

THE SILVER LINING?

--Looking for the 'good' in §2257

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With all of the industry outcry and vociferous objections to the recently-amended Section 2257 regulations, many in the industry have failed to recognize that this otherwise burdensome legislation may have some unintended positive effects. While the entire statute may be unconstitutional, and the courts should certainly strike down portions of the regulations as invalid, the law may provide some unintended and unexpected benefits for the adult entertainment industry.

Industry experts have long been preaching about the positive aspects of 2257 compliance such as the creation of defenses against child pornography charges. In essence, if a webmaster or content producer complies with 2257, he or she should never be successfully prosecuted for child pornography. Theoretically, it is possible for a minor to slip through the cracks by presenting a forged driver's license or passport, but given the criminal intent requirements¹ associated with child pornography violations, 2257 compliance should provide a defense to all but the most egregious violations involving the knowing use of a minor in explicit imagery.² However, the creation of a specific mechanism for the commercial production of sexually explicit content may result in more than just a defense to child pornography. Read on...

¹ See *U.S. v. X-citement Video*, 513 U.S. 64, 115 S.Ct. 464, 63 USLW 4019, 130 L.Ed.2d 372 (1994) [criminal intent as to model's age required for most child pornography offenses, even if not specifically written into the law.]

² Nothing contained in this article constitutes legal advice on child pornography offenses or any other legal issue. Please consult with your personal attorney if anything in this article impacts you.

Since the proliferation of digital cameras and cheap webcams, the creation of sexually explicit materials has spread from the valleys of southern California to virtually every state, county and city throughout the United States of America. The adult industry flourished in the State of California during the 1970's and 80's as a result of a California Supreme Court decision holding that the state's "pandering" laws could not be enforced against those involved in the production of commercial erotica, consistent with the state constitution.³ However, that decision is only binding in the State of California, and despite popular perception, it provides no protection for the countless photographers, cam girls and other content producers located in the other 49 states. That leaves non-California content producers in a state of legal limbo as to whether their activities are constitutionally protected, or whether they fall within traditional notions of prostitution wherein individuals are hired to perform sexual activity. Until recently, this issue remained under the radar as most professional adult production companies set up shop in Southern California. However, the legality of erotic content production will now likely confront one or more courts outside of California, as law enforcement and prosecutors grow bolder in their fight to preserve "societal decency" and garner political support while using the adult industry as a scapegoat.

Enter Section 2257: The federal government may have unwittingly, yet formally, legalized and authorized the creation of hardcore adult materials, so long as 2257's age verification procedure is followed. After all, Section 2257, and its implementing regulations found at 28 C.F.R. § 75 et. seq., specifically contemplate the commercial production and display of depictions of actual human beings engaged in various forms of sexual activity; even including bestiality. Law enforcement would be hard-pressed to prosecute content producers who strictly followed the dictates of 2257's records compilation and maintenance requirements, for any sort

³ People v. Freeman, 250 Cal. Rpt. 589 (Cal. 1988) U.S. cert. den. 488.S.311(1988).

of prostitution-related offense based on the activity that is specifically defined and regulated in federal statutes and regulations. In other words, how could the U.S. government authorize and regulate the creation of commercial adult materials if such activity constituted an obvious violation of the country's prostitution, solicitation, or assignation laws? In fact, it appears that the government has conceded that the adult industry may legitimately create depictions of actual sexually explicit conduct so long as it follows the rules in doing so.

It is just this sort of legitimacy that right wing conservative groups have feared all along. Recently, the Family Research Council objected to the adoption of a .xxx tld for the adult industry since it feared that such actions would legitimize the adult web and end up providing adult sites with *de facto* protection from obscenity prosecutions.⁴ Similarly, the Concerned Women of America has objected to zoning ordinances for brick and mortar adult entertainment establishments on the same theory, i.e., that such laws lend legitimacy to adult businesses. In its effort to strictly regulate the adult industry, Congress and the Department of Justice may have provided just the sort of legitimacy that these groups fear. Even obscenity prosecutions may be rendered more difficult for the prosecutors as a result of the 2257 regulations. Certainly, in order to pursue such a prosecution, the government would need to prove that something beyond the depiction of actual sexually explicit conduct occurred since such activities are impliedly licensed by the federal regulations.

State prosecutors may face even more difficulty in pursuing adult content producers for violations arising out of the creation of adult material given the legal concept of "federal preemption." When the federal government decides to regulate a specific field or industry, any inconsistent state laws may be rendered invalid to the extent they attempt to inconsistently

⁴ M. O'Conner, Christians, Conservatives Blast .xxx, biz.com (June 8, 2005).

regulate that same field.⁵ Federal preemption can be explicitly stated in the statute's language, or implicitly contained in the structure and purpose of the regulatory scheme.⁶ The nuances of federal preemption are beyond the scope of this article, however it suffices to say that the enactment of Section 2257, and the recent adoption of the amended regulations give potential defendants in state prosecutions a new set of arguments and defenses given the apparent permission to create adult materials granted by federal law.

Imagine the look on the face of the sheriff or prosecutor when he first learns that his well-thought-out sex crime prosecution against an adult content producer in Small Town America may be gutted by the existence of a specific federal statutory procedure authorizing the creation of sexually explicit imagery. Anecdotal evidence already exists of local law enforcement agents' ignorance of Section 2257 and associated regulations of the adult industry. Given the government's obvious intent to create one specific and recognized method for producing adult materials, the industry may have gained significant protections against state level prosecutions for prostitution or even obscenity related offenses. While this may come as little comfort for those content producers and webmasters struggling to comply with the burdensome dictates of the new records keeping regulations, the industry must always strive for legitimacy and mainstream recognition. Section 2257 may be just the vehicle for that to occur.

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⁵ Preemption derives from the Supremacy Clause, Article VI, Clause 2 of the United States Constitution; see, English v. General Elec. Co., 496 U.S. 72, 70-79, 110 S.Ct. 2270, 110 L.Ed. 2d., 65 (1990) [Enumerating the three circumstances in which state law is preempted under the Supremacy Clause as: 1) where Congress explicitly defines the extent to which its enactments preempt state laws; 2) where a state law regulates conduct in a field that congress intended the federal government to occupy exclusively; and 3) to the extent that state law actually conflicts with federal law.]

⁶ Moralis v. TransWorld Airlines, Inc., 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

involved in much of the significant Free Speech litigation before the United States Supreme Court over the last 40 years. All statements made in the above article are matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. You can reach Lawrence Walters at Larry@LawrenceWalters.com, www.FirstAmendment.com or AOL Screen Name: "Webattorney."