American Library Association v. Reno: Protecting Producers against Infringement or Children against Vulnerability - First Amendment Issues Surrounding Child Pornography Laws

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Child pornography is a critical problem facing contemporary society.\textsuperscript{1} With advances in accessing pornography from computer databases, children are more vulnerable than ever.\textsuperscript{2} In response to these concerns, Congress has made several efforts to protect children from becoming vulnerable to sexual exploitation. These congressional efforts have resulted in the enactment of the Child Protection and Obscenity Enforcement Act of 1988, and the Child Protection Restoration and Penalties Enhancement Act of 1990 (Child Protection Act or section 2257).\textsuperscript{3} A primary feature of the Child Protection Act is the record-keeping requirements. The record-keeping provisions require all persons producing material containing visual depictions of actual explicit sexual activity to: (1) determine the age of the performers; (2) maintain records contain-
ing this information; and (3) affix to each copy of the material a statement about where these records could be found.\footnote{4. Id.}

Challengers of the Child Protection Act argue that the record-keeping provisions overly burden and unconstitutionally restrict the First Amendment rights of producers of sexually explicit materials. \textit{American Library Ass'n v. Reno},\footnote{5. 33 F.3d 78 (D.C. Cir. 1994), \textit{cert. denied}, 115 S. Ct. 2610 (1995).} the topic of this Note, addresses the level of scrutiny which should be applied to record-keeping legislation in this area. First, this Note traces the development of child pornography laws and First Amendment tests of scrutiny. This Note then explores the reasoning of \textit{American Library Ass'n}. Finally, this Note examines the holding of \textit{American Library Ass'n} and investigates its constitutional and social impact.

II.FACTS

\textit{American Library Ass'n v. Reno} involved a class action suit headed by the American Library Association against the United States Attorney General and other federal officials responsible for enforcing, among other provisions, the record-keeping provisions of the Child Protection and Obscenity Enforcement Act of 1988.\footnote{6. Id. at 78. Other challengers in this suit included the Freedom to Read Foundation, the American Society of Magazine Editors, the American Society of Magazine Photographers, the Council for Periodical Distributors Associations, Inc., the International Periodical Distributors Association, Inc., the Magazine Publishers of America and the American Booksellers Association, Inc. \textit{Id.} at 81. The action was brought against William P. Barr, the predecessor to the current United States Attorney General, Janet Reno. \textit{Id.}}

This suit originated in \textit{American Library Ass'n v. Thornburgh}.\footnote{7. 713 F. Supp. 469 (D.C. 1989). Richard Thornburgh held the position of Attorney General before William P. Barr and the current Attorney General, Janet Reno.} Therein, associations representing producers and distributors of films first challenged the constitutionality of the record-keeping provisions of the Child Protection Act.\footnote{8. \textit{Id.}} The United States District Court for the District of Columbia granted the associations' motion for preliminary injunction and summary judgment and held that the record-keeping provisions violated producers' rights to due process.\footnote{9. \textit{Id.} at 472.} The government appealed the district court's decision.
While cross appeals were pending, Congress amended the record-keeping section.\textsuperscript{10} Thereafter, the United States Court of Appeals for the District of Columbia Circuit held in \textit{American Library Ass'n v. Barr}\textsuperscript{11} that the claims attacking the record-keeping provisions were moot due to the enactment of new legislation concerning the record-keeping provisions.\textsuperscript{12} The court of appeals vacated the portion of the judgment concerning the 1988 Act's record-keeping provisions and remanded the case with instructions to dismiss the corresponding portion of the plaintiffs' complaint.\textsuperscript{13} On remand, the district court held (1) the new record-keeping requirements were not narrowly tailored to the statutory purpose of protecting children and (2) the requirements imposed an excessive burden on the adult models and producers.\textsuperscript{14} Therefore, the requirements could not be upheld as a valid time, place and manner restriction.\textsuperscript{15} On appeal, the D.C. Circuit ruled in \textit{American Library Ass'n v. Reno} that the requirements were narrowly tailored and sufficiently furthered governmental interest in abating child pornography to withstand scrutiny under the First Amendment.\textsuperscript{16}

\textsuperscript{10} This amendment resulted in the Child Protection Restoration and Penalties Enhancement Act of 1990, the statute which the court examined in \textit{American Library Ass'n v. Reno}. For a further discussion of this Act, see \textit{infra} notes 23-25.

\textsuperscript{11} 956 F.2d 1178 (D.C. Cir. 1992).

\textsuperscript{12} \textit{Id.} at 1186.

\textsuperscript{13} \textit{Id.} at 1187.


\textsuperscript{15} \textit{Id.} A "time, place and manner" restriction must satisfy a three-part test: (1) it must be content-neutral; that is, it must be independent of the speech's communicative content; (2) it must be "narrowly tailored" to serve a "significant governmental interest;" and (3) it must "leave open ample alternative channels for communication of the information." \textit{Metromedia, Inc. v. San Diego}, 453 U.S. 490, 516 (1981) (quoting \textit{Virginia Pharmacy Bd. v. Virginia Citizens Consumer Counsel}, 425 U.S. 748, 771 (1976)). When a regulation is "narrowly tailored" to serve such an interest, the interest cannot be equally well served by a means that is substantively less intrusive of First Amendment interests. \textit{See} \textit{Clark v. Community For Creative Non-Violence}, 468 U.S. 288 (1984) (discussing "narrowly tailored" standard). The district court in \textit{Barr} did not find the second prong satisfied; therefore, the new record-keeping requirements were held unconstitutional. \textit{American Library Ass'n v. Barr}, 794 F. Supp. at 419.

\textsuperscript{16} \textit{American Library Ass'n v. Reno}, 33 F.3d at 94. The court of appeals also held in \textit{American Library Ass'n} the following: (1) the action was not a facial challenge (challenged as unconstitutional on its face because of its overbreadth or vagueness) so the plaintiffs were not required to establish that the Act was unconstitutional in every conceivable application; (2) the requirement that the producers keep records of a performer's age as long as the producer remains in business is unduly burdensome; therefore, a five year requirement to hold records should be imposed; (3) the Act does not apply to those who provide services for producers, it applies to primary and secondary producers only; and (4) the application of the Act to foreign producers does not violate the First Amendment. \textit{Id.} at 83-94.

In \textit{American Library Ass'n}, the request for rehearing en banc was denied. \textit{American Library Ass'n v. Reno}, 47 F.3d 1215 (D.C. Cir. 1995). Judge Tatel wrote
III. BACKGROUND

A. Statutory Background

In order to combat the sexual exploitation of children, Congress has enacted legislation targeting producers and distributors of child pornography. First, Congress responded with the Protection of Children Against Sexual Exploitation Act of 1977 (1977 Act), which prohibited both the production and distribution of "sexually explicit" material involving children. Second, Congress enacted the Child Protection Act of 1984 which expanded the prior act by prohibiting such material regardless of whether the material was deemed "obscene." Third, Congress passed the Child Obscenity Protection and Enforcement Act of 1988 to address a particular problem that hindered the prosecution of child pornography offenses. The Attorney General's Commission on Pornography issued a strong dissenting opinion in this action. 


18. 92 Stat. 8. The 1977 Act defines "sexually explicit conduct" as actual or simulated - (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person. Id.


20. American Library Ass'n v. Barr, 956 F.2d at 1182. This Act also increased the maximum fines tenfold, redefined "minor" to mean anyone under the age of 18, replaced the word "lewd" with the word "lascivious" in the definition of sexually explicit conduct, and eliminated the criminal offense condition requiring "pecuniary profit." Id. For a full discussion of obscenity as an "unprotected" area under the First Amendment, see infra notes 35-38 and accompanying text.

ography found that producers were able to avoid prosecution by claiming ignorance of a child performer's true age and asserting that they had been deceived. To eliminate this loophole, the 1988 Act required producers to maintain records of the names and ages of the performers and indicate on each copy of the material where those records are kept. Lastly, in response to numerous challenges and appeals to the constitutionality of the 1988 provisions, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990. This Act "significantly altered" the "scope and burden" of the original record-keeping requirements.


The revisions contained within the 1990 Act provide that producers of materials covered by the Act must, for every performer:

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulation; (2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and (3) record in the records required by section (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.


The Act further provides that producers must also:

cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such a manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.


The Attorney General's Commission on Pornography made the following recommendations:

The recommended legislation would require producers to obtain release forms from each performer with proof of age. The forms would be filed at a specified location listed in the opening or closing footage of a film, the inside cover of the magazine or standard locations in or on other material containing visual depictions.

The name, official title and location of the responsible person or corporate agent supervising such records would also be listed to avoid use of corporate shields. The release forms should be available for inspection by any duly authorized law enforcement officer upon demand as a regulatory function for the limited purposes of determining consent and proof of age . . . .

A producer should be required to maintain these records for a minimum period of five years . . . . This legislation would not only protect
B. First Amendment Background

In order to determine whether the record-keeping provisions unconstitutionally restrict the producers' protected speech, an analysis of First Amendment protections is necessary. The threshold inquiry in any First Amendment issue focuses on the appropriate level of scrutiny to apply to governmental restrictions in such an area.26 "[T]he appropriate level of scrutiny is initially tied to whether the statute distinguished between prohibited and permitted speech on the basis of content."27 Content-based restrictions, in which the government restricts speech because of the ideas or information contained therein or because of the general subject matter expressed, are subject to strict scrutiny.28 Such restrictions are presumptively invalid and will only survive judicial scrutiny if the regulation promotes a compelling state interest and employs the least restrictive means to furthering that interest.29 Content-neutral restrictions, on the other hand, in which the government restricts a form of expression for reasons not related to the particular content of the speech, are subject to intermediate scrutiny.30 Such restrictions must be narrowly tailored to serve a significant government

minors from abuse, but it would also place the burden of ensuring this protection was implemented squarely on the producers of the materials. The proposed legislation would serve a record keeping purpose comparable to that found in environmental and similar statutes . . . .

Attorney General's Commission on Pornography, supra note 21, at 621-22.

26. See Frisby v. Schultz, 487 U.S. 474, 481 (1988). In Frisby, the Court upheld an ordinance which prevented anti-abortion activists from picketing the residence of a doctor who performed abortions. Id. at 488.

27. Id. at 481.

28. Id.; Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Virginia Pharmacy is a case involving content-based restrictions. Id. In Virginia Pharmacy, the Court invalidated a restriction by the state of Virginia that forbade pharmacists to advertise the prices of prescription drugs because the state feared that its citizens would buy drugs at the lowest available price and ignore quality and service. Id. at 773. The Court held that truthful commercial speech is protected by the First Amendment and cannot be restricted because of its content. Id.

Another case involving a content-based restriction is Cohen v. California, 403 U.S. 15 (1971). In Cohen, the Court overturned the defendant's conviction for violating an "offensive conduct" statute by wearing a jacket bearing the words "Fuck The Draft" in a county courthouse. Id. at 25-26. The Court held that profane, offensive language is nonetheless First Amendment speech, and may not be suppressed under the guise of regulating the "manner" of speech. Id.


interest and must leave open ample alternative channels for communication of the information.\footnote{31}

Time, place and manner restrictions often fall into the intermediate scrutiny category. One such restriction involves government regulations aimed at avoiding either some evil unconnected with the speech's content, or some secondary effect of the speech. A zoning restriction placed on adult entertainment theaters in a particular area in order to avoid crime or deterioration of property values is an example of such a regulation.\footnote{32}

The \textit{United States v. O'Brien} test is an additional constitutional test employed to evaluate governmental restrictions which involve both protected speech and non-protected speech.\footnote{33} This four-part test asks the following questions: (1) Is the governmental regulation within the constitutional power of the government? (2) Does the regulation further an important or substantial governmental interest? (3) Is the interest unrelated to the suppression of free expression? (4) Is the incidental restriction on the First Amendment no greater than is essential to the furtherance of that interest?\footnote{34}

\footnote{31. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The Court in \textit{Ward} upheld a requirement that any musician performing in New York City’s Central Park, a public forum, use city-provided sound equipment and technicians. \textit{Id.} at 803. The Court reasoned that the city had a significant governmental interest in protecting its citizens from unduly loud noises, and the restriction was not substantially broader than necessary to achieve that interest. \textit{Id.} For a further discussion of the intermediate scrutiny test, specifically the “time, place and manner” restriction test, see \textit{supra} note 15.}

\footnote{32. \textit{See} Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976). In \textit{Young}, Detroit’s “anti-skid row ordinance,” which required theaters specializing in adult movies to be geographically dispersed from each other and from other adult bookstores, was held to be a valid content-neutral time, place and manner regulation. \textit{Id.} at 71. \textit{See also} Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (zoning ordinance barring adult movie theaters from locating within 1,000 feet of any residence, church, park or school deemed valid content-neutral time, place and manner regulation).}

\footnote{33. United States v. O’Brien, 391 U.S. 367 (1968). Therein, the Court upheld a law that prohibited the destruction of Selective Service registration certificates-draft cards. \textit{Id.} at 386.}

\footnote{34. \textit{Id.} at 377. Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991), involved a statute held constitutional because it satisfied the \textit{O'Brien} test. \textit{Id.} at 567. The statute at issue in \textit{Barnes} was Indiana’s “public indecency” statute. \textit{Id.} at 563. This statute made it a misdemeanor to appear nude in a public place. \textit{Id.} at 572 (Scalia, J., dissenting). The statute was challenged by two strip clubs. \textit{Id.} at 562-63. Under the statute, a woman is deemed “nude” if she appears in public without wearing “pasties” and a “G-string.” \textit{Id.} at 563. The majority held that the \textit{O'Brien} test was satisfied because the requirement: (1) furthers an “important or substantial governmental interest” of protecting order and morality and (2) the “incidental” restriction, requiring a small amount of covering, was no greater than essential to the furtherance of the important governmental interest. \textit{Id.} at 569-72.}
In addition, several areas of speech are deemed "unprotected" and warrant no First Amendment protection.\textsuperscript{35} Two "unprotected" areas of significant concern are obscenity and child pornography.\textsuperscript{36} The \textit{Miller v. California} test is used to identify material which may be banned for being obscene.\textsuperscript{37} To be deemed obscene, this test requires the following: (1) the "average person applying contemporary community standards" would find that "the work taken as a whole, appeals to the prurient interest;" (2) the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" and (3) the work, "taken as a whole, lacks serious literary, artistic, political, or scientific value."\textsuperscript{38}

Child pornography was specifically deemed an "unprotected" category after \textit{New York v. Ferber}.\textsuperscript{39} \textit{Ferber} stands for the proposition

\textsuperscript{35} "Unprotected" areas include obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, "fighting words" and child pornography. For a full discussion of the unprotected areas of obscenity and child pornography, see infra notes 36-43 and accompanying text.


\textsuperscript{37} \textit{Miller}, 413 U.S. at 24. The \textit{Miller} test has three prongs. All three prongs must be met to identify material which should be banned as obscene. \textit{Id.} The \textit{Miller} test's first prong inquiring whether the "average person, applying contemporary community standards" would find that "the work, taken as a whole, appeals to the prurient interest" is directly adopted from \textit{Roth v. United States}, 354 U.S. 476 (1957). \textit{Miller}, 413 U.S. at 24.

\textsuperscript{38} \textit{Miller}, 413 U.S. at 24. The term "prurient" was defined by the Supreme Court in \textit{Roth} as "material having a tendency to excite lustful thoughts" from the "average person" whose attitudes reflect current community standards. \textit{Roth}, 354 U.S. at 487-89. The Court in \textit{Miller} added that the standards that count are those of the "local community" where the prosecution is taking place. \textit{Miller}, 413 U.S. at 32 n.13. In addition, the \textit{Miller} Court extended the definition to include those works which are not "utterly" without social value, but which do not have "serious" value. \textit{Id.} at 24-25.

\textsuperscript{39} 458 U.S. 747, 764 (1982). The Court set forth five reasons which warrant child pornography "unprotected." First, the Court reasoned that the state has a compelling interest in safeguarding the physical and emotional well-being of minors within the state. \textit{Id.} at 756-57. The Court noted that legislation aimed at protecting the physical and emotional well-being of the youth had been upheld even when the laws interfered with constitutionally protected rights. \textit{Id.} at 757.

Second, the Court found that the distribution of photos and films depicting a child's sexual activity intrinsically relates to the sexual abuse of children in two ways: (1) the materials produced are a permanent record of the child's participation in the sexual performance and (2) the circulation of the material exacerbates the harm to the child. \textit{Id.} at 759. Furthermore, the only practical method of controlling sexual abuse of children used in child pornography is to stop the distribution network by imposing criminal penalties on persons involved in the distribution of child pornography. \textit{Id.} at 760.

Third, the Court found that the promotion and distribution of child pornography provides an economic motive for the production of child pornography. \textit{Id.} at 761. The Court stated that First Amendment protection does not extend to speech used as an integral part of conduct that violates a valid criminal statute. \textit{Id.}
that a state may ban the distribution of materials showing children engaged in sexual conduct, even though the material is not obscene. The Ferber Court relied on the state’s compelling and “surpassingly important” interest in preventing the sexual exploitation and abuse of children who are photographed for the production of such materials. The Court held that the First Amendment value of permitting children to be photographed in such performances is “exceedingly modest, if not de minimis.” Therefore, the production of child pornography is an “unprotected” category of speech that may be banned.

C. Additional Child Pornography Cases

Two additional child pornography cases are relevant when discussing First Amendment issues. First, United States v. United States District Court for the Central District of California responded to issues untouched by Ferber. Central District addressed whether a child pornography producer could defend against federal prosecution by demonstrating that he reasonably believed the performer to be of the age required by Congress. The United States Court of Appeals for the Ninth Circuit held that knowledge of a minor’s age, or scienter, is not necessary to convict for the production of child pornography materials. The Ninth Circuit found a very narrow con-

at 762. Since the production of child pornography is illegal, and promotion and distribution of child pornography is an integral part of production, the Court reasoned that the First Amendment protection should not extend to the promotion and distribution of child pornography. Id.

Fourth, the Court found the value of materials depicting children engaged in sexual conduct to be very modest, if not “de minimis.” Id. The Court stated that visual depictions of children engaging in sexual conduct seldom constitute an important and necessary part of literary, scientific or educational work. Id. at 762-63.

Finally, the Court concluded that recognizing child pornography as outside First Amendment protection was not incompatible with earlier court decisions. Id. at 763. The Court contended that it was not unusual for a content-based classification of speech to be found outside First Amendment protection when the evil to be restricted overwhelmingly outweighs the expressive interests. Id. at 763-64.

40. Id. at 759-64.
41. Id.
42. Id. at 763.
43. Id. at 764.
44. 858 F.2d 534 (9th Cir. 1988). Central District involved prosecution under the Child Protection Act of James Marvin Souter, Jr., a so-called “talent agent” and two producers for hiring Traci Lords, a 16-year old minor, to appear in a sexually explicit film entitled Those Young Girls. Id. at 536. The defendants’ main argument centered around an assertion that because they were “seriously misled” as to the actress’s age, the government must prove knowledge of age, or scienter, as part of its prima facie case. Id.
45. Id.
46. Id. at 537-38.
stitutional right to a mistake of age defense. A defendant may avoid conviction only by showing "clear and convincing" evidence that he did not know, and could not have reasonably learned, that the performer was a minor.

The Supreme Court also addressed the scienter requirement in United States v. X-Citement Video, Inc. In X-Citement Video, the Court held that the term "knowingly," as used in a particular statute, applied to the elements of crime concerning the minority of performers and sexually explicit nature of the material, not only to the transportation element. Despite the Ninth Circuit's ruling in Central District, the Supreme Court held that "knowledge" is a necessary element for conviction of child pornography.

IV. DISCUSSION
A. Narrative Analysis

1. Standard of Review

The court in American Library Ass'n first determined the level of scrutiny applicable to the Child Protection Act's record-keeping and disclosure requirements. The court noted that "because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable." The Court distinguished between con-

47. Id. at 543.
48. Id.
49. 115 S. Ct. 464 (1994). Respondents were convicted under the Protection of Children Against Sexual Exploitation Act of 1977. Id. at 466. This Act prohibited the transportation, receipt, distribution or reproduction of a visual depiction if the depiction "involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a). The Supreme Court, however, reversed the conviction and held that "the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performer." X-Citement Video, 115 S. Ct. at 472.
50. X-Citement Video, 115 S. Ct. at 467. The Court rejected the Ninth Circuit's reasoning and held that the term "knowingly" does not apply; rather, it modifies "transports, ships, receives, distributes, or produces." Id. The Court held that this could not be Congress' intent, for it would be "odd ... that Congress distinguished between someone who inadvertently dropped an item into the mail without realizing it, but was nevertheless unconcerned about whether the person had any knowledge of the prohibited contents of the package." Id.
51. Id. at 472.
tent-based restrictions and content-neutral restrictions.\textsuperscript{54} Content-based restrictions survive constitutional review "only if they promote a 'compelling interest' and employ 'the least restrictive means to further the articulated interest.' "\textsuperscript{55} In contrast, the court stated, " 'regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.' "\textsuperscript{56} Noting that this determination is not always a simple task, the court focused on the purpose of the legislation.\textsuperscript{57} " 'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.' "\textsuperscript{58}

The court discussed two cases, \textit{United States v. O'Brien}\textsuperscript{59} and \textit{City of Renton v. Playtime Theaters, Inc.},\textsuperscript{60} as relevant to this inquiry. The Court held in \textit{O'Brien} that if "speech" and "non-speech" elements were combined in a course of action, an important non-speech element could justify incidental limitations on First Amendment freedoms.\textsuperscript{61} In \textit{City of Renton v. Playtime Theaters}, the Court added that regulations should be upheld as long as the justifications for the regulation had nothing to do with the content of the speech, but rather focused on the secondary effects of the speech.\textsuperscript{62} The court in \textit{American Library Ass'n} compared section 2257 to the zoning ordi-

\textsuperscript{54} \textit{American Library Ass'n}, 33 F.3d at 84.
\textsuperscript{55} \textit{Id.} (quoting Sable Communications v. FCC, 492 U.S. 115, 126 (1989)).
\textsuperscript{56} \textit{Id.} (quoting \textit{Turner}, 114 S. Ct. at 2445).
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} (quoting \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 791 (1989)).
\textsuperscript{59} 391 U.S. 367 (1968).
\textsuperscript{60} 475 U.S. 41 (1986).
\textsuperscript{61} \textit{American Library Ass'n}, 33 F.3d at 85 (citing \textit{O'Brien}, 391 U.S. at 376). The four part test of \textit{O'Brien} must also be satisfied for the legislation to be held constitutional. \textit{See supra} note 33 and accompanying text.
\textsuperscript{62} \textit{Id.} (citing \textit{Renton}, 475 U.S. at 47). The Supreme Court in \textit{Renton} acknowledged that although a zoning ordinance treats theaters that specialize in adult films differently than other kinds of theaters, it was not focusing on the content of the films shown at adult motion picture theaters, but rather on the secondary effects of such theaters on the surrounding community. \textit{Renton}, 475 U.S. at 47. The secondary effects doctrine desires to suppress crime and has nothing to do with the actual films being shown inside the adult movie theater. \textit{Id.} at 50. The ordinance was explicitly designed to prevent crime, protect the city's retail trade, and maintain property values. \textit{Id.} at 48. The ordinance was not designed to suppress the expression of unpopular views. \textit{Id.} Furthermore, the ordinance did not ban adult theaters altogether. It merely provided that such theaters may not be located within certain areas. \textit{Id.} at 46.
nance at issue in Renton and concluded both to be content-neutral regulations, unrelated to the suppression of speech.63

The court in American Library Ass'n next examined the purpose of Congress’ adoption of the section 2257 record-keeping requirements.64 The court concluded that the sole purpose for the adoption of section 2257 was to address an important deficiency in the Child Protection Act of 1984.65 The Child Protection Act of 1984 contained a loophole that enabled the continued exploitation of children by failing to address how one ascertains the real ages of performers from a visual depiction.66 The court concluded that the congressional purpose in enacting the record-keeping provision was threefold: (1) to prevent the exploitation of children by requiring those responsible for photographing or videotaping sexually explicit acts to secure proof of the performer's age and maintain such records as evidence of their compliance; (2) to deprive child pornographers access to commercial markets by requiring secondary producers to inspect the primary producers' proof that the persons depicted were adults at the time they were photographed or videotaped and (3) to establish a system by which law enforcement officers in possession of materials containing depictions of sexually explicit acts will be able to identify the performers and verify compliance with the Child Protection Act.67

The court dismissed the challengers' claim that the Child Protection Act was content-based, regardless of its stated purposes.68 The court concluded that the focus of the Child Protection Act was justified without any reference to the speech content.69 The court stated that it was clear that Congress enacted the Act not to regulate

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63. American Library Ass'n, 33 F.3d at 86. Section 2257 does not ban all sexually explicit materials; it only imposes certain requirements on individuals who produce these materials. Id. Likewise, the zoning ordinance in Renton does not ban all adult theaters but merely places restrictions on where they may be located. Id.

64. Id. at 84-85.

65. Id. at 85.

66. Id. The court reviewed the Attorney General's Commission on Pornography which found the existing child protection laws deficient in several aspects. Id. See ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, supra note 21, at 620.

67. American Library Ass'n, 33 F.3d at 86.

68. Id. The appellees argued that a strict scrutiny standard should be applied because the requirements are triggered by speech of a particular content. Id.

69. Id. The court also stated that a valid basis for according differential treatment to even a content-defined subclass of proscribable speech exists when the subclass happens to be associated with particular secondary effects of the speech. Id. (citing R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992)).
the content of sexually explicit materials, but to protect children by
deterring the production and distribution of child pornography.\footnote{70}

Additionally, the court dismissed the challengers' claim that
section 2257 was content-based because the record-keeping and dis-
closure provisions were so burdensome that they would chill or
limit some constitutionally protected speech.\footnote{71} The court reasoned
that the mere assertion of some possible self-censorship does not
render a law unconstitutional.\footnote{72} The court again focused on the
purpose of the Child Protection Act, to prevent the use of underage
performers in the production of sexually explicit materials, and
concluded that since the First Amendment did not afford protec-
tion to such conduct, the Act's requirements were not content-
based.\footnote{73}

The court reasoned that the Child Protection Act satisfied the
content-neutral formulation established in \textit{O'Brien} because the pro-
ducers of sexually explicit materials engage in conduct that poten-
tially contains both protected speech (sexually explicit adult
performers) and unprotected speech (sexually explicit underage
performers); and the Act targets only the latter.\footnote{74} The court deter-
mined the test was reduced to intermediate scrutiny because the
record-keeping and disclosure requirements were deemed content-
neutral.\footnote{75} The test examined the Child Protection Act to deter-
mine whether its requirements were narrowly tailored to serve a sig-
nificant governmental interest and leave open ample alternative
channels for communication of the information.\footnote{76}

\footnotetext{70}{\textit{Id.}}

\footnotetext{71}{\textit{Id.} at 87. The challengers relied on several cases including \textit{FEC v. Massachusetts Citizens for Life}, Inc., 479 U.S. 238, 254, 256 (1986) (addressing federal restriction on expenditures from corporation's treasury funds in election cam-
paign). The challengers claimed that the government should not chill constitu-
tionally protected speech and that the Child Protection Act's record-keeping and
disclosure restrictions create a disincentive to engage in protected speech. \textit{American Library Ass'n}, 33 F.3d at 87 (citing \textit{Massachusetts Citizens}, 479 U.S. at 254). The
court distinguished \textit{American Library Ass'n} from \textit{Massachusetts Citizens} and other
cases because the record-keeping and disclosure restrictions in 18 U.S.C. § 2257
involve neither political speech nor direct restraints on speech-related expendi-
tures. \textit{Id.}}

\footnotetext{72}{\textit{American Library Ass'n}, 33 F.3d at 87 (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989)).}


\footnotetext{74}{\textit{Id.} The court also recognized that while the effects of the Act's record-
keeping requirements on speech are not insubstantial, they are incidental and
largely unavoidable. \textit{Id.} at 87-88.}

\footnotetext{75}{\textit{Id.} at 88.}

\footnotetext{76}{\textit{Id. See also Clark v. Community for Creative Non-Violence}, 468 U.S. 288, 298 (1984) (equating \textit{O'Brien} test with the standard applied to time, place or man-
ner restrictions).}
The sole challenge in application of the intermediate scrutiny test was whether the Child Protection Act's record-keeping requirements were narrowly tailored to the objective of preventing child pornography.\textsuperscript{77} The court concluded that a regulation would meet the Supreme Court's "narrowly tailored" requirement if a substantial portion of the burden it imposes furthers the Government's interest, even though a less intrusive alternative might exist.\textsuperscript{78}

The court reasoned that the requirements of section 2257 advanced the prevention of child pornography in three major ways. First, the requirements ensure that primary producers actually confirm that a potential performer is not a minor.\textsuperscript{79} Second, the requirements deter children from attempting to portray themselves as adults.\textsuperscript{80} Third, the requirements create the only mechanism by which secondary producers, or those who have no contact with the performers, can be required to ascertain the ages of the performers pictured in the materials they will be producing.\textsuperscript{81} Without the primary producers' records, the secondary producers could always plead honest mistake.\textsuperscript{82}

The challengers argued that the regulation was not narrowly tailored to abate child pornography for several reasons. First, they claimed that nearly all producers providing sexually explicit materials for commercial markets already require age verification of some kind.\textsuperscript{83} Second, they argued that the "reasonable mistake" defense was not practically available in child pornography cases.\textsuperscript{84} This defense only exists for those who have "diligently investigated" the

\textsuperscript{77} American Library Ass'n, 33 F.3d at 88. The challengers in this action did not deny that the government had a significant, even compelling interest in preventing child pornography. \textit{Id.} at 88. They also conceded that the Act leaves open ample avenues for the communication of sexually explicit materials. \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 88-89.

\textsuperscript{80} \textit{Id.} at 89.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} American Library Ass'n, 33 F.3d at 89. The Attorney General's Commission on Pornography found that in trying to appeal to the child pornography market, producers often used very young-looking performers to give the impression that they were minors. Prosecution, however, was hindered because only in the most obvious cases, could they ascertain whether the performers were really under the age of 18. Secondary producers professed ignorance that they were actually dealing with sexual materials involving children. Primary producers themselves claimed they were misled about the performer's age or the performer's true identity. American Library Ass'n \textit{v.} Barr, 956 F.2d 1178, 1182 (D.C. Cir. 1992).

\textsuperscript{83} American Library Ass'n, 33 F.3d at 89.

\textsuperscript{84} \textit{Id.} The Ninth Circuit recognizes a very narrow mistake of age defense. \textit{See supra} notes 47-48 and accompanying text.
performer’s age. Essentially, this requires the producer to view some identification documents before he begins filming.\textsuperscript{85} The court rejected both of these arguments.\textsuperscript{86}

The majority also dismissed the challengers’ overbreadth argument. Challengers contended that both the record-keeping requirements and the labeling requirements of section 2257 were substantially overinclusive.\textsuperscript{87} The government contended, however, that the purpose of the Child Protection Act was to prevent subjective age determinations by installing a uniform procedure that applies to all performers.\textsuperscript{88} The court stated, “[t]he Government must be allowed to paint with a reasonably broad brush if it is to cover depictions of all performers who might conceivably have been minors at the time they were photographed or videotaped.”\textsuperscript{89}

Challengers also argued that because the Child Protection Act mainly applied to adult performers, it primarily burdens protected speech and is therefore void under \textit{Simon & Schuster, Inc. v. New York State Crime Victims' Board.}\textsuperscript{90} However, the court held that the Act burdens only that protected speech necessary to advance the government’s interest in abating child pornography.\textsuperscript{91} Unlike the law at issue in \textit{Simon & Schuster}, the Child Protection Act’s impos-

\textsuperscript{85} \textit{American Library Ass’n}, 33 F.3d at 89. In opposition to this claim, the government argued that the record-keeping requirements imposed on the primary producers must remain elements of the statute for they are “critical to ensuring that secondary producers deny child pornographers access to their markets.” \textit{Id.}

\textsuperscript{86} \textit{Id.} The court added that even if these assertions were correct, “the record-keeping obligations imposed on primary producers remain elements of the statutory scheme that are critical to ensuring that secondary producers deny child pornographers access to their markets.” \textit{Id.}

\textsuperscript{87} \textit{Id.} at 89-90. Appellees contended that since very little commercially produced child pornography exists, the Act is overbroad because it applies almost entirely to constitutionally protected depictions of adults. \textit{Id.} at 90.

\textsuperscript{88} \textit{Id.} The court compares the Child Protection Act to 8 U.S.C. § 1324a(b), which requires employers to verify and maintain proof of every employee’s right to work in the United States. \textit{Id.} Both of these statutes contain uniform procedures applicable to all employees.

\textsuperscript{89} \textit{Id.} The court did not find a need to address all applications of the record-keeping requirements at this time. The court stated, “[t]hese cases do not require us to identify or define what affirmative limits the Constitution may impose [because] [t]hose are best determined in case-by-case tests.” \textit{Id.} (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985)).

\textsuperscript{90} \textit{American Library Ass’n}, 33 F.3d at 90. \textit{See Simon & Schuster, Inc. v. New York State Crime Victims Bd.}, 502 U.S. 105 (1991). The “Son of Sam” statute, therein, required that if a criminal profited from a book describing his crime, the money earned must be paid into an escrow fund to benefit his or her victims. \textit{Id.} at 108. The Court found that a compelling interest existed in ensuring that victims of crime are compensated by those who harm them. \textit{Id.} at 123. However, the Court concluded that the law was “significantly overinclusive” because it applied to an overly large number of protected works. \textit{Id.} at 122-23.

\textsuperscript{91} \textit{American Library Ass’n}, 33 F.3d at 90.
tion of such requirements on sexually explicit materials and performers is essential to achieving Congress' goal of preventing child pornography.92

The final issue that the court addressed involved whether the record-keeping and labeling requirements of the Child Protection Act were overly burdensome. The court held that the record-keeping requirements were not onerous as to primary or secondary producers.93 Section 2257 was compared with such records routinely required to facilitate enforcement of immigration, labor and tax laws.94 The court determined that the Child Protection Act best serves law enforcement efficiency by requiring verification records to be available at a single location and best serves the government's interests by denying commercial markets to child pornographers.95

In addition, the court held that the labeling requirements were not onerous as to primary or secondary producers.96 The court

92. Id. Both the Child Protection Act and the statute in Simon & Schuster satisfy the compelling interest prong, however, the statute in Simon & Schuster failed to satisfy the narrow tailoring requirement. See Simon & Schuster, 502 U.S. at 123. Simon & Schuster involved a law challenged as overbroad because the statute reached a wide range of literature, applied to any author regardless of whether he was actually accused or convicted, and did not affect any of the criminal's other assets. Id. For a further discussion of Simon & Schuster, see supra note 90.

93. American Library Ass'n, 33 F.3d at 91-93.

94. Id. at 91; see also 8 U.S.C. §1324(b)(1982)(requires employers to verify identities of employees and maintain proof of verification); 29 C.F.R. §516.2(a)(3)(1993)(requires employers to verify their employees' birthdates); 26 C.F.R. §31.6001-2(a)(1)(i)(1993)(requires employers to maintain records of employees' names and addresses).

95. American Library Ass'n, 33 F.3d at 91. The challengers contended that the time requirement for keeping such records unacceptably burdens speech. Id. The court responded by replacing the statutory requirement that these records be maintained as long as the producer remains in business and for five years thereafter with a standard period of five years, whether or not the producer continues in existence. Id. The challengers also contended that the Child Protection Act's requirement that producers ascertain any name ever used by the performer in accordance with 18 U.S.C. §2257(b)(2) is virtually impossible and does not deter child pornography. Id. at 91-92. The court and the government interpreted this section as merely requiring that the producer record the aliases and other names provided by the performer in response to a request. Id. at 92. Furthermore, the court held that the cross-referencing of records does abate child pornography because it allows law enforcement officers to locate different documents for comparison of ages. Id.

96. Id. The Child Protection Act requires that statements identifying where records are kept should be printed near the beginning of a book or magazine, or placed at the beginning or end of a film or videotape. Id. The Act imposes this requirement only on those who "produce... any book, magazine, periodical, film, videotape, or other matter which... contains... depictions... of actual sexually explicit conduct." Id. (citing 18 U.S.C. §2257(a)(1)(1988 & Supp. II 1990)). Furthermore, the Act defines "produces" to mean "produce, manufacture, or publish any [sexually explicit material]... and includes the duplication, reproduction, or
CHILD PORNOGRAPHY LAWS

ruled that requiring producers to affix statements to sexually explicit materials, identifying where proof of the depicted performers’ age may be found is permissible. The court reasoned that the “creation of records is of little avail if they cannot be readily located.”

3. Dissenting Opinions

Judge Reynolds’ dissent argued that the Child Protection Act was overbroad, chilling and a non-effective deterrent to child pornography. He first stated that the statute regulates a wide variety of material. According to Judge Reynolds, although some of this material is obscene and “non-protected,” some of it is only “indecent” speech and deserves First Amendment protection. The Reynolds’ dissent also reasoned that the statute might have been content-based because it is directed at a particular type of expression and has more than an “incidental limitation” on First Amendment protected speech. Judge Reynolds’ final contention was that the Child Protection Act does not serve as a deterrent. He argued that the Child Protection Act could not be used for its intended purpose of helping to prosecute child pornographers, “be-reissuing of any such matter.”

97. Id. at 92. The court also addressed the challengers’ contention that these labeling requirements will compromise the “artistic integrity” of photographic exhibits in galleries. Id. at 93. The court dismissed the idea as “sheer speculation” not relevant to the constitutional issues at hand, but suggested that such statements may be affixed to the back of pictures in galleries so as to not interfere with aesthetics. Id.

98. Id. at 92.

99. Id. at 94 (Reynolds, J., dissenting). Judge Reynolds argued that the majority opinion allows an unwarranted intrusion into the First Amendment rights of citizens who are not child pornographers. Id. (Reynolds, J., dissenting).

100. American Library Ass’n, 33 F.3d at 94 (Reynolds, J., dissenting).

101. Id. (Reynolds, J., dissenting). Reynolds argued that the trend in Supreme Court cases appears to relax the standard of review for “indecent” speech. Id. at 94-95 (Reynolds, J., dissenting); see Sable Communications v. FCC, 492 U.S. 115 (1989) (holding ban on indecent telephone message services violated First Amendment because it exceeded what was necessary to serve compelling interest of preventing exposure of minors to messages); see also, American Library Ass’n v. Reno, 47 F.3d 1215, 1217 (D.C. Cir. 1995) (Tatel, J., dissenting) (contending vast majority of speech regulated by Act protected by First Amendment).

102. American Library Ass’n, 33 F.3d at 95 (Reynolds, J., dissenting). Reynolds argued, “[t]here is enough ‘bite’ left in the O’Brien standard to strike a statute when it has more than incidental effects on First Amendment expression and does not effectively further an important governmental interest.” Id. (Reynolds, J., dissenting).

103. Id. (Reynolds, J., dissenting).
cause the Act itself precludes the use of the records, directly or indirectly, in a child pornography prosecution." \( ^{104} \)

Subsequently, Judge Tatel of the D.C. Circuit dissented from a denial of rehearing because he doubted whether the statute could accomplish its stated purpose. \( ^{105} \) His dissent reasoned that producers who knowingly use minors in sexually explicit productions were already subject to criminal penalties; therefore, this statute would not help prosecute them. \( ^{106} \) According to section 2257(d), the age and identity records may not be used as evidence "with respect to any violation of law" except the record-keeping statute itself. \( ^{107} \)

The Tatel dissent also questioned the neutrality of the Act. \( ^{108} \) It concluded that the regulatory burden impermissibly targeted a single class of people. \( ^{109} \) The dissent cautioned that possible harassment and physical threatening of identified performers may result under this system. \( ^{110} \) It also determined that the Child Protection Act would unconstitutionally restrict the flow of protected speech in galleries, stores and libraries. \( ^{111} \)

\[ \text{104. Id. (Reynolds, J. dissenting).} \]
\[ \text{105. American Library Ass'n v. Reno, 47 F.3d 1215, 1216 (D.C. Cir. 1994) (Tatel, J., dissenting).} \]
\[ \text{106. Id. (Tatel, J., dissenting). The dissent proposed that the statute should be rewritten to impose criminal liability upon producers who "recklessly" or "negligently" violate the Child Protection Act. Id. (Tatel, J., dissenting). But cf. United States v. X-Citement Video, 115 S. Ct. 464 (1994) (Supreme Court read into 18 U.S.C. § 2252 requirement that distributor has "knowledge" that minor is being used in sexually explicit material).} \]
\[ \text{107. American Library Ass'n, 47 F.3d at 1216 (Tatel, J., dissenting). For a further definition and explanation of 18 U.S.C. § 2257, see supra notes 23-25 and accompanying text.} \]
\[ \text{108. American Library Ass'n, 47 F.3d at 1217 (Tatel, J., dissenting).} \]
\[ \text{109. Id. (Tatel, J., dissenting). The dissent stated, "whatever marginal deterrence the statute achieves may well be overshadowed by its unprecedented imposition of a permanent and pervasive regulatory burden on a single class of speakers." Id. (Tatel, J., dissenting).} \]
\[ \text{110. Id. (Tatel, J., dissenting). The dissent reasoned that mandating controversial artists to reveal their studio or home addresses on their work may subject them to harassment or physical threats. Id. (Tatel, J., dissenting). Furthermore, they argued that legal adult models may be inhibited from seeking employment if their names, photos, ages, addresses or histories are to be associated with their sexually explicit work. Id. (Tatel, J., dissenting).} \]
\[ \text{111. Id. (Tatel, J., dissenting). Judge Tatel added in conclusion of his dissent from the court's denial of rehearing en banc:} \]
\[ \text{Like so many other First Amendment cases that deal with speech on the borders of social acceptability, this case is not just about pornography. It is about all speech. If we ignore our First Amendment guarantees in the face of words and thoughts that are unpopular, unconventional, or even detestable, we create precedents that may later be used to silence the speech we value.} \]
B. Critical Analysis

Throughout its analysis, the court in *American Library Ass'n* recognized the importance of determining the proper test to apply to this potential First Amendment infringement on producers of sexually explicit material. 112 Because the D.C. Circuit had no precedent directly on point, it had to rely on a variety of constitutional decisions involving general First Amendment issues. 113 The *American Library Ass’n* court considered several tests of scrutiny in analyzing whether the record-keeping requirements of section 2257 were permissible. 114 The court determined that the test which should be applied to this particular case was a relaxed intermediate test, the *O’Brien* test. 115

This analysis, however, was not appropriate for two reasons. First, the *O’Brien* test did not need to be addressed because the *Ferber* decision is sufficiently controlling. 116 *Ferber* holds that regulations restricting child pornography are entirely permissible because speech of this type is “unprotected.” 117 Therefore, the *American Library Ass’n* court did not need to approach the regulations with such in-depth First Amendment analysis and it should have applied the *Ferber* reasoning. Second, the court did not need to apply content-neutral tests of First Amendment analysis. 118 The record-keeping regulations could have survived strict scrutiny because of the over-

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113. No other circuit has yet addressed whether the record-keeping and labeling provisions of 18 U.S.C. § 2257 unconstitutionally infringe on the First Amendment rights of producers of sexually explicit material.

114. For a full discussion of the First Amendment tests that the court considered, see supra notes 52-76 and accompanying text.

115. *American Library Ass’n*, 33 F.3d at 87-88. For an explanation of the *O’Brien* test, see supra notes 33-35 and accompanying text.

116. For a full discussion of *Ferber*, see supra notes 39-43 and accompanying text.

117. New York v. *Ferber*, 458 U.S. 747, 764 (1982). The Court explained, “[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of the competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.” *Id.*

118. The court sets forth the *O’Brien* test as the applicable test to apply in this analysis. *American Library Ass’n*, 33 F.3d at 88. However, the court then failed to solely apply the *O’Brien* test. *Id.* Instead, the court chose to combine the *O’Brien* test with a relaxed intermediate scrutiny test. *Id.* The court stated, “[l]ater decisions make clear that once a regulation is deemed content neutral, this inquiry reduces to whether the requirements ‘are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.’” *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). *See also* Clark v. Community for Creative Non-Violence, 468 U.S.
whelming, compelling state interest involved in protecting children from exploitation. The court correctly concluded that the record-keeping requirements were sufficiently narrowly-tailored to this compelling state interest.

In addition, the court appropriately dismissed the challengers' overbreadth argument. The record-keeping and labeling requirements do not excessively overburden producers or affect more people than necessary to fulfill the government's compelling objective. Moreover, the burden is slight in comparison to the benefit of protecting children from such exploitation. The court further noted that First Amendment speech is not chilled as a result of this legislation. Producers are still free to appeal to the child pornography market by using legal performers who only appear to be younger.

The dissent presented two interesting points of discussion. First, Judge Tatel's dissent from the denial of rehearing en banc argued that this statute would not help prosecute child pornographers since the records may not be used as evidence with respect to any violation of law except the record-keeping statute itself. If

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119. The appellees conceded that the government has a significant and compelling interest in the prevention of child pornography. American Library Ass'n, 33 F.3d at 88 (citing Ferber, 458 U.S. at 756-57 (noting "a State's interest in safeguarding physical and psychological well-being of a minor is compelling").

120. Id. at 88-89. The court argues that to satisfy this prong, the regulation need not be the "least restrictive or least intrusive means" of achieving the government's interests, nor does it require that there be no other "conceivable alternative." Id. at 88. For a further discussion of the court's narrow-tailoring analysis, see supra notes 78-82 and accompanying text. For a noteworthy challenge to the majority's narrow-tailoring analysis, see supra notes 105-11 and accompanying text.

121. American Library Ass'n, 33 F.3d at 89-90.

122. Id. at 90-92.

123. Id. at 92. The court disregarded the challengers' contention that the requirements were onerous, and determined that the record-keeping and labeling provisions impose a "nominal burden at best." Id. For a full discussion of the record-keeping and labeling provisions requirements, see supra notes 23-25 and accompanying text.

124. American Library Ass'n, 33 F.3d at 92.

125. The producer of sexually explicit material always has the choice to hire older, legal performers who look young. New York v. Ferber, 458 U.S. 747, 763 (1982). This alternative provides for the legal non-obscene sexual depiction of young adults.

126. For a full discussion of the dissenting opinions in American Library Ass'n, see supra notes 99-111 and accompanying text.

127. American Library Ass'n v. Reno, 47 F.3d 1215, 1216 (D.C. Cir. 1994) (Tatel, J., dissenting). Judge Tatel stated, "[t]his statute will not help prosecute... since these records may not be used as evidence 'with respect to any violation of law' except the record-keeping statute itself." Id. (Tatel, J., dissenting) (citing 18
this non-deterrence argument is valid, then a narrow tailoring of the statute may pose problems. Second, Judge Tatel's dissent proposed an interesting alternative to the current legislation. Judge Tatel recommended that instead of enforcing the record-keeping provisions of section 2257, the legislature could revise the current child pornography statute. The dissent recommended that a knowledge requirement be stricken from the statute. In place of the knowledge requirement, it recommended that the standard be one of recklessness or negligence. If recklessness or negligence were the standard, a mistake of age defense in the production of child pornography could not be utilized. Producers would be forced to responsibly check the ages of performers. Otherwise, producers would face prosecution for recklessly or negligently creating sexually explicit materials involving minors.

Three arguments that the Tatel dissent proposed lack substantial merit. First, the dissent argued that this regulatory burden targets a single class of speakers. Such an argument suggests that sexually explicit producers are targeted because of the content of the materials they produce. This argument is not entirely accurate because the regulations do not intend to reduce the production of sexually explicit materials of adults. Producers are free to pro-

U.S.C. § 2257(d) (1988 & Supp. II 1990)). Judge Tatel further added that the "only class of producers whose behavior this statute is likely to influence . . . [are] those who ignore the age of their models but would nonetheless refuse to employ individuals they knew were minors . . . ." Id. (Tatel, J., dissenting).

128. The dissent contended that the record-keeping and disclosure provisions will not deter producers from employing minors. Id. (Tatel, J., dissenting). Additionally, Judge Tatel argued that producers who fail to acquire such records may only be prosecuted with violation of the record-keeping statute, not with violation of child pornography production. Id. (Tatel, J., dissenting). The dissent also argued under section 2257(d) that the record "info" may not be used as evidence in the prosecution of a producer of sexually explicit material involving children. Id. (Tatel, J., dissenting). Therefore, the dissent concluded that the statute's requirements are not sufficiently narrowly tailored to the governmental objective of protecting children. Id. (Tatel, J., dissenting).

129. Id. at 1216-17 (Tatel, J., dissenting).
130. Id. (Tatel, J., dissenting).
131. Id. (Tatel, J., dissenting).
132. See infra notes 133-41 and accompanying text for a discussion of the dissenting arguments.

133. American Library Ass'n, 47 F.3d at 1217 (Tatel, J., dissenting). Judge Tatel noted "whatever marginal deterrence the statute achieves may well be overshadowed by its unprecedented imposition of a permanent and pervasive regulatory burden on a single class of speakers." Id. (Tatel, J., dissenting).

134. American Library Ass'n, 33 F.3d at 85. Congress enacted the Child Protection Act not to target producers or to regulate the content of sexually explicit materials, but to protect children, by deterring the production and distribution of child pornography. Id. However, under a Ferber analysis, one may argue that be-
duce as much sexually explicit material of adult performers as they desire.

Second, the Tatel dissent argued that harassment and physical threat of identified performers is likely to occur since primary producers, secondary producers and the police will have access to identification of performers of such controversial material. This argument is especially weak when one considers who will actually maintain the records of such information. Only the primary producer who has had contact with the performer will keep such information. Producers of sexually explicit material are not likely to harass or physically threaten potential performers from whom they will profit, and police are forbidden by law to harass or physically threaten performers. The age and identity records will not be disclosed to the public or published so as to cause any potential threat of harassment.

Third, the Tatel dissent argued that these record-keeping requirements would restrict the “flow” within galleries, stores and libraries by artists and adults who appreciate such material for its literary, artistic or social value. The challengers in American Library Ass’n suggested that galleries would be overburdened and artistic integrity would suffer if statements must be attached to the front of each picture indicating where the original record of the model’s age was located. The court held that this identification statement can easily be attached to the back of the painting. The court in American Library Ass’n further dismissed such hypotheticals as “sheer speculation” and admonished that the statute is not meant to be stretched out to such extremes.

cause the whole area of child pornography is “unprotected,” we need not worry about child pornography producers as a class. For a further discussion of Ferber, see supra notes 37-40 and accompanying text.

135. American Library Ass’n, 47 F.3d at 1217 (Tatel, J., dissenting). The dissent mistakenly assumed that performers will have to reveal their studio or home addresses on the face of their work which may subject them to risk of harassment and physical abuse. Id. (Tatel, J., dissenting).


137. American Library Ass’n, 33 F.3d at 94. The information will not be disclosed to anyone other than the Attorney General or his delegee, the primary producers for whom they willingly posed while engaged in sexual acts, and those who publish the pictures or videotapes. Id. The court added in conclusion, “[t]he first of these has a legitimate right to the information, and we believe we may safely assume that the performers are not concerned over the prospect of being stigmatized, harassed, or ridiculed by the producers they help enrich.” Id.

138. American Library Ass’n, 47 F.3d at 1217 (Tatel, J., dissenting).

139. American Library Ass’n, 33 F.3d at 93.

140. Id.

141. Id.
V. IMPACT

The court in *American Library Ass'n* took an important step to ensure the protection and prevention of sexual exploitation of children.\(^{142}\) Child pornography threatens not only our children, but also our society as a whole. The *American Library Ass’n* court recognized the importance of legislation in this area.\(^{143}\) Supporting the constitutionality of section 2257 will help combat the social ills of child pornography production.

The record-keeping and labeling requirements of section 2257 will reduce the vulnerability of children and make producers more responsible.\(^{144}\) Children will not as easily fall prey to greedy film producers if the producers are held more accountable for their actions. The producers will have to ascertain information from the performer regarding his or her age and will have to keep a record of it before any film or photo productions may be made.\(^{145}\) The producer must also label his productions with the whereabouts of the location of such records.\(^{146}\) As the court in *American Library Ass’n* stated, “the creation of records is of little avail if they cannot be readily located.”\(^{147}\)

These requirements will not overburden or infringe upon the rights of producers.\(^{148}\) Age and identity checks are frequently performed, especially for minors. Such requirements are no more stringent than those imposed upon establishments with liquor licenses or licenses to sell tobacco products. Additionally, employers are always required to verify and maintain records of employees in order to facilitate the enforcement of our immigration, labor and tax laws.\(^{149}\)

Further, the record-keeping and labeling provisions will not chill free speech.\(^{150}\) The Child Protection Act’s requirements

\(^{142}\) For a full discussion of the reasoning in *American Library Ass’n*, see *supra* notes 52-98 and accompanying text.

\(^{143}\) *American Library Ass’n*, 33 F.3d at 81.

\(^{144}\) *Attorney General’s Commission on Pornography*, *supra* note 21, at 621-22.


\(^{147}\) *American Library Ass’n*, 47 F.3d at 92.

\(^{148}\) See *id.* at 89-90.

\(^{149}\) *Id.* at 91 (citing 8 U.S.C. § 1324(b)(1982); 26 C.F.R. § 31.6001-2(a)(1)(i)(1993); and 29 C.F.R. § 516.2(a)(3)(1993)).

\(^{150}\) *American Library Ass’n*, 33 F.3d at 92. For a discussion of the effects of the record-keeping and labeling provisions, see *supra* notes 123-124 and accompanying text.
neither target nor affect the legal production of sexually explicit material involving adults.\textsuperscript{151} Producers are still free to employ adult performers of legal age who look young in order to attract this market.\textsuperscript{152}

Finally, these requirements will aid in the prosecution of child pornography producers because compliance with the Act will help prove scienter and knowledge elements of child pornography statutes.\textsuperscript{153} The Act will also prevent producers from using the "I didn’t know how old she was, honest?" excuse when they are caught exploiting minors in their productions.\textsuperscript{154} Section 2257’s intended aim is to increase producer accountability and responsibility. By holding producers of sexually explicit material more accountable, section 2257 of the Child Protection Act will, in turn, reduce the vulnerability and exploitation of our children.

\textit{Lisa L. Eckl}

\begin{itemize}
\item \textsuperscript{151} American Library Ass’n, 33 F.3d at 92. See supra notes 74, 122 & 123 and accompanying text.
\item \textsuperscript{152} See supra note 125 and accompanying text.
\item \textsuperscript{153} Currently, 36 states require the prosecution to show that a defendant in violation of a child pornography statute had “knowledge” that the actor was a minor. Robert R. Strang, “She Was Just Seventeen . . . And The Way She Looked Was Way Beyond [Her Years],” 90 COLUM. L. REV. 1779, 1784 n.42 (1990).
\item \textsuperscript{154} Currently, five states do not require the prosecution to prove that the defendant had knowledge of age, but do allow the defendant to raise a mistake of age defense. \textit{Id.} at 1784 n.43.
\end{itemize}