

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FREE SPEECH COALITION, INC.,
et al.,

Plaintiffs,

Case No. 05 CV 1126

Judge Miller

v.

THE HONORABLE ALBERTO R.
GONZALES, Attorney General of the
United States,

Defendant.

**DEFENDANT’S ANSWERS AND OBJECTIONS TO PLAINTIFFS’ FIRST SET OF
INTERROGATORIES AND REQUESTS FOR ADMISSION**

Pursuant to Fed. R. Civ. P. 33(a), Richard A. Hertling hereby responds to Plaintiffs’ First Set of Interrogatories and Requests for Admission on behalf of Defendant Alberto R. Gonzales, in his official capacity as Attorney General of the United States (“Defendant”).

I. GENERAL OBJECTIONS

These general objections apply to each Interrogatory and Request for Admission as though restated in full in Defendant’s responses to each Interrogatory or Request:

1. Defendant objects to any and all Interrogatories and Requests to the extent that they seek information protected from disclosure by the attorney-client, attorney work-product, deliberative process, or any other applicable privilege or doctrine.
2. Defendant objects to any and all Interrogatories and Requests to the extent that they seek disclosure of the mental impressions, conclusions, opinions, legal research, or legal theories of counsel.

3. Defendant objects to any and all Interrogatories and Requests to the extent that they seek to discover the manner or method of proof at trial or the upcoming preliminary injunction hearing, currently scheduled for August 1, 2005.

4. Defendant objects to any and all Interrogatories and Requests to the extent that they seek information that is irrelevant, overbroad, unduly burdensome to produce, or not reasonably calculated to lead to the discovery of admissible evidence.

5. Defendant objects to any and all Interrogatories and Requests to the extent that they seek information protected by the provisions of the Privacy Act, 5 U.S.C. § 552a.

6. Defendant objects to any and all Interrogatories and Requests to the extent that they seek information or purport to require that information be provided in a manner beyond that required by the Federal Rules of Civil Procedure.

II. CONDITIONS

1. Through this response, defendant does not waive but rather preserves:

A. All objects as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose in subsequent proceedings.

B The right to object to the use of any information which may be provided, or the subject matter thereof, in any subsequent proceedings or the trial of this or any other action on any other grounds.

C. The right to object on any ground at any time to further discovery proceedings involving or relating to the subject matter of these Interrogatories.

D. The right at any time to revise correct, supplement, clarify or amend this response in accordance with the Federal Rules of Civil Procedure.

2. All responses to Interrogatories are based on Defendant's best understanding of the Interrogatories and/or the terms used therein. Such responses cannot properly be used as evidence except in the context in which the Defendant understood the Interrogatories and/or the terms used therein.

3. These responses are not a representation or concession as to the relevance and/or relationship of the information to this action.

III. SPECIFIC ANSWERS AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES

1. Provide the names, addresses, and telephone numbers of any individuals Defendant intends to or may call as witnesses at the preliminary injunction hearing scheduled to begin on August 1, 2005. For each potential witness, state the nature of his/her testimony and the degree to which the Defendant intends to call the person as a witness, i.e. will definitely testify, will likely testify, may testify.

Answer: Howard Schmidt: P.O. Box 2447, Issaquah, Washington 98027, 425-557-9934. Mr. Schmidt is likely to testify. If he testifies, Mr. Schmidt will address technological issues raised by plaintiffs' contentions concerning the alleged costs imposed by 18 U.S.C. § 2257 and the implementing regulations.

Kristi Witsman: 1400 New York Avenue, N.W., 6th Floor, Washington, D.C. 20530, (202) 514-5780. Ms. Witsman will authenticate CD-ROMs that defendant will submit as evidence containing web-sites downloaded by Ms. Witsman. Because of the subject matter of Ms. Witsman's testimony, it is unlikely that it will be necessary for her to testify.

2. Provide the names, addresses, and telephone numbers of any individuals, regardless of whether such individual is employed by or under contract with Defendant, who participated in researching, drafting, writing, or preparing the proposed rule amending 28 C.F.R. Part 75, released June 25, 2004, and the final rule amending 28 C.F.R. Part 75, released May 24, 2005.

Answer: Defendant objects to this Interrogatory because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence, and because the residential addresses and telephone numbers of federal employees are protected under the Privacy Act.

3. Provide the names, addresses, and telephone numbers of any individual, either employed by the Defendant or under contract with the Defendant, who is vested with the responsibility of interpreting and construing 28 C.F.R. Part 75 and who has the authority to resolve any ambiguities regarding the application of 28 C.F.R. Part 75 to a particular individual or entity.

Answer: Defendant objects to this Interrogatory because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to the reference to “resolving any ambiguities” because the regulations are not ambiguous. Subject to the foregoing objection, depending upon the circumstances, individuals in several Justice Department offices could be involved in

interpreting the regulations. Such offices could include offices within the Criminal Division, including the Child Exploitation and Obscenity Section, the Office of Legal Counsel, and the Office of Legal Policy, and other officials of the Justice Department and the agency ultimately charged with carrying out inspections.

4. Provide the names, addresses, and telephone numbers of any individual, entity, department, corporation, or organization who is currently or who may at any point in the future become “investigators” or an “inspecting agency” within the meaning of 28 C.F.R. § 75.5(a) and (c)(1).

Answer: Defendant objects to this Interrogatory because the deliberative process privilege protects from disclosure the agency’s deliberations as to the identity of entities or individuals who may at any point in the future become, but have not yet been designated as, investigators or inspecting agencies. Defendant further objects because the Interrogatory does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence, and because the residential addresses and telephone numbers of investigators are protected under the Privacy Act.

5. Identify any document, study, report, or other information within Defendant’s possession that any Plaintiff or any of Plaintiffs’ members have been involved with or linked to the creation, dissemination, or distribution of actual child pornography. For the purposes of this

interrogatory, assume that Plaintiffs' membership includes **all** corporate entities in the United States that produce material depicting adults engaged in actual sexually explicit conduct.

Answer: Defendant is unable to respond to this Interrogatory insofar as it inquires about the connection of members of the Free Speech Coalition to child pornography, because plaintiffs have refused to identify the members of the Free Speech Coalition, and this information is solely in the possession of the plaintiffs. Given that plaintiffs have never asserted that all corporate entities in the United States that produce material depicting adults engaged in actual sexually explicit conduct are members of the Free Speech Coalition or that the Free Speech Coalition consists only of corporate entities, and given that plaintiffs have declined to identify the members of plaintiff Free Speech Coalition, defendant objects to the reference to the Free Speech Coalition membership as vague. Defendant thus construes this Interrogatory as inquiring only about all corporate entities in the United States that produce material depicting adults engaging in actual sexually explicit conduct.

Defendant further objects that the term "corporate entity" is undefined. Subject to the foregoing objections, defendant construes the term to refer to entities that are actually incorporated under the laws of a particular state, including corporations and limited liability corporations, but not including other entities such as partnerships, limited partnerships, and other unincorporated organizations. Defendant objects to this Interrogatory to the extent that it calls for information concerning ongoing investigations, which is protected by the law-enforcement privilege, and information about completed investigations that is protected by the Privacy Act. Defendant further objects to this Interrogatory because it is unduly burdensome in that it calls for

all “documents” and “other information” in the possession of the Department of Justice on the subject of the Interrogatory. Subject to these objections and qualifications, Defendant is unaware of any non-privileged report or study that references the involvement of specific “corporate entities,” defined as specified *supra*, with child pornography.

6. Identify any actual instances of the creation, dissemination, or distribution of child pornography that were thwarted or diminished as a result of the record-keeping requirement contained in 18 U.S.C. § 2257 and implemented by 28 C.F.R. Part 75.

Answer: Defendant objects to this Interrogatory as unduly burdensome and vague. As the D.C. Circuit Court of Appeals held, in *American Library Association v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994), “it seems obvious” that “the requirements of section 2257 advance the abatement of child pornography in fundamental ways.” The statute and regulations ensure that primary producers confirm that a prospective performer is of age, deter children from attempting to pass as adults, and “are critical to ensuring” that secondary producers deny child pornographers access to their markets. *Id.* at 89. The statute and regulations do not, however, require producers to report to defendant when the creation or distribution of child pornography is “thwarted or diminished,” and therefore defendant is not in a position to identify the instances where “the creation, dissemination or distribution of child pornography” was “thwarted or diminished” because of 18 U.S.C. § 2257 and the implementing regulations.

7. Identify any documents, studies, reports, congressional findings, or any other information within Defendant's possession that indicate that, in enacting the PROTECT Act, P.L. 108-21, 117 Stat. 650, (sic) intended to adopt the Department of Justice interpretation that "secondary producers," as defined in the 2005 version of 28 C.F.R. § 75.1(c)(2), are subject to the requirements of 18 U.S.C. § 2257.

Answer: Defendant objects to this interrogatory because it calls for a purely legal conclusion and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, defendant refers plaintiffs to pages 21-24 of Defendant's Opposition to Motion for Temporary Restraining Order, which references information that may be responsive to this Interrogatory.

8. Identify and explain whether the words "located outside the United States" in the 2005 version of 28 C.F.R. § 75.1(b) refer to individuals, entities, and corporations whose places of residence and/or places of business are in the United States but who travel to foreign locations to create material depicting actual sexually explicit conduct or whether the words refer only to foreign individuals, entities, and corporations whose places of residence and/or places of business are located wholly outside the United States.

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

9. Identify whether the term “portrayed in such a depiction after June 23, 2005,” as used in the 2005 version of 28 C.F.R. § 75.2(a)(1)(i), refers to material created in the first instance after June 23, 2005 or to pre-existing material that is assembled, manufactured, published, duplicated, copied, digitized, reissued, or disseminated after June 23, 2005.

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

10. Explain whether an image that appears multiple times on a particular website, i.e. a thumbnail image that can be expanded to a full page, must be copied only once or as many times as it appears on the website to comply with the 2005 version of 28 C.F.R. § 75.2(a)(1)(i).

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

11. With respect to the Internet, a visual depiction on a website may be associated with multiple uniform resource locators (“URLs”). For example, the URL for a single web page may access numerous visual depictions on the same page, and each of these depictions may be associated with their own individual URLs. In addition, because URLs are often generated automatically by computer programs that create millions of unique URLs in response to user demand, the same visual depiction may be associated with hundreds of URLs. Identify which URL a producer is expected to copy to be in compliance with the 2005 version of 28 C.F.R. § 75.2(a)(1)(ii).

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

12. Identify whether the 2005 version of 28 C.F.R. § 75.2 prohibits a producer from placing a copy of the performer’s picture identification card in her file each time a new work is created depicting that performer, or whether a producer must only maintain one copy of the picture identification card per file.

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

13. Identify whether the requirement in the 2005 version of 28 C.F.R. § 75.6 that the label contain “the date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter” can be satisfied by including only the date upon which the original creation of the work was completed, i.e. the last date of filming, or whether the label must include the most recent date on which any alteration or duplication of the material was completed, i.e. the last date a film was copied.

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

14. Identify the precise method by which a compilation videotape or DVD, i.e. a film comprised of multiple, short excerpts from other pre-existing films, can comply with the labeling requirements of the 2005 version of 28 C.F.R. §§ 75.6 and 75.8. For example, identify whether the required label must appear after each individual scene that is excerpted or whether a single label at the conclusion, of the end credits or within one minute of the beginning of a film which has no end credits, is sufficient.

Answer: Defendant objects to this Interrogatory because it calls for a purely legal conclusion, and because it does not seek relevant information that is either admissible evidence or reasonably calculated to lead to the discovery of admissible evidence.

15. Identify each and every person who assisted with or contributed to answering these interrogatories.

Answer: Defendant objects to this interrogatory because it calls for the home addresses and phone numbers of federal employees, which may not be disclosed under the Privacy Act. Subject to the foregoing objection, defendant responds as follows:

Vincent M. Garvey, Department of Justice, Civil Division, Federal Programs Branch, Deputy Director

William Hall, Department of Justice, Criminal Division, Child Exploitation and Obscenity Branch, Trial Attorney

Richard Hertling, Department of Justice, Office of Legal Policy, Deputy Assistant Attorney General

Samuel C. Kaplan, Department of Justice, Federal Programs Branch, Trial Attorney

Carl Nichols, Department of Justice, Civil Division, Federal Programs Branch, Deputy Assistant Attorney General

Andrew Oosterbaan, Department of Justice, Criminal Division, Child Exploitation and Obscenity Branch, Director

Laura Parsky, Department of Justice, Criminal Division, Deputy Assistant Attorney General

Laurence Rothenberg, Department of Justice, Office of Legal Policy, Counsel

IV. SPECIFIC ANSWERS AND OBJECTIONS TO PLAINTIFFS' REQUESTS FOR ADMISSION

1. The definition of "picture identification card" contained in the 2005 version of 28 C.F.R. § 75.1(b) will be applied only to material created after June 23, 2005. For purposes of

this request for admission, the term “created” shall refer to original production and not to the process of copying, digitizing, reissuing, compiling, or distributing existing works.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

2. Material created between July 3, 1995 and June 23, 2005 which depicts adults engaged in actual sexually explicit conduct and for which the producer has maintained records verifying the age of the performer under the definition of “picture identification card” or “identification document” contained in the 1992 version of 28 C.F.R. § 75.1(b) can be copied, digitized, reissued, compiled, or distributed without compliance with the definition of “picture identification card” contained in the 1995 version of 28 C.F.R. § 75.1(b).

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

3. Individuals or entities who do not hire, contract for, manage, or otherwise arrange for the participation of the performers in material that depicts actual sexually explicit conduct do not constitute primary or secondary producers subject to the record-keeping requirements of 18 U.S.C. § 2257 and 28 C.F.R. Part 75.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

4. The words “located outside the United States” contained in the 2005 version of 28 C.F.R. § 75.1(b) refer to individuals, entities, and corporations whose regular places of residence and/or business are in the United States but who travel outside the United States for the purpose of creating material depicting adults engaged in actual sexually explicit conduct.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

5. Material produced between July 3, 1995 and June 23, 2005 that was compliant with the labeling requirements of the 1992 version of 28 C.F.R. §§ 75.6 and 75.8 at the time it was originally created, but is not compliant with the 2005 version of those regulations, may be lawfully copied, distributed, digitized, compiled, or reissued after June 23, 2005 without compliance with the 2005 version of those regulations.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

6. Material produced between July 3, 1995 and June 23, 2005 that was compliant with the record-keeping requirements of the 1992 version of 28 C.F.R. § 75.2 at the time it was originally created, but is not compliant with the 2005 version of that regulation, may be lawfully copied, distributed, digitized, compiled, or reissued after June 23, 2005 without compliance with the 2005 version of 28 C.F.R. § 75.2.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

7. The words “assisting another person to engage in, actual sexually explicit conduct,” as used in 18 U.S.C. § 2257(h)(4), apply only to actions which involve direct physical contact between the referenced individual and the person he or she is assisting to engage in actual sexually explicit conduct.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

8. Secondary producers may comply with the record-keeping requirements of 18 U.S.C. § 2257 and the 2005 version of 28 C.F.R. § 75.2 by obtaining copies of the required records from the immediately preceding secondary producer in the chain of commerce.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

9. A producer who operates his business out of his residence may lease, purchase, or obtain separate storage space for the records required by 18 U.S.C. § 2257 and the 2005 version of 28 C.F.R. Part 75 and may list that separate address in the label required by 28 C.F.R. §§ 75.6 and 75.8.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

10. The term “actual sexually explicit conduct” includes only actual instances of those actions listed in the current version of 18 U.S.C. § 2256(2)(A)(i)-(iv).

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

11. The exemption statement discussed in the 2005 version of 28 C.F.R. § 75.7 is not mandatory for materials that are exempt from the 18 U.S.C. § 2257 record-keeping requirement.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

12. A website that contains no depictions of actual sexually explicit conduct, but provides hyperlinks to a third-party website containing such material, need not comply with the record-keeping requirements.

Answer: Defendant objects to this Request because it calls for a purely legal conclusion.

As to the answers:

I, Richard A. Hertling, hereby declare that the foregoing responses are true and correct.

Executed on: _____

As to objections:

Respectfully submitted,

PETER D. KEISLER
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CARL J. NICHOLS
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WILLIAM J. LEONE
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/s/ _____
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2005, an exact copy of the foregoing Answers and Objections to Plaintiffs' First Set of Interrogatories and Requests for Admission was served via e-mail pursuant to the agreement of the partes, followed by a signed and executed copy of the foregoing on July 13, 2005 via Federal Express, on:

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/s/
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