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Government Gone Wild: Regulations for 'Explicit' Materials Move Into the Mainstream

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On Jan. 22, 2007, Joe Francis, founder of the popular – and profitable – “Girls Gone Wild” series, was sentenced by a Los Angeles federal district court to two years of probation, 200 hours of community service, and a \$500,000 fine based on his guilty plea to two felony counts for violating federal record-keeping requirements for sexually explicit material. Francis’ company, Mantra Films, was also ordered to pay \$1.6 million by a Florida federal judge in an earlier case involving 10 felony counts of violating the same law.

These sentences represent the first time that federal prosecutors have sought to enforce the record-keeping requirements. For well over a decade, the law, codified at 18 U.S.C. §2257, has required producers of certain sexually explicit material to gather and maintain records concerning the age and identity of individuals performing in those scenes, and to make those records available for inspection by law enforcement officials. Violations of the law are subject to criminal sanctions, including imprisonment and fines.

Until recently, the record-keeping regulations were commonly thought to be limited to the adult entertainment industry, and the government had never actively sought to enforce the inspections or penalty provisions. Last year seemed to have marked a turning point, however. In addition to the indictments of Francis and his company, the Department of Justice for the first time exercised its power to inspect the records required under §2257, with the Federal Bureau of Investigation paying surprise visits to a number of adult entertainment companies in California’s San Fernando Valley in the last three months of 2006.

In addition to this stepped-up enforcement by law enforcement agencies, Congress acted last year to expand the poten-

tial scope of the law. On July 27, 2006, President Bush signed the Adam Walsh Child Protection and Safety Act of 2006, a portion of which expands the range of materials that may be subject to the record-keeping requirements and their corresponding criminal penalties. As a result, the law threatens to reach far beyond adult entertainment to popular movies and television, and other forms of visual art. The Act also includes a “safe harbor” designed to offer protection for mainstream media, but the contours of that safe harbor have yet to be clearly established.

EXISTING RECORD-KEEPING REQUIREMENTS AND PENALTIES

Prior to the Act, the record-keeping requirements applied only to visual depictions of four specific types of “actual sexually explicit conduct”: sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. Under the DOJ’s implementing regulations, producers of material containing such scenes must collect and retain the legal name and date of birth of each performer in the scene, and keep a copy of a government-issued identification card for each such performer, a list of all names ever used by each such performer, and a copy of the video or other matter in which the performer appears. These records must be kept separate from all other



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records and they must be organized so that they are easily retrievable by the name of each performer and the title of each video or other work. In addition, the records must be available for inspection by the attorney general or his agent.

Section 2257 also requires that material depicting actual sexually explicit conduct contain a label indicating the title and date of production of the matter, a street address at which the records are available for inspection, and the name title and business address of the employee responsible for maintaining the records. For films and videos, the label usually appears after the closing credits. Failure to comply with the record-keeping requirements can carry a stiff prison sentence and fine. A first offense is punishable by up to 5 years in prison and a subsequent offense is punishable by between 2 and 10 years. Although entities that merely distribute the materials are not subject to the record-keeping obligations, they may be liable for distributing materials that do not contain the required labels.

EXPANDING THE ACT: THE 2006 AMENDMENTS

Against this backdrop, the Act expanded the record-keeping requirements in two important ways. First, the Act added a fifth type of actual sexually explicit conduct covered by § 2257: “lascivious exhibition of the genitals and pubic area.” Second, the Act added new record-keeping requirements for “simulated” sexually explicit conduct, codified separately at 18 U.S.C. §2257A. On their face, both changes could sweep a significant amount of mainstream entertainment into the ambit of the burdensome record-keeping requirements.

Among other things, the addition of “lascivious exhibition of the genitals and pubic area” injects a highly ambiguous term into a criminal record-keeping statute. That term is generally applied in cases involving child pornography, and involves a highly fact-specific – and necessarily subjective – inquiry. The result is a test for “lascivious exhibition” that is difficult if not impossible to apply with any reasonable degree of certainty – especially in the context of images of adults. For example, courts have held that, although nudity alone is not sufficient to make an image of a child lascivious, nudity also is not necessary, and have found lascivious exhibition to exist even when the pubic area is clothed. The test becomes even more ambiguous when applied to sexual images involving adults. If this case law is imported directly to the record-keeping context, a broad range of sexual scenes in mainstream entertainment could conceivably trigger record-keeping obligations.

The term “simulated sexually explicit conduct,” which is not defined in the statute, is also highly ambiguous. It is not clear, for example, whether “simulated sexually explicit conduct” would include a scene in a mainstream film in which characters are supposed to be having sex but are only shown in

bed from the waist up. Such a broad interpretation could cover a wide range of popular content, and subjecting such material to the record-keeping requirements – with their corresponding criminal penalties – would place significant burdens on a large amount of valuable and protected expression, thereby raising serious constitutional concerns.

SAFE HARBOR – TRULY SAFE?

In response to some of these concerns, Congress included in the Act a safe harbor provision under which companies that create material containing images that might arguably qualify as “lascivious exhibition of the genitals or pubic area” or “simulated sexual conduct” will be exempt from the record-keeping requirements. In order to qualify for the safe harbor, the company’s material must be intended for commercial distribution and the company must certify to the attorney general that it regularly and in the normal course of business collects and maintains certain identifying information about its performers “pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards.” 18 U.S.C. §2257A(h)(1). Companies qualifying for the safe harbor are exempt from the record-keeping and labeling requirements and the corresponding criminal penalties.

Theoretically, the safe harbor should shield a large amount of popular entertainment from the onerous record-keeping requirements – but to ensure this, it is important that the safe harbor be applied in a streamlined and pragmatic way. The safe harbor does not go into effect until three months after the DOJ issues its implementing regulations (in December, the DOJ indicated that it would issue proposed regulations in the early part of this year). The DOJ’s interpretation and implementation of the safe harbor provisions will be critical to assessing whether the safe harbor in fact provides the protection that Congress promised: ensuring that a wide range of protected expression is not improperly subject to the burdens and penalties of the record-keeping requirements.

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