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Free Speech Coalition v. Gonzales

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FREE SPEECH COALITION V. GONZALES

406 F. Supp. 2d 1196 (D. Colo. 2005)

18 U.S.C. § 2257 requires producers of sexually explicit content to maintain age verification records of any person depicted in such content. A federal district court granted a preliminary injunction against enforcement of § 2257 against “secondary producers” of explicit content.

Applying to content produced after November 1, 1990, § 2257 requires producers to return documents proving that “every performer portrayed in a visual depiction of actual sexually explicit conduct” is over the age of eighteen. The statute makes it a crime for producers and publishers of such content to fail to create or maintain such records, to knowingly make a false entry, to knowingly fail to make an appropriate entry, or to knowingly fail to comply with the statute or its regulations. Additionally, the statute makes it a crime for people to knowingly sell or transfer such content without the required documentation. The punishment for first time violators is imprisonment for not more than five years and/or a fine, with sentences for repeat offenses extending to ten years. The Department of Justice issued regulations under this section in 2005, at 28 C.F.R. Part 75, expanding the record-keeping obligations of adult businesses and applying them to “secondary producers,” such as distributors who had no contact with performers themselves.

The Free Speech Coalition challenged the constitutionality of the regulations in *Free Speech Coalition v. Gonzales*. The court held that with respect to primary producers, the regulations were tailored narrowly to protect the government’s interest in preventing child pornography, and that the plaintiffs had not shown that the record-keeping requirements were likely to impose an undue burden on them. Nonetheless, the court granted a preliminary injunction barring enforcement against secondary producers, holding that the regulations exceeded the scope of the statutory language.