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Subject: **OMB Number 1123–0009 ACTION: 30-Day Notice of Information Collection**: Comments to the Proponent Agency *and* Petition to OMB for Hearing under Title 44 United States Code Section 3508 in the absence of a certified or otherwise reliable statement of cost by the Proponent Agency

Gentlemen:

This Document consists of *both*

1. My **Comments** submitted to the Department of Justice by its **OMB Number 1123–0009 ACTION:** 30-Day Notice of Information Collection published in the Federal Register Vol. 77, No. 58 / Monday, March 26, 2012 / Notices Page 17501 ***and***

2. A **Petition for a Formal Investigatory Hearing.** This document comprises a Petition to be forwarded by the Department of Justice to the OMB along with DOJ's own submission concerning the regulations under review, to be conducted under the provisions of Title 44 United States Code Section 3508, in order to determine the necessity of the collection of information under the Regulations affected, and in particular, the actual cost and burden imposed upon those persons whom they affect for compliance and the necessity of the obligations imposed by the provisions under review in the *absence of any reliable or certified estimate of scope, cost, and burden by the Department in its submission for approval*, and in view of its unsupported and woefully incomplete guesses as to these matter of cost and burden in the same submission, a formal investigatory hearing

at which this Petition and others may provide reliable and comprehensive evidence and information concerning matters pertaining to the sweep, necessity, costs and other associated burdens inflicted upon individuals and small businesses and the internal contradictions and incomprehensibility of the Regulations at bar adding to those costs. My reading of 5 CFR Ch. III Section 1320.10 (a), which I concede may be erroneous because of my lack of practical experience in this area of law, suggests that the Notice which invited this Comment was technically deficient and should have invited the Comments to be made to the desk office for DOJ at OIRA in OMP. So that no procedural defect exists, I have both transmitted these comments directly to that official in OMB and also to the DOJ contact designated in the Notice with this request that it be forwarded to OMB.

Introduction

As a very young child growing up in Milwaukee, Wisconsin during the 1950's, my seven-year older sister, Marilyn, sometimes dared me to remove a certain tag from a pillow in our house; that pillow bore the legend, "Do Not Remove Under Penalty of Law", and Marilyn suggested that I might get arrested and go to prison for doing so. I can remember this from my earliest childhood, before kindergarten. It was only many years later, as an adult, that I learned, courtesy of *The Straight Dope*, that the "Tag Law" was a consumer protection law and that it was never any crime for a consumer to remove it. I had lived under the chimera of the potential for federal prosecution as a child and perhaps this ultimately determined my career choices later in life as an attorney who fights against the government for the protection of Liberty from unreasonable government intervention into our personal and private lives, especially in the context of choices for adult entertainment. What amazes me, though, is that the issue of federal incursion into our bedrooms has now come full circle, and I write concerning regulations now on your desk that *this time* present a real, serious and direct threat that what goes on upon and around pillows like that, in countless American bedrooms, even in the absence of commercial involvement, the regulations on your desk present the government with an opportunity to indict, convict, and imprison people for as long as ten years when that activity is recorded, unless the parties involved comply with *the same obligations which are imposed on Playboy, Hustler, and Vivid*. I am writing because the regulations, as if that were not enough to raise serious questions about their necessity, also press the government's heavy hand on newspapers and magazines, on gossip websites and Paparazzi, on small scale commercial boudoir photography, and even upon billboards, treating them all just like the biggest commercial pornographers in the nation whose life blood is the publication of content of the most explicit and extreme nature. I get the strong sense that either the Department of Justice doesn't know how broadly these regulations apply and the crushing and intrusive burden they impose, or that they just don't care, in some kind of studied indifference to the human misery and chilling of newsworthy information that they impose. That's why I'm writing you now about those regulations on your desk.

The United States Department of Justice seeks renewal of regulations whose violation stands to put untold numbers of persons in the custody of the United States Bureau of Prisons for a term of five years on the first offense and ten years on the second offense. 18 United States Code Section 2257. The regulations are dense, detailed, costly, and intrusive into not only the offices of both large and small businesses, but it is clear from their broad wording and the decisions of two Untied States Courts of Appeal, intrusive into the most intimate moments that take place in the bedrooms of millions of Americans who are involved in no commercial activity whatsoever. These decisions and their consequences are detailed below.

As it will become apparent within this Comment and Petition, these regulations continue the imposition of obligations - with the force of law - on the private creation of images on untold cell

phones with imaging capability, digital cameras in the hands of persons with no connection to any commercial purpose, and home computers equipped with cameras - as well as to billboards, mass transit advertising panels, magazines of general circulation, Paparazzi and news photographs, as well as commercial pornography. These regulations treat them all alike, though the Justice Department surely has the discretion to treat them differently and to impose more costly and intrusive obligations on those who are practically able to bear such costs and to lessen the burdensomeness of the obligations on purely private individuals who have no budget for compliance with these intrusive and expensive regulations.

These regulations treat all erotic images alike ("lascivious" images in the words of the relevant statute, Title 18 United States Code Section 2256 (2)(a)), whether they are aimed at Playboy and Hustler or some guy and his girlfriend, requiring them to make the same obligated records (including the often intimate and private images created by husband and wife, boyfriend and girlfriend) available for inspection by strangers carrying an FBI badge at their "place of business" (even if that is their bedroom) or to face five years in prison for refusal to let the guy with the badge into that bedroom. And if, in any particular, there is a defect in the performance of these obligations, or if a "Compliance Statement" is not attached to the depictions telling the world just where the intimate images are stored, Playboy and the guy down the street and his girlfriend equally face those one-size-fit-all obligations and the uniform five years in prison and the lifelong onus of conviction as felons under federal law, sometimes losing the right to vote, to hold public office, to obtain a license or hold a profession for life. I think that the Paperwork Reduction Act was the vehicle Congress chose in order to force The Regulators to think twice about putting their fellow citizens in jeopardy of prison for failure to comply with hypertechnical, hyperintrusive, hypercostly regulations that exceed common sense and stand to terrorize those who are innocent of wrongdoing without really compelling purposes and the lack of reasonable alternatives.

Under these regulations, as DOJ explains them to us, the *same obligations* will apply to a "hot" lingerie photograph that centers on a *fully-clothed* pubic area, or the *pretended simulation* of a sexual act by a private person in an intimate situation, even alone in a bedroom, as apply to the commercial creation of hard core pornographic insertions under bright lights in the presence of a commercial filming crew or the very hardest kind of bondage, domination and other "sadistic or masochistic abuse". One size fits all at the DOJ Rule Factory. No allowance is made for the "softness" of the images, instead, if covered at all, they are all treated alike and the same economic and time burdens are imposed[1]. No allowance is made for the cost of compliance by noncommercial persons.

Most germane to the present inquiry, the Justice Department does not so much as acknowledge the economic and time burden of compliance on untold tens of millions of individual, private Americans who must do at home just as these regulations require *Hustler* to do for business, let alone take their costs into account. It does not so much as pretend to estimate the burden these regulations impose on ordinary Americans using cell phone cameras. Whatever sense the compliance costs of these regulations may have had when they originated in the late 1980's to mid 1990's, when the production of sexually explicit media was expensive, requiring film and development and an expensive means of physical distribution and performance in theatres, they have lost any sane connection with the costs of doing business with the emergence and ubiquitous deployment of digital photography and web cameras in every strata of society, a development that has caused the democratization of pornography, hard and soft. The costs of compliance remain moored to Reuben Sturman and empires such as his when now it's ordinary dayworkers and students who fall under the sweep of the regulations.

Similarly, the photographer and publisher who obtain and print embarrassing images of celebrities or politicians in compromising sexual positions or exhibitions, or documentary images of sexual

activity taken through surveillance, create and publish those images at the peril of felony conviction and prison when the co-operation with the subjects necessary for compliance – harvesting identification documents demonstrating age and identity and a list of alias names as is required under the law - is impossible. The Justice Department provides no leeway to accommodate the legitimate need of the public for such information as this graphic content uniquely provides nor does it assess the costs of chilling and deterring expression so as to deprive a free people from obtain information upon which to make decisions.

(I have attached an ANNEX to this submission which documents images of billboard advertising, magazine ads, mass transit advertising panels, and news and Paparazzi photos, all taken from the contemporary American cultural landscape, images upon which these Regulations act; their publication in each case seeming to patently amount to a criminal offense in violation of Section 2257 and its associated Regulations now under consideration. These images document, in part, why DOJ's conclusions about the sweep and cost of its Regulations now under review amount to an absurdly incomplete underestimate. I obtained these images from a Google Search for "billboard advertising crotch" and it possible that some of the advertising is old and that perhaps one or two images may have been published outside the Untied States. It is the best I could find to illustrate a timely reply.)

It also ignores the costly burden on small photographers of commercial images of still photographers in general, and the bourgeoning boudoir photography industry, failing to take the burden it imposes upon them into account.

It also ignores the costly burden imposed upon advertisers, advertising agencies, and the providers of billboard space and images.

It also ignores the publishers of magazines of general circulation, topical advertising periodicals, and websites covering general news and celebrities, from *Mr. Skin.com* to *People*.

None of these things are on its radar.

It also seemingly goes out of its way in order to avoid ascertaining the actual cost of compliance with respect to small-scale, part-time businessmen and women who run Adult entertainment websites or create images of adult erotic appeal.

A. The Kinds of Images that Are Covered by These Regulations

The wide scope of the regulations – made even wider by DOJ interpretation.

The scope of these Regulations is immense. The rule directly regulates each and every image and video created privately for personal and private use that are of a character likely to be sexually-arousing ("lascivious" in the words of the statute which explains its scope, Title 18 United States Code Section 2256 (2)(a)[2])and which depict:

a. The lascivious depiction of *exposed genitals* of any person, without regard to whether a penis is erect or flaccid;

b. The *simulation of sex,* including pretended intercourse, oral sex, masturbation (without regard to whether the subject is clothed or unclothed during such simulation) and *pretended bondage, domination or sado-masochism* ("sadistic or masochistic abuse" in the words of the statute);

c. The lascivious depiction of the *pubic area*. In the estimation of the United States Department of Justice, faithfully adhering to the holding in *United States v. Knox*, 32 F.3d 733 (6th Cir., 1983) which it cited no fewer than six times as controlling in its December 18, 2008 Preamble to the promulgation of the existing Rules, 73 Fed. Reg. No. 244 / Thursday, December 18, 2008 / Rules and Regulations 77432, a *child pornography case*, an image that depicts a fully-clothed crotch area, even when the shape of genitals *cannot be discerned* through the clothing, if "lascivious" in nature, at least where the crotch area has prominence, is within the coverage of its regulations. The Preamble asserts that the holding of *Knox* determines the scope of the coverage of these regulations, even to include fully clothed adults, and even *when the image is pixilated.* Id. at 77438.

The same Preamble states that the determination of when an image is "lascivious" for the purposes of the statute and its regulations is made under the holding of another *child pornography* case, *United States v. Dost*, 636 F.Supp. 828 (S.D.Ca., 1986), setting out six factors of assessment to determine how sexually-oriented or intense the image may be, some of which factors are plainly and obviously impossible to apply to adults.[3] DOJ has thus created a monstrosity by grafting cases which test the illegality of images as child pornography to the body of law concerning adults. This result is not compelled by law and assaults the actual Congressional intent of Section 2257 in a most costly and unnecessary fashion. There are few things easier on this planet than for a government regulator to spend other people's money. It's precisely that very Republican and very conservative sentiment that inspired the enactment of the Paperwork Reduction Act, a sentiment that DOJ ignores and in fact insults in the present submission and the regulations which underly it.

It seems to be enough for lasciviousness merely that an image be "hot", that is one that evokes a sexual response or ideation. That appears to be the principle underlying the factors laid out in *Dost*. These regulations would appear, under the reading given to them authoritatively by the Justice Department to apply to "hot" images of adults that depict the public area, even when covered, if "hot enough", under the holding in *Knox*. I believe both Knox and Dost to have no applicability whatsoever to images of adults, and nothing, *not a word or syllable contained in either case* suggests any intent to explain the law outside the area of the abuse of little boys and girls. DOJ has imperiously used these cases involving children to expand the scope of its power to regulates hot pictures of adults, and in that regard, and in the economic costs it thereby imposes on Americans, it has gone far too far.

The scope of these regulation covers nonpornographic images widely circulated in contemporary American culture in advertising, in news and in celebrity news coverage. There has been no effort by the proponent to estimate any of the costs of compliance associated with any of these classes of person.

But how do these regulations encompass private, noncommercial images made by private people?

A panel of three judges sitting as the United States Court of Appeals for the Sixth Circuit invalidated the Section 2257 regulatory scheme on constitutional privacy grounds on October 23, 2007. In *Connection Distributing Co. v. Keisle*r, 505 F.3d 545 (6th Cir., 2007) [Vacated], the court determined that the statute swept too far and without justification imposed a serious invasion of privacy on ordinary folk.

Then the Department of Justice, on December 18, 2008, whilst en banc review of that decision was pending, issued its promulgation of the existing regulations as cited above. It stated at page 77456

for the first time that, “The statute is not clearly limited to producers who pay performers. However, it is limited to pornography intended for sale or trade.”

On February 20, 2009, the *en banc* judges of the Sixth Circuit reversed. *Connection Distributing Co. v. Holder*, 557 F.3d 321 (6th Cir., 2009) (en banc), The court was informed of the just-cited language from the new preamble, but the court said it didn’t matter. Without evidence before it of the prevalence of such images, it said, “Connection offers no argument, much less proof, that there are a meaningful number of individuals who would be adversely affected by this construction of the law.” In the absence of evidence one way or the other, in an age when nearly every cell phone has a camera, and many if not most of them create video, when most laptops come equipped with a camera for streaming video, in the era of broadband, the court doubted whether a meaningful number of Americans created hot imagery that depicted at least clothed crotches. I am not making this up. You may read it for yourself.

Subsequently, in oral argument before the United States Court of Appeals for the Third Circuit, on January 11, 2012, the advocate for the Justice Department, in the most official kind to statement that it can utter, in the context of live litigation before a sitting United States Court of Appeals, and standing before those judges on the record, noted the existence of the same language as contained in the preamble, but casually observed that once such an image left the home’s “front door”, *it was fully subject to regulation* – perhaps never considering that the only time when compliance with Section 2257’s scheme can take place is when they are made – in order to record the date of their creation and inspect the mandated identification documents before the images are created as is required by the regulations. So much for any intention *at the time of creation as implied by the Preamble*. Thus, in the DOJ view of the regulations which it promulgated and enforces, the criminality or noncriminality of conduct in association with the creation of a sexually explicit image or video depends *not* on conduct contemporaneous with its creation, but is contingent upon acts taken in disposition of the content at a later time, perhaps years later, at a time when the necessary access to and the co-operation of the persons depicted may be impossible by death, illness, the loss of contact, the expiration of required identification documents or a change in the appearance of the performer, or the destruction of a co-operative relationship between photographer and subject, the actual intent at the time of creation being immaterial to the criminality.

Thus, the negligent loss or disposal of a camera or other media containing such content, or inadvertently leaving it behind when the couple or the photographer move, will create a federal crime, apparently relating back to the time of videography because, in the authoritative voice of the DOJ, the intent at the time of creation of the image does not count, but the mere fact of its disposition outside the walls of the place where it was made perfects the crime. It is totally unclear when any statute of limitations would start to run on events related to its creation, but inasmuch as the publication without Section 2257 compliance would amount to a fresh crime under Section 2257 (f)(4) relating to distribution without a Compliance Statement.

This puts any private person creating such images in peril. If the Section 2257 scheme was not complied with at the time of its creation, the theft or loss and publication or other use of the image associated with a change of intentions or the intentions of a third party would make its maker a criminal subsequently, with perhaps no opportunity to create the obligatory records at a later date. Accordingly, the only prudent and sensible course of conduct for any private individual in order to avoid risk of a federal felony is to fully comply with Section 2257’s obligations in even the most private and intimate records intended when they are made never to circulate. The effect of this, despite the situational meandering of DOJ’s position, is to require every person, regardless of intent, to comply with the provisions of the regulations from the moment of creation in order to avoid the grave risk of imprisonment. Accordingly, under either the analysis of the Third Circuit, the three

judge panel of the Sixth Circuit, or the presently articulated position of the DOJ advocate in oral argument, private individuals must comply. These persons, certainly tens of millions, certainly creating hundreds of millions of images each year, must comply and the costs of compliance in such instances is precisely what Congress intended agencies to consider in enacting the Paperwork Reduction Act.

In the end, the Third Circuit would have nothing of this disingenuous and transitory position-shifting, it determined that **the Preamble's language was meaningless and that Congress intended the statute to cover even such personal and private noncommercial images**. *Free Speech Coalition v. Attorney General*, Third Circuit, slip opinion April 11, 2012 at 33 et seq. **The question of how the records are to be made and precisely what records are to be created in many cases, how they are to be labeled, and how they are to made available for inspection, however, is largely or wholly a matter for the DOJ to determine; it is DOJ alone that requires private couples to incur the same expenses as Hustler, Playboy, Devil's Films, Bangbros,, Red Light Productions, and all the other big commercial operations in the San Fernando Valley and Southern Florida. It is DOJ, not Congress, that decided to treat the couple down the street like big-time commercial pornographers.**

In other words, the Third Circuit has determined that, under its legislative mandate, the Justice Department's regulations now at bar regulate the creation of images made in private, by intimate partners and that means that they require the creation, maintenance, and organization of records, require a Compliance Statement to be attached to them, and require such private, noncommercial persons to make *the image sand videos themselves* (and the most intimate sights, conversations and sounds they contain),and other associated records available to its agents' inspection at least 20 hours every week, 52 weeks per year with no break for an interminable number of years,, making a failure or refusal a federal felony subjecting the photographer to a sentence of confinement in a United States prison for five years. Even in the home among intimate partners or husband and wife within the sacred marital bond. Even when the sex is only pretended and not real. Even when no actual genitals are exposed or otherwise visible through clothing, even in merely sexually arousing lingerie photography of a fully and opaquely covered pubic area of a mature adult. All this because of the Department of Justice's position that the child pornography case cited above controls the meaning of the word "lascivious" within the context of Section 2257. I believe that the economic burden of each and every couple in America who has ever created such images with a digital camera, a cell phone, or a mobile device is simply staggering. In the case of couples who work, or single persons who once were in a relationship, to avoid prison under the DOJ Regulations, each will be required to hire someone to make these records available at least 20 hours per week, to turn over these intimate records to that agent, and to permit the federal agents, and to show the images to the agents upon demand. **The costs of all of this to private individuals are simply ignored by the Justice Department in its submission, and I therefore suggest that it becomes the duty of OMB to ascertain the true facts, which is best accomplished by a formal Hearing.**

The developments cited here amount to a change in circumstances from the time that the regulations were initially promulgated, a recognition that the costs of compliance are far more expansive than DOJ said when they were announced.

Against this prospect, the Justice Department unsuccessfully argued to the Third Circuit that the easier duties afforded by 18 United States Code Section 2257A might be available, a procedure in which a certain category of image creators may certify compliance with a letter to the Attorney General under the regulations provided at Section 75.9. **The Third Circuit, in rejecting the prospect of amelioration of the burden on private persons under the provisions of Title 18 United States Code Section 2257A noted that Congress *limited the application of Section 2257A***

to images created for commercial distribution or those created as part of a commercial enterprise, 18 U.S.C. § 2257A(h)(1)(A)(i) and (h)(1)(B)(ii). Slip Opinion at 35-36. The truth of the Third Circuit's determination is plain from the text of the statute, which speaks for itself without the kinds of pretended ambiguity that DOJ sought to inject before the court in that case - with as much creativity as it employed here in avoid any serious investigation into or discussion of the reality of the substantial costs its regulations at bar impose, in defiance of the plain mandate of Congress in the Paperwork Reduction Act.

Section 2257A certification is simply not available to the ordinary, private persons who are affected profoundly by these regulations and whose cost and burden were ignored by the Justice Department in the present submission. Ordinary couples do not "employ" one another and so they lie far outside the regulations governing certification at Section 75.9. The cost of complying with the obligation to make the records available for inspection by renting space, by employing a custodian, or by hiring a non-employee custodian by tens of millions of Americans certainly imposes a cost of many hundreds of millions of dollars, and likely billions of dollars. There is not a scent of a hint of consideration of these factors in what lies before the OMB in defiance of the mandate of Congress. Because it abdicated its statutory and regulatory duties to honestly assess the costs to individuals, it is appropriate that OMB conduct a formal hearing to establish the factual impact of these regulations on private persons affected by them.

Because ordinary people with cell phones, mobile devices, digital cameras, and laptops with built-in cameras are not likely to be monitoring the Federal Register for notices concerning obscure laws that may sneak up on them to make them federal felons for taking pictures of their boyfriends, girlfriends, husbands, and wives, it is singularly appropriate that a formal and public hearing to be conducted by the OMB is likely to attract the kind of public interest that would be well-calculated to bring the reality of the costs imposed from the privacy of American bedrooms, hot tubs, swimming pools, motel rooms, changing rooms, storage areas, automobiles and the secluded parts of beaches, lake and ocean shores, and parks into sharper governmental focus for the purpose of fiscal assessment of compliance. It's possible that many thousands of hours of running time of such videos might be submitted in evidence before a hearing of the OMB. Any casual examination of the Internet these days will easily disclose what appear to be videos covered by these regulations, capturing these private moments created by the participants themselves on cell phone cameras. The cost of compliance concerning these plainly covered images seems now to be opaque to the proponent Agency, it complains that it has no reliable way to determine the costs though it controls the FBI, and so it is singularly appropriate that the public should be invited to inform the Agency in a far more public manner calculated to bring the facts forth. I believe that the American people will be prepared to tell the Department of Justice and the OMB that which DOJ's Federal Bureau of Investigation either can't determine or can't be bothered to determine as part of the process of defining federal felonies. They may also be prepared, in conjunction with the facts and other data they present, to communicate their message that Congress and the DOJ should mind its own business to the greatest extend feasible consistent with the abatement of child pornography. They surely have not done so, and DOJ has added much unnecessary fuel to this particular fire. It is a case of regulation run amok.

The effects and costs on commercial advertising and news and Paparazzi images

The same kinds of images and videos intended for commercial and public use, for publication and distribution. Bikini, lingerie, liquor and beer, perfume, objects d'art, and sun-protection products easily come to mind as fields in which alluring and sexually-arousing nonpornographic but nevertheless hot, alluring and stimulating images that could fairly be described as "lascivious

images" are in widespread general, public use and amount to images covered by the Department's interpretation of Section 2257 under the *Knox* case and the *Dost Factors;* as a result, they will require the full panoply of Section 2257 compliance, including Compliance Statements (in magazines of general circulation, on billboards, on mass transit car advertising signs, on stand-alone signs, in signs located and posted in retail stores in association with the products advertised .,and on box-covers for the products; the photographers, advertising agencies, design agencies, and manufacturers will be required to create and maintain records and to train and retain staff available at least twenty hours per week to make the records available for inspection, to acquire computers or other storage in which to maintain these records separately from all other records, and to pay rent or otherwise acquire property at which the records may be maintained, or alternatively hire non-employee custodians to perform the same duties. As mentioned in more detail below, the regulation is followed, it will destroy the aesthetic and commercial appeal of such advertising, especially in magazines, and cost advertisers and American manufacturers substantial revenues.

These regulations also apply with equal fervor to news photographs and to magazine advertising, both to magazines that treat issues of interest to the advertising and photographic communities, but to images in books and periodicals of general circulation.

There is no reason to believe that a significant number of commercial photographers creating such images employ models on such a regular basis that any sizable number of models would become *employees* in distinction from occasionally, infrequently, and irregularly used independent contractor models paid on a per-photo shoot basis and compensated in cash or by check with only the possibility of a commercial model release and an IRS Form 1099 creating any permanent record of the limited engagement. Under such circumstances, which are probably typical in at least common small-scale commercial photography, in the absence of regularly-maintained employment records, the commercial advertising photographer could not satisfy the Department of Justice's criteria for exemption from the strictures of Section 2257 by the certification provisions of Section 2257A, because under the regulations at 75.9 because they can only do so if they maintain records of regularly conducted dealings with each model, such as employment records[4]. There is no escape from Section 2257 for the casual and occasional user of models or performers. They must comply as though they were *Playboy* or *Hustler*.

And all of this will apply to the Papparzi who catch an indecent and embarrassing shot of a celebrity emerging from a car, in a simulation of a sexual act on stage at a concert, or of a clothing malfunction. Were these laws and regulations enforced, it would deter the publication of such images and the American public would be deprived of whatever value they possess, because in the case of such images, the co-operation of the performer in producing identity documents would be, of course, impossible. The same can be said regarding the publication of any kind of surveillance video of a sexual nature and stolen or lost video footage of a public interest. As the Justice Department has noted many significant times, even a bona fide news purpose does not excuse compliance with child pornography laws or the laws enacted in support of this agenda. The Justice Department admits of no exceptions even in cases of dramatic or compelling public interest.

The ANNEX documents images of public billboards, magazine advertising, and Paparazzi photographs, none of them pornographic, all of them arousing enough to be called lascivious, all of the advertising of a mainstream nature in support of nonsexual products, and all of them, apparently, published or posted in violation of 18 United States Code Section 2257 as authoritatively interpreted by the Courts under the Regulations issued by the United States Justice Department.

B. The Power of the Attorney General to Investigate – And His Casual Indifference to Investigate Into the Costs Imposed Under these Regulations and Imposed on Ordinary Americans in Abdication of His Regulatory Duty

In a statement, which, in view of the vast investigatory tools are at the Attorney General's disposal, can only be viewed as disingenuous, the Department writes: **"The Department is unable to estimate with any precision the number of entities producing visual depictions of simulated sexually explicit conduct."** 77 Fed. Reg. No. 58 / Monday, March 26, 2012 / Notices at 17501**.** Precision? In fact, regardless of "precision", nothing follows which can appropriately and honestly be denominated as an "estimate". Unreliable speculation, conjecture, and guess is what follows that statement. It is for that reason that the DOJ is unable to certify what it wrote in the language from this submission which follows:

> As a partial indication, the Department's *2008 regulatory review*, including the information collection request and PRA Supporting Statement (RIN 1105–AB19), cited data collected by the U.S. Census Bureau in 2002. Employing the same method of analysis, according to data *collected by the U.S. Census Bureau in 2007*, there were 11,974 establishments engaged in *motion picture and video production* in the United States. Based on a *rough assumption that 10% of the establishments are engaged in the production of visual depictions of simulated sexually explicit conduct*, the Department estimates that approximately 1,974 motion picture and video producing establishments are required to comply with these statutory requirements. (The Department does not Additionally, the statute provides an exemption from these requirements applicable in certain circumstances, and it requires producers to submit certifications to qualify for this exemption. From March 18, 2009, the effective date of the certification regime, to the present, the Department has received approximately 865 certification letters. For the entities that qualify for the exemption, the Department estimates that it would take less than 20 hours per year to prepare the biennial certification required for the exemption. (6) An estimate of the total public burden (in hours) associated with the collection: *If OMB were to assume that 3,000,000 visual depictions of simulated sexually explicit conduct are created each year* and that it requires 6 minutes to complete the recordkeeping requirement for each depiction, the recordkeeping requirements would impose a burden of 300,000 hours. If, however, OMB were to assume that producers of 90% of these depictions qualify for the statutory exemption from these requirements, the requirements would only impose a burden of 30,000 hours (These estimates were included in the Department's 2008 regulatory review, including the information collection request and PRA Supporting Statement (RIN 1105–AB19). *The Department does not certify the accuracy of these numbers.) Id.* .[Emphasis added.]

In the regulatory renewal now proposed, the Attorney General has failed to "certify" any information at all concerning the cost of compliance imposed on Americans by this Regulation despite the clear mandate of 5 CFR 1320.9 and other associated provisions. A casual and reckless underestimate of the sweep of these regulations is substituted in its place, supported by little stronger than five year old census data depending on self-categorization of commercial photography in the Census and pure guesses wildly taken at random applied to that Census data, resulting in the DOJ's guess that perhaps 3 million images covered by the regulations are taken each year in the United States. We believe that guess to be grossly and profoundly wrong, underestimating the reality in this era of digital photography and communication via cell phone, portable device, tablet, and Internet, by a factor of at least 100 to 1000 and perhaps by 10,000 times or by a substantially higher ratio. In other words, I

believe the numbers presented by DOJ to be so far off base as to justify honestly and accurately characterizing them as having to connection to reality *whatsoever*. They amount to a gross deception of the truth.

If the Justice Department actually desired reliable information upon which to base an honest estimate, it comes equipped with a tool that might have provided such information.

The Attorney General of the United States controls elements of the Justice Department far bigger and more powerful than CEOS (the actual proponent of this Regulation, the Child Obscenity and Exploitation Section, a unit within the White Collar Crime Division of DOJ). He also controls the Federal Bureau of Investigation; the FBI is probably the largest and most powerful instrument which has ever existed for the collection of personal information in the history of our planet; it is indisputably the most powerful such tool that has ever existed in the history of the United States of America. (Information tapped by the National Security Agency, the Central Intelligence Agency and the various military intelligence services that continually surveil the American people and their private communications, including images, is also just a request away. The tools used to monitor the Internet for and to combat child pornography, including surveillance of chat rooms and chat boards, social networking sites, and newsgroups are at the disposal of the Justice Department in general and CEOS in particular. They have a constantly open window, with shades not drawn, into the sexual images that millions of Americans make, send to a loved one, or post for all the world to see. In fact, the Justice Department knows so much about these private images that makes radio Public Service spots available to local stations, such as NewsRadio 78, WBBM, the CBS affiliate in Chicago, and many other outlets, discouraging young people from posting erotic images of themselves online. The tagline of the DOJ public service spots warn young girls that their perverted next door neighbor might be spending "alone time" with their naked pictures. It seems plain that the Justice Department knows far more about the prevalence of the creation and transmission of covered images than is discussed in its submission here.) It is unlikely in the extreme that many facts exist that are beyond the FBI's power and its legitimate mandate within the United States.. Employing over 14,000 Special Agents and 22,000 professional staff, with a budget exceeding *$7 billion dollars* and possessing access to every technological device in existence that may uncover and organize information, its capabilities are simply staggering and probably beyond the full comprehension of any ten people. It is certainly within its vast, legitimate mandate to discover information relevant to determine the frequency of violations of federal criminal law, the number of persons doing so, and the cost of compliance with United States federal statutory and regulatory criminal law. It is beyond doubt that it could do so if it were asked. In fact, Attorney General Alberto Gonzales directed the FBI to conduct inspections in enforcement of these very regulations (or their immediate predecessor) on October 25, 2005!

The proposition that the number of covered images, of afflicted individuals, and the cost of compliance cannot be identified with substantially greater accuracy by use of the tools available to the proponent Agency is simply preposterous rubbish. Its present, uncertified "estimate" is so far afield from assessing the actual kinds of images and producers whom the proponent agency knows to exist and the costs of compliance as to verge on the brink of willful blindness or intended misstatement of fact in the administrative process, in rank indifference or willful defiance of a Congressional mandate. The DOJ is simply hiding many balls that it knows to exist.

It has ignored the obvious fact that Americans in huge numbers create and post or transmit lascivious images of themselves and those close to them, and frequently streaming video as well. On information and belief, FBI Agents sit in those very chatrooms, observing, reporting, and sometimes participating. Sites such as chatroullete.com and its imitators, and the hundreds of sites for the publication of amateur photography of an amateur, home-made nature simply can't be unknown by

the Justice Department, *but their present submission restricts itself to five year old census data about the video and movie business and makes guesses from that as to the number of persons affected and burdened.*

Accordingly, the United States Attorney General has made *no serious attempt* to gauge the consequences, the economic costs of compliance, associated with this regulation of his own creation by using this formidable tool, the FBI, which answers directly to him. His submission for renewal cannot stand on such a predicate in violation of the law.

Instead, in what seems to be studied indifference to ordinary Americans, and with a casually reckless indifference to the Paperwork Reduction Act, to the social and political policies expressed by Congress in its enactment, and to the OMB which enforces it, the Attorney General claims *not to know the costs*. He has treated this entire process as a mere formality. *But it is no mere formality which puts the spectre of imprisonment over the heads of untold tens of millions of Americans, treating them all as potential child pornographers, and imposing upon them the same kinds of burdens and costs imposed on persons suspected to have links to the Cosa Nostra or who plainly operate huge pornographic empires.*

C. The Attorney General's Failure to Assess the Economic Burden on Small Business Involved in the Production and Distribution of Adult Content

In particular, beyond its critical failure to certify its guesses as true fact, the DOJ's submission is infirm in the following particulars related to the many thousands of small businesses in America that produce, publish, and distribute adult content materials for an adult audience on the Internet:

First. This Regulation plainly affects the Adult Internet, the myriad websites that afford entertainment of a sexually explicit nature to 40 million or more Americans each year. The *Adult Internet* is a phenomenon that largely started in the kitchens, basement rec rooms, and living rooms of tens of thousands of entrepreneurial people with day jobs, and any casual reading of articles in the mainstream press that explain how this industry started, including *Fortune, The Wall Street Journal,* and many other trusty financial periodicals – show that it grew independently of the existing porn industry in The San Fernando Valley – and that its profit potential continues to inspire start-ups and to maintain many thousands of such small businesses. It is unimaginable that the FBI has not examined into the origin of this Industry ten ways from Sunday looking for a (non-existent) Organized Crime connection, has figured out its grass-roots origins by now, and it would be easy for the Regulators to figure out that a HUGE chunk of this industry, and the people subject to the Regulations, are people who work day jobs and are unlikely to have ever shown up in US Census data. A formal public hearing can establish that.

Second. What does the size of the Adult Industry in 2007 have to do with 2012? Each two years in online business is virtually its re-creation from the ground up in terms of its economy, tools, and vehicles. The data is too old to be reliable in 2012 for any purpose. A hearing can establish that, too.

Third. People who create websites from and merely distribute *existing material* are covered by these regulations as ***Secondary Producers***. None of these people could honestly relate to the US Census that they are involved in "motion picture video and creation". So they don't exist on the radar of DOJ *for purposes of assessing the burden it imposes* on them. Congress (at DOJ's lobbying) went to great lengths to rein these people in after the Sundance Case excluded them from DOJ's regulatory powers by the enactment of the "Protect Act" in March, 2003, nine years ago, which put them back in, under the regulations. It is nothing short of amazing and incomprehensible to me that now, in the eyes of

DOJ, these folks don't even exist, and the economic/manpower burdens imposed upon them with the threat of five years in prison do not even count. *Secondary Producers simply are not taken into consideration in this analysis.* It seems intuitive that far more persons are involved in the republication of adult internet content than the number of persons who actually produce them, but it is obvious that in starting its guesswork, the Agency started with movie and video producers five years ago, a group that is almost certain to exclude them, and made its guesses from there. An analysis that does not take the numerically dominant segment of the covered persons into account cannot possibly lead to anything like an accurate result. A formal hearing can establish the scope of the burden on Secondary Producers, which DOJ ignores.

Fourth. Ten Percent? Have they at DOJ any idea the scope of the Adult Industry? Do they imagine that the many millions of websites online were created by only 2,000 people? Do they even know about camgirls? A Google search for "Section 2257 Notice" conducted for this Comment and Petition discloses **twenty-three million four hundred thousand hits**. *Those 1,974 people DOJ supposes to be subject to regulation under Section 2257 must have been busy!*[5] A hearing could provide valuable insight into the actual number of persons and images affected and the true cost.

Fifth. The chosen point of departure for the guesswork is obviously unreliable to determine the number of person involved in erotic imagery and its distribution. It starts with census data related to *professional video and movie production*, as though still image photography does not exist. Still photography would not get anyone into the US Census data for video creation and production. It is hard to imagine that it never dawned on the proponents that searching 2007 Census data for video and movie creators and producers would leave covered still photographers uncounted. They are obviously covered by the Regulation and it is impossible that an honest inquiry into the calculation of cost would have ignored their existence. For no other reason, the proponent Agency's failure to consider still image photography warrants a formal Hearing.

Sixth: The proponent has failed to inquire and reach findings – or even to consider the existence of the costs of Third Party non-employee record keeper services under 28 CFR Section 75.4.

Seventh. The Proponent estimates that it only takes six minutes to comply with the obligations of Section 2257. How it figured this is anyone's guess, because the figure seems to be plucked from the ether without support. The writer might have asked the FBI what it knows about the time involved in compliance, which surely they learned during the Inspections that did take place in 2006-2007 and from its monitoring of the adult boards and the seminar presentations at adult shows, or DOJ simply ignored what it institutionally knows. When all of the actual time involved in creating forms, getting legal advice, creating a protocol, getting notices online, maintaining records, and making them available for inspection is aggregated, the very substantial probability exists that in small operations without a production line for this kind of activity, the actual time consumed may underestimate it by a factor of ten to fifty times.

Eighth. The proponent makes no account of the financial costs of servers, bandwidth, costs of salaries for people to maintain records, the time spent in corrections, migrating data to new sites, the time involved in setting up programs to deal with live, streaming feeds, etc.

Ninth. The proponent Agency takes no account at all of the existence of live, one-on-one chat, a thriving part of the economy of the adult internet in an era in which static content is widely pirated and made available on so-called "tube sites". These are live transmissions, often originated by individual "cam girls" and sometimes aggregated into networks that feed and sell the services of many camgirls who are ready to conduct sexually explicit performances on demand in real time. Their costs associated with creating a compliant program to stream current disclosure statement, to

keep that information current, to deal with guest performer records, to make required records of each transmission and to organize them, and to make them available for inspection, are simply not mentioned or considered by DOJ. A formal Hearing would be an appropriate forum for these performers to come forward and tell the story of the crushing economic burden these regulations impose on them, often young mothers, without the financial resources of such massive enterprises as Pink Visual, Buttman, and Devil's Playground Films.

Tenth. The proponent Agency makes the assumption that there are two kind of producers, those who create images of a kind and nature and under circumstances that make them eligible for certification and those who make harder kinds of images that would not permit the certification. It then uses a methodology that can only be described as bizarre and misleading in the extreme to train its interest (to determine the cost of compliance) on the set of producers who are eligible for certification and it thereby excludes the cost of compliance soft core images created by those who also create hardcore materials. Those images are subject to the full weight of the DOJ regulations. Because these prodcuers are not eligible for certification under Section 2257A, their costs of compliance for the soft core images simply doesn't count, and in DOJ's bizarre methodology, need not be assessed in computing the economic burdens of compliance. To the contrary, it would be reasonable to assume that their numbers, and the softcore images they produce, far, far outnumber the number of commercial producers who limit their content to soft core work and the number of images they create. A standard gallery of still images that ends with hardcore images will typically begin with a fully dressed or at least somewhat dressed model and progress to the removal of clothing and then to depictions of the genitals and frank sexual content. The soft core images are simply off the radar of cost calculation, but the economic costs of compliance are quite real. A formal hearing can provide a forum at which photographers and publishers may provide evidence of what the proponent Agency has ignored.

The wanton and gross undercalculation of the volume and scope of commercial adult video production and distribution and its attendant costs – the seemingly amateurish pretense of taking old and irrelevant data as a starting point for sheer guess – and the articulation of numbers so disturbingly and patently short and so alarmingly at odds with reality as to raise the question of whether there was a conscious effort to disguise and camouflage the truth to the OMB. If this assessment is wrong, if DOJ provided this assessment in good faith, it is quite more disturbing that the Agency charged by law with the this statute by Congress has not a clue about the scope of the industry it purports to regulate, and this, perhaps, is an even more disturbing prospect, that its regulations are written by pilots flying through a fog without the rudiments of training in instrument flying. In regulation and in flight, this circumstance is needlessly dangerous to human lives.

In the absence of reliable and certified facts about the burden imposed on the public and small businesses by the Agency, it is appropriate that the OMB conduct a formal hearing to establish facts concerning that burden upon which to discharge its own statutory mandate. It is simply a reality that these regulations have driven small businesses into cessation of business, both on account of a legitimate fear that the punctilious and unforgiving complexity of the scheme places honest operators at risk of prison for small acts of negligence, because of the practical inability to fund availability for inspection 20 hours per week, and because of the crushing costs of compliance. The regulatory insufficiency of this refusal to certify facts hardly pretends to establish facts. It is in order to establish a predicate of fact that most justifies the necessity of a hearing to establish the facts concerning the sweep and cost of these regulations, which lies at the heart of Congressional intent[6] in the Paperwork Reduction Act. *Someone has to be concerned with the facts of burden and cost under the Act, and if it is not the proponent of the Regulations, the duty apparently falls to the OMB.*

D. Assorted Matters of Particular Concern

1. It is obvious that the easier obligations of Section 2257A cannot be lawfully used by many persons whose activity is regulated by Section 2257. As noted above, its use is limited to the commercial sphere by its text and, notwithstanding the shape-shifting nature of its public statements that sometimes suggest otherwise, and then which heavily qualify those statements into oblivion, the Third Circuit has plainly so determined. Even within the commercial sphere, its use seems limited to that class of commercial image creators and publishers who regularly maintain records in the nature of employment records; the plain fact is that these provisions are mainly useful to Hollywood, which has a practice of regularly employing the actors in films, and quite unusable by individual commercial photographers who rarely employ models. The text of Section 75.9 seems to go out of its way to include an alternative class by the use of such language as “or engage” which is not found in the regulation.

2. A great many quite lurid images centering on the crotch area, in similarity with the images before the *Knox* court, are now used in contemporary commercial advertising in both public place billboards and in magazines, and there seems to be little doubt that all or most of the images I’ve attached in the ANNEX to this document are, for the purposes of 18 United States Codes Sections 2256 and 2257 “lascivious” depictions of the pubic area or genitals under the tests applied by *Dost* and embraced by the Proponent Agency in its Preamble to promulgation of the current regulations on December 18, 2008.

3. Should the creators and publishers of these billboards, public advertising signs, and magazine advertisements be ineligible for Section 2257A certification, they commit a felony by failing to attach the compliance statement described and defined in the current regulations. It is obvious that the kind of Compliance Statement required by the regulations and ubiquitous in frank pornography would 1) destroy the artistic integrity and purpose of the expression, and 2) destroy its effectiveness by tainting it by association with frank pornography. The ANNEX to this document provides examples.

4. Though the law requires every such covered image to have such a Compliance Statement in the format determined by regulation, the Proponent has never particularly taken into account single images, a single .jpg or .gif or .png file standing by itself. Covered images are often tiny in size, sometimes only 100 pixels by 100 pixels. The Agency has never considered any means by which they might comply without destroying their content. How a typical banner advertisement promoting a website and found on someone else’s website as a paid advertisement is to comply is a matter which has never been addressed. It seems practically impossible to comply in the space available in the displayed image. Because banner advertising is a central element of the entire economy of the adult Internet, DOJ, through its regulatory scheme, puts virtually the entire adult internet in a position of practical inability to comply, and at risk of prison.

5. The purposes of Section 2257 might be accomplished with minimal adverse harm by the use of easily available technology. DOJ should permit the registration of Producers on a voluntary basis and the registration of content on a voluntary basis. The voluntary registration of producers would involve tendering to DOJ the address at which records may be inspected under the regulation at the times specified in the regulation. Upon submission, a number would be issued in the format, “DOJ-P-0000.” This number could be clearly and conspicuously displayed on graphic content, or at the option of the produce, laid out as a string in the image code, so that any image viewer reading the

source might be used to determine if the string “DOJ” exists in the code, the registration number could be conveniently extracted, and if an inspection was desired, it could be planned. Similarly, particular content could be registered by sending all of the required records electronically to DOJ, upon which a registration number in the format “DOJ-C-0000000” would be issued. The producer could then either prominently display the registration number on the face of the content as provided under the regulations, or encode it into the image code so that a string search for “DOJ” would easily disclose the full number of the registration and the agent could examine the filed records. This latter prospect would reduce the costs to the Agency for inspection by eliminating, in these cases, the need to conduct a physical inspection at the producer’s place of business. Moreover, it would provide a quick and easy way to provide “notice” to DOJ as to the 20 hours per week when the producer can make the actual, original records available for inspection, as provided for in the regulations, so that DOJ may, as is its prerogative, schedule an inspection without notice, avoiding unneeded repeat trips to inspect when it finds such a notice tacked to a door.

5. Though the law requires “a statement” to be affixed to each depiction, the DOJ has regulated in such a manner so as to give the impression that multiple notices are required for the same content. For example, it regulates that each page of a website containing sexually explicit content must contain a Disclosure Statement or a link to one. It simultaneously regulates that images and movies are also to have such a statement. Is it the law, as DOJ understands it, that one notice on the page of a website is sufficient compliance? If so, it has never said that, and it appears, by separately requiring Compliance Statements for individual images and movies, to exceed the Congressional mandate by requiring two such statements regarding every image and movie on a website. The Agency should require one and only one Compliance Statement, making its decision on whether particular images or entire web pages or web sites should display such a notice. The cost of the redundant over-regulation might best be addressed in a hearing by webmasters and producers.

6. DOJ’s embrace of *Knox* and *Dost*, in the adult, non-child-pornography context is both misguided, dangerous to a free people, and expensive. It may, on its own volition, honestly and validly admit its mistake and determine that only lascivious exhibitions of the nude and exposed genitals of adults will be subject to regulation, to the exclusion of lascivious images of fully and opaquely clothed or obscured images of adult genitals. It should regulate “pubic areas” and clothed and covered public areas and genitals only in the case of children. The motive of DOJ at present chases a ghost. These interpretation was adopted, without doubt, to target the so-called “Child Model” sites which featured scantily dressed para-pubescent girls. The entire appeal of this kind of pornography was that the models were extremely young females. There simply is no child pornography market for children who look like adults. Regulation of images of clothed and fully obscured images of adult pubic areas and genitals makes no sense whatsoever. It is neither pornography nor is it likely to be an area that conceals covert pedophilic interest. Adoption of such an interpretation would exclude commercial advertising of the nature depicted in the attached ANNEX from the scope of regulation, as it should.

7. Bonafide news, celebrity news, documentary, and Paparazzi images frequently cannot practically comply with the requirements of Section 2257 because those requirements depend on co-operation with the subject, including the production of a government-issued ID (even in the case of a US celebrity vacationing on the beaches of France!) and a self-identification of all alias and other previous names. Hidden surveillance video of a public figure, perhaps an elected official, a candidate, a federal judge, a cabinet member, or a high-ranking official of a federal agency, engaged in illegal sexual relations, seems to be an acme example of such a newsworthy image which the regulations now make impossible to lawfully publish. It seems obvious to me that in such cases, Section 2257 burdens the right of the public to news and information so seriously, and so dramatically threatens and chills the photographer and publisher into depriving the public of that information, as to be unconstitutional in application to such cases. The burden on the public is as

palpable as it is elusive to calculate in economic terms. It is appropriate that the Department provide for such cases in its regulations, in order to eliminate this burden on the public, by providing for certification of noncompliance of newsworthy images created without the co-operation of the subject, under circumstances in which the co-operation of the subject was reasonably concluded to be unreasonable. In such cases, a habitual photographer or publisher of such images might attach a DOJ producer identification number as described above. The process of a declaratory judgment and a determination of invalidity as applied to particular images would be likely to so unreasonably delay the publication of images as to thwart their newsworthiness in a substantial number of cases.

Conclusion

Contrary to its clear legislative mandate under the Paperwork Reduction Act to assess the burden of its actions on ordinary Americans, the United States Justice Department has cavalierly ignored the consequences of its actions and has made no serious effort to determine how many millions of ordinary Americans, equipped with digital cameras on their cell phones, to whom it now applies regulations it created for commercial pornographers. The burden falls equally heavy on the girl in front of her web cam in her bedroom doing video chat with her boyfriend away at college or the wife keeping her relationship alive with her husband far away in the Army as it does on Wicked and Devil's Productions, on *Playboy* and *Hustler*.

And contrary to the law of the land, they've made no effort to determine how many are affected by their regulations or how much it will cost these ordinary Americans to comply in these desperate financial times.

This simple and personal act of communication, if erotic enough, and it does not take much to be erotic enough, a quick flash of a genital is enough, and a revealing shot of the clothed pubic area is enough according to the imperious regulators at our United States Department of Justice, can put each of them in a federal prison for five years and sideline them from the mainstream of American life as convicted felons should they not create and maintain records, attach a notice showing where those records may be inspected, record at least a representative portion of the video transmission, and show the record of these intimate moments to a federal inspector on demand. The very refusal to let the inspector in, or to otherwise meet the burden *by hiring a third party custodian to hold the record of those private intimacies* and make them available to the FBI is also a federal felony.

That our Department of Justice has made serious criminals out of innocent people is shameful. That the enormous human and financial burdens it imposes on private intimacy is shameful as well.

It is but a shade less shameful that these costly burdens are placed on small commercial photographers, amateur photographers, and small time web operations trying to eke out a living in these times.

It has cavalierly ignored, in its expensive and burdensome regulations, which were originally written in an age when the production of pornography was an expensive proposition which mandated the development of film and designed for compliance only by pornographers with substantial economic resources and employees, that the adult internet which has arisen during the past fifteen years was created around kitchen tables by people with day jobs operating on a shoestring, and with no funds with which to either rent an office or staff it with a full time records custodian. The regulations which apply to small time mom and pop internet operations and nineteen year old camgirls living in

trailers and supporting themselves by live internet shows, the 21st Century equivalent in many cases of working at a local strip club, and far less tawdry and far less afflicted with the surroundings of crime, are the same regulations written by the Department of Justice to regulate a field that it considered to be dominated by the Cosa Nostra when they were first written.

For all of the reasons articulated above, I believe that these regulations should not be routinely approved in a perfunctory manner. They are seriously afflicted with costly problems. Some of them are economic burdens imposed on individual Americans and small businesses which certainly aggregate to tens of millions of dollars, and very likely to be in the range of hundreds of millions of dollars. Others are only partly economic and difficult to compute in dollars, but quite real, causing real and serious problems. The spirit of the Paperwork Reduction Act is to minimize those costs whenever it is possible to do so without prejudice to the sensible purpose of regulation. It is obvious that the Department of Justice has given short shrift to these purposes, that it has failed to use the formidable tools at its disposal to determine the actual costs of compliance, and that OMB is now placed in a position of complete but unnecessary blindness about the real costs which will derive from compliance.

Under such circumstances, it is appropriate that DOJ go back to the drafting board to think, perhaps for the first time, honestly about the burden its regulations impose – and to change the regulations to eliminate unwarranted burdens placed on ordinary Americans, on small businesses, on photographers and the press, and on advertisers.

Should it refuse to do so, in the absence of an honest, reliable and certified estimate of costs, OMB should conduct its own Hearing, as authorized by statute, to investigate into those costs, and if it finds them to be unwarranted, unreasonable, and unjustified, to use the full panoply of powers at its disposal under the law, including a rejection of renewal of these regulations. OMB is faced now with an apparent abdication of duty by DOJ; the law requires that someone watch out for the public interest against The Regulators; if DOJ will not comply with its duty under the law, it is left to OMB to protect the public.

I do now, formally, so petition OMB for the Formal Hearing so described herein.

Very truly yours,

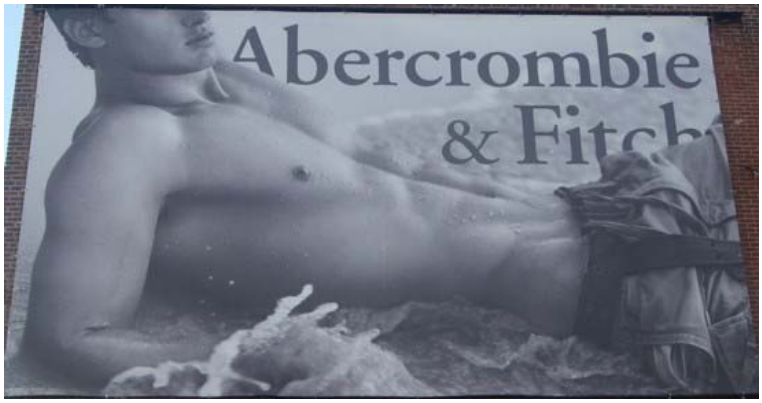
Digitally signed by J D Obenberger
DN: cn=J D Obenberger, c=US, o=J D Obenberger and Associates, email=obiwan@xxxlaw.net
Location: Chicago, IL
Date: 2012.04.25 21:51:15 -05'00'

J. D. Obenberger

ANNEX

Demonstrating the Wide Scope and Reach of the Attorney General's Regulations on Contemporary Advertising Media and Celebrity News

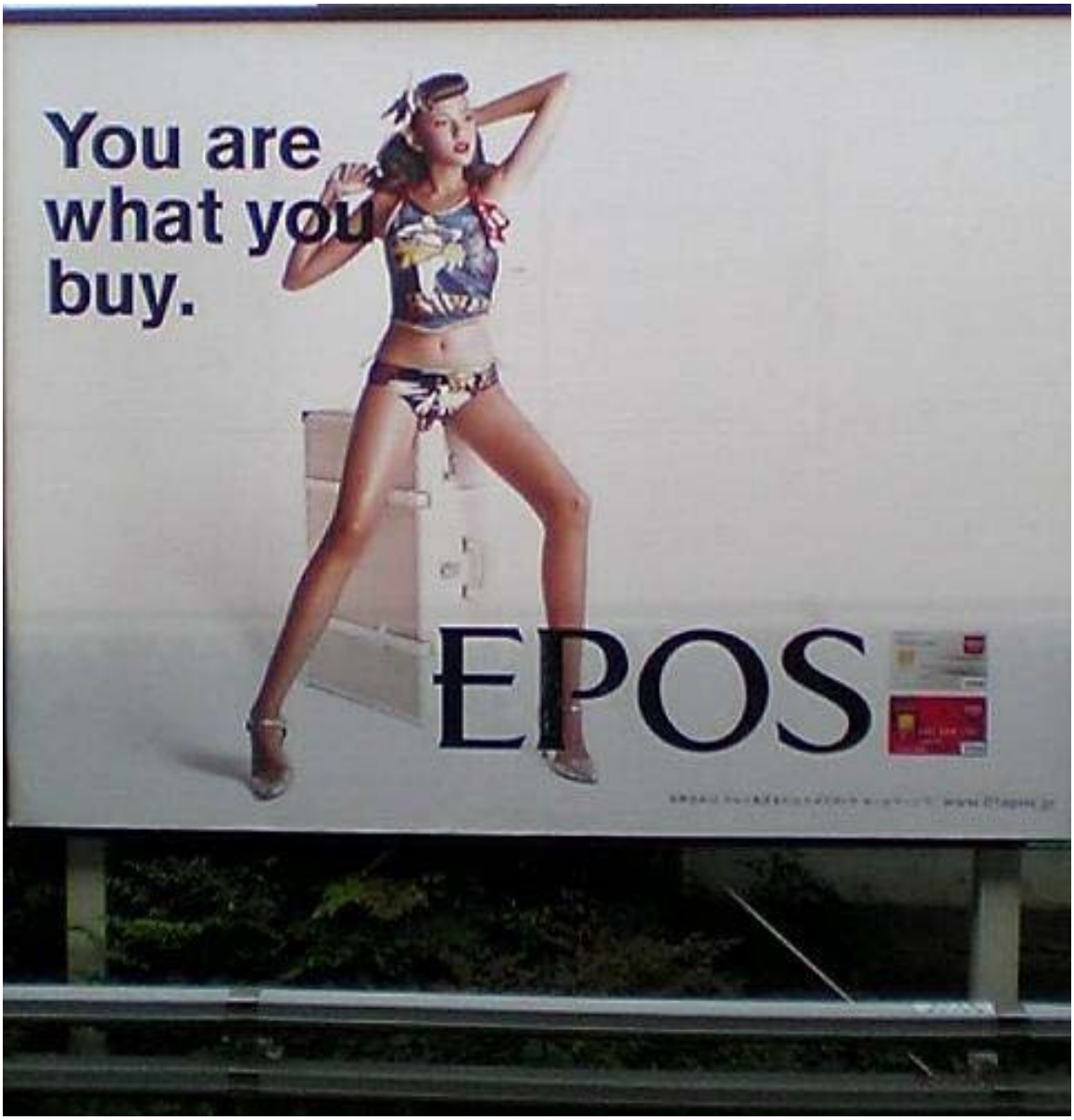
Billboards and Other Advertising Signs



Ambercrombe and Fitch

Sign Installation, NY Times Square

Macey's Storefront, New York



Epos

Calvin Klein

Calvin Klein

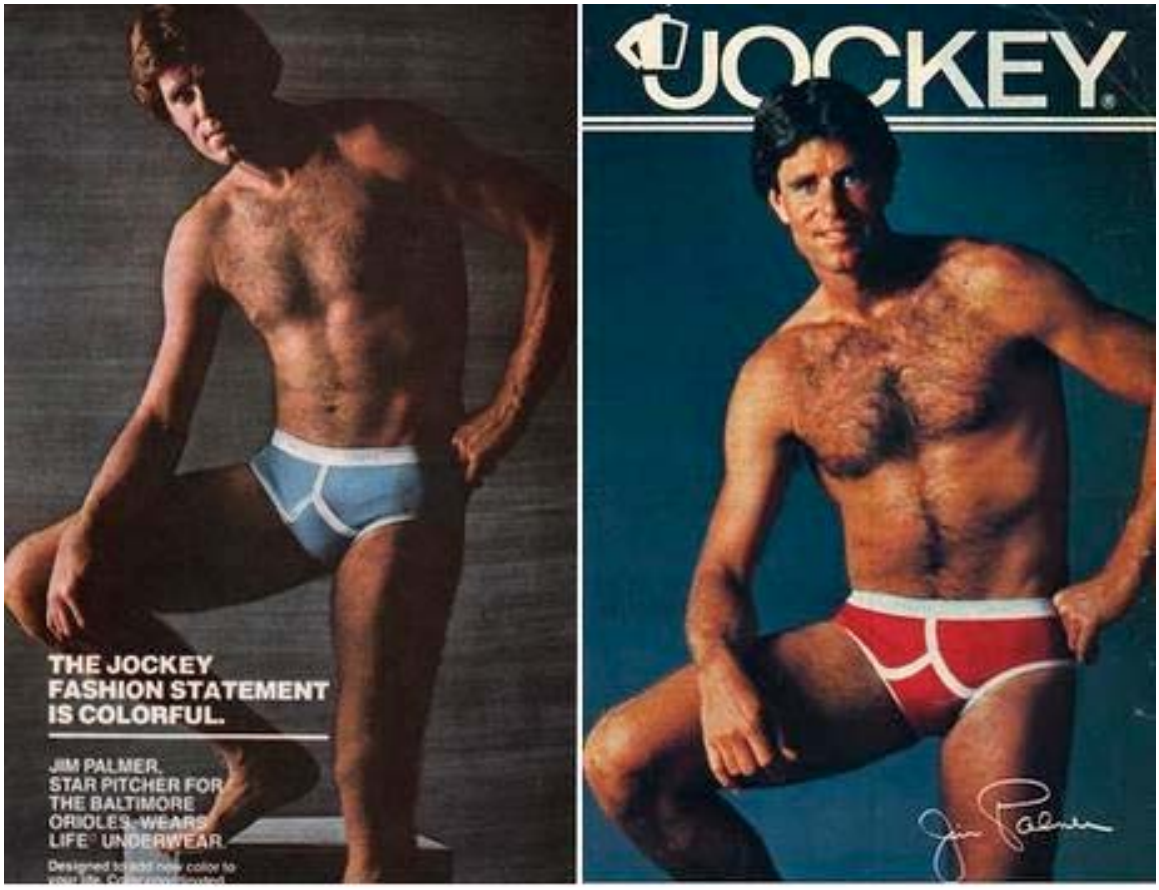
Sunset Strip, Hollywood, Billboard for movie The Brown Bunny, 2002. The image depicted on the billboard is an image of actual, explicit sex, an act of felatio, an outtake from the depiction contained in the movie promoted, and which caused the Ford Agency to terminate the actress depicted. The male lead was her actual boyfriend. She later obtained a starring role in TV's "Big Love" without the Ford Agency.

Magazine and Display Ads

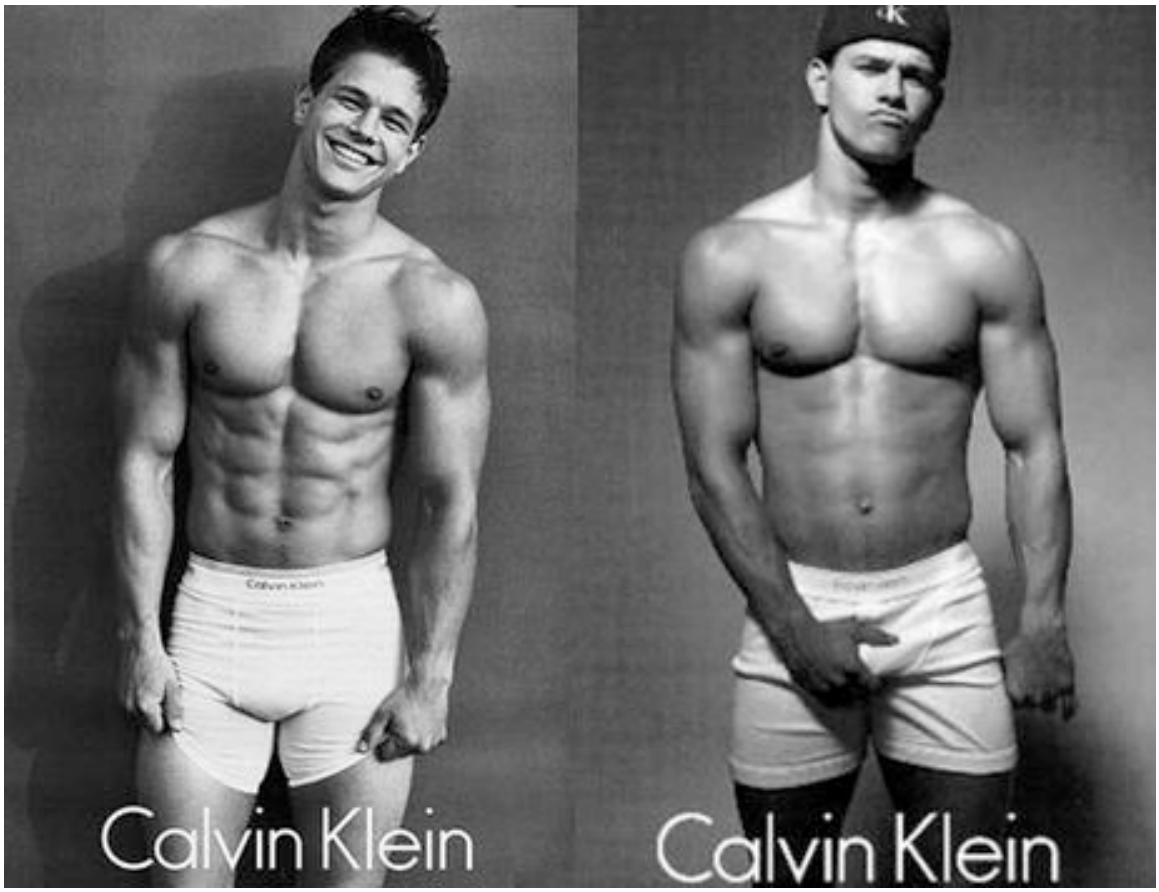
Plugg

Tom Ford Male Fragrance. The venue of publication is not clear to me.

Armani


THE JOCKEY
FASHION STATEMENT
IS COLORFUL.
JIM PALMER,
STAR PITCHER FOR
THE BALTIMORE
ORIOLES, WEARS
LIFE® UNDERWEAR.
JOCKEY

Jockey



Calvin Klein

Baccarat Crystal. A strategically located cat.


Come see why our dancers are so excited about Neverneverland.

Ballet

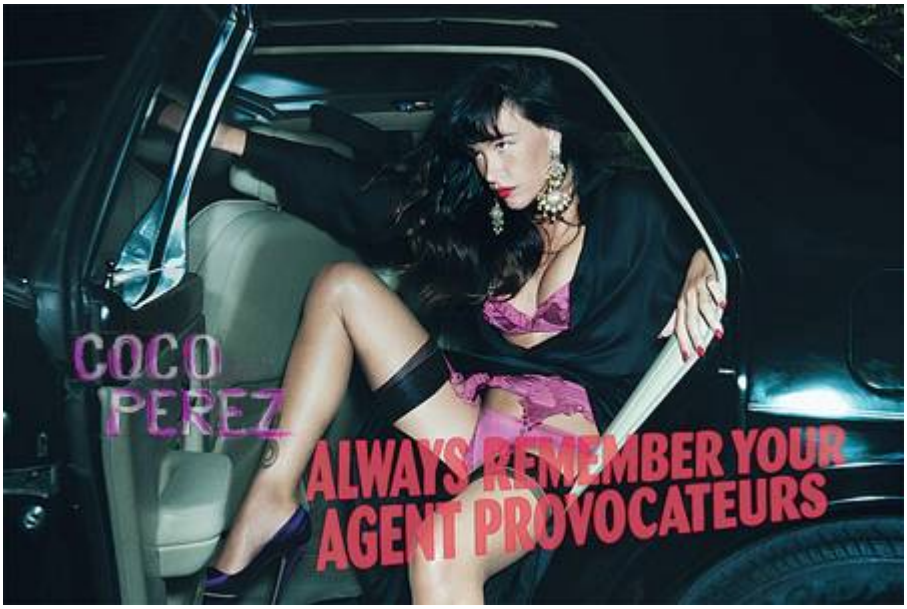
Che Magazine


OH LOLA!

DM Lola Perfume

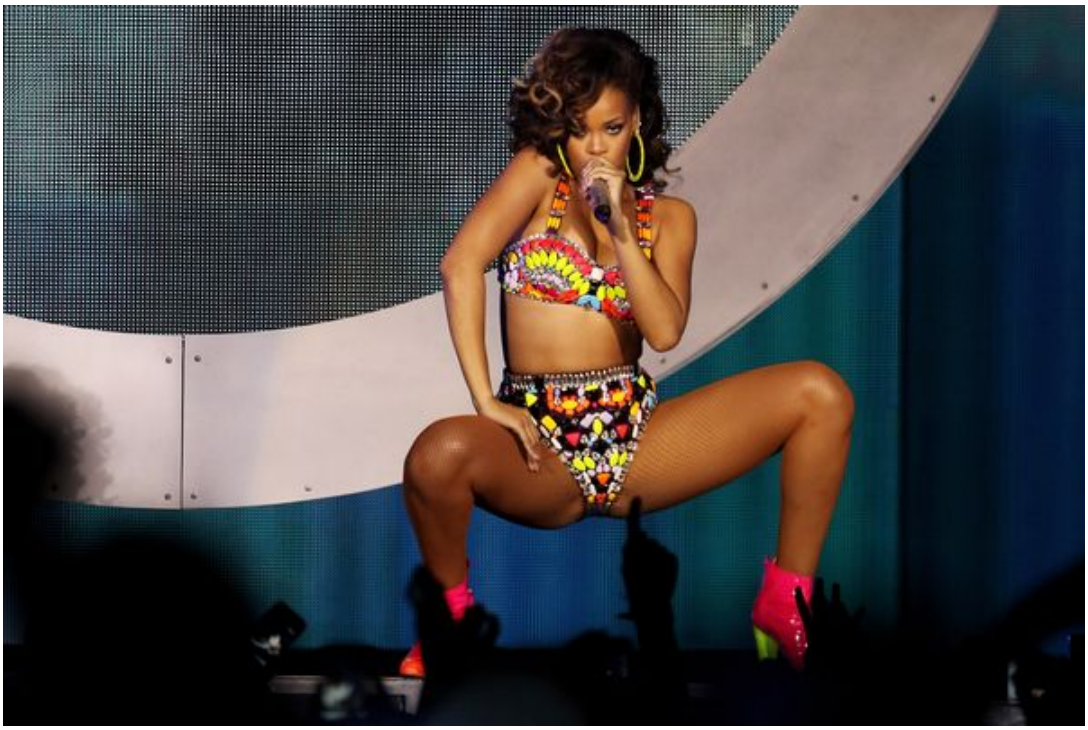
Paparazzi and News Images

Paris Hilton Candid



Paz La Huerta, actress in Boardwalk Empire, Candid

Miley Cyrus Candid Onstage



Rihanna Onstage

[1] The Justice Department has said much about the potential of Section 2257A and its regulation at Section 75.9 to lighten the load for producers of simulations and images of mere lascivious images, but, as the Third Circuit easily determined, and as will be discussed more fully below, these provisions were intended to give a break to Hollywood and commercial producers and do not provide cover for noncommercial photographers and videographers without employees capturing intimate moments in their bedrooms on cell phones. They just don't qualify for the "certification" process because they don't maintain employment records.

[2] The definitions which apply to define the scope of these regulations provide as follows:

> (2)
> (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;
> (iii) masturbation;
> (iv) sadistic or masochistic abuse; or
> (v) lascivious exhibition of the genitals or pubic area of any person;

[3] *Dost* provides the following test, laying out whether an image amounts to *child pornography*. The Proponent here, the Department of Justice has stated that these same factors are appropriate to determine whether *images depicting exclusively adults are "lascivious"*, or in other words, "hot enough" to be within the scope of their regulations at bar, implementing Section 2257:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

[4] Section 75.9 (a)(4) provides as follows: The producer of the visual depiction certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, *employed* by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer. (A producer of materials depicting sexually

explicit conduct not covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime.) [Emphasis added.]

[5] I have been authorized to relate to you that a prominent online forum at which Gay webmasters and content providers meet to discuss business and news items of interest to them, http://forums.gaywidewebmasters.com/ ,alone, has 2,107 active registered members on the date upon which this document was submitted.

[6] Title 44 United States Code §3501. Purposes ''The purposes of this chapter are to—''(1) *minimize the paperwork burden for individuals*, *small businesses*, educational and nonprofit institutions, Federal con-tractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government; . . (10) ensure that information technology is acquired, used, and managed to improve performance of agency missions, including the *reduction of information collection burdens on the public;* [Emphasis added.]