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# The Legacy of Lords: The New Federal Crackdown On the Adult Entertainment Industry's Age- Verification and Record-Keeping Requirements

By Robert D. Richards\* & Clay Calvert\*\*

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## I. INTRODUCTION

### *"Sex Films Pulled; Star Allegedly Too Young."*<sup>1</sup>

That bold and blunt headline, splashed across the front page of the *Los Angeles Times* back in July 1986 in reference to underage movie performances by Traci Lords,<sup>2</sup> brought with it a bad-news story that still reverberates to this day for the nearly \$13-billion adult entertainment industry.<sup>3</sup> Indeed, exactly twenty years after the Lords scandal cost the industry millions of dollars,<sup>4</sup> the FBI in July 2006 began an unprecedented series of inspections<sup>5</sup> – less charitably put, unannounced raids – on adult movie studios in Southern California's San Fernando Valley – nicknamed "Porn Valley"<sup>6</sup> for the plethora of sex-film companies and

<sup>1</sup> Dave Palmero, *Sex Films Pulled, Star Allegedly Too Young*, L.A. TIMES, July 18, 1986, at 1 (emphasis added).

<sup>2</sup> Before she turned seventeen years old, Lords "was hailed as the Princess of Porn" and she claims she was "one of the highest-paid girls in porn at the time, earning about a thousand dollars a day." TRACI ELIZABETH LORDS, *UNDERNEATH IT ALL* 92-93 (2003). Lords "used a fake driver's license and birth certificate showing her to be 22 years old when she arrived in Los Angeles in 1984 and began appearing in adult films. She actually was a 15 1/2-year-old runaway from Ohio at the time." Palmero, *supra* note 1, at 1.

<sup>3</sup> See David Cay Johnston, *Indications of a Slowdown In Sex Entertainment Trade*, N.Y. TIMES, Jan. 4, 2007, at C6 (writing that the "sex-related entertainment business grew in 2006 by just 2.4 percent, roughly the rate of inflation, to just under \$13 billion, according to Paul Fishbein, president of the AVN Media Network, which publishes five trade magazines and runs industry conferences").

<sup>4</sup> See Clay Calvert & Robert D. 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, 298 (2004) (quoting Kat Sunlove, former executive director and head of legislative affairs for the Free Speech Coalition – the adult entertainment industry's leading trade association – for the proposition that "Traci Lords cost people millions of dollars. That doesn't do us any good at all. She only got in through fraud."); Claire Hoffman, *Porn Studios Raided to Ensure Adult-Only Casts*, L.A. TIMES, Jan. 12, 2007, at C1 (attributing to Steven Hirsch, founder of Vivid Entertainment, the world's largest adult entertainment company, the assertion that the Traci Lords "scandal cost the industry millions and put the fear in producers throughout the [San Fernando] Valley").

<sup>5</sup> See Matt O'Conner, *Diabolic Investigation Centered on Specific Performers*, XBIZ.COM, July 26, 2006, available at [http://xbiz.com/news\\_piece.php?id=16195](http://xbiz.com/news_piece.php?id=16195) (describing the July 2006 inspection of Diabolic Video as "the first ever in the 11 years federal agents have had the green light to check records (the statute has been in place since 1988, but movies produced before July 3, 1995 are exempt)" and noting that the FBI determined that "Diabolic was 100 percent compliant on this investigation") (last visited Mar. 30, 2007).

<sup>6</sup> See Sharon Mitchell, *How to Put Condoms in the Picture*, N.Y. TIMES, May 2, 2004, at Section 4, 11 (describing the San Fernando Valley as "Porn Valley" and noting that it is "where much of the sex-film industry is based").

movie locations in towns like Chatsworth<sup>7</sup> and Woodland Hills.<sup>8</sup> The stated purpose of the inspections was to “verify the ages of all performers and off-camera employees and to examine records the industry is now required to keep.”<sup>9</sup> Those requirements, known simply as §2257 compliance<sup>10</sup> or Section §2257<sup>11</sup> in the adult entertainment business after the federal criminal statute in which they are codified,<sup>12</sup> recently ensnared the man behind the *Girls Gone Wild* empire,<sup>13</sup> Joe Francis. In September 2006, Francis “agreed to personally pay a \$500,000 fine to settle charges in Los Angeles that he failed to keep records of the ages and identities of the women who appeared in his films”<sup>14</sup> and then, in early 2007, he was sentenced to 200 hours of community service by a federal judge in Florida for similar record-keeping offenses.<sup>15</sup>

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<sup>7</sup> See Peter Gilstrap, *Generation XXX*, L.A. TIMES MAG., Dec. 11, 2005, at 20 (describing how so-called “traditional porn” is “churned out in Chatsworth (‘Porn Valley’ to those in the business)”).

<sup>8</sup> See 818 Movie Locations, available at <http://www.818movielocations.com/properties.html> (identifying several homes in Woodland Hills, Calif., that can be rented out for movie shoots) (last visited Mar. 29, 2007).

<sup>9</sup> David Cay Johnston, *Sex-Film Industry Talks of Next Step for Hotels*, N.Y. TIMES, Jan. 17, 2007, at C13.

<sup>10</sup> See Brent Hopkins, *FBI Crackdown on Porn Makers*, L.A. DAILY NEWS, Feb. 8, 2007, at B1 (writing that the name-and-age legal requirements are “[k]nown as ‘2257 compliance’”).

<sup>11</sup> See John W. Allman & Lindsay Peterson, *Porn Sites Might Not Comply With Law*, TAMPA TRIB. (Fla.), Nov. 11, 2006, at 1 (describing “the record-keeping rule, known in the industry as Section 2257”).

<sup>12</sup> See 18 U.S.C. § 2257 (2007) (setting forth the terms of the federal law that requires producers of sexually explicit conduct to “create and maintain individually identifiable records pertaining to every performer portrayed,” including records showing each performer’s name, date of birth, aliases, nicknames and stage/professional names, and mandating that such records must be “available to the Attorney General for inspection at all reasonable times”).

<sup>13</sup> See generally Claudia Gryvatz Copquin, *Opinion: These Wild Girls Need Reining In*, NEWSDAY (N.Y.), Feb. 13, 2007, at A41 (describing Francis as “a multi-millionaire from marketing videos of inebriated college girls exposing their breasts and more on camera. Francis has made a fortune from his ‘Girls Gone Wild’ exploitations, while young girls bare themselves for a trucker hat and T-shirt.”); Claire Hoffman, *Baby, Give Me a Kiss*, L.A. TIMES, Aug. 6, 2006, at West Magazine, 14 (describing *Girls Gone Wild*, founded by Francis as part of Mantra Entertainment, as an “empire” that is based largely upon the selling of “videos of women who agree to flash their breasts and French-kiss their friends for the cameras. In exchange, a girl who goes wild will receive a T-shirt, a pair of panties, maybe a trucker hat.”)

<sup>14</sup> Claire Hoffman, *Maker of ‘Girls Gone Wild’ Runs Afoul of Law on Minors*, L.A. TIMES, Sept. 13, 2006, at A1.

<sup>15</sup> Claire Hoffman, *‘Gone Wild’ Figure is Fined \$500,000; Joe Francis Also Must Do Community Service for not Documenting Ages of Everyone in His Videos*, L.A. TIMES, Jan. 23, 2007, at C2. In a separate matter, U.S. District Court Judge Richard Smoak in April 2007 ordered that Francis be “jailed for contempt of court in a civil suit brought by seven young women who claimed the entrepreneur’s film crews had placed them in sexually explicit situations.” Josh Friedman, *Judge Orders Francis Jailed*, L.A. TIMES, Apr. 6, 2007, at C3.

People who consume adult movie content probably are well aware of the Section §2257 requirements each time they purchase a sexually explicit DVD. For instance, the box wrapper or sleeve around Hustler's 2006 release titled "Aphrodisiac," featuring Hustler contract star Memphis Monroe, includes the following text on the back side:

Pursuant to 18 U.S.C. § 2257, this work DVD sleeve art for APHRODISIAC, was produced on 8/9/2006. The date of production for APHRODISIAC is 7/10/2006. The records required to be maintained for all regulated visual depictions of actual sexually explicit conduct contained therein are kept by S. Berrios, custodian of records, at 8484 Wilshire Boulevard, Suite 900, Beverly Hills, CA 90211.<sup>16</sup>

Ironically, the government's ramped up record-keeping search for underage performers are taking place at a time when, as the *New York Times* recently reported, "[t]he mature-woman genre represents one of the fastest-growing areas of video pornography"<sup>17</sup> and older, retired performers are being "lured back into the limelight."<sup>18</sup> Indeed, there is now an entire genre of "MILF" movies featuring older female performers,<sup>19</sup> with its own award category at the 2007 AVN Awards<sup>20</sup> and recent titles such as "The Mother-Load."<sup>21</sup>

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<sup>16</sup> APHRODISIAC (Hustler Video 2006). Other companies use similar, although slightly different, language on their DVD wrappers. For instance, the wrapper for Kick Ass Pictures' 2006 release "Barefoot Confidential 43" provides in pertinent part on the backside:

All performers in this video are 18 years of age or older. Kick Ass Pictures, Inc. hereby certifies that this motion picture and all graphical images associated therewith, are in full compliance with all labeling requirements of 18 U.S.C. Section 2257. Records are maintained by M. Kulkis, custodian of records, at 1220 S. Boyle Ave. Los Angeles, CA 90023. BAREFOOT CONFIDENTIAL #43 was produced on 8/4/06.

BAREFOOT CONFIDENTIAL 43 (Kick Ass Pictures, Inc. 2006). Another moderately different variant, this one used by San Francisco-based and leading gay male adult company, Falcon Studios, on its 2004 release "Through the Woods," provides:

CERTIFICATE OF COMPLIANCE: All actors are professionals 18 years of age or older. The records required by Section 2257 of Title 18, United States Code, with respect to graphical material are kept by the Custodian of Records at the office of the manufacturer at the following location: Keeper of Records, T. Mahaffey, Falcon Studios; 1177 Harrison St.; San Francisco, CA 94103. Date of Production: May 11, 2004.

THROUGH THE WOODS (Falcon Studios 2004).

<sup>17</sup> Sharon Waxman, *The Graying of Naughty*, N.Y. TIMES, Dec. 31, 2006, at Section 9, 1.

<sup>18</sup> *Id.*

<sup>19</sup> See generally *Attraction to Older Women can be Confusing*, TORONTO STAR, Feb. 3, 2007, at L04 (identifying the acronym MILF as standing for "Mom I'd Like to Fuck").

<sup>20</sup> See 2007 AVN Award Winners, available at <http://www.avnawards.com> (identifying an award category called "Best Specialty Series – MILF").

<sup>21</sup> See Eddie Adams, *Bad Seed Releases David Lord's The Mother-Load*, AVN.COM, Feb. 8, 2007, available at [http://avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=283220](http://avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=283220) (last visited Feb. 19, 2007) (describing the movie as "a new MILF-themed title").

Moreover, the mainstream adult entertainment industry seems to abhor child pornography,<sup>22</sup> as evidenced by the many companies that support the Association of Sites Advocating Child Protection, “a non-profit organization dedicated to eliminating child pornography from the Internet”<sup>23</sup> that “battles child pornography through its Child Protection reporting hotline, and by organizing the efforts of the online adult industry to combat the heinous crime of child sexual abuse.”<sup>24</sup> Sponsoring members in February 2007, for instance, included leading adult companies such as Playboy, Hustler and Wicked Pictures.<sup>25</sup> In 2005 ASACP received a certificate of recognition for its work against child pornography from the California State Assembly.<sup>26</sup> The reality is that child pornography, as this article later makes clear,<sup>27</sup> is not part of the mainstream adult entertainment industry,<sup>28</sup> despite the efforts of many interest groups and politicians to link them together.<sup>29</sup>

Nonetheless – and despite the fact that there has not been a Traci Lords-like incident in the San Fernando Valley in well more than a dec-

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<sup>22</sup> Child pornography is one of the few categories of expression not protected by the First Amendment guarantee of free speech. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (providing that “[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children*”) (emphasis added).

<sup>23</sup> Mission Statement, Association of Sites Advocating Child Protection, available at <http://www.asacp.org> (last visited Feb. 20, 2007).

<sup>24</sup> *Id.*

<sup>25</sup> See Sponsors, Association of Sites Advocating Child Protection, available at <http://www.asacp.org/sponsors.php> (last visited Feb. 20, 2007).

<sup>26</sup> See Awards & Partners, Association of Sites Advocating Child Protection, available at <http://www.asacp.org/awards.php> (last visited Feb. 20, 2007).

<sup>27</sup> See *infra* Part II, Section A (setting forth the comments of the individuals interviewed for this article about the non-use of underage performers in the adult movie industry).

<sup>28</sup> Cf. Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM.LAW CONSP. 159, (2001) (quoting Hustler magazine founder and publisher Larry Flynt for the proposition, “This child pornography issue – I’m getting so sick of it. I’ve been in this business for over 26 years, and I’ve never seen it.”); Clay Calvert & Robert D. 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 (2004) (quoting Kat Sunlove, former executive director and head of legislative affairs for the Free Speech Coalition – the adult entertainment industry’s leading trade association – for the proposition that child pornography “is a totally underground world that, as far as I can see, has very little commercial component at all. It’s a sick bunch of puppies out there.”)

<sup>29</sup> See Robert D. Richards & Clay Calvert, *Free Expression, Pornography and the Mainstreaming of Adult Entertainment: Mark Kulkis and the New Voice of the Adult Video Industry*, 1 FLA. ENT. L. REV. 1 (2007) (Statement of adult producer Mark Kulkis of Kick Ass Pictures) “The mainstream porn industry works hard to combat the image of the adult entertainment industry as connected to child pornography, which is false. We have programs in place to prevent child pornography. . . we’re as against it as anyone. For the government to draw a link between the two of us is really unfair.”)

ade<sup>30</sup> – the FBI’s §2257 compliance inspections open up a new, second line of attack by the federal government on the adult movie industry – a line of attack in addition to the obscenity<sup>31</sup> prosecutions pending in 2007 in *United States v. Extreme Associates, Inc.*<sup>32</sup> and *United States v. Five Star Video, L.C.*<sup>33</sup> The Bush administration and embattled Attorney General Alberto R. Gonzales clearly have placed a huge amount of pressure on United States Attorneys to go after adult content,<sup>34</sup> as was made clear in March 2007 during the revelation of background information about the firings of a select group of eight U.S. attorneys by the U.S. Department of Justice.<sup>35</sup> Specifically, the *Los Angeles Times* reported that Justice Department officials “were upset with Daniel G. Bogden in Las Vegas for not bringing enough obscenity prosecutions.”<sup>36</sup> Similarly, the *New York Times* reported in March 2007 that “[f]ormer prosecutors said Mr. Gonzales, relying on advisers who were less experienced prosecutors than their predecessors, took a doctrinaire approach on policy matters, giving front-line lawyers much less discre-

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<sup>30</sup> The last incident – one of a much lower profile than the Traci Lords scandal – involved Alexandria Quinn who, as *Billboard* magazine reported back in 1991, “was underage when she made as many as 60 X-rated features for various manufacturers, including such top sellers as ‘Curse Of The Cat Woman’ (VCA). Quinn used a fake Canadian birth certificate and college ID to obtain work in the films.” Paul Sweeting, *AVA Denounces Underage Porn Star’s Vids*, BILLBOARD, Nov. 16, 1991, at 51.

<sup>31</sup> The U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), created a three-part test for determining when speech constitutes obscenity, with the test focusing on whether the material in question: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law, in its display of sexual conduct; and 3) lacks serious literary, artistic, political or scientific value. *Id.* at 24.

<sup>32</sup> 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

<sup>33</sup> Indictment, *United States v. Five Star Video, L.C.* (D. Ariz. May 23, 2006), available at [http://www.usdoj.gov/criminal/press\\_room/press\\_releases/2006\\_4616\\_2\\_06-01-06obscenity\\_fivestariindict.pdf](http://www.usdoj.gov/criminal/press_room/press_releases/2006_4616_2_06-01-06obscenity_fivestariindict.pdf) (last visited Feb. 19, 2007). See Press Release, U.S. Dep’t of Justice, Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations (June 1, 2006), available at [http://www.usdoj.gov/opa/pr/2006/June/06\\_crm\\_343.html](http://www.usdoj.gov/opa/pr/2006/June/06_crm_343.html) (last visited Feb. 19, 2007) (providing that “[a] Chatsworth, California film production company and a Tempe, Arizona video distributor and retailer, along with three owners of the businesses, have been charged by a federal grand jury in Phoenix, Arizona with operating an obscenity distribution business and related offenses”).

<sup>34</sup> Cf. Michael McGough, *U.S. Appeals Pittsburgh Judge’s Obscenity Ruling*, PITT. POST-GAZETTE (Pa.), Feb. 17, 2005, at A-1 (At his confirmation hearings, Gonzales told the Senate Judiciary Committee that enforcement of laws against obscenity would be a priority for him. ‘I think obscenity is something else that very much concerns me,’ he said.”)

<sup>35</sup> See generally Dan Eggen & Michael Abramowitz, *Bush Reaffirms Confidence in Gonzales Amid New Disclosures*, WASH. POST, Mar. 25, 2007, at A4 (describing the firings and writing that “[s]even U.S. attorneys were fired on Dec. 7. Another was dismissed months earlier. The Justice Department’s shifting explanations for the firings have sparked an uproar in Congress”).

<sup>36</sup> Richard A. Serrano & Richard B. Schmitt, *Justice Dept. Attempted To Curb Fallout*, L.A. TIMES, Mar. 20, 2007, at A1.

tion on death penalty, gun crime, immigration and even *obscenity* cases.”<sup>37</sup> In a remarkably revealing article about the firings of U.S. Attorneys Paul Charlton in Arizona and Daniel G. Bogden of Nevada, the *Los Angeles Times* reported:

In September, Brent Ward, head of the Justice Department’s obscenity task force, complained to Sampson<sup>38</sup> about Charlton and Bogden.

“We have two U.S. attorneys who are unwilling to take good cases we have presented to them,” Ward told Sampson. “This is urgent.” Ward added that he found this particularly troubling “in light of the AG’s [Gonzales’] comment . . . to ‘kick butt and take names’” in prosecuting obscenity cases.<sup>39</sup>

The current §2257 inspections are a stark reminder to an industry that has never carried favor with law enforcement that the government’s reach into its day-to-day operations is not more than a surprise knock-on-the-door away. Once inside, the authorities can demand access to the wealth of information mandated by 18 U.S.C. § 2257 and ensure that the company is meeting what adult industry defense attorney Jeffrey Douglas recently called an “extraordinarily burdensome regulatory scheme.”<sup>40</sup> Those burdens apply not only to the primary producers in the industry that are involved in the actual “filming, videotaping, [and] photographing”<sup>41</sup> of sexually explicit conduct, but also to those secondary companies and individuals involved in “assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or

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<sup>37</sup> Eric Lipton & David Johnston, *Gonzales’s Critics See Lasting, Improper Ties to White House*, N.Y. TIMES, Mar. 15, 2007, at A24 (emphasis added).

<sup>38</sup> This is a reference to D. Kyle Sampson, who was “appointed Deputy Chief of Staff and Counselor to the Attorney General” and who previously “served in the White House as Associate Counsel to the President and as Special Assistant to the President and Associate Director for Presidential Personnel. From 1999 to 2001, Sampson served as Counsel to Senator Orrin G. Hatch on the Senate Judiciary Committee.” Press Release, U.S. Dept. of Justice, Attorney General Alberto R. Gonzales Announces Appointment of Three Senior Department of Justice Staff, Feb. 15, 2005, available at [http://www.usdoj.gov/opa/pr/2005/February/05\\_ag\\_064.htm](http://www.usdoj.gov/opa/pr/2005/February/05_ag_064.htm) (last visited Mar. 24, 2007). Sampson “resigned as Gonzales’ chief of staff March 12, the day before the release of e-mails between the Justice Department and the White House detailing a two-year effort to remove U.S. attorneys who had fallen out of favor.” Richard B. Schmitt and Richard Simon, *Witness to Defend Attorney Firings*, L.A. TIMES, Mar. 29, 2007, at A1.

<sup>39</sup> Richard A. Serrano, *Ouster of U.S. Attorneys: Memos Raise Questions; E-mails Detail Goals in Firing U.S. Attorneys*, L.A. TIMES, Mar. 14, 2007, at A1.

<sup>40</sup> Jeff Douglas, *A 2257 Update*, XBIZ.COM, Jan. 29, 2007, available at [http://xbiz.com/article\\_piece.php?cat=40&id=19350](http://xbiz.com/article_piece.php?cat=40&id=19350) (last visited Feb. 19, 2007).

<sup>41</sup> 18 U.S.C. §2257(h)(2)(A)(i).



other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct.”<sup>42</sup>

Congress adopted 18 U.S.C. §2257 nearly two decades ago as part of the Child Protection and Obscenity Enforcement Act of 1988 to safeguard against future situations like those involving Traci Lords and to prevent the sexual exploitation of minors.<sup>43</sup> It has, however, lain largely dormant in terms of enforcement against the adult industry, while undergoing several amendments in recent years,<sup>44</sup> most recently with the adoption of the Adam Walsh Child Protection and Safety Act of 2006.<sup>45</sup> As Jeffrey Douglas noted in a January 2006 column posted on the online adult industry news Web site *XBIZ.Com*, the §2257 legislative maze – complicated by a complex set of U.S. Justice Department regulations<sup>46</sup> – was “finally initiated after 18 years of inactivity when the FBI began inspections in September [2006].”<sup>47</sup>

Obvious questions thus arise:

- Why did the FBI suddenly begin the §2257 compliance inspections in 2006?
- What are the political forces and motivations behind the inspections?
- Have the inspections, in fact, uncovered underage performers?
- Is there a problem with underage performers today in the adult movie industry?
- How have the inspections affected the adult movie business in Southern California so far and what are the long-term effects likely to be on the industry?

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<sup>42</sup> 18 U.S.C. §2257(h)(2)(A)(ii).

<sup>43</sup> See *Sundance Assocs., Inc v. Reno*, 139 F.3d 804, 805 (10th Cir. 1998) (writing that Congress was “[c]oncerned about the exploitation of children by pornographers,” and it thus “enacted the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Title VII, § 7513(a), 102 Stat. 4187, 4485-4503 . . . to require producers of sexually explicit matter to maintain certain records concerning the performers that might help law enforcement agencies monitor the industry”).

<sup>44</sup> See *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196, 1200 (D. Colo. 2005), *modified*, 2007 U.S. Dist. LEXIS 24389 (D. Colo. 2007) (noting that “in 2003, Congress amended § 2257 by passing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, which stiffened the applicable penalties and expanded the definition of the term ‘produces’ to include creation of a ‘computer generated image, digital image, or picture.’”)

<sup>45</sup> See Pub. L. No. 109-248, H.R. 4472 109th Cong. (2006) (enacted).

<sup>46</sup> See 28 C.F.R. §§ 75.1 – 75.7 (2007) (setting forth definitions related to 18 U.S.C. §2257, and rules about the maintenance, categorization and location of records, as well as details about the statements and information that adult producers must place on and include in their products).

<sup>47</sup> Douglas, *supra* note 40.

- Is there selective enforcement by the FBI in terms of which companies are being targeted?
- What actually transpires when the FBI comes knocking on the doors of an adult movie company, and what takes place once the agents are inside?
- How much time, effort and money do adult movie companies spend in their efforts to comply with the §2257 rules?

This article addresses each of these issues, among others, from the unique, first-person perspectives of more than a half-dozen leading individuals associated with today's adult entertainment industry with direct knowledge of §2257 rules and/or the current searches. In addition, the article examines the remarkable series of events and political maneuverings under which the inspections are taking place, including details behind what one adult industry attorney described on *XBIZ.Com* as "an unprecedented invitation-only meeting of a select group of adult entertainment companies and their attorneys to candidly discuss the §2257 compliance inspection process at FBI headquarters in Washington"<sup>48</sup> on October 12, 2006. The meeting, attended by adult industry attorneys Jeffrey Douglas,<sup>49</sup> Paul Cambria<sup>50</sup> and Greg Piccionelli,<sup>51</sup> was led by James H. "Chip" Burrus, Jr., the FBI's assistant director of its Criminal Investigative Division,<sup>52</sup> who, according to Douglas, acknowledged that the FBI "cannot effectively inspect or regulate an industry without an understanding or dialogue with the industry."<sup>53</sup>

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<sup>48</sup> Gregory Piccionelli, *The FBI Meets with Adult: I*, *XBIZ.COM*, Jan. 4, 2007, available at [http://xbiz.com/article\\_piece.php?cat=40&id=18881](http://xbiz.com/article_piece.php?cat=40&id=18881) (last visited Feb. 19, 2007).

<sup>49</sup> See *infra* note 67 and accompanying text (providing background biographical information on Douglas).

<sup>50</sup> See generally Biography: Paul J. Cambria, Jr., available at <http://www.lipsitzgreen.com/attorneys-12.html> (describing Cambria as practicing in the area of First Amendment law and noting that he "has represented many prominent individuals including Publisher Larry Flynt") (last visited Apr. 3, 2007).

<sup>51</sup> See generally Biography: Gregory A. Piccionelli, available at <http://www.gregpiccionelli.com/bio.html> (describing Piccionelli as "a senior member and co-founder of Piccionelli & Sarno ('P&S'), a pioneering Los Angeles intellectual property and entertainment law firm specializing in e-business, new media, traditional and adult entertainment matters," and noting that he "represents and has counseled many of the world's largest adult entertainment companies. His client list includes scores of domestic and foreign companies spanning the entire spectrum of the adult entertainment industry") (last visited Apr. 3, 2007).

<sup>52</sup> See About Us – FBI Executives, James H. Burrus, Jr., available at <http://www.fbi.gov/libref/executives/burrus.htm> (presenting a brief biography of Burrus) (last visited Mar. 31, 2007).

<sup>53</sup> Dan Miller, *Adult Industry Group Discusses 2257 Inspections with FBI*, *AVN.COM*, Oct. 12, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=277280](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=277280) (quoting Douglas) (last visited Mar. 31, 2007).

By the end of January 2007, ten different adult movie companies, including both producers and distributors, had undergone FBI inspections, including, in alphabetical order: Darkside Entertainment;<sup>54</sup> Diabolic Video;<sup>55</sup> Evasive Angles;<sup>56</sup> K-Beech;<sup>57</sup> Legend Video;<sup>58</sup> Pure Play Media;<sup>59</sup> Robert Hill Releasing;<sup>60</sup> Sebastian Sloane Productions (the only non-Southern California company inspected);<sup>61</sup> Sunshine Films;<sup>62</sup>

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<sup>54</sup> Carlos Martinez, *FBI Inspects Darkside's Talent Records*, AVN.COM, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=277257](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=277257) (reporting that “[a]gents from the FBI inspected talent records at gonzo production house, Darkside Entertainment recently,” and quoting Darkside Production Manager Craig Dayze for the proposition that the five current and former FBI agents who conducted the approximately three-hour inspection “had 10 movies where they took five video pulls of each person that appears in the movie and they compared them to the identification and IDs we had on file”) (last visited Mar. 31, 2007).

<sup>55</sup> Paul Fishbein & Mark Kernes, *FBI Visits Diabolic to Check 2257 Records; FSC Offers Statement to Inspectors*, AVN.COM, July 25, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=272407](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=272407) (reporting that “FBI agents on Monday visited the offices of Diabolic Video to check the company’s records in accordance with the recordkeeping regulations of 18 U.S.C. §2257, according to Diabolic owner Greg Allan,” and quoting Allan for the proposition that the FBI agent “said there are 10 companies on their list and we were the first”) (last visited Mar. 30, 2007).

<sup>56</sup> Steve Javors, *FBI Conducts 2257 Inspection of Evasive Angles*, XBIZ.COM, Oct. 12, 2006, available at [http://xbiz.com/news\\_piece.php?id=17612](http://xbiz.com/news_piece.php?id=17612) (describing the inspection of Evasive Angles and noting that “[t]he FBI also confirmed a 2257 records inspection of Darkside Entertainment Sept. 12”) (last visited Mar. 30, 2007).

<sup>57</sup> Thomas J. Stanton, *FBI Visits K-Beech Again*, AVN.COM, Dec. 19, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=280958](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=280958) (reporting that “[a] small group of FBI agents visited the offices of K-Beech, Inc. on Tuesday morning, company owner Kevin Beechum confirmed to AVN.com. The visit came after the FBI first inspected the company’s 2257 record-keeping on Thursday”) (last visited Mar. 30, 2007).

<sup>58</sup> Carlos Martinez, *FBI Agents Inspect Legend's Records*, AVN.COM, Oct. 10, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=277232](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=277232) (writing that “[a]gents from the FBI inspected performers’ records at Legend Video this morning, its co-owner Bruce Mendelsohn confirmed today”) (last visited Mar. 30, 2007).

<sup>59</sup> Eddie Adams, *FBI Visits Pure Play*, AVN.COM, Nov. 16, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=278682](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=278682) (reporting that “[t]he FBI this morning visited the offices of Pure Play Media to inspect its 2257 record-keeping, the company confirmed,” and quoting Richard Arnold, chief executive officer of Pure Play Media, for the proposition that the FBI agents “were very professional and courteous,” and “[t]hey treated us very well and I was really impressed”) (last visited Mar. 30, 2007).

<sup>60</sup> Mark Kernes, *Robert Hill Releasing Target of 2257 Investigation*, AVN.COM, Aug. 1, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=272838](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=272838) (describing the inspection of Robert Hill Releasing and identifying Robert Hill Releasing as “one of the top she-male producers”) (Mar. 30, 2007).

<sup>61</sup> M.J. McMahon, *Sebastian Sloane Productions Target of Second Reported 2257 Investigation*, AVN.COM, July 28, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=272592](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=272592) (reporting that

and Wicked Pictures.<sup>63</sup> The companies are selected, according to one of the chief FBI agents in charge of the inspections who was present at the Washington meeting, Chuck Joyner, completely at random “like a lottery.”<sup>64</sup> The inspections, which began in July 2006 at Diabolic Video,<sup>65</sup> were named by trade publication *Adult Video News* as the number one news story for the adult movie industry in 2006.<sup>66</sup>

The heart of this article is based on an exclusive set of in-person and in-depth interviews conducted by the authors in Southern California in March 2007 with: 1) Jeffrey Douglas, a leading adult entertainment defense attorney who attended the October 2006 meeting in Washington, D.C., with the FBI officials and who also currently serves as chair of the board of directors for the adult industry’s top trade association, the Free Speech Coalition;<sup>67</sup> 2) Steve Orenstein, a 27-year vet-

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“[a]mateur gay content producer Sebastian Sloane Productions was the target of the second reported 18 U.S.C. §2257 investigation this morning, according to owner JJ Ruch”) (last visited Mar. 30, 2007).

<sup>62</sup> Larissa Gates, *FBI Visits Sunshine Offices for 2257 Inspection*, AVN.COM, Aug. 16, 2006, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=274091](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=274091) (writing that “[t]he FBI on Wednesday morning conducted a search of 2257 records on the premises of Sunshine Films. The target of their search was reportedly records from All Good Video, which has not produced any new product in several years”) (Mar. 30, 2007).

<sup>63</sup> See Steve Javors, *Wicked Pictures Undergoes 2257 Inspection*, XBIZ.COM, Jan. 24, 2007, available at [http://xbiz.com/news\\_piece.php?id=19278](http://xbiz.com/news_piece.php?id=19278) (last visited Mar. 29, 2007) (describing how the “FBI conducted a 2257 records inspection at the offices of Wicked Pictures,” listing the other nine companies inspected, and noting that, among those nine other companies, “[t]he FBI’s inspection of Bethlehem, Pa.-based Sebastian Sloane Productions was prompted by an unrelated search warrant”).

<sup>64</sup> See Ken Knox, *FBI Inspector Addresses Industry During 2257 Seminar*, AVN.COM, Feb. 7, 2007, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=282924](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=282924) (quoting FBI Special Agent Chuck Joyner’s remarks to a “standing-room-only session” of adult industry representatives and attorneys at a special conference hosted by XBIZ magazine in Hollywood, Calif., in February 2007) (last visited Mar. 31, 2007).

<sup>65</sup> See Matt O’Conner, *FBI Not Targeting Specific Titles in 2257 Inspection*, XBIZ.COM, July 25, 2006, available at [http://xbiz.com/news\\_piece.php?id=16168](http://xbiz.com/news_piece.php?id=16168) (describing the search of Diabolic and noting that “2257 regulations requiring record keeping for content depicting actual sexual acts have been in place since Nov. 18, 1988. However, until this week, no adult companies had been subject to inspections”) (last visited Mar. 30, 2007).

<sup>66</sup> Dan Miller et al., *2006: Stories of the Year*, AVN.COM, Dec. 29, 2007, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=281224](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=281224) (identifying “FBI Conducts Random 227 Record Inspections”) (last visited Mar. 30, 2007).

<sup>67</sup> In January 2007, *XBIZ Video* magazine, a leading publication covering the adult industry, named Douglas as one of the “Top 50 Adult Industry Newsmakers of 2006,” writing that: Industry attorney and Free Speech Coalition Board Chair Jeffrey Douglas remained one of the adult industry’s main sources of information and legal counsel regarding 2257 litigation. Fighting many important battles on behalf of the adult industry, Douglas also supervised the FSC’s lawsuit against the Utah Child Protection Registry, one of the most important legal battles for the adult industry and Internet commerce as a whole.

eran of the adult industry and the owner and president of the prominent and well-respected adult movie maker, Wicked Pictures,<sup>68</sup> that was inspected by FBI agents in January 2007; 3) Julie Russell, the chief compliance officer for Wicked Pictures on 18 U.S.C. § 2257 matters who was present, on behalf of both Wicked Pictures and Orenstein, at the October 2006 meeting with the FBI officials;<sup>69</sup> 4) Mark Kulkis, the media savvy president of adult content producer, Kick Ass Pictures;<sup>70</sup> 5) Sean Berrios, the supervisor of records and documents – in-

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*The Top 50 Adult Industry Newsmakers of 2006*, XBIZ VIDEO, Jan. 2007, at 56.

Douglas also is the attorney for Legend Video, one of the companies that was searched by the FBI in 2006. See Michael Hayes, *FBI Inspects Legend Video's 2257 Records*, XBIZ.COM, Oct. 10, 2006, available at [http://xbiz.com/news\\_piece.php?id=17572](http://xbiz.com/news_piece.php?id=17572) (identifying Douglas as the attorney for Legend Video) (last visited Mar. 30, 2007).

See generally Clay Calvert & Robert D. 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 (2004) (including the comments and remarks of Douglas about a number of issues facing both the adult entertainment industry and the Free Speech Coalition in December 2003 when the authors of the article interviewed him and Kat Sunlove); Mission Statement, Free Speech Coalition Web site, available at <http://www.freespeechcoalition.com/FSCview.asp?coid=87#mission> (providing that the "Free Speech Coalition is the trade association of the adult entertainment industry" and describing itself as a "legislative watchdog for the industry" that engages in both "public education" and "lobbying at the state and federal level") (last visited Mar. 23, 2007).

<sup>68</sup> See generally Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, at Section 6, 51 (describing Orenstein, then 38 years old, as "the owner of Wicked Pictures" and calling him "a slight, nervous man with a reputation as a worrier"); Greg Hernandez, *Hard Times Fail to Hurt Los Angeles-Area Adult Video Manufacturers*, DAILY NEWS (L.A., Cal.), Nov. 1, 2001 (describing Orenstein as "Wicked Pictures President"); Wicked Pictures Web site, <http://www.wickedpictures.com> (providing information about Wicked Pictures, including, among other things, its movies and the women who act in them) (last visited Mar. 23, 2007).

<sup>69</sup> While Russell is the chief compliance officer for Wicked Pictures, Steve Orenstein is the official custodian of records for Wicked Pictures. See Custodian of Records, Wicked Pictures Web site, available at [http://www.wickedpictures.com/terms\\_pop.php#a](http://www.wickedpictures.com/terms_pop.php#a) (identifying Steve Orenstein as the custodian of records).

<sup>70</sup> Kulkis has gained national, mainstream news media attention in recent years for a number of efforts to indirectly promote Kick Ass Pictures, including his 2004 "Bullets Not Boobs" campaign criticizing the U.S. military's program that pays – at taxpayer expense – for breast augmentation surgery for female personnel. See Steve Lopez, *Military Perk Looks a Bit Out of Place*, L.A. TIMES, Sept. 3, 2004, at B1 (describing the "Bullets Not Boobs" campaign and quoting Kulkis, who guarantees that all his 'actresses' are 100% natural. "I think it's wrong for someone to cut themselves open to conform to some mythical ideal of beauty"). In 2005, the *Washington Post* reported that Kulkis paid \$5000 to attend, along with adult actress Mary Carey, "a National Republican Congressional Committee event called the President's Dinner and Salute to Freedom. Kulkis, who locked in his tickets by credit card yesterday, tells us he will take the 24-year-old Carey (real name: Mary Cook) as his date." Richard Leiby, *The Reliable Source*, WASH. POST, May 19, 2005, at C03. In 2003, Kulkis had run Mary Carey as a candidate for governor of California in the race eventually won by Arnold Schwarzenegger. See Joe Garofoli, *Moment in the Sun Burns Too Bright for Some Candidates*, S.F. CHRON., Sept. 26, 2003, at A1 (describing Kulkis as Carey's "campaign manager" and noting that Kulkis "doubles as the head of the production company that has Carey under contract").

cluding, importantly, those directly related to 18 U.S.C. § 2257 – for Larry Flynt’s adult entertainment empire, LFP, Inc., and the person who, along with attorney Paul Cambria,<sup>71</sup> represented LFP, Inc. at the Washington meeting with the FBI;<sup>72</sup> 6) Diane Duke, the new executive director of the Free Speech Coalition;<sup>73</sup> 7) Dan Miller, the editor-in-chief of *AVN Magazine*;<sup>74</sup> and 8) Mark Kernes, a senior editor at *AVN Magazine* who has reported for many years on legal issues affecting the adult entertainment industry and is often quoted in the mainstream news media.<sup>75</sup>

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*See generally* Kick Ass Pictures Web site, *available at* <http://www.kickass.com> (describing Kick Ass Pictures as “an explicit, XXX pornography site featuring unusual, hardcore sex acts for the entertainment of ADULTS ONLY,” and identifying some of its adult movies series.) (last visited Mar. 23, 2007).

<sup>71</sup> *See generally* Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry’s Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147 (2004) (profiling Cambria and setting forth his remarks and views on a number of different issues facing the adult entertainment industry when the authors of this article interviewed him in June 2003).

<sup>72</sup> *See* Custodian Of Records - Title 18, U.S.C. Section 2257 Compliance, Hustler Web site, *available at* <http://hustler.com/2257.html> (last visited Mar. 24, 2007) (listing Sean Berrios as “Custodian of Records” for both LFP Internet Group, LLC, and LFP Video Group, LLC).

<sup>73</sup> Duke, who earned a Masters in Business Administration from the University of Oregon, began her duties as executive director of the Free Speech Coalition on November 27, 2006. *See* Press Release, Free Speech Coalition, Free Speech Coalition Welcomes New Executive Director, Nov. 1, 2006, *available at* <http://www.freespeechcoalition.com/FSCView.asp?coid=947> (last visited Mar. 23, 2007). In the official Free Speech Coalition press release announcing her appointment as executive director, Duke, who previously worked as senior vice-president of Planned Parenthood Health Services of Southwestern Oregon, stated: “What we view and read and what happens between consenting adults are fundamental freedoms. I am thrilled and honored to have the opportunity to lead an organization that has been so effective at protecting free speech and the right to privacy; an organization that insists upon government accountability.” *Id.*

<sup>74</sup> *See* Thomas J. Stanton, *Dan Miller Named Editor-in-Chief of AVN Magazine*, AVN.COM, Dec. 19, 2006, *available at* [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=280955](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=280955) (last visited Mar. 24, 2007) (writing that “Dan Miller has been named the new editor-in-chief of *AVN* magazine, effective immediately. Miller has been on the *AVN* editorial staff since August of 2001, starting out as an associate editor for *AVN.com*, where he led the website’s coverage of 9-11,” quoting Miller for the proposition that “[t]his is a once-in-a-lifetime opportunity, and I’m looking forward to all of the challenges that it presents,” and describing Miller’s background as having “graduated from Arizona State University with a degree in Journalism. He has been a professional journalist for the past 11 years, including five-and-a-half years as a sportswriter for the *East Valley Tribune* in Mesa, Arizona”). *See also* Contact, AVN Media Network, *available at* <http://www.avnmedianetwork.com/contacts.html> (last visited Mar. 24, 2007) (identifying Miller as editor-in-chief of *AVN*).

<sup>75</sup> *See* David Ho, *Internet Porn Gets New Address: ‘XXX’*, ATLANTA J.-CONST., June 3, 2005, at 1A (quoting Mark Kernes in a story about the possibility of a “.xxx” domain for adult-content Web sites, and identifying him “senior editor for Adult Video News and a board member of the Free Speech Coalition”); Mireya Navarro, *Women Tailor Sex Industry To Their Eyes*, N.Y. TIMES, Feb. 20, 2004, at A1 (quoting Mark Kernes in an article about

Based on these interviews, the article describes and analyzes the impact that the §2257 rules and their new enforcement are having on the adult entertainment industry. Among other things, it addresses the motivations behind the inspections and why they are happening now when there would seem to be no triggering event like the discovery of underage performers.

Part II of the article briefly describes the methodology for conducting the interviews, including details about the dates, times and locations of the interviews, as well as the recording and transcription processes used by the authors.<sup>76</sup> Part III then moves in to the heart of the article, setting forth the comments, opinions and remarks of the eight individuals interviewed for this article on a number of different issues related to 18 U.S.C. § 2257.<sup>77</sup> Finally, Part IV analyzes and synthesizes their viewpoints and remarks, and it ultimately concludes by calling for the federal government to: 1) institute a far less burdensome method for protecting against child pornography in the adult entertainment industry; and 2) not to pander and kowtow to political pressures of some grandstanding politicians and interest groups that like to score easy points by foisting blame for real-life problems like child pornography on to adult industry.<sup>78</sup>

## II. METHODOLOGY AND PROCEDURES

The interviews between the authors of this article and the individuals whose comments are set forth below took place, in person, during a three-day period – March 13-15, 2007 – at various locations throughout the greater Los Angeles area.<sup>79</sup> All interviews were recorded with Marantz broadcast-quality recording equipment on audiotape using a

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the growing influence of women on both adult entertainment content and adult-oriented sex products, and identifying as “senior editor at Adult Video News, the industry’s trade publication”). Waxman, *supra* note 17, at 1 (quoting Mark Kernes in a story about the increasing use of older performers in adult movies, and identifying Kernes as “a senior editor at Adult Video News, or AVN, the industry’s main trade paper”).

<sup>76</sup> *Infra* note 79 and accompanying text.

<sup>77</sup> *Infra* notes 80–122 and accompanying text.

<sup>78</sup> *Infra* notes 123–135 and accompanying text.

<sup>79</sup> In chronological order, starting with the name of the first person interviewed, the interviews occurred as follows: 1) Diane Duke, Mar. 13, 2007, at 11:30 a.m. at Kate Mantilini restaurant, 5921 Owensmouth Ave., Woodland Hills, Cal.; 2) Sean Berrios, Mar. 13, 2007, at 3:00 p.m. at LFP, Inc. headquarters, 8484 Wilshire Blvd., Beverly Hills, Cal.; 3) Jeffrey Douglas, Mar. 14, 2007, at 10:00 a.m. at his law office, 1717 Fourth Street, Third Floor, Santa Monica, Cal.; 4) Dan Miller and Mark Kernes (interviewed together), Mar. 14, 2007, at 2:30 p.m. at AVN headquarters, 9414 Eton Ave., Chatsworth, Cal.; 5) Steve Orenstein and Julie Russell (interviewed together), Mar. 14, 2007, at Wicked Pictures headquarters, 9040 Eton Ave., Canoga Park, Cal.; 6) Mark Kulkis, Mar. 15, 2007, at 12:30 p.m. at Minx Restaurant and Lounge, 300 Harvey Dr., Glendale, Cal.

tabletop microphone, and the tapes were later transcribed by the authors in State College, Pa., and then reviewed for accuracy. The authors made some minor changes in syntax in a few places but did not alter the substantive content or material meaning of any of the interview subjects. Some responses were then reordered and reorganized to reflect the various themes of this article set forth in Part III, and other portions of the interviews were omitted as extraneous or redundant or beyond the scope of the purpose of this article. The authors retain possession of the original audio recordings and the printed transcripts of the interviews.

For purposes of full disclosure and the preservation of objectivity, it should be emphasized that the individuals interviewed for this article did *not* have an advance opportunity to review or preview any of the questions they would be asked, thus allowing for greater spontaneity of responses. The individuals interviewed were only informed, in advance, that the authors wanted to interview them about 18 U.S.C. §2257 issues facing the adult industry and the series of FBI inspections taking place in 2006 and 2007. Furthermore, the interview subjects did *not* at any time review either the raw transcripts or any of the drafts of this article before its publication. Finally, the authors of this article have never worked for or been employed by any of the individuals interviewed here.

### III. THE INTERVIEWS

This part of the article sets forth the comments and remarks of the individuals interviewed by the authors. Their views and opinions are organized around specific themes and/or topics, each related to the federal crackdown on the age-verification and record-keeping requirements. In some instances, not all individuals are quoted on a particular theme; this occurred because the authors posed different questions to different individuals, depending on their particular positions or jobs either in or related to the adult entertainment industry. The authors have inserted footnotes, where relevant, to help to explain or to elaborate on cases, concepts, terms and/or issues raised by the interviewees in their remarks. The names of the individuals quoted are identified in bold, capital letters immediately before their remarks.

#### A. *Underage Performers in the Adult Industry*

The federal government's sudden enforcement of 18 U.S.C. § 2257, through the ongoing series of FBI inspections of adult companies' records, raises a fundamental question: Is there really even a problem



with underage performers in the adult entertainment industry in Southern California?

If there is, in fact, no problem, then the inspections would seem to be a gigantic waste of taxpayers' dollars – a series of inspections that monitor something that is not even a problem to begin with in the adult entertainment industry. After all, even FBI Special Agent Chuck Joyner told members of the adult industry gathered at a special meeting, hosted by *XBIZ* magazine in February 2007, that the purpose of the inspections is “to prevent the sexual exploitation of children and to require the industry to keep records to prevent that from happening.”<sup>80</sup> If there was no sexual exploitation going on, however, then the inspections easily can be perceived as a needless drain of federal resources when there are more serious issues like homeland security on which the government could be spending time and money.

As this section makes clear, there is universal agreement among those interviewed by the authors in March 2007 that there is not a problem with underage performers in the adult movie industry. While there certainly is acknowledgment that, over the years, a few performers have used fake IDs to defraud the industry in order to perform in movies, it is clear that these are the exceptions to the rule that no one in the adult entertainment industry in Southern California uses children in their films. As Mark Kulkis, the head of Kick Ass Pictures, bluntly puts it below, “everyone is making too much money to want to mess with it – it's poison.”<sup>81</sup>

**JEFFREY DOUGLAS:** No, there is not a problem with underage performers in this business, and there has not been in the twenty-five years that this issue has been the focus of regulators, journalists and others. There have been, at most, a dozen cases where a minor has performed in an adult film. In each and every one of those documented cases, the minor defrauded the filmmaker by acquiring a valid ID, either by stealing a sibling's driver's license or by defrauding a DMV<sup>82</sup> of a state to issue them one.

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<sup>80</sup> Ken Knox, *FBI Inspector Addresses Industry During 2257 Seminar*, AVN.COM, Feb. 7, 2007, available at [http://www.avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=282924](http://www.avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=282924) (last visited Mar. 31, 2007).

<sup>81</sup> This perspective on the fiscal reasons and financial incentives for *not* using underage performers was echoed by Kevin Beechum, the owner of adult movie company K-Beech, Inc. that was inspected by the FBI in December 2006, who told a reporter for the *Los Angeles Times*, “Why would I jeopardize \$10 million a year to shoot an underage girl? We're not stupid.” Hoffman, *supra* note 4, at C1.

<sup>82</sup> This is an abbreviation for Department of Motor Vehicles. See, e.g., California Dep't of Motor Vehicles Web site, <http://www.dmv.ca.gov> (last visited Apr. 2, 2007).

The public rebels at the notion that an underage person performing in the adult industry can be anything other than a victim. In fact, they're the victimizer because they're defrauding the movie company, and when the fraud is revealed, the company loses enormously. They have to destroy all the movies and recall them at their own expense.<sup>83</sup> They're subjected to terrible publicity. The minor, typically, initially lies and says, "Oh, they knew it." There's this overwhelming amount of evidence showing otherwise.

It's difficult. You can't expect a legislator, for instance, or even a prosecutor, to look at a 17-year-old performing in an adult movie as a criminal – despite the fact that that is exactly what they are. So it's extraordinarily rare.

Jan LaRue, the chief counsel for the Concerned Women for America,<sup>84</sup> testified before the California state legislature about ten years ago that the modern adult entertainment industry has no connection with child pornography. This is someone who has spent her lifetime attacking the adult industry for every perceived ill.<sup>85</sup> Even she acknowledged that that's just not the case. It makes no economic sense.

For better or for worse, there's a degree of fungibility in adult performers. There is no one who is so unique that a delay of six months or

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<sup>83</sup> This was the case, for instance, when it was discovered that about 70 of the 100 videos made by Alexandria Quinn, who was born Diane Purdie Stewart, were produced before she was 18 years old. As Gloria Leonard, administrative director of the Adult Video Association, told a reporter from the *San Francisco Chronicle* at the time it was discovered Quinn was underage, "The industry has taken a major bath over the behavior of this rather arrogant young woman. Anything she's been in has to be destroyed. We're talking about hundreds of thousands of tapes and, suffice it to say, its worth is in the millions of dollars." *Underage Porn Star's Films Withdrawn*, S.F. CHRON., Nov. 2, 1991, at C9. Quinn was "the second adult video star found to have made sex films while underage. Traci Lords, who has since tried to break into general-release motion pictures, was discovered to be underage in 1986." *Id.*

<sup>84</sup> See generally About CWA, Concerned Women for America Web site, <http://www.cwfa.org/about.asp> (last visited Mar. 28, 2007) (describing the organization as "the nation's largest public policy women's organization with a rich 28-year history of helping our members across the country bring Biblical principles into all levels of public policy").

<sup>85</sup> As evidence of her blame-the-adult-industry mentality, in February 2007 LaRue wrote that "[a]nybody who knows anything about child predators knows that adult porn desensitizes and sets kids up for sexual abuse and exploitation. It's easier to target kids for abuse when one of the favorite ports of entry to kids, hard-core adult pornography, is readily available to predators." Jan LaRue, *Budgeting Wars Part II: Feds Fail at Obscenity Enforcement*, CONCERNED WOMEN FOR AMERICAN WEBSITE, Feb. 26, 2007, available at <http://www.cwfa.org/articles/12411/LEGAL/pornography/index.htm> (last visited Mar. 30, 2007). In April 2007, LaRue announced her retirement from the positions of chief counsel and legal studies director of the Concerned Women for America. See Mark Kernes, *Commentary: Jan LaRue Retires*, AVN.COM, Apr. 4, 2007, available at [http://avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=286917](http://avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=286917) (last visited Apr. 6, 2007).

a year would make it worth creating product that can't be sold and – upon being revealed of its creation – would result in fifteen years mandatory minimum imprisonment under federal law.<sup>86</sup> If someone were so naïve as to think, “Well, it's worth the risk,” they're putting everything – their financial well-being, their liberty and, in a sense, their life – in the hands of an underage person. As soon as that person discloses, they're destroyed. No one fails to make that calculus, particularly given the fact that there are more people that want to be in adult films than there are roles for them in adult films. There is no one that's so remarkable that it's worth putting everything at risk for virtually no benefit.

If you found that 17-year-old girl, you'd be better off paying her \$50,000 not to do anything for a year in order to keep her under contract.

**STEVE ORENSTEIN:** No, we don't have a problem with underage performers – certainly not in the real business. I know that out there in the media, anyone who actually does do child pornography is somehow considered part of the adult business when, in reality, it's not the case. This is a legal business.

No, there is not a problem. I think there have only been three instances, probably in twenty years, that someone underage wound up in a movie because of a phony ID.

**MARK KULKIS:** There's no problem with underage performers that I have ever encountered. Nobody I know has ever shot them, even accidentally. Everyone is making too much money to want to mess with it – it's poison, so everyone really bends over backwards to make sure that it doesn't happen.

**SEAN BERRIOS:** I've been at my job for over eight years and I haven't come across one situation.

**DIANE DUKE:** There is no problem with underage performers in the adult industry today. Not only is there not a problem, but if somebody even attempts to be in this industry who is underage, not only is that person not hired, but the producer will notify others in the industry about the person. They actively work to help each other make sure that it doesn't happen.<sup>87</sup>

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<sup>86</sup> See 18 U.S.C. § 2251 (e) (2007) (providing, in relevant part, that a person who violates the federal statutes against child pornography “shall be fined under this title and imprisoned not less than 15 years nor more than 30 years”).

<sup>87</sup> Duke's point about the industry's concern is illustrated vividly by a 2006 incident in which the Free Speech Coalition published an “Industry Alert” on its Web site about “an underage girl in possession of a California driver's license that belongs to her 23-year-old sister” and who “may be attempting to find work in California as an adult performer.” Press

The most surprising thing I have learned so far about the adult entertainment industry in my three months on the job is how actively the industry works to prevent child pornography and abuse of youth. They are parents and grandparents, and they are just as appalled by it as any other industry. I think it is so unfortunate – the coupling that happens between the industry and child pornography. At some point, folks are going to wake up and understand that just saying “protect our children” as a banner doesn’t mean it is true; using that against the industry is one of the most heinous ethical crimes you can commit because what really is happening is that a lot of the energy, focus and resources that could be spent preventing child pornography are aimed at the adult entertainment industry, which is not about that at all.

We also just need to start saying, “Shame on you – shame on you for coupling the adult industry and child pornography when that is not really true. And shame on you for raising these fears and falsehoods about the industry.”

**DAN MILLER:** While there are just numerous differences with regard to what producers think is good content, what they ought to put in movies and what is entertaining, one thing that all the producers agree on is that they shouldn’t use underage performers and that they shouldn’t even try to fake it. There is no problem in Southern California with regard to people sneaking around trying to use under-eighteen girls.

**MARK KERNES:** There has never been a problem with underage performers. There have been four of them. Admittedly, I’m not so sure what’s happening with the Asian transsexuals that are being filmed out of this country – people that are not, to my way of thinking, part of the porn industry. But of the people that I know in the adult industry as performers – not the one-shots – there have been four underage performers over the course of the years: Traci Lords, Alexandria Quinn, some girl that showed up in one video for Darkside in 2000, and a gay guy whose name escapes me. The point is that they all had government-issued IDs, which is exactly what the 2257 regulations will protect you against.

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Release, Free Speech Coalition, Industry Alert: Underage Girl May Be Seeking Work as Adult Performer, With Legal ID, *available at* <http://www.freespeechcoalition.com/FSCView.asp?coid=370> (last visited Mar. 30, 2007). The alert added that “[a]ll producers are asked to use extreme caution in the coming weeks while this matter is being resolved. Anyone who encounters this individual is asked to immediately notify AIM or the Free Speech Coalition.” *Id.* AIM is an acronym for the first three words in the name of the organization “Adult Industry Medical Health Care Foundation.” *See* AIM Website, <http://aim-med.org> (last visited Mar. 30, 2007).

If they find any kids – believe me – we would publicize the hell out of that at *AVN* for the simple reason that it would be a warning to every other producer, “Check your records and check the IDs of your performers.”

B. *Why Now? Motivating Forces Behind the §2257 Inspections*

When FBI officials began their Section §2257 compliance inspections in the summer of 2006, it took the adult entertainment industry by complete surprise. At that time, adult producers had no prior warning that federal law enforcement authorities would suddenly show up to their companies’ offices and demand to see the required age-verification records, although the regulations certainly do authorize such unannounced inspections.<sup>88</sup> In October 2006 – after the inspections had begun – the FBI orchestrated a seminal meeting at the Bureau’s headquarters in Washington, D.C., for a small and select group of invited adult industry representatives from major companies like LFP, Inc. and Wicked Pictures, along with three First Amendment attorneys. At the first-of-its-kind gathering, the FBI officials spelled out the procedures for conducting the inspections.<sup>89</sup> The question of the timing of the inspections remains a mystery, given that the §2257 law was enacted in 1988, the regulations became effective in 1995 and no inspections had taken place for more than a decade.

In this section, adult industry representatives comment on the FBI’s sudden interest in the records and openly speculate on the reasons why there were not inspections prior to 2006 and the political forces and motivations that may lie behind the compliance inspections today. In brief, they address two issues: 1) Why not enforce the law before?; and 2) Why start enforcing it now?

**JEFFREY DOUGLAS:** Section 2257 has always been sort of an outsider from law enforcement circles because law enforcement was never consulted or advised about it. It really has nothing to do with the enforcement of child pornography laws, so it was kind of difficult to get anyone psyched for it.

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<sup>88</sup> Inspection of Records, 28 C.F.R. §75.5 (2007). The regulations provide, in relevant part, that “[a]dvance notice of record inspections shall not be given” and that investigators approved by the U.S. Attorney General:

are authorized to enter without delay and at reasonable times any establishment of a producer where records . . . are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of the Act and any other provision of the Act.

*Id.*

<sup>89</sup> See Hoffman, *supra* note 4, at C1.

It was the offspring of, primarily, Orrin Hatch.<sup>90</sup> It never went through any committee hearing at any time; there has never been a committee hearing on 2257. It was attached to a bill, and all amendments to it since then have been attached to some other bill.<sup>91</sup> So, unlike almost any other penal law, there's no constituency supporting it within law enforcement.

It was tied up in litigation from 1988,<sup>92</sup> when it was enacted, well into the Clinton Administration. Janet Reno's position, as attorney general under Clinton, was that it was, essentially, really, really stupid. Again, it wasn't like there was clamor within the FBI to begin enforcement of it. At the end of the Clinton Administration, everyone dreaded the inevitable enforcement of 2257. There was still enormous resistance to it within the executive branch, and it was not until Congress required the Attorney General to report to Congress, by a specific date, on the number of investigations, the number of inspections, the number of prosecutions and the number of convictions pursuant to 2257, that they forced the hand of the Attorney General. He did not make his report showing zero, zero, zero and zero for those categories for several months – past the point where it was demanded.

Instead of such a report that just said “zero, zero, zero, zero,” then-Attorney General [John] Ashcroft reported that new regulations were required to make the law enforceable. The reason he claimed the law was not enforceable was because the regulations were just hopelessly out of date compared to the technology that currently existed, which had an element of truth to it. The regulations were all pre-digital. They clearly, in places, were only considering videotape and not DVDs, yet alone streaming downloads on the Internet. That bought the Justice Department time in the transition between Ashcroft and Gonzales, and the 2005 regulations were promulgated with many, many

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<sup>90</sup> Hatch, a Republican U.S. Senator from Utah, has served in the senate since his election in 1976. See United States Senator Orrin G. Hatch Website, <http://hatch.senate.gov> (last visited Apr. 2, 2007).

<sup>91</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (including in Section 7513 what would become the 18 U.S.C. § 2257 requirements); *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 474 (D. D.C. 1989) (writing that “Congress on October 21, 1988, approved the Child Protection and Obscenity Enforcement Act, which supporters maintained would improve federal prosecution of child pornography. The 1988 Act, enacted as part of the mammoth Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4487 (1988), added a wide range of weapons to the effort to combat child pornography.”)

<sup>92</sup> See *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 477 (D. D.C. 1989) (successfully challenging the constitutionality of 18 U.S.C. § 2257, and concluding that the record-keeping requirements of 18 U.S.C. § 2257 should be enjoined because they “are unconstitutional because they both (1) burden too heavily and infringe too deeply on the right to produce First Amendment protected material and (2) have not been narrowly tailored to fit the legitimate governmental interest of stopping child pornography”).

absurdities. There was a public comment period. When the new regulations were issued, they were still appalling, but some of the more stupid and appalling components were cut out – like the requirement that records be available for inspection sixty hours a week.

While Congress was in the control of the Republicans – essentially four years before the 2005 regulations – the budgets of the Department of Justice and the FBI kept getting more and more funding for 2257. The message the Judiciary Committee was sending was very, very clear: “We really want you to enforce this.” And nothing happened.

Eventually, the pressure became so great – and I don’t know this to be true, but the impression that one gets from talking casually to people in the know, indicates – that both the FBI and the Department of Justice were threatened, saying “If you don’t enforce this, we will cut back your budget in areas you do like.”

The FBI finally, in 2006, began gearing up for inspections. This also coincided with the lawsuit filed against 2257 by the Free Speech Coalition in the United States District Court of Colorado where the government was in this extraordinarily awkward position of arguing that there would be severe harm if 2257 were enjoined when there had been no enforcement of 2257 since 1988.<sup>93</sup> To argue that there would be irreparable harm was really challenging, and it was humiliating.

One of the externalities of the litigation is that those who were involved in the planning and discussion of it – both inside and outside the Free Speech Coalition – recognized that we might actually be forcing the government’s hand. The inspections actually occurred much later than we thought they would. We thought they would get geared up more quickly.

**STEVE ORENSTEIN:** It’s hard to say why the FBI suddenly began conducting inspections. That’s almost a question for the FBI, not for the producer. They’re entitled to do the inspections. Why they didn’t do them previously, I guess, is their issue.

It’s possible that the inspections were motivated by politics. Anything is possible. Look, certainly when it comes to the existence of

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<sup>93</sup> Free Speech Coalition v. Gonzales, 406 F. Supp. 2d 1196 (D. Colo. 2005), *modified*, 2007 U.S. Dist. LEXIS 24389 (D. Colo. 2007). On March 30, 2007 – less than three weeks after the authors of this article conducted the interviews set forth here – U.S. District Court Judge Walker Miller issued an “interim ruling [that] dismissed some causes of action in FSC’s suit, allowing others to proceed in light of the 2006 Adam Walsh Act amendments to 18 U.S.C. § 2257.” Vance Kingsley, *Free Speech Coalition Responds to 2257 Decision*, AVN.COM, Apr. 3, 2007, available at [http://avn.com/index\\_cache.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=286377](http://avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=286377) (last visited Apr. 4, 2007). A discussion of the lawsuit is beyond the scope of this article, which concentrates instead on the FBI inspections and burdens of complying with Section 2257.

2257, we would feel it's a political law to begin with. It doesn't really protect any minors, to speak of. The reality is that information is being checked after a movie was shot. So, if anything happened, it already happened. At this point, it may be nothing more than their obligation under the law to go inspect. The creation of the law – is that more of a political thing? I think it absolutely is.

**MARK KULKIS:** I think one reason they started the inspections, maybe, is that the government had to do it. We're in the midst of this lawsuit in *Free Speech Coalition v. Gonzales*<sup>94</sup> against the Justice Department's new interpretation of the law. Any judge who is looking at this would say, "Why wasn't it okay before?" The government has egg on its face when it has to say, "Well, we actually never inspected under the old interpretation, let alone have we seen there is any cause to change it." It really would be foolish [for the government] to say that 2257 needed to be changed when there had not been a single inspection in the years that the law has been around.

The government also owed the religious right – they owed them votes. That's one of the causes that they are concerned about.

The underlying reason for the regulations is reasonable, and everyone in the industry is fine that you've got to have IDs for everyone. That there should be inspections is a normal part of doing business; it's just like health inspectors inspecting restaurants. I think that is how everyone is treating it. It was kind of weird that they hadn't done any inspections before; it was kind of a bizarre thing.

**SEAN BERRIOS:** According to the FBI agent at the Washington meeting, there wasn't a direct answer to why now, except that last year the supervising agent told us that he was given instructions to start inspections. They didn't have an office and, to this day, they don't have an office; they just have this metal table in some conference room at the FBI office in Van Nuys. A directive was sent down and they're just following through with it; they are doing their job.

The 2257 law is the government's way of trying to prove that everybody appearing in sexually explicit material is over the age of 18.

Is it an all-out attack on the adult industry? I don't think so. I think it is something the government is responsible for.

It could have happened sooner; it has taken over ten years. The inspections should have been occurring more frequently sooner rather than now.

With the current administration that we have, a lot of the people in the industry are going back to that mentality that people had back in

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<sup>94</sup> 406 F. Supp. 2d 1196 (D. Colo. 2005).



the 80s when Ronald Reagan was in office and, just by coincidence, there were a lot prosecutions going on about obscenity and obscenity hearings.

**DIANE DUKE:** I just think it is [U.S. Attorney General Alberto] Gonzales;<sup>95</sup> I have absolutely no question in my mind that it is the current administration and, what is really interesting now, is what is happening with Gonzales. I have to wonder if things are going to lighten up because Gonzales is under so much pressure. I don't know if he is long for his job. Would that be good for us? I would hope so – depends on who replaces him and who is choosing who replaces him.

Gonzalez has said that he is going to take down the adult industry; it has been publicly stated that he is going to take the industry down.<sup>96</sup> When [Janet] Reno was in office, she thought this was a non-issue and that, to me, is true. It really is a non-issue; these are adults producing materials for adults to be viewed by adults.

I believe that the whole idea behind the inspections is just to carry on the fears and falsehoods. There is no reason for these inspections. Child pornography does not exist within the adult entertainment industry. There are pedophiles out there, but that is not the adult entertainment industry. Child abuse happens, but that is not the adult entertainment industry. By forcing this coupling of the child pornography and adult entertainment industry, it is just reinforcing the fears and falsehoods. This reinforcement is not doing anybody a bit of good; it is wasting a lot of taxpayers' money. And guess who are taxpayers? The industry! How ironic is that?

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<sup>95</sup> During Gonzales' tenure as U.S. Attorney General, the U.S. Department of Justice formed the "Obscenity Prosecution Task Force dedicated exclusively to the investigation and prosecution of obscenity cases." Press Release, U.S. Dept. of Justice, Obscenity Prosecution Task Force Established To Investigate, Prosecute Purveyors Of Obscene Materials, May 5, 2005, available at [http://www.usdoj.gov/opa/pr/2005/May/05\\_crm\\_242.htm](http://www.usdoj.gov/opa/pr/2005/May/05_crm_242.htm) (last visited Mar. 30, 2007).

<sup>96</sup> See Dan Eggen, *Gonzales Earns Praise, Despite Lack of Policy Change*, WASH. POST, May 16, 2005, at A4 (writing that after becoming Attorney General, Gonzales "formed a task force to focus on prosecuting obscenity cases, attracting praise from religious conservatives"); Eric Lichtblau, *Gonzales Lays Out His Priorities at Justice Dept.*, N.Y. TIMES, Mar. 1, 2005, at A14 (writing that Gonzales has "said he expected the Justice Department to look for more aggressive ways to prosecute obscenity crimes"). Cf. Prepared Remarks of Attorney General Alberto R. Gonzales at the National Center for Missing and Exploited Children (NCMEC), U.S. Dept. of Justice Web site, Apr. 20, 2006, available at [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_060420.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_060420.html) (last visited Mar. 30, 2007) ("Law enforcement is working to stem the surge in child exploitation and pornography. But the scope of the problem is immense." Gonzalez also called on "all responsible Americans and corporate citizens—down to every last parent, teacher, and minister—to educate themselves about the problem and see how they can help out. Together, we can make our homes and our neighborhoods safer for our sons and daughters.")

**DAN MILLER:** It is grandstanding, to an extent – and taking it really far, doing something just to do something. Sure, they may find that some “i”s aren’t dotted and that some “t”s aren’t crossed in these records, but I don’t know that they have found any real red flags with regard to any of these companies.

**MARK KERNES:** I think [they started the inspections] because they are getting a lot of heat from the religious right, which is extremely agitated that there is still such a thing as pornography in this country and they want to do something about it. And then you have an administration that is very receptive to that,<sup>97</sup> and let’s face it – there really aren’t a lot of things that the administration can really run on these days. Come 2008, Republicans are not going to be running on the war in Iraq, they’re not going to be running on how well they treat veterans or the great healthcare they are providing in the country, and they’re not going to be running on the economy. What have they got left to run on? They can run on anti-porn.

### C. *The Effectiveness and Usefulness of Section §2257*

Ostensibly, the main purpose behind the massive record-keeping requirements of Section §2257 is to ensure that no underage performers ever appear in adult entertainment content – that is, to guard against the sexual exploitation of minors.<sup>98</sup> While that objective could be accomplished fairly simply with the mandate for producing a government-issued form of identification,<sup>99</sup> Section §2257 ventures far beyond the notion of age-verification to create burdensome and complex requirements of cross-categorization<sup>100</sup> and inspection availability.<sup>101</sup> This lay-

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<sup>97</sup> Suggesting the Bush administration’s receptiveness to attacking sexually explicit expression, the *Pittsburgh Post-Gazette* recently observed that that the administration’s “priorities for federal prosecutions” boiled down to three things – “[d]rugs, obscenity and public corruption.” Paula Reed Ward, *No Trouble for Buchanan to Stay in Line; Amid Battle Over Firing of 8 Other U.S. Attorneys, She’s a Model Appointee*, *PITT. POST-GAZETTE* (Pa.), Mar. 18, 2007, at A-1 (emphasis added).

<sup>98</sup> See *supra* note 80.

<sup>99</sup> See Records Keeping Compliance Form Pursuant to 18 U.S.C. §2257, available at <http://www.freespeechonline.org/webdocs/2257RecordKeepingandInspectionForm.pdf> (last visited Apr. 3, 2007) (providing that the “[p]rimary identification document must be government issued passport, driver’s license, motor vehicle department ID, or military ID: (Each should be described, including the ID number. Clear, good-quality photocopies of each must be attached to this Form and the photocopies must be signed in ink by Model”).

<sup>100</sup> Categorization of Records, 28 C.F.R. §75.3 (2006). This section provides that: Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other

ering of burdens, which appears to move further and further away from the underlying rationale of protecting children, raises the legitimate question of whether the government erects hurdles and imposes stiff penalties for the unrelated – perhaps sub-textual – motive of discouraging businesses from engaging in the constitutionally protected activity of producing adult entertainment. In other words, the burdens are so cumbersome that they can create a chilling effect on the production of non-obscene adult movies.

Clearly, the greater disincentive to using underage performers can be found in the tough criminal penalties associated with the creation and distribution of child pornography.<sup>102</sup> In this section, industry leaders comment on the ineffectiveness of the §2257 requirements.

**JEFFREY DOUGLAS:** Once Traci Lords emerged and people realized their vulnerability, checking ID went from being the general practice to the universal practice, particularly when you're dealing with someone that was not clearly in their thirties. The disincentive to fail to check a valid ID and then to record it already existed, and that disincentive is fifteen years mandatory minimum imprisonment under child pornography laws. Section 2257, with its potential two-to-five years imprisonment, can't possibly compete with that. If you create, for the purposes of distribution, child pornography, then that's fifteen years mandatory minimum. If that doesn't give you the disincentive, then what's 2257 going to do?

Section 2257 exists solely for the purpose of (A) deterring people from participating—detering performers because their privacy is not just invaded, but systematically exploited for no purpose whatsoever and (B) creating a series of rules and obstacles that are great enough

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matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter).

*Id.*

<sup>101</sup> Inspection of Records, 28 C.F.R. §75.5, which provides in pertinent part:

(c) Conduct of inspections.

(1) Inspections shall take place during the producer's normal business hours and at such places as specified in § 75.4. For the purpose of this part, "normal business hours" are from 9 a.m. to 5 p.m., local time, Monday through Friday, or any other time during which the producer is actually conducting business relating to producing depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, producers must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than twenty (20) hours per week.

*Id.*

<sup>102</sup> See *infra* note 86.

that businesses will say, “It’s not worth it.” The origin of 2257 can be seen back in the Meese Commission report<sup>103</sup> – before Traci Lords. There was a notion that “we need to be able to get adult producers to self identify” because, when you attempt to regulate content, you have a definitional problem. It’s extremely difficult to define what adult entertainment is versus, say, a training video on how to put on a condom. They clearly need to be treated differently; it’s always difficult to do so. The Meese Commission said, “Well, if we force them to self define and self label, then we overcome that problem.”

At the beginning of the process, if the regulators had just sat down with the industry and said, “We want a way to document that everyone in the business is of age. How can we go about doing that?,” then we could have set up a system that would have been simple, effective and largely non-burdensome. There would still be some issues about privacy, but relatively minor ones. A copy of a valid ID would be maintained, associated with the performance that the person was in. There would have been barely a ripple.

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. You wouldn’t have people, essentially, throwing up their hands and saying, “I just can’t do this,” which is definitely part of the problem.

It essentially would have been the Republican ideal of good regulation: Make it as simple as possible so that it’s not economically burdensome and then everyone can comply, no matter what their education level, and they don’t need to consult with a lawyer. I hear that all the time.

But the government did the exact opposite. They didn’t talk with the industry. They made it as burdensome as possible because the purpose of the regulation really is not to deter and to detect child pornography, but to create as large a financial burden as is possible, with as many traps and as many penal consequences as are possible. That is most unfortunate.

**STEVE ORENSTEIN:** Certainly, I can’t speak on behalf of everyone in the industry, but through my basic understanding of the business as a whole, it’s a legitimate business. It’s not a business of child por-

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<sup>103</sup> See generally FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* 106-108 (2000) (discussing the work in 1986 of the commission, which was chaired by Edwin Meese III, the U.S. Attorney General under President Ronald Reagan, and asserting that “[t]he leanings of the Meese Commission witnesses were so pronounced and the claims of injury from pornography were so outrageous that the commission’s final report was generally dismissed out of hand as preordained”).

nography; it's a business of adult entertainment. The people who create child pornography are not going to be putting a 2257 label on their product. If you stumble upon it somehow, it's not going to be because they were required to keep records.

I guess you could say, at the point of the shoot, if someone wasn't concerned enough before – of course, we always were concerned – about checking IDs properly on the set, I guess maybe this law makes people more fearful and makes them more on top of checking it. But, is it going to stop someone whose goal it is to shoot underage people? No.

**DIANE DUKE:** This law, which I think is ridiculous, was passed. What you're finding is that the industry is working to fight the law,<sup>104</sup> but also simultaneously is in compliance with the law.

**MARK KERNES:** 2257 is just stupid – it doesn't work. As much as we may report – and will report – on whatever violations are found and whatever companies are inspected, we know it is stupid. We'll write about that as well.

I think it's a colossal waste of time. Child pornography is already against the law. If someone is found having used an underage person in a movie, then they will be prosecuted and it is worth five or ten years in jail and huge fines. If the government suspects that someone is underage in a movie, then they have massive investigative forces behind them – they can do an investigation, they can serve subpoenas, they can investigate who this person is and whether or not they are underage. If it turns out they are underage, then someone can be prosecuted – one would think the first person would be the performer, him or her self, but in any case they will go after the producer.

What 2257 does is turn the whole justice concept on its head. It says to producers, "You are guilty until you can prove yourself innocent by showing us this paperwork, which may or may not be good anyway. And, in fact, if it turns out that you have been fooled by a very good ID, you're guilty anyway." So I think that makes 2257 completely useless.

And, of course, that doesn't even deal with the incredible expense that people are going to have to go to in order to keep up with all the records they are expecting you to keep up with.

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<sup>104</sup> See *Free Speech Coalition v. Gonzales*, 2007 U.S. Dist. LEXIS 24389 (D. Colo. Mar. 30, 2007) (granting in part and denying in part the government's motion to dismiss, or in the alternative a motion for summary judgment, multiple legal challenges and claims brought by the Free Speech Coalition to 18 U.S.C. § 2257 and associated regulations on both First Amendment and privacy grounds).

D. *What Took Place at the Washington, D.C., Meeting with the FBI*

In an unprecedented move, in October 2006, the FBI invited several representatives from major adult entertainment companies to travel to Washington, D.C. to discuss the agency's procedures for conducting §2257 compliance inspections.<sup>105</sup> One of the three lawyers who attended the meeting, Gregory Piccionelli, observed in an article published in the adult trade publication *XBIZ.Com*, "The meeting was extraordinary both in its character and because it was initiated by the government for the stated purpose of obtaining input from, and establishing a dialogue with, the adult entertainment industry regarding the 2257 compliance inspection process."<sup>106</sup>

Although inspections already had started prior to the October meeting,<sup>107</sup> "[t]he surprise visits from federal agents began in earnest" after that time.<sup>108</sup> As noted below, some of the adult industry participants at the meeting were left with the distinct impression that the FBI were reluctant inspectors, but nonetheless would carry out their task in a professional, yeoman-like manner.

As attorney Jeffrey Douglas suggests below, "[p]articularly important to them was making sure that people understood that no matter what the conditions of the records were, nobody was going to get arrested." Parsed differently, the FBI's role in the inspection process was simply to check the records and then report back any violations to the U.S. Department of Justice, creating a two-step, FBI-to-Justice process. Any decisions on subsequent prosecutions for record violations would come from the Justice Department, not the FBI.

In this section, three of the attendees at the meeting – attorney Jeffrey Douglas, Wicked Pictures' Julie Russell and LFP, Inc.'s Sean Berrios – weigh in with their observations about the tenor of the discussions that took place in Washington and the naiveté of the FBI in terms of the bureau's understanding of the adult entertainment industry.

**JEFFREY DOUGLAS:** The FBI invited what it characterized as being industry leaders to fly to D.C. at their own expense, go into the J. Edgar Hoover Building<sup>109</sup> and have a chat with the FBI. And their lawyers were not invited.

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<sup>105</sup> See Piccionelli, *supra* note 48.

<sup>106</sup> *Id.*

<sup>107</sup> See *supra* notes 55 and 61 and accompanying text.

<sup>108</sup> Hoffman, *supra* note 4, at C1.

<sup>109</sup> The building, which is located at 935 Pennsylvania Avenue, N.W., in Washington, D.C. and first opened in 1974, "received its official name, the J. Edgar Hoover F.B.I. Building, through Public Law, 92-520, which President Richard Nixon signed May 4, 1972, two days after Director Hoover's death." *The History of FBI Headquarters: The J. Edgar Hoover*

The FBI just sent letters, several of which weren't even opened because they were deemed to be junk mail. Eventually, everyone who was invited attended and a number of the companies said, "We're not going without our lawyers." So heated negotiations ensued and, eventually, three lawyers did attend the meeting.

The letter went out in October 2006. We went to D.C. on October 12th. At that meeting, a couple of things became apparent. One was that the FBI did not want to be doing this and had not been consulted in the creation of the regulations at all. They didn't say, "We hate doing this." What was said was this: "This is the first time in the long, proud history of the FBI" – and I think that's a direct quote – "that we have been required to do regulatory inspections, and that is entirely outside of our mission and our experience." They didn't have to say how they felt about that. It was strongly implied.

It took them six months to get geared up about how to do it. The way they went about doing it, we were told, is that they consulted with other federal agencies that have regulatory inspection requirements, such as the Bureau of Land Management and the Bureau of Alcohol, Tobacco, Firearms and Explosives. They listed a number of agencies. The number three guy in the FBI, Chip Burrus, one of the leaders of the criminal division who was making this speech, said "the one message we got from everyone we talked to is that you cannot successfully engage in regulatory inspections without a dialogue with the industry you're attempting to inspect." My heart raced!

This meeting was their first effort at dialogue. It struck me as a little bit late in the game – after they had started inspections – and a very ineffective way of doing it, which was inviting people in secret to come to Washington and expect that these people would leave the meeting and carry their water for them by saying, "These are really nice guys and all they want to do is make this go as smoothly as possible."

We disabused them of that notion by telling them no one here is going to tell anyone else that they were here because of the obloquy that would be associated with it, the suspicion that the people who were here were going to be getting a break. Nobody wants to do that and nobody wants to say, "Hey, good news guys. The FBI is your friend." We're not going to do that. We said, "You must be out of your mind. If you want to convey this message, convey the message the way everybody conveys the message: Talk to them. There's media. There are

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FBI Building, FBI Web site, *available at* <http://www.fbi.gov/libref/historic/hoverbuilding/hqhistory.htm> (last visited Apr. 4, 2007).

meetings. You're welcome to come. That's the most effective way to do it."

In response they said, "We'll think about it," which is what they said about everything. But they did. They were responsive. They've conducted some interviews. And the big thing was their attendance at the XBIZ show.

I believe the FBI was trying to create a dialogue, but for much narrower purposes than we would have. They want to make sure that nothing bad happens during the inspections, which is that somebody does something stupid like locks them out or pulls a gun. They want everyone to know that no one is going to get arrested. This is not a search. They want to reduce the paranoia. One of the things they took some umbrage at was that one of my colleagues said, "Don't give them water glasses or something that they can get DNA samples from or fingerprint samples from." That comment seemed to really bother them. They expressed that they thought it was funny, but . . .

Particularly important to them was making sure that people understood that no matter what the conditions of the records were, nobody was going to get arrested. That's not the way federal law enforcement works. There's got to be an indictment. There are lots and lots of steps. The other thing they wanted to emphasize was how mechanically it worked, so people would be prepared.

"What we would like is a room with enough room for us to spread out," they told us. "If you stick us in a broom closet, we're going to be there a lot longer and we're going to be annoyed. So let's play nice together." All of which are very good messages. There were lots of little gems that came out at that meeting that answered questions we didn't know we had or ones that had been long burning. For instance, do they prefer to have things in electronic form or do they prefer to have them in paper? If it is in electronic form, are they going to duplicate the hard drive? Under the regulations, they have the absolute right to do so. Their answer was no. If the records are in electronic form, they expect the company to print them out for them. They want hard copies.

So there were lots and lots of very helpful information and answers in there.

**JULIE RUSSELL:** Chuck Joyner, the person in charge of the inspections, is the same agent who was in Washington, but his bosses and their bosses were in the meeting as well. I got the feeling that they had the biggest problem with trying to implement regulations in a business about which they had no idea how it operates. In trying to meet with us, they wanted to get an idea about how they can better understand us



and vice versa – to the point where they were even going to put a 2257 regulations area on their Web site that, as a producer, you could go to in order to look up and find out if you are doing exactly what you're supposed to be doing. I got the feeling they were unaware of what our major bitches, per se, were.

The funny thing is that we didn't really do a whole lot of talking at the meeting. The attorneys did. The company representatives did not. They gave us a lot more information coming out of that meeting than we gave to them. I think it was much more of a wait-and-see as to where they were going with this.

**SEAN BERRIOS:** Their opening remark was, "We're here to establish an open dialogue between the adult industry and the FBI. We're not here to investigate any of you. We just want to get some correspondence started here."

I had mixed feelings because you had all of these FBI agents; this was something that an FBI agent could have just called us up and told us, but then again, we wouldn't have said anything because our attorneys would have advised us not to.

It was the right thing they did by inviting us over there. I was willing not only to listen to what they were saying, but to bring it back to the office and, hopefully, to apply it to our policies as well.

What really helped us out was their description of the method on how they go about inspecting companies. Agent Chuck Joyner made it a point to give us a breakdown on how the inspections were going along and he mentioned it again at the XBIZ conference. At the time of the Washington meeting, I think they had about 38 companies in their database, and they were designing this database so that random companies would come up. Once a company would come up in their database, then they would go online or go to that company's Website to purchase product – DVDs, magazines, anything. Once they reviewed the content in the product, they would write on a spreadsheet who the models were, what scenes and what pages. It is that spreadsheet that they then would take along with them on the inspections. It is interesting to note that everything he discussed – it is the same procedures that we all read about in *AVN* magazine when they are inspected.

While he was talking, a number of people in the industry were asking, "Well, what about if someone is on vacation or if their office hours aren't from nine to five because they are a small company?" Chuck Joyner said that, so long as they are informed, just put a note on the door and they will come back – it's not like they are coming from out of state. It usually is local field agents that will be conducting it; either

Agent Joyner or Agent Lawrence who will be doing the inspections, along with a team of seven or eight agents.

The FBI agents that we met there looked really serious and really committed to fulfilling their obligations as FBI agents. I haven't come across one agent who didn't want to conduct their obligations or fulfill their missions.

E. *The Burdens and Steps of Complying With Section §2257*

The record-keeping requirements of Section §2257 result in a tangled web of paper and electronic documents that often necessitate the attention of full-time personnel devoted solely to the task of maintaining them. As Jeffrey Douglas notes below, one of the attendees at the Washington, D.C. meeting – an adult magazine publisher – told the FBI that he has twelve employees dedicated to 2257 compliance, with four additional management personnel devoting “a substantial amount of time” to supervising those individuals.

Much of the work associated with §2257 comes from the cross-referencing requirements,<sup>110</sup> which typically mean the company must maintain multiple databases organized under: 1) the performer's legal name; 2) the performance itself, such as the specific DVD or issue of a magazine; and 3) any aliases and stage names the performer has used. This cross-categorization often translates – depending on the size of the inventory – into thousands of data entry points.

Clearly, Section §2257 compliance demands a huge investment of time and money. LFP, Inc.'s Sean Berrios suggests below that large companies have an advantage over smaller enterprises because the bigger businesses “can afford to invest time and money into state-of-the-art software, personnel and equipment to maintain an accurate §2257 database.”

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<sup>110</sup> Categorization of Records (“C.F.R.”), 28 C.F.R. §75.3 (2006). This section provides that:

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter).

*Id.*

In this section, industry insiders reflect on the difficulties companies experience when trying to comply with the current §2257 regulations.

**JEFFREY DOUGLAS:** A significant portion of 2257 is that you have to put a scarlet letter on your content, which is a label that says, “All records required by 18 U.S.C. 2257 are in the custody of” an actual person’s legal name – first initial, last name – a street address where the records are kept and the date of production. That labeling process means that you have required a group to self define, and that’s very attractive to law enforcement for lots and lots of reasons.

The record-keeping requirement could be a simple as: check the ID; make a copy of the ID; and that’s the end of it. But, of course, it’s infinitely more complicated than that. There is no justification for the requirements of cross-referencing or that a performer discloses all previous aliases. For instance, if I were a performer, and when I was in kindergarten and I had to get glasses, I was known as “Four Eyes.” Now, if I fail to disclose that nickname to a producer, the producer has not committed a crime and I haven’t committed a crime. But if I disclose to a producer on one production that I was known as “Four Eyes” and then fail to disclose that information to a producer on the next occasion, and the producer does not connect those dots, then that’s a federal felony.

There are no circumstances whatsoever, if it turns out that I was underage, that failure to appropriately cross-reference a nickname I had when I was five years old can possibly impact the ability to detect and deter child pornography. But it’s a crime.

The FBI has been kind enough to say that they don’t intend to aggressively enforce subsections of the regulations that add additional burdens, such as the fact that any extraneous material in a file is a violation of 2257. If you thus were to include the model release in a file folder along with the performer’s ID, then that’s a crime because the model release is extraneous material.

There’s a rationale behind that regulation prohibiting extraneous material, but it keeps getting us further and further away from the purported benign purpose. If I want to conceal something, the easiest way to conceal a piece of paper is to stick it in among tons and tons of extraneous material. The discovery game in complex litigation is that you say, “I want this document,” and the response is, “It’s in that warehouse over there, good luck.”

There’s a legitimate concern that they could show up to look for six pieces of paper and be confronted with a file with 600,000 pieces of paper. Again, creating a rule like that is reasonable, assuming they had

done inspections and found out that's what people were doing. Instead, that rule comes before the first inspection ever occurred, which feels very much like it's just a series of arbitrary land mines and traps.

For instance, there have been a series of regulations in support of 2257. The one that preceded the initial inspection regime – the 2005 regulations – in their initial promulgated form, before they were corrected, required that the record-keeper be available sixty hours a week – from 8:00 a.m. to 6:00 p.m., six days a week. Now, another read of it was that they were required to be available seven days a week. It's not perfectly clear, but it's overwhelmingly clear that the record-keeper had to be available ten hours a day, six days a week. People went nuts in the public response period. So, the new regulations said twenty hours a week. They provided no means to disclose to the FBI which twenty hours they were available. They said it should be normal business hours unless you conduct your normal business in the evening, which certainly many filmmakers do, but it's just a bunch of arbitrary rules issued by people who have no knowledge whatsoever of the industry or how it works and with pure hostility toward the industry.

The one thing that is certain, which I have heard myself say now for more than a decade, is that you can't have effective regulation without a dialogue with the industry you're regulating. It's impossible. You can't think of any other industry – no matter how detested it might be or how low it is on the social-status ladder – that when they regulate it, they don't involve the industry they're regulating. Most of the time, the industry has representatives with a voice – voting representatives – on the regulatory body. If tomorrow, for instance, the nuclear waste industry were told that they were going to be regulated solely by a group of people that said that nuclear energy production has to stop today, they would be righteously outraged, and that is exactly what occurs with the adult industry and has forever. And 2257 is just the worst possible, most egregious example.

Both large and small companies have their own enormous burdens created by 2257. If you're large, then presumably you have the economic base to hire the people necessary to do it. But that's extremely difficult. A magazine publisher noted that it had twelve full-time employees doing nothing but 2257 data entry and data maintenance. It's incredibly difficult to find people who are interested in doing something that is essentially mindless and boring, and doing it perfectly. There's no room for error. So finding, training and keeping those people happy and not changing jobs is extremely difficult.

That magazine owner was talking directly to the FBI, at the FBI meeting we had in Washington, D.C., and this was his disclosure. He

said, “I have four management personnel for whom a substantial amount of their time – more than half – is supervising those twelve people, and coming up with answers to all of the inevitable unanswered questions with all of the varieties.” He, as owner of the company, said: “And not a week goes by – rarely a day goes by – when one of those questions doesn’t end up on my desk.”

That is a problem that is unique for a large company because once you have layers of management, then policy questions have to be answered consistently amongst a group of people.

**STEVE ORENSTEIN:** Well, Julie [Russell] is full time, just handling 2257, and she has had other people help her, as well, over the years to go through stuff. We have 500 movies and compilations at Wicked, bringing it to a total of 900 productions that we have to track. We’re not a major mainstream movie company that puts out three movies a year. We put out three a month.

Then we need the person on the set of the movie who is taking all of the information to make sure that it is all correct. We have to deal with the fact that if the person on the set doesn’t have all of the proper information [for a performer], then we have to replace her [that performer] at the last minute.

Beyond that, all of the work and the rework over the years is that the original writing of the regulations was a little too overbroad and overbearing. They make everyone and their attorneys make interpretations of what something in the regulations means you should do because there really wasn’t really a clear-cut meaning to things. That’s part of the burden as well. Every time something else comes up, we say, “We thought we had to do this. Now, we have to go back and change all that.”

**MARK KULKIS:** We have everything locked down pretty solid. My production manager on the set scans the IDs so you have a really crystal clear, electronic version of the IDs, plus the 2257 page where they say, basically, “Under penalty of perjury, these are real IDs.” So we have it electronically and in paper form. When it is time for the movie to be put out and when it goes in to editing, Ruby at the front desk logs all of that material in and double checks to make sure all of the signatures are in place. Then she files them in the appropriate place and makes the appropriate cross-reference copies for the performers. Then we upload the electronic files to a server.

We actually have them numerically encoded as an additional barrier for privacy purposes. If anyone were to hack in, you would not be able to look for a name – it would all be numbers. We have an Excel chart that has the numbers listed and cross-referenced. A hacker who

was looking for someone particular would have to go through a thousand or more IDs to get to it; it would be like a needle in a haystack.

So we do it all numerically and we upload it to our server; we give passwords to the people who do our VOD [video on demand] and to those others who have a legitimate need to have it because they are a secondary producer. Most secondary producers just want to know that it is there if they need it; secondary producers are not so much in the line of fire, but once they see it is up there and that we are a well-ordered company, it is usually like, "Okay, that's fine. I don't need to download it to my server."

**SEAN BERRIOS:** A company like LFP is here and will always be here only because it can afford to invest time and money in to state-of-the-art software, personnel and equipment to maintain an accurate 2257 database.

Smaller companies may soon be going out of business because of the superfluous amount of documents that they have to have and the filing requirements. What is unfortunate, as you can see in any business, is that when these smaller companies want to be compliant, they will go out there and hire a freelancer or subcontractor to manage their 2257 database, only to find out that the database wouldn't be compliant.

What makes it difficult to comply with is finding the primary producer. Take *Hustler* magazine, for example. Each month, we will purchase one or two sets of photos for *Hustler* magazine from another photographer, and *Barely Legal* magazine is all purchased. So, what makes it difficult for us is obtaining clear and legible copies of the models' identification. This was a huge issue back in 1995. Back then, we didn't have the technology to actually take the photo of the model's ID and then scan the chrome. So we were given fourth or fifth-generation photocopies that you couldn't read it. That's what makes it difficult for a company to comply. Fortunately, a lot of companies understand how important it is for them to be compliant, so what they will do is not release payment to these photographers or directors until they see the IDs.

We actually treat *Barely Legal* as if we are the primary producer because we are publishing the photographs for the first time. We're the secondary producer on *Barely Legal*, so let's say we have a photo set from Denys DeFrancesco, for example. Under the regulations, we have to provide the name and addresses of where we got that.

Up until about three years ago, I was rejecting almost every ID packet that was sent to me. Either the ID wasn't clear, the models didn't complete their release accurately or the directors didn't complete

their end of the model release accurately. What the directors and photographers had to do was track down the models. We had a photographer who designed a magazine for us and he had to fly back to Nebraska to track down a model. Today, it has completely turned around; I'd say it's one out of every ten packets [that is rejected], and it is usually just the absence of the director's signature on the model release.

Since at LFP we consider ourselves the primary producer of all the stuff that we publish, we also maintain records for all of our ads and there are hundreds of phone sex ads in an issue of *Hustler* magazine.

On our own movie productions, on the day of the shoot, we want to show the FBI and the Justice Department that, when the sexual act occurred, "Here's the ID the model provided." All of the models fill out their model release, their 2257 information, including – although it is not mentioned in the regulations – their HIV tests, because we want to provide a healthy working environment for everybody. At that point, the director or the director's assistant will maintain a file so that when the entire production is complete, like with the movie "Aphrodisiac," they will be able to turn in a complete file for all of the performers in that movie. We also require anyone who is around the taping to have ID, so we require IDs and releases for the crew as well as the performers.

We QC [quality control] our videos here at the company a number of times. One of the last checks is through my department. We confirm the scene order, where the model appears in the movie and who the model is because a lot of the models look completely different from their IDs, especially after make-up.

What the current regulations require is that we catalogue the model by her alias, maiden name, stage name, any professional name the model has used, and nicknames. We'll also need to show the titles or productions in which the model used those names. We have to provide them with the opportunity to give us this information as best they can.

**DIANE DUKE:** It is misfiling that they are looking for. We're talking about paperwork that the average citizen could not even imagine.

What happens with this industry – which doesn't happen in other businesses – is that the government keeps changing the rules on the adult entertainment industry. They change the rules and then the adult entertainment industry steps up to the plate, but then they change the rules again! It's definitely a concerted effort to knock the industry down.

But what's constant – and you'll find it over and over and over again – is that the adult entertainment industry continues to comply; it will jump through the hoops – it'll do what it can do to prevent the hoops and we're doing what we can do to prevent the hoops.

You'll find no other business where the rules get changed mid-stream, and that happens in this industry; it is unfair, it is not what this country was founded on it and it is ridiculous.

#### F. *Privacy Concerns Raised by Section §2257*

Not all of the discontent with Section §2257 revolves around the burden and expense associated with keeping compliant or even the sheer confusion created by the multi-layered regulations. In fact, a major industry complaint about the regulations is that the very process of record keeping under the law compromises and jeopardizes the privacy of the performers.

The privacy interests boil down to two main concerns. First, small producers, including solo Webcam operators, often work from home. The requirement that the records “shall be made available at the organization's place of business”<sup>111</sup> thus is particularly troublesome because it means that individuals who operate businesses out of their homes must list their home addresses on any §2257 labeling. This, in turn, obviously opens up the possibility of unwanted visitors – from de-ranked fans to anti-porn crusaders – to their residences. The second concern comes in response to the provisions of the new §2257 regulations promulgated in June 2005<sup>112</sup> that expand the requirement of who

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<sup>111</sup> Location of Records, 28 C.F.R. §75.4 (2006). This section provides that: Any producer required by this part to maintain records shall make such records available at the producer's place of business. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution).

*Id.*

<sup>112</sup> See, e.g., 28 C.R.F. 75.1(c)(2) (2006) providing that: [a] secondary producer is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally- 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 depic-



must keep records to encompass secondary producers – individuals or companies that were not involved in the hiring of the performers or the actual shooting of their performances, but that acquire adult content from others and then create and assemble works from those materials, such as compilation films.<sup>113</sup> For now, the portions of the new regulations involving “secondary producers” are enjoined, pending the outcome of an appeal.<sup>114</sup>

Unfortunately for members of the adult industry, however, U.S. District Court Judge Walker D. Miller, in the case of *Free Speech Coalition v. Gonzales*<sup>115</sup> “found that Plaintiffs were unlikely to succeed on their privacy claims,”<sup>116</sup> reasoning, “that the scant evidence Plaintiffs have produced is insufficient for any reasonable fact-finder to find a reasonable probability of harm from the required disclosures. Therefore, summary judgment is appropriate on these claims.”<sup>117</sup>

In this section, members of the industry discuss Section §2257’s impact on privacy.

**JEFFREY DOUGLAS:** Think of the Webcam people. They’re operating the entire business out of their home. They’re an independent contractor that has signed a contract that was e-mailed to them. They own the equipment themselves and the only deal is that their feed goes to some server somewhere that puts it out and makes it available to someone – or lots of people – targeted in one part of the world or all over the world. Assuming that they fall within 2257, their place of business is their home. They would have to rent a separate business location and operate some business out of that location in order for their home not to be disclosed to all of the people they are “Webcamming” to if any part of it is recorded. If it’s recorded, that’s where the label has to come up and that is a severe deterrent.

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tion 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.  
*Id.*

<sup>113</sup> See Free Speech Coalition Web Site, <http://www.freespeechcoalition.com/FSCView.asp?coid=655#two> (noting that “[t]ypical secondary producers include companies that manufacture compilation movies from other companies’ catalogs, magazines publishing photos from movies, or companies that purchase content recorded by someone else and publish it for the first time, whether in magazines, DVDs or product covers. Most websites are secondary producers”) (last visited Apr. 3, 2007).

<sup>114</sup> *Free Speech Coalition v. Gonzales*, 406 F. Supp. 3d 1196 (D. Colo. 2005) (granting, in part, an injunction against the enforcement of amendments to Section 2257 as they relate to “secondary producers”), *modified*, 2007 U.S. Dist. LEXIS 24389 (D. Colo. 2007) (granting in part and denying in part the government’s motion to dismiss, or in the alternative motion for summary judgment).

<sup>115</sup> 2007 U.S. Dist. LEXIS 24389 (D. Colo. Mar. 30, 2007).

<sup>116</sup> *Id.* at \*27.

<sup>117</sup> *Id.*

The public issue is a real problem. One of the difficulties that one has when one is familiar with the adult culture – different from one that is looking at it from the outside – is this: From the outside, the notion that someone who performs sex on camera or performs nude while doing their vacuuming has a sense of – yet alone a right to – privacy seems absurd. But that's not the case. They're like everyone else, and they have zones of privacy and zones of public life. If you look at Hollywood, even the most aggressive, self-promoting, famous-for-being-famous personalities want, expect and are legally entitled to a zone of privacy. Now, for some of them that zone of privacy might be the size of a quarter, but not for most. Even those that have it the size of a quarter, they are entitled to have that.

So, if a person is making a living and not going on welfare, not prostituting themselves or not doing something else that's illegal, they're still entitled to privacy. By virtue of the fact that they wash their dishes and do their vacuuming naked with a camera, they shouldn't have to share personal information, if they don't want to, with their neighbors or their parents. They should be able to use an alias and not disclose. 2257 violates and intrudes upon that overwhelmingly.

Here's a specific example. I got a call on the eve of the finality of the regulations from a woman who had a prominent husband in a high-profile profession in a large community. She was in her mid-forties. They had been married for twenty years. He was aware of the fact that she had this Webcam life, which he found to be perfectly acceptable and enjoyable. But they went to professional dinners and they were on public committees. Still, no one had yet connected her stage name to her and she didn't think it was terribly likely that it would ever come up. But if she was required to put her home address and the legal name – first initial, last name – that would blow her cover. She had, essentially, three choices: Eliminate her privacy zone, stop doing what she was doing or break the law by having her records kept at a place that was not realistically a place of her business. She opted for the third choice. That is not an appropriate set of choices that people have to make. I have spoken to others who weren't already neck deep in the business when they had to make the choice, but given the choices they had to make, they opted not to engage in constitutionally protected legal behavior of being a Webcam performer.

**STEVE ORENSTEIN:** There was one particular thing brought up at that [FBI] meeting about having to give out personal information with all this stuff about primary and secondary producers. If someone opens up a Web store out of his house, then he now has an online store

and he is scanning our sleeves to upload for the images on the site. He's now a secondary producer and he needs to have our paperwork. So, here's just some random guy, who starts his own little online store, and now we're supposed to send him the girls' IDs, with all of their home information, addresses and other things. When [Agent Joyner] was here, he said, "You know what, I'm OK with you redacting that information. I'm OK with that."

But if our obligation is to make that material available to the Web store owner, we can't turn him down, if he has our stuff out there. And who is he?

**JULIE RUSSELL:** When the new regulations went into effect in 2005, we uploaded all of our files. But before I put them online for anyone to be able to look at, I redacted personal information like social security numbers, home addresses and phone numbers. That was all swept off. The only thing they were entitled to was what 2257 said, but we didn't take off the addresses from the IDs because we were told we're not allowed to doctor the IDs in any way because that could appear as if we were forging the documents.

It was an enlightening meeting in Washington for the FBI because, when we brought up the stalker issue, they said, "That's impossible. People who are just run of the mill – ordering five pieces of a product – shouldn't have a right to get that information." And Jeffrey [Douglas] and a few other people told them that's the point we're trying to make. They are allowed to have that, as secondary producers. Now, there's no secondary title per se anymore, but it's all producer across the board.

**MARK KULKIS:** The FBI agent at the XBIZ conference specifically said that you can redact everything except for the person's name, birth date and the license number, and the FBI considers that fine. He said that was fine, in his point of view, because he was sensitive to that privacy concern as well. So that was one of things where everyone was like, "Oh, good."

We have been doing two separate versions – one redacted, one not. But we have been using the non-redacted version because we didn't want to get in to trouble, but now that he said that – and we haven't gotten around to it yet – we're going replace all of the non-redacted ones with the redacted versions so it will safeguard the performers' privacy.

#### G. *The FBI's Conduct During the Inspections: What Takes Place?*

Although adult movie companies that undergo federal §2257 inspections receive no prior warning that the FBI is coming, the industry

now has a fairly clear idea how the inspections will unfold once federal agents arrive. One industry insider who attended the Washington, D.C. meeting at the bureau's headquarters, but who asked not to be identified, told the *Los Angeles Times* that "[t]he agents gave a slick presentation on what to expect, warning the producers that they would be visiting the facilities at random, with a minimum of five agents."<sup>118</sup> As attorney Jeffrey Douglas, who has counseled clients that have been inspected, observes below, "there's every indication that it is random."

Special Agent Chuck Joyner, who is heading the inspection team, told attendees at the XBIZ conference in February 2007 that "[t]he FBI wants to make the inspection process as transparent as possible. It is not a game of 'gotcha.' We're looking for intent [to commit a violation]."<sup>119</sup> He reassured the audience that the inspections should not be considered a "raid" or a "search," but added, "If we arrive on your doorstep, you are not allowed to delay us from inspecting you."<sup>120</sup>

In this section, industry insiders, including the principal players at Wicked Pictures, Inc. – one of the companies to pass inspection early on in the process – describe what occurs when the FBI comes to call.

**JEFFREY DOUGLAS:** The scope of any individual inspection is extraordinarily circumscribed. Prior to the inspection, they have a database of producers. They assign each a number. A random number generator issues a number and that's the target – with some important variation. That's essentially how an individual company gets drawn. And there's every indication that it is random.

Once your "lucky" number comes up, they acquire what they characterize as a sample of your material. The range has been from eight – the smallest number of titles inspected – to the largest number, which is sixteen. That's it. Only video manufacturers have been inspected so far. No Internet companies. No downloadable clips. Eight to sixteen DVDs. At the XBIZ show, they said "We order directly from you, so we're financially supporting you." It was a punch line that didn't really

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<sup>118</sup> Hoffman, *supra* note 4, at C1 (quoting Steven Hirsch, founder of Vivid Entertainment, who commented that "[t]he FBI is being decent and fair about it" and noted that "large porn purveyors such as his had been militant about record keeping and age verification for years, dating to the scandal surrounding Traci Lords, a 15-year-old girl who lied about her age during the 1980s, shot dozens of porn films and rose to become a celebrated porn star before she turned 18").

<sup>119</sup> Rhett Pardon, *FBI is Building Adult Company Database*, XBIZ.COM, Feb. 7, 2007, [http://www.xbiz.com/news\\_piece.php?id=19544&searchstring=inspections](http://www.xbiz.com/news_piece.php?id=19544&searchstring=inspections) (last visited Apr. 4, 2007) (describing the FBI database of adult companies that could be inspected as part of the recent effort).

<sup>120</sup> *Id.*

carry much response. They then review those movies extraordinarily closely.

An example of just how closely involved one of my clients that got inspected. The agents said “What about this woman? You don’t have ID on this performer.” The client said, “That performer is not in the movie.” They replied, “Yes, she is. There’s a scene in which there is a video monitor in the background and on that video monitor there’s a woman having sex. We can’t see the male partner, but she appears to be actually engaged in sexually explicit conduct.” The movie producer, in fact, had decided – kind of like product placement – to show one of his own movies in the background. They are reviewing these films frame by frame. They then do a video capture of the face of every performer they can find. In movies in which there is no face discernible, they record whatever body part is appropriate.

It was fortunate because the company had a very small number of movies. The producer knew exactly where it came from and showed the ID in a different file. They wrote that up at a technical violation, but not a substantive one. They told him to photocopy those records and stick them in this file. He did, and that was reported to the DOJ.

Once they have their video captures, they then look at whatever cast list is provided – both on the packaging and the movie – and then they go to the location and say, “These are the dozen or so ones that we want.” There you’re not asking someone to download six million documents, as would be the case for one of my clients. Instead, they have to download probably five or six documents per performer, on average. Assuming that there’s a dozen performers in each film and there’s a dozen films, we’re talking about 500 or 600 pieces of paper – relatively manageable.

They say they want to be as non-disruptive as possible, and I think they really want to be. However, it is inherently disruptive. They say, “Here we are. Can you show us where you keep the records?” They photograph the record room. They say, “Can you find us a place where we can work with a conference table?” They photograph that area to show that they left it in better condition than when they arrived. Then they say, “These are the movies we want to look at.” They hope that the company will designate a liaison person – the custodian of records or someone else – to help them. The sooner they get it, the sooner they leave. So far, in 100 percent of the cases, that has occurred.

The companies have provided at least one person – in some instances multiple people – to facilitate. They first check the main file – the film file – to see if all the performers that they know are in the movie have ID and personal information forms. If there are people

who are listed in the record keeping who aren't in the film, those are violations that they record. They then check the cross-referencing to see if, under the aliases that are disclosed on the personal information form, there are designated documents and that there is a list of films that each of the performers they are looking at have been in – and if they are correct.

Let's say they have a movie in which a performer has been in thirty other movies for that company. They look at the list of movies that that performer has been in and see that there are thirty. Apparently, they are not then going to look at each one of those thirty films to see if the ID is in that file. All they do is make sure if the performer is in this movie that there's a list that shows the performer is in that movie.

**STEVE ORENSTEIN:** They came in with a list of titles. On the list were the movie titles, the dates of production and the cast lists from those movies. They basically said, "We're here. Here's what we do. Do you have an area where we can set up? We have our own printers. We have our own stuff. We're not asking you for anything."

They wanted to look at our cross-referencing system in the database, which is an important part of it. They sat and said, "Show me this, show me that, let me see what happens when you do that."

We went through the process on all of the films on the list. Then, Julie [Russell] pulled for them the actual IDs and the movie files for them to go through. They pulled the stuff out of the files, looked at it and made a copy. Then they put it back in the file. They had an assembly line set up to do it.

They looked through everything and, basically, said everything looked good to them. On a couple of IDs they said, "Do you have a better copy? This one is not great for me." Julie went and found a better copy and said, "See if that works." By the letter of the law and the fear that we have been under previously, we didn't think we would get that opportunity.

The process was positive. Based on how negative everything was up to it, certainly the process of dealing with the FBI was very positive. They cleaned up and left everything the way it was when they came in. The agent said, "You'll get a report telling what your shortcomings were – what the mistakes might have been." But since there weren't any mistakes or shortcomings here, there is no report.

The FBI says the producers come up randomly from the computer – who they are going to inspect. All the studios that they know of are put into the system, which spits them out randomly. From that point, they just choose titles. Obviously, if you have titles that imply young [performers], they go towards those. Otherwise, they just randomly

pick an assortment of titles and that's how they gather that other information before they come in. When they go back, they would now just be looking at the back of the movie – the screen shots of the performers – to our IDs. He said, "Look, if you gave me a picture of a 20-year-old blonde and I see it's a 40-year-old black man, I'm going to have a problem with that."

By law, they could look at ten percent of the titles. As I said, he was very reasonable – this one particular agent. Whether that's the whole philosophy all the way back, I don't know. If it is, that's great.

**JULIE RUSSELL:** We were actually the quickest inspection they had done – two hours. It was very easy. They came in and said, "We're going to take a picture of the location that we're going to work out of. When we leave, we're going to take a picture again to show that we didn't tear down the walls."

The way that our files are set up, it was incredibly easy to do. The way that we have our movie files is that each person's ID is in that file itself. And we have a talent file in addition to that. We can literally pull a movie, have the cast list, have everybody in it, so we don't have to go individually and pull those files. That's why it was so simple and so quick.

They took photocopies of everything they asked to see. They checked the cross-referencing of everybody's name. They took the films and all of that. They said, "When we leave, we'll write you a report." But when they were done he said, "I'm not going to write a report because there were no violations here."

**MARK KERNES:** From what I understand, the FBI agents have conducted themselves incredibly professionally throughout this. Considering that they are surrounded by pornography that they may have a personal objection to, I think that is very good of them.

#### H. *Possible Fears About the Inspections*

When FBI Special Agent Chuck Joyner addressed attendees at the XBIZ conference in February 2007 about the ongoing §2257 inspections, he "was peppered with nearly three-dozen questions from audience members who wrote their queries on supplied notepad paper"<sup>121</sup> – a move that easily could be interpreted as an indication of the apprehension many industry people feel about the process. His appearance at the trade conference had been promoted by the program's or-

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<sup>121</sup> Pardon, *supra* note 119.

ganizers as “providing invaluable information about a §2257 inspection that could happen to anyone, at any time.”<sup>122</sup>

The industry’s fear about the inspection process can be viewed as part of an overall skepticism toward law enforcement. As Steve Orenstein of Wicked Pictures notes below, “You go through this business saying, ‘If they can’t get you this way, they’re going to find a way to get you that way.’ If they can’t get you on obscenity, now along comes a record-keeping law that’s cut and dried.”

Although the initial consensus on the part of those interviewed in this article is that the FBI thus far has been true to its word in carrying out inspections in a reasonable manner, in this section, some industry leaders openly worry that, once Agent Joyner is no longer in charge of the inspections, the current professional attitude toward the adult industry could dramatically change.

**JEFFREY DOUGLAS:** There was no warning about the inspections, so everyone was taken by surprise. Looking at the regulations, you make certain assumptions about how it might go, but no one, of course, knew.

The first inspection met a lot of the predictions and also showed that many of the predictions of people within the legal community and the general industry were wrong. It was the first, so we got to learn a little bit.

**STEVE ORENSTEIN:** You go through this business saying, “If they can’t get you this way, then they’re going to find a way to get you that way.” If they can’t get you on obscenity, now along comes a record-keeping law that’s cut and dried and it doesn’t have to do with community standards.

This was the fear, and it’s simple: “You must have this like this. You must take this like this. If you don’t, it’s a violation. A violation means this much jail time.” Yes, that’s been very scary. It’s been so confusing for a long time to know if we were doing everything we can to do it right. But we were still confused to know if we were doing it right. But we always knew that if we were not doing it right, it was cut and dried: There is no discussion. You could wind up in jail for a record-keeping violation. That absolutely has caused a lot of fear for a few years now.

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<sup>122</sup> Gretchen Gallen, *FBI to Address 2257 Inspections at XBIZ Hollywood Conference*, XBIZ.COM, Jan. 23, 2007, available at [http://www.xbiz.com/news\\_piece.php?id=19250&searchstring=inspections](http://www.xbiz.com/news_piece.php?id=19250&searchstring=inspections) (last visited Apr. 4, 2007) (quoting *XBIZ* publisher Tom Hymes, who further observed, “It is about being as prepared as possible, and we want to thank Agent Joyner and the FBI in advance for engaging in a level of direct discussion with the industry that has never taken place before.”)



**MARK KULKIS:** Everyone knows the Department of Justice takes its marching orders more from the White House, but the fact that it wouldn't even get to Justice until it goes through the FBI is comforting because the FBI is saying, "Here's the report we're going to give to the Justice Department." So, basically, all of this other stuff is going to be invisible to the Justice Department unless the FBI considers it to be a violation and here's what they consider. So it was black-and-white. It was like the FBI is a filter, so you saw what would get through the filter and what would not get through the filter.

I don't think anyone is overly concerned as to the actual inspections because, I think, most people have their records in order.

**DIANE DUKE:** There's a fear – it is scary to have the FBI walk into your place and start looking over your papers. But the thing that scares me the most is that there is a clear disconnect between the FBI and Department of Justice.

Some people walked away [from the XBIZ conference meeting with FBI Agent Joyner] feeling very comfortable – that he seemed like a good guy – and he did seem like a good guy. But what if he is not there tomorrow? What is the new guy going to do? Does it mean we shouldn't keep good records? No. Do we need to still comply with the letter of the law? Yes. He was just trying to convey that we are reasonable people.

**MARK KERNES:** Agent Joyner told me that if he comes across talent ID which also has the HIV test and the model release in along with it, although it is illegal under the regulations to have that situation, he would not consider that a violation. That brings up a problem – I have a real problem with the government-by-laws versus government-by-men thing. In other words, if it is against the law to have the model release in along with the ID, but if, as far as Joyner is concerned, that is not a violation, then that sends up all kinds of red flags in my head. If the people who are going to enforce the law are not enforcing the law, then it is a problem. If they decide not to enforce it today, but they do decide to enforce it tomorrow, then you really throw the legal system, in a very small way, in to chaos. If it's not an actual problem having the model release in with the ID, then write the law that way. But if it is a problem and the law is written that way, then what are you doing making exceptions out in the field? I guess the analogy is the cop who catches you speeding and let's you off with a warning, but the government doesn't look at porn the same way that it looks at speeders, generally speaking.

## IV. ANALYSIS &amp; CONCLUSION

The comments of the individuals interviewed in this article make several points very clear. First, there is uniform agreement that there is not a problem with underage performers in the mainstream adult entertainment movie business in Southern California; put more bluntly, the industry is against child pornography. Second, the Section §2257 regulations are very burdensome to comply with, creating massive amounts of record keeping that members of the industry are doing their level best to file and log in accord with what seem to be constantly changing rules. Third, the FBI officials that have been conducting the inspections have been very professional and, similarly, the FBI's meeting in Washington, D.C., was a clear step forward in fostering a better working relationship between federal law enforcement officials and the leaders of the adult movie business.

That said, a number of serious concerns – understandably so – still plague the adult industry. The FBI's manner in handling the inspection process might best be described – borrowing a fashion analogy – as “business casual.” Although the federal agents have handled themselves in a very professional way, questions that occur during the actual inspections have been dealt with on an ad-hoc, almost shoot-from-the-hip basis. For instance, veteran adult trade publication journalist Mark Kernes described a conversation he had with the special agent in charge of §2257 inspections this way: “Agent Joyner told me that if he comes across talent ID which also has the HIV test and the model release in along with it, although it is illegal under the regulations to have that situation, he would not consider that a violation.”<sup>123</sup> In brief, there is a disturbing disconnect between what the law says and how the law is being enforced.

Kernes is uncomfortable with the approach of selectively enforcing the regulations, not because he feels Section §2257 is an appropriate law, but because he worries that confusion could result. He noted during the interview, “If they decide not to enforce it today, but they do decide to enforce it tomorrow, then you really throw the legal system, in a very small way, in to chaos.”<sup>124</sup>

Free Speech Coalition executive director Diane Duke agreed, suggesting, “Some people walked away [from the XBIZ conference meeting with FBI Agent Joyner] feeling very comfortable – that he seemed

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<sup>123</sup> *Supra* Part III, Section H.

<sup>124</sup> *Id.*

like a good guy –and he did seem like a good guy. But what if he is not there tomorrow? What is the new guy going to do?”<sup>125</sup>

Some of the industry insiders interviewed in this article pointed out that problem partially lies in the fact that the FBI is blissfully unaware of the culture of the adult entertainment industry, and that notion came through, in stark fashion, during the October 2006 meeting between Bureau officials and invited industry representatives at FBI headquarters in Washington, D.C. Julie Russell, chief compliance officer for Wicked Pictures who attended the meeting, observed, “I got the feeling that they had the biggest problem with trying to implement regulations in a business about which they had no idea how it operates.”<sup>126</sup> Veteran adult industry attorney Jeffrey Douglas also found the FBI officials to be naïve in their understanding of the industry they were charged to inspect. He acknowledged that the meeting in Washington was designed to start a dialogue,

but for much narrower purposes than we would have. The FBI want to make sure that nothing bad happens during the inspections, which is that somebody does something stupid like locks them out or pulls a gun. They wanted everyone to know that no one is going to get arrested. This is not a search. They wanted to reduce the paranoia.<sup>127</sup>

Indeed, Special Agent Chuck Joyner endorsed that notion when he spoke at the XBIZ conference in February 2007, emphasizing “that the FBI is only complying by the rules set by Congress and that the inspections are just that.”<sup>128</sup>

The FBI’s apparent reluctance to treat the §2257 inspections as anything more than a *pro forma* carrying out of a duty ordained by Congress, while comforting at first blush, could signal trouble for the industry in the future. Section 2257 regulations have been in effect since 1995, yet it took nearly a dozen years for the federal government to begin enforcement procedures in 2006. Why now? Jeffrey Douglas speculated that partisan politics may have played a role, saying that “the impression that one gets from talking casually to people in the know, indicates that both the FBI and the Department of Justice were threatened, saying ‘If you don’t enforce this, we will cut back your budget in areas you do like.’”<sup>129</sup>

Indeed, if that is case, then both the FBI and the Department of Justice conceivably have a major stake in how these inspections unfold.

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<sup>125</sup> *Id.*

<sup>126</sup> *Supra* Part III, Section D.

<sup>127</sup> *Id.*

<sup>128</sup> Pardon, *supra* note 119.

<sup>129</sup> *Supra* Part III, Section B.

According to Douglas, the FBI insisted on “making sure that people understood that no matter what the conditions of the records were, nobody was going to get arrested.”<sup>130</sup> The decision whether to prosecute someone for a §2257 violation is not the FBI’s call, Douglas noted, “That’s not the way federal law enforcement works. There’s got to be an indictment. There are lots and lots of steps.”<sup>131</sup>

If indictments for §2257 violations should ever be handed down, the FBI’s findings during the inspection process arguably could prove to be an important element in the case, but if the FBI sent mixed messages to the industry during the that process – deciding on the scene that some violations are not really violations, at least according to Agent Joyner’s team – the industry might have trouble arguing that the good graces of the inspection team translates into legal exculpation. As journalist Mark Kernes aptly suggested, “I guess the analogy is the cop who catches you speeding and lets you off with a warning, but the government doesn’t look at porn the same way that it looks at speeders, generally speaking.”<sup>132</sup>

Even if the inspections never result in prosecutions of anyone in the adult business for §2257 violations, the political fallout for the industry could be troublesome. The consensus among the industry insiders interviewed in this article is that the first ten inspections yielded only two completely perfect records – Diabolic Video and Wicked Pictures – meaning that eighty percent of the companies inspected had some problems with their record keeping. Placed in context, however, as *AVN Magazine* editor-in-chief Dan Miller pointed out, “Sure, they may find that some ‘i’s aren’t dotted and that some ‘t’s aren’t crossed in these records, but I don’t know that they have found any real flags with regard to any of these companies.”<sup>133</sup> But not everyone would place those results in context, especially a grandstanding politician trying to make headlines.

Armed with those figures, a politician easily could twist the message by proclaiming that the adult industry is eighty percent out of compliance with the very laws that are designed to keep children from performing in adult films and photo shoots. The fact that the paperwork violations are technical and have absolutely nothing to do with any minors performing in the adult industry – as opposed to merely failing to cross-categorize a performer or to list an alias – is a

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<sup>130</sup> *Supra* Part III, Section D.

<sup>131</sup> *Id.*

<sup>132</sup> *Supra* Part III, Section H.

<sup>133</sup> *Supra* Part III, Section B.

nuance that likely would get lost in the heated political rhetoric and the all-to-brief context of a fourteen-inch newspaper story.

On a more global front, the fact that these enormously burdensome and hugely expensive record-keeping requirements do not accomplish what they purport to do – namely, protect against the exploitation of minors and safeguard against child pornography – along with the government’s decision, after a dozen years in hibernation, to enforce them, should sound alarm bells for the American public. If taxpayers step back from the highly charged rhetoric about the sexual exploitation of children and view this situation on balance, they would see, on the one hand, that §2257 levies an expensive tariff on a constitutionally-protected industry through the allocation of resources needed to maintain the records and, on the other hand, taxpayers foot the bill for the FBI’s inspection team to uncover, at most, paperwork discrepancies resulting from an admittedly muddled set of federal regulations.

As industry insiders insist – and the government has yet to prove to the contrary – there is no problem with underage performers in the industry. As producer Mark Kulkis pragmatically noted, “Everyone is making too much money to want to mess with it – it’s poison, so everyone really bends over backwards to make sure that it doesn’t happen.”<sup>134</sup> Diane Duke summed it up this way: “Not only is there not a problem, but if somebody even attempts to be in this industry who is underage, not only is that person not hired, but the producer will notify others in the industry about the person. They actively work to help each other make sure that it doesn’t happen.”<sup>135</sup>

As a post-script, it should be noted that the FBI continued its searches of adult entertainment companies in May 2007. In particular, agents targeted a defunct company called Moonlight Entertainment – it produced adult films from 1987 until 2000 – on May 3.<sup>136</sup> Perhaps more significantly, the popular Shane’s World Studios was inspected on May 7, 2007, with agents looking for records related to titles such as the company’s “College Invasion” series and “Girls Night Out” and “Shane’s World Slumber Party 20.”<sup>137</sup> It thus appeared, at the time this article went to press, that the FBI was not slowing down its efforts against the adult entertainment industry.

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<sup>134</sup> *Supra* Part III, Section A.

<sup>135</sup> *Id.*

<sup>136</sup> See Steve Javors, *FBI Inspects Defunct Company’s 2257 Records*, XBIZ.COM, May 4, 2007, available at [http://xbiz.com/news\\_piece.php?id=22868](http://xbiz.com/news_piece.php?id=22868) (last visited May 11, 2007).

<sup>137</sup> See Steve Javors, *FBI Visits Shane’s World for 2257 Inspection*, XBIZ.COM, May 7, 2007, available at [http://xbiz.com/news\\_piece.php?id=22887](http://xbiz.com/news_piece.php?id=22887) (last visited May 11, 2007).