous, in reality the rule threatens to close thousands of websites that lack the storage space and manpower to comply. Jeffrey Douglas testified in his deposition that there are conservatively 500,000 websites with adult content in the United States.

Douglas depo.. p.102, l.16-18. A large number of these websites contain hundreds or even thousands of separate pages. Douglas depo. p. 97, l. 16-19. Many of these websites have a library 500,000 or more images which may show 500 images at any one time, which images are changing several times each day. Douglas depo. p.104 l. Each of the various iterations of these images would have to be recorded under the 2257 regulatory scheme. The total number of iterations for a site with a library of 500,000 images would be “incomprehensibly huge”. Douglas depo., p.104, l.22-24. The maintenance of the required records for this vast amount of images, that are constantly changing, would require memory storage capacity of staggering magnitude on the order of a thousand gigabytes or a terabyte per day. Douglas depo., 106, l.14-19. The cost and physical space required for the storage of such a vast amount of data would be an “insurmountable burden” on the operators of websites that carry such protected expression. Douglas depo., p. 107, l.22-25. These “secondary producers” would not have any contact with the persons actually appearing in the regulated images and yet would be responsible for the maintenance of a mountain of records in order to document the age of these performers. It is no wonder that such operators would choose to abandon the business because of this oppressive financial and legal burden on the exercise of their constitutional rights.

Plaintiff David Connors is a prime example of how the 2257 regulatory scheme will impermissibly burden his ability to engage in protected speech. He currently owns 600 websites that carry tens of thousands of digital images impacted by the § 2257 record-keeping requirement. *See* Affidavit of David Connors, ¶ 19. In order to effectively keep copies of each image for the required seven year period, Connors would be required to personally copy hundreds of thousands of documents and to buy or lease additional storage space. *Id.* at ¶¶ 24-25. *See* Connors depo., p. 48, l.7-19. These

alterations are so burdensome that Connors will be required to cease all Internet operations and sell his websites should the new regulations take effect. Aff., at ¶ 26.

Plaintiff New Beginnings faces similar consequences for its website. Because it routinely digitizes images to promote the movies it carries, New Beginnings constitutes a secondary producer under the newly amended version of 28 C.F.R. § 75.1(c)(2). See Affidavit of Leonard Friedlander. The enormous cost to comply with the 2257 regulatory scheme as well as the risk of criminal prosecution for a single record keeping foul up would force New Beginnings out of business. Friedlander depo., p. 63, l.3-11, p.89, l. 20 - p. 90, l.13. Likewise, the labeling requirements for New Beginnings would create enormous problems with regard to having to restrict the content of its advertising of movie content to images that cannot accurately depict the movie's content.

**A. The Challenged Statute and Regulations are Not Narrowly Tailored To Advance the Asserted Government Interest**

The government asserts that statute and regulations are narrowly tailored to advance a substantial governmental interest and further, that the regulations are narrowly tailored in response to public comments. While the government did make several modifications to the regulations in response to comments, the government refused to make any changes in very important areas including the inclusion of the category of "secondary producers" and rejection of the Tenth Circuit's decision in *Sundance Associates*. The government did clarify some of these regulations in the course of discovery only after this case was filed. See Exhibit A, attached hereto. In any event, the inquiry is whether the statute and regulations are narrowly tailored to advance the asserted government interest and not whether the regulations are tailored in response to public comments.

**B. The Challenged Statute and Regulations fail to Provide An Ample Opportunity for the Expression of One Category of Protected Expression**

The government twice erroneously asserts that the recording keeping provision of the regulations “do not apply at all to mere distributors, photo processors, or to web masters and electronic communication services that do not manage the sexually explicit content of their website.” Citing 18 C.F.R. Section 75.1 (c)(4)(i)(iv). Brief in Opposition to Prel. Inj. p. 7, 12. However, the exemption provision, 18 C.F.R. Section 75.1 (c) (4)(iv)-(v) indicates the secondary producer provision does not apply to a provider of a web hosting service or electronic communication service “who does not, *and reasonably cannot*, manage the sexually explicit content of the computer site or service.” (Emphasis added). Thus, even if such a provider does not manage the sexually explicit content of a site, if the provider actually does have the ability to do so, it is not exempt from regulation under this provision and will be considered a secondary producer subject to the regulatory scheme.

The government also points to the fact that there has been no discernible effect on the production of sexually explicit films and publications since the enactment of Section 2257 indicates that there exist ample alternative avenues of communication. First, the Department of Justice report, attached to Plaintiffs’ brief as Exhibit A, indicates that there were no inspections concerning the records since enactment of the statute seventeen years ago. Indeed, every one of the four prosecutions listed in the report dealt with the actual production of child pornography. It should come as no big surprise that these producers of child pornography did not maintain the records required by Section 2257.

More importantly, this argument misses the point that if a particular record does not exist or is lost or destroyed for some reason, constitutionally protected expression is converted into illegal

contraband. If the required record for a book containing sexually explicit images burns up in a fire, all copies of that book will be subject to being burned themselves even though there is no question these books do not contain any images of children. The burden shifts to the producer of protected expression to provide proof the performers are not children and, in the absence of such proof, that producer has violated the law and is subject to imprisonment.

The Supreme Court has stated that “one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene materials involving adults” based upon the Court’s consistent decisions on the subject. *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994). However, this reasonable expectation is contradicted by the challenged regulatory scheme that imposes the condition of record keeping prior to creating and disseminating protected speech under threat of imprisonment.

### **Conclusion**

The federal record-keeping statute and its administrative regulations are facially unconstitutional and contravene Plaintiffs’ protected First Amendment rights as applied. Given the importance of the rights at stake, coupled with the significant constitutional questions presented in this case and a long history of non-enforcement, the Court should issue a preliminary injunction prohibiting the enforcement of 18 U.S.C. § 2257 and 28 C.F.R. Part 75.

Respectfully submitted,

/s/ Michael W. Gross

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**CERTIFICATE OF SERVICE**

I hereby certify that an exact copy of the foregoing document has been provided via the Court's electronic filing system, followed by regular U.S. mail, postage prepaid, to:

Samuel C. Kaplan, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, Room 7302, Washington, D.C. 20001, on the 27th day of July, 2005.

/s/ Michael W. Gross

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MICHAEL W. GROSS

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